The Scottish Parliament
Pàrlamaid na h-Alba

Passage of the

Criminal Justice and Licensing (Scotland) Bill 2009

SPPB 148

The Scottish Parliament
Pàrlamaid na h-Alba

Passage of the

Criminal Justice and Licensing (Scotland) Bill 2009

SP Bill 24 (Session 3), subsequently 2010 asp 13

SPPB 148

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Contents

Page

Foreword

Introduction of the Bill

Bill (As Introduced) (SP Bill 24) 1
Explanatory Notes (and other accompanying documents) (SP Bill 24-EN) 169
Policy Memorandum (SP Bill 24-PM) 331
Delegated Powers Memorandum (SP Bill 24-DPM) 426

Stage 1

Stage 1 Report, Justice Committee 455
Written submissions received by the Justice Committee 642
Correspondence from the Scottish Government to the Justice Committee, 24 March 2009 1092
Official Report, Justice Committee, 12 May 2009 1093
Official Report, Justice Committee, 19 May 2009 1117
Official Report, Justice Committee, 26 May 2009 1160
Official Report, Justice Committee, 2 June 2009 1190
Official Report, Justice Committee, 9 June 2009 1216
Official Report, Justice Committee, 16 June 2009 1241
Official Report, Justice Committee, 23 June 2009 1272
Official Report, Justice Committee, 1 September 2009 1297
Supplementary written evidence received by the Justice Committee: other bodies 1309
Correspondence and further written evidence received by the Justice Committee: Scottish Government 1338
Written evidence received by the Finance Committee 1368
Extract from the Minutes, Finance Committee, 21 April 2009 1410
Official Report, Finance Committee, 21 April 2009 1411
Extract from the Minutes of the Parliament, 26 November 2009 1434
Official Report, Meeting of the Parliament, 26 November 2009 1435

After Stage 1

Scottish Government response to Stage 1 Report 1472
Note of informal briefing from the Cabinet Secretary for Justice to the Justice Committee 1524
Correspondence from the Scottish Government to the Justice Committee, 19 February 2010 1529

Stage 2

Marshalled List of Amendments for Stage 2 (SP Bill 24-ML1) 1534
Groupings of Amendments for Stage 2 (SP Bill 24-G1) 1627
Extract from the Minutes, Justice Committee, 2 March 2010 1635
Official Report, Justice Committee, 2 March 2010 1637

Marshalled List of Amendments for Stage 2 (SP Bill 24-ML2) 1658
Groupings of Amendments for Stage 2 (SP Bill 24-G2) 1769

Extract from the Minutes, Justice Committee, 16 March 2010 1777
Official Report, Justice Committee, 16 March 2010 1779

Extract from the Minutes, Justice Committee, 23 March 2010 1803
Official Report, Justice Committee, 23 March 2010 1805

Marshalled List of Amendments for Stage 2 (SP Bill 24-ML3) 1834
Groupings of Amendments for Stage 2 (SP Bill 24-G3) 1929
Extract from the Minutes, Justice Committee, 13 April 2010 1935
Official Report, Justice Committee, 13 April 2010 1937

Marshalled List of Amendments for Stage 2 (SP Bill 24-ML4) 1966
Groupings of Amendments for Stage 2 (SP Bill 24-G4) 2057
Extract from the Minutes, Justice Committee, 20 April 2010 2063
Official Report, Justice Committee, 20 April 2010 2064

Marshalled List of Amendments for Stage 2 (SP Bill 24-ML5) 2089
Groupings of Amendments for Stage 2 (SP Bill 24-G5) 2188
Extract from the Minutes, Justice Committee, 27 April 2010 2195
Official Report, Justice Committee, 27 April 2010 2197

Marshalled List of Amendments for Stage 2 (SP Bill 24-ML6) 2243
Groupings of Amendments for Stage 2 (SP Bill 24-G6) 2314
Extract from the Minutes, Justice Committee, 4 May 2010 2320
Official Report, Justice Committee, 4 May 2010 2321

Marshalled List of Amendments for Stage 2 (SP Bill 24-ML7) 2348
Groupings of Amendments for Stage 2 (SP Bill 24-G7) 2369
Extract from the Minutes, Justice Committee, 11 May 2010 2373
Official Report, Justice Committee, 11 May 2010 2374

Written evidence received by the Justice Committee 2393
Correspondence from the Scottish Government to the Justice Committee, 28 April 2010 2769

Bill (As Amended at Stage 2) (SP Bill 24A) 2813
Revised Explanatory Notes (SP Bill 24A-EN) 3055
Supplementary Financial Memorandum (SP Bill 24A-FM) 3184
Supplementary Delegated Powers Memorandum (SP Bill 24A-DPM) 3187

After Stage 2

Subordinate Legislation Committee Report on the Bill As Amended at Stage 2 3207
Correspondence from the Scottish Government to the Justice Committee 3214

Stage 3

Marshalled List of Amendments selected for Stage 3 (SP Bill 24A-ML) 3228
Groupings of Amendments for Stage 3 (SP Bill 24A-G) 3274
Correction Slip to the Marshalled List of Amendments for Stage 3 (SP Bill 24A-ML (Correction)) 3278
Extract from the Minutes of the Parliament, 30 June 2010 3279
Official Report, Meeting of the Parliament, 30 June 2010 3282

Bill (As Passed) (SP Bill 24B) 3376

Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – "As Introduced", "As Amended at Stage 2" and "As Passed");
- the accompanying documents published with the "As Introduced" print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee's "Stage 1 report" (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected. An exception is the groupings of amendments for Stage 2 and Stage 3 (a list of amendments in debating order was included in the original documents to assist members during actual proceedings but is omitted here as the text of amendments is already contained in the relevant marshalled list).

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament's Standing Orders. In outline, the process is as follows:

- Introduction, followed by publication of the Bill and its accompanying documents;
- Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
- Stage 2: the Bill returns to a committee for detailed consideration of amendments;
- Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the *Guidance on Public Bills* published by the Parliament. That Guidance, and the Standing Orders, are available for sale from Stationery Office bookshops or free of charge on the Parliament's website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament's Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

Stage 1
The written evidence received by the lead committee was listed at Annex E of the Stage 1 report and published electronically on the committee's website. Hard copy versions of all written evidence and supplementary written evidence received by the lead committee has, therefore, been included after the Stage 1 report. During and after the Stage 1 process, there was a series of correspondence between the lead committee and the Scottish Government. Hard copy versions of these documents are also included after the Stage 1 report.

Reports from the then Subordinate Legislation Committee and Finance Committee are included in the lead committee's Stage 1 report. The written evidence received by the Finance Committee and the Official Report of the oral evidence taken by the Finance Committee were not included in the lead committee's Stage 1 report. The written evidence, the relevant extracts from the Official Report and the Committee's minutes are, therefore, included in this volume after the Stage 1 report.

Stage 2

The lead committee invited further written evidence during its Stage 2 consideration. The written evidence received is included after the Official Report of the final day of Stage 2 consideration. The lead committee also received further correspondence from the Scottish Government during the committee's Stage 2 consideration and this correspondence is included after the written evidence referred to above.

Stage 3

Prior to Stage 3, there was further correspondence between the lead committee and the Scottish Government and this is included following the report from the Subordinate Legislation on the Bill as amended at Stage 2.

Criminal Justice and Licensing (Scotland) Bill

[AS INTRODUCED]

CONTENTS

Section

PART 1

SENTENCING

Purposes and principles of sentencing

1 Purposes and principles of sentencing
2 Relationship between section 1 and other law

The Scottish Sentencing Council

3 The Scottish Sentencing Council
4 The Council's objectives
5 Sentencing guidelines
6 Procedure for publication and review of sentencing guidelines
7 Effect of sentencing guidelines
8 Ministers' power to request that guidelines be published or reviewed
9 High Court's power to request review of guidelines
10 Scottish Court Service to provide sentencing information to the Council
11 The Council's power to provide information, advice etc.
12 Business plan
13 Annual report

Community payback orders

14 Community payback orders

Non-harassment orders

15 Non-harassment orders

Short sentences

16 Short periods of detention
17 Presumption against short periods of imprisonment or detention
18 Amendments of Custodial Sentences and Weapons (Scotland) Act 2007
19 Early removal of certain short-term prisoners from the United Kingdom

Other sentencing measures

20 Reports about supervised persons
21 Extended sentences for certain sexual offences
22 Effect of probation and absolute discharge
23 Offences aggravated by racial or religious prejudice
24 Voluntary intoxication by alcohol: effect in sentencing

PART 2

CRIMINAL LAW

Serious organised crime

25 Involvement in serious organised crime
26 Offences aggravated by connection with serious organised crime
27 Directing serious organised crime
28 Failure to report serious organised crime

Articles banned in prison

29 Articles banned in prison

Crossbows, knives etc.

30 Sale and hire of crossbows to persons under 18
31 Sale and hire of knives and certain other articles to persons under 18

Sexual offences

32 Certain sexual offences by non-natural persons
33 Indecent images of children
34 Extreme pornography

People trafficking

35 People trafficking

Fraud and embezzlement

36 Alternative charges for fraud and embezzlement

Conspiracy

37 Conspiracy to commit offences outwith Scotland

PART 3

CRIMINAL PROCEDURE

Children

38 Prosecution of children

Offences: liability of partners

39 Offences: liability of partners

Witness statements

40 Witness statements

Police liberation

41 Breach of undertaking

Bail

42 Bail review applications
43 Bail condition for identification procedures etc.

Prosecution on indictment

44 Prosecution on indictment: Scottish Law Officers

Transfer of justice of the peace court cases

45 Transfer of justice of the peace court cases

Additions to complaint

46 Additional charge where bail etc. breached

Remand and committal of children

47 Remand and committal of children and young persons

Prosecution of organisations

48 Meaning of "organisation"
49 Proceedings on indictment against organisations
50 Prosecution of organisations by summary procedure
51 Manner of citation of organisations in summary proceedings

Disclosure of convictions etc.

52 Disclosure of convictions and non-court disposals

Appeals: time limits

53 Time limits for lodging certain appeals

Crown appeals

54 Submissions as to sufficiency of evidence
55 Prosecutor's right of appeal
56 Power of High Court in appeal under section 107A of 1995 Act
57 Further amendment of 1995 Act

Retention and use of samples etc.

58 Retention of samples etc.
59 Retention of samples etc. from children referred to children's hearings
60 Use of samples etc.

Referrals from the Scottish Criminal Cases Review Commission

61 Referrals from Scottish Criminal Cases Review Commission: grounds for appeal

PART 4

EVIDENCE

62 Witness statements: use during trial
63 Spouse or civil partner of accused a compellable witness
64 Special measures for child witnesses and other vulnerable witnesses
65 Amendment of Criminal Justice (Scotland) Act 2003
66 Witness anonymity orders
67 Television link evidence

PART 5

CRIMINAL JUSTICE

Jury service

68 Upper age limit for jurors
69 Persons excusable from jury service

Data matching for detection of fraud etc.

70 Data matching for detection of fraud etc.

Sharing information with anti-fraud organisations

71 Sharing information with anti-fraud organisations

Closure of premises associated with human exploitation etc.

72 Closure of premises associated with human exploitation etc.

Sexual offences prevention orders

73 Sexual offences prevention orders

Foreign travel orders

74 Foreign travel orders

Risk of sexual harm orders

75 Risk of sexual harm orders

Obtaining information from outwith United Kingdom

76 Obtaining information from outwith United Kingdom

Surveillance

77 Grant of authorisations for directed and intrusive surveillance

Interference with property

78 Authorisations to interfere with property etc.

Amendments of Part 5 of Police Act 1997

79 Amendments of Part 5 of Police Act 1997

Miscellaneous

80 Assistance for victim support
81 Public defence solicitors
82 Compensation for miscarriages of justice
83 Financial reporting orders
84 Compensation orders

PART 6

DISCLOSURE

Meaning of "information"

85 Meaning of "information"

Solemn cases: schedules of information

86 Provision of information to prosecutor
87 Continuing duty to provide schedules of information
88 Review and adjustment of schedules of information

Duties

89 Prosecutor's duty to disclose information
90 Continuing duty of prosecutor
91 Exemptions from disclosure
92 Redaction of non-disclosable information by prosecutor
93 Solemn cases: additional disclosure requirement

Defence statements

94 Defence statements: solemn proceedings
95 Defence statements: summary proceedings

Effect of guilty plea

96 Effect of guilty plea

Means of disclosure

97 Means of disclosure

Confidentiality

98 Confidentiality of disclosed information
99 Contravention of section 98

Disclosure to third party

100 Order enabling disclosure to third party
101 Contravention of order under section 100

Applications to court: orders restricting disclosure

102 Application for non-disclosure order
103 Application for non-notification order or exclusion order
104 Application for non-notification order and exclusion order
105 Application for exclusion order
106 Application for non-disclosure order: determination

Special counsel

107 Special counsel

Appeals

108 Appeal by prosecutor against refusal of application for order
109 Appeal by accused against making of exclusion order or non-disclosure order
110 Appeal by special counsel

Reviews

111 Review of grant of non-disclosure order
112 Review by court of non-disclosure order

Applications and reviews: general

113 Applications and reviews: general provisions

Code of practice

114 Code of practice

Acts of Adjournal

115 Acts of Adjournal

Interpretation of Part 6

116 Interpretation of Part 6

PART 7

MENTAL DISORDER AND UNFITNESS FOR TRIAL

117 Criminal responsibility of persons with mental disorder
118 Acquittal involving mental disorder: procedure
119 Unfitness for trial
120 Abolition of common law rules

PART 8

LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982

121 Conditions to which licences under 1982 Act are to be subject
122 Licensing: powers of entry and inspection for civilian employees
123 Licensing of metal dealers
124 Licensing of taxis and private hire cars
125 Licensing of market operators
126 Licensing of public entertainment
127 Licensing of late night catering
128 Applications for licences

PART 9

ALCOHOL LICENSING

129 Sale of alcohol to persons under 21 etc.
130 Premises licence applications: notification requirements
131 Premises licence applications: modification of layout plans
132 Premises licence applications: antisocial behaviour reports
133 Sale of alcohol to trade
134 Occasional licences
135 Extended hours applications: variation of conditions
136 Personal licences
137 Emergency closure orders
138 False statements in applications: offence
139 Further modifications of 2005 Act

PART 10

MISCELLANEOUS

140 Licensed premises: social responsibility levy

141 Annual report on Criminal Justice (Terrorism and Conspiracy) Act 1998
142 Corruption in public bodies

PART 11

GENERAL

143 Orders and regulations
144 Interpretation
145 Modification of enactments
146 Ancillary provision
147 Transitional provision etc.
148 Short title and commencement

Schedule 1—The Scottish Sentencing Council
Schedule 2—Short-term custody and community sentences: consequential amendments
Schedule 3—Witness anonymity orders: transitional
Schedule 4—Further modifications of 2005 Act
Schedule 5—Modifications of enactments

ACCOMPANYING DOCUMENTS
Explanatory Notes, together with other accompanying documents, are printed separately as SP Bill 24-EN. A Policy Memorandum is printed separately as SP Bill 24-PM.

Criminal Justice and Licensing (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to make provision about sentencing, offenders and defaulters; to make provision about criminal law, procedure and evidence; to make provision about criminal justice and the investigation of crime (including police functions); to amend the law relating to the licensing of certain activities by local authorities; to amend the law relating to the sale of alcohol; and for connected purposes.

PART 1

SENTENCING

Purposes and principles of sentencing

1 Purposes and principles of sentencing

(1) The purposes of sentencing are—

(a) the punishment of offenders,

(b) the reduction of crime (including its reduction by deterrence),

(c) the reform and rehabilitation of offenders,

(d) the protection of the public, and

(e) the making of reparation by offenders to persons affected by their offences.

(2) A court, in sentencing an offender in respect of an offence, must have regard to the purposes of sentencing.

(3) Other matters to which a court must have regard in sentencing an offender in respect of an offence include—

(a) the seriousness of the offence,

(b) any information before the court about the effect of the offence on any person (other than the offender),

(c) the range of sentences available to the court in dealing with the offence,

(d) the desirability of ensuring consistency in sentencing in respect of the same type of offence,

(e) any information before the court about the circumstances and attitude of the offender (including, for example, information about the matters specified in subsection (4)).

(4) Those matters are—

(a) any other offences committed by the offender,

(b) any change in the offender's behaviour or attitude as a result of previous sentences imposed in respect of any other offence,

(c) the offender's family circumstances,

(d) the level of risk which the offender poses to the public,

(e) the offender's willingness to reform.

(5) Subsections (2) and (3) do not apply—

(a) in relation to an offender aged under 18 at the time of the offence,

(b) in relation to the imposition of a sentence in respect of an offence so far as the sentence for that offence is fixed by law,

(c) in relation to the making of—

(i) a compulsion order under section 57A of the 1995 Act,

(ii) a guardianship order under section 58(1A) of that Act,

(iii) a restriction order under section 59 of that Act,

(iv) a hospital direction under section 59A of that Act, or

(v) an intervention order under section 60B of that Act.

(6) In this Part, "sentence" includes any order or disposal which a court may make in dealing with an offender in respect of an offence, but does not include an order for committal in default of payment of any sum of money or for contempt of court; and "sentencing" is to be construed accordingly.

2 Relationship between section 1 and other law

(1) Where, under a provision of any enactment, the matters to which a court must or must not have regard in sentencing an offender in respect of an offence are inconsistent with those to which the court must have regard under section 1, the court need not comply with section 1 to that extent.

(2) Where the matters to which a court must have regard under section 1 in sentencing an offender in respect of an offence are inconsistent with the sentencing guidelines, the court need not comply with section 1 to that extent.

(3) Where the matters to which a court must have regard under section 1 in sentencing an offender in respect of an offence are inconsistent with those to which the court must or must not have regard by virtue of any rule of law, the court need not comply with the rule of law to that extent.

(4) Otherwise, section 1 does not affect any other duty or power imposed or conferred on a court to take account of or have regard to (or not to take account of or have regard to) any matter in sentencing an offender in respect of an offence.

The Scottish Sentencing Council

3 The Scottish Sentencing Council

(1) There is established a body corporate to be known as the "Scottish Sentencing Council" (referred to in this Part as the "Council").

(2) Schedule 1 makes further provision about the Council.

4 The Council's objectives

The Council must, in carrying out its functions, seek to—

(a) promote consistency in sentencing practice,

(b) assist the development of policy in relation to sentencing,

(c) promote greater awareness and understanding of sentencing policy and practice.

5 Sentencing guidelines

(1) The function of the Council is to prepare and publish guidelines relating to the sentencing of offenders.

(2) Such guidelines are to be known as "sentencing guidelines".

(3) Sentencing guidelines may in particular relate to—

(a) the principles and purposes of sentencing,

(b) sentencing levels,

(c) the particular types of sentence that are appropriate for particular types of offence or offender,

(d) the circumstances in which the guidelines may be departed from.

(4) Sentencing guidelines may be general in nature or may relate to a particular category of offence or offender or a particular matter relating to sentencing.

(5) The Council must include in any sentencing guidelines—

(a) an assessment of the costs and benefits to which the implementation of the guidelines would be likely to give rise,

(b) an assessment of the likely effect of the guidelines on—

(i) the number of persons detained in prisons or other institutions,

(ii) the number of persons serving sentences in the community, and

(iii) the criminal justice system generally.

(6) The Council must specify in any sentencing guidelines the date on which the guidelines take effect.

(7) Different dates may be specified in relation to different provisions of the guidelines.

(8) The Council—

(a) must from time to time review any sentencing guidelines published by it, and

(b) may publish revised guidelines.

(9) This section applies to any revised guidelines as it applies to sentencing guidelines.

6 Procedure for publication and review of sentencing guidelines

(1) The Council must, before publishing any sentencing guidelines or revised sentencing guidelines—

(a) publish a draft of the proposed guidelines, and

(b) consult the following persons about the draft—

(i) the Scottish Ministers,

(ii) the Lord Advocate,

(iii) such other persons as the Council considers appropriate.

(2) The draft must include the assessments referred to in section 5(5).

(3) The Council must, in finalising the sentencing guidelines or revised sentencing guidelines, have regard to any comments made on the draft following publication and consultation under subsection (1).

7 Effect of sentencing guidelines

(1) A court (whether at first instance or on appeal) must—

(a) in sentencing an offender in respect of an offence, have regard to any sentencing guidelines which are applicable in relation to the case,

(b) in carrying out any other function relating to the sentencing of offenders, have regard to any sentencing guidelines applicable to the carrying out of the function.

(2) If the court decides not to follow the guidelines, it must state the reasons for its decision.

(3) The sentencing guidelines to which the court must have regard under subsection (1) are those applicable to the case at the time the court is sentencing the offender or, as the case may be, carrying out the function.

(4) Subsection (5) applies where, on appeal in any case, the High Court of Justiciary passes another sentence under one of the following provisions of the 1995 Act—

(a) section 118(3),

(b) section 118(4)(b),

(c) section 118(4A)(b),

(d) section 118(4A)(c)(ii),

(e) section 189(1)(b).

(5) The sentencing guidelines which the High Court must have regard to under subsection (1) in passing that other sentence are those applicable to the case at the time it is passed.

(6) A revision of the sentencing guidelines after an offender is sentenced in respect of an offence is not a ground for the referral of the case to the High Court of Justiciary under section 194B of the 1995 Act (references to the High Court of cases dealt with on indictment).

(7) In section 108 of the 1995 Act (Lord Advocate’s right of appeal against disposal where conviction on indictment), after subsection (2) insert—

"(2A) In deciding whether to appeal under subsection (1) in any case, the Lord Advocate must have regard to any sentencing guidelines which are applicable in relation to the case.".

(8) In section 175 of the 1995 Act (prosecutor's right of appeal against disposal in summary proceedings), after subsection (4B) insert—

"(4C) In deciding whether to appeal under subsection (4) in any case, the prosecutor must have regard to any sentencing guidelines which are applicable in relation to the case.".

8 Ministers' power to request that guidelines be published or reviewed

(1) The Scottish Ministers may request that the Council consider publishing or reviewing sentencing guidelines on any matter.

(2) The Council must have regard to any request made by the Scottish Ministers.

(3) If the Council decides not to comply with a request made by the Scottish Ministers, it must provide the Scottish Ministers with reasons for its decision.

9 High Court's power to request review of guidelines

(1) The High Court of Justiciary may refer sentencing guidelines to the Council and ask the Council to review them in the circumstances set out in subsection (2).

(2) Those circumstances are where—

(a) on appeal in any case, the High Court passes another sentence under a provision of the 1995 Act mentioned in subsection (3), and—

(b) in doing so, the High Court—

(i) decides not to follow any relevant sentencing guidelines, or

(ii) concludes that the guidelines do not deal, or deal adequately, with a significant issue raised by the appeal.

(3) Those provisions are—

(a) section 118(3),

(b) section 118(4)(b),

(c) section 118(4A)(b),

(d) section 118(4A)(c)(ii),

(e) section 189(1)(b).

(4) On referring sentencing guidelines to the Council under subsection (1), the High Court must state the reasons for its decision or conclusion.

(5) The Council must review any guidelines referred to it under subsection (1) and, in doing so, must have regard to the High Court's reasons for its decision or conclusion.

(6) In subsection (2), "relevant sentencing guidelines" means—

(a) any sentencing guidelines which the court whose decision is the subject of the appeal was required to have regard to in the case under appeal,

(b) any sentencing guidelines which the High Court, in exercising its power under any of the provisions mentioned in subsection (3), was or would be required to have regard to in the case.

10 Scottish Court Service to provide sentencing information to the Council

(1) The Scottish Court Service must provide the Council with such information relating to the sentences imposed by courts as the Council may reasonably require for the purposes of its functions.

(2) The information must be provided in such form and by such means as the Council may require.

(3) The Council must from time to time publish information about the sentences imposed by courts.

11 The Council's power to provide information, advice etc.

(1) The Council may—

(a) publish or otherwise disseminate information about sentencing matters,

(b) provide advice or guidance of a general nature about such matters,

(c) conduct research into such matters.

(2) The Council may in particular provide advice or submit proposals about sentencing matters to the Scottish Ministers or any member of the Scottish Parliament.

(3) The Scottish Ministers must have regard to any advice given or proposals submitted by the Council.

(4) In this section, "sentencing matters" means—

(a) sentencing guidelines,

(b) the practice of the courts in relation to sentencing, and

(c) any other matter relating to sentencing.

12 Business plan

(1) The Council must, before the submission day for each period of 3 years, prepare and submit to the Scottish Ministers a plan (a "business plan") describing how the Council proposes to carry out its functions during the period.

(2) The "submission day" is—

(a) for the period of 3 years beginning on the day on which this section comes into force, the day specified by order made by the Scottish Ministers,

(b) for each succeeding period of 3 years, the first day of the period.

(3) A business plan must—

(a) be prepared in such form as the Scottish Ministers may direct,

(b) contain the information specified in subsection (4) and such other information as they may direct, and

(c) be submitted by such time as they may direct.

(4) The information referred to in subsection (3)(b) is details of the matters in relation to which the Council proposes to prepare sentencing guidelines.

(5) The Council may include in a business plan such other information as it considers appropriate.

(6) In preparing a business plan, the Council must consult—

(a) the Scottish Ministers,

(b) the Lord Advocate, and

(c) such other persons as it considers appropriate.

(7) The Scottish Ministers must lay before the Scottish Parliament each business plan submitted to them.

(8) The Council must, as soon as practicable after a business plan has been laid before the Parliament, publish it in such manner as it considers appropriate.

(9) The Council may at any time during a period covered by a business plan review the plan for the period and submit to the Scottish Ministers a revised plan.

(10) Subsections (3) to (8) apply to a revised plan as they apply to a business plan.

13 Annual report

(1) The Council must, as soon as practicable after the end of each financial year, prepare and submit to the Scottish Ministers a report on the carrying out of its functions during the year.

(2) The report must—

(a) be prepared in such form as the Scottish Ministers may direct,

(b) contain the information specified in subsection (3) and such other information as they may direct, and

(c) be submitted by such time as they may direct.

(3) The information referred to in subsection (2)(b) is details of—

(a) the sentencing guidelines published or revised during the year (if any),

(b) any draft sentencing guidelines being consulted upon,

(c) requests made by the Scottish Ministers under section 8 and of the Council's response to them, and

(d) references made by the High Court of Justiciary under section 9 and of the Council's response to them.

(4) The Council may include in the report such other information as it considers appropriate.

(5) The Scottish Ministers must lay before the Scottish Parliament each report submitted to them.

(6) The Council must, as soon as practicable after the report has been laid before the Parliament, publish it in such manner as it considers appropriate.

Community payback orders

14 Community payback orders

After section 227 of the 1995 Act insert—

“*Community payback orders*

227A Community payback orders

(1) Where a person (the “offender”) is convicted of an offence punishable by imprisonment, the court may, instead of imposing a sentence of imprisonment, impose a community payback order in respect of the offender.

(2) A community payback order is an order imposing one or more of the following requirements—

(a) a supervision requirement,

(b) an unpaid work or other activity requirement,

(c) a programme requirement,

(d) a residence requirement,

(e) a mental health treatment requirement,

(f) a drug treatment requirement,

(g) an alcohol treatment requirement.

(3) A court must not impose a community payback order on an offender unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was serious enough to warrant the imposition of such an order.

(4) Where an offender is convicted of an offence other than one punishable by imprisonment, the court may impose a community payback order in respect of the offender imposing—

(a) a level 1 unpaid work or other activity requirement, or

(b) such a requirement together with a supervision requirement.

(5) A justice of the peace court may impose a community payback order under this section only if the order imposes one or more of the following requirements—

(a) a supervision requirement,

(b) an unpaid work or other activity requirement,

(c) a residence requirement.

(6) Subsection (5)(b) is subject to section 227J(3).

(7) Before making a community payback order imposing two or more requirements falling within subsection (2), the court must consider whether, in the circumstances of the case, the requirements are compatible with each other.

(8) The Scottish Ministers may by order made by statutory instrument amend subsection (5) so as to add to or omit requirements that may be imposed in a community payback order imposed by a justice of the peace court.

(9) An order is not to be made under subsection (8) unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.

(10) In this section—

"court" means the High Court, the sheriff or a justice of the peace court,

"imprisonment" includes detention,

"level 1 unpaid work or other activity requirement" has the meaning given by section 227I(4).

227B Community payback order: further provision

(1) This section applies where a court is considering imposing a community payback order in respect of an offender.

(2) The court must not impose the order unless it has obtained, and taken account of, a report from an officer of a local authority containing such information relating to the offender as may be specified by Act of Adjournal.

(3) The clerk of the court must give a copy of any report obtained under subsection (2) to—

(a) the offender,

(b) the offender's solicitor (if any), and

(c) the prosecutor.

(4) Before imposing the order, the court must explain to the offender in ordinary language—

(a) the purpose and effect of each of the requirements to be imposed by the order,

(b) the consequences which may follow if the offender fails to comply with any of the requirements imposed by the order, and

(c) where the court proposes to include in the order provision under section 227W for it to be reviewed, the arrangements for such a review.

(5) The court must not make the order unless the offender has, after the court has explained those matters, confirmed that the offender—

(a) understands those matters, and

(b) is willing to comply with each of the requirements to be imposed by the order.

(6) Subsection (5) is subject to section 227M(7).

227C Community payback order: responsible officer

(1) This section applies where a court imposes a community payback order in respect of an offender.

(2) The court must, in imposing the order—

(a) specify the locality in which the offender resides or will reside for the duration of the order,

(b) require the local authority within whose area that locality is situated to nominate, within five days of its receiving a copy of the order, an officer of the authority as the responsible officer for the purposes of the order,

(c) require the offender to comply with any instructions given by the responsible officer—

(i) about keeping in touch with the responsible officer, or

(ii) for the purposes of subsection (3), and

(d) if the order does not impose a residence requirement, require the offender to notify the responsible officer of any change or proposed change of address.

(3) The responsible officer is responsible for—

(a) making any arrangements necessary to enable the offender to comply with each of the requirements imposed by the order,

(b) promoting compliance with those requirements by the offender,

(c) taking such steps as may be necessary to enforce compliance with the requirements of the order or to vary or discharge any of them.

(4) References in this Act to the responsible officer are, in relation to an offender in respect of whom a community payback order has been imposed, the officer for the time being nominated in pursuance of subsection (2)(b).

(5) In reckoning the period of five days for the purposes of subsection (2)(b), no account is to be taken of Saturdays and Sundays.

227D Community payback order: offender’s duties

(1) Subsection (2) applies where a community payback order has been imposed in respect of an offender.

(2) The offender must—

(a) report to the responsible officer in accordance with instructions given by that officer,

(b) if the order does not impose a residence requirement or a restricted movement requirement, notify the responsible officer without delay of—

(i) any change or proposed change of the offender’s address,

(ii) the times, if any, at which the offender usually works (or carries out voluntary work) or attends school or any other educational establishment, and

(c) where the order imposes an unpaid work or other activity requirement, undertake for the number of hours specified in the requirement such work or activity as the responsible officer may instruct, and at such times as may be so instructed.

(3) Failure to comply with a duty under subsection (2) is to be treated as a failure to comply with a requirement imposed by the order.

227E Community payback order: further provision

(1) Where a community payback order is imposed in respect of an offender, the order is to be taken for all purposes to be a sentence imposed on the offender.

(2) On imposing a community payback order, the court must state in open court the reasons for imposing the order.

(3) The imposition by a court of a community payback order in respect of an offender does not prevent the court from—

(a) imposing a disqualification on the offender,

(b) making an order for forfeiture in respect of the offence, or

(c) ordering the offender to find caution for good behaviour.

(4) Where a court imposes a community payback order in respect of an offender, the clerk of the court must ensure that—

(a) a copy of the order imposing the community payback order is given to—

(i) the offender, and

(ii) the local authority within whose area the offender resides or will reside, and

(b) a copy of the order and such other documents and information relating to the case as may be useful are given to the clerk of the appropriate court (unless the court imposing the order is that court).

(5) A copy of the order imposing the community payback order may be given to the offender—

(a) by being delivered personally to the offender, or

(b) by being sent—

(i) by a registered post service (as defined in section 125(1) of the Postal Services Act 2000 (c.26)), or

(ii) by a postal service which provides for the delivery of the document to be recorded.

(6) An order imposing a community payback order is to be in such form, or as nearly as may be in such form, as may be prescribed by Act of Adjournal.

227F Requirement to avoid conflict with religious beliefs, work etc.

(1) In imposing a community payback order in respect of an offender, the court must ensure, so far as practicable, that any requirement imposed by the order avoids—

(a) a conflict with the offender's religious beliefs,

(b) interference with the times, if any, at which the offender normally works (or carries out voluntary work) or attends school or any other educational establishment.

(2) The responsible officer must ensure, so far as practicable, that any instruction given to the offender avoids such a conflict or interference.

Supervision requirement

227G Supervision requirement

(1) In this Act, a "supervision requirement" is, in relation to an offender, a requirement that, during the specified period, the offender must attend appointments with the responsible officer or another person determined by the responsible officer, at such time and place as may be determined by the responsible officer, for the purpose of promoting the offender's rehabilitation.

(2) On imposing a community payback order, the court must impose a supervision requirement if—

- (a) the offender is under 18 years of age and the court is satisfied as to the services which the local authority will provide for the offender's support and rehabilitation in the specified period,
- (b) the court, in the order, imposes—
  - (i) a programme requirement,
  - (ii) a residence requirement,
  - (iii) a mental health requirement,
  - (iv) a drug treatment requirement, or
  - (v) an alcohol treatment requirement, or
- (c) the order imposes two or more requirements (other than a supervision requirement).

(3) The specified period must be at least 6 months and not more than 3 years.

(4) In this section, the "specified period", in relation to a supervision requirement, means the period specified in the requirement.

227H Supervision requirement: power to order payment of compensation

(1) This section applies where a court imposes a community payback order in respect of an offender which imposes a supervision requirement.

(2) The court may also impose a requirement in the order that the offender must pay compensation for any personal injury, loss or damage caused (whether directly or indirectly) by the acts which constituted the offence in respect of which the order is imposed.

(3) The court may require the compensation to be paid in a lump sum or in instalments.

(4) Where a requirement to pay compensation is imposed, the offender must complete payment of the compensation before the earlier of the following—

- (a) the end of the period of 18 months beginning with the day on which the requirement is imposed,
- (b) the beginning of the period of 2 months ending with the date on which the period specified in the supervision requirement ends.

(5) The requirement to pay compensation and the requirement in subsection (4) are to be treated for the purposes of this Act as if they were part of the supervision requirement.

Unpaid work or other activity requirement

227I Unpaid work or other activity requirement

(1) In this Act, an "unpaid work or other activity requirement" is, in relation to an offender, a requirement that the offender must, for the specified number of hours, undertake—

(a) unpaid work, and

(b) another activity.

(2) The nature of the unpaid work and other activity to be undertaken by the offender is to be determined by the responsible officer.

(3) The number of hours that may be specified in the requirement must be (in total)—

(a) at least 20 hours, and

(b) not more than 300 hours.

(4) An unpaid work or other activity requirement which requires the work or activity to be undertaken for a number of hours totalling no more than 100 is referred to in this Act as a "level 1 unpaid work or other activity requirement".

(5) An unpaid work or other activity requirement which requires the work or activity to be undertaken for a number of hours totalling more than 100 is referred to in this Act as a "level 2 unpaid work or other activity requirement".

(6) The Scottish Ministers may by order made by statutory instrument substitute another number of hours for any of the numbers of hours for the time being specified in subsections (3) to (5).

(7) An order under subsection (6) is subject to annulment in pursuance of a resolution of the Scottish Parliament.

(8) In this section, "specified", in relation to an unpaid work or other activity requirement, means specified in the requirement.

227J Unpaid work or other activity requirement: further provision

(1) A court may not impose an unpaid work or other activity requirement on an offender who is under 16 years of age.

(2) A court may impose such a requirement on an offender only if the court is satisfied, after considering the report mentioned in section 227B(2), that the offender is a suitable person to undertake unpaid work in pursuance of the requirement.

(3) A justice of the peace court may impose a level 2 unpaid work or other activity requirement only if—

(a) the Scottish Ministers by regulations made by statutory instrument so provide, and

(b) the requirement is imposed in such circumstances and subject to such conditions as may be specified in the regulations.

(4) Regulations are not to be made under subsection (3) unless a draft of the statutory instrument containing them has been laid before and approved by resolution of the Scottish Parliament.

227K Allocation of hours between unpaid work and other activity

(1) Subject to subsection (2), it is for the responsible officer to determine how many out of the total number of hours specified in an unpaid work or other activity requirement are to be allocated to undertaking, respectively—

(a) unpaid work, and

(b) another activity.

(2) The number of hours allocated to undertaking an activity other than unpaid work must not exceed whichever is the lower of—

(a) 30% of the total number of hours specified in the requirement, and

(b) 30 hours.

(3) The Scottish Ministers may by order made by statutory instrument amend subsection (2).

(4) An order under subsection (3) is subject to annulment in pursuance of a resolution of the Scottish Parliament.

227L Time limit for completion of unpaid work or other activity

(1) The total number of hours of unpaid work and other activity that the offender is required to undertake in pursuance of an unpaid work or other activity requirement must be completed by the offender before the end of the specified period.

(2) The "specified period" is such period beginning with the imposition of the requirement as the court may specify in the requirement.

(3) That period must not be less than—

(a) in relation to a level 1 unpaid work or other activity requirement, 3 months,

(b) in relation to a level 2 unpaid work or other activity requirement, 6 months.

227M Fine defaulters

(1) This section applies where—

(a) a fine has been imposed on an offender in respect of an offence,

(b) the offender fails to pay the fine or an instalment of the fine,

(c) the amount of the fine or the instalment does not exceed level 2 on the standard scale, and

(d) apart from this section, the court would have imposed a sentence of imprisonment on the offender under section 219(1) of this Act in respect of the failure to pay the fine or instalment.

(2) The court must, instead of imposing a sentence of imprisonment under section 219(1) of this Act, impose a community payback order on the offender imposing a level 1 unpaid work or other activity requirement.

(3) Where the amount of the fine or the instalment does not exceed level 1 on the standard scale, the total number of hours specified in the requirement must not exceed 50.

(4) On completion of the hours of unpaid work and other activity specified in an unpaid work or other activity requirement imposed under this section, the fine in respect of which the requirement was imposed is discharged (or, as the case may be, the outstanding instalments of the fine are discharged).

(5) If, after a community payback order is imposed in respect of an offender under this section, the offender pays the fine or the full amount of any outstanding instalments, the appropriate court must discharge the order.

(6) If, after a community payback order is imposed on an offender under this section, the offender pays part of the fine, or part of any outstanding instalments, the appropriate court must vary the order to take account of the payment.

(7) A level 1 unpaid work or other activity requirement may be imposed on an offender under this section whether or not the offender indicates a willingness to comply with the requirement.

(8) Where a community payback order is imposed under subsection (2), section 227B(5) does not apply.

(9) Subsection (2) is subject to sections 227J(1) and 227N(2), (3) and (6).

(10) In this section, “court” does not include the High Court.

227N Offenders subject to more than one unpaid work or other activity requirement

(1) This section applies where—

(a) a court is considering imposing an unpaid work or other activity requirement in respect of an offender (referred to as the “new requirement”), and

(b) at the time the court is considering imposing the requirement, there is already in effect one or more such requirements in respect of the same offender (each referred to as an “existing requirement”).

(2) The court may, in imposing the new requirement, direct that it is to be concurrent with any existing requirement.

(3) Where the court so directs, hours of unpaid work or other activity undertaken after the new requirement is imposed count for the purposes of compliance with that requirement and the existing requirement.

(4) Subsection (5) applies where the court does not so direct.

(5) The maximum number of hours which may be specified in the new requirement is 300 less the total number of hours specified in each existing requirement.

(6) Where that maximum number is less than the minimum number of hours that can be specified by virtue of section 227I(3)(a), the court must not impose the new requirement.

227O Rules about unpaid work and other activity

(1) The Scottish Ministers may make rules by statutory instrument for or in connection with the undertaking of unpaid work and other activities in pursuance of unpaid work or other activity requirements.

(2) Rules under subsection (1) may in particular make provision for—

(a) limiting the number of hours of work or other activity that an offender may be required to undertake in any one day,

(b) reckoning the time spent undertaking unpaid work or other activity,

(c) the payment to the offender of travelling or other expenses in connection with the undertaking of unpaid work or other activity,

(d) the keeping of records of unpaid work and other activity undertaken.

(3) Rules under subsection (1) are subject to annulment in pursuance of a resolution of the Scottish Parliament.

Programme requirement

227P Programme requirement

(1) In this Act, a “programme requirement” is, in relation to an offender, a requirement that the offender must participate in a specified programme, at the specified place and on the specified number of days.

(2) In this section, “programme” means a course or other planned set of activities, taking place over a period of time, and provided to individuals or groups of individuals for the purpose of addressing offending behavioural needs.

(3) A court may impose a programme requirement on an offender only if the specified programme is one which has been recommended by an officer of a local authority as being suitable for the offender to participate in.

(4) If an offender’s compliance with a proposed programme requirement would involve the co-operation of a person other than the offender, the court may impose the requirement only if the other person consents.

(5) A court may not impose a programme requirement that would require an offender to participate in a specified programme after the expiry of the period specified in the supervision requirement to be imposed at the same time as the programme requirement (by virtue of section 227G(2)(b)).

(6) Where the court imposes a programme requirement on an offender, the requirement is to be taken to include a requirement that the offender, while attending the specified programme, complies with any instructions given by or on behalf of the person in charge of the programme.

(7) In this section, “specified”, in relation to a programme requirement, means specified in the requirement.

Residence requirement

227Q Residence requirement

(1) In this Act, a "residence requirement" is, in relation to an offender, a requirement that, during the specified period, the offender must reside at a specified place.

(2) The court may, in a residence requirement, require an offender to reside at a hostel or other institution only if the hostel or institution has been recommended as a suitable place for the offender to reside in by an officer of a local authority.

(3) The specified period must not be longer than the period specified in the supervision requirement to be imposed at the same time as the residence requirement (by virtue of section 227G(2)(b)).

(4) In this section, "specified", in relation to a residence requirement, means specified in the requirement.

Mental health treatment requirement

227R Mental health treatment requirement

(1) In this Act, a "mental health treatment requirement" is, in relation to an offender, a requirement that the offender must submit, during the specified period, to treatment by or under the direction of a registered medical practitioner or a chartered psychologist (or both) with a view to improving the offender's mental condition.

(2) The treatment to which an offender may be required to submit under a mental health treatment requirement is such of the kinds of treatment described in subsection (3) as is specified; but otherwise the nature of the treatment is not to be specified.

(3) Those kinds of treatment are—

(a) treatment as a resident patient in a hospital (other than a State hospital) within the meaning of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) ("the 2003 Act"),

(b) treatment as a non-resident patient at such institution or other place as may be specified, or

(c) treatment by or under the direction of such registered medical practitioner or chartered psychologist as may be specified.

(4) A court may impose a mental health treatment requirement on an offender only if the court is satisfied—

(a) on the evidence of an approved medical practitioner (within the meaning of the 2003 Act), that Condition A is met,

(b) on the written or oral evidence of the registered medical practitioner or chartered psychologist by whom or under whose direction the treatment is to be provided, that Condition B is met, and

(c) that Condition C is met.

(5) Condition A is that—

(a) the offender suffers from a mental condition,

(b) the condition requires, and may be susceptible to, treatment, and

(c) the condition is not such as to warrant the offender's being subject to—

(i) a compulsory treatment order under section 64 of the 2003 Act, or

(ii) a compulsion order under section 57A of this Act.

(6) Condition B is that the treatment proposed to be specified is appropriate for the offender.

(7) Condition C is that arrangements have been made for the proposed treatment including, where the treatment is to be of the kind mentioned in subsection (3)(a), arrangements for the offender's reception in the hospital proposed to be specified in the requirement.

(8) The specified period must not be longer than the period specified in the supervision requirement to be imposed at the same time as the mental health treatment requirement (by virtue of section 227G(2)(b)).

(9) In this section, "specified", in relation to a mental health treatment requirement, means specified in the requirement.

227S Mental health treatment requirements: medical evidence

(1) For the purpose of making a finding under section 227R(4)(a) or (b), a written report purporting to be signed by an approved medical practitioner may be received in evidence without the need for proof of the signature or qualifications of the practitioner.

(2) Where such a report is lodged in evidence otherwise than by or on behalf of the offender, a copy of the report must be given to—

(a) the offender, and

(b) the offender's solicitor (if any).

(3) The court may adjourn the case if it considers it necessary to do so to give the offender further time to consider the report.

(4) Subsection (5) applies where the offender is—

(a) detained in a hospital under this Act, or

(b) remanded in custody.

(5) For the purpose of calling evidence to rebut any evidence contained in a report lodged as mentioned in subsection (2), arrangements may be made by or on behalf of the offender for an examination of the offender by a registered medical practitioner.

(6) Such an examination is to be carried out in private.

227T Power to change treatment

(1) This section applies where—

(a) a mental health treatment requirement has been imposed on an offender, and

(b) the registered medical practitioner or chartered psychologist by whom or under whose direction the offender is receiving the treatment to which the offender is required to submit in pursuance of the requirement is of the opinion mentioned in subsection (2).

(2) That opinion is—

(a) that the offender requires, or that it would be appropriate for the offender to receive, a different kind of treatment (whether in whole or in part) from that which the offender has been receiving, or

(b) that the treatment (whether in whole or in part) can be more appropriately given in or at a different hospital or other institution or place from that where the offender has been receiving treatment.

(3) The practitioner or, as the case may be, psychologist may make arrangements for the offender to be treated accordingly.

(4) Subject to subsection (5), the treatment provided under the arrangements must be of a kind which could have been specified in the mental health treatment requirement.

(5) The arrangements may provide for the offender to receive treatment (in whole or in part) as a resident patient in an institution or place even though it is one that could not have been specified for that purpose in the mental health treatment requirement.

(6) Arrangements may be made under subsection (3) only if—

(a) the offender and the responsible officer agree to the arrangements,

(b) the treatment will be given by or under the direction of a registered medical practitioner or chartered psychologist who has agreed to accept the offender as a patient, and

(c) where the treatment requires the offender to be a resident patient, the offender will be received as such.

(7) Where arrangements are made under subsection (3)—

(a) the responsible officer must notify the court of the arrangements, and

(b) the treatment provided under the arrangements is to be taken to be treatment to which the offender is required to submit under the mental health treatment requirement.

Drug treatment requirement

227U Drug treatment requirement

(1) In this Act, a "drug treatment requirement" is, in relation to an offender, a requirement that the offender must submit, during the specified period, to treatment by or under the direction of a specified person with a view to reducing or eliminating the offender's dependency on, or propensity to misuse, drugs.

(2) The treatment to which an offender may be required to submit under a drug treatment requirement is such of the kinds of treatment described in subsection (3) as is specified (but otherwise the nature of the treatment is not to be specified).

(3) Those kinds of treatment are—

(a) treatment as a resident in such institution or other place as is specified,

(b) treatment as a non-resident at such institution or other place, and at such intervals, as is specified.

(4) The specified person must be a person who has the necessary qualifications or experience in relation to the treatment to be provided.

(5) The specified period must not be longer than the period specified in the supervision requirement to be imposed at the same time as the drug treatment requirement (by virtue of section 227G(2)(b)).

(6) A court may impose a drug treatment requirement on an offender only if the court is satisfied that—

(a) the offender is dependent on, or has a propensity to misuse, any controlled drug (as defined in section 2(1)(a) of the Misuse of Drugs Act 1971 (c.38)),

(b) the dependency or propensity requires, and may be susceptible to, treatment, and

(c) arrangements have been made for the proposed treatment including, where the treatment is to be of the kind mentioned in subsection (3)(a), arrangements for the offender’s reception in the institution or other place to be specified.

(7) In this section, “specified”, in relation to a drug treatment requirement, means specified in the requirement.

Alcohol treatment requirement

227V Alcohol treatment requirement

(1) In this Act, an “alcohol treatment requirement” is, in relation to an offender, a requirement that the offender must submit, during the specified period, to treatment by or under the direction of a specified person with a view to the reduction or elimination of the offender’s dependency on alcohol.

(2) The treatment to which an offender may be required to submit under an alcohol treatment requirement is such of the kinds of treatment described in subsection (3) as is specified (but otherwise the nature of the treatment is not to be specified).

(3) Those kinds of treatment are—

(a) treatment as a resident in such institution or other place as is specified,

(b) treatment as a non-resident at such institution or other place, and at such intervals, as is specified,

(c) treatment by or under the direction of such person as is specified.

(4) The person specified under subsection (1) or (3)(c) must be a person who has the necessary qualifications or experience in relation to the treatment to be provided.

(5) The specified period must not be longer than the period specified in the supervision requirement to be imposed at the same time as the alcohol treatment requirement (by virtue of section 227G(2)(b)).

(6) A court may impose an alcohol treatment requirement on an offender only if the court is satisfied that—

(a) the offender is dependent on alcohol,

(b) the dependency requires, and may be susceptible to, treatment, and

(c) arrangements have been, or can be, made for the proposed treatment, including, where the treatment is to be of the kind mentioned in subsection (3)(a), arrangements for the offender's reception in the institution or other place to be specified.

(7) In this section, "specified", in relation to an alcohol treatment requirement, means specified in the requirement.

Community payback orders: review, variation etc.

227W Periodic review of community payback orders

(1) On imposing a community payback order in respect of an offender, the court may include in the order provision for the order to be reviewed at such time or times as may be specified in the order.

(2) A review carried out in pursuance of such provision is referred to in this section as a "progress review".

(3) A progress review may be carried out by the court which imposed the community payback order or by the appropriate court.

(4) A progress review is to be carried out in such manner as the court carrying out the review may determine.

(5) Before each progress review, the responsible officer must give the court a written report on the offender's compliance with the requirements imposed by the community payback order in the period to which the review relates.

(6) The offender must attend each progress review.

(7) If the offender fails to attend a progress review, the court may—

(a) issue a citation requiring the offender's attendance, or

(b) issue a warrant for the offender's arrest.

(8) The unified citation provisions apply in relation to a citation under subsection (7)(a) as they apply in relation to a citation under section 216(3)(a) of this Act.

(9) On conclusion of a progress review in respect of a community payback order, the court may vary, revoke or discharge the order in accordance with section 227Y.

227X Applications to vary, revoke and discharge community payback orders

(1) The appropriate court may, on the application of either of the persons mentioned in subsection (2), vary, revoke or discharge a community payback order in accordance with section 227Y.

(2) Those persons are—

(a) the offender in respect of whom the order was imposed,

(b) the responsible officer in relation to the offender.

227Y Variation, revocation and discharge: court's powers

(1) This section applies where a court proposes to vary, revoke or discharge a community payback order under section 227W(9) or 227X(1).

(2) The court may vary, revoke or discharge the order only if satisfied that it is in the interests of justice to do so having regard to circumstances which have arisen since the order was imposed.

(3) In varying an order, the court may, in particular—

(a) add to the requirements imposed by the order,

(b) revoke or discharge any requirement imposed by the order,

(c) vary any requirement imposed by the order.

(4) In varying a requirement imposed by the order, the court may, in particular—

(a) extend or shorten any period or other time limit specified in the requirement,

(b) in the case of an unpaid work or other activity requirement, increase or decrease the total number of hours specified in the requirement,

(c) in the case of a supervision requirement containing a requirement to pay compensation under section 227H, vary the amount of compensation or any instalment.

(5) The court may not, under subsection (4)(a), extend any period or time limit so as to extend it beyond the maximum period or limit that could have been specified in the requirement when it was imposed.

(6) The court may not, under subsection (4)(b), increase the total number of hours beyond the maximum that could have been specified in the requirement when it was imposed.

(7) Where the court varies a restricted movement requirement imposed in a community payback order, the court must give a copy of the order making the variation to the person responsible for monitoring the offender's compliance with the requirement.

(8) Where the court revokes a community payback order, the court may deal with the offender in respect of the offence in relation to which the order was imposed as it could have dealt with the offender had the order not been imposed.

(9) Where the court proposes to vary, revoke or discharge the order otherwise than on the application of the offender, the court must issue a citation to the offender requiring the offender to appear before the court (except where the offender is required to appear by section 227W(6)).

(10) If the offender fails to appear as required by the citation, the court may issue a warrant for the arrest of the offender.

(11) The unified citation provisions apply in relation to a citation under subsection (9) as they apply in relation to a citation under section 216(3)(a) of this Act.

227Z Variation of community payback orders: further provision

(1) This section applies where a court is considering varying a community payback order in respect of an offender.

(2) The court must not make the variation unless it has obtained, and taken account of, a report from the responsible officer containing such information relating to the offender as may be specified by Act of Adjournal.

(3) The clerk of the court must give a copy of any report obtained under subsection (2) to—

(a) the offender,

(b) the offender's solicitor (if any).

(4) Before making the variation, the court must explain to the offender in ordinary language—

(a) the purpose and effect of each of the requirements to be imposed by the order as proposed to be varied,

(b) the consequences which may follow if the offender fails to comply with any of the requirements imposed by the order as proposed to be varied, and

(c) where the court proposes to include in the order as proposed to be varied provision under section 227W for it to be reviewed, or to vary any such provision already included in the order, the arrangements for such a review.

(5) The court must not make the variation unless the offender has, after the court has explained those matters, confirmed that the offender—

(a) understands those matters, and

(b) is willing to comply with each of the requirements to be imposed by the order as proposed to be amended.

(6) Where the variation would impose a new requirement—

(a) the court must not make the variation if the new requirement is not a requirement that could have been imposed in the order when it was made,

(b) if the new requirement is one which could have been so imposed, the court must, before making the variation take whatever steps the court would have been required to take before imposing the requirement had it been imposed in the order when it was made.

(7) Where the variation would vary any requirement imposed by the order, the court must not make the variation if the requirement as proposed to be varied could not have been imposed, or imposed in that way, in the order when it was made.

227ZA Change of offender's residence to new local authority area

(1) The section applies where—

(a) the offender in respect of whom a community payback order is in force proposes to change, or has changed, residence to a locality ("the new locality") situated in the area of a different local authority from that in which the locality currently specified in the order is situated, and

(b) an application is made to the appropriate court under section 227X(1) for the order to be varied so as to specify the new local authority area in which the offender resides or will reside.

(2) The court may vary the order as proposed in the application only if satisfied that arrangements have been, or can be, made in the local authority area in which the new locality is situated for the offender to comply with the requirements of the order.

(3) Where the court varies the order as proposed in the application, the court must also vary the order so as to require the local authority for the area in which the new locality is situated to nominate an officer of the authority to be the responsible officer for the purposes of the order.

Breach of community payback order

227ZB Breach of community payback order

(1) This section applies where it appears to the appropriate court that an offender in respect of whom a community payback order has been imposed has failed to comply with a requirement imposed in the order.

(2) The court may—

(a) issue a warrant for the offender's arrest, or

(b) issue a citation to the offender requiring the offender to appear before the court.

(3) If the offender fails to appear as required by a citation issued under subsection (2)(b), the court may issue a warrant for the arrest of the offender.

(4) The unified citation provisions apply in relation to a citation under subsection (2)(b) as they apply in relation to a citation under section 216(3)(a) of this Act.

(5) If the court is satisfied that the offender has failed without reasonable excuse to comply with a requirement imposed by the order, the court may—

(a) impose on the offender a fine not exceeding level 3 on the standard scale,

(b) revoke the order and deal with the offender in respect of the offence in relation to which the order was imposed as it could have dealt with the offender had the order not been imposed, or

(c) vary the order so as to impose a new requirement, vary any requirement imposed by the order or discharge any requirement imposed by the order.

(6) The requirements which the court may impose under subsection (5)(c) include a restricted movement requirement.

(7) If the court imposes a restricted movement requirement, the court must also vary the order so as to impose a supervision requirement, unless a supervision requirement is already imposed by the order.

(8) Where the court varies the order so as to impose a restricted movement requirement, the court must give a copy of the order making the variation to the person responsible for monitoring the offender's compliance with the requirement.

(9) The period for which the restricted movement requirement is in effect must not exceed whichever is the lesser of—

(a) the period for which the supervision requirement has effect, and

(b) the period of 12 months.

(10) If during the period for which the restricted movement requirement is in effect it appears to the person responsible for monitoring the offender's compliance with the requirement that the offender has failed to comply with the requirement, the person must report the matter to the offender's responsible officer.

(11) On receiving a report under subsection (10), the responsible officer must report the matter to the court.

(12) The Scottish Ministers may by regulations made by statutory instrument substitute for the number of months for the time being specified in subsection (9)(b) another number of months.

(13) Regulations are not to be made under subsection (12) unless a draft of the statutory instrument containing the regulations has been laid before and approved by resolution of the Scottish Parliament.

227ZC Breach of community payback order: further provision

(1) Subsection (2) applies where the court, under paragraph (b) of subsection (5) of section 227ZB, revokes a community payback order imposing only a level 1 unpaid work or other activity requirement.

(2) In dealing with the offender as mentioned in that paragraph, the court may not impose a sentence of imprisonment for a term exceeding—

(a) in the case of a justice of the peace court, 20 days,

(b) in any other case, 30 days.

(3) Evidence of one witness is sufficient for the purpose of establishing that an offender has failed without reasonable excuse to comply with a requirement imposed by a community payback order.

(4) Subsection (5) applies in relation to a community payback order imposing a supervision requirement containing a requirement to pay compensation under section 227H.

(5) A document bearing to be a certificate signed by the clerk of the appropriate court and stating that the compensation, or an instalment of the compensation, has not been paid as required by the requirement is sufficient evidence that the offender has failed to comply with the requirement.

(6) The appropriate court may, for the purpose of considering whether an offender has failed to comply with a requirement imposed by a community payback order, require the responsible officer to provide a report on the offender's compliance with the requirement.

227ZD Restricted movement requirement

(1) In this Act, a "restricted movement requirement" is, in relation to an offender, a requirement restricting the offender's movements to such extent as is specified.

(2) A restricted movement requirement may in particular require the offender—

(a) to be in a specified place at a specified time or during specified periods, or

(b) not to be in a specified place, or a specified class of place, at a specified time or during specified periods.

(3) A restricted movement requirement may not require the offender to be at any place for periods totalling more than 12 hours in any one day.

(4) A restricted movement requirement—

(a) takes effect from the specified day, and

(b) has effect for such period of not more than 12 months as is specified.

(5) A court imposing a restricted movement requirement must specify in it—

(a) the method by which the offender's compliance with the requirement is to be monitored, and

(b) the person who is to be responsible for monitoring that compliance.

(6) The Scottish Ministers may by regulations made by statutory instrument substitute—

(a) for the number of hours for the time being specified in subsection (3) another number of hours,

(b) for the number of months for the time being specified in subsection (4)(b) another number of months.

(7) Regulations are not to be made under subsection (6) unless a draft of the statutory instrument containing the regulations has been laid before and approved by resolution of the Scottish Parliament.

(8) In this section, "specified", in relation to a restricted movement requirement, means specified in the requirement.

227ZE Restricted movement requirements: further provision

(1) A court may not impose a restricted movement requirement requiring the offender to be, or not to be, in a specified place unless it is satisfied that the offender's compliance with the requirement can be monitored by the method specified in the requirement.

(2) Before imposing a restricted movement requirement requiring the offender to be in a specified place, the appropriate court must obtain and consider a report by an officer of the local authority in whose area the place is situated on—

(a) the place, and

(b) the attitude of any person (other than the offender) likely to be affected by the enforced presence of the offender at the place.

(3) The court may, before imposing the requirement, hear the officer who prepared the report.

227ZF Variation of restricted movement requirement

(1) This section applies where—

(a) a community payback order which is in force in respect of an offender imposes a restricted movement requirement requiring the offender to be at a particular place specified in the requirement for any period, and

(b) an application is made to the appropriate court under section 227X for the requirement to be varied so as to require the offender to be at a different place (“the new place”).

(2) Before making the variation proposed in the application, the appropriate court must obtain and consider a report by an officer of the local authority in whose area the new place is situated on—

(a) the new place, and

(b) the attitude of any person (other than the offender) likely to be affected by the enforced presence of the offender at the new place.

(3) The court may, before making the variation proposed in the application, hear the officer who prepared the report.

227ZG Remote monitoring

Section 245C of this Act, and regulations made under that section, apply in relation to the imposition of, and compliance with, restricted movement requirements as they apply in relation to the imposition of, and compliance with, restriction of liberty orders.

227ZH Restricted movement requirements: Scottish Ministers’ functions

(1) The Scottish Ministers may by regulations made by statutory instrument prescribe—

(a) which courts, or class or classes of courts, may impose restricted movement requirements,

(b) the method or methods of monitoring compliance with a restricted movement requirement which may be specified in such a requirement,

(c) the class or classes of offender in respect of whom such a requirement may be imposed.

(2) Regulations under subsection (1) may make different provision about the matters mentioned in paragraphs (b) and (c) of that subsection in relation to different courts or classes of court.

(3) Regulations under subsection (1) are subject to annulment in pursuance of a resolution of the Scottish Parliament.

(4) The Scottish Ministers must determine the person, or class or description of person, who may be specified in a restricted movement requirement as the person to be responsible for monitoring the offender's compliance with the requirement (referred to in this section as the "monitor").

(5) The Scottish Ministers may determine different persons, or different classes or descriptions of person, in relation to different methods of monitoring.

(6) The Scottish Ministers must notify each court having power to impose a restricted movement requirement of their determination.

(7) Subsection (8) applies where—

(a) the Scottish Ministers make a determination under subsection (4) changing a previous determination made by them, and

(b) a person specified in a restricted movement requirement in effect at the date the determination takes effect as the monitor is not a person, or is not of a class or description of person, mentioned in the determination as changed.

(8) The appropriate court must—

(a) vary the restricted movement requirement so as to specify a different person as the monitor,

(b) send a copy of the requirement as varied to that person, and

(c) notify the offender of the variation.

227ZI Documentary evidence in proceedings for breach of restricted movement requirement

(1) This section applies for the purposes of establishing in any proceedings whether an offender in respect of whom a restricted movement requirement has been imposed has complied with the requirement.

(2) Evidence of the presence or absence of the offender at a particular place at a particular time may be given by the production of a document or documents bearing to be—

(a) a statement automatically produced by a device specified in regulations made under section 245C of this Act, by which the offender's whereabouts were remotely monitored, and

(b) a certificate signed by a person nominated for the purposes of this paragraph by the Scottish Ministers that the statement relates to the whereabouts of the offender at the dates and times shown in the statement.

(3) The statement and certificate are, when produced in evidence, sufficient evidence of the facts stated in them.

(4) The statement and certificate are not admissible in evidence at any hearing unless a copy of them has been served on the offender before the hearing.

(5) Where it appears to any court before which the hearing is taking place that the offender has not had sufficient notice of the statement or certificate, the court may adjourn the hearing or make any order that it considers appropriate.

Local authorities: annual consultation about unpaid work

227ZJ Local authorities: annual consultations about unpaid work

(1) Each local authority must, for each year, consult prescribed persons about the nature of unpaid work and other activities to be undertaken by offenders residing in the local authority's area in respect of whom community payback orders are imposed.

(2) In subsection (1), "prescribed persons" means such persons, or class or classes of person, as may be prescribed by the Scottish Ministers by regulations made by statutory instrument.

(3) A statutory instrument containing regulations under subsection (2) is to be subject to annulment in pursuance of a resolution of the Scottish Parliament.

Community payback order: meaning of "the appropriate court"

227ZK Meaning of "the appropriate court"

(1) In sections 227A to 227ZI, "the appropriate court" means, in relation to a community payback order—

(a) where the order was imposed by the High Court of Justiciary, that Court,

(b) where the order was imposed by a sheriff, a sheriff having jurisdiction in the locality mentioned in subsection (2),

(c) where the order was imposed by a justice of the peace court—

(i) the justice of the peace court having jurisdiction in that locality, or

(ii) if there is no justice of the peace court having jurisdiction in that locality, a sheriff having such jurisdiction.

(2) The locality referred to in subsection (1)(b) is the locality for the time being specified in the order imposing the community payback order under section 227C(2)(a).".

Non-harassment orders

15 Non-harassment orders

In section 234A of the 1995 Act (non-harassment orders)—

(a) in subsection (1), for "harassment of" substitute "misconduct towards",

(b) in subsection (2), for "further harassment" substitute "harassment (or further harassment)",

(c) after subsection (2) insert—

"(2A) The court may, for the purpose of subsection (2) above, have regard to any information given to it for that purpose by the prosecutor—

(a) about any other offence involving misconduct towards the victim—

(i) of which the offender has been convicted, or

(ii) as regards which the offender has accepted (or has been deemed to have accepted) a fixed penalty or compensation offer under section 302(1) or 302A(1) or as regards which a work order has been made under section 303ZA(6),

(b) in particular, by way of—

(i) an extract of the conviction along with a copy of the complaint or indictment containing the charge to which the conviction relates, or

(ii) a note of the terms of the charge to which the fixed penalty offer, compensation offer or work order relates.

(2B) But the court may do so only if the court may, under section 101 or 101A (in a solemn case) or section 166 or 166A (in a summary case), have regard to the conviction or the offer or order.

(2C) The court must give the offender an opportunity to make representations in response to the application.", and

(d) for subsection (7) substitute—

"(7) For the purposes of this section—

"harassment" and "conduct" are to be construed in accordance with section 8 of the Protection from Harassment Act 1997 (c.40),

"misconduct" includes conduct that causes alarm or distress.".

Short sentences

16 Short periods of detention

(1) The 1995 Act is amended as follows.

(2) Section 169 (detention in precincts of court) is repealed.

(3) In section 206 (minimum periods of detention)—

(a) in subsection (1), for "five" substitute "15", and

(b) subsections (2) to (6) are repealed.

17 Presumption against short periods of imprisonment or detention

(1) The 1995 Act is amended as follows.

(2) In section 204 (restrictions on passing sentence of imprisonment or detention), after subsection (4) insert—

"(4A) A court may pass a sentence of imprisonment for a term not exceeding 6 months on a person only where the court considers that no other method of dealing with the person is appropriate.

(4B) Where a court passes such a sentence, the court must—

(a) state its reasons for the opinion that no other method of dealing with the person is appropriate, and

(b) have those reasons entered in the record of the proceedings.".

(3) In section 208 (detention of children convicted on indictment)—

(a) after subsection (1) insert—

"(1A) Where the court imposes a sentence of detention for a term not exceeding 6 months on a child, the court must—

(a) state its reasons for the opinion that no other method of dealing with the child is appropriate, and

(b) have those reasons entered in the record of the proceedings.", and

(b) in subsection (2), after "(1)" insert "and (1A)".

18 Amendments of Custodial Sentences and Weapons (Scotland) Act 2007

(1) The Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17) is amended as follows.

(2) In section 4 (basic definitions)—

(a) in subsection (1)—

(i) the definitions of "custody-only prisoner" and "custody-only sentence" are repealed,

(ii) in the definition of "custody and community sentence" for "15 days or more" substitute "at least the prescribed period",

(iii) after the definition of "Parole Board" insert—

""prescribed period" means such period as the Scottish Ministers may by order specify,", and

(iv) after the definition of "punishment part" insert—

""short-term custody and community prisoner" means a person serving a short-term custody and community sentence,

"short-term custody and community sentence" means a sentence of imprisonment for an offence for a term of less than the prescribed period", and

(b) subsection (2) is repealed.

(3) For section 5 (release of custody-only prisoners on completion of sentence) substitute—

"Short-term custody and community prisoners

5 Release of short-term custody and community prisoners

As soon as a short-term custody and community prisoner has served one-half of the prisoner's short-term custody and community sentence the Scottish Ministers must release the prisoner on short-term community licence.".

(4) In Chapter 3 of Part 2, in the chapter title, for "Community" substitute "Short-term community, community".

(5) In section 29 (release on licence of certain prisoners: the supervision conditions), in subsection (2)(a)—

(a) in sub-paragraph (ii), the words from "serving" to the end are repealed,

(b) sub-paragraph (iii) is repealed,

(c) in sub-paragraphs (iv) and (v), for "person" substitute "short-term custody and community prisoner",

(d) in sub-paragraph (vi), for “person” substitute “short-term custody and community prisoner serving a sentence of imprisonment of 6 months or more and”, and

(e) in sub-paragraph (vii), at the beginning insert “a short-term custody and community prisoner who is”.

(6) After section 29 insert—

“Short-term community licences

29A Release on short-term community licence: conditions

(1) This section applies where, by virtue of section 5, the Scottish Ministers release a prisoner on short-term community licence.

(2) The Scottish Ministers must include in the prisoner’s short-term community licence—

(a) the standard conditions, and

(b) where the prisoner falls within section 29(2), the supervision conditions.

(3) The Scottish Ministers may include in the prisoner’s short-term community licence—

(a) where the prisoner does not fall within section 29(2), any of the supervision conditions,

(b) such other conditions as they consider appropriate.

(4) The Scottish Ministers may—

(a) vary any condition mentioned in subsection (2) or (3),

(c) cancel any condition mentioned in subsection (3),

(b) include any further conditions in the licence.

(5) The Scottish Ministers may not cancel any condition mentioned in subsection (2).

(6) Before exercising any of the powers conferred by subsection (3) or (4), the Scottish Ministers must, in pursuance of arrangements established under section 46A(1), co-operate with the appropriate local authority.

(7) In this section, “appropriate local authority”, in relation to a short-term custody and community prisoner, means the local authority for the area in which the prisoner—

(a) resided immediately before the imposition of the short-term custody and community sentence, or

(b) intends to reside on release on short-term community licence.

(8) If, by virtue of subsection (7), two or more local authorities are the appropriate local authority in relation to a short-term custody and community prisoner, those authorities may agree that the functions conferred on them by subsection (5) and section 46A(2) may be carried out by only one of them.”.

(7) After section 46 insert—

“*Assessment of conditions for short-term community licences*

46A Joint arrangements between Scottish Ministers and local authorities

(1) The Scottish Ministers and each local authority must jointly establish arrangements for the assessment and management of the risk posed in the local authority’s area by short-term custody and community prisoners released on licence subject to the supervision conditions.

(2) For the purposes of assisting the Scottish Ministers in deciding whether, under section 29A(3)(a), to include any of the supervision conditions in a prisoner’s short-term community licence, the Scottish Ministers and the appropriate local authority must, during the first half of a short-term custody and community prisoner’s sentence, assess, in accordance with arrangements established under subsection (1), whether any of those conditions are appropriate.

(3) In this section, “appropriate local authority” is to be construed in accordance with section 29A(7) and (8).”.

(8) In section 47 (curfew licences)—

(a) in subsection (1), after “to” insert “a short-term custody and community prisoner or”,

(b) in subsection (2) for “the custody part of the prisoner’s sentence” substitute—

“(a) in the case of a short-term custody and community prisoner, the first half of the prisoner’s sentence,

(b) in the case of a custody and community prisoner, the custody part of the prisoner’s sentence”,

(c) after subsection (3) insert—

“(3A) The Scottish Ministers may release a short-term custody and community prisoner on curfew licence only—

(a) after the later of—

(i) the day on which the prisoner has served the greater of one-quarter or four weeks of the prisoner’s sentence, or

(ii) the day falling 166 days before the expiry of one-half of the prisoner’s sentence, and

(b) before the day falling 14 days before the expiry of one-half of the prisoner’s sentence.”,

(d) in subsection (4)—

(i) after “a” insert “custody and community”, and

(ii) in paragraph (a)(ii), for “135” substitute “166”, and

(e) in subsection (8), for “the custody part of the prisoner’s sentence” substitute—

“(a) in the case of a short-term custody and community prisoner, the first half of the prisoner’s sentence,

(b) in the case of a custody and community prisoner, the custody part of the prisoner’s sentence”.

(9) Schedule 2 amends the Custodial Sentences and Weapons (Scotland) Act (asp 17) and the 1995 Act in consequence of amendments made by this section.

19 Early removal of certain short-term prisoners from the United Kingdom

For schedule 6 to the Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17) (transitory amendments of the Prisoners and Criminal Proceedings (Scotland) Act 1993) substitute—

“SCHEDULE 6

(introduced by section 66(3))

TRANSITORY AMENDMENTS

1 Until the coming into force of the repeal by this Act of Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9), that Part has effect in accordance with paragraphs 2 to 4.

2 In section 1 (release of short-term and long-term prisoners), subsection (3) has effect as if for paragraphs (a) and (b) there were substituted “must,”.

3 Section 9 (persons liable to removal from the United Kingdom) has effect as if—

(a) subsection (1) were repealed, and

(b) in subsection (3), after “section”, where it first occurs, there were inserted “and sections 9A and 9B”.

4 That Part has effect as if after section 9 there were inserted—

“9A Persons eligible for removal from the United Kingdom

(1) For the purposes of this Part, to be “eligible for removal from the United Kingdom” a person must show, to the satisfaction of the Scottish Ministers, that the condition in subsection (2) is met.

(2) The condition is that the person has the settled intention of residing permanently outside the United Kingdom if removed from prison under section 9B.

(3) The person must not be one who is liable to removal from the United Kingdom.

9B Early removal of certain short-term prisoners from the United Kingdom

(1) Subject to subsection (2), where a short-term prisoner is liable to, or eligible for, removal from the United Kingdom, the Scottish Ministers may remove the prisoner from prison under this section at any time during the period of 180 days ending with the day on which the prisoner will have served one-half of the prisoner’s sentence.

(2) Subsection (1) does not apply in relation to a prisoner unless the prisoner has served one-quarter of the sentence.

(3) A prisoner removed from prison under this section—

(a) if liable to removal from the United Kingdom, is so removed only for the purpose of enabling the Secretary of State to remove the prisoner from the United Kingdom under powers conferred by—

(i) Schedule 2 or 3 to the Immigration Act 1971 (c.77), or

(ii) section 10 of the Immigration and Asylum Act 1999 (c.33),

(b) if eligible for removal from the United Kingdom, is so removed only for the purpose of enabling the prisoner to leave the United Kingdom in order to reside permanently outside the United Kingdom, and

(c) in either case, so long as remaining in the United Kingdom, remains liable to be detained in pursuance of the prisoner's sentence until the prisoner has served one-half of the sentence.

(4) So long as a prisoner removed from prison under this section remains in the United Kingdom but has not been returned to prison, any duty or power of the Scottish Ministers under section 1(1), 1AA or 3 is exercisable in relation to the prisoner as if the prisoner were in prison.

(5) The Scottish Ministers may by order amend the number of days for the time being specified in subsection (1).

(6) A statutory instrument containing an order under subsection (5) may not be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.

9C Re-entry into United Kingdom of prisoner removed from prison early

(1) This section applies in relation to a person (referred to in this section as "the removed person") who, after being removed from prison under section 9B, has been removed from the United Kingdom before serving one-half of the sentence.

(2) Where the removed person re-enters the United Kingdom at any time before the date on which the person would have served the person's sentence in full (but for the person's removal from prison under section 9B), the person is liable to be detained in pursuance of the person's sentence until the earlier of the following—

(a) the date of the expiry of the outstanding custodial period,

(b) the date on which the person would have served the person's sentence in full (but for the person's removal from prison under section 9B).

(3) In the case of a person liable to be detained under subsection (2), the duty to release the person under section 1(1) or 1AA(1) applies only after the expiry of the outstanding custodial period.

(4) A person who is liable to be detained by virtue of subsection (2) is, if at large, to be taken for the purposes of section 40 of the Prisons (Scotland) Act 1989 (c.45) (persons unlawfully at large) to be unlawfully at large.

(5) Subsection (2) does not prevent—

(a) the further removal from prison under section 9B(1) of a person falling within that subsection, or

(b) the further removal from the United Kingdom of such a person.

(6) In this section, the "outstanding custodial period" means, in relation to a removed person, a period of time equal to the period beginning with the date of removal from the United Kingdom and ending with the date on which the person would, but for the removal, have served one-half of the sentence.".

5 Until the coming into force of the repeal by this Act of Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9), paragraph (c) of section 24 of the International Criminal Court (Scotland) Act 2001 (asp 13) (limited disapplication of certain provisions relating to sentences) has effect as if—

(a) after "9" there were inserted ", 9A, 9B, 9C", and

(b) after "transfer" there were inserted ", removal".".

Other sentencing measures

20 Reports about supervised persons

(1) Section 203 of the 1995 Act (reports) is amended as follows.

(2) In subsection (3), for the words from "the offender" to the end substitute—

"(a) the offender,

(b) the offender's solicitor (if any), and

(c) the prosecutor.".

21 Extended sentences for certain sexual offences

In section 210A of the 1995 Act (extended sentences for sex and violent offenders)—

(a) in subsection (10), at the end of the definition of "sexual offence" add—

"(xxviii) an offence (other than one mentioned in the preceding paragraphs) where the court determines for the purposes of this paragraph that there was a significant sexual aspect to the offender's behaviour in committing the offence;", and

(b) after subsection (11) add—

"(12) An extended sentence may be passed by reference to paragraph (xxviii) only if the offender is or is to become, by virtue of Schedule 3 to the Sexual Offences Act 2003 (c.42), subject to the notification requirements of Part 2 of that Act.".

22 Effect of probation and absolute discharge

(1) In section 1(4) of the Rehabilitation of Offenders Act 1974 (c.53) (construction of references in Act to "conviction"), for "section 9 of the Criminal Justice (Scotland) Act 1949" substitute "section 247 of the Criminal Procedure (Scotland) Act 1995 (c.46)".

(2) In section 49(6) of the 1982 Act (offences relating to dangerous and annoying creatures: power to order disposal of creature), the words "or makes a probation order in relation to him" are repealed.

(3) In section 58(3) of the 1982 Act (convicted thief in possession: power to order forfeiture of tools etc.)—

(a) the words "or makes a probation order in relation to him" are repealed, and

(b) for the words from "discharged absolutely" to the end substitute ", as the case may be, discharged absolutely.".

(4) In section 96 of the 2005 Act (exclusion orders: supplementary provision), after subsection (2) insert—

"(2A) For the purposes of section 94, section 247(1) of the Criminal Procedure (Scotland) Act 1995 (c.46) (convictions deemed not be convictions where offender placed on probation or discharged absolutely) does not apply to a conviction for a violent offence within the meaning of section 94.".

(5) In section 129 of the 2005 Act (relevant and foreign offences), after subsection (4) add—

"(5) For the purposes of the provisions of this Act specified in subsection (6), section 247(1) and (2) of the Criminal Procedure (Scotland) Act 1995 (c.46) (convictions deemed not to be convictions where offender placed on probation or discharged absolutely) does not apply to a conviction for a relevant offence.

(6) Those provisions are—

(a) section 21(4),

(b) section 23(6),

(c) section 24,

(d) section 33(6),

(e) sections 41 to 44,

(f) section 73(3),

(g) section 75,

(h) sections 80 to 83,

(i) section 89(4) and (5),

(j) subsection (3) of this section, and

(k) section 130.".

23 Offences aggravated by racial or religious prejudice

(1) In section 96 of the Crime and Disorder Act 1998 (c.37) (racially aggravated offences), for subsection (5) substitute—

"(5) The court must—

(a) state on conviction that the offence was racially aggravated,

(b) record the conviction in a way that shows that the offence was so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.”.

(2) In section 74 of the Criminal Justice (Scotland) Act 2003 (asp 7) (offences aggravated by religious prejudice)—

(a) after subsection (2) insert—

“(2A) It is immaterial whether or not the offender’s malice and ill-will is also based (to any extent) on any other factor.”,

(b) subsections (3) and (4) are repealed, and

(c) after subsection (4) insert—

“(4A) The court must—

(a) state on conviction that the offence was aggravated by religious prejudice,

(b) record the conviction in a way that shows that the offence was so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.”.

24 Voluntary intoxication by alcohol: effect in sentencing

(1) Subsection (2) applies in relation to an offender who was, at the time of the offence, under the influence of alcohol as a result of having voluntarily consumed alcohol.

(2) A court, in sentencing the offender in respect of the offence, must not take that fact into account by way of mitigation.

PART 2

CRIMINAL LAW

Serious organised crime

25 Involvement in serious organised crime

(1) A person who agrees with at least one other person to become involved in serious organised crime commits an offence.

(2) For the purposes of this section and sections 26 to 28—

“serious organised crime” means crime involving two or more persons acting together for the principal purpose of committing or conspiring to commit a serious offence or a series of serious offences, and "serious offence" means an indictable offence—

(a) committed with the intention of securing a material benefit for any person, or

(b) which is an act of serious violence committed with the intention of securing such a benefit in the future.

(3) A person guilty of an offence under subsection (1) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both.

26 Offences aggravated by connection with serious organised crime

(1) This subsection applies where it is—

(a) libelled in an indictment or specified in a complaint that an offence is aggravated by a connection with serious organised crime, and

(b) proved that the offence is so aggravated.

(2) An offence is aggravated by a connection with serious organised crime if the person committing the offence is motivated (wholly or partly) by the objective of committing or conspiring to commit serious organised crime.

(3) It is immaterial whether or not in committing the offence the person in fact enables the person or another person to commit serious organised crime.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated by a connection with serious organised crime.

(5) Where subsection (1) applies, the court must—

(a) state on conviction that the offence is aggravated by a connection with serious organised crime,

(b) record the conviction in a way that shows that the offence was so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.

27 Directing serious organised crime

(1) A person commits an offence by directing another person—

(a) to commit a serious offence,

(b) to commit an offence aggravated by a connection with serious organised crime under section 26.

(2) A person commits an offence by directing another person to direct a further person to commit an offence mentioned in subsection (1).

(3) For the purposes of subsections (1) and (2), a person directs another person to commit an offence if the person—

(a) does something, or a series of things, to direct the person to commit the offence,

(b) intends that the thing or things done will persuade the person to commit the offence, and

(c) intends that the thing or things done will—

(i) result in a person committing serious organised crime, or

(ii) enable a person to commit serious organised crime.

(4) For the purposes of subsection (3)(b) and (c), the intention of the person directing the other person may be reasonably inferred by the context in which the steps taken to direct the person were taken.

(5) The person directing the other person commits an offence under subsection (1) whether or not the other person in fact commits—

(a) a serious offence, or

(b) an offence aggravated by a connection with serious organised crime under section 26.

(6) Any direction by means of a message (however communicated) is to be treated as done in Scotland if the message is sent or received in Scotland.

(7) In this section "directing" a person to commit an offence includes inciting the person to commit the offence.

(8) A person guilty of an offence under subsection (1) or (2) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 14 years or to a fine or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both.

28 Failure to report serious organised crime

(1) This section applies where—

(a) a person ("the person") knows or suspects that another person ("the other person") has committed—

(i) an offence under section 25 or 27, or

(ii) an offence which is aggravated by a connection with serious organised crime under section 26, and

(b) that knowledge or suspicion originates from information obtained—

(i) in the course of the person's trade, profession, business or employment, or

(ii) as a result of a close personal relationship between the person and the other person.

(2) In the case of knowledge or suspicion originating from information obtained by the person as a result of a close personal relationship between the person and the other person, this section applies only where the person has derived a material benefit as a result of the commission of serious organised crime by the other person.

(3) The person commits an offence if the person does not disclose to a constable—

(a) the person's knowledge or suspicion, and

(b) the information on which that knowledge or suspicion is based.

(4) It is a defence for a person charged with an offence under subsection (3) to prove that the person had a reasonable excuse for not making the disclosure.

(5) Subsection (3) does not require disclosure by a person who is a professional legal adviser (an "adviser") of—

(a) information which the adviser obtains in privileged circumstances, or

(b) knowledge or a suspicion based on information obtained in privileged circumstances.

(6) For the purpose of subsection (5), information is obtained by an adviser in privileged circumstances if it comes to the adviser, otherwise than for the purposes of committing serious organised crime—

(a) from a client (or from a client's representative) in connection with the provision of legal advice by the adviser to that person,

(b) from a person seeking legal advice from the adviser (or from that person's representative), or

(c) from a person, for the purpose of actual or contemplated legal proceedings.

(7) The reference in subsection (3) to a constable includes a reference to a police member of the Scottish Crime and Drug Enforcement Agency.

(8) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both.

Articles banned in prison

29 Articles banned in prison

(1) In section 41 of the Prisons (Scotland) Act 1989 (c.45) (unlawful introduction of tobacco etc. into prison)—

(a) for subsection (1) substitute—

"(1) A person commits an offence if without reasonable excuse the person—

(a) brings or otherwise introduces into a prison a proscribed article (or attempts to do so),

(b) takes out of or otherwise removes from a prison a proscribed article (or attempts to do so).

(1A) A person who commits an offence under this section—

(a) where the proscribed article falls within paragraphs (b) to (f) of subsection (9A), is liable on summary conviction to imprisonment for a period not exceeding 30 days or to a fine not exceeding level 3 on the standard scale (or to both),

(b) where the proscribed article falls within paragraph (a) of subsection (9A) (whether or not also within paragraph (f) of that subsection), is liable to the penalties set out in section 41ZA(5).",

(b) in subsection (2), for "the foregoing subsection" substitute "subsection (1)(a),",

(c) in subsection (2A)—

(i) for "article mentioned in paragraphs (a) to (e) of subsection (1) above" substitute "proscribed article", and

(ii) for "article mentioned in those paragraphs" substitute "proscribed article",

(d) in subsection (2B)(c), for the words from "mentioned" to "that subsection)" substitute "that is a proscribed article falling within paragraph (d) to (f) of subsection (9A) (but not also within paragraph (b) or (c) of that subsection), or falling within paragraph (a) of that subsection",

(e) in subsection (3), for "subsection (1) above" substitute "this section or section 41ZA",

(f) after subsection (9) insert—

"(9A) In this section, a "proscribed article" is—

(a) any personal communication device,

(b) any drug,

(c) any firearm or ammunition,

(d) any offensive weapon,

(e) any article which has a blade or is sharply pointed,

(f) any article (or other article) which is a prohibited article within the meaning of rules made under section 39.

(9B) In this section, a "personal communication device" includes—

(a) a mobile telephone,

(b) any other portable electronic device that is capable of transmitting or receiving a communication of any kind,

(c) any—

(i) component part of a device mentioned in paragraph (a) or (b),

(ii) article that is designed or adapted for use with such a device.", and

(g) in subsection (10), in the definition of "offensive weapon", for "the Prevention of Crime Act 1953" substitute "section 47 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)".

(2) After section 41 of that Act insert—

"41ZA Further provision for communication devices

(1) A person commits an offence if, knowing another person to be a prisoner, the person gives a personal communication device to the prisoner while the prisoner is inside a prison.

(2) A person commits an offence if, by means of a personal communication device, the person—

(a) transmits, from inside a prison, a communication of any kind, or

(b) intentionally receives, when inside a prison, a communication of any kind.

(3) A person commits an offence if, while inside a prison, the person is in possession of a personal communication device.

(4) A person who commits an offence under subsections (1) to (3) is liable to the penalties set out in subsection (5).

(5) The penalties are—

(a) on conviction on indictment, to imprisonment for a period not exceeding 2 years or to a fine (or to both),

(b) on summary conviction, to imprisonment for a period not exceeding 12 months or to a fine not exceeding the statutory maximum (or to both).

(6) In this section, "personal communication device" is to be construed in accordance with section 41(9B).

41ZB Exceptions as to communication devices

(1) No offence—

(a) under section 41, where the proscribed article falls within paragraph (a) of subsection (9A) (whether or not also within paragraph (f) of that subsection), or

(b) under section 41ZA(1) to (3),

is committed by a person where subsection (2) applies.

(2) This subsection applies—

(a) if (and in so far as) the act which constitutes the offence is done by the person at or in relation to a designated area at the prison, or

(b) if (and in so far as) the person is acting in circumstances to which an authorisation under subsection (8) applies.

(3) No offence—

(a) under section 41, where the proscribed article falls within paragraph (a) of subsection (9A) (whether or not also within paragraph (f) of that subsection), or

(b) under 41ZA(2) or (3),

is committed by a prison officer (or other prison official) where subsection (4) applies.

(4) This subsection applies—

(a) if the device is one supplied to the person specifically for use in the course of the person's official duties at the prison, or

(b) if (and in so far as) the person is acting in accordance with those duties.

(5) No offence under section 41ZA(3) is committed by a person other than a prisoner if in the circumstances there is a reasonable excuse for the possession.

(6) The defences mentioned in subsection (7) apply in any proceedings for an offence under—

(a) section 41(1), where the proscribed article falls within paragraph (a) of subsection (9A) (whether or not also within paragraph (f) of that subsection), or

(b) 41ZA(1) to (3).

(7) In relation to such an offence, it is a defence for the accused person to show that—

(a) the person reasonably believed that the person was acting in circumstances to which an authorisation under subsection (8) applied (even though no such authorisation did apply), or

(b) in the circumstances there was an overriding public interest which justified the person's actions.

(8) An authorisation under this subsection is a written authorisation that is given—

(a) in favour of any person specified in the authorisation (or person of a specified description),

(b) for a specified purpose, and

(c) by—

(i) the governor or director of a prison in relation to activities at that prison, or

(ii) the Scottish Ministers in relation to activities at any specified prison.

(9) A designated area referred to in subsection (2)(a) is any part of the prison, used solely or principally for an administrative or similar purpose, that is specified as such by a written designation given under this paragraph by the governor or director of the prison.

(10) Prison officers (or other prison officials) who are Crown servants or agents do not benefit from Crown immunity in relation to an offence under—

(a) section 41, where the proscribed article falls within paragraph (a) of subsection (9A) of that section (whether or not also within paragraph (f) of that subsection), or

(b) section 41ZA.".

Crossbows, knives etc.

30 Sale and hire of crossbows to persons under 18

(1) The Crossbows Act 1987 (c.32) is amended as follows.

(2) In section 1 (sale and letting on hire), the words from "unless" to the end are repealed.

(3) After that section insert—

"1A Defences

(1) It is a defence for a person charged with an offence under section 1 (referred to in this section as "the accused") to show that—

(a) the accused believed the person to whom the crossbow or part was sold or let on hire (referred to in this section as "the purchaser or hirer") to be aged 18 or over, and

(b) either—

(i) the accused had taken reasonable steps to establish the purchaser or hirer's age, or

(ii) no reasonable person could have suspected from the purchaser or hirer's appearance that the purchaser or hirer was under the age of 18.

(2) For the purposes of subsection (1)(b)(i), the accused is to be treated as having taken reasonable steps to establish the purchaser or hirer's age if and only if—

(a) the accused was shown any of the documents mentioned in subsection (3), and

(b) the document would have convinced a reasonable person.

(3) Those documents are any document bearing to be—

(a) a passport,

(b) a European Union photocard driving licence, or

(c) such other document, or a document of such other description, as the Scottish Ministers may by order made by statutory instrument prescribe.

(4) A statutory instrument containing an order under subsection (3)(c) is subject to annulment in pursuance of a resolution of the Scottish Parliament.".

(4) After section 3 insert—

"3A Test purchasing

(1) A person under the age of 18 who buys or hires, or attempts to buy or hire, a crossbow or a part of a crossbow does not commit an offence under section 2 or 3 if the person is authorised to do so by the chief constable for the purpose of determining whether an offence is being committed under section 1.

(2) A chief constable may authorise a person under the age of 18 to buy or hire, or attempt to buy or hire, a crossbow or a part of a crossbow only if satisfied that all reasonable steps have been or will be taken to—

(a) ensure the person's safety, and

(b) avoid any risk to the person's welfare.".

31 Sale and hire of knives and certain other articles to persons under 18

(1) Section 141A of the Criminal Justice Act 1988 (c.33) (sale of knives and certain articles with blade or point to persons under eighteen) is amended as follows.

(2) In subsection (1), after "sells" insert "or lets on hire".

(3) In subsection (3A), after "sell" insert "or let on hire".

(4) For subsection (4) substitute—

"(4) It is a defence for a person charged with an offence under subsection (1) (referred to in this section as "the accused") to show that—

(a) the accused believed the person to whom the article was sold or let on hire (referred to in this section as “the purchaser or hirer”) to be of or above the relevant age, and

(b) either—

(i) the accused had taken reasonable steps to establish the purchaser or hirer’s age, or

(ii)no reasonable person could have suspected from the purchaser or hirer’s appearance that the purchaser or hirer was aged under the relevant age.

(4A) For the purposes of subsection (4)(b)(i), the accused is to be treated as having taken reasonable steps to establish the purchaser or hirer’s age if and only if—

(a) the accused was shown any of the documents mentioned in subsection (4B), and

(b) the document would have convinced a reasonable person.

(4B) Those documents are any document bearing to be—

(a) a passport,

(b) a European Union photocard driving licence, or

(c) such other document, or a document of such other description, as the Scottish Ministers may by order prescribe.

(4C) In subsection (4), “the relevant age” is—

(a) in the case where the article is a knife or knife blade designed for domestic use, 16 years, and

(b) in any other case, 18 years.”.

Sexual offences

32 Certain sexual offences by non-natural persons

(1) The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) is amended as follows.

(2) At the end of each of the following provisions insert “or a fine or both”—

(a) subsections (4)(b) and (5)(b) of section 9 (paying for sexual services of a child),

(b) subsection (2)(b) of section 10 (causing or inciting provision by child of sexual services or child pornography),

(c) subsection (2)(b) of section 11 (controlling a child providing sexual services or involved in pornography), and

(d) subsection (2)(b) of section 12 (arranging or facilitating provision by child of sexual services or child pornography).

(3) After section 14 insert—

“14A Offences by bodies corporate etc.

(1) Subsection (2) applies where an offence under sections 10 to 12 committed—

(a) by a body corporate, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—

(i) is a director, manager, secretary or other similar officer of the body corporate, or

(ii) purports to act in any such capacity,

(b) by a Scottish partnership, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—

(i) is a partner, or

(ii) purports to act in that capacity,

(c) by an unincorporated association other than a Scottish partnership, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—

(i) is concerned in the management or control of the association, or

(ii) purports to act in the capacity of a person so concerned.

(2) The individual (as well as the body corporate, Scottish partnership or, as the case may be, unincorporated association) commits the offence and is liable to be proceeded against and punished accordingly.

(3) Where the affairs of a body corporate are managed by its members, this section applies in relation to acts and defaults of a member in connection with the member's function of management as if the member were a director of the body corporate.".

33 Indecent images of children

(1) In the 1982 Act—

(a) in section 52 (indecent photographs etc. of children)—

(i) in subsection (2C)(b), for "a pseudo-photograph" substitute "an indecent pseudo-photograph",

(ii) after subsection (8) add—

"(9) In this section, references to a photograph also include a tracing or other image, whether made by electronic or other means (of whatever nature), which is not itself a photograph or pseudo-photograph but which is derived from the whole or part of a photograph or pseudo-photograph (or a combination of either or both).

(10) And subsection (2B) applies in relation to such an image as it applies in relation to a pseudo-photograph.", and

(b) in section 52A (possession of indecent photographs of children), in subsection (4), for "and (8)" substitute "and (8) to (10)".

(2) In Schedule 1 to the 1995 Act (offences against children under the age of 17 years to which special provisions apply), in paragraph 2B, after "photograph" insert "or pseudo-photograph".

(3) In Schedule 3 to the Sexual Offences Act 2003 (c.42) (list of sexual offences for the purposes of Part 2)—

(a) in paragraph 44, for the words from "the" where it third occurs to the end substitute—

"(a) the prohibited goods included indecent photographs or pseudo-photographs of persons under 16 and the offender—

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph.".

(b) in paragraph 97(b), for "and (8)" substitute "and (8) to (10)".

34 Extreme pornography

(1) In section 51 of the 1982 Act (obscene material)—

(a) for subsection (3) substitute—

"(3) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a period not exceeding 12 months or to a fine not exceeding the statutory maximum or to both, or

(b) on conviction on indictment—

(i) in a case where the obscene material is or includes an extreme pornographic image, to imprisonment for a period not exceeding 5 years or to a fine or to both, or

(ii) in any other case, to imprisonment for a period not exceeding 3 years or to a fine or to both.", and

(b) in subsection (8)—

(i) before the definition of "material" insert—

""extreme pornographic image" is to be construed in accordance with section 51A;", and

(ii) the definition of "prescribed sum" is repealed.

(2) After section 51 of that Act insert—

"51A Extreme pornography

(1) A person who is in possession of an extreme pornographic image is guilty of an offence under this section.

(2) An extreme pornographic image is an image which is all of the following—

(a) obscene,

(b) pornographic,

(c) extreme.

(3) An image is pornographic if it is of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal.

(4) Where (as found in the person's possession) an image forms part of a series of images, the question of whether the image is pornographic is to be determined by reference to—

(a) the image itself (and any sounds accompanying it), and

(b) where the series of images (and any sounds accompanying them) is such as to be capable of providing a context for the image, its context within the series of images.

(5) So, for example, where—

(a) an image forms an integral part of a narrative constituted by a series of images, and

(b) having regard to those images as a whole, they are not of such a nature that they must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal,

the image may, by virtue of being part of that narrative, be found not to be pornographic (even if it may have been found to be pornographic where taken by itself).

(6) An image is extreme if it depicts, in an explicit and realistic way any of the following—

(a) an act which takes or threatens a person's life,

(b) an act which results, or is likely to result, in a person's severe injury,

(c) rape or other non-consensual penetrative sexual activity,

(d) sexual activity involving (directly or indirectly) a human corpse,

(e) an act which involves sexual activity between a person and an animal (or the carcase of an animal).

(7) In determining whether (as found in the person's possession) an image depicts an act mentioned in subsection (6), reference may be had to—

(a) how the image is or was described (whether the description is part of the image itself or otherwise),

(b) any sounds accompanying the image,

(c) where the image forms an integral part of a narrative constituted by a series of images, the context provided by that narrative.

(8) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a period not exceeding 12 months or to a fine not exceeding the statutory maximum or to both,

(b) on conviction on indictment, to imprisonment for a period not exceeding 3 years or to a fine or to both.

(9) In this section, an "image" is—

(a) a moving or still image (made by any means), or

(b) data (stored by any means) which is capable of conversion into such an image.

51B Extreme pornography: excluded images

(1) An offence is not committed under section 51A if the image is an excluded image.

(2) An “excluded image” is an image which is all or part of a classified work.

(3) An image is not an excluded image where—

(a) it has been extracted from a classified work, and

(b) it must be reasonably be assumed to have been extracted (whether with or without other images) from the work solely or principally for the purpose of sexual arousal.

(4) In determining whether (as found in the person’s possession) the image was extracted from the work for the purpose mentioned in subsection (3)(b), reference may be had to—

(a) how the image was stored,

(b) how the image is or was described (whether the description is part of the image itself or otherwise),

(c) any sounds accompanying the image,

(d) where the image forms an integral part of a narrative constituted by a series of images, the context provided by that narrative.

(5) In this section and section 51C—

“classified work” means a video work in respect of which a classification certificate has been issued by a designated authority,

“classification certificate” and “video work” have the same meanings as in the Video Recordings Act 1984 (c.39),

“designated authority” means an authority which has been designated by the Secretary of State under section 4 of that Act,

“extract” includes an extract of a single image,

“image” and “extreme pornographic image” are to be construed in accordance with section 51A.

51C Extreme pornography: defences

(1) Where a person (“A”) is charged with an offence under section 51A, it is a defence for A to prove one or more of the matters mentioned in subsection (2).

(2) The matters are—

(a) that A had a legitimate reason for being in possession of the image concerned,

(b) that A had not seen the image concerned and did not know, nor had any cause to suspect, it to be an extreme pornographic image,

(c) that A—

(i) was sent the image concerned without any prior request having been made by or on behalf of A, and

(ii) did not keep it for an unreasonable time.

(3) Where A is charged with an offence under section 51A, it is a defence for A to prove that—

(a) A directly participated in the act depicted, and

(b) subsection (4) applies.

(4) This subsection applies—

(a) in the case of an image which depicts an act described in subsection (6)(a) of that section, if the act depicted did not actually take or threaten a person's life,

(b) in the case of an image which depicts an act described in subsection (6)(b) of that section, if the act depicted did not actually result in (nor was it actually likely to result in) a person's severe injury,

(c) in the case of an image which depicts an act described in subsection (6)(c) of that section, if the act depicted did not actually involve non-consensual activity,

(d) in the case of an image which depicts an act described in subsection (6)(d) of that section, if what is depicted as a human corpse was not in fact a corpse,

(e) in the case of an image which depicts an act described in subsection (6)(e) of that section, if what is depicted as an animal (or the carcase of an animal) was not in fact an animal (or a carcase).

(5) The defence under subsection (3) is not available if A shows, gives or offers for sale the image to any person who was not also a direct participant in the act depicted.".

People trafficking

35 People trafficking

(1) In section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (traffic in prostitution etc.)—

(a) in subsection (1)(a)—

(i) after "arrival in" insert "or the entry into",

(ii) after "such arrival" insert "or entry",

(b) for subsection (4) substitute—

"(4) Subsection (1) applies to anything done in or outwith the United Kingdom.",

(c) for subsection (5) substitute—

"(5) A person may be proceeded against, indicted, tried and punished for any offence to which this section applies—

(a) in any sheriff court district in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on trial or punishment, to be deemed to have been committed in that district).", and

(d) subsection (6) is repealed.

(2) In the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19)—

(a) in section 4 (trafficking people for exploitation), in subsection (1), after "arrival in" insert ", or the entry into,", and

(b) in section 5 (section 4: supplemental)—

(i) subsections (1) and (2) are repealed, and

(ii) after subsection (2) insert—

"(2A) Subsections (1) to (3) of section 4 apply to anything done in or outwith the United Kingdom.

(2B) A person may be proceeded against, indicted, tried and punished for any offence to which section 4 applies—

(a) in any sheriff court district in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on trial or punishment, to be deemed to have been committed in that district).

(2C) In subsection (2B), "sheriff court district" is to be construed in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995 (c.46) (interpretation).".

Fraud and embezzlement

36 Alternative charges for fraud and embezzlement

In Schedule 3 to the 1995 Act (indictments and complaints), after paragraph 8(3) insert—

"(3A) Under an indictment or a complaint for breach of trust and embezzlement, an accused may be convicted of falsehood, fraud and wilful imposition.

(3B) Under an indictment or a complaint for falsehood, fraud and wilful imposition, an accused may be convicted of breach of trust and embezzlement.".

Conspiracy

37 Conspiracy to commit offences outwith Scotland

(1) The title of section 11A of the 1995 Act becomes "Conspiracy to commit offences outwith Scotland".

(2) In that section—

(a) in subsection (1), for "in a country or territory outside the United Kingdom" substitute "outwith Scotland",

(b) in subsection (3)—

(i) for "the law in force in the country or territory where the act or other event was intended to take place" substitute "the relevant law", and

(ii) for "the law in force in the country or territory" where it second occurs substitute "that law", and

(c) after subsection (3) insert—

"(3A) In subsection (3) above, "the relevant law" is—

(a) if the act or event was intended to take place in another part of the United Kingdom, the law in force in that part,

(b) if the act or event was intended to take place in a country or territory outwith the United Kingdom, the law in force in that country or territory.".

PART 3

CRIMINAL PROCEDURE

Children

38 Prosecution of children

(1) The 1995 Act is amended as follows.

(2) After section 41 insert—

"41A Prosecution of children under 12

(1) A child under the age of 12 years may not be prosecuted for an offence.

(2) A person aged 12 years or more may not be prosecuted for an offence which was committed at a time when the person was under the age of 12 years.".

(3) In section 42 (prosecution of children), in subsection (1)—

(a) for "No child under the age of 16 years shall" substitute "A child aged 12 years or more but under 16 years may not",

(b) for "his instance" substitute "the instance of the Lord Advocate", and

(c) for "a child under the age of 16 years" substitute "such a child".

(4) In section 234AA (antisocial behaviour order), in subsection (2), paragraph (b) is repealed.

Offences: liability of partners

39 Offences: liability of partners

(1) A partner of a partnership (other than a limited liability partnership) is guilty of a corporate offence where—

(a) the partnership is guilty of the corporate offence, and

(b) it is proved that the corporate offence—

(i) was committed with the consent or connivance of the partner (whether alone or among others), or

(ii) was attributable to the neglect of the partner (whether alone or among others).

(2) In subsection (1), a "corporate offence" is an offence in relation to which an enactment has the effect that where—

(a) a body corporate is guilty of the offence, and

(b) it is proved that the offence—

(i) was committed with the consent or connivance of a director (whether alone or among others), or

(ii) was attributable to the neglect of a director (whether alone or among others),

the director (as well as the body corporate) is guilty of the offence.

(3) Subsection (1) does not apply in relation to a corporate offence if an enactment (other than subsection (1)) makes provision in relation to the offence having the same effect as that subsection.

Witness statements

40 Witness statements

(1) This section applies where—

(a) in the course of a criminal investigation, a witness makes a statement in relation to the matter to which the investigation relates,

(b) the statement is contained in a document, and

(c) the witness is likely to be cited to give evidence in criminal proceedings arising from the matter.

(2) Before the witness gives evidence in the criminal proceedings, the prosecutor may—

(a) give the witness a copy of the statement, or

(b) make the statement available for inspection by the witness at all reasonable hours.

(3) Section 262 of the 1995 Act (interpretation of certain expressions for purposes of sections 259 to 261A of that Act) applies for the purposes of this section as it applies for the purposes of section 261A of that Act except that for the purposes of this section "statement" does not include a victim statement.

Police liberation

41 Breach of undertaking

After section 22 of the 1995 Act insert—

"22ZA Offences where undertaking breached

(1) A person who without reasonable excuse breaches an undertaking given by the person under section 22—

(a) by reason of failing to appear at court as required under subsection (1C)(a) of section 22, or

(b) by reason of failing to comply with a condition imposed under subsection (1D) of that section,

is guilty of an offence.

(2) A person who is guilty of an offence under subsection (1) is liable on summary conviction to—

(a) a fine not exceeding level 3 on the standard scale, and

(b) imprisonment for a period—

(i) where conviction is in the JP court, not exceeding 60 days,

(ii) where conviction is in the sheriff court, not exceeding 12 months.

(3) Despite subsection (1)(b), where (and to the extent that) the person breaches the undertaking by reason of committing an offence while subject to the undertaking—

(a) the person is not guilty of an offence under that subsection, and

(b) subsection (4) applies instead.

(4) The court, in determining the sentence for the subsequent offence, must have regard to—

(a) the fact that the subsequent offence was committed in breach of the undertaking,

(b) the number of undertakings to which the person was subject when that offence was committed,

(c) any previous conviction of the person of an offence under subsection (1)(b),

(d) the extent to which the sentence or disposal in respect of any previous conviction differed, by virtue of this subsection, from that which the court would have imposed but for this subsection.

(5) Subsections (3)(b) and (4) apply only if the fact that the subsequent offence was committed while the person was subject to an undertaking is specified in the complaint or indictment.

(6) In this section and section 22ZB, “the subsequent offence” is the offence committed by a person while the person is subject to an undertaking.

22ZB Evidential and procedural provision

(1) In any proceedings in relation to an offence under section 22ZA(1), the fact that a person—

(a) breached an undertaking given by the person under section 22 by reason of failing to appear at court as required under subsection (1C)(a) of that section, or

(b) was subject to any particular condition imposed under subsection (1D) of that section,

is, unless challenged by preliminary objection before the person’s plea is recorded, to be held as admitted.

(2) In any proceedings in relation to an offence under section 22ZA(1) or (as the case may be) the subsequent offence—

(a) something in writing, purporting to be an undertaking given by a person under section 22 (and bearing to be signed and certified), is sufficient evidence of the terms of the undertaking so given,

(b) a document purporting to be a notice (or copy of a notice) effected under subsection (1F) of that section is sufficient evidence of the terms of the notice,

(c) an undertaking whose terms are modified under paragraph (b) of that subsection is to be regarded as if given in the terms as so modified.

(3) The fact that the subsequent offence was committed while the person was subject to an undertaking is to be held as admitted, unless challenged—

(a) in summary proceedings, by preliminary objection before the person's plea is recorded, or

(b) in the case of proceedings on indictment, by giving notice of a preliminary objection in accordance with section 71(2) or 72(6)(b)(i) of this Act.

(4) Where the maximum penalty in respect of the subsequent offence is specified by (or by virtue of) any enactment, that maximum penalty is, for the purposes of the court's determination of the appropriate sentence or disposal in respect of that offence, increased—

(a) where it is a fine, by the amount equivalent to level 3 on the standard scale, and

(b) where it is a period of imprisonment—

(i) as respects conviction in the JP court, by 60 days,

(ii) as respects conviction in the sheriff court or the High Court, by 6 months,

even if the maximum penalty as so increased exceeds the penalty which it would otherwise be competent for the court to impose.

(5) A penalty under section 22ZA(2) may be imposed in addition to any other penalty which it is competent for the court to impose even if the total of penalties imposed may exceed the maximum penalty which it is competent to impose in respect of the original offence.

(6) The reference in subsection (5) to a penalty being imposed in addition to another penalty means, in the case of sentences of imprisonment or detention—

(a) where the sentences are imposed at the same time (whether or not in relation to the same complaint), framing the sentences so that they have effect consecutively,

(b) where the sentences are imposed at different times, framing the sentence imposed later so that (if the earlier sentence has not been served) the later sentence has effect consecutive to the earlier sentence.

(7) Subsection (6)(b) is subject to section 204A of this Act.

(8) The court must state—

(a) where the sentence or disposal in respect of the subsequent offence is different from that which the court would have imposed but for section 22ZA(4), the extent of and the reasons for that difference, or

(b) otherwise, the reasons for there being no such difference.

(9) A court which finds a person guilty of an offence under section 22ZA(1) may remit that person for sentence in respect of that offence to any court which is considering the original offence.

(10) At any time before the trial of an accused in summary proceedings for the original offence, it is competent to amend the complaint to include an additional charge of an offence under section 22ZA(1).

(11) In this section, "the original offence" is the offence in relation to which an undertaking is given.".

Bail

42 Bail review applications

(1) The 1995 Act is amended as follows.

(2) In section 30 (bail review)—

(a) for subsection (2A) substitute—

"(2A) On receipt of an application under subsection (2), the court must—

(a) intimate the application to the prosecutor, and

(b) before determining the application, give the prosecutor an opportunity to be heard.

(2AA) Despite subsection (2A)(b), the court may grant the application without having heard the prosecutor if the prosecutor consents.", and

(b) in subsection (2C), in paragraph (b), for "heard" substitute "determined".

(3) In section 31 (bail review on prosecutor's application)—

(a) after subsection (2), insert—

"(2ZA) Despite subsection (2)(b), the court may grant the application without fixing a hearing if the person granted bail consents.", and

(b) in subsection (3), the word "hearing" is repealed.

43 Bail condition for identification procedures etc.

In section 24 of the 1995 Act (bail and bail conditions)—

(a) in paragraph (b) of subsection (4), sub-paragraph (ii) and the word "and" immediately preceding it are repealed,

(b) in subsection (5), after paragraph (ca) insert—

"(cb) whenever reasonably instructed by a constable to do so—

(i) participates in an identification parade or other identification procedure; and

(ii) allows any print, impression or sample to be taken from the accused;".

Prosecution on indictment

44 Prosecution on indictment: Scottish Law Officers

(1) The 1995 Act is amended as follows.

(2) In section 64 (prosecution on indictment), in subsection (1), for "in name" substitute "at the instance".

(3) In subsection 287 (demission of office by Lord Advocate)—

(a) in subsection (1)—

(i) for "by a Lord Advocate" substitute "at the instance of Her Majesty's Advocate", and

(ii) for "his" where it first occurs substitute "the holder of the office of Lord Advocate",

(b) in subsection (2)—

(i) for "in name" substitute "at the instance", and

(ii) the words "then in office" are repealed,

(c) after subsection (2), insert—

"(2A) Any such indictments in proceedings at the instance of the Solicitor General may be signed by the Solicitor General.

(2B) Subsection (2C) applies during any period when the offices of Lord Advocate and Solicitor General are both vacant as a result of the deaths of the holders of those offices.

(2C) It is lawful to indict accused persons at the instance of Her Majesty's Advocate.", and

(d) in subsection (4)—

(i) after "Advocate" insert "or Solicitor General",

(ii) in paragraph (b), for "in the name" substitute "raised at the instance", and

(iii) after that paragraph, insert—

"(c) by virtue of subsection (2C) above, is raised at the instance of Her Majesty's Advocate".

(4) In Schedule 2, the words "A.F.R. (*name of Lord Advocate*)," are repealed.

Transfer of justice of the peace court cases

45 Transfer of justice of the peace court cases

After section 137C of the 1995 Act insert—

"137CA Transfer of JP court proceedings within sheriffdom

(1) Subsection (2) applies—

(a) where the accused person has been cited in summary proceedings to attend a diet of a JP court, or

(b) if the accused person has not been cited to such a diet, where summary proceedings against the accused have been commenced in a JP court.

(2) The prosecutor may apply to a justice for an order for the transfer of the proceedings to another JP court in the sheriffdom (and for adjournment to a diet of that court).

(3) On an application under subsection (2), the justice may make the order sought.

(4) In this section and sections 137CB and 137CC, "justice" does not include the sheriff.

137CB Transfer of JP court proceedings outwith sheriffdom

(1) Subsection (2) applies where the clerk of a JP court informs the prosecutor that, because of exceptional circumstances which could not reasonably have been foreseen, it is not practicable for the JP court or any other JP court in the sheriffdom to proceed with some or all of the summary cases due to call at a diet.

(2) The prosecutor shall as soon as practicable apply to the sheriff principal for an order for the transfer of the proceedings to a JP court in another sheriffdom (and for adjournment to a diet of that court).

(3) Subsection (4) applies where—

  (a) either—

    (i) the accused person has been cited in summary proceedings to attend a diet of a JP court, or

    (ii) if the accused person has not been cited to such a diet, summary proceedings against the accused have been commenced in a JP court, and

  (b) there are also summary proceedings against the accused person in a JP court in another sheriffdom.

(4) The prosecutor may apply to a justice for an order for the transfer of the proceedings to a JP court in the other sheriffdom (and for adjournment to a diet of that court).

(5) Subsection (6) applies where—

  (a) the prosecutor intends to take summary proceedings against an accused person in a JP court, and

  (b) there are also summary proceedings against the accused person in a JP court in another sheriffdom.

(6) The prosecutor may apply to a justice for an order for authority for the proceedings to be taken at a JP court in the other sheriffdom.

(7) On an application under subsection (2), the sheriff principal may make the order sought with the consent of the sheriff principal of the other sheriffdom.

(8) On an application under subsection (4) or (6), the justice is to make the order sought if—

  (a) the justice considers that it would be expedient for the different cases involved to be dealt with by the same court, and

  (b) a justice of the other sheriffdom consents.

(9) On the application of the prosecutor, the sheriff principal who has made an order under subsection (7) may, with the consent of the sheriff principal of the other sheriffdom—

(a) revoke the order, or

(b) vary it so as to restrict its effect.

(10) On the application of the prosecutor, the justice who has made an order under subsection (8) (or another justice of the same sheriffdom) may, with the consent of a justice of the other sheriffdom—

(a) revoke the order, or

(b) vary it so as to restrict its effect.

137CC Custody cases: initiating JP court proceedings outwith sheriffdom

(1) Subsection (2) applies where the prosecutor believes—

(a) that, because of exceptional circumstances (and without an order under subsection (3)), it is likely that there would be an unusually high number of accused persons appearing from custody for the first calling of cases in summary prosecutions in the JP courts in the sheriffdom, and

(b) that it would not be practicable for those courts to deal with all the cases involved.

(2) The prosecutor may apply to the sheriff principal for an order authorising summary proceedings against some or all of the accused persons to be—

(a) taken at a JP court in another sheriffdom, and

(b) maintained—

(i) at that JP court, or

(ii) at any of the JP courts referred to in subsection (1) as may at the first calling of the case be appointed for further proceedings.

(3) On an application under subsection (2), the sheriff principal may make the order sought with the consent of the sheriff principal of the other sheriffdom.

(4) An order under subsection (3) may be made by reference to a particular period or particular circumstances.”.

Additions to complaint

46 Additional charge where bail etc. breached

(1) In section 27 of the 1995 Act (breach of bail conditions: offences), after subsection (8) insert—

“(8A) At any time before the trial of an accused in summary proceedings for the original offence, it is competent to amend the complaint to include an additional charge of an offence under this section.”.

(2) In section 150 of that Act (failure of accused to appear), for subsection (10) substitute—

“(10) At any time before the trial in the prosecution in which the failure to appear occurred, it is competent to amend the complaint to include an additional charge of an offence under subsection (8).”.

Remand and committal of children

47 Remand and committal of children and young persons

(1) Section 51 of the 1995 Act (remand and committal of children and young persons) is amended in accordance with subsections (2) and (3).

(2) The following provisions are repealed—

- (a) in subsection (1)—
  - (i) in paragraph (a) the words from "but" to "applies", and
  - (ii) paragraph (bb),
- (b) in subsection (2A), the words "Subject to subsection (4) below",
- (c) subsections (3) and (4), and
- (d) in subsection (4A), the words "or subsection (4) above".

(3) In subsection (5), for "(1)(aa), (b)(ii), (bb)(ii) or (3)(b)" substitute "(1)(aa) or (b)(ii)".

(4) In section 23 of the Criminal Justice (Scotland) Act 2003 (asp 7) (remand and committal of children and young persons), subsections (6) and (7) are repealed.

Prosecution of organisations

48 Meaning of "organisation"

In section 307(1) of the 1995 Act (interpretation), after the definition of "order for lifelong restriction", insert—

""organisation" means—

- (a) a body corporate;
- (b) an unincorporated association;
- (c) a partnership;
- (d) a body of trustees;
- (e) a government department;
- (f) a part of the Scottish Administration;
- (g) any other entity which is not an individual;".

49 Proceedings on indictment against organisations

(1) The title of section 70 of the 1995 Act (proceedings against bodies corporate) is amended by substituting "organisations" for "bodies corporate".

(2) Section 70 of that Act is amended as follows.

(3) In subsection (1), for "a body corporate" substitute "an organisation".

(4) For subsection (2) substitute—

"(2) The indictment may be served by delivery of a copy of the indictment together with notice to appear at—

- (a) in the case of a body of trustees—

(i) the dwelling-house or place of business of any of the trustees, or

(ii) if the solicitor of the body of trustees is known, the place of business of the solicitor,

(b) in the case of any other organisation, the registered office or, if there is no registered office or the registered office is not in the United Kingdom, at the principal place of business in the United Kingdom of the organisation.”.

(5) In subsection (3)—

(a) for “the registered office or principal place of business of the body corporate” substitute “any place”, and

(b) for “the registered office or place of business” substitute “that place”.

(6) In subsection (4)—

(a) for “A body corporate” substitute “An organisation”, and

(b) the words “of the body corporate” are repealed.

(7) In subsection (5), for “body corporate” in both places that expression occurs substitute “organisation”.

(8) In subsection (5A)(a), for “body corporate” substitute “organisation”. and

(9) In subsection (6)—

(a) for “a body corporate” substitute “an organisation”, and

(b) for “the body corporate” substitute “the organisation”.

(10) In subsection (7), for “a body corporate” substitute “an organisation”.

(11) In subsection (8), for paragraph (c) substitute—

“(ba) in the case of a partnership (other than a limited liability partnership), a partner or other person in charge, or locally in charge, of the partnership’s affairs;

(bb) in the case of an unincorporated association, the secretary or other person in charge, or locally in charge, of the association’s affairs;

(c) in the case of any other organisation, an employee, officer or official of the organisation duly appointed by it for the purposes of the proceedings.”.

(12) In subsection (9), after paragraph (b) insert—

“(c) in the case of a partnership (other than a limited liability partnership), purporting to be signed by a partner;

(d) in the case of an unincorporated association, purporting to be signed by an officer of the association;

(e) in the case of a government department or a part of the Scottish Administration, purporting to be signed by a senior officer in the department or part,”.

50 Prosecution of organisations by summary procedure

(1) Section 143 of 1995 Act (prosecution of companies etc.) is amended as follows.

(2) In subsection (1), for "a partnership, association, body corporate or body of trustees" substitute "an organisation".

(3) In subsection (2), for "partnership, association, body corporate or body of trustees in their" substitute "organisation in its".

(4) In subsection (4), for "A partnership, association, body corporate or body of trustees" substitute "An organisation".

(5) In subsection (5)(b), for "of the partnership, association, body corporate or body of trustees" substitute ", officer or official of the organisation".

(6) In subsection (6), after paragraph (d) insert—

"(e) in the case of a government department or part of the Scottish Administration, purporting to be signed by a senior officer in the department or part,".

(7) In subsection (7)—

(a) for "a partnership, association, body corporate or body of trustees" substitute "an organisation",

(b) for "partnership, association, body corporate or (as the case may be) body of trustees" substitute "organisation".

51 Manner of citation of organisations in summary proceedings

In section 141 of the 1995 Act (manner of citation), in subsection (2)(b), for "a partnership, association or body corporate" substitute "an organisation other than a body of trustees".

Disclosure of convictions etc.

52 Disclosure of convictions and non-court disposals

(1) After section 101 of the 1995 Act insert—

"**101A Post-offence convictions etc.**

(1) This section applies where an accused person is convicted of an offence ("offence O") on indictment.

(2) The court may, in deciding on the disposal of the case, have regard to—

(a) any conviction in respect of the accused which occurred on or after the date of offence O but before the date of conviction in respect of that offence,

(b) any of the alternative disposals in respect of the accused that are mentioned in subsection (3).

(3) Those alternative disposals are—

(a) a—

(i) fixed penalty under section 302(1) of this Act, or

(ii) compensation offer under section 302A(1) of this Act, that has been accepted (or deemed to have been accepted) on or after the date of offence O but before the date of conviction in respect of that offence,

(b) a work order under section 303ZA(6) of this Act that has been completed on or after the date of offence O but before the date of conviction in respect of that offence.

(4) The court may have regard to any such conviction or alternative disposal only if it is—

(a) specified in a notice laid before the court by the prosecutor, and

(b) admitted by the accused or proved by the prosecutor (on evidence adduced then or at another diet).”.

(2) For section 166A of that Act substitute—

“**166A Post-offence convictions etc.**

(1) This section applies where an accused person is convicted of an offence (“offence O”) on summary complaint.

(2) The court may, in deciding on the disposal of the case, have regard to—

(a) any conviction in respect of the accused which occurred on or after the date of offence O but before the date of conviction in respect of that offence,

(b) any of the alternative disposals in respect of the accused that are mentioned in subsection (3).

(3) Those alternative disposals are—

(a) a—

(i) fixed penalty under section 302(1) of this Act, or

(ii) compensation offer under section 302A(1) of this Act,

that has been accepted (or deemed to have been accepted) on or after the date of offence O but before the date of conviction in respect of that offence,

(b) a work order under section 303ZA(6) of this Act that has been completed on or after the date of offence O but before the date of conviction in respect of that offence.

(4) The court may have regard to any such conviction or alternative disposal only if it is—

(a) specified in a notice laid before the court by the prosecutor, and

(b) admitted by the accused or proved by the prosecutor (on evidence adduced then or at another diet).”.

(3) In section 302 of that Act (fixed penalty: conditional offer by procurator fiscal), in subsection (2), after sub-paragraph (ii) of paragraph (e) insert—

“(iia)that that fact may be disclosed to the court also in any proceedings for an offence to which the alleged offender is, or is liable to become, subject at such time as the offer is accepted;”.

(4) In section 302A of that Act (compensation offer by procurator fiscal), in subsection (2), after sub-paragraph (ii) of paragraph (f) insert—

“(iia)that that fact may be disclosed to the court also in any proceedings for an offence to which the alleged offender is, or is liable to become, subject at such time as the offer is accepted;”.

(5) In section 303ZA of that Act (work orders), in subsection (3)—

(a) after sub-paragraph (i) of paragraph (e) insert—

“(ia) that if a work offer is not accepted, that fact may be disclosed to the court in any proceedings for the offence to which the offer relates;”,

(b) in sub-paragraph (ii) of that paragraph, for “the offer has been accepted” substitute “a resultant work order has been completed”,

(c) after sub-paragraph (ii) of that paragraph insert—

“(iia)that that fact may be disclosed to the court also in any proceedings for an offence to which the alleged offender is, or is liable to become, subject at such time as the offer is accepted;”, and

(d) in sub-paragraph (iii) of that paragraph, for “work order under subsection (6) below” substitute “resultant work order”.

Appeals: time limits

53 Time limits for lodging certain appeals

(1) The 1995 Act is amended as follows.

(2) In section 74 (appeals in connection with preliminary diets), in subsection (2)(b), for “2” substitute “seven”.

(3) In section 174 (appeals relating to preliminary pleas), in subsection (1), for “two” substitute “seven”.

Crown appeals

54 Submissions as to sufficiency of evidence

After section 97 of the 1995 Act insert—

“97A Submissions as to sufficiency of evidence

(1) Immediately after the close of the whole of the evidence, the accused may make either or both of the submissions mentioned in subsection (2) in relation to an offence libelled in an indictment (the “indicted offence”).

(2) The submissions are—

(a) that the evidence is insufficient in law to justify the accused’s being convicted of the indicted offence or any other offence of which the accused could be convicted under the indictment (a “related offence”),

(b) that there is no evidence to support some part of the circumstances set out in the indictment.

(3) A submission of a kind mentioned in subsection (2) may be made after the close of the whole of the evidence only under this section.

(4) A submission made under this section must be heard by the judge in the absence of the jury.

97B Acquittals etc. on section 97A(2)(a) submissions

(1) This section applies where the accused makes a submission of the kind mentioned in section 97A(2)(a).

(2) If the judge is satisfied that the evidence is insufficient in law to justify the accused's being convicted of the indicted offence, then—

(a) where the judge is satisfied that the evidence is also insufficient in law to justify the accused's being convicted of a related offence—

(i) the judge must acquit the accused of the indicted offence, and

(ii) the trial is to proceed only in respect of any other offence libelled in the indictment,

(b) where the judge is satisfied that the evidence is sufficient in law to justify the accused's being convicted of a related offence, the judge must direct the prosecutor to amend the indictment accordingly.

(3) If the judge is not satisfied as is mentioned in subsection (2)—

(a) the judge must reject the submission, and

(b) the trial is to proceed as if the submission had not been made.

(4) The judge may make a decision under this section only after hearing both (or all) parties.

(5) An amendment made by virtue of this section must be sufficiently authenticated by the initials of the clerk of court.

(6) In this section, "indicted offence" and "related offence" have the same meanings as in section 97A.

97C Directions etc. on section 97A(2)(b) submissions

(1) This section applies where the accused makes a submission of the kind mentioned in section 97A(2)(b).

(2) If the judge is satisfied that there is no evidence to support some part of the circumstances set out in the indictment, the judge must direct the prosecutor to amend the indictment accordingly.

(3) If the judge is not satisfied as is mentioned in subsection (2)—

(a) the judge must reject the submission, and

(b) the trial is to proceed as if the submission had not been made.

(4) The judge may make a decision under this section only after hearing both (or all) parties.

(5) An amendment made by virtue of this section must be sufficiently authenticated by the initials of the clerk of court.".

55 Prosecutor's right of appeal

After section 107 of the 1995 Act insert—

“107A Prosecutor’s right of appeal: decisions on section 97 and 97A submissions

(1) The prosecutor may appeal to the High Court against—

(a) an acquittal under section 97 or 97B(2)(a), or

(b) a direction under section 97B(2)(b) or 97C(2).

(2) If an appeal is brought under subsection (1)(a), the High Court may—

(a) make an order under section 4(2) of the Contempt of Court Act 1981 (c.49) (which gives a court power, in some circumstances, to order that publication of certain reports be postponed) as if proceedings for the offence of which the person was acquitted were pending or imminent,

(b) exceptionally and after giving the parties an opportunity of being heard, order the detention of the person in custody or admit him to bail.

107B Prosecutor’s right of appeal: decisions on admissibility of evidence

(1) The prosecutor may appeal to the High Court against a finding, made after the jury is empanelled and before the close of the evidence for the prosecution, that evidence that the prosecution seeks to lead is inadmissible.

(2) The appeal may be made only with the leave of the court of first instance, granted—

(a) on the motion of the prosecutor, or

(b) on that court’s initiative.

(3) Any motion for leave to appeal must be made before the close of the case for the prosecution.

(4) In determining whether to grant leave to appeal the court must consider—

(a) whether there are arguable grounds of appeal, and

(b) what effect the finding has on the strength of the prosecutor’s case.

(5) If an appeal is brought under subsection (1) against a finding in relation to evidence in the prosecution of an offence of which the accused has been acquitted, the High Court may—

(a) make an order under section 4(2) of the Contempt of Court Act 1981 (c.49) (which gives a court power, in some circumstances, to order that publication of certain reports be postponed) as if proceedings for the offence of which the person was acquitted were pending or imminent,

(b) exceptionally and after giving the parties an opportunity of being heard, order the detention of the person in custody or admit him to bail.

107C Appeals under section 107A and 107B: general provisions

(1) In an appeal brought under section 107A or 107B the High Court may review not only the acquittal, direction or finding appealed against but also any direction, finding, decision, determination or ruling in the proceedings at first instance if it has a bearing on the acquittal, direction or finding appealed against.

(2) The test to be applied by the High Court in reviewing the acquittal, direction or finding appealed against is whether it was wrong in law.

107D Expedited appeals

(1) Subsection (2) applies where—

(a) an appeal is brought under section 107A or leave to appeal is granted by the court under section 107B, and

(b) the court is able to obtain confirmation from the Keeper of the Rolls that it would be practicable for the appeal to be heard and determined during an adjournment of the trial diet.

(2) The court must inform both parties of that fact and, after hearing them, must decide whether or not the appeal is to be heard and determined during such an adjournment.

(3) An appeal brought under section 107A or 107B which is heard and determined during such an adjournment is referred to in this Act as an "expedited appeal".

(4) If the court decides that the appeal is to be an expedited appeal the court must, pending the outcome of the appeal—

(a) adjourn the trial diet, and

(b) where the appeal is against an acquittal, suspend the effect of the acquittal.

(5) Where the court cannot obtain from the Keeper of the Rolls confirmation of the kind mentioned in subsection (1)(b), the court must inform the parties of that fact.

(6) Where the High Court in an expedited appeal determines that an acquittal of an offence libelled in the indictment was wrong in law it must quash the acquittal and direct that the trial is to proceed in respect of the offence.

107E Other appeals under section 107A or 107B: appeal against acquittal

(1) This section applies where—

(a) an appeal brought under section 107A or 107B is not an expedited appeal,

(b) the appeal is against an acquittal, and

(c) the High Court determines that the acquittal was wrong in law.

(2) The court must quash the acquittal.

(3) If the prosecutor seeks leave to bring a new prosecution charging the accused with the same offence as that libelled in the indictment, or a similar offence arising out of the same facts as the offence libelled in the indictment, the High Court must grant the prosecutor authority to do so in accordance with section 119, unless the court considers that it would be contrary to the interests of justice to do so.

(4) If—

(a) no motion is made under subsection (3), or

(b) the High Court does not grant a motion made under that subsection,

the High Court must in disposing of the appeal acquit the accused of the offence libelled in the indictment.

107F Other appeals under section 107A or 107B: appeal against directions etc.

(1) This section applies where—

(a) an appeal brought under section 107A or 107B is not an expedited appeal, and

(b) the appeal is not against an acquittal.

(2) The court of first instance must desert the diet *pro loco et tempore* in relation to any offence to which the appeal relates.

(3) The trial is to proceed only if another offence of which the accused has not been acquitted and to which the appeal does not relate is libelled in the indictment.

(4) If the prosecutor seeks leave to bring a new prosecution charging the accused with the same offence as that libelled in the indictment, or a similar offence arising out of the same facts as the offence libelled in the indictment, the High Court must grant the prosecutor authority to do so in accordance with section 119, unless the court considers that it would be contrary to the interests of justice to do so.”.

56 Power of High Court in appeal under section 107A of 1995 Act

In section 104(1) of the 1995 Act (which makes provision as regards the power of the High Court in appeals under section 106(1) or 108 of that Act), after “106(1)” insert “, 107A, 107B”.

57 Further amendment of 1995 Act

(1) In section 110(1) of the 1995 Act (note of appeal), after paragraph (b), add—

“(c) within 7 days after an appeal is brought under section 107A(1), the prosecutor may, except in the case of an expedited appeal, lodge such a note with the Clerk of Justiciary, who must send a copy to the judge and to the accused or to the accused’s solicitor,

(d) within 7 days after leave to appeal under section 107B(1) is granted, the prosecutor may, except in the case of an expedited appeal, lodge such a note with the Clerk of Justiciary, who must send a copy to the judge and to the accused or to the accused’s solicitor,

(e) in the case of an expedited appeal, as soon as practicable after the decision as to hearing and determining the case is made under section 107D(2), the prosecutor may—

(i) lodge such a note with the Clerk of Justiciary, and

(ii) provide a copy to the judge and to the accused or to the accused’s solicitor.”.

(2) In section 113(1) of that Act (judge’s report), after “under” insert “any of paragraphs (a) to (d) of”.

(3) After section 113 of that Act insert—

“113A Judge’s observations in expedited appeal

(1) On receiving a note of appeal given under section 110(1)(e), the judge who presided at the trial may give the Clerk of Justiciary any written observations that the judge thinks fit on—

(a) the case generally,

(b) the grounds contained in the note of appeal.

(2) The High Court may hear and determine the appeal without any such written observations.

(3) If written observations are given under subsection (1), the Clerk of Justiciary must give a copy of them to—

(a) the accused or the accused’s solicitor, and

(b) the prosecutor.

(4) The written observations of the judge are available only to—

(a) the High Court,

(b) the parties, and

(c) any other person or classes of person prescribed by Act of Adjournal, in accordance with any conditions prescribed by Act of Adjournal.”.

(4) In section 119 of that Act (provision where High Court authorises new prosecution)—

(a) in each of subsections (1) and (10), after “118(1)(c)” insert “or 107E(3) or 107F(4)”,

(b) for subsection (2), substitute—

“(2) In a new prosecution under this section—

(a) where authority for the prosecution is granted under section 118(1)(c), the accused must not be charged with an offence more serious than that of which the accused was convicted in the earlier proceedings,

(b) where authority for the prosecution is granted under section 107E(3), the accused must not be charged with an offence more serious than that of which the accused was acquitted in the earlier proceedings,

(c) where authority for the prosecution is granted under section 107F(4), the accused must not be charged with an offence more serious than that originally libelled in the indictment in the earlier proceedings.”,

(c) after subsection (2) insert—

“(2A) In a new prosecution under this section brought by virtue of section 107F(4), the circumstances set out in the indictment are not to be inconsistent with any direction given under section 97B(2)(b) or 97C(2) in the proceedings which gave rise to the appeal in question unless the High Court, in disposing of that appeal, determined that the direction was wrong in law.”, and

(d) in subsection (9), after “setting aside the verdict” insert “or under section 107E(3) or 107F(4) granting authority to bring a new prosecution”.

Retention and use of samples etc.

58 Retention of samples etc.

(1) The 1995 Act is amended as follows.

(2) In section 18(7A) (meaning of "relevant physical data" for purposes of certain provisions of 1995 Act), for "19 and" substitute "18A to".

(3) In section 18A (retention of samples)—

(a) in subsection (1)—

(i) after "to" insert "relevant physical data taken or provided under subsection (2) of section 18 and to", and

(ii) for "section 18 of this Act" substitute "that section",

(b) in subsection (2), after "whom" insert "the relevant physical data was taken or by whom it was provided or, as the case may be, from whom",

(c) in subsection (3), after "the", where it first occurs, insert "relevant physical data,"

(d) in subsection (10), after "the", where it fourth occurs, insert "relevant physical data,", and

(e) in subsection (11), in paragraph (a) of the definition of "the relevant chief constable", after "who" insert "took the relevant physical data or to whom it was provided or who".

59 Retention of samples etc. from children referred to children's hearings

(1) After section 18A of the 1995 Act insert—

"18B Retention of samples etc.: children referred to children's hearings

(1) This section applies to—

(a) relevant physical data taken from or provided by a child under section 18(2); and

(b) any sample, or any information derived from a sample, taken from a child under section 18(6) or (6A),

where the first condition, and the second, third or fourth condition, are satisfied.

(2) The first condition is that the child's case has been referred to a children's hearing under section 65(1) of the Children (Scotland) Act 1995 (c.36) (the "Children Act").

(3) The second condition is that—

(a) a ground of the referral is that the child has committed an offence mentioned in subsection (6) (a "relevant offence");

(b) both the child and the relevant person in relation to the child accept, under section 65(5) or (6) of the Children Act, the ground of referral; and

(c) no application to the sheriff under section 65(7) or (9) of that Act is made in relation to that ground.

(4) The third condition is that—

(a) a ground of the referral is that the child has committed a relevant offence;

(b) the sheriff, on an application under section 65(7) or (9) of the Children Act—

(i) deems, under section 68(8) of the Children Act; or

(ii) finds, under section 68(10) of that Act,

the ground of referral to be established; and

(c) no application to the sheriff under section 85(1) of that Act is made in relation to that ground.

(5) The fourth condition is that the sheriff, on an application under section 85(1) of the Children Act—

(a) is satisfied, under section 85(6)(b) of that Act, that a ground of referral which constitutes a relevant offence is established; or

(b) finds, under section 85(7)(b) of that Act, that—

(i) a ground of referral, which was not stated in the original application under section 65(7) or (9) of that Act, is established; and

(ii) that ground constitutes a relevant offence.

(6) A relevant offence is such relevant sexual offence or relevant violent offence as the Scottish Ministers may by order made by statutory instrument prescribe.

(7) Subject to section 18C(5) and (6), the relevant physical data, sample or the information must be destroyed no later than the destruction date.

(8) The destruction date is—

(a) the date of expiry of the period of 3 years following—

(i) where the second condition is satisfied, the date on which the ground of referral was accepted as mentioned in that condition;

(ii) where the third condition is satisfied, the date on which the ground of referral was established as mentioned in that condition;

(iii) where the ground of referral is established as mentioned in paragraph (a) of the fourth condition, the date on which that ground was established under section 68(8) or, as the case may be, (10) of the Children Act; or

(iv) where the ground of referral is established as mentioned in paragraph (b) of the fourth condition, the date on which that ground was established as mentioned in that paragraph; or

(b) such later date as an order under section 18C(1) may specify.

(9) No statutory instrument containing an order under subsection (6) may be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.

(10) In this section—

"relevant person" has the same meaning as in section 93(2) of the Children Act;

“relevant sexual offence” and “relevant violent offence” have the same meanings as in section 19A(6) and include any attempt, conspiracy or incitement to commit such an offence.

18C Retention of samples etc. relating to children: appeals

(1) On a summary application made by the relevant chief constable within the period of 3 months before the destruction date the sheriff may, if satisfied that there are reasonable grounds for doing so, make an order amending, or further amending, the destruction date.

(2) An application under subsection (1) may be made to any sheriff—

(a) in whose sheriffdom the child mentioned in section 18B(1) resides;

(b) in whose sheriffdom that child is believed by the applicant to be; or

(c) to whose sheriffdom that child is believed by the applicant to be intending to come.

(3) An order under subsection (1) must not specify a destruction date more than 2 years later than the previous destruction date.

(4) The decision of the sheriff on an application under subsection (1) may be appealed to the sheriff principal within 21 days of the decision.

(5) The sheriff principal’s decision on an appeal under subsection (4) is final.

(6) Section 18B(7) does not apply where—

(a) an application under subsection (1) has been made but has not been determined;

(b) the period within which an appeal may be brought under subsection (4) against a decision to refuse an application has not expired; or

(c) such an appeal has been brought but has not been withdrawn or finally determined.

(7) Where—

(a) the period within which an appeal referred to in subsection (6)(b) may be brought has expired without such an appeal being brought;

(b) such an appeal is brought and is withdrawn or finally determined against the appellant; or

(c) an appeal brought under subsection (4) against a decision to grant an application is determined in favour of the appellant,

the relevant physical data, sample or information must be destroyed as soon as practicable after the expiry, withdrawal or, as the case may be, determination.

(8) In this section—

“destruction date” has the meaning given by section 18B(8); and

“relevant chief constable” has the same meaning as in section 18A(11), with the modification that references to the person referred to in subsection (2) of that section are references to the child referred to in section 18B(1).”.

(2) In section 18 of the 1995 Act (prints, samples etc. in criminal investigations), in subsection (3), after “subsection (4) below” insert “and to sections 18A to 18C”.

60 Use of samples etc.

(1) After section 19B of the 1995 Act insert—

“19C Sections 18 and 19 to 19AA: use of samples etc.

(1) This section applies to—

(a) relevant physical data, or any information derived from relevant physical data, taken or provided under section 18(2), 19(2)(a), 19A(2)(a) or 19AA(3)(a),

(b) a sample, or any information derived from a sample, taken under section 18(6) or (6A), 19(2)(b) or (c), 19A(2)(b) or (c) or 19AA(3)(b) or (c),

(c) relevant physical data, a sample or an impression taken from a person—

(i) by virtue of any power of search,

(ii) by virtue of any power to take possession of evidence where there is immediate danger of its being lost or destroyed, or

(iii) under the authority of a warrant, and

(d) information derived from relevant physical data or a sample or impression falling within paragraph (c).

(2) The relevant physical data, sample, impression or information may be used—

(a) for the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or

(b) for the identification of a deceased person or a person from whom the relevant physical data, sample or impression came.

(3) In subsection (2)—

(a) the reference to crime includes a reference to—

(i) conduct which constitutes a criminal offence or two or more criminal offences (whether under the law of a part of the United Kingdom or a country or territory outside the United Kingdom), or

(ii) conduct which is, or corresponds to, conduct which, if it all took place in any one part of the United Kingdom would constitute a criminal offence or two or more criminal offences,

(b) the reference to an investigation includes a reference to an investigation outside the United Kingdom of a crime or suspected crime, and

(c) the reference to a prosecution includes a reference to a prosecution brought in respect of a crime in a country or territory outside the United Kingdom.

(4) This section is without prejudice to any other power relating to the use of relevant physical data, samples, impressions or information derived from relevant physical data or a sample or impression.”.

(2) In section 56 of the Criminal Justice (Scotland) Act 2003 (asp 7) (use of samples etc. voluntarily given)—

(a) in subsection (1)—

  (i) after “sample” insert “or impression”, and

  (ii) after “from,” insert “or provided by”,

(b) in subsection (2)—

  (i) after “sample”, where it first occurs, insert “, impression”, and

  (ii) for the words from “may” where it first occurs to the end substitute “, or information derived from that sample, impression or relevant physical data may be held and used—

   (a) for the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or

   (b) for the identification of a deceased person or a person from whom the sample, impression or relevant physical data came.”,

(c) in subsection (3)—

  (i) after “sample,”, where it first occurs, insert “impression,”, and

  (ii) after “sample”, where it second occurs, insert “or impression”,

(d) in subsection (4)(a), after “sample” insert “or impression”,

(e) in subsection (5)(a), after “sample” insert “or impression”,

(f) in subsection (6)(a)—

  (i) for the words from “data”, where it first occurs, to “them” substitute “impression or data, or information derived from the sample, impression or data,”, and

  (ii) after “sample”, where it second occurs, insert “or impression”,

(g) in subsection (6)(b)(i), after “sample” insert “, impression”,

(h) in subsection (7)(a), after “sample”, in both places where it occurs, insert “, impression”, and

(i) after subsection (7) insert—

“(7A) In subsection (2)—

  (a) the reference to crime includes a reference to—

   (i) conduct which constitutes a criminal offence or two or more criminal offences (whether under the law of a part of the United Kingdom or a country or territory outside the United Kingdom), or

   (ii) conduct which is, or corresponds to, conduct which, if it all took place in any one part of the United Kingdom would constitute a criminal offence or two or more criminal offences,

  (b) the reference to an investigation includes a reference to an investigation outside the United Kingdom of a crime or suspected crime, and

  (c) the reference to a prosecution includes a reference to a prosecution brought in respect of a crime in a country or territory outside the United Kingdom.”.

Referrals from the Scottish Criminal Cases Review Commission

61 Referrals from Scottish Criminal Cases Review Commission: grounds for appeal

In section 194D of the 1995 Act (further provisions as to references to the High Court by the Scottish Criminal Cases Review Commission), after subsection (4) insert—

“(4A) The grounds for an appeal arising from a reference to the High Court under section 194B of this Act must relate to one or more of the reasons contained in the Commission’s statement of reasons.

(4B) Despite subsection (4A), the High Court may, if it considers it is in the interests of justice to do so, grant leave for additional grounds of appeal to be raised.

(4C) An application by the appellant for leave under subsection (4B) must be made and intimated to the Crown Agent within 21 days after the date on which a copy of the Commission’s statement of reasons is sent under subsection (4)(b).

(4D) The High Court may, on cause shown, extend the period of 21 days mentioned in subsection (4C).

(4E) The Clerk of Justiciary must intimate to the persons mentioned in subsection (4F)—

(a) a decision under subsection (4B), and

(b) in the case of a refusal to grant leave for additional grounds to be raised, the reasons for the decision.

(4F) Those persons are—

(a) the appellant or the appellant’s solicitor, and

(b) the Crown Agent.”.

PART 4

EVIDENCE

62 Witness statements: use during trial

(1) The 1995 Act is amended as follows.

(2) After section 261 insert—

“*Witness statements*

261A Witness statements: use during trial

(1) Subsection (2) applies where—

(a) a witness is giving evidence in criminal proceedings,

(b) the witness has made a prior statement,

(c) the prosecutor has seen or has been given an opportunity to see the statement, and

(d) the accused (or a solicitor or advocate acting on behalf of the accused in the proceedings) has seen or has been given an opportunity to see the statement.

(2) The court may allow the witness to refer to the statement while the witness is giving evidence.”.

(3) In section 262 (construction of sections 259 to 261 of Act)—

(a) in the title, for “261” substitute “261A”,

(b) in each of subsections (1) to (4), for “261” substitute “261A”, and

(c) in subsection (3)—

(i) in the definition of “criminal proceedings”, after “include” insert “(other than in section 261A)”, and

(ii) in the definition of “made”, after “includes” insert “(other than in section 261A)”.

63 Spouse or civil partner of accused a compellable witness

(1) For section 264 of the 1995 Act (spouse of accused a competent witness) substitute—

“264 Spouse or civil partner of accused a compellable witness

(1) The spouse or civil partner of an accused is a competent and compellable witness for the prosecution, the accused or any co-accused in the proceedings against the accused.

(2) Subsection (1) is, if the spouse or civil partner is a co-accused in the proceedings, subject to any enactment or rule of law by virtue of which an accused need not (by reason of being an accused) give evidence in the proceedings.

(3) Subsection (1) displaces any other rule of law that would (but for that subsection) prevent or restrict, by reference to the relationship, the giving of evidence by the spouse or civil partner of an accused.”.

(2) Section 130 of the Civil Partnership Act 2004 (c.33) (civil partner of accused a competent witness) is repealed.

64 Special measures for child witnesses and other vulnerable witnesses

(1) The 1995 Act is amended as follows.

(2) In section 271 (vulnerable witnesses: main definitions)—

(a) in subsection (1)—

(i) for “a trial” substitute “a hearing in relevant criminal proceedings”, and

(ii) for “the trial”, wherever it occurs, substitute “the hearing”, and

(b) in subsection (5)—

(i) the definition of “trial” is repealed, and

(ii) after the definition of “court” insert—

“hearing in relevant criminal proceedings” means any hearing in the course of any criminal proceedings in the High Court or the sheriff court.”.

(3) In section 271A (child witnesses)—

(a) in subsection (1), for “a trial” substitute “a hearing in relevant criminal proceedings”,

(b) in subsection (5A)(c), for “the trial diet” substitute “the hearing at which the evidence is to be given”,

(c) in subsection (6)(a), for “the trial” substitute “a hearing in relevant criminal proceedings”,

(d) in subsection (7)(b)(ii), for “the trial” substitute “the hearing at which the evidence is to be given”,

(e) in subsection (8), for “the trial diet” substitute “the hearing at which the evidence is to be given”,

(f) in subsection (10)(b)(i), for “the trial diet” substitute “the hearing at which the evidence is to be given”,

(g) in subsection (12), for “the trial diet in the case” substitute “the hearing at which the evidence is to be given”, and

(h) in subsection (13A)(c), for “the trial diet” substitute “the hearing at which the evidence is to be given”.

(4) In section 271B (further special provision for child witnesses under the age of 12)—

(a) in subsection (1)(a), for “a trial” substitute “a hearing in relevant criminal proceedings”,

(b) in subsection (1)(b), for “the trial” substitute “the hearing”, and

(c) in subsection (3)(b)(i), for “the trial” substitute “the hearing”.

(5) In section 271C (vulnerable witnesses other than child witnesses)—

(a) in subsection (1), for “a trial” substitute “a hearing in relevant criminal proceedings”,

(b) in subsection (5A)(c), for “the trial diet” substitute “the hearing at which the evidence is to be given”,

(c) in subsection (6), for “the trial diet” substitute “the hearing at which the evidence is to be given”,

(d) in subsection (10), for “the trial diet in the case” substitute “the hearing at which the evidence is to be given”, and

(e) in subsection (12)(c), for “the trial diet” substitute “the hearing at which the evidence is to be given”.

(6) In section 271D (review of arrangements for vulnerable witnesses)—

(a) in subsection (1)—

(i) for “the trial”, where it first occurs, substitute “a hearing in relevant criminal proceedings”, and

(ii) for “the trial”, where it second occurs, substitute “the hearing”, and

(b) in subsection (4)(b)(i), for “the trial” substitute “the hearing”.

(7) In section 271F (the accused)—

(a) in subsection (1)—

(i) for "the trial", where it first occurs, substitute "a hearing in relevant criminal proceedings", and

(ii) for "the trial", where it second occurs (in subsection (1)(a)), substitute "the hearing",

(b) in subsection (2)—

(i) for "the trial", where it first occurs, substitute "the hearing",

(ii) for "the trial", where it second occurs (in subsection (2)(a)(iii)), substitute "a hearing in relevant criminal proceedings", and

(iii) for "the trial", where it third occurs (in subsection (2)(b)(i)), substitute "a hearing in relevant criminal proceedings",

(c) in subsection (3), for "the trial" substitute "a hearing in relevant criminal proceedings", and

(d) in subsection (5), for "the trial" substitute "the hearing".

(8) In section 271J (live television link)—

(a) in subsection (1), for "the trial" substitute "the hearing",

(b) in subsection (2)(b), for "the trial" substitute "the hearing", and

(c) in subsection (5)(a), for "the trial" substitute "the hearing".

(9) In section 271L (supporters), in subsection (2), for "the trial" substitute "that or any other hearing in the proceedings".

(10) In section 288E (prohibition of personal conduct of defence in certain cases involving child witnesses under the age of 12), in subsection (5), for "a child witness referred to in subsection (2)(b) above" substitute "the trial".

65 Amendment of Criminal Justice (Scotland) Act 2003

Section 15A of the Criminal Justice (Scotland) Act 2003 (asp 7) (application of certain vulnerable witness provisions in proofs) is repealed.

66 Witness anonymity orders

(1) After section 271M of the 1995 Act insert—

"*Witness anonymity orders*

271N Witness anonymity orders

(1) A court may make an order requiring such specified measures to be taken in relation to a witness in criminal proceedings as the court considers appropriate to ensure that the identity of the witness is not disclosed in or in connection with the proceedings.

(2) The court may make such an order only on an application made in accordance with section 271P, if satisfied of the conditions set out in section 271Q having considered the matters set out in section 271R.

(3) The kinds of measures that may be required to be taken in relation to a witness include in particular measures for securing one or more of the matters mentioned in subsection (4).

(4) Those matters are—

(a) that the witness's name and other identifying details may be—

(i) withheld,

(ii) removed from materials disclosed to any party to the proceedings,

(b) that the witness may use a pseudonym,

(c) that the witness is not asked questions of any specified description that might lead to the identification of the witness,

(d) that the witness is screened to any specified extent,

(e) that the witness's voice is subjected to modulation to any specified extent.

(5) Nothing in this section authorises the court to require—

(a) the witness to be screened to such an extent that the witness cannot be seen by—

(i) the judge or other members of the court,

(ii) the jury, or

(iii) any interpreter or other person appointed by the court to assist the witness,

(b) the witness's voice to be modulated to such an extent that the witness's natural voice cannot be heard by any persons within paragraph (a)(i) to (iii).

(6) An order made under this section is referred to in this Act as a "witness anonymity order".

(7) In this section "specified" means specified in the order concerned.

271P Applications

(1) An application for a witness anonymity order to be made in relation to a witness in criminal proceedings may be made to the court by the prosecutor or the accused.

(2) Where an application is made by the prosecutor, the prosecutor—

(a) must (unless the court directs otherwise) inform the court of the identity of the witness, but

(b) is not required to disclose in connection with the application—

(i) the identity of the witness, or

(ii) any information that might enable the witness to be identified,

to any other party to the proceedings (or to the legal representatives of any other party to the proceedings).

(3) Where an application is made by the accused, the accused—

(a) must inform the court and the prosecutor of the identity of the witness, but

(b) if there is more than one accused, is not required to disclose in connection with the application—

(i) the identity of the witness, or

(ii) any information that might enable the witness to be identified,

to any other accused (or to the legal representatives of any other accused).

(4) Accordingly, where the prosecutor or the accused proposes to make an application under this section in respect of a witness, any relevant material which is disclosed by or on behalf of that party before the determination of the application may be disclosed in such a way as to prevent—

(a) the identity of the witness, or

(b) any information that might enable the witness to be identified,

from being disclosed except as required by subsection (2)(a) or (3)(a).

(5) "Relevant material" means any document or other material which falls to be disclosed, or is sought to be relied on, by or on behalf of the party concerned in connection with the proceedings or proceedings preliminary to them.

(6) The court must give every party to the proceedings the opportunity to be heard on an application under this section.

(7) Subsection (6) does not prevent the court from hearing one or more of the parties to the proceedings in the absence of an accused and the accused's legal representatives, if it appears to the court to be appropriate to do so in the circumstances of the case.

(8) Nothing in this section is to be taken as restricting any power to make rules of court.

271Q Conditions for making orders

(1) This section applies where an application is made for a witness anonymity order to be made in relation to a witness in criminal proceedings.

(2) The court may make the order only if it is satisfied that Conditions A to D below are met.

(3) Condition A is that the proposed order is necessary—

(a) in order to protect the safety of the witness or another person or to prevent any serious damage to property, or

(b) in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities or otherwise).

(4) Condition B is that, having regard to all the circumstances, the effect of the proposed order would be consistent with the accused's receiving a fair trial.

(5) Condition C is that the importance of the witness's testimony is such that in the interests of justice the witness ought to testify.

(6) Condition D is that—

(a) the witness would not testify if the proposed order were not made, or

(b) there would be real harm to the public interest if the witness were to testify without the proposed order being made.

(7) In determining whether the measures to be specified in the order are necessary for the purpose mentioned in subsection (3)(a), the court must have regard in particular to any reasonable fear on the part of the witness—

(a) that the witness or another person would suffer death or injury, or

(b) that there would be serious damage to property,

if the witness were to be identified.

271R Relevant considerations

(1) When deciding whether Conditions A to D in section 271Q are met in the case of an application for a witness anonymity order, the court must have regard to–

(a) the considerations mentioned in subsection (2), and

(b) such other matters as the court considers relevant.

(2) The considerations are—

(a) the general right of an accused in criminal proceedings to know the identity of a witness in the proceedings,

(b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of the witness's evidence comes to be assessed,

(c) whether evidence given by the witness might be the sole or decisive evidence implicating the accused,

(d) whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without the witness's identity being disclosed,

(e) whether there is any reason to believe that the witness—

(i) has a tendency to be dishonest, or

(ii) has any motive to be dishonest in the circumstances of the case,

having regard in particular to any previous convictions of the witness and to any relationship between the witness and the accused or any associates of the accused,

(f) whether it would be reasonably practicable to protect the witness's identity by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court.

271S Warning to jury

(1) Subsection (2) applies where, in a trial on indictment, any evidence has been given by a witness at a time when a witness anonymity order applied to the witness.

(2) The judge must give the jury such warning as the judge considers appropriate to ensure that the fact that the order was made in relation to the witness does not prejudice the accused.

271T Discharge and variation of order

(1) This section applies where a court has made a witness anonymity order in relation to any criminal proceedings.

(2) The court may discharge or vary (or further vary) the order if it appears to the court to be appropriate to do so in view of the provisions of sections 271Q and 271R that applied to the making of the order.

(3) The court may do so—

- (a) on an application made by a party to the proceedings if there has been a material change of circumstances since the relevant time, or
- (b) on its own initiative.

(4) The court must give every party to the proceedings the opportunity to be heard—

- (a) before determining an application made to it under subsection (3)(a), and
- (b) before discharging or varying the order on its own initiative.

(5) Subsection (4) does not prevent the court from hearing one or more of the parties to the proceedings in the absence of an accused and the accused's legal representatives, if it appears to the court to be appropriate to do so in the circumstances of the case.

(6) In subsection (3)(a) "the relevant time" means—

- (a) the time when the order was made, or
- (b) if a previous application has been made under that subsection, the time when the application (or the last application) was made.

271U Appeals

(1) The prosecutor or the accused may appeal to the High Court against—

- (a) the making of a witness anonymity order under section 271N,
- (b) the kinds of measures that are required to be taken in relation to a witness under a witness anonymity order made under that section,
- (c) the refusal to make a witness anonymity order under that section,
- (d) the discharge of a witness anonymity order under section 271T,
- (e) the variation of a witness anonymity order under that section, or
- (f) the refusal to discharge or vary a witness anonymity order under that section.

(2) The appeal may be made only with the leave of the court of first instance, granted—

- (a) on the motion of the party making the appeal, or
- (b) on its own initiative.

(3) The procedure in relation to the appeal is to be prescribed by Act of Adjournal.

(4) If an appeal is brought under this section, the High Court may—

(a) postpone the trial diet for any period that appears to it to be appropriate, and

(b) direct that the period, or some part of it, is not to count towards any time limit applying in respect of the case.

(5) An appeal under this section does not affect any right of appeal in relation to any other decision of any court in the criminal proceedings.

271V Appeal against the making of a witness anonymity order

(1) This section applies where—

(a) an appeal is brought under section 271U(1)(a) against the making of a witness anonymity order, and

(b) the High Court determines that the decision of the judge at first instance was wrong in law.

(2) The High Court must discharge the order and the trial is to proceed as if the order had not been made.

271W Appeal against the refusal to make a witness anonymity order

(1) This section applies where—

(a) an appeal is brought under section 271U(1)(c) against the refusal to make a witness anonymity order in relation to a witness in criminal proceedings, and

(b) the High Court determines that the decision of the judge at first instance was wrong in law.

(2) The High Court must make an order requiring such specified measures to be taken in relation to the witness in the proceedings as the court considers appropriate to ensure that the identity of the witness is not disclosed in or in connection with the proceedings.

271X Appeal against a variation of a witness anonymity order

(1) This section applies where—

(a) an appeal is brought under section 271U(1)(e) against a variation of a witness anonymity order, and

(b) the High Court determines that the decision of the judge at first instance was wrong in law.

(2) The High Court must discharge the variation.

(3) If the High Court determines that it is appropriate to make an additional variation in view of the provisions of sections 271Q and 271R, the court may do so.

271Y Appeal against a refusal to vary or discharge a witness anonymity order

(1) This section applies where—

(a) an appeal is brought under section 271U(1)(f) against a refusal to discharge or vary a witness anonymity order, and

(b) the High Court determines that the decision of the judge at first instance was wrong in law.

(2) The High Court must discharge the order, or make the variation, as the case requires.

(3) If, in the case of a variation, the High Court determines that it is appropriate to make an additional variation in view of the provisions of sections 271Q and 271R, the court may do so.”.

(2) Sections 271N to 271Y of the 1995 Act apply to proceedings in cases where the trial or hearing begins on or after the day on which this section comes into force.

(3) Nothing in this section or sections 271N to 271Y of the 1995 Act affects the power of a court under any rule of law to make an order for securing that the identity of a witness in a trial or hearing in criminal proceedings is withheld from the accused (or, on a defence application, from other accused), where the trial or hearing begins before the day on which this section comes into force.

(4) Schedule 3 makes provision about certain appeals.

67 Television link evidence

(1) The 1995 Act is amended as follows.

(2) In section 273 (television link evidence from abroad), in subsection (1), for “solemn” substitute “criminal”.

(3) After that section insert—

“Evidence from other parts of the United Kingdom

273A Television link evidence from other parts of the United Kingdom

(1) In any criminal proceedings in the High Court or the sheriff court a person other than the accused may give evidence through a live television link if—

(a) the witness is within the United Kingdom but outside Scotland,

(b) an application under this section for the issue of a letter of request has been granted, and

(c) the court is satisfied as to the arrangements for the giving of evidence in that manner by that witness.

(2) The prosecutor or the defence in any proceedings referred to in subsection (1) may apply for the issue of a letter of request.

(3) The application must be made to a judge of the court in which the trial is to take place or, if that court is not yet known, to a judge of the High Court.

(4) The judge may, on an application under this section, issue a letter to a court or tribunal exercising jurisdiction in the place where the witness is ordinarily resident requesting assistance in facilitating the giving of evidence by that witness through a live television link, if the judge is satisfied of the matters set out in subsection (5).

(5) Those matters are—

(a) that the evidence which it is averred the witness is able to give is necessary for the proper adjudication of the trial,

(b) that the granting of the application—

(i) is in the interests of justice, and

(ii) in the case of an application by the prosecutor, is not unfair to the accused.”.

PART 5

CRIMINAL JUSTICE

Jury service

68 Upper age limit for jurors

(1) Section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55) (qualification of jurors) is amended as follows.

(2) In subsection (1)—

(a) in paragraph (b), for “65 years of” substitute “the relevant”, and

(b) the words “, civil or criminal” are repealed.

(3) After subsection (1) insert—

“(1A) In subsection (1)(b), “the relevant age” means—

(a) in relation to civil proceedings, 65 years of age; and

(b) in relation to criminal proceedings, 70 years of age.”.

69 Persons excusable from jury service

In the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55), in Schedule 1 (ineligibility for and disqualification and excusal from jury service), Part 3, Group F, for paragraph (a) substitute—

“(a) where citation for jury service would result in a person’s serving as a juror in relation to criminal proceedings—

(i) persons who have served as a juror in the period of 5 years ending with the date on which the person is cited first to attend, and

(ii) persons who have attended for jury service in relation to criminal proceedings, but have not served as a juror, in the period of 2 years ending with the date on which the person is cited first to attend;

(aa) where citation for jury service would result in a person’s serving as a juror in relation to civil proceedings, persons who have served, or duly attended for service, as a juror in the period of 5 years ending with the date on which the person is cited first to attend;”.

Data matching for detection of fraud etc.

70 Data matching for detection of fraud etc.

(1) The Public Finance and Accountability (Scotland) Act 2000 (asp 1) is amended as follows.

(2) In section 11 (Audit Scotland: financial provisions)—

(a) after subsection (1)(c) insert—

"(ca) carrying out a data matching exercise under section 26A,", and

(b) after subsection (5) insert—

"(5A) Charges under subsection (1)(ca) may be imposed on (either or both)—

(a) persons who disclose data for a data matching exercise,

(b) persons who receive the results of such an exercise.".

(3) After section 26 insert—

"**PART 2A**

DATA MATCHING

26A Power to carry out data matching exercises

(1) Audit Scotland may carry out data matching exercises or arrange for them to be carried out on its behalf.

(2) A data matching exercise is an exercise involving the comparison of sets of data to determine how far they match (including the identification of any patterns and trends).

(3) The power in subsection (1) may be exercised for one or more of the following purposes—

(a) assisting in the prevention and detection of fraud,

(b) assisting in the prevention and detection of crime (other than fraud),

(c) assisting in the apprehension and prosecution of offenders.

(4) A data matching exercise may not be used for the sole purpose of identifying patterns and trends in a person's characteristics or behaviour which suggest the person is likely to commit fraud in the future.

26B Voluntary disclosure of data to Audit Scotland

(1) For the purposes of a data matching exercise, any person may disclose data to Audit Scotland (or a person acting on its behalf).

(2) Such disclosure does not breach—

(a) any duty of confidentiality owed by the person making the disclosure, or

(b) any other restriction on the disclosure of data.

(3) Nothing in this section authorises a disclosure—

(a) which contravenes the Data Protection Act 1998 (c.29),

(b) which is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000 (c.23) (interception, acquisition and disclosure of communications data), or

(c) of data comprising or including patient data.

(4) "Patient data" means data relating to an individual which is held for medical purposes and from which the individual can be identified.

(5) "Medical purposes" are the purposes of—

(a) preventative medicine,

(b) medical diagnosis,

(c) medical research,

(d) the provision of care and treatment,

(e) the management of health and social care services, and

(f) informing individuals about their physical or mental health or condition, the diagnosis of their condition or their care and treatment.

(6) Nothing in this section prevents disclosure of data under any other provision of this Act, another enactment or any rule of law.

(7) Data matching exercises may include data disclosed by a person outside Scotland.

26C Power to require disclosure of data

(1) Audit Scotland may require the persons mentioned in subsection (2) to disclose to it (or a person acting on its behalf) such data as it (or the person acting on its behalf) may reasonably require for the purpose of carrying out data matching exercises in such form as it (or such person) may so require.

(2) Those persons are—

(a) a body or an office holder any of whose accounts is an account in relation to which sections 21 and 22 apply,

(b) a body whose accounts must be audited under Part 7 of the Local Government (Scotland) Act 1973 (c.65) (finance),

(c) a Licensing Board continued in existence by or established under section 5 of the Licensing (Scotland) Act 2005 (asp 16), or

(d) an officer or a member of a body, office holder or board mentioned in paragraph (a), (b) or (c).

(3) Audit Scotland must not require a person to disclose data if—

(a) the disclosure would contravene the Data Protection Act 1998 (c.29),

(b) the disclosure is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000 (c.23) (interception, acquisition and disclosure of communications data).

(4) A disclosure made in response to a requirement imposed under subsection (1) does not breach—

(a) any duty of confidentiality owed by the person making the disclosure, or

(b) any other restriction on the disclosure of data.

(5) A person mentioned in subsection (2) who without reasonable excuse fails to comply with a requirement made in accordance with this section is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

26D Disclosure of results of data matching

(1) This section applies to the following data—

(a) data relating to a particular person obtained by or on behalf of Audit Scotland for the purpose of carrying out a data matching exercise, and

(b) the results of such an exercise.

(2) Data to which this section applies may be disclosed by or on behalf of Audit Scotland if the disclosure is—

(a) for, or in connection with, a purpose for which a data matching exercise is carried out,

(b) to a Scottish audit agency, or a related party, for, or in connection with a function of that audit agency under—

(i) Part 2 of this Act, or

(ii) Part 7 of the Local Government (Scotland) Act 1973 (c.65) (finance),

(c) to a United Kingdom audit agency, or a related party, for, or in connection with, a function of that audit agency corresponding or similar to—

(i) the functions of a Scottish audit agency, or

(ii) the functions of Audit Scotland under this Part, or

(d) in pursuance of a duty imposed by or under an enactment.

(3) "Scottish audit agency", for the purpose of subsections (2)(b) and (c)(i), means—

(a) the Auditor General, or

(b) the Accounts Commission.

(4) "United Kingdom audit agency", for the purposes of subsection (2)(c), means—

(a) the National Audit Office,

(b) the Audit Commission for Local Authorities and the National Health Service in England and Wales,

(c) the Auditor General for Wales,

(d) the Comptroller and Auditor General for Northern Ireland, or

(e) a person designated as a local government auditor under article 4 of the Local Government (Northern Ireland) Order 2005 (S.I. 2005/1968 (NI.18)).

(5) “Related party”, in relation to a Scottish or United Kingdom audit agency means—

(a) a person acting on its behalf,

(b) a body or office holder whose accounts are required to be audited by it or by a person appointed by it, or

(c) a person appointed by it to audit those accounts.

(6) If the data used for a data matching exercise includes patient data—

(a) subsection (2)(a) applies only so far as the purpose for which the disclosure is made relates to a relevant NHS body, and

(b) subsection (2)(b) or (c) applies only so far as the function for, or in connection with, which the disclosure is made relates to such a body.

(7) In subsection (6)—

“patient data” has the same meaning as section 26B(4), and

“relevant NHS body” means—

(a) an NHS body as defined in section 22(1) of the Community Care and Health (Scotland) Act 2002 (asp 5),

(b) a health service body as defined in section 53(1) of the Audit Commission Act 1998 (c.18),

(c) a Welsh NHS body as defined in section 60 of the Public Audit (Wales) Act 2004 (c.23),

(d) a body to which Article 90 of the Health and Personal Social Services (Northern Ireland) Order 1972 (S.I. 1972/1265 (N.I. 14)) applies.

(8) Data disclosed under subsection (2) may not be further disclosed except—

(a) for, or in connection with—

(i) the purpose for which it was disclosed under subsection (2)(a), or

(ii) the function for which it was disclosed under subsection (2)(b) or (c),

(b) otherwise for the investigation or prosecution of an offence, or

(c) in pursuance of a duty imposed by or under an enactment.

(9) Except as authorised by subsections (2) and (8), a person who discloses data to which this section applies is guilty of an offence and liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine or to both, or

(b) on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both.

26E Publication of reports on data matching

(1) Audit Scotland may publish a report on a data matching exercise (including a report on the results of an exercise).

(2) Such a report must not include data relating to a particular person if—

(a) the person is the subject of any data included in the data matching exercise,

(b) the person can be identified from the data, and

(c) the data is not otherwise in the public domain.

(3) A report published under subsection (1) is to be published in such manner as Audit Scotland considers appropriate for the purposes of bringing it to the attention of those members of the public who may be interested.

(4) Nothing in section 26D prevents publication under this section.

(5) This section does not affect any powers of an auditor where the data matching exercise in question forms part of an audit under—

(a) Part 2 of this Act, or

(b) Part 7 of the Local Government (Scotland) Act 1973 (c.65) (finance).

26F Data matching code of practice

(1) Audit Scotland must prepare, and keep under review, a code of practice with respect to data matching exercises.

(2) Regard must be had to the code in carrying out and participating in any such exercise.

(3) Audit Scotland must consult the following persons before preparing or altering the code of practice—

(a) the Information Commissioner,

(b) the persons mentioned in section 26C(2), and

(c) any other person Audit Scotland thinks fit.

(4) Audit Scotland must, from time to time, publish the code.

26G Powers of the Scottish Ministers

(1) The Scottish Ministers may by order amend this Part—

(a) to add a public body to the persons mentioned in section 26C(2),

(b) to modify the application of this Part in relation to a public body so added, or

(c) to remove a person from the persons mentioned in section 26C(2).

(2) An order under this section may include such incidental, consequential, supplementary or transitional provision as the Scottish Ministers think fit.

(3) In this section, “public body” means a person whose functions—

(a) are functions of a public nature, or

(b) include functions of a public nature.

(4) A person referred to in subsection (3)(b) is a public body to the extent only of the functions referred to in that subsection.”.

Sharing information with anti-fraud organisations

71 Sharing information with anti-fraud organisations

In the Serious Crime Act 2007 (c.27), the following provisions are repealed—

(a) in section 68 (disclosure of information to prevent fraud), subsections (5) and (6),

(b) in section 69 (offence for certain further disclosures of information), subsection (3), and

(c) in section 71 (code of practice for disclosure of information to prevent fraud)—

  (i) subsection (4), and

  (ii) in subsection (6), the definition of "relevant public authority".

Closure of premises associated with human exploitation etc.

72 Closure of premises associated with human exploitation etc.

(1) In section 26 of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8) (authorisation of closure notice)—

(a) in subsection (1), for "and (3)" substitute "to (3B)",

(b) in subsection (3), after "may" insert ", in a case involving antisocial behaviour,", and

(c) after subsection (3) insert—

"(3A) A senior police officer may, in a case involving an exploitation offence, authorise the service of a closure notice only where the senior police officer—

  (a) has reasonable grounds for believing that—

    (i) such an offence is being (or, at any time in the immediately preceding 3 months, was) committed in the premises, or

    (ii) the premises are being (or, at any time in the immediately preceding 3 months, have been) used for or in connection with the commission of such an offence, and

  (b) is satisfied that—

    (i) the local authority for the area in which the premises are situated has been consulted, and

    (ii) reasonable steps have been taken to establish the identity of any person who lives on, has control of, has responsibility for or has an interest in the premises.

(3B) Subsection (3A) is without prejudice to subsection (3) (including in so far as subsection (3) is applicable in relation to a brothel or other place where prostitution may occur).".

(2) In section 27 of that Act (service etc.), in subsection (2)—

(a) in paragraph (b)(i), after "section 26(3)(b)(ii)" insert "or (as the case may be) (3A)(b)(ii)", and

(b) in paragraph (b)(ii), for "in that subsection" substitute "there".

(3) In section 30 of that Act (application: determination)—

(a) in subsection (1), after "subsection (2)" insert "or (2A)",

(b) in subsection (2), for "Those" substitute "Where the application is in a case involving antisocial behaviour, the",

(c) after subsection (2) insert—

"(2A) Where the application is in a case involving an exploitation offence, the conditions are—

(a) that it appears that—

(i) such an offence is being (or was recently) committed in the premises, or

(ii) the premises continue to be (or recently have been) used for or in connection with the commission of such an offence, and

(b) that the making of the order is necessary to prevent the commission of such an offence for the period specified in the order.",

(d) in subsection (3)(b), for the words from "engaged" to the end substitute "(as the case may be)—

(i) engaged in antisocial behaviour which has occurred in the premises, or

(ii) involved in the commission of an exploitation offence in or connected with the premises.", and

(e) after subsection (3) insert—

"(3A) For the purpose of paragraph (b)(ii) of subsection (3), a person such as is mentioned in paragraph (a) of that subsection is not involved in the commission of an exploitation offence where that person is the victim of the offence.".

(4) In section 32 of that Act (extension)—

(a) after subsection (1) insert—

"(1A) The sheriff may, on the application of a senior police officer and if satisfied that it is necessary to do so to prevent the commission of an exploitation offence, make an order extending the period for which a closure order has effect for a period not exceeding the maximum period.",

(b) in subsection (2), for "subsection (1)" substitute "subsections (1) and (1A)",

(c) in subsection (3)—

(i) after "may" insert ", in a case involving antisocial behaviour,", and

(ii) for "this section" substitute "subsection (1)", and

(d) after subsection (3) insert—

"(3A) A senior police officer may, in a case involving an exploitation offence, make an application under subsection (1A) only if—

(a) it is made while the closure order has effect, and

(b) the senior police officer—

(i) has reasonable grounds for believing that it is necessary to extend the period for which the closure order has effect for the purpose of preventing the commission of an exploitation offence, and

(ii) is satisfied that the appropriate local authority has been consulted about the intention to make the application.”.

(5) In section 33 of that Act (revocation), in subsection (1), for the words from “the occurrence” to the end substitute “(as the case may be)—

(a) the occurrence of relevant harm, or

(b) the commission of an exploitation offence,

revoke the order.”.

(6) In section 36 of that Act (appeals), in subsection (5), after “section 32(1)” insert “or (1A)”.

(7) After section 40 of that Act insert—

“40A Exploitation offences

(1) In this Part, an “exploitation offence” is any of the following offences—

(a) so far as concerning travel or identity documentation for enabling the trafficking of people (including passports, visas and work permits)—

(i) fraud, or

(ii) uttering a forged document,

(b) so far as concerning the trafficking of people, an offence under section 26(1)(d) of the Immigration Act 1971 (c.77) (falsification of documentation),

(c) an offence under section 52 or 52A of the Civic Government (Scotland) Act 1982 (c.45) (possession, taking or distribution of indecent images of children),

(d) an offence under sections 7 to 12 or 13(9) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (offences relating to prostitution and brothels),

(e) an offence under section 22 of the Criminal Law (Scotland) Act 2003 (asp 7) (traffic in prostitution etc.),

(f) an offence under section 1 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) (meeting a child following certain preliminary contact),

(g) an offence under sections 9 to 12 of that Act (offences relating to provision by child of sexual services or child pornography),

(h) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation),

(i) an offence under Part 1 of the Sexual Offences (Scotland) Act 2009 (asp 00) (rape etc.),

(j) an offence under Part 4 of that Act (sexual offences involving children) other than an offence under section 27 (older children engaging in penetrative sexual conduct with each other),

(k) an offence under section 31 of that Act (sexual abuse of trust),

(l) an offence under section 35 of that Act (sexual abuse of trust of a mentally disordered person).

(2) For the purposes of subsection (1)(a) and (b), a reference to trafficking of people is a reference to a person intentionally doing something in respect of at least one other person which involves the commission of an offence mentioned in subsection (1)(e) or (h).

(3) For the purposes of subsection (1), a reference to an offence includes a reference to—

(a) an attempt to commit an offence,

(b) incitement to commit an offence,

(c) counselling or procuring the commission of an offence,

(d) involvement art and part in an offence, and

(e) an offence as modified by section 42 of the Sexual Offences (Scotland) Act 2009 (asp 00) (incitement to commit certain sexual acts outside the United Kingdom).

(4) The Scottish Ministers may by order add to or otherwise modify the specification of offences listed in subsection (1).".

Sexual offences prevention orders

73 Sexual offences prevention orders

(1) In section 141 of the Criminal Justice and Immigration Act 2008 (c.4) (sexual offences prevention orders: relevant sexual offences), subsection (2) is repealed.

(2) In the Sexual Offences Act 2003 (c.42)—

(a) in section 106 (applications and grounds for sexual offences prevention orders: supplemental), in subsection (13), the words from "in their" to the end are repealed,

(b) in section 109 (interim SOPOs), in subsection (5), for "107(3)" substitute "107(2)",

(c) after section 111 insert—

"111A SOPO and interim SOPO requirements: Scotland

(1) This section applies in relation to a sexual offences prevention order or an interim sexual offences prevention order made, or to be made, by a court in Scotland.

(2) Such an order, in addition to or instead of prohibiting the defendant from doing anything described in the order, may require the defendant to do anything described in the order.

(3) Accordingly, in relation to such an order—

(a) the references in sections 107(2) and 108(5) to a prohibition include a reference to a requirement, and

(b) the reference in section 113(1) to a person's doing anything which he is prohibited from doing includes a reference to his failing to do anything which he is required to do.", and

(d) in section 112 (provisions relating to sexual offences prevention orders in Scotland), in subsection (1), after paragraph (d) insert—

"(da) a court may make an order under section 104(1)—

(i) at its own instance, or

(ii) on the motion of the prosecutor;".

Foreign travel orders

74 Foreign travel orders

(1) The Sexual Offences Act 2003 (c.42) is amended as follows.

(2) In section 115 (definition of "protecting children generally or any child from serious sexual harm from the defendant outside the United Kingdom"), in subsection (2), for "16" in both places it occurs substitute "18".

(3) In section 116 (qualifying offenders: offences), in subsection (2)(d), for "16" substitute "18".

(4) In section 117(1) (foreign travel orders: effect), for "6 months" substitute "5 years".

(5) Before section 118, insert—

"117B Surrender of passports: Scotland

(1) This section applies in relation to a foreign travel order which contains a prohibition within section 117(2)(c).

(2) The order must require the person in respect of whom the order has effect to surrender all of the person's passports, at a police station specified in the order—

(a) on or before the date when the prohibition takes effect, or

(b) within a period specified in the order.

(3) Any passports surrendered must be returned as soon as reasonably practicable after the person ceases to be subject to a foreign travel order containing a prohibition within section 117(2)(c).

(4) Subsection (3) does not apply in relation to—

(a) a passport issued by or on behalf of the authorities of a country outside the United Kingdom if the passport has been returned to those authorities;

(b) a passport issued by or on behalf of an international organisation if the passport has been returned to that organisation.

(5) In this section "passport" means—

(a) a United Kingdom passport within the meaning of the Immigration Act 1971 (c.77);

(b) a passport issued by or on behalf of the authorities of a country outside the United Kingdom, or by or on behalf of an international organisation;

(c) a document that can be used (in some or all circumstances) instead of a passport.".

(6) In section 122 (breach of foreign travel order), before subsection (2) insert—

"(1B) A person commits an offence if, without reasonable excuse, the person fails to comply with a requirement under section 117B(2).".

Risk of sexual harm orders

75 Risk of sexual harm orders

(1) The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) is amended as follows.

(2) In section 2 (risk of sexual harm orders: applications, grounds and effect)—

(a) in subsection (7)(a), after "doing" insert ", or requires that person to do,", and

(b) in subsection (8), after "prohibitions" insert "or requirements".

(3) In section 4 (risk of sexual harm orders: variations, renewals and discharges), in subsection (4), after "prohibitions" in both places where it occurs insert "or requirements".

(4) In section 5 (interim risk of sexual harm orders), in subsection (3), after "doing" insert ", or requiring that person to do,".

(5) In section 7 (offence: breach of risk of sexual harm order or interim risk of sexual harm order), in subsection (1), after "doing" insert ", or fails to do anything which the person is required to do,".

Obtaining information from outwith United Kingdom

76 Obtaining information from outwith United Kingdom

After section 194I of the 1995 Act insert—

"194IA Power to request assistance in obtaining information abroad

(1) Where it appears to the Commission that there may be information which they require for the purposes of carrying out their functions, and the information is outside the United Kingdom, they may apply to the High Court to request assistance.

(2) On an application made by the Commission under subsection (1), the High Court may request assistance if satisfied that it is reasonable in the circumstances.

(3) In this section, "request assistance" means request assistance in obtaining outside the United Kingdom any information specified in the request for use by the Commission for the purposes of carrying out their functions.

(4) Section 8 of the Crime (International Co-operation) Act 2003 (c.32) (sending requests for assistance) applies to requests for assistance under this section as it applies to requests for assistance under section 7 of that Act.

(5) Subsections (2), (3) and (6) of section 9 of that Act (use of evidence obtained) apply to information obtained pursuant to a request for assistance under this section as they apply under subsection (1) of that section to evidence obtained pursuant to a request for assistance under section 7 of that Act.".

Surveillance

77 Grant of authorisations for directed and intrusive surveillance

(1) The Regulation of Investigatory Powers (Scotland) Act 2000 (asp 11) is amended as follows.

(2) After section 9 insert—

> **“9A Authorisation of directed surveillance: joint surveillance operations**
>
> (1) Subsection (2) applies in the case of a joint surveillance operation where authorisation is sought for the carrying out of directed surveillance.
>
> (2) The persons designated for the purposes of section 6 are those prescribed by order under section 8(1).”.

(3) In section 10 (authorisation of intrusive surveillance)—

- (a) in subsection (1), for the words from “the” where it second occurs to the end substitute “any of the persons mentioned in subsection (1A) may grant authorisations (including authorisations in the case of a joint surveillance operation) for the carrying out of intrusive surveillance.”, and
- (b) after that subsection insert—

> “(1A) Those persons are—
>
> (a) the chief constable of every police force,
>
> (b) the Director General of the Scottish Crime and Drug Enforcement Agency,
>
> (c) the Deputy Director General of the Scottish Crime and Drug Enforcement Agency.”.

(4) In section 11 (rules for grant of authorisations), in subsection (3), after “General” insert “or the Deputy Director General”.

(5) In section 12A (grant of authorisations in cases of urgency: Scottish Crime and Drug Enforcement Agency), in subsection (1), after “General” insert “or the Deputy Director General”.

(6) In section 31 (interpretation), in subsection (1), after the definitions of “directed” and “intrusive” insert—

> ““joint surveillance operation”, where authorisation is sought for the carrying out of directed or intrusive surveillance, means a case involving—
>
> (a) at least two police forces in Scotland working together; or
>
> (b) at least one police force in Scotland and the Scottish Crime and Drug Enforcement Agency working together;”.

Interference with property

78 Authorisations to interfere with property etc.

(1) The Police Act 1997 (c.50) is amended as follows.

(2) In section 93 (authorisations to interfere with property etc.)—

- (a) after subsection (3) insert—

“(3A) In the case of a joint operation, an authorising officer mentioned in subsection (3B) may authorise a person mentioned in subsection (3C) to take such action as is referred to in subsection (1).

(3B) Those authorising officers are—

(a) the chief constable of a police force—

(i) maintained under or by virtue of section 1 of the Police (Scotland) Act 1967, and

(ii) involved in the joint operation, or

(b) where the Scottish Crime and Drug Enforcement Agency is involved in the joint operation, the Director General or Deputy Director General of that Agency.

(3C) The persons who may be authorised under subsection (1) are—

(a) a constable of any of the police forces involved in the joint operation (whether or not the authorised action is to be carried out in the area of operation of the constable’s police force),

(b) where the joint operation falls within paragraph (b) of subsection (3B), a police member of the Scottish Crime and Drug Enforcement Agency.

(3D) In subsection (3A), “joint operation” means a case involving—

(a) at least two police forces in Scotland working together, or

(b) at least one police force in Scotland and the Scottish Crime and Drug Enforcement Agency working together.”, and

(b) in paragraph (j) of subsection (5), after “General” insert “, or Deputy Director General,”.

(3) In section 94 (authorisations given in absence of authorising officer)—

(a) in subsection (2)(h), after “(5)” insert “or, as the case may be, subsection (6)”,

(b) in subsection (5)(a), at the beginning insert “where the case is not a joint operation,”, and

(c) after subsection (5), add—

“(6) Where the case is a joint operation, the chief constable of a police force involved in the joint operation in the relevant area.

(7) In subsections (5) and (6)—

“joint operation” has the meaning given by section 93(3D), and

“relevant area” means the area—

(a) for which the police forces involved in the joint operation are maintained, and

(b) to which the application for authorisation relates.”.

Amendments of Part 5 of Police Act 1997

79 Amendments of Part 5 of Police Act 1997

(1) The Police Act 1997 (c.50) is amended as follows.

(2) After section 113B insert—

"113BA Information held outside the United Kingdom

(1) The Scottish Ministers may by order made by statutory instrument amend the definition of—

(a) "criminal conviction certificate" in section 112(2),

(b) "central records" in sections 112(3) and 113A(6),

(c) "criminal record certificate" in section 113A(3),

(d) "relevant matter" in section 113A(6),

(e) "enhanced criminal record certificate" in section 113B(3).

(2) An order under subsection (1) may be made only for the purposes of, or in connection with, enabling certificates issued under this Part to include details of information held outside the United Kingdom.

(3) No order may be made under subsection (1) unless a draft of the statutory instrument containing the order has been laid before, and approved by resolution of, the Scottish Parliament.".

(3) In section 120ZB (regulations about registration), after subsection (2) insert—

"(2A) The provision which may be made by virtue of subsection (2)(a) includes in particular provision for—

(a) the payment of fees in respect of applications to be listed in the register,

(b) the payment of different fees in different circumstances,

(c) annual or other recurring fees to be paid in respect of registration, and

(d) such annual or other recurring fees to be paid in advance or in arrears.

(2B) Where provision is made under subsection (2)(a) for a fee to be charged in respect of an application to be listed in the register, the Scottish Ministers need not consider the application unless the fee is paid.".

Miscellaneous

80 Assistance for victim support

(1) The Scottish Ministers may make grants for the purposes of or in connection with the provision of assistance to victims, witnesses or other persons affected by an offence.

(2) Grants under subsection (1) may be made—

(a) to such bodies, and

(b) subject to such conditions,

as the Scottish Ministers consider appropriate.

81 Public defence solicitors

(1) In section 28A of the Legal Aid (Scotland) Act 1986 (c.47) (power of Board to employ solicitors to provide criminal assistance)—

(a) in subsection (1), the words from "may" where it first occurs to "accordingly," are repealed, and

(b) subsection (9A) is repealed.

(2) In section 73 of the Criminal Justice (Scotland) Act 2003 (asp 7) (public defence), paragraph (b) is repealed.

82 Compensation for miscarriages of justice

(1) In section 133 of the Criminal Justice Act 1988 (c.33) (compensation for miscarriages of justice)—

(a) after subsection (1) insert—

"(1A) The Scottish Ministers may by order provide for—

(a) further circumstances in respect of which a person (or, if dead, the person's representatives) may be paid compensation for a miscarriage of justice,

(b) circumstances in respect of which a person (or, if dead, the person's representatives) may be paid compensation for wrongful detention prior to acquittal or a decision by the prosecutor to take no proceedings (or to discontinue proceedings).",

(b) after subsection (2) insert—

"(2AA) Such an application requires to be made within the period of 3 years starting with—

(a) in the case of compensation under subsection (1), the date on which the conviction is reversed or (as the case may be) the person is pardoned,

(b) in the case of compensation under subsection (1A), whichever is relevant of—

(i) that date, or

(ii) the date on which the person is acquitted or the relevant decision is made known to the person.

(2AB) The Scottish Ministers may accept such an application outwith that time limit if they think it is appropriate in exceptional circumstances to do so.",

(c) in subsection (4A), after paragraph (a) insert—

"(aa) the seriousness of the offence with which the person was charged or detained (but in respect of which offence the person was not convicted);",

(d) after subsection (4A) insert—

"(4B) The assessor must also have particular regard to any guidance issued by the Scottish Ministers for the purposes of this section.",

(e) in subsection (5)—

(i) after "quashed" insert "(or set aside)",

(ii) the word "or" where it occurs immediately after each of paragraphs (a), (b) and (c) is repealed,

(iii) after paragraph (d) add "; or

(e) under section 188(1)(b) of the Criminal Procedure (Scotland) Act 1995.",

(f) after subsection (6) insert—

"(6A) For the purposes of this section, a person suffers punishment as a result of conviction also where (in relation to the conviction) the court imposes some other disposal including by way of—

(a) making a probation order, or

(b) discharging the person absolutely.", and

(g) after subsection (7) insert—

"(8) The power to make an order under subsection (1A) is exercisable by statutory instrument.

(9) A statutory instrument containing such an order is subject to annulment in pursuance of a resolution of the Scottish Parliament.".

(2) In Schedule 12 to that Act (assessors of compensation for miscarriages of justice), in paragraph 1—

(a) immediately after sub-paragraph (c), insert "or", and

(b) sub-paragraph (e) and the word "or" immediately preceding it are repealed.

83 Financial reporting orders

In section 77 of the Serious Organised Crime and Police Act 2005 (c.15) (financial reporting orders: making in Scotland), after subsection (4) insert—

"(4A) A financial reporting order may be made—

(a) on the prosecutor's motion, or

(b) at the court's own instance.".

84 Compensation orders

(1) In section 249 of the 1995 Act (compensation order against convicted person)—

(a) in subsection (1)—

(i) for "Subject to subsections (2) and (4) below, where" substitute "Where",

(ii) after "compensation" where it second occurs insert "in favour of the victim",

(b) after subsection (1A) insert—

"(1B) Where a person is convicted of an offence, the court may (instead of or in addition to dealing with the person in any other way), in accordance with subsections (3A) to (3C), make a compensation order requiring the convicted person to pay compensation in favour of—

(a) the victim, or

(b) a person who is liable for funeral expenses in respect of which subsection (3C)(b) allows a compensation order to be made.

(1C) For the purposes of subsection (1B)(a), "victim" means—

(a) a person who has suffered personal injury, loss or damage in respect of which a compensation order may be made by virtue of subsection (3A), or

(b) a relative (as defined in Schedule 1 to the Damages (Scotland) Act 1976 (c.13)) who has suffered bereavement in respect of which subsection (3C)(a) allows a compensation order to be made.”,

(c) after subsection (3) insert—

“(3A) A compensation order may be made in respect of personal injury, loss or damage (apart from loss suffered by a person’s dependents in consequence of a person’s death) that was caused directly or indirectly by an accident arising out of the presence of a motor vehicle on a road if—

(a) it was being used in contravention of section 143(1) of the Road Traffic Act 1988 (c.52), and

(b) no compensation is payable under arrangements to which the Secretary of State is a party.

(3B) Where a compensation order is made by virtue of subsection (3) or (3A), the order may include an amount representing the whole or part of any loss of (including reduction in) preferential rates of insurance if the loss is attributable to the accident.

(3C) A compensation order may be made—

(a) for bereavement in connection with a person’s death resulting from the acts which constituted the offence,

(b) for funeral expenses in connection with such a death,

except where the death was due to an accident arising out of the presence of a motor vehicle on a road.”,

(d) in subsection (4)—

(i) for “No” substitute “Unless (and to the extent that) subsections (3) to (3C) allow a compensation order to be made, no”,

(ii) in paragraph (b), the words from “, except” to the end are repealed,

(e) subsection (6) is repealed, and

(f) after subsection (8) insert—

“(8A) In summary proceedings before the sheriff, where the fine or maximum fine to which a person is liable on summary conviction of an offence exceeds the prescribed sum, the sheriff may make a compensation order awarding in respect of the offence an amount not exceeding the amount of the fine to which the person is so liable.”.

(2) In section 251 of that Act (review of compensation order)—

(a) paragraph (a) of subsection (1) is repealed, and

(b) after subsection (1) insert—

“(1A) On the application of the prosecutor at any time before a compensation order has been complied with (or fully complied with), the court may increase the amount payable under the compensation order if it is satisfied that the person against whom it was made—

(a) because of the availability of materially different information about financial circumstances, has more means than were made known to the court when the order was made, or

(b) because of a material change of financial circumstances, has more means than the person had then.”.

PART 6

DISCLOSURE

Meaning of “information”

85 Meaning of “information”

(1) In this Part “information”, in relation to an accused, means material of any kind (other than precognitions and victim statements) given to or obtained by the prosecutor in connection with the case against the accused.

(2) In particular, “information” includes—

(a) information contained in precognitions,

(b) information contained in victim statements,

(c) any previous convictions and outstanding charges relating to witnesses whom the prosecutor intends to call in the proceedings against the accused, if the convictions and charges are material to the accused’s case,

(d) in solemn cases, any statements of witnesses whom the prosecutor intends to call in the proceedings against the accused,

(e) in summary cases, any statements of witnesses whom the prosecutor intends to lead in evidence, if any such statement contains information that has not otherwise been disclosed by the prosecutor.

Solemn cases: schedules of information

86 Provision of information to prosecutor

(1) This section applies where—

(a) an accused appears for the first time on petition, or

(b) an accused appears for the first time on indictment.

(2) As soon as practicable after the appearance, the prosecutor must give notice of the appearance to the investigating agency that reported to the prosecutor the matter to which the appearance relates.

(3) As soon as practicable after receiving notice under subsection (2), the investigating agency must comply with subsections (4) and (5).

(4) The investigating agency must prepare and give to the prosecutor schedules listing all the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained (whether by the agency or otherwise) in the course of investigating the matter to which the appearance relates.

(5) For the purposes of subsection (4) the investigating agency must, in relation to each item of information—

(a) determine which of the categories mentioned in subsection (6) it falls into,

(b) list it in a schedule containing information falling into the same category, and

(c) set out a brief description of it.

(6) Those categories are—

(a) sensitive,

(b) highly sensitive,

(c) non-sensitive.

(7) The investigating agency need not include in a schedule prepared under subsection (4) anything that the agency has already included in a schedule prepared under that subsection in relation to the same matter (whether because the same matter has been the subject of an earlier petition or indictment or otherwise).

(8) In this section "sensitive", in relation to an item of information, means that if the item were to be disclosed it would be likely—

(a) to cause serious injury, or death, to any person,

(b) to obstruct or prevent the prevention, detection, investigation or prosecution of crime, or

(c) to cause serious prejudice to the public interest.

(9) In this section "investigating agency" means—

(a) a police force, or

(b) such other person who—

(i) engages (to any extent) in the investigation of crime or sudden deaths, and

(ii) submits reports relating to those investigations to the procurator fiscal,

as the Scottish Ministers may prescribe by regulations.

87 Continuing duty to provide schedules of information

(1) This section applies where—

(a) an investigating agency has complied with section 86(3) in relation to an accused, and

(b) during the relevant period the investigating agency becomes aware that further information that may be relevant to the case for or against the accused has been obtained (whether by the agency or otherwise) in the course of investigating the accused's case.

(2) The agency must comply with the duties imposed by section 86(3) in relation to that further information.

(3) In this section—

"investigating agency" has the same meaning as in section 86,

"the relevant period" means the period—

(a) beginning with the investigating agency's compliance with section 86(3) in relation to the accused, and

(b) ending with the agency's receiving notice from the prosecutor of the conclusion of the proceedings against the accused.

(4) For the purposes of this section, proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the indictment falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

88 Review and adjustment of schedules of information

(1) This section applies where by virtue of section 86(3) or 87(2) a prosecutor receives from an investigating agency schedules of information relating to an accused.

(2) The prosecutor must—

(a) review the schedules, and

(b) consider in relation to each piece of information whether the prosecutor agrees with the determination made by the agency by virtue of section 86(5)(a) or 87(2).

(3) If in relation to an item of information the prosecutor disagrees with the determination made by the agency, the prosecutor must—

(a) return the schedules to the agency from whom the prosecutor received them, and

(b) require the agency to adjust the schedules so as to include the item of information in the category mentioned in section 86(5)(a) into which the prosecutor considers that the item of information falls.

(4) As soon as practicable after receiving the schedules, the investigating agency must—

(a) adjust them in the way required by the prosecutor, and

(b) return them to the prosecutor.

Duties

89 Prosecutor’s duty to disclose information

(1) This section applies where—

(a) an accused appears for the first time on petition,

(b) an accused appears for the first time on indictment, or

(c) a plea of not guilty is recorded against an accused charged on summary complaint.

(2) As soon as practicable after the appearance or the recording of the plea, the prosecutor must—

(a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

(b) determine whether subsection (3) applies to any of the information.

(3) This subsection applies if—

(a) the information would materially weaken or undermine the prosecution case,

(b) the information would materially strengthen the accused's case, or

(c) the information is likely to form part of the prosecution case.

(4) The following are examples of information to which subsection (3) applies—

(a) information that tends to exculpate the accused,

(b) information that would be likely to be of material assistance to the proper preparation or presentation of the accused's defence,

(c) information that relates to a material line of the accused's defence and which is likely to form part of the prosecution case.

(5) If subsection (3) applies to any of the information, the prosecutor must disclose that information to the accused.

(6) If subsection (3) does not apply, the prosecutor must notify the accused of that fact.

(7) The prosecutor need not disclose under subsection (5) anything that the prosecutor has already disclosed in relation to the same matter (whether because the same matter has been the subject of an earlier petition, indictment or complaint or otherwise).

90 Continuing duty of prosecutor

(1) This section applies where the prosecutor has complied with subsection (5) or (6) of section 89 in relation to an accused.

(2) During the relevant period, the prosecutor must—

(a) from time to time review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware,

(b) determine whether subsection (3) of section 89 applies to any of the information, and

(c) comply with subsection (5) or (6) of that section.

(3) In subsection (2) "the relevant period" means the period—

(a) beginning with the prosecutor's compliance with subsection (5) or (6) of section 89 in relation to an accused, and

(b) ending with the conclusion of the proceedings against the accused.

(4) For the purposes of this section, proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the indictment or complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

91 Exemptions from disclosure

Information must not be disclosed under section 89(5) or 90(2) to the extent that it is material the disclosure of which is prohibited by section 17 of the Regulation of Investigatory Powers Act 2000 (c.23).

92 Redaction of non-disclosable information by prosecutor

(1) Subsection (2) applies where—

(a) by virtue of section 89(5), 90(2)(c), 94(1)(c) or 95(3)(c) the prosecutor is required to disclose to the accused an item of information (the "disclosable information"), and

(b) the disclosable information forms part of, or contains, other information (the "non-disclosable information") which the prosecutor is not required to disclose by virtue of any of those sections.

(2) Before disclosing the disclosable information, the prosecutor may (whether by redaction or otherwise) remove or obscure the non-disclosable information.

93 Solemn cases: additional disclosure requirement

(1) Subsection (2) applies where the prosecutor is obliged to comply with the requirement imposed by subsection (5) of section 89 in relation to an accused such as is mentioned in paragraph (a) or (b) of subsection (1) of that section.

(2) In addition to complying with that requirement, the prosecutor must also disclose to the accused any schedule of information which—

(a) relates to the proceedings against the accused, and

(b) following the making of any adjustment required by virtue of section 88(3)(b), is specified as falling into the category of non-sensitive.

(3) In this section "sensitive" has the same meaning as in section 86.

Defence statements

94 Defence statements: solemn proceedings

(1) As soon as practicable after the accused lodges under section 70A of the 1995 Act a defence statement or a pre-trial statement, the prosecutor must—

(a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware,

(b) determine whether subsection (3) of section 89 applies to any of that information, and

(c) comply with subsection (5) or (6) of section 89.

(2) After section 70 of the 1995 Act insert—

“70A Defence statements

(1) This section applies where an indictment is served on an accused.

(2) The accused must lodge a defence statement at least 14 days before the first diet.

(3) The accused must lodge a defence statement at least 14 days before the preliminary hearing.

(4) The accused must lodge a statement (a “pre-trial statement”) at least 7 days before the trial diet stating—

(a) in relation to the last defence statement lodged by the accused by virtue of this section, whether there has been a material change in circumstances since the defence statement was lodged, and

(b) if so, setting out details of the change and the new position.

(5) The accused may lodge a defence statement at any other time before the trial diet.

(6) In this section “defence statement” means a statement setting out—

(a) the nature of the accused’s defence, including any particular defences on which the accused intends to rely,

(b) any matters of fact on which the accused takes issue with the prosecution and the reason for doing so,

(c) any point of law in relation to disclosure which the accused wishes to take and any authority on which the accused intends to rely for that purpose,

(d) by reference to the accused’s defence, the nature of any information that the accused requires the prosecutor to disclose, and

(e) the reasons why the accused considers that disclosure by the prosecutor of any such information is necessary.”.

95 Defence statements: summary proceedings

(1) This section applies where—

(a) a plea of not guilty is recorded against an accused charged on summary complaint, and

(b) during the relevant period the prosecutor receives from the accused a defence statement.

(2) A defence statement must set out—

(a) the nature of the accused’s defence, including any particular defences on which the accused intends to rely,

(b) any matters of fact on which the accused takes issue with the prosecution and the reason for doing so,

(c) any point of law in relation to disclosure which the accused wishes to take and any authority on which the accused intends to rely for that purpose,

(d) by reference to the accused's defence, the nature of any information that the accused wishes the prosecutor to disclose, and

(e) the reasons why the accused considers that disclosure by the prosecutor of any such information is necessary.

(3) As soon as practicable after receiving the defence statement the prosecutor must—

(a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware,

(b) determine whether subsection (3) of section 89 applies to any of that information, and

(c) comply with subsection (5) or (6) of that section.

(4) In this section "the relevant period", in relation to the accused, is the period—

(a) beginning with the recording of the accused's plea of not guilty, and

(b) ending with the conclusion of the proceedings to which the plea relates.

(5) For the purposes of subsection (4), proceedings are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

Effect of guilty plea

96 Effect of guilty plea

(1) This section applies where—

(a) by virtue of section 89(5), 90(2)(c), 94(1)(c) or 95(3)(c) the prosecutor is required to disclose information to an accused, but

(b) before the prosecutor does so, a plea of guilty is recorded against the accused.

(2) The prosecutor need not comply with the requirement in so far as it relates to the disclosure of information which is likely to form part of the prosecution case.

(3) Subsections (1) and (2) cease to apply if the accused withdraws the plea of guilty.

Means of disclosure

97 Means of disclosure

(1) This section applies where by virtue of section 89(5), 90(2)(c), 94(1)(c) or 95(3)(c) the prosecutor is required to disclose information to an accused.

(2) The prosecutor may disclose the information by any means.

(3) In particular, the prosecutor may disclose the information by enabling the accused to inspect it at a reasonable time and in a reasonable place.

Confidentiality

98 Confidentiality of disclosed information

(1) This section applies where by virtue of section 89(5), 90(2)(c), 94(1)(c) or 95(3)(c) the prosecutor discloses information to an accused.

(2) The accused must not use or disclose the information or anything recorded in it other than in accordance with subsection (3).

(3) The accused may use or disclose the information—

(a) for the purposes of the proper preparation and presentation of the accused's case in the proceedings in relation to which the information was disclosed ("the original proceedings"),

(b) with a view to the taking of an appeal in relation to the matter giving rise to the original proceedings,

(c) for the purposes of the proper preparation and presentation of the accused's case in any such appeal.

(4) A person to whom information is disclosed by virtue of subsection (3) must not use or disclose the information or anything recorded in it other than for the purpose for which it was disclosed.

(5) In subsection (3) "appeal" includes the reference of a case to the High Court of Justiciary by the Scottish Criminal Cases Review Commission under section 194B of the 1995 Act.

(6) Nothing in this section affects any other restriction or prohibition on the use or disclosure of information, whether the restriction or prohibition arises by virtue of an enactment (whenever passed or made) or otherwise.

99 Contravention of section 98

(1) A person who knowingly uses or discloses information in contravention of section 98 commits an offence.

(2) A person guilty of an offence under subsection (1) is liable—

(a) on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both,

(b) on conviction on indictment to imprisonment for a term not exceeding 2 years or to a fine or to both.

Disclosure to third party

100 Order enabling disclosure to third party

(1) This section applies where by virtue of section 89(5), 90(2)(c), 94(1)(c) or 95(3)(c) the prosecutor discloses information to an accused.

(2) On the application of the accused the court may make an order enabling the accused to disclose specified information to a specified person for a specified purpose.

(3) Before making an order under this section the court must give—

(a) the prosecutor, and

(b) any person appearing to the court to have an interest in the information to which the application relates,

an opportunity to be heard.

(4) Section 99 does not apply in relation to information disclosed by virtue of an order under this section.

(5) In this section—

"court" means—

(a) if the proceedings in relation to which the information was disclosed to the accused are on indictment, the court hearing the proceedings,

(b) if the proceedings in relation to which the information was disclosed to the accused are petition or summary proceedings, the sheriff, and

"specified" means specified in the order.

101 Contravention of order under section 100

(1) A person who knowingly uses or discloses information in contravention of an order under section 100(2) commits an offence.

(2) A person guilty of an offence under subsection (1) is liable—

(a) on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both,

(b) on conviction on indictment to imprisonment for a term not exceeding 2 years or to a fine or to both.

Applications to court: orders restricting disclosure

102 Application for non-disclosure order

(1) This section applies where—

(a) by virtue of section 89(5), 90(2)(c), 94(1)(c) or 95(3)(c) the prosecutor is required to disclose an item of information to an accused,

(b) section 89(3)(a) or (b) applies to the information, and

(c) the prosecutor considers that subsection (2) applies.

(2) This subsection applies if disclosure of the item of information—

(a) would be likely to cause serious injury, or death, to any person,

(b) would be likely to obstruct or prevent the prevention, detection, investigation or prosecution of crime, or

(c) would be likely to cause serious prejudice to the public interest.

(3) The prosecutor must apply to the court for a non-disclosure order in relation to the item of information.

(4) A non-disclosure order is an order under section 106 requiring the prosecutor to withhold (wholly or to a specified extent) from the accused a specified item of information—

(a) that the prosecutor would otherwise be required to disclose to the accused by virtue of section 89(5), 90(2)(c), 94(1)(c) or, as the case may be, 95(3)(c), and

(b) to which section 89(3)(a) or (b) applies.

(5) In subsection (4), "specified" means specified in the order.

103 Application for non-notification order or exclusion order

(1) This section applies where the prosecutor is required by section 102(3) to apply to the court for a non-disclosure order.

(2) If the application for a non-disclosure order relates to solemn proceedings, the prosecutor may apply to the court for—

(a) a non-notification order and an exclusion order, or

(b) an exclusion order (but not a non-notification order).

(3) If the application for a non-disclosure order relates to summary proceedings, the prosecutor may apply to the court for an exclusion order.

(4) A non-notification order is an order under section 104 prohibiting notice being given to the accused of—

(a) the making of an application for—

(i) the non-disclosure order to which the non-notification order relates,

(ii) the non-notification order, and

(iii) an exclusion order, and

(b) the determination of those applications.

(5) An exclusion order is an order under section 105 prohibiting the accused from attending or making representations in proceedings for the determination of the application for a non-disclosure order to which the exclusion order relates.

(6) Subsection (7) applies where the prosecutor applies—

(a) by virtue of subsection (2)(a) for a non-notification order and an exclusion order, or

(b) by virtue of subsection (2)(a) or (b) for an exclusion order.

(7) Before determining in accordance with section 106 the application for the non-disclosure order, the court must—

(a) in accordance with section 104, determine any applications for a non-notification order and an exclusion order,

(b) in accordance with section 105, determine any application for an exclusion order.

104 Application for non-notification order and exclusion order

(1) This section applies where the prosecutor applies for a non-notification order and an exclusion order.

(2) On receiving the application, the court must appoint a hearing to determine whether a non-notification order should be made.

(3) The accused is not to be notified of—

(a) the applications for the non-disclosure order, non-notification order and exclusion order, or

(b) the hearing appointed under subsection (2).

(4) The accused is not to be given the opportunity to be heard or be represented at the hearing.

(5) If, after giving the prosecutor an opportunity to be heard, the court is satisfied that the conditions in subsection (6) are met, the court may make a non-notification order.

(6) Those conditions are—

(a) that disclosure to the accused of the making of the application for the non-disclosure order would be likely to disclose to the accused the nature of the information to which that application relates,

(b) that it is not in the public interest that the nature of the information be disclosed to the accused, and

(c) that, having regard to all the circumstances, the making of a non-notification order would be consistent with the accused's receiving a fair trial.

(7) If the court makes a non-notification order, it must also make an exclusion order.

(8) If the court refuses to make a non-notification order—

(a) the court must appoint a hearing to determine the application for an exclusion order,

(b) the court must give notice to the accused of the hearing, and

(c) if, after giving the prosecutor and the accused an opportunity to be heard, the court is satisfied that the conditions in subsection (4) of section 105 are met, the court may make an exclusion order under subsection (3) of that section.

105 Application for exclusion order

(1) This section applies where by virtue of section 103(2)(b) the prosecutor applies for an exclusion order (but not a non-notification order).

(2) On receiving the application the court must appoint a hearing.

(3) If after giving the prosecutor and the accused an opportunity to be heard the court is satisfied that the conditions in subsection (4) are met, the court may make an exclusion order.

(4) Those conditions are—

(a) that disclosure to the accused of the nature of the information to which the application for the non-disclosure order relates would be likely to disclose to the accused that information,

(b) that it is not in the public interest that the nature of the information be disclosed to the accused, and

(c) that, having regard to all the circumstances, the making of an exclusion order would be consistent with the accused's receiving a fair trial.

106 Application for non-disclosure order: determination

(1) This section applies where—

(a) the prosecutor applies for a non-disclosure order, and

(b) any application for a non-notification order or an exclusion order has been determined by the court.

(2) If after—

(a) considering the item of information to which the application for a non-disclosure order relates, and

(b) giving the prosecutor and (if the court has not made an exclusion order) the accused the opportunity to be heard,

the court is satisfied that the conditions mentioned in subsection (3) are met, the court may grant a non-disclosure order.

(3) The conditions are—

(a) that by virtue of section 89(5), 90(2)(c), 94(1)(c) or 95(3)(c) the prosecutor is required to disclose the item of information,

(b) that if the item of information were to be disclosed it would be likely—

(i) to cause serious injury, or death, to any person,

(ii) to obstruct or prevent the prevention, detection, investigation or prosecution of crime, or

(iii) to cause serious prejudice to the public interest,

(c) that withholding the item of information would be consistent with the accused's receiving a fair trial, and

(d) that the public interest would be protected only if a non-disclosure order were to be made.

(4) In determining the application, the court must consider whether the item of information could in the opinion of the court be disclosed or partly disclosed in such a way that—

(a) the conditions in paragraph (b) of subsection (3) would not be met, and

(b) the disclosure (or partial disclosure) would be consistent with the accused's receiving a fair trial.

(5) For the purposes of subsection (4) the ways in which the item of information might be disclosed or partly disclosed include in particular—

(a) providing the information after (whether by redaction or otherwise) removing or obscuring parts of it,

(b) providing extracts or summaries of the information or part of it.

(6) Where the court determines that the item of information could be disclosed (or partly disclosed) as mentioned in subsection (4), the court may, instead of making a non-disclosure order, make an order requiring the prosecutor to disclose to the accused the item of information in the way specified in the order.

Special counsel

107 Special counsel

(1) This section applies where the court is determining—

(a) an application for—

(i) a non-notification order,

(ii) an exclusion order, or

(iii) a non-disclosure order,

(b) an application for review of the grant or refusal of any of those orders,

(c) an appeal relating to any of those orders.

(2) If the condition in subsection (3) is met, the court may appoint a person ("special counsel") to represent the interests of the accused to whom the application, review or appeal relates.

(3) The condition is that the court considers that the appointment of special counsel is necessary to ensure that the accused receives a fair trial.

Appeals

108 Appeal by prosecutor against refusal of application for order

(1) This section applies where the court refuses an application by the prosecutor for—

(a) a non-notification order,

(b) an exclusion order, or

(c) a non-disclosure order.

(2) The prosecutor may appeal against the decision of the court.

109 Appeal by accused against making of exclusion order or non-disclosure order

The accused may appeal against an order of the court making an exclusion order or a non-disclosure order.

110 Appeal by special counsel

(1) This section applies where—

(a) the court makes a non-notification order, an exclusion order or a non-disclosure order, and

(b) special counsel was appointed in relation to the application for any of those orders.

(2) Special counsel may appeal against the making of the order.

Reviews

111 Review of grant of non-disclosure order

(1) This section applies where—

(a) the court makes a non-disclosure order, and

(b) during the relevant period—

(i) the prosecutor or the accused becomes aware of information that was unavailable to the court at the time when the order was made, and

(ii) the prosecutor or, as the case may be, the accused considers that the information is material information that the prosecutor ought to disclose to the accused by virtue of section 89(5), 90(2)(c), 94(1)(c) or 95(3)(c).

(2) The prosecutor or, as the case may be, the accused may apply to the court to review the non-disclosure order.

(3) Except in the case mentioned in subsection (4), the same persons are entitled to be heard on the application for review as were entitled to be heard on the application for the non-disclosure order.

(4) If—

(a) a non-notification order was granted in relation to the non-disclosure order which is under review, and

(b) the court is satisfied that the conditions in section 104(6) are met,

the court may, where the prosecutor applies for the review, make an order prohibiting notification being given to the accused of the application for review.

(5) If—

(a) an exclusion order was granted in relation to the non-disclosure order which is under review, and

(b) the court is satisfied that the conditions in section 105(4) are met,

the court may, where the prosecutor or the accused applies for the review, exclude the accused from the review.

(6) If the court is not satisfied that the conditions mentioned in section 106(3) are met, the court may—

(a) recall the non-disclosure order, or

(b) recall the non-disclosure order and make an order requiring disclosure to the specified extent.

(7) Nothing in this section affects any right of appeal in relation to the non-disclosure order.

(8) In this section—

"specified" means specified in the order of the court,

"the relevant period", in relation to an accused, means the period—

(a) beginning with the making of the non-disclosure order, and

(b) ending with the conclusion of the proceedings against the accused.

(9) For the purposes of this section, proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal.

(e) any appeal by the prosecutor is determined or abandoned, or

(f) the accused is convicted and any appeal is determined or abandoned.

112 Review by court of non-disclosure order

(1) This section applies where the court makes a non-disclosure order.

(2) During the relevant period, the court must from time to time consider whether, having regard to the information of which the court is aware, the non-disclosure order continues to be appropriate.

(3) If the court considers that the non-disclosure order might no longer be appropriate, the court must appoint a hearing to review the matter.

(4) In this section "the relevant period" has the same meaning as in section 90(4).

Applications and reviews: general

113 Applications and reviews: general provisions

(1) This section applies in relation to—

(a) an application for an order mentioned in subsection (2), and

(b) a review relating to such an order.

(2) The orders are—

(a) a non-notification order.

(b) an exclusion order,

(c) a non-disclosure order.

(3) Except where it is impracticable to do so, the application or review is to be assigned to the same justice of the peace, sheriff or, as the case may be, judge as has been (or is to be assigned) to the trial diet in the proceedings against the accused to which the application relates.

(4) The accused is not entitled to see or be made aware of the contents of an application for—

(a) a non-notification order,

(b) an exclusion order,

(c) a non-disclosure order,

(d) a review made by the prosecutor.

Code of practice

114 Code of practice

(1) The Lord Advocate—

(a) must issue a code of practice providing guidance about this Part, and

(b) may from time to time revise the code for the time being in force.

(2) The persons mentioned in subsection (3) must have regard to the code of practice for the time being in force in carrying out their functions in relation to the investigation and reporting of crime and sudden deaths.

(3) Those persons are—

- (a) police forces,
- (b) prosecutors,
- (c) such other persons who—
  - (i) engage (to any extent) in the investigation of crime or sudden deaths, and
  - (ii) submit reports relating to those investigations to the procurator fiscal,

  as the Scottish Ministers may prescribe by regulations.

(4) The Lord Advocate must lay before the Scottish Parliament any code or revised code issued under this section.

Acts of Adjournal

115 Acts of Adjournal

The High Court may by Act of Adjournal make such rules as it considers necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of this Part.

Interpretation of Part 6

116 Interpretation of Part 6

(1) In this Part "prosecutor" and "procurator fiscal" have the meanings given by section 307(1) of the 1995 Act.

(2) References in the following sections to the accused include references to a solicitor or advocate acting on behalf of the accused—

- (a) section 89(5) and (6),
- (b) section 90(1),
- (c) section 93(2) (where it first occurs),
- (d) section 95(1)(b),
- (e) section 97,
- (f) section 98(1), and (2) and (where it first occurs) (3),
- (g) section 100,
- (h) section 102,
- (i) section 103,
- (j) section 104,
- (k) section 105,
- (l) section 106(2), and
- (m) section 111(1), (2), (4) and (5).

PART 7

MENTAL DISORDER AND UNFITNESS FOR TRIAL

117 Criminal responsibility of persons with mental disorder

(1) Before section 52 of the 1995 Act insert—

“*Criminal responsibility of mentally disordered persons*

51A Criminal responsibility of persons with mental disorder

(1) A person is not criminally responsible for conduct constituting an offence, and is to be acquitted of the offence, if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.

(2) But a person does not lack criminal responsibility for such conduct if the mental disorder in question consists only of a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct.

(3) The defence set out in subsection (1) is a special defence.

(4) The special defence may be stated only by the person charged with the offence and it is for that person to establish it on the balance of probabilities.

(5) In this section, “conduct” includes acts and omissions.

Diminished responsibility

51B Diminished responsibility

(1) A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person’s ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind.

(2) For the avoidance of doubt, the reference in subsection (1) to abnormality of mind includes mental disorder.

(3) The fact that a person was under the influence of alcohol, drugs or any other substance at the time of the conduct in question does not of itself—

(a) constitute abnormality of mind for the purposes of subsection (1), or

(b) prevent it from being established for those purposes.

(4) It is for the person charged with murder to establish, on the balance of probabilities, that the condition set out in subsection (1) is satisfied.

(5) In this section, “conduct” includes acts and omissions.”.

118 Acquittal involving mental disorder: procedure

Before section 54 of the 1995 Act insert—

“*Acquittal involving mental disorder*

53E Acquittal involving mental disorder

(1) Where the prosecutor accepts a plea by the person charged with the commission of an offence of the special defence set out in section 51A of this Act, the court must declare that the person is acquitted by reason of the special defence.

(2) Subsection (3) below applies where—

(a) the prosecutor does not accept such a plea, and

(b) evidence tending to establish the special defence set out in section 51A of this Act is brought before the court.

(3) Where this subsection applies the court is to—

(a) in proceedings on indictment, direct the jury to find whether the special defence has been established and, if they find that it has, to declare whether the person is acquitted on that ground,

(b) in summary proceedings, state whether the special defence has been established and, if it states that it has, declare whether the person is acquitted on that ground.”.

119 Unfitness for trial

(1) In the 1995 Act, after section 53E (inserted by section 118), insert—

“*Unfitness for trial*

53F Unfitness for trial

(1) A person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of a mental or physical condition, of participating effectively in a trial.

(2) In determining whether a person is unfit for trial the court is to have regard to—

(a) the ability of the person to—

(i) understand the nature of the charge,

(ii) understand the requirement to tender a plea to the charge and the effect of such a plea,

(iii) understand the purpose of, and follow the course of, the trial,

(iv) understand the evidence that may be given against the person,

(v) instruct and otherwise communicate with the person’s legal representative, and

(b) any other factor which the court considers relevant.

(3) The court is not to find that a person is unfit for trial by reason only of the person being unable to recall whether the event which forms the basis of the charge occurred in the manner described in the charge.

(4) In this section "the court" means—

(a) as regards a person charged on indictment, the High Court or the sheriff court,

(b) as regards a person charged summarily, the sheriff court.".

(2) The title of section 54 of the 1995 Act (insanity in bar of trial) is replaced by "Unfitness for trial: further provision", the cross-heading which precedes it is omitted and the section is amended as follows—

(a) in subsection (1)—

(i) the words ", on the written or oral evidence of two medical practitioners," are repealed, and

(ii) for "insane" substitute "unfit for trial",

(b) in subsection (3)—

(i) for "the insanity of a person" substitute "whether a person is unfit for trial", and

(ii) after "mental" insert "or physical", and

(c) in subsection (5), for "insane" substitute "unfit for trial".

(3) Subsections (6) and (7) are repealed.

120 Abolition of common law rules

Any rule of law providing for—

(a) the special defence of insanity,

(b) the plea of diminished responsibility, or

(c) insanity in bar of trial,

ceases to have effect.

PART 8

LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982

121 Conditions to which licences under 1982 Act are to be subject

(1) The 1982 Act is amended as follows.

(2) In section 3(4) (automatic grant or renewal of licence where application not determined within specified period), the word "unconditionally" is repealed.

(3) After section 3 insert—

"3A Mandatory licence conditions

(1) The Scottish Ministers may by order made by statutory instrument prescribe conditions to which licences granted by licensing authorities under this Act are to be subject.

(2) Different conditions may be prescribed under subsection (1)—

(a) in respect of different licences, or different types of licence,

(b) otherwise for different purposes, circumstances or cases.

(3) A statutory instrument containing an order made under subsection (1) is subject to annulment in pursuance of a resolution of the Scottish Parliament.

(4) Subsection (1) does not affect any other power of the Scottish Ministers under this Act or any other enactment to prescribe conditions—

(a) to which licences granted by licensing authorities under this Act are to be subject, or

(b) to be imposed by licensing authorities in granting or renewing licences under this Act.

(5) The following conditions are referred to in this Part and Part 2 of this Act as "mandatory conditions"—

(a) conditions prescribed under subsection (1),

(b) conditions prescribed under any power referred to in subsection (4), and

(c) conditions imposed, or required to be imposed, by any provision of this Part or Part 2 of this Act.

(6) In this section and section 3B, references to licences granted by licensing authorities include references to—

(a) licences renewed by licensing authorities, and

(b) licences deemed by virtue of section 3(4) to be granted or renewed by licensing authorities.

3B Standard licence conditions

(1) A licensing authority may determine conditions to which licences granted by them under this Act are to be subject.

(2) Conditions determined under subsection (1) are referred to in this Part and Part 2 as "standard conditions".

(3) Different conditions may be determined under subsection (1)—

(a) in respect of different licences, or different types of licence,

(b) otherwise for different purposes, circumstances or cases.

(4) A licensing authority must publish, in such manner as they think appropriate, any standard conditions determined by them.

(5) Standard conditions have no effect—

(a) unless they are published, and

(b) so far as they are inconsistent with any mandatory conditions.

(6) Subsection (1) is subject to paragraph 5(1A)(a) of Schedule 1 to this Act.".

(4) In section 27C (conditions in respect of knife dealers' licences)—

(a) in subsection (1)—

(i) in paragraph (b), after "prejudice to" insert "section 3B and", and

(ii) in paragraph (c), after "that" insert "section and", and

(b) subsection (2) is repealed.

(5) In section 41(3) (power to attach conditions to public entertainment licences), after "prejudice to" insert "section 3B of and".

(6) In Schedule 1 (further provisions as to the general licensing system), in paragraph 5—

(a) in sub-paragraph (1)—

(i) in paragraph (a), the word "unconditionally" is repealed, and

(ii) paragraph (b) is repealed,

(b) after that sub-paragraph insert—

"(1A) In granting or renewing a licence under sub-paragraph (1)(a), a licensing authority may (either or both)—

(a) disapply or vary any standard conditions so far as applicable to the licence,

(b) impose conditions in addition to any mandatory or standard conditions to which the licence is subject.",

(c) in sub-paragraph (2), for "(1)(b)" substitute "(1A)(b)", and

(d) after that sub-paragraph insert—

"(2A) A variation made under sub-paragraph (1A)(a) or condition imposed under sub-paragraph (1A)(b) has no effect so far as it is inconsistent with any mandatory condition to which the licence is subject.".

122 Licensing: powers of entry and inspection for civilian employees

(1) The 1982 Act is amended as follows.

(2) In section 5 (rights of entry and inspection)—

(a) in subsection (1), after "licensing authority" insert ", an authorised civilian employee",

(b) in subsection (3)(a) and (b)—

(i) after "constable" where it first occurs insert ", an authorised civilian employee", and

(ii) after "such an" insert "employee or",

(c) in subsection (3)(c), after "constable" insert ", an authorised civilian employee",

(d) in subsection (4)—

(i) after "licensing authority" insert ", an authorised civilian employee", and

(ii) after "the officer" insert ", employee", and

(e) in subsection (6), after "licensing authority" insert "or authorised civilian employee".

(3) In section 8 (interpretation of Parts 1 and 2), after the definition of "appropriate relevant authority" insert—

""authorised civilian employee" means a person—

(a) employed by a police authority under section 9(1)(a) of the Police (Scotland) Act 1967 (c.77), and

(b) authorised by the chief constable for the purposes of sections 5, 11 and 29 of this Act;”.

(4) In section 11 (inspection and testing of vehicles), in subsection (2)—

(a) after “the authority)” insert “, an authorised civilian employee”,

(b) in paragraph (b), after “licensing authority” insert “, an authorised civilian employee”, and

(c) after “authorised officer” where it last occurs, insert “, employee”.

(5) In paragraph 3 (miscellaneous definitions) of Schedule 2 (control of sex shops), after the definition of “appropriate relevant authority” insert—

““authorised civilian employee” means a person—

(a) employed by a police authority under section 9(1)(a) of the Police (Scotland) Act 1967 (c.77), and

(b) authorised by the chief constable for the purposes of paragraph 20 of this Schedule;”.

(6) In paragraph 20 of that Schedule (rights of entry and inspection)—

(a) in sub-paragraph (1), after “local authority” insert “, an authorised civilian employee”,

(b) in sub-paragraph (3), after “local authority” insert “or an authorised civilian employee”, and

(c) in sub-paragraph (5)—

(i) after “constable” where it first occurs insert “, an authorised civilian employee”, and

(ii) after “such” insert “employee or”.

123 Licensing of metal dealers

(1) The 1982 Act is amended as follows.

(2) In section 9 (optional provisions)—

(a) for subsection (1) substitute—

“(1) The provisions mentioned in subsection (1A) (referred to in this section as the “optional provisions”) have effect in the area of a licensing authority only if and in so far as the authority makes a resolution in accordance with subsections (2) to (8).

(1A) Those provisions are—

(a) sections 10 to 27 (except section 20) of this Act,

(b) sections 28 to 43 (except section 41A) of this Act,

(c) any regulations made under section 20 of this Act, and

(d) any order made under section 44(1)(a) of this Act.”.

(3) In section 29 (metal dealers’ exemption warrants)—

(a) in subsection (1)—

(i) for the words from "a certificate" to "stating" substitute "such evidence as they may determine showing",

(ii) for "certificate" where it second occurs substitute "evidence", and

(iii) for the words from "£100,000" to the end substitute "such sum (including nil) as the licensing authority may determine.",

(b) for subsection (2) substitute—

"(2) A licensing authority must publish any determinations made under subsection (1).", and

(c) in subsection (10), the definition of "auditor" is repealed.

124 Licensing of taxis and private hire cars

(1) The 1982 Act is amended as follows.

(2) In section 13 (taxi and private hire car licences), in subsection (3), for "during any continuous period of 12 months" substitute "throughout the period of 12 months immediately".

(3) In section 17 (taxi fares)—

(a) for subsections (2) to (4) substitute—

"(2) The licensing authority must fix scales for the fares and other charges mentioned in subsection (1) within 18 months beginning with the date on which the scales came into effect.

(3) In fixing scales under subsection (2), the licensing authority may—

(a) alter fares or other charges,

(b) fix fares or other charges at the same rates.

(4) Before fixing scales under subsection (2), the licensing authority must review the scales in accordance with subsection (4A).

(4A) In carrying out a review, the licensing authority must—

(a) consult with persons or organisations appearing to it to be, or to be representative of, the operators of taxis operating within its area,

(b) following such consultation—

(i) review the existing scales, and

(ii) propose new scales (whether at altered rates or the same rates),

(c) publish those proposed scales in a newspaper circulating in its area—

(i) setting out the proposed scales,

(ii) explaining the effect of the proposed scales,

(iii) proposing a date on which the proposed scales are to come into effect, and

(iv) stating that any person may make representations in writing until the relevant date, and

(d) consider any such representations.

(4B) In subsection (4A)(c)(iv) "the relevant date" is a date specified by the licensing authority falling at least one month after the first publication by the authority of the proposed scales.

(4C) After fixing scales under subsection (2), the licensing authority must give notice in accordance with subsection (4D).

(4D) The licensing authority must—

(a) set out, and explain the effect of, the scales as fixed,

(b) notify the persons mentioned in subsection (4E) of—

(i) the date on which the scales as fixed are to come into effect, and

(ii) the rights of appeal under section 18.

(4E) Those persons are—

(a) all operators of taxis operating within their area, and

(b) the persons and organisations consulted under subsection (4A)(a).", and

(b) in subsection (5)—

(i) for "(4)" where it first occurs substitute "(4D)(b)",

(ii) in paragraph (a)—

(A) for "(4)" where it first occurs substitute "(4E)",

(B) for "five days after the decision referred to in subsection (4)" substitute "seven days after the scales are fixed under subsection (2)".

(4) In section 18 (appeals in respect of taxi fares)—

(a) for subsection (1) substitute—

"(1) Any person mentioned in subsection (1A) may, within 14 days of notice being given under section 17(4C), appeal against those scales to the traffic commissioner for the Scottish Traffic Area as constituted for the purpose of the Public Passenger Vehicles Act 1981.",

(b) after that subsection insert—

"(1A) Those persons are—

(a) any person who operates a taxi in an area for which scales have been fixed under section 17(2), and

(b) any person or organisation appearing to the traffic commissioner to be representative of such taxi operators.",

(c) in subsection (3)—

(i) the words "to them" are repealed,

(ii) in paragraph (b) the word "may" is repealed, and

(iii) in paragraph (b)(i), for "on the grounds that" substitute "if", and

(d) subsection (9) is repealed.

(5) After section 18 insert—

“18A Publication and coming into effect of taxi fares

(1) Following the fixing of scales by a licensing authority under section 17(2), the licensing authority must—

(a) determine the date on which the scales are to come into effect, and

(b) publish the scales in accordance with subsections (3) to (5).

(2) The scales may come into effect no earlier than seven days after the date on which they are published.

(3) The licensing authority must—

(a) give notice of the scales by advertisement in a newspaper circulating in its area, and

(b) specify in that advertisement the date on which the scales are to come into effect.

(4) The authority must give notice of the scales—

(a) where no appeal has been lodged under subsection (1) of section 18, as soon as practicable after the expiry of the period of 14 days mentioned in that subsection,

(b) where such an appeal has been lodged, as soon as practicable after the determination of the appeal.

(5) For the purposes of subsection (4), an appeal is determined on the date on which the appeal is abandoned or notice is given to the appellant of its disposal.”.

125 Licensing of market operators

(1) Section 40 of the 1982 Act (market operators’ licences) is amended as follows.

(2) In subsection (2), the words from “either” to the end of paragraph (a) are repealed.

(3) In subsection (4), the words “by retail” are repealed.

126 Licensing of public entertainment

(1) Section 41 of the 1982 Act (public entertainment licences) is amended as follows.

(2) In subsection (2)—

(a) the words “, on payment of money or money’s worth,” are repealed,

(b) in paragraph (d), for “, section 1 of the Cinemas Act 1985 or Part II of the Gaming Act 1968” substitute “or section 1 of the Cinemas Act 1985”,

(c) for paragraph (e), substitute—

“(e) premises in respect of which there is a club gaming permit (within the meaning of section 271 of the Gambling Act 2005 (c.19)) or a prize gaming permit (within the meaning of section 289 of that Act of 2005);”,

(d) the word “or” immediately preceding paragraph (g) is repealed, and

(e) after paragraph (g), add “, or

(h) such other premises as the Scottish Ministers may by order made by statutory instrument specify.”.

(3) After subsection (2) insert—

“(2A) A statutory instrument containing an order made under subsection (2)(h) is subject to annulment in pursuance of a resolution of the Scottish Parliament.”.

127 Licensing of late night catering

(1) Section 42 of the 1982 Act (late hours catering) is amended as follows.

(2) In subsections (1) and (2), for “meals or refreshment” in each place where those words occur substitute “food”.

(3) In subsection (2), for “they are” substitute “it is”.

(4) In subsection (3), for “meals or refreshments” in both places where those words occur substitute “food”.

(5) After subsection (6), add—

“(7) In this section “food” has the meaning given in section 1 of the Food Safety Act 1990 (c.16).”.

128 Applications for licences

(1) The 1982 Act is amended as follows.

(2) In Schedule 1 (further provisions as to the general licensing system)—

(a) in paragraph 1(2)(b), for “and address” in both places where those words occur substitute “, address and date and place of birth”,

(b) in paragraph 1(2)(c)—

(i) in sub-paragraph (iii), for “and private addresses” substitute “, private addresses and dates and places of birth”, and

(ii) in sub-paragraph (iv), for “and address” substitute “, address and date and place of birth”,

(c) in paragraph 3(1)(e), for “21” substitute “28”,

(d) in paragraph 4(2), for “7” substitute “14”,

(e) in paragraph 8, after sub-paragraph (5) insert—

“(5A) On good cause being shown, a licensing authority may, for the purposes of sub-paragraph (5), deem an application for renewal of a licence made up to 28 days after the expiry of the licence to be an application made before the expiry.”,

(f) in paragraph 11(8), for “21” substitute “14”, and

(g) in paragraph 17(2), for “28” substitute “21”.

(3) In Schedule 2 (control of sex shops)—

(a) in paragraph 6(2), for paragraph (b) substitute—

“(b) the date and place of birth of the applicant;”,

(b) in paragraph 6(2)(c), for “age” substitute “date and place of birth”,

(c) in paragraph 6(3)—

(i) in paragraph (c), for "and private addresses" substitute ", private addresses and dates and places of birth", and

(ii) in paragraph (d), for "age" substitute "date and place of birth",

(d) in paragraph 8(7), after "them" insert "and, where they propose to do so, must, within such reasonable period (not being less than 14 days) of the date of the hearing, notify the applicant and each such person of that date",

(e) in paragraph 9(3), in both paragraphs (e) and (f), for "the United Kingdom" substitute "a member state of the European Union",

(f) in paragraph 12, after sub-paragraph (3) insert—

"(3A) On good cause being shown, a local authority may, for the purposes of sub-paragraph (3), deem an application for renewal of a licence made up to 28 days after the expiry of the licence to be an application made before the expiry.",

(g) in paragraph 13(6), for "21" substitute "14", and

(h) in paragraph 23(2), for "28" substitute "21".

PART 9

ALCOHOL LICENSING

129 Sale of alcohol to persons under 21 etc.

(1) The 2005 Act is amended as follows.

(2) In section 7 (duty to assess overprovision)—

(a) in subsection (1), after "statement" where it second occurs insert "(an "overprovision statement")", and

(b) after subsection (1) insert—

"(1A) A Licensing Board may at any time review an overprovision statement.".

(3) After section 7 insert—

"7A Duty to assess impact of off-sales to persons under the age of 21

(1) Each licensing policy statement published by a Licensing Board must in particular include a statement (a "detrimental impact statement") as to the extent to which the Board considers that off-sales to persons under the age of 21—

(a) in its area, or

(b) in any locality within its area,

are having a detrimental impact in that area or locality.

(2) In subsection (1)—

(a) "off-sales" means the sale of alcohol on licensed premises for consumption off those premises,

(b) "detrimental impact" means any adverse effect on one or more of the licensing objectives.

(3) A Licensing Board may at any time review a detrimental impact statement.

(4) In preparing a detrimental impact statement, a Licensing Board must—

(a) ensure that the policy stated in the statement seeks to promote the licensing objectives, and

(b) consult—

(i) the Local Licensing Forum for the Board's area,

(ii) if the membership of the Forum is not representative of the interests of all of the persons specified in paragraph 2(6) of schedule 2, such person or persons as appear to the Board to be representative of those interests of which the membership is not representative, and

(iii) such other persons as the Board thinks appropriate.

(5) At the request of a Licensing Board—

(a) the appropriate chief constable, or

(b) the relevant council,

must provide to the Board such statistical or other information as the Board may reasonably require for the purpose of preparing a detrimental impact statement.

(6) A Licensing Board must, at the request of—

(a) the appropriate chief constable, or

(b) the Local Licensing Forum for the Licensing Board's area,

within 42 days of the date of receipt of the request, consider reviewing the detrimental impact statement.

(7) Where, following a review under subsection (3) or (6), a Licensing Board revises the detrimental impact statement, it must publish it in a supplementary licensing policy statement.

(8) It is for the Licensing Board to determine a "locality" within its area for the purposes of subsection (1).

(9) In subsection (2)(a) "licensed premises" does not include premises in respect of which an occasional licence has effect.".

(4) After section 27 insert—

"27A Power of Board to vary premises licence conditions

(1) A Licensing Board may, in relation to any matter which the Scottish Ministers may by regulations prescribe, make a variation of the conditions to which a premises licence in respect of licensed premises within its area is subject.

(2) A variation under subsection (1) may apply to—

(a) all licensed premises,

(b) particular licensed premises,

(b) licensed premises within particular parts of its area, or

(c) licensed premises of a particular description.

(3) A variation under subsection (1) has effect for such period as the Board may specify in it.

(4) The Board may make a variation under subsection (1) only where it is satisfied that the variation is necessary or expedient for the purposes of any of the licensing objectives.

(5) Where a Licensing Board makes a variation under subsection (1), the Board must—

(a) amend the premises licence,

(b) within the period of one month, give notice of the variation to—

(i) the appropriate chief constable, and

(ii) the holders of premises licences in respect of premises to which the variation applies,

(c) send a copy of the variation to the address of the premises to which the variation applies, and

(d) publicise the variation in such manner as the Board sees fit.

(6) A variation under subsection (1) does not have effect unless notice under subsection (5)(b)(ii) has been given.

(7) In subsection (1), the power to make a variation of the conditions to which a premises licence is subject includes—

(a) a power to make a revocation of such a variation in the same manner and subject to the same conditions, duties and limitations as the variation,

(b) a power to make a variation (or a revocation of a variation) of the conditions to which a provisional premises licence is subject.”.

(5) In section 146 (orders and regulations), in subsections (4)(b) and (5)(b), after “27(2)” insert “, 27A(1)”.

130 Premises licence applications: notification requirements

(1) Section 21 of the 2005 Act (notification of premises licence application) is amended as follows.

(2) For subsection (2), substitute—

“(2) On giving notice of an application under subsection (1), the Licensing Board—

(a) must provide the appropriate chief constable with a copy of the application, and

(b) may provide any other person to whom notice is given with a copy of the application.”.

(3) In subsection (3), the following are repealed—

(a) the word “and” after paragraph (a), and

(b) paragraph (b).

(4) In subsection (6), the following are repealed—

(a) the definition of “antisocial behaviour”,

(b) the word “and” following the definition of “neighbouring land”, and

(c) the definition of "relevant period".

131 Premises licence applications: modification of layout plans

In section 23 of the 2005 Act (determination of premises licence application), in subsection (7)(b), after "plan" insert "or layout plan (or both)".

132 Premises licence applications: antisocial behaviour reports

(1) The 2005 Act is amended as follows.

(2) In section 22 (objections and representations), after subsection (2) insert—

"(2A) The appropriate chief constable may, under subsection (1)(b), make representations concerning a premises licence application by giving to the Licensing Board a report detailing—

(a) any cases of antisocial behaviour indentified by constables as having taken place on, or in the vicinity of, the premises,

(b) any complaints or other representations made to constables concerning antisocial behaviour on, or in the vicinity of, the premises.".

(3) After section 24 insert—

"24A Power to request antisocial behaviour report

(1) A Licensing Board may, at any time before determining a premises licence application, request the appropriate chief constable to give the Board a report detailing—

(a) all cases of antisocial behaviour indentified within the relevant period by constables as having taken place on, or in the vicinity of, the premises,

(b) all complaints or other representations made within the relevant period to constables concerning antisocial behaviour on, or in the vicinity of, the premises.

(2) The appropriate chief constable must give the report within 21 days of the request.

(3) Where the Licensing Board requests a report under subsection (1), the Board must suspend consideration of the application until it receives the report.

(4) On receipt of the chief constable's report under subsection (2), the Licensing Board must—

(a) give a copy of the report to the applicant in such manner and by such time as may be prescribed by regulations, and

(b) resume consideration of the application and determine it in accordance with section 23.

(5) In this section—

"antisocial behaviour" has the same meaning as in section 143 of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8), and

"relevant period" means the period of one year ending with the date of the request.".

133 Sale of alcohol to trade

(1) The 2005 Act is amended as follows.

(2) In section 63 (prohibition of sale, consumption and taking away of alcohol outwith licensed hours), in subsection (2)(f), after "on" where it first occurs insert "or taken from".

(3) In section 117 (offence relating to sale of alcohol to trade), in subsection (1), after "from" insert "licensed premises or".

134 Occasional licences

(1) The 2005 Act is amended as follows.

(2) In section 57 (notification of application to chief constable and Licensing Standards Officer), after subsection (3), add—

> "(4) Subsection (5) applies where the Licensing Board is satisfied that the application requires to be dealt with quickly.
>
> (5) Subsections (2) and (3) have effect in relation to the application as if the references to the period of 21 days were references to such shorter period of not less than 24 hours as the Board may determine.".

(3) In paragraph 10 of schedule 1 (delegation of functions of Licensing Boards), after sub-paragraph (4), add—

> "(5) Despite sub-paragraph (1), a Licensing Board may not delegate the function of deciding whether an occasional licence application requires to be dealt with quickly for the purposes of section 57(4) to a member of staff provided under paragraph 8(1)(b).".

135 Extended hours applications: variation of conditions

After section 70 of the 2005 Act insert—

> **"70A Extended hours applications: variation of conditions**
>
> (1) On granting an extended hours application under section 68(1) in respect of a premises licence, the Licensing Board may make such variation of the conditions to which the licence is subject as the Board considers necessary or expedient for the purposes of any of the licensing objectives.
>
> (2) A variation made under subsection (1)—
>
> (a) may have effect only in relation to a period of licensed hours which is extended under section 68(1), and
>
> (b) ceases to have effect at the end of the period for which the extension of the licensed hours has effect under section 68(2).
>
> (3) In subsection (1), "variation" includes addition, deletion or other modification.".

136 Personal licences

(1) The 2005 Act is amended as follows.

(2) In section 74 (determination of personal licence application)—

(a) in subsection (2)—

(i) the word "and" immediately following paragraph (a) is repealed, and

(ii) after paragraph (b) add—

"(c) the applicant has signed the application, and

(d) subsection (8) does not apply,",

(b) in subsection (3)—

(i) the word "and" immediately following paragraph (b) is repealed, and

(ii) after paragraph (b) insert—

"(ba) the applicant does not already hold a personal licence, and", and

(c) after subsection (6) insert—

"(7) Subsection (8) applies if—

(a) all of the conditions specified in subsection (3) are met in relation to the applicant,

(b) the Board has received from the appropriate chief constable a notice under section 73(3)(a), and

(c) the applicant has held a personal licence which—

(i) expired within the period of 3 years ending on the day on which the application was received, or

(ii) was surrendered by the applicant by notice under section 77(6) received within that period.

(8) The Licensing Board may—

(a) after having regard to the circumstances in which the personal licence previously held expired, or as the case may be, was surrendered—

(i) refuse the application, or

(ii) grant the application, and

(b) hold a hearing for the purposes of considering and determining the application.".

(3) In section 76 (issue of licence), after subsection (3) add—

"(4) A person who holds a void personal licence must surrender it to the Licensing Board.

(5) A person who, without reasonable excuse, fails to comply with subsection (4) commits an offence.

(6) A person who passes off a void personal licence as a valid personal licence knowing that the licence is void commits an offence.

(7) A person guilty of an offence under subsection (5) or (6) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.".

(4) In section 92 (theft, loss etc. of personal licence), after subsection (3) insert—

"(3A) A replacement personal licence is void if at the time it is issued the personal licence in respect of which it was issued is not lost, stolen, damaged or destroyed.

(3B) Where a replacement personal licence is issued in respect of a personal licence which has been lost or stolen, the replacement personal licence becomes void if the personal licence is subsequently found or recovered.

(3C) A person who holds a void replacement personal licence must surrender it to the Licensing Board.

(3D) A person who, without reasonable excuse, fails to comply with subsection (3C) commits an offence.

(3E) A person who passes off a void replacement personal licence as a valid licence, knowing that the licence is void, commits an offence.

(3F) A person guilty of an offence under subsection (3D) or (3E) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.”.

137 Emergency closure orders

(1) The 2005 Act is amended as follows.

(2) In section 97 (closure orders)—

(a) in subsection (2), for “senior police officer may, if the officer” substitute “constable of or above the rank of inspector may, if the constable”, and

(b) in subsection (4), the words “by a senior police officer” are repealed.

(3) In section 98 (termination of closure orders)—

(a) in subsection (1)—

(i) for “senior police officer” substitute “constable of or above the rank of inspector”, and

(ii) for “the officer” substitute “the constable”,

(b) in subsection (2)—

(i) for “senior police office” substitute “constable”, and

(ii) for “the officer” substitute “the constable”.

(4) In section 99 (extension of emergency closure order), in subsection (1)—

(a) for “senior police officer” substitute “constable of or above the rank of inspector”, and

(b) in paragraph (b), for “officer” substitute “constable”.

138 False statements in applications: offence

After section 134 of the 2005 Act insert—

“134A Offence of knowingly making a false statement in an application

(1) A person who knowingly makes a false statement in an application under this Act commits an offence.

(2) A person guilty of an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.”.

139 Further modifications of 2005 Act

Schedule 4 makes further modifications of the 2005 Act (including extending police powers to object).

PART 10

MISCELLANEOUS

140 Licensed premises: social responsibility levy

(1) The Scottish Ministers may by regulations make provision for the imposition on relevant licence-holders of charges for the purpose mentioned in subsection (3).

(2) In this section, “relevant licence-holders” means—

(a) holders of premises licences or occasional licences granted under the 2005 Act,

(b) holders of street trader’s licences granted under section 39 of the 1982 Act where the licence authorises the carrying on of a food business within the meaning of section 1(3) of the Food Safety Act 1990 (c.16),

(c) holders of public entertainment licences granted under section 41 of the 1982 Act, and

(d) holders of late hours catering licences granted under section 42 of the 1982 Act.

(3) The purpose referred to in subsection (1) is to meet or contribute to expenditure incurred or to be incurred by any local authority—

(a) in furtherance of the licensing objectives, and

(b) which the authority considers necessary or desirable with a view to remedying or mitigating any adverse impact on those objectives attributable (directly or indirectly) to the operation of the businesses of relevant licence-holders in the authority’s area.

(4) Regulations under this section may, in particular—

(a) specify charges or provide for them to be determined under the regulations,

(b) specify charges, or provide for them to be determined, by reference to such factors or circumstances as may be specified in or determined under the regulations,

(c) provide for annual or other recurring charges,

(d) provide for exemptions from charges,

(e) provide for the remission or repayment of charges,

(f) provide for the collection and enforcement of charges,

(g) provide for the charging of interest on overdue charges,

(h) provide for the payment of charges to be a condition of the licences held by relevant licence holders,

(i) make provision about the particular purposes for which income from charges may be applied,

(j) provide for the accounting for income from charges and the expenditure of that income,

(k) confer functions on local authorities in relation to the determination, administration, collection and enforcement of charges, or in relation to any other matter provided for in the regulations.

(5) In this section—

"business", in relation to a relevant licence-holder, means the business comprising the activity in respect of which the licence-holder's licence was granted,

"licensing objectives" means the objectives specified in section 4 of the 2005 Act,

"local authority" means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39); and "area", in relation to a local authority, means the local government area for which the authority is constituted.

141 Annual report on Criminal Justice (Terrorism and Conspiracy) Act 1998

Section 8 of the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c.40) (requirement for annual report on working of the Act) is repealed.

142 Corruption in public bodies

(1) In section 8 of the Public Bodies Corrupt Practices Act 1889 (c.69) (application of Act to Scotland), the words from "the sheriff principal" to "and" where it second occurs are repealed.

(2) In section 3 of the Prevention of Corruption Act 1906 (c.34) (application to Scotland), subsection (2) is repealed.

PART 11

GENERAL

143 Orders and regulations

(1) Any power of the Scottish Ministers to make regulations or an order under this Act is exercisable by statutory instrument.

(2) Any such power includes power to make—

(a) such incidental, supplementary, consequential, transitional, transitory or saving provision as the Scottish Ministers think necessary or expedient,

(b) different provision for different purposes or different areas.

(3) Subject to subsection (4), a statutory instrument containing regulations or an order under this Act (except an order under section 148(1)) is subject to annulment in pursuance of a resolution of the Scottish Parliament.

(4) A statutory instrument containing—

(a) regulations under section 140(1), or

(b) an order under section 146(1) or 147(1) containing provisions which add to, replace or omit any part of the text of an Act,

is not to be made unless a draft of the instrument containing the regulations or order has been laid before, and approved by resolution of, the Parliament.

144 Interpretation

In this Act—

"the 1982 Act" means the Civic Government (Scotland) Act 1982 (c.45),

"the 1995 Act" means the Criminal Procedure (Scotland) Act 1995 (c.46), and

"the 2005 Act" means the Licensing (Scotland) Act 2005 (asp 16).

145 Modification of enactments

Schedule 5 modifies enactments.

146 Ancillary provision

(1) The Scottish Ministers may by order make such supplementary, incidental or consequential provision as they consider appropriate for the purposes of, in consequence of or for giving full effect to any provision of this Act.

(2) An order under subsection (1) may modify any enactment (including this Act).

147 Transitional provision etc.

(1) The Scottish Ministers may by order make such provision as they consider necessary or expedient for transitory, transitional or saving purposes in connection with the coming into force of any provision of this Act.

(2) An order under subsection (1) may modify any enactment (including this Act).

148 Short title and commencement

(1) The provisions of this Act, other than this section and sections 143 to 147, come into force in accordance with provision made by order by the Scottish Ministers.

(2) This Act may be cited as the Criminal Justice and Licensing (Scotland) Act 2009.

SCHEDULE 1
(introduced by section 3(2))

THE SCOTTISH SENTENCING COUNCIL

Membership

1 (1) The Council consists of a chairing member, other judicial members, legal members and lay members.

(2) The chairing member is the Lord Justice Clerk.

(3) The other judicial members comprise—

(a) one other person holding the office of judge who normally sits as a judge of the Outer House of the Court of Session or the High Court of Justiciary,

(b) two persons holding the office of sheriff principal or sheriff, and

(c) one person holding the office of justice of the peace or stipendiary magistrate.

(4) The legal members comprise—

(a) one prosecutor within the meaning of section 307 of the 1995 Act,

(b) one constable,

(c) one advocate practising as such in Scotland (other than one who is a prosecutor), and

(d) one solicitor practising as such in Scotland (other than one who is a prosecutor).

(5) The lay members comprise—

(a) one person appearing to the Scottish Ministers to have knowledge of the issues faced by victims of crime, and

(b) two other persons neither of whom is qualified for appointment as a judicial or legal member.

Procedure for appointment of members

2 (1) It is for the Lord Justice General, after consulting the Scottish Ministers, to appoint the members of the Council other than the Lord Justice Clerk and the lay members.

(2) It is for the Scottish Ministers, after consulting the Lord Justice General, to appoint the lay members.

(3) The Lord Justice General may appoint a person to be a member only if the person has been nominated, or otherwise selected for appointment, in accordance with such procedures as the Scottish Ministers may by regulations prescribe.

(4) The regulations may—

(a) in particular, make provision for or in connection with enabling a person to nominate or select persons suitable for appointment,

(b) prescribe different procedures for different categories of membership.

(5) The Scottish Ministers must consult the Lord Justice General before making the regulations.

Persons disqualified from membership

3 A person is disqualified from appointment, and from holding office, as a member of the Council if the person is or becomes—

(a) a member of the House of Commons,

(b) a member of the Scottish Parliament,

(c) a member of the European Parliament,

(d) a councillor of any council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39),

(e) a Minister of the Crown, or

(f) a member of the Scottish Executive.

Term of office

4 (1) A member holds office for such period not exceeding 5 years as the Lord Justice General or, as the case may be, the Scottish Ministers may, at the time of appointment, determine.

(2) A member ceases to hold office—

(a) on becoming disqualified from holding office as a member, or

(b) on ceasing to fall within the category of membership under which the member was appointed.

(3) A person who has previously been a member may not be re-appointed.

Resignation and removal of members

5 (1) A member appointed by the Lord Justice General may resign office by giving notice in writing to the Lord Justice General.

(2) A member appointed by the Scottish Ministers may resign office by giving notice in writing to the Scottish Ministers.

(3) The Lord Justice General may, by notice in writing, remove a judicial or legal member if satisfied that the member is unfit to be a member by reason of inability, neglect of duty or misbehaviour.

(4) The Scottish Ministers may, by notice in writing, remove a lay member if satisfied that the member is unfit to be a member by reason of inability, neglect of duty or misbehaviour.

Suspension of judicial members

6 A judicial member is suspended from acting as such during any period in which the member is suspended from the judicial office which the member holds.

Chairing of the Council

7 (1) The Lord Justice Clerk is to chair meetings of the Council.

(2) If the Lord Justice Clerk is for any reason unable to chair a meeting, the meeting may be chaired by another judicial member nominated—

(a) by the Lord Justice Clerk, or

(b) if the Lord Justice Clerk is unable to make such a nomination, by the Council.

(3) The Lord Justice Clerk may nominate another judicial member to chair meetings of the Council for a temporary period.

Committees

8 The Council may establish committees comprising members of the Council.

Proceedings

9 The Council may determine—

(a) its own procedure (including the number of members required to constitute a quorum), and

(b) the procedure (including the number of members required to constitute a quorum) of any committees established by it.

Validity of acts

10 The validity of proceedings or actings of the Council is not affected by—

(a) any vacancy in the membership of the Council,

(b) any defect in the appointment of a member of the Council, or

(c) disqualification of any person from holding office as a member of the Council.

Ancillary powers

11 The Council may do anything which it considers necessary or expedient for the purposes of or in connection with its functions.

Delegation

12 (1) Any function of the Council, other than the function of preparing and publishing sentencing guidelines, may be carried out on its behalf by—

(a) a member of the Council,

(b) a committee, or

(c) any other person,

authorised (whether specially or generally) by it for the purpose.

(2) Nothing in sub-paragraph (1) prevents the Council from exercising any function delegated under that sub-paragraph.

Maladministration

13 In the Scottish Public Services Ombudsman Act 2002 (asp 11), in schedule 2 (which lists the authorities subject to investigation under that Act), in Part 2 (entries amendable by Order in Council), after paragraph 50 insert—

> “50A The Scottish Sentencing Council.”.

Freedom of information

14 In the Freedom of Information (Scotland) Act 2002 (asp 13), in schedule 1 (which lists the Scottish public authorities subject to that Act), in Part 7 (other authorities), after paragraph 98 insert—

> “98A The Scottish Sentencing Council.”.

SCHEDULE 2
(introduced by section 18(9))

SHORT-TERM CUSTODY AND COMMUNITY SENTENCES: CONSEQUENTIAL AMENDMENTS

Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17)

1 The Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17) is amended in accordance with paragraphs 2 to 14.

2 In section 34 (period during which licence in force), for subsection (1) substitute—

> “(1) Where a short-term custody and community prisoner is released on short-term community licence by virtue of section 5, 27(1) or, as the case may be, 42(4)(a), the licence remains in force until the expiry of the prisoner’s sentence.”.

3 In the following places after “section” insert “5,”—

(a) section 35 (prisoner to comply with licence conditions),

(b) subsection (1)(a) of section 36 (suspension of licence conditions while detained),

(c) subsections (1)(a) and (4)(a) of section 37 (revocation of licence).

4 In section 40 (compassionate release: effect of revocation in certain circumstances), in subsection (3), for paragraph (a) substitute—

> “(a) in the case of a short-term custody and community prisoner, one-half of the prisoner’s sentence,”.

5 (1) Section 42 (consideration by Parole Board) is amended as follows.

(2) In subsection (1), after “41(2)(b)” insert “, 42A(9)”.

(3) In subsection (5), after “on” insert “short-term community licence,”.

6 After section 42 insert—

“42A Determination that section 42(3) applicable: consequences for short-term custody and community prisoners

(1) This section applies where the Parole Board determines, under subsection (2) of section 42, that subsection (3) of that section applies to a short-term custody and community prisoner.

(2) The Parole Board must give the prisoner reasons in writing for its determination.

(3) If on the day of the determination less than 4 months of the prisoner’s sentence remain to be served, the prisoner must be confined until the expiry of the prisoner’s sentence.

(4) If on the day of the determination at least 4 months but no more than 2 years of the prisoner’s sentence remain to be served, the Parole Board may, subject to section 26, fix a date falling within the period mentioned in subsection (5) on which it will next consider the prisoner’s case.

(5) That period is the period—

(a) beginning with the day falling 4 months after the day of the determination, and

(b) ending on the expiry of the prisoner’s sentence.

(6) If no date is fixed under subsection (4) the prisoner must be confined until the expiry of the prisoner’s sentence.

(7) If on the day of the determination at least 2 years of the prisoner’s sentence remain to be served, the Parole Board must, subject to section 26, fix a date falling within the period mentioned in subsection (8) on which it will next consider the prisoner’s case.

(8) That period is the period—

(a) beginning with the day falling 4 months after the day of the determination, and

(b) ending immediately before the second anniversary of the day of the determination.

(9) Where a date is fixed under subsection (4) or (7), the Scottish Ministers must refer the case to the Parole Board before that date.”.

7 (1) Section 45 (prisoner’s right to request early reconsideration by Parole Board) is amended as follows.

(2) In subsection (1), after “under—” insert—

“(za) section 42A(4),

(zb) section 42A(7),”.

(3) In subsection (2), after “section” insert “42A(4), 42A(7),”.

(4) In subsection (3), after “section” insert “42A(4) or”.

(5) In subsection (4), after “section” insert “42A(4) or, as the case may be,”.

8 In section 46 (multiple licences to be replaced by single licence), in subsection (1)(a), after “section” insert “5,”.

9 (1) Section 51 (prisoners serving extended sentences) is amended as follows.

(2) In subsection (1), for "(2)" substitute "(1A)".

(3) After that subsection insert—

"(1A) In section 5, the reference to the prisoner's short-term custody and community sentence is to be read as a reference to the confinement term of the prisoner's extended sentence.".

10 (1) Section 55 (application to young offender and children) is amended as follows.

(2) In subsection (1), for "custody-only" substitute "short-term custody and community".

(3) In subsection (2)(a), for "15 days" substitute "the prescribed period".

(4) In subsection (4)(a), for "15 days or more" substitute "at least the prescribed period".

11 In section 56 (fine defaulters and persons in contempt of court), in subsection (1), for "custody-only" substitute "short-term custody and community".

12 In section 65 (rules, regulations and orders), in subsection (4)(a), for "4(2), 7, 47(1)(b)" substitute "4(1), 7, 47(1)(b), 55(2) or (4)".

13 (1) Schedule 2 (prisoners serving more than one sentence) is amended as follows.

(2) Before paragraph 1, in the italic heading, for "custody-only" substitute "short-term custody and community".

(3) In paragraph 1—

(a) in sub-paragraph (1)(a), for "custody-only" substitute "short-term custody and community",

(b) in sub-paragraph (3)—

(i) for "and 34(1)" substitute ", 34(1) and 42A",

(ii) for "custody-only" in both places where it occurs substitute "short-term custody and community",

(c) after sub-paragraph (3) add—

"(4) In section 47(3A)—

(a) references to the expiry of one-half of the prisoner's sentence are to be read as references to the expiry of one-half of the short-term custody and community sentence that expires after the expiry of one-half of the other short-term custody and community sentence (or sentences),

(b) in paragraph (a)(i), the reference to the expiry of the prisoner's sentence is to be read as a reference to the longer (or longest) of the sentences imposed on the prisoner.".

(4) Before paragraph 3, in the italic heading, for "custody-only" substitute "short-term custody and community".

(5) In paragraph 3—

(a) in sub-paragraph (1)(a), for "custody-only" substitute "short-term custody and community",

(b) in sub-paragraph (3), for "and 34(1)" substitute ", 34(1), 42A and subsections (3A) and (8)(a) of section 47",

(c) in sub-paragraph (4)—

(i) for "the custody-only" substitute "one-half of the short-term custody and community",

(ii) in paragraph (a), for "any other custody-only" substitute "one-half of any other short-term custody and community",

(d) in sub-paragraph (5)(b)(ii) and (6)(b), for "the custody-only" substitute "at least one-half of the short-term custody and community".

(6) In paragraph 5—

(a) in sub-paragraph (1), in both paragraphs (a) and (b), for "custody-only" substitute "short-term custody and community",

(b) in sub-paragraph (3)—

(i) after "19" insert ", 29A, 29B",

(ii) after "(2)" insert ", 42A".

(c) in sub-paragraph (4)—

(i) for "the custody-only" substitute "one-half of the short-term custody and community",

(ii) in paragraph (a), for "any other custody-only" substitute "one-half of any other short-term custody and community".

(7) In paragraph 6, in sub-paragraph (1)(b), after "section" insert "5,".

(8) In paragraph 7, after sub-paragraph (1) insert—

"(1A) Where a short-term custody and community sentence imposed on a prisoner is an extended sentence, the modifications in paragraphs 1(3) and (4), 3(4), (5)(b)(ii), (6) and (8A) are to be read subject to sub-paragraph (2).".

14 (1) Schedule 3 (sentences framed to run consecutively) is amended as follows.

(2) In paragraph 1(4)(a), for "custody-only sentence, that sentence" substitute "short-term custody and community sentence, one-half of that sentence".

(3) Before paragraph 3 insert—

"2A (1) This paragraph applies where—

(a) the court imposes a short-term custody and community sentence as a further sentence,

(b) the court frames the sentence to take effect in accordance with paragraph 1(2) or (3), and

(c) the prisoner's previous sentence (or one of the prisoner's previous sentences) is a short-term custody and community sentence.

(2) In determining the date on which the previous sentence expires, no account is to be taken of the period of confinement served under the further sentence.

(3) In determining the date on which the further sentence expires, no account is to be taken of the balance of the previous sentence.".

(4) In paragraph 3—

(a) in sub-paragraph (1)(a), for "custody-only" substitute "short-term custody and community",

(b) after sub-paragraph (2) insert—

"(3) In determining the date on which the further sentence expires, no account is to be taken of the balance of the previous sentence.".

(5) After paragraph 3 insert—

"3A (1) This paragraph applies where—

(a) the court imposes a custody and community sentence as a further sentence,

(b) the court frames the sentence to take effect in accordance with paragraph 1(2) or (3), and

(c) the prisoner's previous sentence (or one of the prisoner's previous sentences) is a short-term custody and community sentence.

(2) In determining the date on which the previous sentence expires, no account is to be taken of the period of confinement served under the further sentence.

(3) In determining the date on which the further sentence expires, no account is to be taken of the balance of the previous sentence.".

(6) In paragraph 5—

(a) sub-paragraph (1) is repealed,

(b) in sub-paragraphs (2) and (3), for "paragraph 4" substitute "the relevant paragraph",

(c) in sub-paragraph (4)—

(i) in paragraph (a), for "4(2) and (3)" substitute "sub-paragraphs (2) and (3) of the relevant paragraph", and

(ii) in paragraph (c), for "paragraph 4(3)" substitute "sub-paragraph (3) of the relevant paragraph",

(d) after sub-paragraph (4) insert—

"(4A) Where a short-term custody and community sentence or custody and community sentence imposed on a prisoner is an extended sentence, references in this schedule to—

(a) the prisoner's "previous sentence" are to be read as references to the "previous confinement term" of the prisoner's sentence,

(b) the prisoner's "further sentence" are to be read as references to the "further confinement term" of the prisoner's sentence.", and

(e) after sub-paragraph (5) insert—

"(6) In this paragraph "the relevant paragraph" means paragraph 2A, 3, 3A or 4 (whichever applies in the circumstances described).".

The 1995 Act

15 The 1995 Act is amended in accordance with paragraphs 16 and 17.

16 (1) Section 167 (forms of finding and sentence in summary proceedings) is amended as follows.

(2) In subsection (7D), for "any previous custody-only" substitute "one-half of any previous short-term custody and community".

(3) In subsection (7E), for "custody-only" substitute "short-term custody and community".

17 (1) Section 210A (extended sentences for sex and violent offenders) is amended as follows.

(2) In subsections (1)(b) and (2)(b), after "a" insert "short-term community or".

(3) In subsection (10), after the definition of "sexual offence" insert—

> ""short-term community licence" has the same meaning as in Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17).".

SCHEDULE 3

(introduced by section 66(4))

WITNESS ANONYMITY ORDERS: TRANSITIONAL

Interpretation

1 In this schedule—

"commencement" means the day on which section 66 comes into force,

"pre-commencement anonymity order" means an order made by a court before commencement under any rule of law relating to the power of the court to make an order for securing that the identity of a witness in criminal proceedings is withheld from the accused (or, on a defence application, from other accused),

"witness anonymity order" has the meaning given by section 271N of the 1995 Act.

Pre-commencement anonymity orders: appeals

2 (1) This paragraph applies where—

(a) the High Court of Justiciary is considering an appeal against a conviction in a case where the trial began before commencement, and

(b) the court from which the appeal lies ("the trial court") made a pre-commencement anonymity order in relation to a witness at the trial.

(2) The High Court—

(a) may not treat the conviction as unsafe solely on the ground that the trial court had no power under any rule of law to make the order mentioned in sub-paragraph (1)(b), but

(b) must treat the conviction as unsafe if it considers that, as a result of the order, the accused did not receive a fair trial.

SCHEDULE 4

(introduced by section 139)

FURTHER MODIFICATIONS OF 2005 ACT

1 The 2005 Act is amended in accordance with the following paragraphs.

2 In section 4 (the licensing objectives), subsection (2) is repealed.

3 In section 21 (notification of premises licence applications), subsection (5) is repealed.

4 In section 22 (objections and representations), subsection (2) is repealed.

5 In section 23 (determination of premises licence application), for subsection (6) substitute—

“(6) In considering whether the granting of the application would be inconsistent with one or more of the licensing objectives, the Licensing Board must in particular take into account—

(a) any conviction, notice of which is given by the appropriate chief constable under subsection (4)(b) of section 21, and

(b) any report given by the appropriate chief constable under section 22(2) or 24A(2).”.

6 (1) Section 24 (applicant’s duty to notify Licensing Board of convictions) is amended as follows.

(2) In subsection (8)(b), for “the crime prevention objective” substitute “any of the licensing objectives”.

(3) For subsection (10) substitute—

“(10) In considering for the purposes of section 23 whether the granting of the application would be inconsistent with one or more of the licensing objectives, the Licensing Board must take into account, in addition to the matters in subsection (6) of that section—

(a) any conviction confirmation of which is given by the appropriate chief constable in a notice under subsection (7)(b) of this section, or

(b) any recommendation of the chief constable included in such a notice.”.

7 (1) Section 33 (transfer of premises licence on application of licence holder) is amended as follows.

(2) For subsections (7) to (9) substitute—

“(7) On giving a notice under subsection (6)(a) or (b), if the appropriate chief constable considers that it is necessary for the purposes of any of the licensing objectives that the application for the transfer of the licence to the transferee be refused, the chief constable may include in the notice a recommendation to that effect.

(8) Where, in relation to an application under subsection (1)—

(a) the Licensing Board receives a notice under subsection (6)(a), and

(b) the notice does not include a recommendation under subsection (7),

the Board must grant the application.

(9) In any other case, the Licensing Board must hold a hearing for the purpose of considering and determining the application.”.

(3) In subsection (10)(a), for “the crime prevention objective” substitute “any of the licensing objectives”.

8 In section 44 (procedure where Licensing Board receives notice of conviction), in subsection (5)(b), for "the crime prevention objective" substitute "any of the licensing objectives".

9 In section 57 (notification of occasional licence application to chief constable and Licensing Standards Officer), subsection (2) is repealed.

10 (1) Section 59 (determination of occasional licence application) is amended as follows.

(2) In subsection (2), paragraph (a) is repealed.

(3) Subsection (7) is repealed.

11 In section 69 (notification of extended hours application), in subsection (2), for "the crime prevention objective" substitute "any of the licensing objectives".

12 In section 73 (notification of personal licence application to chief constable), for subsection (4) substitute—

"(4) On giving a notice under subsection (3)(a) or (b), if the appropriate chief constable considers that it is necessary for the purposes of any of the licensing objectives that the personal licence application be refused, the chief constable may include in the notice a recommendation to that effect.".

13 (1) Section 74 (determination of personal licence application) is amended as follows.

(2) In subsection (2)—

(a) the word "and" immediately following paragraph (a) is repealed,

(b) after paragraph (b) add ", and

(c) the notice does not include a recommendation under section 73(4),".

(3) In subsection (5), for paragraph (b) substitute—

"(b) the notice received from the appropriate chief constable under subsection (3)(a) or (b) of section 73 includes a recommendation under subsection (4) of that section,".

(4) After subsection (5) insert—

"(5A) If—

(a) all of those conditions are met in relation to the applicant,

(b) the Board has received from the appropriate chief constable a notice under subsection (3)(b) of section 73, and

(c) the notice does not include a recommendation under subsection (4) of that section,

the Board may hold a hearing for the purpose of considering and determining the application.

(5B) If the Board decides not to hold a hearing under subsection (5A), the Board must grant the application.".

(5) In subsection (6)—

(a) after "subsection (5)" insert "or (5A)",

(b) in paragraph (a), for "the crime prevention objective" substitute "any of the licensing objectives".

14 (1) Section 75 (applicant's duty to notify Licensing Board of convictions) is amended as follows.

(2) In subsection (7)(b), for "the crime prevention objective" substitute "any of the licensing objectives".

(3) In subsection (9)—

(a) the word "and" immediately following paragraph (a) is repealed,

(b) after paragraph (b) add ", and

(c) references in it to a recommendation under section 73(4) include references to a recommendation under subsection (7) of this section.".

15 (1) Section 83 (procedure where Licensing Board receives notice of conviction) is amended as follows.

(2) In subsection (5)(b), for "the crime prevention objective" substitute "any of the licensing objectives".

(3) In subsection (8)(c), for "the crime prevention objective" substitute "any of the licensing objectives".

16 After section 84 insert—

"84A Power of chief constable to report conduct inconsistent with the licensing objectives

(1) If a chief constable considers that any personal licence holder has acted in a manner which is inconsistent with any of the licensing objectives, the chief constable may report the matter to the relevant Licensing Board.

(2) Where a Licensing Board receives a report from a chief constable under subsection (1), the Board must hold a hearing.

(3) Subsections (6), (7) and (8)(a) of section 84 and subsection (1)(b) of section 85 apply in relation to a hearing under subsection (2) of this section as they apply in relation to a hearing under subsection (3)(a) or (5) of section 84.

(4) In subsection (1), "relevant Licensing Board" has the meaning given in section 83(11).".

17 In section 148 (index of defined expressions), in the table, the entry relating to "crime prevention objective" is repealed.

18 In schedule 1 (Licensing Boards), in paragraph 10(4), the words from ", or no notice" to the end are repealed.

SCHEDULE 5

(introduced by section 145)

MODIFICATIONS OF ENACTMENTS

The False Oaths (Scotland) Act 1933 (c.20)

1 The False Oaths (Scotland) Act 1933 is repealed.

The Public Records (Scotland) Act 1937 (c.43)

2 In section 14 of the Public Records (Scotland) Act 1937 (interpretation)—

(a) for the definition of “court records” substitute—

““court records” includes (in addition to records of the ordinary courts) records of the Scottish Land Court;”, and

(b) for subsection (2) substitute—

“(2) Any question as to whether or not a document is part of the records of a particular court is to be determined—

(a) in the case of the High Court, by the Lord Justice General,

(b) in any other case, by the Lord President.”.

The Rehabilitation of Offenders Act 1974 (c.53)

3 In section 1 of the Rehabilitation of Offenders Act 1974 (rehabilitated persons and spent convictions), in subsection (4)(b), after “insanity” insert “or, as the case may be, a finding that a person is not criminally responsible under section 51A of the Criminal Procedure (Scotland) Act 1995 (c.46)”.

The Evidence (Proceedings in Other Jurisdictions) Act 1975 (c.34)

4 In Schedule 1 to the Evidence (Proceedings in Other Jurisdictions) Act 1975 (consequential amendments), the paragraph relating to the False Oaths (Scotland) Act 1933 is repealed.

The 1982 Act

5 The 1982 Act is amended as follows.

6 In section 52 (indecent photographs etc. of children), subsection (7) is repealed.

7 In section 64 (appeals against orders in relation to public processions), in subsection (6), for “paragraph (a)(ii)” substitute “paragraph (a)(i)”.

The Legal Aid (Scotland) Act 1986 (c.47)

8 In section 22 of the Legal Aid (Scotland) Act 1986 (automatic availability of criminal legal aid), in subsection (1)—

(a) in paragraph (da), for “he is insane so that his trial cannot proceed or continue;” substitute “the accused is unfit for trial under section 53F of the Criminal Procedure (Scotland) Act 1995;”, and

(b) in paragraph (dc), for “in case involving insanity” substitute “where accused found not criminally responsible or unfit for trial”.

The Criminal Justice (Scotland) Act 1987 (c.41)

9 In the Criminal Justice (Scotland) Act 1987, sections 51 to 54 (investigation of serious or complex fraud) are repealed.

The Criminal Justice Act 1988 (c.33)

10 In the Criminal Justice Act 1988, in Schedule 15 (minor and consequential amendments), paragraphs 89 and 117 are repealed.

The Criminal Justice and Public Order Act 1994 (c.33)

11 In the Criminal Justice and Public Order Act 1994, in section 164 (extension of powers of Serious Fraud Office and of powers to investigate serious fraud in Scotland), subsections (3) and (4) are repealed.

The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)

12 The Criminal Law (Consolidation) (Scotland) Act 1995 is amended as follows.

13 Section 16 (powers of search) is repealed.

14 In section 23 (interpretation of Part 2), in the definition of "period of a designated sporting event", for "in" substitute "it".

The 1995 Act

15 The 1995 Act is amended as follows.

16 After section 5 insert—

"**5A Signing of warrants etc. outwith sheriff's jurisdiction**

The competence of a sheriff to sign any warrant, judgement, interlocutor or other document relating to any proceedings within the sheriff's jurisdiction extends to competence to do so at any other place in Scotland.".

17 In section 10A (jurisdiction for transferred cases)—

(a) after subsection (1) insert—

"(1A) The jurisdiction of a JP court includes jurisdiction for any cases which come before it by virtue of section 137CA, 137CB or 137CC of this Act.",

(b) in subsection (2)—

(i) the word "and" immediately following paragraph (a) is repealed,

(ii) after paragraph (a) insert—

"(aa) power to prosecute in any cases which come before a JP court of that district by virtue of a provision mentioned in subsection (1A) above;", and

(iii) in paragraph (b), for "criminal proceedings which otherwise come before that sheriff" substitute "the other cases which come before that sheriff when exercising criminal jurisdiction or (as the case may be) before that JP court", and

(c) for subsection (3) substitute—

"(3) This section is without prejudice to sections 4 to 10 of this Act.".

18 In section 19A (samples etc. from persons convicted of sexual and violent offences), in subsection (6), in paragraph (a) of the definition of "conviction", for the words from ", by" to the end substitute "by reason of the special defence set out in section 51A of this Act;".

19 In section 22 (liberation by police), subsections (1H), (2), (4), (4A) and (5) are repealed.

20 In section 55(4) (acquittal at examination of facts)—

(a) for the words from "insane" to "omission" substitute "not, because of section 51A of this Act, criminally responsible for the conduct", and

(b) for "on the ground of such insanity" substitute "by reason of the special defence set out in that section".

21 The title of section 57 (disposal of case where accused found to be insane) is amended by substituting "not criminally responsible or unfit for trial" for "to be insane" and the cross-heading which precedes it is amended by substituting "*where accused found not criminally responsible*" for "*in case of insanity*".

22 In section 57 (disposal of case where accused found to be insane), in subsection (1)(a), for the words from ", by" to "omission" substitute "acquitted by reason of the special defence set out in section 51A of this Act".

23 In section 60C(7) (disapplication of provision where person acquitted on ground of insanity)—

(a) after "apply" insert "in a case where the person is acquitted by reason of the special defence set out in section 51A of this Act.", and

(b) paragraphs (a) and (b) are repealed.

24 In section 61 (requirements as to medical evidence)—

(a) in subsection (1), the words "under section 54(1)(a) of this Act or" are repealed,

(b) in subsection (3), the words "or 54(1)(a)" are repealed, and

(c) in subsection (5), for "the said section 54(1)" substitute "section 54(1)(c) of this Act".

25 The title of section 62 (appeal by accused in case involving insanity) is amended by substituting "not criminally responsible or unfit for trial" for "in case involving insanity" and the section is amended as follows—

(a) in subsection (1)(a), for "insane" substitute "unfit for trial", and

(b) in subsection (2)(b)(iii), for the words from "virtue" to "omission" substitute "reason of the special defence set out in section 51A of this Act".

26 The title of section 63 (appeal by prosecutor in case involving insanity) is amended by substituting "where accused found not criminally responsible or unfit for trial" for "in case involving insanity" and subsection (1) of that section is amended as follows—

(a) in paragraph (a), for "insane" substitute "unfit for trial",

(b) for paragraph (b) substitute—

> "(b) an acquittal by reason of the special defence set out in section 51A of this Act;", and

(c) in paragraph (c), for the words from "on" to "omission" substitute "by reason of the special defence set out in section 51A of this Act".

27 In section 78(2) (which attracts the procedure for notifying special defences in relation to certain other defences), after "apply" insert "to a plea of diminished responsibility or".

28 In section 90D (review of orders under section 90B(1)(a) or (b)), in subsection (3)(b), for "any other any" substitute "any other".

29 In section 102A (failure of accused to appear), for paragraph (b) of subsection (4) substitute—

"(b) section 27(7) of this Act,".

30 In section 118(5) (disposal of appeal from solemn proceedings where High Court considers appellant to have been insane)—

(a) for "insane when he did so" substitute "not, because of section 51A of this Act, criminally responsible for it", and

(b) for "on the ground of insanity" substitute "by reason of the special defence set out in section 51A of this Act".

31 In section 136A (time limits for transferred and related cases), in subsection (1)—

(a) in paragraph (a)(i), for "in pursuance of section 137A(1)" substitute "under section 137A or 137CA", and

(b) in paragraph (a)(ii), for "in pursuance of section 137B(1), (1A) or (1C)" substitute "under 137B or 137CB".

32 In section 137B (transfer of sheriff court summary proceedings outwith sheriffdom), in subsection (4), for "a sheriff who has made an order under subsection (2A) above" substitute "the sheriff who has made an order under subsection (2A) above (or another sheriff of the same sheriffdom)".

33 The title of section 190 (disposal of appeal where appellant insane) is amended by substituting "not criminally responsible" for "insane".

34 In section 190—

(a) in subsection (1), for "insane when he did so" substitute "not, because of section 51A of this Act, criminally responsible for it", and

(b) for "on the ground of insanity" substitute "by reason of the special defence set out in section 51A of this Act".

35 Sections 228 to 234 (probation) are repealed.

36 Section 234J (concurrent drug treatment and testing and probation orders) is repealed.

37 Sections 235 to 245 (supervised attendance orders and community service orders) are repealed.

38 (1) Section 245D (combination of restriction of liberty orders with other orders) is amended as follows.

(2) In subsection (1)(b)—

(a) in sub-paragraph (i), for "probation order made under section 228(1)" substitute "community payback order imposed under section 227A(1)", and

(b) in sub-paragraph (ii)—

(i) for "probation order made under section 228(1) of this Act," substitute "community payback order imposed under section 227A(1) of this Act or", and

(ii) the words "or both such orders" are repealed.

(3) In subsection (2), for "probation order" substitute "community payback order".

(4) In subsection (3)—

(a) the word "228(1)," is repealed,

(b) in paragraph (a), for "probation order" substitute "community payback order", and

(c) in paragraph (b), for "either or both of a probation order and" substitute "either a community payback order or".

(5) In subsection (4)—

(a) for "probation order" substitute "community payback order", and

(b) for paragraph (b) substitute—

"(b) the responsible officer in relation to the community payback order.".

(6) Subsection (6) is repealed.

(7) In subsection (7)—

(a) in paragraph (a)—

(i) for "contained in a probation order and is dealt with under section 232(2)(c) of this Act" substitute "imposed by a community payback order and is dealt with under section 227ZB(5)(c) or (d) of this Act", and

(ii) the words from "234G(2)(b)" to "section" where it third occurs are repealed,

(b) in paragraph (b), the words from "232(2)(c)" to "section" where it third occurs are repealed, and

(c) in paragraph (c), for "232(2)(c) of this Act in relation to the probation order" substitute "227ZB(5)(c) or (d) of this Act".

(8) In subsection (8), for "232(2)" substitute "227ZB".

(9) In subsection (9)—

(a) in paragraph (a), for "probation order" substitute "community payback order", and

(b) paragraph (c) is repealed.

39 Sections 245K to 245Q (community reparation orders) are repealed.

40 In section 247 (effect of probation and absolute discharge)—

(a) in subsection (1), for the words from "placing" to "him" substitute "discharging the offender",

(b) in subsection (2), the words "placed on probation or" are repealed, and

(c) subsection (6) is repealed.

41 In section 254 (search warrant for forfeited articles)–

(a) the existing provision becomes subsection (1), and

(b) after that subsection insert—

"(2) In subsection (1), "article" includes animal.".

42 In section 258 (uncontroversial evidence), after subsection (4A) insert—

"(4AA) Where in summary proceedings the relevant diet for the purposes of subsection (4A) above is an intermediate diet, an application under that subsection may be made at (or at any time before) that diet.".

43 In section 307 (interpretation), in subsection (1), after the definition of "treatment order", insert—

""unfit for trial" has the meaning given by section 53F of this Act;".

The Crime and Punishment (Scotland) Act 1997 (c.48)

44 In section 9 of the Crime and Punishment (Scotland) Act 1997 (power to specify hospital unit), in subsection (1)(a), for "insane" substitute "found not criminally responsible or unfit for trial".

The Terrorism Act 2000 (c.11)

45 In paragraph 30 of Part II of Schedule 5 to the Terrorism Act 2000 (explanations), in sub-paragraph (3)(a), for "section 2 of the False Oaths (Scotland) Act 1933" substitute "section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)".

The Protection of Children (Scotland) Act 2003 (asp 5)

46 In section 10 of the Protection of Children (Scotland) Act 2003 (referral of individuals acquitted of offence against a child on ground of insanity), in subsection (11)(a)—

(a) in sub-paragraph (i), for "on the ground of insanity" substitute "by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995 (c.46)", and

(b) in sub-paragraph (ii), for "the Criminal Procedure (Scotland) Act 1995 (c.46)" substitute "that Act".

The Criminal Justice (Scotland) Act 2003 (asp 7)

47 In section 3 of the Criminal Justice (Scotland) Act 2003 (the Risk Management Authority), in paragraph (b) of subsection (2), for "to be insane" substitute "not criminally responsible or unfit for trial".

The Sexual Offences Act 2003 (c.42)

48 In section 135 of the Sexual Offences Act 2003 (interpretation: mentally disordered persons), after subsection (2) insert—

"(2A) In the application of this Part in relation to Scotland, a reference to a person being found not guilty of an offence by reason of insanity is to be read as a reference to a person being acquitted of an offence by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995.".

The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9)

49 In section 8 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (effect of conviction etc. under section 7 above or section 128 of Sexual Offences Act 2003)—

(a) in subsection (1)—

(i) the word "or" immediately following paragraph (c) is repealed, and

(ii) after paragraph (c) insert—

"(ca) is acquitted by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995 (c.46), or", and

(b) in subsection (5)—

(i) in paragraph (a), for "(1)(a), (c) or (d)" substitute "(1)(a) or (c) to (d)", and

(ii) in paragraph (c), for "(1)(a), (c) or (d)" substitute "(1)(a) or (c) to (d)".

The Management of Offenders etc. (Scotland) Act 2005 (asp 14)

50 In section 10 of the Management of Offenders etc. (Scotland) Act 2005 (arrangements for assessing and managing risks posed by certain offenders)—

(a) in subsection (1)—

(i) in paragraph (c)(i), for "on the ground of insanity" substitute "by reason of the special defence set out in section 51A of that Act of 1995", and

(ii) in paragraph (d), for the words from "section 54(1)" to the end substitute "section 53F of that Act of 1995 (unfitness for trial) to be unfit for trial;", and

(b) in subsection (11)(a), for "to be insane" substitute "not criminally responsible or unfit for trial".

The Serious Organised Crime and Police Act 2005 (c.15)

51 In section 65 of the Serious Organised Crime and Police Act 2005 (restrictions on the use of statements), in subsection (2)(c), for "section 2 of the False Oaths (Scotland) Act 1933 (c.20)" substitute "section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)".

The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6)

52 The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 is amended as follows.

53 In section 7 (liberation on undertaking), in subsection (2), paragraphs (c), (e), (f) and (g) are repealed.

54 In the schedule (modification of enactments)—

(a) paragraph 3(b) is repealed, and

(b) in paragraph 26, the words "(in addition to the provisions amended by paragraphs 7(4) and 16(a))" are repealed.

The Protection of Vulnerable Groups (Scotland) Act 2007 (asp 14)

55 In section 32 of the Protection of Vulnerable Groups (Scotland) Act 2007 (relevant offences etc.), in subsection (3)(b)(i), for "on the ground of insanity" substitute "by reason of the special defence set out in section 51A of the 1995 Act".

The Counter-Terrorism Act 2008 (c.28)

56 In section 45 of the Counter-Terrorism Act 2008 (sentences or orders triggering notification requirements), in subsection (2)(b)—

(a) in sub-paragraph (ii), for the words from "on grounds of insanity" to the end substitute "by reason of the special defence set out in section 51A of that Act (criminal responsibility of persons with mental disorder), or", and

(b) in sub-paragraph (iii), for the words from "the Criminal" to "facts)" substitute "that Act (examination of facts where person unfit for trial)".

The Coroners and Justice Act 2009 (c.00)

57 In section 134 of the Coroners and Justice Act 2009 (exploitation proceeds orders: qualifying offenders)—

(a) in subsection (2)—

(i) the word "or" immediately following paragraph (b) is repealed, and

(ii) after paragraph (b) insert—

"(ba) has been acquitted by such a court of an offence by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995 (c.46), or", and

(b) in subsection (3)(a)—

(i) the word "or" immediately following sub-paragraph (ii) is repealed, and

(ii) after sub-paragraph (ii) insert—

"(iia)such a court has made, in respect of a foreign offence, a finding equivalent to a finding of the person's acquittal by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995, or".

Criminal Justice and Licensing (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to make provision about sentencing, offenders and defaulters; to make provision about criminal law, procedure and evidence; to make provision about criminal justice and the investigation of crime (including police functions); to amend the law relating to the licensing of certain activities by local authorities; to amend the law relating to the sale of alcohol; and for connected purposes.

Introduced by:	Kenny MacAskill
On:	5 March 2009
Bill type:	Executive Bill

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Criminal Justice and Licensing (Scotland) Bill introduced in the Scottish Parliament on 5 March 2009:

- Explanatory Notes;
- a Financial Memorandum;
- an Executive Statement on legislative competence; and
- the Presiding Officer's Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 24–PM.

EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

COMMENTARY ON SECTIONS

PART 1 - SENTENCING

Section 1 - Purposes and principles of sentencing

4. Section 1(1) sets out the purposes of sentencing and 1(2) requires the courts to have regard to these when sentencing offenders. The duty applies regardless of whether the court is imposing a sentence, making an order or disposing of the case in any other way. This is not intended to prevent courts from considering other matters when sentencing offenders.

5. The weight to be given to each of the purposes of sentencing will vary depending on the facts and circumstances of the case and no inference should be drawn from the order in which they are listed.

6. Sections 1(3) and 1(4) set out other matters that the court must have regard to when sentencing offenders - the principles of sentencing. This does not prevent courts from considering other matters when sentencing offenders. These are not to be the only matters that the courts can consider and it is not intended to limit the matters that the court can take into account. No inference should be drawn from the order in which the principles are listed.

7. Section 1(5) sets out the circumstances in which it is not appropriate to require the courts to have regard to the purposes and principles of sentencing as detailed here. This includes occasions where courts are dealing with young offenders (i.e. those under 18 years of age), where a penalty is fixed by law and where courts are dealing with mental health disposals.

Section 2 – Relationship between section 1 and other law

8. Section 2 deals with the relationship between the requirement upon the courts to have regard to the purposes and principles of sentencing under section 1 and their other duties.

9. Section 2(1) provides that the court does not have to comply with the duty to have regard to the purposes and principles in a case where another provision of legislation contains requirements which are inconsistent with those purposes and principles.

10. If sentencing guidelines published by the Scottish Sentencing Council are inconsistent with the purposes and principles, section 2(2) provides that the court need not comply with the requirement to have regard to the purposes and principles in respect of those inconsistencies.

11. Section 2(3) provides that where the purposes and principles are inconsistent with those to which the court must have regard at common law, the court need not comply with the common law in respect of those inconsistencies.

12. Section 2(4) provides that apart from the circumstances dealt with in section 2(1) to (3) the purposes and principles to which the court must have regard under section 1 do not affect any other duty or power imposed or conferred on a court in respect of sentencing an offender.

Sections 3 - 13 - The Scottish Sentencing Council

13. Sections 3 – 13 and Schedule 1 set out the provisions for the establishment of a Scottish Sentencing Council ("the Council"), which will produce sentencing guidelines for Scotland.

14. Section 3 establishes the name of the Council and its status as a body corporate.

15. Section 4 sets out the objectives of the Council, which it must seek to achieve when carrying out its functions. These are to promote consistency in sentencing, assist the development of sentencing policy and support transparency in sentencing by promoting greater awareness and understanding of sentencing policy and practice.

16. Section 5 relates to the sentencing guidelines to be produced by the Council and what they may be about. Subsection (5) requires the Council to include an assessment in each guideline of the costs and benefits of the guideline and the projected impacts on the criminal justice system, in particular prisons and community justice services.

17. Section 6 sets out the consultation procedure for the Council, ahead of publishing any guidelines. The Council must publish a draft of the proposed guidelines for comment before publishing. There is a requirement to consult the Scottish Ministers and the Lord Advocate, as well as such other persons as the Council considers appropriate. Any draft must include the cost assessments and impact assessments required by section 5(5).

18. Section 7 details the effect of the guidelines on the courts. A court must have regard to any guidelines which are applicable in a case and must state its reasons if it chooses to depart from the guidelines. The guidelines that are applicable are those in force and applicable to the case at the time the court is sentencing the offender.

19. When the High Court is dealing with an appeal and is passing a different sentence under relevant provisions in the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"), then it must have regard to the guidelines that are applicable at the time that it is considering the appeal. The provisions in the 1995 Act are as follows:

- Section 118(3) relates to the power of the High Court to quash a sentence and pass another one of equal measure when dealing with an appeal against conviction;

- Section 118(4)(b) relates to the power of the High Court to pass a greater or lesser sentence when dealing with an appeal against conviction;
- Section 118(4A)(b) relates to cases where a court has imposed a sentence other than a mandatory sentence and the High Court opts to pass a different sentence, but one that is still not the mandatory sentence;
- Section 118(4A)(c)(ii) relates to the High Court's decision to set aside a decision and any sentence that departs from the mandatory sentence for drugs offences made under section 205B of the 1995 Act, and instead impose the mandatory minimum sentence or greater;
- Section 189(1)(b) relates to the power of the High Court, in an appeal against sentence in summary proceedings to quash the sentence and substitute another, whether more or less severe.

20. Section 7(6) is intended to prevent the revision of sentencing guidelines from becoming a ground for appeal referral by the Scottish Criminal Cases Review Commission. The Commission often deals with cases in which a significant period of time has lapsed between the original conviction and the appeal.

21. Section 7(7) requires the Lord Advocate to have regard to applicable sentencing guidelines when deciding whether to appeal a sentence.

22. Section 7(8) requires the prosecutor to have regard to applicable sentencing guidelines when deciding whether to appeal a sentence.

23. Section 8 gives the Scottish Ministers the power to request that the Council produces or reviews sentencing guidelines on any matter. While the Council must have regard to the request, it is not bound to comply with it. It must however, provide reasons for its decision not to comply.

24. Section 9 provides the High Court with the power to request that the Council reviews its guidelines on the occasions when it is sitting as an Appeal Court and has opted to pass another sentence under the provisions of the 1995 Act detailed in paragraph 8 above and has decided not to abide by the guidelines or has concluded that the guidelines do not deal adequately with an issue raised by the appeal.

25. The provisions require the High Court to state the reasons for its decision. The Council is required to review any guidelines referred to it under section 9(4).

26. Section 10 provides that the Scottish Court Service must provide the Council with information it may reasonably require in the form in which it requires.

27. Section 11 provides the Council with the power to publish and provide information and guidance on sentencing (in particular to the Scottish Ministers or members of the Scottish Parliament) and conduct research into sentencing. This section requires the Scottish Ministers to have regard to advice or proposals from the Council.

28. Section 12 relates to the business plan of the Council and sets out the requirements for the plan. It requires the Council to submit a 3 year plan to the Scottish Ministers describing how it plans to carry out its functions. Scottish Ministers must lay the plan before Parliament and the Council must publish it. It may also be revised at any time during its three years.

29. Section 13 relates to the annual report which the Council must submit to the Scottish Ministers and sets out the requirements for the content of the report. Each report must be laid before the Scottish Parliament by the Scottish Ministers and published thereafter by the Council.

Section 14 – Community payback orders

30. Section 14 inserts new sections 227A to 227ZK into the Criminal Procedure (Scotland) Act 1995 to establish community payback orders.

31. Section 227A makes provision for the court to impose a community payback order (CPO) on an offender, who has committed an offence, which would otherwise be punishable by imprisonment. Subsection (2) sets out the different requirements that can be included in a CPO. Subsection (3) requires the court to be satisfied that the seriousness of the offence(s) warrant imposition of a CPO. Subsection (4) provides two exceptions to the imposition of a CPO as an alternative to custody, specifically a level 1 unpaid work or other activity requirement, or a level 1 unpaid work or other activity requirement with a supervision requirement. Subsections (5) and (6) set out the restrictions on requirements a justice of the peace court may impose. Subsection (7) requires the court to ensure that the requirements, which form a CPO, are compatible. Subsections (8) and (9) provide powers for the Scottish Ministers to amend the requirements which may be imposed by the justice of the peace court by means of statutory instrument. Subsection (10) provides definitions of court, imprisonment and a level 1 unpaid work and other activity requirement.

32. Section 227B sets out the general procedures, which a court requires to apply, before imposing a CPO. Subsection (2) provides that before making a CPO, the court requires to obtain and take account of a report from a local authority officer. A CPO cannot be made unless such a report has been secured. Subsection (3) sets out who should receive a copy of the report. Subsection (4) provides that before making the order, the court must explain in open court, to the offender the purpose and effect of the CPO and the consequences for the offender should he/she fail to comply with its terms. Subsection (5) requires the offender to confirm that he/she understands and is willing to comply with all the requirements which form the CPO.

33. Section 227C sets out the generic requirements which need to feature in a CPO. These include the need to identify the area where the offender will reside and for the relevant local authority to nominate a responsible officer within 5 days of receiving a copy of the order. The order will indicate the need for the offender to comply with any instructions given by the responsible officer including change of address if the order does not impose a residence requirement. Subsections (3) and (4) set out the duties of the responsible officer including matters of compliance by the offender. Subsection (5) provides that in calculating the period of 5 days for the local authority to nominate a responsible officer, no account will be taken of Saturdays and Sundays.

34. Section 227D sets out the duties of the offender in relation to the CPO. Subsection (2) requires the offender to comply with the instructions of the responsible officer, including where an unpaid work or other activity requirement has been made to attend as instructed, and to notify changes of address and employment and educational circumstances. Subsection (3) provides for failure to comply with any of these duties will treated as non-compliance with the order.

35. Section 227E makes further provision in relation to the CPO. Subsection (1) provides that a CPO is to be regarded as a sentence of the court. Subsection (2) provides that the court must give reasons for imposing the CPO in open court. Subsection (3) provides that the court in imposing a CPO is not prevented from taking other actions e.g. imposing a disqualification on the offender, making an order for forfeiture on the offence or ordering the offender to find caution for good behaviour. Subsections (4) and (5) indicate the arrangements to be followed by the clerk of the court with regard to those who should receive copies of the order and how they should be given. Subsection (6) provides for the form of the order to be set out in an Act of Adjournal.

36. Section 227F provides that the court in deciding on the requirements, which will form a CPO, should so far as possible avoid any conflict with the offender's religious beliefs, or interference with the offender's times of work or attendance at school or any other educational establishment.

37. Section 227G(1) sets out that as part of a supervision requirement and for the period specified the offender must attend as instructed for appointments with the responsible officer or his/her nominee. This indicates that the purpose of the requirement is to engage with the offender to support their rehabilitation. Subsection (2) concerns when a court must impose a supervision requirement. Subsection (2)(a) provides that a supervision requirement must be imposed on an offender under 18 years of age, subject to the court being satisfied that the local authority will be in a position to support and rehabilitate the offender. Subsection (2)(b) provides that a supervision requirement must be included in a CPO where certain other specified requirements are included or where the number of requirements amounts to two or more. A supervision requirement (subsections (3) and (4)) must be at least 6 months and not exceed 3 years.

38. Section 227H applies where a court makes a CPO and imposes a supervision requirement on the offender. Subsection (2) provides that, as part of the order, the court can also impose an obligation on the offender to pay compensation in relation to the offence(s) for which the CPO has been imposed. The compensation can be paid (subsection (3)) by a lump sum or in instalments as determined by the court. Subsection (4)(a) and (b) provide that where compensation is to be paid, it must be paid by the offender either within 18 months of the CPO being made or not later than 2 months before the end of the supervision period, whichever is earlier. The obligation to pay compensation and the time periods over which it is to be paid are to be treated as if they are part of the supervision requirement (subsection (5)).

39. Section 227I sets out the provisions the court must apply when imposing a CPO with an unpaid work or other activity requirement. Subsection (2) provides that the nature of the unpaid work or other activity requirement is not to feature as part of the order but rather to be determined by the responsible officer. Subsection (3) specifies the minimum and maximum

number of hours that constitute an unpaid work or other activity requirement. Subsections (4) and (5) provide for two levels of unpaid work and other activity to be known as level 1 and level 2 and defines the range of hours within these levels. Subsections (6) and (7) provide that the Scottish Ministers have the power to make an order varying the minimum and maximum hours of unpaid work or other activity that an offender can be required to perform. Subsection (8) defines 'specified' as relating to the unpaid work and activity requirement in the CPO.

40. Section 227J sets out further provisions in relation to an unpaid work and other activity requirement. Subsection (1) restricts the court to imposing this requirement only on an offender aged 16 years or over. Subsection (2) provides that this requirement can only be imposed by the court, where the court considers the offender to be suitable to perform the unpaid work or other activity requirement. Subsections (3) and (4) provide for the Scottish Ministers to make regulations to allow justice of the peace courts to impose a level 2 unpaid work and activity requirement.

41. Section 227K(1) provides for the split between unpaid work or other activity to be determined by the responsible officer subject to limits set out in subsection (2) on the maximum number of hours of other activity that can count towards the requirement. Subsection (3) and (4) provide the Scottish Ministers with powers to vary the limits specified in subsection (2.

42. Section 227L sets out the maximum time limit for completion of levels 1 and 2 unpaid work or other activity requirement.

43. Section 227M (1) and (2) provide that where the offender has defaulted on a fine not exceeding £500 and where the court in disposing of the matter would otherwise have imposed a custodial sentence, the court must impose a CPO with a level 1 unpaid work and other activity requirement. Subsection (3) limits the number of hours to 50 for the requirement where the fine that has been imposed does not exceed £200.

44. Subsection (4) provides that the fine or remaining instalment is discharged when the offender completes the hours of unpaid work and other activity requirement imposed by the court. Subsection (5) provides for discharge of the order where the offender after its imposition pays in full the amount of the fine outstanding. Subsection (6) sets out the arrangements which are to apply where the outstanding amount is paid in part. Subsection (7) provides that a level 1 unpaid work and other activity requirement can be imposed on an offender without his consent. Subsection (8) does not apply the wider consent provisions in relation to a CPO in dealing with a fine defaulter under the section 227M provisions. Subsection (9) provides that the court cannot impose a level 1 unpaid work and other activity requirement on an offender aged under 16 years, or where within the context of an overall maximum of 300 hours a further requirement would breach this limit. Subsection (9) does not apply this section to the High Court.

45. Section 227N(1) indicates that this section applies to situations where a court is considering imposing an unpaid work and other activity requirement on an offender already subject to an existing such requirement(s). Subsection (2) gives the court discretion to direct that the new requirement can be concurrent to any existing requirement(s). Where a concurrent requirement is made, subsection (3) sets out that the hours of unpaid work and other activity undertaken in respect of the new requirement also count towards any existing requirement(s).

46. Where a new unpaid work and other activity requirement is to be consecutive to an existing requirement, subsections (4) and (5) provide that the total number of hours to be undertaken must not exceed 300. Subsection (6) specifies that a court cannot impose a new unpaid work and activity requirement where it would result in the maximum 300 hours figure being exceeded.

47. Section 227O gives the Scottish Ministers the power to make rules for regulating performance of unpaid work and other activity requirements including in relation to a daily maximum number of hours, calculations of time undertaken, provision for travel expenses and record keeping.

48. Section 227P requires the offender to participate in a specified programme at the place specified and on the specified number of days. Subsection (2) provides a definition of "programme". Subsection (3) prevents the court from making a programme requirement unless recommended by a local authority officer as being suitable for the offender to take part in. If the cooperation of someone other than the offender would be necessary to ensure the compliance of an offender with the proposed programme requirement, subsection (4) provides that the court can only impose the requirement if that other person consents. If the offender is subject to a programme requirement, Subsection (6) requires the offender to comply with any instructions given by the person in charge of the programme. Subsection (7) defines "specified" in relation to the programme requirement..

49. Section 227Q(1) requires the offender as part of a residence requirement to reside at a specified place for a specified period. If the specified place is to be a hostel or institution, subsection (2) restricts the court from imposing the requirement to only if it has been recommended by a local authority officer. Subsection (3) stipulates that the specified period must not be longer than the period specified in the supervision requirement. "Specified" means specified in the requirement (subsection (4)).

50. Section 227R(1) provides a definition including purpose of a mental health treatment requirement. Subsection (2) indicates that subject to certain specified types of treatment listed in subsection (3) the nature of the treatment is not to be specified. Before imposing a mental health requirement subsection (4) requires the court to be satisfied on the basis of evidence submitted by appropriately qualified individuals that three conditions (A – C) have been met. Subsection (5) sets out the considerations in relation to Condition A in that the offender must be suffering from a mental condition, which requires and may be susceptible to treatment and that other specified orders are not appropriate. Condition B is set out in subsection (6) and requires the proposed treatment to be appropriate for the offender. Subsection (7) requires that where the proposed treatment consists of a resident patient in a hospital arrangements exists for the offender's reception (Condition C). Subsection (9) defines the specified treatment as the mental health treatment specified by the court in the requirement.

51. Section 227S(1) provides that proof of signature or qualifications on a report from an approved medical practitioner is not necessary when the report is submitted in evidence for imposition of a mental health treatment requirement. Subsections (2) and (3) state that the offender and his/her solicitor must receive a copy of the report of the medical evidence and the case may be adjourned to give the offender further time to consider the report.. Where the offender is being detained in hospital or remanded to custody, subsections (4) and (5) make

provision for an examination of the offender by an approved medical practitioner for the purposes of challenging the evidence to be presented in court. Subsection (6) provides for any such examination to be undertaken in private.

52. Section 227T(1) to (3) enable the practitioner under whose direction the treatment is being carried out to make arrangements where appropriate for the offender to receive a different kind of treatment or to receive it at a different place. Subsection (4) states the treatment to be provided requires to be of a kind which could have been specified in the requirement. Subsection (5) provides for the offender as a residential patient to receive treatment in a different institution or place not necessarily specified for that purpose as part of the requirement. Subsection (6) requires the agreement of the offender and the responsible officer to the proposed changes, for the agreement of an approved medical practitioner to accept the offender as a patient and where the offender is to be a resident patient for him/her to be received as such. Subsection (7) requires the court to be informed of changes under this section and for the planned treatment to be appropriate to the mental health treatment requirement.

53. Section 227U(1) specifies the purpose of a drug treatment requirement. Subsection (2) indicates that subject to certain specified types of treatment listed in subsection (3) the nature of the treatment is not to be specified. The person who treats or directs the treatment of the offender (subsection 4) must be appropriately qualified or experienced. Subsection (5) states that the specified period must not be longer than the period of the supervision requirement. Subsection (6) requires the court to satisfy itself before imposing a drug treatment requirement that a) the offender is dependent on drugs or misuses drugs, which are defined b) his/her condition may be treatable and c) arrangements exist for the offender's treatment. Subsection (7) defines "specified".

54. Section 227V(1) specifies the purpose of an alcohol treatment requirement. Subsection (2) indicates that subject to certain specified types of treatment listed in subsection (3) the nature of the treatment is not to be specified. The person who treats or directs the treatment of the offender (subsection 4) must be appropriately qualified or experienced. Subsection (5) states that the specified period must not be longer than the period of the supervision requirement. Subsection (6) requires the court to satisfy itself before imposing an alcohol treatment requirement that a) the offender is dependent on alcohol, b) his/her condition may be treatable and c) arrangements exist for the offender's treatment. Subsection (7) defines "specified".

55. Section 227W sets out the arrangements for periodic review of CPOs. When the court makes a CPO, subsection (1) provides for it to be reviewed at the time or times stated in the Order. Such reviews are to be referred to as "progress reviews"(subsection 2). Subsection (3) allows progress reviews to be carried out by the court which made the CPO or by the appropriate court and subsection (4) for the manner of the review to be determined by the court. Subsection (5) places a responsibility on the responsible officer to the court with a written report before a progress review takes place and subsection (6) a responsibility on the offender to attend each such review. Where he/she fails to attend the progress review, subsection (7) provides for the court to (a) issue a citation for the offender's attendance or (b) a warrant for his/her arrest. Subsection (8) defines the citation provisions. Subsection (9) provides for the court to vary, revoke or discharge the CPO on conclusion of a progress review.

56. Section 227X provides for application by the offender or the responsible officer to vary, revoke or discharge a CPO.

57. Section 227Y(1) applies where a court proposes to vary, revoke or discharge a CPO following a periodic review, application by offender or responsible officer. Subsection (2) provides that the court can only revoke, vary or discharge the order where it is in the interests of justice to do so, having regard to the circumstances following the start of the order. Subsection (3) and (4) set out the options available to the court in considering variation of the order. Subsection (5) provides that where the court proposes to extend the period or time limit specified in the requirement this cannot be longer than the overall maximum period or limit allowable for such a requirement. Subsection (6) applies the same principles set out in subsection (5) to an unpaid work and activity requirement.

58. Subsection (7) provides that where the court varies a restricted movement requirement, a copy of the variation order must be provided to the responsible officer. Subsection (8) allows the court when revoking an order to deal with the offender as it could if the order had not been made. Where the court proposes to vary, revoke or discharge the order, other than on the application of the offender, subsection (9) provides that it must issue a citation requiring the offender to appear before the court. Where the offender fails to appear as cited, subsection (10) allows a warrant for his/her arrest to be issued by the court. Subsection (11) defines the unified citation provisions.

59. Section 227Z(1) and (2) require the court when considering varying a CPO to first obtain a report from the responsible officer. Subsection (3) indicates who is to be provided with a copy of the report. Subsection (4) sets out that when varying the order the court must explain in ordinary language to the offender (a) the purpose and effect of each of the proposed varied requirements, (b) the consequences of non-compliance and (c) any variations to progress review arrangements. Subsection (5) requires confirmation from the offender that he/she understands the variations and is willing to comply with each of them.

60. Where the variation imposes a new requirement, subsection (6) sets out that (a) the court cannot a new requirement which was not available at the point of imposition of the order and (b) where a new requirement is permissible undertake the necessary steps which would have applied had it been imposed at the outset. Subsection (7) reinforces the need for the court to vary a requirement, which would not have been permissible at the point of imposition of the order.

61. Section 227ZA applies to situations where the offender (a) proposes to change, or has changed address within a different local authority to that specified in the order and (b) an application to vary the order to specify the new address has been made to the appropriate court. The court (subsection (2)) may only vary the order as proposed if arrangement exist in the new local authority area for the offender to comply with the order's requirements. Subsection (3) requires the new local authority to nominate one of its officer's to be the responsible officer for the order.

62. Section 227ZB details the procedures and powers of the court in dealing with cases where the offender has failed to comply with the terms and conditions of a CPO and is considered to be in breach of the order. Subsections (1) to (4) set out the procedures for bringing cases to court,

included issue of citations and warrants as required Subsections (5) to (10) set out the options available to the court in dealing with cases where breach of an order has been admitted or proven. Subsection (6) indicates that where a court decides to vary the order to by imposing a new requirement this can include a restricted movement requirement.

63. Subsection (7) requires the court when imposing a restricted movement requirement to also make a supervision requirement if one is not already in place. Subsection (8) requires the restricted movement contractor to be provided with a copy of any such requirement. Subsection (9) restricts the maximum period of a restricted movement requirement to the remaining period of any existing supervision requirement or a maximum 12 months period, whichever is the lesser.

64. Subsection (10) requires the contractor supervising the restricted movement requirement to report any failure in compliance to the responsible officer. Subsection (11) requires the responsible to report incidents of failure of compliance to the court.

65. Section 227ZC details supplementary requirements in respect of evidence and penalties related to dealing with breaches of CPOs. Subsections (1) and (2) set out the custodial terms that different courts can impose for breach of a level 1 CPO. Subsection (3) provides for the evidence of one witness to be sufficient to evidence proof of breach of an order. Subsections (4) and (5) detail the evidence required to prove a breach of an order in respect of a requirement to pay compensation. Subsection (6) requires the court in dealing with cases of alleged breach to obtain a report from the responsible officer on the offender’s compliance during the order.

66. Section 227ZD defines a restricted movement requirement (RMR) which can be imposed as a requirement of a community payback order for failure to comply with that order (see section 227ZB(5)(c) and (6)) and replicates some of the provisions of section 245A of the Criminal Procedure (Scotland) Act 1995 in respect of the requirements of the RMR.

67. Subsection (2) provides that the RMR may require an offender to remain at a specified address, and/or away from a specified address during certain specified periods. Subsection (3) restricts the requirement to remain at a certain address to 12 hours in any one day. Subsection (4) restricts the maximum duration of an RMR to 12 months. Subsection (6) empowers Scottish Ministers to amend by regulation the maximum periods specified in subsections (3) and (4)(b). The regulations would follow the affirmative procedure. Subsection (5) requires the court to specify the method of compliance and the person responsible for monitoring that compliance on the RMR. Subsections (6) and (7) provide for the Scottish Ministers to prescribe by regulation changes to the restrictions set out in subsections (3) and (4). Subsection (8) defines “specified” for the purposes of the section.

68. Section 227ZE further replicates some of the provisions of section 245A of the 1995 Act in respect of requirements placed on the court. Subsection (1) requires the court to be satisfied that compliance with the RMR can be monitored in the way specified in the order – which will be by way of remote (electronic) monitoring. Failure to be satisfied means that the RMR cannot be imposed. Subsections (2) and (3) require the court to obtain a report from the local authority, usually the social work service about the specified address and the views of the people staying at

that address who are likely to be affected by the enforced presence of the offender. The court may hear from the report writer if required before imposing the RMR

69. Section 227ZF provides for the court to consider an application from the offender to vary the terms of the RMR to change the specified address. Before agreeing to the variation the court must consider a report as detailed in section 227ZE above.

70. Section 227ZG applies section 245C of the 1995 Act (remote monitoring of compliance with restriction of liberty orders) to remote monitoring requirements. In particular this provides for the Scottish Ministers to make arrangements, including contractual arrangements, to remotely monitor compliance with RMRs and to specify by regulation the devices which may be used in remote monitoring. It also provides that an offender made subject to an RMR will be required to wear a device to enable such remote monitoring and should not tamper with or damage the devices used for remote monitoring.

71. Section 227ZH makes various provisions with respect to the functions of the Scottish Ministers, replicating some provisions from section 245A and 245B of the 1995 Act.

72. Subsections (1) to (3) provide for the Scottish Ministers to prescribe by regulation the court or classes of courts which may impose RMRs, the method of monitoring which may be used to monitor compliance with the RMR and the class of offender who may be made subject to an RMR. These regulations follow the negative resolution procedure.

73. Subsections (4) and (5) require the Scottish Ministers to determine the person or persons responsible for monitoring compliance with the RMR and provides for different persons to be determined for different methods of monitoring. In practice, this is likely to be the company contracted to provide the remote monitoring service as referred to in section 227ZG.

74. Subsections (6) to (8) require the Scottish Ministers to advise the court of who is responsible for monitoring compliance with the RMR, enabling the court to specify this on the order. These subsections also require Scottish Ministers to advise the courts if there is any change in the persons responsible for monitoring compliance, and for those courts to subsequently vary the RMR to specify the new responsible persons, to send a copy of the varied order to the new responsible person and to notify the offender of the variation.

75. Section 227ZI details the documentary evidence required in order to establish in any proceedings (most likely in breach proceedings) whether the offender has complied with the RMR. It provides that a document produced by the device specified in section 245C of the 1995 Act, as applied by section 227ZG (in practice the remote monitoring system), certificated by a person nominated by the Scottish Ministers that the statement provides information on the presence or otherwise of the offender at the specified address at the date and times shown on that document is sufficient evidence of the facts.

76. Section 227ZJ(1) requires local authorities to consult prescribed persons annually about the nature of the unpaid work and other activities to be undertaken as part of a CPO within their

areas. Subsection (2) defines "prescribed persons" as such persons or class or class of persons as prescribed by Scottish Ministers by regulations.

77. Section 227ZK provides definition of the term "the appropriate court" as used in relation to the provisions for the CPO.

Section 15 – Non-harassment orders

78. Section 234A of the Criminal Procedure (Scotland) Act 1995 ("the Act"), enables a prosecutor to apply for a non-harassment order against a person convicted of an offence involving harassment towards a victim. This section makes changes to the Act to make it less onerous for prosecutors to apply for an order.

79. Subsection (a) changes the test in section 234A(1) of the Act so that an order may be applied for where a person is convicted of an offence involving misconduct towards a victim. Misconduct is defined (as per the substituted definition at subsection (d)) as including "conduct that causes alarm or distress". This is a lower threshold than the existing reference to 'harassment' of the victim and will remove the need for the accused to have been convicted of an offence which in itself involved conduct on more than one occasion. It will allow criminal non-harassment orders to be considered in a greater number of cases.

80. Subsection (b) makes an associated change so that an order can be made to prevent harassment rather than merely any 'further harassment' therefore giving the court powers to protect victims at an earlier stage.

81. Subsection (c) inserts new subsections (2A), (2B) and (2C) into section 234A. New subsection (2A)(a) allows the court to have regard to information on other offences which involved misconduct towards the victim which the offender has been convicted of or has accepted a fixed penalty or compensation offer or work order for under sections 302(1), 302A(1) and 303ZA(6) of the 1995 Act.

82. New subsection (2A)(b) sets out the way in which the information can be given to the court and will allow the court to see the relevant details of previous convictions (rather than simply a list of previous convictions as they currently do) when deliberating on an application for a non-harassment order. This is to enable a court to have fuller details of the past offending behaviour of a person.

83. New subsection (2B) limits the court's right to have regard to this information in accordance with the existing rules on previous convictions, offers or orders set out in sections 101, 101A (solemn proceedings) and 166 and 166A (summary proceedings) of the 1995 Act. New subsection (2C) requires the court to give the offender the opportunity to respond to the application for a non-harassment order.

84. Subsection (d) substitutes a new subsection (7) relating to definitions.

Section 16 - Short periods of detention

85. Section 169 of the Criminal Procedure (Scotland) Act 1995 permits summary courts to detain offenders at court or a police station until 8pm in lieu of imprisonment, so long as the offender can get home that day. As this section is not used and has been redundant for some time, it is being repealed.

86. Section 206(1) of the Criminal Procedure (Scotland) Act 1995 provides that a summary court cannot impose imprisonment for a period of less than five days. The time period for imposing imprisonment is being extended from less than “five days” to less than “fifteen days”. Subsections (2) to (6) permit summary courts to sentence an offender to be detained in a certified police cell or similar place for up to four days. As there are no such certified police cells in Scotland, and have not been any for some time, subsections (2) to (6) are redundant and are therefore being repealed.

Section 17 - Presumption against short periods of imprisonment or detention

87. This section amends the Criminal Procedure (Scotland) Act 1995 so that a court should not sentence a person to a period of imprisonment not exceeding six months unless it considers that no other method of dealing with the person is appropriate. If the court is of the opinion that no other method of dealing with the offender is appropriate, other than imposing a sentence not exceeding six months, then the court must give its reasons for that opinion. The court must enter those reasons in the record of proceedings.

88. Subsection (3) deals with sentencing of children, and provides that where the court sentences a child to a period of detention of six months or less, then it must state its reasons for the opinion that no other method of dealing with the child is appropriate and enter those reasons in the record of proceedings.

Section 18 - Amendments of Custodial Sentences and Weapons (Scotland) Act 2007

89. Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007 (“2007 Act”) deals with the confinement and release of prisoners. These provisions of the 2007 Act have not yet been commenced. Section 18 makes amendments to a number of statutory provisions in the 2007 Act to change the framework relating to the release of prisoners from custody.

90. Subsections (2) and (3) repeal the provisions providing for custody-only sentences and prisoners in the 2007 Act and make provision for a new type of sentence called a short-term custody and community sentence. A short-term custody and community sentence is a sentence of imprisonment for less than the period prescribed in an order made by the Scottish Ministers. A custody and community sentence is a sentence of imprisonment for at the least the period prescribed by the Scottish Ministers in an order. For example a short-term custody and community sentence may be a sentence of imprisonment for less than one year and a custody and community sentence a sentence of imprisonment for a year or more. A prisoner serving a short-term custody and community sentence (a “short-term custody and community prisoner”) is released after he or she has served one-half of his or her sentence of imprisonment and is released on licence for the remainder of the sentence. Subsection (2) also makes provision for the order making power prescribing the period sentence of imprisonment that determines a short-

term custody and community sentence and a custody and community sentence is subject to the affirmative resolution procedure.

91. Subsection (4) makes a consequential amendment to the chapter title in Chapter 3 of Part 2 of the 2007 Act so that it refers to short-term custody and community prisoners.

92. Subsection (5) amends section 29 of the 2007 Act to require the Scottish Ministers to include supervision conditions in a prisoner's licence where the prisoner being released (other than one liable to removal from the United Kingdom) falls into the following categories: a life prisoner; a custody and community prisoner; a short-term custody and community prisoner released on compassionate grounds, a short-term custody and community prisoner subject to an extended sentence, a short-term custody and community prisoner who is a sex offender and is serving 6 months or more, or short-term custody and community prisoner who is a child.

93. Subsection (6) inserts a new provision relating to the licence conditions to which a short-term custody and community prisoner is to be subject to. The Scottish Ministers must include the standard conditions in the licence. The Scottish Ministers must also include the supervision conditions in the licence if the prisoner is a person to whom section 29(1) of the 2007 Act applies i.e. a prisoner released on compassionate grounds; a prisoner serving an extended sentence; a sex offender serving 6 months or more; or a child sentenced to detention. The Scottish Ministers may include other licence conditions if they consider this appropriate.

94. Subsection (7) inserts a new provision for the assessment of conditions for short-term community licences (the licence that a short-term custody and community prisoner is released on). The Scottish Ministers and local authorities are required to put in place joint working arrangements in relation the assessment and management of the risks posed by short-term custody and community prisoners. In deciding whether to include non-mandatory supervision conditions in a short-term community licence for a particular prisoner, the Scottish Ministers and the appropriate local authority must jointly assess whether any of such conditions are appropriate.

95. The appropriate local authority is defined as either the local authority in whose area the offender resided immediately prior to being sentenced or the local authority in whose area the offender intends to reside in upon his or her release on licence.

96. Subsection (8) amends section 47 of the 2007 Act to provide that Scottish Ministers may release, on a curfew licence, a short-term custody and community prisoner who is serving a sentence of 3 months or more and is of a description to be specified by the Ministers by order. Such an order is subject to the affirmative resolution procedure. Section 47(3) of the 2007 Act provides that the curfew licence must include a curfew condition, which is described in section 48 of the 2007 Act.

97. Subsection (8)(c) amends section 47 of the 2007 Act to specify the period during which a short-term custody and community prisoner may be released on a curfew licence. The Scottish Ministers may only release a short-term custody and community prisoner on curfew licence after the later of: the day on which the prisoner has served one-quarter or four weeks of the sentence (whichever is the greater), or the day falling 166 days before the expiry of one-half of the

sentence. In addition, release must be before the day falling 14 days before the expiry of one-half of the sentence. So the window for release on curfew licence is between 166 days and 14 days before the expiry of one-half of the sentence so long as the prisoner has served at least one-quarter (or 4 weeks if this is more than one quarter) of his or her sentence at the proposed time of release.

98. Subsection (8)(e) amends section 47(8) of the 2007 Act to provide that a curfew licence for a short-term custody and community prisoner remains in force until the expiry of the first half of that prisoner's sentence.

99. Paragraphs 2 to 5 of Schedule 1 make consequential amendments to sections 34, 35, 36, 37, 40 and 42 of the 2007 Act.

100. Paragraph 6 of Schedule 1 inserts a new section 42A into the 2007 Act. Section 42A applies where the Parole Board considers under section 42(3) of the 2007 Act that it is in the public interest that a recalled short-term custody and community prisoner be confined. The parole Board are required to provide the prisoner with the reasons for its determination in writing. If there is less than 4 months of the prisoner's sentence remaining, the prisoner must remain in custody for the remainder of the sentence. If there are between 4 months and 2 years of the prisoner's sentence remaining, the Board must fix a date when it will next review the prisoner's case within the period mentioned in section 42A(5). Section 42A(5) specifies that the period begins 4 months after the date of the determination and ends on the expiry of the prisoner's sentence. Subparagraph (6) provides that if no date is set under section 42A(4) the prisoner must remain in prison to the end of the sentence.

101. Section 42A(7) of the 2007 Act provides that if at least 2 years remain of the short-term custody and community prisoner's sentence then the Parole Board must, subject to section 26, fix a date for when it will next hear the prisoner's case within the period mentioned in section 42A(8). Section 42A(8) provides that the period begins 4 months after the date of the determination and ends immediately before the second anniversary of the determination. Section 42A(9) requires Scottish Ministers to refer the case to the Parole Board before any date set by the Parole Board under section 42A(4) or (7).

102. Paragraphs 7 to 14 of Schedule 1 make consequential amendments to sections 45, 46, 51, 55, 56 and Schedules 2 and 3 of the 2007 Act. Paragraphs 15 to 17 make minor consequential amendments to sections 167 and 210A of the Criminal Procedure (Scotland) Act 1995.

Section 19 – Early removal of certain short-term prisoners from the United Kingdom

103. This section substitutes a new version of Schedule 6 to the Custodial Sentences and Weapons (Scotland) Act 2007 ("2007 Act"). The Schedule contains transitory amendments to Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("1993 Act"), which will have effect until the 1993 Act is repealed by the 2007 Act. Paragraph 3(a) replicates the effect of the existing version of Schedule 6.

104. Paragraph 4 inserts three new sections, 9A to 9C, into the 1993 Act. Inserted section 9A provides for a definition of prisoners who are eligible for but not liable to removal from the UK.

In order to be eligible for removal, a prisoner must be able to satisfy the Scottish Ministers that he or she has the settled intention of residing permanently outside the UK if removed from prison. If satisfied, the Scottish Ministers may release the prisoner from prison using the power under inserted section 9B.

105. Inserted section 9B provides the Scottish Ministers with a discretionary power to release short-term prisoners who are liable to or eligible for removal from the UK. This power may be exercised at any time during the 180 day period before the prisoner will have served one-half of their sentence, provided that the prisoner has already served at least one-quarter of his or her sentence. This corresponds to the existing time limits for Home Detention Curfew in the 1993 Act (inserted by the Management of Offenders etc. (Scotland) Act 2005). The Scottish Ministers also have the power to amend the 180 day period, up or down, by means of an order subject to approval by the Scottish Parliament.

106. Inserted section 9B(3) sets out conditions that must be satisfied before a prisoner can be removed from prison under the powers conferred by this section. If a prisoner removed under this section remains in the UK but has not been returned to prison, subsection 9B(4) enables the Scottish Ministers to exercise their duties and powers under sections 1(1), 1AA or 3 of the 1993 Act in relation to the prisoner as if the prisoner were in prison (i.e. duty to release the prisoner after serving one half of the sentence, and the power to release on compassionate grounds).

107. Inserted section 9C provides for the detention and/or further removal of a person who re-enters the UK within a certain time after being released from prison under section 9B.

108. Paragraph 5 makes amendments to the International Criminal Court (Scotland) Act 2001. The amendments to section 24 of the 2001 Act prevent sections 9A, 9B and 9C of the 1993 Act from being applied to international criminal court prisoners.

Section 20 - Reports about supervised persons

109. This section amends section 203 of the 1995 Act (reports) to provide that where a local authority officer makes a report to the court to assist in deciding on the most appropriate sentence, a copy requires to be given to the offender, the offender’s solicitor (if any) and the prosecutor.

Section 21 - Extended sentences for certain sexual offences

110. Under the provisions of section 86(1) of the Crime and Disorder Act 1998, which inserted section 210A into the Criminal Procedure (Scotland) Act 1995, the court is able to impose an “extended sentence” on an offender who is convicted of a relevant sexual or violent offence in circumstances where the offender would, but for the extended sentence, receive a determinate sentence of imprisonment of any length in respect of a sexual offence or a sentence of 4 years or more in respect of a violent offence.

111. Imposition of an extended sentence provides for an additional period of supervision on licence in the community over and above that which would normally have been the case. An extended sentence may only be passed in indictment cases and if the court is of the opinion that

the period of supervision on licence, which the offender would otherwise be subject to, would not be adequate for the protection of the public from serious harm from the offender.

112. An extended sentence is defined, by subsection (2) of section 210A, as being the aggregate of the term of imprisonment which the court would otherwise have passed ("the custodial term") and a further period, known as the "extension period", for which the offender is to be on licence (and which is in addition to any licence period attributable to the "custodial term"). The extension period shall not exceed 10 years (though subsection (5) provides that the total length of an extended sentence shall not exceed any statutory maximum for a particular offence).

113. The following example demonstrates how the extended sentence arrangements currently work in practice (i.e. from the implementation of section 15 of the Management of Offenders etc. (Scotland) Act 2005 in February 2006 which provided for sex offenders sentenced to more than 6 months in custody to be released on licence).

- Example - An offender sentenced to 3 years custodial term and 3 years extension period would be released after serving 18 months in prison but will be on licence for the balance of the custodial period ie. 18 months plus a further 3 years = 4 years and six months in total on licence.

114. Section 210A provides a definition of "sexual offence", which takes the form of listed offences, either under statute or at common law. It also defines "violent offence".

115. The new provision will allow courts in appropriate circumstances, to impose an extended sentence where a person is convicted of an offence which discloses, in the court's opinion, a significant sexual aspect to the offender's behaviour but which is not otherwise covered by the current definitions of "sexual offence" and "violent offence".

116. Schedule 3 to the Sexual Offences Act 2003, lists at paragraphs 36-59 the sexual offences in Scotland in relation to which the notification requirements under that Act apply. Paragraph 60 includes "an offence in Scotland other than those mentioned in paragraphs 36 to 59 if the Court, in imposing sentence or otherwise disposing of the case, determines for the purposes of this paragraph that there was a significant sexual aspect to the offender's behaviour in committing the offence".

117. The new provision will remedy the current absence of a power for the courts to impose an extended sentence in such cases by adding a further "catch all" category to the list of offences, but this will be dependent on the offender being subject, by virtue of Schedule 3 to the Sexual Offences Act 2003, to the notification requirements of Part 2 of that Act.

Section 22 - Effect of probation and absolute discharge

118. This section makes amendments to a number of statutory provisions in order to remove unnecessary references to probation orders and to ensure that probation orders and orders for absolute discharge are treated appropriately in the Licensing (Scotland) Act 2005.

119. Subsection (1) amends section 1(4) of the Rehabilitation of Offenders Act 1974 to update references to statutory provisions which have now been consolidated twice. There is no change to the effect of the sections, and the amendment simply makes the section easier to read.

120. Subsections (2) and (3) remove redundant references to probation orders in sections 49(6) and 58(3) of the Civic Government (Scotland) Act 1982.

121. Subsection (4) inserts a new subsection (2A) into section 96 of the Licensing (Scotland) Act 2005. This will ensure that the court can make an exclusion order when dealing with a person who has been convicted of a violent offence and placed on probation. It displaces section 247(1), which would otherwise provide that the person would not be treated as having been convicted.

122. Subsection (5) inserts new subsections (5) and (6) into section 129 of the Licensing (Scotland) Act 2005 and specifies a number of provisions to which sections 247(1) and (2) of the Criminal Procedure (Scotland) Act 1995 do not apply. The purpose is to ensure that probation orders and orders for absolute discharge are treated as convictions for the purposes of these provisions of the Licensing (Scotland) Act 2005.

Section 23 - Offences aggravated by prejudice

123. Section 96 of the Crime and Disorder Act 1998 (“the 1998 Act”) created a statutory aggravation relating to race requiring that the court shall, on convicting a person of an offence, take the aggravation into account in determining the appropriate sentence.

124. In a similar vein, section 74 of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”) created a statutory aggravation relating to religion requiring that the court shall, on convicting a person of an offence, take the aggravation into account in determining the appropriate sentence.

125. This section amends both the 1998 Act and the 2003 Act to require that the courts record how an aggravation has affected a sentence (if at all) and to ensure consistency between the statutory provisions.

126. Subsection (1) substitutes subsection (5) of section 96 of the 1998 Act. This requires that, where an aggravation relating to prejudice is proved, the court must also explain how the aggravation has affected the sentence (if at all – and if not, then the reasons for this) and record the conviction in a manner which shows that the offence was aggravated by prejudice related to race.

127. Subsection (2)(a) inserts a new subsection (2A) into section 74 of the 2003 Act. This provides that the aggravation can apply even if prejudice relating to religion is not the sole motivation for the offence. This is already the case for racial aggravations and therefore ensures consistency between the two provisions.

128. Subsection (2)(b) replaces subsections (3) and (4) of section 74 of the 2003 Act with subsection (4A), which requires that, where an aggravation relating to prejudice is proved, the court must explain how the aggravation has affected the sentence (if at all – and if not, then the

reasons for this) and record the conviction in a manner which shows that the offence was aggravated by prejudice related to religion.

Section 24 - Voluntary intoxication by alcohol: effect in sentencing

129. This section provides that, at the point of sentence, the Court must not consider it a mitigating factor that the offender was voluntarily intoxicated at the time the offence was committed.

PART 2 - CRIMINAL LAW

Section 25 – Involvement in serious organised crime

130. Section 25(1) makes it an offence for a person to agree with at least one other person to become involved in the commission of serious organised crime. The effect is that those who conspire to commit serious organised crime, as defined, are guilty of an offence.

131. Section 25(2) defines serious organised crime for the purpose of this section and sections 26, 27 and 28 as crime involving two or more people acting together for the principal purpose of committing or conspiring to commit one or more serious offences.

132. A "serious offence" is also defined in subsection (2). It is an indictable offence that is committed with the intention of securing material benefit for any person or a serious act of violence committed for the purpose of securing such benefit at some time in the future.

133. Section 25(3) provides that this offence will attract a maximum penalty on indictment of 10 years imprisonment, an unlimited fine or both. In summary proceedings the available penalties are a maximum of 12 months imprisonment or a fine not exceeding the statutory maximum or both.

Section 26 – Offences aggravated by connection with serious organised crime

134. Section 26 makes provision about a statutory aggravation which applies in cases where an accused commits an offence connected with serious organised crime. Subsection (1) provides that section 26 applies where an indictment or complaint libels or specifies that an offence is aggravated by a connection with serious organised crime and it is subsequently proved that the offence is aggravated in that way.

135. Section 26(2) explains the circumstances in which an offence can be regarded to have been aggravated by a connection with serious organised crime. This relies on proof that the accused was motivated, in whole or in part, by the objective of committing or conspiring to commit serious organised crime. In terms of subsection (3), it is not material to the matter of establishing the accused's motivation whether or not the accused actually enabled a person to commit serious organised crime (as defined in section 25(2)).

136. Section 26(4) specifies that the normal rules on corroboration in criminal proceedings do not apply to establishing the aggravation. Evidence from a single source is sufficient proof.

137. Section 26(5) sets out the steps the court must take when it is libelled in an indictment or specified in a complaint that an offence is aggravated by a connection with serious organised crime and proved that the offence is so aggravated. In addition to a number of formal matters, the court must take the aggravation into account in determining the appropriate sentence.

Section 27 – Directing serious organised crime

138. Section 27(1) makes it an offence to direct another person to commit a serious offence (as defined in section 25(2)) or an offence aggravated by a connection with serious organised crime under section 26.

139. Section 27(2) provides that a person also commits an offence where the direction he or she gives is to direct a further person to commit a serious offence or an offence aggravated by a connection with serious organised crime.

140. Section 27(3) and (7) set out what constitutes direction for the purposes of subsections (1) and (2). First, by virtue of section 27(3), the accused must have done something, or a series of things, to direct another person to commit an offence. Second, the accused must have intended that the thing or things done will persuade that person to commit an offence. And third, the accused must intend that the direction will result in a person committing or enable a person to commit serious organised crime. Section 27(7) provides that "directing" a person to commit an offence includes, but is not limited to, "inciting" a person to commit an offence.

141. Section 27(4) deals with the matter of proving the accused's intention under section 27(3)(b) and (c). That intention may reasonably be inferred from the context in which the steps taken by the accused to direct another person to commit an offence were taken.

142. By virtue of section 27(5), any person directing a person to commit an offence mentioned in section 27(1) will be deemed to have done so regardless of whether that offence was in fact committed.

143. Section 27(6) makes provision about when a direction is to be treated as having been done in Scotland such that it comes within the jurisdiction of the Scottish courts. Where a message containing a direction is either sent or received in Scotland, the direction is to be treated as having been done in Scotland.

144. Section 27(8) deals with penalties. The penalty for the offences in subsections (1) and (2) when tried on indictment is a maximum of 14 years imprisonment, a fine or both. On summary conviction, the available penalties are a maximum of 12 months imprisonment, a fine not exceeding the statutory maximum or both.

Section 28 – Failure to report serious organised crime

145. Section 28 places certain classes of individual under a duty to report to the police any knowledge or suspicion of another person's involvement in serious organised crime. It is an offence for an individual under such a duty to fail to disclose that knowledge or suspicion.

146. Subsections (1) and (2) describe the circumstances in which section 28 applies. Subsection (1) provides that this section applies where a person knows or suspects that another person has committed an offence under section 25 or 27 or an offence aggravated under section 26 in cases where that knowledge or suspicion arises from information obtained in one of two sets of circumstances, namely: (a) in the course of a person's trade, profession, business or employment or (b) as a result of a close personal relationship between the person holding the knowledge or suspicion and the person who has allegedly committed the offences. By virtue of subsection (2), section 28 only applies by virtue of a close personal relationship where the person holding the knowledge or suspicion has derived material benefit as a result of the commission of serious organised crime by the alleged offender.

147. Section 28(3) describes the offence. It provides that where this section applies it is an offence to fail to disclose to a constable any knowledge or suspicion described above and the information on which that is based.

148. Section 28(4) provides that it will be a defence to prove that the accused had a reasonable excuse for failing to disclose a knowledge or suspicion or the information on which it is based.

149. Subsections (5) and (6) provide that disclosure is not required by a professional legal adviser in relation to information they have received in privileged circumstances and set out what is meant by "privileged circumstances".

150. Section 28(7) makes it clear that the reference to a constable in subsection (3) includes a reference to a police member of the Scottish Crime and Drug Enforcement Agency.

151. The penalty for failing to report serious organised crime is stated in subsection (8) to be a maximum of five years imprisonment, a fine or both in proceedings tried on indictment or a maximum of 12 months imprisonment or a fine not exceeding the statutory maximum or both on summary conviction.

Section 29 – Articles banned in prison

152. This section amends section 41 of the Prisons (Scotland) Act 1989 ("the 1989 Act") to create additional specific offences in relation to the introduction, use and possession of a personal communication device (including a mobile telephone and any component part of a mobile telephone) in prisons. In addition, it provides a definition of "proscribed article" and "personal communication device", for the purpose of this section, and inserts further provisions which define the maximum penalty that can be imposed for the introduction, use or possession of personal communication device in a prison, and provide limited circumstances where it is not an offence to have a committed such an act .

153. Subsection (1)(a) substitutes section 41(1) of the 1989 Act, and provides that it is an offence for a person to introduce or attempt to introduce a "proscribed article" in a prison, without a reasonable excuse. It also provides that the maximum penalty that can be imposed for introducing or attempting to introduce a proscribed article (other than a personal communication device) into a prison is, on summary conviction, a period of imprisonment not exceeding 30 days, or a fine not exceeding level 3 on the standard scale (or both).

154. Subsections (1)(b)-(e) make minor consequential amendments to sections 41(2), 41(2A), 41(2B) and 41(3) of the 1989 Act.

155. Subsection (1)(f) inserts two new subsections after section 41(9). The new subsection (9A) provides a definition of "proscribed article" and the new subsection (9B) provides a definition of what a personal communication device includes.

156. Subsection (1)(g) updates the definition of "offensive weapon" in section 41(10) of the 1989 Act, by substituting the reference to the Prevention of Crime Act 1953 with a reference to the definition contained in section 47 of the Criminal Law (Consolidation)(Scotland) Act 1995.

157. Subsection (2) inserts two new sections after section 41 of the 1989 Act in relation to personal communication devices; sections 41ZA and 41ZB.

158. The new sections 41ZA(1)-(3) provides that it is an offence for a person to: Give a personal communication device to a prisoner while the prisoner is inside a prison; transmit or intentionally receive any communication by means of a personal communication device in a prison; or be in possession of a personal communication device while inside a prison.

159. Offences in section 41ZA(1)-(3) are, on indictment, a period of imprisonment not exceeding two years, or a fine, or both; or, in summary proceedings, a period of imprisonment not exceeding 12 months, or to a fine not exceeding the statutory maximum, or both.

160. The new section 41ZB provides a number of exceptions in relation to communication devices. In particular, subsections (1) and (2) of section 41AB provide that it will not be an offence to introduce, use or possess a personal communication device in a designated area of a prison, or where the person has received written authorisation from the governor, director of a prison, or the Scottish Ministers.

161. Subsections (3) and (4) of section 41ZB provide that it will not be an offence for a prison officer (or other prison official) to introduce, use or possess a personal communication device if the device is one supplied to the person specifically for use in the course of the person's official duties at the prison, or the person is acting in accordance with those duties.

162. Subsection (5) of section 41ZB provides that no offence is committed by a person, other than a prisoner, where there is a reasonable excuse for the possession. A prisoner would not have a reasonable excuse, given that personal communication devices are not permitted in prisons and they are asked as part of the reception process whether or not they have any proscribed articles on their possession.

163. Subsections (6) and (7) of section 41ZB provide that it is a defence for a person accused of introducing, using or possessing a personal communication device in a prison to show that the person reasonably believed that the person was acting with authorisation or in circumstances where there was an overriding public interest which justified the person's actions. For example, where an individual from the emergency service had to access the prison with a communication

device, in an emergency situation, and there was insufficient time for the individual to receive written authorisation.

164. Subsection (8) of section 41ZB provides the circumstances where written authorisation is given. In particular it provides that written authorisation should be provided in favour of a specified person (or person of a specified description), or for a specified purpose. Written authorisation is given either by the governor or director of the prison (in relation to activities at that prison), or the Scottish Ministers (in relation to activities at a prison specified in the authorisation).

165. Subsection (9) of section 41ZB provides the definition of a designated part of a prison, where it is not an offence to introduce, use or possess a personal communication device. This is necessary because it is not illegal to use or possess a personal communication device in the community. It is not the intention to penalise a person for entering an administrative area or other designated area of a prison with a personal communication device. It should only be an offence to introduce, use or possess a personal communication device beyond the designated part of a prison i.e. in the secure part of the establishment.

166. Subsection (10) of section 41ZB provides that prison officers or other prison officials who are crown servants or agents do not benefit from Crown immunity in relation to an offence of introducing, using or possessing a personal communication device in a prison. This is to ensure that the personal communication devices are only permitted in prisons in limited circumstances e.g. with authorisation.

Section 30 - Sale and hire of crossbows to persons under 18

167. The Crossbows Act 1987 controls the sale and hire of crossbows and this section introduces new provisions to that Act. Subsection (3) introduces a new section 1A to achieve consistency with the proof of age provisions of the Licensing (Scotland) Act 2005 by clarifying the defences a person charged with selling an article to someone underage can rely upon. Subsection (4) introduces a new section 3A which has the effect of legalising an attempt to purchase or hire a crossbow by a young person, where the young person is acting as part of an authorised test purchasing scheme. It also makes provision to ensure the safety of young people participating in such a scheme. These provisions bring the Act into line with the test purchasing provisions of the Licensing (Scotland) Act 2005.

Section 31 - Sale and hire of knives and certain other articles to persons under 18

168. Section 141A of the Criminal Justice Act 1988 controls the sale of knives and certain articles with a blade or point to under 18s. Subsections (2) and (3) amend the Act to close a gap in the law relating to the hiring of a knife or bladed article to an under 18. Subsection (4) amends the proof of age provisions of section 141A to ensure consistency with the Licensing (Scotland) Act 2005 by clarifying the defences a person charged with selling an article to someone underage can rely upon.

Section 32 - Certain sexual offences by non-natural persons

169. This section makes amendments to the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005. Subsection (2) broadens the range of penalties available for offences under sections 9(4)(b), 9(5)(b), 10(2)(b), 11(2)(b) and 12(2)(b) of the 2005 Act to include an unlimited fine. Consequently, a person found guilty of an offence on indictment under sections 9 to 12 of the 2005 Act, may be liable to an unlimited fine and/or imprisonment for up to 7 years in the case of offences to which section 9(4)(b) relate or, for the other relevant offences, for up to 14 years.

170. Subsection (3) inserts a new section 14A into the 2005 Act. Inserted section 14A provides that, where an offence under sections 10, 11 or 12 of the 2005 Act is committed by a body corporate (such as a company), a Scottish partnership, or an unincorporated association, certain officers of the body or other persons purporting to act in such a capacity may in certain circumstances be held to have committed the offence and will be liable to prosecution as well as the body.

Section 33 - Indecent images of children

171. This section extends the provisions of sections 52 and 52A of the Civic Government (Scotland) Act 1982 ("the 1982 Act") to make it an offence to take, make, distribute, show, publish or possess etc. derivatives of indecent photographs or pseudo-photographs such as line traced and computer traced images. It also extends Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (Offences Against Children Under the Age of 17 Years to which Special Provisions Apply) to include pseudo-photographs and amends Schedule 3 to the Sexual Offences Act 2003 (Sexual offences for the purposes of Part 2 of that Act) in relation to derivatives of indecent photographs or pseudo-photographs.

172. Subsection (1)(a)(i) amends section 52(2C)(b) of the 1982 Act to make clear that indecent pseudo-photographs include data capable of conversion into a pseudo-photograph only where that conversion would result in an indecent image.

173. Subsection (1)(a)(ii) amends section 52 of the 1982 Act by the insertion of new subsections (9) and (10). Section 52(9) extends the definition of "photograph" to cover derivatives of photographs or pseudo-photographs or combinations of these. For example, it includes a computer tracing which is neither a photograph nor a pseudo-photograph but is derived from one. Section 52(10) provides that subsection 52(2B) applies to such derivatives in the same way that it applies to pseudo-photographs.

174. Subsection (2) amends paragraph 2B of Schedule 1 to the Criminal Procedure (Scotland) Act 1995, which lists offences against children under the age of 17 to which special provisions apply. Paragraph 2B, which concerns offences under sections 52 and 52A of the Civic Government (Scotland) Act 1982, is amended to include offences involving indecent pseudo-photographs, as well as indecent photographs of a child under the age of 17 years.

175. Subsection (3) amends Schedule 3 to the Sexual Offences Act 2003, which lists sexual offences for the purposes of Part 2 of that Act. Part 2 of the 2003 Act makes provision for relevant offenders to be subject to the notification requirements set out in that Part of that Act

176. Subsection (3)(a) amends paragraph 44 of Schedule 3 to the Sexual Offences Act 2003 which relates to offences under section 170 of the Customs and Excise Management Act 1979 (concerning the penalty for the fraudulent evasion of duty etc.) in relation to goods which are prohibited from being imported where they included indecent photographs of children under 16. So as to provide consistency with the entries in the Schedule relating to offences in the Civic Government (Scotland) Act 1982 concerning the making, possessing &c of such indecent images, the entry is amended to provide that it applies only where the offender is 18 or over, or is or has been sentenced to at least 12 months imprisonment, or where the court considers it appropriate that the sex offender notification requirements should apply. While this will limit the automatic application of the notification requirements, the provisions outlined in the preceding paragraphs concerning SOPOs will mean that the restriction does not apply in relation to applications for SOPOs. Paragraph 44 of Schedule 3 to the Sexual Offences Act 2003 is also amended to include reference to pseudo-photographs of children under 16.

177. Subsection (3)(b) amends the interpretative provision in paragraph 97(b) of Schedule 3 to the 2003 Act to extend the meaning of indecent photographs and pseudo-photographs for that Act to include derivatives of such photographs and pseudo-photographs (by applying definitions in the 1982 Act which include the amendments made by subsection (1)(a)(ii), above).

Section 34 - Extreme pornography

178. This section creates a new offence of possession of extreme pornography and increases the maximum penalty for the sale etc. of obscene material of that nature. It inserts new sections 51A to 51C into the Civic Government (Scotland) Act 1982 and amends section 51 of that Act.

179. Subsection (1) amends section 51(3) of the 1982 Act to increase the maximum penalty, on conviction on indictment, from 3 to 5 years imprisonment for the offence of displaying, publishing, selling, distributing or possessing etc. with a view to selling or distributing obscene material, where that material contains an extreme pornographic image.

180. Subsection (2) inserts new sections 51A “Extreme pornography”, 51B “Exception to section 51A offence” and 51C “Defences to section 51A offence” into the 1982 Act.

181. Section 51A creates an offence of possession of an extreme pornographic image, defines such images and specifies the maximum penalty which may be imposed for the offence.

182. Subsection 51A(2) provides that an extreme pornographic image must be “obscene”, “pornographic” and “extreme”. The test of “obscene” means that the material must be of such a nature that it would fall within the category of the material whose sale etc. is already prohibited under section 51 of the 1982 Act.

183. Subsection 51A(3) defines a "pornographic" image as one which must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal. Therefore, an image is not pornographic if it can reasonably be assumed that the image has been made principally for another purpose e.g. educational purposes.

184. Subsection 51A(4) provides that where an image forms part of a series of images which can provide a context, then that context, the image itself and any associated sounds must be taken into account when determining whether the image is pornographic.

185. Subsection 51A(5) sets out an example of how subsection 51A(4) can work. Where an image forms an integral part of a narrative (e.g. a story), the whole story will be considered for the purposes of determining whether the image in question is pornographic. This could lead to the conclusion that an image is not pornographic, notwithstanding that when considered on its own, the opposite conclusion would be reached. Subsection 51A(5) is only one example of how subsection 51A(4) may operate. The reference to "context" in subsection 51A(4) not only covers a narrative, it can also, for example, include a series of images which do not tell a story, but which have a recurring theme. In addition, subsection 51A(4) may operate so as to have the opposite effect to that described in subsection 51A(5)(b): examination of an image's context could lead to the conclusion that an image *is* pornographic.

186. Subsection 51A(6) provides that an image is extreme if it depicts in an explicit and realistic way any of the acts set out in subsection 51A(6)(a) to (e). The terms "explicit" and "realistic" require that the act depicted in the image must be clearly seen, lifelike and convincing and appear to a reasonable person to be real. It is not required that the act itself is real.

187. Subsection 51A(7) provides that where an image is an integral part of a narrative, the context provided by that narrative may be taken into account in determining whether an image is extreme in terms of subsection 51A(6). In addition, any description or sound accompanying the image can similarly be taken into account.

188. Section 51B makes provision to exclude images in unaltered classified works and defines the circumstances in which such images are not excluded.

189. Subsections 51B(1) and (2) provide that possession of an excluded image is not an offence under section 51A and define an excluded image.

190. Subsection 51B(3) provides that an image extracted from a classified work for the purposes of sexual arousal is not an excluded image.

191. Subsection 51B(4) provides that in determining whether an image has been extracted for the purpose of sexual arousal, account may be taken of the storage, description, accompanying sound and context of the image.

192. Subsection 51B(5) defines terms used in this section including "classified work" and thereby "excluded image" in subsection 51B(2).

193. Section 51C makes provisions for defences to the offence of possession of extreme pornography. It replicates defences provided for possession of indecent images of children under section 52A of the 1982 Act and makes specific provision in relation to extreme images.

194. Subsection 51C(1) provides that the onus is on the accused to prove the matters specified in subsections 51C(2), (3) and (4) in order to use one or more of the defences. The Crown must prove the essential elements of the offence beyond reasonable doubt.

195. Subsection 51C(2) provides that it is a defence for a person to prove that: (a) he/she had a legitimate reason for possession of the image, (b) he/she had no knowledge of the image and no awareness as to the nature of the image or (c) the image was unsolicited and disposed of promptly.

196. Subsection 51C(3) provides a defence for those who directly participated in the act depicted in an extreme pornographic image and can prove the circumstances set out in subsection 51C(4). When read with subsections 51C(4) and (5) this subsection limits the defence to those who directly participate in simulated acts and retain the images for their own private use. The defence does not extend to a person who films or watches an act depicted in an image but who does not participate directly.

197. Subsection 51C(4) provides that a direct participant must be able to demonstrate that the act depicted in the image was simulated i.e. that it did not actually:

- take or threaten a person’s life;
- result in nor was it likely to result in severe injury;
- involve non-consensual activity;
- feature a human corpse;
- feature an animal or carcase.

198. Subsection 51C(5) provides that the defence in subsection 51C(3) is not available if the image in question is shown, given or offered for sale to any person who was not a direct participant in the act depicted in the image.

Section 35 - People trafficking

199. Trafficking for the purposes of prostitution or for the making or production of obscene or indecent material is an offence under the provisions of section 22 of the Criminal Justice (Scotland) Act 2003, including where it is believed that another person is likely to exercise such control or to so involve the individual. Following changes made by the UK Borders Act 2007, the Bill will align the wording of the section 22 of the Criminal Justice (Scotland) Act 2003 with that now contained in the Sexual Offences Act 2003 by amending:

- section 22(1) (a) by extending its scope so that it refers to facilitating “entry into” the UK as well as the “arrival in” the UK
- section 22(4) by extending the extra-territorial effect so that it is not limited to British nationals and companies by providing that that the offence applies to

anything done whether inside or outside the UK by any person, no matter whether they are in any way connected to the United Kingdom. Section 22 (6) is also repealed. .

200. The section also makes clear that the sheriff court has jurisdiction to deal with those offences by amending section 22(5) to specify in the statute that the sheriff court should have jurisdiction to deal with those offences.

201. This is consistent with section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 which deals with extra-territorial sexual offences. Similar changes are made to the offences relating to trafficking for purposes other than sexual exploitation in sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 by amending:

- section 4(1) by extending its scope so that it refers to "entry into" the UK as well as the "arrival in" the UK;
- section 5 by repealing subsection (1) and (2) and adding a new provision to make clear that section 4(1) to (3) apply to anything done within or outwith the UK; and
- section 5 by adding a new provision to specify that in Scotland the sheriff court has jurisdiction to deal with those offences.

Section 36 - Alternative charges for fraud and embezzlement

202. Paragraph 8 of Schedule 3 to the Criminal Procedure (Scotland) Act 1995 can be applied in certain cases where the evidence led in court would not support a conviction on the basis of the offence as charged but would permit conviction of a different offence. It permits this application of an alternative charge in certain offences involving dishonest appropriation of property. For example, in terms of paragraph 8(2) of Schedule 3 an accused person charged with theft may instead be convicted of reset if the evidence led would not support conviction of theft but would support conviction of reset.

203. The amendments to Schedule 3 extend this principle to cover fraud and embezzlement. As a result of these changes, it will be possible for an accused charged with "breach of trust and embezzlement" to instead be convicted of "falsehood, fraud and wilful imposition". Similarly, an accused charged with "falsehood, fraud and wilful imposition" may be convicted instead of "breach of trust and embezzlement".

Section 37 - Conspiracy to commit offences outwith Scotland

204. Section 11A of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") provides that conspiracy in Scotland to commit an offence outwith the United Kingdom is in itself an offence, provided that the criminal purpose being conspired would constitute an offence in the place where it was intended to be carried out. However, section 11A of the 1995 Act does not cover conspiracies formed in Scotland to commit an offence in England, Wales and Northern Ireland. This section amends the scope of section 11A of the 1995 Act to cover conspiracy in Scotland to commit an offence in other parts of the United Kingdom.

PART 3 - CRIMINAL PROCEDURE

Section 38 – Prosecution of children

205. Section 38 implements in part the Scottish Law Commission's Report on Age of Criminal Responsibility, published in 2002.

206. This section implements Recommendation 2 of the Scottish Law Commission's Report by inserting a new section 41A into the Criminal Procedure (Scotland) Act 1995 prohibiting the prosecution of any child under the age of 12. The age limit applies at the commencement of the prosecution. In addition to the SLC's recommendation, subsection (2) prevents persons over the age of 12 being prosecuted for an offence they committed under that age.

207. The prosecution of children between 12 and 16 would remain subject to the existing statutory provisions, requirements of the European Convention on Human Rights, and the current practices and directions of the Lord Advocate and the Crown Office. The main statutory provision limiting prosecution of children under 16 is section 42(1). This provides that no child under 16 is to be prosecuted except on the instructions of the Lord Advocate or at his instance and that any prosecution is to take place in the High Court or a sheriff court. Subsection (3) makes consequential amendments to section 42 so that it will apply to children aged between 12 and 16.

208. Subsection (4) makes a consequential amendment to section 234AA(2)(b), which provides that the criminal courts can make an antisocial behaviour order only where at the time when he committed the offence, the offender was at least 12 years of age. In light of the limit on prosecution established by section 41A, this provision is no longer necessary and is repealed.

209. The existing rule in section 41 that it shall be conclusively presumed that no child under the age of eight years can be guilty of any offence is retained.

Section 39 – Offences: liability of partners

210. Section 39 provides that where a partnership is guilty of a "corporate offence" that has been committed with the consent or connivance of a partner or attributable to the partner's neglect that partner will also be guilty of the offence. "Corporate offences" are those where in similar circumstances statute provides for individual liability for directors of a body corporate.

211. The effect is to put partners of partnerships in the same position as directors of bodies corporate in relation to statutory criminal offences. Similar provision has already been made under the Limited Liability Partnerships (Scotland) Regulations 2001 in relation to partners of Limited Liability Partnerships, so these are excluded from the operation of section 39. As some statutes have already made provision for individual liability of partners, subsection (3) disapplies the new provisions where such provision has already been made.

Section 40 – Witness statements

212. Section 40 deals with covers witness statements and allows the Crown at any point, both before commencement and during the trial, to provide to any witness who is cited a copy of their statement or to give a witness access to it at a reasonable time and place. "Statement" is defined at (3) with reference to section 262 of the 1995 Act.

Section 41 - Breach of undertaking

213. Under section 22 (liberation on undertaking) of the 1995 Act an accused person can be released by the police on the undertaking that they will appear at court at a later date and that they will comply with certain conditions. The conditions which can be attached to a police undertaking are the same as those which can be applied to a bail order granted by a court and include, for example, a requirement not to commit further offences.

214. Section 41 adds new sections 22ZA and 22ZB to the 1995 Act. It makes provision in relation to offences committed while a person is subject to a police undertaking. These provisions are broadly similar to those that apply where an accused person commits an offence while liberated on bail.

215. Section 22ZA(1) provides that a person commits an offence where they fail to appear at court as required under an undertaking and also where they fail to comply with a condition attached to that undertaking. Subsection (2) provides for the applicable penalty levels for section 22ZA(1) offences. Subsections (3) (read with subsection (4)) provides that where a person subject to an undertaking commits a further offence, the fact that they have breached the undertaking is not to be treated as a separate offence, but is to be taken account of (along with the other listed factors in subsection (4)) by the court in determining the sentence for the further offence.

216. Section 22ZB makes provision for evidential and procedural matters in relation to offences committed or dealt with under section 22ZA.

Section 42 - Bail review applications

217. The prosecutor or the accused can apply for review of a decision to grant, or to refuse to grant, an application for bail or for review of the conditions attached to the grant of bail, e.g. for a change of address.

218. This section amends sections 30 and 31 of the 1995 Act to remove the requirement to hold a hearing in circumstances where an application for review is made but only when the other party consents to, and the court considers it appropriate to grant, the application. Section 30 is also amended to make it clear that an application for review by the accused must be intimated to the prosecutor.

Section 43 - Bail condition for identification procedures etc.

219. Section 43 introduces a new standard bail condition. This new condition provides, that whenever reasonably instructed by a constable to do so, a person released on bail should participate in an identification parade or other identification procedure, and allow any print, impression or sample to be taken from him or her. Although such a condition is not currently a standard condition, under section 24(4)(b) of the 1995 Act, the court may currently impose a further condition to this effect.

Section 44 - Prosecution on indictment: Scottish Law Officers

220. This section amends the procedures contained in the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") for the raising of indictments in name of the Lord Advocate.

221. Section 64 of the 1995 Act currently provides that all prosecutions before the High Court of Justiciary or before the Sheriff sitting with a jury shall proceed in name of Her Majesty's Advocate.

222. Subsection (2) amends section 64 of the 1995 Act (and subsection (4) amends Schedule 2 to the 1995 Act) to provide that indictments are to be libelled at the instance of "Her Majesty's Advocate", removing any requirement for the individual Lord Advocate to be named, personally.

223. Subsection (3)(b)(i) makes a similar amendment to subsection 287(2) of the 1995 Act with regard to the Solicitor General where there is no Lord Advocate in office.

224. Section 287 of the 1995 Act sets out arrangements for the situation where a Lord Advocate resigns or dies and where there is a gap in time before a new Lord Advocate is appointed. In this case indictments are raised at the instance of the Solicitor General. Section 287 makes provision for circumstances where both offices of the Lord Advocate and Solicitor General are vacant, to include where both Law Officers demit office on the same day.

225. Subsection (3)(c) provides that indictments raised by the Solicitor General may be signed by that Law Officer. It also provides that during any period where both offices of the Scottish Law Officers are vacant as a result of the deaths of the Scottish Law Officers that it shall be lawful for indictments to be raised at the instance of the Lord Advocate. Subsection 3(d) includes provision that, where an indictment is raised at the instance of the Solicitor General, that indictment continues to be valid notwithstanding that he or she has since died or otherwise left office.

Section 45 -Transfer of justice of the peace court cases

226. This section introduces new provisions into the 1995 Act relating to the jurisdiction of the JP court in relation to the commencement and transfer of proceedings. Three new sections, 137CA, 137CB and 137CC, are inserted. The purpose is to make provision for JP courts similar to that which exists for the transfer of sheriff court cases under section 137A to 137C of the 1995 Act. It should be noted that consequential amendment to section 10A of the 1995 Act is made in Schedule 5 to this Bill.

227. Section 137CA provides that where an accused person has been cited to a diet, or where citation has not taken place but proceedings have been commenced against an accused in a JP court, the prosecutor may apply to a justice to transfer the proceedings to another JP court in the same sheriffdom.

228. Subsections (1) and (2) of section 137CB provide that where the clerk of a JP court informs the prosecutor that due to unforeseen circumstances it is not practicable for that JP court or any other JP court in the sheriffdom to proceed with some or all of the cases due to call at a diet, the prosecutor may apply to the sheriff principal to transfer the proceedings to a JP court in another sheriffdom.

229. Subsections (3) and (4) provide that where an accused person has been cited to a diet, or where proceedings have been commenced against an accused person in a JP court, the prosecutor can apply to a justice to transfer the proceedings to a JP court in another sheriffdom, if there are proceedings against the accused in a JP court in that sheriffdom.

230. Subsections (5) and (6) provide that where it is intended to take proceedings against an accused person in a JP court, and there are proceedings against the accused in a JP court in another sheriffdom, the prosecutor may apply to a justice for authority to take proceedings against the accused in a JP court in the other sheriffdom.

231. Subsection (7) provides that where an application is made under subsection (2), a sheriff principal may only make the order with the consent of the sheriff principal of the other sheriffdom. Subsection (9) permits the sheriff principal who has made an order under subsection (7) to revoke or vary it, with the consent of the sheriff principal of the receiving sheriffdom.

232. Subsection (8) provides that where an application is made under subsection (4) or (6), the justice is to make the order sought if s/he considers it expedient and if a justice of the other sheriffdom consents. Subsection (10) provides that a justice who has made an order under subsection (8) (or any justice of the same sheriffdom) may revoke or vary that order, if a justice of the receiving sheriffdom consents.

233. Subsections (1) & (2) provide that where there are exceptional circumstances leading to an unusually high number of accused persons appearing from custody for a first calling in JP courts, and it is unlikely that those courts would be able to deal with all these cases, the prosecutor may apply to the sheriff principal for authority to take proceedings against some or all of the accused in a JP court in another sheriffdom. The sheriff principal may order that the proceedings are to be maintained at the receiving JP court, or at the original court. Under subsection (4), the order may be made in relation to a particular period of time, or particular circumstances.

Section 46 – Additional charge where bail etc. breached

234. This section amends sections 27 (breach of bail conditions: offences) and 150 (failure of accused to appear) of the 1995 Act.

235. The effect of these amendments is to allow a complaint to be amended to include an additional charge covering an offence committed as a result of breaching bail conditions or an offence committed in respect of a failure to appear at a diet. A similar provision to allow amendment of a complaint to include a charge of breaching an undertaking is to be found in section 22ZB(10).

Section 47 - Remand and committal of children and young persons

236. This section repeals the provisions contained in section 51 of the 1995 Act, which allow for the remand of children aged 14 and 15 years to prison.

237. Where a child under the age of 16 years is not released on bail or ordained to appear he shall instead be remanded to the local authority to be detained either in secure accommodation or a suitable place of safety.

Sections 48 to 51 - Prosecution of organisations

238. Sections 48 to 51 deal with procedural matters in relation to the prosecution of organisations.

239. Section 70 of the 1995 Act deals with proceedings on indictment against bodies corporate. It provides for how the indictment is served, appearance by a representative for certain purposes, and the recovery of fines. It does not make provision about partnerships or other unincorporated associations. In contrast, section 143 of the same Act, which deals with summary procedure, specifically provides for how proceedings may be brought against partnerships, associations, and bodies of trustees as well as bodies corporate.

240. Sections 48 to 51 clarify and extend these procedural provisions by extending them to apply to "organisations", as defined in the new definition inserted in the 1995 Act by section 48.

241. Section 49 amends section 70 of the 1995 Act to provide for:

- how indictments may be served on different sorts of organisation;
- how organisations may appear by a representative (defined in section 70(8) and (9)) for the purpose of stating objections to the competency or relevancy of the indictment or proceedings, tendering a plea of guilty or not guilty, making a statement in mitigation of sentence;
- the trial to proceed and the case be disposed of where an organisation does not appear either by a representative or by counsel or solicitor; and
- the recovery of fines

242. Section 50 similarly amends section 143 of the 1995 Act to provide for:

- summary proceedings to be taken against an organisation in its corporate capacity for against an individual representative of the organisation;

- how organisations may appear by a representative for the purpose of stating objections to the competency or relevancy of the complaint or proceedings, tendering a plea of guilty or not guilty, making a statement in mitigation of sentence;
- the case to proceed and the case be disposed of where an organisation does not appear either by a representative or by counsel or solicitor; and
- recovery of fines

243. Section 51 amends section 141(2)(b) of the 1995 Act to provide that an organisation (other than a body of trustees) may be cited in summary proceedings if the citation is left at its ordinary place of business with a partner, director, secretary or other official or if it is cited in the same manner as if the proceedings were in a civil court. Section 141(2)(c) already deals with citation of bodies of trustees.

Section 52 - Disclosure of convictions and non-court disposals

244. This section makes provision relating to the circumstances in which convictions and non-court disposals may be disclosed to the court in summary and solemn proceedings. Two new sections, 101A and 166A, are introduced to the 1995 Act and amendment is made to the existing provisions of the 1995 Act in relation to the disclosure of non-court disposals.

245. Subsections (1) and (2) of section 101A provide that when considering sentence in solemn proceedings the court may have regard to convictions, or non-court disposals, acquired after the date of the offence with which the accused is charged but before the date of conviction.

246. Subsection (3) specifies the non-court disposals which are referred to in subsection (2). These are:

- fixed penalties under section 302(1);
- compensation offers under section 302A(1); and
- work orders under section 303ZA(6) of the 1995 Act

247. A fixed penalty or compensation offer may be disclosed only if it has been accepted (or deemed to have been accepted) before the date of conviction. Only a work order that has been completed before the date of conviction may be disclosed to the court.

248. Subsection (4) of section 101A requires the prosecutor to provide the court with a notice of the conviction or non-court disposal.

249. Section 52(2) substitutes a new section 166A into the 1995 Act. The previous version of section 166A, inserted by section 12 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, allowed the court in deciding on the disposal of a case in summary proceedings to have regard to any convictions acquired between the date of the offence and the date of conviction. The effect of new section 166A is to expand that provision to include non-court disposals. This is in the same manner as the provision for solemn proceedings under new section 101A discussed above.

250. Subsections (3) and (4) make amendments to section 302 and section 302A of the 1995 Act. Those sections provide for the offer of a procurator fiscal fixed penalty or compensation offer respectively. The amendments extend the provisions relating to the information to be provided to an alleged offender when an offer of these disposals is made. Subsections (3) & (4) provide that an offer of a fixed penalty or compensation offer must state that if it is accepted, or deemed to have been accepted, that fact may be disclosed to a court in any proceedings to which the alleged offender is (or is liable to become) subject at that time.

251. Amendments to section 303ZA of the 1995 Act under subsection (5) make provision relating to the information that must be included in an offer of a work order.

252. In addition to the information listed in section 303ZA the offer must also state that:

- if it is refused, or not completed, that fact may be disclosed in any proceedings for the offence in question;
- if it is completed, that fact may be disclosed in any proceedings for an offence committed within two years of the date of completion;
- if it is completed, that fact may be disclosed in any proceedings to which the alleged offender is (or is liable to become) subject at that time.

Section 53 – Time limits for lodging certain appeals

253. Section 74 of the 1995 Act makes provision in solemn criminal cases to allow for appeals to be taken in respect of certain decisions made by a court at either a first diet or a preliminary hearing. Section 174 of the 1995 Act makes provision for the procedure to be followed at the "first diet" of a summary criminal case. Both sections provide for appeals to be made against certain decisions of the court and stipulate that any appeal must be lodged no later than two days after the decision. Subsections (2) and (3) of section 53 amend sections 74 and 174 of the 1995 Act, by extending the time limit for lodging these appeals from 2 days to 7 days.

Section 54 – Submissions as to sufficiency of evidence

254. This section inserts sections 97A, 97B and 97C into the Criminal Procedure (Scotland) Act 1995. New section 97A effectively creates a statutory replacement for what is termed a "common law submission". Under the common law a submission to the court may be made by the defence at the end of all evidence in a case. If successful, it typically results in a direction, in the course of the judge's charge to the jury, that the jury should not convict on a particular charge, or should consider only a reduced charge. This direction may be focused on the basis that the evidence in the case is insufficient in law to justify a conviction. It is in the context of the judge's role in determining questions of law, which comes before the ultimate assessment of questions of fact by the jury.

255. At present, an accused may make a submission as of right only after the Crown speech to the jury, although the Crown commonly consents to a submission being made at the close of the evidence. Where a submission is made after the Crown speech, the Crown does not have a right of reply, on the basis that at that stage the prosecutor is *functus officio* (prevented from taking the matter further as a result of having fulfilled his or her official duties).

256. Subsection (1) of section 97A gives the accused the right to make certain submissions immediately after the close of the evidence. Subsection (2)(a) permits such a submission to contend that the evidence is insufficient in law to justify the accused's being convicted of the offence (or of any other offence of which he could be convicted under the indictment). The meaning of "insufficient in law" is the same as in section 97 of the 1995 Act and is a test of technical sufficiency rather than a test as to the quality of the evidence. This permits an accused to submit that there is no case to answer. Accordingly, a submission under subsection 2(a) will succeed in two circumstances: either where there is an absence of corroboration or in the rare circumstance (such as arose in *HMA v Purcell* 2008 SLT 44) where the indictment is irrelevant and the judge could not permit the jury to convict regardless of the evidence. Subsection (2)(b) permits a submission to be made that there is no evidence to support some part of the circumstances set forth in the indictment; for example, to support the allegation of the use of a weapon in a charge of assault.

257. Subsection (3) provides that a submission of the kind referred to in subsection (2) may only be made under section 97A (and at the close of evidence). The effect of this provision is to bypass the use of the common law submission as it applies to the matters described in subsection (2).

258. Section 97B applies where the accused makes a submission under section 97A(2)(a) that the evidence is insufficient in law to justify the accused's being convicted of the indicted offence or of any other offence of which the accused could be convicted under the indictment.

259. Subsection (2) makes provision for where the judge is satisfied that the evidence is insufficient in law to justify a conviction for the indicted offence. It ensures that the trial will proceed only where the judge is satisfied that the evidence is sufficient in law to justify the accused's being convicted of a related offence or where another offence is libelled in the indictment which has not itself been subject to a submission under section 97A(2).

260. Subsection (3) provides for the continuation of the trial where the judge rejects a submission under section 97A(2)(a).

261. Subsection (5) ensures that the clerk of court will check and confirm that the amendment has been properly made.

262. Section 97C applies where the accused makes a submission under section 97A(2)(b) that there is no evidence to support some part of the circumstances set out in the indictment.

263. Subsection (2) provides that the prosecutor will be directed to amend the indictment where the judge is satisfied that there is no evidence to support some part of the circumstances set out in the indictment.

264. Subsection (3) provides for the continuation of the trial where the judge rejects a submission under section 97A(2)(b).

265. Subsection (5) ensures that the clerk of court will check and confirm that the amendment has been properly made.

Section 55 – Prosecutor's right of appeal

266. The Crown is not able under the existing law to a challenge a decision by a judge that brings a criminal case to an end. The existing rights of appeal available to the Crown are highly restricted. The prosecution may be able to use a bill of advocation in relation to some aspects of the trial process, although this is normally confined to procedural errors in the preliminary stages of a case. The Crown may also appeal against sentence under section 108 of the Criminal Procedure (Scotland) Act 1995. This can be on a number of grounds, including that the disposal of the case was unduly lenient. The other option available to the Crown is not technically an appeal, but a reference made by the Lord Advocate under section 123 of the 1995 Act where the Crown wish the High Court to consider a particular point of law that arose in a criminal case. This has no effect on the disposal of the case that lead to the reference.

267. Section 107A gives the Crown a right of appeal against certain decisions by a judge that bring a criminal case to an end without a decision by a jury. These are rulings of no case to answer under section 97 and decisions under section 97A (the statutory replacement for a common law submission). Section 107B provides the Crown with a right of appeal against certain findings relating to the admissibility of prosecution evidence. These changes do not create any rights of appeal in relation to a decision by a jury.

268. Section 107A(1)(a) creates a right of appeal in relation to a decision by a judge under section 97 that, at the close of the evidence for the prosecution, the evidence led is insufficient in law to justify the accused being convicted of the offence charged. Paragraph (a) of subsection (1) also provides a right of appeal in relation to a decision taken under section 97B(2)(a), at the close of the entire evidence in the case, to acquit the accused of the indicted offence on the grounds that the evidence is insufficient in law to justify the conviction of the accused for that offence.

269. Paragraph (a) of subsection (1) creates a right of appeal in relation to a decision by a judge under section 97 that, at the close of the evidence for the prosecution, the evidence led is insufficient in law to justify the accused being convicted of the offence charged. Paragraph (a) also provides a right of appeal in relation to a decision taken under section 97B(2)(a), at the close of the entire evidence in the case, to acquit the accused of the indicted offence on the grounds that the evidence is insufficient in law to justify the conviction of the accused for that offence

270. Paragraph (b) of subsection (1) creates a right of appeal in relation to a direction made under section 97B(2)(b). This is a direction to the prosecutor to amend an indictment and is given where the judge is satisfied that the evidence is sufficient in law to justify the accused being convicted of a related offence. Paragraph (b) also provides a right of appeal against a decision under section 97C(2) directing the prosecutor to amend the indictment to reflect a decision that there is no evidence to support some part of the circumstances set out in the indictment.

271. Section 4(2) of the Contempt of Court Act 1981 allows a court, where it appears to be necessary in order to avoid a substantial risk of prejudice to the administration of justice in any proceedings which are pending or imminent, to order that the publication of any report of the proceedings be postponed for such period as the court thinks necessary. Subsection (2)(a) of section 107A allows the court, where it appears that the prosecution appeal may result in further proceedings against a person for an offence of which he has been acquitted, to make an order under section 4(2) of the Contempt of Court Act 1981. This will avoid the risk of prejudice to those further proceedings.

272. Subsection (2)(b) permits the court, in exceptional circumstances and after hearing the parties, to order the detention of an acquitted person in custody or admit him to bail pending the hearing of the prosecution appeal.

273. Most rulings on the admissibility of evidence are made at preliminary diets or preliminary hearings. However, some evidential questions may still arise during the course of a trial, for example where an unexpected development occurs in the course of oral evidence. If a challenge to admissibility of evidence is successful and the accused is acquitted, it could be maintained that a ruling on admissibility had been fatal to the entire prosecution.

274. Section 107B gives the prosecutor a right of appeal against findings made during the course of the trial that evidence which the prosecution seeks to lead is inadmissible. Subsection (2) establishes that the leave of the trial court is required in all appeal cases involving a finding that evidence is inadmissible. Subsection (3) requires any motion for leave to appeal to be made before the close of the Crown case. Subsection (4) sets out the factors to be taken into account by the court in determining whether or not to grant leave to appeal.

275. Section 4(2) of the Contempt of Court Act 1981 allows a court, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in any proceedings which are pending or imminent, to order that the publication of any report of the proceedings be postponed for such period as the court thinks necessary.

276. Subsection (5)(a) of section 107B allows the court, where it appears that the prosecution appeal may result in further proceedings against a person for an offence of which he has been acquitted, to make an order under section 4(2) of the Contempt of Court Act 1981 to avoid the risk of prejudice to those further proceedings. Subsection (5)(b) permits the court, in exceptional circumstances and after hearing the parties, to order the detention of an acquitted person in custody or admit him to bail pending the hearing of the prosecution appeal.

277. Subsection (1) of section 107C allows the High Court, in considering an appeal under section 107A or 107B, to review not only the decision appealed against but any earlier decisions which may have a bearing on the decision appealed against. So, for example, where an acquittal under section 97 is appealed, the High Court will be able to review not only the trial judge's decision that the evidence led by the prosecution was insufficient in law to justify the conviction of the accused, but also an earlier finding by that judge that an element of prosecution evidence was inadmissible. Subsection (2) provides that the test to be applied by the High Court in considering an appeal under section 107A or 107B is whether the trial judge's decision was wrong in law.

278. If a Crown appeal (under either section 107A or 107B) is successful, then the Crown may seek to continue the prosecution. It is likely that in the majority of cases the continuation of the existing trial would not be a realistic possibility because of the delay that would necessarily be incurred during the appeal process. Proceeding with the case in those circumstances would therefore require the Crown to raise a fresh prosecution. However, in some instances it may be considered practicable for the appeal to be heard and determined during an adjournment of the trial, allowing the trial to continue if the appeal is upheld. Such an appeal is defined as an "expedited appeal" in subsection (2).

279. Section 107D makes provision for expedited appeals to be heard and determined during an adjournment of the trial. Subsection (1) and (2) provide for the court to take steps to determine whether it would be practicable to continue the existing trial following the appeal. After hearing the views of both the Crown and the accused, the Court will decide whether the appeal should be heard during an adjournment of the trial.

280. Subsection (6) means that where an appeal against an acquittal under section 97 or 97B(2)(a) is successful; the High Court will quash the acquittal and direct that the trial is to continue in respect of the offence.

281. Section 107E makes provision for appeals against an acquittal that are not subject to the expedited appeal procedure provided for by section 107D. It applies to acquittals arising under section 97 or section 97B(2)(a) or as a consequence of a ruling that evidence that the prosecution sought to lead was inadmissible under section 107B(1). This section will apply where it would not be practicable to continue the existing trial whilst the appeal against conviction is being considered. Subsection (1) limits section 107E to appeals against an acquittal. Non expedited appeals that are *not* against an acquittal are dealt with under section 107F.

282. The effect of subsections (1)(c) and (2) are that where the High Court (sitting as a court of appeal) determines that the acquittal was wrong in law, it shall quash the acquittal. Subsection (3) provides for the High Court to grant authority for a new prosecution in accordance with section 119 of the Criminal Procedure (Scotland) Act 1995 for the same or any similar offence arising from the same facts. The High Court will not grant authority to bring a new prosecution where it considers that doing so would be contrary to the interests of justice.

283. Subsection (4) provides that if no motion is made for authority to bring a new prosecution, or if the High Court refuses such a motion, the High Court shall itself acquit the accused of the offence in question.

284. Section 107F makes provision for appeals made under section 107A or 107B that are not appeals against an acquittal and that are not subject to the expedited appeal procedure provided for by section 107D. This section will apply where it would not be practicable to continue the existing trial whilst the appeal against conviction was being considered. The practical effect of subsection (1) is to limit section 107F to non-expedited appeals against:

- a direction to amend the indictment to cover a related offence (where the judge is satisfied that the evidence is insufficient in law to justify the accused's being convicted of the indicted offence) (section 97B(2)(b));

- a direction to amend the indictment (where the judge has ruled that there is no evidence to support some part of the circumstances set out in the indictment) (section 97C(2);
- a finding that prosecution evidence is inadmissible.

285. Non expedited appeals against an acquittal are dealt with under section 107E.

286. Because the appeal in question is not being expedited, the trial is unable to continue in relation to any offence to which the appeal relates. Subsection (2) therefore provides for the court to desert the diet in relation to that charge (or those charges) *pro loco et tempore* and, under subsection (3), the trial shall proceed only in relation to any other charges remaining on the indictment. The ordinary consequence of desertion *pro loco et tempore* is that the Crown is free to bring a fresh indictment (see Renton & Brown, *Criminal Procedure* (6th edn, R 22: Apr 2005) paragraph 18-21).

287. Subsection (4) provides for the High Court to grant authority for a new prosecution in accordance with section 119 of the Criminal Procedure (Scotland) Act 1995 for the same or any similar offence arising from the same facts. The High Court (sitting as a court of appeal) will not grant authority to bring a new prosecution where it considers that doing so would be contrary to the interests of justice.

Section 56 – Power of High Court in appeal under section 107A of 1995 Act

288. This section amends section 104 of the 1995 Act to make a number of powers available to the High Court for use in connection with appeals under sections 107A and 107B. Section 104 already confers powers upon the High Court when hearing appeals under section 106(1) or 108 of that Act, including power to order the production of documents, to hear evidence etc.

Section 57 – Further amendment of the 1995 Act

289. This section makes a number of amendments to the Criminal Procedure (Scotland) Act 1995. The amendments made by subsections (1) to (3) relate to the lodging of notes of appeal and the provision of the trial judge's report. Subsection (4) makes amendments concerned with the procedure following the granting of the High Court's authority to bring further proceedings following a successful Crown appeal.

290. Section 110 of the 1995 Act makes provision for notes of appeal. Subsection (1) of that section contains time limits for lodging such notes and provides for the transmission of copies of notes to the court and to the parties concerned in the appeal. Subsection (3) of that section requires that a note of appeal identify the proceedings, contain a full statement of the ground of appeal, and be in as nearly as may be the form prescribed by Act of Adjournal. Subsection (4) of that section provides that, except by leave of the High Court on cause shown, it shall not be competent for an appellant to found any aspect of his appeal on a ground not contained in the note of appeal.

291. Subsection (1) of section 57 inserts new sub-paragraphs (c), (d) and (e) into section 110(1) of the 1995 Act, providing for the lodging of a note of appeal within seven days of a non-expedited appeal being brought under section 107A; within seven days of the granting of leave for a non-expedited appeal under section 107B; and as soon as practicable after a decision under section 107D(2) that an appeal be expedited. An effect of this insertion is that subsections (3) and (4) (of section 110 of the 1995 Act) apply to Crown appeals as they do to appeals by a convicted person under section 106 and by the Lord Advocate against disposal under section 108. (Note, however, that while the time limits for appeals by convicted persons may be extended under either section 110(2) or 111(2), the time limit imposed upon a Crown appeal by inserted paragraphs (c) and (d) of section 110(1) cannot be extended).

292. Section 113 of the 1995 Act requires the trial judge, on receiving the copy note of appeal sent to him under section 110(1), to furnish the Clerk of Justiciary with a written report giving the judge's opinion on the case generally and on the grounds contained in the note of appeal. It is appropriate that such a note should be provided to assist the High Court in considering a Crown appeal; but in an expedited appeal, where the appeal is to be heard during an adjournment of the trial, it will often be impractical to require a full report.

293. Subsections (2) and (3) of this section address these points. The effect of subsection (2), together with subsection (1), is to apply section 113 of the 1995 Act to non-expedited appeals: in any such appeal, the trial judge will be required to provide a full report. Subsection (3) inserts a new section 113A into the 1995 Act, permitting the trial judge in an expedited appeal to furnish the Clerk of Justiciary with such written observations as he or she thinks fit.

294. Subsection (4) of section 57 makes amendments applying section 119 of the 1995 Act (provision where High Court authorises new prosecution) to Crown appeals. Paragraph (a) inserts reference to new prosecutions authorised under section 107E(3) and section 107F(4) in relation to non expedited appeals arising under section 107A or 107B.

295. Paragraph (b) creates a replacement for subsection (2) of section 119. New subsection (2)(a) reproduces the existing law which states that a new prosecution granted where a conviction is quashed under section 118 of the 1995 Act (following a successful appeal by the defence) may not proceed upon the basis of a more serious charge than that on which the accused was convicted in the earlier proceedings.

296. New subsection (2)(b) provides, where a new prosecution is granted after a successful appeal against an acquittal under section 107A or 107B, that a new prosecution may not proceed upon the basis of a more serious charge than that on which the accused was acquitted in the earlier proceedings.

297. New subsection (2)(c) places a similar restriction in relation to a new prosecution authorised under section 107F(4) resulting from an appeal against a direction as to sufficiency, admissibility or lack of evidence. By virtue of this subsection a new indictment may not contain a more serious charge than that libelled in the original proceedings.

298. Where a successful appeal under section 107A has resulted in a new prosecution, new subsection 2A of section 119 (inserted by paragraph (c)) ensures that the circumstances set out in

the new indictment are not to be inconsistent with any direction made by a trial judge to amend the old indictment under section 97B(2)(b) or 97C(2). A direction under those provisions would have been to either include a related offence within the indictment (the judge having ruled that the evidence was insufficient in law to justify a conviction under the indicted offence) or to reflect a ruling that that there was no evidence to support some part of the circumstances set out in the indictment. However, this requirement does not apply if the High Court determines that the direction under section 97B(2)(b) or 97C(2) was wrong in law.

299. Paragraph (d) amends subsection (9) of section 119. The effect of this amendment is that where two months elapse following the date upon which the High Court grants authority under section 107E(3) and section 107F(4) and no new prosecution has been brought, the order granting authority to bring a new prosecution shall have the effect, for all purposes, of an acquittal.

Sections 58 – 60 - Retention and use of samples etc.

300. Sections 58 to 60 contain provisions on the retention and use of samples.

301. The law on police powers to take, retain and use DNA, fingerprints and other forensic data (such as palm prints) is predominantly set out in sections 18-20 of the 1995 Act. In general, samples and records of forensic data must be destroyed once the decision is taken not to prosecute an individual for the offence the samples and records were collected in connection with, or, if the individual is prosecuted, when the proceedings end without a conviction. If the individual is found guilty of the offence, the samples and records of their forensic data can be retained indefinitely

302. Section 18A of the 1995 Act allows an exception to this general rule where criminal proceedings have been initiated against an individual for an offence, but end without a conviction. This only applies to criminal proceedings for a list of serious sexual or violent offences set out in section 19A(6) of the 1995 Act. In these circumstances, DNA samples and records can be retained by the police for at least three years. At the end of that time, the Chief Constable can apply to a sheriff for these samples and records to be kept for up to a further two years and this process can be repeated at the end of each extended period.

303. Section 58 amends sections 18 and 18A of the 1995 Act, extending this exception to cover the retention of “relevant physical data” (which is defined in section 18(7A) of the 1995 Act as fingerprints, palm prints, prints or impressions of another external part of the body, and records of skin on an external part of the body) as well as DNA records.

304. Section 59 inserts new sections 18B and 18C to the 1995 Act. These introduce a similar exception to the normal rules governing retention of DNA, fingerprint and other physical data to that described above in relation to section 58, covering certain cases dealt with by the Children’s Hearings System. This applies where a child is referred to a Children’s Hearing on the grounds that they have committed one of a list of specified serious violent or sexual offences and has had DNA, fingerprint or other physical data taken from them under section 18 of the 1995 (upon his/her arrest or detention). The list of relevant offences will be drawn from the lists of sexual or

violent offences in section 19A(6) of the 1995 Act, and set out in secondary legislation, which will need to be approved by the Scottish Parliament.

305. If the child and relevant person (a parent or person with control over the child) accepts that he or she has committed one of the relevant offences, or a sheriff establishes that they have done so, DNA, fingerprint or other physical data can be kept for at least three years.

306. As with section 58, the Chief Constable will be able to apply to a sheriff for an extension of up to two years at the end of this time, and this process can be repeated at the end of each extended period.

307. If a child is referred to a Children's Hearing on the grounds of having committed a relevant offence and refuses to accept that such an offence was committed, any DNA, fingerprints and other physical data which has been taken from that child under section 18 of the 1995 Act must be destroyed. This also applies where the commission of a relevant offence by the child is not established by a sheriff, to whom a children's hearing refers the case to establish the facts or who reviews the case under section 85 of the Children (Scotland) Act 1995.

308. Section 60 inserts a new section 19C into the 1995 Act, setting out the general purposes for which DNA and fingerprint information can be used. This makes it clear that the police can use the DNA and fingerprint information as a tool to help prevent, detect, and investigate crime, and prosecute crime in court. It also allows the information to be used to establish the identity of a deceased person and also a person from whom DNA samples, relevant physical data and information from samples comes from, as there may be a need to identify a person from whom a body or body part where no criminal activity is suspected: for example, following a natural disaster. These purposes apply whether the crime or incident occurs or is being investigated in Scotland, elsewhere in the UK or abroad, enabling the police to assist with investigations and prosecutions wherever they take place.

309. At present, police use common law powers for the use of fingerprints and DNA in criminal investigations and prosecutions. The powers in new section 19C aim to provide clarity on the purpose for which samples and records of forensic data can be used. They are without prejudice to existing powers at common law.

Section 61 - Referrals from Scottish Criminal Cases Review Commission: grounds for appeal

310. The Scottish Criminal Cases Review Commission was established by section 194A of the 1995 Act, inserted by the Crime and Punishment (Scotland) Act 1997.

311. Section 194B(1) of the 1995 Act sets out the Commission's power to refer a person's conviction or sentence to the High Court. Where the Commission makes a reference to the High Court, the Commission is required to give the Court a statement of their reasons for making the reference, in accordance with section 194D(4).

312. The High Court is then required to consider the matter referred as if it were an appeal under Part 8 (appeals from solemn proceedings) or Part 10 (appeals from summary proceedings) of the 1995 Act.

313. Section 194C of the 1995 Act sets out the grounds on which the Commission can make a reference to the High Court. These are that the Commission believe that a miscarriage of justice may have occurred, and that it is in the interests of justice that a reference should be made.

314. The effect of a reference by the Commission is that there is no need for the applicant to seek leave to appeal under section 107 of the 1995 Act (for solemn appeals) and section 180 (for summary appeals). Where the Commission has made a reference to the High Court there is nothing to limit the appellant from raising grounds of appeal that are not related to the reasons that the Commission made the reference. Section 194D is being amended so that where the Commission make a reference, an appeal arising from this reference can only be based on grounds relating to one or more of the reasons given by the Commission in its statement of reasons.

315. If the appellant seeks to make a case based on grounds of appeal that are not related to the reasons contained for the Commission’s reference, then this will only be possible if leave is given by the High Court in the interests of justice.

PART 4 - EVIDENCE

Section 62 – Witness statements: use during trial

316. Section 62 creates a power for the court to allow a witness to refer to his statement during the giving of evidence subject to the witness statement having been made available to the Crown and to the defence in advance of the trial. Subsection (3) extends the applicability of section 262 (construction of sections on hearsay) of the 1995 Act to witness statements. Within that, subsection (3)(c) disapplies the meanings of “criminal proceedings” and “made” to witness statements.

Section 63 - Spouse or civil partner of accused a compellable witness

317. This section makes provision for the spouse or civil partner of an accused to be a competent and compellable witness. This section amends section 264 of the 1995 Act and repeals section 130 of the Civil Partnership Act 2004. The common law provisions regarding the spouse as a witness will also be overturned.

318. This section provides that the spouse or civil partner of an accused is a competent and compellable witness for the prosecution, accused or co-accused in the proceedings against the accused. Currently the law provides that a spouse is a competent witness in all circumstances. However, s/he is a compellable witness for the prosecution or a co-accused only where s/he is compellable at common law. In respect of the common law, a spouse is only compellable where the accused is charged with an offence against him or her. The operation of the common law rule is not restricted to offences of personal injury, but extends to false accusation and to

offences against property, including theft and even the forgery of the spouse's signature on a cheque.

319. It does not extend to damage to property of which the spouse is only a tenant, unless perhaps if s/he is liable to pay for the repair of the damage. If a spouse of an accused is the victim of the crime with which the accused is charged then their marital status is of no consequence. A spouse and an unmarried partner would be a compellable witness for the prosecution in such a case.

320. It is only where the spouse is not the victim that s/he can decline to give evidence for the prosecution. If the spouse of an accused is called as a Crown witness, in circumstances in which s/he is not compellable against her husband or wife, s/he has the option of declining to give evidence. But if s/he elects to give evidence against the accused, s/he cannot decline to answer questions which incriminate the spouse. An unmarried partner cannot decline to give evidence in any circumstances.

321. By the 2004 Act, a civil partner is not a compellable witnesses for the prosecutor or a co-accused. Persons in a registered civil partnership are, accordingly, never compellable against each other.

322. This provision of the Bill will provide that the spouse and civil partner of an accused will be competent and compellable witnesses for the prosecution, accused or co-accused in any proceedings against the accused. In effect they will be treated no differently to any other witness. It will also take away the common law right of an accused's spouse to refuse to give evidence of matrimonial communings.

Section 64 – Special measures for child witnesses and other vulnerable witnesses

323. This section amends sections 271-271M of the 1995 Act to allow the special measures (listed at section 271H) that are available for vulnerable witness to be used in "any relevant criminal proceedings in the High Court or the sheriff court", as defined in subsection 2(b)(ii).

324. Subsections (3)-(9) replace all references to "trial" in sections 271-271M with references to the relevant criminal proceedings. This allows the special measures to be used in proceedings other than trials.

325. Subsection (10) makes consequential amendment to section 288E (5) of the 1995 Act.

Section 65 – Amendment of Criminal Justice (Scotland) Act 2003

326. Section 65 repeals section 15A of the Criminal Justice (Scotland) Act 2003. This section allowed the special measures to be used in relation to proofs in relation to victim statements. This section is no longer necessary now that the special measures may be used in any hearing in relevant criminal proceedings.

Section 66 - Witness anonymity orders

327. Subsection (1) inserts new sections 271N to 271Y into the 1995 Act and provides courts with an order-making power to secure anonymity for witnesses when giving evidence in court.

328. The new section 271N(1) sets out what a witness anonymity order is and defines the order in such a way as to grant the court a wide discretion as to how the court protects the anonymity of a witness in any particular case.

329. The new section 271N(2) refers to procedures detailed at sections 271P, 271Q and 271R which deal with how applications should be made and what conditions the court needs to consider when considering whether to make an order.

330. The new section 271N(3) and (4) lists the kinds of measures the court may use to secure the witness's anonymity. The list is only illustrative; the court may employ other measures if it thinks fit. Technological developments and the practical arrangements in the court may affect such decisions.

331. The new section 271N(5) provides that the court may not make a witness anonymity order which prevents the judge, jury or interpreter either from seeing the witness or from hearing the witness's natural voice. The judge, jury and interpreter must always be able to see and hear the witness.

332. The new section 271P(1) provides that applications for a witness anonymity order may be made by the accused as well as prosecutors. This reflects the position in the case of *Davis*, where the Court of Appeal allowed a defence witness as well as prosecution witnesses to give evidence anonymously. It is expected that defence applications are most likely to be made in multiple accused cases where one accused does not wish a witness's identity to be known by the other accused. But this subsection does not exclude the possibility of a defence application in a single accused case.

333. The new section 271P(2) provides that, where an application for an witness anonymity order is made by the prosecutor, the identity of witnesses may be withheld from the accused before and during the making of the application. This ensures that the operation of the legislation is not impeded by procedural challenges to the power of the prosecution to withhold this information pending the court's determination of the application for the witness anonymity order.

334. The new section 271P(2) therefore provides that prosecutors are under no obligation to disclose the witness's identity to the accused at the application stage but must inform the court of the identity of the witness. Similar provision is made for the accused in the new section 271P(3), except that the accused must always disclose the identity of the witness to the prosecutor and the court but do not have to disclose it to any other defendant.

335. The new section 271P(4) provides that where the prosecutor or the accused proposes to make an application for a witness anonymity order, information that might identify the witness

can be taken out of any relevant material which is disclosed before the application has been determined. This does not, however, override the obligation to disclose the identity of the witness to the court (in the case of a prosecutor's application) or to the court and prosecutor (in the case of an accused's application).

336. The new section 271P(2) also enables the court to direct that it should not be informed of the identity of the witness. This provides for the possibility that, whilst in the vast majority of cases the court will require to be informed of the witness's identity, there may be rare cases (particularly national security related cases) where even the court will neither need nor wish to know it.

337. The new section 271P(6) and (7) set out two basic principles. Subsection (6) states that on an application for a witness anonymity order every party to the proceedings must be given the opportunity to be heard. However, it may be necessary in the course of making the application to reveal some or all of the very information to which the application relates: for example, the name and address of the witness who is fearful of being identified. So subsection (7) provides that the court has the power to hear any party without an accused or the accused's legal representative being present. This reflects the existing practice, by which prosecution applications were expected to be made in the absence of any other parties in the case, with the accused able to make representations later at a hearing with the prosecution (and possibly other accused) present. It is expected that defence applications will be permitted without other accused being present but will always be made in the presence of the prosecution.

338. The new section 271Q(1) and (2) requires four conditions to be met before a court can make a witness anonymity order. They are described as conditions A, B, C and D.

339. The new section 271Q(3) sets out condition A, which is that the measures to be specified in the order are necessary for one of two reasons. The first is to protect the safety of the witness or another person or to prevent serious damage to property. There is no requirement for any actual threat to the witness or any other person. The second is to prevent real harm to the public interest. This will include, but will not be restricted to, the public interest in police or security service undercover officers being able to carry out future operations, whether or not they are fearful in any particular case.

340. The new section 271Q(4) sets out condition B, which is that the effect of the order would be consistent with the accused receiving a fair trial. Thus the grant of the order must be compliant with Article 6 of the ECHR.

341. The new section 271Q(5) sets out condition C, which is that the witness's testimony is such that in the interests of justice the witness ought to testify and new section 271Q(6) provides that either the witness would not testify if the order was not made or there would be real harm to the public interest if the witness were to testify without an order being made (such harm might, for example, arise as a result of the identity of a member of the security services being made public).

342. The new section 271Q(7) specifies that in determining for the purposes of condition A whether the order is necessary to protect the safety of the witness, another person or prevent damage to property, the court must have regard to the witness's reasonable fear of death or injury

either to himself or herself or to another person (for example family members or friends) or reasonable fear that there would be serious damage to property (for example fire bombing the witness's home).

343. The new section 271R(1) requires the court to have regard to the considerations set out in the new section 271R(2) when deciding whether to make an order. The court must also have regard to any other factors it considers relevant.

344. The considerations in new section 271R(2) are the accused's general right to know the identity of a witness, the extent to which credibility of the witness is relevant in assessing the weight of the evidence he or she gives, whether the witness's evidence might be the sole or decisive evidence in implicating the accused, whether the witness's evidence can be properly tested without knowing the witness's identity, whether the witness has a tendency or any motive to be dishonest and whether alternative means could be used to protect the witness's identity.

345. New section 271S requires the judge to warn the jury in a trial on indictment in such way as the judge considers appropriate, so as to ensure that the fact that the order was made does not prejudice the accused.

346. New section 271T(1), (2) and (3) provide for the court that has made an order to discharge or vary it in those proceedings, either on an application by a party to the proceedings or on its own initiative. This power may be used where, for example, a witness who previously gave evidence anonymously is content for the anonymity to be lifted.

347. New section 271T(4) the court must give every party to the proceedings an opportunity to be heard before determining an application for variation or discharge of an order or before varying or discharging an order on its own initiative.

348. New subsection 271U(1) sets out the various grounds for making an appeal to the High Court in relation to witness anonymity orders. An appeal can be made by the prosecutor or the accused. New section 271U(2) states that an appeal to the High Court can be allowed by the court hearing the trial in which the witness who is subject to an application for an anonymity order is to give evidence. As well as allowing for the prosecution and the accused to seek leave to make an appeal, this section also provides that the court itself may grant leave to appeal to the High Court on its own initiative.

349. New section 271U(4) allows the High Court hearing the appeal to postpone the relevant trial for as long as it thinks appropriate and instruct that any postponement should not affect any time limit associated with the case being tried.

350. New section 271V provides that the High Court, having considered an appeal, must overturn the granting of a witness anonymity order by the court hearing the relevant trial if it decides that the decision to grant the order was wrong in law. Once this decision has been taken the trial can continue but without the witness who was the subject of the order giving their evidence anonymously.

351. New section 271W enables the High Court, having considered an appeal, to reverse the decision of a court which has refused an application for a witness anonymity order, if it concludes that the decision of the judge in that court was wrong in law. The High Court must then order that appropriate measures should be taken to preserve the anonymity of the relevant witness when he or she is giving their evidence.

352. New subsections 271X(1) and (2) enable the High Court, having considered an appeal, to reverse the decision of a court that has varied the way in which the witness anonymity order has been applied if it concludes that the decision of the judge in that court was wrong according to the law. New subsection 271X(3) provides that the High Court can decide that other variations to the order are justified under the relevant terms of the law as set out at 271Q and 271R.

353. New subsection 271Y(1) enables the High Court, having considered an appeal, to reverse the decision of a court that has refused an application made by either the prosecutor or the accused to vary or disallow a witness anonymity order if it concludes that the decision of the judge in that court was wrong according to the law. Thereafter new subsections 271Y(2) and (3) provide for the High Court to disallow an order or vary it depending on the case, and allows it make an additional variation to the order as it deems appropriate and under the relevant terms of the law as set out at 271Q and 271R.

354. Subsection (2) provides for the coming into effect of provisions for witness anonymity orders.

355. Subsection (3) provides that witness anonymity orders made under an existing rule of law in a trial or a hearing that starts before the day the new provisions come into effect are not affected by the coming into force of these provisions.

Section 67 - Television link evidence

356. This section provides that section 273 of the Criminal Procedure (Scotland) Act 1995 will be amended to allow witnesses to give evidence from abroad via live television link in all criminal proceedings in the High Court or sheriff court.

357. A new section 273A is inserted that allows witnesses to give evidence via live television link from outwith Scotland, but within the United Kingdom, from an acceptable location within the United Kingdom, thereby relieving them of the requirement to travel to Scotland and give their evidence in the Scottish court.

PART 5 - CRIMINAL JUSTICE

Section 68 - Upper age limit for jurors

358. This section provides that the upper age limit for jurors serving on criminal juries in Scotland will be extended from the current limit of 65 to 70 years of age.

359. This involves amendment to section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980. This amendment will allow individuals between 65 and 70 years of age to

be cited for jury service on criminal trials Scotland. Extending the upper age limit will also require amendment of sections 2 and 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 which relate to fines for non-attendance and offences relating to jury service in that these will apply to persons between 65 and 70 years of age. The upper age limit for jurors serving on civil trials remains unchanged at 65 years of age.

Section 69 - Persons excusable from jury service

360. This section replaces paragraph (a) of Schedule 1, Part 3, Group F of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 concerning the period of entitlement to excusal from criminal jury service in Scotland. This section makes provision to reduce the exemption period from 5 to 2 years for individuals who attend court but who are not subsequently balloted to sit on a jury. Currently the system makes no distinction between those who attend at court as required but do not then get picked from the ballot to serve, and those who attend and are selected by ballot to form part of a jury in a case.

361. It is not the intention that this should be a retrospective change; rather it will apply from the commencement date of this section of the legislation. This subsection has no impact on the power that a judge has, for example following particularly long or difficult trials, to direct that jurors be excused from service for any period up to and including excusal for life.

Section 70 - Data matching for detection of fraud etc.

362. Section 73 of, and Schedule 7 to, the Serious Crime Act 2007 provided the national audit agencies in England, Wales and Northern Ireland with the power to match data, and provides statutory provision for an existing data-matching scheme known as the National Fraud Initiative. The National Fraud Initiative is a UK-wide data matching scheme conducted for the purpose of assisting in the prevention and detection of fraud.

363. Section 70 of this Bill amends the Public Finance and Accountability (Scotland) Act 2000 to provide equivalent provisions enabling the National Fraud Initiative to be carried out in Scotland on a statutory basis. The main amendment consists of the insertion of a new Part 2A (Data Matching) of the 2000 Act consisting of sections 26A to 26G.

364. Section 26A(1) provides for Audit Scotland to carry out data matching exercises or to arrange for another organisation to do this on its behalf. Subsection (2) defines what a data matching exercise is. It involves the comparison of sets of data, for example, the taking of two local authority payroll databases and matching them. Matching exercises may identify fraudulent activity as having taken place. Subsection (3) defines the purposes for which a data matching exercise can be exercised. These purposes are assisting in the prevention and detection of fraud, assisting in the prevention and detection of crime other than fraud, and assisting in the apprehension and prosecution of offenders. Subsection (4) provides that data matching may not be used to identify patterns and trends in an individual’s characteristics or behaviour which suggest nothing more than his potential to commit fraud in future. This is designed to prevent the Audit Scotland from creating individual "profiles" of future fraudsters.

365. Section 26B(1) provides that a person may disclose data to Audit Scotland for the purposes of a data matching exercise. This could include private sector bodies such as mortgage providers who wish to be part of the exercise. There is no compulsion on any of these bodies to take part in a data matching exercise. Subsection (2) provides that the disclosure of information does not breach (a) any duty of confidentiality owed by a person making the disclosure or (b) any other restriction on the disclosure of information, however imposed. Subsection (3) provides that nothing relating to voluntary provision of data authorises any disclosure which (a) contravenes the Data Protection Act 1998, or (b) is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000, or (c) allows the disclosure of data comprising or including patient data. Subsection (4) defines patient data as meaning data relating to an individual which is held for medical purposes and from which the individual can be identified. Subsection (5) defines medical purposes. Subsection (6) provides that this section does not limit the circumstances in which data may be disclosed apart from this section. Subsection (7) provides that data matching exercises may include data disclosed by a person outside Scotland.

366. Section 26C(1) enables Audit Scotland to require the disclosure of information to conduct a data matching exercise. Subsection (2) sets out which persons may be required to disclose data under subsection (1). They are those bodies whose accounts are subject to audit by the Auditor General, or are sent to him for auditing, local authorities, Licensing Boards and their officers, office-holders or members. Subsection (5) creates an offence and accompanying penalty for non-compliance with this requirement.

367. Section 26D sets out the circumstances in which information relating to a data matching exercise, including the results of such an exercise, may be disclosed by or on behalf of Audit Scotland, and the persons and bodies to whom the data may be disclosed. Subsection (6) imposes special restrictions on the disclosure of information if it includes patient data (as defined in subsection (7). Subsection (8) places restrictions on the further disclosure of information disclosed under subsection (2) and allows the further disclosure in certain specified circumstances. Subsection (9) creates an offence of disclosing information where the disclosure is made other than as authorised by subsections (2) and (8), and sets out the penalty.

368. Section 26E(1) makes clear that Audit Scotland will be able to publish a report on its data matching exercises notwithstanding the limitation on disclosure as is provided under section 26D. Subsection (2) provides that a report that is published under section 26E may not include information relating to a particular person if (a) the person is the subject of any data included in the data matching exercise; and (b) the person can be identified from the information; and (c) the data is not otherwise in the public domain. Subsection (3) provides that Audit Scotland may publish a report in such a manner as it considers appropriate for bringing it to the attention of those members of the public who may be interested. Subsection (5) preserves the existing powers of an auditor to publish information under Part 2 of the 2000 Act or Part 7 of the Local Government (Scotland) Act 1973.

369. Section 26F(1) provides that Audit Scotland must prepare and keep under review a code of data matching practice. Subsection (2) sets out that all those involved in this process must have regard to the code of data matching practice. Subsection (3) requires Audit Scotland to consult all those bodies or office holders who must provide data, the Information Commissioner, and such other bodies as Audit Scotland thinks appropriate before preparing or altering the code of

data matching. Subsection (4*)* places a duty on Audit Scotland to publish the code from time to time.

370. Section 26G(1) provides for the Scottish Ministers to add public bodies to those listed in new section 26C(2) by order. The Scottish Ministers may also, by that subsection, modify the application of Part 2A to any body so added, and may remove bodies from section 26C(2). Subsection (2) provides that any order made under section 26G can include any incidental, consequential, supplemental or transitional provision the Scottish Ministers think fit. Subsection (3) defines the meaning of public body. Subsection (4) provides that a public body, whose functions are both public and private in nature, is a public body only to the extent of its functions which are public in nature.

371. Section 70(2) amends section 11 of the 2000 Act to allow Audit Scotland to impose reasonable charges in respect of the exercise of its functions in connection with a data matching exercise (such fees would currently be charged as part of any audit fee), and for these charges to be imposed on those who supply data for a data matching exercise and/or those who receive the results of such an exercise.

Section 71 - Sharing information with anti-fraud organisations

372. The Serious Crime Act 2007 ("the 2007 Act") allows public authorities (within the meaning of section 6 of the Human Rights Act 1998) in England, Wales and Northern Ireland to disclose information as a member of a specified anti-fraud organisation for the purposes of preventing fraud or a particular kind of fraud.

373. Sections 68 to 72 of the 2007 Act provide the framework for the scheme. The information may be information of any kind, including personal and documentary information. Sections 68(5) and (6), 69(3) and 71(4) of the 2007 Act provide that the information sharing scheme, by which certain information may be shared for the purposes of preventing fraud, shall extend to reserved but not devolved information held by Scottish public authorities. By repealing these sections of the 2007 Act, this section will allow Scottish public authorities to disclose devolved information, for the purposes of the prevention of fraud or a particular kind of fraud, to a specified anti-fraud organisation.

374. Section 68(5) and (6) of the 2007 Act, excludes Scottish public authorities from the information sharing scheme in respect of devolved information. This section repeals 68(5) and (6) and as a result will allow Scottish public authorities to disclose and share such devolved information with anti-fraud organisations in the same way as public authorities in England, Wales and Northern Ireland.

375. Section 69(1) makes it an offence for a person to further disclose protected information which had been disclosed by a public authority member of an anti-fraud organisation or otherwise in accordance with any arrangements made by such an organisation. "Protected information" is any revenue and customs information disclosed by HM Revenue and Customs which reveals the identity of the persons to whom the information relates, and specified information disclosed by other public authorities. Section 69(3) provides that this offence does not apply where the original disclosure was by a relevant public authority (ie an authority not

covered by the new power in section 68) and related to devolved matters. As the power in section 68 is being extended to cover devolved information of Scottish public authorities, this exclusion can be removed and the offence in section 69(1) will apply to any protected information.

376. Section 71 of the 2007 Act provides that the Secretary of State must prepare and keep under review a code of practice with respect of the disclosure, for the purposes of preventing fraud or a particular type of fraud, of information by public authorities. This section of the Bill repeals section 71(4) of the 2007 Act so that the code of practice will apply for disclosures of devolved information made for the purposes of the prevention of fraud by Scottish public authorities. Section 71(4) of the 2007 Act provides that this does not apply in relation to disclosures, relating to devolved information, by Scottish public authorities. This section of the Bill also repeals in part section 71(6) of the 2007 Act to remove the now redundant definition of "relevant public authority".

Section 72 - Closure of premises associated with human exploitation etc.

377. This section makes amendments to the Antisocial Behaviour etc. (Scotland) Act 2004 and provides for the closure of premises associated with the commission of "exploitation offences" such as human trafficking and child sexual abuse. Subsection (1) inserts new subsections (3A) and (3B) into section 26 of the 2004 Act. The inserted subsections (3A) and (3B) set out the grounds on which a senior police officer may authorise the service of a closure notice in cases involving an exploitation offence.

378. Subsection (2) amends the provisions in section 27 of the 2004 Act to take account of the form and service of a closure notice in cases involving an exploitation offence.

379. Subsection (3) makes amendments to section 30 of the 2004 Act and inserts new subsections (2A) and (3A). The inserted subsection (2A) sets out the conditions that must be met before the sheriff can make a closure order in respect of premises associated with the commission of an exploitation offence. The inserted subsection (3A) provides that, in determining whether or not to make a closure order, a sheriff shall have regard to any vulnerability of a victim of an exploitation offence.

380. Subsection (4) inserts new subsections (1A) and (3A) into section 32 of the 2004 Act. The inserted subsection (1A) enables a sheriff to extend the duration of a closure order for a period not exceeding the maximum period where it is necessary to prevent the commission of an exploitation offence. The inserted subsection (3A) sets out the conditions which must be satisfied before a senior police officer can make an application to extend the period for which a closure order has effect in cases involving an exploitation offence.

381. Subsection (5) amends section 33 of the 2004 Act in order to provide for the revocation of a closure order, following an application, in cases involving an exploitation offence.

382. Subsection (6) amends section 36 of the 2004 Act in order to provide for the making of appeals in respect of closure orders which have been given an extension in cases involving an exploitation offence.

383. Subsection (7) inserts a new section 40A into the 2004 Act and sets out the offences which may be considered as exploitation offences for the closure of premises under the 2004 Act.

Section 73 - Sexual offences prevention orders

384. Section 73 makes a number of amendments to the provisions of the Sexual Offences Act 2003 which relate to sexual offences prevention orders (SOPOs).

385. Subsections (1) and (2)(a) make provision concerning the criteria which currently exist in some cases before a person may become subject to the notification requirements under the 2003 Act, and before a SOPO can be made. Courts in Scotland can make a SOPO when dealing with an offender for an offence listed in Schedule 3 to the 2003 Act. For some offences listed in Schedule 3 there are conditions, which are based on the sentence or age of the persons involved in the offence, in place which currently limit the application of the scheme which provides for the making of a SOPO. Section 141 of the Criminal Justice and Immigration Act 2008 amended the 2003 Act for England and Wales and Northern Ireland to provide that these conditions do not restrict the making of a SOPO in cases where the conditions are not met. Section 73(1) and (2)(a) extends the application of the amendment made by section 141 of the 2008 Act so that it applies in Scotland.

386. Subsection (2)(b) corrects a minor error in section 109 of the Sexual Offences Act 2003. It ensures that section 107(2) will apply in applications for interim SOPOs. That section provides that prohibitions (which will, in due course, be extended by the Bill to include requirements) may be included in an order are those necessary for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant, applies to interim SOPOs as well as full SOPOs.

387. Subsection (2)(c) inserts new section 111A into the Sexual Offences Act 2003. New subsections 111A(2)-(3) have effect of extending the permitted content of a SOPO, and an interim SOPO, so that the court can impose requirements as well as such other terms in the order, whether prohibitions, restrictions, or other terms, as it considers appropriate so as to protect the public by preventing, restricting or disrupting the involvement of the subject of the order in sexual crime.

388. Subsection (2)(d) amends section 112 of the Sexual Offences Act 2003 to provide that a SOPO may be made at the instance of the court or on the motion of the prosecutor.

Section 74 - Foreign travel orders

389. This section amends the provisions on foreign travel orders (“FTO”) in Part 2 of the Sexual Offences Act 2003 (“the 2003 Act”).

390. Subsections (2) and (3) amend sections 115 and 116 of the 2003 Act by increasing the age of a child from under 16 to under 18. The effect of subsection (2) is that a court can impose a foreign travel order on a qualifying offender if that offender is considered to pose a risk to a child who is outside the United Kingdom who is aged under 18.

391. The effect of subsection (3) is that it alters the criteria determining which sex offenders are to be regarded as "qualifying offenders". A qualifying offender is a sex offender against whom a court may impose a FTO, provided all the other criteria set out in sections 114 to 116 of the 2003 Act are met. The amendment means that those who have committed certain sexual offences against children under 18, rather than offences against children under 16 will be regarded as "qualifying offenders".

392. Subsection (4) amends section 117 of the 2003 Act to increase the maximum duration of any foreign travel order specified in s117(2), from six months to five years. Therefore, a court has the discretion to impose a FTO on a qualifying offender for any period of time up to a maximum of 5 years.

393. Subsection (5) inserts a new section 117B into the 2003 Act to require offenders who are subject to a FTO imposed under section 117(2)(c), that prohibits them from travelling anywhere in the world, to surrender their passports at a police station specified in the order. Such offenders must also surrender any new passports which they acquire throughout the duration of a FTO.

394. This new section also requires the police to return any passport as soon as reasonably practicable after the relevant FTO has ceased, unless that passport is a foreign passport or a passport issued by an international organisation and it has been returned by the police to the authorities outside the United Kingdom which issued the passport.

395. Subsection (6) amends section 122 of the 2003 Act to create a new offence of failing to comply with a requirement to surrender a passport.

Section 75 - Risk of sexual harm orders

396. Section 75 amends provisions of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 which concern risk of sexual harm orders.. The amendments are similar to those provided by section 73 for sexual offences prevention orders and have the effect of extending the permitted content of a risk of sexual harm order so that the court can impose requirements on persons who are made subject to such orders. Currently, like SOPOs, risk of sexual harm orders can only impose prohibitions on such persons.

Section 76 – Obtaining information from outwith United Kingdom

397. The Scottish Criminal Cases Review Commission (SCCRC) cannot currently issue, or apply for, a letter to request assistance from outwith the United Kingdom because its investigations are not within the scope of the Crime (International Co-operation) Act 2003 ("the 2003 Act").

398. This section creates a bespoke power for the SCCRC to apply to a judge of the High Court to request assistance in obtaining information from outwith the United Kingdom for the purposes of carrying out its functions.

399. Section 7 of the 2003 Act sets out the authorities which may make requests for assistance, and in which circumstances and form requests may be made. Section 8 of the 2003 Act deals

with requests for assistance from the United Kingdom and sets out to which authorities requests may be sent. Section 9 of the 2003 Act sets out what may be done with the evidence obtained in relation to a request for assistance from abroad under section 7 of this Act.

400. Subsection (4) applies section 8 of the 2003 Act to requests for assistance from abroad by the SCCRC in the same way as it applies to section 7 of the 2003 Act, so that, requests for assistance are sent to a foreign court or authority designated by government of that country, or Interpol or EuroJust in cases of urgency.

401. Subsection (5) applies provisions of section 9 of the 2003 Act to requests for assistance from abroad by the SCCRC in the same way as they apply to section 7 of the 2003 Act. The effect is that information may not without the consent of the appropriate overseas authority be used for any purpose other that specified in the request and when information is no longer required for that purpose (or any other purpose for which consent has been obtained) it must be returned to the appropriate overseas authority, unless that authority indicates that it need not be returned.

Section 77 – Grant of authorisations for directed and intrusive surveillance

402. This section amends the Regulation of Investigatory Powers (Scotland) Act 2000 ("the 2000 Act") in relation to joint surveillance operations.

403. Subsection (2) inserts a new section 9A into the 2000 Act which makes provision about who may grant authorisations for the use of directed surveillance in a joint surveillance operation. Subsection (6) inserts a definition of "joint surveillance operation" into section 31 of the 2000 Act; such an operation is one involving at least two police forces in Scotland working together, or at least one police force in Scotland and the Scottish Crime and Drug Enforcement Agency ("the SCDEA") working together.

404. Section 9A(2) provides that the persons who are designated for the purpose of granting an authorisation for directed surveillance in a joint surveillance operation are the same people who are designated for the purposes of section 6 of the 2000 Act in terms of an order made by the Scottish Ministers under section 8(1)[1] of that Act to grant authorisations for directed surveillance where the operation is not a joint surveillance operation: in relation to the SCDEA, that person is an officer of the rank of at least Superintendant or Grade PO7 Authorising Officer (Inspector in an urgent case); in relation to a police force that person is an officer of the rank of at least Superintendent (Inspector in an urgent case).

405. Subsection (3) amends section 10 (authorisations for intrusive surveillance) of the 2000 Act in two ways. Currently, the persons who may grant authorisations for the carrying out of intrusive surveillance are the chief constable of a police force and the Director General of the SCDEA. Section 10 is amended so as to include the Deputy Director General of the SCDEA as a person who may grant an authorisation for intrusive surveillance. Secondly, section 10 is

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[1] That Order is currently the Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions)(Scotland) Order 2000 (SSI 2000/343) "as amended by the Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland) Amendment Order 2006 (SS1 466/2006)

further amended so as to provide that those same persons (namely, a chief constable of a police force, the Director General and the Deputy Director General) are permitted to grant authorisations for the carrying out of an intrusive surveillance operation where it is a joint surveillance operation.

406. Subsections (4) and (5) make consequential amendments as a result of the addition of the Deputy Director General of the SCDEA as a person who may grant authorisations for the carrying out of intrusive surveillance (including a joint surveillance operation). Subsection (4) amends section 11(3) of the 2000 Act so as to make it clear that the Deputy Director General of the SCDEA can only grant an authorisation for the carrying out of intrusive surveillance where the application is made by a police member of that Agency. Subsection (5) amends section 12A(1) of the 2000 Act so as to include the Deputy Director General of the SCDEA within the ambit of that section which deals with the grant of authorisations for intrusive surveillance in cases of urgency.

407. Subsection (6) amends section 31 of the 2000 Act so as to include a definition of joint surveillance operation.

Section 78 – Authorisations to interfere with property etc.

408. This section amends section 93 of the Police Act 1997 ("the 1997 Act") so as to make equivalent amendments in relation to authorisations for interference with property as those which have been made by virtue of section 76 in relation to authorisations for directed and intrusive surveillance.

409. Subsection (2)(a) inserts subsections (3A) to (3D) into section 93 of the 1997 Act. Subsections (3A) to (3C) make provision about authorisations to interfere with property where there is a joint operation. Subsection (3D) defines a "joint operation" in the same way as it is defined for the purposes of the 2000 Act.

410. These provisions when read together ensure that in the case of a joint operation, the chief constable of a Scottish police force involved in the operation may authorise the persons mentioned in subsection (3C) to take action under section 93(1) of the 1997 Act. The persons mentioned in subsection (3C) are constables of any of the police forces involved in the joint operation (including action which might be outwith the area of operation of the constable's own force) and if the SCDEA are involved in the operation, a police member of that Agency.

411. Similarly, where the SCDEA is involved in the joint operation, the Director General or the Deputy Director General of the SCDEA may authorise the persons mentioned in subsection (3C) to take action under section 93(1) to interfere with property.

412. As the 1997 Act extends to England and Wales also, subsection (3B)(a)(i) is designed to ensure that the amendments will only catch Scottish police forces.

413. Subsection (2)(b) amends subsection (5)(j) of section 93 of the 1997 Act so as to include the Deputy Director General of the SCDEA alongside the Director General as an "authorising officer" who may authorise interference with property.

414. Subsection (3)(c) inserts subsections (6) and (7) into section 94 (authorisation given in the absence of authorising officer) of the 1997 Act. These two new provisions read together make it clear that where the SCDEA are the lead Agency in a joint operation and the Director General or the Deputy Director General are not available then an application for an authorisation to interfere with property may be made to the chief constable of one of the forces involved in the joint operation.

415. Subsection (3)(a) and (b) make amendments consequential upon the insertion of new subsections (6) and (7) into section 94 of the 1997 Act.

Section 79 - Amendments of Part 5 of Police Act 1997

416. This section amends Part 5 of the Police Act 1997 ("the 1997 Act"). The 1997 Act is the legislation under which criminal record certificates (basic, standard and enhanced disclosures) are issued for employment and other purposes. The day to day functions of the Scottish Ministers under Part 5 of the 1997 Act are carried out by Disclosure Scotland.

417. Section 79 makes 2 amendments to the 1997 Act: the first provides an order making power to amend 5 definitions used in Part 5 of the 1997 Act; and the second clarifies the power to charge fees in connection with registration in the register of registered persons kept under section 120 of the 1997 Act.

418. Subsection (2) inserts a new section 113BA into Part 5 of the 1997 Act that will enable Scottish Ministers, by order, to amend the definitions of the expressions: "criminal conviction certificate" (basic disclosure) in section 112(2); "central records" in sections 112(3) and 113A(6); "criminal record certificate" (standard disclosure) in section 113A(3); "relevant matter" in section 113A(6); and "enhanced criminal record certificate" (enhanced disclosure) in section 113B(3).

419. Section 113BA(2) restricts the use of the order making power. An order can only be made to enable certificates to include information held outside the United Kingdom. Section 113BA(3) provides that any order will be a class 1 instrument, i.e. it cannot be made unless it has been laid in draft and approved by resolution of the Scottish Parliament.

420. It is intended that the order making power will be used to enable disclosure certificates to include relevant information from outside the United Kingdom (e.g. information relating to convictions for offences outside the United Kingdom) where that information has been provided to the Scottish Ministers on the basis that it may be used for employment purposes.

421. The second amendment to the 1997 Act is at section 79(3) and the effect is to insert 2 new subsections into section 120ZB.

422. An application for either a standard or an enhanced disclosure certificate must be countersigned by a person whose name is listed in the register kept by Scottish Ministers under section 120 of the 1997 Act. Section 120ZB, which was inserted into the 1997 Act by section 81 of the Protection of Vulnerable Groups (Scotland) Act 2007 (not yet in force), allows regulations to be made about this registration.

423. Section 120ZB(2A) clarifies the fee charging power in section 120ZB(2)(a). It provides that, in particular Ministers may charge fees in respect of applications to be listed in the register, this will allow fees for registration itself and for the nomination of counter-signatories. Different fees may be charged in different circumstances, annual or recurring fees may be charged and fees may be charged in advance or arrears.

424. It is intended that the power will be used to provide different fees for different situations. For example, a different charge is likely to be made for inclusion in the register for the first time as compared with an application from someone already listed to have another signatory added to act on behalf of their registration entry.

425. Lastly, section 120ZB(2B) will enable Ministers to disregard an application for inclusion in the register if the fee for that application is not paid.

Section 80 - Assistance for victim support

426. This section allows the Scottish Ministers to make grants for the purposes of the provision of assistance to victims, witnesses or other persons affected by a criminal offence. This extends the power to make grants under section 10 of the Social Work (Scotland) Act 1968, which permits grants to be made to national organisations or innovative projects, but excludes grants to local authorities.

Section 81 - Public defence solicitors

427. This section amends section 28A of the Legal Aid (Scotland) Act 1986 ("the 1986 Act") to place the Public Defence Solicitors Office ("the PDSO") on a permanent footing. The PDSO was established in 1998 to provide criminal defence services from solicitors employed by the Scottish Legal Aid Board (‘the Board’) on a trial basis.

428. Section 28A of the 1986 Act currently provides for regulations to be made for the purpose of carrying out a feasibility study. It also provides for the laying of a report before Parliament by 31 December 2008. The report was laid on 23 December 2008 [SG/2008/259]. This section removes these provisions as the PDSO is to be permanent.

429. Regulations have been made under section 28A of the 1986 Act[2]. These regulations make provision for the employment of solicitors by the Board to provide criminal legal assistance.

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[2] The Scottish Legal Aid Board (Employment of Solicitors to Provide Criminal Legal Assistance) Regulations 1998 (SI 1998/1938) as amended by the Scottish Legal Aid Board (Employment of Solicitors to Provide Criminal Legal Assistance) Amendment Regulations 2008 (SSI 2003/511)

Section 82 - Compensation for miscarriages of justice

430. The Scottish Government operates two schemes for the payment of compensation as a result of a miscarriage of justice. The statutory scheme under section 133 of the Criminal Justice Act 1988 ("the 1988 Act") provides for compensation to be paid in certain circumstances. The decision as to whether compensation is payable is for Scottish Ministers but the amount of the award is quantified solely by an independent assessor. An ex gratia scheme covering other types of cases has also operated for a number of years with successful cases treated in the same way as statutory ones by the assessor.

431. Subsection (1)(a) provides an Order-making power for Scottish Ministers to specify further sets of circumstances in which compensation may be payable. This power will be used to replace the existing ex gratia scheme by placing it on a statutory footing with the existing statutory scheme. It is intended to correspond to the existing ex gratia criteria. The seriousness of the offence for which the individual was charged or detained, but not convicted, will be taken account of when assessing compensation (subsection (1)(c)). This is consistent with the way the assessor takes into account the seriousness of the offence when assessing compensation under the statutory scheme where the individual had been convicted.

432. Subsection (1)(b) inserts a new section into the 1988 Act to impose a time limit of 3 years for applications to be made for compensation. It also allows a discretionary power for the Scottish Ministers to waive that time limit where it is in the interests of justice to do so, or where there are exceptional circumstances. The 3 year time limit is consistent with civil limitation periods for personal injury claims.

433. Subsection (1)(d) makes the Independent Assessors have particular regard to any guidance issued by the Scottish Ministers. It is necessary to have a statutory basis for this guidance as the assessor is discharging a quasi-judicial role. It is not intended for the guidance to impinge on the independence of the assessor when making a decision on the quantum of a claim but is designed to promote consistency in decision making.

434. Section 133(5) of the 1988 Act states that a conviction being "reversed" (one of the criteria for eligibility for compensation) shall be taken to mean as referring to a conviction being quashed in certain circumstances. Section 188 of the Criminal Procedure (Scotland) Act 1995 allows for a conviction and sentence or both to be set aside by way of a minute from the prosecutor to the court without an appeal being heard but in such circumstances this would not entitle a successful appellant to seek compensation for a miscarriage of justice. Subsection (1)(e) makes appropriate changes to the 1988 Act to allow someone who has had their conviction set aside by way of section 188(1)(b) of the 1995 Act to be considered for compensation.

435. Subsection (1)(f) makes an amendment to the 1988 Act so that those persons who are subject to a probation order or discharged absolutely are eligible to seek compensation in accordance with the Act. The order-making power in this section is exercisable by statutory instrument subject to annulment in pursuance of a resolution of the Scottish Parliament.

436. Subsection (2) removes a redundant reference to the Criminal Injuries Compensation Board in Schedule 12 to the 1988 Act.

Section 83 - Financial reporting orders

437. The Serious Organised Crime and Police Act 2005 ("the 2005 Act") introduced the use of Financial Reporting Orders (FRO). Those persons subject to an FRO are required to report their financial dealings over a specified period of time as directed by the court. In Scotland they can only be applied when someone is convicted of the common law offence of fraud or an offence specified in Schedule 4 to the Proceeds of Crime Act 2002.

438. Section 83 amends section 77 of the 2005 Act by inserting a new subsection (4A). The inserted subsection (4A) sets out the two ways in which an FRO can be made. It makes it clear that either a prosecutor may apply to the court to make an FRO or the court may make such an order at its own instance.

Section 84 - Compensation orders

439. Under section 249 of the 1995 Act, where a person is convicted of an offence, the court may make an order requiring him to pay compensation for any personal injury, loss or damage caused directly or indirectly, or alarm or distress caused directly, to the victim.

440. A court cannot make a compensation order in respect of loss suffered in consequence of the death of any person; or injury loss or damage due to an accident involving a motor vehicle on the road, except where the damage is treated as having arisen out of the theft of the car by the convicted person.

441. The maximum amount which may be awarded under a compensation order by a sheriff or stipendiary magistrate in summary proceedings is £10,000 ("the prescribed sum"). The maximum amount which can be awarded by a Justice of the Peace is an amount not exceeding level 4 on the standard scale (£2,500). In solemn proceedings there is no limit on the amount which may be awarded.

442. Subsection (1)(a)(i) amends section 249(1) of the 1995 Act. This allows courts to make compensation orders in relation to deaths or road accidents, subject to the following amendments.

443. Subsection (1)(a)(ii) amends section 249(1) to clarify that a compensation order must be paid in favour of the victim.

444. Subsection (1)(b) inserts a new subsection (1B) into section 249, which provides that compensation may be paid to a victim or a person who is liable for funeral expenses. A new subsection (1C) is also inserted, which defines a victim as either the person who has suffered injury, loss or damage, or a relative who has suffered a bereavement caused by an offence being committed.

445. Subsection (1)(c) inserts new subsections (3A), (3B) and (3C) into section 249. Subsection (3A) allows a compensation order to be made in cases where a road accident has been caused by an uninsured driver, provided no other type of compensation is payable. Subsection (3B) provides that where a compensation order is made following damage to a stolen vehicle or an

accident with an uninsured driver, then that compensation may include some or all of the cost of the loss of preferential insurance rates. Subsection (3C) provides that a compensation order may be made in respect of loss suffered as a result of bereavement and funeral expenses in connection with a person's death, except where the death was as a result of a road accident.

446. Subsection (1)(d) amends subsection (4) of section 249. This provides that unless subsections (3) – (3C) allow a compensation order to be made, then compensation orders shall not be made in respect of loss relating to a death or, injury, loss or damage relating to a road accident.

447. In some exceptional cases, statute provides that summary courts may impose a maximum fine, the amount of which exceeds "the prescribed sum" (i.e. the statutory maximum) of £10,000 set out by section 225(8) of the 1995 Act. Subsection (1)(f) inserts a new subsection (8A) into section 249 of the 1995 Act. Section (8A) allows the sheriff, in cases where an exceptionally high fine may be imposed, to make an compensation order up to the same amount.

448. Subsection (2) amends section 251 of the 1995 Act. It repeals paragraph (a) of subsection (1) of section 251 and removes the power of the court to reduce or discharge the compensation order when the injury, loss or damage has been held in civil proceedings to be less than it was taken to be for the purposes of the compensation order. This removes any explicit link with civil proceedings.

449. Subsection (2)(b) inserts a new subsection (1A) into section 251 of the 1995 Act. Subsection (1A) allows the court to review the compensation order at any time before it has been fully complied with and gives the court the power to increase the order if materially new information about the means of the offender has become available or the offender's financial circumstances have improved.

PART 6 - DISCLOSURE

450. This part of the Bill makes provision concerning the disclosure of evidence in criminal proceedings. It is a long established rule in the Scottish legal system that the Crown has an obligation to give the accused notice of the case against him, i.e. to tell him what charges he faces and what evidence the Crown intends to bring to prove the charges. Any *exculpatory* material should be identified and given/disclosed to the accused/defence. Disclosure is presently carried out on a common law basis but it is clear that there are shortcomings in the current regime. A series of high profile decisions of the Judicial Committee of the Privy Council including the cases of *Holland and Sinclair*, have refined that duty but have also given rise to some uncertainty about the exact requirements of the duty of disclosure.

451. Following these decisions Lord Coulsfield was invited to carry out a review on the law and practice of disclosure of evidence in the Scottish criminal justice system, which was published in August 2007. He recommended that disclosure would benefit from having a statutory framework. The provisions in the Bill seek to give effect to that recommendation and build on other recommendations made to clarify the law and practice in disclosure in criminal proceedings.

Section 85 - Meaning of "information"

452. This section defines what the term "information" covers where it is used in the provisions. It covers material of any kind (other than precognition statements and victim statements) which is given to or obtained by the prosecutor in connection with the case against the accused. It makes clear that material previous convictions and outstanding charges of those witnesses that the prosecutor intends to lead in evidence are disclosed. In solemn cases, any statements of witnesses whom the prosecutor intends to call against the accused are covered. In summary cases the statement itself need not be disclosed although any information contained in it that has not otherwise been disclosed to the accused should be disclosed. It is also designed to make clear that, although a precognition or victim statement does not require to be disclosed, where there is information contained in a precognition or victim statement which does require to be disclosed, that information should be disclosed.

Section 86 – Provision of information to prosecutor

453. This section creates a duty on an investigating officer, whether a police officer or officer of an investigating agency (as defined in subsection (9)), to create and submit schedules listing information gathered during the course of an investigation which may be relevant to cases which are brought by solemn proceedings only. As soon as practicable after the accused has appeared for the first time in the proceedings, the prosecutor will give notice of that appearance to the investigating agency to which the appearance relates. On receiving that notice, the investigating agency must prepare and give the schedule/s to the prosecutor. The information ingathered which may be relevant to the case for or against the accused will appear in one of three schedules (sensitive, highly sensitive or non-sensitive) dependant upon the nature of the information. On each schedule there will be an entry in respect of each piece of information held, together with a brief description of the information.

454. Subsection (7) provides that, where the investigating agency has previously included a reference to a piece of information on a schedule, whether that be because the same matter has been the subject of earlier proceedings or otherwise, it need not repeat that information in any subsequent schedule.

455. Subsection (8) defines "sensitive" in relation to an item of information.

Section 87 – Continuing duty to provide schedules of information

456. This section provides for a continuing duty on the investigating agency to submit further schedules to the prosecutor where additional, further information that may be relevant to the case for or against the accused is obtained during the course of the investigation. This duty continues until proceedings against the accused are concluded. Subsection (4) sets out circumstances in which the proceedings are deemed to have concluded.

Section 88 – Review and adjustment of schedules of information

457. This section provides for a duty on the prosecutor to review schedules of information, on their receipt from the investigating agency, and, in so doing, consider whether they agree with

the category of sensitivity specified for each piece of information as shown on the schedule/s by the investigating body i.e. sensitive, non-sensitive or highly sensitive.

458. Subsection (3) provides that when the prosecutor disagrees with the category of sensitivity given to the information by the investigating agency, as shown in the schedule/s, the prosecutor will return the schedule/s to the investigating agency and instruct that it be amended and resubmitted to the prosecutor. Subsection (4) provides that the investigating agency must, as soon as practicable after receiving the schedule/s, then adjust the schedule/s in the way required by the prosecutor and submit a revised schedule.

Section 89 – Prosecutor's duty to disclose information

459. This section sets out the test by which information has to be disclosed to the accused under the statutory scheme. It provides that, where the accused appears for the first time in solemn proceedings, or where a plea of not guilty is recorded against the accused charged on summary complaint that the prosecutor has a duty to consider whether all information which may be relevant to the case for or against the accused meets the test. The prosecutor must review all such information of which he is aware (i.e. all information submitted to the prosecutor by the investigating agency) and determine whether subsection (3) applies to any of the information.

460. Subsection (3) sets out the rules which determine whether the information must be disclosed by the prosecutor. If subsection (3) applies to any of that information then the prosecutor must disclose all such information to the accused. Subsection (4) gives specific, non-exhaustive examples of types of information that the prosecutor must disclose. If subsection (3) does not apply to any of that information, then the prosecutor need not disclose that information to the accused.

461. Subsection (6) ensures that where, in any case, there is no such information that the prosecutor requires to disclose to the accused the prosecutor must notify the accused that, at that point in time, there is nothing that requires to be disclosed in respect of that case.

462. Subsection (7) provides that the prosecutor need not disclose anything that he has already disclosed in respect of the same matter (whether because it has been the subject matter of earlier proceedings or otherwise).

Section 90 – Continuing duty of prosecutor

463. This section confirms that in cases where the disclosure statutory scheme is to apply that the prosecutor has a duty to proactively review information that may be relevant to the case for or against the accused of which the prosecutor is aware for the purposes of complying with the disclosure scheme, until such time as the case concluded. Subsection (5) defines when a case is considered concluded.

Section 91 – Exemptions from disclosure

464. This section sets out the information which is exempt from the statutory scheme for disclosure. Information, the disclosure of which is prohibited by section 17 of the Regulation of Investigatory Powers Act 2000, must not be disclosed.

Section 92 – Redaction of non-disclosable information by prosecutor

465. This section applies where the Crown has a document or other piece of information in its possession that satisfies the disclosure test and which contains information which it not under a duty to disclose. This provision enables the Crown to be able to redact, edit or obscure the non-disclosable information from the document.

Section 93 – Solemn cases: additional disclosure requirement

466. This section provides that in solemn cases the prosecutor must disclose to the accused a schedule of any information which relates to the proceedings against the accused and which falls into the category of non-sensitive. The disclosure of this schedule, in solemn cases, is in addition to the basic requirement of disclosure of information, which meets the disclosure test.

Section 94 – Defence statements: solemn proceedings

467. This section provides that defence statements shall be mandatory in all solemn cases and provides the timings for lodging of such statements. Subsection (1) sets out the effect of a defence statement; that is, as soon as practicable after the accused lodges a defence statement or a pre-trial statement, the prosecutor must review all of the information which may be relevant to the case for or against the accused of which he is aware for the purposes of complying with the disclosure scheme.

468. Subsection 2 amends the Criminal Procedure (Scotland) Act 1995 by inserting a new section 70A. That section provides that the accused must lodge a defence statement at least 14 days before the first diet, in sheriff and jury proceedings, and the preliminary hearing, in High Court proceedings. The information that the defence statement must contain is specified in subsection (6) of new section 70A of the Criminal Procedure (Scotland) Act 1995.

469. New section 70A also provides that, at least 7 days before the trial diet, the accused must lodge a pre-trial statement. This statement must set out whether there has been a material change in circumstances since the defence statement was lodged and, if so, it must set out the details of that change and what the new position is. Subsection (5) enables the accused to lodge a defence statement at any other time before the trial diet.

Section 95 – Defence statements: summary proceedings

470. This section enables the accused to make a defence statement to the prosecutor in those summary proceedings where a plea of not guilty is recorded against the accused. The accused may do so in such cases at any time following the plea of not guilty until the conclusion of the proceedings. Subsection (5) defines when proceedings are to be taken to be concluded.

471. Subsection (2) sets out what a defence statement shall contain.

472. By subsection (3) the prosecutor must, as soon as practicable after receiving the defence statement, review all the information that relates to the proceedings of which the prosecutor is aware for the purposes of determining whether the disclosure test is satisfied. By subsection (3) the prosecutor must then either disclose any information that he is required to disclose that has, thus far, not been disclosed on account of it so far not meeting the disclosure test or inform the accused that the information has been reviewed but that no further information requires to be disclosed.

Section 96 – Effect of guilty plea

473. This section provides that where the prosecutor is required to disclose information to an accused, but before doing so a plea of guilty is recorded against the accused, that the prosecutor need not comply with the requirement in so far as it relates to the disclosure of information which is likely to form part of the prosecution case. If the accused withdraws the plea of guilty then this provision ceases to apply.

Section 97 – Means of disclosure

474. This section provides that the prosecutor may disclose information by any means including allowing the information to be viewed by the accused at a reasonable time and place. The provision is designed to make clear that the means of disclosure is entirely a matter for the prosecutor’s discretion, and will ensure that it is open to the Crown to fulfil its disclosure obligations through provision of a narrative detailing the information.

Section 98 – Confidentiality of disclosed information

475. This section covers disclosed information and restricts how the accused and others may use information that has been disclosed to him. The restrictions are set out in subsections (2) and (4). These prevent the accused and all other persons to whom the information has been disclosed, whether by the prosecutor or any other person, from using or sharing disclosed information with anyone else in any way except where subsection (3) applies.

476. Subsections (3) and (5) make provision to ensure that, notwithstanding the overall restriction, the accused may use the information disclosed to him for certain specified purposes connected with the preparation and presentation of his case or appeal and with a view to taking an appeal, including references to the SCCRC.

477. Subsection (6) ensures that other legislation is given effect to, for example Data Protection Act 1998 and any other statutory scheme which creates prohibitions or obligations of confidentiality

Section 99 – Contravention of section 98

478. This section provides that any person who misuses information or otherwise breaches the confidentiality of the information, in terms of section 98, which has been disclosed to them will

commit an offence. The section provides that the maximum sentence on conviction in summary proceedings is 12 months imprisonment or a fine not exceeding the statutory maximum or both and, on conviction on indictment, 2 years imprisonment or a fine or both.

Section 100 – Order enabling disclosure to third party

479. This section enables the accused to apply to the court for an order allowing him to disclose information to a third party. The accused need not make an application if the use or disclosure is for any of the purposes set out in section 98(3).

480. Before making the order the court must allow the prosecutor and anyone else with an interest in the information the opportunity to make representations.

Section 101 – Contravention of order under section 100

481. This section provides that a person who knowingly uses or discloses information in contravention of an order enabling disclosure to a third party commits an offence and the maximum sentence for that offence, on conviction, in summary proceedings, 12 months imprisonment or a fine not exceeding the statutory maximum or both and, on conviction on indictment, 2 years imprisonment or to a fine or both.

482. Sections 102 through to 113 establish a procedure whereby the prosecution can seek authority of the Court not to disclose otherwise disclosable information on the grounds that disclosure would compromise a compelling public interest

Section 102 – Application for non-disclosure order

483. Section 102 provides for an application to be made to the Court by the prosecutor for an order prohibiting disclosure of information which he would otherwise require to disclose where such disclosure would create a risk of substantial prejudice to an important public interest. Subsection (2) sets out what that public interest means i.e. would likely cause serious injury, or death to any person, or would likely obstruct or prevent the prevention, detection, investigation or prosecution of crime or would be likely to cause serious prejudice to the public interest.

484. Subsection (3) provides that the prosecutor must make an application for a non-disclosure order in those circumstances.

485. Subsection (4) explains the effect of a non-disclosure order i.e. if the order is granted by the court, the prosecutor may withhold from the accused an item or items of information specified in the order which would otherwise require to be disclosed.

Section 103 – Application for non-notification order or exclusion order

486. Lord Coulsfield envisaged there being three types of procedure, broadly described as type 1, type 2 and type 3:

- Non-Disclosure application only - Crown and defence (and special counsel if appointed by the court) represented at hearing and have opportunity to make representations
- Exclusion with non disclosure applications - Crown represented at hearing and special counsel if appointed by Court. Defence may be represented only to allow them to be heard on the procedure, thereafter they are to be excluded from the hearing to decide whether the non-disclosure order is to be made
- Non-notification with exclusion and non disclosure applications - Crown represented at hearing and special counsel if appointed by Court. Accused and his/her legal representative are not present and are not notified of any of the hearings.

The provisions are designed to give effect to this.

487. Section 103 sets out the procedure where a prosecutor has applied for a non-notification order or an exclusion order. Subsection (2) provides that the prosecutor may apply for a non-notification order and/or an exclusion order in relation to solemn proceedings only.

488. Subsection (3) provides that the prosecutor can apply for an exclusion order in summary proceedings i.e. a non-notification order cannot be sought in summary proceedings.

489. Subsection (4) explains the effect of a non-notification order i.e. that it is an order prohibiting notice being given to the accused of the making of the applications for non-notification, exclusion and non-disclosure orders and also the decisions of the court in relation to any of those applications.

490. Subsection (5) explains the effect of an exclusion order i.e. that it is an order prohibiting the accused from attending or making representations in proceedings relating to the application for a non-disclosure order.

491. Subsections (6) and (7) set out the order in which the court must consider each application. Before making a decision on whether a non-disclosure should be granted the court must first make a decision in relation to any applications for non-notification and/or exclusion. This has the effect of ensuring that the court first considers whether any application for non-notification (if applied for) should be granted, then considers whether any application for exclusion should be granted (if applied for) and only then can consider whether the application for non-disclosure should be made.

Section 104 – Application for non-notification order and exclusion order

492. This section applies where the prosecutor has made an application for both a non-notification order and an exclusion order.

493. Subsection (2) requires the court, first, to fix a hearing to determine whether a non-notification order should be made.

494. Subsections (3) and (4) establish that, where an application is made for non notification the accused will not be notified of either the making of such applications or of the hearing. The accused will not be represented or appear at the hearing, also. (Although his interests may be represented by Special Counsel if one is appointed by the court).

495. Subsection (5) provides that the court must make a non-notification order if the conditions set out in subsection (6) are met. The tests in subsection (6) require the court to look at the information, and to consider what the effect will be of revealing it to the accused even where an application has been made; whilst at the same time in considering disclosure versus non disclosure, balancing the competing interests of the injury to the public interest imperative on the one side, with the private individuals interests and right to a fair trial on the other.

496. Subsection (7) provides that if the court makes a non-notification order, the court must grant the application for an exclusion order, also.

497. Subsection (8) provides that, if the court refuses to make a non-notification order, the court will then appoint a hearing to determine the application for an exclusion order and the accused will then be notified that an application for an exclusion order has been made and invited to attend at the hearing that has been appointed. At that hearing the prosecutor and accused will both be entitled to make representations, after which, the court may make an exclusion order if it is satisfied that the conditions in section 105(4) are met (see below).

Section 105 – Application for exclusion order

498. This section allows the prosecutor to apply for an exclusion order to exclude the accused from a hearing. This would result in an accused being excluded from attending and making representations at a hearing of the non-disclosure order.

499. Subsection (2) provides that on receiving an application for an exclusion order the court must appoint a hearing.

500. Subsections (3) and (4) provide for the Court to make an exclusion order providing certain conditions are met after it has given both the prosecutor and the accused the opportunity to be heard. The tests in subsection (4) require the court to look at the information, and to consider what the effect will be of revealing the nature of the information to the accused; whilst at the same time in considering disclosure versus non disclosure, balancing the competing interests of the injury to the public interest imperative on the one side, with the private individuals interests and right to a fair trial on the other.

Section 106 – Application for non-disclosure order: determination

501. This section allows the prosecutor to apply for a non disclosure order which would result in the information in question not being disclosed to the accused.

502. Subsections (2) and (3) provide for the court to make a non-disclosure order where certain conditions are met. The court must consider the information that the application relates to and give the prosecutor and, if the accused has not been excluded, the accused the opportunity to

make representation to the court. The court must also consider whether the prosecutor is required to disclose the information in question and whether, if it were to be disclosed, it would be likely to cause serious injury, or death, to any person, or it would be likely to obstruct or prevent the prevention, detection, investigation or prosecution of crime or it would be likely to cause serious prejudice to the public interest. The court is required to balance the public interest against the private individual's right to a fair trial. A further test is at subsection (3)(d) - that the public interest would be protected only by non-disclosure.

503. Subsection (4) provides that the court must consider whether the information could be disclosed or partly disclosed in such a way as to provide the accused with something rather than nothing and still achieve the correct balance between public and private interests.

504. Subsections (5) and (6) provide for ways in which the court might decide that information could be disclosed e.g. by provision of redacted or edited information or summaries of the information or any other way specified in the order.

Section 107 – Special counsel

505. This section gives a power to the court in considering an application for a non- notification order, an exclusion order or a non-disclosure order, to appoint special counsel to represent the interests of the accused in respect of the applications at a hearing on any or all of the applications. The test for such appointment is in subsection (3).

Section 108 – Appeal by prosecutor against refusal of application for order

506. This section provides for a prosecutor to be able to appeal against a court decision to refuse an application for a non-notification order and an exclusion order, or an application for an exclusion order or a non-disclosure order.

Section 109 - Appeal by accused against making of exclusion order or non-disclosure order

507. This section provides for an accused to be able to appeal against a court decision to make an exclusion order or a non-disclosure order.

Section 110 - Appeal by special counsel

508. This section provides for any special counsel appointed to be able to appeal against a court decision to make a non-notification order and an exclusion order, an exclusion order or a non-disclosure order.

Section 111 – Review of grant of non-disclosure order

509. This section entitles the prosecutor or the accused to apply to the court to seek review of a non-disclosure order. This would be on the basis that they have become aware of material information which was not available at the time the order was made.

510. Subsections (1) and (2) provides that such an application for review can be made only where the court has made a non-disclosure order, where the prosecutor or accused becomes aware of information that was unavailable to the court at the time of making that order and that the prosecutor or accused considers that the information is material information that the prosecutor ought to disclose.

511. Subsection (3) provides who can attend at a review hearing: the same parties as were heard in relation to the non-disclosure order will have the opportunity to make representations i.e. where there is a non-notification order and/or exclusion order in place, only the prosecutor and any special counsel appointed may be heard; where there are no such orders, the prosecutor, accused and any special counsel may all be heard.

512. In terms of subsection (4), where there was a non-notification order in place and the court is satisfied that the grounds for non-notification remain, the court may make an order prohibiting the accused being notified of the application, having the same effect as a non-notification order.

513. Similarly, in terms of subsection (5), where there was an exclusion order in place and the court is satisfied that the grounds for exclusion remain, the court may make an order excluding the accused from the review.

514. Subsection (6) provides that if the court is satisfied that the grounds for non-disclosure no longer remain, the court may recall the non-disclosure order, or make an order for partial disclosure.

515. Subsections (8) and (9) have the effect of allowing applications for review at any time following the making of the non-disclosure order until the conclusion of the proceedings, as defined in subsection (9).

Section 112 – Review by court of non-disclosure order

516. Section 112 provides that the court is to be under a duty to keep under review the appropriateness of a non- disclosure order made until the conclusion of the proceedings.

517. Subsection (2) provides that, where the court considers that the non-disclosure order might not be appropriate, the court must appoint a hearing to reconsider the order.

Section 113 – Applications and reviews: general provisions

518. This section sets out the procedure for dealing with applications, appeals and reviews of non-disclosure, exclusion and non-notification orders. The accused is not entitled to see or be made aware of the contents of the application for such orders or the application for the review of such orders or the information itself that the applications are designed to protect.

Section 114 – Code of practice

519. This section provides for a code of practice to accompany the legislation. It is intended that the legislation will provide the statutory framework for the disclosure scheme and the code will provide the detail on how it will operate in practice.

520. Subsections (1) and (4) provides for the Lord Advocate to prepare the code and lay it and any revisions to the code before Parliament. The intended effect of the provisions is that the code will regulate its own procedures and the date on which it, and any revised code, comes into effect.

521. Subsections (2) and (3) specify those persons who must have regard to the code namely police, prosecutors and any other investigating agency whom the Scottish Ministers prescribe, who carry out functions in relation to the investigation of crime and sudden deaths.

Section 115 – Acts of Adjournal

522. This section provides for the High Court to make such rules as it considers necessary to give full effect to these provisions.

Section 116 – Interpretation of Part 6

523. Subsection (1) clarifies the meaning of “prosecutor” and “procurator fiscal” where they appear in these provisions.

524. Subsection (2) clarifies that where there are references to the accused having information disclosed to him, or imposes any obligation on him in relation to disclosure; those references should be read as including reference to a solicitor or advocate acting on behalf of the accused.

PART 7 - MENTAL DISORDER AND UNFITNESS FOR TRIAL

Section 117 - Criminal responsibility of persons with mental disorder

525. Sections 117 to 120 and associated minor amendments in Schedule 5 implement the Scottish Law Commission’s Report on Insanity and Diminished Responsibility, published in 2004. The provisions directly reflect the draft Bill contained in the Commission’s Report, with changes only to reflect the incorporation of the provisions within the larger Criminal Justice and Licensing (Scotland) Bill, to deal with changes to the law since the Commission’s Report, and to correct some minor errors and omissions.

526. Section 117 introduces a new statutory defence to replace the common law defence of insanity. It does so by inserting a new section 51A into the 1995 Act. It provides for a special defence in respect of persons who lack criminal responsibility by reason of their mental disorder at the time of the offence with which they are charged.

527. Subsection (1) sets out the test for the new statutory defence. It provides that there are two elements to the test. The first is the presence of a mental disorder suffered by the accused at the

time of the conduct constituting the offence. Secondly, the mental disorder must have a specific effect on the accused for the defence to be available. This effect is the inability of the accused to appreciate either the nature or wrongfulness of the conduct constituting the offence. 'Nature' and 'wrongfulness' are alternative concepts and the defence may be established by proving lack of appreciation in respect of only one of them. The concept of appreciation is wider than that of mere knowledge. Failure to appreciate the nature of conduct would not therefore be precluded by knowledge of the physical attributes of the conduct. Similarly the defence may be available to an accused who knew that his conduct was in breach of legal or moral norms but who had reasons for believing that he was nonetheless right to do what he did.

528. Subsection (2) provides that the special defence does not apply to a person who at the time of the conduct constituting the offence had a mental disorder which consisted of a psychopathic personality disorder alone. The exclusion in this subsection applies only to psychopathic personality disorder. Other forms of personality disorder may give rise to the defence provided that the effect on the accused satisfies the test in subsection (1) above. The defence would also be available where psychopathic personality disorder co-existed with another mental disorder (including other personality disorders) provided that the effect of the other mental disorder falls within the test in subsection (1).

529. Under the common law insanity is classified as a special defence. Subsection (3) provides for a similar rule in relation to the new statutory defence based on mental disorder. The main effect of the characterisation of a defence as a special defence is in relation to various procedural requirements under the 1995 Act (e.g. section 78(1) (giving of notice), section 89 (reading of the defence to the jury)).

530. Subsection (4) deals with who can raise the defence and with the relevant standard of proof. It provides that the special defence can be raised only by the person charged with the offence. It cannot be raised by the Crown or by the court of its own accord. This provision is in contrast to the common law defence, which can be raised by the Crown. The subsection also provides that the standard of proof on an accused person who states the defence is the balance of probabilities. This rule corresponds with that for the common law defence of insanity (*HM Advocate v Mitchell* 1951 JC 53).

531. Section 117 introduces a statutory version of the plea of diminished responsibility in place of the common law plea. It does so by inserting a new section 51B into the 1995 Act. The test for the statutory plea is modelled on the common law as set out in *Galbraith v HM Advocate* 2002 JC 1, subject to some variations noted below.

532. Subsection (1) provides that a plea of diminished responsibility is applicable in cases of murder but not in respect of any other crime or offence. The effect of the plea, if proved, is that a person who would otherwise be convicted of murder is to be convicted instead of culpable homicide. The main difference between the two outcomes is that the court has a discretion in sentencing a person convicted of culpable homicide which it lacks in a murder case (a person convicted of murder must be given a sentence of life imprisonment: 1995 Act, section 205(1)). The test for the plea is based on that laid down in *Galbraith v HM Advocate*, namely at the time of the killing the accused must have been suffering from an abnormality of mind which substantially impaired his ability to determine or control his conduct. Comments by the Court in

the *Galbraith* case on this part of the common law test will be of use in interpreting the statutory test.

533. Subsection (2) makes two significant changes to the law on the plea of diminished responsibility. At common law the plea is not available where the relevant abnormality of mind falls within the scope of the insanity defence. The position is different under the Bill where the accused's condition at the time of an unlawful killing falls within the definitions of the both the defence based on mental disorder and diminished responsibility. In this situation, the accused has the option of advancing either the defence or the plea. Secondly the subsection allows for diminished responsibility to be based on the condition of psychopathic personality disorder. At common law this condition cannot be used as a basis for the plea (*Carraher v HM Advocate* 1946 JC 108). The subsection makes clear that this exclusion does not apply to the statutory test for diminished responsibility.

534. Subsection (3) clarifies the effect which a state of intoxication has on the availability of diminished responsibility. In the first place, the provision re-states the rule laid down in *Brennan v HM Advocate* 1977 JC 38 that a person who kills whilst in state of intoxication cannot found a plea of diminished responsibility on that condition. Secondly, it states that the presence of intoxication does not preclude diminished responsibility provided that there is a basis for the plea independently of the intoxication.

535. Subsection (4) deals with the burden and standard of proof in relation to a plea of diminished responsibility. The subsection follows the same approach as that for the defence based on mental disorder. Only the accused can raise the plea, and if raised the accused has to prove diminished responsibility on the balance of probabilities. The rule is in substance the same as the common law rule (*HM Advocate v Braithwaite* 1945 JC 55).

Section 118 - Acquittal involving mental disorder: procedure

536. Section 118 inserts a new section 53E into the 1995 Act. The new section deals with the procedure where an accused is acquitted by reason of mental disorder.

537. Subsection (1) of the new section 53E replaces the existing statutory procedure under section 54(6) of the 1995 Act for acquittal involving mental disorder. Under section 54(6) of the 1995 Act (before its repeal by this Bill), where the defence of insanity is raised in a solemn case, there must be a verdict returned by the jury. A consequence of section 54(6) is that a jury requires to be empanelled and directed to return a verdict even where the Crown accepts a plea of insanity. This subsection provides for a different procedure for the statutory defence based on mental disorder. Where the Crown accepts a plea by the accused based on the defence, the court is to declare that the accused has been acquitted by reason of the special defence. This provision assimilates the procedure for solemn and summary cases. A declaration setting out the special nature of the acquittal is necessary in order to trigger the provisions in Part VI of the 1995 Act which deal with disposals.

538. Subsections (2) and (3) of the new section 53E provide for the situation where the Crown has not accepted a plea by the accused of the defence based on mental disorder. The defence does not become an issue for the court or jury to consider unless there has been evidence to

support it. If the defence falls to be considered, in solemn cases the court must direct the jury to make a finding whether or not they accept that the defence has been established. Where the jury find that the defence has been established they must also declare whether their verdict of acquittal is based on the defence. A similar procedure applies in summary cases, where the court must state whether it finds that the defence has been established. If it has, the court must also declare whether the accused has been acquitted on that ground. The purpose of the declaration, in both solemn and summary cases, is to deal with the possibility that a jury might acquit the accused on some other ground. In this situation, even if the defence has been proved, the acquittal is not a special one triggering the disposal provisions of Part VI of the 1995 Act.

Section 119 - Unfitness for trial

539. Subsection (1) inserts a new section 53F into the 1995 Act. The new section replaces the existing common law rule on insanity as a plea in bar of trial, with a new statutory plea of unfitness based on the mental or physical condition of the accused.

540. Subsection (1) of the new section 53F sets out a general test for the new statutory plea of unfitness for trial. The effect of the provision is that a person is unfit for trial if he cannot effectively participate in the proceedings because of his mental or physical condition.

541. The Bill does not change the common law rule that the issue of an accused's fitness for trial may be raised by the accused, the Crown, or by the court. However, this subsection makes clear that the appropriate standard of proof for a finding of unfitness for trial is on the balance of probabilities.

542. Subsection (2) of the new section 53F lists various inabilities which if proved in respect of the accused indicate his unfitness for trial. The list in paragraph (a) is illustrative, and not exhaustive, of the types of inabilities which constitute lack of ability to participate effective in proceedings. Paragraph (b) provides that other factors may be relevant to making a determination.

543. Subsection (3) of the new section 53F applies to the statutory plea a common rule laid down in *Russell v HM Advocate* 1946 JC 37. It makes clear that a person is not unfit for trial simply because he cannot remember what happened at the time of the offence with which he is charged. However the rule does not apply where the accused is suffering from problems affecting memory of events at the time of the trial itself.

544. Subsection (4) of the new section 53F explains the meaning of "the court" when used in the new section 53F.

545. Subsection (2) of section 119 amends the title of section 54 of the 1995 Act and introduces some amendments to that section.

546. Subsection (2)(a)(i) repeals part of section 54(1) of the 1995 Act. Section 54(1) of the 1995 Act contained a requirement that various court orders must be based on the evidence of two medical practitioners, one of whom must have been approved as having special expertise in

mental health. The effect of subsection 2(a)(i) is that this requirement does not apply to a finding by a court that a person is unfit for trial.

547. Subsections (2)(b) and (c) amend section 54 to reflect the names for the new defence and plea in bar of trial. References to insanity as a plea in bar are changed to refer to unfitness for trial.

548. Subsection (3) of section 119 repeals subsection (6) of section 54 of the 1995 Act. That provision dealt with procedure on insanity as a defence. The repeal follows on from the introduction by section 118 of the Bill of the new statutory defence based on the accused's mental disorder. By placing the defence in provisions separate from section 54, the definition of "court" in section 54(8) no longer applies to the procedure relating to the defence. The effect is to make clear that the provisions for recording an acquittal based on the defence apply to proceedings in the district/justice of the peace courts.

549. Subsection (3) of section 119 also repeals subsection (7) of section 54 of the 1995 Act. The effect is that the procedure in summary cases for the giving of notice of a plea of unfitness for trial is governed by the general rules for intimation of pleas in bar (see 1995 Act, section 144).

Section 120 - Abolition of common law rules

550. The effect of section 120 is to abolish any existing common law rules regarding the special defence of insanity, the plea of diminished responsibility and the plea of insanity in bar of trial.

PART 8 - LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982

551. Part 8 of the Bill makes various changes to the general licensing provisions of the Civic Government (Scotland) Act 1982 Act and to its specific provisions on metal dealers, market operators, public entertainment, late hours catering, and taxis and private hire cars.

Section 121 - Conditions to which licences under 1982 Act are to be subject

552. This section provides for mandatory and standard conditions to be attached to licences issued under the 1982 Act and makes consequential amendments.

553. Mandatory conditions are determined by the Scottish Ministers, or by the 1982 Act itself or other powers under other legislation to prescribe conditions. Under new section 3A(3), the order-making power for the Scottish Ministers to set mandatory conditions will be subject to the negative resolution procedure.

554. Standard conditions are determined by the licensing authorities under the 1982 Act - they must not be inconsistent with any mandatory conditions and must be reasonable. Licensing authorities have a duty (new section 3B(4)) to publish standard conditions determined by them and these can be applied to deemed grants or renewals (i.e. grant or renewal of licences where the authority has failed to reach a decision on an application within the statutory period allowed). Subsection (6) enables licensing authorities to impose further conditions, as well as omit or vary any of the standard conditions applicable to licences.

555. For both mandatory and standard conditions, different sets of conditions can be set for different types of licence (e.g. boat-hire licences or street traders' licences under sections 38 and 39 of the 1982 Act respectively).

Section 122 - Licensing: powers of entry and inspection for civilian employees

556. Section 5 of the 1982 Act empowers a constable or 'authorised officer' to enter and inspect premises to ensure compliance with licence conditions. This section extends the powers of 'authorised officers' to include civilian staff employed by the police (under the provisions of section 9 of the Police (Scotland) Act 1967) and makes consequential amendments to other parts of the 1982 Act.

Section 123 - Licensing of metal dealers

557. Under section 9 of the 1982 Act, the provisions dealing with the regulation and licensing of metal dealers and itinerant metal dealers are mandatory for licensing authorities to operate. Subsection (2) replaces the mandatory licensing scheme with an optional scheme, i.e. it will be open to local licensing authorities to determine whether or not a licence is required in their areas.

558. Subsection (3) repeals the exemption from the metal dealers' licensing scheme provisions (section 29 of the 1982 Act), thus bringing all metal dealers within the scope of the scheme, and makes consequential amendments. Licensing authorities are, however, empowered by this subsection to determine whether any exemptions should apply and, if so, at what level of annual turnover. Where licensing authorities opt to provide for exemptions, they are under a duty to publish details of them.

Section 124 – Licensing of taxis and private hire cars

559. Subsection (2) amends section 13(3) of the Civic Government (Scotland) Act 1982 to provide that an applicant for a taxi or private hire car driver's licence must have held throughout the period of 12 months immediately prior to the date of the application a licence authorising the person to drive a motor car issued under Part III of the Road Traffic Act 1988 or a licence which would at the time of the application entitle the person to such a licence without taking a test, not being a provisional licence.

560. Subsection (3) inserts new sections 17(2) – (4) which provide that a licensing authority must fix scales for the fares and other charges referred to in subsection (1) within 18 months beginning with the date on which the scales came into effect. Subsection (3) provides that in fixing the scales under subsection (2) a licensing authority may alter the fares or other charges or fix fares or other charges at the same rates. Subsection (4) provides that the licensing authority review the scales in accordance with subsection (4A) before fixing scales under subsection (2). Subsection (4A)(a) provides that a licensing authority, in carrying out a review, consult with persons or organisations appearing to be representative of taxi operators in the area. Subsections (4A)(b) and (c) set out procedures for consultation and notification of the licensing authority's proposals and subsection (d) provides that they consider any representations received thereon. Subsection 4B provides that a review must be completed before the end of the 18 month period beginning with the fixing of scales under subsection (2). Subsection (4D) sets out the duty to give notice as to the effect of the fare scales fixed and subsection (4E) contains the

notification requirements. Subsection (4F) provides that after fixing scales they must notify all operators of taxis within their area and the persons and organisations consulted under subsection (4A)(a). Section 17(5)(a) is amended to extend the period provided for notification of a licensing authority's decision from 5 days to 7 days.

561. Subsection (4) amends section 18(1) and introduces a new section 18(1A) to extend the right of appeal against the decision by a licensing authority in regard to the fixing of taxi fare scales or review to persons or bodies representative of taxi operators in the licensing area.

562. Subsection (5) inserts a new section 18A(1) which provides that following the fixing of scales or the carrying out of a review the licensing authority must determine the date upon which the scales are to come into effect and publish them in accordance with the terms of section 18A(3) to (5). Section 18A(2) provides that the revised scales may not come into effect earlier than 7 days after the date on which they were published. Sections 18A(3) to (5) set out the notification procedures and the timescale to be followed. Section 18(9) is repealed in consequence.

Section 125 - Licensing of market operators

563. Subsection (2) removes the exemption from the market operators' licensing provisions for non-commercial organisations at section 40(2) of the 1982 Act. While this will bring charitable organisations etc within the scope of the licensing provisions, licensing authorities have discretion as to whether to charge reduced or no fees to such organisations.

564. Subsection (3) repeals the words "by retail" from section 40(4) of the 1982 Act. Some licensing authorities have been reluctant to use their powers to license car boot sales because of the authorities' interpretation of those words. Removal of "by retail" should remove any restrictive interpretation and allow licensing authorities to regulate car boot sales along with other types of market operators.

Section 126 – Licensing of public entertainment

565. Subsection (2) repeals the words "on payment of money or money's worth" from section 41(2) of the 1982 Act. This allows licensing authorities to control large-scale public entertainments that are free to enter but authorities have discretion whether to license events such as gala days or school fetes.

566. Subsection (2) also updates some references to gambling legislation for premises that are exempt from the public entertainment licensing provisions (sections 41(2)(d) and (e) of the 1982 Act refer) and empowers the Scottish Ministers to add other premises to the list of exemptions. Under subsection (3), the order-making power for the Scottish Ministers to exempt other premises will be subject to the negative resolution procedure.

Section 127 -Licensing of late night catering

567. Under section 42 of the 1982 Act, premises providing meals and refreshments between 11pm and 5am require to be licensed where licensing authorities have opted to use this

provision. This section replaces the references to “meals or refreshments” with “food”, thus bringing late-night grocers and 24-hour stores within the scope of the provisions. It will continue to be for licensing authorities to determine which classes of premises actually require to be licensed.

Section 128 - Applications for licences

568. This section requires people applying for licences under the 1982 Act to provide details of their date and place of birth on the application forms. Where the applicant is not responsible for the day-to-day management of the activity being licensed, an employee or agent with such responsibility must provide such details. Similar provision is made in respect of applications on behalf of companies.

569. Subsections (2)(c), (d), (e), (f) and (g), and subsections (3)(d), (f), (g) and (h) amend various time limits of the application process to: make representations; provide reasons for decisions; give notice of hearings; and for licensing authorities to consider licence renewal applications received after the expiry date as renewals, rather than new applications.

570. Subsection (3)(e) updates paragraph 9(3) of Schedule 2 to the 1982 Act to reflect the position of the United Kingdom as a member state of the European Union and its obligations under EC law.

PART 9 - ALCOHOL LICENSING

Section 129 - Sale of alcohol to persons under 21 etc.

571. Each Licensing Board is required by section 6 of the Licensing (Scotland) Act 2005 (‘the 2005 Act’) to publish a licensing policy statement which is a statement of the policy on how it will carry out its functions. Such a statement must be prepared every three years. A Board may choose to publish a supplementary licensing policy statement during the three year period that the licensing policy statement applies. In preparing a licensing policy statement or a supplementary licensing policy statement a Board must consult with various people and ensure that the policy statement promotes the licensing objectives found in section 4 of the 2005 Act.

572. Subsection (3) inserts a new section 7A into the 2005 Act requiring Licensing Boards to include within the licensing policy statement a statement regarding the effect of off sales on those under 21 and whether this is having a detrimental effect on one or more of the licensing objectives in the whole or part of the Licensing Board’s area. For example a Board may decide that there was only a detrimental impact in certain communities.

573. The detrimental impact statement will form part of the three yearly licensing policy statement. It can also be published as a supplementary licensing policy statement in between the three year period. Subsection (6) of this new section enables the Police or the Local Licensing Forum set up by section 10 of the 2005 Act to require the Licensing Board to consider the detrimental impact assessment with a view to changing it in whole or in part. Following such consideration the Licensing Board may choose to publish a supplementary licensing policy statement.

574. In exercising its functions under the 2005 Act a Licensing Board is required to have regard to its licensing policy statement and any supplementary licensing policy statement it may have published (section 6(4) of the 2005 Act). The addition of the detrimental impact statement on off-sales to those under 21 would therefore enable a Licensing Board to have a policy of applying a condition to licensed premises which banned the sale of alcohol to those under 21 depending on the policy statement this could entail a restriction on off-sales to those under 21 in terms of geographical area, type of premises or time.

575. A Licensing Board can only impose conditions on a premises licence when it grants the licence under section 27(6) of the 2005 Act or if it reviews a premises licence under section 36 to 40 of the 2005 Act in those circumstances it may only do so on a case by case basis. Subsection (4) will enable Licensing Boards to vary all the premises in its area, or vary a category, or group of premises and apply the same conditions to all the premises in its area or the category or group of licences. A Board is only able to impose a bloc condition if the Board considers it necessary or expedient for the purposes of any of the licensing objectives (section 4 of the 2005 Act). Licensing Boards will also be restricted to imposing bloc conditions to areas set out by the Scottish Ministers in affirmative regulations under section 146 of the 2005 Act.

Section 130 - Premises licence applications: notification requirements

576. This section amends the list of those to whom the Licensing Board must send a copy of an application when undertaking its obligations under section 21(1) of the Licensing (Scotland) Act 2005. Previously a copy of the application was required to accompany each notice issued under section 21(1) of the 2005 Act. The section also removes the chief constable’s obligation to provide the Board with antisocial behaviour reports. A Licensing Board’s ability to request such reports is now provided for under section 24A of the Licensing (Scotland) Act 2005 , inserted by section 132 of the Bill.

Section 131 - Premises licence applications: modification of layout plans

577. This section amends section 23(7) of the Licensing (Scotland) Act 2005 concerning the determination of an application for a premises licence. Section 23(7) provided that a Licensing Board could propose a modification to the operating plan in circumstances where the Licensing Board would otherwise refuse the application. The Licensing Board would grant the license if the applicant agreed to the proposed modification.

578. This section extends section 23(7) so that a Licensing Board can also propose a modification to the layout plan, which is required to accompany the application under section 20(2)(b) of the Licensing (Scotland) Act 2005. The Licensing Board may propose a modification to the layout plan in circumstances where the Licensing Board would otherwise refuse the application. The Licensing Board grants the license if the applicant agrees to the proposed modification. The amendment allows the Licensing Board to propose modifications to either the operating plan or the layout plan, or both if necessary.

Section 132 - Premises licence applications: antisocial behaviour reports

579. This section amends the Licensing (Scotland) Act 2005 requirements concerning a Chief Constable’s obligation to provide the Licensing Board with an antisocial behaviour report. It

would be no longer necessary for the chief constable to provide a report in respect of every application. Instead, a report will only be required if the Licensing Board requests one, or if the chief constable wishes to forward a report for the Board's consideration.

Section 133 – Sale of alcohol to trade

580. This section adjusts an offence in the Licensing (Scotland) Act 2005 to enable the trade as defined by section 147(2) of the 2005 Act to purchase alcohol from a premises which holds a premises licence or occasional licence granted for the sale of alcohol under section 17 and 56 of the 2005 Act respectively. Previously the trade would only have been able to purchase from premises which supplied trade only. This section would now allow, for example, a restaurant owner to purchase alcohol from a supermarket for the restaurant without committing an offence.

Section 134 - Occasional licences

581. This section reduces the length of time a Licensing Board is required to wait for comments from the Chief Constable and the Licensing Standards Officer in respect of an application for an occasional licence by the Chief Constable and the Licensing Standards Officer from 21 days to a period of not less than 24 hours where the Licensing Board is satisfied that the application requires to be dealt with quickly. This section however restricts the ability to delegate approval of occasional licences which are "fast tracked" in this way to any member of the Board, any committee established by the Board and the clerk of the Board.

Section 135 - Extended hours application: variation of conditions

582. This section will enable Licensing Boards to amend for the first time the conditions of operation for a licensed premises for the duration of the extended period and the period that the extension applies to. For example if a premises was ordinarily open on a Saturday from 11am until 11pm and applied to extend its licence to 2am on that day, a Licensing Board would be able to vary conditions, for example, requiring door supervisors or use of plastic drinking vessels for the whole period, 11am on Saturday until 2am on Sunday, or any part of that period, not just for the extended period after 11pm.

Section 136 - Personal licences

583. Under section 76(3) of the Licensing (Scotland) Act 2005 a personal licence is not valid if at the time it is issued the individual to whom it is issued already holds a personal licence. The 2005 Act does not prevent an applicant making a second application, it is not a criminal offence and a Licensing Board must grant the application as the 2005 Act does not enable a Board to refuse an application on the grounds that an applicant already holds one.

584. This section amends the 2005 Act by enabling the Licensing Board to enact other options than granting, these being to refuse the application or hold a hearing to decide whether or not to grant the application if the applicant already holds a personal licence or if a previous personal licence held by the applicant had been surrendered or expired in the previous three years before a new application was made.

585. This provision is to close a possible loophole where a licence holder who had an endorsement under section 85(1) of the 2005 Act could avoid the suspension or revocation provisions of section 86 of the 2005 Act by voluntarily surrendering their personal licence before the Licensing Board had had an opportunity to consider what action it might take under section 86 of the 2005 Act, and then apply for another personal licence which would be "clean". The section also makes it a criminal offence not to surrender a void personal licence or attempt to use a void licence as a valid licence. A level 3 fine under section 225 of the Criminal Procedure (Scotland) Act 1995 presently stands at £1000.

Section 137 - Emergency closure orders

586. This section changes the rank of the constable who may request or order a closure order for licensed premises and its subsequent extension or termination under section 97 to 99 of the Licensing (Scotland) Act 2005. The change is from a constable of or above the rank of superintendent as defined by section 147(1) of the Licensing (Scotland) Act 2005 to a constable of or above the rank of inspector.

Section 138 – False statements in applications: offence

587. An offence is committed by any person who makes a false statement on an application. This section could be used in respect of those who apply for a second personal licence, which a personal licence holder may wish to have as a backup as their original licence being suspended or revoked for improper conduct. The personal licence form specifically asks if the applicant already hold a licence. A level 3 fine under section 225 of the 1995 Act presently stands at £1000.

Section 139 – Further modifications of 2005 Act

588. Police powers to object to the granting of licenses for the sale of alcohol under the Licensing (Scotland) Act 2005 are extended.

589. Section 22 of the 2005 Act allows any person to object to an application for a premises licence, but subsection (2) limits the chief constable so that he can only object on the ground that he has reason to believe that the applicant is involved in serious organised crime and that refusal of the application is necessary for the purpose of the crime prevention objective (section 4(2)). Under section 21(5) the chief constable may recommend that an application be refused if necessary for the purpose of the crime prevention objective, but only where he is giving notice of any relevant or foreign offence. For occasional licences, section 57(2) allows the chief constable to recommend the refusal of an application only on the grounds of the crime prevention objective. Under section 73 of the 2005 Act, the chief constable may not object but may recommend that an application for a personal licence be refused if necessary for the purposes of the crime prevention objective, but only where he is giving notice of any relevant or foreign offence.

590. The amendments in Schedule 4 widen the grounds a licensing board may consider in refusing an application for a premises licence on receiving a notice from the chief constable, from the crime prevention objective to any of the licensing objectives listed in section 4 of the 2005 Act. This effectively widens the grounds on which a chief constable may object from

purely crime prevention to securing public safety, preventing public nuisance and protecting children from harm. Paragraph 5 sees this widening in relation to an application for a premises licence and this process is repeated in paragraph 6 where an applicant or connected person is convicted during the determination of a premises licence; in paragraph 7 it concerns the transfer of a premises licence on application of the licence holder; paragraph 12 & 13 are in respect of an application for a personal licence; paragraph 14 where an applicant is convicted during the determination of a personal licence and paragraph 15 where a personal licence holder is convicted.

591. Paragraph 16 ensures that the chief constable may report a personal licence holder to the licensing board for actions which are inconsistent with the licensing objectives and that a licensing board must then hold a hearing to consider what action if any should be taken against the personal licence holder as allowed by section 84(7) of the 2005 Act.

PART 10 - MISCELLANEOUS

Section 140 - Licensed premises: social responsibility levy

592. This section gives the Scottish Ministers a power through affirmative regulations to impose a charge on certain holders of licences under the Licensing (Scotland) Act 2005 and the Civic Government (Scotland) Act 1982. Money raised by the charge will be for local authorities to use in contributing towards the costs of dealing with the adverse effects of the operations of these businesses, for example extra policing or street cleaning or in furthering the licensing objectives listed in section 4 of the 2005 Act.

Section 141 - Annual report on Criminal Justice (Terrorism and Conspiracy) Act 1998

593. The Criminal Justice (Terrorism and Conspiracy) Act 1998 (“the 1998 Act”) was passed following emergency parliamentary procedure in the wake of the Omagh bombing in August 1998.

594. There were 2 main parts in the 1998 Act. Sections 1 to 4 made provision about procedure and forfeiture in relation to offences concerning proscribed organisations. Sections 5 to 7 concern conspiracy to commit offences outside the United Kingdom.

595. Section 8 requires that a statutory report on the working of the Act be laid before both Houses of Parliament on an annual basis. Although the section is drafted in such a way so as it applies generally to the working of the Act as a whole, it is understood that the requirement was directed principally at the terrorism provisions in sections 1 to 4, which have now been repealed.

596. Section 8 is now considered redundant. It has been repealed for England, Wales and Northern Ireland by the Criminal Justice and Immigration Act 2008. This section repeals section 8 of the 1998 Act as it applies to Scotland. The effect is that the section will be repealed UK wide.

Section 142 – Corruption in public bodies

597. Section 1 of the Public Bodies Corrupt Practices Act 1889 provides that a person in public office who is involved in any form of corrupt practice in connection with their work is guilty of a crime. Offences under the Act can be triable by solemn or summary procedure. Section 8 makes provision as to the application of the Act to Scotland. It provides that the sheriff principal and sheriff shall have jurisdiction to try any offence under the Act. The effect is that section 8 excludes the district court or the justice of the peace court from being able to try an offence under the 1889 Act. Section 8 is being amended to remove the exclusion of the jurisdiction of district courts or justice of the peace courts to try offences under the 1889 Act, so that lower level offences can be dealt with in those courts.

598. The Prevention of Corruption Act 1906 makes similar provision to the 1889 Act. It provides that any employee who carries out any activity in a corrupt manner is guilty of an offence. Section 3 of the 1906 Act makes provision as to its application to Scotland, and provides that all offences which are punishable under the Act on summary conviction shall be prosecuted before the sheriff. In line with the amendment being made to the 1889 Act, section 3(2) of the 1906 Act is being repealed to allow offences under the 1906 Act to be triable not only in the sheriff court but in the district court and justice of the peace court too.

PART 11 - GENERAL

Section 143 - Orders and regulations

599. This section regulates the powers of the Scottish Ministers contained in the Act to make regulations and orders. It provides for these powers to be exercisable by statutory instrument, and provides standard powers for instruments to include ancillary provisions and to make different provisions for different purposes. It also provides for the level of Parliamentary procedure to which any instrument is to be subject.

Section 144 – Interpretation

600. This section provides short references for three enactments referred to frequently throughout the Bill.

Section 145 - Modification of enactments

601. This section introduces Schedule 5 which makes modifications to certain enactments.

Section 146 – Ancillary provision

602. This section allows the Scottish Ministers by order to make supplementary, incidental or consequential provisions in connection with any provision of the Bill.

Section 147 -Transitional provision etc.

603. This section allows the Scottish Ministers by order to make transitory, transitional or savings provisions in connection with the coming into force of any provision of the Bill.

Section 148 – Short title and commencement

604. This section provides for commencement of the majority of the Bill to be made by order. Sections 143 to 148 will commence upon Royal Assent.

Schedule 1 – The Scottish Sentencing Council

605. Schedule 1 provides for the membership of the Council. It sets out the procedures for the appointment of members and membership of the Council.

606. It also contains detailed provisions on the procedure of the Council, ancillary process and powers to delegated functions.

607. Paragraph 13 places the Council on the list of authorities subject to investigation by the Scottish Public Services Ombudsman. Paragraph 14 places the Council under the requirements of the Freedom of Information (Scotland) Act 2002.

Schedule 2 – Short-term custody and community sentences: consequential amendments

608. See section 18 above.

Schedule 3 – Witness anonymity orders

609. This Schedule deals with appeals on the granting of witness anonymity orders made under common law powers prior to the provisions under 271N to 271T coming into effect. The High Court can only treat a conviction as unsafe if, as a result of an order made under common law, the accused did not receive a fair trial. It cannot rule a conviction as unsafe simply on the basis that the trial court had no power to make a witness anonymity order under common law.

Schedule 4 – Further modifications of 2005 Act

610. See section 139 above.

Schedule 5 – Modification of enactments

Paragraph 1 – The False Oaths (Scotland) Act 1933

611. Sections 44 to 46 of the Criminal Law (Consolidation) (Scotland) Act 1995 (“the 1995 Act”) re-enact most of the False Oaths (Scotland) Act 1933 (“the 1933 Act”). Schedule 5 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 which lists the repeals undertaken in the consolidation exercise does not include a reference to the 1933 Act. This is an error and should have been included at the time of the consolidation exercise was carried out. This section repeals the 1933 Act in full. Consequential amendments are required where reference is made to the 1933 Act, or a provision of that Act, in other pieces of legislation, substituting a reference to the new provisions in the 1995 Act. Paragraphs 4, 45 and 51 make the necessary consequential amendments.

Paragraph 2 – The Public Records (Scotland) Act 1937

612. Paragraph 2 amends section 14 of the Public Records (Scotland) Act 1937. Paragraph 1(a) puts beyond any doubt that references to "court records" in that Act include the Scottish Land Court as well as all the ordinary courts. Paragraph (2) provides that any question as to whether or not a document is part of the records of a particular court is to be determined by either the Lord President or the Lord Justice General.

Paragraph 3 – The Rehabilitation of Offenders Act 1974

613. Paragraph 3 amends section 1 (4)(b) of the Rehabilitation of Offenders Act 1974 (c.53) to change the reference of "insanity" in that Act to refer to the new defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill.

Paragraph 4 – The Evidence (Proceedings in Other Jurisdictions) Act 1975

614. This amendment is consequential on the repeal of the False Oaths (Scotland) Act 1933 by paragraph 1.

Paragraphs 5 –7 - The 1982 Act

615. Section 52(7) of the Civic Government (Scotland) Act 1982 provided that offences of taking, permitting to be taken, or making of any indecent photograph or pseudo-photograph (section 52(1)(a) of the 1982 Act) were to be included in the list of offences contained in Schedule 1 to the Criminal Procedure (Scotland) Act 1975. Schedule 1 to the 1975 Act listed offences against children under the age of 17 years, to which special provisions applied. Section 52(7) of the 1982 Act also provided that section 52(1)(a) offences were included in Schedule 1 to the 1975 Act for the purposes of Part III of the Social Work (Scotland) Act 1968, which has since been repealed.

616. Schedule 1 to the 1975 Act has since become Schedule 1 to the Criminal Procedure (Scotland) Act 1995, and was later amended by the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 to insert the offences under sections 52 and 52A of the 1982 Act in relation to an indecent photograph of a child under the age of 17 years. As section 52(7) has been overtaken by subsequent legislation, this subsection is repealed.

617. Paragraph 6 repeals a minor amendment made to section 52(7) of the Civic Government (Scotland) Act 1982 by the Criminal Justice Act 1988, consequential on the repeal of section 52 (7) by paragraph 6 of this schedule.

618. Paragraph 7 simply corrects a minor error in section 64 of the 1982 Act, which provides for appeals against orders in relation to public processions.

Paragraph 8 – The Legal Aid (Scotland) Act 1986

619. Paragraph 8 amends section 22 of the Legal Aid (Scotland) Act 1986 (c.47) which deals with the availability of criminal legal aid so as to substitute reference to the new defence and plea of unfitness for trial in place of the references to cases involving "insanity".

Paragraph 9 – The Criminal Justice (Scotland) Act 1987

620. Sections 27 to 30 of the Criminal Law (Consolidation)(Scotland) Act 1995 provide for special investigating powers to be exercised by a nominee of the Lord Advocate in the event of a direction being given when a suspected offence may involve serious or complex fraud. They re-enact sections 51 to 54 of the Criminal Justice (Scotland) Act 1987.

Paragraph 11 – The Criminal Justice and Public Order Act 1994

621. Schedule 5 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 lists the provisions which were repealed as part of the consolidation exercise. However, the schedule does not include sections 51 to 54 of the 1987 Act. This is an error and should have been included at the time of the consolidation exercise. This paragraph repeals sections 51 to 54 of the 1987 Act, and paragraphs 8 and 9 repeal amendments made to those sections by the Criminal Justice Act 1988 and the Criminal Justice and Public Order Act 1994. .

Paragraphs 12, 13 and 14 – The Criminal Law (Consolidation) (Scotland) Act 1995

622. Section 16 of the Criminal Law (Consolidation) (Scotland) Act 1995 allows any parent, relative, guardian or person acting in the best interests of a woman or girl to ask for a warrant to be issued. This warrant will authorise a named constable to enter a specified place and search for that woman or girl where they believe she is unlawfully being held for immoral purposes. If the woman or girl is found she will be delivered to her parents or guardians.

623. There is also a right afforded to the person requesting the warrant to accompany the constable when the warrant is executed. This is an outmoded provision and in practical terms the police already have the common law power to request warrants for circumstances such as this. This section repeals section 16. The power has not been used for many years, and is repealed as it is considered to be redundant.

624. Part II of the Criminal Law (Consolidation) (Scotland) Act 1995 makes provision for sporting events and specifically makes provision regarding the control of alcohol, fireworks and flares at sporting grounds and sporting events. Paragraph 14 substitutes "it" for "in" section 23 (interpretation of part 2) to correct a typographical error. The relevant provision was originally section 77 of the Criminal Justice (Scotland) Act 1980 where the text was correct. Although we are not aware of any problems arising from the error in the definition we have taken the opportunity offered by this Bill to correct this mistake.

Paragraphs 15-43 – The 1995 Act

625. Paragraph 16 inserts new section 5A into the 1995 Act providing that it is competent for a sheriff to sign certain documents at any place in Scotland. As this is currently provided for under section 9A of the 1995 Act, this amendment has no effect on existing practice. However, new section 5A will become necessary upon the full repeal of section 9A (by paragraph 9(7) of the Schedule to the Criminal Proceedings etc. (Reform) (Scotland) Act 2007). Separate provision as to the signing of documents by justices of the peace and stipendiary magistrates is made in section 62 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007.

626. Paragraph 17 amends section 10A of the 1995 Act and is consequential upon section 46 of the Bill. It confers jurisdiction upon both the JP court and the procurator fiscal of the relevant court where proceedings have been initiated in or transferred to another JP court.

627. Paragraphs 18, 20, 21, 22, 23, 25, 26, 30 and 33-34 all concern the change in references to "insanity" and "insanity as a plea in bar" in the 1995 Act. References in the 1995 Act to "insanity" as a defence are changed to refer to the defence created by the new section 51A of the 1995 Act, as inserted by section 117 of this Bill. References to "insanity as a plea in bar" are changed to refer to unfitness for trial.

628. Paragraph 19 repeals parts of section 22 of the 1995 Act, in consequence of the amendments made by section 41.

629. Paragraph 24 amends section 61 of the 1995 Act. Section 61 of the 1995 Act contains a requirement that various court orders must be based on the evidence of two medical practitioners, one of whom must have been approved as having special expertise in mental health. The effect of these amendments is that this requirement does not apply to a finding by a court that a person is unfit for trial.

630. Paragraph 27 amends section 78(2) of the 1995 Act so as to provide that diminished responsibility is treated as if it were a special defence for the purpose of giving advance notice (see 1995 Act, section 78(1)). The plea is not treated as if it were a special defence for any other purpose (eg disclosure to the jury under section 89(1)).

631. Paragraph 28 removes a superfluous word from section 90D of the 1995 Act.

632. Paragraph 29 substitutes a new subsection (4) into section 102A of the 1995 Act. The effect of this is to remove from that subsection a reference to section 27(1)(a) of the 1995 Act which has no application in the context of the section 102A provision.

633. Paragraph 31 is consequential upon section 45 of the Bill. The effect is to ensure time limits for transferred and related cases apply also to relevant cases in JP courts.

634. Paragraph 32 makes an amendment to section 137B of the 1995 Act. Where a sheriff has made an order allowing the transfer of, or initiation of proceedings in, another sheriff court paragraph 28 provides that any other sheriff of the same sheriffdom may revoke or vary that order.

635. Paragraphs 35 to 37, 39 and 40 are consequential on the creation of community payback orders by section 14 of the Bill. These paragraphs repeal the provisions of the 1995 Act dealing with probation orders, community service orders, supervised attendance orders and community reparation orders, and remove references to probation orders from section 247 (effect of probation and absolute discharge).

636. Paragraph 38 amends section 245D which deals with the combination of restriction of liberty orders with other orders. It substitutes references to probation order with community

payback order. The effect of this section will be to enable a restriction of liberty order to be imposed concurrently with a community payback order (as is currently possible with restriction of liberty orders and probation orders). The amendments also remove the current option to impose a drug treatment and testing order, a restriction of liberty order and a probation order concurrently, meaning that the court will only be able to impose a restriction of liberty order concurrently with a community payback order or a drug treatment and testing order but not both.

637. Paragraph 41 amends section 254 to make clear that the term "article" includes animal. A consequential rearrangement of section 254 is made.

638. Paragraph 42 inserts new subsection (4AA) into section 258.. This clarifies that where an objection to a notice of uncontroversial evidence has been lodged in summary proceedings, this may be challenged at any time prior to an intermediate diet.

639. Paragraph 43 amends section 307 of the 1995 Act (which defines certain terms for the purposes of the 1995 Act) so as to provide that the meaning of "unfit for trial" is given in the new section 53F.

Paragraph 44 – The Crime and Punishment (Scotland) Act 1997

640. Paragraph 44 amends section 9 the Crime and Punishment (Scotland) Act 1997. Section 9 of the 1997 Act refers to "section 57(2)(a) of the 1995 Act (disposal where accused insane)." The effect is to substitute references to the new statutory defence and plea in bar of trial, in place of the reference to "insane".

Paragraph 45 – The Terrorism Act 2000

641. This amendment is consequential on the repeal of the False Oaths (Scotland) Act 1933 by paragraph 1.

Paragraph 46 – The Protection of Children (Scotland) Act 2003

642. Paragraph 46 amends section 10 of the Protection of Children (Scotland) Act 2003 so as to substitute reference to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill, in place of the reference to acquittal on the ground of "insanity".

Paragraph 47 – The Criminal Justice (Scotland) Act 2003

643. Paragraph 47 amends the Criminal Justice (Scotland) Act 2003 to adjust a reference in section 3 of that Act to section 57 of the 1995 Act to take account of the change of the title of section 57 by paragraph 21 of this Schedule.

Paragraph 48 – The Sexual Offences Act 2003

644. Paragraph 48 amends section 135 of the Sexual Offences Act 2003 so that references in Part 2 of that Act (notification and orders) to a person being found not guilty of an offence by reason of insanity include reference to a person acquitted by reason of the defence created by the

new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill.

Paragraph 49 – The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005

645. Paragraph 49 amends section 8 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, which deals with persons who breach Risk of Sexual Harm Orders. It adds reference to a person acquitted of an offence of breaching an risk of sexual harm order by reason of the defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill alongside references to a person being found not guilty of such an offence by reason of insanity.

Paragraph 50 – The Management of Offenders etc. (Scotland) Act 2005

646. Paragraph 50 amends section 10 of the Management of Offenders etc. (Scotland) Act 2005 so that references to persons acquitted on the ground of insanity and persons found to be insane in bar of trial are updated to reflect the new equivalents established by this Bill.

Paragraph 51 – Serious Organised Crime and Police Act 2005

647. This amendment is consequential on the repeal of the False Oaths (Scotland) Act 1933 by Paragraph 1.

Paragraphs 52 – 54 - The Criminal Proceedings etc. (Reform) (Scotland) Act 2007

648. Paragraphs 53 and 54 remove unnecessary references from section 7 of, and the Schedule to, the 2007 Act, in consequence of the amendments made by section 41 of this Bill.

Paragraph 55 – The Protection of Vulnerable Groups (Scotland) Act 2007

649. Paragraph 55 amends section 32 of the Protection of Vulnerable Groups (Scotland) Act 2007 so as to substitute reference to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 119 of this Bill, in place of the reference to acquittal on the ground of “insanity”.

Paragraph 56 – The Counter-Terrorism Act 2008

650. Paragraph 56 amends section 45 of the Counter-Terrorism Act 2008 so as to substitute reference to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill, in place of the reference to acquittal on the ground of “insanity” and to update a reference to section 55 of the Criminal Procedure (Scotland) Act 1995.

Paragraph 57 – The Coroners and Justice Act 2009

651. Paragraph 57 amends section 134 of the Coroners and Justice Bill so as to substitute references to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill, in place of the references to acquittal on the ground of “insanity”.

FINANCIAL MEMORANDUM

INTRODUCTION

652. This document relates to the Criminal Justice and Licensing (Scotland) Bill introduced in the Scottish Parliament on 5 March 2009. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament's Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

653. The Criminal Justice and Licensing (Scotland) Bill contains provisions on a range of topics to improve the justice system through changes to sentencing, criminal law, criminal procedure, evidence, criminal justice, licensing under the Civic Government (Scotland) Act 1982 and alcohol licensing. The Bill also contains a number of other miscellaneous justice topics.

Methodology

654. For all the topics contained within the Bill, consideration has been given as to whether a Regulatory Impact Assessment (RIA) was required. We will publish separately a summary of the regulatory impact of the Bill as a whole along with individual RIAs.

655. There are 5 topics within the Bill that carry a *significant* financial impact. For the purposes of this financial memorandum, a *significant* financial impact is defined as a topic having a financial impact of over £0.4m per annum once implemented. These 5 topics are as follows:

- The Scottish Sentencing Council (sections 3-13 of the Bill);
- Community payback orders/presumption against short periods of imprisonment or detention/reports about supervised persons (sections 14, 17 and 20 of the Bill);
- Serious organised crime (sections 25-28 of the Bill);
- Disclosure (sections 85-116 of the Bill); and
- Sale of alcohol to persons under the age of 21 (section 129 of the Bill).

656. Chapter 1 of this Financial Memorandum draws out from the Bill and details the financial impact of the 5 topics with a *significant* financial impact (as listed above).

657. The other chapters of this financial memorandum presents the financial impact of the remaining provisions of the Bill (ie. those that do not have a *significant* financial impact). The memorandum follows the order of the Bill being splits into chapters covering the following parts of the Bill:

- Chapter 2 of the Financial Memorandum covers Part 1 of the Bill – Sentencing;
- Chapter 3 of the Financial Memorandum covers Part 2 of the Bill - Criminal law;
- Chapter 4 of the Financial Memorandum covers Part 3 of the Bill - Criminal procedure;

- Chapter 5 of the Financial Memorandum covers Part 4 of the Bill – Evidence;

- Chapter 6 of the Financial Memorandum covers Part 5 of the Bill - Criminal justice;

- Chapter 7 of the Financial Memorandum covers Part 7 of the Bill – Mental disorder and unfitness for trial (note that Part 6 of the Bill – Disclosure is covered in chapter 1 of this Financial Memorandum);

- Chapter 8 of the Financial Memorandum covers Part 8 of the Bill - Licensing under the Civic Government (Scotland) Act 1982;

- Chapter 9 of the Financial Memorandum covers Part 9 of the Bill - Alcohol licensing; and

- Chapter 10 of the Financial Memorandum covers Part 10 of the Bill - Miscellaneous.

658. For the purposes of this financial memorandum, all figures given assume a commencement of provisions in April 2010. It should be noted this is unlikely to be the case for all provisions within the Bill with decisions as to when to commence provisions made in the future.

659. A number of topics within the Bill carry either no financial impact or a minimal financial impact. Where a section of the Bill is not mentioned within this financial memorandum, the provisions do not have any financial impact as they are merely technical changes to the law eg. a repeal of redundant provisions. There are however some sections (not technical changes to the law) that are mentioned that do not have a financial impact. These sections are included to provide an explanation as to why it is considered the particular section does not have a financial impact.

660. There are some topics which are described as having “minimal” costs/savings attached to them without specific figures being given. It is estimated that the financial impact of any of these topics is less than £3,000 per topic. An explanation is also given as to why we have been unable to provide a specific estimate of the financial impact for such topics.

661. A table providing an overall summary of the financial impact of the Bill is included at paragraph 991 of this financial memorandum.

CHAPTER 1:

PROVISIONS WITH SIGNIFICANT FINANCIAL IMPACT

SECTIONS 3-13 - THE SCOTTISH SENTENCING COUNCIL

662. The Scottish Sentencing Council (SSC) will be made up of 12 members drawn from both judicial and non judicial backgrounds. In order to carry out its functions effectively, the Council will need a dedicated team of professional support staff including lawyers, researchers, analysts and administrators. Our consultation paper on the proposed creation of a Sentencing Council

suggested its administrative support might be provided by the Scottish Court Service (SCS), which could be well placed to provide the body with necessary back office functions such as IT and human resources services. The following estimates are provided on that basis.

663. Based on the running costs incurred by bodies of a likely similar size, and the assumption that administrative functions would be provided by the Scottish Court Service, we anticipate that an annual budget of approximately £1-£1.1m will be required. This would be funded by the Scottish Government as an element of our funding of the Scottish Court Service and there will be no negative impact on the SCS as a result of its new responsibilities.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

664. We would provide funding to the Scottish Court Service in recognition of the support function which would be provided by the SCS to the Sentencing Council. These estimated costs are drawn from those incurred by the Sentencing Guidelines Council and Sentencing Advisory Panel for England and Wales and their shared secretariat and those incurred by the Scottish Criminal Cases Review Commission – similar organisations in terms of size to the Scottish Sentencing Council.

Members' fees and expenses

665. Those members of the Council who are not employed on a full time basis in the criminal justice system will be entitled to claim fees for meetings of the Council. All members will be entitled to claim reimbursement of travel and subsistence expenses actually and necessarily incurred in the course of business. The daily rate of fees payable will be around £230, based on the current rate set by the Sentencing Guidelines Council for England and Wales. On the assumption that the entire SSC would meet for a day once a month, this would amount to £33,120 annually. However, it should be noted the decision on how to manage its business and how often it needs to meet will ultimately sit with the SSC itself.

Cover for Judicial Absence

666. When members of the Judiciary are not available for bench work, because of other commitments, SCS requires to backfill for them. This costs SCS £575 per day plus travel and writing time for a part-time sheriff and £774 per day and writing time for a temporary judge. Again, with the assumption that the SSC will meet once a month, this amounts to an annual cost of £32,376.

Staff salaries

667. The support office to the Sentencing Council will be headed up by a Chief Executive who it is anticipated will be supported by a secretary to the Council, four members of staff dedicated to research, analysis and statistics, two members of staff with legal expertise and an administrative support team of four. Details of costs are as follows:

- Chief Executive (Deputy Director level) – £97,055
- Secretary to the Sentencing Council – (grade B1) £28,474

- Researchers x 4 (2 x grade C1 and 2 x grade B2) - £190,462
- Legal Officers x 2 (2 x C1) - £120,652
- Admin staff x 4 – (1 x grade A4, 3 x grade A3) £82,208
- Estimated annual staff salary expenditure – £518,851

Office expenditure, training and meetings

668. The estimated annual costs are £81,000 based on those incurred by the Sentencing Guidelines Council. We estimate that an initial set up cost of £450,000 will be needed to cover the provision of office furniture, equipment and computers and library shelving.

Accommodation

669. SCS has advised that its current estate has extensive demands on it. Accommodation for the SSC in the centre of Edinburgh for 12 people, a library and boardroom would cost in the region of £165,000 annually.

Research, publications and website

670. The estimated costs for this are £270,000, based on those incurred by the Sentencing Guidelines Council.

Members' fees and expenses	£33,120
Staff salaries	£518,851
Office expenditure, training and meetings	£81,000 (initial £450,000)
Accommodation	£165,000
Research, publications and website	£270,000
Judicial cover for absence	£32,376
Total	£1,100,347

COSTS ON LOCAL AUTHORITIES

671. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

672. None

Summary

Sections 3-13 - The Scottish Sentencing Council (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
1.100	0.450	1.100	0.000	1.100	0.450	0.000

SECTION 14 - COMMUNITY PAYBACK ORDERS

SECTION 17 - PRESUMPTION AGAINST SHORT PERIODS OF IMPRISONMENT OR DETENTION

SECTION 20 – REPORTS ABOUT SUPERVISED PERSONS

673. There are currently a number of community sentences that a court can impose. The policy intention is to replace the existing probation orders, community service orders, supervised attendance orders and community reparation orders with the new style Community Payback Order. The new Order will provide courts with a range of requirements from which those most appropriate to the individual offender will be selected.

674. Section 17 of the Bill provides for a presumption against custodial sentences of 6 months or less unless the particular circumstances of the case lead the court to believe that no other option would be appropriate. These provisions will not necessarily lead to the imposition of Community Payback Order. Courts in disposing of a case will continue to have access to certain other community penalties including Drug Treatment and Testing Orders and Restriction of Liberty Orders in addition to fines, etc.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

675. The majority of the additional costs, which will be incurred as a result of these provisions, will fall to be dealt with under the existing funding arrangements for section 27A of the Social Work (Scotland) Act 1968, which provides funding to the local authorities for delivery of criminal justice social work services. This ringfenced funding is routed in the first instance through the eight Community Justice Authorities, which have responsibility for distributing available funds to the constituent local authorities within their areas. Expenditure in relation to delivery of electronic monitoring requirements is the subject of a commercial contract between the Scottish Government and its electronic monitoring contractor.

Methodology

Financial Allocations

676. In the 2007-08 financial year, funding was allocated to the Community Justice Authorities for the following purposes as part of the overall grant made available:

Community Service Orders	£13,543,144
Probation Orders	£10,754,169
Supervised Attendance Orders	£3,374,589

677. The figure for probation orders is based on the cost of delivering a standard probation order. It equates in broad terms to a Community Payback Order with merely a supervision requirement.

678. Community Reparation Orders were the subject of a restricted 2 year pilot exercise. A sum of £354,772 was allocated for part year of 2007-08 for the pilot.

Number of Orders

679. In 2007-08, courts imposed the following number of orders:

• Community Service Orders	6,202
• Probation Orders	8,751
• Supervised Attendance Orders	4,438

680. The number of Community Reparation Orders during the part year operation of the pilots was minimal.

681. In broad terms this suggests that the unit costs for the individual sentences which will be replaced by the new Community Payback Order amount to:

• Community Service Orders	£2,184
• Probation Orders	£1,229
• Supervised Attendance Orders	£760

682. The unit cost figure for Community Service Orders does not take account of those instances of where unpaid work is undertaken as a condition of a probation order. 3,053 such requirements were imposed in 2007-08. If account is taken of the latter the unit cost of delivering community service/unpaid work decreases to £1,463. It is not possible to produce a meaningful unit cost figure for Community Reparation Orders.

Requirements

683. The new Community Payback Orders will provide courts with a menu of seven requirements. In broad terms these equate to the additional conditions that are currently available to courts when imposing a probation order. 5,692 such additional conditions were made by courts in 2007-08, funding for which is provided through the ringfenced funding arrangements for criminal justice social work. In broad terms funding provided in 2007-08 for this purpose, which includes the cost of supported accommodation for offenders, amounted to £13.7m, although services/projects covered by this funding are not restricted to those on community sentences i.e. they are also used by ex-prisoners following release from custody, this figure should be taken as indicative only.

Electronic Monitoring

684. Courts can currently add an electronic monitoring condition to a probation order. In 2007-08, 113 such conditions were made. Courts will be unable to impose a condition of electronic monitoring when a person is first sentenced to a Community Payback Order, but this will be an option available to the court should the individual subsequently breach the order. The average unit costs for a 6 months period for electronic monitoring amount to approximately £3,500.

Review Hearings

685. The new Community Payback Order contains provisions for courts to periodically review the progress of an offender during the course of the order. Existing legislation in relation to

probation orders allow for review hearings to be undertaken as part of that order. No data is available on the number of such review hearings carried out each year but the estimated unit cost of a hearing covering judicial salaries and Scottish Court Service running costs amounts to £23.

Additional Costs associated with introduction of Community Payback Order

686. Responsibility for sentencing decisions in individual cases rests with courts. It is difficult to predict what impact the introduction of the Community Payback Order will have on current sentencing patterns. However, there are two key aspects, which require to be addressed. First, assuming no overall increase by courts in use of Community Payback Orders compared with the existing sentences, the extent to which additional costs will be incurred as a result of the introduction of the new Order. Second, the extent to which the new order will be viewed by courts as a more attractive sentencing option leading to increased numbers of orders and associated increased costs.

Review Hearings

687. On the basis of one review hearing per order it is estimated that the Community Payback Order might generate an additional 9,000 review hearings per year. Each review hearing will require the local authority supervising officer to submit a report to assist the court in carrying out the review. On the basis of a unit cost of £100 per report, an additional £900,000 will be needed for this purpose.

688. In addition, additional annual revenue funding of £162,000 will be needed for judicial salaries and £45,000 for Scottish Court Service running costs. One-off set up costs estimated at £50,000 for IT development will also be required.

Requirements

689. There are similarities between the Community Payback Order and the single Community Order, introduced in England and Wales following commencement of the Criminal Justice Act 2003. Experience since introduction of the Community Order, which offers a menu of 12 requirements (compared with the seven with the Community Payback Order) suggests that there has been little change in the number and types of requirements being imposed. The average number of requirements per order has remained broadly constant at 1.7 per order. In Scotland, historically the average number of additional conditions per probation order is estimated at 1.2 per order. In anticipation that there will be no significant increase by courts in the use of the available requirements we are proposing no increase in the £13,700,000 currently being provided for this purpose.

690. The one area, where we have identified a need for additional funding in respect of the menu of options is in respect of the provision whereby a supervision requirement will be mandatory when a Community Payback Order is imposed on a 16-17 year old offender. In 2007-08, 387 Community Service Orders, which are restricted to the carrying out of unpaid work, were imposed on offenders of this age group. On the basis of a unit cost of £1,229 per supervision requirement an additional £475,623 will be needed for this purpose.

Electronic Monitoring for breach

691. In dealing with breach of a Community Payback Order courts will have the option of imposing an electronic monitoring requirement. This will result in additional costs beyond those currently being incurred.

692. The average length of an electronic monitoring condition when applied to a probation order amounts to 5.3 months. Approximately 13% of community penalties, where a breach application is made, are dealt with by revocation of the order and imposition of a custodial sentence. This equates to 870 offenders per year. The intention is for an electronic monitoring requirement to be added to an order in appropriate cases, where a custodial term might otherwise have been imposed, although there is a possibility of electronic monitoring also being applied in other cases. There is no available data on the extent to which courts might use the electronic monitoring option in dealing with breach and we are therefore providing figures based on assumptions of a 25% or 50% usage (as compared with custody) plus a 10% displacement in respect of other cases. This would result in additional costs for the electronic monitoring contract of £728,488 and £1,725,633 respectively. For local authorities there would be additional costs in preparing reports of £21,800 and £43,500 and because a supervision requirement is mandatory where an electronic monitoring condition has been applied further costs of £41,610 and £82,650 respectively. For the Scottish Court Service we estimate additional costs of £80,510 and £116,532 for additional diets to consider electronic monitoring reports.

693. The additional costs which will be incurred in delivering Community Payback Orders assuming no volume increases is summarised below:

Cost of introduction of Community Payback Orders assuming no change in use (all figures in £m)		
	Recurring costs	**Non-recurring costs**
Review hearing reports	0.900	0.000
16-17 year olds	0.476	0.000
Other costs	0.095	0.000
Criminal Justice Social Work Costs	**1.471**	0.000
Judicial salaries	0.162	0.000
SCS running costs	0.045	0.000

Additional diets	0.098	0.000
IT development	0.000	0.050
Scottish Court Services Costs	**0.305**	**0.050**
Electronic Monitoring Costs	**1.227**	0.000
Total Costs	**3.430**	**0.050**

Volume Increases

694. It is difficult to forecast the extent to which courts might make increased use of the new order compared with existing sentences and against the backdrop of the presumption against the use of short term custodial sentences of six months or less. Over the past 5 years the annual rate of increase of numbers of probation orders, for example, has been 2.6%. We are adopting assumptions of a 10% and 20% increase in overall volumes.

10% assumption

695. Before a Community Payback Order can be imposed a court requires to have access to a report on the offender prepared by the local authority. The unit cost of these reports, known as Social Enquiry Reports, is estimated at £250. A 10% increase in orders would therefore require an additional 1,939 reports to be prepared at a cost of £484,750.

696. We estimate the additional costs, including those of the additional Social Enquiry Reports, which will be incurred by local authorities if a 10% increase were to occur, at £4,778,000. This sum reflects the impact of a 10% increase on current expenditure on the existing community penalties and requirements, which will be replaced by the new order. For the electronic monitoring contractor there would be additional costs of £122,761 and Scottish Courts Service £30,552. In all instances these would be additional to the additional costs identified in the table at paragraph 694.

20% assumption

697. A 20% increase would lead to increased costs for local authorities of £9,538,000, £245,522 for the electronic monitoring contractor and £55,000 for the Scottish Courts Service. These would be further to the additional costs set out in paragraph 693.

COSTS ON LOCAL AUTHORITIES

698. The additional costs, which will be incurred by local authorities, will be reimbursed by the Scottish Administration through the ringfenced funding arrangements for criminal justice social work.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

699. The costs of delivering the electronic monitoring requirements will be covered by a revised commercial contract between the Scottish Government and the electronic monitoring contractor.

Summary

Sections 14, 17 and 20 - Community sentence orders/Presumption against short periods of imprisonment or detention/Reports about supervised persons (all figures in £m)						
	2010/11 - Recurring costs assuming **10%** workload increase	2010/11 - Recurring costs assuming **20%** workload increase	2010/11 - Non-recurring costs	2011/12 - Recurring costs assuming **10%** workload increase	2011/12 - Recurring costs assuming **20%** workload increase	2011/12 – Non-recurring costs
Additional orders	2.767	5.534	0.000	2.767	5.534	0.000
Social enquiry reports	0.485	0.970	0.000	0.485	0.970	0.000
Review hearing reports	0.990	1.080	0.000	0.990	1.080	0.000
Requirements	1.380	2.740	0.000	1.380	2.740	0.000
16-17 year olds	0.523	0.571	0.000	0.523	0.571	0.000
Other costs	0.104	0.114	0.000	0.104	0.114	0.000
Criminal Justice Social Work costs	**6.249**	**11.009**	**0.000**	**6.249**	**11.009**	**0.000**
Judicial salaries	0.180	0.190	0.000	0.180	0.190	0.000
SCS running costs	0.050	0.050	0.000	0.050	0.050	0.000
Additional diets	0.110	0.120	0.000	0.110	0.120	0.000
IT development	0.000	0.000	0.050	0.000	0.000	0.000
Reasons to be recorded where custodial sentence of 6 months or less	0.298	0.264	0.000	0.298	0.264	0.000
Scottish Court Service costs	**0.638**	**0.624**	**0.050**	**0.638**	**0.624**	**0.000**

Electronic Monitoring costs	**1.350**	**1.470**	**0.000**	**1.350**	**1.470**	**0.000**
Total costs	**8.237**	**13.103**	**0.050**	**8.237**	**13.103**	**0.000**

SECTIONS 25-28 – SERIOUS ORGANISED CRIME

SECTION 25 – INVOLVEMENT IN SERIOUS ORGANISED CRIME

700. This should not involve many cases which would not currently be prosecuted under an existing offence. We anticipate around 2 new cases per year. Our figures are based on 2 cases per year in High Court proceedings, prosecution and prison costs. The average High Court costs are around £6,000 and the prosecution costs are £19,000. The average cost of imprisonment for one offender is £25,000 per year.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

701. The anticipated additional costs for the Scottish Court Service is £12,000 and for the Crown Office is £38,000 which is based on 2 cases at the High Court per year. The anticipated additional cost for the Scottish Prison Service is £80,000 in a year which is based on 2 persons imprisoned for an average of 4 years (where the individual is released at the half way point of sentence).

COSTS ON LOCAL AUTHORITIES

702. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

703. We do not anticipate any additional costs on other bodies, individuals or businesses.

Summary

Section 25 - Involvement in serious organised crime (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
0.130	0.000	0.210	0.000	0.210	0.000	0.000

SECTION 26 - OFFENCES AGGRAVATED BY CONNECTION WITH SERIOUS ORGANISED CRIME

704. Schedule 4 to the Proceeds of Crime Act 2002 sets out the range of offences that are likely to attract the statutory aggravation. The bulk of convictions (around 800 a year) are under sections 4(3)(b) and 5(3) of the Misuse of Drugs Act 1971 and we expect these would be the offences the aggravation would be linked to. This will not involve any cases which would not

currently be prosecuted under an existing offence. There will, therefore, be no extra court or prosecution costs.

705. In 2006-2007 there were 663 people convicted under section 4(3)(b) of the Misuse of Drugs Act 1971 (to be concerned in the supply of a controlled drug) who received an average sentence of 704 days. If 50% of this number receive an additional 20% added to their sentence for aggravation 330 individuals would receive an average sentence of 844 days with an additional 140 days, of which 70 will be served in custody. The average daily cost of imprisonment is £109 which gives a total of £2.5m.

706. In 2006-2007 144 people were convicted under section 5(3) of the Misuse of Drugs Act 1971 (an offence for a person to have a controlled drug in his possession with intent to supply) who received an average sentence of 292 days. If 50% of this number receive an additional 20% added to their sentence for aggravation. 72 individuals would receive an average sentence of 350 days with an additional 58 days, of which 29 are served in custody. The average daily cost of imprisonment is £109 which gives a total of £227,000.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

707. The estimated additional costs for the Scottish Prison Service is around £2.7m per year which is based on 330 individuals receiving an additional 70 days imprisonment for offences under section 4(3)(b) and 72 individuals receiving an additional 29 days in custody for section 5(3). There will be non-recurring costs of £5,000 in amending Scottish Court Service (SCS) IT systems to record the new aggravation. There will also be running costs of £18,000 in recording the aggravations.

COSTS ON LOCAL AUTHORITIES

708. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

709. We do not anticipate any additional costs on other bodies, individuals or businesses.

Summary

Section 26 – Offences aggravated by connection with serious organised crime (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
2.748	0.005	2.748	0.000	2.748	0.000	0.000

SECTION 27 - DIRECTING SERIOUS ORGANISED CRIME

710. The number of cases expected is low and we anticipate an average of 2 cases per year. These cases are likely to be at High Court level and the average cost of the court procedure is £25,000 per case: the average court costs being £6,000 and the average prosecution costs being £19,000.

711. The average cost of imprisonment is £40,000 per year. This figure is used for illustrative purposes only as it is not the marginal cost of imprisoning an offender for one year (which is substantially lower).

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

712. On the basis of 2 cases in the High Court each year the anticipated additional costs for the Scottish Court Service is £12,000 and the Crown Office is £38,000. The anticipated additional cost for the Scottish Prison Service is around £80,000 in a year, rising to £440,000 in year 5 (assuming individuals are sentenced to 7 years and are released at the 2/3 point of their sentence).

COSTS ON LOCAL AUTHORITIES

713. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

714. We do not anticipate any additional costs on other bodies, individuals or businesses.

Summary

Section 27 – Directing serious organised crime (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
0.130	0.000	0.210	0.000	0.566	0.000	0.000

SECTION 28 - FAILURE TO REPORT SERIOUS ORGANISED CRIME

715. The number of cases expected is low and we anticipate an average of 2 cases per year. These cases are likely to be at High Court level and the average cost of the court procedure is £25,000 per case: the average court costs being £6,000 and the average prosecution costs being £19,000. The average cost of imprisonment is £40,000 per year.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

716. The anticipated additional costs for the Scottish Court Service is £12,000 and for the Crown Office is £38,000 which is based on 2 cases at the High Court per year. The anticipated additional cost for the Scottish Prison Service is £80,000 which is based on 2 persons imprisoned for an average of 2 years (and where the individuals are released at the half way point of sentence).

COSTS ON LOCAL AUTHORITIES

717. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

718. We do not anticipate any additional costs on other bodies, individuals or businesses.

Summary

Section 28 - Failure to report serious organised crime (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
0.130	0.000	0.130	0.000	0.130	0.000	0.000

Overall summary (Serious organised crime)

Sections 25 to 28 – serious organised crime offences (all figures in £m)							
	2010/11	2010/11	2011/12	2011/12			
	Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
Section 25	0.130	0.000	0.210	0.000	0.210	0.000	0.000
Section 26	2.748	0.005	2.748	0.000	2.748	0.005	0.000
Section 27	0.130	0.000	0.210	0.000	0.566	0.000	0.000
Section 28	0.130	0.000	0.130	0.000	0.130	0.000	0.000
Total costs	**3.138**	**0.005**	**3.298**	**0.000**	**3.654**	**0.005**	**0.000**

SECTIONS 85-116 - DISCLOSURE

COSTS ON THE SCOTTISH ADMINISTRATION - OVERVIEW

Police Service

719. As a result of Lord Coulsfield's review, his recommendations, and in anticipation of the legislation, ACPOS established a steering group, implementation team and a number of working groups who examined practices and procedures within all the affected policing business areas; Criminal Justice, Crime Investigation, Sensitive and Intelligence material, Professional Standards, Forensics, Records Management, and Training. Additional costs to take this forward have already been spent and it is anticipated, will continue to accrue until at least the legislation comes into force.

720. In addition, to ensure that the Scottish Police Service is in a position to be compliant with their revelation and disclosure obligations prior to and after legislation is introduced a training strategy is being developed (Lord Coulsfield recommendation) to train staff on the principles and changes to practices and procedures that will require to be adopted as a result of the forthcoming legislation. It is estimated that approx 21,000 police officers and staff will require differing levels of training, dependant on their role (with additional costs for training materials).

721. In order to estimate the future expenditure likely to be incurred by the Scottish Police Service after the implementation of legislation covering Criminal Disclosure the following methodology was used.

Operational Policing after Legislation Implementation

722. When investigating a crime or offence and to subsequently report the circumstances to COPFS, police officers will as a result of new practices and procedures to be adopted spend additional time recording, reviewing, assessing and revealing all relevant material to COPFS to comply with their legislative requirements.

723. Dependant on the complexity, length of time, volume of material generated during an investigation, each enquiry and subsequent case reported to COPFS will determine the varying degrees of additional time spent recording, reviewing, assessing and revealing relevant material. Another contributing factor is whether the prosecution is dealt with in the summary or solemn courts, as the proposed procedures to be adopted for solemn cases are far more time consuming. It was therefore felt necessary to look at, and differentiate between investigations and prosecutions in both these areas.

724. In addition, it was felt necessary to break down the length of additional time spent conducting these processes within the solemn arena. This has been split into 2 distinct areas; Investigations which are conducted using HOLMES2/MIRSAP (manual incident rooms), usually only used in only the most serious of investigations such as murders or organised crime, and non HOLMES2/MIRSAP investigations.

725. These issues, whilst extremely difficult to quantify, have been explored using statistical information from the Scottish Government and COPFS along with operational policing data on

the deployment of HOLMES 2 incident rooms across the 8 Scottish Police forces. Research was also undertaken in England on the deployment of Disclosure officers and time spent by officers on disclosure duties.

726. Excluded in the considerations are investigations where a report has been submitted to COPFS and which has resulted in either COPFS applying a direct measure or taking no proceedings. The police will have still undertaken their responsibilities in these instances. Similarly, in major crime investigations or large scale intelligence led operations, which do not come to a successful conclusion, a considerable amount of resource and time may have been spent on recording, reviewing and assessment of material for revelation purposes. Also, for HOLMES 2 major crime investigations it is relatively common (identified through research in England and Wales) for multiple officers and intelligence officers to be deployed in the disclosure process.

Crown Office and Procurator Fiscal Service

727. Since the Privy Council decisions in *Holland* and *Sinclair* in 2005 the COPFS has had to develop much more detailed procedures in relation to disclosure, all of which has placed a substantial additional financial burden on the Crown Office and Procurator Fiscal Service (COPFS).

728. These detailed procedures have required staff to carry out a great deal of additional work that it did previously require to do, e.g. reconciliation in all High Court cases (checking that the Crown has received all statements submitted by the police and then ensuring that they have all been disclosed); sending out statements for all witnesses in all cases placed on petition or where the accused has pled not guilty (staffing costs to process and postage costs of sending these out); obtaining criminal history records for all witnesses (something that pre- *Holland* the COPFS did not obtain); considering statements and other materials to ensure that no sensitive irrelevant material about witnesses was disclosed in contravention of articles 2 & 8 of the ECHR; providing all of this new information to the defence; providing summaries of evidence in all summary prosecutions.

729. Many of the provisions to be contained in the Bill and in the associated Statutory Code of Practice, while not necessarily imposing additional work on COPFS, give these new procedures that were developed by the Crown a statutory basis.

730. In order to assess the additional costs over and above the substantial additional financial burden imposed by *Holland* and *Sinclair*, it is necessary to first consider where additional costs to COPFS might arise. In order to do this, the following questions were addressed:

- What, if any, IT changes are required as a result of the new provisions;
- What training requirements are necessary for staff that would be additional to current training provided?
- What will the Bill introduce which is new to the COPFS?

IT changes

731. On considering the proposed statutory disclosure regime, the principle IT changes will be required in relation to the transmission and completion of disclosure schedules in solemn cases.

Training

732. As a result of the changes to the disclosure regime the following one-off training will require to be given to staff:

- All staff (legal, administrative and precognition) will require to receive training on the basis changes to the system brought about by the legislation;
- All staff involved in solemn work (legal and precognition) will need to attend training on how to use and complete schedules.

733. As a result of the legislation, existing mandatory rolling-training courses will need to be updated. As such courses are always under review, it is anticipated that the additional costs of updating the mandatory courses will be negligible.

What's new in the legislation that might incur additional costs?

734. COPFS has estimated that the principal additional costs will be in using a system of schedules in all solemn cases.

735. It is anticipated that the creation of a new offence of misuse of disclosure material would not incur any additional costs as the number of such offences is likely to be minimal and would be offset against the savings made to the COPFS by no longer requiring to prepare protective orders prior to disclosure of certain evidence to the unrepresented accused (it should also be noted that such orders have been rare to date).

736. It is anticipated that the creation of the PII system will have minimal additional costs for the COPFS. This is based on the fact that, although there is currently no statutory scheme of public interest immunity, the Crown does still, at present, have to consider public interest immunity issues of which there have been few to date.

737. Although it is possible that the system of schedules will result in an increased number of defence applications to the court for additional disclosure, it is not possible at this stage to estimate the number of these. Accordingly, it is not possible to estimate the additional costs to the COPFS of this part of the new regime.

Scottish Court Service

738. It will only be with the detail of both primary and secondary legislation of court hearings and proceedings that an exact estimation of costs for the Disclosure provisions can be made. There is no indication of the numbers of cases likely to occur at each stage of the proceedings so only a general estimation of costs per hearing can be made.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION – DETAILS

Scottish Police Service - Operational Policing

739. The period of comparison for this estimate is the fiscal year 2007/08 and is subdivided into **Summary** and **Solemn** procedure via the reporting of cases to COPFS. The Scottish Police service recorded 385,509 Crimes and 571,881 Offences during the fiscal year 2007/08 with a total of 306,770 crimes being reported to COPFS.

Fiscal Year 2007/08	
District Court	39,733
Sheriff Court	80,283
Total Court Disposals	120,016

740. Behind every Standard Prosecution Report (SPR) submitted to COPFS, during the investigation and case preparation phase an officer will be required to spend additional time on recording, reviewing and assessing all material that has been obtained or generated by the investigation to ensure that all relevant material is identified and revealed to COPFS.

741. There is a potential that through the summary justice reform program that there will be a reduction in the number of cases submitted to COPFS and that more fixed penalties will be issued. This may reduce some of the additional time spent on revelation and disclosure however as there is currently no data available it is not viable to estimate any savings at this time.

742. In Solemn cases the level of recording, reviewing, assessing and revelation will significantly increase as a result of new practices and procedures to be adopted also the volume of material generated is significantly greater than in summary cases. Dedicated officer/s will be deployed in major crime investigation to deal solely with the new legal responsibilities and during an average year approximately 400 investigations are conducted throughout Scotland using HOLMES 2 and MIRSAP administration systems.

Fiscal Year 2007/08	
Sheriff & Jury	4,700
High Court	764
Total Court Disposals	5,464

HOLMES 2 and MIRSAP Investigations

743. Police forces anticipate having to dedicate a total of 50 officers to disclosure duties. Chief Constables will wish to maintain capacity to investigate Serious and Organised Crime and will need to consider how this could best be achieved. This could be through recruitment of suitable police support staff to act as Disclosure Reviewing Officers which would reduce the additional costs involved:

50 officers @ £44,000 per annum = £2,200,000

Non Holmes2/MISRAP Investigations

744. Detective officers will routinely be required to dedicate significant time to meeting disclosure requirements for serious crimes and offences.

Training

745. At the present time all Scottish forces are undertaking an increased period of recruitment and therefore the initial training courses delivered at the Scottish Police College, Junior Division have been amended to provide an awareness of Criminal Disclosure prior to the implementation of the full Criminal disclosure process. All training packages delivered within the Junior Division have been reviewed and "disclosure proofed" as part of the normal ongoing review processes employed by the Scottish Police College. Any future training packages, although likely to incur initial development costs will ultimately form part of the normal training curriculum with the cost implications being absorbed.

746. The police figures total £5.3m for set up and training. However the majority of costs (£4m for training of police officers) will be incurred in 2009-2010 in preparation for the implementation of disclosure, so only £1.3m has been included as a non-recurring cost for training, with the possibility of a small element of recurring cost.

Disclosure - Police (all figures in £m)	
Police officer time on disclosure duties	2.2
Training	1.3
Total costs	**3.5**

Scottish Police Services Authority

Forensic Services

747. SPSA Forensic Services estimate that all staff will require some form of training to ensure disclosure protocols are properly understood and adhered to.

Disclosure – SPSA training costs (all figures in £m)	
Training Staff Costs	**Estimated cost**
Total frontline staff affected = 427. This excludes managers and admin staff. Estimated no of days training required = 2 Total Cost (based on average rates)	0.110

Training Non Staff Costs	
Assumption is people would be trained on site or at the Scottish Police College to minimise non staff costs. As a contingency though it would be prudent to assume some sessions will need to be arranged off-site and some level of cost associated with travel and overnight stays. This is assumed to be 10% of staff costs.	0.011
Training Development Costs	
Development of training package and materials over a period of 6 weeks for 1 trainer	0.005
Production of training materials (printing etc.)	0.005
Delivery of training by 1 trainer, estimated to take 3 months full time	0.010
Non Staff – travel & subsistence for trainer	0.002
Total costs	**0.143**

Administration

748. There will be an impact on admin and potentially scientific resources at each of the SPSA service centres. The SPSA estimate is that this will amount to around 1 person at each centre and a central co-ordinator.

749. This would cost in the region of £150,000 assuming 4 Assistant Scientist posts, 1 based in each laboratory (£110,000), and the co-ordinator post pitched around scientist grade, who would be used to ensure compliance with disclosure protocols and to manage cases across service areas as a single point of contact for Police and COPFS (£40,000).

Defence Access

750. Where this occurs SPSA would look to minimise the cost impact but would have to accept that, where access is necessary there will need to be some level of cost incurred, for example it would be necessary for those seeking access to be accompanied throughout the period of their visits. This is an unknown and would vary according to the cases being reviewed. Current experience suggests we would require an additional two people to supplement the main disclosure posts and provide resilience in periods of absence or during major inquiries. This would cost around £55,000 for two assistant posts. Some of the cost of this could be recovered by charging defence teams for access at an hourly rate if this was seen as acceptable. This would need to be explored further though.

751. All SPSA estimates are based on rates of pay this year (2008-09) and will likely increase marginally over time.

Summary

Disclosure - SPSA costs (all figures in £m)	
Training	0.143
Administration	0.150
Access	0.055
Total costs	**0.398**

Scottish Crime Drug Enforcement Agency (SCDEA)

752. In relation to costs for training, this is incorporated in the police costings. The SCDEA is charged with progressing the investigation of serious and organised crime on behalf of the communities of Scotland and the Scottish Police service and as such all enquiries are deemed to have the potential to be prosecuted in either the High Court or Sheriff and Jury. As such it has been estimated that with the advent of disclosure there will be an impact on already stretched resources which it is assessed will equate to 10 persons being actively engaged with the management of Criminal Disclosure throughout the Agency. This will cover all areas of areas of Agency activity including Operations, Intelligence, eCrime, Scottish Money Laundering Unit and the Technical Support Unit and others at the 4 sites.

753. A decision as to whether the role of Criminal Disclosure Officer is performed by a Police Officer or a member of Police Staff has yet to be clarified and as such at this time associated staffing costs have yet to be determined.

Summary

Disclosure - SCDEA costs (all figures in £m)	
Police Officers undertake role of Criminal Disclosure Officer	0.065 x 10 = 0.650
Field Support Officer undertake role of Criminal Disclosure Officer	0.034 x10 = 0.340
Expected total costs (average of two possible figures)	**0.495**

Crown Office and Procurator Fiscal Service

IT Costs

754. Although discussions are still at a very preliminary stage on how and the format in which schedules will be transmitted between the police and COPFS, it is estimated that the development costs for making the necessary IT changes could be £200,000.

Training

755. All staff (legal, administrative and precognition) will require to receive training on the basis changes to the system brought about by the legislation. It is anticipated that this could be done through a basic training session delivered by District Fiscals which is a relatively straightforward process. It may, however, be necessary to also conduct a ½ day training event for all legal staff at the Scottish Prosecution College to ensure that the implications of the Act for COPFS are fully understood particularly in relation to public interest immunity, misuse of disclosure material, access to witness statements etc. If so, it is anticipated that the cost to COPFS for such a course could be £15-20,000 taking into account Prosecution College costs, travel and subsistence and any essential backfill.

756. All staff involved in solemn work (legal and precognition) will need to attend training on how to use and complete schedules. Based on the training required on this in England and Wales, it is likely that a one day course at the Scottish Prosecution College for all legal and precognition staff will be required and the cost to COPFS for such a course could be about £50-£60,000 taking into account Prosecution College costs, travel and subsistence and any essential backfill.

757. Accordingly, the costs for training are estimated as follows:

Disclosure – COPFS training costs (all figures in £m)	
½ day training session for all legal members of staff (average expected costs)	0.018
Full day training session of all legal and precognition staff (average expected costs)	0.055
Total costs (average expected costs)	**0.073**

Completion of schedules in solemn cases

758. The following assumptions are being made:

- At present the average time spent on reconciliation per High Court case is 3 hours;
- The time required to consider and complete a schedule will be approx double the length of time required to complete the current reconciliation process adopted in High Court cases (based on the fact that the schedules will list all relevant information not just statements and productions and the process will include

considering material that has not actually been submitted). Accordingly it is assumed that 6 hours will be spent on the scheduling process per case;

- There will be an estimated 4700 Sheriff and Jury cases and 764 High Court cases per year based on 2007/2008 statistics;
- In High Court cases, therefore, 4,584 hours per year will be spent on the scheduling process. However, 2,292 hours of that would have been spent on the old reconciliation process which will be replaced by schedules. Accordingly, for High Court cases, the additional time spent on schedules will be 2,292 hours;
- For Sheriff and Jury cases the average time spent on scheduling will be 28,200 hours;
- Accordingly, it is assumed that completion of schedules will take an average of 30,492 additional hours work for COPFS staff;
- Consideration of schedules will be undertaken by the precognoscer;
- In the majority of cases, the precognoscer will be a Band D member of staff;
- The average hourly rate for a Band D member of staff is £11.70.

Disclosure - COPFS costs for completing the schedule (all figures in £m)	
For sheriff and jury cases	0.0000117 x 28200 hours = 0.330
For High Court cases	0.0000117 x 2292 hours = 0.027
Total costs	**0.357**

Review of Disclosure on receipt of mandatory Defence Statements in Solemn Proceedings

759. The following assumptions are being made:

- It is anticipated that the average time taken to review disclosure in High Court cases following receipt of defence statements will be 6 hours.
- The anticipated time taken to review disclosure in Sheriff and Jury cases following receipt of defence statements will be 2 hours.
- There will be an estimated 4700 Sheriff and Jury cases and 764 High Court cases per year based on 2007/2008 statistics.
- In High Court cases, therefore, 4584 hours per year will be spent reviewing disclosure following receipt of defence statements.
- For Sheriff and Jury cases, 9400 hours will be spent on the same reviewing process.
- Accordingly, it is assumed that reviewing disclosure following receipt of mandatory defence statements in solemn proceedings will take an average of 13,984 additional hours work for COPFS staff.

- The reviewing process will be undertaken by the precognoser.
- In the majority of cases, the precognoser will be a Band D member of staff.
- The average hourly rate for a Band D member of staff is £11.70.

Disclosure - mandatory Defence Statements in Solemn proceedings (all figures in £m)	
For sheriff and jury cases	£11.70 x 9400 = 0.110
For High Court cases	£11.70 x 4584 = 0.054
Total costs	**0.164**

760. Total Crown Office costs amount to:

Disclosure – total COPFS costs (all figures in £m)	
Training	0.073
Completing the schedule	0.357
Mandatory Defence Statements	0.164
Total costs	**0.594**

Scottish Court Service

761. There are a number of areas in the provisions which are likely to create additional court hearings which are estimated as follows:-

Disclosure – total Scottish Court Service (all figures in £m)			
	Estimates of numbers	**Per 100 cases**	**Total**
General			
Mandatory Defence Statements	Estimate 4200 cases at preliminary hearing/first diet @£20 per case	0.002	0.084

Adjournment to allow further time to the Crown where a Defence statement is only lodged shortly prior to trial	Hearing on motion for further time possible in High court or sheriff court. Estimate of 10 cases per annum.	0.006	0.001
Application for disclosure of item of material in schedule (Solemn only)	Hearing on application for disclosure per application possible in High court or sheriff court. Estimate of 50 cases per annum.	0.006	0.003
Application to court to pass on disclosed material which would otherwise be an offence – likely to be very rare			
Application to court by Defence for additional disclosure following lodging of defence statement			
Appeals against any decision made in any application as detailed above	Appeals will be very rare (less than 1 a year expected)	0.207	0.001
New offence of misuse of disclosed material (Solemn and summary)	SCS estimate limited number of cases – 10 for purposes of this financial memorandum with 2 in High Court (HC), 4 in Sheriff and Jury (S&J) courts and 4 cases in Justice of Peace (JP) courts.	HC – 0.600 S&J – 0.147 JP – 0.026	HC - 0.001 S&J - 0.006 JP – 0.000
Public Immunity Interest Hearings			
Crown application to court for hearing. Separate application for each item of information. Hearing necessary with a Special Counsel being appointed in some cases.	Hearing on application for non disclosure for PII reasons per application – estimated 10 cases with 5 cases in High Court and 5 cases in Sheriff and Jury Court		
	(High Court)	0.068 (per 50 cases)	0.007
	(Sheriff and Jury Court)	0.052 (per 50 cases)	0.005
Appointment of Special Counsel		(Cost of special counsel not budgeted for by SCS at this stage.)	N/A

Point of review of decision to prohibit disclosure at some stage in proceedings. (May also be set up as special court hearing) Accused/ special counsel may apply for review at any stage prior to conviction/ acquittal or following conviction for the purposes of considering appeal / review by SCCRC or during appeal proceedings. Considered by trial judge at hearing	Hearing on review of non disclosure for PII reasons within existing court proceedings – estimate of 20 cases. (High Court)	0.014	0.003
Appeal against any PII decision (Solemn and summary)	Based on 3 bench appeal hearings with estimated 20 cases.	0.207	0.041
Additional provisions in Rules for court to ensure safe and secure confidential storage of minutes of proceedings etc. and restricted access	‘Developed vetting’ per member of staff. Fitting of combination lock to provide ‘secure storage’ per court plus Securicor costs (11 courts in total)		Estimates based on application of Terrorism Act with 15 people vetted. 0.005 0.003
Requirement for Code of Practice : Following from Crown Disclosure manual			
Additional appeals to High Court against refusal of ‘protective order’ by Crown Bill of Advocation	Estimate of 2 cases.	0.207	0.004
Total costs			**0.164**

762. There may be an additional one-off cost required for IT upgrades to deal with additional hearings and applications, both within and outwith normal criminal case progression. This has an estimated cost of £100,000.

Scottish Legal Aid Board

763. The introduction of Mandatory Defence Statements will impact on the Scottish Legal Aid Board as per the table below.

Scottish Legal Aid Board – Estimated cost of introduction of Mandatory Defence Statements			
Court	**No. of Cases**	**Costs**	**Total (all figures in £m)**
High Court	1,005*	This equates to a fee of £125 plus VAT (£143.75) being payable to counsel for the drafting and lodging of the mandatory defence statement. We would seek to ensure that the fee allowable will also encompass any pre-trial statement which may require to be submitted. The "drafting" fee is similar to sums prescribed within the legal aid tables for written work required as part of the proper conduct of the case. *It is assumed that in the High Court counsel will be expected to complete this form.*	0.145
Sheriff Court	6,530*	This equates to a fee on average of circa £50 plus VAT (£57.50) payable to the solicitor. This is arrived at using the increased legal aid rates which are to be introduced shortly. The fee is arrived at by assuming the average time required of a solicitor to complete the form will be circa 30 minutes plus lodging and intimation dues.	0.375
The number of solemn accused in year to March 2008 was 8,158. The difference between no. of cases and accused is 8,158 - 7,535 = 623 We assume a fee of £57.50 per accused.			0.036
TOTAL			**0.556**

** Based on number of cases in year to March 2008 where indictments have been served in solemn cases. Some cases will have multiple accused.*

764. The following assumptions have been made:

- The solemn figures above represent the number of cases in year to March 2008 where indictments have been served. The number of accused in these cases totalled 8,158.
- Where counsel completes the mandatory defence statement SLAB are of the view that there will be no additional costs payable to the solicitor on the basis that the statutory test of taxation is that you do not make payment for the same work twice. SLAB believe that there is likely to be additional work on the solicitors' part quite separate from the framing of the statement. However, they are of the view these costs will be subsumed within the normal communications which take place between defence agent and counsel.
- Although sanction may be granted for counsel in the sheriff court we are of the view that given the stage at which the mandatory statement must be completed, the defence statement will be the responsibility of the nominated solicitor to complete.

- This costing is based on the 2007-08 current fee structures and general profile of criminal cases. The introduction of the mandatory defence statement assumes that there will be no material changes in solicitors' behaviour in the conduct of cases.

COSTS ON LOCAL AUTHORITIES

765. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

766. We do not anticipate any additional costs on other bodies, individuals and businesses.

Summary

Sections 85-116 - Disclosure (all figures in £m)							
	2010/11		2011/12				
	Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
Police	2.200	1.300 (training)	2.200	0.000	2.200	1.300	0.000
SPSA	0.205	0.143 (training)	0.205	0.000	0.205	0.143	0.000
SCDEA	0.495	0.000	0.495	0.000	0.495	0.000	0.000
SCS	0.164	0.100	0.164	0.000	0.164	0.100	0.000
COPFS	0.485	0.073 (training) 0.200 (IT costs)	0.485	0.000	0.485	0.273	0.000
SLAB	0.556	0.000	0.556	0.000	0.556	0.000	0.000
Total costs	**4.105**	**1.816**	**4.105**	**0.000**	**4.105**	**1.816**	**0.000**

SECTION 129 - SALE OF ALCOHOL TO PERSONS UNDER THE AGE OF 21 ETC.

767. The impact of the provisions on businesses has been assessed by drawing on alcohol sales data, survey data and population figures in order to estimate the effect of raising the minimum age of off-sales alcohol purchases from 18 to 21. It should be noted that the provisions do not require Licensing Boards to raise the age. Rather the provisions place a duty on them to consider the detrimental impact of off-sales to those under 21 years of age, with a view to considering whether a condition should be applied to some or all licences in their Board area requiring those purchasing off-sales alcohol to be 21 or over. The actual impact on business will depend on the extent to which Boards choose to establish such conditions and the extent to which purchasers switch to on-sales.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

768. We do not anticipate any additional costs on the Scottish Administration.

COSTS ON LOCAL AUTHORITIES

769. There is likely to be a marginal additional cost on Licensing Boards in considering the detrimental impact of under 21 off-sales as part of their policy statement. However, this is considered to be a small addition to the overall work of the Board and is unlikely to have any significant resource impact. Licensing Standards Officers (LSOs) would have a role in ensuring compliance with any conditions laid down by Boards in relation to raising the age of off-sales purchases to 21, however, such costs are again likely to be marginal as the condition would be one of many on licensed premises. The cost of running the licensing system, including the costs of LSOs, are generally recovered by Licensing Boards from fee income.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

770. The additional costs on individuals will be limited to those aged 18-20 who may be restricted as to whether, or where they may be able to purchase off-sales alcohol. The cost of a unit of alcohol in on-sales is approximately three times that of off-sales (£1.28 compared with 40p)[3], so it reasonable to assume that those affected may reduce their total intake, or alternatively spend more on alcohol.

771. In terms of the impact on business of raising the age of off-sales purchases to 21, it is difficult to quantify the income that the industry derives from any particular age group. However, using data from the General Register Office for Scotland (GRO)[4], Scottish Health Survey (SHeS)[5] and the Nielsen Company [6], it is possible to generate an estimate. The latest population data from GRO shows that in Scotland, 18–20 year olds make up approximately 5% of those currently legally allowed to buy alcohol. Table 1, from SHeS[7], illustrates the percentage of this age group drinking and the mean number of units of alcohol reported consumed per week.

Table 1: adults (16+) drinking prevalence (per wk)

	Age													
	16-24		25-34		35-44		45-54		55-64		65-74		75+	
Gender	M	F	M	F	M	F	M	F	M	F	M	F	M	F
% drinking any alcohol	90	91	93	92	93	92	95	93	93	85	90	79	80	69
Mean no of units /wk	19.6	12.2	20	11.9	23	10.3	23.1	11.2	21.1	7.9	15.7	5.2	12.5	2.7

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[3] Data supplied to the Scottish Government by The Nielsen Company: http://www.scotland.gov.uk/Topics/Health/health/Alcohol/resources/nielson-data. 40p is the mean price per alcohol unit across all alcoholic drinks in the off trade (2007) quoted in Nielson data: by category of drink mean price per unit varied from 23p to 87p. *[Link no longer operates]*

[4] GRO: Estimated population by age and sex, Scotland: 30 June 2007, available at: http://www.gro-scotland.gov.uk/statistics/publications-and-data/population-estimates/mid-2007-population-estimates-scotland/index.html

[5] Revised Alcohol Consumption Estimates from the 2003 Scottish Health Survey, Scottish Government, May 2008, available at: http://www.scotland.gov.uk/Resource/Doc/229667/0062208.pdf

[6] Op cit, The Nielsen Company.

[7] Op cit, SHeS

772. Analysis of the Nielson Company data suggests that, on average, 63% of alcohol (expressed as units of pure alcohol,) is consumed in the form of off sales purchases. Applying that to the available SHeS data results in a market share of approximately 3% of the off trade for 18–20 year olds. In terms of value, this equates to approximately £38m per annum using 40p/unit as the average cost of a unit of alcohol from off sales[8].

773. Subject to paragraph 775, a ban on off sales would represent around £15m in lost sales revenue to businesses. The UK Government would also lose around £23m in lost VAT and alcohol duty.

774. If 18–20 yr olds were to be banned from purchasing alcohol from off sales, then it is reasonable to assume that there would be an increase in purchases as on sales trade. The average cost of a unit of alcohol in licensed premises is quoted as £1.28 in the Nielsen data set (2007). It is very difficult to estimate how many 18-20 year olds who previously purchased alcohol from off sales will, in future, purchase alcohol from on sales, but businesses and the UK Government are likely to recover a proportion of lost revenue in this way. If 18-20 year olds were to spend some of this £15m on other items subject to VAT, then the UK Government would, in part, still receive the VAT currently paid on off sales.

775. The figures provided represent the maximum estimated effect of the provisions. They assume that every Licensing Board introduces a ban on the off sale of alcohol to 18-20 year olds across their entire Board area. The loss of revenue to the off sales trade is equivalent to the estimate of the value of total purchases currently made by 18-20 yr olds.

Summary

Section 129 - Sale of alcohol to persons under the age of 21 etc. (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
38.000	0.000	38.000	0.000	38.000	0.000	0.000

CHAPTER 2:

PART 1 OF THE BILL - SENTENCING

SECTION 15 – NON-HARASSMENT ORDERS

776. Figures provided by the Scottish Court Service suggest that there is a relatively low number of non-harassment orders granted each year.

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[8] Op cit, The Nielsen Company.

777. Figures for the Sheriff Courts are

- 2006 = 24 case disposals
- 2007 = 23 case disposals
- 2008 = 29 case disposals

778. This data excludes High Court and District/Justice of the Peace courts and the figures may be an undercount due to some court disposals being recorded as "text disposals" for which the SCS cannot identify what the exact disposal was.

779. The Crown Office and Procurator Fiscal Service has indicated that it should not entail more hours of work for COPFS if the decision is made to apply for an NHO.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

780. Given the lack of concrete data on the "cost " of a non-harassment order, it is difficult to provide figures for the impact of the changes in the Bill. As a relatively low number of NHOs are currently granted each year, it is estimated that an increase of even 100% in the number of applications would have a minimal cost impact on the police, COPFS and Scottish Court Service.

SECTION 16 - SHORT PERIODS OF DETENTION

781. The provisions increase the minimum custodial sentence that can be imposed by a court from 5 days to 15 days. In practice, courts very rarely impose such short sentences and therefore there will be no financial impact of these provisions.

SECTION 18 – AMENDMENTS OF CUSTODIAL AND SENTENCES AND WEAPONS ACT (SCOTLAND) 2007

782. The modifications to the Custodial Sentences and Weapons (Scotland) Act 2007 will put in place a more proportionate and effective system for the end to end management of offenders sentenced to imprisonment. These amendments will form part of the plan for delivering a comprehensive offender management structure as set out in the Scottish Government's plan – *"Protecting Scotland's Communities: Fair, Fast and Flexible Justice*[9]*"* published on 17 December 2008.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

783. There are no direct cost implications of the amendments proposed to the Custodial Sentences and Weapons (Scotland) Act 2007. However the costs involved in implementing the Custodial Sentences and Weapons (Scotland) Act 2007 (as amended by the measures proposed in the Bill) and compared with the consequential costs of implementing the 2007 Act as enacted

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[9] http://www.scotland.gov.uk/Publications/2008/12/16132605/0

are given below. These are based on current assumptions and prisoner projections and show the (indicative) impact on applying the modified measures in measureable packages.

COSTS ON LOCAL AUTHORITIES

784. No additional costs will have to be met by local authorities. While Criminal Justice Social Work is delivered by local authorities, they would not require to incur additional costs from within their overall budgets since the Scottish Government will fully reimburse the Community Justice Authorities the cost of the community component of the new arrangements. There are no costs on other bodies, individuals or businesses.

Summary

785. The figures are based on estimated prison population projections for 2015/16, this is indicative at this stage of the full implementation of the Custodial Sentences and Weapons (Scotland) Act 2007 as amended by the Criminal Justice and Licensing (Scotland) Bill provisions. The Scottish Government has made it clear in Protecting Scotland's Communities Fair, Fast and Flexible Justice that subject to certain modifications, the Custodial Sentences and Weapons (Scotland) Act could provide the structure upon which to build a modern offender management regime for offenders who are sentenced to a period of imprisonment. For the purposes of the overall summary table of the financial impact of the Bill at paragraph 991, these indicative costs are excluded.

Implementation of Custodial And Sentences And Weapons Act 2007 as amended by section 18 of the Bill (all figures in £m)

	Estimates for (Year 5 implementation)* Based on 9,600 prisoners		
	Full implementation	**Combined sentence applied at 1 year**	**Combined sentence applied at 2 years**
Scottish Prison Service			
Continued detention	16.000	16.000	13.000
Recall to custody	17.800	14.000	8.600
Risk Assessment	4.600	4.100	2.900
Escorting	3.800	3.400	2.400
Overall Scottish Prison Service costs	**42.200**	**37.500**	**26.900**
Criminal Justice Social Work (funded by Scottish Government)	**6.100**	**5.400**	**3.900**
Scottish Court Service			
Appeals	0.030	0.030	0.020
Reports - Judicial Salaries	1.100	1.000	0.700
Reports - running costs	0.100	0.100	0.100
Overall SCS costs	**1.230**	**1.130**	**0.820**

COPFS	**0.000**	**0.000**	**0.000**
Police	**0.020**	**0.020**	**0.010**
Parole Board			
Detaining in custody	0.400	0.400	0.300
Recalls	0.100	0.100	0.000
Overall Parole Board costs	**0.500**	**0.500**	**0.300**
Scottish Legal Aid Board	**0.500**	**0.400**	**0.300**
Electronic Monitoring	**0.900**	**0.800**	**0.500**
Total costs	**51.450**	**45.750**	**32.730**

SECTION 19 - EARLY REMOVAL OF CERTAIN SHORT-TERM PRISONERS FROM THE UNITED KINGDOM

786. The provisions will provide a discretionary power to Scottish Ministers to authorise the early removal of short term foreign national prisoners held in Scottish prisons, subject to certain conditions (including that the released prisoner leaves the UK).

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

787. There will no additional costs associated with the provisions. There may be some limited savings to the Scottish Prison Service as a result of the early removal of foreign prisoners from the UK before the end of their sentence. These savings will be ad hoc and depend on the number of suitable prisoners who fit the criteria for early removal. It is expected there will be only a very small number of cases each year that will fit the criteria. For the purposes of this financial memorandum, it is estimated that this will be 6 prisoners each year that will be removed from the country an average of 60 days before the end of their prison sentence.

788. This averages out in saving 360 days each year where a prison place will not be used (6 prisoners x 60 days). The average cost of keeping a person in prison is £40,000 per year and this will be the estimated saving to SPS each year.

COSTS ON LOCAL AUTHORITIES

789. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

790. None.

Section 19 - Early removal of certain short-term prisoners from the United Kingdom (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
0.000	0.000	0.000	0.000	0.000	0.000	0.040

SECTION 21 - EXTENDED SENTENCES FOR CERTAIN SEXUAL OFFENCES

791. Extended sentences are imposed by the courts on sex and violent offenders where they consider that additional supervision is necessary to protect the public from serious harm from the offender following release. During 2007/08 there were 73 offenders being supervised in the community on extended sentences.

792. It is difficult to estimate how many more offenders would receive an extended sentence because of the new provision which would allow an extended sentence to be imposed in cases such as a breach of the peace where the offence has a significant sexual element. As the 73 offenders on extended sentences will cover both sex and violent offences we would estimate no more than 5 additional extended sentences being imposed per annum as a result of the new provision in relation to offences with a significant sexual aspect.

793. Current figures suggest that the annual unit cost of delivering statutory supervision is approximately £3,200. The additional cost of supervising 5 extra offenders on extended sentences is therefore estimated at £3,200 x 5 = £16,000.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

794. The additional costs would fall to the Scottish Government who provide direct funding (through section 27A of the Social Work (Scotland) Act 1968) to local authorities for delivery of community-based supervision of offenders by criminal justice social work services. From April 2007, funding has been directed to the Community Justice Authorities (CJAs) which have responsibility for distributing funds to constituent local authorities according to the area partnership plan.

COSTS ON LOCAL AUTHORITIES

795. Local authorities will be funded under the arrangements described in the previous paragraph.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

796. No other bodies will incur costs.

Summary

Section 21 - Extended sentences for certain sexual offences (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
0.016	0.000	0.016	0.000	0.016	0.000	0.000

SECTION 23 - OFFENCES AGGRAVATED BY RACIAL OR RELIGIOUS PREJUDICE

797. Statutory aggravations for offences motivated by prejudice relating to race and religion are already in place. Section 96 of the Crime and Disorder Act 1998 provides that the court shall, when it is libelled in an indictment or specified in a complaint, and, in either case, proved that an offence has been racially aggravated, take the aggravation into account in determining the appropriate sentence. Section 74 of the Criminal Justice (Scotland) Act 2003 provides that when it has been libelled in an indictment or specified in a complaint, and, in either case, proved that an offence has been aggravated by religious prejudice; the court must take the aggravation into account in determining the appropriate sentence.

798. In 2006-07, 1081 persons were proceeded against for offences with a religious and/or racial aggravation. Of those, 870 had a charge proved. However, the information on whether a religious or racial aggravation was included in the final conviction and what if any impact it had on the sentence is less robust and it is sometimes that case that the information as to whether the aggravation has been taken into account in the determination of the sentence is not recorded. The provisions in the Bill require that the court must state on conviction that the offence was racially or religiously aggravated, record the conviction in a way that shows that the offence was so aggravated, take the aggravation into account in determining the appropriate sentence, and state where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or otherwise, the reasons for there being no such difference.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

Police

799. There will be no new costs to the police. The provisions in the Bill do not create any new offences. Aggravations relating to race have been in place since 1998 and aggravations relating to religion have been in place since 2003. The police are already required to record these aggravations as part of a charge when a report is put forward to the Procurator Fiscal.

Crown Office and Procurator Fiscal Service

800. The Crown Office already produces racially or religiously aggravated charges on complaints or indictments so the provisions in the Bill will not place any new burden.

Scottish Court Service

801. The provisions in the Bill will have some cost implications for the Scottish Court Service, with the added administrative arrangements involved in taking account of the recording (and other) requirements. SCS estimates a one-off cost of £5,000 for IT development and modifications. Based on the most up-to-date figures (2006-2007) for the number of individuals in Scotland proceeded against in which a racial or religious aggravation was applied, it is estimated that ongoing annual administrative costs for the SCS will be in the region of £23,800.

Scottish Prison Service

802. The provisions in the Bill will not impact on the number of offenders convicted of an aggravated offence. As a result, there will be no new costs for the Scottish Prison Service.

COSTS ON LOCAL AUTHORITIES

803. No additional costs to local authorities are anticipated.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

804. There are no costs for other bodies or businesses.

Section 23 - Offences aggravated by racial or religious prejudice (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
0.024	0.005	0.024	0.000	0.024	0.005	0.000

SECTION 24 - VOLUNTARY INTOXICATION BY ALCOHOL: EFFECT IN SENTENCING

805. The provisions set out in statute that voluntary intoxication through alcohol is not a mitigating factor in the commission of an offence. This measure codifies in statute an approach that is already generally used. The implications could include some minor savings in court time as the provision will prevent defence agents even considering pleading mitigation of a sentence due to intoxication. Any savings would however be minimal, but are very difficult to estimate.

CHAPTER 3:

PART 2 OF THE BILL - CRIMINAL LAW

SECTION 29 – ARTICLES BANNED IN PRISON

806. Offenders convicted of an offence relating to mobile phones as a prohibited article under the provisions of the Bill could potentially spend longer in custody than they otherwise would, if

they are found guilty of the offence. It is difficult to estimate how many convictions may be imposed for the introduction or use of a personal communication device in prisons. The creation of a specific offence in relation to this matter progressed together with the introduction of signal blocking devices (mobile phone blockers) in prison grounds is intended to provide an effective deterrent to the introduction and use of mobile phones in prisons. We anticipate that only those individuals who are suspected of introducing, or attempting to introduce, a personal communication device and those who are suspected of having used a personal communication device for the purposes of running their criminal activities within the prison or intimidating witnesses or members of the public will be reported to the police for possible prosecution. Prisoners found in possession of a mobile phone would likely be dealt with through the internal disciplinary procedures that apply to prisoners under the Prison Rules, as possession of a prohibited article is a disciplinary offence.

807. There were approximately 800 mobile phones, or component parts of mobile phones, found in SPS prisons over the last 12 months. This figure includes all incidents involving all mobile phones, i.e. those thrown over the perimeter wall, those found in communal areas of the prison, those found in prisoners' property and those found on individual prisoners. Of the 800 mobile phone finds, 68 were found in the possession of a prisoner. Therefore, a total of 68 individuals could have been reported to the Police and considered for possible criminal prosecution had legislation been in place. Given that the Scottish Prison Service envisages most such instances being dealt with by way of a fine or internally under the Prison Rules, and drawing on experience from HM Prison Service for England and Wales, which has had similar legislative provisions in force 1 March 2008, it is estimated that there may be around 10 prosecutions leading to convictions each year for the new offence.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

Scottish Court Service/Crown Office and Procurator Fiscal Service

808. Given that it is expected that the majority of prisoners will continue to be dealt with by internal prison discipline and considering the very low levels of prosecutions in England and Wales, there are likely to be minimal cost implications the Crown. With around 10 prosecutions likely to be taken forward in the sheriff and jury courts, additional costs of £14,800 are likely to fall on the Scottish Court Service.

Scottish Prison Service

809. In relation to possible additional costs falling on the Scottish Prison Service, a successful conviction and custodial sentence could theoretically result in some upward pressure on the prison population. However, the low number of prosecutions anticipated makes estimating additional costs difficult. SPS estimates that the recurring annual cost per prisoner place, if additional capacity were required is £40,000. It is estimated that the average daily prison population may increase by 5 as a result of the provisions. This is calculated from 10 convictions each year, where the average sentence handed down is 1 year with time served in jail being 6 months. The theoretical cost (if additional prison capacity were needed) is £200,000.

COSTS ON LOCAL AUTHORITIES

810. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

811. We do not anticipate any additional costs on other bodies, individuals or businesses.

Section 29 – Articles banned in prison (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
0.215	0.000	0.215	0.000	0.215	0.000	0.000

SECTIONS 30 - SALE AND HIRE OF CROSSBOWS TO PERSONS UNDER 18

SECTION 31 - SALE AND HIRE OF KNIVES AND CERTAIN OTHER ARTICLES TO PERSONS UNDER 18

812. The costs of these proposals for police forces are likely to be minimal and will depend on the number of test purchases carried out and whether they are incorporated into any wider scheme of test purchasing for offensive weapons. It should be noted that it is unlikely that a test purchasing scheme would be carried out for crossbows alone. It is not possible to provide an estimate of the costs incurred by Scottish Police Forces for mounting test purchasing programmes, because these are absorbed within operational police budgets and any test purchasing would likely form part of a wider test purchasing scheme. There are no other costs.

SECTION 32 - CERTAIN SEXUAL OFFENCES BY NON-NATURAL PERSONS

813. The provisions will broaden the range of available disposals for a solemn court where an offence has been committed under sections 9-12 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (the “2005 Act”). The court will now be able to impose a financial penalty as well as, or instead of, a custodial penalty. In 2007/08, there was one offence recorded under sections 9-12 of the 2005 Act. For the purposes of this financial memorandum, a very minimal financial impact is estimated.

SECTION 33 - INDECENT IMAGES OF CHILDREN

814. These provisions clarify offences relating to possession of indecent photographs of children to include pseudo-photographs i.e. images which are derived from actual photographs but which do not appear to be photographs themselves. It is not known how widespread possession of pseudo-photographs is among individuals in Scotland; however as this material is likely to come to light as a result of investigations into child pornography already instigated no or very minimal additional costs are expected to be incurred.

SECTION 34 - EXTREME PORNOGRAPHY

815. These provisions create a new offence of possession of extreme forms of pornographic material and increase penalties for existing offences of publicly displaying, publishing, selling, distributing and possessing for gain obscene material which is or includes an extreme pornographic image. It is not known how widespread possession of this material is among individuals in Scotland. On the one hand, it has been an offence to publish or distribute in Scotland obscene material of this nature for a number of years. However, given the developments in technology, including the emergence of the internet, which have made the production and distribution of such material faster, more convenient and anonymous, there may be a significant base of consumers. The key factor governing cost implications will be the number of investigations and prosecutions. It is impossible to quantify this but it is not expected that there will be a large number as many cases liable to be prosecuted are likely to be those that come to light as a result of investigations in other areas, including investigations into indecent images of children. In 2006-07, 71 persons were proceeded against on charges relating to possession of indecent images of children. We would not expect as many persons to be proceeded against in relation to possession of extreme pornographic material as those offences relating to indecent images of children will continue to have a higher priority for the police. For the purposes of this financial memorandum we therefore estimate that an average of 5 persons will be proceeded against for this offence in each year. It is assumed that these cases will be tried in the sheriff court under summary procedure.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

816. In 2007 the Scottish Crime and Drug Enforcement Agency's National High Tech Crime Unit estimated that the police investigation costs relating to possession of indecent images of children were around £1,000 per case. We have assumed that the investigation costs will be similar for extreme pornography which gives an overall estimated cost of £5,000 for 5 cases. Crown Office's prosecution costs range from £199, where a section 76 plea is made, to £676 if the case goes to trial (based on Crown Office's average case costs for 2006-07). On the assumption that the cases are tried under summary procedure in the sheriff court the weighted average case cost would be £320 which gives an overall total of £1,600.

817. From the Scottish Legal Aid Board's 2006-2007 annual report the average criminal case cost for a sheriff court case is £825 which gives an overall total of £4,125.

818. Costs to the Scottish Court Service range from £93 where there is a plea at first diet to £1,360 if the case goes to trial based on Scottish Court Service average criminal case costs for 2006-2007. On the assumption that the cases are tried under summary procedure in the sheriff court the weighted average case cost would be £244 which gives an overall total of £1,220.

819. It is not known in what proportion of cases the court will opt to impose a prison sentence on conviction. The Scottish Prison Service calculates that the cost of 6 months in prison is approximately £20,000. On the assumption that one offender per year receives a prison sentence of 6 months, the total additional cost to the Scottish Prison Service would be £20,000 per year.

COSTS ON LOCAL AUTHORITIES

820. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

821. We do not anticipate any additional costs on other bodies, individuals or businesses.

Summary

Section 34 - Extreme pornography (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
0.027	0.000	0.027	0.000	0.027	0.000	0.000

SECTION 35 - PEOPLE TRAFFICKING

822. The extension to the territorial extent of human trafficking offences will have a minimal financial impact as it will affect extremely few cases each year (if any at all). Extending the jurisdiction of the sheriff court to deal with human trafficking offences will also have a minimal financial impact, with some limited savings possible through cases being heard at a lower level than otherwise would have been the case. For the purposes of this financial memorandum, a nil financial impact has been assumed given the likely extremely few cases these provisions will affect.

CHAPTER 4:

PART 3 OF THE BILL - CRIMINAL PROCEDURE

SECTION 38 – PROSECUTION OF CHILDREN

823. In the last 5 years, there has only been 1 prosecution of a child under the age of 12. The provisions will therefore have no material financial impact.

SECTION 40 - WITNESS STATEMENTS

SECTION 62 – WITNESS STATEMENTS: USE DURING TRIAL

COSTS ON THE SCOTTISH ADMINISTRATION

Crown Office and Procurator Fiscal Service

Sending Copies of statements to witnesses

824. The following assumptions are being made:

- Copies of statements will be provided by post;
- Only witnesses categorised as civilian witnesses will require copies of their statement;
- It is estimated that 162,490 civilian witnesses will be cited to give evidence per year, based on 2007/2008 statistics;
- Statements will be posted out first class, at a cost of £0.36 per letter;
- In each summary case, it will take a Band B member of staff an average of .5 hours to process the case and send out the statements;
- The average hourly rate for a Band B member of staff is £7.24;
- There will be an estimated 44,005 pleas of not guilty at pleading diet at Sheriff Summary level and at estimated 7119 pleas of not guilty at pleading diet at District/JP level, based on 2007/2008 statistics, giving an estimated 51,124 cases in which statements will be obtained;
- Of the estimated 51,124 trials per year, it is anticipated that 25% of these will involve police witnesses only, leaving at estimated 38,343 cases in which civilian statements will require to be processed;
- Thus it is anticipated that there will be 19,171.5 hours work per year processing these for summary cases;
- There will be an estimated 5,464 solemn cases per year in which witness statements will be provided to witnesses, again requiring 0.5 hours work per case;
- Thus it is anticipated that there will be 2,732 hours work per year processing these for solemn cases.

Postage:		£0.36 x 162,490	=	£58,496.40
Staffing costs:	Summary	£7.24 x 19,171.5	=	£138,801.66
	Solemn	£7.24 x 2,732	=	£18,779.68
		Total cost per year	=	£216,077.74

Note: It is stressed that the costs detailed above are the upper limit of what is anticipated as COPFS will continue to consider methods of carrying out the work that will reduce the financial burden, e.g. through making effective use of IT systems

Scottish Court Service

825. The general assumption is that copies of statements will be provided by post, however there may be the odd occasion where a court may adjourn to allow witnesses to read statement – this would be an exception as it is not recommended to have witnesses given statements on day of trial. If court adjourned to allow witnesses to read statements, the result would be a delay to proceedings in High Court or Sheriff Court. Estimated costs of such delays per 20 cases is £2,000.

COSTS ON LOCAL AUTHORITIES

826. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

827. We do not anticipate any additional costs on other bodies, individuals and businesses.

Section 40 - Witness statements
Section 62 – Witness statements: use during trial (all figures in £m)

	2010/11		2011/12				
	Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
Section 40 – COPFS	0.216	0.000	0.216	0.000	0.216	0.000	0.000
Section 62 - SCS	0.002	0.000	0.002	0.000	0.002	0.000	0.000
Total costs	**0.218**	**0.000**	**0.218**	**0.00**	**0.218**	**0.000**	**0.000**

SECTION 41 - BREACH OF UNDERTAKING

828. This is a procedural change whereby in future, rather than libelling a separate charge, the accused will instead face the original charge with an "aggravation" added. There will be no financial impact of this change.

SECTION 42 - BAIL REVIEW APPLICATIONS

829. This provision will deliver a saving through the use of less court time. In 2007/08 there were 1900 applications for bail review, of which 400 were refused. It is already the case that uncontested applications relating to a change of address do not require a hearing (and so will not be covered by this change) and 90% of bail review applications relate to a change of address. This leaves around 150 applications for bail review which do not relate to a change of address and which are granted (those that are not granted are obviously contested). The majority of these cases will be contested as they relate to the bail conditions originally deemed acceptable by the prosecutors.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

830. For the purposes of this financial memorandum, if we estimate that around 50 cases will not be contested, then the saving in court time represented by not having to consider uncontested cases will be 10 minutes (max) @ £750 per hour x 50, or £6,250.

COSTS ON LOCAL AUTHORITIES

831. There will be no additional costs for local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

832. There will be no additional costs for other bodies, individuals or businesses.

Section 42 - Bail review applications (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
0.000	0.000	0.000	0.000	0.000	0.000	0.006

SECTION 43 - BAIL CONDITION FOR IDENTIFICATION PROCEDURES ETC.

833. The provisions introduce a new standard condition of bail to require that accused persons make themselves available: (i) to attend at an identification parade or other identification procedure; and (ii) to enable the taking of any print, impression or sample from them.

834. This new standard condition will save some court time as it will no longer be necessary for a prosecutor to have to ask the court to impose a requirement to participate in an ID procedure. At present it is relatively common (though no specific figures exist) for the prosecutor to seek such a requirement, and it is understood that the imposition of this condition is rarely, if ever, contested by the defence. The change made by the provisions therefore has the potential to achieve only a very small time saving in any individual case, but will potentially affect a substantial number of trials.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

835. No additional costs falling on the police or the Scottish Prison Service.

836. No additional costs falling on the Crown Office and Procurator Fiscal Service. There will be a minimal cost to the Scottish Court Service in updating their IT systems with details of this new standard condition. However, this is likely to be offset by a small cumulative saving of court (and prosecution time), as it will no longer be necessary for the prosecutor to have to ask the court to impose a requirement to participate in an ID procedure. It is not possible to estimate with any degree of certainty the amount of time that will be saved, but it is likely to be minimal.

COSTS ON LOCAL AUTHORITIES

837. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

838. We do not anticipate any additional costs on other bodies, individuals or businesses.

SECTION 44 - PROSECUTION ON INDICTMENT: SCOTTISH LAW OFFICERS

839. This provision is intended simplify the change over between Lord Advocates i.e. when can indictments be issued in the new name. There will be no costs associated with this provision. There may be some minimal savings as and when the provisions are used on occasions when the holder of the post of Lord Advocate changes, but given this provision will only be used as and when the holder of the post of Lord Advocate changes, it is not possible to estimate what savings are likely with any degree of certainty.

SECTION 46 - ADDITIONAL CHARGE WHERE BAIL ETC. BREACHED

840. The provisions will allow a complaint in summary proceedings to be amended, prior to trial, to include a charge of failing to appear. This will remove the need for the prosecutor to prepare a separate complaint containing the charge of failing to appear. This change should lead minimal savings in court, COPFS and legal aid costs. It will cut down on the need for a new complaint (with associated requirements as to service), and minimal additional legal aid costs currently incurred in representing an accused in what amounts to a separate matter will also likely be reduced. It is not possible to estimate these minimal savings with any degree of certainty as it is not clear how often the provisions will be used.

SECTION 47 - REMAND AND COMMITTAL OF CHILDREN AND YOUNG PERSONS

841. Over the last three years (up to and including the year 2007/08), an average of 27 young people were remanded on judicial unruly certificates and spent an average of 17 days in prison custody (average total of 459 days). With the abolition of judicial unruly certificates it is anticipated that these young people will, instead, be remanded to secure accommodation and associated costs will move from the Scottish Prison Service to the Local Authorities.

842. 2007/08 saw a significant fall in the number of young people remanded on judicial unruly certificates, and the time spent in prison custody, compared with previous years. This was due, in part, to the availability and uptake of alternative options. As a result it is anticipated that, if the legislation was not abolished, the numbers being remanded would continue to fall. Assuming implementation of the provisions in April 2010, costs have been calculated to reflect this projected fall at 25% per annum (both number of young people and number of days) for each of the two years (2008/09 and 2009/10) until 2010/11 implementation.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

843. No additional cost falling directly on the police.

844. No additional costs falling on the Crown Office and Procurator Fiscal Service. Minor savings may be achieved based on the fact that young people are generally remanded in prison for the shortest period of time before being transferred to a suitable secure unit. For this to be achieved, the case has to be called before a sheriff to vary the remand conditions.

845. No additional costs falling on the Scottish Court Service but some minor savings may be achieved as set out above.

846. No additional costs will fall on the Scottish Prison Service but again minor savings will be achieved. The average cost of a prison place is £40,000 per annum (approx £109 per day). Therefore average total savings to the prison service can be calculated at approximately £50,500 if the provisions had been implemented in 2007/08. As per above, this saving is anticipated to reduce by 25% per annum from April 2008 and the estimated recurring saving by the year 2012/13 is £11,983.

COSTS ON LOCAL AUTHORITIES

847. The burden will fall on local authorities to provide alternative remand accommodation, most likely in the form of secure accommodation. On average the cost per day of secure accommodation is calculated at £700 therefore the additional cost is calculated at approximately £321,500 for the year 2007/08. Additional costs will also fall on the local authority to transport young people from court to secure establishments and this has been estimated at £5,000. Total estimated cost to local authorities is approximately £326,500 for the year 2007/08. Assuming implementation in April 2010 of the provisions and the estimated 25% reduction in demand for places each year, this equates to a cost in 2010/11 of £137,742. It is projected that this cost will fall, due to the availability of alternative options to prison remand and secure accommodation, by 25% per annum, so that the recurring cost by 2012/13 is £77,480.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

848. We do not anticipate any additional costs on other bodies, individuals or businesses.

Summary

Section 47 – Remand and committal of children and young persons (all figures in £m)					
	2010/11		2011/12		
	Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Recurring costs by 2012/13
Local authorities	0.138	0.000	0.103	0.000	0.077
SPS	-0.021	0.000	-0.016	0.000	-0.012
Total costs	**0.117**	**0.000**	**0.087**	**0.000**	**0.065**

SECTION 52 - DISCLOSURE OF CONVICTIONS AND NON-COURT DISPOSALS

Convictions in solemn proceedings

849. The provisions will allow courts making sentencing decisions in solemn proceedings to take account of any conviction(s) acquired by an accused between the date of the offence which led to the current conviction and the actual date of that conviction. This change potentially allows a judge in determining sentence to consider additional convictions that might warrant a stricter sentence. This might in some cases result in an increased prison term. The extent of any increase as a result of this provision is extremely difficult to assess. It is not expected that the disclosure of post-offence convictions would be likely to have a significant impact on sentences, although there might be some slight increase in the level of sentences imposed. Ascertaining how much weight a judge is likely to give a direct measure in determining sentence is however very difficult to assess with such an appraisal (and impact of eventual sentence) likely to vary depending upon the facts of each case.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

850. Some minimal additional costs will fall on the Crown Office and Procurator Fiscal Service. The Procurator Fiscal will have to check the position as regards convictions/alternative disposals between the offence date and date of conviction. This is not work that is currently done. It may then be necessary to create and serve and amended schedule of previous convictions upon the accused and court. It is anticipated these costs will be minimal.

851. In relation to possible additional costs falling on the Scottish Prison Service, any impact on the prison population would depend on the extent of any increase in sentence length. It is impossible to quantify this but the effect is expected to be minimal.

COSTS ON LOCAL AUTHORITIES

852. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

853. We do not anticipate any additional costs on other bodies, individuals or businesses.

Fiscal fines, compensation offers and work orders in proceedings

854. The provisions will allow courts in making sentencing decisions in both solemn and summary proceedings to take account of offers of fiscal fines, compensation offers and work orders that have arisen following the date of the offence. This change potentially allows a judge in determining sentence to consider additional factors that might warrant a stricter sentence. This might result in a limited number of cases in an increased level of fine or prison term.

855. The extent of any increase as a result of this provision is extremely difficult to assess. It is not expected that the proposed change would be likely to have a significant impact on sentences, although there may be some slight increase. Ascertaining how much weight a judge is likely to

give a direct measure in determining sentence is however very difficult to assess with such an appraisal (and impact of eventual sentence) likely to vary depending upon the facts of each case.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

856. No additional costs falling on the police or Scottish Court Service.

857. Some minimal additional costs falling on the Crown Office and Procurator Fiscal Service. The Procurator Fiscal will have to check the position as regards convictions/alternative disposals between the offence date and date of conviction. This is not work that is currently done. It may then be necessary to create and serve and amended schedule of previous convictions upon the accused and court. It is anticipated these costs will be minimal.

858. In relation to possible additional costs falling on the Scottish Prison Service, any impact on the prison population would depend on the extent of any increase in sentence length. It is impossible to quantify this with any degree of certainty but the effect is expected to be minimal.

COSTS ON LOCAL AUTHORITIES

859. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

860. We do not anticipate any additional costs on other bodies, individuals or businesses.

SECTIONS 54-57 - CROWN APPEALS

861. The provisions will allow the Crown a right of appeal against two types of judicial ruling that can bring a solemn criminal case to an end without the verdict of a jury. These are rulings of no case to answer or on the basis of a statutory replacement of a common law submission. The Crown will also gain a right of appeal against certain judicial findings relating to the admissibility of prosecution evidence.

862. It is difficult to estimate how many appeals may be taken by the Crown under the provisions in the Bill. However, the Crown Office and Procurator Fiscal Service envisage that these rights of appeal will be used sparingly and only in cases which have been assessed by Crown Counsel as being appropriate to invoke the appeal procedure.

863. In relation to existing rights, the Crown exercises its right of appeal against an unduly lenient sentence approximately 10 times a year. The Lord Advocate’s Reference procedure, which can be used where the Crown wish the Appeal Court to consider a particular point of law that arose in a criminal case, has been used 3 times since 1998 (but none since 2002).

864. The Crown estimates that the rights of appeal provided under this Bill are unlikely to be utilised more than 3-4 times a year. Such appeals would involve consideration by the Appeal Court, and if successful might result in a retrial of the accused although that is not guaranteed. In some exceptional circumstances it might be possible for an appeal to be considered

sufficiently swiftly to allow a continuation of the original trial. This would be substantially less expensive than a retrial.

865. Although it is difficult to estimate the likely duration of a Crown appeal with any accuracy, it is assessed for the purposes of this memorandum that a Crown appeal would take approximately 4 days court time per appeal given the likely profile and size of such cases.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

866. No additional costs falling on the police.

867. The average cost to the Scottish Court Service in salary terms per day for a solemn conviction appeal would be approximately £4,500. The cost to the Scottish Court Service of 4 appeal cases per annum, each lasting an average of 4 days is estimated to be approximately £72,000.

868. The Crown Office and Procurator Fiscal Service estimate that these appeals would be expected to involve around 40 days preparation and court time for an Advocate Depute. In addition, legal staff would have to consider a range of cases, many of which would not ultimately be subject to an appeal. This time cost is estimated at 0.25 of a full time legal post, together with 0.25 of a legal trainee. The estimate for average staffing costs for Crown Counsel and legal staff in a Crown appeal is £51,200.

869. The average prosecution costs of a High Court trial in 2005/06 was £19,300[10] (adjusted for inflation £21,000). Assuming that there would be a retrial in each case and that the case would be in the High Court (neither of those assumptions are certain), the total annual expenditure to the Crown Office and Procurator Fiscal Service for 4 retrials per annum would be £84,000. In relation to court costs for retrials, it is estimated that the average court cost for 4 High Court retrials per annum would be £78,000, with non-recurring set-up costs of £5,000.

870. This gives a total annual court and prosecution cost figure of £285,200.

871. The average cost to the legal aid budget of a Criminal appeal case in 2007-08 was £1,615. The cost to the Scottish Legal Aid Board of 4 appeal cases of unusual complexity per annum is estimated to be approximately £40,000. The average cost to the legal aid budget of a non appeal High Court case in 2007-08 was £12,900. If there were to be a retrial in each Crown Appeal case (which is thought to be unlikely), the total annual expenditure for retrials is estimated at £51,600. Together, this gives a figure for the Scottish Legal Aid Board of £91,600.

872. In relation to possible additional costs falling on the Scottish Prison Service, a successful appeal followed by a retrial ending in a conviction and custodial sentence could theoretically result in some upward pressure on the prison population. However, the low number of appeals anticipated makes estimating additional costs very difficult. The process will not necessarily

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[10] Costs and Equalities and the Scottish Criminal Justice System, http://www.scotland.gov.uk/Resource/Doc/237550/0065253.pdf

result in a conviction and to have any effect on prison population, any custodial sentence would either have to result in a new term of imprisonment or extend an existing period of imprisonment. A nil financial impact has been assumed.

COSTS ON LOCAL AUTHORITIES

873. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

874. We do not anticipate any additional costs on other bodies, individuals or businesses.

Sections 54-57 - Crown appeals (all figures in £m)

	2010/11		2011/12				
	Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
COPFS & SCS	0.285	0.000	0.285	0.000	0.285	0.000	0.000
Scottish Legal Aid Board	0.092	0.000	0.092	0.000	0.092	0.000	0.000
Total	**0.377**	**0.000**	**0.377**	**0.000**	**0.377**	**0.000**	**0.000**

SECTIONS 58-60 – RETENTION AND USE OF SAMPLES ETC.

875. The Scottish Police Services Agency (SPSA) indicate that, in 2007-08, 807 DNA records were retained in respect of individuals who were been proceeded against but not convicted of a relevant sexual or violent offence. For the purposes of this financial memorandum, we have assumed that the extending these retention arrangements to fingerprints will result in a similar number of fingerprint records being retained annually.

876. In response to Professor Fraser's review, the Scottish Children's Reporter Administration (SCRA) indicated that 883 children were referred to the Reporter on the ground that they had committed serious sexual or violent offences in 2006-07. We understand from SCRA that, in 2007-08, 12.2% of children referred to the children's hearings system on offence grounds either accepted those grounds or had them established. On this basis, for the purposes of this memorandum we have estimated that there would be around 100 cases per year where DNA and fingerprint data taken from children subsequently referred to the children's hearings system for serious violent or sexual offences could be retained for a limited period.

877. SPSA indicate that it costs approximately £25 to process a DNA sample (i.e. to turn into a DNA profile and place it on the system). However, currently most samples taken are routinely processed prior to a decision on the disposal of a case, so we anticipate little additional

processing cost in light of the new provisions. It costs £0.75 per annum to store DNA samples and approximately £9 per annum to maintain each fingerprint record.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

878. We estimate that an additional 807 fingerprint records would be retained in respect of individuals who were proceeded against but not convicted of a relevant sexual or violent offence. Approximately 100 fingerprint and DNA records taken from children subsequently referred to the children's hearings system would also be retained. The cost to SPSA of storing these additional records would be approximately £8,000 per annum. This cost will accumulate each year as another year's worth of samples is added to those already stored. However, this would reach a 'critical mass' at the end of the third year once records begin to be destroyed. Once destruction of records after three years' retention begins, approximately three years' worth of additional data will be retained at any one time.

879. There would be one-off system change costs to SPSA of around £25,000.

880. There may be minimal additional costs to the Crown Office and Procurator Fiscal Service associated with amendments to IT systems.

881. We do not anticipate additional costs to police forces. The provisions in the Bill provide powers to retain forensic data that has already been taken by police. Therefore, there should be no increase in the number of samples taken by the police.

882. No additional costs to the Scottish Court Service.

883. No additional costs to the Scottish Prison Service.

COSTS ON LOCAL AUTHORITIES

884. No additional costs to local authorities

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

885. No additional costs to other bodies, individuals and businesses.

Summary

Sections 58-60 – Retention and use of samples etc. (all figures are £m)							
	2010/11		2011/12				
	Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
Retention of fingerprint and other forensics data for 3 years – sexual and violent offences	0.007	0.025	0.014	0.000	0.021	0.025	0.000

Expressly stating what use can be made of DNA and other forensics data	0.000	0.000	0.000	0.000	0.000	0.000	0.000
Retention of DNA/forensics in Children's Hearing system	0.001	Costs included within "Retention of fingerprint and other forensics data for 3 years…" entry above	0.002	0.000	0.004	0.000	0.000
Total costs	**0.008**	**0.025**	**0.016**	**0.000**	**0.025**	**0.025**	**0.000**

SECTION 61 - REFERRALS FROM SCOTTISH CRIMINAL CASES REVIEW COMMISSION: GROUNDS FOR APPEAL

886. The impact of the provisions concerning miscarriage of justice appeals procedures will be to reduce the scope of appeals that can follow a SCCRC referral. In general, the appellant will in future only be able to raise appeal proceedings of the basis of the SCCRC statement of reasons (subject to a court permitting an appeal on other grounds).

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

887. There may be limited costs to the SCCRC as the grounds for appeal within their reports will assume greater importance. There may be a small increase in the number of judicial reviews sought by appellants who seek to challenge the grounds laid out in SCCRC statement of reasons. It is considered this may amount to 1 additional judicial review a year at the cost of £30,000. There may be some limited savings to the Scottish Court Service and COPFS as a result of the grounds for hearing of appeals being limited. It is not possible to quantify with any degree of certainty how much these savings would be.

COSTS ON LOCAL AUTHORITIES

888. There are no costs falling to local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

889. There are no costs falling on other bodies, individuals or businesses.

Section 61 - Referrals from Scottish Criminal Cases Review Commission: grounds for appeal (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
0.030	0.000	0.030	0.000	0.030	0.000	0.000

CHAPTER 5:

PART 4 OF THE BILL - EVIDENCE

SECTION 67 - TELEVISION LINK EVIDENCE

890. It is very difficult to estimate with any degree of certainty the number of cases where this provision will be used, but for the purposes of this financial memorandum an estimate of 100 cases each year is used.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

891. The cost to Scottish Court Service based on 100 cases per annum is estimated at –

High Court

- Judicial salaries £8,000
- Running costs £1,500

Sheriff Court

- Judicial salaries £6,000
- Running costs £1,500
- Court Service salaries in respect of additional court time - £30,000

One–off costs to equip 1 additional court per sheriffdom with tv links - £132,000

COSTS ON LOCAL AUTHORITIES

892. There are no costs falling on local authorities

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

893. There are no costs falling on other bodies, individuals and businesses.

Section 67 - Television link evidence (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
0.047	0.132	0.047	0.000	0.047	0.132	0.000

CHAPTER 6:

PART 5 OF THE BILL - CRIMINAL JUSTICE

SECTION 68 – UPPER AGE LIMIT FOR JURORS

SECTION 69 – PERSONS EXCUSABLE FROM JURY SERVICE

894. The provisions will raise the upper age limit of jurors from 65 to 70. This would increase the juror pool in Scotland by some 200,000 individuals per annum (based on General Register of Scotland figures - June 2006).

895. The provisions do not entail any new spending. It would save in the region of £250,000 to £300,000 per year since jurors drawing pensions would claim less than most jurors claiming allowances to replace lost earnings. We have assumed that 10% of all jurors will fall into the upper age band, and that a minority of these will be drawing a salary or a wage. That minority will grow over time as increasing numbers of people over 60 continue in employment of some kind and defer their pensions. For that reason the estimated savings have been pitched cautiously at rather less than the 10% of the £3m currently allocated to allowances. Any savings will be used to implement improvements to the system of reimbursement of jurors as set out in our consultation paper *"The Modern Jury in Scottish Criminal Trials*[11]*"*.

896. The provisions will also change the rules on exemptions in respect of those who attend for jury duty, but do not sit on a jury. There is no financial impact of these provisions.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

897. No additional costs falling on the Scottish Court Service. Some savings likely to result for lower loss of earnings likely to be paid to those retired from work estimated at £250,000.

COSTS ON LOCAL AUTHORITIES

898. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

899. We do not anticipate any additional costs on other bodies, individuals or businesses.

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[11] http://www.scotland.gov.uk/Publications/2008/09/17121921/0

Sections 68 – Upper age limit for jurors Section 69 – Persons excusable from jury service (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
0.000	0.000	0.000	0.000	0.000	0.000	0.250

SECTION 70 - DATA MATCHING FOR DETECTION OF FRAUD ETC.

900. The National Fraud Initiative is designed to allow Audit Scotland to compare information about individuals held by different public bodies, and on different financial systems, to identify circumstances that might suggest the existence of fraud or error. The provisions will put on a statutory basis the work of Audit Scotland in relation to the National Fraud Initiative.

901. In 2006/07 (the last full year for which figures are available), the work of Audit Scotland in relation to the National Fraud Initiative identified fraud amounting to nearly £10m. The provisions will help safeguard the work of Audit Scotland in this area.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

902. As the provisions will place on a statutory footing the work of Audit Scotland in relation to the National Fraud Initiative, there will be no additional costs incurred by the Scottish Administration.

903. Audit Scotland will have a power to charge fees on the costs incurred in obtaining data. This power already exists through currently used audit powers however and no changes to practice are envisaged that should alter the level of costs. The provisions should not therefore have a financial impact.

COSTS ON LOCAL AUTHORITIES

904. Audit Scotland will have a power to charge fees on the costs incurred in obtaining data. This power already exists through currently used audit powers however and no changes to practice are envisaged that should alter the level of costs. The provisions should not therefore have a financial impact.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

905. None.

SECTION 71 - SHARING INFORMATION WITH ANTI-FRAUD ORGANISATIONS

906. The provisions will enable public authorities to share information with each other and anti-fraud organisations to help prevent and detect fraud.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

907. It is likely that some public bodies will use the powers to prevent and detect fraud. It is a flexible power and will be up to public bodies to decide themselves how they use this new power. It is therefore difficult to provide an estimate of what additional costs will fall on these public bodies, but it is likely that any costs incurred will be offset by the benefits of preventing cases of fraud and the resultant savings that will accrue.

COSTS ON LOCAL AUTHORITIES

908. As above, it is likely that local authorities will use the powers to prevent and detect fraud. It is a flexible power and will be up to local authorities to decide themselves how they use this new power. It is therefore difficult to provide an estimate of what additional costs will fall on local authorities, but it is likely that any costs incurred will be offset by the benefits of preventing and detecting fraud and the resultant savings that will accrue.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

909. There will be no costs falling on other bodies, individuals and businesses.

SECTION 72 - CLOSURE OF PREMISES ASSOCIATED WITH HUMAN EXPLOITATION ETC.

910. The provisions amend the Antisocial Behaviour etc. (Scotland) Act 2004 by making explicit provision to provide for the closure of premises associated with the commission of offences in relation to trafficking of human beings and child exploitation.

911. There is likely to be a minimal financial impact as a result of the provisions. Senior police officers can already apply for similar closure powers under the 2004 Act, which provides for the service of closure notice, and making of closure orders of premises associated with antisocial behaviour. The new provisions will assist the police by widening closure powers to help the police deal with premises associated with human trafficking and child sexual exploitation. It is not expected there will be more than a 1 or 2 closure orders sought each year using this new power.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

912. This will be a discretionary power for the police and it is difficult to estimate precisely how often the power will be used. However, it is not thought that any more than 1 or 2 closure orders a year will take place across Scotland with a minimal financial impact.

COSTS ON LOCAL AUTHORITIES

913. There are no costs falling to local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

914. No costs will be placed on other bodies, individuals and businesses.

SECTION 73 - SEXUAL OFFENCES PREVENTION ORDERS

SECTION 75 - RISK OF SEXUAL HARM ORDERS

Extending range of cases where a sexual offences prevention order can be imposed

915. The provisions will extend the range of relevant cases where the court can impose a Sexual Offences Prevention Order (SOPO). On average, it is considered no more than 1 or 2 additional cases a year will emerge where a SOPO is imposed by the courts.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

916. It is likely there will be some additional costs for Scottish Court Service as hearings in relevant cases will be extended slightly to consider whether it is appropriate to impose a SOPO. However, these costs will be minimal as it is only a very low volume of relevant cases where such consideration will be appropriate.

COSTS ON LOCAL AUTHORITIES

917. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

918. None.

Explicit power for a prosecutor to ask the court for a SOPO/expanding content of a SOPO and Risk of Sexual Harm Order

919. The provisions will provide an explicit power for a prosecutor to apply to the court for a SOPO to be imposed at the point where the court moves for sentence. It is considered this may lead to a slight increase in the number of cases a year where a SOPO is imposed by the courts. This additional number of cases is likely to be no more than 3 cases a year.

920. The provisions will also expand the content of SOPOs/Risk of Sexual Harm Orders to allow the court to impose restrictions and obligations/requirements on an offender. This would be in addition to the court’s current power to impose conditions that the offender requires to comply with.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

921. It is likely there will be some limited additional costs for Scottish Court Service as hearings in relevant cases will be extended slightly to consider the prosecutor’s request that a SOPO should be imposed. However, these costs will be offset as it is likely that the cases where the prosecutor applies for a SOPO will often be cases where the police themselves would have sought the imposition of a SOPO at a later date. There will be some limited savings for the police therefore in no longer having to apply to the court for a SOPO in these cases. Scottish Court Service should also benefit from a reduction in the number of police applied for SOPOs.

922. In terms of the cost of monitoring the expanded SOPO/Risk of Sexual Harm Orders, it should be noted that these Orders are essentially an extension of the wider often multi-agency management of sex offenders in the community. While a variety of monitoring techniques are used, the intensity and nature of that monitoring will be dependent on the type and degree of risk-management required in each case, the operational decisions taken in each force on how to manage the Orders, and the capacity of each force to implement the Orders. With this in mind, it is difficult to provide an estimate for any costs associated with these provisions, though it is likely to be minimal in the wider context of work to monitor sex offenders in the community.

COSTS ON LOCAL AUTHORITIES

923. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

924. None.

SECTION 74 - FOREIGN TRAVEL ORDERS

925. The provisions, which mirror separate provisions in England, Wales, and Northern Ireland, will help protect vulnerable individuals by strengthening and widening the circumstances in which Foreign Travel Orders (FTOs) can be applied. In particular offenders subject to FTOs (i.e. those offenders most likely to want to travel to abuse children abroad) will have to surrender their passports. This will be of significant assistance to the police in enforcing FTOs. Increasing the maximum duration of a FTO from 6 months to 5 years will also attempt to increase the use of FTOs to prevent sex offenders travelling abroad. Between 2004/05–2006/07, only 5 FTOs were issued across the UK. No police force in Scotland has ever applied for/been granted an FTO. It is considered that these measures will lead to a slight increase in the number of cases a year where a FTO is imposed by the courts. This additional number of cases is likely to be no more than 1 or 2 cases a year.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

926. It is likely that there will be some minimal additional costs for the Scottish Court Service in processing FTOs. However these costs will be offset since there is a further provision allowing the police to obtain an FTO for a longer period without having to obtain a renewal.

COSTS ON LOCAL AUTHORITIES

927. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

928. None.

SECTION 76 – OBTAINING INFORMATION FROM OUTWITH UNITED KINGDOM

929. The provisions will provide legal authority for the Scottish Criminal Cases Review Commission (SCCRC) to request co-operation from other jurisdictions as they carry out investigations in alleged miscarriages of justice.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

930. There will be no additional costs arising from these provisions. There may be some minimal savings as the process by which the SCCRC can seek information from other jurisdictions will be simplified. It is not possible with any degree of certainty to estimate these savings.

COSTS ON LOCAL AUTHORITIES

931. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

932. None.

SECTION 77 – GRANT OF AUTHORISATIONS FOR DIRECTED AND INTRUSIVE SURVEILLANCE

933. Authorisation for police and SCDEA surveillance is undertaken by a number of relevant officers within these bodies under the terms of the Regulation of Investigatory Powers (Scotland) Act 2000. The provisions will allow one force to take the lead in authorising surveillance in joint operations (which could consist of two or more police forces, or the SCDEA and at least one police force). This is designed to reduce bureaucracy. The provision will not result in either more or less operations occurring; it will simply streamline the process for putting authorisations in place for joint operations.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

934. No additional costs falling on the police. Minimal savings may accrue to the police from the reduced bureaucracy, but these will be ad hoc and depend on the number of joint operations.

COSTS ON LOCAL AUTHORITIES

935. No additional costs falling on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

936. No additional costs on other bodies, individuals or businesses.

SECTION 78 – AUTHORISATIONS TO INTERFERE WITH PROPERTY ETC.

937. In order to improve the effectiveness of the operation of the Scottish Crime and Drug Enforcement Agency (SCDEA), the Regulation of Investigatory Powers (Scotland) Act 2000 and the Police Act 1997 are being amended to allow the Deputy Director General of the SCDEA to authorise intrusive surveillance and property interference.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

938. No additional costs falling on the SCDEA. There will some efficiency savings as a result of freeing up some of the Director General’s time to deal with other SCDEA matters.

COSTS ON LOCAL AUTHORITIES

939. No additional costs falling on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

940. No additional costs on other bodies, individuals or businesses.

SECTION 79 - AMENDMENTS OF PART 5 OF POLICE ACT 1997

Requests to overseas jurisdictions

941. In 2007, Disclosure Scotland dealt with over 20,000 enhanced disclosure applications where the applicant gave a place of birth or previous address outwith the UK. This proposal gives Disclosure Scotland the power to gather information from any jurisdiction that is willing to share information for employment checking purposes. Three EU Member States have indicated a willingness to share information with the UK as has 1 other non-EU country. In 2007, Disclosure Scotland handled 7,100 applications from these countries.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

942. It is not possible to say what charge, if any, would be levied by an overseas jurisdiction. It is also hard to predict if the number of people coming to work in Scotland from these countries will rise or fall. But assuming static application figures, and a lower charge of £5 and a higher charge of £25 per application then the annual cost to the Scottish Government would range from £35,500 to £177,500. The alternative to the Scottish Government bearing this cost would be for the additional cost of gathering information from overseas to be passed onto applicants. The issue of translating overseas information is another factor that needs to be considered.

943. The language groups involved currently have a fee of £57 and £74 per 1,000 words for translation into English (from Interdepartmental Committee on Linguistic Services Government Guideline Rates (2007-8)). If the trend for UK information is repeated in overseas information, then 90% of applications to foreign jurisdictions would result in no information being returned. So 10% (710 on 2007 figures) would require some action. Of the applications in 2007, a total of 57% (405) might require translation. There is some flexibility around how this charge is calculated. We expect that between 100 and 150 words would require translation in each case.

With aggregation, the cost to Disclosure Scotland could be between £4,000 and £6,000 annually. If the translations have to be carried out on a case-by-case basis, the annual costs could be higher at around £23,000. If Scottish Ministers are to carry out effectively their functions under the Protection of Vulnerable Groups (Scotland) Act 2007 then translation will be necessary.

944. There will be development costs falling to Disclosure Scotland to create links and these could vary depending on the solution that is devised to gather the information. These are charged on a case-by-case basis as the need arises. Because of that it is not possible to give precise figure at this time.

945. There could be some costs to the Scottish Police Service if they wish to make use of any of the information that Disclosure Scotland gather and that requires to be translated separately by the Service.

946. No additional costs falling on the Crown Office and Procurator Fiscal Service.

947. No additional costs falling on the Scottish Court Service.

COSTS ON LOCAL AUTHORITIES

948. There could be a cost to local authorities if there is a need for language translation.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

949. There could be a cost if there is a need for language translation.

Section 79 - Amendments of Part 5 of Police Act 1997* (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
0.041-0.200	0.050-0.100	0.041-0.200	0.050-0.100	0.041-0.200	0.100-0.200	0.000

*Both the recurring and non-recurring costs are difficult to estimate accurately at this time due to a number of unknown factors. As regard recurring costs: first, the number of people from outwith the UK coming to live in Scotland; second, the number of people from that group who then go into paid or unpaid work where it is possible for their employer to have a criminal record check carried out; third, the number of people whose home country is willing to provide information to Scottish Ministers for Disclosure Scotland's purposes; and fourth the number of people in that group whose home country provide information that has to be translated into English. As regards non-recurring costs, these will cover such aspects as IT and supporting changes that are needed for the exchange of information to happen. The timing of this expenditure will happen as and when countries sign agreements to share information. At present it is not possible to say with confidence when this is likely to happen. The table estimates 2 countries signing agreements each year and at a cost to Scottish Ministers of £50,000 per time.

But even this is speculative as getting such agreements is a prolonged process. Also, more countries particularly from within the EU could become willing to provide information in the coming years and that too would affect these costs.

Fee charging regime

950. At January 2009, Disclosure Scotland had 3,036 registered persons / bodies and 9,187 nominees included in the register held under section 120 of the Police Act 1997. A one-off charge has been paid (£150 for registered persons / bodies and £10 for each nominee). The provisions will replace this one-off charge with an annual subscription.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

951. There will be development costs for Disclosure Scotland but as these will be an integral part of the solution to deliver the Protection of Vulnerable Groups (Scotland) Act 2007, it is not possible to separate out the costs of one small part of a much wider IT project.

952. No additional costs falling on the Scottish Police Service.

953. No additional costs falling on the Crown Office and Procurator Fiscal Service.

954. No additional costs falling on the Scottish Court Service.

COSTS ON LOCAL AUTHORITIES

955. There will be a charge to each Council for the annual subscription and also for nominees. It is not possible to say what these fees will be. Councils might also incur costs internally in relation to managing their registration. The policy intent will be that the total income received by Disclosure Scotland does not grow as a result of this, so income gained in subscription charges will be offset against disclosure fees.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

956. There will be a charge to each organisation for the annual subscription and also for each nominee. It is not possible to say what these fees will be. Organisations might also incur costs internally in relation to managing their registration.

957. It is not possible to provide non-recurring costs for this proposal as these costs will be part of the wider IT solution to deliver the Protection of Vulnerable Group (Scotland) Act 2007. It is also not possible to provide the future recurring costs. The determining factor, the fee to be charged for the annual subscription will be set in regulations under the Police Act 1997 to be made in the Scottish Parliament at a future date. Because of that, it is also not possible to say if any savings will arise for the bodies on which these costs will fall as comparison with the existing registration fee charging regime cannot be made now.

SECTION 80 - ASSISTANCE FOR VICTIM SUPPORT

958. The provisions introduce an enhanced power for Scottish Ministers to pay grant to victims' organisations. This power will be discretionary and therefore there is no direct financial impact of the provisions. It is intended to use the provision to allow a wider distribution of existing funding to victims' organisations.

SECTION 81 - PUBLIC DEFENCE SOLICITORS

959. The provisions will have the effect of confirming in statute the status of the Public Defence Solicitors' Office (PDSO). As the provisions will not change how the PDSO currently operates on a day to day basis, there is no financial impact of the change.

SECTION 82 - COMPENSATION FOR MISCARRIAGES OF JUSTICE

Ex gratia scheme

960. The provisions will place on a statutory footing the existing *ex gratia* scheme for payment of compensation as a result of a miscarriage of justice, combining it with the statutory scheme under the Criminal Justice Act 1988. The *ex gratia* scheme has been in operation since 1986 and no changes are planned to the coverage of the scheme as a result of putting it on a statutory footing.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

961. No additional costs will fall on the Scottish Administration. There may be some minimal administrative savings through combining the *ex gratia* and statutory schemes as a result of simplified processes, though it is not possible to provide a specific estimate of these savings.

COSTS ON LOCAL AUTHORITIES

962. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

963. None.

Convictions which the Crown have set aside

964. The provisions will permit the possibility of compensation being paid under the statutory miscarriage of justice scheme where it is the Crown who seek to have a conviction set aside. These cases are extremely rare, but can occur when, for example, it is found that an offence contained in a statutory instrument is found to be *ultra vires*.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

965. The purpose of the provisions is to ensure miscarriage of justice statute is fully comprehensive to cover all potential situations where compensation may become payable. It is

not expected that these provisions will used very often, if at all. It is very difficult to estimate if any extra cases will occur where compensation is deemed payable, but it is likely to be very low (perhaps 1 or 2 a *decade* at most). For the purposes of this financial memorandum, no additional costs have been assumed.

COSTS ON LOCAL AUTHORITIES

966. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

967. None.

SECTION 83 - FINANCIAL REPORTING ORDERS

968. As a result of the provisions, we anticipate an increase in the number of Financial Reporting Orders (FROs) being imposed each year. Currently only one FRO has been imposed. Following the change, we estimate 12 cases per year will have a FRO imposed by the courts.

969. Using cost information provided by the Serious Organised Crime Agency (who administer FROs in England and Wales), we anticipate that an average of 10 working days would be required to facilitate the extra FROs each year. However, it has to be acknowledged that every case will be different in length and the amount of work involved cannot be estimated exactly. There has only been one case to date in Scotland and it is too early to work out the costs per order, therefore it is difficult to judge the average costs involved and the extent that the courts will impose these orders. However, any costs are estimated to be minimal.

SECTION 84 - COMPENSATION ORDERS

970. In 2006/07, 1,382 Compensation Orders were imposed as a main penalty. 4,870 were imposed as a secondary penalty in addition to another penalty, generally a fine. Compensation was ordered in 5 per cent of convictions in 2006/07, most frequently in convictions for vandalism (46 per cent of such convictions). The average value of compensation order awarded was £343 in 2006/07.

971. It is possible that by making Compensation Orders easier to impose, courts will move away from imposing fines as a main penalty in certain cases. In 06/07, 6,252 Compensation Orders at an average of £343 were imposed, totalling £2,144,436. Should there be an increase of, for example, 5% in the number of Compensation Orders imposed, this could represent a loss of fine revenue of £107,222 (using the average compensation award of £343).

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

972. Under the Scotland Act 1998 (Designation of Receipts) Order 2004, fine income is surrendered to the UK Consolidated Fund, so any reduction in fine income would not affect the Scottish Administration.

COSTS ON LOCAL AUTHORITIES

973. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

974. As noted above, fine income is surrendered to the UK Consolidated Fund so the UK Government may suffer a reduction in the amount of fine income received from Scottish courts. This is estimated to be £107,222 (as per above assumptions). As this represents a net transfer rather than a new cost, a summary table is not provided.

CHAPTER 7:

PART 7 OF THE BILL – MENTAL DISORDER AND UNFITNESS FOR TRIAL

SECTIONS 117-120 – MENTAL DISORDER AND UNFITNESS FOR TRIAL

975. The provisions will modernise the law without changing the current common law position. As such, the provisions will have no financial impact.

CHAPTER 8:

PART 8 OF THE BILL - LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982

SECTIONS 121-123 AND 125-128 – GENERAL CIVIC GOVERNMENT (SCOTLAND) ACT 1982

976. Most of the amendments to the Civic Government (Scotland) Act 1982 are of a technical nature (such as altering time periods for making representations on licence applications) and will not result in extra costs. A few of the amendments could potentially lead to minimal extra costs – they enable local authorities to license any premises selling food or drink at late hours, and remove the current exemptions from the public entertainment licensing provisions for free events and from the market operators' licensing provisions for non-commercial organisations. These are referred to below but for the reasons explained, no meaningful cost estimates can be supplied.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

977. None.

COSTS ON LOCAL AUTHORITIES

978. Where local authorities opt to introduce licensing schemes to cover any premises selling food or drink at late hours, or in respect of large-scale public entertainments (which are free to enter and were previously exempt), or non-commercial market operators (which were previously exempt), the authorities will incur some costs. However, these costs can be met from the fees the authorities will be able to charge. Paragraph 15 of Schedule 1 to the Civic Government (Scotland) Act 1982 empowers local authorities to charge reasonable fees - they must seek to

ensure that the fees are sufficient to meet their expenses in carrying out their functions under the 1982 Act. The overall impact of local authorities therefore should be neutral.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

979. As a corollary of the above, some late-night catering establishments, or previously exempt organisers of large-scale public entertainments and non-commercial market operators, will be required to pay fees to those local authorities who choose to introduce licensing schemes. But the 32 local authorities will have discretion in both determining whether to license such activities and what level of fee to charge. Consequently, no meaningful estimate of possible costs can be supplied.

SECTION 124 – LICENSING OF TAXIS AND PRIVATE HIRE CARS

980. The estimated maximum cost to Scottish licensing authorities relates to the additional cost of notifying all taxi operators when fixing any taxi scales or undertaking a review under section 17 of the Civic Government (Scotland) Act 1982. The estimated annual costs assume that the licensee of all taxis (10,441 licensed vehicles) in Scotland will receive notification (by First Class recorded delivery @ £1.08 per letter) in terms of section 17 based on 2 notifications per 3 year period.

COSTS FALLING ON THE SCOTTISH GOVERNMENT

981. There are no cost implications for the Scottish Government arising from the proposed legislative changes.

COSTS ON LOCAL AUTHORITIES

982. The costs to local authorities are those relating to the notification of additional parties (all taxi operators) under section 17. It is anticipated that licensing authorities will choose to notify parties by means of recorded delivery as opposed to personal service and our estimate of costs are based on that assumption. Current legislation requires that licensing authorities conduct fare scale reviews at least every 18 months. For the sake of calculating the cost to local authorities we have assumed that authorities will conduct notification procedure twice during a three year period.

983. Using the methodology above we calculate that the total annual cost to licensing authorities is unlikely to exceed £7,500 per annum.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

984. The above costs will be added in to the overall expenses incurred by licensing authorities in carrying out their licensing functions in relation to such licences and will be reflected in the licence fees applied by individual authorities in terms of section 12 of the 1982 Act. We calculate using the above methodology that the cost to individual taxi operators would amount to less than £1.00 per annum.

Section 124 – Licensing of taxis and private hire cars (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
0.008	0.000	0.008	0.000	0.008	0.000	0.000

CHAPTER 9:

PART 9 OF THE BILL - ALCOHOL LICENSING

SECTION 130 - PREMISE LICENCE APPLICATIONS: NOTIFICATION REQUIREMENTS

985. These proposals will allow police forces to make savings by reducing notification and reporting requirements. While the amount of time spent on producing anti-social behaviour reports varies from force to force depending on IT systems we estimate that a report costs a minimum of £50 to produce and savings can be made by reducing the requirement to report to only where the Licensing Board requests it or where the police deem it necessary. Any savings therefore will be minimal.

SECTION 135 - EXTENDED HOURS APPLICATIONS: VARIATION OF CONDITIONS

986. The provisions will permit the application of extra conditions on a licensee when granted an extended hours licence. The provisions may create greater expense for any business on who they are imposed. However without the ability to impose such conditions there is the possibility that Licensing Boards would refuse to grant these additional hours licences and businesses would lose the additional revenue that they would expect to gain during the additional trading period. It is very difficult to provide an estimate for the cost on business as this will be dependent on the number of businesses who seek an extended hours licence, the type of additional conditions a Licensing Board wishes to impose and the number of occasions on which such conditions will apply.chapter 10:

PART 10 OF THE BILL - MISCELLANEOUS

SECTION 140 - LICENSED PREMISES: SOCIAL RESPONSIBILITY LEVY

987. The provisions have no direct financial implications as they enable the Scottish Ministers to establish arrangements for a Social Responsibility Levy by way of regulations. The application of a levy to licensed premises will shift some of the burden of dealing with the consequences of alcohol misuse from the public bodies which currently meet the cost – notably the police, the health service and the ambulance service – to those who profit from the sale of alcohol. We are of course sensitive to the impact of introducing a levy during an economic downturn when many businesses are facing increased costs and reducing income. A decision to introduce regulations

will not be take before autumn 2010 and consideration will be given to the prevailing economic climate at that time.

988. During the passage of the Bill through Parliament, we intend to work with stakeholders to develop the detail of the Social Responsibility Levy, including the parameters of the arrangements. Subject to the satisfactory completion of its work, a full regulatory impact assessment will be prepared and presented to Parliament with the appropriate regulations which would be subject to affirmative resolution procedure. The level or levels at which the levy may be set, and whether such levels should be set nationally or locally, will be considered on completion of the engagement process with stakeholders. Where the levy is applied some business may pass the cost onto customers.

SECTION 142 - CORRUPTION IN PUBLIC BODIES

989. The provisions will extend the jurisdiction of district/Justice of the Peace courts so they can deal with cases involving offences under the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906. It is unlikely that any more than a 1/2 cases (at most) each year will be dealt with in the district/JP court following this change.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

990. It should be noted that the number of cases prosecuted under the two Acts is very low. There may be some extremely minimal savings for Scottish Court Service as some cases are tried in a lower court than they would have been previously.

991. The following table summarises the overall financial impact of the Bill:

SUMMARY OF ADDITIONAL COSTS ARISING FROM THE CRIMINAL JUSTICE AND LICENSING (SCOTLAND) BILL (all figures in £m)

Section(s) of Bill	Details given at paragraph numbers within this financial memorandum	Eventual recurrent costs (a minus figure indicates a cost saving)	Eventual non-recurrent costs	Additional comment
Sections 3-13 – Scottish Sentencing Council	662-672	1.100	0.450	

Sections 14, 17 and 20 - Community Payback Order/Presumption against short periods of imprisonment or detention/Reports about supervised persons	673-699	10.670	0.050	Figure given here is mid point of range of two figures assuming 10% and 20% increase in use of community penalties following implementation of provisions (see table after para 700)
Section 19 – Early removal of certain short-term prisoners from the United Kingdom	786-790	-0.040	0.000	
Section 21 - Extended sentences for certain sexual offences	791-796	0.016	0.000	
Section 23 - Offences aggravated by racial and religious prejudice	797-804	0.024	0.005	
Sections 25-28 - Serious organised crime	700-718	3.654	0.005	
Section 29 – Articles banned in prison	806-811	0.215	0.000	
Section 34 - Extreme pornography	815-821	0.027	0.000	
Section 40 and 62 – Witness statements	824-827	0.218	0.000	
Section 42 - Bail review applications	829-832	-0.006	0.000	

Section 47 - Remand and committal of children and young persons	841-848	0.065	0.000	
Sections 54-57 – Crown appeals	861-874	0.377	0.000	
Sections 58-60 – Retention and use of samples etc.	875-885	0.025	0.025	
Section 61 – Referrals from Scottish Criminal Cases Review Commission: grounds for appeal	886-889	0.030	0.000	
Section 67 - Television link evidence	890-893	0.047	0.132	
Sections 68 and 69 - Jury service	894-899	-0.250	0.000	
Section 79 – Amendments to Part 5 of Police Act 1997	941-957	0.120	0.150	Figures shown are mid point of range of figures shown in table after para 950
Sections 85-116 – Disclosure	719-766	4.105	1.816	
Section 124 – Licensing of taxi and private hire cars	980-984	0.008	0.000	
Section 129 – Sale of alcohol to persons under the age of 21 etc.	767-775	38.000	0.000	As per para 776, this figure represents the maximum potential lost revenue to businesses and the UK Government.
TOTAL COSTS		**58.405**	**2.633**	

992. This table above does not include the financial impact of section 18 (Amendments of Custodial Sentences and Weapons (Scotland) Act 2007) of the Bill. Paragraph 785 explains the rationale for excluding this section's financial impact from the overall summary table.

EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

993. On 5 March 2009, the Cabinet Secretary for Justice (Kenny MacAskill MSP) made the following statement:

> "In my view, the provisions of the Criminal Justice and Licensing (Scotland) Bill would be within the legislative competence of the Scottish Parliament."

PRESIDING OFFICER'S STATEMENT ON LEGISLATIVE COMPETENCE

994. On 4 March 2009, the Presiding Officer (Alex Fergusson MSP) made the following statement:

> "In my view, the provisions of the Criminal Justice and Licensing (Scotland) Bill would be within the legislative competence of the Scottish Parliament."

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Criminal Justice and Licensing (Scotland) Bill introduced in the Scottish Parliament on 5 March 2009. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 24–EN.

POLICY OBJECTIVES OF THE BILL

2. It is critical our justice system is able to cope with the demands placed upon on it by life in modern Scotland. A range of reforms to the justice system have been taken forward since May 2007 including:

- investing additional resources to enhance operational policing by building police capacity through increased recruitment of new police officers and improved opportunities for retention and redeployment of existing police officers to help make Scotland's communities safer;
- committing funding in our ageing prison estate to provide facilities that are "fit for purpose" and capable of holding those serious offenders the public deserve protection from;
- taking forward a National Drugs strategy designed to promote recovery from drug problems as the focus of efforts to tackle drug use;
- taking forward the work of the National Violence Reduction Unit in tackling the scourge of violence within Scotland's communities; and
- using funds confiscated from criminals to fund a host of initiatives that help expand young people's horizons and steer them away from a life of crime.

3. We also need modern, effective laws that work in tackling criminals and their criminal behaviour. We want the dedicated people working in our criminal justice system to be equipped to deal with the impact of offending from the moment a crime is committed, through the police investigation and court process and then when the sentence is handed out to the offender.

4. The Bill is split into the following Parts:

- Part 1 – Sentencing;
- Part 2 – Criminal law;
- Part 3 – Criminal procedure;
- Part 4 – Evidence;
- Part 5 – Criminal justice;
- Part 6 – Disclosure;
- Part 7 – Mental disorder and unfitness for trial;
- Part 8 - Licensing under Civic Government (Scotland) Act 1982;
- Part 9 – Alcohol licensing;
- Part 10 – Miscellaneous; and
- Part 11 – General.

5. The provisions will assist in ensuring Scotland is a safer and stronger place for hard working families to live and work in.

ALTERNATIVE APPROACHES

6. Each topic has an explanation as to what alternative approaches would be available to achieve the policy objectives for each topic.

CONSULTATION

7. Each topic contains a summary of consultation undertaken. References to "Revitalising Justice" contained within this memorandum refer to our proposals document (*Revitalising Justice – Proposals To Modernise And Improve The Criminal Justice System*[1]) published in September 2008 outlining measures to be contained within a future Criminal Justice and Licensing Bill.

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[1] http://www.scotland.gov.uk/Publications/2008/09/24132838/0

PART 1 - SENTENCING

Section 1 – Purposes and principles of sentencing

Section 2 – Relationship between section 1 and other law

Policy objectives

8. To create a straightforward and transparent framework within which sentencers can base their decisions in individual cases; thereby increasing general understanding of the purposes and principles of sentencing and improving confidence in the sentencing process and the wider criminal justice system.

Key information

9. The provisions lay down in statute the purposes and principles of sentencing. This is intended to ensure that the public has a much clearer understanding of what sentencing is actually for and is clear on the key factors that every sentencer must have regard to when making decisions in individual cases.

Consultation

10. Our consultation paper "*Sentencing Guidelines and a Scottish Sentencing Council – Consultation and Proposals*[2]", outlining the detail of our proposals was published on 1 September 2008.

Alternative approaches

11. There are no alternative approaches that achieve the policy objective.

Sections 3-13 and Schedule 1 – The Scottish Sentencing Council

Policy objectives

12. To help ensure greater consistency, fairness and transparency in sentencing and thereby increase public confidence in the integrity of the Scottish criminal justice system.

Key information

13. The provisions create a Scottish Sentencing Council to provide a new sentencing guidelines regime for Scotland. This proposal originated in recommendations by the judicially-led Sentencing Commission, which examined the issue of consistency in sentencing. The central recommendation of the Commission's 2006 report *"The Scope to Improve Consistency in Sentencing*[3]" was the creation of a procedure for giving effect to sentencing guidelines.

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[2] http://www.scotland.gov.uk/Publications/2008/08/29100017/0

[3] http://www.scottishsentencingcommission.gov.uk/docs/consistency/Consistency%20Report%20-%20Final.pdf

14. At present, sentencing practice in Scotland operates mainly on a case-by-case basis in the criminal courts, with reference to the wide experience of sentencers in criminal cases and Appeal Court decisions. This is supplemented the Appeal Court's power to issue guideline judgements. As a result, it can be difficult for the public to properly understand the sentencing process, or to see clearly the reasons behind decisions in individual criminal cases. This has created the common perception that sentencing is inconsistent, which has had a negative effect on public confidence in the criminal justice system leading, in some quarters, to criticism of the judiciary.

15. It has been argued, particularly by practitioners, that sentencing is not inconsistent but is instead tailored to the facts and circumstances of each individual case. However, the Sentencing Commission examined the available evidence and concluded that, even though there is little empirical evidence to support the contention that inconsistency is present, the public perception of that inconsistency was well founded and was in itself something that needed to be addressed.

16. Additionally, the independent Scottish Prisons Commission recommended in its July 2008 report that the Scottish Government should establish a National Sentencing Council to develop clear sentencing guidelines.

Current legislation

17. Section 118(7) of the Criminal Procedure (Scotland) Act 1995 provides that when the High Court disposes of an appeal, by an offender or by the Lord Advocate, against an offender's sentence following conviction on indictment, the Court can pronounce an opinion on the sentence or other disposal or order that is appropriate in similar cases. Section 189(7) of the Act makes similar provision in respect of appeals following convictions in summary proceedings.

18. Section 197 of the Criminal Procedure (Scotland) Act 1995 provides that in passing sentence a court must have regard to any relevant opinion that has been given under section 118(7) or 189(7) of the Act.

19. The power of the courts to issue sentencing opinions under these provisions has not been used very often.

20. There are also some offences where the sentence is fixed by law. For example, section 205(1) of the Criminal Procedure (Scotland) Act 1995 provides that a person convicted of murder is to be sentenced to imprisonment for life.

Section 3 – The Scottish Sentencing Council

Section 4 – The Council's objectives

21. The provisions will establish a Scottish Sentencing Council (SSC). They set out the objectives of the Council, with a focus on the promotion of consistency in and a greater understanding of sentencing.

Section 5 – Sentencing guidelines

22. The function of the Council is to prepare and publish guidelines for the courts on the sentencing of offenders. The guidelines can relate to the purposes behind sentencing and the principles to consider when sentencing. They can also relate to sentencing levels and the types of sentences that are appropriate for particular offences and offenders. They may also relate to the kinds of circumstances in which they can be departed from.

23. It will be for the Council to decide whether a guideline is general or relates to a specific type of offence or offender. Guidelines may also relate to broad matters in sentencing. The Council must assess the costs and benefits of the guidelines and their impacts on prisons, community justice services and the criminal justice system in general. This assessment will form part of the guidelines.

Section 6 – Procedure for publication and review of sentencing guidelines

24. The Council will be expected to publish draft guidelines for general comment and, in particular, consult the Scottish Ministers, the Lord Advocate and other people it considers appropriate.

Section 7 – Effect of sentencing guidelines

25. Where the SSC has published sentencing guidelines and those sentencing guidelines apply, then courts must have regard to those guidelines unless they consider that there are good reasons not to. This means that when sentencing an offender, courts must have regard to any sentencing guidelines which are relevant to the offender’s case. If the courts exercise any other functions relating to the sentencing of offenders, the courts must have regard to any guidelines which are relevant to the exercise of those functions, e.g. a decision to impose a probation order rather than sentence an offender.

26. If the court is of the opinion that it is not appropriate to apply one of more or the sentencing guidelines that are relevant to the offender’s case then in imposing a sentence the court must set out the reasons for imposing a sentence that does not follow the guidelines.

27. Under section 108 of the Criminal Procedure (Scotland) Act 1995, the Lord Advocate has power to appeal against certain disposals including a sentence passed on conviction, a probation order and a community service order. Section 108(2) sets out the grounds on which the Lord Advocate can make such appeals. In deciding whether to make an appeal under section 108 the Lord Advocate will be required to have regard to any sentence guidelines that are relevant to the matter which the Lord Advocate is considering appealing.

28. Under section 118(4)(b) of the Act, when dealing with an appeal the High Court can impose a different sentence to that imposed by the original court. In imposing a different sentence the court must have regard to any relevant guidelines that exist at the time of passing the new sentence.

Section 8 – Ministers' power to request that guidelines be published or reviewed

29. The Scottish Ministers may at any time request that the SSC undertake to develop and publish sentencing guidelines on any matter within the SSC's remit or review a particular guideline or guidelines. The SSC must consider the Scottish Ministers' request but it is not bound to undertake to review that guideline or those guidelines. The SSC must include details of any such requests and its response in its annual report.

Section 9 – High Court's power to request review of guidelines

30. If the High Court in dealing with an appeal disagrees with the content of a relevant sentencing guideline then the intention is that the court can require the SSC to review the guideline. If the High Court makes such a reference, then the SSC must review that guideline or those guidelines. The SSC must include details of any such references in its annual report.

Section 10 – Scottish Court Service to provide sentencing information to the Council

31. The SSC can require that the Scottish Court Service (SCS) provides information that the SSC requests from the SCS relating to sentencing practice, compliance with and departure from sentencing guidelines. The SSC must from time to time publish information about sentences imposed by the courts. The purpose of this is to make the sentencing process more transparent and improve public understanding of how sentencing decisions are reached. The intention is that the SSC will publish research and analyses of sentencing trends and patterns across Scotland – i.e. looking at the differences between courts in different parts of the country, highlighting trends in the types of disposal used for certain offences etc. This will help to inform the judiciary, the wider justice system and the public about how sentencing is actually being carried out and will assist in highlighting where inconsistencies lie and understanding how to tackle them or even whether they need to be tackled.

Section 11 – The Council's power to provide information, advice etc.

32. The SSC may advise Scottish Ministers and the Scottish Parliament on sentencing practice and issues relating to sentencing. It may also submit proposals on sentencing matters. Scottish Ministers must have regard to these proposals or advice submitted by the Council. The advice can be given at the request of Scottish Ministers or the Scottish Parliament or on the SSC's own initiative.

Section 12 - Business plan

33. Every financial year the SSC will be required to publish a business plan. The Scottish Ministers will be required to lay a copy of the business plan before Parliament as soon as reasonably practicable after they have received the business plan. The business plan must set out how the SSC intends fulfilling is functions during the year to which the business plan relates. This will include setting out the subject matters that the SSC intends preparing draft guidelines about. The SSC may choose to include other information in its business plan. In preparing the business plan the SSC must consult the Scottish Ministers and the Lord Advocate.

Section 13 - Annual report

34. Every financial year the SSC will be required to prepare an annual report. This report will have to be submitted to the Scottish Ministers as soon as practicable after the end of the financial year for which it is prepared.

35. The annual report must include information as to how the SSC has fulfilled its functions and purposes during the period to which the annual report relates. This must include:

- details of the sentencing guidelines that have been published;
- details of draft sentencing guidelines that have been or are being consulted upon;
- where Scottish Ministers asked for a sentencing guideline to be prepared on a particular topic, whether that request was accepted. If accepted the report should set out the timetable for producing those guidelines and if rejected the report should set out why the request was rejected; and
- details of references made by the High Court of the Justiciary and the Council's response to them.

36. The SSC may also include other information in the annual report.

37. The Scottish Ministers must lay a copy of every annual report received from the SSC before Parliament and the SSC must publish the annual report as soon as practicable after the report is prepared.

Schedule 1 - The Scottish Sentencing Council

38. The SSC is to consist of a combination of judicial and non-judicial members and will be chaired by the Lord Justice Clerk. It is proposed that the Scottish Court Service would provide the property, services and staff required by the Council. The details of the membership of the Council and the approach to appointments are set out in Schedule 1.

Consultation

39. Our "*Sentencing Guidelines and a Scottish Sentencing Council – Consultation and Proposals*[4]" consultation paper outlining the detail of our proposals was published on 1 September 2008. There were over 40 responses to the consultation from individuals and groups from both within the legal sphere and more broadly. A majority of response were in favour of the proposals and the long term goals of improving transparency and consistency in sentencing.

40. The responses are being analysed and will be used to inform further development and refinement of the policy.

41. A summary of the proposal was also included within the Revitalising Justice paper published in September 2008.

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[4] http://www.scotland.gov.uk/Publications/2008/08/29100017/0

Alternative approaches

42. There are none that meet the policy objectives.

Section 14 – Community payback orders

Section 20 - Reports about supervised persons

Paragraph 38 of Schedule 5 - Combination of restriction of liberty orders with community payback orders

Policy objectives

43. To introduce a new style easy to understand "Community Payback Order" to replace an unnecessarily complex range of sentencing options currently available which are not readily understood by the public.

Key information

44. The report of the *"Review of Community Penalties*[5]*"* was published on 27 November 2007. One of the concerns that the review highlighted was that the range of community sentences was more complex than it needed to be. For example, reparative activities can form all or part of a community service order, supervised attendance order, community reparation order or an additional condition of a probation order. The Review concluded that a new approach to community service was needed to ensure that community service is respected as a high quality disposal which balances the requirement that offenders pay back for their crimes and also have the opportunity to improve their lives. The Review proposed that there should be a single reparative community sentence to be known as a "community service order" and that this would replace the existing community service orders, supervised attendance orders and community reparation orders. It was not proposed to amend the way in which probation orders operated.

45. *"Scotland's Choice - report of the Scottish Prisons Commission*[6]*"* was published on 1 July 2008 and made a number of radical proposals for how imprisonment is used in Scotland. It recommended the creation of a single community sentence to be known as the Community Supervision Sentence:

> *"The Commission recommends that judges should be provided with a wide range of options through which offenders can payback in the community, but that where sentences involving supervision are imposed, there should be one single Community Supervision Sentence with a wide range of possible conditions and measures."*

46. We wish to legislate for the broad substance of this recommendation. The policy aim is for the existing community penalties - probation orders, community service orders, supervised attendance orders and community reparation orders - to be replaced with the new community payback order. In bringing together the options for judges, we are highlighting the scope for

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[5] http://www.scotland.gov.uk/Publications/2007/11/20142739/0

[6] http://www.scotland.gov.uk/Publications/2008/06/30162955/0

courts to punish offenders in a way which also addresses the areas of their lives which need to change. Setting out the options in this way also enables us to underline the fact that a community sentence is a punishment and not merely a supportive intervention. We prefer the term "community payback order" to "community supervision sentence" as the sentence may not include a supervision requirement.

47. There are a number of requirements which can be included in a community payback order. When imposing a community payback order on an offender it is intended that the court may include one or more of the following requirements as part of the order.

- A supervision requirement;
- An unpaid work and activity requirement;
- A programme requirement;
- A residence requirement;
- A mental health treatment requirement;
- A drug treatment and testing requirement; and/or
- An alcohol treatment requirement

48. If an offender subsequently breaches the terms of the community payback order, the court in disposing of the case will have access to imposing a requirement of electronic monitoring. This will be one of a number of options open to the court in dealing with breach cases. The community payback order will also provide judges where considered appropriate with the opportunity to carry out review hearings during the course of the order. This is in line with the Prison Commission's recommendation for 'progress courts' to be held as part of the management of the sentence.

49. It is anticipated that approximately 90% of offenders, who are currently sentenced by courts to a community disposal, will in future be made the subject of a community payback order. The intention is to retain the existing specialist drug treatment and testing and restriction of liberty orders alongside the new order and these two existing disposals will deal with the remaining 10% of offenders on community sentences.

50. Ensuring sentences served in the community are robust, immediate and visible to the community will contribute to delivery of a coherent penal policy, and introduce a more structured sentence management regime tailored to the risk and needs of the offender and public safety.

Consultation

51. In formulating its views, the Scottish Prisons Commission[7] took evidence from COSLA, Lothian and Borders CJA, SACRO, SPS, Scottish Prison Officers Association, Victim Support Group Scotland, ACPOS, HM Chief Inspector of Prisons, SCCCJ, Families Outside, ADSW, Labour, Liberal-Democrat and Conservative Justice Spokespersons, Risk Management

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[7] http://www.scotland.gov.uk/Resource/Doc/230180/0062359.pdf

Authority, Prison Governors' Association, Women's Aid, and held public events in Dundee, Edinburgh, Glasgow, Aberdeen and Inverness. In addition to this and in the context of conducting our Reforming and Revitalising – Report of the Review of Community Penalties,[8] we consulted with the following: ADSW, COSLA, key voluntary sector providers including Turning Point, Phoenix Futures, NCH Scotland, Academics including researchers from the SCCCJ and the Universities of Edinburgh and Strathclyde; selected interest groups including Howard league, Scottish Association for the Study of Offenders, Scottish Consortium on Crime, and the Airborne Initiative; CJA Chief Officers and Conveners; Criminal Justice Agencies – Scottish Court Service, Crown Office, Procurators Fiscal Service, Scottish Prison Service and Social Work Inspection Agency; representatives from health/employment, training and housing bodies; community service supervisors and managers. In addition to this, a consultation session was held at the National Advisory Body on Offender Management attended by representatives of APEX, ACPOS, the Criminal Justice Voluntary Sector Forum, COSLA, Crown Office, Families Outside, Includem, the Parole Board of Scotland, SACRO, Scottish Federation of Housing Associations, the Scottish Prison Service, ADSW, Victim Support Scotland and academics from the universities of Edinburgh, Strathclyde, London and Wales.

Alternative approaches

52. The alternative would be to maintain the status quo and in doing so retain an unnecessarily complex range of sentencing options, which are not readily understood by the public. We do not consider that that approach would be tenable.

Section 15 – Non-harassment orders

Policy objectives

53. To make it easier for prosecutors to obtain criminal NHOs against offenders so that victims are protected from further harassment and repeat offending.

Key information

54. The provisions in the Bill will remove the precondition for a course of conduct amounting to harassment in the consideration of criminal NHOs.

55. Section 11 of the Protection from Harassment Act 1997 (the "1997 Act") amends the Criminal Procedure (Scotland) Act 1995, by inserting a new section (section 234A) to allow criminal courts to make Non-Harassment Orders (NHOs) after convicting a person of a criminal offence involving harassment. This section refers back to the definition of harassment contained in section 8 of the 1997 Act (which is concerned with civil NHOs).

56. Responses to the 2001/2002 consultation on stalking and harassment in Scotland identified a number of issues relating to the usefulness and workability of criminal NHOs. This included the need for prosecutors seeking a criminal NHO to be able to provide evidence of a course of conduct which has amounted to harassment before a judge can even consider the imposition of an NHO.

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[8] http://www.scotland.gov.uk/Resource/Doc/204067/0054359.pdf

57. The effect of this is that there must be evidence on the basis of at least two incidents for which an offence is being prosecuted. The offence must itself involve conduct on at least two separate occasions if, following conviction, an NHO is to be considered. For example, if an offender is charged and prosecuted for one incident of breach of the peace, then proceedings for obtaining an NHO cannot even begin because the offence for which the offender has been convicted does not in itself demonstrate a course of conduct.

58. Further provisions on the Bill will amend the legislation on criminal NHOs to ensure that courts should have regard to previous convictions and allow judges access to relevant information to assist in deciding whether to impose an NHO.

59. There is currently concern at the difficulty in using previous convictions as evidence of a course of conduct or to strengthen a case for a NHO. Information about previous convictions can be invaluable in demonstrating the propensity for an offender to commit crimes of harassment in general or to target the same victim repeatedly. Either way, it would be useful if judges were able see the pertinent details of previous convictions while deliberating on NHOs, rather than simply the list of previous convictions, which is standard practice.

Consultation

60. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

61. There are none that meet the policy objective.

Section 16 - Short periods of detention

Policy objectives

62. To tidy the law, reducing the risk of error and confusion; and to ensure the efficient use of custodial sentences.

Key information

63. Section 169 of the Criminal Procedure (Scotland) Act 1995 permits summary courts to detain an offender at court or at a police station until 8pm in lieu of imposing imprisonment, so long as the offender can get home that day. These provisions date back many years and exist in the 1995 Act as a result of consolidation of the law. In practice, the provisions in section 169 are not currently used, have not been used for a considerable number of years and are no longer of any practical use. Section 15(2) of the Bill repeals section 169 of the 1995 Act to help tidy up the law.

64. Section 206(1) of the Criminal Procedure (Scotland) Act 1995 provides that a summary court cannot impose imprisonment for a period of less than five days. Section 15(3)(a) of the Bill changes this minimum period from five days to fifteen days to reflect our policy on the efficient use of custodial sentences.

65. Subsections (2) to (6) permit the summary courts to sentence an offender to be detained in a certified police cell or similar place for up to 4 days. It is our understanding that there are no such certified police cells in Scotland, and have not been any for some time. This change will not affect "legalised police cells" under the Prisons (Scotland) Act 1989, which can be used to detain prisoners before, during or after trial for up to 30 days. Subsections (2) to (6) are, therefore, repealed by section 15(3)(b) of the Bill.

Consultation

66. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

67. There is no alternative approach available that meets the policy objectives.

Section 17 – Presumption against short periods of imprisonment or detention

Policy objectives

68. To ensure appropriate use is made by courts of short term custodial sentences.

Key information

69. We want to make it clear that sentencers should not impose a custodial sentence of 6 months or less, unless the particular circumstances of the case lead them to believe that no other option would be appropriate. We are also legislating to provide that the sentencer must explain in court the circumstances which made them conclude that only a custodial sentence could be imposed.

70. Reducing the number of custodial sentences of six months or less is a policy priority because of the strong evidence from all quarters that they are ineffective and make it harder for the Scottish Prison Service to invest the time needed in intensive rehabilitation of more serious offenders. Whilst eliminating such sentences altogether would not solve prison overcrowding, reducing their number has the potential to diminish churn and wasted activity in the prison system. We wish to steer judges away from custodial sentences while giving them options which offer real opportunities for rehabilitation but also impose effective (and tough) restrictions on offenders, and making it clear that judicial discretion remains intact.

Consultation

71. The proposal arises following a recommendation in the report of the Scottish Prisons Commission[9]. In formulating its views, the Scottish Prisons Commission took evidence from COSLA, Lothian and Borders CJA, SACRO, SPS, Scottish Prison Officers Association, Victim Support Group Scotland, ACPOS, HM Chief Inspector of Prisons, SCCCJ, Families Outside, ADSW, Labour, Liberal-Democrat and Conservative Justice Spokespersons, Risk Management Authority, Prison Governors' Association, Women's Aid, and held public events in Dundee, Edinburgh, Glasgow, Aberdeen and Inverness.

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[9] http://www.scotland.gov.uk/Resource/Doc/230180/0062359.pdf

Alternative approaches

72. The alternative would be to maintain the status quo and to lose this opportunity to underline the importance of using a short custodial sentence only when there is no realistic alternative available, given the evidence that community sentences offer more scope both for payback to the community and for individual rehabilitation

Section 18 – Amendments of the Custodial Sentences and Weapons (Scotland) Act 2007

Policy objectives

73. To help deliver a comprehensive offender management structure.

Key information

74. The provisions modify the Custodial Sentences and Weapons (Scotland) Act 2007 to obtain the statutory framework upon which to build, in due course, a modern regime for managing offenders who are sentenced to custody. This will form part of the plan for delivering a comprehensive offender management structure as set out in our plan "Protecting Scotland's Communities: Fair, Fast and Flexible Justice" published on Wednesday, 17 December 2008.

75. The policy objective will be achieved by retaining the current custody and community provisions in the 2007 Act. However, there will be an order making power subject to affirmative resolution to designate the group of offenders to whom the custody and community provisions will apply eg. offenders sentence to 1 year or more.

76. The custody only provisions in the 2007 Act will be repealed and substituted with new measures to be known as the short-term custody and community sentence. The application of the short-term custody and community sentence arrangements will comprise those offenders to whom the custody and community provisions will not apply eg offenders sentenced to less than 1 year.

77. Short-term custody and community sentence offenders will be released at the halfway point of their sentence but will be subject to a licence for the entire remainder of their sentence. Conditions may be imposed on the licence and a serious breach of a licence condition could mean the offender returning to custody for the remainder of the sentence. A short-term custody and community sentence offender who has been recalled to custody will have the right to have their continued detention reviewed by the Parole Board for Scotland. If the short-term custody and community sentence offender is sentenced to a period of 6 months or more and is subject to the notifications requirements of the Sexual Offences Act 2003, supervision will be a mandatory condition of that offender's short-term custody and community sentence licence.

78. Aside from a few consequential amendments to integrate the new proposals, there are no other changes to the custodial sentences provisions in the 2007 Act.

Consultation

79. These proposals take account of the recommendations of the independent Scottish Prisons Commission's report *"Scotland's Choice: Report of The Scottish Prisons Commission*[10]*"* that reported in July 2008. The outline proposal was included in our "Revitalising Justice" proposals document published in September 2008. Our wider plan for a coherent offender management strategy set out details of the proposal in *"Protecting Scotland's Communities: Fair, Fast and Flexible Justice*[11]*"* published on 17 December 2008.

Alternative approaches

80. Following the findings of the Scottish Prisons Commission, we are of the view that there is no feasible alternative approach that would achieve the objective of better sentence management for those offenders who are sentenced to imprisonment.

Section 19 – Early removal of certain short-term prisoners from the United Kingdom

Policy objectives

81. To remove criminals from the country who wish to leave when coming towards the end of their custodial sentence thus freeing up valuable prison resources.

Key information

82. While "domestic" prisoners can be placed on Home Detention Curfew and curfewed to their home address, foreign prisoners are often either subject to deportation on release, or have no address in Scotland to which they can be curfewed, and have to remain in prison until they reach the point at which they are automatically released. The Bill will give Scottish Ministers discretionary powers to release early a prisoner, subject to the requirement that they are liable for removal from the UK or have the settled intention of residing permanently outside the United Kingdom once removed from prison. This will mirror a scheme that already exists in England and Wales for prisoners liable for removal from the UK, which is being expanded by the Criminal Justice & Immigration Act 2008.

Consultation

83. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

84. There are none that meet the policy objectives.

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[10] http://www.scotland.gov.uk/Publications/2008/06/30162955/0

[11] http://www.scotland.gov.uk/Publications/2008/12/16132605/0

Section 21 – Extended sentences for certain sexual offences

Policy objectives

85. To ensure courts are able to protect public safety by being empowered to impose an extended sentence (additional post release supervision) for an offence which discloses a significant sexual aspect to the offender's behaviour.

Key information

86. Section 210A of the Criminal Procedure (Scotland) Act 1995 provides the court with the power to impose additional post release supervision on sex and violent offenders where it considers that the additional supervision is necessary to protect the public from serious harm from the offender following release. This is known as an extended sentence. The maximum extension period is 10 years. Extended sentences may be imposed only in indictment cases and on the imposition of a determinate custodial sentence of 4 years and over for a violent offence. There is no minimum determinate custodial term for sexual offences.

87. We propose to extend this power to allow the courts, in appropriate circumstances, to impose an extended sentence where a person is convicted of an offence which discloses, in the court's opinion, a significant sexual aspect to the offender's behaviour but which is not otherwise covered by the current definitions of "sexual offence" and "violent offence" in section 210A of the Criminal Procedure (Scotland) Act 1995.

88. Courts are currently unable to impose an extended sentence, for example, in respect of a conviction for a breach of the peace where there was a significant sexual element to the offence.

89. The anomaly of the present situation is demonstrated by the requirement in section 21 of the Criminal Justice (Scotland) Act 2003, for certain reports to be produced where an offence has a significant sexual element and also by the possibility that the court may put the person on the "sex offenders' register" by virtue of an offence with a significant sexual aspect under paragraph 60 of Schedule 3 to the Sexual Offences Act 2003.

Consultation

90. The provisions were identified by the judiciary to improve public protection. It will plug a gap and bring the provisions into line with other legislation which covers offences with a significant sexual element. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

91. There is no alternative approach that can achieve the policy objective.

Section 22 – Effect of probation and absolute discharge

Policy objectives

92. To remove unnecessary references to probation orders, and to ensure that probation orders and orders for absolute discharge are treated appropriately in the Licensing (Scotland) Act 1995

Key information

93. Since changes made in the Criminal Justice (Scotland) Act 1995 came into force in 1996, it has only been possible for Scottish courts to make a probation order following conviction. It had previously been the case that in summary procedure probation orders were made without proceeding to conviction.

94. References in the Civic Government (Scotland) Act 1982 to the court being able to make certain orders when it "convicts a person of an offence …. or discharges him absolutely or makes a probation order in relation to him" can be simplified to remove the reference to probation orders, which are now redundant.

95. Sections 247(1) and (2) of the Criminal Procedure (Scotland) Act 1995 provide that a conviction of an offence for which an order is made placing the offender on probation or discharging him absolutely shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of laying it before a court as a previous conviction in subsequent proceedings for another offence, and that the conviction of an offender who is placed on probation or discharged absolutely shall be disregarded for the purposes of any enactment which imposes any disqualification or disability upon convicted persons, or authorises or requires the imposition of any such disqualification or disability. It is necessary to displace the effect of these provisions for the purposes of the Licensing (Scotland) Act 2005, to ensure that convictions resulting in probation orders or absolute discharge can be taken into account in the same way as other convictions.

Consultation

96. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

97. There is no alternative approach that meets the policy objective.

Section 23 – Offences aggravated by racial or religious prejudice

Policy objectives

98. To ensure offenders are aware of the seriousness of their racially and/or religiously motivated offending at the point of sentence and harmonise the operation of hate crime aggravations.

Key information

99. The provisions harmonise the application of hate crimes legislation across the statute book and improve the recording of racially and religiously aggravated offences and convictions. They will also ensure that it is made explicit at the point of sentence that racially and religiously aggravated crime will be punished accordingly.

100. Section 96 of the Crime and Disorder Act 1998 (racially aggravated offences) and section 74 of the Criminal Justice (Scotland) Act 2003 (religiously aggravated offences) will be amended to ensure that where the sentence is different as a result of the aggravation, the court

must record that the sentence was so aggravated and state extent of, and reasons for, that difference or the reasons for there being no difference. This will harmonise the application of these aggravations with the provisions for aggravations relating to disability, sexual orientation and transgender status in the Offences (Aggravation by Prejudice) (Scotland) Bill (introduced into the Scottish Parliament on 19 May 2008).

Consultation

101. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

102. Legislation is required to take forward these changes. Inclusion of these changes in the Offences (Aggravation by Prejudice) (Scotland) (Bill) was proposed but this was considered to be outwith the scope of that Bill.

Section 24 – Voluntary intoxication by alcohol: effect in sentencing

Policy objectives

103. To make clear to offenders and courts that (voluntarily) being under the influence of alcohol cannot be an excuse for offending behaviour.

Key information

104. The provisions in the Bill will enshrine in statute that the commission of an offence while voluntarily under the influence of alcohol should not be considered as a mitigating factor by the courts when sentencing an offender.

Consultation

105. A consultation paper, (*Sentencing Guidelines and a Scottish Sentencing Council – Consultation and Proposals)*, outlining the detail of our proposals was published on 1 September 2008.[12]

Alternative approaches

106. The alternative approach would be not to place on statute these provisions. We do not consider this will help meet the policy objective.

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[12] http://www.scotland.gov.uk/Publications/2008/08/29100017/0

PART 2 – CRIMINAL LAW

Sections 25-28 – Serious organised crime

Policy objectives

107. We have made it clear we want to tackle those involved in serious organised crime to help ensure that Scotland is a safer and stronger place for hard working families to live and work in and to send a message to those involved in such activity that Scotland does not want their business.

108. The Serious Organised Crime Taskforce was established by the Cabinet Secretary for Justice to provide strategic direction to tackling serious organised crime. The Taskforce has proposed the creation of new offences to tackle serious organised crime. These new offences will provide law enforcement in Scotland with additional tools to tackle this problem. It will also send the important message to the communities of Scotland we are committed to taking on these criminals.

109. These provisions put in place new offences to criminalise those people who direct or are involved in the commission of serious organised crime. They also criminalise certain classes of individual who fail to report serious organised criminal activity. The creation of these offences will open up the possibility of any material benefit an offender derives from such criminal activity being seized or confiscated under the Proceeds of Crime Act 2002 where appropriate. We want to pursue those who work together for the purposes of committing and conspiring to commit serious crimes which are intended to generate material benefit, whether directly or indirectly.

Key information

110. Serious organised crime is often carried out by groups of individuals working together to maximise the benefits they derive from their criminal activity. By doing so it allows individuals to obtain a greater benefit from their offending than they might do if working alone and outside an established criminal network. It can also provide protection from those at the very top of such networks who can instruct or direct others to carry out activity on behalf of their network but who do not carry out criminal acts and therefore prove difficult to prosecute. We want to capture all levels of serious organised crime from those at the very top who instruct or direct others to undertake such activity to the drug dealer on the street corner who is supporting serious organised crime in our communities. .

111. This will be a serious offence and attract a maximum sentence of 14 years imprisonment on indictment with an unlimited fine or both. On summary procedure the maximum sentence will be 12 months imprisonment or a fine not exceeding the statutory maximum or both.

Section 25 - Involvement in serious organised crime

112. This provisions will target those who agree to become involved in the commission of serious organised crime and help to ensure that they are held criminally responsible in a way that takes account of the context of their actions. It is intended to capture those who become

involved in criminal activity with at least one other person where their main purpose is to commit or conspire to commit serious offences for material gain.

113. The offence of involvement in serious organised crime is intended to capture those individuals further down the chain of command and subject to criminal penalties those individuals who are less directly involved, but who nevertheless are working in conjunction with others to commit serious organised crime. It will also provide further flexibility to the Crown and may be helpful in circumstances where it was not possible to prove beyond reasonable doubt that an individual was directing serious organised crime.

114. This offence will attract a maximum penalty of 10 years imprisonment on indictment, an unlimited fine or both. In summary procedure there will be a maximum penalty of 12 months imprisonment or a fine not exceeding the statutory maximum or both.

Section 26 - Offences aggravated by connection with serious organised crime

115. In addition to the directing and involvement in serious organised crime offences we propose a statutory aggravation where an offence can be proved to have been connected with serious organised crime. We believe that criminal offences committed with the underlying purpose or motivation of committing or conspiring to commit serious organised crime are more serious on account of the context in which they take place and the motivation of the offender. Using the new statutory aggravation, the court will now have the opportunity to treat an offence committed in this context and with this underlying motivation as having been aggravated by the connection between the index offence and serious organised crime and has discretion to adjust the sentence accordingly.

Section 27 - Directing serious organised crime

116. This offence will help tackle those at the high level end of an organised crime network and help capture those who do not engage directly in criminal conduct but who direct and incite others to commit serious offences with the intention that his or her direction will result in or enable the commission of serious organised crime. Serious organised crime is for these purposes crime which involves two or more people acting together for the principal purpose of committing one or more serious offences, those being indictable offences committed with the intention of securing a material benefit for anyone or acts of serious violence committed with the intention of securing a material benefit in the future.

Section 28 - Failure to report serious organised crime

117. Serious Organised Crime groups rely on the assistance of professional associates and family members. The assistance of professional occupations such as lawyers and accountants is required when hiding the profits of criminal activity or converting illegitimate gains into legitimate assets. We want to ensure that those who have knowledge of an individual's involvement in a serious organised crime network, whether in a professional or private capacity, should be under a duty to report it. The overwhelming majority of professionals comply with the regulatory and reporting requirements, but there are a small number who either turn a blind eye to such activity or who are benefitting from such activity - and it is those that we wish to capture. This offence will capture those who fail to report that they know or suspect such activity is

taking place following information that has come to them in the course of their professional business or employment.

118. We also want to capture those whose knowledge or suspicion arises as a consequence of their close personal relationship with the alleged offender where they have derived benefit from that person's offending when they have known or suspected that the material benefit they gained was a result of serious organised crime.

119. There will be a maximum penalty of 5 years imprisonment, an unlimited fine or both if convicted on indictment and 12 months imprisonment, or a fine not exceeding the statutory maximum or both if conviction is in summary proceedings.

120. We propose that all these offences are added to Schedule 4 (Lifestyle Offences in Scotland) in the Proceeds of Crime Act 2002, which will allow for the confiscation of the criminal benefit gained from such activity or the recovery of assets gained through unlawful conduct. This would be achieved by way of an order made under the Proceeds of Crime Act and is not intended to be included in this Bill.

Consultation

121. Following the recommendations of the Serious Organised Crime Taskforce to look at bringing forward new offences for those directing or being involved in serious organised crime, we have been working closely with the Crown Office and Procurator Fiscal Service to formulate these offences and have regularly updated the Taskforce members on progress. Our intention to create such offences was set out in the Revitalising Justice Document in September 2008.

Alternative approaches

122. We could have decided to maintain the status quo and continue to rely on the current common and statutory laws to deal with serious organised crime.

123. However, at present the common and statutory laws are not providing convictions of those individuals directing or inciting or being involved in serious organised crime. We therefore believe there is merit in making it easier to convict criminals involved in serious organised crime and to subject them to appropriate criminal sanctions. This will also send a clear message to Scottish communities that action is being taken to tackle serious organised crime at all levels.

Section 29 – Articles banned in prison

Policy Objectives

124. To provide an effective deterrent against the use (often for illegal purposes) of personal communication devices within prison.

Key Information

125. The provisions create the specific offences of introduction, use and possession of a personal communication device (including mobile phones and any component part of a mobile phone) in a prison.

126. Intelligence information available to Scottish Prison Service (SPS) suggests that mobile phones are commonly used within prisons for, amongst other purposes-

- the continuation of criminal activities within the prison;
- to intimidate witnesses; and
- to facilitate the supply of, and payment for, illegal drugs.

127. Intelligence information also suggests that prisoners who have access to a mobile phone are frequently bullied by those who do not.

128. The smuggling of mobile phones into prisons is becoming increasingly difficult to detect given that mobile phone technology is decreasing in size. This is particularly problematic bearing in mind that a very common method of smuggling a mobile phone is through packing in a bodily orifice. Other methods are used, however, for example throwing over the prison walls or, at times, introduction via a contractor carrying out work at the prison.

129. In many instances it is simply a SIM card which is introduced. A small number of handsets are shared amongst prisoners, who "take turns" at inserting their SIM cards into them. SIM cards are, of course, extremely difficult to detect.

130. Section 41 of the Prisons (Scotland) Act 1989 makes it an offence to bring or introduce, or attempt to introduce, certain items into a prison without reasonable excuse. The list of prohibited articles includes, amongst others, drugs and offensive weapons. Section 41(1)(e) provides that the prohibited items include any article which is a "prohibited article" within the meaning of the Prison and Young Offenders Institutions (Scotland) Rules 2006. The Prison Rules were amended by Scottish Statutory Instrument on 11 December 2008 to provide that personal communication devices are "prohibited articles". This means that the effect of section 41(1)(e) is that a person who brings a mobile phone into a prison without reasonable excuse would be liable on conviction to a fine not exceeding level 3 (up to £1,000) of the standard scale or to imprisonment for a period not exceeding 30 days.

131. The provisions alter the Prisons (Scotland) Act 1989 to create additional specific offences in relation to the introduction, possession and use of personal communication devices in prisons. In addition, it will also increase the maximum penalty which may be imposed on a summary conviction to imprisonment not exceeding 12 months, or a fine not exceeding the statutory maximum, or both (the statutory maximum is currently set at £10,000). The maximum penalty on conviction on indictment is imprisonment for a term not exceeding 2 years, or an unlimited fine, or both. We consider maximum penalties of this level will prove a far more effective deterrent than those which can currently be imposed.

Consultation

132. The prohibition of mobile phones has been discussed by senior SPS colleagues and the Serious Organised Crime Taskforce, who fully supported the need to crack down on prisoners who make use of mobile phone technology to commit crimes whilst in prison. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

133. These changes will provide an effective deterrent against the use of mobile phones in prison and help tackle prisoners who continue their criminal activities from inside prison. There are no alternative approaches that help meet this policy objective.

Section 30 – Sale and hire of crossbows to persons under 18

Section 31 – Sale and hire of knives and certain other articles to persons under 18

Policy objectives

134. To allow robust police enforcement of the law in relation to age restrictions on the sale of crossbows by allowing a system of test purchasing and modernise 'proof of age' provisions by ensuring consistency with the Licensing (Scotland) Act 2005.

Key information

135. The Crossbows Act 1987 is the only remaining statutory provision relating to age-restricted goods for which it is not legal to operate a test purchasing scheme. A test purchasing scheme allows a child or young person to carry out the purchase of an age-restricted good to check whether the retailer is applying the age restriction in the sale of the good. Crucially, the child or young person is not committing an offence when test purchasing rules are being followed. While it is unlikely that a test purchasing scheme would be established for crossbows alone, it may be desirable to do so as part of a more general scheme relating to the test purchasing of offensive weapons. The provisions proposed will allow test purchasing, following the model in Section 102 of the Licensing (Scotland) Act 2005.

136. The Crossbows Act 1987 provides a defence to the offence of selling a crossbow to a person under 18 if the seller had 'reasonable ground for the belief' that the person was 18 or over. The Criminal Justice Act 1988 has a similar defence but it has a higher threshold of 'reasonable precautions' and 'due diligence'. The provisions bring them into line with the standard set in the Licensing Act 2005.

Consultation

137. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

138. The provisions in relation to test purchasing are supported by ACPOS.

Alternative approaches

139. There are none that meet the policy objectives.

Section 32 – Certain sexual offences by non-natural persons

Policy objectives

140. To improve the law.

Key information

141. Sections 9 to 12 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 established a number of offences relating to the sexual services of children and child pornography. The offences relate to:

- paying for sexual services of a child (section 9);
- causing or inciting provision by child of sexual services or child pornography (section 10);
- controlling a child providing sexual services or involved in pornography (section 11); and
- arranging or facilitating provision by child of sexual services or child pornography (section 12).

142. A minor difficulty has been identified with penalties for the offences under sections 9 to 12 of the Act when prosecuted on indictment. The penalty provisions provide that a person is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, except for section 9 offences when involving the sexual services of a child aged 16 or over in which case the maximum term is 7 years. There is no reference to the possibility of a fine, in contrast to the position in summary procedure, and to most other penalty provisions which generally refer to the imposition of imprisonment, or a fine, or both. In the absence of a reference to a fine, there is no inherent power for the solemn courts in Scotland to impose a fine in place of imprisonment, nor to allow a fine to be imposed along with a custodial sentence.

143. Under the provisions it will be competent for the court to impose an unlimited fine following successful prosecution on indictment, instead of or as well as, imprisonment. While custodial sentences are likely to be appropriate for most offenders, the availability of a fine in solemn procedure will allow the courts to deal with corporate offenders such as companies. This will better meet our international obligations on the criminalisation of the sexual exploitation of children.

Consultation

144. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

145. There are no alternative approaches available that meets the policy objective.

Section 33 – Indecent images of children

Policy objectives

146. To help clarify the law and close a gap in existing legislation which has developed as technology advances to circumvent the controls already in place.

Key information

147. Under the provisions of sections 52 and 52A of the Civic Government (Scotland) 1982 it is an offence to make, take, distribute, publish or possess indecent photographs or pseudo-photographs of children. A pseudo–photograph is an image which, though not a photograph itself, appears to be one.

148. The definition of pseudo–photograph does not extend to cover images derived from actual photographs but which do not appear to be photographs themselves. Such images are increasingly easy to make using readily available image manipulation software.

149. The provisions extend the provisions of sections 52 and 52A of the 1982 Act to cover derivatives of indecent photographs or pseudo–photographs to include, for example, line traced and computer traced images. These derivatives will fall under the scope of sections 52 and 52A of the Act and it will therefore become an offence to make, take, distribute, publish or possess such images.

150. There are also a number of technical amendments that will clarify certain provisions concerning indecent images of children as they apply for the purposes of Schedule 3 to the Sexual Offences Act 2003. That Schedule lists offences which trigger the notification requirements in Part 2 of that Act. The amendments will remove any doubt that the provisions contained within paragraph 44 of Schedule 3, which refers to Customs legislation about prohibited goods, covers both photographs and pseudo-photographs. Changes are also intended to be made to Schedule 3 to ensure clarity in respect of age thresholds.

Consultation

151. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

152. There are none that meet the policy objectives.

Section 34 – Extreme pornography

Policy objectives

153. To help ensure the public are protected from exposure to extreme pornography that depicts horrific images of violence.

Key information

154. There have been criminal offences in Scotland for a considerable time relating to the publication, distribution and display of indecent and obscene material. The current legislation on this matter is contained in the Civic Government (Scotland) Act 1982 and the Indecent Displays (Controls) Act 1981, which combined to replace the previous provisions in the Burgh Police (Scotland) Act 1892. Section 51 of the 1982 Act provides that it is an offence to publicly display, sell or distribute any obscene material. It also makes it an offence to make, print, have or keep obscene material with a view to its eventual sale or distribution. Section 52 of the 1982 Act makes similar provision in relation to child pornography while Section 52A provides that it is an offence to possess any indecent photograph or pseudo-photograph of a child. So, while possession of obscene material has not previously been an offence in itself (other than for child pornography), laws have long been in place to prevent obscene material being published, sold or imported to Scotland.

155. However developments in production and distribution technology, including the emergence of the internet, has offered individuals faster, more convenient and anonymous means to publish and distribute material of this type. By implementing a new criminal offence for the possession of extreme pornographic material we intend to protect society from exposure to such material, to which access can no longer be reliably controlled through existing legislation dealing with publication and distribution. These provisions will also protect those who participate in the creation of sexual material containing obscene violence, cruelty or degradation, who may thereby be the victims of crime. By closing the gap in existing legislation, which has developed as technology advances to circumvent the controls already in place, the offence will discourage interest in extreme pornographic material by breaking the demand/supply cycle.

156. This new offence will criminalise the possession of obscene pornographic images which realistically depict the following extreme acts:

- Life-threatening acts and violence likely to cause severe injury;
- Rape and other non-consensual penetrative sexual activity, whether violent or otherwise;
- Sexual activity involving a human corpse; and
- Sexual activity between a person and an animal.

157. The maximum penalty for the new offence will be 3 years imprisonment.

158. It is already illegal to publish, sell or distribute (or to possess with a view to selling or distributing) the obscene material that would be covered by this new offence. It is intended to increase the maximum penalty for publication etc. (under section 51 of the Civic Government (Scotland) Act 1982) in respect of extreme pornographic material from 3 to 5 years to emphasise the seriousness attached to distribution of this type of material.

Consultation

159. The Scottish Executive issued a joint consultation in 2005[13] with the Home Office on issues relating to the possession of extreme pornography. The consultation sought to determine views on whether advances in technology, including the internet, have resulted in a need for the law in this area to be strengthened and outlined proposals to criminalise possession of obscene and explicit pornography containing actual or realistic depictions of an extreme nature. This consultation ran until December 2005 and 93 Scottish responses were received. The analysis of responses received to the consultation was published on 9 June 2006[14]. Although the views expressed in response to the consultation document were polarised those in favour agreed that technological advances have meant that there is a need to strengthen the law as access to this type of material is now much more widespread. In 2006 a short life Working Group was set up by the then Scottish Executive to consider how an offence of possession of extreme pornographic material might be constructed in Scots law.

160. We announced in the "Revitalising Justice" proposals document in September 2008 that we would legislate for a new offence for the possession of extreme pornographic images (which are obscene, appear to a reasonable person to have been produced for the purpose of sexual arousal, are sexually explicit, realistic and depict images of an extreme nature as set out above).

Alternative approaches

161. Three broad options for progressing work on extreme pornography were considered. Option one was to legislate to create a separate Scottish offence of possession of extreme pornographic material as proposed by the short life Working Group and implemented in this Bill. The second option was to replicate the English and Welsh provisions as set out in section 63 of the Criminal Justice and Immigration Act 2008 whilst the third option was to do nothing.

162. The first option was considered most appropriate as it was considered that the definition of "extreme pornography" adopted in England and Wales was insufficiently broad. In particular, that definition does not extend to images of rape, unless they depicted activity likely to result in serious injury to the victim's breasts, anus or genitals or to threaten that person's life.

163. Although adopting the second option would result in legislative consistency across the UK, that is not paramount and the Working Group concluded that there was little justification for excluding images of rape from an offence intended to combat extreme pornography.

164. Given that consideration of a possession offence is intended to address the technological advances which have led to individuals being able to access material whose sale or distribution has long been prohibited under existing legislation the status quo was not considered to be acceptable.

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[13] http://www.homeoffice.gov.uk/documents/cons-extreme-porn-3008051/

[14] http://www.scotland.gov.uk/Topics/Justice/criminal/17543/ExtremePornograhicMateria/AnalysisReport

165. The new offence is therefore similar to that at section 63 of the Criminal Justice and Immigration Act 2008, which applies in England, Wales and Northern Ireland. The Scottish offence goes further, however, in that it will cover all obscene pornographic images which realistically depict rape or other non-consensual penetrative sexual activity, whether violent or otherwise (whereas the English offence only covers forms of violent rape).

Section 35 - People trafficking

Policy objectives

166. To improve the law.

Key information

167. The trafficking of human beings for exploitation is a criminal offence. Scottish provisions relating to those trafficked for sexual exploitation are contained in section 22 of the Criminal Justice (Scotland) Act 2003 with the equivalent legislation for England, Wales and Northern Ireland being contained in sections 57 to 60 of the Sexual Offences Act 2003. The provisions relating to trafficking of people for forced labour, slavery and organ harvesting are contained in sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and these provisions extend to Scotland.

168. The offences in England, Wales and Northern Ireland relating to trafficking of people for non-sexual exploitation were amended by section 31(1)-(2) of the UK Borders Act 2007, which extended the provisions to include facilitating the arrival or entry into the UK of a person for the purposes of exploitation and also removed the limitations on the territorial application of the offence. Therefore, facilitating the arrival or entry into the UK of a person for the purposes of exploitation, regardless of where the facilitation took place and irrespective of the nationality of the facilitator, is caught by the offences. However, these amendments were not extended to Scotland.

169. In addition, section 31(3)-(4) of the UK Borders Act 2007 made similar changes to the provisions in the Sexual Offences Act 2003 concerning the trafficking of people for sexual exploitation. As mentioned above, these provisions do not apply to Scotland as separate provision is made in the Criminal Justice (Scotland) Act 2003.

170. The provisions in this Bill will make similar changes to those contained in section 31 of the UK Borders Act 2007 by amending and clarifying Scots law to:

- ensure that where a person outwith the UK (irrespective of his/her nationality) undertakes trafficking activities and an individual is trafficked to, within or out of the UK for the purposes of sexual or non-sexual exploitation it will constitute an offence under Scots law; and
- extend the offence provisions concerning trafficking for sexual or non-sexual exploitation so that they cover any act of facilitation of an individual into the UK following his/her arrival here (but before they have entered the UK).

171. It will also make clear that the sheriff court has jurisdiction to deal with these extra-territorial offences.

172. The changes will ensure consistency of the law on this issue across the UK.

Consultation

173. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

174. No alternative approaches were considered as these proposals are necessary technical changes to Scots law to ensure consistency of the law on this issue across the UK.

Section 36 – Alternative charges for fraud and embezzlement

Policy objectives

175. To provide an increase in flexibility for a court in reaching a verdict in prosecutions for the offences of fraud or of "breach of trust and embezzlement".

Key information

176. The provisions will ensure that where an accused is charged with the offence of "breach of trust and embezzlement" it will be possible for the court to instead convict the offender of fraud if such a verdict is more appropriate on the evidence led. In a similar way, where in future an accused is charged with fraud he or she may be convicted instead of "breach of trust and embezzlement".

177. An offender may be convicted of certain alternative offences involving dishonest appropriation of property notwithstanding the fact that the indictment or summary complaint refers to a different offence. This applies where the evidence led would not support conviction on the basis of the offence as charged but would support conviction of the alternative offence. For example, an accused person charged with theft may instead be convicted of reset if the evidence led would not support conviction of theft but would support conviction of the alternative offence of reset.

178. The provisions will provide that where an accused is charged under indictment or on complaint with "breach of trust and embezzlement" he or she may be convicted of fraud. Conversely, if charged with fraud he or she may be convicted instead of "breach of trust and embezzlement".

Consultation

179. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

180. There is no alternative approach that can achieve the policy objective. If this measure were not to be adopted, it would perpetuate the existing situation in which a fraud conviction is not an option in a trial for breach of trust and embezzlement even though the evidence led in a trial for becomes, in the course of the case, more suggestive of fraud.

Section 37 – Conspiracy to commit offences outwith Scotland

Policy objectives

181. To provide clarity for Scottish courts to deal with conspiracies in Scotland to commit criminal acts elsewhere in the United Kingdom.

Key information

182. Section 11A of the Criminal Procedure (Scotland) Act 1995 deals with conspiracies to commit offences. This section was inserted by section 7 of the Criminal Justice (Terrorism and Conspiracy) Act 1998. In essence, it provides that conspiracy in Scotland to commit an offence outwith the United Kingdom is itself an offence, provided that the criminal purpose being conspired would constitute an offence in the place where it was intended to be carried out.

183. In light of the Glasgow and London attacks in July 2007, the law on extraterritorial offences was reconsidered. Section 28 of the UK Counter-Terrorism Act 2008 contains provisions allowing proceedings to be taken in any part of the UK for terrorist offences (including conspiracy) regardless of where in the UK the offence is committed. These new provisions will only apply to "terrorist offences", which would be outwith the legislative competence of the Scottish Parliament.

184. In relation to non-terrorist offences, a gap in law has been identified in that section 11A does not provide statutory coverage for conspiracies formed in Scotland to commit offences in England, Wales or Northern Ireland. Scottish courts can assert jurisdiction and rely on common law to deal with conspiracy, for example, a conspiracy formed abroad where the prospective act, which constitutes a crime under Scots law, was intended be committed in Scotland. However, there is sufficient doubt that exists about the jurisdiction of Scottish courts to deal with conspiracies to commit offences in England, Wales and Northern Ireland.

185. Closing the loophole by amending section 11A of the Criminal Procedure (Scotland) Act 1995 will provide clarity for Scottish courts to deal with conspiracies in Scotland to commit offences in other parts of the United Kingdom, which in turn will mean section 11A can be used to deal with conspiracies to commit offences in any part of the world furth of Scotland.

Consultation

186. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

187. There are none that meet the policy objective.

PART 3 – CRIMINAL PROCEDURE

Section 38 – Prosecution of children

Policy objectives

188. To ensure Scotland meets international standards as regards the age at which children can be prosecuted.

Key information

189. The provisions will raise the age of criminal responsibility by prohibiting the prosecution of children under 12 while still allowing them to be referred to a Children's Hearing on offence grounds, whilst retaining the existing rule that children under 8 are conclusively presumed not to be guilty of any offence.

190. Section 41 of the Criminal Procedure (Scotland) Act 1995 states that it "shall be conclusively presumed that no child under the age of eight years shall be guilty of an offence". Under section 42 of that Act "no child under the age of 16 shall be prosecuted for an offence except on the instructions of the Lord Advocate, or at his instance". The law as it currently stands therefore allows children from the age of 8 up to 16 to be prosecuted in the criminal justice system. This is considered by many to be contrary to international standards and the United Nations Convention on the Rights of the Child (article 40(3)(a)) which suggests that 12 is the minimum acceptable age at which children should be held accountable for their actions before full (adult) criminal justice proceedings.

191. The Bill includes provision to prohibit the prosecution of children under the age of 12 (or a person over that age for an offence committed while under 12). When this takes effect it will mean that, whatever the offence committed, a child under the age of 12 can only be dealt with by the Children's Hearings system.

Consultation

192. In 2001, the Scottish Law Commission (SLC) consulted a variety of stakeholders during their review of the age of criminal responsibility between 2000 and 2002. Wide support was received for their recommendations to raise the age at which children can be prosecuted in the criminal justice system. The provisions contained in the Bill implement the main recommendations of the SLC report *"Report on Age of Criminal Responsibility*[15]*"* by introducing a restriction on prosecution of children under 12, however the SLC's recommendation to abolish the existing conclusive presumption in relation to under 8s is not taken forward.

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[15] http://www.scotlawcom.gov.uk/downloads/rep185.pdf

193. On 18 December 2008, we published a consultation on our response to the 2008 concluding observations from the UN Committee on the Rights of the Child[16]. This includes specific reference to the age of criminal responsibility and invites responses on this key issue.

Alternative approaches

194. The current approach to delivering this policy is for the Lord Advocate to choose not to prosecute children under the age of 12. That is a decision entirely for the Lord Advocate. (No children under the age of 12 were prosecuted between 2002/03 and 2006/07). Nevertheless, so long as Scots law continues to allow for prosecution of children under the age of 12 it will remain a possibility which will continue to contravene international standards. Provisions contained within the Bill will resolve this and ensure that children under the age of 12 who commit offences are dealt with effectively in an age appropriate system.

Section 39 – Offences: liability of partners

Policy objectives

195. To establish consistent provision for individual criminal liability of partners for offences committed by Scottish partnerships.

Key information

196. Many statutes creating criminal offences provide for individual liability of directors of corporate bodies. Where such a body corporate is guilty of the offence, and an individual director has consented or connived in the offence or his/her neglect has led to the offence, then that director is also guilty of the offence.

197. More recent statutes have sometimes also made similar provision for partners in Scottish partnerships, but this has not been done consistently. The provisions rectify this by providing that wherever statute provides for individual liability for directors of a body corporate, there will be equivalent individual liability for partners of a Scottish partnership. This will also apply to future legislation and will simplify drafting. A similar approach has already been taken with respect to Limited Liability Partnerships.

Consultation

198. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

199. The alternative approach would be to continue to make piecemeal provision for individual liability of partners for offences committed by Scottish partnerships. The approach adopted has the benefit of achieving consistency.

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[16] http://www.scotland.gov.uk/Publications/2008/12/18090842/0

Section 40 – Witness statements

Section 62 – Witness statements: use during trial

Policy objectives

200. To ensure fairness for witnesses in giving evidence in criminal cases.

Key information

201. The provisions will allow witnesses to have sight of their statement(s) before giving evidence in court. Lord Coulsfield's *"Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland*[17]*"* was published in September 2007. The report noted that, although not strictly an issue of disclosure in criminal proceedings in Scotland, this issue is linked and that there was general support for change, to allow witnesses being able to refer to copies of their statements, in all cases where these statements have been made available to the Crown and to the defence.

202. The issue was one of fairness to witnesses who could be presented with their statement(s), or parts of their statement(s), in court for the first time which does not allow any inaccuracies or misunderstandings to be addressed and could have an inadvertent, detrimental effect on their ability to give evidence.

203. Further, with developments in the law on disclosure, witnesses now are commonly the only people in court who have not seen their own statement prior to a trial. There is concern that this is unfair and could turn the witness's testimony into little more than a memory test.

204. The provisions will:

- enable prosecutors to provide those witnesses that will give evidence at trial with a copy of their statement(s) or otherwise make it available to them by inspection, in all cases where the statement(s) have been made available to the Crown and to the defence (but not necessarily the accused himself), in advance of a trial;
- enable witnesses to refer to their own statement(s) at trial. The Bill will not replace the existing common law on the use to which statements can be put, it is designed purely to allow witnesses to check their statement if they are unsure about anything or cannot remember something. This is something that police witnesses have been and are able to do but not civilians. This is not intended to replace parole or oral evidence given by witnesses. Parole evidence will still be taken from the witness but the court will be able to allow the witness to refer to their statement in certain circumstances; and
- Make clear that "statements" must be contained in a document or otherwise recorded before these provisions apply.

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[17] http://www.scotland.gov.uk/Publications/2007/09/11092728/0

205. By specifically enabling prosecutors to allow witnesses to see their statement(s) in advance of giving evidence, or to refer to them in giving evidence, through express statutory authority this should remove the risk of successful challenges to otherwise admissible evidence, purely on the basis of the witness having had access to his or her own statement – again, in the same way as police witnesses have long been assumed to be able to consult their notebooks.

206. The detail of how the system for giving witnesses access to their statements in practice will be included in the Code of Practice on Disclosure (see section 114 of the Bill).

Consultation

207. In November 2007 we published a consultation paper on proposals for legislation to implement the recommendations in the Coulsfield Report. Most respondents agreed that witnesses should be able to refer to copies of their statements when called to give evidence but caution was expressed regarding quality of statements, it being essential to ensure that witness statements are recorded or noted using the witness's own words.

Alternative approaches

208. There are none that meet the policy objective.

Section 41 – Breach of undertaking

Policy objectives

209. To ensure consistency in law with how breaches of undertakings and breaches of bail are dealt with.

Key information

210. The provisions will allow an accused who has committed an offence after being liberated by police on an undertaking to be charged with an aggravation of the subsequent offence rather than being charged with the separate offence, as at present.

211. This change means that breach of police undertakings will be treated in the same way as a breach of bail (imposed by the court), both of which can indicate contempt for the criminal justice system.

Consultation

212. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

213. We could continue to charge for the separate offence rather than treat as an aggravation, but we consider it is preferable to have consistency in law with how breaches of bail are dealt with.

Section 42 – Bail review applications

Policy objectives

214. To save court time.

Key information

215. The provisions remove the requirement for a hearing to give consideration to an application made under section 30 of the Criminal Procedure (Scotland) Act 1995 where i) the other party consents to the application and ii) the court is minded to grant the application. An example of an application under this section would be an accused seeking to have the hours of a curfew bail condition altered (perhaps as a result of their working hours changing). Arrangements are already in place to facilitate change of domicile where both parties agree, this proposal will cover other bail conditions.

Consultation

216. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

217. There is no alternative approach that meets the policy objective. The current position could continue whereby courts consider all unopposed bail review applications, but this would continue to waste valuable court time.

Section 43 – Bail condition for identification procedures etc.

Policy objectives

218. To save court time.

Key information

219. The provisions remove the need for the Crown to seek a further special bail condition for an accused to make themselves available for attendance at any ID procedure. Such conditions are becoming more and more common and by including it in the standard conditions, this will save court time through the Procurator Fiscal not having to ask the court to impose the additional condition. The effect of the provision is that the accused will, where reasonably instructed to do so, be required to appear at any ID procedure and to give any print, impression or sample. This requirement will sit alongside the existing list of standard bail conditions.

Consultation

220. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

221. There is no alternative approach that meets the policy objective. Procurator Fiscals could continue to specifically ask the court to impose the requirement to attend an ID procedure; however this would continue to result in taking up valuable court time.

Section 44 – Prosecution on indictment: Scottish Law Officers

Policy objectives

222. To improve criminal procedure.

Key information

223. The provisions will improve the procedures for the raising of indictments in name of the Lord Advocate and, in particular, reduce the risk that proceedings fail due only to an error prompted by the timing of the appointment of the Lord Advocate or Solicitor General.

224. Section 64 of the Criminal Procedure (Scotland) Act 1995 provides that all prosecutions before the High Court of Justiciary or before the Sheriff sitting with a jury shall proceed on indictment in name of Her Majesty's Advocate.

225. A strict reading of the provision means that the indictment requires to run in the personal name of the Lord Advocate, rather than by his or her official title as "Her Majesty's Advocate". Where the Lord Advocate dies or demits office and is immediately succeeded by a new Lord Advocate, without the office of Lord Advocate being vacant for any period, the correct libelling of indictments relies on knowing the precise point at which the warrant of appointment was signed. In practice, this causes administrative difficulties for the Crown in ensuring that indictments are correctly libelled, having regard to the timing of demission and succession.

226. By extension, the same issue arises where the indictment may be in name of the Solicitor General, in the event of the death or demission of office of the Lord Advocate. If the Solicitor General were then to die or demit office and be succeeded while the office of Lord Advocate remained vacant, the same administrative difficulties arise.

227. The current provisions are to be amended to make clear that accused persons should be indicted at the instance of "Her Majesty's Advocate" but that there should be no requirement for the individual Lord Advocate to be named, personally. In addition the provisions are to be amended to ensure that where accused persons are indicted at the instance of the Solicitor General, the individual Solicitor General need not be named, personally, and that the format of an indictment need not be changed on demission and appointment of either the Lord Advocate or Solicitor General.

228. The provisions governing death and demission of office by the Lord Advocate or Solicitor General (section 287 of the Criminal Procedure (Scotland) Act 1995) are also to be amended to cure a lacuna in the current provisions, which deal with the situation where the Law Officers demit office separately or on the same day, but not where the reason for both their

offices being vacant is caused by the death of the remaining Law Officer in office or the deaths of both of the Law Officers. The provisions are to be amended to address this.

Consultation

229. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

230. In addition, the Lord President's Office and the Crown Office were informed of the proposals and invited to comment.

Alternative approaches

231. The procedures are set down in statute and so any change to those procedures requires an amendment to the relevant legislation.

Section 45 – Transfer of justice of the peace court cases

Policy objectives

232. To enable more efficient court programming and allow the fullest use to be made of Justice of the Peace (JP) courts.

Key information

233. The unification of the summary courts under the administration of the Scottish Court Service is currently being rolled out on a sheriffdom-by-sheriffdom basis using provisions contained within the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. The first three phases of unification are now complete, with district courts managed by local authorities having now been replaced by JP courts managed by the Scottish Court Service in the sheriffdoms of Lothian & Borders; Grampian, Highland & Islands; and Glasgow & Strathkelvin.

234. In sheriffdoms where unification is yet to occur, the district court may sit at various locations within the sheriffdom. The frequency of sittings is determined by the level of business in the area. Where the district court sits infrequently at a particular location, it is common practice to move cases which require to call before the next sitting to a different location.

235. While Justices of the Peace have Sheriffdom wide jurisdiction, JP courts are established by reference to a particular sheriff court district (section 59(3) of the 2007 Act). The provisions in this Bill make express provision to allow cases to be transferred between JP courts in similar circumstances as those specified in sections 137A-137C of the Criminal Procedure (Scotland) Act 1995 for sheriff courts. The Bill provides for the transfer of proceedings to another JP court, either to another JP court within the Sheriffdom or where there are exceptional circumstances to a JP court within another Sheriffdom.

Consultation

236. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

237. In the absence of statutory provision, the view may be taken that cases heard in the JP court could not be moved into another JP Court in the same manner as between district courts. The provisions remove any doubt as to whether or not cases may be similarly transferred between JP courts, ensuring that current practice may continue. This will facilitate the smooth operation of court business.

Section 46 – Additional charge where bail etc. breached

Policy objectives

238. To streamline the administration of justice while continuing to underline the importance to the accused of attending court when they are required to.

Key information

239. The provisions will allow complaints to be amended to include an additional charge covering an offence committed as a result of breaching bail conditions or an offence committed in respect of a failure to appear at a diet. This change will assist the Procurator Fiscal in that they will no longer have to libel a separate charge where such breaches or failures occur.

Consultation

240. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

241. There is no alternative approach that meets the policy objective. The current position could continue whereby the Procurator Fiscal libels a separate charge with respect to the failures to appear, but this would not meet the policy objectives.

Section 47 – Remand and committal of children and young persons

Policy objectives

242. To ensure children (accused of offences) no longer suffer the adverse effects of being remanded in adult prisons alongside convicted adult criminals.

Key information

243. Under section 51 of the Criminal Procedure (Scotland) Act 1995, a child aged 14 or 15 years who appears before a court charged with a crime or offence may, because of their "unruly" character, be detained in the prison system.

244. The provisions will repeal section 51. When this takes effect, it will mean that where a court remands or commits a child for trial or for sentence and does not release him on bail or ordain him to appear, the court shall commit him to an appropriate local authority to be detained in secure accommodation (where necessary) or a suitable place of safety.

Consultation

245. A consultation exercise[18] on the implications of this change was conducted in the summer of 2008, with numerous responses from public bodies such as local authorities and the Children's Commissioner. The responses, which were supportive of the proposed change, are being analysed and will be used to inform any need for alternative provision of accommodation. Analysis of the responses will be published on the Scottish Government website in due course.

246. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

247. In the absence of the repeal, the status quo would remain in place. However, we are convinced that the repeal will ensure that the needs and welfare of young people are best addressed through the use of more appropriate facilities designed specifically to cater for their needs.

Sections 48-51 – Prosecution of organisations

Policy objectives

248. To tidy up the law by clarifying how criminal proceedings against partnerships should operate, and ensure there is consistency between the provisions of sections 70 and 143 of the Criminal Procedure (Scotland) Act 1995.

Key information

249. Section 70 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") deals with proceedings on indictment against corporate bodies. It provides for how the indictment is served, appearance by a representative for certain purposes, and for recovery of fines. While limited liability partnerships are covered, section 70 does not make provision about partnerships or other unincorporated associations.

250. In contrast, section 143 of the same Act, which deals with summary procedure, specifically provides for how proceedings may be brought against partnerships, unincorporated associations, and bodies of trustees as well as bodies corporate.

251. The provisions widen the provisions of section 70 of the 1995 Act to cover partnerships, associations and bodies of trustees to bring it in line with section 143.

252. The provisions extend sections 70 and 143 to other entities not already covered, such as government departments and the Scottish Ministers.

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[18] http://www.angus.gov.uk/ccmeetings/reports-committee2008/Socialhealth/689App2.pdf

Consultation

253. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

254. There are no alternative approaches that meet the policy objective.

Section 52 – Disclosure of convictions and non-court disposals

Policy objectives

255. To allow the court to have as full a picture as possible of an accused's behaviour when passing sentence.

Key information

Taking account in sentencing in solemn proceedings of any conviction(s) acquired between the date of the offence and the date of conviction.

256. In summary proceedings, the court may have regard to convictions acquired by a person between the date of the offence and the date of conviction for the offence where sentence is being passed. We consider that this principle should also apply in solemn proceedings and the provisions achieve this.

Disclosure of post-offence direct measures in all proceedings

257. Where an offender is charged with an offence, and accepts, or is deemed to have accepted an offer of a direct measure in relation to a separate offence *between* the date of the offence being prosecuted and the date of disposal, this could not currently be disclosed to the court in passing sentence. The provisions therefore allow the court to take account of offers of fixed penalties ("fiscal fines") and compensation offers which have been accepted (or have been deemed to be accepted) and work orders which have been completed between the date of the current offence and the date of disposal for that offence.

Changes to disclosure of Procurator Fiscal "Work Orders" to the Court

258. The provisions will ensure that accused persons will be informed that where a work offer is accepted but not completed, that fact may be disclosed to the court in any subsequent proceedings for the offence to which the work offer relates. This is in line with other direct measures such as fiscal fines and compensation offers.

259. The provisions will also ensure that a work order completed in the two years preceding the date of the offence charged can be disclosed to the court in relation to proceedings for a subsequent offence.

Consultation

260. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

261. There is no alternative approach that can achieve the policy objective. Continuing with the status quo would mean criminal cases would proceed in the same way as at present without the court having access to as much relevant information when passing sentence.

Section 53 – Time limit for lodging certain appeals

Policy objectives

262. To improve the operation of certain appeal procedures before the courts.

Key information

263. The provisions extend the time limit for lodging appeals against decisions made at certain preliminary diets from 2 days to 7 days.

264. Sections 74 and 174 of the Criminal Procedure (Scotland) Act 1995 make provision, in solemn and summary proceedings respectively, for appeals against certain decisions of the court. Both sections provide that an appeal is to be lodged no later than two days after the decision.

265. In order to properly consider whether to appeal, parties have to examine the exact details of the decision. It is often difficult to obtain this information within the two-day time limit. By enabling both Crown and defence sufficient time to consider and lodge an appeal against a preliminary decision, the efficiency of the courts will be improved.

Consultation

266. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

267. If this change were not made, it would continue the current position where it is possible for neither the Crown nor the defence to have sufficient time to reach a decision on whether to make an appeal. The Crown might in some High Court cases be able to seek to exercise its general right to challenge any decision of the High Court by way of bill of advocation, however, that provision is a cumbersome alternative and is, in addition, not available to the defence.

Sections 54-57 – Crown appeals

Policy objectives

268. To help ensure public confidence in the legal system is maintained.

Key information

269. The provisions clarify and remove some ambiguities and flaws in the law concerning certain judicial decisions that can end a trial without a verdict of a jury. The provisions also provide the Crown with a right to appeal against those decisions.

270. This right of appeal provides a safeguard for cases where the trial judge's decision to end a trial is disputed and the Appeal Court agree that the case should have continued. Such cases are expected to be highly unusual. Enabling the Appeal Court to consider questions on sufficiency that arise in the course of a Crown Appeal is expected to promote the accurate settling of the law and its proper application to the facts of future cases. It will allow retrieval of prosecution cases which would previously have fallen as a result of an error in law by a trial judge. We accept the Scottish Law Commission's assessment (in looking at this issue) that "public confidence in the legal system is more likely to be maintained if an erroneous ruling at first instance can be reversed" (see paras. 3.4-3.11 of the SLC's Report for further detail).

271. The provisions are based on recommendations contained in the Scottish Law Commission's recent report *"Report on Crown Appeals*[19]*"*. The recommendations have largely been accepted for the reasons put forward in the report. Certain recommendations have not been accepted, as explained further below.

272. Three types of ruling can bring solemn proceedings to an end without the verdict of a jury. The first is a ruling of no case to answer, where the judge rules at the close of the Crown case that the evidence led by the prosecution is insufficient in law to justify a conviction. The second is a direction, in the course of the judge's charge to the jury after all evidence has been led, that the jury should not convict on a particular charge, or should consider only a reduced charge. Such a direction, made following a so-called "common-law submission", may be focused on the basis of insufficient evidence. The third is a ruling in the course of a trial that an important item of prosecution evidence is inadmissible, leaving the Crown with no option but to abandon the case. As the law currently stands, the Crown has no means of appealing against any of these rulings.

273. The SLC's Report on Crown Appeals makes 22 recommendations for changes to solemn criminal procedure. The effect of the accepted recommendations as they appear in the Bill will be:

- to introduce a statutory replacement for the "common-law submission" at the close of all (Crown and defence) evidence. However one aspect of the SLC's recommendation on this point has not been adopted (see below).
- to provide the Crown with a right of appeal against rulings of no case to answer, decisions on the statutory replacement of a common law submission and certain findings relating to the admissibility of prosecution evidence.

274. The statutory restatement of the "common-law submission" will allow the defence to make a submission at the close of the entire evidence in a case to the effect that there is:

(i) an insufficiency of evidence to support the charge in the indictment or any other related offence; and/or

(ii) no evidence to support some part of the circumstances set out in the indictment.

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[19] http://www.scotlawcom.gov.uk/downloads/reps/rep212.pdf

275. It will be possible for the defence to make the submission without Crown consent, but the Crown will have a right of reply. If the judge upholds the defence submission, then the judge will either acquit the accused of the charge in question; order that the indictment be amended to reflect a related charge or order that the indictment be amended to reflect the fact that there was no evidence to support some of the circumstances narrated.

Crown Rights of Appeal

276. The Bill grants new rights of appeal to the Crown. It will in future be possible for the Crown to appeal the decision of a trial judge to acquit an accused of a charge following either a submission of no case to answer under section 97 of the Criminal Procedure (Scotland) Act 1995 (the “1995 Act”) or using the new statutory formulation of the “common-law submission". It will also become possible for the Crown to appeal against evidential rulings made by a judge during the course of a trial, for instance on the admissibility of a particular piece of evidence. The Crown already has a right of appeal in respect of evidential rulings made during pre-trial procedure, and it would seem consistent for the right to extend to all such rulings.

277. Where the Crown is to appeal a decision by the trial judge, it will be on the basis that the judge’s ruling was wrong in law. If the Crown appeal succeeds, the Appeal Court will be able to grant authority to bring a new prosecution where that is not contrary to the interests of justice. If authority is granted, it is anticipated that the normal result should be a re-trial rather than the continuation of the existing trial. This is for reasons of practicality: if it were feasible for an appeal to be heard during a continuation of the existing trial, then this will be permissible.

278. In relation to whether leave of the court should be sought for the Crown to make an appeal, we have departed from the SLC’s conclusions. Recommendation 17 of the Report proposed a leave requirement for all forms of Crown Appeal being made possible under this Bill and the draft Bill does require the Crown to seek leave to appeal certain findings relating to the admissibility of prosecution evidence. However, it has been concluded that rights of appeal under either a submission of no case to answer (under section 97 of the 1995 Act) or under the new statutory formulation of the “common-law submission" should not be restricted by a leave requirement. It is not anticipated that these rights of appeal will be used except in a very limited number of cases, and it is not considered that there is a need for a leave requirement in order to guard against overuse of the appeal procedure.

279. Where leave to appeal is required, it should be granted by the trial judge. In making the assessment, the judge should consider the arguability of the Crown appeal and the effect of the evidential ruling (or series of rulings) has had on the strength of the Crown case.

280. Where the Crown has launched an appeal against an acquittal under sections 97, 97B or as a result of evidence being found inadmissible, the Bill allows the court to remand the accused in custody or to admit him to bail. The court may only exercise this power after hearing parties. This provision is intended for use in exceptional circumstances.

281. Provision is also made to allow a trial judge to make an order under the Contempt of Court Act 1981 where an appeal is made by the Crown under sections 107A or 107B, following an acquittal. This will mean that publication of any media report of proceedings can be

postponed where there is a possibility that further proceedings might be brought against the accused.

Departures from the SLC Report

282. It is outlined above that recommendation 17 (in relation to leave to appeal) has not been fully adopted. We have also departed from the SLC's proposals in relation to two other recommendations.

283. The SLC in its first recommendation had proposed an extension of the no case to answer provision under section 97 of the 1995 Act. This extension would have allowed a judge to rule that on the evidence led by the Crown no reasonable jury, properly directed, could convict. We have decided not to adopt the proposed extension of section 97. The issue is a complex one, and there was a substantial level of opposition to the proposal recorded within the SLC's Report. A significant factor in deciding not to adopt this proposal was the concept of allowing the court to consider all of the evidence in its totality. We consider that it is fair as a matter of principle for all evidence to be led (both by the prosecution and the defence) before the court is asked to give a view on the quality of evidence in the case. It has therefore been concluded that the balance is struck appropriately by the current provisions of section 97, and recommendation 1 is not being adopted.

284. Although recommendation 2 has to a large extent been incorporated in the Bill, one aspect of it has not been adopted. This is recommendation 2(a)(iv), which would have included within the statutory replacement for the "common-law submission" an ability for the defence to contend that on the entire evidence led in the case, no reasonable jury properly directed could convict. If it were the case that the Appeal Court handled greater numbers of appeals on the grounds that no reasonable jury could have returned a conviction, then recommendation 2(a)(iv) could be seen as a useful tool to deploy as a way of pre-empting such appeals. However, as appeals on this ground are relatively few in number we have concluded that it is not clear whether adoption of the recommendation would provide any great benefit in practice. The benefit would appear to be that juries would not be compelled to assess a small number of hopeless cases and that an even smaller number of cases would not go to the appeal court where the jury had convicted in circumstances in which no reasonable jury could have reached that conclusion (and so avoiding cost and injustice as a result).

285. Against that relatively limited benefit is to be weighed the potential impact on court time in processing "no reasonable jury" submissions. Although trial judges would be expected to follow the appeal court by maintaining "no reasonable jury" as a very high test, there is a risk that the proposal might create a negative impact on court time.

286. Considering the lack of a significant 'mischief' to be addressed by the proposal and the potential that it bears for disruption to court time, we have decided not to adopt recommendation 2(a)(iv) within the Bill.

Consultation

287. In November 2007 we asked the SLC to consider a reference featuring several topics, including Crown Appeals. In March 2008, the SLC published a Discussion Paper on Crown

Appeals (*discussion paper no. 137*[20]) which sought views on their emerging findings on reform of the law.

288. The SLC received 14 responses to their discussion paper, which helped to inform the recommendations contained in their final report, published on 30 June 2008. A full list of those who submitted written responses to the SLC's discussion paper can be found at Appendix B to their final report[21]. Those making a response were typically legal academics or practitioners. The SLC also held discussions with a reference group consisting of members of the judiciary and held preliminary consultations with representatives of the Faculty of Advocates' Criminal Bar Association, the Law Society of Scotland's Criminal Law Committee and the Crown Office.

289. Responses to the SLC's Discussion Paper were generally in favour of the proposed reforms. Recommendation 1 attracted the least consensus, with the judges of the High Court, the Sheriff's Association, the Crown Office and two of the Scottish Law Commissioners not in favour. Recommendation 2, with its proposed statutory restatement of the common law submission, attracted the support of all but two respondents. One specific challenge was made to recommendation 2(a)(iv) on the grounds that it would not be appropriate for a judge to rule that on the evidence led no reasonable jury properly directed could convict of the charge libelled. This view was based on the opinion that this issue was not a question of law, but of fact and consequently should be left to the jury. The general principle of providing the Crown with a right of appeal in relation to at least some of the judicial rulings that can bring a solemn case to an end without the verdict of a jury attracted support from all the respondents who expressed a view. In relation to leave to appeal, most consultees favoured our approach of not imposing a leave requirement for rights of appeal under a submission of no case to answer or under the new statutory formulation of the "common-law submission". Although this stance was initially proposed by the SLC itself in the Discussion Paper, the SLC decided in their report that leave should be required.

290. There were a number of additional recommendations where not all respondents were in agreement, for example in relation to the extension of a Crown right of appeal to evidential rulings. However, in general the SLC's other proposals were broadly accepted.

291. A summary of the SLC's principal recommendations were included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

292. There is no alternative approach that can achieve the policy objective. Continuing with the status quo would not pose great difficulty, and criminal cases would proceed in the same way as at present; without a Crown right's of appeal as described above. However, the reforms are intended to improve the law at a low overall cost.

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[20] http://www.scotlawcom.gov.uk/downloads/dp137.pdf

[21] http://www.scotlawcom.gov.uk/downloads/reps/rep212.pdf

Sections 58-60 – Retention and use of samples etc.

Policy objectives

293. To enhance public protection and improve the law in relation to the retention and use of DNA, fingerprints and other physical data.

Key information

294. Forensic evidence obtained from DNA, fingerprints and other physical data ('forensic data') plays an important and increasing role in the investigation of crime. It is standard practice in Scotland, as in many other countries, for the police to take forensic data from someone who is arrested or detained on suspicion of having committed criminal offences and such samples are routinely added to forensic databases. If that person is subsequently convicted, his or her forensic data may be retained indefinitely, subject to periodic weeding of records relating to old or minor offences.

295. Forensic evidence has played a key role in securing convictions in a number of serious and high profile crimes, including some which remained unsolved for a number of years. Being able to positively identify an offender at an early stage can prevent further offences being committed. Forensic evidence is, therefore, an important tool in terms of protecting the public and communities. Not only does forensic evidence play a role in establishing guilt, it can also eliminate the innocent from investigations and, in homicides, terrorist incidents and civil disasters, plays a vital role in the identification of bodies and body parts.

296. The present statutory framework in Scotland in respect of the retention of forensic data from those who have not been convicted (section 18A of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act")), which has been in place since 1 January 2007, seeks to strike a balance between the undoubted benefits of retaining forensic data for future criminal investigations and the civil liberties implications of retaining forensic data (specifically DNA samples and profiles) taken from persons arrested on suspicion of having committed an offence but who are not ultimately convicted of that offence. There are some gaps in the current arrangements in Scotland: for example there are limited powers for the retention of DNA samples and profiles from persons proceeded against but not convicted of sexual or violent offences, but none in respect of fingerprint data. Against this background, Professor James Fraser, the Director of the Centre for Forensic Science at Strathclyde University and Chair of the European Academy of Forensic Science, was asked to review the operation and effectiveness of the legislative regime governing police powers regarding the acquisition, use and destruction of forensic data. In September 2008, we consulted on proposals stemming from Professor Fraser's review[22]. This work formed the basis of the provisions that have been introduced in this Bill.

297. The recent judgement from the European Court of Human Rights (ECHR) in the case of S and Marper v UK (application Nos: 30562/04 and 30566/04) has highlighted the importance of achieving striking this balance and having measures which are proportionate for retaining forensic data which is taken. The judgement highlighted that the present arrangements in Scotland contained in section 18A of the 1995 Act, strike a balance between the public

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[22] http://www.scotland.gov.uk/Publications/2008/09/22154244/0

protection benefits of retaining DNA for future criminal investigations and the rights of those who have had DNA taken under suspicion of having committed and offence, but are not ultimately convicted. The current statutory framework only allows DNA which is taken from those who are not convicted, to be retained for a limited period of time. Furthermore, such material can only be retained if a person is proceeded against for a violent or sexual offence. The measures only apply to those suspected of committing serious offences.

298. With the introduction of the new powers proposed, it is the intention to ensure that this balance is maintained and, in particular, that power to retain forensic data indefinitely is only available if a person has been convicted of an offence in a court of law.

299. In Scotland, power already exists to take forensic data (DNA, fingerprints and other physical data - palm prints, prints or impressions of another external part of the body, and records of skin on an external part of the body) from any individual who is arrested and is in custody or detained under section 18 of the Criminal Procedure (Scotland) Act 1995. Therefore, there are no proposals to extend powers to take forensic data, only to retain it.

300. Where a person has been convicted in court of any offence, there is currently a power to retain his or her forensic data indefinitely. Where a person has been proceeded against but not convicted in court of a sexual or violent crime, DNA can currently be retained for a period of three years, with discretion for the chief constable to apply to a sheriff for extensions of up to 2 years at a time. The proposals outlined below seek to extend this latter arrangement to the retention of fingerprints; and to certain cases within the Children's Hearings System.

Section 58 – Retention of samples etc.

301. This section authorises the retention of fingerprints and any other forensic data already taken from persons proceeded against but not convicted of a serious sexual or violent offence. Data does not have to be destroyed for at least 3 years, and the relevant chief constable would have discretion to apply to a sheriff for extensions of up to 2 years at a time. This would bring the law on the retention of fingerprints and other forensic data into line with current law on DNA retention. The Marper judgement comments favourably on the current Scottish position on retention of DNA in such cases. Strasbourg also recognised that DNA is classed as more sensitive personal information than fingerprints and other relevant physical data. So, if DNA can already be retained, for the reasons set out above, it is logical to retain any fingerprints and other material, which is taken upon the arrest or detention of a person, provided they meet the criteria for retention.

Section 59 – Retention of samples etc. from children referred to children's hearings

302. This section authorises the retention for three years forensic data taken under existing powers where a child accepts or is found by a Sheriff to have committed one of certain serious violent and sexual offences, with discretion for the chief constable to apply to a sheriff for extensions of up to 2 years at a time to provide a means of managing high risk cases. This would align with current arrangements under section 18A of the 1995 Act for retention of DNA from individuals proceeded against for violent and sexual offences, but not convicted and aims to strike a balance between the need to manage risk and protect the public with regard to offending behaviour; and maintaining the core ethos of the Children's Hearings System – to address the

needs of the child. The list of applicable violent and sexual offences would be developed in consultation with interested parties and prescribed in secondary legislation, with the resulting order subject to affirmative procedure. This approach will enable full consultation on the offences to be included, ensure links into other policy developments relating to children and provide an opportunity to review arrangements at a later date if this was considered appropriate.

Section 60 – Use of samples etc.

303. This section sets in statute the purposes for which forensic data can be used. The purposes are the prevention or detection of crime; the investigation of an offence or the conduct of a prosecution; and purposes related to the identification of a deceased person or of the person from whom the material came. This is intended to provide clarity to the public as to what forensic data can be used for in light of remarks about transparency made by Professor Fraser in his report.

Consultation

304. We published our consultation paper responding to the recommendations in Professor Fraser's review on 23 September 2008[23]. The consultation closed on Friday 21 November 2008.

Alternative approaches

305. A range of options were considered following receipt of Professor Fraser's review, which culminated in the options set out in our consultation paper. The proposals outlined above either reflect or strike the best balance between the views received in response to the consultation.

Section 61 – Referrals from Scottish Criminal Cases Review Commission: grounds for appeal

Policy objectives

306. To ensure a more streamlined appeals procedure to assist courts in making the best use of their time in dealing with cases referred by the SCCRC.

Key information

307. The Scottish Criminal Cases Review Commission (SCCRC) was established in 1999 by section 194A of the Criminal Procedure (Scotland) Act 1995. It is an independent public body which impartially reviews cases submitted by applicants convicted of a crime in a Scottish court where there may be possible grounds for considering a miscarriage of justice has occurred. The Act enables the SCCRC, if it thinks fit, to refer any conviction or sentence passed on a person to the High Court for further consideration. This covers cases where an appeal against such conviction or sentence has been heard and determined already by the High Court, but can also include cases where no appeal has been heard.

308. The grounds upon which the SCCRC may refer cases is set out at section 194C of the Act and are as follows:

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[23] http://www.scotland.gov.uk/Publications/2008/09/22154244/0

- that a miscarriage of justice may have occurred; and
- that it is considered in the interests of justice that a reference should be made.

309. The SCCRC is required by section 194D(4) to provide the Court with a statement of their reasons for making the reference. The practice of the SCCRC is to consider the possible grounds for a miscarriage of justice submitted by the applicant, and any other grounds that the SCCRC may itself identify during their consideration of the case. The SCCRC's statement of reasons is submitted which sets out the grounds on which the case is being referred alongside a referral. In practice, difficulties have emerged in that the appellant, in pursuing his appeal, can depart from the grounds on which the SCCRC has made the referral. This can include seeking to make a case on grounds that have already been discounted or rejected by the SCCRC, which in turn, can potentially have a significantly negative impact with regard to the use of court time.

310. The provisions establish a process whereby an appeal, following a reference made by the SCCRC, can only be based on the statement of reasons given in the SCCRC referral, subject to the power of the court to allow other grounds to be argued.

Consultation

311. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approach

312. There are none that meet the policy objective.

PART 4 – EVIDENCE

Section 63 – Spouse or civil partner of accused a compellable witness

Policy objectives

313. To improve the operation of the justice system and ensure the non-diverse nature of the current law is removed.

Key information

314. The provisions amend the law in order that a spouse or civil partner of an accused is treated no differently to any other witness. This will involve replacing section 264 of the Criminal Procedure (Scotland) Act 1995 and repealing section 130 of the Civil Partnership Act 2004.

315. Under the current law, in criminal proceedings in Scotland, any person who has information about a crime may be cited as witness by either the Crown or by the accused. A witness who is permitted by law to give evidence is known as a competent witness, and any witness who can be required to attend court to give evidence is known as a compellable witness. A competent and compellable witness who fails to give evidence may be guilty of contempt of court. There is, however, an exception to this rule which can lead to a witness not giving evidence and that is where the witness is a spouse or civil partner of the accused.

316. Under section 264 of the Criminal Procedure (Scotland) Act 1995, a spouse is a competent witness in all circumstances. However, s/he is a compellable witness for the prosecution or for a co-accused only where s/he is compellable at common law. In terms of the common law, a spouse is only compellable where the accused is charged with an offence against him or her. It is only where a spouse is not the victim that he or she can decline to give evidence for the prosecution. So, for example, when the victim is a child of the couple, the spouse of the accused may be an important witness. However, s/he is not a compellable witness, whereas an unmarried partner would be.

317. The rules regarding compellability of a civil partner under section 130 of the Civil Partnership Act 2004 are similar to those for a spouse.

318. The current rules have caused difficulty, particularly where the crime libelled is a crime against a child and there is important and material evidence to be obtained from a spouse in relation to that crime. It is capable of exploitation and causing abuse of the institution of marriage and of civil partnerships. There have been cases where an accused has married their partner who is a main witness in order that the partner cannot be compelled to give evidence against them. This may result in the court being unable to consider all of the material evidence in the case.

Consultation

319. A consultation paper *("Consultation Paper on Proposals to Amend the Law on Compellability of Spousal Witnesses*[24] *")* was published in June 2006. An analysis of responses to the consultation was published in November 2006[25].

320. We announced plans to repeal section 264 of the Criminal Procedure (Scotland) Act 1995 and section 130 of the Civil Partnership Act 2004 on 5 May 2008[26]. This will result in a spouse or civil partner of an accused being treated no differently to any other witness. This proposal stems from a desire to amend the non-diverse nature of the current provisions and to help protect children.

Section 64 – Special measures for child witnesses and other vulnerable witnesses

Policy objectives

321. To ensure that vulnerable witnesses benefit from "special measures" and are able to give their best evidence in all criminal proceedings (except in JP courts).

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[24] http://www.scotland.gov.uk/Publications/2006/06/21135942/0

[25] http://openscotland.gov.uk/Publications/2006/11/spousalwitnessreport/Q/Page/3 *[Link no longer operates]*

[26] http://www.scotland.gov.uk/News/Releases/2008/05/02150833

Key information

322. The provisions extend the applicability of sections 271-271M of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") to all hearings in criminal courts (except in JP courts) where a witness could be called to give evidence. The proposed change will allow special measures to be applied to all relevant criminal proceedings, and will not be restricted to trials.

323. This approach follows the one taken by section 15A of the Criminal Justice (Scotland) Act 2003 regarding proofs in relation to victim statements. Consequently, section 15A of the Criminal Justice (Scotland) Act 2003 will be repealed, because the general amendment to sections 271-271M covers proofs in relation to victim statements, since such proofs will be classed as "relevant proceedings".

324. The amendment will replace references to "trial" or "trial diet" in sections 271-271M with references to "relevant hearing" where "relevant hearing" is to mean "a hearing in relevant criminal proceedings".

325. This general textual amendment will be sufficient in operational terms and therefore will not require consequential amendment to the substantive provisions of section 271-271M, for example the time limit provisions contained in section 271(5A), or 271(13A).

Consultation

326. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

327. Maintaining the status quo would probably lead to continued inconsistency between different levels of support for vulnerable witnesses and resultant uncertainty and probably distress for witnesses who in a trial may well have benefited from special measures but who are then expected to give evidence in open court in related proceedings.

328. Only partly extending provision to certain non-trial proceedings as opposed to others would probably result in the same confusion and uncertainty for witnesses and practitioners alike. Specifying the types of additional proceeding, even if this was a non-exhaustive list may well end up being too restrictive in practice itself leading to confusion and uncertainty amongst witnesses and practitioners.

Section 66 – Witness anonymity orders

Policy objectives

329. To ensure the interests of justice are served in allowing courts, in appropriate cases, to permit witnesses to give evidence in court using measures designed to preserve their anonymity.

Key information

330. In the case of *R v Davis* issued on 18 June 2008 the House of Lords had to consider whether the Courts in England and Wales at common law enjoyed a power to permit witnesses to give evidence using measures that are designed to preserve their anonymity. The Appellate Committee, in overturning the judgement of the Court of Appeal, concluded that there was no such power at common law in England and Wales.

331. In response to the decision in the *Davis* case the UK Government introduced legislation (the Criminal Evidence (Witness Anonymity) Bill) in July 2008 on an emergency basis to confer a power on Courts in England and Wales to grant "Witness Anonymity Orders" in appropriate cases. The resulting Act does not modify or limit the Article 6 rights of an accused to receive a "fair" trial, rather it puts on a statutory footing what was always believed prior to the House of Lords decision in *Davis* to be the position at common law, namely that Courts have an inherent power to permit evidence to be given anonymously in appropriate cases.

332. In the *Davis* case the witnesses who were permitted to give evidence anonymously were the sole eye witnesses to the offence (the murder of two individuals). The following measures were permitted at the trial:

- (i) witnesses gave evidence under a pseudonym;
- (ii) the address and personal details, and any particulars which might identify the witnesses, were withheld from the appellant and his legal advisers;
- (iii) the appellant's Counsel was permitted to ask witnesses no questions that might enable any of them to be identified;
- (iv) the witnesses were to give evidence behind a screen so that they could be seen by the Judge and jury but not by the appellant;
- (v) the witnesses' natural voices were to be heard by the Judge and jury but were heard by the appellant and his Counsel subject to mechanical distortion to prevent recognition by the appellant.

333. Such a range and combination of measures have rarely, if ever, been used in Scotland to preserve a witness's anonymity, however less comprehensive measures are used and there may be circumstances where the Crown or the accused might wish to make use of the same type and combination of measures used in cases such as *Davis*.

334. Until now the courts in Scotland have held that they have the power at common law to permit a witness to give evidence with the benefit of measures that conceal their identity. In addition, the Criminal Procedure (Scotland) Act 1995 makes provision for certain measures that modify recognised practice and procedure in order to protect the interests or identity of a witness. However, the result of *Davis*, although not applicable to Scotland, has introduced a degree of uncertainty to this position.

335. The provisions in this Bill broadly replicate in Scotland the effect of the 2008 Act in England and Wales.

336. The District, Justice of the Peace, Sheriff and High Courts will all have the power to grant such Orders in any criminal proceedings. The power to grant the Order will only be available where the Court is satisfied that it is appropriate to make a Witness Anonymity Order. In granting an order, the Court must be satisfied that the following conditions are met:

(i) that the order is necessary to protect the safety of the witness or serious damage to property, or to prevent real harm to the public interest;

(ii) the power must be exercised in a manner that is consistent with the rights of the accused receiving a fair trial in terms of Article 6 subject to, of course, the possibly conflicting rights of the witness under Article 8;

(iii) that it is satisfied that it is in the interests of justice for this power to be exercised in the circumstances of the case before it.

337. There are likely to be two reasons why witness anonymity would be appropriate. Firstly, it may be granted on the basis that the witness's safety or property is threatened as a consequence of their giving evidence. Secondly, it may be that there are operational reasons why it would be undesirable for the identity of the witness to be disclosed. For example those situations where evidence is given by under cover police officers or other agents whose effectiveness would be severely compromised if their identity became known.

338. The provisions seek to ensure that before granting a Witness Anonymity Order the Court would have regard to all relevant factors including the following:

(i) the generally recognised right of an accused to know the identity of a witness and to hear that witness' evidence;

(ii) the extent to which the credibility of the witness is a relevant factor in assessing his or her evidence;

(iii) whether the evidence of the witness might be the sole or decisive evidence implicating the accused;

(iv) whether the witnesses' evidence can be tested properly without disclosure of his or her identity;

(v) any reason to believe that the witness may be unreliable or dishonest; and

(vi) whether it is reasonable for the witness to be protected by any means other than the granting of anonymity.

339. The provisions also enable a court that grants a Witness Anonymity Order to order the implementation of such measures as are necessary, in the court's view to give effect to the Order. It will be for the Court to determine which measures will be appropriate in any particular case.

340. Both the Crown and the accused will be able to apply for an Order for witnesses they intend to call to give evidence and both parties will have an opportunity to be heard when the court is considering and application.

341. The court will have the power to vary or discharge an Order, either in response to an application by one of the parties or at its own hand. In doing so the court will give both the Crown and the accused the opportunity to make representations.

Consultation

342. The possibility that these provisions might be included in the Bill was referred to in our "Revitalising Justice" document. No responses were received.

Alternative approaches

343. The UK Criminal Evidence (Witness Anonymity) Bill was introduced into the UK Houses of Parliament after the Scottish Parliament had risen for the 2008 summer recess. We concluded at the time that there was not sufficient urgency in Scotland in light of the *Davis* decision (which is not binding in Scottish law) to justify the recall of Parliament either to pass emergency legislation in Scotland or to pass a legislative consent motion that would have allowed the Westminster Bill to be extended to Scotland. Provisions have been included in this Bill as it represents the earliest suitable scheduled legislative opportunity.

344. Courts could continue to rely on Scots common law provision for witness anonymity, but with a risk that this would be subject to judicial review resulting in a similar outcome to the Davis case in England and Wales.

Section 67 – Television link evidence

Policy objectives

345. To lessen the distress, inconvenience and cost of requiring witnesses from outside Scotland, but within the United Kingdom to give their evidence in Scottish Courts.

Key information

346. The provisions will allow witnesses from outside Scotland, but within the United Kingdom to give evidence in criminal proceedings via a live television link in both solemn and summary cases (but not JP courts) from outwith Scotland. The current legislative position in Scotland regarding television link evidence is set out in section 273 of the Criminal Procedure (Scotland) Act 1995. This section, which applies to all witnesses, whether vulnerable or not, covers evidence which is given in any solemn proceedings in the High Court or the sheriff court by a witness from outside the UK. It does not cover witnesses who are outside Scotland but within the UK. Section 271(J) of the 1995 Act allows vulnerable witnesses to give evidence via a live television link; however, this power does not extend to witnesses who are within the UK but outwith Scotland.

347. Section 273(1) sets out three criteria that must be satisfied in order for a witness to be able to give evidence via a TV link:-

- the witness is outside the UK;
- an application under subsection (2) for the issue of a letter of request has been granted; and

- the court is satisfied as to the arrangements for the giving of evidence by that witness.

348. The prosecutor or defence may apply to a judge under subsection (2) for the issue of a letter of request to a court or tribunal exercising jurisdiction, or an appropriate authority, in a country or territory outside the UK where a witness is ordinarily resident. This letter of request asks for assistance in facilitating the giving of evidence by that witness through a live television link.

349. In order for a letter of request to be granted, the judge must be satisfied that the granting of the application is in the interests of justice and is not unfair to the accused.

350. The requirement to travel to a Scottish court from other UK jurisdictions can present a number of difficulties for certain witnesses, both vulnerable and non-vulnerable. Extending the current powers which exist under section 273 of the Criminal Procedure (Scotland) Act 1995 would enable witnesses to give evidence from a local court or other approved location elsewhere in the UK instead of having to travel to Scotland.

351. This provision will apply to both vulnerable and non-vulnerable witnesses and cover summary (except JP courts) and solemn proceedings. It is intended that the power might be used to cover such situations where, for example, a witness is too ill to travel, or has moved away from Scotland in order to escape an abusive or violent relationship.

352. In order for a witness to be allowed to give evidence in this way, the same criteria as are currently in place under section 273(2)-(3) of the 1995 Act will have to be met. This means that the witness must be outside Scotland but within the UK, an application for a letter of request has been granted and the court is satisfied as to the arrangements for the giving of evidence by that witness in that manner.

353. An application should only be granted where the court is satisfied that the granting of the application is in the interests of justice, or, in the case of an application by the prosecutor, that it is not unfair to the accused; and that the evidence of the witness in question is necessary for the proper adjudication of the trial.

Consultation

354. There has been no formal consultation on this proposal. The Scottish Court Service and the Crown Office and Procurator Fiscal Service are supportive of the proposal.

Alternative approaches

355. One alternative is the status quo where witnesses from within the UK but outwith Scotland continue to have to travel to Scotland to give evidence. However, this is likely to lead to significant inconvenience and disruption for witnesses which is likely to compound the distress of giving evidence and add to the costs of the Scottish criminal justice system. Another option would be to secure the evidence of a witness living in the UK, but outwith Scotland, by

conveying the judge, Crown and accused to a location more convenient to the witness. Again, this presents an expensive and inconvenient alternative.

PART 5 – CRIMINAL JUSTICE

Section 68 – Upper age limit for jurors

Section 69 – Persons excusable from jury service

Policy objectives

356. To improve the operation of the jury system in criminal cases.

Key information

357. We are legislating to increase the number of available jurors in Scotland. Over recent years the number of jury trials proceeding has increased and it has become increasingly difficult to ensure a sufficiently large group of potential jurors. In certain urban areas, the Scottish Court Service finds it increasingly challenging to maintain a sufficient juror pool. We are therefore legislating in two areas.

358. The provisions raise the upper age limit for sitting on a jury in criminal cases in Scotland from 65 to 70. Currently in Scotland individuals over the age of 65 are not eligible for jury duty. This present age limit fails to recognise the valuable contribution that over 65s can make to jury deliberations. The age limit for jurors in England, Wales and Northern Ireland is 70. Raising the age limit for Scottish jurors to 70 would achieve a common age limit for jurors throughout the UK. In addition, the change would ensure that, as the demographic profile of Scotland changes, juries are drawn from a wider age range. It will also bring operational benefits to the jury system, enlarging the pool of potential jurors by around 200,000.

359. The provisions also change the rules on exemption after citation to sit on a jury in a criminal case. Currently once an individual has attended court as a juror in answer to their jury citation for a criminal case, they are entitled to be excused as of right from jury duty for up to 5 years. This takes them out of the available juror pool for a substantial length of time therefore lowering the pool of available jurors which the court service may draw on. The current system makes no distinction between those jurors who attend at court as required but do not then get picked from the ballot to serve, and those who attend and are selected by ballot to form part of a jury in a criminal case. Those jurors who do not ultimately serve on a jury receive the same five year entitlement to excusal as of right as those who are selected to serve. This proposal will reduce the period of entitlement to excusal as of right from 5 years to 2 years for those jurors who attend at court but who are not selected by ballot to sit on a jury. It is not the intention that this would be a retrospective change; rather it would apply from an agreed date once appropriate legislative change was in place.

Consultation

360. *Our "Modern Jury in Criminal Trials*[27]*"* consultation document was launched on 18 September 2008. The consultation period ended on 11 December 2008.

Section 70 – Data matching for detection of fraud etc.

Policy objectives

361. To ensure Audit Scotland can continue their efforts to match data to prevent and detect fraud in the public sector.

Key information

362. The Serious Crime Act 2007 contains provisions that will place the National Fraud Initiative on a statutory footing in England, Wales and Northern Ireland. The National Fraud Initiative is a data matching exercise conducted for the purpose of assisting in the prevention and detection of fraud. Section 73 of, and Schedule 7 to, the 2007 Act contains the statutory framework within which data can be matched, but these provisions do not apply in Scotland. The National Fraud Initiative already operates on a non-statutory basis and has identified around £37m of fraud and error in Scotland and led to over 75 prosecutions.

363. The provisions broadly replicate the 2007 Act provisions for Scotland. Audit Scotland will be given the power to conduct data matching exercises on its own accord, or to arrange for such exercises to be conducted on its behalf.

Consultation

364. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

365. The Scottish Parliament Audit Committee took evidence from Audit Scotland on the National Fraud Initiative on 28 May 2008 and has indicated its support for legislation in this area.

Alternative approaches

366. The National Fraud Initiative could continue to operate on a non-statutory basis, as at present, but a statutory basis provides clearer powers, creates a unified system across the public sector and facilitates cross-border matching.

Section 71 – Sharing information with anti-fraud organisations

Policy objectives

367. To allow Scottish public authorities to play a leading role in tackling fraud by sharing information with each other and with anti-fraud organisations to detect fraudulent activity and help prevent future fraud.

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[27] http://www.scotland.gov.uk/News/Releases/2008/09/18102403

Key information

368. The Serious Crime Act 2007 contains provisions that enable public authorities to share information with each other and with anti-fraud organisations to help prevent and detect fraud. However, these provisions do not have effect in Scotland for those public authorities insofar as they relate to their devolved functions.

369. The provisions will extend the operation of the 2007 Act to cover all of Scotland's public authorities, regardless of whether they operate in a reserved or a devolved area. They achieve this by repealing the restrictions in the 2007 Act.

370. The Serious Crime Act 2007 (Specified Anti-Fraud Organisations) Order 2008 (SI 2008/2353) specifies six anti-fraud organisations including CIFAS, Experian and the Insurance Fraud Bureau.

Consultation

371. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

372. Similar powers could have been conferred on individual public authorities on a case-by-case basis, or authorities could rely on common law or statutory powers where they already exist. The approach adopted is simpler and provides a unified regime throughout the UK.

Section 72 – Closure of premises associated with human exploitation etc.

Policy objectives

373. Will assist the police in tackling the misery of human trafficking and child sexual exploitation by providing explicit powers for the closure of premises associated with the commission of offences in relation to trafficking of human beings and child sexual exploitation.

Key information

374. Article 23 of the Council of Europe Convention on Action Against Trafficking in Human Beings requires measures necessary to enable the temporary or permanent closing of premises used to carry out trafficking in human beings.

375. Article 27 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse also requires measures necessary to enable the temporary or permanent closure of establishments used to carry out the offences of child abuse, child prostitution, child pornography, child pornographic performances, corruption of children and grooming.

376. The Antisocial Behaviour etc. (Scotland) Act 2004 provides for the service of closure notices and the making of closure orders in respect of premises. Section 26 of that Act which

provides for closure notices requires reasonable grounds for believing that the premises are associated with antisocial behaviour and the occurrence of relevant harm. Closure orders are provided for in section 30 and require that:

- a person has engaged in antisocial behaviour on the premises;
- the use of the premises is associated with the occurrence of relevant harm; and
- an order is necessary to prevent the occurrence of such relevant harm for the period specified in the order.

377. Relevant harm is defined in section 40 of the Act and section 143 provides that a person engages in antisocial behaviour if he/she acts in a manner or pursues a course of conduct that causes or is likely to cause alarm or distress to at least one person who is not a member of the household.

378. While it may be possible to demonstrate that a person is engaging in antisocial behaviour towards a victim through causing alarm and distress it is less likely to be able to demonstrate that the premises are associated with relevant harm as neighbours and the general public may be oblivious as to the use and occupants of the premises.

379. We make explicit provision within the Antisocial Behaviour etc. (Scotland) Act 2004 for the closure of premises used to carry out the offences specified in the Council of Europe Conventions by providing a new set of circumstances where notices and orders may be invoked for relevant offences in relation to trafficking and child sexual exploitation.

380. Closure notices would require senior police officers to have reasonable grounds for believing that the premises are associated with the commission of relevant offences while closure orders would require senior police officers to have reasonable grounds for believing that the use of the premises is associated with the commission of relevant offences.

Consultation

381. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approach

382. There are none that meet the policy objective.

Section 73 – Sexual offences prevention orders

Section 75 – Risk of sexual harm orders

Policy objectives

383. To ensure a robust criminal law in respect of the operation of Sexual Offences Prevention Orders (SOPOs) and Risk of Sexual Harm Orders (RSHOs).

Key information

384. A SOPO is a civil preventative order designed to protect the public from serious sexual harm. They were introduced in the Sexual Offences Act 2003 (the "2003 Act") as a replacement, with some amendments, to sex offender orders.

385. A SOPO imposes prohibitions on a person who poses a risk of serious sexual harm. A SOPO could, for example, be used to prohibit a sex offender from being alone with children under the age of 16 and from loitering outside school playgrounds where his behaviour suggests that he is likely to re-offend. The granting of a SOPO makes the offender subject to the notification requirements set out in Part 2 of the 2003 Act. Breach of the prohibitions provided by a SOPO is punishable by a maximum of 5 years imprisonment.

386. Under existing arrangements, SOPOs can be imposed in the Scottish courts as set out in Part 2 of the 2003 Act. There are two ways to proceed; first, the court itself can make an order when dealing with a "defendant" for a range of specified offences. Second, the chief constable may make a summary application to the sheriff for the imposition of an order. Section 73(2)(d) of the Bill widens the application process, so that in addition to the existing power of the court to make an order, a power is given to the prosecutor to apply for a SOPO to be imposed at the point where he or she moves for sentence.

387. In reviewing the implementation of the 2003 Act, an anomaly in the law has been identified relating to the thresholds which apply in certain circumstances before a SOPO may be made. An offender who has been convicted of a sexual offence listed in Schedule 3 which is subject to age or sentence thresholds may not be made subject to a SOPO where the age or sentence thresholds are not satisfied. In contrast under paragraph 60 of Schedule 3 an offender who commits an offence which is not sexual in nature but which has a significant sexual aspect to his behaviour may be made subject to a SOPO.

388. The provisions disapply the age and sentence thresholds for the purposes of the making of a SOPO in respect of any person. This issue was very recently addressed for England, Wales and Northern Ireland by the Criminal Justice and Immigration Act 2008. The change will provide the court with the discretion to impose a SOPO in all cases where there is evidence of a real risk of serious sexual harm.

389. The provision also expands the content of a SOPO to allow for appropriate restrictions and obligations/requirements (e.g. a requirement to produce documentation or provide information) to be imposed by the order, rather than simply prohibitions which may only currently be imposed by such an order. This would place greater responsibility on offenders to comply with certain conditions.

390. At the moment the SOPO legislation does not place any responsibility on the offender to comply with the risk assessment process. Both the Irving Report and the Report of the Expert Panel on Sex Offending (the Cosgrove Report) commented on the "*lack of any requirement on individuals to comply with the risk assessment process and the potential for non-compliance to increase*". This was seen as a major weakness.

391. Adjusting the SOPO regime requiring certain positive actions on the part of offenders would address that deficiency. It would also have the potential to extend the range of information certain relevant sex offenders are required to provide as part of the requirements of the sex offenders register. A SOPO with positive provisions could be useful to the police if they wanted to know more details about a specific offender's lifestyle, which in turn would mean that the police would have more information to assist in the investigation of offences. Accordingly, if the police wanted to know if a relevant offender was living in the same household as a child under the age of 18, or wanted to have details of their leisure activities, employment, telephone numbers, or vehicles (and/or access thereto) they could apply for a SOPO with a condition that the offender notify the police of such circumstances and/or details. If the police had concerns about a specific offender who claimed to be homeless, they could place a positive obligation on the offender to report more regularly, or at a specified time, to a prescribed police station. Again this would implement a recommendation of the Irving Report.

392. The 2003 Act also introduced RSHOs which are civil preventative orders used to protect children from the risks posed by individuals who do not necessarily have a previous conviction for a sexual or violent offence but who have, on at least two occasions, engaged in sexually explicit conduct or communication with a child or children and who pose a risk of further such harm. The provisions in this Bill bring in changes to the operation of RSHOs so that a court can when imposing a RSHO include appropriate restrictions and obligations/requirements in such an order. These changes mirror those made to SOPOs.

393. Some other minor inconsistencies in the 2003 Act are also addressed through the provisions.

Consultation

394. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

395. There are none that meet the policy objectives.

Section 74 – Foreign travel orders

Policy objectives

396. To ensure robust enforcement of the criminal law in respect of the operation of Foreign Travel Orders (FTOs).

Key information

397. A FTO is a civil preventative order designed to prevent sex offenders travelling overseas in order to commit sexual offences against children. They were introduced in the Sexual Offences Act 2003 (the "2003 Act").

398. A FTO prohibits an offender from travelling to a particular country or countries or from travelling to any country outside the UK. Breach of the prohibitions provided by a FTO is punishable by a maximum of 5 years imprisonment.

399. Under existing arrangements, FTOs can only be imposed for 6 months, following which an application has to be made for such an order to be renewed. It is proposed to increase the maximum period for which a FTO can take effect from 6 months to 5 years. It is also proposed to increase the age of a child, located outside the United Kingdom, who a sex offender is considered to pose a risk to, from 16 to 18. At present, for the purposes of obtaining an FTO, a court must be satisfied that a sex offender poses a risk to child, outside the UK, under 16.

400. Currently there is no provision in the 2003 Act for an offender subject to a FTO to surrender their passport. It is proposed that where a court makes a FTO under s117(2)(c) of the 2003 Act prohibiting the offender from any travel outside the UK, the FTO will contain a requirement that the person to whom it applies must surrender any passports which they hold at a police station specified in the order on or before the date when the prohibition takes effect or within a period specified in the order. The surrender of a passport will ensure that a FTO which imposes a travel ban outside the UK can be effectively enforced. Whilst, a sex offender holds their passport, there is nothing to stop him or her from travelling overseas, in contravention of the order. This measure will only apply to FTOs which impose a travel ban outside the United Kingdom, as if another type of FTO is issued, a sex offender will still be able to travel to some other countries and will need their passport to do so.

401. The strengthened provisions, which mirror separate provisions being brought forward in England, Wales, and Northern Ireland, will better protect vulnerable individuals against the risks which sex offenders pose to them. If a sex offender is considered to pose a risk against children outside the UK who are under the age of 18, a court has the discretion to impose an order for a maximum period of 5 years. This will mean a sex offender is prohibited from travelling outside the UK for a longer period of time which will act as a deterrent to offending overseas.

402. Since the legislation came into force in 2004 no police force in Scotland has applied for a FTO. Only 5 FTOs have been made elsewhere in the UK.

Consultation

403. The Child Exploitation and Online Protection Centre and the police have suggested a number of reasons why FTOs are not more widely used including the fact that they only last 6 months before they have to be renewed and that the police have limited time to obtain the orders as offenders only have to notify their travel arrangements 7 days before they travel.

Alternative approach

404. There are none that help meet the policy objective.

Section 76 – Obtaining information from outwith the United Kingdom

Policy objectives

405. To improve the powers of the SCCRC to investigate alleged miscarriages of justice, allowing swifter handling of complex applications.

Key information

406. The Crime (International Co-operation) Act 2003 (the "2003 Act") enabled the United Kingdom to ratify the 2000 Convention on Mutual Assistance in Criminal Matters between member states of the European Union.

407. The 2003 Act was limited in scope to implementation of international obligations. It did not extend Mutual Legal Assistance powers to the Criminal Cases Review Commission or the Scottish Criminal Cases Review Commission (SCCRC).

408. In the absence of such a power, the SCCRC have faced problems in securing co-operation from overseas. While it is anticipated that there can be no guarantee that outgoing requests from the SCCRC would be subsequently executed by all countries, it is the case that many have confirmed that they would be able and willing to assist on the receipt of a request.

409. Section 53 provides a new power for the SCCRC to apply to the High Court to request information from other jurisdictions.

Consultation

410. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

411. The alternative approach would be to continue to rely on diplomatic channels to seek information from other jurisdictions. A clear power for the SCCRC, subject to the control of the Court, helps protect the independence of the SCCRC.

Section 77 – Grant of authorisations for directed and intrusive surveillance

Section 78 – Authorisations to interfere with property etc.

Policy objectives (both section 77 and 78)

412. To simplify procedures for obtaining authorisations for specific types of surveillance. The provisions streamline the procedures for the authorisation of joint surveillance operations generally and improve the effectiveness of the authorisation processes used by the Scottish Crime and Drug Enforcement Agency (SCDEA). These measures will improve the effectiveness of existing procedures, helping to prevent and detect crime in Scotland.

Key information

413. The Regulation of Investigatory Powers (Scotland) Act 2000 (the "2000 Act") and Part III of the Police Act 1997 (the "1997 Act") set out the legislative framework for authorising different forms of surveillance in Scotland. These provisions affect certain types of covert surveillance in Scottish police and SCDEA operations.

414. Currently, police forces are required to obtain authorisation for directed and intrusive surveillance under the 2000 Act and for property interference under the 1997 Act. Forces need to obtain authorisation from their own force command to carry out these forms of surveillance. Where an operation will involve 2 or more forces (one of which could be the SCDEA), 2 or more sets of authorisations are required (i.e. each force involved must seek their own authorisation).

415. The provisions will allow a lead force to be agreed between the participating forces who can grant a single set of authorisations which will be effective for any force (including SCDEA) involved in a joint operation. This authorisation would be limited jurisdictionally to the areas covered by the participating forces.

416. Provision is also made to allow the Deputy Director of the SCDEA to be able to routinely authorise applications for intrusive surveillance and property interference. The SCDEA is making increasing use of intrusive surveillance and property interference in a number of serious crime operations. As matters stand currently, these applications require to be authorised and reviewed by the Director General. The impact this is having on the Director General's time is resulting in a disproportionate effect on other Agency business. It would prove helpful from an operational and practical perspective, therefore, to amend current legislation to allow both the Director General and the Deputy Director to authorise the aforementioned types of covert surveillance and the provisions achieve this.

Consultation

417. These provisions are included at the request of ACPOS and the SCDEA. The proposal to simplify the authorisation procedure for joint surveillance operations was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received. No formal consultation was considered necessary in respect of the proposal to allow the Deputy Director of SCDEA to authorise applications for intrusive surveillance and property interference as this is purely a technical change which will allow the SCDEA to operate in a more effective manner.

Alternative approaches

418. In relation to the authorisation process for joint surveillance operations it would be possible to achieve the same outcome using a collaborative arrangement under section 12 of the Police (Scotland) Act 1967. This may be explored further in conjunction with ACPOS in tandem with similar legislative developments for the Regulation of Investigatory Powers Act 2000 and the Police Act 1997 being considered currently by the Home Office.

419. The status quo is the only alternative option available in respect of the proposal to allow the Deputy Director of SCDEA to authorise applications for intrusive surveillance and property

interference. For the reasons mentioned above, this position is no longer considered to be sustainable.

Section 79 – Amendments of Part 5 of Police Act 1997

Policy objectives

420. To increase the ability of Scottish Ministers to gather information in response to applications for criminal record checks; and increase flexibility to the fee charging regime within section 120 of the Police Act 1997 ("the 1997 Act").

Key information

421. Scottish Ministers carry out criminal record checks for employment and other purposes under the 1997 Act. The day-to-day work is carried out by Disclosure Scotland. At present, Disclosure Scotland can only include information held in records kept for the use of UK police forces when doing these checks (though for the enhanced disclosure only, relevant information from the Isle of Man and the Channel Islands police forces can be included at the discretion of the force's chief officer). This is unhelpful as many people on whom the checks are done have previously lived outwith the UK. The effect of this is that relevant information could be missed.

422. In partnership with the UK Government, we are engaged in discussion with a number of countries, mainly EU Member States, about putting agreements in place for those countries to provide information to the UK for the criminal record checks under the 1997 Act. The first proposal provides Ministers with an order-making power to amend the meaning of certain definitions in the 1997 Act. This power would allow Ministers to respond to agreements with other jurisdictions and bring proposals to the Scottish Parliament to have information that results from the agreements to be regarded as relevant information for the 1997 Act.

423. Scottish Ministers currently charge a one-off fee for registration under section 120 of the 1997 Act and a separate one-off fee for nominees of the registered person. Persons listed in the register can countersign applications for standard and enhanced disclosures under the 1997 Act and will make declarations in relation to requests for disclosures under section 52 or 53 of the Protection of Vulnerable Groups (Scotland) Act 2007 once that Act is commenced. These fees are set in The Police Act 1997 (Criminal Records) (Registration) (Scotland) Regulations Scottish Statutory Instrument 2006 No 97.

424. We propose to amend the power in section 120ZB of the 1997 Act to enable Scottish Ministers to make further provision about registration fees to provide greater flexibility in the fee charging powers. This would assist Disclosure Scotland in managing the content of the register held under section 120; allow new services to be developed for registered persons that might not otherwise be cost-effective to pursue; and would enable arrangements to spread the cost of registration over the lifetime of registration rather having a one-off charge as is the case now.

Consultation

425. Both proposals were included in our "Revitalising Justice" document published in September 2008. No comments were received.

426. With regard to the provisions regarding registration fees, this proposal arose after different proposals with regard to managing the register held under the 1997 Act (which were in the consultation on the *"Protection of Vulnerable Groups (Scotland) Act 2007*[28]*"*) were generally opposed by respondents. You can see the original proposal at chapter 2.5 paragraphs 90 to 94 of the consultation document.

427. The original proposal would have meant that low-volume users would have been removed from the register. The revised proposal will not have the effect of removing low-volume users and so responds to stakeholders' objections. However it can be used to structure fees to provide an incentive to those listed in the register to de-register as soon as they no longer need to be in it.

Alternative approaches

428. An alternative to the first proposal would be to use secondary legislation powers under the European Communities Act 1972. But that would have been restrictive; it would only address information covered by European Directives and Regulations, and so that power could not be used in respect of non EU agreements.

429. The second proposal will help address problems with the management of the register held under the 1997 Act while not excluding low-volume users. The power will facilitate the register being used more effectively by providing an incentive, through the fee arrangements, to those no longer requiring to be registered to cancel their registration and so not incur any further charges. It is not an option to do nothing about the register as the current arrangements do not facilitate the register being used as effectively as it could be.

Section 80 – Assistance for victim support

Policy objectives

430. To increase the flexibility with which Scottish Ministers can fund victims' organisations.

Key information

431. The provisions improve support for victims of crime by giving Scottish Ministers greater flexibility to fund a wider range of organisations or projects providing assistance to victims of crime, or to witnesses.

432. At present, grants to organisations providing support to victims of crime are generally made under section 10 of the Social Work (Scotland) Act 1968. This is usually sufficient, but it does limit grants to national organisations or to innovative projects and excludes grants to local authorities. There are occasions where more flexibility would be helpful, such as:-

- Payments to a local authority when it is providing services to victims. Victims of human trafficking often need emergency support once they are recovered. That support is sometimes provided by local authorities in the absence of any other provider, but if the victim has no recourse to public funds the local authority may not be able to support the victims unless funded by central government;

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[28] http://www.scotland.gov.uk/Resource/Doc/1124/0056475.pdf

- Support for local organisations if they meet a particular need, such as support for victims of murder in areas where murder is particularly prevalent; and
- Allowing initiatives such as that being developed in England and Wales where the Ministry of Justice allows Victim Support (the equivalent in England and Wales of Victim Support Scotland) to make small payments direct to victims in certain circumstances.

433. The examples above only show potential uses of a wider power to make grants to organisations that support victims and witnesses. Decisions to support any particular initiative would be taken on a case by case basis.

Consultation

434. This is a minor technical adjustment that brings our powers to give grant to victims' organisations in line with those available to the UK Government. Informal contacts with victims' organisations have indicated that they would welcome this provision.

Alternative approaches

435. We make *ad hoc* payments to appropriate organisations, but that is not a long term solution and it would be appropriate to regularise Scottish Ministers' powers through legislation.

Section 81 – Public defence solicitors

Policy objectives

436. To provide long term certainty for the operation of the Public Defence Solicitor's Office (PDSO) to offer criminal legal assistance in the future.

Key information

437. The PDSO was originally established in 1998 in order to test the feasibility of providing criminal legal assistance through solicitors directly employed by the Scottish Legal Aid Board. The legislation was subsequently amended to allow the feasibility study to continue after 1 October 2003.

438. A report on the feasibility study was laid before parliament in December 2008. The policy now is to put the PDSO on a more solid statutory footing to enable it to provide criminal legal advice, assistance and representation as a matter of course rather than for the purposes of the feasibility study.

Consultation

439. A number of stakeholders from the legal profession and the criminal justice system were interviewed as part of the preparation of the feasibility study but no formal consultation on the provisions in this section has been undertaken. The proposal was included in the "Revitalising Justice" document with no comments being received.

Alternative approaches

440. It would be possible for the PDSO to continue to function as a feasibility study or for publicly funded criminal defence services to be provided solely through solicitors in private practice. Establishing that the PDSO is to continue to provide criminal legal assistance as a matter of course is intended to enhance public confidence in the PDSO and to assist in the recruitment and retention of its staff. The number of solicitors employed by PDSO represents approximately 1% of the total number registered with the Scottish Legal Aid Board to provide such services.

Section 82 – Compensation for miscarriages of justice

Policy objectives

441. To establish a single statutory scheme that is more efficient and effective in consideration of claims for compensation arising out of miscarriages of justice and to tidy the law in this area and ensure there are no gaps in the legislation.

Key information

442. We operate two schemes for the payment of compensation as a result of a miscarriage of justice: the statutory scheme under section 133 of the Criminal Justice Act 1988 (“the 1988 Act”) and the *ex gratia* scheme.

443. Section 133 of the 1988 Act requires Scottish Ministers to pay compensation for a miscarriage of justice in certain circumstances. The statutory scheme allows compensation to be payable when a conviction is “reversed” by the High Court on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice.

444. In addition to the statutory scheme, there also operates an *ex gratia* scheme. This allows compensation to be paid to individuals who have spent a period in custody following a wrongful conviction or charge if that wrongful conviction or charge resulted from “serious default on the part of a member of the police force or of some other public authority”. Compensation may also be paid in “exceptional circumstances that justify compensation in cases outside these categories”. Compensation is not paid however merely because at the trial or on appeal the prosecution was unable to sustain the burden of proof beyond reasonable doubt.

445. No changes are proposed to the scope of the *ex gratia* scheme but the provisions places this *ex gratia* scheme on a statutory footing, combining it with the existing statutory scheme.

446. Schedule 12 to the 1988 Act contains a reference to the Criminal Injuries Compensation Board. This is a redundant provision as the Criminal Injuries Compensation Board no longer exists and the reference is therefore repealed.

447. Section 133 of the 1988 Act currently allows for compensation to be paid when an individual has been convicted of a criminal offence and subsequently had that conviction reversed or they are pardoned. The condition that has to be met is that the reversal or pardon is

on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice.

448. However, section 188 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") allows for a conviction and sentence or both to be set aside by way of a minute from the prosecutor to the court without an appeal being heard. The provisions amend section 133 of the 1988 Act in order to allow someone who has had their conviction set aside by way of section 188(1)(b) of the 1995 Act to receive compensation.

449. Section 133(6) of the 1988 Act states that "…for the purposes of this section a persons suffers punishment as a result of a conviction when sentenced is passed on him for the offence of which he was convicted." Section 228 and section 246 of the 1995 Act allow the court to impose a probation order or order absolute discharge instead of sentence. As disposals such as probation order and orders of absolute discharge are "sentences", section 133(6) of the 1988 Act would not recognise the person as having been punished and compensation would not be available.

450. The provisions ensures that convictions resulting in a disposal such as a probation order or absolute discharge can be taken into account for the purposes of section 133 of the 1988 Act.

451. An issue that has come to light with recent cases is the ability to deal with applications under section 133(2) of the 1988 Act which have been made a significant time after the conviction. This has lead to difficulties in obtaining evidence to substantiate claims as court records are destroyed after a period of time. Additionally, the absence of a time limit is at odds with civil litigation procedures.

452. The provisions will limit the time in which an application can be considered to 3 years from the date the appeal is finally disposed of by the High Court with the addition of a discretionary power for Scottish Ministers to waive that where it is in the interests of justice to do so, or that there are exceptional circumstances. This is in line with civil limitation periods for personal injury claims.

Consultation

453. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

454. The UK Government has adopted a different approach. Section 61 of the Criminal Justice and Immigration Act 2008 has placed a number of restrictions on compensation payments, and the *ex gratia* scheme has been abolished and not replaced. We consider it preferable to establish a statutory *ex gratia* scheme.

Section 83 – Financial reporting orders

Policy objectives

455. To encourage the use of Financial Reporting Orders (FROs).

Key information

456. The provisions clarify the right for a prosecutor to apply to the court to consider imposing a FRO.

457. The Serious Organised Crime and Police Act 2005 introduced the use of FROs which requires those subject to the order to report their financial dealings over a specified period of time as directed by the court. In Scotland they can be applied for when an individual has been convicted of the common law offence of fraud or an offence listed in Schedule 4 to the Proceeds of Crime Act 2002 and when the court believes that there is a sufficiently high risk that a similar offence will likely be committed in the future.

458. At present the number of FROs imposed in Scotland is limited. It is unclear whether it is for the court on its own initiative to make a FRO or whether prosecutors can ask the court to make such an order. The purpose of this provision is to make it explicit that either the prosecutor can bring to the court’s attention its power to impose a FRO or the court can make such an order at its own instance. Section 77 of the Serious Organised Crime and Police Act is amended accordingly.

Consultation

459. This proposal has been drawn up in conjunction with the Crown Office and Prosecutor Fiscal Service. The proposal was included in our “Revitalising Justice” proposals document published in September 2008. No comments were received.

Alternative approaches

460. We could have decided not to amend the legislation and rely on the court to take account of the possibility of imposing Financial Reporting Orders. However, as there have been so few orders imposed we felt it necessary to put it beyond doubt that a prosecutor can bring the possibility of the imposition of these orders to the courts attention. This will hopefully result in more FROs.

Section 84 – Compensation orders

Policy objectives

461. To improve courts’ flexibility to award compensation thus helping victims of crime achieve greater satisfaction.

Key information

462. The provisions widen the circumstances in which criminal courts may make compensation orders by making it more straightforward for the courts to award financial

compensation back to victims of crime for any personal injury, loss or damage caused directly or indirectly; or alarm or distress caused directly to the victim resulting from that offence or any other offence which is taken into consideration by the court in determining the sentence.

463. The provisions will:

- allow compensation orders to be made in respect of bereavement and the cost of funeral expenses and make compensation orders available against an offender if they have a traffic accident and are uninsured, including covering the expenses of the preferential insurance rates lost by the victim, if applicable;
- make it easier for courts to award compensation orders by decoupling them from civil proceedings (where existing legislation allows a compensation order to be discharged or reduced if there is a subsequent civil determination that the amount awarded in the criminal case was too high);
- allow the earnings of an offender (contingent on employment on release from custody) to be taken into account when deciding compensation; and
- allow courts to review an award of compensation in cases where an offender has had a substantial increase in means.

464. Furthermore, Sheriffs and stipendiary magistrates currently have powers to impose exceptionally high maximum fines for some offences, which exceed the standard limits set for summary courts. Compensation orders are however currently restricted to standard limits and we intend to remove that restriction.

Consultation

465. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

466. There are none that allow the policy objectives to be met.

PART 6 – DISCLOSURE

Sections 85-116 – Disclosure

Policy objectives

467. To provide certainty in statute as regards how the disclosure of evidence regime should operate.

Key information

468. Effective disclosure of information to the accused in criminal proceedings by the prosecutor to the defence is recognised as necessary to ensure trials are conducted fairly.

469. In the Scottish legal system it is a fundamental principle that an accused is entitled to a fair trial. To help achieve this the Crown has an obligation to give the accused notice of the charge against him and to make available information/evidence which the Crown intends to bring to prove the charges. Any *exculpatory* material should be identified and given/disclosed to the defence. A series of decisions of the Judicial Committee of the Privy Council including the cases of *Holland and Sinclair*, have refined that duty but have also given rise to uncertainty about the exact requirements of the duty of disclosure.

470. Although disclosure is presently carried out on a common law basis, it is clear that there are shortcomings in the current regime and that disclosure would benefit from having a statutory framework.

471. The provisions in the Bill clarify what requires to be disclosed and establishes a statutory regime for material to be disclosed. They are based on the recommendations contained in Lord Coulsfield's 'Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland' which was published in August 2007[29].

472. We consulted publicly[30] on Lord Coulsfield's recommendations and, subsequently, published the responses received in relation to that consultation[31]. We also published an analysis of those responses and a statement of our intended next steps, which were committing to bringing forward legislation and to develop a statutory Code of Practice to accompany the legislation – the "Next Steps" paper.[32]

473. Lord Coulsfield's recommendations have, largely, been accepted for the reasons put forward in his report and in the "Next Steps" paper. Certain recommendations have not been accepted, as explained in the "Next Steps" paper, and below.

474. The Bill is designed to establish a statutory system of disclosure which, broadly, sets out:-

- A continuing duty on the Crown to disclose material and relevant information for and against the accused to the defence;
- A statutory definition of that duty and provision for how and when the duty is complied with;
- A duty on the police and other agencies or organisations who investigate crimes and submit reports to the prosecutor to provide the prosecutor with schedules listing all the information which may be relevant to the case obtained during the course of the

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[29] Lord Coulsfield's 'Review of the Law and Practice of Disclosure in Criminal proceedings in Scotland' - August 2007 http://www.scotland.gov.uk/Publications/2007/09/11092728/0

[30] http://www.scotland.gov.uk/Publications/2007/11/09145246/0 Scottish Government Consultation Paper

[31] Responses to the consultation into proposals for legislation to implement the recommendations in the report of the Independent Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland by the Rt Hon Lord Coulsfield – March 2008 http://www.scotland.gov.uk/Publications/2008/03/12145347/0

[32] A Statutory Basis for Disclosure in Criminal Proceedings in Scotland Analysis of responses to Consultation and Next Steps – April 2008 http://www.scotland.gov.uk/Resource/Doc/221066/0059469.pdf

investigation; and a duty on the prosecutor to disclose to the defence in solemn cases a schedule listing all the information that may be relevant that is categorised as non-sensitive;

- Provision for defence statements;
- Provision for applications to the court for orders restricting disclosure. In other jurisdictions, these are sometimes referred to as Public Interest Immunity (PII) procedures, designed to allow material which falls within the definition of what requires to be disclosed to be withheld on public interest grounds;
- A new offence of misuse of disclosed information; and
- Provision for a statutory Code of Practice to support the legislative provisions

Duty of Disclosure

475. The Bill seeks to re-state and clarify the duty of the prosecutor to disclose information and the definition of what requires to be disclosed.

476. The prosecutor will be under a duty to review all relevant and material information for or against the accused of which he is aware (i.e. all information that has been submitted to him by the police or other investigating agency). Such information will require to be disclosed if it materially weakens or undermines the prosecution case, it materially strengthens the accused's case or it is information which is likely to form part of the prosecution case – i.e. is likely to be led at any trial. (Information that is material is, by definition, also relevant). The provisions give non-exhaustive examples of the types of information, which are designed to include the types of information set out by Lord Coulsfield in recommendation 7 of his report.

477. That duty is one that is proactive and continues, throughout the life of the case until proceedings have concluded. After the accused has been convicted, however, the duty changes and the prosecutor will not be required to disclose information which forms part of the prosecution case.

478. The prosecutor will be able to disclose information by any means. This will include providing a narrative containing the information, providing copies of documents containing the information or allowing the accused or his solicitor or advocate to inspect the information at a reasonable time and in a reasonable place. Some documents might contain information that does require to be disclosed and other information that does not. The prosecutor will be able to edit, redact or otherwise obscure any information that does not require to be disclosed in any such document.

479. Information contained in criminal history records relating to witnesses, sometimes referred to as "previous convictions and outstanding charges" will require to be disclosed only if it meets the test for disclosure.

480. In solemn proceedings, witness statements of those witnesses whom the prosecutor intends to call to give evidence at trial, as a class of documents, will require to be disclosed. The prosecutor may, however, edit, redact or otherwise obscure any part or parts of a witness statement for information that does not require to be disclosed.

481. In summary proceedings, witness statements as a class of documents will not always require to be disclosed, even where the witness is likely to give evidence. In practice, in summary proceedings, the Crown will continue to prepare a narrative containing the information that the prosecutor is aware of (sometimes referred to as a "summary of evidence"). If there is additional information, whether contained in witness statements or elsewhere, that has not previously been disclosed, the prosecutor will provide the information.

482. There will for solemn cases be a duty on the police (and other agencies or organisations who investigate crimes and submit reports to the prosecutor in relation to those investigations) to provide the prosecutor with schedules listing all the information which may be relevant to the case obtained during the course of the investigation. The schedules will list the information ingathered which may be relevant to the case for or against the accused – which schedule information is listed on will depend on the sensitivity of the information. There will be three separate schedules (sensitive, highly sensitive or non-sensitive) dependant upon the nature of the information. On each schedule there will be an entry in respect of each piece of information held, together with a brief description of the information. If the prosecutor disagrees with the categorisation of any piece of information, he will be able to direct that the schedules are amended and re-submitted.

483. In solemn cases there will be a duty on the prosecutor to disclose to the defence a schedule listing all the information that may be relevant that is categorised as non-sensitive. This is in addition to their duty to disclose all material (and therefore relevant) information for and against the accused.

484. Although it is essential that the accused receives material and relevant information for or against him in connection with his case, it is equally essential that some balance is struck to protect the privacy of witnesses. To achieve that balance, the accused will only be able to use information disclosed to him by the prosecutor for the purposes of preparing or presenting his defence, whether in the trial or at (or in deciding whether to) appeal – including any application to the SCCRC or reference by the SCCRC to the High Court of Justiciary. It will be a criminal offence for the accused, or by any other person whom the accused passes the information to, to use the information for any other purpose.

485. The accused will be able to apply to the court to seek permission to pass on the information to a third party (but, clearly, need not do so if the reason for passing the information on is for the purposes of preparing or presenting his defence), whether in the trial or at (or in deciding whether to) appeal. If the court makes an order allowing the accused to pass on information to a particular person for a particular purpose, and the accused passes information to a different person or for a different purpose, he will commit an offence.

Non-disclosure – "Public Interest immunity"

486. There will be cases where the information which the prosecutor requires to disclose is sensitive and the disclosure of it would create a risk of substantial prejudice to an important public interest. In those circumstances, and only in such circumstances, the prosecutor will apply to the court for an order prohibiting disclosure. If, and only if, the court makes a non-disclosure order, the prosecutor will be able to withhold from the accused an item or items of information

specified in the order which would otherwise require to be disclosed (the prosecutor will retain, however, his discretion to discontinue proceedings).

487. This is not entirely novel; but as Lord Coulsfield recommended, there is a need to put in place a statutory system for such decisions to be made.

488. There is a difficult balance to be struck here between protecting the public interest at stake and the private interests of the accused. To achieve that, Lord Coulsfield envisaged there being three types of procedure, broadly described as type 1, type 2 and type 3:-

- **Non-Disclosure application only** - Crown and defence (and special counsel if appointed by the court) represented at hearing and have opportunity to make representations;
- **Exclusion with non disclosure applications** - Crown represented at hearing and special counsel if appointed by Court. Defence may be represented only to allow them to be heard on the procedure, thereafter they are to be excluded from the hearing to decide whether the non-disclosure order is to be made; and
- **Non-notification with exclusion and non disclosure applications** - Crown represented at hearing and special counsel if appointed by Court. Accused and his/her legal representative are not present and are not notified of any of the hearings.

The provisions are designed to give effect to this.

489. It will be possible, therefore, where the prosecutor applies for a non-disclosure order, for the prosecutor to apply to the court for a non-notification order and/or an exclusion order, also. A non-notification order will be an order prohibiting notice being given to the accused of the making of the applications for non-notification, exclusion and non-disclosure orders and also the decisions of the court in relation to any of those applications. An exclusion order will be an order prohibiting the accused from attending or making representations in proceedings relating to the application for a non-disclosure order.

490. The court will be able to appoint special counsel to represent the interests of the accused in respect of the applications at a hearing on any or all of the applications. Unlike the accused, special counsel will be able to see the applications and the information that is the subject of the application – ensuring that the accused's interests are represented.

491. The tests that the court will apply in deciding whether to grant any of these orders are necessarily high, particularly so for non-notification orders and exclusion orders. It is anticipated that the number of applications for non-disclosure order will be small, relative to the overall number of cases prosecuted and, of those, the number of applications for non-notification will be few; but however small the number, it is vital that there are clear procedures to allow applications to be made and to make clear the procedures for their consideration.

492. In considering whether to make a non-disclosure order, even if the court is of the view that the information in question cannot be disclosed, the court will require to consider whether disclosure of the information could be made to any extent. If it considers that information could

be disclosed to any extent the court will be able to specify that. This is another safeguard to ensure that only that information which absolutely must be withheld, is withheld.

493. The prosecutor will be able to appeal against a court decision to refuse an application for a non-notification order and an exclusion order, or against a decision for an exclusion order or a non-disclosure order.

494. The accused will be able to appeal against a court decision to make an exclusion order or a non-disclosure order. As the accused will not know that a non-notification order has been made, he will not be able to appeal.

495. Any special counsel appointed will, however, be able to appeal against a court decision to make a non-notification order and an exclusion order, or against a decision making an exclusion order or a non-disclosure order. This is to ensure that the accused's interests are represented.

496. The prosecutor and the accused will be able to apply for a review of a non-disclosure order on the basis that new information has come to light which was unavailable to the court at the time when the order was made. Notwithstanding that, the trial judge will be under a duty to keep under review the appropriateness of any non-disclosure order made and, if he considers that the non-disclosure order may no longer be appropriate then he will appoint a hearing. This is critical to ensuring that, throughout the proceedings, the reasons for non-disclosure remain and, if not, information is disclosed to the accused (whether in whole or to a specified extent).

Code of Practice

497. As Lord Coulsfield recommended, there will be a statutory code of practice which will set out in more detail how the scheme will work in practice. The code will apply only to prosecutors, police forces and any other investigating agency that is specified by Scottish Ministers. The code will not apply to the accused or the defence and as such will not impose any obligations on the accused or his legal representative.

498. The code will be prepared by and laid before Parliament by the Lord Advocate; as the code will direct prosecutors, police forces and investigating agencies in relation to the exercise of their functions, it is proper that the Lord Advocate has this function. If, in future, the Lord Advocate were to revise the code, any revised code will also be laid before Parliament.

Departures from Lord Coulsfield's report

499. The "Next Steps" paper outlined those recommendations made by Lord Coulsfield that were not being adopted, or not being fully adopted.

500. Subsequent to publication of that paper, of those recommendations that were adopted, one has been reconsidered and departed from. It was proposed that there should be a standard format for voluntary defence statements. It was proposed, also, that where, following disclosure by the Crown in accordance with the requirements, the defence wishes to request further consideration to be given to disclosure issues, it should be mandatory for a defence statement in the standard form to be submitted. That is still the intention in relation to summary proceedings.

501. In solemn proceedings it became apparent that the nature and scale of such cases are such that the prosecutor's task in assessing what requires to be disclosed would be almost impossible without knowing some information regarding the accused's line of defence. That risks essential information not being disclosed inadvertently and through no fault on either the prosecutor or the accused. It has been concluded, therefore, that the provision of a mandatory defence statement in all solemn proceedings by which the accused shall advise the prosecutor of the position he intends to take at trial is the only way to confidently secure disclosure to the accused of all the information which needs to be disclosed to him was for him to advise the prosecutor of the position he intended to take at trial.

502. The timing of when this requirement should be carried out is crucial: if it is required at too early a stage, the line of defence may not have become sufficiently clear, or might then change as the defence preparations develop. A balance was struck by requiring the accused to intimate and lodge his defence statement in solemn proceedings only 14 days before the Preliminary Hearing (in High Court cases) or First Diet (in Sheriff and Jury cases) and an updated statement (or where there is no update, a statement confirming that fact) 7 days before the trial diet).

503. The effect of the defence statement will be the same, regardless. On receiving it the prosecutor will require to review all of the information that may be relevant to the case for or against the accused of which it is aware. If anything further requires to be disclosed, the prosecutor will disclose it. If, and only if, the accused has sent the prosecutor a defence statement and nothing further is disclosed following that defence statement or if the accused believes that not all of the information that should have been given to him, has been disclosed, he can apply to the court (as he would at present).

Consultation

504. In November 2007, we published a consultation paper[33] on proposals for legislation based on Lord Coulsfield's recommendations and, following consideration and publication of the responses received, published an analysis of the responses and a statement setting out our next steps[34] for legislation.

Alternative approaches

505. There is no alternative approach that can achieve the policy objective. Although criminal cases would still proceed, continuing with the status quo would leave the uncertainty that which Lord Coulsfield's report was designed to address.

PART 7 – MENTAL DISORDER AND UNFITNESS FOR TRIAL

Sections 117-120 – Mental disorder and unfitness for trial

Policy objectives

506. To modernise the law in the area of mental disorders in criminal proceedings.

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[33] http://www.scotland.gov.uk/Publications/2007/11/09145246/0 Scottish Government Consultation Paper

[34] http://www.scotland.gov.uk/Publications/2008/04/24084456/0 - Scottish Government Next Steps paper

Key information

507. We are taking forward legislative changes recommended by the Scottish Law Commission (SLC) in their "*Report on Insanity and Diminished Responsibility*[35]" report published in 2004. Their report was drafted following Scottish Ministers giving the SLC the following remit:

"To consider-

- the tests to establish insanity (either as a defence or as a plea in bar of trial) and the plea of diminished responsibility; and
- issues of the law of evidence and procedure involved in raising and establishing insanity and diminished responsibility; and
- To make recommendations for reform, if so advised; and
- Consequent upon any recommendations for reform, to consider what changes, if any, should be made to the powers of the courts to deal with persons in respect of whom insanity (either as a defence or as a plea in bar of trial) or diminished responsibility has been established."

508. We welcome the recommendations contained in the report and consider them to be an important modernisation of the law in this important area.

509. We accept all of their recommendations and they are included within the Bill for the reasons outlined in the SLC report.

PART 8 – LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982

Policy objectives

510. To modernise licensing provisions within the Civic Government (Scotland) Act 1982 in line with the Task Group report's recommendations.

Key information

511. A Task Group was set up by the previous administration to review the licensing provisions contained in the 1982 Act. The Group reported in December 2004[36] and made a number of recommendations for reform. The then Scottish Executive responded to the report in August 2005[37] agreeing with the broad thrust of the recommendations, but indicated that those requiring primary legislation would be for a new administration to introduce following the 2007 elections, in light of competing priorities. We now consider it correct to take forward the relevant recommendations within this Bill.

512. The Task Group report's recommendations cover the general licensing provisions of the 1982 Act, and include specific provisions on metal dealers, market operators, public

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[35] http://www.scotlawcom.gov.uk/downloads/rep195.pdf

[36] http://www.scotland.gov.uk/Publications/2004/12/20391/48542

[37] http://www.scotland.gov.uk/News/Releases/2005/08/02134157

entertainment and late hours catering, taxis and private hire cars. The amendments to the 1982 Act are largely of a technical nature (affecting procedural aspects of the current licensing regime generally), though they also include some measures aimed at specific activities - the main amendments are listed below. The aim of the amendments is to make the 1982 Act licensing provisions fit for the 21st century in line with the Task Group report's recommendations.

Section 121 – Conditions to which licences under 1982 Act are to be subject

513. Where the licensing authority has failed to reach a final decision on a grant application before the expiry of the statutory period under the 1982 Act, the licence is statutorily deemed to have been granted unconditionally on the date of expiry and remains in force for one year. The Bill retains the existing "deemed grant" provisions, but amends the Act to permit the application of standard conditions to any such licence.

514. In the interests of public safety, a regulation-making power in the Bill will be used to make it a mandatory condition of a licence that the licence (or a copy) be displayed on premises, vehicles (or a plate) and vessels, and where this is not practical for the licence to be carried at all times by the day-to-day manager. In the case of other activities (such as window cleaners), the regulations will require individuals to carry the licence (or a copy) on their person unless the licensing authority, under its discretionary powers, has made it a condition of licence that an identification badge be displayed or shown on demand.

Section 122 – Licensing: powers of entry and inspection for civilian employees

515. Constables have rights of entry and inspection under the 1982 Act for specified purposes (such as checking compliance with the terms of the licence). The Bill extends these rights to include civilian staff employed by the police under the provisions of section 9 of the Police (Scotland) Act 1967.

Section 123 – Licensing of metal dealers

516. The Bill replaces the current mandatory licensing scheme for metal dealers with an optional licensing scheme, i.e. it will be open to local licensing authorities to determine whether or not licences are required in their areas. The Bill repeals the current exemption from the licensing provisions (where annual turnover is over £100,000) and enables authorities to determine whether there should be any exemptions for larger businesses.

Section 124 – Licensing of taxis and private hire cars

Policy objectives

517. To modernise the taxi and private hire car licensing regime within the Civic Government (Scotland) Act 1982 in line with the Task Group report's recommendations.

Key information

518. The provisions amend the 1982 Act in relation to the way in which licensing authorities fix the scales for taxi fares. The provisions provide details of how the licensing authority should carry out their review of the scales including the consultation and notification procedures. The

new provisions require that the review mechanism must be completed and the fares fixed within 18 months of the date on which the scales came into effect.

519. The provisions amend the 1982 Act to extend the right of appeal to the Traffic Commissioner (TC) against taxi fares fixed by a licensing authority to bodies representative of taxi operators operating in the council area as well as individual taxi operators.

520. The Task Group reported that the TC had called for extension of the existing appeal provisions under section 18. The TC considered it appropriate that representative bodies consulted under section 17 and that are required to be notified of an authority's decision on the fixing of taxi fare scales or review should have the right of appeal. The proposal was widely supported during the Task Group's consultation.

521. The provisions also amend the 1982 Act to clarify that a licensing authority shall not grant a taxi or private hire car driver's licence to any applicant unless that person has held for the 12 month period immediately prior to that application a licence authorising them to drive a motor car under Part III of the Road Traffic Act 1988.

522. The Task Group took the view that the provisions as presently worded allowed a driving licence to be provided where an applicant had held a driving licence for any continuous 12 month period prior to submission of their application. The proposed amendment clarifies the original intention of the policy and was widely supported during the consultation on the Task Group review.

523. The provisions amend the 1982 Act to extend the period within which an authority is required to serve notice of its decision with regard to the fixing of taxi fare scales or of a review from 5 days to 7 days.

524. The Task Group considered that the 5 day period presently prescribed was unnecessarily tight particularly where broken by a weekend and/or public holiday. The proposed extension received almost unanimous support in consultee responses.

Section 126 – Licensing of public entertainment

525. The provisions amend the 1982 Act to remove the existing exemption for free events. The Task Group viewed it as unsatisfactory that licensing authorities are not able to control large scale public entertainments that are free to enter. It noted that authorities may not wish to license certain types of free event, such as gala days and school fetes, but considered that the decision on whether to license these events should rest with the authority.

Section 127 – Licensing of late night catering

526. The provisions extend the part of the 1982 Act covering late hours catering to ensure that licensing authorities have the power to license any premises selling food or drink at late hours. The Task Group report states that "the principal justification for licensing such premises related to the potential for large numbers of people leaving pubs, night clubs etc. late at night to cause a disturbance, and that this potential exists regardless of whether the food or drink being sold has

been cooked or pre-prepared in any way". This amendment will give licensing authorities the option of licensing all such premises if they consider it necessary to do so.

Section 128 – Applications for licences

527. The provisions makes a number of amendments to Schedules to the 1982 Act, which include: extending the time allowed for making representations on any application for the grant or renewal of a licence from 21 days to 28 days; increasing the period of notice which licensing authorities must give for attendance at a hearing from 7 days to 14 days; and allowing licensing authorities to consider licence renewal applications received after the expiry date as renewals rather than applications for a new licence for up to 28 days after the expiry of the previous licence.

Consultation

528. Given the diverse range and technical nature of the licensing activities covered by the 1982 Act, the Task Group decided to draw up emerging findings first and then test these through wide consultation. The Group thus consulted very widely on its preliminary findings before firming up its recommendations. Over 70 responses were received from local authorities, the police, affected traders, legal interests, trade associations, individuals, consumer interests and trading standards officers.

Alternative approaches

529. The alternative would have been to do nothing in respect of the Task Group's report and leave the 1982 Act unchanged. This was disregarded as there was a broad consensus that the Act would benefit from some updating and the Bill provides a legislative opportunity to do so.

PART 9 – ALCOHOL LICENSING

Section 129 – Sale of alcohol to persons under 21 etc.

Policy objectives

530. To require Licensing Boards to actively consider the detrimental effect of off-sales purchases of alcohol to people under the age of 21 within their area, or part of their area and to provide Licensing Boards with a power to impose licensing conditions restricting off-sales of alcohol to people under the age of 21. This is part of our efforts to tackle alcohol misuse and reduce alcohol-related harm.

Key information

531. Our discussion document "*Changing Scotland's Relationship with Alcohol*[38]", issued in June 2008, set out Ministers' strategic approach to tackle alcohol misuse and reduce alcohol-related harm. This included a proposal to raise the minimum legal age for purchasing alcoholic drinks in off-sales to 21 across Scotland, on which views were sought.

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[38] http://www.scotland.gov.uk/Topics/Health/health/Alcohol/strategy

532. The discussion document set out the key arguments in support of this approach:

- alcohol is much cheaper and more widely accessible in off-sales than on-sales and, therefore, the measure would be likely to generally reduce the amount of alcohol purchased by young people;
- on-sales premises offer a more controlled drinking environment than off-sales, therefore, the behaviour of 18-21 year olds is more likely to be moderated;
- it could act as a particular deterrent for drinkers under 18 who are significantly more likely to purchase their alcohol from off-sales rather than on-sales. It would also reduce the opportunity for those aged under 18 to purchase alcohol by proxy through 18-21 year olds; and
- pilot projects in Cupar, Stenhousemuir and Armadale have shown a positive impact of raising the age for off sales. All three of these local pilots have shown a significant reduction in anti-social behaviour and offending as a result of raising the age of off-sales purchases to 21 on Friday and Saturday evenings.

533. However, there was limited support for the proposal amongst those who responded to the consultation. Amongst individuals 62% were against this proposal and 38% were in favour. Of the organisations that responded to this question, 63% were against and 27% in favour.

534. In light of the consultation responses and the difficulties of carrying such a measure through Parliament, we have decided not to pursue a blanket approach across Scotland. However, we are persuaded that there are clear arguments in support of local approaches where appropriate, as shown by the positive impact of the pilots in Cupar, Stenhousemuir and Armadale. The proposed amendments to the Licensing (Scotland) Act 2005 will, therefore, encourage the development of local solutions to address local problems.

535. It will do this by requiring every Licensing Board to undertake an assessment as to whether off sales of alcohol to people under 21 is having a detrimental impact on one or more of the licensing objectives (i.e. crime and disorder, public safety, public nuisance, public health and on children), within their Board area or any part of it. Boards will be required to undertake this assessment as part of their regular review of their policy statement, at least every 3 years. In addition the Police or the Local Licensing Forum will be able to ask a Board to conduct additional assessments outwith the 3 year cycle. The conclusions drawn by the Board do not have to relate to the whole geographical area covered by the Board. For example, a Board could decide that there was a detrimental impact for only certain communities.

536. The Bill will also create an enabling power for Scottish Ministers to set out in regulations specific circumstances in which Licensing Boards would be able to apply new conditions to more than one licensed premise at a time. Ministers intend to bring forward regulations which would enable Licensing Boards to impose a block restriction on all or certain premises (e.g. in a particular geographical area) from providing off-sales to those under 21, at all or at certain times. This would remove the need for Licensing Boards to hold a hearing for each individual premise to which they wish to apply this condition.

Consultation

537. As described above, we consulted on the proposal to raise the minimum legal age to 21 across Scotland between June and September 2008.

Alternative approaches

538. As described above, following consideration of the responses received, we have decided not to pursue a blanket approach to raising the minimum legal age for purchasing alcoholic drinks in off-sales to 21 across Scotland. Instead we have agreed to provide for locally flexible solutions by requiring all Local Licensing Boards to actively consider raising the age of off-sales purchases to 21 in all or part of their Board area and providing the Police and Local Licensing Forum with the powers to request the Board to review their policy.

Sections 130-139 – Alcohol licensing

Policy objectives

539. To improve the operation of the Licensing (Scotland) Act 2005 through modifying a number of the provisions to reduce costs, shorten process times, remove unintended barriers and close loopholes, while ensuring Licensing Boards receive sufficient information on which to base their decisions concerning licences to sell alcohol.

Key information

540. The Licensing (Scotland) Act 2005 (the "2005 Act") will replace the Licensing (Scotland) Act 1976 in its entirety. The 2005 Act and the new licences under it come fully into force on 1 September 2009 at the end of a transition period that began in February 2008. It replaces the 1976 Act system of separate licences for pubs, restaurants etc with a single all-purpose premises licence, and a personal licence.

Section 130 - Premises licence applications: notification requirements

541. The provisions remove the need for Licensing Boards, when notifying the range of interested parties as required by the 2005 Act, to include with that notification a copy of the application, except in respect of the Chief Constable. This does not prevent the application being available for public inspection but reduces the cost and burden of notification. Similar provisions have been in use during the licensing transition period, having been put in place by Scottish Ministers using regulatory powers to make transitional modifications.

Section 131 - Premises licence applications: modification of layout plans

542. The provisions enable a Licensing Board to consider that where they would refuse an application as made, but would grant it if a modification to the layout plan, proposed by it, was made, they would be able to grant the application. The Board must, if the applicant accepts the proposed modification, grant the application as modified. Previously the Board would be required to reject the application and the applicant would need to reapply with all the associated costs that would entail.

Section 132 - Premises licence applications: antisocial behaviour reports

543. The provisions reduce the requirement for the Chief Constable to provide within 21 days a report detailing all cases of antisocial behaviour identified within the relevant period by constables as having taken place on, or in the vicinity of, the premises, and all complaints or other representations made within the relevant period to constables concerning antisocial behaviour on, or in the vicinity of, the premises.

544. The provisions state that these such reports should be required only if the Licensing Board requests one (which they may do following public objections or representations concerning a premises) or if the Chief Constable chooses to provide one. As consideration was being given to the implementation of the 2005 Act, it became clear that the 2005 Act procedure was unnecessarily onerous and bureaucratic. Using regulatory powers, Scottish Ministers made transitional modifications that reduced the requirement for the Chief Constable to provide a report on antisocial behaviour and these provisions will establish a similar situation after transition. This will ensure unnecessary costs are not entailed for the production of reports which are not required.

Section 133 - Sale of alcohol to trade

545. The provisions amend the provision in the 2005 Act whereby it is an offence for a licensed premises to sell to the trade. This is a common sense measure that corrects an unintended consequence of the 2005 Act. For example if a restaurant owner wished to buy alcohol for the restaurant from a supermarket instead of the wholesaler, the restaurant owner would under the 2005 Act be committing an offence.

Section 134 - Occasional licenses

546. The provisions will enable the fast tracking of some occasional licences where there is very limited notice of the need for such a licence e.g. a funeral. At present the statutory time requirements of the 2005 Act would prevent such functions or events from taking place.

Section 135 - Extended hours applications: variation of conditions

547. The provisions will allow Licensing Boards the flexibility to apply additional conditions when granting extended hours applications. For example where a licensed premises has listed one of its activities as showing televised sport, a Licensing Board may see no reason to apply specific conditions. However if there was a request for extended hours to enable the screening of certain football matches during a major competition (for example the World Cup), the Licensing Board may wish to see additional conditions applied to the premises, e.g. extra door staff and the use of plastic glasses while those extended hours apply (and earlier in the day).

Section 136 - Personal licences

Section 138 - False statements in applications: offence

548. The provisions in section 136 will allow the Licensing Board to refuse to process or issue a personal licence if the applicant already holds a valid personal licence. Section 138 would also

make it an offence to apply for a second personal licence under the Licensing (Scotland) Act 2005 if the applicant already held a personal licence. This prevents a person from avoiding any sanctions a Licensing Board had wished to impose for actions in relation to an existing licence which were not in accordance with the licensing objectives.

Section 137 - Emergency closure orders

549. While maintaining the need for a senior officer to take decisions about prohibiting the sale of alcohol, the provisions will amend the definition of a senior officer from being a constable of or above the rank of Superintendent to the rank of Inspector or above. These changes will accord better with the practicalities of day to day policing by making the rank of officer required to take these decisions more appropriate.

Section 139 – Further modifications of 2005 Act

550. The provisions ensure the police are able to bring a wider range of information to the attention of the Licensing Board at the time of application. The 2005 Act limits the chief constable so that he can only object on the ground that he has reason to believe that the applicant is involved in serious organised crime and that refusal of the application is necessary for the purpose of the crime prevention objective. This provision will ensure that the police have the same ability as anyone else to object to a licence on any or all of the grounds offered by the Licensing Objectives including prevention of crime and public nuisance, securing public safety and protecting children from harm.

Consultation

551. These provisions have arisen as stakeholders have considered the day to day operation of the system after implementation and following encouragement from Scottish Ministers to highlight areas of concern. Suggestions were forwarded by trade organisations, their legal representatives, Clerks to the Licensing Boards and the police.

552. The proposal was included in our “Revitalising Justice” proposals document published in September 2008 and were generally welcomed by those who responded.

Alternative approaches

553. The alternative would have been to do nothing in respect of stakeholders requests for changes and to leave the 2005 Act unchanged. This was disregarded as there was a broad consensus that the operation of the Act would be improved to the benefit of the local community and the trade and the Bill provides a legislative opportunity to do so.

PART 10 – MISCELLANEOUS

Section 140 – Licensed premises: social responsibility levy

Policy objectives

554. To ensure alcohol retailers and licensed premises whose activities can impact negatively on the wider community contribute towards the cost of this impact.

Key information

555. We are proposing that a levy should be applied to some alcohol retailers and certain licence holders under the Civic Government (Scotland) Act 1982 to help offset the costs of dealing with the adverse impact of these businesses or their customers. The principle that the costs associated with the wider impacts of a commercial activity should be borne by those who benefit from it is well established and already applied, for example, in respect of environmental impacts.

556. For example, alcohol misuse and overconsumption and subsequent disorder and harm places a heavy burden on our public services from policing city centres at night, treating alcohol related injuries in Emergency Departments, and providing other services to respond to the consequences of alcohol misuse. We are aware that many town and city centres face their own unique problems with regard to the effects of alcohol misuse. Licensed premises – for example, pubs, nightclubs, off-sales and takeaways – play a vital part in the night-time economy but large numbers of people using these facilities within relatively compact districts can lead to anti-social behaviour and disorder.

557. We consider it is wrong for the full burden of providing these services to continue to be met by the tax payer. Money available to Government is limited, and while businesses already pay business rates, we consider that some of the additional cost of providing services (for example, policing the night-time economy) should be met by those who profit from the sale of alcohol and profit from other types of licensed premises. The objective of a Social Responsibility Levy would be for alcohol retailers and other licensed premises to contribute financially to the furtherance of the Licensing Objectives set out in the Licensing (Scotland) Act 2005.

558. We do not consider that the uses to which a Social Responsibility Levy should be put should be set out nationally. Rather, local authorities should be able to determine priorities in their areas and identify new or enhanced services, initiatives or projects where the use of additional money could best contribute to the achievement of the Licensing Objectives. The levy should not become a direct alternative to established sources of funding but should provide an opportunity for local authorities and other public bodies to be innovative and creative in finding new ways of promoting the licensing objectives.

Consultation

559. The proposal for a Social Responsibly Levy was set out in *"Changing Scotland's Relationship with Alcohol*[39]*"* published in June 2008. This document sought comments on the levy. The evaluation of the consultation process was published in February 2009.

560. Although the provisions in the Bill are for an enabling power, we will work with key stakeholders including ACPOS, COSLA, the alcohol industry and other business interests to

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[39] http://www.scotland.gov.uk/Publications/2008/06/16084348/0

develop the detail of the Social Responsibility Levy before considering whether to bring any regulations before Parliament.

Alternative approaches

561. In the absence of a Social Responsibility Levy, the full cost of dealing with the adverse impact of licensed premises would continue to be met fully by local authorities, health boards, the police and other agencies.

Section 141 – Annual report on Criminal Justice (Terrorism and Conspiracy) Act 1998

Policy objectives

562. To tidy up the law, reducing the risk of error and confusion.

Key information

563. The Criminal Justice (Terrorism and Conspiracy) Act 1998 (the "1998 Act") was introduced as emergency legislation following the Omagh bombing. The Act contained a package of measures designed to tackle terrorism. It also introduced section 11A of the Criminal Procedure (Scotland) Act 1995, which deals with the jurisdiction of the Scottish Courts to deal with conspiracies in Scotland to commit offences outside the United Kingdom (see also description of section 37 of the Bill within this memo).

564. Section 8 of the 1998 Act introduced the requirement for a statutory report on the working of the Act to be laid before both Houses of Parliament not less than once a year. Section 121 of the Scotland Act 1998 widened these reporting arrangements so that the requirement to lay the report became a requirement to lay the report in the Scottish Parliament too, so far as any report related to the provisions on conspiracy.

565. The UK Government considers this part of the Act to be redundant and this section has been repealed for England, Wales and Northern Ireland by the Criminal Justice and Immigration Act 2008. The reporting requirements to Parliament on the operation of terrorism provisions is now provided for by section 36 of the Terrorism Act 2006. The majority of provisions, including section 36, of this Act apply on a UK wide basis. The reporting requirement at section 8 now relates only to the provisions on conspiracy.

566. Section 11A of the 1995 Act has never been used in practice since its enactment and there has, therefore, been nothing to report. The provisions therefore repeal section 8 of the 1998 Act as it applies to Scotland.

Consultation

567. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

568. There are none that meet the policy objective.

Section 142 – Corruption in public bodies

Policy objectives

569. To improve the operation of courts.

Key information

570. This section extends the jurisdiction of district/justice of the peace courts so that they can deal with cases involving offences under the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906. In simple terms, the 1889 Act provides that a person in public office who is involved in any form of corrupt practice in connection with their work is guilty of an offence. The 1906 Act provides that any employee who carries out activity in a corrupt manner is guilty of an offence.

571. The antiquated terms of the 1889 and 1906 Acts exclude jurisdiction of the district/ justice of the peace courts, unlike the vast majority of other statutory offences that can be tried either summarily or on indictment. The provisions repeals these provisions so that the normal jurisdiction provisions in the Criminal Procedures (Scotland) Act 1995 can operate.

572. The choice of forum for prosecutors will remain with the prosecutor and, in practice, it is unlikely that significant numbers of cases will be dealt with in the district/justice of the peace court.

573. The provisions will remove an unnecessary restriction on which courts can deal with corruption offences.

Consultation

574. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

575. There are none that meet the policy objective.

SCHEDULE 5 – MODIFICATION OF ENACTMENTS

Paragraphs 1, 4, 45 and 51

Policy objectives

576. To tidy up the law, reducing the risk of confusion and error.

Key information

577. A major consolidation exercise of Scottish criminal law and procedure was carried out in 1995. The then existing law was consolidated by the combined effect of the Criminal Procedure (Scotland) Act 1995, the Criminal Law (Consolidation) (Scotland) Act 1995, the Criminal

Procedure (Consequential Provisions) (Scotland) Act 1995, and the Proceeds of Crime (Scotland) Act 1995.

578. The Criminal Law (Consolidation) (Scotland) Act 1995 consolidated certain enactments creating offences and relating to the criminal law in Scotland.

579. This consolidation exercise included consolidation of the False Oaths (Scotland) Act 1933 to create sections 44-46 of the Criminal Law (Consolidation) (Scotland) Act 1995. Consequential provisions required as a result of this exercise were provided for in the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995. It has emerged that a minor error occurred during this consolidation exercise. Schedule 5 to the Criminal Procedure (Consequential Provisions) (Scotland) Act, containing the list of repeals, should have included a reference to the False Oaths (Scotland) Act 1933. This was however omitted, and the 1933 Act remains in force alongside its intended replacement. The provisions therefore repeal the 1933 Act in full. Appropriate consequential amendments are also made where reference has been made to the 1933 Act in other legislation.

Consultation

580. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

581. There are none that meet the policy objective.

Paragraphs 9-11

Policy objectives

582. To tidy up the law, reducing the risk of confusion and error.

Key information

583. A major consolidation exercise of Scottish criminal law and procedure was carried out in 1995. The then existing law was consolidated by the combined effect of the Criminal Procedure (Scotland) Act 1995, the Criminal Law (Consolidation) (Scotland) Act 1995, the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995, and the Proceeds of Crime (Scotland) Act 1995.

584. The Criminal Law (Consolidation) (Scotland) Act 1995 consolidated certain enactments creating offences and relating to the criminal law in Scotland. In essence, this was a tidying up exercise, which made no changes to existing law and covered a wide range of subject matters.

585. Sections 27 to 30 of the Criminal Law (Consolidation) (Scotland) Act 1995 provide the Lord Advocate with special investigatory powers to deal with serious or complex fraud. They re-enact sections 51 to 54 of the Criminal Justice (Scotland) Act 1987, as amended by the Criminal Justice and Public Order Act 1994.

586. However, the provisions of the 1987 Act were not repealed, so they continue to exist in parallel with the 1995 Act replacements. The provisions correct this error by repealing the provisions of the 1987 Act and two later amendments to that Act.

Consultation

587. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

588. There are none that meet the policy objective.

Paragraph 13

Policy objectives

589. To tidy up the law, removing an archaic section.

Key information

590. Section 16 of the Criminal Law (Consolidation) (Scotland) Act 1995 provides a power of search or entry in respect of brothels. The section allows any parent, relative, guardian or person acting in the best interests of a woman or girl to ask for a warrant to be issued. This warrant will authorise a named constable to enter a specified place and search for that woman or girl where they believe she is unlawfully being held for immoral purposes. If the woman or girl is found, she will be delivered to her parents or guardians. There is also a right afforded to the person requesting the warrant to accompany the constable when the warrant is executed.

591. This provision was first to be found in section 10 of the Criminal Law Amendment Act 1885, which has been consolidated twice.

592. This appears to be a rather outmoded provision. In practical terms, the police already have the power to request warrants for circumstances such as this, so the power is redundant.

593. There is no need to retain this provision, as a constable has the common law power to apply for a warrant to enter and search any premises if he or she suspects that a criminal offence is being carried out. The English equivalent was repealed in 2003. The provisions therefore repeal section 16.

Consultation

594. The proposal was included in our "Revitalising Justice" proposals document published in September 2008. No comments were received.

Alternative approaches

595. There are none that meet the policy objective.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

596. The Bill's provisions do not discriminate on the basis of gender, race, religion, disability or sexual orientation. Given the multitude of topics contained with the Bill, an overall summary of the equalities impact of the Bill will be published on the Scottish Government website (on the day of publication of the Bill). Two sections below (section 23 and section 129 of the Bill) are considered to have the most significant equalities impact.

Section 23 – Offences aggravated by racial or religious prejudice

597. There are statutory aggravations in place to require courts to consider increasing a sentence when it has been shown that a crime was racially or religiously motivated. The amendments to that legislation will ensure that it is made explicit at the point of sentence that the offence was racially and/or religiously aggravated and the impact that the aggravation has had on the sentence. These measures will harmonise the application of hate crimes legislation across the statute book in Scotland and improve the recording and application of race and religion aggravations. Evidence suggests that certain groups of people in society are much more likely to have been offended against simply because of who they are. These measures will help to ensure visible justice for the victims of crimes motivated by prejudice.

Section 129 – Sale of alcohol to persons under 21 etc.

598. Discrimination on grounds of age in relation to the purchase of alcohol in off sales is considered to be justifiable in terms of the greater good. Age restrictions currently apply to the purchase of a number of products including alcohol, tobacco and DVDs. The underlying rationale for such restrictions is the need to balance the need to protect young people and the wider community with the right of young people to purchase a legal product.

599. Alcohol is a dangerous drug when consumed irresponsibly. The impacts of misusing alcohol can be significant for both an individual's health, well-being and life chances as well as for society more widely in terms of the costs of dealing with any health or criminal justice consequences.[40] For this reason there are existing restrictions on the sale of alcohol to those aged under 18.[41]

600. However, evidence from other countries suggests that increasing the legal drinking age from 18 to 21 can have substantial effects on youth drinking and alcohol-related harm, often for

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[40] The costs of alcohol misuse in Scotland are estimated to be £2.25 billion per annum, *Costs of Alcohol Use and Misuse*, Scottish Government, May 2008.

[41] Section 68(1)-(3) of the Licensing (Scotland) Act 1976 prohibits the selling alcohol on licensed premises to under 18s, these provisions will be further strengthened when the Licensing (Scotland) Act 2005 comes fully into force on 1 September 2009, when it will be an offence to sell alcohol to a person aged under 18 anywhere (not just on licensed premises).

well after young people reached the legal drinking age.[42] There is also evidence that delaying the onset of drinking may be important in reducing the risk of harmful drinking.[43]

601. Research evidence also suggests that young people who drink are more likely to be the both the perpetrators and victims of violence.[44] In addition experience from three local pilots in Stenhousemuir, Cupar and Armadale - under which shopkeepers voluntarily raised the age of off-sales purchases to 21 on Friday and Saturday evenings - suggests that such restrictions can significantly reduce anti-social behaviour and offending.

602. It is considered that Licensing Boards should have the opportunity to thoroughly consider whether there is justification for increasing the age for off-sales purchases to 21 in all or part of their Board area, taking into account the interests both of young people themselves and the wider community.

Human rights

603. We are satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights.

Part 1 - Sentencing

604. The provisions of Part 1 concerning the purposes and principles of sentencing and the creation of sentencing guidelines could give rise to issues under Article 6. The Scottish Sentencing Council will be responsible for preparing and publishing sentencing guidelines and will operate independently of Scottish Ministers. Although the Court will be required to have regard to sentencing guidelines it may in any individual case depart from the guidelines where it considers that there are reasons to do so. Consequently the guidelines will not prevent the Court dealing with an individual case in the most appropriate, ECHR compliant, manner. As a public authority the Courts are required to exercise their functions in an ECHR compliant manner and the establishment of the Scottish Sentencing Council and sentencing guidelines will not impact on that obligation.

605. The provisions regarding community payback orders could raise questions under Articles 4, 5 and 8. However, the provisions of Article 4 are not engaged as any community payback order will usually be imposed where the offender has expressed a willingness to comply with the requirements. Although the imposition of such an order may interfere with an individual's liberty the fact that the restriction, if any, is imposed in accordance with a procedure prescribed by law and the deprivation, if there is such, is at the instigation of a Court, will ensure there is no incompatibility with Article 5. Any interference with an offender's private and family life is in accordance with the law and necessary for the prevention of disorder or crime, consequently bringing the provisions within the scope of Article 8.2.

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[42] Wagenaar A.C. and Toomey T.L. (2000) *Alcohol policy: gaps between legislative action and current research.* Contemporary Drug Problems 37

[43] Newbury-Birch et al , *Impact of Alcohol consumption on Young People: A Review of Reviews,* UK Government Department for Children, Schools and Families, January 2009

[44] Ibid.

606. The proposals for revocation of licences of offenders by Scottish Ministers are to considered to be compatible with ECHR notwithstanding that there is a deprivation of liberty. Although the licences revoked at the instance of Scottish Ministers the case must be referred to the Parole Board, as at present, and the Board has the power in appropriate cases to direct re-release on licence. The Board is, by virtue of its constitution, an independent and impartial tribunal and consequently no issues under ECHR arise.

Part 2 - Criminal law

607. The Bill provides for "personal communication devices" to be banned in prisons. This could give rise to issues under Article 8 and Article 1 of Protocol 1. It is considered, however, that any interference is necessary in a democratic society and consequently the provisions of Article 8.2 apply. Deprivation of such property is in the public interest and consequently there is no infringement of Article 1 of Protocol 1.

608. The Bill also makes provision for creating offences of possession of extreme pornography. This could give rise to issues under Article 8 and Article 10. Any interference with rights protected by these Articles must be in accordance with and prescribed by law, for a legitimate aim and must be necessary and proportionate. Each of these tests is met as regards possession of extreme pornography.

Part 3 - Criminal procedure

609. The power to retain DNA and fingerprints from individuals not convicted of an offence raises issues under Article 8 ECHR. The issue was considered recently in the case of *S and Marper v UK* by the Court of Human Rights in Strasbourg. The Court in that case was considering the provisions of section 64 of the Police and Criminal Evidence Act 1984. The Court concluded that retention of forensic data was justified under Article 8(2) for the prevention and detection of crime. However, the Court considered that there were difficulties regarding the indefinite retention of such material. The proposals for retention of DNA and fingerprints under the Bill are considered to be compatible with ECHR on the grounds that they pursue the legitimate aim of prevention and detection of crime and protection of the health and morals of others. Measures have been put in place to ensure that the proposals are proportionate to the aims pursued. DNA and fingerprints will only be retained for an initial period of 3 years. Any extension of that period would require the authority of a Court. Forensic data taken from a child may only be retained if the child accepts that they have committed, or have been found by a Sheriff to have committed, a serious offence (a violent or sexual offence). Separate and more stringent arrangements, therefore, apply as regards DNA and fingerprints taken from children than from adults. This is considered to be compatible with the provisions of Article 8.

Part 4 – Evidence

610. Provision to permit the granting of a witness anonymity order by a Court is considered to be compatible with Article 6 ECHR notwithstanding the decision of the House of Lords in the case of *R v Davis* (2008) UK HL 36. Under Article 6 ECHR everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Permitting evidence to be led under a witness anonymity order is not *per se* incompatible with Article 6. The obligation on a Court to ensure that any criminal proceedings are "fair" will ensure that the provisions are exercised in an Article 6 compliant manner. Under Article 8

everyone has the right to respect for his or her private and family life. Consequently a witness is entitled to protection of his or her Article 8 rights. In determining whether to grant a witness anonymity order a Court will need to balance the Article 6 rights of the accused with the Article 8 rights of a witness. There is nothing in the Bill that requires a Court to grant an order in any individual case. It is considered, therefore, that the provisions of the Bill are not *per se* incompatible with the Convention and the obligation will be on the Court to apply them in an ECHR compliant manner.

Part 5 - Criminal justice

611. The power to permit Audit Scotland to undertake data matching for the purpose of protection of fraud and other purposes may give rise to Article 8 issues. It is considered that any interference with the individual's rights under Article 8 are justified and would not be disproportionate to the achievement of a legitimate aim. The onus will be on Audit Scotland as a public authority to exercise its powers in an ECHR compliant manner.

612. Provision dealing with the granting of foreign travel orders under the Sexual Offences Act 2003 may raise issues under Article 8. The maximum duration for which an FTO may be imposed is being increased but it is considered that the period specified, which is a maximum period, does not necessarily interfere disproportionately with the individual's rights under Article 8. It is considered that the measures that would need to be exercised by a Court in an ECHR compliant manner are proportionate and necessary for the reasons set out in Article 8.2.

613. Police forces currently have the power to exercise surveillance measures and it is considered that the new proposals under the Bill, while extending these powers, will not do so in a manner that necessarily would be exercised incompatibly with ECHR. The police will be required to exercise any powers conferred on them in an ECHR compliant manner and consequently the proposals are not *per se* incompatible with ECHR.

Part 6 – Disclosure

614. These provisions are designed to place the Crown's obligations to disclose information relevant to the accused's defence on a statutory footing. The provisions requiring the accused to lodge a Defence Statement may give rise to issues under Article 6 particularly with regard to the right not to self-incriminate. It is considered however that the requirement to lodge a Defence Statement is a procedural measure designed to assist the court to identify the real issues in dispute. It does not amount to self incrimination.

615. The provisions relating to the conduct of Public Interest Immunity Hearings and the granting of Non-Disclosure Orders, Exclusion Orders and Non Notification Orders could give rise to issues under Article 6, specifically the right of an accused to receive a fair trial in the context of certain parts of the trial process being conducted in the absence of the accused. It is noted however that the requirement in terms of Article 6 is to ensure that any trial is conducted in a manner that is "fair". The Court as a public authority is required to have regard to that duty. In assessing whether the proceedings are "fair" the Court has to balance the interests of the accused with the interests of third parties and the general public interest in ensuring that justice is achieved by the Court. The provisions contain a series of checks and balances that give the Court the necessary power to ensure that in any individual case these interests, which may be

conflicting, are given due weight. These include provision requiring the Court to determine the appropriate procedure and to keep that under review and the power to appoint independent "special counsel" in appropriate cases to represent the interests of the accused in circumstances where the accused is neither present nor represented by his or her own legal representative.

Part 7 – Mental disorder and unfitness for trial

616. The provisions dealing with mentally disordered persons raise issues under Article 5 of ECHR. The new defence is concerned with a question of criminal responsibility. Such provisions do not in themselves deprive an individual of his or her personal liberty. Instead they identify a category of persons who cannot be regarded as criminally liable for the acts in question. It is the disposal of such people within the criminal justice system, if convicted, that would give rise to issues under Article 5. Article 5(1)(a) permits the lawful detention of a person following conviction by a competent court. Any order imposed on an individual would be imposed by an Article 6 compliant court and consequently it is considered that the detention is lawful. The Court will be under a duty to exercise its powers in an ECHR compliant manner having regard to the competing demands imposed by *inter alia* Articles 5, 6 and 8.

Part 8 - Licensing under the Civic Government (Scotland) Act 1982

617. The application of new conditions to be attached to existing licences could give rise to an interference with the licence holder's rights under Article 1 of Protocol 1. The Scottish Government considers that the rights can be exercised in a manner that is compatible with the licence holder's rights and the provisions are consequently compatible with the ECHR.

Part 9 - Alcohol Licensing

618. The power to impose variations in licensing conditions under the Licensing (Scotland) Act 2005 could give rise to issues under Article 1 of Protocol 1 of ECHR. That is on the basis that the licence constitutes a "right" or "property". However, the rights under Article 1 of Protocol 1 are not absolute and they may be interfered with in the public interest and in accordance with the law. It is considered that the "in accordance with the law" test is met and any decision to vary a licence would be undertaken by a Licensing Board. The Board would need to ensure that any interference is in the public interest and is proportionate. Consequently it would be in accordance with ECHR. The provisions are, therefore, not in themselves incompatible with ECHR but will need to be exercised in a manner that is so compatible.

Island communities

619. The Bill has no differential impact upon island communities. The provisions of the Bill apply equally to all communities in Scotland.

Local government

620. CoSLA and local authorities have been consulted on the provisions of the Bill that directly impact on them. We are satisfied that the Bill has no detrimental impact on local authorities.

Sustainable development

621. The Bill will have no negative impact on sustainable development.

This document relates to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Criminal Justice and Licensing (Scotland) Bill. Its purpose is to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Standing Orders, of provisions in the Criminal Justice and Licensing (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose of each provision and explains the reasons for seeking the proposed delegated powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

OUTLINE OF BILL PROVISIONS

2. The Bill contains provisions that will deliver a series of reforms to strengthen, modernise and improve the effectiveness of the justice system in Scotland.

3. The Bill will be a very wide-ranging piece of legislation that includes provisions to reform community penalties, improve criminal law, modernise court procedures and assist victims and witnesses. It also contains measures that will help address Scotland's drinking culture through reforms to licensing law. The Bill is split into 11 parts.

- Part 1 – Sentencing;
- Part 2 – Criminal law;
- Part 3 – Criminal procedure;
- Part 4 – Evidence;
- Part 5 – Criminal justice;
- Part 6 – Disclosure;
- Part 7 – Mental disorder and unfitness for trial;
- Part 8 – Licensing under Civic Government (Scotland) Act 1982;
- Part 9 – Alcohol licensing;

- Part 10 – Miscellaneous; and
- Part 11 – General.

4. Further information about the Bill's provisions is contained in the Explanatory Notes (and Financial Memorandum) published separately as [SP Bill 24–EN] and in the Policy Memorandum published separately as [SP Bill 24–PM].

APPROACH TO USE OF DELEGATED POWERS - OUTLINE

5. The Bill contains a number of delegated powers provisions which are explained in more detail below. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, we have carefully considered the importance of each matter against the need to:

- strike the right balance between the importance of the issue and the need to provide flexibility to respond to changing circumstances quickly, in light of experience, without the need for primary legislation;
- make proper use of parliamentary time; and
- allow detailed administrative arrangements to be kept up to date with the basic structures and principles set out in the primary legislation.

GENERAL SUBORDINATE LEGISLATION PROVISION

6. Section 143 contains the general subordinate legislation provisions. Subsection (1) provides that all powers to make regulations or orders under the Bill are exercisable by statutory instrument. Subsection 2(a) permits the powers to be used to make, incidental, supplementary, consequential, transitional, transitory or saving provisions. Subsection 2(b) also allows for different provision to be made for different purposes or different areas.

7. The provisions containing delegated powers are listed below with an explanation of each power, why the power has been taken in the Bill and why the selected form of parliamentary procedure, if any, has been considered appropriate.

SUBORDINATE LEGISLATION POWERS - DETAIL

Section 12(2)(a) – Power to specify the submission date for the first Scottish Sentencing Council Business Plan

Power conferred on:	**Scottish Ministers**
Power exercisable by:	**Order made by statutory instrument**
Parliamentary procedure:	**Negative resolution of the Scottish Parliament**

Provision

8. The power will allow the Scottish Ministers to specify the day by which the Scottish Sentencing Council must submit its first three year business plan. Thereafter, the day for submission of the plan will be the first day of each subsequent three year period.

Reason for taking this power

9. We consider it appropriate to provide flexibility to the Sentencing Council in terms of the preparation and submission of its first business plan.

Choice of procedure

10. This is a procedural and administrative necessity and does not require a high level of scrutiny from the Parliament. Negative resolution procedure is considered appropriate.

Section 14 (new section 227A(8) of the 1995 Act) – Power to change the powers of Justice of the Peace courts to impose requirements on an offender

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Affirmative resolution of the Scottish Parliament**

Provision

11. Section 227A makes provision for the court to impose a community payback order (CPO) on an offender, who has committed an offence, which would otherwise be punishable by imprisonment. Subsection (2) sets out the different requirements that can be included in a CPO. Subsection (3) requires the court to be satisfied that the seriousness of the offence(s) warrant imposition of a CPO. Subsection (4) provides two exceptions to the imposition of a CPO as an alternative to custody, specifically a level 1 unpaid work or other activity requirement, or a level 1 unpaid work or other activity requirement with a supervision requirement. Subsections (5) and (6) set out the restrictions on requirements a justice of the peace court may impose. Subsection (7) requires the court to ensure that the requirements, which form a CPO, are compatible. Subsections (8) and (9) provide powers for the Scottish Ministers to amend the requirements which may be imposed by the justice of the peace court by means of statutory instrument. Subsection (10) provides definitions of court, imprisonment and a level 1 unpaid work and other activity requirement.

Reason for taking this power

12. This power will enable Scottish Ministers to change the powers of Justice of the Peace courts to impose requirements on an offender. Subsections (5) and (6) restrict the powers of Justice of the Peace courts to three specific requirements, in contrast to the wider powers available to other courts as specified in subsection (2). The power would enable these to be varied, either extended or restricted, without recourse to primary legislation. An order making power is considered appropriate to add or remove the requirements which can be imposed by Justice of the Peace courts and can be brought forward in shorter timescales than primary legislation.

Choice of procedure

13. Changes could result in more onerous requirements being imposed on offenders by the Justice of the Peace courts and therefore we consider the appropriate level of parliamentary scrutiny should be by affirmative resolution.

Section 14 (new section 227B(2) of the 1995 Act) – Power to specify by Act of Adjournal the nature of information, to be provided in a report to the court by the local authority before imposition of a Community Payback Order

Power conferred on: **High Court of Justiciary**
Power exercisable by: **Act of Adjournal**
Parliamentary procedure: **None**

Provision

14. Section 227B sets out the general procedures which a court requires to apply before imposing a Community Payback Order (CPO). Subsection (2) provides that before making a CPO, the court requires to obtain and take account of a report from a local authority officer. This report must contain such information as is specified by Act of Adjournal. A CPO cannot be made unless such a report has been secured. Subsection (3) sets out who should receive a copy of the report. Subsection (4) provides that before making the order, the court must explain in open court, to the offender the purpose and effect of the CPO and the consequences for the offender should he/she fail to comply with its terms. Subsection (5) requires the offender to confirm that he/she understands and is willing to comply with all the requirements which form the CPO.

Reason for taking this power

15. Section 227B(2) precludes a court from imposing a Community Payback Order without first obtaining a report from the relevant local authority. Setting out the details of the information to be included in the report is essentially an administrative matter and would not normally be the subject of primary legislation. We therefore consider it appropriate that the High Court of Justiciary should be able to prescribe it if required.

Choice of procedure

16. Detailed matters relating to court procedure, such as the content of reports to assist with sentencing decisions, are not considered appropriate to be included in primary legislation. Such administrative matters can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any parliamentary procedure (see section 305 of the Criminal Procedure (Scotland) Act 1995, which makes provision about Acts of Adjournal generally).

Section 14 (new section 227E(6) of the 1995 Act) – Power to provide that the form of the Community Payback Order is to be set out in an Act of Adjournal

Power conferred on: **The High Court of Justiciary**
Power exercisable by: **Act of Adjournal**
Parliamentary procedure: **None**

Provision

17. Section 227E(1) provides that a CPO is to be regarded as a sentence of the court. Subsection (2) provides that the court must give reasons in open court for imposing the CPO. Subsection (3) provides that the court in imposing a CPO is not prevented from taking other actions e.g. imposing a disqualification on the offender, making an order for forfeiture on the

offence or ordering the offender to find caution for good behaviour. Subsections (4) and (5) set out the arrangements to be followed by the clerk of the court with regard to those who should receive copies of the order and how they should be given. Subsection (6) provides for the form of the order to be set out in an Act of Adjournal.

Reason for taking this power

18. Subsection 227(E)(6) provides for the form of Community Payback Orders to be set out by Act of Adjournal. The format of the report is essentially an administrative matter and would not normally be the subject of primary legislation. We therefore consider it appropriate that the High Court of Justiciary should be able to prescribe it if required.

Choice of procedure

19. Detailed matters relating to court procedure are not considered appropriate to be included in primary legislation. Such administrative matters can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any Parliamentary procedure (see section 305 of the Criminal Procedure (Scotland) Act 1995, which makes provision about Acts of Adjournal generally).

Section 14 (new section 227I(6) of the 1995 Act) – Power to make an order varying the minimum and maximum hours of unpaid work or other activity requirement

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order made by statutory instrument**
Parliamentary procedure:	**Negative resolution of the Scottish Parliament**

Provision

20. Section 227I sets out the provisions the court must apply when imposing a CPO with an unpaid work or other activity requirement. Subsection (2) provides that the nature of the unpaid work or other activity requirement is not to feature as part of the order but rather to be determined by the responsible officer. Subsection (3) specifies the minimum and maximum number of hours that constitute an unpaid work or other activity requirement. Subsections (4) and (5) provide for two levels of unpaid work and other activity to be known as level 1 and level 2 and define the range of hours within these levels. Subsections (6) and (7) provide that the Scottish Ministers have the power to make an order varying the minimum and maximum hours of unpaid work or other activity that an offender can be required to perform. Subsection (8) defines ‘specified’ as relating to the unpaid work and activity requirement in the CPO.

Reason for taking this power

21. Subsection (3) sets out the minimum and maximum hours that constitute an unpaid work or other activity requirement and subsection (4) provides a definition of a level 1 such requirement. Subsection (6) provides for Scottish Ministers to vary the number of hours stated in subsections (3) and (4) without recourse to primary legislation. An order-making power is considered more appropriate to make such changes and can be brought forward in shorter timescales than primary legislation.

Choice of procedure

22. We consider negative resolution procedure is sufficient for the purpose of varying the number of hours. It is a matter of detail that is unlikely to require to be debated, but use of negative procedure still affords Parliament the opportunity to debate any variation they object to.

Section 14 (new section 227J(3) of the 1995 Act) – Power to make regulations to allow justice of the peace courts to impose a level 2 unpaid work and activity requirement

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Affirmative resolution of the Scottish Parliament**

Provision

23. Section 227J sets out further provisions in relation to an unpaid work or other activity requirement. Subsection (1) restricts the court to imposing this requirement only on an offender aged 16 years or over. Subsection (2) provides that this requirement can only be imposed by the court, where the court considers the offender to be suitable to perform the unpaid work or other activity requirement. Subsections (3) and (4) provide for the Scottish Ministers to make regulations to allow justice of the peace courts to impose a level 2 unpaid work or other activity requirement.

Reason for taking this power

24. Scottish Ministers may at some future date wish to adjust the powers of justice of the peace courts in the light of the summary justice reforms in respect of an unpaid work or other activity requirement in excess of 100 hours but subject to the overall maximum of 300 hours.

Choice of procedure

25. Exercise of these powers by Scottish Ministers could result in more onerous requirements being imposed on offenders. For this reason it is felt that the affirmative resolution procedure would be more appropriate.

Section 14 (new section 227K(3) of the 1995 Act) – Power to vary the limits of the current balance of other activity within the unpaid work or other activity requirement

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Negative resolution of the Scottish Parliament**

Provision

26. Section 227K(1) provides for the split between unpaid work and other activity to be determined by the responsible officer subject to limits set out in subsection (2) on the maximum number of hours of other activity that can count towards the requirement. Subsections (3) and (4) provide the Scottish Ministers with powers to vary the limits specified in subsection (2).

Reason for taking this power

27. Scottish Ministers may wish at some future date to vary in the light of experience with the new order the current balance within subsection (2) of up to 30%/30 hours of other activity (whichever is the lesser) within an unpaid work or other activity requirement.

Choice of procedure

28. In varying the existing balance between the unpaid work and other activities components of the requirement it is possible that the unpaid work element might decrease. It is a matter of detail that is unlikely to require to be debated but use of negative procedure still affords Parliament the opportunity to debate any variation they object to.

Section 14 (new section 227O(1) of the 1995 Act) – Power to make rules about the performance of unpaid work and other activity requirements in relation to a daily maximum number of hours, calculations of time undertaken, provision for travel expenses and record keeping

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order made by statutory instrument**
Parliamentary procedure:	**Negative resolution of the Scottish Parliament**

Provision

29. New section 227O(1) of the 1995 Act gives the Scottish Ministers the power to make rules about the performance of unpaid work and other activity requirements in relation to a daily maximum number of hours, calculations of time undertaken, provision for travel expenses and record keeping.

Reason for taking this power

30. These are essentially administrative matters and would not normally be the subject of primary legislation.

Choice of procedure

31. The negative resolution procedure is considered the appropriate level of parliamentary scrutiny for any regulations made under this section in light of the limited nature of the enabling power.

Section 14 (new section 227Z(2) of the 1995 Act) – Power to specify the nature of information to be provided by a responsible officer in a report to the court before variation of a Community Payback Order

Power conferred on: **High Court of Justiciary**
Power exercisable by: **Act of Adjournal**
Parliamentary procedure: **None**

Provision

32. Section 227Z(1) and (2) require the court when considering varying a CPO to first obtain a report from the responsible officer. Subsection (3) indicates who is to be provided with a copy of the report. Subsection (4) sets out that when varying the order the court must explain in ordinary language to the offender (a) the purpose and effect of each of the proposed varied requirements, (b) the consequences of non-compliance and (c) any variations to progress review arrangements. Subsection (5) requires confirmation from the offender that he/she understands the variations and is willing to comply with each of them.

Reason for taking this power

33. Section 227Z(2) provides that where the court is considering varying a community payback order, the court must not make the variation unless it has obtained and taken account of a report from the responsible officer containing such information relating to the offender as may be specified by Act of Adjournal.

Choice of procedure

34. Detailed matters relating to court procedure, such as the content of reports to assist with decisions on variation of orders, relate to matters which are not considered appropriate to be included in primary legislation. Such administrative matters can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any parliamentary procedure (see section 305 of the Criminal Procedure (Scotland) Act 1995, which makes provision about Acts of Adjournal generally).

Section 14 (new section 227ZB(12) of the 1995 Act) – Power to amend the maximum duration of a restricted movement requirement

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Affirmative resolution of the Scottish Parliament**

Provision

35. Section 227ZB(12) provides for Scottish Ministers to substitute a different number of months for the number of months specified in section 227ZB(9)(b). This links with section 227ZD which provides for the maximum duration of a restricted movement requirement and provides for Scottish Ministers to amend this by regulation.

Reason for taking this power

36. The power is required to ensure that any changes made to section 227ZD(4)(b) are reflected in section 227ZB.

Choice of procedure

37. Affirmative resolution. See explanation for section 227ZD(3) below.

Section 14 (new section 227ZD(3) of the 1995 Act) – Power to specify the maximum number of hours and the maximum duration in months a restricted movement requirement may be imposed for

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order made by statutory instrument**
Parliamentary procedure:	**Affirmative resolution of the Scottish Parliament**

Provision

38. Section 227ZD(3) provides that a restricted movement requirement may not require an offender to remain at a specified place for more than 12 hours in any one day. Section 227ZD(4)(b) provides that the maximum duration of a restricted movement requirement is 12 months. Section 227ZD(6) confers powers on Scottish Ministers to amend by regulation both the maximum duration (in months) of a restricted movement requirement and the maximum number of hours in any one day a restricted movement requirement may be imposed for.

Reason for taking this power

39. The purpose of providing a power for Scottish Ministers to amend the maximum hours and/or months is to provide a level of flexibility, enabling the courts to impose remote monitoring requirements for longer durations or to restrict an offender to an address for longer periods in any one day. Equally, the maximum durations may be reduced.

Choice of procedure

40. Changes to the regulations could make the remote monitoring requirement more onerous for the offender. For this reason, we consider that in order to provide the necessary level of parliamentary scrutiny, any changes should follow the affirmative resolution procedure.

Section 14 (new section 227ZG of the 1995 Act) – Effect of application of section 245C of the Criminal Procedure (Scotland) Act 1995 (remote monitoring of offenders subject to restriction of liberty orders)

41. Although not strictly a new power, the Committee may wish to be aware of the effect of the amendments made by new section 227ZG on the existing power contained in section 245C of the 1995 Act. Section 227ZG applies section 245C of the Criminal Procedure (Scotland) Act 1995 (which makes provision about remote monitoring of offenders subject to restriction of liberty orders) so that section 245C and regulations made under section 245C also apply to offenders subject to community payback orders with restricted movement requirements.

Regulations made under section 245C specify the equipment which may be used to monitor compliance with the restricted movement requirement.

Section 14 (new section 227ZH(1) of the 1995 Act) – Power to specify the courts which may impose restricted movement requirements, the method of monitoring compliance with a restricted movement requirement and the class of offender who may be made subject to a restricted movement requirement

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Negative resolution of the Scottish Parliament**

Provision

42. Section 227ZH(1) provides for Scottish Ministers to prescribe by regulations:

(a) the courts which may impose restricted movement requirements;

(b) the method of monitoring compliance with such requirements (in practice this is via electronic monitoring or "tagging"); and

(c) the class of offender in respect of whom a remote monitoring requirement may be imposed.

Reason for taking this power

43. The purpose of providing Scottish Ministers with this power is to:

(a) enable only certain courts or classes to impose a remote monitoring requirement, for example Sheriff Courts or High Court;

(b) specify the type of monitoring which can be used to monitor compliance (enabling other forms of remote monitoring to be used as the technology is improved and developed);

(c) specify upon which offenders a remote monitoring requirement may be imposed.

Choice of procedure

44. We consider that the negative procedure provides the necessary level of parliamentary scrutiny given the limited nature of these regulations which simply specify courts/monitoring/ class of offender rather than the more substantive elements of the remote monitoring requirement itself.

Section 14 (new section 227ZJ(2) of the 1995 Act) – Power to prescribe the persons or class of persons with whom local authorities should consult about the nature of the unpaid work to be undertaken in their areas as part of an unpaid work or other activities requirement

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Negative resolution of the Scottish Parliament**

Provision

45. Section 227ZJ(1) requires local authorities to consult prescribed persons annually about the nature of the unpaid work and other activities to be undertaken as part of a CPO within their areas. Subsection (2) defines "prescribed persons" as such persons or class or class of persons as prescribed by Scottish Ministers by regulations.

Reason for taking this power

46. This power is designed to enable Scottish Ministers to specify the groups and organisations local authorities require to consult about the nature of the unpaid work and other activities to be undertaken as part of a CPO within their areas. An order making power is considered appropriate for this purpose and would allow amendments if needed to be made without recourse to primary legislation.

Choice of procedure

47. The negative resolution procedure is considered the appropriate level of parliamentary scrutiny for any regulations made under this section in light of the limited nature of the enabling power.

Section 18(2) – Power to prescribe the length of sentence of imprisonment which determines meaning of "short-term custody and community sentence" and "custody and community sentence"

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Affirmative resolution of the Scottish Parliament**

Provision

48. Section 18(2) enables the Scottish Ministers to prescribe by order the length of sentence of imprisonment which determines the meaning of "short-term custody and community sentence" and "custody and community sentence" to be referred to in section 4 of the Custodial Sentences and Weapons (Scotland) Act 2007 ("2007 Act").

Reason for taking this power

49. The power to prescribe the period is necessary to provide Scottish Ministers with the flexibility required to accommodate changing trends in sentencing, types of offences and the management of offenders. By way of example, on the basis of future data it may be shown that the custody and community sentence is more effective for sentences of one year or more.

Choice of procedure

50. An order made under this subsection must be laid in draft before, and approved, by a resolution of the Scottish Parliament. As the period of imprisonment in the definition of "short-term custody and community sentence" and "custody and community sentence" will result in potentially significant changes to, for example, the way a number of prisoners serve their sentences (by spending, longer or shorter periods in custody), it is considered that the affirmative procedure is appropriate.

Section 19 (section 9B(5)) – Power to amend the number of days before half-sentence during which a prisoner can be removed from prison

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Affirmative resolution of the Scottish Parliament**

Provision

51. Section 19 inserts into the Custodial Sentences and Weapons (Scotland) Act 2007 a new schedule 6 which modifies certain provisions of Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (the "1993 Act") on a temporary basis pending the coming into force of the repeal of that Part. As modified, section 9B(5) of the 1993 Act allows the Scottish Ministers by order to amend the number of days specified in section 9B(1), that is the number of days before half-sentence during which the prisoner can be removed from prison.

Reason for taking this power

52. The early removal scheme needs to correlate to the existing provisions for Home Detention Curfew contained in section 3AA of the 1993 Act. The period during which a prisoner can be removed under the new scheme is equivalent to the period during which HDC is available for other prisoners. Were the period for HDC to be changed, as provided for by section 3AA(6)(c), it would be desirable to keep the period for the early removal scheme in line.

Choice of procedure

53. Affirmative resolution procedure (see modified section 9B(6)) is considered appropriate as this is the same procedure as for orders under section 3AA(6) of the 1993 Act in relation to the Home Detention Curfew.

Section 30(3) (inserted section 1A(3)(c) – Power to prescribe documents valid for establishing the age of a purchaser

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Negative resolution of the Scottish Parliament**

Provision

54. Section 30 inserts new section 1A into the Crossbows Act 1987 (the "1987 Act") to establish a defence for a person charged with an offence under section 1 of the 1987 Act. One aspect of the proposed defence is that the accused is required to have taken reasonable steps to establish the purchaser's or hirer's age. A passport and European Union photocard driving licence are the two documents listed as being valid forms of documentation able to be relied upon to establish a purchaser's or hirer's age. The enabling power contained within inserted subsection 1A(3)(c) will allow the Scottish Ministers to prescribe any further documents that will be valid for the purpose of establishing the age of a customer.

Reason for taking this power

55. We consider the order-making power is required to prescribe other suitable means of establishing age that the Scottish Ministers may wish to add. This power follows the approach taken within section 102 of the Licensing (Scotland) Act 2005 relating to the sale of alcohol to those aged under 18.

Choice of procedure

56. Given the limited nature of the enabling power, negative resolution procedure is considered appropriate.

Section 31(4) (inserted subsection (4B)(c)) – Power to prescribe documents valid for establishing the age of a purchaser

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Negative resolution of the Scottish Parliament**

Provision

57. Section 31 inserts new subsection 4 into section 141A of the Criminal Justice Act 1988 (the "1988 Act") to establish a defence for a person charged with an offence under section 141A(1) of the 1988 Act. One aspect of the proposed defence is that the accused is required to have taken reasonable steps to establish the purchaser's or hirer's age. A passport and European Union photocard driving licence are the two documents listed as being valid forms of documentation able to be relied upon to establish a purchaser's or hirer's age. The enabling power contained within inserted subsection 4B(c) will allow the Scottish Ministers to prescribe any further documents that will be valid for the purpose of establishing the age of a customer.

Reason for taking this power

58. We consider the order-making power is required to prescribe other suitable means of establishing age that the Scottish Ministers may wish to add. This power follows the approach taken within section 102 of the Licensing (Scotland) Act 2005 relating to the sale of alcohol to those aged under 18.

Choice of procedure

59. Given the limited nature of the enabling power, negative resolution procedure is considered appropriate.

Section 57(3) (inserted section 113A(4)(c)) – Power to specify classes of person who may have access to the trial judge's observations in relation to an expedited appeal under sections 107A, 107B and 107D of the Criminal Procedure (Scotland) Act 1995

Power conferred on: High Court of Justiciary
Power exercisable by: Act of Adjournal
Parliamentary procedure: None

Provision

60. Section 55 of the Bill inserts new sections 107A, 107B and 107D into the Criminal Procedure (Scotland) Act 1995 (the "1995 Act"). These provisions permit the Crown to appeal against certain decisions by a judge that bring a criminal case to an end without a decision by a jury and against certain findings relating to the admissibility of prosecution evidence. Where it is considered practicable for the appeal to be heard and determined during an adjournment of the trial it will be possible for the appeal to be "expedited", allowing the appeal to be considered by the High Court with the existing trial being continued and avoiding the need for the Crown to raise a fresh prosecution if the appeal succeeds.

61. Section 57(3) inserts new section 113A into the 1995 Act. This permits the trial judge to provide observations on the case and the grounds of appeal to the High Court. The written observations of the judge are available only to (a) the High Court; (b) the parties; and (c) any other person or classes of person prescribed by Act of Adjournal.

Reason for taking this power

62. In relation to existing criminal appeals, section 113 of the 1995 Act provides for the trial judge to provide the High Court with a report on the case generally and on the grounds of appeal. Section 113(4) provides that that report shall be available to the High Court, the parties and such other persons as may be so prescribed by Act of Adjournal. The same position is being adopted here in relation to access to the trial judge's observations on an expedited appeal. The decision as to who should be able to access a copy of the trial judge's observations is a detailed matter related to court procedure. The power is included to add some flexibility to these provisions. It is not considered necessary or desirable to compile a restrictive list that would require amendment by primary legislation if such a need for access arose. The delegation of this power to the High Court of the Justiciary reflects the proposals of the Scottish Law Commission in its Report on Crown Appeals (SCOT LAW COM No. 212).

Choice of procedure

63. Detailed matters related to court procedure, such as the access to a judge's observations on an appeal case relate to the type of matters which are not considered appropriate to be included in primary legislation. We consider that such procedural matters can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any parliamentary procedure (see section 305 of the 1995 Act which makes provision about Acts of Adjournal generally).

Section 59 (inserted section 18B(6)) – Power to prescribe list of relevant offences for purposes of new sections 18B and 18C of the Criminal Procedure (Scotland) Act 1995

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order made by statutory instrument**
Parliamentary procedure:	**Affirmative resolution of the Scottish Parliament**

Provision

64. Section 59 of the Bill inserts new sections 18B and 18C into the Criminal Procedure (Scotland) Act 1995. Section 18B provides that forensic data which is taken from a child upon their arrest or detention may be retained for an initial period of 3 years providing the child is referred to a children's hearing on grounds of having committed a relevant offence, and this ground is accepted or found to be established by a sheriff.

65. New section 18B(6) provides that a "relevant offence" is a relevant sexual and violent offence which is prescribed in an order by the Scottish Ministers.

66. In accordance with the definition of a "relevant violent offence" and a "relevant sexual offence", the Scottish Ministers may prescribe any offence which is listed in section 19A(6) as a "relevant offence" for the purposes of sections 18B and 18C of the 1995 Act.

Reason for taking this power

67. To enable full consultation with stakeholders on the type of sexual and violent offences which should be prescribed for the purpose of the new provisions. This will enable the list to be reviewed following an assessment of the initial operation of the policy.

68. Prescribing the list of relevant offences by using an order will also provide the flexibility to amend the list of relevant offences without having to amend primary legislation on each occasion a new offence is to be added or removed. Prescribing relevant offences in an order will also mean that all the offences will be contained in one place which will be more accessible and easier for the users of the legislation.

Choice of procedure

69. The order will be subject to affirmative procedure (section 18B(9)) as this is considered to provide the appropriate level of parliamentary scrutiny.

Section 66(1) (inserted section 271U(3)) – Power to prescribe procedure for an appeal against a witness anonymity order

Power conferred on: **High Court of Justiciary**
Power exercisable by: **Act of Adjournal**
Parliamentary procedure: **None**

Provision

70. Section 66 inserts new section 271U into the Criminal Procedure (Scotland) Act 1995. The new section confers a right of appeal to the High Court against the making of a witness anonymity order by a court. An appeal can be made by the prosecution or the accused. The court of first instance has to grant leave to appeal, and parties to the proceedings can be heard as part of this consideration. Appeals can also be made about the varying or discharging of an order (and refusals to vary or discharge an order). Subsection (3) provides that the procedure in relation to appeals is to be prescribed by Act of Adjournal.

Reason for taking this power

71. We consider such matters of detail should not be included on the face of the Bill with the mechanics of the appeal process able to be prescribed by Act of Adjournal.

Choice of procedure

72. Such detailed matters regarding court procedures are not considered appropriate for inclusion in primary legislation. It is appropriate for the Court to regulate its own procedures in order to achieve the effective operation of the provisions (see section 305 of the Criminal Procedure (Scotland) Act 1995, which makes provision about Acts of Adjournal generally).

Section 70(3) (inserted section 26G(1)) – Power to amend the list of persons mentioned in section 26C(2) of the Public Finance and Accountability (Scotland) Act 2000 by adding or removing a public body and to modify the application of new Part 2A of that Act to a public body so added

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Negative resolution of the Scottish Parliament**

Provision

73. Inserted section 26G(1) of the Public Finance and Accountability (Scotland) Act 2000 provides a power for the Scottish Ministers to add a public body to the list of persons mentioned in section 26C(2); to modify the application of Part 2A of the Act in relation to a public body so added; or to remove a person from that list. The list in section 26C(2) is of the persons whom Audit Scotland may require to disclose data to them for the purposes of a data matching exercise. It consists of those bodies and office holders whose accounts are audited by the Auditor General for Scotland (or sent to him for auditing), local authorities and other such bodies audited under Part 7 of the Local Government (Scotland) Act 1973, Licensing Boards, and officers/members of

such bodies &c. An order may include incidental, consequential, supplementary or transitional provisions as the Scottish Ministers think fit.

Reason for taking this power

74. While the list in section 26C is fairly comprehensive, and would automatically include any new public bodies whose accounts are audited by the Auditor General, the power is taken to allow for additional public bodies to be added in future e.g. if different audit arrangements are made for a particular body. The power to modify the application of Part 2A in relation to such a body, and to make incidental, consequential &c provision gives flexibility so that appropriate arrangements can be made for particular bodies.

Choice of procedure

75. By virtue of section 27(3) of the 2000 Act, orders under inserted section 26G(1) are subject to negative procedure.

Section 72(7) (inserted section 40A(4)) – Power to add to or otherwise modify the specification of "exploitation offences"

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order made by statutory instrument**
Parliamentary procedure:	**Negative resolution of the Scottish Parliament**

Provision

76. Inserted section 40A of the Antisocial Behaviour etc. (Scotland) Act 2004 specifies the "exploitation offences" in respect of which the new powers to make closure notices and orders apply. Subsection (4) provides a power for the Scottish Ministers by order to add to or otherwise modify the specification of offences. By virtue of section 141(2) of the 2004 Act, an order may make incidental, consequential &c. provision.

Reason for taking this power

77. While the list of offences already specified in section 40A(1) is comprehensive, the power allows the list to be kept up to date and for additional forms of exploitation offence to be added should they be identified.

Choice of procedure

78. By virtue of section 141(3) of the 2004 Act, orders under inserted section 40A(4) are subject to negative procedure.

Section 79(2) (inserted section 113BA(1)) – Power to amend the meanings of "criminal conviction certificate"; "central records"; "criminal record certificate"; "relevant matter" and "enhanced criminal record certificate" in Part 5 of the Police Act 1997

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Affirmative resolution of the Scottish Parliament**

Provision

79. Section 79(2) inserts a new section 113BA into the Police Act 1997 ("the 1997 Act") giving Scottish Ministers a power to amend 5 definitions in the 1997 Act. Scottish Ministers will be able to bring orders to the Scottish Parliament to amend the meanings of "criminal conviction certificate"; "central records"; "criminal record certificate"; "relevant matter" and "enhanced criminal record certificate".

Reason for taking this power

80. The reason for taking this power is to ensure that the Scottish Ministers have the flexibility to respond to any information sharing agreements between the UK and overseas jurisdictions that result in new information sources, outwith the UK, becoming available for use in connection with criminal record checks. This change will enable Ministers, in practice on a day-to-day basis Disclosure Scotland, to gather information from a wider range of sources when discharging Ministers' functions under the 1997 Act. The power is being taken in secondary legislation through the draft affirmative procedure to enable Ministers to respond quickly and flexibly to new sources of information as and when they become available. Making use of the new source of information should help ensure that the disclosure system is as comprehensive and robust as possible.

Choice of procedure

81. Given the extent of the possible changes to the certificates provided by the order-making power we have provided that the order may only be made by draft affirmative procedure. This will afford the appropriate level of parliamentary scrutiny while still affording Ministers the speed and flexibility to respond to emerging information sharing agreements.

Section 79(3) (inserted subsection (2A)) – Power to make further provision about registration under section 120 of the Police Act 1997 by virtue of regulations made under section 120ZB

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by statutory instrument**
Parliamentary procedure: **Negative resolution of the Scottish Parliament**

Provision

82. Section 79(3) inserts two subsections into section 120ZB of the Police Act 1997. Section 120ZB is inserted into the Police Act 1997 by section 81(2) of the Protection of Vulnerable Groups (Scotland) Act 2007 but the provision has not yet been commenced. The new subsection 120ZB(2A) clarifies the regulation-making power at section 120ZB(2)(a).

Reason for taking this power

83. This amendment to the existing regulation-making power is to clarify the existing power of the Scottish Ministers to make regulations relating to fees for registration as a registered person. This amendment will ensure greater flexibility on charges regarding the register held under section 120 of the 1997 Act. The new subsection 120ZB(2A) will allow different fees to be set for applications for inclusion in the register and also for the possibility of these fees being charged annually. This approach should encourage users to manage their entries in the register more effectively.

Choice of procedure

84. Negative resolution was considered the appropriate procedure for the regulation-making power conferred by the Protection of Vulnerable Groups (Scotland) Act 2007 as the regulations relate to the detailed administrative and procedural operation of the registration system. This amendment relates to the detailed tailoring of fees in connection with registration. Given the limited nature of the amendment we consider that the negative resolution procedure continues to provide the appropriate level of parliamentary scrutiny.

Section 81 – Power to enable the Scottish Legal Aid Board to employ solicitors for the purpose of providing criminal legal assistance

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order made by statutory instrument**
Parliamentary procedure:	**Negative resolution of the Scottish Parliament**

Provision

85. This section does not insert a new regulation-making power. However it does amend the regulation-making power in section 28A of the Legal Aid (Scotland) Act 1986 to make the scheme set up by regulations (the Public Defence Solicitors Office) permanent rather than for a test basis only. It is not anticipated that a new set of regulations will be made in the near future.

Reason for taking this power

86. No new power is taken in this section as it amends an existing regulation-making power. The purpose of this amendment is to convert the current scheme from one run on a test basis to one of permanency.

Choice of procedure

87. As this amends an existing power it is not considered appropriate to change the procedure.

Section 82(1) (inserted section 133(1A)) – Power to specify further circumstances in respect of which compensation may be paid for a miscarriage of justice or for wrongful detention prior to the acquittal or a decision to take no proceedings or discontinue proceedings

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order made by statutory instrument**
Parliamentary procedure:	**Negative resolution of the Scottish Parliament**

Provision

88. Inserted subsection (1A) of section 133 of the Criminal Justice Act 1988 provides that the Scottish Ministers may by order specify further circumstances in respect of which compensation may be paid for a miscarriage of justice or for wrongful detention prior to acquittal or a decision to take no proceedings or discontinue proceedings.

Reason for taking this power

89. This power will allow the existing *ex gratia* scheme for compensation to be combined with the statutory scheme (contained in section 133 of the 1988 Act). The *ex gratia* scheme operates under the prerogative and has not been subject to statutory or parliamentary control. The intention is to put that *ex gratia* scheme on a statutory footing. The order-making power allows that *ex gratia* scheme, which was set out in a parliamentary written answer, to be expressed in appropriate statutory terms. It would also permit the expansion of the scheme in future, if that were desired.

Choice of procedure

90. By virtue of inserted subsections (8) and (9) of section 133 (inserted by section 82(1)(g) of the Bill), orders under subsection (1A) are subject to negative procedure. This level of parliamentary oversight is considered appropriate given that it replaces the current *ex gratia* scheme for which there is no such oversight.

Section 86(9)(b) – Power to specify bodies which constitute an “investigating agency” for the purpose of creating and submitting schedules in terms of section 86

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order made by statutory instrument**
Parliamentary procedure:	**Negative resolution of the Scottish Parliament**

Provision

91. Section 86 creates a duty on an investigating officer, whether a police officer or officer of an investigating agency, to create and submit schedules listing information gathered during the course of an investigation which may be relevant to cases which are brought by solemn proceedings only. Section 86(9)(b) enables Scottish Ministers to prescribe by regulations which specific bodies will constitute an “investigating agency” for the purposes of section 86.

Reason for taking this power

92. It is considered more appropriate that this be set out in detail in an order rather than on the face of the Bill. In addition to existing bodies which submit reports to procurators fiscal, over time, new bodies may be added, or others removed where they no longer carry out that function. Listing such bodies by virtue of an order-making power provides the flexibility to respond to such changes without the need for primary legislation. Although changes should be relatively infrequent, we consider that it would not be an effective use of parliamentary time to require that primary legislation be brought forward to amend the definition of these bodies on each occasion that changes are required.

Choice of procedure

93. We consider that the negative resolution procedure provides the appropriate level of parliamentary scrutiny given the limited nature of the enabling power. It provides only a power to specify which bodies are "investigating agencies" for the purposes of the Bill. It does not confer powers on any bodies nor substantively extend or restrict the range of persons to whom the duties set out in the Bill apply. Such matters are dealt with in the Bill itself. The specification of bodies to be regarded as "investigating agencies" is, therefore, generally administrative in character.

Section 114(3)(c) – Power to specify persons who engage to any extent in the investigation of crime or sudden deaths and submit reports to the procurator fiscal for the purpose of the code of practice in carrying out those functions, as provided for in section 114

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order made by statutory instrument**
Parliamentary procedure:	**Negative resolution of the Scottish Parliament**

Provision

94. Section 114 requires the Lord Advocate to issue a code of practice and specifies the persons who must have regard to the code, namely police, prosecutors and any other persons who engage to any extent in the investigation of crime or sudden deaths and who submit reports relating to those investigations to the procurator fiscal and who are prescribed by regulations made by the Scottish Ministers (section 114(3)(c)).

Reason for taking this power

95. It is considered more appropriate that this be set out in detail in regulations rather than on the face of the Bill. In addition to existing bodies which submit reports to procurators fiscal, over time, new persons or bodies may be added, or others removed where they no longer carry out that function. Listing such persons or bodies by virtue of an order-making power provides the flexibility to respond to such changes without the need for primary legislation. Although changes should be relatively infrequent, we consider that it would not be an effective use of parliamentary time to require that primary legislation be brought forward to amend the definition of these persons or bodies on each occasion that changes are required.

Choice of procedure

96. We consider that the negative resolution procedure provides the appropriate level of parliamentary scrutiny given the limited nature of the enabling power. It provides only a power to specify persons who investigate crime or sudden deaths and submit reports to the procurator fiscal for the purposes of the Bill. It does not confer powers on any bodies, or persons, nor substantively extend or restrict the range of persons to whom the duties set out in the Bill apply. Such matters are dealt with in the Bill itself. The specification of such other persons is, therefore, considered to be generally administrative in nature.

Section 115 – Power to make rules of court in relation to Part 6

Power conferred on:	**High Court of Justiciary**
Power exercisable by:	**Act of Adjournal**
Parliamentary procedure:	**None**

Provision

97. Part 6 of the Bill sets out a statutory regime for disclosure in criminal proceedings. Section 115 enables the High Court to make rules of court by Act of Adjournal in relation to Part 6 of the Bill.

Reason for taking this power

98. Rules of court will be required in relation to how certain provisions are given effect to and to provide forms for applications and other court documents required under Part 6.

Choice of procedure

99. Detailed matters relating to court procedure, such as the content of court forms and administrative directions to the court are the type of matters which are not considered appropriate to be included in primary legislation. Such administrative matters can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any parliamentary procedure. This provision mirrors similar provision in section 305 of the Criminal Procedure (Scotland) Act 1995 in relation to criminal procedure generally.

Section 121(3) (inserted section 3A(1)) – Power to set mandatory conditions for licences granted under the Civic Government (Scotland) Act 1982

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order made by statutory instrument**
Parliamentary procedure:	**Affirmative resolution of the Scottish Parliament**

Provision

100. This provision enables the Scottish Ministers to set mandatory conditions for licences granted under the Civic Government (Scotland) Act 1982.

Reason for taking this power

101. This power recognises that in some circumstances mandatory conditions in respect of particular activities would be better applied consistently across Scotland rather than left to local discretion.

Choice of procedure

102. An order-making power will allow conditions to be applied and updated in accordance with any changes to the types of activity licensed. The choice of affirmative procedure is consistent with the power in the Licensing (Scotland) Act 2005 to amend the lists of mandatory conditions for premises licences and occasional licences, and with the power in section 44 of the 1982 Act to provide for the licensing of additional activities.

Section 126(2)(e) (inserted section 41(2)(h)) – Power to prescribe premises for which a public entertainment licence is not required

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order made by statutory instrument**
Parliamentary procedure:	**Negative resolution of the Scottish Parliament**

Provision

103. Section 126 amends the Civic Government (Scotland) Act 1982 so that the exemption that free-to-enter events enjoy in respect of not requiring a public entertainment licence is removed. Subsection (2)(e) inserts a new paragraph (h) into section 41(2) of that Act conferring power on the Scottish Ministers to add by order premises for which a public entertainment licence is not required.

Reason for taking this power

104. Taking an order-making power will allow the list of premises for which a public entertainment licence is not required to be updated to reflect any changes in the public entertainment market.

Choice of procedure

105. Given the limited nature of the enabling power, negative resolution procedure is considered appropriate.

Section 129(4) (inserted section 27A(1)) – Power to prescribe those areas in respect of which licensing boards may vary all or a particular group of premises licences' conditions of operation

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Affirmative resolution of the Scottish Parliament**

Provision

106. Section 129(4) inserts a new section 27A into the Licensing (Scotland) Act 2005. Subsection (1) confers on the Scottish Ministers the power to prescribe by regulations the matters in respect of which Licensing Boards may vary all or a particular group of premises licences' conditions of operation.

Reason for taking this power

107. Under new section 27A(1), Licensing Boards will be able to vary the conditions of all or a group of premises licence in their area. These conditions dictate how premises will operate. A Licensing Board can impose licence conditions when granting the premises licence or following a hearing concerning the conduct of individual premises. New section 27A(1) enables Licensing Boards to impose a condition en bloc which is a significant increase in Licensing Boards' power. This provision enables Scottish Ministers to set out the subject matter of the variations that a Licensing Board may apply, ensuring a consistency within the national framework within which Licensing Boards operate. At present Ministers intend to make regulations enabling Licensing Boards to vary conditions relating to the restriction on the purchase of alcohol at off-sale premises for people aged under 21.

Choice of procedure

108. In those areas designated by Scottish Ministers, Licensing Boards will be able to impose conditions en bloc on licensed premises. This is a significant change in their powers from only being able to apply conditions on a premises by premises basis. It is therefore considered that the affirmative resolution procedure is appropriate.

Section 140(1) – Power to make provision for the imposition on relevant licence-holders of a social responsibility levy

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Affirmative resolution of the Scottish Parliament**

Provision

109. Section 140(1) confers power on the Scottish Ministers to make regulations imposing and setting out the detail of a social responsibility levy.

Reason for taking this power

110. Taking a regulation-making power will allow the Scottish Government to discuss further with the licensed trade and other interests the detail of how the levy should be imposed, applied and collected. It will further allow flexibility for the detail of the levy to be revised in the future to keep pace with the changing nature of the licensed trade.

Choice of procedure

111. Given the scope of the power taken, affirmative resolution procedure is considered appropriate.

Section 146(1) – Power to make supplementary, incidental or consequential provision for the purposes of, in consequence of or for giving full effect to any provision of the Bill

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order made by statutory instrument**
Parliamentary procedure:	**Generally negative resolution but affirmative resolution if modifying the text of an Act**

Provision

112. Section 146(1) of the Bill confers on Scottish Ministers a power to make by order such supplementary, incidental or consequential provision as they consider appropriate for the purposes of, in consequence of or for giving full effect to any provision of the Bill. Section 146(2) provides that the power extends to the modification of any enactment (including the Bill).

Reason for taking this power

113. Any body of new law may give rise to the need for a range of ancillary provisions. For example, whilst a number of consequential modifications have been identified prior to the introduction of the Bill, it may be that not all of the consequences have been identified and as such further changes may be required. We consider the order-making power to be necessary to allow for this flexibility.

114. We consider that the power to make such provision should extend to the modification of enactments. Without the power to make supplementary, incidental and consequential provision, it may be necessary to return to Parliament, through subsequent primary legislation, to deal with a matter which is clearly within the scope and policy intentions of the original Bill. That would not be an effective use of resources by Parliament or the Scottish Government.

115. The power, whilst potentially wide is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate to do so for the purposes of, in consequence of or for giving full effect to any provision of the Bill

Choice of procedure

116. Section 143(4)(b) provides that any order made under this section will be subject to affirmative resolution procedure if it modifies any part of the text of an Act. Otherwise, it will

be subject to negative resolution procedure. We consider that this provides the appropriate level of parliamentary scrutiny for the powers conferred.

Section 147(1) – Power to make transitory, transitional and saving provision necessary or expedient in connection with the coming into force of any provisions in the Bill

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Generally negative resolution but affirmative resolution if modifying the text of an Act**

Provision

117. Section 147(1) of the Bill confers on Scottish Ministers a power to make by order such transitory, transitional and saving provision as they consider necessary or expedient in connection with the coming into force of any provisions in the Bill. Section 147(2) provides that the power extends to the modification of any enactment (including the Bill).

Reason for taking this power

118. We consider the order-making power to be necessary to allow for flexibility as provisions within the Bill are brought into force. Without the power, it may be necessary to return to Parliament, through subsequent primary legislation, to deal with a matter which could be dealt with through this power. That would not be an effective use of resources by Parliament or the Scottish Government.

119. The power, whilst potentially wide is limited to the extent that it can only be used if the Scottish Ministers consider it necessary or expedient to do so in connection with the coming into force of any provisions of the Bill.

Choice of procedure

120. Section 143(4)(b) provides that any order made under this section will be subject to affirmative resolution procedure if it modifies any part of the text of an Act. Otherwise, it will be subject to negative resolution procedure. We consider that this provides the appropriate level of parliamentary scrutiny for the powers conferred.

Section 148(1) – Power to commence provisions of the Bill

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **None**

Provision

121. Section 148(1) of the Bill provides that with the exception of sections 143-148, the Scottish Ministers may by order bring the provisions of the Bill into force. The provisions in the Bill can be commenced at different times. Section 143(3) has the effect that any such commencement orders will not be subject to parliamentary procedure.

Paragraph 2(3) of schedule 1 – Power to specify the procedures for the nomination and appointment of members of the Scottish Sentencing Council

Power conferred on: **Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Negative resolution of the Scottish Parliament**

Provision

122. Paragraph 2 of schedule 1 sets out the procedure for appointment of members of the Scottish Sentencing Council. Paragraph 2(3) enables the Scottish Ministers to set out in regulations the procedures for the nomination and appointment of members.

Reason for taking this power

123. It is considered more appropriate that the details of the nominations and appointment procedures be set out in regulations rather than on the face of the Bill.

Choice of procedure

124. Given the limited enabling power, negative resolution procedure is considered appropriate.

Paragraph 10(3) and (4) of schedule 2 – Power to prescribe the length of periods of detention for those under 21 years of age for the purpose of determining if they are serving "short-term custody and community sentences" or "custody and community sentences"

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Affirmative resolution of the Scottish Parliament**

Provision

125. Paragraph 10(3) and (4) of schedule 2 enables the Scottish Ministers to prescribe by order the length of periods of detention for those under 21 years of age which will determine when Part 2 of the 2007 Act applies to such a person as a "short-term custody and community sentence" and when Part 2 applies to such a person as a "custody and community sentence".

Reason for taking this power

126. A person under 21 years of age cannot be sentenced to imprisonment, but will instead be sentenced to a period of detention. The provisions in Part 2 operate by reference to the term of imprisonment that a person is sentenced to and so do not apply to people under 21. Section 55 of the 2007 Act sets out how Part 2 is to apply to people under 21. The reason for taking the power is to allow the Scottish Ministers to take account of changes in the length of period of imprisonment that determines when a sentence of imprisonment is a custody and community sentence and when it is a short-term custody and community sentence (as provided for in the definitions of those terms in section 4 of the 2007 Act).

Choice of procedure

127. An order made under this provision must be laid in draft before, and approved, by a resolution of the Scottish Parliament. As the period of detention in the definition specified in the regulations will result in potentially significant changes to, for example, when a person aged under 21 is released from detention, it is considered that the affirmative procedure is appropriate.

The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

18th Report, 2009 (Session 3)

Stage 1 Report on the Criminal Justice and Licensing (Scotland) Bill

Published by the Scottish Parliament on 12 November 2009

The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

18th Report, 2009 (Session 3)

Contents

Remit and membership

Report 1

Introduction 1

Background and consultation 2

Evidence received by the Committee 3

Part 1 – Sentencing 5
- Sections 1 and 2: Purposes and principles of sentencing 6
- Sections 3-13 and schedule 1: The Scottish Sentencing Council 11
- Section 14: Community payback orders 25
- Section 16: Short periods of detention 35
- Section 17: Presumption against short periods of imprisonment or detention 36
- Section 18: Amendment of the Custodial Sentences and Weapons (Scotland) Act 2007 42
- Section 24: Voluntary intoxication by alcohol – effect in sentencing 45

Part 2 – Criminal Law 47
- Sections 25-28: Serious organised crime 47
- Section 34: Extreme pornography 57
- Section 35: People Trafficking 65

Part 3 – Criminal Procedure 66
- Section 38: Prosecution of children 66
- Sections 58-60: Retention and use of samples etc. 71

Part 4 – Evidence 62
- Section 62: Witness statements: use during trial 62
- Section 63: Spouse or civil partner of accused a compellable witness 78

Section 66: Witness anonymity orders 79

Part 5 – Criminal Justice 81
Section 68: Upper age limit for jurors 81
Section 70: Data matching for detection of fraud etc. 81
Section 82: Compensation for miscarriages of justice 82

Part 6 – Disclosure 83
Background 83
Fairness, certainty and clarity 84
Sections 86 to 88: Solemn cases: schedules of information 86
Sections 94-95: Defence statements 88
Sections 102-106: Applications to court: orders restricting disclosure 90
Section 107: Special counsel 92
Section 115: Acts of Adjournal 93

Part 7 – Mental Disorder and Unfitness for Trial 94

Part 8 – Licensing Under Civic Government (Scotland) Act 1982 96
Introduction 96
The 1982 Act and the Task Group recommendations 96
Section 121: Conditions to which licences under 1982 Act are to be subject 97
Section 123: Licensing of metal dealers 98
Section 124: Licensing of taxis and private hire cars 99
Sections 125 and 126: Licensing of market operators and licensing of public entertainment 103
Section 127: Licensing of late night catering 106
Section 128: Applications for licences 107

Part 9 – Alcohol Licensing 109
Introduction 109
Sections 129 and 140 110
Wider issues relating to the 2005 Act 110
Section 130: Premises licence applications: notification requirements 114
Section 131: Premises licence applications: modification of layout plans 115
Section 132: Premises licence applications: antisocial behaviour reports 117
Section 133: Sale of alcohol to trade 119
Section 134: Occasional licences 120
Section 135: Extended hours applications: variation of conditions 121
Section 136: Personal licences 122
Section 137: Emergency closure orders 124
Section 138: False statements in applications: offences 125
Section 139 and schedule 4: Further modifications of 2005 Act 125

Additional Issue: Non-Invasive Post-Mortem 127

Conclusion 128
Recommendation 128

Annexe A: Subordinate Legislation Committee Report 129

Annexe B: Finance Committee Report 153

Annexe C: Extracts from the minutes 168

Annexe D: Index of oral evidence 174

Annexe E: Index of written evidence 177

The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

Remit and membership

Remit:

To consider and report on (a) the administration of criminal and civil justice, community safety, and other matters falling within the responsibility of the Cabinet Secretary for Justice and (b) the functions of the Lord Advocate, other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Bill Aitken (Convener)
Robert Brown
Bill Butler (Deputy Convener)
Angela Constance
Cathie Craigie
Nigel Don
James Kelly (Member from 05/11/2009)
Paul Martin (Member from 13/06/2007 until 04/11/2009)
Stewart Maxwell

Committee clerking team:

Andrew Mylne
Anne Peat
Andrew Proudfoot
Christine Lambourne

The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

18th Report, 2009 (Session 3)

Stage 1 Report on the Criminal Justice and Licensing (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. The Criminal Justice and Licensing (Scotland) Bill was introduced in the Parliament on 5 March 2009 by Kenny MacAskill, Cabinet Secretary for Justice. The Parliament designated the Justice Committee as the lead committee to consider and report on the general principles of the Bill.

2. The Subordinate Legislation Committee (SLC) considered the delegated powers proposed in the Bill and reported to the Parliament on 4 June 2009.[1] The SLC report refers to 14 provisions in relation to which it raised concerns with the Scottish Government. The outcome was that it accepted in eight of those instances the Scottish Government's response – which, in five cases, included a commitment to bring forward amendments at Stage 2 to address the Committee's concerns. In relation to two of the provisions identified by the SLC, the Scottish Government is committed to lodging Stage 2 amendments to remove entirely the sections in which they arise (sections 129 and 140). The remaining four provisions are drawn to the attention of the Justice Committee and the Parliament as raising more substantial issues, or issues that the Subordinate Legislation Committee does not consider to have been satisfactorily resolved. These outstanding issues are considered in this report in the context of those sections to which they relate. The report of the Subordinate Legislation Committee is contained in Annexe A to this report.

3. The Finance Committee considered the Bill's Financial Memorandum and reported to the Justice Committee on 21 May 2009.[2] The Committee afforded this

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[1] Scottish Parliament Subordinate Legislation Committee. *Report on the Criminal Justice and Licensing (Scotland) Bill at Stage 1*. Available at: http://www.scottish.parliament.uk/s3/committees/subleg/reports-09/sur09-CriminalJusticeLicensing.htm

[2] Scottish Parliament Finance Committee. *Report on the Financial Memorandum of the Criminal Justice and Licensing (Scotland) Bill*. Available at: http://www.scottish.parliament.uk/s3/committees/finance/reports-09/fir09-CriminalJusticeLicensingBill.htm.

Bill "level three" scrutiny, that is, it considered written and oral evidence from affected organisations[3] and from the Scottish Government before finalising its report.[4] The Finance Committee's recommendations and observations are considered in this report in the context of those sections to which they relate. The report of the Finance Committee is contained in Annexe B.

4. Standing Orders require the lead committee to consider and report on the Bill's Financial Memorandum, taking into account any views submitted to it by the Finance Committee, and to consider and report on the Policy Memorandum. The Committee has no general comments to make on these documents at this stage, although there are some specific points (for example, on the figures relating to anticipated take-up of community payback orders) that are addressed at relevant points later in this report.

BACKGROUND AND CONSULTATION

5. In his statement to the Parliament on 3 September 2008 on the Scottish Government's programme, the First Minister announced the Scottish Government's intention to introduce the Bill as follows—

> "The criminal justice and licensing bill will ensure that prison remains the correct disposal for serious and violent offenders and will ensure that they are dealt with firmly and effectively in prison. Building on the recommendations of the Scottish Prisons Commission, it will reform the community punishments that are available to the courts and reform criminal law and criminal court procedures. Consolidated by the creation of a sentencing council, the bill will ensure that there is public confidence in sentencing decisions.
>
> "As members know, we are consulting on a wide range of measures to challenge Scotland's relationship with alcohol. The consultation, which ends later this month, outlines proposals in several key areas: to prohibit off-sales to under-21s; to set a minimum price for alcoholic drink; and to introduce a social responsibility fee. We will reflect on the results of the consultation and use the bill to effect those proposals which require primary legislation."[5]

6. Following this announcement, the Government published *Revitalising Justice – Proposals to Modernise and Improve the Criminal Justice System*[6] which summarised the proposals to be included in the Bill as "measures to improve criminal law; take forward sensible sentencing reforms; modernise criminal procedures; develop licensing laws; and assist victims and witnesses." A total of 66 measures were listed, of which ten were described as "major reforms". For

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[3] Community Justice Authorities, local authorities, the Crown Office and Procurator Fiscal Service, the Scottish Police Services Agency, the Scottish Prison Service, and the Scottish Legal Aid Board.

[4] An explanation of the three "levels" of Finance Committee scrutiny of Financial Memorandums is provided at: http://www.scottish.parliament.uk/s3/committees/finance/financialMemo.htm

[Link no longer operates]

[5] Scottish Parliament. *Official Report, 3 September 2008*, Cols 10305-6: Available at: http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-08/sor0903-02.htm#Col10301.

[6] Scottish Government. *Revitalising Justice – Proposals to Modernise and Improve the Criminal Justice System.* Available at http://www.scotland.gov.uk/Publications/2008/09/24132838/0

each one, the document outlined the main proposal and indicated where consultation was already underway or about to commence.

7. By the time the Bill itself was finalised, further measures had been added, beyond those outlined in *Revitalising Justice*. The Bill, as introduced, consists of 148 sections and five schedules, grouped into 11 parts, the main ones covering sentencing, criminal law, criminal procedure, evidence, criminal justice, disclosure, mental disorder and unfitness for trial, licensing under the Civic Government (Scotland) Act 1982 and alcohol licensing.

8. In all, the Bill implements more than eighty distinct policy proposals. Some of these – most notably the establishment of a Scottish Sentencing Council and the creation of a statutory presumption against short-term prison sentences – are Scottish National Party manifesto commitments. Others originate from the work of independent bodies or take forward reforms initiated by the previous administration. The opportunity has also been taken to make a number of technical changes such as repealing spent enactments or correcting errors in existing statutes.

9. The principal non-governmental sources for the proposals implemented in the Bill are:

- Professor James Fraser's review of police powers in relation to forensic data taken from adults prosecuted for sexual or violent offences but not convicted, and from children who have committed similar offences;
- Lord Coulsfield's review of the law and practice of disclosure in criminal proceedings;
- the report of the Scottish Prisons Commission, chaired by Henry McLeish;
- various reports by the Sentencing Commission for Scotland;
- reports by the Scottish Law Commission, including on a Crown right of appeal in criminal cases, on the age of criminal responsibility and on insanity and diminished responsibility;
- a joint Scottish Executive and Home Office consultation on the possession of extreme pornographic material.

EVIDENCE RECEIVED BY THE COMMITTEE

10. With such a wide-ranging Bill it has been impossible, in the time available to the Committee, to take evidence and consider in detail each and every proposal. It has also become clear from the written and oral evidence that there is a much more limited number of proposals that raise particularly complex issues or have generated significant controversy, and to which the Committee has therefore devoted most attention.

11. The Committee issued its call for written evidence on the Bill in March 2009 and has since received more than 90 submissions.[7]

12. The Committee took oral evidence over eight meetings in May, June and August. The principal individuals and organisations who attended were—

- the Lord President of the Court of Session and Lord Justice General (Lord Hamilton) and the Lord Justice Clerk (Lord Gill)
- the Sheriffs' Association
- the Scottish Justices Association
- the Royal Society of Edinburgh
- Henry McLeish (chair of the Scottish Prisons Commission)
- representatives of three Community Justice Authorities (Fife and Forth Valley, North Strathclyde, Lanarkshire)
- the Association of Directors of Social Work
- Howard League for Penal Reform
- the Scottish Consortium on Crime and Criminal Justice
- the Association of Chief Police Officers in Scotland
- the Scottish Crime and Drug Enforcement Agency
- Victim Support Scotland
- the office of Scotland's Commissioner for Children and Young People
- Children 1st
- Children in Scotland
- the Law Society of Scotland
- the Faculty of Advocates
- Professor Jim Fraser (Centre for Forensic Science, University of Strathclyde)
- Scottish Police Services Authority
- Lord Coulsfield (author of the independent review of the law and practice of disclosure in criminal proceedings in Scotland)

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[7] The written submissions are published on the Committee's webpage. Available at: http://www.scottish.parliament.uk/s3/committees/justice/index.htm

- the Centre for Sentencing Research (University of Strathclyde)
- James Chalmers, School of Law, University of Edinburgh
- Dr Sarah Armstrong, Faculty of Law, University of Glasgow
- the Scottish Prison Service
- the Convention of Scottish Local Authorities
- the Lord Advocate (Elish Angiolini QC) and Solicitor General for Scotland (Frank Mulholland)
- the Scottish Licensed Trade Association
- Noctis (which represents night clubs and other late-night venues)
- the Scottish Late Night Operators Association
- the Scottish Beer and Pub Association
- City of Edinburgh and City of Glasgow Licensing Boards
- Fife Council
- the Cabinet Secretary for Justice (Kenny MacAskill).[8]

13. As always, the tight timescale for the Committee's Stage 1 scrutiny resulted in a relatively short deadline, particularly given the breadth of this Bill, for those interested to give their views. The Committee is very grateful to those who were able to contribute to the process.

14. The Committee would also like to thank the staff at Alloa Town Hall and the members of the public who attended the Committee's meeting there on 19 May 2009, as well as the witnesses who gave evidence on that occasion. This meeting enabled the Committee, amongst other things, to gain a local perspective on some of the changes proposed in the Bill. The Committee is also grateful for the assistance provided by its two advisers, Professor Peter Duff of Aberdeen University (on the criminal procedure aspects of the Bill) and Robert Millar, principal solicitor at City of Edinburgh Council (on the licensing provisions).

PART 1 – SENTENCING

15. Part 1 of the Bill covers issues relating to sentencing including the purposes and principles of sentencing, the creation of a Scottish Sentencing Council, community payback orders, and a presumption against short periods of imprisonment.

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[8] Full details of oral witnesses are set out in Annexe C (extracts from the minutes of the Justice Committee) and Annexe D (index of oral witnesses).

Sections 1 and 2: Purposes and principles of sentencing

Background

16. The Sentencing Commission for Scotland (the Commission) recommended that, as a useful step to promoting consistency in sentencing, the purposes of sentencing should be enshrined in statute. In its report, the Commission stated that the purposes of sentencing "commonly accepted by most jurisdictions are punishment or retribution, protection of the public or incapacitation, deterrence and rehabilitation or reform. To these are sometimes added denunciation, reparation, crime reduction and economy of resources".[9]

17. Section 1 sets out the purposes of sentencing as: the punishment of offenders, the reduction of crime (including its reduction by deterrence), the reform and rehabilitation of offenders, the protection of the public, and the making of reparation by offenders to persons affected by their offences.

18. Section 1(3) lists other matters to which a court must have regard in sentencing an offender, namely the seriousness of the offence, any information before the court about the effect of the offence on any person (other than the offender), the range of sentences available to the court in dealing with the offence, the desirability of ensuring consistency in sentencing in respect of the same type of offence, and any other information before the court about the circumstances and attitude of the offender.

19. By setting down the purposes of sentencing, Scottish Ministers intend—

> "that the public has a much clearer understanding of what sentencing is actually for and is clear on the key factors that every sentencer must have regard to when making decisions in individual cases."[10]

Evidence received

20. Victim Support Scotland agreed with the Bill's proposals in this regard and said—

> "We believe that the introduction of a statutory definition of the aim of sentencing will help create more consistency in sentences … More consistency will subsequently make the criminal justice process more transparent, enabling parties to foresee and understand why a particular verdict is given."[11]

21. The Law Society of Scotland was broadly supportive of the purposes and principles as set out in the Bill, but suggested that—

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[9] The Scottish Sentencing Commission for Scotland. *The Scope to Improve Consistency in Sentencing*, paragraph 9.5. Available at: http://www.scottishsentencingcommission.gov.uk/docs/consistency/Consistency%20Report%20-%20Final.pdf

[10] Criminal Justice and Licensing (Scotland) Bill. Policy Memorandum, paragraph 9. Available at http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/b24s3-introd-pm.pdf

[11] Victim Support Scotland. Written submission to the Justice Committee.

> "the purpose as outlined at section 1(1)(b) should be the deterrence of crime as opposed to the reduction of crime (including its reduction by deterrence). The Society also believes that one of the main principles of sentencing is to serve the interests of justice and that should be reflected in the Bill."[12]

22. Both the Faculty of Advocates and the Judges of the High Court of Justiciary flagged up a concern about section 2(2), according to which a court need not comply with the purposes and principles of sentencing where they are inconsistent with sentencing guidelines. As Lord Hamilton put it—

> "If the principles are to be recognised as being applicable in the criminal justice system, they should also be applicable to the sentencing council. It should not be free to deal with the matter without regard to those principles."[13]

23. The High Court judges, the Sheriffs' Association and the Scottish Centre for Criminal Justice Research all questioned why (under subsection (5)(a) of section 1), the purpose and principles of sentencing (subsections (2) and (3)) do not apply to offenders under the age of 18. The judges recognised that it would be necessary to take account of a child's age, but suggested that "the considerations referred to in subsections (2) and (3) appear to be equally apt for the sentencing of any person who has attained the age of criminal responsibility".[14]

24. The Sheriffs' Association accepted that the principles set out in section 1(3) are not intended to be exclusive or exhaustive, but suggested denunciation (the expression of "society's abhorrence of a particular crime") as an additional purpose of sentencing and the nature or character of the offence (in addition to its seriousness) and local circumstances as additional matters to be taken into account. It also questioned section 1(3)(d), which provides that a court must have regard to "the desirability of ensuring consistency in sentencing in respect of the same type of offence"—

> "Consistency in sentencing is not stated in the Bill as a purpose of sentencing. This provision assumes a purpose that is not stated. Under the proposal, if the court considers that consistency is not desirable, it may be ignored. How is a court to ascertain what the consistent sentence is if there is no guideline published? … This provision should be removed as containing no principle that can be applied in practice."[15]

25. Overall, the Association's view was summarised by Sheriff Nigel Morrison QC—

> "The purpose of setting out the principles in the Bill was not simply to set them out. As the policy memorandum indicates, the purpose was to achieve

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[12] The Law Society of Scotland. Written submission to the Justice Committee.

[13] Scottish Parliament Justice Committee. *Official Report, 12 May 2009*, Col 1771.

[14] Judges of the High Court of Justiciary, Sheriffs' Association and Scottish Centre for Criminal Justice Research. Written submissions to the Justice Committee.

[15] Sheriffs' Association. Written submission to the Justice Committee.

> consistency, transparency and confidence. However, we do not think that that purpose has been achieved."[16]

26. In its written submission, the Royal Society of Scotland (RSE) said that the purposes of sentencing are already well known and there is no need for them to be embodied in statute. In the RSE's view, the extent to which any of the purposes listed in the Bill would apply depends on the nature and circumstances of the case and hence on the judgement of the sentencer, and that listing the purposes in statute "serves no practical purpose".[17]

27. In later oral evidence, Lord Cullen for the RSE was asked whether there was anything that should be added to the list, were it to remain in the Bill. He replied—

> "The trouble is that that would be like adding one unnecessary thing to a lot of other unnecessary things. However, I can think of a few additions. For example, we mention in our submission the absence of any reference to the significance of a guilty plea, which is a potent factor."[18]

28. Professor Neil Hutton (Centre for Sentencing Research, University of Strathclyde) drew attention to the English sentencing guidelines which included "overarching principles of seriousness" and advocated a similar approach for Scotland, consistent with the recommendations of the Scottish Prisons Commission. This would involve the level of penalty being set by reference to the seriousness of the offence, both in terms of the culpability of the offender and the harm caused to the victim, while the precise amount and form of penalty would be decided by the judge according to the facts and circumstances of the offence and the offender. In this way, fairness would take priority over other purposes of sentencing—

> "Arguably, fairness is one thing that a systematic approach to sentencing can deliver and fairness is valued by the public. It is not so easy to make this claim about other purposes."[19]

29. The Scottish Consortium on Crime and Criminal Justice (SCCCJ) welcomed a statutory statement of the purposes of sentencing, but believed it could go further. In particular, it could include reference to the larger purpose of making society more just and safer for its citizens, thus providing some basis for choosing between the stated purposes and principles when they conflict—

> "The difficulty with the way in which the bill is drafted is that it simply lists a range of purposes that sentences might serve. The list is familiar, covering exactly what is found in similar legislation or in the relevant textbooks in various jurisdictions. It provides no coherent rationale that a sentencer might employ when thinking about which principles should apply or have priority in

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[16] Scottish Parliament Justice Committee. *Official Report, 12 May 2009*, Col 1774.
[17] Royal Society of Edinburgh. Written submission to the Justice Committee.
[18] Scottish Parliament Justice Committee. *Official Report, 12 May 2009*, Col 1797.
[19] Professor Neil Hutton. Written submission to the Justice Committee.

> particular circumstances, or how to choose between different purposes of punishment or sanctioning that might conflict in certain ways."[20]

30. Professor Fergus McNeill of the SCCCJ rejected the idea that reducing reoffending could be regarded as an overarching principle—

> "It is a laudable objective for the system to pursue, but if adhering to the principle allowed disproportionate sentences – perhaps even incapacitating sentences of a duration that was not merited by the gravity of the crime – to be applied, that would be contrary to the interests of justice. … A better approach than putting the reduction of reoffending first is to try to approximate to fairness and justice in the first instance, before thinking about the specific outcomes that we might pursue through a properly proportionate penalty."[21]

31. The SCCCJ also suggested that the first purpose listed in section 1(1), "the punishment of offenders", could be omitted on the grounds that punishment would serve no purpose if it did not secure any of the other purposes listed. Instead, it advocated a principle of "parsimony", namely "that any sentence should be the least oppressive and intrusive consistent with the other aims of sentencing".[22]

32. This approach was strongly supported by the Scottish Centre for Crime and Justice Research, which also wanted the Bill to—

> "make it explicit that each of the stated purposes of sentencing should serve a larger purpose, i.e. the production of a more just and safer society for all of its citizens."[23]

33. The Cabinet Secretary was not convinced that any overarching purpose was needed—

> "We think that sections 1 and 2 are clear and easy to understand. They set out the purposes and principles of sentencing, and we think it essential to do that. Sentencing does not have just a single purpose – that of punishment – and the lack of hierarchy in section 1 is quite deliberate. In trying to get the balance right, fairness is important, and setting out purposes and principles will contribute to achieving that."[24]

Committee conclusions

34. **The Committee believes that the purposes or principles of sentencing, as established by common law, are already well understood by the courts. The common law has the advantage that it can more easily evolve and develop in response to changes in social attitudes; fixing this common-law understanding in statute carries a risk of unintended consequences, and may also lose some of the nuances of case-law jurisprudence. What is**

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[20] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1866.

[21] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1867.

[22] Scottish Consortium on Crime and Criminal Justice. Written submission to the Justice Committee.

[23] Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.

[24] Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Col 2159.

more, it is generally understood to be a principle of legislative drafting to make provision only where it is necessary to do so – and, indeed, this has often been articulated by Ministers (both of the current and previous administrations) as a reason to resist backbench amendments.

35. **Considering section 1 in isolation, therefore, we are not convinced that a sufficiently good case has been made for its inclusion. However, we recognise the Scottish Government's view that an opening section setting out in broad terms what sentencing is for may be a useful preliminary to the creation of a Scottish Sentencing Council. Accordingly, we invite the Scottish Government both to justify the necessity for setting out the purposes and principles of sentencing in the Bill and to provide assurance that the provisions in sections 1 and 2 do not inadvertently change the law. Without adequate justification and assurance, we are liable to conclude that retaining these sections in the Bill may be problematic.**

36. **We acknowledge that all the purposes listed in subsection (1), and the "other matters" to which the courts must have regard listed in subsections (3) and (4), have a part to play in sentencing decisions. We believe it is important that, if these are to be listed in statute, they are regarded as non-exhaustive and unranked lists, with the order not implying any general priority of earlier items over later ones. We also note that, while the section title refers both to "purposes" and "principles", only purposes are actually listed. In our view, principles of fairness, justice and proportionality are at least as important as the purposes already included, and we therefore invite the Scottish Government to consider including these principles within the section (or removing reference to "principles" from the section title).**

37. **The Committee is also uncertain as to why subsections (2) and (3) of section 1 are disapplied in relation to persons under the age of 18. Our presumption would be that the matters listed in subsection (3) are still relevant in that context, albeit in a context where the offender's age is also a significant factor. We are also unclear what status subsection (1) is meant to have in relation to a young offender – it is not disapplied, but the court is under no obligation to have regard to it in sentencing that offender. We would invite the Scottish Government either to provide a better justification for its drafting approach here, or to bring forward amendments to clarify the application of section 1 to under-18 offenders.**

38. **The Committee has also found difficulty with the relationship between the purposes of sentencing in section 1 and the sentencing guidelines to be issued by the Scottish Sentencing Council (SSC). Specifically, the SSC does not appear to be required to reflect the purposes in preparing guidelines, but the courts are obliged to give precedence to the guidelines should they and the purposes of sentencing come into conflict (section 2(2)). We do not see the logic of creating a statutory Sentencing Council and, at the same time, setting out the purposes of sentencing in statutory form if that Council is not itself made subject to those purposes in carrying out its work. That way, there should be no question of the council issuing guidelines that are inconsistent with the purposes of sentencing. We recognise that the Scottish Sentencing Council is likely, in practice, to follow the purposes in**

any event, and there may also be reasons for not having this as a statutory obligation on the Council. Nevertheless, we believe the Scottish Government needs to do more to explain its thinking on these matters, so that the Committee can either satisfy itself that the relationship is an appropriate one, or consider how it might be amended at Stage 2.

Sections 3-13 and schedule 1: The Scottish Sentencing Council

Background

39. At present, sentencing mainly operates on a case-by-case basis in the criminal courts, supplemented by the power of the Appeal Court to issue guideline judgements under the Criminal Procedure (Scotland) Act 1995, a power that has so far been little used.

40. The Sentencing Commission for Scotland, set up by the previous administration in 2003, was tasked with considering what scope there was for improving consistency in sentencing, and reported on this topic in 2006.[25] The report recommended that the Appeal Court should consider making greater use of its power to issue guideline judgements and that a sentencing advisory body, to be known as the Advisory Panel on Sentencing in Scotland (APSS), should be set up. with members from each level of the judiciary, the law enforcement agencies, the prosecuting authorities, the legal profession, offender management services and organisations working with victims and the wider community. The APSS would be responsible for drafting guidelines for consideration by the Appeal Court on general topics related to sentencing, on new sentencing disposals introduced by legislation and on particular categories of crimes and offences. The Appeal Court would then approve the draft guidelines, refer them back to the APSS for further consideration, or decline to approve them.[26]

41. The Scottish Prisons Commission, in its report *Scotland's Choice*, published in July 2008, supported the establishment of a body to develop clear sentencing guidelines applicable nationwide to aid consistency and improve the effectiveness of sentencing.[27]

42. The Scottish Government agreed that there was a need for a statutory body to produce sentencing guidelines and in September 2008 its proposals for a Scottish Sentencing Council were published for consultation. Over 40 responses were received and, although the majority were in favour of the proposals, some concerns were raised about the proposed relationship between the Sentencing Council and the Appeal Court. In particular, the High Court Judges said that the proposed relationship between the Sentencing Council and the Appeal Court was unsatisfactory, unworkable and unacceptable. In the Judges' view the proposals would have significant impact on the independence of the judiciary and would fundamentally alter the position of the Appeal Court in its role of controlling the development and application of sentencing policy.[28]

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[25] Sentencing Commission for Scotland. *The Scope to Improve Consistency in Sentencing.*

[26] Sentencing Commission for Scotland, paragraphs 9.16 – 9.17; recommendations 12, 13, 14, 15.

[27] http://www.scotland.gov.uk/Publications/2008/06/30162955/0

[28] Scottish Government 2009, response 034

The proposals

43. Section 3 of the Bill establishes a Scottish Sentencing Council (the Council). Its functions, under section 4, are to prepare and publish sentencing guidelines and, in doing so, promote consistency in sentencing practice, assist the development of policy in relation to sentencing, and promote greater awareness and understanding of sentencing policy and practice.

44. Section 5 provides that sentencing guidelines may relate to the principles and purposes of sentencing, sentencing levels, the particular types of sentence that are appropriate for particular types of offence or offender and the circumstances in which the guidelines may be departed from. Guidelines must include an assessment of the relevant costs and benefits and an assessment of the likely effect on the number of persons detained in prisons or other institutions, the number of persons serving sentences in the community, and the criminal justice system generally.

45. The Scottish Government's overall policy objective in creating the Council is—

> "to help ensure greater consistency, fairness and transparency in sentencing and thereby increase public confidence in the integrity of the Scottish criminal justice system."[29]

46. Before publishing any sentencing guidelines, the Council is required to publish a draft and consult the Scottish Ministers, the Lord Advocate and such other persons as the Council considers appropriate. When finalising a guideline, the Council must have regard to any comments made on the draft.

47. Courts must have regard to any final guideline which is applicable to a case before them. If the court decides not to apply any relevant guideline, it must state its reasons for not doing so.

48. The Council will comprise twelve members: the Lord Justice Clerk, as chairing member, four other judicial members (one other High Court judge, two sheriffs or sheriffs principal and one JP or stipendiary magistrate), four legal members (one prosecutor, one constable, one advocate and one solicitor) and three lay members (one of whom must have knowledge of the issues faced by victims).

49. The Lord Justice General, after consulting the Scottish Ministers, will be responsible for appointing the judicial and legal members. The Scottish Ministers, after consulting the Lord Justice Clerk, will be responsible for appointing the lay members.

Evidence received – general comments

50. Most witnesses from whom the Committee took evidence were supportive of the aims behind the proposals for the Council – to contribute to greater consistency, fairness and transparency in sentencing and thereby increase public confidence. Many witnesses also recognised that a sentencing council could

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[29] Policy Memorandum, paragraph 12.

contribute to a greater knowledge base, the development of public policy and better research into public attitudes to sentencing.

51. In support of the proposals, Professor Neil Hutton commented —

> "The Council provides an institutional space for judges to work with others to develop sentencing policy. Crime and punishment have become such sensitive political issues that many jurisdictions have found it helpful to develop an institution which provides an opportunity to develop a more rational, evidence-based approach to policy-making which can be pursued away from the media glare of the world of electoral politics. Guidelines will provide a clear and transparent structure within which judges can exercise their discretion at the level of the individual case. This will help the public to understand sentencing decisions and, over time, lead to enhanced public confidence in the courts."[30]

52. Victim Support Scotland also expressed support and said—

> "It is about the need to build public confidence in our sentencing processes, so that there is demonstrably a greater understanding of consistency in sentencing. That is required in the 21st century. The sentencing guidelines will be an important tool for judges and other sentencers. The proposal is a win-win for communities, victims and the criminal justice system."[31]

53. The Scottish Police Federation (SPF) said it supported the establishment of the Council and its aim of ensuring greater consistency in sentencing. It considered however that the requirement on the Council to include in any guidelines "an assessment of the likely effect of the guidelines on the number of persons detained in prisons or other institutions" was incompatible with the principle of the punishment fitting the crime.[32]

54. The Scottish Centre for Crime and Justice Research said that the Council had the potential to make sentencing practice more consistent and just, although that would depend on its powers and how it was organised.[33]

55. The Scottish Consortium on Crime and Criminal Justice (SCCCJ) was unable to reach a consensus view on the merits of the Council as proposed, saying "the case for and likely effects of a Sentencing Council are far from clear".[34] It drew attention to some of the arguments it had considered: that retaining judicial control over sentencing provides a necessary independence from political intervention; that prison populations have risen in most US states which have developed sentencing guidelines; that guidelines can reduce judicial discretion and can carry the risk of unjust sentences being imposed in individual cases; but that on the other hand it is legitimate for governments to set a sentencing policy to make the most effective use of scarce criminal justice resources and that the current system

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[30] Professor Neil Hutton. Written submission to the Justice Committee.

[31] Scottish Parliament Justice Committee. *Official Report, 26 May 2009*, Col 1932.

[32] Scottish Police Federation. Written submission to the Justice Committee.

[33] Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.

[34] Scottish Consortium on Crime and Criminal Justice. Written submission to the Justice Committee.

of individualised sentencing does not make provision for consistency in sentencing.[35]

56. Professor Spencer, representing the SCCCJ, said—

> "the proposal for a sentencing council is a case of using a sledgehammer to crack a nut. I am not sure that I completely favour a sentencing council, because we have to get the number of people in prison down, and judges have to fit in to that framework."[36]

57. Other witnesses, most particularly sentencers, did not feel they could support the Sentencing Council as proposed in the Bill.

58. Lord Gill, the Lord Justice Clerk, agreed that there was a role for a sentencing council in Scotland but not the role as envisaged in the Bill. He said—

> "We need hard research to establish the effects of sentencing. The courts have before them a wider range of disposals than they have had at any stage in history. We need to know how to measure the success of those disposals and, if a criterion exists for their success or failure, to know what is happening out there in the field. Useful research could be done on that."[37]

59. For those who did not feel able to support the creation of a Sentencing Council as envisaged in the Bill, four main areas of concern were expressed in evidence: firstly, that the proposals were founded on an unproven claim of inconsistency in sentencing; secondly, that the Sentencing Council as proposed would undermine the independence of the judiciary by taking decision-making away from the Appeal Court; thirdly, about the composition of the Council and in particular its lack of a judicial majority; and, fourthly, about cost in a time of budget pressures.

Inconsistency in sentencing

60. One of the main policy objectives behind the proposal to create a Sentencing Council is to improve consistency in sentencing. The question of what evidence exists of a lack of consistency was one that arose repeatedly throughout the evidence taking.

61. In his foreword to the Sentencing Commission's report, Lord McFadyen (the Commission chairman) had concluded—

> "While there is little research evidence measuring the extent to which there is inconsistency in sentencing in the courts in Scotland, there is a public perception that such inconsistency exists, and the Commission has concluded that that perception is in some measure well founded."[38]

62. The Lord Advocate endorsed this view, saying that—

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[35] Scottish Consortium on Crime and Criminal Justice. Written submission to the Justice Committee.

[36] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1870.

[37] Scottish Parliament Justice Committee, *Official Report, 12 May 2009*, Col 1769.

[38] Sentencing Commission for Scotland. *The Scope to Improve Consistency in Sentencing.*

> "it can be difficult to assess whether there is inconsistency in the sentencing process because of the absence of data and, indeed, of a system that is open to examination. I have been a practitioner in the courts over the years and I can tell you that there is anecdotal evidence across the board that some sentences surprise practitioners and that in certain circumstances it is difficult to predict what the sentence will be … On days when a particular judge is known to be on duty, there might be a queue of enthusiastic guilty pleas, but on other days the court can be a veritable desert as far as guilty pleas are concerned."[39]

63. Henry McLeish, the Chair of the Scottish Prisons Commission, said that there was sufficient evidence from various sources to suggest that there are inconsistencies in sentencing throughout Scotland. He cited publicly recorded cases that generate public debate, court decisions and anecdotal evidence.[40]

64. Community Justice Authorities (CJAs) also felt that there was inconsistency in sentencing. Tony McNulty of Lanarkshire CJA referred to court statistics and said—

> "in some courts 22 per cent of the sentences that are imposed are custodial, whereas in other courts custodial sentences account for 11 per cent of sentences. There seems to be no rhyme or reason for such variations in sentencing."[41]

65. However Dr Cyrus Tata of the Centre for Sentencing Research at the University of Strathclyde cautioned against drawing such inferences directly from "bald statistics", since they did not take account of possible differences in the cases that come before different courts. As he put it, the statistics "do not control for input. If you do not control for input, you are unable to control for output." Nevertheless, Dr Tata cited a range of studies which had been carried out which together provided some limited evidence of inconsistency, together with evidence of consistency: "The overall picture is rather like a bell curve, with a lot of consistency and some variation."[42]

66. Professor Fergus McNeill of the Scottish Consortium on Crime and Criminal Justice agreed that it was impossible to establish conclusively whether there was inconsistency through research. However, he believed there was "variance in sentencing that seems to be beyond what is defensible". He based this view on statistical evidence, research studies and anecdotal evidence, including the fact that—

> "At intermediate diets, some people will plead guilty instantly if the judge whom they are going to appear before is deemed to be a relatively lenient sentencer. If a harsher or more punitive sentencer is on the bench, the person will not plead guilty in the hope that, when they return to court later,

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[39] Scottish Parliament, Justice Committee. *Official Report, 9 June 2009*, Col 2058.
[40] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Cols 1816-7.
[41] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1841.
[42] Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Cols 2010-12.

> they will face a different judge. Judges know that this happens. It is called judge shopping and … it goes on to a significant degree in our system."[43]

67. Victim Support Scotland said that in its view, there was little evidence of inconsistency, but even less evidence of consistency and added—

> "People have the right to understand why a particular sentence was given in a particular case. That is what sentencing guidelines can do for us."[44]

68. For Professor Neil Hutton of the Centre for Sentencing Research at the University of Strathclyde, demanding evidence of inconsistency got things the wrong way round—

> "The onus is on the judiciary to tell us what they mean by consistency, and to explain that in a transparent way to the public. They do not have a language – that is a criticism not of judges but of the structure in which they work – that enables them to talk about consistency. That is why we need guidelines, and the sentencing council."[45]

69. The judiciary, however, was not convinced. Lord Hamilton said that he was not aware of, and no one had brought to his attention, any empirical evidence to suggest that there is inconsistency of sentencing in Scotland. He offered access to court records to allow an empirical exercise to be carried out, saying that—

> "we should want to know that there is truly an inconsistency in sentencing before undertaking the very expensive exercise of setting up a body of the kind envisaged in the Bill, with operating funds that have been identified of more than £1 million a year."[46]

70. This view was supported by Ian Duguid QC, of the Faculty of Advocates, who said that he had not seen "an inconsistency in sentencing to the point at which another body would be required to set guidelines."[47]

71. Bill McVicar from the Law Society of Scotland questioned whether consistency in sentencing is, in fact, desirable—

> "We are concerned to understand what is meant by consistency in sentencing. Two apparently similar cases may attract different sentences for reasons that are particular to those cases; that is the difficulty in applying strict guidelines. The question is whether we want uniform sentences or consistent sentences – and what is meant by consistent sentences. It seems to me that such matters are not properly dealt with in the Bill."[48]

72. The Lord Justice Clerk felt that a definition of consistency was essential if sentencing was to be a stated aim of the legislation—

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[43] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1883.
[44] Scottish Parliament Justice Committee. *Official Report, 26 May 2009*, Col 1933.
[45] Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Col 2010.
[46] Scottish Parliament Justice Committee. *Official Report, 12 May 2009*, Cols 1761, 1764.
[47] Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Col 1976.
[48] Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Col 1977.

> "The consultation paper started off by talking about inconsistency and then spoke about a perception of inconsistency, which is rather a different thing. It is not quite clear yet what the legislation seeks to achieve. There is no definition of consistency in the draft, and it seems to me that those who would form a sentencing council would find some difficulty in knowing exactly what they were trying to do unless the legislation gave them a clear definition by which to judge their own views and decisions."[49]

73. The Cabinet Secretary for Justice explained the rationale for the provisions in the Bill as follows—

> "We have founded our approach on the conclusions of the Sentencing Commission for Scotland, which was an august body that contained senior figures, including senior members of the judiciary. We are building on their comments. … Factors other than inconsistency are involved. However, we think that there is disquiet among the public about inconsistency in sentencing, which must be tackled, whether it is based on anecdotal evidence or reality."[50]

The powers of the Council and the independence of the judiciary

74. While most witnesses were generally supportive of sentencing guidelines, there was significant disagreement on whether a new Sentencing Council was needed and whether its role should be more than advisory.

75. In their written submission, the High Court judges observed that the Council will prepare guidelines "which will have direct legal effect thus restricting the sentencing discretion and power not only of all courts, including the High Court sitting as a court of appeal (section 7(1)(a)), but also of that court when carrying out its other function of issuing guideline judgments (section 7(1)(b))." The Council will also have the power to prescribe when its guidelines may (and presumably may not) be departed from (section 5(3)(d)).

76. In the judges' view, the Bill's proposals—

> "strike directly at the independence of the judiciary (and in particular of the High Court) as the arm of Government essentially responsible for the setting of sentencing policy. The proposals (as framed) are fundamentally unacceptable both on domestic constitutional grounds and because mandatory directions to the court by a non-judicial body undermine the judicial independence required of courts by Article 6 of the European Convention on Fundamental Rights and Freedoms."[51]

77. In his oral evidence, Lord Hamilton expanded on these objections—

> "One has to recognise the radical difference between the proposals now made and the proposals that were made by the Sentencing Commission for Scotland, chaired by Lord Macfadyen. The commission recognised the

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[49] Scottish Parliament Justice Committee. *Official Report, 12 May 2009*, Col 1762.

[50] Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Col 2161.

[51] Judges of the High Court of Justiciary. Written submission to the Justice Committee, paragraph 10.

> importance of the High Court of Justiciary, as the senior criminal court in Scotland, being the ultimate body responsible for laying down sentencing guidelines. It saw the advantage in there being an advisory body with a research facility for undertaking exercises and putting matters before the appeal court for endorsement or otherwise. However, I think a situation in which an outside body that is not itself elected and which comprises, as the present proposals indicate, a majority of non-judicial office-holders impinges on the independence of the judiciary, if that body is to lay down what are, in effect, prescriptive guidelines."[52]

78. While Lord Hamilton accepted that any guidelines published by the Sentencing Council would not be binding, the requirement on the court to "have regard to" them would be "constraining to a significant extent, as I think it is intended to be". This would not be welcome in the context of guidelines laid down by a sentencing council as opposed to the Appeal Court.[53]

79. The Royal Society of Edinburgh (RSE) pointed out that, while the Policy Memorandum cited the Sentencing Commission as the origins of the proposals in the Bill, it did not mention that the Commission had only been in favour of an advisory body and against a sentencing guidelines council; nor did the Memorandum explain why the Scottish Government had taken a different view. In the Society's view—

> "the purpose of the Sentencing Council is open to grave objection on constitutional grounds. Sentencing policy is, and should remain, a matter for the Parliament on the one hand and the Appeal Court on the other, following, we may say, a public hearing. It is fundamentally wrong that sentencing policy should be determined by a Sentencing Council, for which it appears that the executive have disproportionate influence on the procedure for appointment of members."[54]

80. However Professor Neil Hutton did not accept that a Sentencing Council undermined judicial independence—

> "Judicial independence means that a judge makes a decision in an individual case. It is entirely appropriate for a body such as a sentencing council to develop a broader sentencing policy or to decide what sentencing should be for particular types of cases. I do not think that interferes with judicial independence at all."

81. Indeed, he suggested, well-crafted guidelines, by "giving judges something to argue about" would bolster judicial independence—

> "If they decide to depart from the guidelines in a particular case, they can set out the range of penalties for the crime and then give a clear reason in public for their decision. Unlike the present situation, such a move blends

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[52] Scottish Parliament Justice Committee. *Official Report, 12 May 2009*, Col 1761.
[53] Scottish Parliament Justice Committee. *Official Report, 12 May 2009*, Col 1766.
[54] Royal Society of Edinburgh. Written submission to the Justice Committee.

> consistency and individualised sentencing in a way that is transparent to the public."

82. Nor, in his view, did judicial independence require the sentencing council to have only an advisory role—

> "If we have a sentencing council whose task is to devise guidelines, it is appropriate that it should have final authority. That preserves judicial independence at a sufficient level, as it allows the appeal court to make decisions in individual cases."[55]

83. Dr Cyrus Tata agreed that "in principle, a sentencing council can … be a way of buttressing the judicial independence rather than detracting from it", but it depended on the detail. He had some concerns that the council as proposed in the Bill "appears to report mainly to the Scottish Ministers and, to some extent, the Lord Advocate. I would want it to be more distanced from the Executive and perhaps a little more accountable to the Parliament."[56]

84. John Scott, representing the SCCCJ and the Howard League for Penal Reform, was concerned that the Council might be exposed to undue political pressure, or pressure from the media. He was not wholly opposed to such a body, suggesting that it could play a useful role if it was an advisory body rather than one that issues guidelines.[57]

85. However, David McKenna of Victim Support Scotland was opposed to a Sentencing Council that was purely advisory—

> "I am not sure whether that arrangement would be as effective in demonstrating sentencing consistency to the public as the approach that is set out in the Bill. An advisory group might just disappear into the background and never be heard from again."[58]

86. Henry McLeish downplayed the significance of a sentencing council, suggesting that the arguments on both sides were in danger of becoming polarised. He saw no threat to the independence of the judiciary, described the establishment of a sentencing council as "a modest measure that should not get too many people too excited" and said that he had no strong views on how it operated. His only concern was—

> "that the sentencing council should not appear as an ultra-quasi-legal body that looks like it is imposing its individual judgments on the work of the courts."[59]

87. James Chalmers (Edinburgh University) said that, as the Bill makes clear that the final decision on sentencing is still left to judges, he did not see how

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[55] Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Cols 2008, 2012, 2017.
[56] Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Col 2008.
[57] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1874.
[58] Scottish Parliament Justice Committee. *Official Report, 26 May 2009*, Col 1934.
[59] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Cols 1820-1.

independence would be undermined.[60] Similarly, the Lord Advocate said it was "quite clear that it will not be the council's role to provide prescriptive mandatory guidelines or to interfere with judges' independence in individual cases."[61]

88. The Cabinet Secretary for Justice explained why he felt there was no substance to fears that the Sentencing Council would undermine the independence of the judiciary. He pointed to the fact that the Parliament had only recently enshrined the independence of the judiciary in statute and that there was no intention to go against this—

> "We have made it as clear as we can do that we will not interfere with the ultimate responsibility of each sheriff or judge to make the decision that they think is appropriate to the specific offence of the individual offender who appears before them. … I just cannot see the basis on which the sentencing council could be viewed as unconstitutional. It will not interfere with the independence of the judiciary and it is clearly intra vires."[62]

89. He also argued that—

> "the sentencing guidelines must be more than advisory. The judiciary will have the opportunity to say that the guidelines do not fit in the particular circumstances of an individual offender or individual offence. … However, in the main, the guidelines will apply."[63]

90. On a related point, a number of witnesses expressed concerns about section 5(3)(d) of the Bill, which allows the Sentencing Council to specify the circumstances in which sentencing guidelines may be departed from. The Sheriffs' Association described this as "an unwarranted restriction on sentencing in individual circumstances" and suggested it ran counter to section 7(2) of the Bill, which allows a court not to follow guidelines (so long as it states its reasons for doing so).[64] Lord Cullen, speaking for the RSE, agreed that section 5(3)(d) enabled the Sentencing Council to restrict the scope of the court to depart from its guidelines, noting that the court in turn could not force the Council to review guidelines: "We are dealing with a constitutional point – whether the court remains in charge of its original and proper constitutional responsibility to determine sentences".[65]

91. The Sheriffs' Association also expressed concerns about section 5(5), which requires the sentencing guidelines to include "an assessment of the costs and benefits to which the implementation of the guidelines would be likely to give rise, and an assessment of the likely effect of the guidelines on the number of persons detained in prisons or other institutions, the number of persons serving sentences in the community and the criminal justice system generally". According to Sheriff

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[60] Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Col 2009.
[61] Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Col 2057.
[62] Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Cols 2162-3.
[63] Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Col 2167.
[64] Sheriffs' Association. Written submission to the Justice Committee, para 2.15; Scottish Parliament Justice Committee. *Official Report, 12 May 2009*, Col 1782.
[65] Scottish Parliament Justice Committee. *Official Report, 12 May 2009*, Cols 1801-2.

Fletcher, it would be inappropriate for sentencers to take such matters into account—

> "We think that the person who is being sentenced is entitled to be sentenced by someone whose attention is not directed at whether there is a place available for them".[66]

Sentencing Council – membership

92. A closely related issue was about the composition of the Council and, in particular, the fact that it is to have only a minority of judicial members. The High Court judges, the Sheriffs' Association, the Scottish Justices Association, the Faculty of Advocates and the Royal Society of Edinburgh all argued that the Council should have a judicial majority – particularly if it was to have more than a purely advisory role.

93. Lord Hamilton set out the changes in membership he would like to see—

> "It would be inappropriate merely to have the Lord Justice Clerk as the chairman and one other judge – in effect, a first-instance criminal judge – as the only senators on the council. I would be minded to double that to four senators. I would leave the number of sheriffs and justices the same, but I would remove the constable, because I do not recognise the function of the constable in that regard. I would reduce the provision in paragraph 1(5)(b) in schedule 1 from "two other persons" to "one other person" which would mean council membership of 12, with judicial office-holders being seven of the 12."[67]

94. The Sheriffs' Association said that it would be difficult for sheriffs, or the public, to have confidence in a body that did not have a judicial majority.[68] The RSE said it could not support a Council with only a minority of people having experience of sentencing. John Scott said he would "lean towards having a majority of judges on the sentencing council, if it were going to be more than just advisory".[69]

95. Professor Fergus McNeill was less concerned about an overall judicial majority than with the balance among the judicial members, arguing that the focus should be on including more sheriffs rather than senior judges.[70]

96. There were also some specific concerns about the drafting of the provisions for judicial members of the Council. The Sheriffs' Association was concerned that the drafting could allow there to be two sheriffs principal and no sheriffs, given that sheriffs principal have no active role in sentencing. Similarly, the Scottish Justices Association questioned the provision requiring one Council member to be either a justice of the peace or a stipendiary magistrate. Pointing out that there were hundreds of JPs doing a great deal of criminal work across Scotland and only a handful of stipendiary magistrates, all based in Glasgow, the Association said it

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[66] Scottish Parliament Justice Committee. *Official Report, 12 May 2009*, Col 1785.
[67] Scottish Parliament Justice Committee. *Official Report, 12 May 2009*, Col 1767.
[68] Sheriffs' Association. Written submission to the Justice Committee.
[69] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1879.
[70] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1879.

would be “extremely concerned if we did not have a say or a place on the sentencing council”.[71]

97. There were also arguments about the legal and lay membership of the Council. The Scottish Justices Association questioned the need for the police or the legal professional bodies to be represented and suggested that, if they were to be represented, so too should the Scottish Prison Service and perhaps COSLA.[72] The Joint Faiths Advisory Board on Criminal Justice said that it would be preferable to draw membership of the Council from a wider range of professions involved in the justice system, and suggested additional lay members from the Scottish Prison Service, criminal justice social work teams and community justice authorities.[73] Action for Children Scotland suggested that the membership should include a representative from an agency working directly in the rehabilitation of offenders.[74]

98. However Mike Ewart, Chief Executive of SPS did not agree that his organisation should be represented on the Council, for two reasons—

> “First, we are required to discharge the lawful warrant that is the outcome of a sentence. Secondly, unlike some other organisations that take part in such discussions, we are part of Government and could be seen to be directed by ministers. I do not think that such a position would be helpful for us or for the sentencing council.”[75]

99. The Community Justice Authorities said they were relaxed about the proposed membership of the Council so long as lay people and victims were represented.[76] But Professor McDonald of the Royal Society of Edinburgh disagreed—

> “There is very little point to involving non-experts in making expert decisions. If the problem is public perception, and we then involve members of the public without improving public perception, perhaps we need to educate our masters, if such they are to be.”[77]

100. The Cabinet Secretary for Justice explained the rationale for the composition that was proposed in the Bill—

> “The council will be judicially led. We accept that that is important. We are open to persuasion, but our view is that it is important that the council also has representatives of broader society … it is important that we take into account others who have an interest, such as the police, the prosecution service or Victim Support Scotland.”[78]

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[71] Scottish Parliament Justice Committee. *Official Report, 12 May 2009*, Cols 1786-7.
[72] Scottish Justices Association. Written submission to the Justice Committee.
[73] Joint Faiths Advisory Board on Criminal Justice. Written submission to the Justice Committee.
[74] Action for Children Scotland. Written submission to the Justice Committee.
[75] Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Col 2044.
[76] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1842-3.
[77] Scottish Parliament Justice Committee. *Official Report, 12 May 2009*, Col 1805.
[78] Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Col 2164.

Sentencing Council – cost and resourcing

101. The Bill's Financial Memorandum states that establishing the Scottish Sentencing Council is one of the proposals in the Bill that carries a significant financial impact and estimates the annual budget at between £1 million and £1.1 million, plus one-off set-up costs of £0.45 million. These costs are to be met entirely by the Scottish Government as part of its funding of the Scottish Court Service.

102. The Judges of the High Court of Justiciary questioned whether this cost could be justified—

> "We are profoundly concerned that, at the present time of financial stringency, when the justice system has other very pressing demands for funding – not least of judicial training and of the provision of judicial manpower – the Government is promoting and the Parliament is contemplating such expenditure on such a Council."[79]

103. Similar doubts were expressed by the Faculty of Advocates and by the Scottish Consortium on Crime and Criminal Justice (SCCCJ), who suggested that, "given the pressures on the criminal justice budget, the sum required for the establishment of a Sentencing Council could be spent more effectively in other ways."[80]

104. Asked to expand on this in oral evidence, Professor Fergus McNeill pointed out that the estimated £1 million annual running cost of the Council could buy 25 prison places for a year, or nearly 1,000 community penalties. However, his personal view was that—

> "investing £1 million in producing a coherent and rational approach to sentencing would be an excellent use of taxpayers' money—as long as a coherent and rational approach was indeed the outcome."[81]

105. In its report, the Finance Committee notes that the Scottish Court Service agreed that cost estimates for the Scottish Sentencing Council were "in the right ballpark" but that it could not be expected to meet the costs of running the Council without receiving additional funding from the Government. The Finance Committee's report also draws attention to the £97,000 costs associated with the post of the Sentencing Council's chief executive, and to ongoing discussions about the extent to which support services for the Council could be provided by the body that will shortly replace the Scottish Court Service.

Committee conclusions

106. **The Committee recognises that some degree of inconsistency in sentencing is probably inevitable in any system that respects the independence both of the judiciary as a whole and of individual sentencers. We also accept that there is a perception, both among people working in the justice system and among the wider public as well, of at least a degree of**

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[79] Judges of the High Court of Justiciary. Written submission to the Justice Committee.

[80] Scottish Consortium on Crime and Criminal Justice. Written submission to the Justice Committee.

[81] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1881.

inconsistency in the sentences given out by different judges or in different locations for similar offences. We have not been convinced that there is clear objective evidence – as opposed to anecdotal and circumstantial evidence – to substantiate this perception, no doubt partly because of the inherent difficulties involved in comparing individual sentencing decisions on a like-for-like basis.

107. **We regard any actual – or indeed perceived – inconsistency as a problem, in that it runs counter to the principle of fairness that must be central to any justice system. We therefore support the aim of minimising inconsistency in sentencing. However, that aim cannot be an over-riding one, and must clearly be balanced against other considerations – including cost, and the potential for compromising other principles of justice. A majority of the Committee is not yet convinced that a Scottish Sentencing Council, as proposed in the Bill, can be justified in terms of its capacity to reduce inconsistency beyond what might be achieved using existing mechanisms (such as the existing power of the Appeal Court to issue guideline judgments). On the other hand, we are also conscious that there are other aims for the Council, including the consideration of wider sentencing issues, and the promotion of relevant research. We accept that there may be a case for the setting of guidelines for sentencers, but recognise that there are issues as to how such guidelines are approved and promulgated. Overall, taking account of the other aims that it may serve, which we support, we recognise that there could be merit in a Sentencing Council.**

108. **A Sentencing Council will inevitably have some influence on judicial discretion (indeed, there would be little point in having it if it did not), and there is a tension between that and the principle of separation of powers.**

109. **There was no consensus view in the Committee on how that tension is best addressed. A majority of members would prefer a structure in which sentencing guidelines developed by any Sentencing Council would take effect only after formal endorsement by the Appeal Court. These members argue that such endorsement would no doubt be forthcoming in the large majority of cases, but such a structure would also enable there to be a constructive dialogue in cases where the Court questioned some aspect of the guidelines proposed. These members also believe that having any guidelines issued with the authority of the Court itself is the best means of resolving the constitutional concerns about the role of the Sentencing Council that some witnesses have raised.**

110. **An alternative view within the Committee is that, to the extent that any adjustment to the provisions of the Bill is needed to address those concerns, it would be preferable to adjust the composition of the Council to provide a judicial majority. On this view, any structure that leaves the courts with the final say on sentencing guidelines would not represent a sufficient advance over the present arrangements.**

111. **In that context we regard the safeguard in the Bill – that any court can decide not to follow a sentencing guideline so long as it states its reason for**

doing so – as essential, and the minimum necessary to preserve judicial independence. We will keep an open mind during Stage 2 as to whether further such safeguards are necessary, particularly whether the Council's composition should be adjusted to ensure there is a judicial majority.

112. **On other aspects of the Council's composition, we can be more definite. We do not believe that a constable should be included among the "legal members" (although it will of course be important for the police to have a proper input in other ways to the Council's deliberations). We also think there is at least a question whether a prosecutor should be included. We do not support any of the various suggestions made to us for additional members (such as a representative of the Scottish Prisons Service, or of local authorities). We do, however, have sympathy with concerns made in evidence that the Bill would allow – at least in principle – the appointment of two sheriff principals but no sheriff, or two stipendiary magistrates but no JP – thus unbalancing the judicial composition of the Council. This may be unlikely in practice, but we suggest that some redrafting would address these concerns – perhaps by amalgamating what are currently separate requirements into a single requirement for three judicial members holding (any of) the offices of sheriff, sheriff principal, JP or stipendiary magistrate, of whom at least one must be a sheriff and at least one a JP.**

113. **We note the concerns of some witnesses as to the costs of establishing a Sentencing Council, and ask the Scottish Government to consider further whether this cost is still a priority for the use of scarce Justice Department resources at a time of financial stringency.**

Section 14: Community payback orders

Background and proposals

114. The Scottish Government's 2007 report *Reforming and Revitalising: Review of Community Penalties*[82] recommended a single community sentence to replace the existing probation orders, community service orders, supervised attendance orders and community reparation orders.

115. The Scottish Prisons Commission recommended that prison "should be reserved for those people whose offences are so serious that no other form of punishment will do and for those who pose a threat of serious harm to the public." Accordingly, "to move beyond our reliance on imprisonment as a means of punishing offenders", the Commission recommended that "paying back in the community should become the default position in dealing with less serious offenders". The Commission wanted there to be a single community sentence, with judges provided with a wide range of "payback" options through which offenders could make good to the victim and/or the community whether by unpaid work, engaging in rehabilitative work that benefited both victims and communities by reducing re-offending, or some combination of these and other approaches.[83]

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[82] Scottish Government. (2007) *Reforming and Revitalising: Review of Community Penalties* Available at: http://www.scotland.gov.uk/Publications/2007/11/20142739/0

[83] Scottish Prisons Commission. (2008) *Scotland's Choice* Executive Summary, paragraphs 1, 2 and 11.

116. Taking forward these recommendations, section 14 of the Bill inserts 37 new sections into the Criminal Procedure (Scotland) Act 1995 in order to provide the statutory basis for community payback orders (CPOs). These orders (CPOs) are intended to be easy to understand in contrast to "the unnecessarily complex range of sentencing options currently available which are not readily understood by the public." However, CPOs will not replace two existing orders – Drug Treatment and Testing Orders (DTTOs) and Restriction of Liberty Orders (RLOs), which the Policy Memorandum anticipates will continue to be used for around 10% of community disposals.[84]

117. A CPO is defined (by inserted section 227A(2)) as an order imposing one or more of the following requirements on the offender: a supervision requirement, an unpaid work and activity requirement, a programme requirement (a course or planned set of activities designed to address the behavioural needs of the offender), a residence requirement, a mental health treatment requirement, a drug treatment and testing requirement, and an alcohol treatment requirement.

General response of witnesses

118. Many witnesses were broadly supportive of the proposed new CPOs.[85] For example, the Scottish Consortium on Crime and Criminal Justice welcomed them as implementing recommendations of the Scottish Prisons Commission that put the emphasis on "flexibility, reparation and 'problem solving' sentencing", and as an effective approach to reducing imprisonment.[86] But many witnesses argued that for these proposals to be effective, they would need to be properly resourced. Many also emphasised the importance of ensuring that the nature of the community payback work needed to be properly explained to the public.

119. The Wise Group said that it supported the new CPOs and advocated a more holistic approach to addressing offenders' needs and reducing reoffending. In its experience, programmes to support offenders are better provided in the community than in prisons.[87]

Terminology

120. Some witnesses were critical of some of the terminology used in relation to the new orders. The Faculty of Advocates said that it would be "particularly inappropriate" to describe those requiring mental health treatment or alcohol treatment as undertaking community payback, suggesting that a more general title such as "community involvement orders" would be preferable.[88]

121. The Scottish Children's Reporter Administration pointed out that the term "supervision requirement", used in section 14 for one of the requirements of a CPO, is also the name given to an order made by a children's hearing under section 70 of the Children (Scotland) Act 1995—

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[84] Policy Memorandum, paragraphs 43, 49.

[85] Aberdeenshire Council, Dumfries and Galloway Council, Ayrshire Criminal Justice Social Work Partnership, Scottish Justices Association, Turning Point Scotland, Action for Children Scotland, Victim Support Scotland, The Sheriffs' Association. Written submissions to the Justice Committee.

[86] Scottish Consortium on Crime and Criminal Justice. Written submission to the Justice Committee.

[87] The Wise Group. Written submission to the Justice Committee.

[88] Faculty of Advocates. Written submission to the Justice Committee.

> "As it is possible that both types of supervision requirement might apply to an individual child or young person, SCRA suggests that another name is found for the order created under section 14 to avoid confusion."[89]

Consequences of non-compliance

122. For Yvonne Robertson of the Association of Directors of Social Work (ADSW), a particular advantage was that—

> "The new order will also provide an opportunity for the imposition of electronic monitoring, if someone is taken back to court for breach. … If an offender is in breach currently, the court either allows the order to continue or considers sending them to prison. The imposition of electronic monitoring, with the support that the community payback order will provide, may be sufficient to help some offenders to move away from non-compliance towards compliance."[90]

123. Victim Support Scotland also supported the CPO provisions, but wanted greater clarity from the outset about the consequences of non-compliance. It therefore suggested that—

> "an alternative (suspended) sentence should be set out by the court alongside the community payback order, which would announce what sentence would be given if the offender breaches the payback order".[91]

124. Challenged on how compliance with CPOs would be managed, the Cabinet Secretary pointed to local monitoring mechanisms that were in place, the introduction of progress courts and the option of electronic monitoring. He also argued that it was—

> "not simply about keeping people on a tight leash and berating them; sometimes it is about encouraging them, and saying how well they have done. We are giving sheriffs the flexibility to encourage people who are doing well to overcome their addictions, to become less of a nuisance in their communities and to contribute as net taxpayers who function manageably in our communities, rather than their being a drain on taxpayers."[92]

Drug treatment and testing orders

125. Drug Treatment and Testing Orders (DTTOs) are generally used as a high tariff disposal for drug-misusing offenders who might otherwise receive a custodial sentence. They have two objectives: to reduce the amount of acquisitive crime to fund drug misuse, and to reduce the level of drug misuse itself. A DTTO includes a requirement for regular reviews by the court to enable sentencers to monitor progress and a requirement that the offender consent to regular, random drug tests during the period of the order.

126. Although the Bill does not replace DTTOs, it includes a drug treatment requirement as one of the options available to the courts when imposing a CPO.

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[89] Scottish Children's Reporter Administration. Written submission to the Justice Committee.

[90] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1850.

[91] Victim Support Scotland. Written submission to the Justice Committee.

[92] Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Cols 2191-2.

127. Cosla saw a potential difficulty with this, suggesting there was "potential for confusion" between DTTOs and CPOs that included a drug treatment requirement. A similar point was made by the Community Justice Authorities.[93]

Resourcing

128. The Financial Memorandum estimates that CPOs, together with the presumption against short periods of imprisonment or detention and reports about supervised persons, will cost £10.67 million per year (the mid-point figure between the costs associated with a 10% or 20% increase in community sentencing) plus one-off costs of £50,000. The majority of these additional costs will fall to be dealt with under the existing ring-fenced funding arrangements for local authority criminal justice social work services.[94]

129. The Financial Memorandum explains that, as it is difficult to predict sentencing practice, it is difficult to forecast what the take-up of the new CPO will be, when compared to existing sentences and against the backdrop of the new presumption against the use of prison sentences of six months or less. For indicative cost purposes therefore, the memorandum uses two assumptions – an increase of 10% and an increase of 20% in community sentences or community payback orders. In oral evidence, Wilma Dickson of the Criminal Justice Directorate explained that although around 12,000 sentences of less than six months were imposed each year, this translated into only around 6,000 individuals entering prison each year. A 10% increase in community sentences, representing 1,931 CPOs, was therefore equivalent to 31% of the current number of short-term prison receptions, while a 20% increase in community sentences was equivalent to 62% of those receptions.[95]

130. Councillor McGuigan of COSLA argued that, in order to make the new CPOs effective, there needed to be—

> "a willingness to redistribute resources between the set of agencies – not just the Scottish Prison Service, but local authorities and the national health service … I simply do not think that the bill will work if the necessary resources are not in place. Local authority budgets are not as abundant as you might believe, and we are making considerable efficiency savings – cuts, if you like – in many services. … The provisions for community payback orders, which involve reviews, putting in place responsible officers and meeting other responsibilities, will cost the local authority a fair amount, which I cannot quantify at the moment."[96]

131. Henry McLeish said that, in its report, the Prisons Commission had—

> "made it clear that no one should be under the impression that the proposed changes could be made without considerable input of new resources – the statement was as bald as that. There must be new

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[93] Convention of Scottish Local Authorities, Community Justice Authorities. Written submissions to the Justice Committee; Scottish Parliament Justice Committee. *Official Report, 19 May 2009,* Col 1848.

[94] Financial Memorandum, paragraphs 675, 991.

[95] Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Cols 2193-4.

[96] Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Cols 2050, 2053.

> resources. If we are successful in the long term, there could conceivably be a transfer of resources from prisons to the community, but that cannot happen in the short term."[97]

132. Mike Ewart, Chief Executive of the Scottish Prison Service, agreed that greater use of community penalties would not necessarily result, at least in the short term, in a significant reduction in prison populations or expenditure—

> "During the period in which effective community disposals and interventions are built up and crucial confidence in them is developed, so that we collectively feel that that is the appropriate route, we will still have to maintain the required resource for keeping more or less the current population running through the prison system. There will not be a major shift of population until that confidence is established."[98]

133. Victim Support Scotland presented a different perspective, arguing that there were "plenty of resources" in the system; the challenge was to find new ways of thinking about them. It wanted to see more use made of compensation orders to victims or, where no individual victim is discernible, to pay for improvements to the communities that suffered from the offending behaviour. [99]

134. Many witnesses drew particular attention to the resource implications for criminal justice social work. For example, the view of Aberdeenshire Council was that—

> "Whilst both elements of the new community payback orders have positive elements, their introduction is likely to have a significant impact on criminal justice social work resources; in particular, the need to identify, and supervise, additional work placements. There will also be an increase in the number of reports that will be required by Progress Courts."[100]

135. The Association of Directors of Social Work (ADSW), while supporting CPOs "as an alternative to expensive and ineffective short sentences of imprisonment", said it was necessary to acknowledge "that this will place increased demands on a range of specialist and mainstream services including local authority social work, housing and education services; health; Jobcentre Plus and others."[101]

136. In evidence to the Finance Committee, Community Justice Authorities—

> "expressed concern about the assumption in the Financial Memorandum that current funding for probation, social enquiry reports (SERs), community service orders and supervised attendance orders is adequate. They indicated that six of the eight authorities have this year asked for approval to move money from non-core funding to core funding, citing this as evidence that existing core funding is not sufficient for purpose and told the Committee, 'we

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[97] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1825.
[98] Scottish Parliament Justice Committee. Official Report, 9 June 2009, Col 2041.
[99] Scottish Parliament Justice Committee. *Official Report, 26 May 2009*, Col 1942.
[100] Aberdeenshire Council. Written submission to the Justice Committee.
[101] Association of Directors of Social Work. Written submission to the Justice Committee.

> are concerned that, if we have a large increase in the number of CPOs, we may have to vire further moneys from non-core to core funding'."[102]

137. The Finance Committee also heard concerns that Scottish Government funding for local authority core criminal justice functions had not kept pace with inflation, and that the funding formula was sometimes based on out-of-date activity levels and did not take account of the additional costs of service delivery in rural areas. Perth and Kinross Council made specific reference to the unit cost used for probation orders, saying that it is unrealistic and does not take account of people who require ever-higher levels of support and supervision if they are to escape the cycle of reoffending. The Community Justice Authorities suggested that the Financial Memorandum might underestimate the number of additional social enquiry reports (SERs) that would be required; in response, the Scottish Government confirmed that costings for additional SERs had not been included and that this would need to be kept under careful review.

138. In its report, the Finance Committee notes that funding for full implementation of the Bill has not been confirmed. It also notes that it has not received any evidence "to allow it to understand whether the estimated uptake of CPOs, of between 10 and 20 per cent, is accurate or whether this figure is likely to increase year-on-year, along with the cost implications" and drew attention to "the apparent disconnect" between the creation of a statutory presumption against short-term custodial sentences and the assumptions in the Financial Memorandum concerning the expected uptake of CPOs.[103]

139. The Cabinet Secretary said that the Scottish Government had already invested an additional £2 million in community service – "£1 million to get orders under way and completed more quickly, and a further £1 million in recognition of underlying workload pressures". He said this represented a 15% increase between 2008-09 and 2009-10.

140. Mr MacAskill agreed that resources were required, for local authorities, for courts in respect of progress hearings and for the additional electronic monitoring capacity in order to deliver the approach envisaged by the Bill, and he announced that he would make a further £5.5 million available over the next two years – £1.5 million this year and £4 million the next.[104] Wilma Dickson, for the Scottish Government, added that all of the £1.5 million going out this year would be distributed to local authorities on the normal distribution formula so that they could begin to clear current backlogs, and it was hoped that by the end of the second year, some funds could be redirected into CPOs.[105]

Availability of programmes and timescales for commencement and completion

141. For Raymund McQuillan of ADSW, one of the big advantages of the new CPO was that—

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[102] Scottish Parliament Finance Committee. *Report on Financial Memorandum on the Criminal Justice and Licensing (Scotland) Bill*, paragraph 36.

[103] Scottish Parliament Finance Committee. *Report on Financial Memorandum on the Criminal Justice and Licensing (Scotland) Bill,* paragraph 59.

[104] Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Col 2158.

[105] Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Col 2190.

> "It provides for a substantial tightening of timescales, which sends an important message from the courts to the public and to offenders about the commencement of new orders. We support the view that orders should be started and should finish quickly. The current arrangements provide for the work to commence within three weeks; under the new arrangements, that period would be reduced to one week. Current legislation allows one year for completion of a community service order; the new guidelines suggest that orders should be completed within three to six months."[106]

142. The Cabinet Secretary confirmed in evidence that the target was "that unpaid work should start within seven days".[107]

143. Victim Support Scotland wanted to tighten the legislation to make such a timescale enforceable. In its view, a CPO should not be made unless the relevant treatment or activity "is available at the time of sentencing. This will ensure that the offender will start the disposal straight away, instead of for instance waiting several months to begin a particular treatment, which gives a signal to the victim that nothing has happened."[108]

144. But for Professor Neil Hutton, this was not the most important consideration relating to timing—

> "If punishment is to be effective, the important issue is probably not immediacy after the decision to punish but immediacy after the commission of the offence, which is a different story altogether. How long do people have to wait before they come to court? That is a resource issue."[109]

145. For Turning Point Scotland, the availability of programmes was crucial—

> "When a Community Payback Order is made, and an offender is subject to its requirement, it is clear that the appropriate services must be in place if the goals of the Order are to be achieved. When they are not, or when the offender is forced into the wrong services, it is far more likely that they will be unable to address their issues, or even comply with the requirements. In this case they would be seen as having failed to meet the requirements under the order, when in reality the system has failed them".[110]

146. However, when Councillor Harry McGuigan of COSLA was asked about current availability of existing community programmes, he said—

> "I doubt very much whether there are sufficient programmes available for community sentences, especially if we move towards an increased demand or call on services that are to be delivered locally. The quality of such programmes is another matter, too. We need to question whether current

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[106] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1850.
[107] Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Col 2185.
[108] Victim Support Scotland. Written submission to the Justice Committee.
[109] Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Col 2023.
[110] Turning Point Scotland. Written submission to the Justice Committee.

> resources are sufficient to enable quality, effectiveness and credibility in community sentences."[111]

Progress reviews

147. An important element of the new regime is the option for courts to require periodic "progress reviews" of CPOs, which the offender must attend. On conclusion of a progress review, the court may vary, revoke or discharge the CPO (inserted section 227W).

148. The Association of Directors of Social Work supported the introduction of progress reviews, but said they should be "targeted rather than universally applied to all offenders".[112] The Community Justice Authorities and COSLA also welcomed the provision, but suggested that in order to ensure consistency in the operation of the reviews, further guidance on the purpose and practice for reviews should be issued, following consultation with stakeholders.[113]

149. The Scottish Centre for Crime and Justice Research was critical of the fact that, under the Bill, progress reviews would be optional rather than mandatory, and would be conducted by the mainstream criminal courts rather than by specialised "progress courts"—

> "In our view this represents a missed opportunity. The Prisons Commission, based on clear evidence, highlighted that because the business of desisting from crime (and complying with both community supervision and the law in general) is complex and challenging for offenders, the management of that process might be better remitted to a court in which specially trained judges and court social workers could better support it. In our view, removing that function from already busy generic criminal courts and placing it within a more specialised progress court made considerable sense and merits re-examination."[114]

150. But the decision to make progress reviews optional was greeted "with some relief" by the Sheriffs' Association, who said that "for them to be mandatory would be unduly burdensome to the system financially and take up already precious court time."[115]

Other suggestions in relation to community payback orders

151. The Scottish Centre for Crime and Justice Research said that for the new CPO to be effective, changes to the Bill would be required to take account of existing research on effectiveness—

> "As a disposal, its effectiveness will be improved by acting on the research evidence about how to increase both public support for community penalties and behavioural change in offenders. The two key factors are clarity (as to what a community punishment is) and speed (with which the order is made and fulfilled). This evidence suggests careful consideration and some re-

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[111] Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Col 2048.
[112] ADSW. Written submission to the Justice Committee.
[113] Community Justice Authorities and COSLA. Written submissions to the Justice Committee.
[114] Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.
[115] Sheriffs' Association. Written submission to the Justice Committee.

> drafting is required of provisions on conditions (to prevent ‘condition loading’), progress reviews, the role of Responsible Officers, and continuing to have separate community orders (like RLOs and DTTOs).”[116]

152. Victim Support suggested that the existing requirement to explain in ordinary language the purpose of the CPO requirements, and the consequences of non-compliance, to the offender should also be extended to the victim (unless he or she did not wish to receive this information).[117]

153. On a similar theme, Sacro suggested that individual victims or communities affected by offenders’ behaviour should be given a direct input into the nature of community payback activity undertaken (“reparative tasks”). Without such a facility, the Bill would—

> “miss an important opportunity to gain widespread support for a refocussing of the objectives of our criminal justice system to give increased attention to repairing the harm caused by offending together with reducing the likelihood of re-offending”.[118]

154. The Joint Faiths Advisory Board on Criminal Justice said that it would like to see restorative justice included as part of the community sentencing, with a focus not just on the offender but on the victim and the community.[119]

Mental health treatment requirement

155. The Scottish Association for Mental Health (SAMH) noted that instead of imposing a sentence of imprisonment, a court may instead impose a CPO which could include a “mental health treatment requirement”. They said—

> “SAMH has long argued that people who have mental health problems should receive treatment rather than being imprisoned, and we hope that this Bill might present a mechanism for this. However, we are unsure about how this system would work in practice and specifically seek clarification about the role of judges.”

156. SAMH sought clarity on who would make the decision to seek the view of a medical practitioner, how this regime would relate to the existing Mental Health Tribunal and asked whether there was a risk of a parallel system being set up. It also questioned whether the new regime would be subject to the same principles as underpin the Mental Health (Care and Treatment) Act 2003, without which there could be “an unfair disparity which would cause SAMH great concern”.[120]

157. The Mental Welfare Commission for Scotland (MWC) said that it had significant concerns about the provision for a “mental health treatment requirement” in a CPO (under inserted section 227R), and that it was not clear what status an individual subject to such a requirement would have in the context of hospital or outpatient treatment. The MWC highlighted some specific concerns,

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[116] Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.
[117] Victim Support Scotland. Written submission to the Justice Committee.
[118] SACRO. Written submission to the Justice Committee.
[119] Joint Faiths Advisory Board on Criminal Justice. Written submission to the Justice Committee.
[120] SAMH. Written submission to the Justice Committee.

including that there does not appear to be any requirement for a report from a Mental Health Officer or a social work report to assist with decisions; that there does not appear to be any consideration of the individual's ability to consent to treatment; and that the individual would have no automatic recourse to independent or statutory review or to the safeguards that are available to people who are otherwise subject to compulsion in respect of mental disorder.[121]

Committee conclusions

158. **The Committee broadly supports the creation of community payback orders (CPOs) on the grounds that they should simplify and strengthen the current range of community sentences, allowing more focus on offenders' needs.**

159. **However, we are also convinced that CPOs will not deliver the benefits envisaged for them unless they are adequately resourced – and we find it difficult or impossible to be sure at this stage whether sufficient funds have been or will be made available.**

160. **We are conscious that the level of take-up of CPOs will be closely linked to the views of sentencers on their effectiveness and the impact of any new statutory presumption against short-term custodial sentences, and that the Scottish Government itself cannot forecast with any confidence how many CPOs are likely to be made. What does seem clear is that there is very little prospect of any significant savings being made, in the short to medium term, in the largely fixed costs of running Scotland's prisons even if the Bill succeeds in its aim of diverting a substantial number of offenders from custodial to community disposals. Therefore, even though community sentences are generally cheaper than imprisonment, there will be a need for additional resources to make this approach work. (We also recognise, however, that if nothing is done to address rising prison populations, it will at some point become necessary to increase prison capacity, and that this will also have significant resource implications.)**

161. **We strongly believe that, if CPOs are to gain credibility with the public, and with the victims of crime in particular, they must begin (and be seen to begin) very shortly after sentence is declared – either on the day of sentence or (where this is not practicable, as we accept will sometimes be the case) as soon as possible thereafter. This is on the same principle that judgment should be given as soon as possible after an offence is committed – namely that justice delayed is justice denied.**

162. **The Cabinet Secretary has already announced some additional resources for existing community sentences, but until we know what the level of take-up will be, it is difficult or impossible to say whether current budgets will be sufficient. It is clear that many witnesses are concerned about this issue, and equally clear that an increased take up of CPOs of 10% or 20% (as postulated by the Scottish Government in the Financial Memorandum) will require additional resources. We welcome the additional resources already committed, but note that they require to be used both to**

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[121] Mental Welfare Commission for Scotland. Written submission to the Justice Committee.

eliminate barriers to the speedy commencement of the orders, and to address issues of quality. There may also be issues about the adequacy of the unit cost calculation used in this context. Further, it is evident that the programme, residence, mental health treatment, drug treatment or alcohol treatment requirements that may be applied to the new orders will require additional resourcing. The Committee asks the Scottish Government to provide further assurance as to how such costs are to be met. Thereafter we need a commitment by Ministers to keep the level of take-up under review, and to bring forward additional funding as required.

163. **In this connection, we are conscious that, while the main impact will be felt by criminal justice social work services, there will be resource implications for other areas. For example, there will be additional costs for the Scottish Court Service as a consequence of the progress reviews, and for voluntary sector bodies involved in the delivery of the new CPOs. Appropriate consideration must be given to these wider resource implications.**

164. **We do not agree with those witnesses who argued that progress courts should have been established as specialist courts, as the Prisons Commission recommended. We believe this should be a matter for individual sheriffs principal to consider in the light of local circumstances. We also believe the Bill gets it right in making progress reviews optional, so that the resources involved in them can be targeted to where they are most needed.**

165. **The Committee also recommends that the Scottish Government reconsider some of the terminology used in the Bill, specifically whether an alternative name might be considered to avoid confusion over the term "supervision requirement". We also invite the Scottish Government to consider making the rehabilitative element in community payback orders clearer.**

Section 16: Short periods of detention

Background and evidence received

166. Section 16 repeals section 169 of the Criminal Procedure (Scotland) Act 1995 which permits summary courts to detain an offender at a court or police station until 8 pm instead of imposing imprisonment. As the provisions have not been used for a number of years they are considered no longer to be of any practical use.

167. This section also extends the current minimum period of imprisonment that can be imposed by a summary court from five to 15 days and repeals the provision whereby the summary courts can sentence an offender to be detained in a certified police cell or similar place for up to four days. According to the Explanatory Notes, this provision is redundant as there are no certified police cells in Scotland and have not been for some time. However, the Scottish Police Federation said that certified police cells are still used in the Orkney, Shetland and

Western Isles and are essential, when, for example, severe weather conditions prevent transfer to mainland Scotland.[122]

Committee conclusions

168. **There is clearly uncertainty from the evidence about whether there are, in fact, any police cells in remote parts of Scotland that are certified for use for short-term detention. The Committee invites the Scottish Government to provide clarification on this point, and also to explain more fully how the process of certification operates. We would also suggest that further consideration be given to whether, even if no police cells are currently certified, this is a sufficient basis to repeal the provision that enables them to be so certified. We can envisage circumstances in which the facility to detain people in such cells, as an alternative to a long journey to the nearest prison, could continue to be useful.**

Section 17: Presumption against short periods of imprisonment or detention

Background

169. Section 17 amends the Criminal Procedure (Scotland) Act 1995 to create a presumption against prison sentences of six months or less, so that they may be imposed only where the court considers that no other method of dealing with the offender is appropriate. Where such a short sentence is imposed, the court must state its reasons for that opinion, and enter them in the record of proceedings.

Evidence received

170. Many witnesses expressed support for this proposal on the grounds that short-term prison sentences are generally regarded as expensive and ineffective, both in terms of protecting communities and in terms of rehabilitating offenders and reducing crime.[123]

171. In its written submission, Scottish Women’s Aid said that a presumption against short custodial sentences “may have a positive impact on certain offenders with chaotic lifestyles for whom prison is a ‘revolving door’”, but that perpetrators of domestic abuse do not fall into that category. The presumption could therefore “have a negative impact on women, children and young people experiencing domestic abuse”.[124]

172. Clydebank Women’s Aid Collective agreed, saying that a presumption against sentences of six months or less would be “gendered in its impact. For women facing sentencing themselves it is likely to be positive. However, women affected by crimes committed against them by men may be affected detrimentally.”[125]

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[122] Criminal Justice and Licensing (Scotland) Bill. Explanatory Notes, paragraph 86. Available at: http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/b24s3-introd-en.pdf Scottish Police Federation. Written submissions to the Justice Committee.

[123] Association of Directors of Social Work, Ayrshire Criminal Justice Social Work Partnership, Association of Scottish Neighbourhood Watches, Joint Faiths Advisory Board on Criminal Justice, SAMH, Action for Children Scotland. Written submissions to the Justice Committee.

[124] Scottish Women’s Aid. Written submission to the Justice Committee.

[125] Clydebank Women’s Aid Collective. Written submission to the Justice Committee.

173. Professor Alec Spencer of the Scottish Consortium on Crime and Criminal Justice said: "The use of short-term and very short-term sentences is complete eye-wash. It has no effect at all on reducing crime."[126] Indeed, he cited international research suggesting that where prison was used on its own, crime actually increases slightly.

174. Professor Spencer said that 81 per cent of prison sentences are for six months or less, and two-thirds of those are for three months or less; and that people sentenced to six months or less subsequently spend, on average, only around 23 days in prison. This did not allow time for prison staff to obtain the relevant information about the prisoner, assess them and arrange for appropriate interventions. As a result, he said, short sentences are a cause of frustration to prison staff, who have to spend a lot of time and effort accommodating people, but without the opportunity to help them address their offending behaviour.[127]

175. His colleague Professor Fergus McNeill added—

> "three things help people to stop offending: getting older and becoming more mature; developing social ties that mean something to them; and changing their view of what they are about as a person. Short periods in prison do not help with any of those three things." [128]

176. Dr Sarah Armstrong (University of Glasgow) referred to the Scottish Prisons Commission's finding that many people in prison are repeatedly serving short sentences, in effect completing a life term by instalments but without access to the programmes and services available to those who are given a life sentence. She drew attention to research suggesting that short prison terms are not only ineffective but can be counter-productive, since people are more likely to engage in worse offending after they have been imprisoned than before.[129]

177. Rona Sweeney, for the Scottish Prison Service, confirmed that for prisoners sentenced to a short period of custody, there was very little that could be done beyond meeting health care needs: "During those very short sentences we focus on undoing the harm that imprisonment has caused, because we know that many of the protective factors that support someone in not reoffending are damaged by imprisonment".[130]

178. Representatitves of Community Justice Authorities said that while there were occasions when short prison sentences was justified they were being used "far too frequently" and sometimes only because sentencers felt they had no alternative disposals available.[131]

179. In its report, the Scottish Prisons Commission recommended a legislative presumption against custodial sentences of six months except where the judge is satisfied that a custodial sentence should be imposed having regard to one or

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[126] Scottish Parliament. *Official Report, 19 May 2009*, Col 1891.
[127] Scottish Parliament Justice Committee. *Official Report, 19 May 2009,* Cols 1889.
[128] Scottish Parliament Justice Committee. *Official Report, 19 May 2009,* Col 1893.
[129] Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Col 2018.
[130] Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Col 2034.
[131] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Cols 1861-2.

more of the following: violent and sexual offences that raise significant concerns about serious harm; offences that constitute a breach of bail conditions; offenders already subject to a community sentence and/or with a significant history of failing to comply with community or conditional sentences; offenders subject to a release licence; offenders who do not consent to rehabilitative elements in a community sentence; and other sentences of imprisonment then being served by the offender.[132]

180. Henry McLeish said that the Bill aimed to strike the same balance that the Scottish Prisons Commission had done. The Commission had considered the option of a statutory ban on custodial sentences of less than six months but—

> "to preserve the independence of the judiciary and to take a commonsense approach, we rejected that option. Of the people who go to prison for less than six months, a small group have committed what I would regard as serious offences, one of which is domestic violence."[133]

181. Some witnesses questioned the basis upon which the six month dividing line had been selected. Cyrus Tata of the Centre for Sentencing Research (University of Strathclyde) said it was "not harmonious with the new summary powers for sentences of up to 12 months", but that a more appropriate way to make the distinction would rely on the nature of the offence—

> "If the argument behind the bill is that we should not imprison non-violent, non-dangerous offenders who might simply be feckless, we should focus on those types of cases. We should specify those cases, rather than a limit of six months, because the group of prisoners on sentences of six months or under will include—this will give the tabloids a field day—people who are convicted of dangerous and violent offences."[134]

182. Similarly, the Scottish Police Federation described the six month cut-off as "arbitrary", pointing out that there are many habitual offenders who have no desire to comply with any court disposal and hence that short periods of imprisonment may well be necessary for even minor offences.[135]

183. The experience of the High Court judges was that—

> "under existing arrangements courts resort to short custodial sentences only where there is no realistic alternative … we doubt whether the proposed legislative changes will in practical terms achieve much."[136]

184. The Sheriffs' Association went further, saying that arguments about the ineffectiveness of short prison sentences misunderstood their point. A custodial sentence was unavoidable, whereas community disposals "without the option of custody for breach, would be rendered voluntary". Noting that a 30-day sentence was to be an option for breach of a level 1 CPO, the Association concluded—

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[132] Scottish Prisons Commission. (2008) *Scotland's Choice*, paragraph 3.36.
[133] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1826.
[134] Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Col 2019.
[135] Scottish Police Federation. Written submission to the Justice Committee.
[136] Judges of the High Court of Justiciary. Written submission to the Justice Committee.

> "As a means of dealing with breaches of court orders, as a sharp reminder to some offenders of the consequences of breaking the law for repeated offending when all else has been tried, or to give the public some measure of relief from their activities, short prison sentences have a purpose."[137]

185. Mike Ewart of the Scottish Prison Service disagreed. In terms of giving relief to the community, his view was that a short-term sentence could do more harm than good in terms of recidivism and hence community safety. In terms of being the only alternative for offenders who have repeatedly breached community service orders or reoffended, he said that—

> "if a community disposal was appropriate four or five times for a particular offender in particular circumstances, that disposal might still be appropriate if the only factor that has changed is the irritation of the criminal justice system with that character's reappearance."[138]

186. Henry McLeish said that the Scottish Prisons Commission had considered the argument about community respite but rejected it—

> "What people want in communities throughout Scotland is a long-term future in which the crime figures go down and people are less afraid of crime and can have a sense of security. The respite approach is no more than a short-term consideration."[139]

187. Dr Cyrus Tata also questioned the argument that custodial sentences are sometimes appropriate where a court has lost patience with an offender who has repeatedly breached the conditions attached to community sentences. Recent research challenged the assumption that such breaches were wilful, suggesting instead that many of those subject to such sentences had significant learning difficulties and simply failed to understand the conditions.[140]

188. The Scottish Justices Association noted that, whereas the Scottish Prisons Commission had listed six circumstances in which a short sentence could be justified, no such list was included in the Bill, and it suggested that these should at least be set out in sentencing guidelines.[141] Sheriff Fletcher, speaking for the Sheriffs' Association, suggested that, with a statutory requirement to state reasons for imposing a short sentence, "the unintended result might be to slow down the court system while the judge makes up the short statement that he has to make".[142]

189. Professor Neil Hutton (Centre for Sentencing Research, University of Strathclyde) suggested that judges already recognise the need to impose custodial sentences only when non-custodial options are inappropriate. In his view, making

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[137] Sheriffs' Association. Written submission to the Justice Committee. A level 1 unpaid work or other activity requirement involves up to 100 hours of work or activity (new section 227I).

[138] Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Col 2035.

[139] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1838.

[140] Scottish Parliament Justice Committee. *Official Report*, *2 June 2009*, Col 2019.

[141] Scottish Justices Association. Written submission to the Justice Committee.

[142] Scottish Parliament Justice Committee. *Official Report, 12 May 2009*, Col 1788.

it more difficult to impose prison sentences of six months or less could create a temptation for judges to impose sentences of seven months or more—

> "This will produce the unintended consequence of a rise in the overall prison population. … A more appropriate way of reducing the use of short sentences would be to ask the Scottish Sentencing Council to develop a comprehensive inaugural set of guidelines which paid particular attention to defining the custody threshold in a way which reduced the overall use of short sentences of imprisonment."[143]

190. The Scottish Consortium on Crime and Criminal Justice said that the only sure way to achieve a reduction in short sentences would be to cap the number of places available for sentences of less than six months, so that, when the cap is reached, those given short sentences would be placed on a waiting list and their sentences suspended until a place becomes available.[144]

191. The Cabinet Secretary for Justice said that Scottish Ministers would fully support any sheriff who feels it appropriate to use a short term prison sentence as a last resort. However, the problem of prison overcrowding had to be tackled, and he also wanted to "end the free-bed-and-board culture" in which "far too many people go to prison and sit there twiddling their thumbs" at taxpayers' expense and to the frustration of the communities who have suffered from their behaviour. Through the Bill, he wanted to see people convicted of less serious offences given community payback orders in order to "free up our prisons to deal with the people who have to be there because they are a danger to our communities".[145]

192. Asked for clarification of the term "less serious offenders" and the types of crimes such offenders would have committed, the Cabinet Secretary said that ultimately that would be left to the Sentencing Council given the variable nature of common-law offences in Scotland and the need for flexibility.[146]

Committee conclusions

193. **The Committee agrees that there is a need to strike a proper balance between the imposition of short custodial sentences and effective community disposals. Additionally, the Committee agrees that there is a need to develop a range of community sentences in which the public can have confidence and which present the best chance of long-term rehabilitation of offenders. However, members were unable to agree on whether it was either necessary or desirable to create a statutory presumption against custodial sentences of six months or less in order to achieve that balance.**

194. **All Committee members recognise that the priority is to imprison offenders who (as the Prisons Commission said) commit offences so serious that no other form of punishment will do or who pose a threat of serious harm to the public. Committee members also recognise that those**

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[143] Professor Neil Hutton. Written submission to the Justice Committee.
[144] Scottish Consortium on Crime and Criminal Justice. Written submission to the Justice Committee.
[145] Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Cols 2176-7.
[146] Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Cols 2179-81.

who have persistently failed to respond to non-custodial disposals may also have to be imprisoned. We acknowledge that this is, to a significant extent at least, what sentencers already aim to do, and that they do not lightly send people to prison if this is unlikely to benefit either them or those affected by their offending behaviour. We accept that short prison sentences do not normally achieve much by way of rehabilitation, that while they provide respite for victims and communities, this is only for a limited period, and that high re-offending rates tend to demonstrate that they have limited effect as a deterrent. Finally, we all recognise that the Bill, although undoubtedly intended to shift sentencing behaviour, leaves the final decision in any individual case to the court, thus allowing a short-term prison sentence still to be given where the court is convinced that that is the best option in the circumstances.

195. **Where Committee members do not agree is on how far short-term custodial sentences should continue to be regarded as an appropriate disposal (other than in exceptional circumstances), and on whether they are currently being overused, or inappropriately used.**

196. **Some members point to the weight of evidence, particularly from academics, suggesting that short sentences involve only "warehousing" of offenders and provide no real opportunity to engage them in programmes to tackle their offending behaviour or address their other problems – and indeed that imprisonment itself may make those problems worse. These members also cite Scotland's high incarceration rate, and the re-offending statistics, in support of the view that current sentencing policy is not working.**

197. **However, other members question that evidence, pointing out in particular that, since the people the courts imprison are likely to be the more persistent or serious offenders, it is hardly surprising that their re-offending rates are higher than those given community disposals. These members also cite examples referred to by witnesses, where a short prison sentence has had a salutary effect in persuading an offender to change his or her behaviour, even where previous community disposals had failed to do so. They also question the assumption that short-term sentences are currently given out where better alternatives exist, and hence doubt that a statutory presumption will make any real difference.**

198. **At least one member of the Committee questions whether, in the context of a provision aimed at discouraging sentencers from imposing short custodial sentences, a six-month threshold is the right one to use. On this view, reducing this to (say) three months, at least initially, would focus the provision on those cases where there is the least chance of rehabilitation in prison and which are least likely to involve serious or violent offences.**

199. **Overall, the Committee did not agree with the proposal in the Bill to create a statutory presumption against short-term custodial sentences.**[147]

Section 18: Amendment of the Custodial Sentences and Weapons (Scotland) Act 2007

Background and proposals

200. Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007, which makes provision for the imprisonment and release of prisoners, has not yet been commenced. Section 18 of the Bill amends some of the statutory provisions in the 2007 Act relating to the release of prisoners from custody.

201. The 2007 Act makes provision for two different categories of sentence for an offence: a custody and community sentence (a sentence of imprisonment for a term of 15 days or more) and a custody-only sentence (a sentence of imprisonment for a term of less than 15 days). Where a custody and community sentence is imposed, the court must make an order specifying the custody part of the sentence. If the court intends to specify a custody part of more than one-half of the total sentence, it must state publicly its reasons for doing so.

202. The Scottish Government has expressed support for the offender management principles contained in the 2007 Act but believes that, "as enacted, the process would not work and would place an intolerable burden on the Scottish Prison Service and the Local Authorities that would undermine the core intentions of the legislation"[148].

203. Section 18 repeals the custody-only provisions of the 2007 Act and replaces them with new measures to be known as the short-term custody and community sentence. The current custody and community sentence provisions, as set out in the 2007 Act, are retained.

204. The Bill provides for an order-making power, subject to affirmative resolution, to designate the length of sentence that will distinguish short-term custody and community sentences from (other) custody and community sentences. The Explanatory Notes and Policy Memorandum make reference, by way of example, to a threshold set at one year, while the Financial Memorandum considers the cost implications both of that and a two-year threshold.[149] Short-term custody and community prisoners will be released on licence at the halfway point of their sentence, and the licence conditions must include the standard conditions in every case and supervision requirements in specified cases (prisoners released on compassionate grounds, those with extended sentences, sex offenders serving six months or more, and child offenders). Local authorities and the Scottish

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[147] This conclusion was reached by a division on the question whether to agree with the principle of a statutory presumption against short-term custodial sentences. The Committee divided Yes 4 (Robert Brown, Angela Constance, Nigel Don, Stewart Maxwell), No 4 (Bill Aitken, Bill Butler, Cathie Craigie, Paul Martin); the question was disagreed to on the Convener's casting vote.

[148] Scottish Government. (2008) *Protecting Scotland's Communities: Fair Fast and Flexible Justice.* Available at: http://www.scotland.gov.uk/Publications/2008/12/16132605/0.

[149] Explanatory Notes, paragraph 90, Policy Memorandum, paragraph 75, Financial Memorandum, paragraph 785.

Government are required to establish joint arrangements for assessing the risks involved in the release of short-term custody and community prisoners on licence.

Evidence received

205. Mike Ewart, Chief Executive of the Scottish Prison Service, said that the 2007 Act, as enacted, would have increased the number of prisoners serving longer sentences, and he was concerned about "the inevitable impact … on an already overcrowded prison system". In relation to the changes now proposed, Rona Sweeney, of the SPS, added that until the SPS knew what the threshold was to be and what the risk assessments would involve, it could not assess the likely impact on resources.[150]

206. The Association of Directors of Social Work (ADSW) said that "introducing the new custody and community licenses and extending formal supervision to all prisoners sentenced to more than 12 months will have massive implications for local authority criminal justice social work services".[151]

207. The Sheriffs' Association were critical of this provision, in particular the new provisions for early release on "curfew licence"—

> "It hardly makes public sentencing decisions of the courts clear to the public, or enhances its confidence in the system, if the public has no idea what the time served will be and if the actual time served bears no resemblance to [the] sentence imposed in public by the court. It involves an unseen, unaccountable exercise of executive discretion in contrast to public sentencing in open court."[152]

208. The Scottish Centre for Crime and Justice Research said it had "great reservations" about implementing the 2007 Act at all, and could only consider supporting it if the threshold was set at two years – as the Scottish Prisons Commission had recommended. It noted that (according to the Financial Memorandum) the annual estimated cost of implementing the 2007 Act, as amended by the Bill, was around £45 million with a one-year threshold, but only £32 million with a two-year threshold.[153] The Centre's concern was not simply "the enormous costs of implementation" but also the minimal returns expected, as it was aware of no research which would justify blanket pre-release risk assessment. To limit the "potentially disastrous consequences" for criminal justice services, the SCCJR urged the Parliament to drop the provisions entirely or at least raise the threshold to two years, or to implement them only after "there has been an observable trend in reduced use of prison for short sentence prisoners."[154]

209. According to Professor Fergus McNeill of the Scottish Consortium on Crime and Criminal Justice—

> "The 2007 Act is a dreadful piece of legislation, which will have very negative consequences for the operation of the prison service and criminal justice

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[150] Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Col 2042.
[151] ADSW. Written submission to the Justice Committee.
[152] Sheriffs' Association. Written submission to the Justice Committee.
[153] Financial Memorandum, paragraph 785.
[154] SCCJR. Written submission to the Justice Committee.

> social work. The money that it will cost to implement it would be far better spent on making community payback work … and not on a peculiarly muddled and ill-considered set of release reforms."[155]

210. John Scott, speaking for the Consortium and for the Howard League on Penal Reform, said the provisions would make Scotland less safe because of the "waste of professional resources" that would be involved.[156]

211. In its written submission, ACPOS said that "the good work achieved to date in relation to the deterrence of knife crime would be lost if knife crime is not separated from this legislation". Invited to clarify this, ACPOS said it was not seeking to argue that knife crime should be treated differently from other crimes, but was trying to highlight a possible unintended consequence of the proposal for automatic early release of short-term custody and community prisoners. This, it suggested, could be seen as inconsistent with recent initiatives to combat knife crime, which included sending a message that people caught carrying a knife could expect a custodial sentence.[157]

212. The Scottish Police Federation said that the provision for automatic early release of short-term custody and community prisoners "will not be readily understood or accepted", since it did not take into account "the conduct and contrition of the offender whilst imprisoned". The Federation wanted it to be a standard condition of any licence that the offender provide a home address at which he or she may be contacted by the police, and that the police should have the power to search the premises without a warrant.[158]

213. The Cabinet Secretary emphasised that he was building on the Custodial Sentences and Weapons (Scotland) Act 2007 and the recommendations of the Scottish Prisons Commission, thus replacing a system of "arbitrary unconditional automatic early release" with a system in which the sentence is explained publicly in court and where release, when it happens, is based on conditions. He went on—

> "Letting people out early is not necessarily a bad thing if they show remorse and have been dealt with, but there is something wrong with a system in which people get out after the same period of time whether they show no remorse for what they have done or whether they have recanted and reformed and will be an exemplary citizen."[159]

214. Philip Lamont of the Scottish Government explained that the cost of implementing the 2007 Act as amended by the Bill (estimated in the Financial Memorandum as £51.45 million) will be lower than implementing it unamended (estimated as £45.75 million if the "prescribed period" is set at one year, and £32.73 million if set at two years). These costs, according to Mr Lamont, would

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[155] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Cols 1896-1897.
[156] Scottish Parliament Justice Committee. *Official Report, 19 May 2009*, Col 1897.
[157] Association of Chief Police Officers in Scotland. Written submission and supplementary written submission to the Justice Committee.
[158] Scottish Police Federation. Written submission to the Justice Committee.
[159] Scottish Parliament Justice Committee. *Official Report, 23 June 2009*, Col 2179.

"require financial commitment at a future stage", but since that would be covered by a future spending review, it would be "premature to pre-empt that outcome".[160]

215. The Subordinate Legislation Committee (SLC) questioned the scope of the power being given to Scottish Ministers in section 18(2) to prescribe the threshold that distinguishes short-term custody and community sentences from custody and community sentences – in particular, why the delegated power required to be drawn so widely as to enable any period at all to be substituted for the period of 15 days in the existing legislation.[161] In its response to the SLC, the Scottish Government said that it would consider this power again and whether the scope could be narrowed by setting minimum or maximum limits.

Committee conclusions

216. **The Committee has found this a particularly difficult provision to assess, because of the complex interface between the current law, the regime that would be introduced by commencing relevant provisions of the 2007 Act as it was enacted, and the version of that Act that would result from the amendments made by the Bill. We are grateful to Scottish Government officials and to SPICe for providing the Committee with additional briefing on this section at a late stage in our Stage 1 consideration.**

217. **We understand the general intention of the 2007 Act to move away from a system of automatic and unconditional early release to a system that allows appropriate conditions to be imposed. However, we also recognise the serious concerns that have been raised about the complexity and cost involved in implementing that Act unamended, given the number of prisoners who would be subject to supervision and assessment requirements. We therefore agree that the Bill represents some improvement on the current law, as it will result in more prisoners being subject to statutory supervision on release and fewer to automatic unconditional early release, while avoiding the more onerous requirements of the 2007 Act. We understand that the intention is to set the threshold at sentences of one or two years' duration, and we note the significant difference in the resource implications according to which of these is chosen. We also note the Subordinate Legislation Committee's concerns about the unlimited nature of the power delegated by this provision, and welcome the Scottish Government's commitment (in response to that Committee) to consider whether appropriate parameters might be specified in the Bill.**

Section 24: Voluntary intoxication by alcohol – effect in sentencing

Background and evidence received

218. Under section 24, courts must not consider the fact that an offender is voluntarily intoxicated by alcohol at the time of the offence as a mitigating factor in

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[160] Scottish Government. Supplementary written submission to the Justice Committee, 29 September 2009.

[161] Subordinate Legislation Committee. *Report on the Criminal Justice and Licensing (Scotland) Bill*, paragraphs 23-31. The SLC raised exactly similar concerns about paragraphs 10(3) and (4) of schedule 2, which make equivalent provision in relation to periods of detention for offenders aged under 21 – see paragraphs 32-35 of its Report.

sentencing. The Scottish Government considers that there "is a very strong link between alcohol and offending" but that intoxication can often be presented by the defence as "an excuse or reason for offending behaviour."[162]

219. The provision was supported by Victim Support Scotland and the Joint Faiths Advisory Board on Criminal Justice.[163] ACPOS also backed the provision, but suggested that it should be widened "to include all intoxicants, whether legitimate, prescribed or otherwise" – a suggestion backed by the Law Society of Scotland.[164]

220. However, both the Faculty of Advocates and the Sheriffs' Association considered section 24 unnecessary, since it was already understood in common law that intoxication is not a mitigating factor. The Faculty also suggested that the provision as drafted could lead to "unforeseen consequences", since it was not clear whether it applied to an alcoholic who could not control their consumption and so could be regarded as involuntarily intoxicated (and for whom a defence of diminished responsibility might be available under common law).[165] The Sheriffs' Association was concerned that the provision was inflexible, and would not allow intoxication to be a mitigating factor even where someone had, for example, had their drink "spiked with stronger liquor" before committing a breach of the peace. The Association suggested that the test should not just be whether someone had consumed alcohol voluntarily, but also whether they had done so "knowingly".[166]

221. The Lord President questioned whether the "sentencer would be allowed to take into account background circumstances such as a personal tragedy", for example, bereavement. He conceded that it might be possible to allow mitigation by reference to the tragedy itself rather than directly by reference to the intoxication, but felt the provision "gives rise to an ambiguity that ought to be addressed".[167]

222. Responding to these points, the Lord Advocate acknowledged that most judges would not currently accept voluntary intoxication as a mitigating factor but said that solicitors continued to advance the argument, particularly in domestic abuse cases. She believed that—

> "An important message would be sent out if we codified what is already known in our common law, which is that alcoholic intoxication is not a mitigating factor and that defendants who have imbibed alcohol will not have their sentences reduced because of that."

223. She defended the decision to include only alcohol in the scope of the provision, on the basis that it featured far more frequently than drugs in cases that prosecutors dealt with, and was much more liable to be associated with violence.

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[162] Scottish Government. (2008) *Sentencing Guidelines and a Scottish Sentencing Council – Consultation and Proposals.* Available at: http://www.scotland.gov.uk/Resource/Doc/236809/0064977.pdf

[163] Victim Support Scotland and the Joint Faiths Advisory Board on Criminal Justice. Written submissions to the Justice Committee.

[164] Association of Chief Police Officers in Scotland, Law Society of Scotland. Written submissions to the Justice Committee.

[165] Faculty of Advocates. Written submission to the Justice Committee.

[166] Sheriffs' Association. Written submission to the Justice Committee.

[167] Scottish Parliament Justice Committee. *Official Report, 12 May 2009,* Col 1771.

She also argued that the provision would not prevent the underlying cause of intoxication (such as bereavement or alcoholism) being treated as a mitigating factor even if the intoxication itself could not be.[168]

Committee conclusions
224. **The Committee fully supports the principle that voluntary intoxication by alcohol should not be regarded as a mitigating factor in sentencing, but most members are less convinced of the case for codifying this principle in statute. The evidence suggests the principle is already well understood by sentencers, and there may be a risk that a statutory provision will confuse the legal position instead of clarifying it. This is partly because of uncertainty about the meaning of "voluntary" intoxication, and about the distinction between the intoxication itself and any underlying circumstances which might properly be regarded as mitigating. It could also be inferred from the fact that the provision mentions only alcohol in the context of what is not to be regarded as a mitigating factor, that the position in respect of other forms of intoxication must be intended to be different. It would be unfortunate if one of the consequences of this well-intentioned provision was to make it easier to advance an argument for mitigation in the context of voluntary intoxication by drugs. We would therefore be grateful for further explanation from the Scottish Government about the rationale for this provision and its response to these concerns.**

PART 2 – CRIMINAL LAW

Sections 25-28: Serious organised crime

Policy objectives
225. In the Policy Memorandum, the Scottish Government explains that the provisions creating a series of new offences derive from recommendations by the Serious Organised Crime Taskforce. The objective is—

> "to tackle those involved in serious organised crime to help ensure that Scotland is a safer and stronger place for hard working families to live and work in and to send a message to those involved in such activity that Scotland does not want their business."[169]

226. The Bill proposes the creation of three new offences—

- involvement in serious organised crime (section 25);
- directing serious organised crime (section 27); and
- failure to report serious organised crime (section 28).

227. There is also to be a statutory aggravation (section 26) "where an offence can be proved to have been connected with serious organised crime."[170]

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[168] Scottish Parliament Justice Committee. *Official Report, 9 June 2009,* Col 2060.
[169] Policy Memorandum, paragraph 107.
[170] Policy Memorandum, paragraph 115.

228. A number of witnesses raised concerns about the interaction or overlap with the existing common law, the definitions and other aspects of these offences.

Interaction with the common law

229. The Judges of the High Court of Justiciary observed in their written submission that “a person who agrees to become involved in serious organised crime under our existing law commits the offence of conspiracy to commit a crime.”[171] They sought further explanation of what section 25 would achieve which is not already provided for by the existing common law.

230. The SCCJR also questioned this apparent overlap with the common law—

> “It is not clear whether these new sections really add anything to existing offences such as conspiracy or incitement, or simply constitute a rather muddy overlap and ‘legislative creep’.”[172]

231. Responding to the point about overlap, the Solicitor General accepted that the new statutory provision would duplicate the common law to some extent – as was already the case with, for example, vandalism and malicious mischief – but argued that specific statutory provision could provide a useful framework for prosecutors and investigators seeking to address serious organised crime.[173]

232. However, the main argument advanced in support of the new provisions was that they would make it easier to secure a conviction than the existing law of conspiracy. According to Gordon Meldrum, Director General of the SCDEA—

> “The current criminal law does not completely fail us – we can use the charge of conspiracy – but it is difficult to prove that such individuals have been involved in a specific offence, whereas the provisions in the Bill will create the specific offences of being involved in and directing serious organised crime.”

233. Similarly, the Lord Advocate accepted that “with creativity” the common law could be used to prosecute most of the behaviour aimed at by the new provisions, but section 25 in particular takes matters “a stage back” compared with the existing law on conspiracy—

> “We are talking about the stage of preparation and the stage of perpetration. In many cases, we have evidence that does not quite show that the person was at the actual conspiracy stage; rather, it relates to their becoming involved in a conspiracy.”[174]

234. The Cabinet Secretary backed this up by saying—

> “The Crown has made the point that proving conspiracy can be difficult. It is therefore appropriate that we have an additional statutory basis that allows us, while keeping the appropriate balance in the scales of justice, to ensure that it is not as difficult to convict someone of involvement in serious

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[171] Judges of the High Court of Justiciary. Written submission to the Justice Committee.

[172] Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.

[173] Scottish Parliament Justice Committee. *Official Report, 9 June 2009,* Col 2064.

[174] Scottish Parliament Justice Committee. *Official Report, 9 June 2009,* Col 2062.

> organised crime as it is to convict them of conspiracy, and to send a message that society will take serious organised crime extremely seriously."[175]

235. Later in the same evidence session, he added that—

> "The job of our Government is to ensure that the appropriate legislative framework is put in place to allow the police and the prosecution service to do their job. They have told us that they do not believe that the current law of conspiracy is appropriate."[176]

Definition of serious organised crime

236. Section 25 of the Bill defines "serious organised crime" as—

> "crime involving two or more persons acting together for the principal purpose of committing or conspiring to commit a serious offence or a series of serious offences"

and then defines "serious offence" as

> "an indictable offence—
>
> (a) committed with the intention of securing a material benefit for any person, or
>
> (b) which is an act of serious violence committed with the intention of securing such a benefit in the future.[177]

237. The Committee notes that the definition of "serious offence" covers all indictable offences aimed at securing a material benefit (for instance any common law theft or fraud) rather than being restricted to offences involving serious violence, drugs trafficking and firearms, for example. The Committee also notes that the definition of "organised" as involving two or more people conspiring together would cover much ordinary criminal activity.

238. The Scottish Crime and Drug Enforcement Agency (SCDEA), the body responsible for tackling serious organised crime in Scotland, welcomed the new offences but expressed a number of concerns about the definitions and the difficulties of securing evidence in order to prove the offences.[178] The Agency said that it would be preferable if the term "serious offence" could be applied to any crime capable of being indicted which would enable instances of minor crime, motivated by serious organised crime, to be dealt with more effectively."[179]

239. The Scottish Centre for Crime and Justice Research (SCCJR) was one of a number of witnesses concerned about the potential breadth of the definition of serious organised crime. It observed that the definition "sets a very low threshold

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[175] Scottish Parliament Justice Committee. *Official Report, 23 June 2009,* Cols 2195-6.
[176] Scottish Parliament Justice Committee. *Official Report, 23 June 2009,* Col 2200.
[177] Criminal Justice and Licensing (Scotland) Bill, section 25(2).
[178] Scottish Crime and Drug Enforcement Agency. Written submission to the Justice Committee.
[179] Scottish Crime and Drug Enforcement Agency. Written submission to the Justice Committee.

for what might constitute serious organised crime" and that "much of what would be captured by the definition given here is 'crime that is comparatively organised' *not* serious organised crime."[180]

240. The SCCJR also noted that there is no standard UK definition of organised crime, although there are various informal working definitions in use. It argued, therefore, that—

> "Whilst such definitions may be appropriate in the context of policing, it is not appropriate for a statutory definition. Given the lack of a standard definition it seems inadvisable to frame legislation that introduces one that is so over-inclusive."[181]

241. In their written submission, the Judges of the High Court of Justiciary said that these provisions risked including a wider range of offenders than is appropriate—

> "If this is correct, we doubt that it is a principled approach in the criminal law simply to leave it to the discretion of the prosecuting authorities when to invoke provisions which are themselves unduly wide in their scope."[182]

242. Ian Duguid QC, representing the Faculty of Advocates, also questioned the scope of the definition—

> "If the Bill is trying to pursue persons who have a remote connection with serious organised crime, that is a perfectly laudable objective. That aspect of the provisions is well founded; the issue is whether enough care has been taken in the drafting and whether the Bill will create more difficulties than it is trying to solve. Who is envisaged to be 'involved in serious organised crime'? Is it every person across the board?"[183]

243. Using an extreme example to illustrate the same point, the Sheriffs' Association pointed out that "if two people agree to steal a meat pie from a shop to give it to a starving beggar, they commit the offence of being involved in serious organised crime."[184]

244. However, in oral evidence, the Lord Advocate refuted the suggestion that such a crime would be prosecuted on indictment—

> "Of course, if two people conspire to steal a meat pie, I can – theoretically – indict them for that. Currently, that is under the common law. However, I would not do so, because if I did, I would receive criticism – and not delicate criticism – from the judiciary and others. I would be seen as having lost all common sense."[185]

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[180] Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.
[181] Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.
[182] Judges of the High Court of Justiciary. Written submission to the Justice Committee.
[183] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Col 1982.
[184] Sheriffs' Association. Written submission to the Justice Committee.
[185] Scottish Parliament Justice Committee. *Official Report, 9 June 2009,* Col 2064.

245. The Cabinet Secretary for Justice re-emphasised the point—

> "The Crown will not libel such matters on a whim or fancy. Indeed, if any such matter were so libelled, I would expect our judiciary to treat the charge with the contempt that it deserved by dismissing it fairly summarily."[186]

246. The Lord Advocate explained to the Committee why she considered that a wide definition of serious organised crime was appropriate—

> "With the jurisprudence of the European Convention on Human Rights, particularly Article 7, there is a drive towards greater certainty about what constitutes a crime … The benefit of having a wider definition is that it gives us the capacity to indict immediately, without having to wait for legislation, when an innovative new business is created that should clearly be struck at in the context of serious organised crime, as opposed to the simple commission of fraud. Even emergency legislation can miss that opportunity."[187]

247. Chief Constable Stephen House, representing ACPOS, also argued against tightening the definition—

> "If we tighten the definition too much we will miss issues and new crimes. Criminals might even exploit the definition to ensure that activity does not fall within the definition of 'serious organised crime' and therefore cannot attract the powers that we are talking about. Definitions have been exploited in that way in the past."[188]

248. The Cabinet Secretary said he was willing to consider narrowing down the scope of the provision to concentrate more clearly on serious organised crime, but pointed out that "the fail-safe of judicial interpretation" should ensure that the provisions are not used inappropriately.[189]

Serious violence

249. In addition to these concerns that the definitions are too widely drawn, there was also a suggestion that including the term "serious violence" in the definition of serious offence risked being too restrictive. According to the Scottish Crime and Drugs Enforcement Agency (SCDEA)—

> "It is unclear what would constitute an act of serious violence … those involved in organised crime may achieve their objectives through fear and intimidation without necessarily resorting to serious violence, albeit it is acknowledged that violence may well occur. The use of the term appears to be unnecessarily restrictive and should be widened to include any behaviour which is used to further the activity of organised crime."[190]

250. Expanding on the point in oral evidence, Gordon Meldrum argued—

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[186] Scottish Parliament Justice Committee. *Official Report, 23 June 2009,* Col 2197.
[187] Scottish Parliament Justice Committee. *Official Report, 9 June 2009,* Col 2065.
[188] Scottish Parliament Justice Committee. *Official Report, 26 May 2009,* Col 1906.
[189] Scottish Parliament Justice Committee. *Official Report, 23 June 2009,* Col 2197.
[190] Scottish Crime and Drug Enforcement Agency. Written submission to the Justice Committee.

> "In witness statements or through intelligence, we pick up on the fact that serious and organised crime groups operate through a culture of fear, intimidation and threats. On occasions, there might not be a physical act of violence but there will be threats, intimidation and all sorts of other non-violent abuse. That is how those groups manipulate people from all walks of life in order to get their own way."[191]

251. In response, the Lord Advocate explained that—

> "Threats and intimidation are indictable offences; the outcome depends on the situation in which they take place. I could indict a threat or extortion in the High Court—indeed, we have done so."[192]

Offences aggravated by connection with serious organised crime

252. In the Policy Memorandum, the Scottish Government sets out its view that—

> "criminal offences committed with the underlying purpose or motivation of committing or conspiring to commit serious organised crime are more serious on account of the context in which they take place and the motivation of the offender."[193]

253. Accordingly, under the Bill, where a criminal offence has been committed with the underlying purpose or motivation of committing or conspiring to commit serious organised crime, this could be treated as an aggravating factor and the court would have the discretion to adjust the sentence accordingly.[194]

254. The Sheriffs' Association, however, questioned this reasoning—

> "It is not always appreciated that courts can take aggravating circumstances into account in sentencing without there having to be a statutory aggravation as in [section] 26. There may be a desire for statutory aggravations for statistical purposes, but they are not necessary."[195]

255. Nevertheless, the Lord Advocate said that she believed the new provisions would be "very useful"—

> "I hope that, in addition to dealing with the crime itself, the courts will clearly show and reflect the seriousness with which engagement in serious organised crime, intimidation, the exploitation of human beings for human trafficking or sexual purposes, or engagement in drug trafficking are treated in Scotland by reference to the aggravation and by having the particular offences available."[196]

256. The Scottish Centre for Crime and Justice Research (SCCJR) accepted that this may be an appropriate aggravation to recognise in law but considered that the

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[191] Scottish Parliament Justice Committee. *Official Report, 26 May 2009,* Col 1907.

[192] Scottish Parliament Justice Committee. *Official Report, 9 June 2009,* Col 2067.

[193] Policy Memorandum, paragraph 115.

[194] Policy Memorandum, paragraph 115.

[195] Sheriffs' Association. Written submission to the Justice Committee.

[196] Scottish Parliament Justice Committee. *Official Report, 9 June 2009,* Col 2063.

broad definition of serious organised crime meant that the aggravation could be “too easily applied or proved”. It also questioned why, under section 26(4), the normal requirement for corroborating evidence is disapplied, so that evidence from a single source is sufficient to prove aggravation by a connection with serious organised crime—

> “Given the potential severity of the penalty it is not clear why this requirement is being relaxed, or that the relaxation is justified.”[197]

Failure to report serious organised crime

257. The Policy Memorandum explains the rationale for section 28 of the Bill as follows—

> “Serious Organised Crime groups rely on the assistance of professional associates and family members. The assistance of professional occupations such as lawyers and accountants is required when hiding the profits of criminal activity or converting illegitimate gains into legitimate assets. We want to ensure that those who have knowledge of an individual’s involvement in a serious organised crime network, whether in a professional or private capacity, should be under a duty to report it.”[198]

258. This offence will carry a maximum penalty of 5 years imprisonment, an unlimited fine or both for conviction on indictment and 12 months imprisonment, a fine not exceeding the statutory maximum or both for summary conviction.[199]

259. In oral evidence, Gordon Meldrum, Director of the SCDEA, explained that the provision was designed to catch individuals whom he described as consultants and facilitators—

> “They oil the wheels of organised crime but do not necessarily get close to the front-end criminality – they might be involved in the banking profession, the legal profession, the accounting profession, the haulage industry and so on. … Often, they have a knowledge of the business of serious organised crime, if not necessarily the daily transaction of the criminality. The fact that they fail to report that knowledge often inhibits us. Having an offence around failure to report knowledge of serious and organised crime would be helpful with regard to those people.”[200]

260. The Solicitor General gave the example of an estate agent who factors a number of flats for a client and then notices they are paying huge monthly amounts for electricity: “That would tip off anyone with any semblance of common sense … that the flats were being used as cannabis farms”. Such a person might be tempted not to report their suspicions because of the large fees they are getting – and while this would not be covered by existing money-laundering legislation, the Bill would, he argued, provide a useful tool to address the situation.[201]

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[197] Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.

[198] Policy Memorandum, paragraph 117.

[199] Policy Memorandum, paragraph 119.

[200] Scottish Parliament Justice Committee. *Official Report, 26 May 2009,* Col 1908.

[201] Scottish Parliament Justice Committee, *Official Report*, 9 June 2009, Col 2070.

261. But the Sheriffs' Association expressed concern about the terms of the offence—

> "Having regard to the wide definition, the offence of failure to report serious organised crime under [section] 28 is a frightening prospect. It is of some concern that a person may unwittingly fall foul of this provision."[202]

262. The Judges of the High Court of Justiciary also expressed "considerable concerns as to how these provisions will work", referring specifically to—

- the level of suspicion needed to render criminal any failure to disclose such a suspicion;
- the implications for this offence of the width of the definitions of "serious organised crime" and "serious offence" in section 25; and
- the breadth and lack of definition of some of the concepts used in defining this offence, such as "material benefit" in subsection (2) and "reasonable excuse" in subsection (4).[203]

263. Sir Gerald Gordon expressed similar reservations—

> "As it stands it could require children to report their parents just because the latter pay their school fees. The whole idea of making it an offence not to report a crime has its problems, but this section (which does not define 'material benefit') goes too far. It could perhaps be cured, and could certainly be improved, by some limitation on 'material benefit'. If it is indeed intended only to apply to a direct share in the proceeds of the crime, such an amendment might help to avoid the apparent creation of a society which encourages denunciation. As it stands it has totalitarian overtones."[204]

264. On a similar theme, the Law Society of Scotland raised the issue of compatibility with the European Convention on Human Rights. It drew to the Committee's attention a German case where the European court held that there had been a breach of Article 8 (respect for privacy and family life)—

> "In this case, which involved the unlawful search of a lawyer's office in Germany to find documents revealing the identity of a supposed associate of the lawyer, the court held that the search was a violation of Article 8 and commented that the notion of "private life" should not be taken to exclude activities of a professional or business nature. The Society questions whether the provisions of section 28 comply with Article 8."[205]

265. In oral evidence, Alan McCreadie of the Law Society concluded—

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[202] Sheriffs' Association. Written submission to the Justice Committee.

[203] Judges of the High Court of Justiciary. Written submission to the Justice Committee.

[204] Sir Gerald Gordon. Written submission to the Justice Committee.

[205] The Law Society of Scotland. Written submission to the Justice Committee.

> "Perhaps section 28 is too widely drafted and has unintended consequences. It must be properly considered who the provision is intended to capture."[206]

266. Other witnesses raised more specific concerns. Her Majesty's Revenue and Customs (HMRC) argued that, since the offence was defined in terms of failing to report knowledge or suspicion to "a constable" it would be appropriate for this to cover relevant officers of HMRC—

> "We think it should, as the obvious route for reporting tax-related offending in particular would be to HMRC directly. It would seem to us to be wrong in such cases for a person to be criminalised for reporting to HMRC instead of the police."[207]

267. The SCDEA expressed concern that professional legal advisers employed by an organised crime group could escape prosecution under the provisions of section 28, since "by virtue of the defence afforded under subsections (4) and/or (5) a legal adviser could continuously evade prosecution."[208]

268. However, according to the Lord Advocate, the protection provided for legal privilege "should not be used as a cover by solicitors or other professionals who would facilitate crime". For her, the new offence was important—

> "because a lot of organised crime can take place only with the acquiescence of certain professionals, be they estate agents, solicitors or others, who allow activity to take place through what are ostensibly legal and legitimate activities. We must ensure that we tackle that route. … I am not concerned that the provision is too widely drawn, but if that is seen to be the case, we can consider whether amendments might provide reassurance."[209]

269. Chief Constable Stephen House, ACPOS, argued that the new offence was necessary—

> "simply because we have to get at serious and organised crime in any way that we can. The people who choose to become involved in it make a conscious choice. Therefore, they are ready for it and are getting into a defendable position. … In section 28, we are saying that, if such people have suspicions or knowledge, they need to step forward and, if they do not, they commit an offence."[210]

270. In a joint supplementary submission, SCDEA and ACPOS gave several examples of how the new provisions could make a difference to the prosecution of serious organised crime, including the following—

> "During a recent investigation it became apparent that a number of persons were identified as having knowledge of the business of a serious organised crime group. There was however insufficient evidence to charge them with

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[206] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Col 1985.
[207] Her Majesty's Revenue and Customs. Written submission to the Justice Committee.
[208] Scottish Crime and Drug Enforcement Agency. Written submission to the Justice Committee.
[209] Scottish Parliament Justice Committee. *Official Report, 9 June 2009,* Col 2066.
[210] Scottish Parliament Justice Committee. *Official Report, 26 May 2009,* Col 1910.

> offences in connection with the primary activity of the group. Had the provisions of section 28 been available then they most certainly would have been charged under those provisions. As it was, whilst a number were charged with other offences, some of those involved could not be charged and therefore evaded prosecution."[211]

271. The Cabinet Secretary for Justice acknowledged that the offence of failure to report serious organised crime was targeted widely, but said it was "about allowing discretion and judgment to be used by the police, the SCDEA, HMRC and, ultimately, the Crown and the courts", and was "a backstop, to an extent". He went on—

> "It is not so much the person whom we might ask, 'Where did you think the money was coming from?' whom we are targeting; we are targeting the people whom we know to be working as the scribes or authors of inventive schemes to take money that has been bled from our community to make themselves ever richer."[212]

Committee conclusions

272. **We strongly support the underlying intention of these sections of the Bill to provide additional tools for the police and the courts to tackle those involved in serious organised crime. We are less certain, however, that the Bill gets the detail right.**

273. **While there was contradictory evidence and most members are not entirely clear on what sections 25 and 27 add to the existing common law on conspiracy and incitement, and while we have some concern that the key terms of "involvement" and "direction" are insufficiently clear, on balance we support the creation of these new offences. We also support the new aggravation provided for in section 26, although we are not wholly convinced of the case for removing the normal requirement for corroborating evidence. We would therefore welcome a clearer justification for this element of the provision from Ministers.**

274. **We have considered carefully the evidence we have received about the definitions underpinning these new offences, namely the definitions of "serious organised crime" and "serious offence". The main concern is that they are too widely drawn, and in this context we note that there is some dispute about whether offences need to be widely drawn in statute to ensure that the courts can apply them as intended. The Lord Advocate advanced this view, suggesting that ECHR case-law has made it increasingly difficult for the courts to "expand" on a narrowly-drawn statutory definition in deciding what constitutes an offence. However, the Committee's criminal justice adviser (Professor Peter Duff) has suggested that the European Court of Human Rights extends a considerable "margin of appreciation" to domestic courts, and that if the serious organised crime offences were more tightly defined, the Court "would grant the Scottish courts considerable leeway in interpreting the legislation creatively to extend to all the types of**

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[211] ACPOS. Supplementary written submission to the Justice Committee.

[212] Scottish Parliament Justice Committee. *Official Report, 23 June 2009,* Col 2199.

mischief it was intended to cover". Accordingly, we invite the Scottish Government to re-examine the extent to which it may be possible to tighten the definitions in the light of the evidence we have received.

275. **Of the provisions on serious organised crime, the one that has given us most difficulty is the section 28 offence of failure to report serious organised crime. It would clearly aid the fight against serious organised crime if people who come into contact with it, even quite innocently or inadvertently, were more prepared to report their suspicions to the police – but it is much less clear that a criminal sanction for not doing so is a fair or indeed effective way of encouraging this. People may be reluctant to report suspicions to the police for quite understandable reasons.**

276. **We also think more allowance should be made for the nature of a person's role if they are to be held liable for not reporting suspicions arising from information gained in the course of their business or employment. For example, if unusually large amounts of cash are banked by a small business and this prompts suspicion among bank staff, it is one thing to hold liable for not reporting this a senior manager or trained professional, but another to hold liable a junior cashier. Similar concerns may arise about information gained through a "close personal relationships" from which a "material benefit" is derived, as this could apply to the teenage child of a gangster who has begun to understand where the family income comes from.**

277. **While we do not agree with Sir Gerald Gordon that section 28 has "totalitarian overtones", we do agree with his view that the provision could certainly be improved. For the time being, we invite the Scottish Government either to provide a better justification for this provision, or to bring forward amendments that will address the concerns raised.**

Section 34: Extreme pornography

278. Section 34 of the Bill inserts into the Civic Government (Scotland) Act 1982 new provisions to criminalise the possession of obscene pornographic images which explicitly and realistically depict various "extreme acts".

279. The policy objective is to "help ensure the public are protected from exposure to extreme pornography that depicts horrific images of violence".[213] The maximum penalty for the new offence will be three years imprisonment or a fine or both.[214]

280. The Policy Memorandum explains that it is already illegal to publish, sell or distribute the obscene material that would be covered by this new offence. Section 34(1) increases the maximum penalty for these activities from three to five years "to emphasise the seriousness attached to distribution of this type of material".[215]

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[213] Policy Memorandum, paragraph 153.

[214] Criminal Justice and Licensing (Scotland) Bill, section 34(2) inserting section 51A(8)(b)

[215] Policy Memorandum, paragraph 158.

281. The new offence is similar to that in section 63 of the Criminal Justice and Immigration Act 2008, which applies in the rest of the UK. The proposed Scottish offence goes further, however, as—

> "it will cover all obscene pornographic images which realistically depict rape or other non-consensual penetrative sexual activity, whether violent or otherwise (whereas the English offence only covers forms of violent rape)."[216]

282. Provisions to establish a category of excluded images and defences to a charge of possession of an extreme pornographic image are also included within section 34.

283. Most of those who commented on this section supported the creation of an offence of possessing extreme pornography, although some argued that there is no evidence that pornography increases sexual offending and opposed these provisions as an unjustifiable intrusion into the private lives of citizens.[217]

Definition of extreme pornography

284. A number of concerns were expressed about the definition of the new offence, either arguing that it is too wide or that it should be extended in various directions.

285. In his written submission, James Chalmers of Edinburgh University School of Law noted that the provisions in the Bill go significantly beyond the definition canvassed in a consultation exercise carried out by the Scottish Executive and Home Office in 2005 and subsequently implemented for the rest of the UK in the Criminal Justice and Immigration Act 2008.[218] He noted that the Policy Memorandum says only that this definition was "insufficiently broad" without giving any further explanation—

> "The Policy Memorandum observes that the English legislation does not cover rape *per se*, but this is hardly an accident of drafting: there was a clear desire to limit the legislation to extremely serious cases."[219]

286. Mr Chalmers argued that the Scottish Government had "at no stage explained its rationale for criminalising such possession. It can hardly be the simple fact that the activity depicted is criminal: murder is regularly depicted on terrestrial television without objection."[220]

287. On the other hand, several respondents expressly supported the use of the wider definition in the Bill.[221]

288. Ian Duguid QC, representing the Faculty of Advocates, expressed strong support for an offence of possessing extreme adult pornography—

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[216] Policy Memorandum, paragraph 165.

[217] Allan Balsillie; Consenting Adult Action Network. Written submissions to the Justice Committee.

[218] James Chalmers. Written submission to the Justice Committee.

[219] James Chalmers. Written submission to the Justice Committee.

[220] James Chalmers. Written submission to the Justice Committee.

[221] Engender; Zero Tolerance; Glasgow City Council. Written submissions to the Justice Committee.

> "It is only proper that the law deal with such images, including computer-generated images. The difficulty that I can envisage concerns policing the internet, but I have no difficulty with the full weight of the law being applied when a fruitful investigation is undertaken that reveals images of that type. If the law requires to be amended as is proposed so that it reflects the public's attitude, that is perfectly reasonable as far as I am concerned."[222]

289. In its written submission, the Crown Office explained how it would approach enforcement of the new offence—

> "Although the offence is broad in its terms and allows for a wide latitude of discretion in determining what amounts to a prohibited image, careful consideration will be given, if it is enacted, to the development of clear guidance for police and prosecutors to ensure that it is enforced consistently and fairly."[223]

290. In oral evidence, the Lord Advocate was asked whether the new offence was drawn widely enough. She commented—

> "We already have the Civic Government (Scotland) Act 1982, which includes the wider definition of, or the fundamental platform of, obscenity. … The difficulty in respect of pornography is that we come up against the ECHR rights of freedom of expression and the article 8 rights to privacy in the context of sexual activity. It is important to derive some certainty in that area in order to show a balance – to show not only that what is being done in engaging article 8 is proportionate, but that it has a degree of certainty in that area of criminality."[224]

Definition of obscene

291. Several respondents questioned whether the word obscene should form part of the definition. For example, the Women's Support Project argued that—

> "the inclusion of 'obscene' in the criteria for extreme pornography dilutes the focus of the new proposals, retains a 'moral' judgement and suggests that the intention behind the proposals is to prevent depravity or corruption. The WSP believes that the Scottish Government should not rely on the 1982 Act for a definition of obscenity but develop a definition based on an understanding of the broad cultural harm to which pornography contributes."[225]

292. Other respondents also argued for a definition focused on "cultural harm".[226] Professor Clare McGlynn and Dr Erika Rackley, Durham Law School, offered a justification for this approach—

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[222] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Cols 1985-6.

[223] Crown Office and Procurator Fiscal Service. Written submission to the Justice Committee.

[224] Scottish Parliament Justice Committee. *Official Report, 9 June 2009,* Cols 2080-1.

[225] Women's Support Project. Written submission to the Justice Committee.

[226] Engender; Women's Support Project; Professor Clare McGlynn and Dr Erika Rackley; Violence Against Women Strategy Multi-Agency Working Group. Written submissions to the Justice Committee.

> "Legislative action against extreme pornography is justified because of the 'cultural harm' of such material, by which we mean that the existence and use of extreme pornography contributes to a society which fails to take sexual violence against women seriously."

293. Professor McGlynn and Dr Rackley urged the Committee to reconsider the use of the language and concept of "obscenity", partly because "the definition of 'obscene' is vague and opaque" and leads to "a great level of discretion and lack of clarity". In addition, the term—

> "has been used to cover the depiction of activities which are not in themselves unlawful, yet may be viewed by some as morally wrong or disgusting (such as images of coprophilia). The criminal law should not be used to proscribe the depiction or viewing of acts which are not unlawful in themselves to carry out."

294. However, they also argued that the use of the term "obscene" alone was preferable to the "exceptionally vague and undefined reference in the English provisions to material which is 'grossly offensive, disgusting or otherwise of an obscene character' [section 63(6) of the Criminal Justice and Immigration Act 2008]".[227]

295. For ACPOS, the problem was that while "pornographic" and "extreme" were defined in the Bill, "obscene" was not, and it suggested it could be defined as "abhorrent to morality or virtue; specifically designed and intended to incite lust or depravity".[228]

296. The Committee notes the evidence presented regarding the inclusion of the term "obscene" as part of the definition of extreme pornography. The Committee understands that the Civic Government (Scotland) Act 1982 already includes reference to obscene material but notes that the word obscene is not defined in that Act.

Definition of extreme image

297. The Bill defines an image as extreme "if it depicts, in an explicit and realistic way any of the following—

> (a) an act which takes or threatens a person's life,
>
> (b) an act which results, or is likely to result, in a person's severe injury,
>
> (c) rape or other non-consensual penetrative sexual activity,
>
> (d) sexual activity involving (directly or indirectly) a human corpse,
>
> (e) an act, which involves sexual activity between a person and an animal (or the carcase of an animal)."[229]

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[227] Professor Clare McGlynn and Dr Erika Rackley. Written submission to the Justice Committee.
[228] ACPOS. Supplementary written submission to the Justice Committee.
[229] Criminal Justice and Licensing (Scotland) Bill, section 34(2).

298. Some respondents, including the Zero Tolerance Charitable Trust and the Violence Against Women Strategy Multi-Agency Working Group, suggested that the definition of an extreme image set out at (b) above should be changed from an act which is “likely” to result in severe injury to “threatens” to cause this result. They argued that this would increase the scope to cover acts of rape which could be said to threaten severe injury, but are not likely actually to result in severe injury.[230]

299. The SCDEA suggested there might be “practical difficulties” with the definition of an extreme image—

> “The use of the terminology ‘depicts, in an explicit and realistic way’ would seem to include all images where such acts are depicted but are subsequently shown to have been staged or acted out. For example, a realistic depiction of a rape or sexual murder, which is undoubtedly pornographic but where the ‘victim’ is shown to have suffered no harm and to have been a willing participant in actions depicted, would appear to be included in the definition.”[231]

300. Subsequently, in a joint submission with SCDEA, ACPOS suggested that a better approach to defining extreme image could be to replace the list of specified acts with a more general definition that would capture “all images of illegal acts committed with a sexual motivation (subject to the exclusions currently outlined within the Bill)”.[232]

Computer-generated images

301. Several respondents suggested that non-photographic representations of extreme acts should be covered, in particular computer generated images of the sort found in virtual reality games.[233] Rape Crisis Scotland explained the basis for its concern about this issue—

> “We believe that it is a missed opportunity to not include non-photographic representations of extreme acts in the Bill. This means that the provision in the Bill will not cover depictions of extreme pornography on virtual worlds such as Second Life or games online or other digital platforms, where the pornography is violent, extreme and interactive, but where the images are not photographic. Similarly, we would like to emphasis that there is still a need to enact similar legislation in relation to child pornography, as proposed by the Scottish Executive in early 2007.”[234]

302. Tom Roberts, representing Children 1st, commented on the effect such images may have on children—

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[230] Zero Tolerance Charitable Trust; Violence Against Women Strategy Multi-Agency Working Group. Written submissions to the Justice Committee.

[231] Scottish Crime and Drug Enforcement Agency. Written submission to the Justice Committee.

[232] ACPOS. Supplementary written submission to the Justice Committee.

[233] Violence Against Women Strategy Multi-Agency Working Group; Rape Crisis Scotland; Zero Tolerance; Scottish Centre for Crime and Justice Research. Written submissions to the Justice Committee.

[234] Rape Crisis Scotland. Written submission to the Justice Committee.

> "Given that computer-generated images can be used to groom children by suggesting to them that something that happens on their computer must be acceptable, the distribution of such images can cause harm or distress to children and can be just as bad as the other type of material that circulates on the internet. We need to ensure that our laws can deal with that appropriately."[235]

303. ACPOS considered this issue in a supplementary written submission—

> "The use of the phrase 'in an explicit and realistic way' is worthy of debate when considering the definition of 'extreme' in respect of cartoon images, etc. It may be argued that cartoon (or other) images with gross distortions are not 'realistic'. However these may well portray extreme pornographic images which are clearly understood."[236]

304. ACPOS suggested that it may be more appropriate to address the action rather than the realistic portrayal of the image, for example by referring to any image that "depicts in an explicit manner a representation of an event of a sexual and pornographic nature".[237]

305. But for James Chalmers, it was "clear" that section 34 already covers computer generated images—

> "The only limiting factor is that an image must be 'realistic' to fall within the scope of the provisions. The Bill is not limited to particular *types* of image. In this respect, it is rather wider than the offence of possessing indecent photographs of children, which is restricted to 'photographs or pseudo-photographs', including photographs comprised in films. A 'pseudo-photograph' is 'an image, whether produced by computer-graphics or otherwise howsoever, which appears to be a photograph' [Civic Government (Scotland) Act 1982, sections 52 and 52A]."[238]

Incest

306. A number of organisations argued in favour of extending the definition of "extreme pornography" to cover incest.[239] Rape Crisis Scotland argued that the provisions in the Bill would not necessarily cover pornography which glorifies incest, unless it is clear that the woman depicted is not old enough to consent—

> "We believe serious consideration must be given to extending the definition of extreme to include depictions of incest (which is in itself an illegal activity) to ensure these types of materials are covered by the legislation."[240]

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[235] Scottish Parliament Justice Committee. *Official Report, 26 May 2009,* Col 1959.

[236] ACPOS. Supplementary written submission to the Justice Committee.

[237] ACPOS. Supplementary written submission to the Justice Committee.

[238] James Chalmers. Supplementary written submission to the Justice Committee.

[239] Violence Against Women Strategy Multi-Agency Working Group; Rape Crisis Scotland; Zero Tolerance Charitable Trust. Written submissions to the Justice Committee.

[240] Rape Crisis Scotland. Written submission to the Justice Committee.

Possession

307. Various questions about the definition of “possession” were raised by respondents to the Committee’s call for evidence.

308. The SCCJR argued that for reasons of clarity, it would be better if the provisions were to clearly define the meaning of possession—

> “Since, as is acknowledged in the Policy Memorandum, this is aimed at material produced and distributed in electronic form, it is important to be specific about what amounts to possession in these circumstances. Viewing an image online means that it is downloaded and (usually) stored on the hard drive of the computer of the viewer. Does possession extend to all images cached on the computer hard-drive?”[241]

309. The National Gender-based Violence Programme Team, part of the Healthcare, Strategy and Policy Directorate, Scottish Government, submitted that there was a need to clarify whether possession would cover repeated viewings of extreme pornography, whether or not the material was actually downloaded.[242]

310. According to Professor McGlynn and Dr Rackley—

> “The concept of possession is key to this offence. It is not defined in the Bill (nor in the English provisions). This is a serious omission. We suggest the legislation include a definition of possession to clarify exactly what will be covered.”[243]

311. However, ACPOS and the SCDEA said they were “content that existing legislation and case law would provide sufficient definition around the term ‘possession’.”[244]

Excluded images and defences

312. Under the proposed section 51B of the 1982 Act, images that would otherwise qualify as extreme pornography are excluded from the scope of the offence (under proposed section 51A) if they are from a “classified work” – which is defined as a video work which has been classified by a “designated authority” such as the British Board of Film Classification (BBFC). In addition, section 51C provides a series of defences to a charge of possession of an extreme pornographic image, including a defence for those who directly participated in the act depicted.

313. The Consenting Adult Action Network, which opposes making possession of extreme pornography a criminal offence, questioned whether the provision for “excluded images” was appropriate—

> “If the material in question causes demonstrable harm, then it is totally utterly irresponsible on the part of government to insert the BBFC exemption – and

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[241] Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.

[242] National Gender-based Violence Programme Team, Scottish Government. Written submission to the Justice Committee.

[243] Professor Clare McGlynn and Dr Erika Rackley. Written submission to the Justice Committee.

[244] ACPOS. Supplementary written submission to the Justice Committee.

> suggests a bowing to commercial (film) pressure in preference to a genuine desire to protect members of society. Further, would not most BBFC material fail the 'realistic' or 'pornographic' test once it is known that the material is from a film? There is no reason for this section to be in there."[245]

314. The Judges of the High Court of Justiciary also questioned the provisions regarding excluded images and the defence of direct participation—

> "We question the policy of allowing a designated body to exclude from the scope of the criminal law an image which meets the definition of extreme pornographic image. Why should such a body, in the context of criminal law, decide that such material, the possession of which would otherwise be criminal, is acceptable as a part of or as being in its entirety a work of art?
>
> "We are also at a loss to understand the defence in proposed section 51C of the 1982 Act protecting the persons who directly participated in the act depicted. If the depiction is unacceptable as amounting to extreme pornography, we do not see why the participant who retains the material for private use should have the defences available in subsection (4) of section 51C when other possessors, for good policy reasons, do not."[246]

Committee conclusions

315. **The Committee shares the Scottish Government's aim to protect the public from extreme pornography, but has noted a range of concerns raised in evidence about the parameters of the new offence proposed. There are various points on which we would seek further clarification from the Scottish Government. The first is why the definition of "extreme image" includes a much broader reference to depictions of rape than was suggested in consultation and is provided for in the equivalent England and Wales legislation. Secondly, we would be grateful for further explanation about why that definition refers to "realistic" depictions of sexual acts, and how that relates to cartoons or other images that have been distorted or have a fantasy element. Thirdly, we would seek clarification on the rationale for using the term "obscene" as part of the definition of extreme pornography, when that term is itself undefined in the Bill, and whether any consideration was given to alternative definitions in terms of the cultural harm that pornography can cause. Finally, we would be grateful for clarification of what is meant by "possession" of extreme pornography, and whether, in the absence of any definition in the Bill, what understanding of that term would be relied on by the courts (particularly where images come into someone's possession through electronic transmission).**

316. **The Committee accepts the rationale for excluding from the offence of possessing extreme pornography images that form all or part of a classified work, such as a film granted a certificate by the British Board of Film Classification. However, we are uncertain about some of the practical implications, for example whether it offers protection from prosecution to**

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[245] Consenting Adult Action Network. Written submission to the Justice Committee.
[246] Judges of the High Court of Justiciary. Written submission to the Justice Committee.

the film-maker who is in possession of a film that the BBFC has not yet been able to consider for certification.

317. **We are satisfied with the defences that are provided in inserted section 51C. In particular, while we note the concerns raised in evidence, we agree that the Bill is right to distinguish between the possession of an image by those who participated in the sexual activity depicted and the onward transmission of that image to third parties.**

Section 35: People Trafficking

Background

318. Section 22 of the Criminal Justice (Scotland) Act 2003 makes it an offence to engage in trafficking for the purposes of prostitution. UK-wide provisions making it an offence to engage in trafficking for purposes of exploitation (including slavery, forced labour and organ harvesting) are contained in sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. Amendments to the 2004 Act to clarify the application of those offences were made by the UK Borders Act 2007, but these amendments only apply in England, Wales and Northern Ireland.

319. Section 35 of the Bill is intended to clarify Scots law and ensure consistency across the UK. Accordingly, it amends section 22 of the 2003 Act to make clear that the existing offence of trafficking for the purposes of prostitution applies whether the trafficking is into, within or out of the UK, and whether it is directed from inside the UK or from outside the UK, and it specifies in which sheriff court districts an offender may be proceeded against. The section also makes similar changes to the 2004 Act to ensure consistency across the UK.

Evidence received

320. ACPOS was supportive of the proposed changes but sought clarification that any new offences created would apply to those who traffic from within the UK and would not be limited to those who orchestrate trafficking from outwith the UK. It also suggested that the definition of facilitation should include related activity such as the procurement of travel documents, transport and offers of work and accommodation. Finally, ACPOS argued that "it is vital that further consideration should be given to extending the legislation to include labour exploitation, sexual exploitation and domestic servitude rather than being exclusive to prostitution".[247]

321. Care for Scotland also welcomed the proposals but said it missed an opportunity and that "until the root causes of sex trafficking and other forms of sexual exploitation through prostitution are sufficiently addressed, attempts to diminish the phenomenon will be limited." It warned that, unless Scottish legislation in this area kept pace with that in the rest of the UK, the numbers of people trafficked into Scotland for the purpose of sexual exploitation would continue to grow.[248]

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[247] ACPOS. Written submission to the Justice Committee.

[248] Care for Scotland. Written submission to the Justice Committee.

Committee conclusions

322. **The Committee has no difficulties with this provision as far as it goes, but it would be useful to get a clearer indication of what else the Scottish Government is doing to tackle trafficking issues, particularly in view of the absence so far of convictions for sexual exploitation under the 2003 Act (notwithstanding suggestions that Glasgow has the highest number of trafficked persons outside London).[249] We are sympathetic to the concerns expressed by ACPOS that the legislation should be sufficiently broad to cover all forms of trafficking. We are particularly concerned that the problem may be exacerbated during the Commonwealth Games in 2014. We would therefore welcome assurances from the Cabinet Secretary that the changes made by the Bill will contribute meaningfully to addressing this problem.**

PART 3 – CRIMINAL PROCEDURE

Section 38: Prosecution of children

Background

323. Section 38 of the Bill amends the Criminal Procedure (Scotland) Act 1995 so as to prohibit the prosecution of children under the age of 12 years in the criminal courts. As a result, whatever the offence committed, a child under the age of 12 will in future only be able to be dealt with by the children's hearing system.[250]

324. The UN Committee on the Rights of the Child carried out a periodic examination of the UK in September 2008 to see how well it was protecting children's human rights. It made more than 100 concluding observations (recommendations) about where the UK must do more to put the UN Convention on the Rights of the Child (UNCRC) fully into practice. Among its recommendations on youth justice, the UN Committee said that the age of criminal responsibility (currently eight in Scotland) must be made higher.[251]

325. Article 40(3)(a) of the UNCRC requires States to establish "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law".[252] The UN Committee considers it not to be internationally acceptable for a minimum age of criminal responsibility to be set below the age of 12 years.[253]

326. In December 2008, the Scottish Government published a consultation on its response to the UN Committee's concluding observations. This included specific

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[249] See written answer of 31 August 2009 by Kenny MacAskill to S3W-26275. Available at: http://www.scottish.parliament.uk/Apps2/Business/PQA/Default.aspx

[250] Policy Memorandum, paragraph 191.

[251] Scottish Government. (2008) *UN Convention on the rights of the child: UK Concluding Observations 2008*, paragraph 108. Available at: http://www.scotland.gov.uk/Publications/2009/01/27155153/0

[252] United Nations. (1989) *Convention on the Rights of the Child*. Available at: http://www2.ohchr.org/english/law/crc.htm#art40

[253] United Nations Committee on the Rights of the Child. (2007) *General Comment No.10 (2007) Children's rights in juvenile justice*. Available at: http://www2.ohchr.org/english/bodies/crc/docs/GC10_en.doc

reference to the age of criminal responsibility and invited responses on this issue.[254]

327. In October 2000, the Scottish Law Commission ("the SLC") was asked by the Scottish Ministers to look at the rules on the age of criminal responsibility, including the rule (contained in section 41 of the 1995 Act) which presumes that a child under the age of eight cannot be guilty of any offence. In its report, published in January 2002, the SLC made the following principal recommendations—

> "1. Any rule (whether at common law or statutory) on the age at which children cannot be found guilty of an offence should be abolished.
>
> "2. The existing statutory provisions which place restrictions on the prosecution of children under 16 should be retained subject to an amendment to the effect that a child under the age of 12 cannot be prosecuted.
>
> "3. It should be competent to refer a child to a children's hearing under section 52(2)(i) of the Children (Scotland) Act 1995 notwithstanding that because of his age the child cannot be prosecuted for the offence.
>
> "4. None of the provisions in the Act shall apply in respect of the conduct of a child committed prior to the date on which the Act comes into force or to any prosecution commenced prior to that date."[255]

328. The Policy Memorandum claims that the Bill implements the main recommendations of the SLC report by introducing a prohibition on the prosecution of children under 12 in the criminal courts. However, "the SLC's recommendation to abolish the existing conclusive presumption in relation to under 8s is not taken forward"; nor is the current age-limit increased.[256]

329. The result is that, under the Bill, children aged between eight and 11 will continue to be treated as capable of committing criminal offences but will not be capable of being prosecuted in the criminal courts. Instead, they will, where appropriate, be referred to a Children's Hearing. The prosecution of children aged between 12 and 15 will remain a decision entirely for the Lord Advocate.

Evidence received

330. The Committee received several written submissions which expressed support for the proposal to raise the minimum age at which children may be prosecuted.[257]

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[254] Scottish Government. (2008) *Improving the Lives of Children in Scotland - are we there yet?* Available at: http://www.scotland.gov.uk/Publications/2008/12/18090842/0

[255] Scottish Law Commission. (2002) *Report on Age of Criminal Responsibility*. Available at: http://www.scotlawcom.gov.uk/downloads/rep185.pdf

[256] Policy Memorandum, paragraph 192.

[257] Action for Children Scotland; Children in Scotland; COSLA; ADSW. Written submissions to the Justice Committee.

331. Children 1st welcomed the proposed increase to 12 but commented that this was “the bare minimum and still leaves Scotland with a low age in comparison to many other European states.”[258]

332. Dr Jonathan Sher of Children in Scotland argued that 16, not 12, should be both the age of criminal responsibility and the age of criminal prosecution—

> “That would dovetail with other things that already exist. The children’s hearings system, by and large, operates until the age of 16. Polmont young offenders institution starts to take offenders at the age of 16. Looked-after and accommodated children continue to be so until they age out at 16. Even if 16 is somewhat arbitrary, it is at least consistent with other laws relating to age and the perception of responsibility.”[259]

333. The Scottish Centre for Crime and Justice Research (SCCJR) generally welcomed the changes proposed, but noted that they fell short of the Scottish Law Commission’s recommendations—

> “The Bill proposes that 8 years would be retained as the age below which children are incapable of committing crime; 12 would be introduced as the age below which children can no longer be prosecuted and 16 would remain as the (usual) age of automatic referral to the adult system. The only difference, then, is the inability to prosecute those children aged eight, nine, ten and eleven.”[260]

334. James Chalmers described as a “surprising omission” the decision not to implement the Scottish Law Commission recommendation to abolish the rule that no child under the age of eight can commit a criminal offence—

> “This is because there might be circumstances in which a child under that age had committed a crime, ought therefore to be referred to a children’s hearing, and could not be referred on any other ground (as in *Merrin v S* 1987 SLT 193). The Commission noted that virtually all consultees who had responded to the proposals in their Discussion Paper on this point agreed with this proposal (*Report*, para 3.24).”

335. Mr Chalmers concluded that “in the absence of good reason to the contrary – this recommendation should be implemented in the Bill.”[261]

336. The Scottish Children’s Reporter Administration (SCRA) expressed its support for the Scottish Government’s proposals on the grounds that the children’s hearings system is able to ensure that children get the most appropriate form of intervention and support, while addressing concerning behaviour. However, the SCRA cautioned that—

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[258] Children 1st. Written submission to the Justice Committee.
[259] Scottish Parliament Justice Committee. *Official Report, 26 May 2009,* Col 1945.
[260] Scottish Centre for Crime and Justice Research. Written submission to the Justice Committee.
[261] James Chalmers. Written submission to the Justice Committee.

> "if the [children's hearings] system is to deal with the small number of very serious offences committed by 8-12 year olds it must be properly resourced and interventions must be focused and effectively delivered."[262]

337. The office of Scotland's Commissioner for Children and Young People (SCCYP) was also generally supportive, but with reservations—

> "We believe that the Bill in its current form would continue to allow for children between 8 and 11 years of age to face 'criminal' consequences despite the new minimum age for prosecution set at 12. With section 41 [of the 1995 Act] retained in its present form, disposals of the welfare-based Children's Hearing relating to this age group count as a conviction for the purposes of the Rehabilitation of Offenders Act 1974."[263]

338. Maire McCormack, for the SCCYP, explained further—

> "If a child accepts an offence ground or that is established, there are serious implications under section 3 of the Rehabilitation of Offenders Act 1974. Our office has evidence that there are implications later in life for children who accept such grounds, because the information is still carried when they are looking for employment or want to go to college. The fact that they accepted a ground as a young child can come back to haunt them."[264]

339. A child dealt with by the welfare-based Children's Hearing System could therefore still "have a criminal record if they and their relevant adult accept an offence ground or an offence ground is established by a Sheriff". As a result, "questions would therefore remain as to whether the age of criminal responsibility has actually been raised – it could be argued that in terms of the criminal consequences for children who commit offences this remains at the unacceptably low level that is at present."[265]

340. SCCYP suggested that section 41 of the 1995 Act should be repealed and "a new non-offence ground should be introduced to allow for children under 12 to be referred to the Children's Hearing so that their behaviour and their needs can be addressed without the prospect of 'criminal' consequences."[266]

341. The Law Society of Scotland also proposed the creation of a new non-offence ground for referral to a Children's Hearing, suggesting it could be—

> "along the lines of 'the child has behaved in such a way as to cause (or risk causing) harm to himself/herself or another person or damage to property' … The benefits of this proposal would be that the child would not carry the taint

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[262] Scottish Children's Reporter Administration. Written submission to the Justice Committee.

[263] Scotland's Commissioner for Children and Young People. Written submission to the Justice Committee.

[264] Scottish Parliament Justice Committee. *Official Report, 26 May 2009*, Col 1944.

[265] Scotland's Commissioner for Children and Young People. Written submission to the Justice Committee.

[266] Scotland's Commissioner for Children and Young People. Written submission to the Justice Committee.

> of criminality for the rest of his or her life and that he or she would receive early intervention."[267]

Committee conclusions

342. **The Committee recognises that there are various ways of addressing concerns about the fact that Scots law allows children as young as eight to be regarded as criminally liable and prosecuted through the courts, when a minimum age of 12 is recommended by the UN Committee. However, we remain unclear why the Scottish Government has opted for raising the minimum age at which a child may be prosecuted, rather than also abolishing the rule of law on the age at which children cannot be guilty of an offence (as the Scottish Law Commission recommended). An alternative, suggested by SCCYP, would have been to raise that age from eight to 12, and then to provide for a new "non-offence" ground to enable children below 12 to be referred to a Children's Hearing in cases where other grounds for referral do not apply. We find it difficult to assess whether the approach adopted in the Bill is the best available option without a fuller explanation of the Scottish Government's reasoning. While we recognise that the difference between the various approaches may be mostly theoretical, it would be useful to know how far the Scottish Government's choice of approach was based on practical considerations, such as whether it would permit retention of children's forensic data, or how offences committed by children would be recorded (and what implications this might have for their future prospects).**

343. **We recognise that children under 12 can sometimes do terrible things, and if there is to be a statutory ban on criminal prosecution in all such cases, it would be useful to have an assurance from the Cabinet Secretary that there is a sufficient range of disposals available within the children's hearings system.**

344. **We note that the Bill does not change the existing situation in which the option of referring children to a Children's Hearing on the ground that they have committed an offence is unavailable for a child under the age of eight. We note that the Scottish Government intends to bring forward a Children's Hearings Bill in the near future and we trust that this issue will be properly and fully considered in that context.**

345. **On the question of whether 12 is the appropriate age threshold (either for being deemed capable of committing a crime, or for being liable to prosecution), we have no settled view. We recognise that any age is, to some extent, arbitrary, but there may be merit in having some consistency with age-limits in other relevant statutory contexts. We are conscious, in particular, that the new Sexual Offences (Scotland) Act sets an age threshold of 13 for the definition of various sexual offences against young children, and we suggest that the Scottish Government could do more to explain why the same age was not adopted in the current context.**

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[267] Law Society of Scotland. Written submission to the Justice Committee.

Sections 58-60: Retention and use of samples etc.

Background

346. Sections 58-60 of the Bill extend the powers of the police to keep forensic (primarily, DNA and fingerprint) data in a way that is consistent with the European Convention on Human Rights.

347. The Policy Memorandum explains that where a person has been convicted in court of any offence, there is currently a power to retain his or her forensic data indefinitely. In addition, since January 2007, where a person has been proceeded against but not convicted in court of certain sexual or violent crimes, the person's DNA can be retained for a period of three years, with discretion for the chief constable to apply to a sheriff for extensions of up to two years at a time. The Bill extends this latter arrangement to the retention of fingerprints and to certain cases within the children's hearings system.

348. In the recent case of *S and Marper v. the United Kingdom,* the European Court of Human Rights held that the DNA retention policy in England and Wales, which allows indefinite retention of DNA and fingerprint data taken from a suspect, regardless of whether the suspect was convicted or even charged, was incompatible with Article 8 of ECHR (respect for privacy and family life). In so doing, the court contrasted this with the present arrangements in Scotland, on which it commented favourably.

349. In 2007, the Scottish Government asked Professor James Fraser, the Director of the Centre for Forensic Science at Strathclyde University and Chair of the European Academy of Forensic Science, to review the operation and effectiveness of the legislative regime governing police powers regarding the acquisition, use and destruction of forensic data. In September 2008, the Scottish Government published the Fraser report together with a consultation on the issues it raised. This work formed the basis of the provisions that have been included in the Bill.[268]

350. Section 58 authorises the retention of fingerprints and any other forensic data already taken from persons proceeded against but not convicted of a serious sexual or violent offence. Data would not have to be destroyed for at least three years, and the relevant chief constable would have discretion to apply to a sheriff for extensions of up to two years at a time. This would bring the law on the retention of fingerprints and other forensic data into line with current law on DNA retention.

351. Section 59 would authorise the retention of forensic data taken from children who are dealt with by the children's hearing system for committing relevant violent or sexual offences, again for a period of three years with the possibility of subsequent extensions of up to two years if authorised by a sheriff. The list of relevant offences is to be prescribed by statutory instrument made under the affirmative procedure.

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[268] Policy Memorandum, paragraph 296. The Scottish Government consultation (including the Fraser report) is available at http://www.scotland.gov.uk/Publications/2008/09/22154244/0.

352. In addition, section 60 specifies that retained forensic data may only be used for the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution; or for the identification of a deceased person or a person from whom the data originated. This is to provide clarity and better comply with the ECHR.

Evidence received – general responses
353. Responses to the proposals contained in the Bill were few and generally favourable, although some specific issues were raised.

354. The Nuffield Council on Bioethics supported the proposal to bring the law on the retention of fingerprints and other forensic data into line with existing law on DNA retention.[269]

355. GeneWatch argued that samples should be destroyed once DNA profiles have been obtained and loaded onto the DNA database because it is only the profile that is necessary for the purposes of future identification. GeneWatch also urged the Committee to consider putting the weeding rules for records relating to old and minor offences on a statutory basis, "with a view to improving public trust in the system of oversight for police records and linked forensic data".[270]

356. Professor Fraser, in oral evidence to the Committee, said that he was satisfied that the proposals in the Bill achieved an appropriate balance between law enforcement and the rights of individuals—

> "The main issue relates to the retention of samples from unconvicted people. Proportionality is a tricky issue, because there are not many data to allow detailed analysis. However, when I considered the three-year period, the available data showed that a considerable number of people reoffended during the period. That was a fairly short period, and the study related to serious offences, so the retention struck me as reasonable and balanced."[271]

Alternatives to prosecution
357. ACPOS was concerned that the Bill failed to address what ACPOS saw as an oversight in the current law, which allows samples to be retained only where "criminal proceedings … were instituted" but no conviction was obtained. Since no criminal proceedings are instituted in cases where offenders are offered alternatives to prosecution (such as fiscal fines or fixed penalty notices), it is currently not possible for forensic data taken from such offenders to be retained.[272]

358. Asked to comment on this, Professor Fraser said—

> "The issue of direct disposals came up, and was referred to in my report, but I did not feel that I had the data to make any real sense of that. It strikes me that the purpose of such disposals is the speedy administration of justice. That purpose had not previously taken DNA into account, and I felt that the

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[269] Nuffield Council on Bioethics. Written submission to the Justice Committee.
[270] Genewatch UK. Written submission to the Justice Committee.
[271] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Col 1995.
[272] ACPOS. Written submission to the Justice Committee.

> issue merited more research and more consideration, so I did not express a view."[273]

359. Tom Nelson, Scottish Police Services Authority, supported Professor Fraser's view and added—

> "An opportunity may have been missed; we need to be careful, and more work is needed. If more cases take the road of alternatives to prosecution, I will be concerned about losing opportunities to get people's DNA profile and check it against the DNA database. A lot more work needs to be done in this area."[274]

360. When asked about the same issue, the Cabinet Secretary for Justice said that the Scottish Government was considering whether there was a case for an amendment at Stage 2 to address this issue.[275]

Retention of samples etc. from children

361. The Nuffield Council on Bioethics recommended that, when considering requests for the removal of children's DNA profiles and the destruction of their samples, "there should be a presumption in favour of the removal of all records, fingerprints and DNA profiles, and the destruction of samples".[276] Children 1st also argued in favour of a strong presumption against the retention of samples from children.[277]

362. The Law Society of Scotland submitted that it was not appropriate as a matter of principle to retain DNA and fingerprints from children who are dealt with by Children's Hearings as opposed to the criminal courts.[278]

363. The Information Commissioner's Office said that, while its preferred position was for no change to the current position, it recognised that—

> "an element of retention would provide a balance between the public interest in retaining relevant material of those who have committed violent or sexual crimes and the recognition that offences committed by children may not be replicated in adulthood. The proposal contained within section 59 of the Bill reflects that balance."[279]

364. Professor Fraser explained the basis for his conclusion on this issue—

> "My recommendation was that a sample should be retained if the child accepted that he had committed, or was found by a sheriff to have committed, an offence in the narrow category of serious sexual and violent offences. Because the numbers involved are small, and because the offences are serious and involve some sort of judicial proceedings—that is,

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[273] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Cols 1995-6.
[274] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Col 1996.
[275] Scottish Parliament Justice Committee. *Official Report, 23 June 2009,* Cols 2201-2.
[276] Nuffield Council on Bioethics. Written submission to the Justice Committee.
[277] Children 1st. Written submission to the Justice Committee.
[278] Law Society of Scotland. Written submission to the Justice Committee.
[279] Information Commissioner's Office. Written submission to the Justice Committee.

> some process whereby the child is represented—I feel that the recommendation strikes a good balance between looking after the welfare of the very small number of children involved and public protection."[280]

365. The Scottish Children's Reporter Administration accepted that it may be necessary to retain DNA and other forensic evidence from a child but considered that there should be a judicial process, separate from the children's hearings system, to determine whether there is a clear and justifiable reason for doing so.[281]

366. Similarly, the office of Scotland's Commissioner for Children and Young People (SCCYP) argued that the automatic retention of the DNA profile of children dealt with by a Children's Hearing for a qualifying offence was "disproportionate" and that a sheriff should only approve retention subject to the following five conditions—

> "(1) the child has been referred on an offence ground; (2) the offence is one of a list of 'trigger offences' to be specified in the Bill; these should be serious violent and sexual offences; (3) the child and their relevant adult have accepted the ground, or it has been established by a sheriff; (4) the police or another relevant agency has made an application to the sheriff for an order to retain the child's DNA for a period of up to three years; and (5) the sheriff makes a decision based on the risk that the child poses to public safety."[282]

List of specified offences

367. Maire MacCormack, representing SCCYP, expressed concern that the Bill itself did not specify those offences that would trigger retention of children's samples—

> "The Bill talks about 'sexual and violent offences', but that is a broad spectrum and it does not define what those offences are. I know that a working group will be set up to look into that, but we need to consider the definitions."[283]

368. The Law Society of Scotland also expressed concern that the list of prescribed offences is to be made by statutory instrument, albeit under affirmative procedure, "rather than placed on the face of the Bill".[284]

369. The SCRA submitted that if a list of relevant offences is to be produced, it should be developed by an expert working group "representing all interests, including those of children and young people themselves".[285]

370. Questioned on this point, the Cabinet Secretary said that the Scottish Government would consult the forensic data working group and would ensure that

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[280] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Col 1998.

[281] Scottish Children's Reporter Administration. Written submission to the Justice Committee.

[282] Scotland's Commissioner for Children and Young People. Written submission to the Justice Committee.

[283] Scottish Parliament Justice Committee. *Official Report, 26 May 2009,* Col 1956.

[284] Law Society of Scotland. Written submission to the Justice Committee.

[285] Scottish Children's Reporter Administration. Written submission to the Justice Committee.

"appropriate people from a variety of backgrounds" were involved in drawing up the list of relevant offences.[286]

Committee conclusions

371. **The Committee agrees with the Scottish Government that it is sensible to enable fingerprint data and other forensic data to be subject to the same ECHR-compatible retention regime as DNA data.**

372. **We are less certain about whether the current provisions in the Bill should be extended to cover forensic data taken from people who are then offered alternatives to prosecution. We certainly would not support any change that would result in the police being required or expected routinely to take samples in situations where, at present, fixed penalties or fiscal fines can be imposed with minimal time and bureaucracy. However, we also recognise the logic of saying that, where a sample has already been taken from an individual in connection with an offence, the decision to offer an alternative to prosecution rather than institute criminal proceedings should not be sufficient to determine whether the forensic data can subsequently be retained. We would therefore look forward to a Stage 2 amendment that would allow for the retention of data in such circumstances. However, in considering the terms of any such amendment, particularly the duration of retention provided for, we would wish to ensure that an appropriate balance was struck between considerations of consistency and proportionality.**

373. **In relation to the retention of forensic data taken from children referred to a Children's Hearing, we are sympathetic to the broad outline of what is proposed, but uncomfortable with the fact that the Bill leaves unspecified the sexual or violent offences that would enable the retention of data in such cases. We take the view that retention of DNA and other data from children would be required only in a small proportion of cases, probably involving serious violent or sexual crimes. We note both the evident difficulties the Scottish Government has in defining the list of relevant offences satisfactorily and concerns that the children's hearing system is not equipped to determine such questions. It would be helpful if the Scottish Government would provide us with its view of the suggestion by SCCYP that retention should only be on application to a sheriff.**

374. **The Committee is conscious that the retention of DNA and other evidence, particularly from children and from persons not convicted of significant crimes, can raise issues under Article 8 of ECHR and requires a proportional approach. We note both the suggestion by the Nuffield Council on Bioethics that there should be a presumption in favour of the removal of all records, fingerprints and DNA profiles, and the argument by Genewatch that DNA samples should be destroyed once DNA profiles have been obtained, and would seek the comments of the Scottish Government on these matters.**

375. **We would therefore expect the Scottish Government to report in the Stage 1 debate on its position on these matters and on progress with the**

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[286] Scottish Parliament Justice Committee. *Official Report, 23 June 2009,* Col 2202.

forensic data working group and, ideally, commit to providing us with a draft list of proposed relevant offences before Stage 2.

PART 4 – EVIDENCE

Section 62: Witness statements: use during trial

Background and evidence received

376. Under section 62, courts would be able to allow witnesses to refer to prior statements while giving evidence. This is related to section 40, which allows the prosecutor to give the witness a copy of his or her written statement in advance of giving evidence in court. The Policy Memorandum explains that it is intended "to ensure fairness for witnesses in giving evidence in criminal cases" and that it had been generally supported by those who contributed to Lord Coulsfield's review of the law and practice of disclosure.[287]

377. The provision was supported by the Solicitor General for Scotland who said it would reduce the length of trials by reducing time spent on questioning witnesses, and would improve the criminal justice process by enabling witnesses to point out any inaccuracies in their statements. He also argued that many trials can become "a memory test for witnesses", pointing out that witnesses are often questioned in court on statements they may have made many years earlier—

> "If they cannot remember precisely what they said or if they say something slightly different, they will be accused of being inconsistent. It seems unfair that the only person in a prosecution who cannot see the statement before the trial is the witness who gave the statement in the first place."[288]

378. The Solicitor General also explained that police officers are already allowed to refer to their notebooks, which may contain their own statements, while giving evidence, and that this provided a precedent for allowing witnesses also to refer to their statements during trials. Similar arrangements were also made in other jurisdictions, including England and Wales.

379. However, the Judges of the High Court of Justiciary said that section 62 gave "real cause for concern". They explained that prior statements given by civilians (as opposed to police officers or expert witnesses) are written down by the investigating police officer and may not accurately reflect what the witness actually said; partly for this reason, the Scottish courts have normally accorded them much less weight than oral evidence given from the witness box.

380. In the judges' view, there was "a real danger that the new provision will encourage a greater reliance to be placed on the contents of police statements, as opposed to a witness' recollection of what happened and that this may complicate and lengthen trials."[289] They also suggested the provision was unnecessary—

> "In our opinion, the limited circumstances in which the common law and the provisions of section 260 of the [1995] Act enable the Court to allow

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[287] Policy Memorandum, paragraphs 200-1.

[288] Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Cols 2070-1.

[289] Judges of the High Court of Justiciary. Written submission to the Justice Committee.

> reference to prior statements are more than sufficient to ensure that a witness can be questioned as to the contents of a prior police statement should the interests of justice require that to happen."[290]

381. The Sheriffs' Association noted that there are at present four situations in which prior statements of witnesses other than the accused may be used during a trial—

> "One is where the evidence of the witness is inconsistent with a prior statement (s. 263(4) of the 1995 Act). The purpose is at least to challenge the credibility and reliability of the witness and also in the hope that the witness might accept the truth of the prior statement. Any part of the prior statement becomes evidence only in so far as the witness accepts it to be the truth. The second is where the witness adopts a prior statement in a document of which the witness was the originator as his or her evidence in court (s. 260). The third is where a witness cannot remember everything, accepts that he or she made a prior statement to someone and accepts that if he or she said what he or she is alleged to have said, it must be the truth. In that case the person to whom the statement was made may give evidence of it and it becomes part of the evidence of the witness: *Jamieson v. HM Advocate,* 1994 J.C. 251; 1994 S.C.C.R. 610. The fourth is where the statement was recorded by the witness at the time of the incident to which it relates and is used to refresh the memory of the witness."[291]

382. According to the Association, section 62 "will lead to a number of appeals to define its parameters". Its view was that, if the present common law position is to be changed, then this should be in accordance with Lord Coulsfield's recommendation – namely, that witnesses should only be supplied with prior statements taken by the police that they read and signed at or close to the time when the statement was taken.[292]

383. The Law Society of Scotland was also opposed to the proposals, largely because of concerns about the accuracy of prior statements and because "material discrepancies between statements given to the police and evidence given in court at a later date can call into question the credibility and reliability of a witness".[293] As Bill McVicar of the Society put it in oral evidence—

> "The problem is that the statement will not be the words of the witness. Having asked witnesses countless times about the statements that they have given to the police and whether what is contained in those statements is right, I can say that, unless almost every witness in the universe is telling lies about it, the police tend not to write down exactly what the witness has said."[294]

384. Ian Duguid, representing the Faculty of Advocates, expressed complete opposition to the provisions. He explained that although a statement recorded by

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[290] Judges of the High Court of Justiciary. Written submission to the Justice Committee.
[291] Sheriffs' Association. Written submission to the Justice Committee.
[292] Sheriffs' Association. Written submission to the Justice Committee.
[293] Law Society of Scotland. Written submission to the Justice Committee.
[294] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Col 1991.

a police officer is admissible in court, a statement taken by a legally qualified solicitor from a witness for the defence is called a precognition, which is inadmissible in accordance with the practice of the courts—

> “The difficulty immediately arises that the prosecution is placed at an extreme advantage over the defence. The question arises whether the provision will ever be sustained as a matter of fairness to the accused. If prosecution witnesses can have a statement in front of them and read it out, and defence witnesses have no such facility, is that a recognition that defence witnesses are in a different position to prosecution witnesses? Of course it is not.”[295]

Committee conclusions
385. **The Committee was unable to reach consensus on the merits of this provision. On the one hand, we can understand why it seems anomalous that a witness, almost alone among those taking part in a trial, does not have access to the statement he or she made at the time the offence was investigated (which may have been months or even years previously). On the other hand, we understand the concerns expressed in evidence about the accuracy of these statements, and the risk of exacerbating a difference of treatment between prosecution and defence witness statements. We would therefore appreciate clarification from the Scottish Government on its justification for this provision, particularly in view of the strong reservations expressed in evidence from the legal profession and the judiciary.**

Section 63: Spouse or civil partner of accused a compellable witness

Background
386. Under section 264 of the Criminal Procedure (Scotland) Act 1995, the spouse of an accused person is always a competent witness, but is only a compellable witness for the prosecution or for a co-accused where (by virtue of the common law) he or she was a victim of the offence charged. As a result, a married parent can, for example, decline to give evidence against a spouse accused of abusing their child. Civil partners are given similar protection against compellability by section 130 of the Civil Partnership Act 2004.

387. Section 63 of the Bill replaces these existing provisions with a new section in the 1995 Act specifying that the spouse or civil partner of an accused is both a competent and a compellable witness in all circumstances. The Policy Memorandum states that the current law has caused difficulty, particularly where the crime is against a child and there is important and material evidence that could have been obtained from a spouse. It says that, in some cases, accused persons have married partners in order to ensure they cannot give evidence against them.[296]

Evidence received
388. ACPOS was supportive of the change, saying that many offences where spouses or civil partners are competent witnesses occur in the family home where

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[295] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Col 1990.
[296] Policy Memorandum, paragraph 318.

their evidence could be crucial for a conviction. This provision, in ACPOS's view, will ensure that children are better protected by the criminal justice system.[297]

389. Victim Support Scotland supported the principle, particularly in cases of serious and organised crime, but suggested that the value of using evidence from a spouse or partner should be subject to a test of proportionality and risk assessment in order to "protect the integrity of the family".[298] South Lanarkshire Council was also supportive in principle but sought assurances that sufficient safeguards would be put in place to protect individuals who may be subject to abuse or threat by a spouse or partner.[299]

390. North Lanarkshire Council went further, arguing that compelling people to give evidence against their spouses or partners could place them at greater risk. Pointing out that the vast majority of currently "non-compelled" witnesses are women experiencing domestic abuse, the Council said that if a woman in those circumstances is compelled to give evidence and refuses, she could be held in contempt of court and be classed as an offender herself. In the Council's view, this would present her with a "Hobson's choice" that had no place in a modern justice system.[300]

391. The Law Society of Scotland also opposed the provision, primarily because it ignored the "long-established purpose behind the rule on compellability … which attaches to the status of marriage and the risk of perjury by the spouse". Experience suggested that people were only rarely prepared to give evidence against their spouses or partners even when compelled to do so by law. The Society suggested that a fairer approach would be to bring the law in Scotland in line with that in England and Wales, where the spouse or civil partner of an accused is a compellable witness for the prosecution only where the offence is one of personal violence against the spouse or civil partner or a child under the age of 16, a sexual offence against such a child, or related offences of attempt, conspiracy etc. in relation to those offences.[301]

Committee conclusions

392. **The Committee understands the underlying rationale for this provision, but acknowledges the concerns raised in evidence that removing entirely the current limits on compellability, and hence making persons who refuse to give evidence against their spouses or partners liable to a charge of contempt of court, risks putting them in an invidious position in certain circumstances. We therefore invite the Scottish Government to explain further its approach in the light of the evidence received.**

Section 66: Witness anonymity orders

Background and evidence

393. The purpose of section 66 is to replicate the regime established in England and Wales by the Criminal Evidence (Witness Anonymity) Act 2008, which

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[297] ACPOS. Written submission to the Justice Committee.

[298] Victim Support Scotland. Written submission to the Justice Committee.

[299] South Lanarkshire Council. Written submission to the Justice Committee.

[300] North Lanarkshire Council. Written submission to the Justice Committee.

[301] Law Society of Scotland. Written submission to the Justice Committee.

enables the courts to grant “witness anonymity orders” in appropriate cases. The Bill for this Act was introduced by the UK Government on an emergency basis in response to the decision of the House of Lords to quash the conviction in the case of *R v Davis* [2008] UKHL 36, on the basis of its concerns over the use of anonymous witnesses.[302]

394. In their written submission, the Judges of the High Court of Justiciary agreed that it was appropriate to provide a statutory basis for the powers of Scottish courts to permit witnesses to give evidence anonymously—

> “It would be unsatisfactory to leave the matter to be governed by the common law in Scotland when the House of Lords has held that no such common law power exists in England and Wales. Although not directly applicable in Scotland, the decision in *Davis* may be thought to have introduced a measure of uncertainty about the position here.”[303]

395. According to the Crown Office, protective measures such as those referred to in section 66(4) of the Bill had been used before in Scotland; nevertheless, following the House of Lords decision, “the current position is that no guarantee can be given to witnesses that there are steps which can be taken to protect their identity.”[304]

396. Questions were also raised about the drafting of this section of the Bill. The Judges of the High Court of Justiciary queried one of the tests for a witness anonymity order set out in inserted section 271Q, namely that “the witness would not testify if the proposed order were not made” (Condition D)—

> “Taken literally, this condition might be thought to be almost impossible to satisfy since any witness is obliged to testify when validly cited and called upon so to do. The point might be met by making it clear that the condition is to the effect that the witness would not willingly testify if the proposed order were not made.”[305]

397. The SCDEA also had concerns about the drafting of condition D—

> “It would appear however, from the way in which this condition is framed, that it may present a barrier to those willing witnesses who may be denied anonymity only because they are willing to testify.”[306]

Committee conclusion

398. **The Committee accepts the rationale for this provision, but would invite the Scottish Government to reflect on the drafting in the light of the points raised by witnesses.**

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[302] Policy Memorandum, paragraph 331.

[303] Judges of the High Court of Justiciary. Written submission to the Justice Committee.

[304] COPFS. Written submission to the Justice Committee.

[305] Judges of the High Court of Justiciary. Written submission to the Justice Committee.

[306] Scottish Crime and Drug Enforcement Agency. Written submission to the Justice Committee.

PART 5 – CRIMINAL JUSTICE

Section 68: Upper age limit for jurors

Background and evidence

399. Section 68 raises the upper age limit for sitting on a jury in criminal cases in Scotland from 65 to 70, bringing the position in Scotland in line with the rest of the UK. The aim is to enlarge the pool of potential jurors by around 200,000 and ensure that, as the demographic profile of Scotland changes, juries are drawn from a wider age range.[307]

400. Although the Judges of the High Court of Justiciary supported this move, they pointed out that the upper age limit for jurors in civil trials would remain unchanged at 65—

> "While we appreciate that the scope of the Bill does not extend to civil as opposed to criminal procedure, we would observe that it may be thought to be anomalous to have different age limits for jurors in criminal and civil cases."[308]

401. The Law Society of Scotland also raised no objection to the proposal, while stressing the importance of considering the age balance of jury composition.[309]

Committee conclusion

402. **We endorse this provision, so far as it goes, but note that it will create an inconsistency in terms of the upper age limit for jurors in criminal and civil trials. While we recognise that this cannot be addressed through the present Bill, we recommend that the Scottish Government address this through separate legislation at the earliest practical opportunity.**

Section 70: Data matching for detection of fraud etc.

Background

403. The National Fraud Initiative is a data matching exercise conducted for the purpose of assisting in the prevention and detection of fraud. It already operates on a non-statutory basis in Scotland and has identified around £37 million of fraud and error in Scotland and led to over 75 prosecutions. The Serious Crime Act 2007 provided a statutory basis for the National Fraud Initiative in England, Wales and Northern Ireland, and the purpose of section 70 is to make similar provision for Scotland. This involves giving Audit Scotland the power to conduct data matching exercises on its own accord, or to arrange for such exercises to be conducted on its behalf.[310]

404. Data matching involves the use of computerised techniques to compare information about individuals held by different public bodies, and on different

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[307] Policy Memorandum, paragraph 358.

[308] Judges of the High Court of Justiciary. Written submission to the Justice Committee.

[309] Law Society of Scotland. Written submission to the Justice Committee.

[310] Policy Memorandum, paragraphs 362-3.

financial systems, to identify circumstances (matches) that might suggest the existence of fraud or error.[311]

405. An Audit Scotland report on the National Fraud Initiative was considered by the Audit (now Public Audit) Committee in May 2008. The Committee agreed to note the report and to write to the Cabinet Secretary for Justice to request that legislation providing explicit data matching powers for Audit Scotland be brought forward at the earliest opportunity.[312]

Evidence received

406. In evidence to the Committee, Audit Scotland explained that data matching exercises have been carried out by the Audit Commission in England for some years using auditors' powers to obtain information from audited bodies and others for the purposes of their audit—.

> "Without similar explicit powers in Scotland, Audit Scotland would have to continue to rely on its existing powers to obtain the relevant information. These powers are not consistent across the different parts of the public sector and do not allow for cross border matching. … In the absence of similar clear legislation in Scotland it will undoubtedly be the case that fraud and error will be less likely to be detected in the public sector in Scotland than elsewhere in the United Kingdom and cross border cases will not be detected at all."[313]

407. The proposals were also supported by the Information Commissioner's Office (ICO)—

> "We welcome the clarification of practice in Scotland and note the attention paid to protection of privacy within this section of the Bill which is particularly important given the breadth of information which may be sought by Audit Scotland in fulfilment of this function. We also welcome the requirement that Audit Scotland produce a data matching code of practice and that the ICO must be consulted prior to its publication and subsequent amendments."[314]

Section 82: Compensation for miscarriages of justice

Background

408. Section 133 of the Criminal Justice Act 1988 provides for a scheme of compensation for miscarriages of justice which, in Scotland, is operated by the Scottish Ministers. There is also a non-statutory *ex gratia* scheme dating from 1986, and the main purpose of section 82 of the Bill is to put that on a statutory footing by making provision for it within the existing statutory scheme. Accordingly, Scottish Ministers are given the power, by order, to provide for the circumstances in which compensation may be paid for a miscarriage of justice (or

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[311] Audit Scotland. National Fraud Initiative. Available at: http://www.audit-scotland.gov.uk/work/nfi.php

[312] Scottish Parliament Public Audit Committee. Minute of Proceedings, 28 May 2008. Available at: http://www.scottish.parliament.uk/s3/committees/audit/mop-08/aumop08-0528.htm

[313] Audit Scotland. Supplementary written submission to the Justice Committee.

[314] Information Commissioner's Office. Written submission to the Justice Committee.

for wrongful detention, or a decision by the prosecutor not to take or to discontinue proceedings).

Subordinate Legislation Committee report

409. The Subordinate Legislation Committee (SLC), in its report on the Bill, questioned why the *ex gratia* scheme was to be provided for in subordinate legislation, when the existing scheme was provided for directly in the 1988 Act. It also questioned the scope of the delegated power, which in its view went beyond what was required to achieve the Scottish Government's stated purpose for the provision. The Scottish Government told the SLC that it wished to have flexibility in relation to how it gave statutory effect to the *ex gratia* scheme, but the SLC concluded that "no adequate justification has been given by the Scottish Government for the power to extend the scheme beyond that currently operating".[315]

Committee conclusion

410. **The Committee notes and endorses the concerns expressed by the Subordinate Legislation Committee about the scope of the delegated power proposed. We therefore invite the Scottish Government either to justify that scope by reference to any changes of substance it might wish to make to the existing *ex gratia* scheme in the course of putting it on a statutory basis, or to limit the scope of the delegated power to what is required to replicate the existing scheme without substantial change.**

PART 6 – DISCLOSURE

411. Part 6 of the Bill establishes a statutory framework for disclosure of evidence in criminal proceedings in Scotland.

Background

412. In November 2006, the then Justice Minister, Cathy Jamieson MSP, appointed Lord Coulsfield to review the law and practice of disclosure of evidence in the Scottish criminal justice system. This was prompted by a number of decisions of the Judicial Committee of the Privy Council and of the High Court which redefined and expanded the duty of disclosure, the most important being *McLeod v HMA (No. 2)* [1998] JC 67, *Holland v HMA* [2005] SC(PC) 3 and *Sinclair v HMA* [2005] SC(PC) 28.[316]

413. Lord Coulsfield's final report was published in September 2007. Having consulted on Lord Coulsfield's recommendations, the Scottish Government

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[315] Subordinate Legislation Committee. *Report on the Criminal Justice and Licensing (Scotland) Bill*, paragraphs 51-58.

[316] The Rt Hon Lord Coulsfield. (2007) *Review of the Law and Practice of Disclosure in Criminal proceedings in Scotland*. Available at: http://www.scotland.gov.uk/Publications/2007/09/11092728/0. Further background is set out in the letter from the Cabinet Secretary of 22 October 2009.

published a statement of its intended next steps, including a commitment to bring forward legislation and to develop a statutory Code of Practice.[317]

414. According to the Policy Memorandum the purpose of this Part of the Bill is to "provide certainty in statute as regards how the disclosure of evidence regime should operate", in place of the existing common law system. In particular, the new regime provides—

- "a continuing duty on the Crown to disclose material and relevant information for and against the accused to the defence;
- a statutory definition of that duty and provision for how and when the duty is complied with;
- a duty on the police and other agencies or organisations who investigate crimes and submit reports to the prosecutor to provide the prosecutor with schedules listing all the information which may be relevant to the case obtained during the course of the investigation; and a duty on the prosecutor to disclose to the defence in solemn cases a schedule listing all the information that may be relevant that is categorised as non-sensitive;
- provision for defence statements;
- provision for applications to the court for orders restricting disclosure. In other jurisdictions, these are sometimes referred to as Public Interest Immunity (PII) procedures, designed to allow material which falls within the definition of what requires to be disclosed to be withheld on public interest grounds;
- a new offence of misuse of disclosed information; and
- provision for a statutory code of practice to support the legislative provisions."[318]

Fairness, certainty and clarity

415. The Law Society of Scotland was largely positive about the disclosure provisions—

> "The Society's position is that a full and fair system of disclosure to the accused is an essential element of a fair trial and without such a system there can be no guarantee of an accused person receiving a fair trial."[319]

416. For the Solicitor General for Scotland, the key benefit of the Part 6 provisions was to provide certainty to those involved—

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[317] Scottish Government. (2008) *A Statutory Basis for Disclosure in Criminal Proceedings in Scotland Analysis of responses to Consultation and Next Steps*. Available at: http://www.scotland.gov.uk/Resource/Doc/221066/0059469.pdf

[318] Policy Memorandum, paragraphs 467, 474.

[319] Law Society of Scotland. Written submission to the Justice Committee.

> "The Bill gives us a comprehensive set of rules so that the police and the prosecutor know that if they comply with those rules, they will comply with their disclosure obligations, which will ensure a fair trial in accordance with article 6 of the European convention on human rights."[320]

417. The Crown Office, similarly, described the Bill as providing "for the first time, a clear procedural and legal framework for disclosure within which the police, the Crown and the accused can operate with certainty." This would be complemented by a code of practice which would—

> "set out publicly the procedures to be adopted by investigators and prosecutors which might be thought to be less appropriate for primary legislation such as the conduct of lines of enquiry during an investigation, the detailed responsibilities of key roles in the investigation and prosecution and the consequences for completion of reports and witness statements".[321]

418. The Committee was advised that work had already started in preparing a draft code of practice, and that a copy will be provided as soon as it is available.[322]

419. However, others were doubtful about the level of detail included in the primary legislation. The Judges of the High Court of Justiciary described the style and structure of the drafting of Part 6 as "often unnecessarily complicated and 'user unfriendly'", while the Sheriffs' Association warned of "detailed, complicated and time-consuming rules about disclosure that will further delay trials".[323]

420. Lord Coulsfield had similar doubts. For him, the key was "to state the fundamental duty of the prosecution clearly and in a simple and memorable form at the start of the relevant part of the statute". Instead, he believed that "the provisions of the Bill are much too elaborate and diffuse and tend to confuse rather than clarify the statement of the fundamental duty."[324] He would prefer to see sections 85 to 90 replaced by one or possibly two fairly short and simple sections.[325]

421. The Solicitor General, however, argued that the Bill already contained a clear statement of principle in section 89(3) which requires the prosecutor to review all relevant information and disclose it to the accused where—

> "(a) the information would materially weaken or undermine the prosecution case,
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> (b) the information would materially strengthen the accused's case, or
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> (c) the information is likely to form part of the prosecution case."

422. According to the Solicitor General—

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[320] Scottish Parliament Justice Committee. *Official Report, 9 June 2009,* Col 2073.
[321] COPFS. Written submission to the Justice Committee.
[322] COPFS. Written submission to the Justice Committee.
[323] Judges of the High Court of Justiciary; Sheriffs' Association. Written submissions to the Justice Committee.
[324] Lord Coulsfield. Written submission to the Justice Committee.
[325] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Col 2002.

> “That is a statement of principle—it is our disclosure obligation. It takes into account the most up-to-date and authoritative jurisprudence on the matter from the Privy Council, and it is enshrined in the Bill.”[326]

Sections 86 to 88: Solemn cases: schedules of information

423. Sections 86 to 88 of the Bill create a duty on the police (and other agencies or organisations who investigate crimes and submit reports to the prosecutor) in solemn cases to provide the prosecutor with schedules listing all the information which may be relevant to the case obtained during the course of the investigation. The schedules need to distinguish between information that is “sensitive”, “highly sensitive” and “non-sensitive”, although only “sensitive” is defined in the Bill. If the prosecutor disagrees with the categorisation of any piece of information, he or she will be able to direct that the schedules are amended and re-submitted.[327]

424. Although Lord Coulsfield had recommended a practice, similar to that employed in England, of listing the material to be disclosed in various categories set out in schedules, he was sceptical about how this had been effected in the Bill—

> “The Bill makes the provision of schedules, both by the police to the prosecutor and by the prosecutor to the accused, a statutory requirement. That was not my intention and it is, I think, a serious error. The use of schedules is only a method of carrying out the duty of disclosure. It is an inconvenient and cumbersome method. One should not exclude the possibility that, with experience, better methods may be devised. If any prescription is required, it should be done by a code of practice or by regulation: it is easy to amend a code of practice but much harder to amend a statute. There may even be cases in which it is inconvenient or harmful to use schedules even where adequate disclosure could be made in a different form. In England, the statute does not include any requirement for schedules.”[328]

425. The Judges of the High Court of Justiciary agreed, saying it was not appropriate or necessary to include in the Bill detailed provision about schedules of information, which would be better dealt with administratively—

> “To attempt to address such practical, administrative arrangements by means of detailed provision in primary legislation risks creating an undesirable lack of flexibility and the possibility of raising objections and questions of a highly technical nature.”[329]

426. These points were acknowledged by the Scottish Law Officers. The Lord Advocate said “I certainly agree with the desire to make things as straightforward and simple as possible”, while the Solicitor General accepted that the schedules of

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[326] Scottish Parliament Justice Committee. *Official Report, 9 June 2009,* Col 2073.

[327] Policy Memorandum, paragraph 482.

[328] Lord Coulsfield. Written submission to the Justice Committee. See also Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Col 2001.

[329] Judges of the High Court of Justiciary. Written submission to the Justice Committee.

evidence "could reasonably be taken out of the Bill and put into subordinate legislation or a code of practice".[330] However, he added—

> "I am a great advocate of simplicity, but as I said, disclosure is a complex matter. When you look at the number of relevant provisions and sections in comparison with our disclosure manual from which we operate, they are not overly long or detailed and they give us a comprehensive set of rules or provisions. We know that if we comply with them, we will ensure a fair trial and comply with our disclosure obligations."[331]

427. Chief Constable House, on behalf of the the Assocation of Chief Police Officers in Scotland, said that his main concern in relation to these provisions was the level of police resources that would be required. He cited his experience of the English and Welsh system where "disclosure was a massive drain on police resources" and "it was a monster, to be frank, and one from which England and Wales have stepped back significantly."[332]

428. The Cabinet Secretary agreed to consider whether elements of the provisions could be dealt with in rules of court or in the code of practice, but expressed caution on the grounds that "the duty to disclose is a critical duty and if we were to remove too many provisions we would deprive [the] Parliament of its role in scrutinising the proposals".[333]

429. A separate point raised by the Sheriffs' Association concerned the need for a distinction between "sensitive" and "highly sensitive" information in section 86. The Sheriffs foresaw delays "created by information having to be categorised, the information having to be described, and with inevitable arguments between the prosecutor and the investigating authorities over the correct categorisation".[334]

Committee conclusions

430. **We support the general policy of clarifying the rules of disclosure, and accept that these provisions are motivated by good intentions. However, we agree with Lord Coulsfield that the way in which his recommendations have been given effect in the Bill is too complex and detailed, and risks losing sight of the underlying principle. We would prefer to see the basic duty of disclosure elevated to greater prominence.**

431. **The Committee invites the Scottish Government to review, in the light of Lord Coulsfield's comments, where the line has been drawn between what is set out in the Bill (including provision about schedules of information in solemn cases) and what is to be included the proposed code of practice (or in guidance). We welcome the Crown Office's commitment to provide a copy of the draft code, and look forward to being given sight of it in advance of Stage 2.**

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[330] Scottish Parliament Justice Committee. *Official Report, 9 June 2009,* Cols 2072-3.

[331] Scottish Parliament Justice Committee. *Official Report, 9 June 2009*, Col 2073.

[332] Scottish Parliament Justice Committee. *Official Report, 26 May 2009*, Cols 1920-21.

[333] Letter from Cabinet Secretary for Justice, 22 October 2009.

[334] Sheriffs' Association. Written submission to the Justice Committee.

432. **We also note the evidence by the Sheriffs' Association questioning the need for a distinction between "sensitive" and "highly sensitive" information, particularly when the latter is not separately defined. It would be helpful if the Scottish Government could provide a fuller justification for why this distinction is considered necessary and how it is to be applied.**

Sections 94-95: Defence statements

Background and evidence received

433. Under sections 94 and 95 of the Bill, the accused (or the accused person's defence team) must (in solemn cases) or may (in summary cases) provide the prosecution with a "defence statement" setting out certain details of the planned defence. It is intended that this will assist the prosecution in determining what evidence must be disclosed to the accused.

434. However, there was significant scepticism amongst practitioners about how well the defence statement regime would work and whether it would add very much to the present position.[335]

435. Lord Coulsfield, in his report, said that the experience of English practitioners was that "in the majority of cases, defence statements are late, unspecific and unhelpful", and that it would be difficult to make the system work better through more rigorous enforcement without "either causing delay or prejudicing a legitimate defence or both". In his view, in Scotland the well-established rules for notification of special defences and the relatively new mechanisms for holding pre-trial hearings fulfilled most of the functions expected of defence statements. He was therefore not convinced that a general requirement for defence statements "would give any significant, additional benefit to justify the additional work and cost which would be generated".[336] He maintained this view in evidence to the Committee, saying that—

> "Requiring the preparation of defence statements would have a cost in time and expense, and they could cause confusion and delay and add to complexity in the conduct of trials."[337]

436. For the Law Society of Scotland, a key concern was about the requirement on the accused to lodge a defence statement at least fourteen days before the first diet and at least fourteen days before the preliminary hearing, given the requirements about what such a statement should include—

> "14 days before a preliminary hearing or first diet in the sheriff court, we do not always know the facts that the prosecution will seek to establish. It is difficult to know how the defence will be able to deal with a requirement to set out 'matters of fact on which the accused takes issue with the prosecution'. Furthermore—others have said this and I agree—the danger is that, if the

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[335] Judges of the High Court of Justiciary; Law Society of Scotland. Written submissions to the Justice Committee.

[336] The Rt Hon Lord Coulsfield. (2007) *Review of the Law and Practice of Disclosure in Criminal proceedings in Scotland*. Available at: http://www.scotland.gov.uk/Publications/2007/09/11092728/0

[337] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Col 2003.

> accused has to set things out in the detail that seems to be envisaged, their right to silence will be undermined."[338]

437. The Sheriffs' Association were also concerned about the proposal to make defence statements compulsory in solemn procedure, rather than voluntary as Lord Coulsfield had envisaged. They argued that the timing requirements envisaged could lead to the accused being required to lodge a defence to an indictment before the prosecution has provided any information about the prosecution case, and that this "will no doubt be regarded as repugnant to our legal system" and, as well as being unnecessary, was "contrary to the principles of our law, the right to silence and article 6 of the European Convention of Human Rights".[339]

438. Ian Duguid, for the Faculty of Advocates, was also sceptical, saying that defence statements "are a concept that is particular to the law of England and Wales and are required there because they do not have the procedures that we have". In particular, the Bonomy reforms of 2004 had already put in place a range of procedures, such as a requirement for advance intimation of special defences—

> "We have gone some way towards addressing the issues that defence statements were designed to address in England … so I am curious as to whether a defence statement will do anything over and above what we have, other than increase expenditure."[340]

439. However, the Lord Advocate argued that recent statutory amendments and changes in practice in England and Wales – details of which were later provided in a supplementary submission by the Crown Office[341] – meant that the experience with defence statements was now quite different from that encountered by Lord Coulsfield. Referring to the thousands of documents that can be involved in High Court cases, she argued—

> "To understand what might be relevant or of interest to the defence, it is of considerable help—in establishing the rights of the accused to a fair trial under article 6 of the ECHR—to be able to anticipate in what the defence might be interested. It is not just about assisting the prosecution; it is also about assisting the accused. It's not about prosecution by ambush or surprise – we now disclose all relevant information – but nor should it be about defence by ambush or surprise."[342]

440. The Solicitor General referred to cases he had been involved in where he believed a defence statement would have assisted the prosecution to effectively discharge its duty of disclosure. He argued strongly in favour of making defence statements mandatory—

> "A trial is a test of the prosecution evidence and the defence case, if the defence wants to put forward a case. One would want to identify issues in

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[338] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Col 1989.
[339] Sheriffs' Association. Written submission to the Justice Committee.
[340] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Cols 1987-8.
[341] COPFS. Supplementary written submission to the Justice Committee.
[342] Scottish Parliament Justice Committee. *Official Report, 9 June 2009,* Cols 2074-5.

> advance of the trial because that, in my view, makes for a much better trial. It means that it will not be simply a case of taking a scattergun approach to the evidence: there will be focus to assist the court and the jury, and there will be no excessive delays or long trials. A defence statement is a good thing: it should be mandatory rather than discretionary in order to achieve the purposes that I have articulated."[343]

441. For John Logue of the Crown Office and Procurator Fiscal Service, the Bill's provisions reflected an important point of principle, namely—

> "that it is difficult to conceive of a reason why the defence would, at the stage of being ready to go to trial, be unable to advise anyone of what its case is. After all, as a result of the recent changes, the defence now has fair notice of the entirety of the Crown case to the extent that is required under the law, and the accused is the only person in the process who is able to say at that stage what the defence case potentially is."[344]

Committee conclusions

442. **This is another provision on which the Committee has not been able to reach an agreed and settled view. We understand the rationale presented by the Scottish Government, but we also recognise the concerns expressed by some witnesses. However, the Committee is not currently persuaded that there is merit in the proposal to make defence statements compulsory in solemn cases, as it appears that the timing of their production may risk jeopardising important principles of justice. Some further explanation of the Scottish Government's thinking would therefore be appreciated, including on its reasons for departing from Lord Coulsfield's recommendations on this issue.**

Sections 102-106: Applications to court: orders restricting disclosure

Background

443. Under sections 102-106 the prosecutor may apply to the court for orders to withhold certain information from the accused on the grounds that the information is sensitive. This is sometimes referred to as "public interest immunity". The three categories of order proposed – "non-disclosure orders", "non-notification orders" and "exclusion orders" – are intended to give effect to recommendations made by Lord Coulsfield in his report.

444. A non-disclosure order allows the prosecutor to withhold from the accused an item or items of information specified in the order which would otherwise require to be disclosed. An exclusion order prohibits the accused from attending or making representations in proceedings relating to the application for a non-disclosure order, while a non-notification order prohibits notice being given to the accused of the making of the applications for non-notification, exclusion and non-disclosure orders and also the decisions of the court in relation to any of those applications.[345] An exclusion order may be made with or without a non-notification

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[343] Scottish Parliament Justice Committee. *Official Report, 9 June 2009,* Col 2076.

[344] Scottish Parliament Justice Committee. *Official Report, 9 June 2009,* Col 2077.

[345] Policy Memorandum, paragraph 489.

order also being made, but if a non-notification order is made, an exclusion order must also be made.

Evidence received

445. Ian Duguid, for the Faculty of Advocates, recognised that there would be situations when information would have to be withheld in the public interest, and that a framework had to be provided for this situation. He questioned, however, whether the proposals were balanced, and whether there were enough safeguards for the withholding of information.[346]

446. Speaking for the Law Society of Scotland, Bill McVicar suggested that the provisions "might – unfortunately – complicate the system more than is necessary", and that they adopted an English system that "would not fit terribly well with our procedures".[347]

447. The Sheriffs' Association expressed strong reservations about the provisions in the Bill—

> "In a democratic society such provisions are likely to be regarded as disturbing. We anticipate time taken up with challenges under the European Convention of Human Rights."[348]

448. The Association also questioned why one of the tests for granting a non-notification or exclusion order was lower than that required for a non-disclosure order—

> "It is simply whether "it is not in the public interest that the nature of the information be disclosed", instead of "likely to cause serious prejudice to the public interest". We are not clear why the test is lower for non-notification and exclusion orders."[349]

449. Lord Coulsfield argued in favour of setting out the detail in subordinate legislation—

> "In my view, issues to do with orders, such as the procedure for making them, the terms of orders and what kind of orders can be made, should all properly be found in subordinate legislation, because one hopes that, with experience, it will be possible to simplify and improve the procedure, so it should be easy to change."[350]

Committee conclusions

450. **The Committee accepts the case made by the Scottish Government, following Lord Coulsfield, for having a statutory process to allow non-disclosure of information in certain circumstances. However, we also recognise the inherent difficulties in achieving this objective while continuing to secure adequate protection for the rights of the accused. We**

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[346] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Col 1989.
[347] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Cols 1988-9.
[348] Sheriffs' Association. Written submission to the Justice Committee.
[349] Sheriffs' Association. Written submission to the Justice Committee.
[350] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Col 2002.

are also concerned about the amount of detail set out in these sections of the Bill, and agree with witnesses that some of this provision would be better dealt with in subordinate legislation (subject to appropriate Parliamentary control) to allow them to be refined and developed over time.

Section 107: Special counsel

Background and evidence received

451. Section 107 allows the court, when considering an application for a non-notification, exclusion or non-disclosure order, or a review or appeal in relation to such an order, to appoint "special counsel" if the court considers it necessary to ensure that the accused receives a fair trial.

452. Commenting on this, the Sheriffs' Association said—

> "We think that such an appointment may be inevitable for an application for a non-notification order, an exclusion order or a non-disclosure order where either of the first two has been granted. The task of special counsel will be difficult because he or she will not be familiar with the details of the defence case and because the accused is not to be made aware of the contents of these applications."[351]

453. In their written submission, the Judges of the High Court of Justiciary noted that nothing is said in the Bill about the funding of special counsel.[352]

454. Bill McVicar, representing the Law Society of Scotland, questioned whether the proposed special counsel system – which he described as being about "hiding information from the defence" – was compatible with human rights.[353]

455. When asked about compatibility with ECHR, Lord Coulsfield drew to the attention of the Committee a House of Lords appeal case concerned with control orders under terrorism legislation, under which there is a procedure for the use of special counsel to consider information that is thought not to be suitable for public disclosure. He explained that a decision in that case was still awaited. He commented—

> "If we are asking ourselves whether the proposed system would be compatible with ECHR, the response must be that the system as it has been operating in England has so far survived all the challenges that have been made to it, but one cannot say whether it will continue to do so."[354]

456. The Lord Advocate acknowledged that the issue of special procedures and non-notification had been looked at by the House of Lords recently. She commented—

> "I am satisfied that, so far as is possible, the Bill sets a framework that will be compatible with the ECHR as we understand it in the United Kingdom, and

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[351] Sheriffs' Association. Written submission to the Justice Committee.

[352] Judges of the High Court of Justiciary. Written submission to the Justice Committee.

[353] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Col 1989.

[354] Scottish Parliament Justice Committee. *Official Report, 2 June 2009,* Col 2004.

> that much will depend on the facts of individual cases. It will ultimately be for judges to determine whether the provisions, as they operate in practice, can allow fair trials in that respect. That judicial role will be important."[355]

457. On 10 June in *Secretary of State for the Home Department v AF and others* [2009] UKHL 28 on the use of secret evidence in control order hearings, nine Law Lords (including two Scottish judges, Lords Hope of Craighead and Rodger of Earlsferry) unanimously agreed that the procedure that resulted in the making of the control orders in relation to the three individuals concerned did not amount to a fair trial, and accordingly allowed their appeal.[356] The Law Lords did not accept the argument that "special counsel" can second-guess the impact of non-disclosed material on the defence's conduct of the trial in such a way as to allow the court to retain confidence that the accused can have a fair trial.

458. However, the Cabinet Secretary said that the House of Lords judgment "does not apply to the procedures that we operate in Scotland" because of the checks and balances that are built into the non-disclosure provisions.[357] He added that—

> "The fundamental differences between the circumstances of the AF case and the provisions of the Bill are that, in control order cases, the non-disclosed information is the incriminatory evidence used by the court in deciding whether to grant the order whereas, in our proposed scheme, it is only the exculpatory evidence which is not disclosed (and, even then, only where rigorous tests are met) and, therefore, the court has to entirely disregard information which is the subject of a non-disclosure order in reaching its verdict. As such, Special Counsel within the scheme proposed in Scotland for non-disclosure orders in criminal proceedings do provide an additional safeguard in ensuring that the accused's rights are protected."[358]

Committee conclusions

459. **The Committee is satisfied that the provision for special counsel in this Bill do not fall foul of the human rights objections raised by the House of Lords in relation to control orders, and are appropriate in the context of a non-disclosure regime. However, we would be grateful for clarification about how special counsel would be paid for, and in particular whether any changes to legal aid regulations will be required.**

Section 115: Acts of Adjournal

Background

460. Under this section, the High Court is empowered to make "such rules as it considers necessary or expedient for the purposes of, in consequence of, or for giving full effect to" Part 6 of the Bill. Any such rules would be in the form of "Acts of Adjournal" – a form of subordinate legislation made directly by the High Court and not subject to any Parliamentary procedure or control.

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[355] Scottish Parliament Justice Committee. *Official Report, 9 June 2009,* Col 2078.

[356] Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and another (Appellant) and one other action [2009] UKHL 28. Available at: http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090610/af-1.htm

[357] Scottish Parliament Justice Committee. *Official Report, 1 September 2009,* Col 2245.

[358] Letter from Cabinet Secretary for Justice, 22 October 2009.

Subordinate Legislation Committee report

461. The Subordinate Legislation Committee (SLC), in its report on the Bill, questioned the width of the delegated power involved and even whether a new power was necessary in addition to the existing power of the High Court to make Acts of Adjournal under section 305 of the Criminal Procedure (Scotland) Act 1995. It concluded that "insufficient justification" had been given for a power in these terms, or for the decision not to limit its scope to "matters of criminal practice or procedure or other matters within the remit of the High Court".[359]

Committee conclusion

462. **The Committee notes the concerns of the Subordinate Legislation Committee, and invites the Scottish Government to provide a fuller justification of the scope of the proposed power, and indeed why it is considered necessary in addition to existing powers to make Acts of Adjournal.**

PART 7 – MENTAL DISORDER AND UNFITNESS FOR TRIAL

Background

463. Part 7 of the Bill implements the recommendations made by the Scottish Law Commission in its 2004 *Report on Insanity and Diminished Responsibility*.[360]

464. The principal recommendation of the Commission's report was that the common law test for insanity as a defence should be abolished in favour of a statutory special defence, provable on the balance of probabilities, that the accused lacks criminal responsibility by reason of mental disorder (defined to exclude psychopathic personality disorder). It also recommended a statutory basis for the plea of diminished responsibility, available only in cases of murder, which should, if successful, reduce any conviction to one of culpable homicide; and that the common law plea of insanity in bar of trial should be replaced by a statutory plea on the basis of "unfitness for trial".

Evidence received

465. The Mental Welfare Commission for Scotland welcomed the introduction of the new statutory defence to replace the common law defence of insanity and the removal of outdated and inappropriate terminology. However, it questioned the exclusion of psychopathic personality disorder from the defence of mental disorder, pointing out that the Mental Health (Care and Treatment) (Scotland) Act 2003 defines "mental disorder" to include all forms of personality disorder.

466. The Commission also questioned the lack of reference to individuals with a learning disability or cognitive impairment, pointing out that their ability to understand and give informed consent to participation in community programmes may be limited and hence that they may be "set up to fail".[361]

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[359] Subordinate Legislation Committee, *Report on the Criminal Justice and Licensing Bill*, paragraphs 63-69.

[360] Scottish Law Commission. (2004) *Report on Insanity and Diminished Responsibility.* Available at: http://www.scotlawcom.gov.uk/downloads/rep195.pdf

[361] Mental Welfare Commission for Scotland. Written submission to the Justice Committee.

467. A further issue was that the proposed defence depends on whether the offender was able to "appreciate the nature or wrongfulness of the conduct". For the Commission—

> "a mental disorder may not just impair an individual's ability to appreciate the wrongfulness of the conduct but may also impair their ability to control their behaviour even though they may appreciate that their actions are wrong."

468. Very similar concerns were raised by the Law Society of Scotland and the Scottish Association for Mental Health (SAMH). SAMH also suggested that "abnormally aggressive or seriously irresponsible conduct" needed to be further defined, but other witnesses did not think that further definitions would necessarily help.[362]

469. The Law Society of Scotland, in explaining its concern about the terms of the "mental disorder" defence, suggested that it might not be available to "a person who kills his or her children while suffering from a depressive illness [and who] may be able to appreciate what he/she is doing and understand that it is wrong in the eyes of the law, but nonetheless be driven to commit the crime by his or her illness." However, James Chalmers, from the University of Edinburgh, thought the Society had misunderstood the position and was wrongly assuming that the Bill relied on "the much criticised English position" according to which "no defence of insanity is available to a person who knows their actions to be *legally* wrong, but – due to mental disorder – does not appreciate that they are *morally* wrong". Scots law, he said, already recognised a defence of insanity based on circumstances similar to those outlined by the Law Society, and the defence provided under the new section 51A would not change that, since it "encompasses a failure to appreciate either legal or moral wrongfulness". He added that the Law Society's arguments for a defence of "volitional insanity" had already been fully considered by the Scottish Law Commission in its report and rejected "for cogent reasons which have not been challenged".[363]

470. However, where Mr Chalmers did see a problem was with subsection (4) of the new section 51A(4) which allows only the accused to advance the special defence of mental disorder. He gave various examples of situations in which there could be a dispute about whether an offender had a mental disorder or suffered instead from diminished responsibility and where, without the ability of the Crown also to advance the special defence, the court could find itself unable to reach the appropriate verdict.[364]

Committee conclusions

471. **The Committee broadly supports this provision insofar as it implements the Scottish Law Commission's recommendations. However, we are not yet confident that the proposed special defence of mental disorder has been appropriately defined, given the concerns raised in evidence and the differences of interpretation between Mr Chalmers and other witnesses**

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[362] Law Society of Scotland, SAMH. Written submissions to the Justice Committee. Scottish Parliament Justice Committee. *Official Report, 2 June 2009*, Cols 1993-4.

[363] Law Society of Scotland. Written submission to the Justice Committee. James Chalmers. Supplementary written submission to the Justice Committee.

[364] James Chalmers. Written submission to the Justice Committee.

about whether the special defence would be available to people who know their conduct is wrong, but are driven by their mental illness to do it anyway. We therefore invite the Scottish Government to consider carefully and respond to the points raised. We support the suggestion by James Chalmers that it should be open to the Crown as well as the accused to advance the special defence. We also invite the Scottish Government to comment on the issues raised by the Mental Welfare Commission relating to people with learning disability or cognitive impairment.

PART 8 – LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982

Introduction

472. Part 8 of the Bill—

> "makes various changes to the general licensing provisions of the Civic Government (Scotland) Act 1982 and to its specific provisions on metal dealers, market operators, public entertainment, late hours catering, and taxis and private hire cars."[365]

473. These changes are based on recommendations made by a Task Group set up to review the licensing provisions contained in the 1982 Act.[366] The Task Group's remit was to—

> "re-examine the principles and mechanisms of licensing as they are set out in the 1982 Act and, having done so, review the existing provisions and any proposals for change submitted to the Executive."

474. When the Task Group's report was published in 2004, the then Scottish Executive stated that it was not in a position to bring forward the necessary legislative changes prior to the 2007 Scottish Parliament elections.[367]

475. According to the Policy Memorandum, the amendments to the 1982 Act taken forward in the Bill are "largely technical", although they include some more substantive changes. Overall—

> "The aim of the amendments is to make the 1982 Act licensing provisions fit for the 21st century in line with the Task Group report's recommendations."[368]

The 1982 Act and the Task Group recommendations

Evidence received

476. Aberdeenshire Council said that, rather than further amendments to the 1982 Act, it would prefer to see an overhaul of the Act as a whole.[369] Midlothian Council,

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[365] Explanatory Notes, paragraph 551.

[366] Scottish Government. (2004) *A Report by the Task Group Set Up to Review the Licensing Provisions Contained in the Civic Government (Scotland) Act 1982*. Available at: http://www.scotland.gov.uk/Resource/Doc/30859/0026954.pdf [Accessed 28 July 2009]

[367] Scottish Government. (2005) *Executive response to report on licensing*. Available at http://www.scotland.gov.uk/News/Releases/2005/08/02134157 [Accessed 29 July 2009]

[368] Policy Memorandum, paragraph 512.

[369] Aberdeenshire Council. Written submission to the Justice Committee.

while generally welcoming the provisions, noted that no explanation had been given for why some of the recommendations made in the Task Group's report had not been taken forward in the Bill.[370]

477. The Scottish Taxi Federation went further, suggesting that only "a few" of the Task Group's recommendations were implemented by the Bill, and that "if the efforts of the Task Group are not to be lost and the 1982 Act properly updated, then much more needs to be included".[371]

478. However, responding to these claims, the Cabinet Secretary said that all but two of the Task Group's recommendations that required legislation were being implemented by the Bill, and that the aim was to improve an Act that had served Scotland well, rather than making change for its own sake.[372]

Committee conclusion

479. **The Committee accepts the Cabinet Secretary's explanation, and recognises that the Task Group recommendations provide a sound general basis for the provisions in this Part of the Bill.**

Section 121: Conditions to which licences under 1982 Act are to be subject

Background and evidence received

480. The 1982 Act allows for the automatic and unconditional grant or renewal of a licence where the licensing authority has failed to reach a final decision on an application within a specified period.

481. Section 121 of the Bill removes the term "unconditionally" and instead allows for mandatory and standard conditions to be applied to any such licence issued by a licensing authority. Mandatory conditions will be determined by Scottish Ministers while standard conditions will be determined by licensing authorities.

482. The proposal was generally welcomed. North Ayrshire Council called it "a good proposal"[373] and Aberdeenshire Council said—

> "While normally all licences are processed and issued within 28 days, there are occasions where problems arise that make it difficult to issue a licence within the permitted six months. To be able to issue a licence by default with the same standard conditions that all other licences issued under the Act have makes the licence enforceable where there are problems. This provision is long overdue."[374]

483. In order to have effect, a licensing authority will be required to publish any standard conditions determined by them. The Law Society of Scotland suggested that a transitional period should be set to allow local authorities "time to draft, consider, publish and determine standard conditions for all licence types."[375] The

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[370] Midlothian Council. Written submission to the Justice Committee.
[371] Scottish Taxi Federation. Written submission to the Justice Committee.
[372] Scottish Parliament Justice Committee. *Official Report, 1 September 2009*, Col 2225.
[373] North Ayrshire Council. Written submission to the Justice Committee.
[374] Aberdeenshire Council. Written submission to the Justice Committee.
[375] The Law Society of Scotland. Written submission to the Justice Committee.

Cabinet Secretary for Justice said that he recognised the need for a transitional period and that it would be considered carefully as part of implementation.[376]

484. The Faculty of Advocates welcomed the intention to remove the term "unconditionally" from the 1982 Act, but described the introduction of mandatory licensing conditions as "a radical departure from the current approach which is to leave the attachment of specific conditions to licensing authorities."[377] In the Faculty's view, mandatory conditions would not allow licensing authorities to take into account local circumstances and it said that no explanation had been given for this change.

485. Mr MacAskill, when questioned by the Committee on the potential inflexibility of mandatory conditions, said—

> "We accept that the setting of mandatory conditions has the potential to limit local flexibility. Whenever they exercise the power, ministers will need to be aware of that. We are seeking an appropriate balance between matters that require to be dealt with uniformly and those that require to be dealt with on a much more localised basis."[378]

486. George Burgess, for the Scottish Government, explained that the inclusion in the Bill of a power to set mandatory conditions for licences was seen as the easiest way of addressing the Task Group recommendation that all licence holders should be required to display or carry their licences. Given the variety of licences covered by the 1982 Act, he said it was considered preferable to create a power rather than "write directly into the 1982 Act a different type of condition for each type of licence"; but he added: "We do not have a long list up our sleeve of other mandatory conditions that we are looking to insert by way of the power."[379]

Committee conclusion

487. **The Committee is satisfied with the Scottish Government's justification for seeking a power to set mandatory conditions, and accepts its explanation about the conditions it envisages determining.**

Section 123: Licensing of metal dealers

Background and evidence received

488. The 1982 Act provides for a mandatory licensing scheme for all metal dealers. Section 123 of the Bill replaces this with an optional scheme by which it will be "open to local licensing authorities to determine whether or not licences are required in their areas."[380]

489. Again, the Committee received evidence[381] requesting transitional provisions in order to afford licensing authorities time to decide whether or not to retain a

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[376] Scottish Parliament Justice Committee. *Official Report, 1 September 2009*, Col 2226.

[377] The Faculty of Advocates. Written submission to the Justice Committee.

[378] Scottish Parliament Justice Committee. *Official Report, 1 September 2009*, Col 2226.

[379] Scottish Parliament Justice Committee. *Official Report, 1 September 2009*, Col 2227.

[380] Policy Memorandum, paragraph 516.

[381] Glasgow City Council and the Law Society of Scotland. Written submissions to the Justice Committee.

licensing requirement for metal dealers. Some witnesses questioned the need to relax the regime. Dumfries and Galloway Council said it was an “odd time”[382] to introduce an optional scheme when the “theft of metal is regularly reported in the press.” Aberdeenshire Council shared this view, saying that—

> “The price of metal is currently very high and many communities are experiencing random theft of metal. This activity should remain mandatory.”[383]

490. However, the Association of Chief Police Officers in Scotland (ACPOS) was content for the decision on whether or not to licence metal dealers to rest with local authorities, saying that—

> “The theft of metal has been an issue in the past. Our local experience is that it has been curtailed to a large extent, probably due to the economic downturn.”[384]

Committee conclusions

491. **The Committee notes the concerns raised by some witnesses about theft of metals and the implication that a mandatory system of licensing may have a role to play in tackling this problem. We recognise that tackling criminality is only one factor to be taken into account in deciding on an appropriate licensing regime, but we are also uncertain about the Scottish Government’s rationale for proposing moving to an optional system of licensing in this area. We therefore invite the Cabinet Secretary to provide a fuller justification of this aspect of its policy intention.**

Section 124: Licensing of taxis and private hire cars

Background

492. The Task Group made over 20 recommendations in its report on the licensing of taxis and private hire cars, noting that—

> “of all the licensing activities contained in the 1982 Act, this was the one that had over the years attracted the most criticism, particularly from the trade who had been pressing for a review for some time. In view of this, and given the number of people involved in the trade, it was not surprising that this was the activity which attracted most responses from our consultation.”[385]

493. According to the Policy Memorandum, the purpose of section 124 of the Bill is to—

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[382] Dumfries and Galloway Council. Written submission to the Justice Committee.

[383] Aberdeenshire Council. Written submission to the Justice Committee.

[384] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2114.

[385] Scottish Government. (2004) *A Report by the Task Group Set Up to Review the Licensing Provisions Contained in the Civic Government (Scotland) Act 1982*. Available at: http://www.scotland.gov.uk/Resource/Doc/30859/0026954.pdf [Accessed 28 July 2009]

> "modernise the taxi and private hire car licensing regime within the Civic Government (Scotland) Act 1982 in line with the Task Group report's recommendations."[386]

Applications for taxi and private car licences

494. The 1982 Act requires applicants for taxi or private hire car licences to have held a driving licence for any continuous period of 12 months. Under the new proposals, all applicants for taxi and private hire licenses must have held a driving licence for 12 months immediately prior to the application.

495. The Policy Memorandum states that this new provision "clarifies the original intention of the policy and was widely supported during the consultation on the Task Group review."[387]

496. Aberdeenshire Council strongly supported this proposed change in the interests of public safety, while North Ayrshire Council stated that it "clarifies a grey area of law".[388] Dumfries and Galloway Council generally supported the change but suggested that some discretion be granted to local authorities to allow an applicant's individual circumstances to be taken into account – a view supported by the Law Society of Scotland, which gave the example of someone disqualified from driving on a "totting up" basis (i.e. where the disqualification is triggered by the most recent of a series of driving offences committed over a period of time). The Bill would prevent that person applying for a taxi licence until a year after the end of the disqualification period, something that both the Society and Glasgow City Council suggested would amount to a double penalty for the individual.[389]

497. Responding to these concerns, the Cabinet Secretary said that the purpose of section 124(2) "is to ensure that an applicant has a proven record of unblemished recent driving experience to the benefit of public safety and confidence". He wanted to see "a uniform approach throughout all areas", and on this basis did not support giving discretion to licensing authorities.

Fixing scales for taxi fares

498. Section 17 of the 1982 Act specifies how licensing authorities should fix the scales for taxi fares. The Bill updates these provisions to include a requirement to review and then fix scales within an 18-month period.

499. Glasgow City Council and the Law Society of Scotland both suggested that the 18-month deadline could prove difficult to meet, given the time sometimes required for consultation. The Scottish Taxi Federation believed that such reviews should be completed annually and suggested a method to make this possible—

> "If a cost formula were agreed between trade representatives and the local authority, such a review would simply be a case of checking the figures

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[386] Policy Memorandum, paragraph 517.

[387] Policy Memorandum, paragraph 522.

[388] Aberdeenshire Council, North Ayrshire Council. Written submissions to the Justice Committee.

[389] Dumfries and Galloway Council, Law Society of Scotland, Glasgow City Council. Written submissions to the Justice Committee.

> against the previous figures and calculating any percentage increase which may apply."[390]

500. According to the Federation, section 17 will be ineffective as there are no sanctions for local authorities should a review of fares be late. They suggested the section be amended to include a right of appeal by taxi operators against an authority's failure to carry out a fares review within the prescribed timescale.

501. The Cabinet Secretary did not see why the 18-month timescale should be a problem, since most local authorities interpreted the existing legislation on a similar basis. He also did not think it was necessary for the Bill to provide sanctions against a licensing authority that fails to review fares within the set period. His experience was that "the taxi trade is not shy in coming forward if it thinks there are matters that are prejudicial to its financial wellbeing", so there is "an inbuilt mechanism for local authority accountability". Nevertheless, he was willing to consider a statutory sanction if it was thought necessary.[391]

Appeals in respect of taxi fares

502. Taxi operators can currently appeal against a licensing authority's review of taxi scales. Section 124 of the Bill will amend the 1982 Act to widen this right of appeal to include representatives of taxi operators.

503. While the Scottish Taxi Federation supported this amendment,[392] Glasgow City Council considered that the right to appeal decisions should only be extended to those who responded to the original consultation.[393]

504. However, the Scottish Government said it was appropriate to give all representative bodies a right of appeal, since these groups already require to be consulted by licensing authorities when they review taxi scales and then notified of the outcome.[394]

Publication and coming into effect of taxi fares

505. Section 124(5) requires licensing authorities, once they have fixed taxi fare scales, to publicise the scales in a newspaper circulating in the relevant area. The Law Society of Scotland and Glasgow City Council both commented on this provision, pointing out that newspaper advertisements are expensive and that it would be more consistent with the "modern approach" of the Licensing (Scotland) Act 2005 which allows advertising via a website.[395] John Loudon from the Law Society of Scotland also pointed out that people can find information on a website at any time, whereas they will only see a newspaper advertisement if they happen to read the relevant edition.[396]

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[390] The Scottish Taxi Federation. Written submission to the Justice Committee.
[391] Scottish Parliament Justice Committee. *Official Report, 1 September 2009,* Col 2228.
[392] The Scottish Taxi Federation. Written submission to the Justice Committee.
[393] Glasgow City Council. Written submission to the Justice Committee.
[394] Scottish Government. Supplementary written submission to the Justice Committee.
[395] Glasgow City Council and the Law Society of Scotland. Written submissions to the Justice Committee.
[396] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2101.

506. The Cabinet Secretary said the aim was simply to follow existing practice, which appeared to have worked well, with no specific concerns about cost having been raised. He noted the point about the use of websites, but said that making a change in this context "would have potential implications for other parts of the 1982 Act."[397]

Other issues

507. The Committee also received evidence suggesting further provisions in relation to the licensing of taxis and private hire cars. For example, the Scottish Taxi Federation suggested that local authorities' power to limit the number of taxi licences should be extended to cover private hire licences.[398]

508. While not considering this an issue to be considered in the context of the Bill, the Cabinet Secretary for Justice added—

> "we do anticipate that we may need to look more widely at the existing powers once we have a clearer understanding of where the current consultation on vehicle accessibility is proceeding."[399]

509. Both the City of Edinburgh Council and West Lothian Council also proposed additional restrictions for non-UK residents who applied for taxi and private hire car driver licences. According to the City of Edinburgh Council—

> "Taxis and private hire cars often carry children and vulnerable adults, mostly without incident. However, licensing authorities and the police wish to ensure that all drivers are subject to rigorous background and criminal checks. These checks cannot be carried out effectively on persons who reside outwith the United Kingdom."[400]

510. The Scottish Government said that it had received no evidence of such concerns from either licensing authorities or the police.[401]

Committee conclusions

511. **The Committee supports the proposal to require all applicants for taxi licences to have held a driving licence for the year immediately prior to their applications. We agree with the Cabinet Secretary that discretion for licensing authorities would not be appropriate in this context.**

512. **We also agree with the Cabinet Secretary that provision for sanctions against authorities that fail to review fares within the set period is unnecessary, given existing mechanisms to enable authorities to be held accountable.**

513. **While we would not wish to undermine the distinction between taxis that are entitled to ply for trade and private hire cars that are not, we accept**

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[397] Scottish Government. Supplementary written submission to the Justice Committee.

[398] The Scottish Taxi Federation. Written submission to the Justice Committee.

[399] Scottish Government. Supplementary written submission to the Justice Committee.

[400] The City of Edinburgh Council Regulatory Committee. Written submission to the Justice Committee.

[401] Scottish Government. Supplementary written submission to the Justice Committee.

that there may be a case for allowing local authorities to limit the number of private hire cars operating in their areas, just as they can limit the number of taxis. However, we agree that this is not a matter for the current Bill, not least because of the shortage of evidence we have taken on this issue and the fact that the Task Group did not address the point in its report.

514. **Finally, we are surprised that the Scottish Government is unaware of concerns about the ability of licensing authorities to carry out appropriate checks on non-UK residents applying for a taxi or private hire car driver's licence. Members of the Committee have, individually, heard such concerns expressed, and we would encourage the Scottish Government to adopt a more active approach to establishing whether this anecdotal impression is borne out by the evidence.**

Sections 125 and 126: Licensing of market operators and licensing of public entertainment

Background

515. Section 125 of the Bill removes the exemption from holding a market operators' licence currently given to non-commercial organisations. The new provisions will bring charitable, youth, religious, community, political and other organisations within the scope of the new provisions and "licensing authorities [will] have discretion as to whether to charge reduced or no fees to such organisations."[402] Licensing authorities will be able to regulate car boot sale organisers as well as other types of market operators.

516. Section 126 of the Bill removes the existing exemption in section 41 of the 1982 Act from the need to hold a public entertainment licence if an event is free to enter. This will allow licensing authorities to control large-scale free events but will give them discretion whether to require licences for certain events such as school fetes or gala days.[403]

Evidence received

517. East Lothian Council supported the removal of both statutory exemptions, as it believed that events held outwith the licensing framework could "easily be to the detriment of the public with regard to safety and lack of measures for public protection."[404]

518. Aberdeenshire Council took a similar view, saying the removal of the exemption was "long overdue"—

> "Many large scale events regularly get round licensing requirements by being 'free'. This often means that essential health and safety checks are not carried out and the applicants do not have the proper measures in place to ensure the safety of the events. Likewise, the ability to be able to exclude small events is welcomed."[405]

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[402] Explanatory Notes, paragraph 563.

[403] Explanatory Notes, paragraph 565.

[404] East Lothian Council. Written submission to the Justice Committee.

[405] Aberdeenshire Council. Written submission to the Justice Committee.

519. Dumfries and Galloway Council was concerned that sections 125 and 126, by removing the statutory exemptions for non-commercial organisations, will take up local authorities' "valuable time and resources" and "will impact on local community groups". They argued that authorities would have to publicise the new arrangements and process additional applications, and that (given their obligation to secure cost recovery) it would unfairly increase fees for other applicants if they exercised their discretion to waive or reduce the fees for non-commercial organisations.[406]

520. Other written submissions[407] questioned whether the potential costs of obtaining a market operators' licence or a public entertainment licence would be prohibitive for not-for-profit organisations. Midlothian Council said that volunteers who organise events such as gala days and fetes need to be supported rather than potentially have obstacles placed in their path.[408] Both the Law Society of Scotland and ACPOS questioned whether there was sufficient evidence of a current problem to justify this change in the law – "what is the mischief that we are trying to resolve?"[409]

521. Frank Jensen, speaking for Fife Council, pointed out that local authorities currently only had discretion either to license all market operators in their area, or none. He suggested that—

> "It would be highly desirable if there were explicit provision that gave local authorities discretion to determine which categories of market in their area they wished to license, control or regulate … through assessment of perceived risk, numbers and so on. Such explicit provision would allow local authorities to decide whether to license small-scale markets, or car-boot sales by church groups, and so on."[410]

522. Alan McCreadie, Deputy Director Law Reform of the Law Society of Scotland, questioned the statements in the Policy Memorandum and the Explanatory Notes that local authorities already have discretion either to charge reduced or no fees to non-commercial organisations or exempt them from licensing requirements.[411] He did not see how such discretion was provided for by the Bill, and therefore concluded that the reference must be to authorities' existing discretion under section 9 of the 1982 Act (according to which the licensing of market operators and public entertainment applies only where an authority has so resolved). He described it as a "curious situation" in which authorities, by invoking section 9, would be able to "circumvent" the intention of these sections of the Bill.[412]

523. In oral evidence, the Cabinet Secretary insisted that the removal of exemptions would not prevent local authorities from creating their own exemptions

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[406] Dumfries and Galloway Council. Written submission to the Justice Committee.

[407] Glasgow City Council, South Lanarkshire Council and the Law Society of Scotland. Written submissions to the Justice Committee.

[408] Midlothian Council. Written submission to the Justice Committee.

[409] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Cols 2103, 2114.

[410] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2141.

[411] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2104.

[412] The Law Society of Scotland. Supplementary written submission to the Justice Committee.

for some or all of the organisations presently entitled to exemptions. He said it was appropriate that these decisions should be made by locally-accountable politicians rather than centrally, by Scottish Ministers.[413] In a supplementary submission, the Cabinet Secretary further explained the basis for his view, asserting that—

> “If section 125 is approved and a licensing authority did subsequently decide to licence non-commercial market operator activities, the 1982 Act affords licensing authorities full flexibility in deciding whether to charge reduced or no fees to non-commercial organisations. For example, a licensing authority could decide to license non-commercial market operators but charge no fees to applicants.”[414]

Licensing of lap dancing clubs
524. The Committee understands that local authorities regulate lap dancing clubs primarily through the alcohol licensing system (although such clubs could also be regulated under section 41 of the 1982 Act which requires a “public entertainment licence” in order to operate legally). Both the Trafficking Awareness Raising Alliance and Glasgow City Council said that the Bill “provides a valuable opportunity to reassess the current licensing of lap dancing venues”.[415] The Alliance added that it would “strongly welcome” any move to re-categorise such clubs as sex shops for licensing purposes, in order to “give local authorities greater powers to apply conditions and restrictions on such clubs.”[416]

525. However, the Cabinet Secretary said that the Licensing (Scotland) Act 2005 “enables local authorities to take what action is required in this area”, although he did not give details of the existing powers in question.[417]

Committee conclusions
526. **The Committee shares concerns raised in evidence that the potential costs for non-commercial groups to obtain a market operator’s or public entertainment licence might prove prohibitive. We recognise that the Bill gives local authorities discretion over whether to charge for such licenses, but we can also understand concerns that where the power to charge exists, it may in practice be used.**

527. **The Committee also recognises the public safety concerns surrounding large-scale events that are free to enter, and hence currently do not require a public entertainment licence. We believe that it is important that community and charitable groups are able to hold small-scale events easily while also ensuring that licensing authorities have the power to control these large-scale events. The Committee therefore invites the Scottish Government to consider the alternative of basing the requirement for a public entertainment licence on the scale of the event (recognising that this will require authorities that choose to impose a licensing regime also to exercise**

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[413] Scottish Parliament Justice Committee. *Official Report, 1 September 2009,* Cols 2228-9.
[414] Scottish Government. Supplementary written submission to the Justice Committee.
[415] Glasgow City Council. Written submission to the Justice Committee.
[416] Trafficking Awareness Raising Alliance. Written submission to the Justice Committee.
[417] Scottish Government. Supplementary written submission to the Justice Committee.

discretion in relation to the size of events that would then require to be licensed).

528. **In relation to lap-dancing clubs, the Committee is strongly in favour of local authorities having sufficient powers under licensing legislation to be able to control the numbers of such venues in their area – including to the extent of setting zero as the appropriate number of such venues. We would be grateful for an assessment by the Scottish Government of whether it considers those powers to be sufficient for this purpose. Subject to that, we are not convinced that re-categorising these venues for licensing purposes would necessarily be beneficial.**

Section 127: Licensing of late night catering

Background

529. The 1982 Act provides that premises providing meals and refreshments between 11 pm and 5 am are to be licensed if licensing authorities so decide.

530. Section 127 of the Bill replaces "meals and refreshments" with "food", bringing late-night grocers and 24-hour stores within the scope of the provisions, although licensing authorities will still have the power to determine which types of premises require a licence. This change implements a recommendation of the Task Group, which believed that—

> "the potential for large numbers of people leaving pubs, night clubs etc. late at night to cause a disturbance … exists regardless of whether the food or drink being sold has been cooked or pre-prepared in any way".[418]

Evidence received

531. South Lanarkshire and East Lothian Councils supported this provision on the grounds that it removes current uncertainty about whether certain types of premises, such as those selling kebabs, require to be licensed.[419]

532. ACPOS fully supported the provision as a useful tool in licensing premises which can be a source of disorder late at night, although it also pointed out that there could be "fairly significant" resource implications for the police.[420]

533. However, the Law Society of Scotland said that—

> "Section 42 of the 1982 Act was enacted in order to regulate the sale of meals or refreshments from take-away establishments located in the main in city centres and in residential areas with potential for disturbance. The Society would therefore question why late night grocers, 24-hour stores and motorway service stations etc. should be brought within the scope of these provisions and questions whether the regulation and cost is proportionate to the perceived benefit."[421]

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[418] Task Group report, paragraph 10.2; Policy Memorandum, paragraph 526.
[419] South Lanarkshire Council, East Lothian Council. Written submissions to the Justice Committee.
[420] ACPOS. Written submission to the Justice Committee.
[421] The Law Society of Scotland. Written submission to the Justice Committee.

534. In his response to the Committee, the Cabinet Secretary for Justice reiterated that section 127 of the Bill takes forward a Task Group recommendation and believed that it was appropriate to give licensing authorities the discretion to licence such premises "as they are best placed to decide what subset of food and drink retailers need to be licensed."[422]

Committee conclusion
535. **The Committee considers that there is a case for broadening the definition for late night catering but supports local authorities retaining discretion in determining which types of premises require a licence.**

Section 128: Applications for licences

536. Section 128 of the Bill makes various changes to Schedules 1 and 2 to the 1982 Act, including some of the time-limits that apply to applications for and the issuing of licences.

537. South Lanarkshire Council pointed out that some of these changes would have both advantages and disadvantages – for example, extending from 21 to 28 days the period within which people may object to licence applications "will cause delay for people wishing to obtain a licence although it may make it easier for partner organisations to submit timeous reports"[423] However, Dumfries and Galloway argued that increasing the length of the objection period is unnecessary as most applications are unopposed and there is already provision allowing authorities to consider objections outwith the time-limit.[424]

538. The Cabinet Secretary for Justice accepted that the existing time period of 21 days for objections is "usually sufficient". However, he pointed out that the police, for example, often have much less than 21 days to object once they have received notice of the application, and that lengthening the objection period would "ease such problems considerably."[425]

Statement of reasons time limit
539. Under Schedule 1 (paragraph 17) to the 1982 Act, a person applying for a licence has 28 days from the date of the decision to request a written statement of reasons from the licensing authority. Section 128 of the Bill reduces the time which an applicant has to request a statement of reasons from 28 to 21 days.

540. Dumfries and Galloway Council supported this change as being—

> "of advantage to the authority especially in relation to issuing of a licence where an objection has been lodged. It is presently unfortunate that the period during which a statement of reasons can be requested equates with the period for lodging an appeal."[426]

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[422] Scottish Government. Supplementary written submission to the Justice Committee.
[423] South Lanarkshire Council. Written submission to the Justice Committee.
[424] Dumfries and Galloway Council. Written submission to the Justice Committee.
[425] Scottish Government. Supplementary written submission to the Justice Committee.
[426] Dumfries and Galloway Council. Written submission to the Justice Committee.

Renewal applications after the expiry of a licence

541. Section 128 will allow licensing authorities, "on good cause being shown"[427], to treat renewal applications received up to 28 days after the expiry of the previous licence as having been made on time, rather than treating them as new applications. While this amendment was welcomed by the Faculty of Advocates,[428] the Committee received a number of critical comments.

542. Dumfries and Galloway Council pointed out that, since a decision on any such late application would require the exercise of discretion, it would have to be taken by councillors rather than delegated to staff; but that the timescales demanded an "almost immediate response" if the advantage of the provision was not to be lost. [429]

543. Midlothian Council regarded the proposal as "a backward step" that was likely to lead to confusion and make enforcement more difficult.[430] Glasgow City Council also cautioned against the change, saying it was "very concerning from a regulatory perspective" as, presumably in an attempt to protect licence-holders from the consequences of forgetting to renew, it risked undermining the importance of expiry dates. It also questioned what was meant by "good cause shown" and whether a hearing would be required to decide.[431]

544. The Law Society of Scotland expressed similar concerns.[432] John Loudon, convener of the Society's licensing law sub-committee, said he could—

> "see the logic and the fairness of having a bit of leeway. However, what happens if, for example, an offence occurs or someone applies for an extra taxi during the 28-day period?"[433]

545. In a supplementary submission, the Society suggested that a shorter period of leeway, perhaps seven days, would be better than the 28 days proposed, although it also felt that the leeway provision was unnecessary. In its view, if the provision is to remain, a licensing authority should convene a hearing to determine whether there had been cause shown for a late renewal.[434]

546. According to the Cabinet Secretary—

> "If the licensing authority allows a late renewal application, trading will be legal, in the same way that it will be when the renewal application is made on time. If there has been no renewal application, or if the licensing authority does not recognise good cause for a late application, offences concerning trading without a licence will apply as normal. … Section 128 allows the

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[427] Criminal Justice and Licensing (Scotland) Bill, section 128.
[428] The Faculty of Advocates. Written submission to the Justice Committee.
[429] Dumfries and Galloway Council. Written submission to the Justice Committee.
[430] Midlothian Council. Written submission to the Justice Committee.
[431] Glasgow City Council. Written submission to the Justice Committee.
[432] The Law Society of Scotland. Written submission to the Justice Committee.
[433] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2106.
[434] The Law Society of Scotland. Supplementary written submission to the Justice Committee.

> licensing authority to recognise honest mistakes and to allow a licence holder to continue to trade, even if the renewal application is made late."[435]

Applicants' personal information

547. The 1982 Act requires people applying for licences to provide their address. Section 128 of the Bill will additionally require them to provide their date and place of birth.

548. South Lanarkshire Council welcomed the new provision and said that it is a practice which they have already adopted. Punch Taverns had no objection to this information being provided to licensing boards, the police and other statutory bodies but said that "this information must not be available in the public domain."[436]

549. The Cabinet Secretary for Justice said that, while applicants for licences would continue to be required publicly to display notices containing certain information, this did not include the additional information being required by the Bill (i.e. date and place of birth). He would expect local authorities only to use this additional information to assist the relevant authorities and not to publish it.[437]

Committee conclusion

550. **The Committee recognises that these amendments are based on the Task Group's recommendations and considers them as sensible proposals.**

PART 9 – ALCOHOL LICENSING

Introduction

551. The provisions in this Part of the Bill make changes to the Licensing (Scotland) Act 2005 in order to—

> "reduce costs, shorten process times, remove unintended barriers and close loopholes, while ensuring Licensing Boards receive sufficient information on which to base their decisions concerning licences to sell alcohol."[438]

552. The 2005 Act came fully into force on 1 September 2009, replacing the Licensing (Scotland) Act 1976 in its entirety. There was a transitional period, beginning in February 2008, aimed at giving existing licence holders and licensing boards sufficient time and information to enable them to adapt to the new system, with Ministers putting in place by subordinate legislation (using powers under the 2005 Act) some of the legislative changes proposed in the Bill.

553. Despite this, there were widespread reports in the immediate run-up to the 1 September date about problems relating to the new regime, with many councils reported to be late in issuing many of the new personal licences applied for. In June, the Law Society of Scotland outlined the extent of the problems being encountered by licencees and trade bodies, and suggested an extension to the

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[435] Scottish Parliament Justice Committee. *Official Report, 1 September 2009*, Col 2234.
[436] Punch Taverns. Written submission to the Justice Committee.
[437] Scottish Government. Supplementary written submission to the Justice Committee.
[438] Policy Memorandum, paragraph 539.

1 September deadline for processing applications to enable those who had put in applications in good time to continue trading lawfully beyond the deadline.[439]

554. Responding to these and similar concerns, the Cabinet Secretary made further use of the "transitional provisions" power in the 2005 Act to allow a personal licence to be deemed to be in effect in relation to a premises manager from 1 September 2009 provided an application for personal licence for that manager had been made by 31 August. Licensing boards must process all such personal licences by 1 November 2009.[440]

Sections 129 and 140

Background

555. Section 129 of the Bill is intended—

> "to require Licensing Boards to actively consider the detrimental effect of off-sales purchases of alcohol to people under the age of 21 within their area, or part of their area, and to Licensing Boards with a power to impose licensing conditions restricting off-sales of alcohol to people under the age of 21."[441]

556. Section 140 enables Scottish Ministers to impose a "social responsibility levy" for alcohol retailers and certain licence holders "to help offset the costs of dealing with the adverse impact of these businesses or their customers".[442]

557. On 24 March 2009, following the introduction of the Bill but before the Committee had started its oral evidence-taking, Bruce Crawford, the Minister for Parliamentary Business, advised the Committee that the Scottish Government intended to introduce a new health bill to take forward a range of alcohol measures including minimum pricing, restrictions on the sale of alcohol to persons under 21 and a social responsibility levy. As a consequence, the Scottish Government would be lodging amendments to remove sections 129 and 140 of the Bill at Stage 2. In light of this announcement, the Justice Committee decided not to consider further these sections of the Bill.[443]

Committee conclusion

558. **The Committee welcomes the Scottish Government's commitment to remove these sections of the Bill at Stage 2.**

Wider issues relating to the 2005 Act

559. As the Committee's consideration of the Bill overlapped with the period immediately preceding full commencement of the 2005 Act, it was perhaps not surprising that some of those who commented on the Bill also offered comments on the commencement process as well.

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[439] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Cols 2112-3.

[440] The Licensing (Scotland) Act 2005 (Transitional Provisions) Order 2009 (SSI 2009/277), considered by the Justice Committee on 8 September 2009.

[441] Policy Memorandum, paragraph 538.

[442] Policy Memorandum, paragraph 555.

[443] Letter from Bruce Crawford.

Licence fees

560. The submission from the Scottish Licensed Trade Association (SLTA) concentrated on the fees set by licensing authorities to cover the costs of the new licensing system introduced by the 2005 Act. The SLTA said it was “absolutely absurd” that the major supermarkets – which accounted for 73% of off-sales alcohol purchases – would pay fees that were equivalent to “only 7.5% of the total running costs for the transitional period”. In the SLTA’s view, the supermarkets should “make a far greater contribution to the running of the new licensing regime”. It also argued that the fees set by licensing boards “will lead to inconsistency and confusion throughout the country” and the new system was “a money making exercise for Local Councils who we are sure will find some way of justifying the fees set.” The SLTA was particularly concerned that the fee structure proposed unfairly burdened the on-trade and that small, independent pubs were being targeted disproportionately.[444]

561. John Loudon from the Law Society of Scotland was asked how an appropriate balance should be struck between reflecting in the fee structure the volumes of sales between different outlets, while at the same time equating fees to the administrative costs of processing applications (on the principle of full cost recovery). He acknowledged that—

> “With the judgment of Solomon. It is very difficult to strike the balance. You will never get it right, because whatever you plump for, there will always be people who are caught fairly – or unfairly. … I appreciate what the SLTA is saying. I am glad that I am not the one who has to make the decision on the fees, because it is not easy.”[445]

562. The Cabinet Secretary for Justice, while stating that the Parliament had already agreed that the licensing regime must be self-financing, wrote—

> “Fees are set by the local authorities within capped bands and those bands ensure a small corner shop pays less than a large supermarket. This is unlike the current arrangements where everybody pays the same. It is easy to say the costs should be loaded onto the biggest retailers but we believe the system has to be fair to everyone, including the council tax payer. The fees are charged for the cost of processing the application (a position that will be reinforced by the forthcoming EU Services Directive). Any Board which collects an excess is expected to reduce the coming year's annual fee.”

563. The Cabinet Secretary added that the Accounts Commission had been asked to consider these issues and that the Scottish Government will consider its recommendations.[446]

564. **The Committee acknowledges that concerns raised on the structure of alcohol licence fees, as defined in the 2005 Act, are outwith the scope of the current Bill. However, the Committee is of the view that there are some inequalities in the present system, including the difference in fees paid by**

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[444] Scottish Licensed Trade Association. Written submission to the Justice Committee.

[445] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2111.

[446] Scottish Government. Supplementary written submission to the Justice Committee.

different sized outlets, on-sales and off-sales premises and discrepancies across licensing boards. The Committee therefore welcomes the Scottish Government's decision to ask the Accounts Commission to consider these issues and would encourage the Commission to look in particular at the cost implications for smaller outlets in rural areas. The Committee looks forward to receiving the Scottish Government's response to the Commission's recommendations in due course.

Appeals procedure

565. The Committee received a number of representations about the appeal procedures introduced by the 2005 Act, which replaced a system of appeal by summary application with a system of application by way of stated case. The City of Edinburgh Licensing Board considered the new system "cumbersome" and suggested that "thought should be given to reverting to the arrangements for summary appeals under the Licensing (Scotland) Act 1976."[447] Fife Licensing Board described the stated case appeals process as "time consuming" as they "deal in facts and while in liquor licensing cases there are indeed findings in fact by the Board, a considerable amount of what they do is founded on possibilities and probabilities."[448]

566. John Loudon from the Law Society of Scotland said that there were widespread concerns in the profession about the stated case appeals procedure—

> "We have the rare situation that almost every lawyer – if not every lawyer – whom I have met agrees that the new appeal procedures are cumbersome, expensive and not working in practice. That is what the private sector, the public sector and sheriffs have said."[449]

567. Mairi Millar, Senior Solicitor and Assistant Clerk to the City of Glasgow Licensing Board, agreed, saying that—

> "the stated case procedure does not work for licensing appeals and a straightforward return to the summary application is welcomed by all."[450]

568. In his evidence, the Cabinet Secretary advised that the concerns had been recognised and that the appropriate amendments would be lodged at Stage 2.

569. **The Committee welcomes the Cabinet Secretary's commitment to lodge amendments at Stage 2 to reinstate the summary appeals procedure.**

Provisional premises licenses and site-only application procedure

570. A further area of criticism of the 2005 Act focused on the procedures under section 45 for obtaining a new provisional premises licence, and the lack of a "site-only application" process like that under section 26(2) of the Licensing (Scotland) Act 1976. Under the 1976 Act, according to the Law Society of Scotland, "an applicant could make an application to the board having obtained only planning permission", whereas under the 2005 Act, "applicants require to incur the expense

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[447] The City of Edinburgh Licensing Board. Written submission to the Justice Committee.

[448] Fife Licensing Board. Written submission to the Justice Committee.

[449] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2096.

[450] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2156.

of an operating plan, a layout plan and all statutory consents before the Board can consider the application for premises licence." Giving oral evidence for the Society, John Loudon acknowledged that "the mischief under the 1976 Act was that the board had no control over the detail once someone got to the affirmation stage", but that there was nevertheless "a desperate need" for a similar procedure under the 2005 Act. He gave the example of a major hotel project that was not going ahead because of the cost involved in preparing the detailed plans required for an application, saying "that represents the loss of a major inward investment to Scotland, which is crackers".[451]

571. Mr Loudon also highlighted the two-year period within which a provisional premises licence under the 2005 Act was valid:

> "A project of any size will take longer than two years. If the project is not completed within two years and the board does not grant an extension, the developer might have spent heaven knows what and still have no licence. Developers are simply not going to do that. Bankers or financiers will not lend someone the money to do that."[452]

572. In his view, increasing the period to five years would be sensible, especially for bigger projects.

573. The Scottish Beer and Pub Association (SBPA) was also critical of the changes made to site-only applications in the 2005 Act, describing the new process as "time consuming, complex and very expensive". The SBPA acknowledged that once the provisional premises licence is granted, the applicant has the ability to make subsequent changes to the premises "but that is process akin to a new licence application and may easily take another three to six months in addition to the time already spent in applying for planning and licensing." The Association also said that the two year maximum length of the provisional licence was "completely unrealistic for any major development." The Scottish Late Night Operators Assocation echoed these concerns, arguing that the costs of the 2005 Act application process were deterring much-needed investment and development.[453]

574. **The Committee shares the concerns raised in evidence about the procedures for obtaining a provisional premises licence under section 45 of the 2005 Act, and believes that there is a case for modifying these procedures within the current Bill. We therefore invite the Scottish Government to consider bringing forward suitable amendments at Stage 2. These amendments might re-introduce something similar to the site-only application procedure under the 1976 Act while also extending the current two-year time limit for provisional licences.**

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[451] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Cols 2097-8.
[452] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2110.
[453] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2131-2.

Licence transfers

575. The Law Society of Scotland highlighted a potential difficulty with the 2005 Act regarding transferring licences to court-appointed administrators. The Law Society wrote—

> "In terms of the 1976 Act [Licensing (Scotland) Act 1976], there was no requirement for the licence to be transferred. The position now is that the administrator would be required to become the premises licence holder in his own right as opposed to as an agent of the insolvent company (and apply within 28 days of their appointment) and may be reluctant to do so."[454]

576. Asked to comment on this, the Cabinet Secretary said he was unaware of the details, but was prepared to consider it further.

577. **The Committee welcomes the Cabinet Secretary's willingness to address this potential difficulty and trusts that an appropriate solution can be found.**

Section 130: Premises licence applications: notification requirements

Background and evidence received

578. Under the 2005 Act a licensing board, when notifying a required list of interested parties, must provide a copy of the application along with the notification. Section 130 of the Bill amends this requirement so that licensing boards must provide copies only to the appropriate chief constable, and may provide copies to "any other person". According to the Policy Memorandum, this "does not prevent the application being available for public inspection but reduces the cost and burden of notification."[455]

579. This change was generally welcomed.[456] However, the City of Glasgow Licensing Board[457] considered that it should also be a requirement to provide a copy of the application to the relevant fire authority, while the City of Edinburgh Licensing Board[458] suggested extending the requirement to include Licensing Standard Officers.

580. Fife Licensing Board suggested making it clear that the requirement to provide a "copy" of the application was understood to include electronic transfer of the information contained in an application forms an not necessarily the form itself.[459] North Ayrshire Council pointed out that it may be difficult for some persons who have received a notice of an application to view the application if they live some distance from a council office.[460]

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[454] The Law Society of Scotland. Supplementary written submission to the Justice Committee.

[455] Policy Memorandum, paragraph 541.

[456] Aberdeenshire Council, South Lanarkshire Council, North Ayrshire Council, City of Edinburgh Licensing Board and the Law Society of Scotland. Written submissions to the Justice Committee.

[457] City of Glasgow Licensing Board. Written submission to the Justice Committee.

[458] City of Edinburgh Licensing Board. Written submission to the Justice Committee.

[459] Fife Licensing Board. Written submission to the Justice Committee.

[460] North Ayrshire Council. Written submission to the Justice Committee.

581. Doubts were also expressed about the value of providing copies of applications to “any other person”, suggesting this could lead to uncertainty over what is being proposed and therefore generate a large number of objections. The City of Edinburgh Licensing Board suggested that any notice of an application sent to interested parties should include a broad outline of the application, while the City of Glasgow Licensing Board asked whether a standard form of notification would be developed.

582. During oral evidence, Mairi Millar of the City of Glasgow Licensing Board, said—

> “A balance must be struck. Given the length of such documents, it would be overburdensome for boards to have to provide copies of the application form, the operating plan and the layout plan for neighbourhood notification and various other consultations. ... My experience throughout the transition period for the 2005 Act coming fully into force is that people who have received letters of notification have had no idea as to what was proposed, because of the lack of information that I have described. In all honesty, I think that even providing them with a copy of the application form, operating plan and layout plan would take them no further. I find it difficult to understand what is proposed in applications, because the generic operating plan has little or no information about what will happen on the premises.”[461]

Committee conclusions

583. **The Committee believes that a balance must be struck between the cost and burdens of notification and providing appropriate information. The Committee therefore recommends that the minimum notification required should consist of a summary of what is being proposed along with information on how to view the application in full.**

Section 131: Premises licence applications: modification of layout plans

Background and evidence received

584. Section 131 enables a licensing board to propose a modification to the layout plan provided with an application for a premises licence if that modification would enable it to accept an application that would otherwise be refused.

585. While this was welcomed by some local authorities[462], the City of Glasgow Licensing Board and the Law Society of Scotland both highlighted potential difficulties in practice and suggested that the proposal be clarified. The City of Glasgow Licensing Board noted that a modified application would not be able to be granted “there and then”[463] as any such amended plan would require further consultation with other interested parties such as building control officers and the fire authority.

586. The Law Society also commented on the potential for the licensing board to refuse “applications accompanied by layout plans which had received the

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[461] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Cols 2144-2145.

[462] North Lanarkshire Council, North Ayrshire Council and the City of Edinburgh Licensing Board. Written submissions to the Justice Committee.

[463] City of Glasgow Licensing Board. Written submission to the Justice Committee.

appropriate statutory consents."[464] Alan McCreadie of the Law Society of Scotland expanded—

> "For want of a better phrase, we would end up with a catch-22 situation. Once the technical consents have been given, if the board is not happy with something, which is then fixed—if the applicant is happy to do so—the premises might then no longer meet the technical consents."[465]

587. The Scottish Beer and Pub Association (SBPA) and Punch Taverns were both opposed to the provision. The SPBA stated—

> "We do not believe this is proportionate and we are concerned the clause could lead if passed to Licensing Boards effectively having the power to 'micro manage' the actual operation of a licensed premises, with significant likely cost and other implications such as planning, listed building consent and building warrant requirements."[466]

588. SBPA Chief Executive Patrick Browne expanded on the point in oral evidence—

> "We have no issue with an applicant and a board mutually agreeing that a course of action is appropriate for an application, with a consequent change to a layout plan. … Our concern is that if boards are given the power to make changes, they might try in some cases to do so without agreement and leave it for the applicant to seek a remedy."[467]

589. Paul Smith, Vice-Chairman of the Scottish Late Night Operators Association, added—

> "I am worried that licensing boards, which sometimes have only five or 10 minutes to decide on an application, could suggest a change that might seem right to them but which would destroy a building's layout and design. I am greatly concerned that if an applicant were presented with a fait accompli – we should remember that the decision whether to grant the licence on the day might be critical for the applicant to secure options on buildings or funding – they might be forced to accept it." [468]

590. But Mairi Millar from the City of Glasgow Licensing Board said she was not aware of her Board ever intervening on "cosmetic" grounds—

> "Any attempts to modify the layout or operating plan have been the result of concerns raised by building control officers or licensing standards officers".[469]

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[464] The Law Society of Scotland. Written submission to the Justice Committee.
[465] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Cols 2107-2108.
[466] The Scottish Beer and Pub Association. Written submission to the Justice Committee.
[467] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2133.
[468] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2134.
[469] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2142.

591. Councillor Thomas from the City of Edinburgh Licensing Board agreed, saying that her board "would change plans only if officials reckoned that we needed to do so."[470]

592. According to the Cabinet Secretary—

> "The provision was included following a request from licensing boards, which saw it as being helpful, rather than something that would stifle businesses – it should enable applications to be progressed, rather than rejected."[471]

593. However, he said that he was more than happy to discuss the issue again with the trade.

Committee conclusions

594. **While acknowledging the concerns raised in evidence about giving licensing boards the power to suggest modifications to layout plans, the Committee is not convinced that this would be a problem in practice. The Committee nevertheless welcomes the Cabinet Secretary's commitment to discuss the matter further with the licensed trade.**

Section 132: Premises licence applications: antisocial behaviour reports

Background

595. The 2005 Act requires chief constables to provide an antisocial behaviour report to the licensing board within 21 days for every application. The report is required to describe "all cases of antisocial behaviour identified within the relevant period by constables as having taken place on, or in the vicinity of, the premises, and all complaints or other representations made within the relevant period to constables concerning antisocial behaviour on, or in the vicinity of, the premises."[472]

596. Section 132 of the Bill amends the 2005 Act to require that chief constables only have to provide such a report if requested by the licensing board, although they may also choose to provide one. According to the Policy Memorandum, it had become clear, when considering the implementation of the 2005 Act, that the existing procedure was "unnecessarily onerous and bureaucratic."[473] Scottish Ministers used secondary legislation to introduce a similar provision for the duration of the transitional period prior to the implementation of the 2005 Act.

Evidence received

597. This proposal has been welcomed by some respondents, such as the SBPA and Punch Taverns. North Lanarkshire Council also supported the proposal—

> "Allowing the Chief Constable if he sees fit to produce such reports or the Board at any time prior to determining applications to request such reports

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[470] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2143.

[471] Scottish Parliament Justice Committee. *Official Report, 1 September 2009,* Col 2234.

[472] Policy Memorandum, paragraph 543.

[473] Policy Memorandum, paragraph 544.

> from the Chief Constable will avoid any unnecessary work being undertaken regarding the preparation of such reports."[474]

598. ACPOS, although welcoming the provision, was concerned about the usefulness of the reports because incidents of antisocial behaviour cannot always be directly attributed to individual premises. Assistant Chief Constable Barker explained—

> "The provisions that were put in place during transition have been helpful. The amount of work that would be involved in producing an antisocial behaviour report for every premises is considerable. … Where there are clusters of licensed premises in a town or city centre, it would be difficult in a general report to attribute antisocial behaviour to particular premises, but we can say that a group of premises has caused concern."[475]

599. The Committee received evidence questioning whether there was any merit in retaining this provision. For example, the City of Glasgow Licensing Board stated that, in relation to antisocial behaviour reports, "their content adds no value to a Board's consideration of an application."[476]

600. Similarly, Mairi Millar of the City of Glasgow Licensing Board, was concerned that antisocial behaviour reports offered "no tie-in with the applicant premises". She added—

> "I would be reluctant to advise a board that it could refuse an application based on an antisocial behaviour report, because that report will display no evidence of culpability on the part of the applicant."[477]

601. That view was supported by Fife Council, whose Legal Team Leader Frank Jensen said—

> "So far, the antisocial behaviour reports that our board has viewed have been of very limited value, essentially because of that point about culpability. The reports do not contain a great deal of information that can be used, although they might paint a picture of the area. The information in antisocial behaviour reports might be used more beneficially in larger areas such as town centres, where the details could be reported to licensing forums, which can make general recommendations to the licensing board on terminal hours and other issues. However, that option is available already."[478]

602. North Ayrshire Council said that antisocial behaviour reports, as presently prepared, contain fundamental flaws and that much more information requires to be given to the Board.[479] This was echoed by the City of Edinburgh Licensing

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[474] North Lanarkshire Council. Written submission to the Justice Committee.
[475] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Cols 2117-2118.
[476] City of Glasgow Licensing Board. Written submission to the Justice Committee.
[477] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2146.
[478] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2147.
[479] North Ayrshire Council. Written submission to the Justice Committee.

Board who emphasised “the need for consideration of the type of report that would be of most value.”[480]

603. The Cabinet Secretary for Justice said that Scottish Ministers supported the view taken by police and that the Bill seeks to—

> “strike the appropriate balance between the needs and wants of our communities, the requirements of our police and the amount of information that can be dealt with by the board that is charged with the ultimate responsibility of deciding whether to grant the application.”

604. The Cabinet Secretary added that as licensing standards officers are now in place, a variety of checks and balances exist.[481]

Committee conclusions

605. **The Committee was unable to reach consensus on the merits of this provision. Some members of the Committee considered the current measures within the 2005 Act requiring chief constables to provide an antisocial behaviour report to licensing boards for all applications still to be appropriate. Other members felt that such reports should only be provided by chief constables if requested to do so by the licensing board or if they choose to provide one, so as to target resources more effectively. The Committee specifically notes that, now that all premises licences are subject to the requirements of the 2005 Act, antisocial behaviour reports are required only in respect of applications for new licences. We also note that the provisions in the 2005 Act allowing a premises licence to be reviewed provide an opportunity for a licensing board to consider any evidence on antisocial behaviour associated with a particular licensed premises, or indeed to request an antisocial behaviour report itself.**

606. **While we note the evidence suggesting that antisocial behaviour reports are often not specific enough to aid a licensing board’s consideration of an individual application, we do not consider this to demonstrate a problem with the legislation, and is something that should be addressed by better communication between boards and the police on the information required.**

Section 133: Sale of alcohol to trade

Background and evidence received

607. Section 133 of the Bill amends section 63 of the 2005 Act, so that it is no longer an offence for licensed premises to sell to the trade. The Policy Memorandum describes it as—

> “a common sense measure that corrects an unintended consequence of the 2005 Act. For example if a restaurant owner wished to buy alcohol for the

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[480] City of Edinburgh Licensing Board. Written submission to the Justice Committee.

[481] Scottish Parliament Justice Committee. *Official Report, 1 September 2009*, Col 2236.

> restaurant from a supermarket instead of the wholesaler, the restaurant owner would under the 2005 Act be committing an offence."[482]

608. North Lanarkshire Council[483] was supportive of the change as providing clarity to section 63 of the 2005 Act. The Law Society of Scotland[484] also welcomed the provision.

Committee conclusion
609. **The Committee welcomes this as a sensible amendment to the 2005 Act.**

Section 134: Occasional licences

Background
610. Section 134 of the Bill reduces the length of time, from 21 days to not less than 24 hours, that a licensing board is required to wait for comments from the chief constable and the licensing standards officer. The Policy Memorandum explains—

> "The provisions will enable the fast tracking of some occasional licences where there is very limited notice of the need for such a licence e.g. a funeral. At present the statutory time requirements of the 2005 Act would prevent such functions or events from taking place."[485]

611. The licensing board must be satisfied that the application requires to be dealt with quickly while the provision also restricts the approval of such applications to "any member of the Board, any committee established by the Board and the clerk of the Board."[486]

Evidence received
612. This proposal was generally welcomed. The SPBA, Punch Taverns, City of Edinburgh Licensing Board and the Law Society of Scotland all supported the provision but suggested that the procedure should also include applications for extended hours. John Loudon from the Law Society of Scotland explained—

> "Under the 1976 Act, occasional extensions, as they are known, are common. It is very rare for there to be a problem with an occasional extension: you put in your application and it is processed and granted. Some boards turn such applications round within two or three days, although others take a couple of weeks. … Relatively few issues have arisen. I therefore cannot see any good reason for not replicating that system in the 2005 Act. That would be in the interests of the public, business and councils. We could be creating a time problem when none exists at present."[487]

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[482] Policy Memorandum, paragraph 545.
[483] North Lanarkshire Council. Written submission to the Justice Committee.
[484] The Law Society of Scotland. Written submission to the Justice Committee.
[485] Policy Memorandum, paragraph 546.
[486] Explanatory Notes, paragraph 581.
[487] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2109.

613. North Ayrshire Council, North Lanarkshire Council and South Lanarkshire Council also welcomed the change but questioned why the power was not also delegated to members of staff employed to assist the Clerk. North Lanarkshire Council said that not extending the power to such staff "could, on occasion, cause unnecessary delay."[488]

614. The City of Glasgow Licensing Board feared that the reduction in the reporting period could be abused by applicants who were "seeking to have the reduced reporting period in less than exceptional circumstances"[489]and suggested that the provisions need to be tightened to avoid such abuse. It also considered it unsatisfactory that any concerns from the chief constable or licensing standards officer might not be highlighted to the board before the application is granted. Dumfries and Galloway Council, meanwhile, was concerned about the "vastly detailed procedure"[490] for occasional licences within the 2005 Act, and suggested that the Licensing (Scotland) Act 1976 contained a much simpler and more effective procedure. Mairi Millar, Senior Solicitor and Assistant Clerk to the City of Glasgow Licensing Board agreed.[491]

615. The Cabinet Secretary said that in light of the concerns expressed he would be happy to look again at this provision.[492] Responding further in writing, the Cabinet Secretary pointed out that the 2005 Act for the first time gives the local community affected an opportunity to comment and believed that any "simplification of the procedure as suggested would remove that community involvement."[493]

Committee conclusions

616. **While the Committee acknowledges the need for fast-tracking of some occasional licence applications, in light of points raised by witnesses it has some concerns that the procedure might be open to abuse. The Committee therefore seeks assurances from the Scottish Government that the procedure will minimise the scope for such abuse and notes the Cabinet Secretary's willingness to look again at the provision.**

617. **The Committee also recommends that the power to approve such applications should be capable of being delegated to licensing authority officials.**

Section 135: Extended hours applications: variation of conditions

Background and evidence received

618. Section 135 enables licensing boards to apply additional conditions to extended hours licences for the period that the extended hours apply or for the whole period of the licence. The Policy Memorandum provides a practical example—

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[488] North Lanarkshire Council. Written submission to the Justice Committee.
[489] City of Glasgow Licensing Board. Written submission to the Justice Committee.
[490] Dumfries and Galloway Council. Written submission to the Justice Committee.
[491] Mairi Millar. Supplementary written submission to the Justice Committee.
[492] Scottish Parliament Justice Committee. *Official Report, 1 September 2009,* Col 2238.
[493] Scottish Government. Supplementary written submission to the Justice Committee.

> "where a licensed premises has listed one of its activities as showing televised sport, a Licensing Board may see no reason to apply specific conditions. However if there was a request for extended hours to enable the screening of certain football matches during a major competition (for example the World Cup), the Licensing Board may wish to see additional conditions applied to the premises, e.g. extra door staff and the use of plastic glasses while those extended hours apply (and earlier in the day)."[494]

619. This provision was broadly welcomed.[495] For example Dumfries and Galloway Council said it—

> "will allow the Board to address concerns arising from the use of the additional hours without reviewing the premises licence and is therefore a positive step."[496]

620. North Lanarkshire Council[497] also welcomed the provision but said it was unclear whether a licence holder would be given a hearing into whether the variations proposed are necessary for the purposes of the licensing objective. Aberdeenshire Council was concerned that there could be room for legal argument about exactly what additional conditions licensing boards had power to impose.[498]

621. According to the Cabinet Secretary for Justice, it is a matter for a licensing board to decide whether to hold a hearing. When questioned on what powers licensing boards had to impose such additional conditions, Mr MacAskill stated that "the position on enforcement is no different from any other licence".[499] Philip Lamont added that the Scottish Government would re-examine the provisions in the light of the comments by Aberdeenshire Council to ensure the powers assigned are clear.[500]

Committee conclusions

622. **While generally content with the provision, the Committee notes that extended hours applications might increase the potential for irresponsible drinking. The Committee therefore seeks clarification from the Scottish Government as to how it envisages licensing boards ensuring they take health and public order concerns into account when considering such applications.**

Section 136: Personal licences

Background and evidence received

623. Section 136 of the Bill amends the 2005 Act to allow a licensing board to refuse an application for a personal licence on the grounds that the applicant

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[494] Policy Memorandum, paragraph 547.

[495] Dumfries and Galloway Council, the Law Society of Scotland and the City of Edinburgh Licensing Board. Written submissions to the Justice Committee.

[496] Dumfries and Galloway Council. Written submission to the Justice Committee.

[497] North Lanarkshire Council. Written submission to the Justice Committee.

[498] Aberdeenshire Council. Written submission to the Justice Committee.

[499] Scottish Government. Supplementary written submission to the Justice Committee.

[500] Scottish Government. Supplementary written submission to the Justice Committee, 29 September 2009.

already holds one, or that a previous licence held by the applicant expired or was surrendered during the past three years. The section also makes it a criminal offence, subject to a fine of up to £1,000, to pass off as valid or fail to surrender a void personal licence. The purpose is—

> "to close a possible loophole where a licence holder who had an endorsement under section 85(1) of the 2005 Act could avoid the suspension or revocation provisions of section 86 of the 2005 Act by voluntarily surrendering their personal licence before the Licensing Board had had an opportunity to consider what action it might take under section 86 of the 2005 Act, and then apply for another personal licence which would be "clean"."[501]

624. Both the City of Edinburgh Council Licensing Board and Dumfries and Galloway Council welcomed the provision.[502] However, the Scottish Beer and Pub Association considered it unlikely that a person would apply for a second personal licence to avoid sanctions, given the vigilance of licensing boards and the existence of a National Personal Licence Database.[503] Similarly, Punch Taverns said that the 2005 Act is still in its infancy, no problems concerning second personal licences have so far arisen and there are "sufficient safeguards to prevent the issues which appear to cause the Government concern."[504]

625. The City of Glasgow Licensing Board, although supportive of the change, said it was unclear how licensing boards would know whether an applicant already holds, or previously held, a personal licence issued by a different licensing board, since the National Personal Licence Database was not used by all boards, and was not always updated quickly.[505] In oral evidence, Mairi Millar, Assistant Clerk of the Board, added that "the Bill will cure many of the problems that we have identified with personal licences" and that the database would be "useful in the future", once the Bill had taken effect. At present, she said, there is no point in checking the database because boards have no right to refuse an application for a personal licence on the ground that the applicant already holds or previously held one.[506]

626. The Law Society of Scotland also supported the change, and suggested that all licensing boards should be required to update the national database.[507]

627. The Society also questioned the requirement in the Bill that an application must be signed by the applicant, arguing that the applicant's agent should also be able to sign the application. However, Frank Jensen of Fife Council suggested that the provision could be interpreted so as to allow an agent to sign, since "the person making the application" need not be the person who would benefit from it. He believed that the correct interpretation would be influenced by the EU Services Directive, which is intended to remove certain barriers to trade. Mairi Millar also

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[501] Explanatory Notes, paragraph 585.
[502] City of Edinburgh Council Licensing Board and Dumfries and Galloway Council. Written submissions to the Justice Committee.
[503] The Scottish Beer and Pub Association. Written submission to the Justice Committee.
[504] Punch Taverns. Written submission to the Justice Committee.
[505] City of Glasgow Licensing Board. Written submission to the Justice Committee.
[506] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2155.
[507] The Law Society of Scotland. Written submission to the Justice Committee.

referred to the Directive, suggesting that it would require licensing boards to accept online and hence unsigned applications, although this might not apply directly to personal licences.[508]

628. Section 73 of the 2005 Act requires chief constables to be notified of all personal licence applications and allows them to recommend to the board that a particular application be refused by reference to the applicant's relevant previous offences. ACPOS suggested that chief constables should, in addition, be able to make formal representations to boards that would be relevant to the board's consideration of an application even though they did not merit a recommendation to refuse it.

629. Aberdeenshire Council noted that section 136 includes provision apparently aimed at tackling a "possible black market in personal licences", but suggested this would be more effective if personal licences issued by a particular licensing board were only valid in that board's area, rather than throughout Scotland.[509]

630. The Cabinet Secretary confirmed that the Scottish Government was in the process of ensuring that all provisions within both the Bill and the 2005 Act meet the requirements of the EU Services Directive, but he acknowledged that there were some technical difficulties with the National Personal Licence Database which were being "tackled".[510] He confirmed that all local authorities had signed up to participate in the Database but that if this participation was not realised, he would consider making it mandatory.

Committee conclusions

631. **The Committee supports these provisions for tightening the rules on applications for personal licences. We recognise the importance of the national database to make the provision effective, and accept the Cabinet Secretary's assurances about the practical measures being taken in this connection. We also support ACPOS's suggestion that chief constables should have wider powers to make representations to licensing boards in relation to personal licence applications, and would invite the Scottish Government to give this serious consideration.**

Section 137: Emergency closure orders

Background and evidence received

632. The 2005 Act allows "a senior police officer" (defined as a constable of or above the rank of superintendent) to make an "emergency closure order" requiring licensed premises to close for up to 24 hours in the interests of public safety, and then to extend or terminate the order. Section 137 of the Bill changes this to a constable of or above the rank of inspector so as to "accord better with the practicalities of day to day policing".[511]

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[508] Scottish Parliament Justice Committee. *Official Report, 16 June 2009,* Col 2152.

[509] Aberdeenshire Council. Written submission to the Justice Committee.

[510] Scottish Government. Supplementary written submission to the Justice Committee.

[511] Policy Memorandum, paragraph 549.

633. The SBPA and Punch Taverns both welcomed this clarification[512], North Lanarkshire Council described the provisions as "helpful"[513] and the Law Society of Scotland considered it a "sensible proposal."[514] However, while accepting that the amendment may assist the police on an operational level, Dumfries and Galloway Council believed that "keeping it at a higher rank would underline the importance of what is being sought or imposed."[515]

Committee conclusion

634. **The Committee welcomes the changes made by this section of the Bill.**

Section 138: False statements in applications: offences

Background and evidence received

635. Section 138 of the Bill makes it an offence, punishable by a fine of up to £1,000, knowingly to make a false statement in an application under the 2005 Act. The Explanatory Notes suggest this might be used to deter people from applying for a second personal licence as a precaution against the original such licence being suspended or revoked for improper conduct.[516]

636. In its written submission North Lanarkshire Council considered the creation of the offence "an incentive for applications to be completed honestly and accurately."[517] The provision was also welcomed by the City of Edinburgh Licensing Board and the City of Glasgow Licensing Board, although the Glasgow Board sought clarification on how the offence would be established if the application was submitted electronically without a signature.[518] Further clarification of the provision was also sought by the SPBA and Punch Taverns who sought an assurance that "honest oversights or mistakes would not be caught by this provision".[519]

637. On the point about electronic applications, the Cabinet Secretary said that the Scottish Government was "in the process of ensuring" that the 2005 Act and the Bill fully complied with the EU Services Directive. On the point about oversights or mistakes, the Cabinet Secretary said that—

> "A defence is afforded in that the person must knowingly make a false statement before an offence is committed."[520]

Committee conclusion

638. **The Committee accepts the policy rationale for the changes proposed.**

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[512] The Scottish Beer and Pub Association and Punch Taverns. Written submissions to the Justice Committee.
[513] North Lanarkshire Council. Written submission to the Justice Committee.
[514] The Law Society of Scotland. Written submission to the Justice Committee.
[515] Dumfries and Galloway Council. Written submission to the Justice Committee.
[516] Explanatory Notes, paragraph 587.
[517] North Lanarkshire Council. Written submission to the Justice Committee.
[518] City of Glasgow Licensing Board. Written submission to the Justice Committee.
[519] The Scottish Beer and Pub Association and Punch Taverns. Written submissions to the Justice Committee.
[520] Scottish Government. Supplementary written submission to the Justice Committee.

Section 139 and schedule 4: Further modifications of 2005 Act

Background and evidence received

639. The 2005 Act allows any person to make an objection to a premises licence. However, the chief constable is limited to making an objection on the grounds of crime prevention if there is reason to believe that the applicant is involved in serious organised crime. Schedule 4 to the Bill (introduced by section 139) makes various changes to the 2005 Act to widen the grounds on which a chief constable can raise objections in relation to a premises or personal licence. The Policy Memorandum states that—

> "This provision will ensure that the police have the same ability as anyone else to object to a licence on any or all of the grounds offered by the Licensing Objectives including prevention of crime and public nuisance, securing public safety and protecting children from harm."[521]

640. The proposed changes were welcomed by the City of Edinburgh Licensing Board and also North Lanarkshire Council, which said—

> "There was always a feeling that the Board's powers were unnecessarily restricted in this area with the legislation as it was originally drafted. … The proposed new power of the Chief Constable to report conduct inconsistent with the licensing objectives will, of course, be welcomed by the police and it is a positive measure since it allows for the ongoing monitoring of the operation of premises and personal licences and is a clear indicator to those involved in the licensed trade that if the police in their monitoring of matters have concerns regarding anything inconsistent with any licensing objectives there is provision for them to refer the matter, as they see fit to the Licensing Board."[522]

641. Aberdeenshire Council, Dumfries and Galloway Council and the City of Glasgow Licensing Board each suggested minor amendments, sought clarification or highlighted possible drafting errors within schedule 4. All three, however, generally welcomed the changes.

642. Both Punch Taverns and the SBPA, however, described the provisions as "very wide ranging" and questioned whether they were necessary, given that the police would already be fully consulted on licence applications, and would have carried out criminal records checks. They went on—

> "We would suggest that allowing the police to comment on applications solely on the basis of the objective of 'preventing crime and disorder' is entirely appropriate, adequate and proportionate. Extending this to all of the other licensing objectives risks the police acquiring the status of the catch all objector of last resort. We do not believe this would be appropriate nor reasonable and it could lead to the police commenting on matters which are more appropriately dealt with by other agencies with more relevant, or indeed the only, expertise. We would suggest that this could only weaken the status

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[521] Policy Memorandum, paragraph 549.

[522] North Lanarkshire Council. Written submission to the Justice Committee.

> of the police in the process and indeed the credibility of their objections on legitimate criminal matters."[523]

643. In response, the Cabinet Secretary argued that the police had the same right to comment on all licensing objectives as members of the public, and that it would be for "the Licensing Board to weigh the information before reaching a decision".[524]

Committee conclusions
644. **The Committee accepts the case made by the Scottish Government for this provision. We are not persuaded by the objections raised, and accept the Cabinet Secretary's argument that chief constables should have greater powers to object to applications for a premises or personal licence.**

ADDITIONAL ISSUE: NON-INVASIVE POST-MORTEM

Background and evidence received
645. The Scottish Council of Jewish Communities (SCoJeC) made a written submission to the Committee urging the Parliament to take the opportunity presented by the Criminal Justice and Licensing (Scotland) Bill to provide that "a post-mortem carried out by non-invasive methods such as Magnetic Resonance Imaging (MRI) is acceptable for all purposes for which a surgical post-mortem is generally accepted". As this topic is not currently addressed in the Bill, SCoJeC asked that consideration be given to an amendment to add this new subject-matter within the overall scope of the Bill.

646. The submission explained that *Halachah* (Jewish Law) regards the human body (including all body parts and tissue) is sacrosanct, and requires that it should always be treated with dignity. Although fully accepting that there may be occasions when it may be necessary for a post-mortem examination to take place, SCoJeC pointed out that, since MRI scanning was made available in Manchester in 1997, the number of surgical post mortems carried out in the Jewish community there has fallen from around 100 to fewer than ten per annum. However, SCoJeC had been told that MRI is not currently recognised as a form of post-mortem examination in Scotland.

647. SCoJeC also explained that the Coroners and Justice Bill, currently before the UK Parliament, included a provision that would permit a coroner to specify the kind of post-mortem examination that should be made, the Explanatory Notes for which made specific mention of MRI.[525]

648. In response, the Lord Advocate made clear that she had no objection in principle to the introduction of non-invasive post mortems in Scotland but that "it would depend on the nature of the death". John Logue, Head of Policy at the Crown Office, said that following representations from the Jewish community the matter was being considered closely. However, he cautioned that there might be relatively limited scope for using MRI in Scotland, given the difference between the

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[523] Punch Taverns and the Scottish Beer and Pub Association. Written submissions to the Justice Committee.
[524] Scottish Government. Supplementary written submission to the Justice Committee.
[525] Scottish Council of Jewish Communities. Written submission to the Justice Committee.

role of procurators fiscal in investigating deaths in Scotland and the role of coroners in England. He also suggested that it was unclear whether legislation was necessary to enable MRI to be used in post-mortem examinations in Scotland.[526]

Committee conclusions

649. **The Committee acknowledges the importance of this issue to the Jewish community and potentially other faith groups in Scotland. However, we are unclear whether an amendment of the sort sought by the Scottish Council of Jewish Communities is necessary to enable MRI to be used where appropriate. It must also be doubtful whether such an amendment would be within the scope of the current Bill, given that the issue of post-mortem examination is not directly a matter of criminal justice.**

650. **Nevertheless, since the matter has been raised with us, it would be helpful if the Scottish Government or the Crown Office could give us a more definitive view on whether it supports SCoJeC's case for a change to the system of post-mortems in Scotland, whether legislative change would be required and, if so, when that legislation might be forthcoming.**

651. **We would certainly wish to ensure that a full range of techniques for the conduct of post-mortems is available in Scotland, so that non-invasive methods can be considered in appropriate circumstances. We accept that many relatives will understandably prefer such non-invasive methods where possible, but accept that this must always be a decision for the procurator fiscal, acting in the public interest.**

CONCLUSION

652. **As will be evident from this report, the Justice Committee has scrutinised in considerable depth the many complex issues raised by this Bill. Some of the more significant provisions are controversial, and it was predictable that we would not be able to agree on those. Many raise difficult issues in terms of legal principle, effectiveness and cost, and we have found it challenging to reach a clear view based on the often strong and diverse evidence we have received.**

Recommendation

653. **Notwithstanding the differences of view on specific provisions set out earlier in this Report, the Committee agrees to recommend to the Parliament that the general principles of the Bill be agreed to.**

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[526] Scottish Parliament Justice Committee. *Official Report, 9 June 2009,* Cols 2078-80.

ANNEXE A: SUBORDINATE LEGISLATION COMMITTEE REPORT

Subordinate Legislation Committee Report on the Criminal Justice and Licensing (Scotland) Bill

The Committee reports to the Parliament as follows—

Introduction

1. At its meetings on 5 May[1], and 26 May[2] 2009 the Subordinate Legislation Committee considered the delegated powers provisions in the Criminal Justice and Licensing (Scotland) Bill at Stage 1. The Committee submits this report to the Justice Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill.[3]

3. The Committee's correspondence with the Scottish Government is reproduced in the Appendix.

Delegated Powers Provisions

4. The Committee considered each of the delegated powers provisions in the Bill.

5. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following sections: 5, 12(2)(a), 13(2), 14 (inserted sections 227A(8), 227B(2), 227E(6), 227J(3), 227O(1), 227Z(2), 227ZD(6), 227ZG, 227ZH(4) and (5) and 227ZJ(2)), 19 (inserted section 9B(5)), 30(3) (inserted section 1A(3)(c)), 31(4) (inserted subsection (4B)(c), 57(3) (inserted section 113A(4)(c)), 59 (inserted section 18B(6)), 66(1) (inserted section 271U(3)), 72(7) (inserted section 40A(4)), 79(2) and (3) (inserted sections 113BA(1) and 120ZB(2A)), 81(1), 86(9)(b), 114(1) and (3)(c), 126(2)(e) (inserted paragraph (h)), 148(1) and schedule 1 paragraph 2(3) and schedule 1 paragraph 4.

Section 14 (Community payback orders) (inserting section 227I(6) of the Criminal Procedure (Scotland) Act 1995 – power to vary the minimum and maximum hours of unpaid work or other activity requirement)

6. New sections 227I to 227O of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") concern the "unpaid work or other activity requirement" which may be imposed on an offender in a community payback order. Section 227I(1) defines "unpaid work or other activity requirement" as a requirement that the offender must, for a specified number of hours, undertake unpaid work or another activity. Section 227I(3) sets minimum and maximum hours which may be

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[1] Official Report 5 May

[2] Official Report 26 May

[3] Delegated Powers Memorandum ('DPM')

specified in an unpaid work or other activity requirement; namely at least 20 hours, and not more than 300 hours.

7. The effect of the power at section 227I(6) is that the Scottish Ministers may vary by order the minimum and maximum numbers of hours of unpaid work or other activity which may be specified in the requirement. They may also vary the number of hours at which a requirement is considered to be level 1 or level 2. (Level 1 being a requirement to work for 100 hours or less, level 2 more than 100 hours.)

8. The Committee asked why this power could not be expressed as a power to vary within defined maximum and minimum limits. The response indicates that the Government will bring forward Stage 2 amendments to provide limits to the extent to which the minimum and maximum hours stated can be varied, and to provide limits to the extent to which the "100" figure can be varied. The Committee welcomes this undertaking in relation to the extent of this delegated power. The Government does not indicate in its response the likely range of the limits that will be in such amendments. However, given that finite limits shall be put in the Bill, the actual limits themselves may be considered a policy matter for the lead committee and Parliament.

9. While the Committee is of the view that generally modifications amending the text of the Act should be subject to affirmative resolution procedure, this is not an absolute rule and in this case the power is to be quite strictly defined, so far as it only allows changing the minimum and maximum number of hours in the requirement, and the “100” figure which distinguishes a level 1 requirement from level 2.

10. Accordingly, the Committee is content with the exercise of the power being subject to negative procedure.

11. **The Committee welcomes the confirmation provided by the Government in its response that it shall bring forward amendments at Stage 2, to provide limits to the extent to which the minimum and maximum number of hours stated in section 227I(3) can be varied, and to provide limits to the extent to which the “100” figure in section 227I(4) and (5) can be varied.**

Section 14 (Community payback orders) (New section 227K(3) – power to vary the limits of the balance of activity within the unpaid work or other activity requirement)

12. Section 227K deals with the split of hours between unpaid work and other activity in relation to an unpaid work and other activity requirement. It will be for the responsible officer (an officer of the relevant local authority) to specify the allocation of activity between unpaid work activity and other activity. This is subject to subsection (2) - the number of hours allocated to undertaking an activity other than unpaid work must not exceed whichever is the lower of, 30% of the total number of hours specified in the requirement, and 30 hours. This means that the number of hours allocated to non-work activity cannot exceed 30 hours.

Subsection 227K(3) permits the Scottish Ministers to amend subsection (2) by regulations subject to negative procedure.

13. The Committee asked for further explanation as to why the power is required to amend subsection (2) in any respect instead of a power to specify different figures in subsection (2)(a) or (b) and given that this is a “Henry VIII power” how negative procedure can be justified.

14. The response confirms that the Government proposes to bring forward amendments at Stage 2 to address the issues raised in the Committee’s questions. The reply also confirms that the amendments will apply affirmative resolution procedure to these powers.

15. **The Committee welcomes the Government’s confirmation that it shall bring forward amendments at Stage 2 to vary the powers as drafted in section 14 (so far as inserting new section 227K(3) of the 1995 Act). The Committee understands this to mean that instead of the power permitting the amendment of subsection (2) in any respect, it shall be a power to specify different figures in subsection (2)(a) or (b). The Committee notes that the response also confirms that the amendments at Stage 2 shall provide for the application of affirmative resolution procedure, rather than negative procedure.**

Section 14 (Community payback orders) (Inserting section 227ZB(12) – power to vary the maximum number of months in which a restricted movement requirement can have effect

16. Section 227ZB(9) restricts the maximum period for which a restricted movement requirement can have effect. The period must not exceed whichever is the lesser of—

(a) the period for which the supervision requirement has effect, and

(b) the period of 12 months. So the maximum period for which a restricted movement requirement can have effect is 12 months. A supervision requirement may be between 6 months, and not more than 3 years.

17. The power at section 227ZB(12) permits the Scottish Ministers to substitute the number of months specified in subsection (9)(b) with another number of months. This allows Ministers to vary (up or down) the maximum number of months in which a restricted movement requirement can have effect.

18. A related provision is section 227ZD(4)(b), which provides that a restricted movement requirement “has effect for such period of not more than 12 months as is specified.” The Scottish Ministers’ have power at section 227ZD(6) to modify section 227D(4)(b).

19. The Committee asked for confirmation whether the intention is that there is a single overall maximum period of 12 months for which a restricted movement requirement may last (subject to the ability to modify that period). If that is the case, the Scottish Government was asked why the maximum is specified in two

places, with a separate power to change each figure, rather than providing the maximum in one place only – albeit that cross-reference to the maximum may be appropriate elsewhere. The Committee considered that the provision of two separate powers gives rise to the risk that they may not be used to maintain parity.

20. This power has significant consequences, in that it will affect the duration of the period in which an offender can be subject to restrictions on his or her movement under a restricted movement requirement. The response confirms that it is intended there is a single overall maximum period of 12 months for which a restricted movement requirement may last.

21. The response confirms that the Government accepts the Committee's concerns and will address the issue raised by the Committee's question, by amendment at Stage 2.

22. **The Committee welcomes the Government's confirmation in relation to the delegated powers specified in section 14 of the Bill (inserting new section 227ZB(12) of the 1995 Act) that it shall bring forward amendments at Stage 2 to address the issue raised by the Committee's question. This would provide for a single overall maximum period of 12 months for a restricted movement requirement (subject to the ability to modify that period by affirmative regulations).**

Section 18(2)(a)(iii) of the Bill (so far as amending section 4(1) of the Custodial Sentences and Weapons (S) Act 2007– power to prescribe by order the "prescribed period" for the purposes of certain sentences under Part 2 of that Act

23. Section 18(2) introduces various revised definitions of sentences for the purposes of Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007. The Committee understands that Part 2 of the 2007 Act has still to be commenced. The 2007 Act's existing regime for offender release depends on whether an individual is serving a "custody-only" sentence (less than 15 days), or a "custody and community sentence" (15 days or more).

24. The amendments in section 18(2) remove the 15 day period which is specified in the 2007 Act for the purposes of defining custody-only and custody and community sentences. The 15 days is replaced with a "prescribed period", defined as "such period as the Scottish Ministers may by order specify".

25. The amendments in section 18 also replace the "custody-only sentence" with a "short-term custody and community sentence". A revised section 5 of the 2007 Act is inserted at section 18(3) of the Bill. It replaces the unconditional release of custody-only prisoners on completion of their prison term. Under that revised provision, short-term custody and community prisoners will generally be released on a short-term community licence on completion of one-half of their sentence.

26. The amendment at section 18(2)(a)(iii) empowers the Scottish Ministers to specify the prescribed period for the purposes of defining, and distinguishing between, short-term custody and community sentences, and custody and community sentences. Previously the relevant time period (15 days) had been

specified on the face of the Custodial Sentences and Weapons (Scotland) Act 2007. This time period has significant consequences, as different release regimes flow from a prisoner being categorised as serving a short-term custody and community sentence; or a custody and community sentence.

27. The Committee understands that the distinction between the two types of sentence can impact on the length of time an offender spends in prison. In the case of a short-term custody and community sentence a prisoner is released, subject to licence conditions, on serving one half of his sentence. In the case of a custody and community sentence, release on serving one half of a prison sentence is not automatic – it depends on a number of other requirements being met.

28. The Committee asked questions on the scope of this power, particularly why the delegated power requires to be drawn as wide as to enable any period at all to be substituted for the period of 15 days in the existing legislation. The Committee accepts the further explanation offered by the Government on this apparently significant power. Any future decision on a change to this period involves matters of sentencing policy, and therefore the Committee considers that the responses on this power should be drawn to the attention of the Justice Committee.

29. The Committee considers that it is appropriate this power is subject to affirmative procedure. The power may have significant effects, and it will textually amend the Act.

30. The response also confirms that the Government is considering if the scope of this power could be narrowed by setting a limit beyond which the demarcation line could not be moved. Further consideration will be given to what that demarcation point might be. The Committee agreed to re-visit the provisions after the Bill has been amended at Stage 2.

31. **The Committee reports to the lead committee, in relation to the delegated power in section 18(2)(a)(iii) of the Bill—**

- **that the Government has indicated in its response that it will reconsider whether the power requires to be taken to prescribe *any* new period of custody, instead of 15 days, for the purposes of that section, and will consider whether the scope of this power could be narrowed by setting minimum or maximum limits;**

- **otherwise, the Committee draws its questions and the Government responses on the scope of, and reasons for, this delegated power to the lead committee in connection with its consideration of the Bill;**

- **the Committee is content that this power shall be subject to affirmative resolution procedure.**

Paragraphs 10(3) and (4) of Schedule 2 (amending section 55 of the 2007 Act) – Power to prescribe the length of periods of detention for those under 21 years of age for the purpose of determining if they are serving "short-

term custody and community sentences" or "custody and community sentences"

32. The Delegated Powers Memorandum explains that a person under 21 cannot be sentenced to imprisonment, but will instead be sentenced to a period of detention. The provisions in Part 2 (confinement and release of prisoners) operate by reference to the term of imprisonment that a person is sentenced to, so do not apply to people under 21. Section 55 of the 2007 Act sets out how Part 2 is to apply to people under 21. The reason for taking this power is to allow the Scottish Ministers to take account of changes in the length of a period of imprisonment that determines when a sentence of imprisonment is a custody and community sentence, and when it is a short-term custody and community sentence.

33. The questions raised here were similar to those raised in relation to section 18(2)(a)(iii) of the Bill, above.

34. The Government provided a similar response as for section 18(2)(a)(iii) of the Bill.

35. **Therefore, the Committee reports to the lead committee—**

- **that the Government has indicated in its response that it will reconsider whether the power requires to be taken to prescribe *any* new period of custody, instead of 15 days, for the purposes of that section, and will consider whether the scope of this power could be narrowed by setting minimum or maximum limits;**

- **otherwise, the Committee draws its questions and the Government responses on the scope of, and reasons for, this delegated power to the lead committee in connection with its consideration of the Bill;**

- **the Committee is content that this power shall be subject to affirmative resolution procedure.**

Section 70(3) (inserted section 26G(1))-power to amend list of persons mentioned in section 26C(2)of the Public Finance and Accountability (Scotland) Act 2000 by adding or removing a public body and to modify the application of new Part 2A of that Act to a public body so added

36. Section 70(3) of the Bill inserts a substantial new Part (Part 2A, encompassing inserted sections 26A to G) into the Public Finance and Accountability (Scotland) Act 2000 ('the 2000 Act') in relation to data matching. This covers such matters as the power to carry out data matching exercises; voluntary disclosure of data to Audit Scotland; power to require disclosure of data; disclosure of results of data matching; publication of reports on data matching, and provisions for a data matching code of practice.

37. It was accepted that there may, from time to time be a need to adjust the list set out in section 26C(2), whether to add a public body to it, or to remove a person from it, and the Committee recognises that it would be considered desirable to be able to do so by means of subordinate legislation.

38. The Committee noted the list to be of some importance, in respect that persons (or public bodies) named on it may be required by Audit Scotland to disclose data to them for the purposes of a data matching exercise. That being so, the Committee raised the issue of whether it would be appropriate that the exercise of a power to add a public body to the list, or to remove persons from it, should be subject to more rigorous parliamentary scrutiny than that afforded by negative procedure. The Committee questioned whether a higher level of scrutiny might be required where the power is used to modify the application of Part 2A to the body specified. The power to modify is not restricted to administrative matters. On one view, the power could be used to amend the purposes for which the data matching is to be conducted set out in section 26A(3).

39. In addition, very limited justification had been provided within the DPM in respect of the related power, under section 26G(2) for such an order to include incidental etc. provision as the Scottish Ministers may think fit. It was stated that this is required to give flexibility ‘so that appropriate arrangements can be made for particular bodies’. The provision itself is quite a wide one and the Committee asked why an unlimited power to modify Part 2A in respect of new bodies added to the list was necessary. It sought clarification of the reason for there being provision for an order under inserted section 26G(1)being able to include such incidental etc. provision as the Scottish Ministers think fit and how that ancillary power might be used. The Committee also sought clarification as to the choice of procedure, and in particular why negative procedure had been preferred to affirmative.

40. The response seeks to justify the use of negative procedure on the grounds of the narrowness of the power. It has been provided in order to allow for additional public bodies to be added in future. The response goes on to emphasise that it can apply to a limited range of bodies. It can apply only to those whose functions are of a public nature, or include such functions, but which are not such as to be automatically covered by virtue of having their accounts added by the Auditor General. Accordingly, in view of that narrowness, the Government considered that negative procedure was appropriate.

41. The Committee sought clarification as to why it was considered that there was a need for an unlimited power to modify Part 2A of the Act (which deals with ‘data matching’). The question also noted and sought comment on the apparent ability of the provision to modify the purposes for which data matching may be conducted.

42. The response indicates that this is required for reasons of flexibility and also so that appropriate arrangements can be made for particular bodies. The response goes on to acknowledge the power which exists, to modify Part 2A, so that data cannot be used for certain data matching circumstances.

43. It was also noted that the limited range of bodies in respect of which the power could be used are stated as being those which are effectively at the fringes of the public sector. These are bodies with functions of a public nature, or including such functions, but which are not automatically covered by virtue of having their accounts audited by the Auditor General. For such bodies the full data matching provisions might not be appropriate.

44. However, in the absence of a power to be able to modify the application of Part 2 in regard to a body which has been added to it, and which has only limited public functions, such a body might be unwilling to come within the scope of section 26C. Reliance might therefore require to be made on data being provided under section 26B, under which disclosure is only on a voluntary basis.

45. It was noted that there may be circumstances where it would be preferable by means of section 26G, to add a body to the list of those required to disclose data to Audit Scotland. It was also acknowledged that it may be appropriate to have the flexibility to be able to modify Part 2A in relation to such bodies, given that the full data matching functions might not be appropriate.

46. The Committee also asked why it is thought necessary for provision for an order under inserted section 26G(1) being able to include such incidental etc. provisions as the Scottish Ministers think fit. And, with further reference to that matter, the Committee sought further explanation as how and in what circumstances the ancillary power under section 26G(2) might require to be used.

47. The Government responded that provision has been made for reasons of flexibility. Adding a body to the list of those under section 26C which are required to disclose data involves a disapplication of the ‘normal’ restrictions on disclosure of data. The power to make incidental or consequential provision could therefore be useful to remove any apparent inconsistencies in other legislation or instruments.

48. The Committee concluded that the further information provided by the Government was of assistance in terms of setting out why powers in this particular form have been taken and how they might be used. In relation to procedure, having regard to the narrowness of the power and in terms of the limited range of bodies which might be affected, the Committee agreed that negative procedure should provide an appropriate level of scrutiny. Similarly, the Committee is satisfied with the further justification provided in relation to the power for an order to include incidental provision etc.

49. It was considered that some reassurance could therefore be taken from the response in relation to why the provision is in the terms set out, and in regard to how the Government would envisage this power being used. The power to modify could, on the face of it, be used in order to expand the purposes for which data matching could be conducted in relation to new bodies, as well as limiting those purposes as the Government suggests. However, this might represent an unusual use of the power given that it would go beyond the primary scheme set out in the Bill itself. As such it would at least attract comment and negative procedure would allow Parliament the remedy of annulment.

50. **Having obtained further explanation and justification from the Government, the Committee finds the proposed power under section 70(3), in regard to inserted section 26G(1) of the Public Finance and Accountability (Scotland)Act 2000, to be acceptable in principle, and also that it is subject to negative resolution procedure.**

Section 82(1)(a) – Amendment to section 133 of the Criminal Justice Act 1988 - Power to specify further circumstances in respect of which compensation may be paid for a miscarriage of justice or for wrongful detention prior to the acquittal or a decision to take no proceedings or discontinue proceedings

51. Section 82(1)(a) inserts a new subsection (1A) into section 133 of the Criminal Justice Act 1988 ('the 1988 Act'). Section 133 currently provides for a statutory scheme of compensation for miscarriages of justice. In addition to the statutory scheme an ex gratia scheme covering other types of cases has operated for a number of years. The ex gratia scheme operates under the prerogative and has not been subject to statutory or parliamentary control. The intention of this provision is to put the ex gratia scheme on a statutory footing and to combine it with the statutory scheme under section 133.

52. The Policy Memorandum states that no changes are proposed to the scope of the *ex gratia* scheme other than to place it on a statutory footing and to combine it with the scheme under section 133. However, no details of the ex gratia scheme are given in the DPM or in the Explanatory Note.

53. In order to take a view, the Committee asked for an explanation as to the scope of the current scheme and an explanation as to whether the powers sought extend beyond what is necessary to replicate the current non-statutory arrangements. Given that the scope of the existing statutory scheme was set out in primary legislation the Committee also asked the Scottish Government to explain why it was considered necessary to use delegated powers for the extended scheme.

54. Details of the ex gratia scheme are given in the first two paragraphs of the Scottish Government's response. Although the DPM states (para. 89) that the intention is to put the ex gratia scheme on a statutory footing, the third paragraph of the response acknowledges that the power is not limited to this.

55. The response states that the provisions of the existing statutory scheme are required to meet international obligations. The inference is that these obligations cannot be changed and that flexibility (with respect to the provisions of the existing statutory scheme) is not required. However, in placing the ex gratia scheme on a statutory basis, the Scottish Ministers wish to retain flexibility in terms of what any new provisions may provide (in so far as they go beyond the international obligations as reflected in the provisions of the existing statutory scheme). The response points out that an order making power will allow for flexibility while at the same time introducing an element of parliamentary control which is currently absent.

56. The committee is content with the principle of putting the ex gratia scheme on a statutory basis. This allows for Parliamentary accountability. However, the Scottish Government acknowledged in its response that the power goes beyond what is required to put the ex gratia scheme on a statutory basis. The Committee considers that the power is too wide. The Scottish Government claim that flexibility is required, but the Committee considers that there has been no adequate

justification of the breadth of the power and of the need for the power to go beyond what is required to put the ex gratia scheme on a statutory basis.

57. As the question of whether there should be wider compensation schemes of this kind is essentially a policy matter the Committee simply draws this issue to the attention of the lead committee and of the Parliament.

58. **The Committee draws to the attention of the lead committee and of the Parliament that the proposed power goes beyond what is strictly necessary to achieve the objective stated in the Scottish Government's Delegated Powers Memorandum, namely to put the ex gratia scheme on a statutory basis, and that, in the opinion of the Committee, no adequate justification has been given by the Scottish Government for the power to extend the scheme beyond that currently operating.**

Section 82(1)(d) - New section 133(4B) Criminal Justice Act 1988 - Guidance to assessors

59. Section 133(4) of the Criminal Justice Act 1988 ('the 1988 Act') provides that where the Scottish Ministers determine that there is a right to compensation for a miscarriage of justice, the amount of the compensation shall be assessed by an assessor appointed by the Scottish Ministers. Section 134(4A) specifies certain matters which an assessor is required to have regard to in assessing the amount of compensation payable. The new section 133(4B) requires an assessor to have particular regard to any guidance issued by the Scottish Ministers.

60. The committee asked whether the guidance to be issued under this new sub-section should be laid before Parliament, and whether such provision is or is not appropriate given Parliament's interest in ensuring the independence of assessors and the proper use of public funds.

61. The Government responded that it does not consider that a statutory requirement to lay guidance before the Parliament is necessary, but gave a commitment that any such guidance will be laid before Parliament.

62. **The Committee welcomes the commitment from the Scottish Government that any guidance issued under this power will be laid before the Parliament. The Committee finds the proposed power acceptable in principle and that it is subject to no parliamentary procedure.**

Section 115 – Power to establish rules of court in relation to Part 6

63. Part 6 of the Bill creates a statutory regime for disclosure in criminal proceedings. Section 115 enables the High Court to make rules as it considers necessary or expedient for the purposes of, in consequence of, or for giving full effect to Part 6 of the Bill by Act of Adjournal. Para. 99 of the DPM explains that rules of court will be required in relation to how certain provisions are given effect to and to provide forms for applications and other court documents required under Part 6.

64. The Committee was concerned that the power was potentially too wide in scope, having regard to the manner in which the power is expressed. It was not clear that the power was restricted to making rules of court or regulating practice and procedure in relation to criminal proceedings in which part 6 is engaged.

65. The Committee asked the Scottish Government why the power was an open one and was not restricted to regulating practice and procedure in relation to criminal proceedings or otherwise clearly restricted to matters for which the courts are responsible.

66. The response acknowledged that the provision does not ‘mirror’ section 305 of the Criminal Procedure (Scotland) Act 1995, as stated in the DPM. Having regard to the terms of section 305(1)(a) and (b) the committee was surprised that it was considered necessary and appropriate to create a new power. The Scottish Government had considered whether or not section 305 was sufficient for their purposes but had taken the view that it was not. No explanation was given for the Scottish Government taking this view. It was unclear to the committee why section 305 is not sufficient or why there was a need to create a new power.

67. As presently expressed, the Committee remains concerned that the power in section 115 could permit matters addressed by Act of Adjournal to stray beyond the realms of criminal procedure into areas of substantive law. Had the words ‘in relation to criminal procedure’ appeared at the end of section 115, the committee would have been content with the power as expressed.

68. The Committee takes the view that the Scottish Government has not justified the width of the power, particularly given that it is intended that rules are to be made by the High Court without any form of parliamentary procedure or control and that there is no restriction on the exercise of the power by reference to criminal procedure.

69. **The Committee draws the breadth and scope of the proposed power to the attention of the lead committee and of the Parliament. The Committee considers that insufficient justification has been given by the Scottish Government for the need for a power in these terms, or why the scope of the proposed power should not be limited to matters of criminal practice or procedure or other matters within the remit of the High Court given that this is a power which is not subject to parliamentary procedure.**

Section 121(3) – Power to set mandatory conditions to licences granted under the Civic Government (Scotland) Act 1982

70. This provision enables the Scottish Ministers to set mandatory conditions which are applicable to licences granted under the Civic Government (Scotland) Act 1982. Local authorities are the licensing authorities under the 1982 Act in relation to a number of activities listed in that Act. These include taxis, second hand dealers, knife dealers, metal dealers, street traders, markets, public entertainment, window cleaners and sex shops.

71. The Committee noted that it is the Government’s intention that the power to prescribe mandatory conditions in respect of licences under the Civic Government

(Scotland) Act 1982 should be subject to affirmative procedure in line with the approach taken to alcohol licensing under the Licensing (Scotland) Act 2005, but that new section 3A(3) provides for such orders to be subject to annulment. The committee therefore sought clarification on this matter.

72. The Government confirmed that this was an error and that they will bring forward an amendment to remedy this at Stage 2.

73. **The Committee welcomes the Government's undertaking to bring forward an amendment at Stage 2 which will require the power setting mandatory conditions in respect of licences under the Civic Government (Scotland) Act 1982 to be subject to affirmative procedure.**

Section 129(4) – new section 27A Licensing (Scotland) Act 2005 -Power to prescribe those areas in respect of which licensing boards may vary all or a particular group of premises licences' conditions of operation

74. Section 129(4) introduces a new section 27A(1) into the Licensing (Scotland) Act 2005 which confers on the Scottish Ministers the power to prescribe by regulations the matters in respect of which licensing boards may vary all or a particular group of premises licences' conditions of operation.

75. There was no justification provided in the DPM as to why it is considered appropriate to use subordinate legislation to enable licensing boards to vary certain licence conditions. The Scottish Government was asked to explain why this cannot be achieved through primary legislation alone.

76. The Government informed the committee that it intends to bring forward a separate Bill to take forward alternative measures on alcohol. The Government will therefore seek to remove section 129 at Stage 2. The Committee is content for present purposes to note the intention to remove this power and to return to the Bill after Stage 2.

77. **The Committee draws the attention of the lead committee to the Government's confirmation that it intends to remove section 129 at Stage 2.**

Section 140(1) – Power to make provision for the imposition on relevant licence-holders of a social responsibility levy

78. Section 140 provides a power for the Scottish Ministers to make regulations imposing and setting out the detail of a social responsibility levy. Under the levy charges are to be imposed on the persons mentioned in subsection (2) for the purposes set out in subsection (3). The Explanatory Notes state that (para 592) "money raised by the charge will be for the local authorities to use in contributing towards the cost of dealing with the adverse effects of the operation of those businesses, for example extra policing or street cleaning or furthering the licensing objectives [under the 2005 Act]." Subsection (4) sets out in more detail what the regulations may include.

79. The Scottish Government was asked why it is not considered appropriate for the general principles of the proposal to be set out in primary legislation leaving only administrative detail for subordinate legislation.

80. Again, the Government confirmed that it will remove section 140 at Stage 2. While the Committee's concerns with the proposed approach remain unanswered, the Committee is content to note the intention to remove this power and to return to the Bill after Stage 2.

81. **The Committee draws the attention of the lead committee to the Government's confirmation that it intends to remove section 140 at Stage 2.**

Section 146(1) – Power to make supplemental, incidental or consequential provision appropriate for the purposes of, or in connection with the Bill

Section 147 – Power to make transitory, transitional and saving provision necessary or expedient for the purposes of, or in connection with, the coming into force of any provisions in the Bill

82. Section 146(1) confers on the Scottish Ministers a power to make by order such supplemental, incidental, or consequential provision as they consider appropriate for the purposes of, or in connection with, giving full effect to any provision of the Bill. Section 146(2) provides that the power extends to the modification of any enactment.

83. Section 147(1) confers on Scottish Ministers a power to make by order such transitory, transitional and saving provision as they consider necessary or expedient in connection with, the coming into force of any provisions in the Bill. Section 147(2) provides that the power extends to the modification of any enactment.

84. In each case section 143(4) provides that an order under either section which makes textual amendments to an Act is subject to affirmative procedure. Otherwise the power is subject to negative procedure.

85. In this Bill the normal group of ancillary powers has been split in two. Section 146 contains the ancillary powers which may make additional provision which could augment the provisions in the Bill or the subordinate legislation made under the Bill permanently. Section 147 deals with the ancillary powers which are intended to make temporary provision of a transitional or transitory nature or which save the existing law as required.

86. The committee accepts the Government's argument that ancillary powers are necessary in a substantial Bill like this. Given the breadth and complexity of the measures in this Bill, it is to be anticipated that not every fine detail of what is required to integrate these new provisions fully with the existing law may have been identified. The Committee agrees that it would not be sensible to require further primary legislation in order to deliver minor additional measures which are subsequently found to be necessary in order for the Bill to work properly or to have full effect.

87. However, the Committee also considers that the availability of ancillary powers should not be taken for granted. Their scope and the manner in which they can be used should still be tested on the merits of each case, as should the Parliamentary procedure to which they should be subject. Care should be taken to ensure that they are appropriate for the individual Bill concerned according to its scope, complexity and the sensitivity of the subject matter.

88. Having accepted that ancillary powers are necessary here, the Committee noted that the Government seeks the ability to use them to modify enactments. It is proposed that only textual amendments will be subject to affirmative procedure. As this Bill concerns provisions relating to criminal justice which frequently affect the liberty of persons and have the potential to impact significantly on the individual. In this context the Government was asked to explain why it is not thought appropriate to provide that any modification of the statute book in this context should not be subject to affirmative procedure.

89. In relation to section 146 the Committee welcomes the Government's undertaking to bring forward an amendment so that the exercise of ancillary powers under section 146 that make consequential, incidental or supplementary provision will be subject to affirmative procedure in any case where enactments are modified whether by textual amendment or otherwise.

90. In relation to section 147, the Government explained that it has reviewed its position and considers that given that these ancillary powers are temporary in nature, where they make modifications which do not textually amend acts then they will remain subject to negative procedure.

91. These kinds of powers are by their nature intended to have only temporary effect. However, measures in the area of criminal justice can have significant effects on individuals and their rights and liberty. Transitional provisions which deal with the application of the new measures to cases in progress when provisions are commenced could have a significant impact on accused persons.

92. There may be occasions when temporary provision is made as a textual amendment but it may be more likely to be made by modification which "sits" in separate subordinate legislation – and which would not attract affirmative procedure.

93. The Committee accepts that providing a subjective test in section 147 of "significance" or other similar description would introduce unwanted uncertainty and therefore accepts the Government's proposal but on the understanding that the Committee would expect the Government to bring forward measures in a form that attracts affirmative procedure where the measures impact on individuals' rights or liberty.

94. **The Committee welcomes the Government's undertaking to amend section 146 so as to provide that any modification of enactments is subject to affirmative procedure.**

95. **The Committee accepts section 147 and that only textual amendments will be subject to affirmative procedure but on the understanding that the**

Committee would expect the Government to bring forward measures in a form that attracts affirmative procedure where the measures impact on individuals' rights or liberty.

Appendix

Response from Scottish Government

Criminal Justice and Licensing (Scotland) Bill at Stage 1

Section 14 (Community payback orders) so far as inserting section 227I(6) of the Criminal Procedure (Scotland) Act 1995 – power to vary the minimum and maximum hours of unpaid work or other activity requirement

The Committee asks the Scottish Government to provide further explanation of the following—

- why the scope of the power requires to be drawn to permit any variation of either the minimum and maximum hours stated in section 227I(3), and the "100" figure in section 227I(4) and (5), rather than a power to vary within defined maximum and minimum limits

SG response

We accept the Committee's observations and will bring forward amendments at Stage 2 to provide limits to the extent to which the minimum and maximum hours stated in section 227I(3) can be varied and to provide limits to the extent to which the "100" figure in section 227I(4) and (5) can be varied.

- given that this is a Henry VIII power and such a power where justifiable would usually be exercisable by affirmative procedure –particularly where concerned with levels of maximum penalty – why it is justifiable that negative resolution procedure should apply here?

SG response

We consider that the variation of the number of hours within the defined minimum and maximum number of hours is a matter of detail which is unlikely to require a debate. However, the negative procedure instrument would still afford the Parliament the opportunity to debate variations if they had objections.

Section 14, so far as inserting section 227K(3) of the Criminal Procedure (S) Act 1995 – power to vary the limits of the balance of activity within the unpaid work or other activity requirement

The Committee asks the Scottish Government to provide further explanation of the following—

- why the power is required to amend subsection (2) in any respect instead of a power to specify different figures in subsection (2)(a) or (b); and

SG response

We accept the Committee's observations and will bring forward amendments at Stage 2 to provide that these powers, as to be amended, will be exercisable by affirmative resolution procedure.

- given that this is a Henry VIII power enabling amendment of primary legislation which affects a type of sentencing why negative procedure is considered appropriate rather than affirmative procedure.

SG response

Variation of the existing balance between the unpaid work and other activity requirement components of the order is a matter of detail and it was not considered that a debate in the Parliament would be required. However, the use of negative procedure still affords the Parliament the opportunity to debate any variation that they were opposed to.

Section 14, so far as inserting section 227ZB(12) of that 1995 Act – power to vary the maximum number of months in which a restricted movement order can have effect

The Committee asks for confirmation whether the intention is that there is a single overall maximum period of 12 months for which a restricted movement requirement may last (subject to the ability to modify that period). If that is the case, the Scottish Government is asked why the maximum is specified in two places with a separate power to change each figure rather than providing the maximum in one place only – albeit that cross-reference to the maximum may be appropriate elsewhere. Does the provision of two separate powers not give rise to the theoretical risk that they may not be used to maintain parity?

SG response

We accept the Committee's observations and will bring forward an amendment at Stage 2 so that the maximum is provided for in one place only.

Section 18(2)(a)(iii) – power to prescribe by order the "prescribed period" for the purposes of certain sentences under Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007

The Committee asks for an explanation, in relation to the width of the delegated power in section 18(2)(a)(iii) of the Bill—

- why the power is required to be taken to prescribe any new period whatever, instead of 15 days, and why the parameters of any new period could not be drawn within a minimum and maximum set out in primary legislation?

Schedule 2, paragraphs 10(3) and (4) – power to prescribe the length of periods of detention for those under 21 years of age for the purpose of determining if they are serving "short-term custody and community sentences" or "custody and community sentences"

The Committee asks for an explanation, in relation to the width of the delegated power in paragraphs 10(3) and (4) of Schedule 2—

- why the power is required to be taken to prescribe any new period whatever, instead of 15 days, and why the parameters of any new period could not be drawn within a minimum and maximum set out in primary legislation?

SG response

The intention behind these powers is to set the length of sentence where the custody and community sentence provisions apply. It may prove, on the basis of future data (and in the light of the benefits of the investment in the prisons estate and the community payback strategy), that custody and community sentences are more effective for sentences of a longer period than the 15 days currently prescribed for. The power allows the demarcation line to be set on the basis of evidence but without the need for new primary legislation to allow the Scottish Ministers to respond effectively and promptly to changing circumstances in sentence management. The powers will also allow the Scottish Ministers to make changes, if required, to respond effectively to trends.

The affirmative resolution will require a full Parliamentary debate before the period, which would be evidence-based, could be prescribed. On that basis, we accept that this power could be narrowed without losing the desired effect by setting a limit beyond which the demarcation line could not be moved. Further consideration will be given to what that demarcation point might be. This maintains the desired degree of flexibility whilst we hope answering the Committee's concern about the breadth of the power.

Section 18(2)(a)(iii) – power to prescribe by order the "prescribed period" for the purposes of certain sentences under Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007

The Committee asks for an explanation, in relation to the width of the delegated power in section 18(2)(a)(iii) of the Bill—

- could the Government explain the "potentially significant" effects of the use of this power in relation to the sentencing of offenders, given that the period could be prescribed at less than 15 days, or substantially more than 15 days – as the DPM suggests?

Schedule 2, paragraphs 10(3) and (4) – power to prescribe the length of periods of detention for those under 21 years of age for the purpose of determining if they are serving "short-term custody and community sentences" or "custody and community sentences"

The Committee asks for an explanation, in relation to the width of the delegated power in paragraphs 10(3) and (4) of Schedule 2—

- could the Government explain the "potentially significant" effects of the use of this power in relation to the sentencing of offenders, given that the period could be prescribed at less than 15 days, or substantially more than 15 days – up to a year as the DPM suggests.

SG response

The powers would have no effect in relation to the sentence handed down to offenders. It is not about introducing a new sentencing option but rather is about managing offenders from the beginning of their sentence through to the end. It will provide a workable and proportionate sentence management regime that will reflect the risk and needs of all offenders and focus on reducing reoffending. The new measures will see all offenders subject to some form of restriction for the full length of the sentence whether it is being served in custody or in the community on licence.

In practice this will mean that offenders who receive a sentence of below the demarcation line will be released on licence at the halfway point of their sentence but will be restricted and supported in the community for the second part of the sentence. For offenders who receive a sentence above the demarcation line, their suitability for release at the end of the custody part of the sentence will be informed by the joint risk assessment and on release he or she will be subject to statutory supervision by a criminal justice social worker. The level of supervision and intervention will vary from offender to offender and will be informed, as above, by the nature of the offence and the offender's response to work begun in custody.

Section 70(3), so far as inserting section 26G(1) of the Public Finance and Accountability (Scotland) Act 2000 – power to amend list of persons mentioned in that Act

The Committee seeks clarification from the Scottish Government as to (a) the choice of procedure in relation to this power, and in particular why negative procedure has been preferred to affirmative, having regard to the terms of this power, including the consequences of being on the list, (b) the need for an unlimited power to modify Part 2A in respect of new bodies added to the list (including it would appear the ability to modify the purposes for which data matching may be conducted); and (c) why it is thought necessary for provision for an order under inserted section 26G(1) being able to include (in terms of 26G(2)) such incidental, consequential, supplementary or transitional provision as the Scottish Ministers think fit, and in particular to provide further explanation as to how and in what circumstances it is envisaged that the ancillary power under section 26G(2) might require to be used.

SG response

As noted in the Delegated Powers Memorandum, the list of bodies in section 26C is fairly comprehensive, and would automatically include any new public bodies whose accounts are audited by the Auditor General. The power is a narrow one to allow for additional public bodies to be added in future. It can apply to a limited range of bodies, ie those whose functions are functions of a public nature, or include such functions, but which are not automatically covered by virtue of having their accounts audited by the Auditor General. In light of that narrowness, negative procedure is considered appropriate. We note that the related powers for England, Wales and Northern Ireland inserted by the Serious Crime Act 2007 are subject to draft affirmative procedure. However those powers are wider, and include power to add further purposes for which data matching can be used.

The power to modify the application of Part 2A in relation to bodies that are added, and to make incidental, consequential &c provision gives flexibility and is considered necessary so that appropriate arrangements can be made for particular bodies. As the Committee has identified, this would include power to modify Part 2A so that data cannot be used for certain data matching circumstances. As noted above, the limited range of bodies in respect of which the power could be used are effectively those at the fringes of the public sector, for which the full data matching provisions may not be appropriate. Without this power a body which has only limited public functions may not be willing to come within the scope of section 26C, requiring reliance instead on the voluntary provision of data under section 26B. While section 26C disapplies restrictions on disclosure of data, the power to make incidental or consequential provision could be useful to remove any apparent inconsistencies in other legislation or instruments.

Section 82(1)(a) – Amendment to section 133 of the Criminal Justice Act 1988 - Power to specify further circumstances in respect of which compensation may be paid for a miscarriage of justice

The Committee asks the Scottish Government the following questions—

- The DPM simply states that the purpose of the power is to enable a statutory basis for the existing ex gratia payment scheme to be established. The Committee requests an explanation as to the scope of the current scheme and an explanation as to whether the powers sought extend beyond what is necessary to replicate the current non-statutory arrangements.

The Scottish Government has not explained why it seeks to use delegated powers to provide a statutory basis for the extended scheme. Given that the scope of the existing statutory scheme is set out in primary legislation the Government is asked to explain why it considers it necessary to use delegated powers for the extended scheme.

SG response

The circumstances in which an individual may be eligible for compensation under the ex gratia *scheme were set out in a statement by the then Secretary of State (Malcolm Rifkind) in a Written Answer to a Parliamentary Question in January 1986 (Hansard, 23 January 1986, cols 237-8). This statement is similar in its content to the one made by the then Home Secretary in November 1985 (Hansard, 29 November 1985, cols 689-90).*

The Secretary of State stated that he was-

> *"prepared to pay compensation to people who ... have spent a period in custody following a wrongful conviction or charge, where I am satisfied that this has resulted from serious default on the part of a member of a police force or of some other public authority; and there may be exceptional circumstances that justify compensation in cases outside these categories. I will not, however, be prepared to pay compensation simply because at the trial or on appeal the prosecution was unable to sustain the burden of proof beyond reasonable doubt in relation to the specific charge that was brought."*

As set out in the Explanatory Notes, this power will be used to replace the ex gratia *scheme by placing it on a statutory footing with the existing statutory scheme. It is intended to correspond to the existing* ex gratia *criteria. Strictly, the power is not limited to placing the* ex gratia *scheme on a statutory basis, and no need has been identified to do so – Ministers may in future wish to recognise further circumstances in which compensation should be available, and without some flexibility in the power the only way to do so would be through the creation of another* ex gratia *scheme.*

We anticipate that in preparing an order under this power, detailed consideration will have to be given to the terms used in the 1986 Written Answer, eg what constitutes a "public authority" and "exceptional circumstances", rather than simply repeating the terms of the written answer verbatim. That might better be done in secondary legislation. A distinction can also be drawn between the provisions of the existing statutory scheme, which are required to meet international obligations, and those of the ex gratia *scheme which, to the extent that they go beyond the statutory scheme, are not required by international obligations and which could currently be modified or revoked by Ministers at will. Placing the* ex gratia *scheme on a statutory basis by way of an order making power retains some of this flexibility, but introduces an element of Parliamentary control that is currently absent.*

Section 82(1)(d) - New section 133(4B) Criminal Justice Act 1988 - Guidance to assessors

The Committee asks the Scottish Government whether it has considered whether the guidance to be issued under this sub-section should be laid before Parliament, and to comment on whether such provision is or is not in its view appropriate given Parliament's interest in ensuring the independence of assessors and the proper use of public funds.

SG response

We do not consider that a statutory requirement to lay guidance before the Parliament is necessary. As set out in the Explanatory Notes, it is necessary to have a statutory basis for this guidance as the assessor is discharging a quasi-judicial role. Doing so provides greater transparency. We are however content to give a commitment that any guidance that is issued under this power will be laid before the Parliament.

Section 115 – Power to establish rules of court in relation to Part 6

Given that the Scottish Government refers to section 305 of the Criminal Procedure (Scotland) Act 1995 as the model for the power to be conferred on the High Court, why the power is an open power to make rules as may be considered necessary or expedient and not restricted to making rules of court or otherwise provision to regulate practice and procedure in relation to criminal proceedings?

SG response

We have reflected on our comment that section 115 "mirrors similar provision" in section 305 of the 1995 Act. It does not actually "mirror" that provision, and on reflection we consider that this is potentially misleading.

In preparing the draft Bill, we considered whether section 305 was sufficient for our purposes and considered that it was appropriate to create a new power. We required to consider what powers would be necessary given that this is the first time the Disclosure scheme has been put into statute and concluded that we needed flexibility to enable the High Court to do everything we thought it would be likely to require to do in ensuring the statutory scheme worked efficiently. In any event we consider that section 115 is not an entirely open power in that it is limited by the wording of section 115 to only those aspects required in consequence of or giving full effect to, only Part 6 itself, which deals only with the Disclosure of information in criminal matters.

Section 121(3) – Power to set mandatory conditions to licences granted under the Civic Government (Scotland) Act 1982

The DPM states that it is the Government's intention that the power to prescribe mandatory conditions in respect of licenses under the Civic Government (Scotland) Act 1982 should be subject to affirmative procedure in line with the approach taken to alcohol licensing under the Licensing (Scotland) Act 2005. However, the Committee notes that new section 3A(3) provides for such orders to be subject to annulment. Can the Government clarify its intention and if the power is not to be subject to affirmative procedure to explain why it takes that view?

SG response

We can confirm that it is our intention that the affirmative procedure should apply and we will bring forward an amendment at Stage 2.

Section 129(4) – new section 27A Licensing (Scotland) Act 2005 - Power to prescribe those areas in respect of which licensing boards may vary all or a particular group of premises licences' conditions of operation

- No justification is provided in the DPM as to why it is considered appropriate to use subordinate legislation to enable licensing boards to vary certain licence conditions. If consistency of application is the policy objective can the Scottish Government explain why this cannot be achieved through primary legislation alone?

The DPM explains that the present policy intention is to enable the restriction of the sale of alcohol at off-sales premises to persons under 21. If such a restricted policy objective is in view why is a broad discretionary power required? No justification for the breadth of the power is provided in the DPM. Can the Scottish Government provide such justification to the Committee?

Section 140(1) – Power to make provision for the imposition on relevant licence-holders of a social responsibility levy

Given that the power in section 140 is a significant revenue raising measure, why is it not considered appropriate for the general principles of the proposal (including how the levy is to be calculated and by whom it is proposed to be administered) to be set out in primary legislation leaving only administrative detail for subordinate legislation?

SG response

In a letter to the Justice Committee and Health Committee on 24 March 2009, we advised of our intention to introduce a new health bill to take forward provisions on a range of measures, including those currently set out in sections 129 and 140 of the Bill. As a consequence, we intend to seek to remove these sections from the Bill at Stage 2.

Sections 146(2) and 147(2) – ancillary provision

The Committee asks the Scottish Government for the following additional information—

- To give its reasons for considering negative procedure as a sufficient level of parliamentary control in respect of modifications of the statute book using these powers where there is no textual amendment, particularly in the context of the subject matter of the Bill which impacts on individual rights and liberty.

SG response

We can appreciate the Committee's concern that the Bill deals with the rights and liberty of individuals. We have considered again the question of the appropriate level of parliamentary scrutiny in relation to orders under sections 146 and 147 which would modify the effect of – but not textually amend or repeal – enactments.

Given the subject matter of this Bill we acknowledge that the effect of a modification could be just as significant as the effect of a textual amendment. We think that there is a case for adjusting the level of scrutiny in relation to section 146 and we will bring forward amendments at Stage 2 to increase the level of parliamentary scrutiny in any case where an enactment is modified.

In our view, however, the position is different in relation to section 147. In that case, the modification is made in the context of a move from the old law to the new. The modification is temporary in nature and it is very focused and tightly drawn. The power is exercisable only for transitory, transitional or saving purposes and it is clearly linked to the coming into force of a particular provision of the Bill. We consider that, for these reasons, the current level of parliamentary scrutiny is appropriate.

ANNEXE B: FINANCE COMMITTEE REPORT

Finance Committee Report on the Financial Memorandum of the Criminal Justice and Licensing (Scotland) Bill

The Committee reports to the Justice Committee as follows—

INTRODUCTION

1. The Criminal Justice and Licensing (Scotland) Bill ("the Bill") was introduced in the Scottish Parliament on 5 March 2009. The Justice Committee has been designated as the lead committee on the Bill at Stage 1.

2. Under Standing Orders Rule 9.6, the lead committee at Stage 1 is required, among other things, to consider and report on the Bill's Financial Memorandum. In doing so, it is required to consider any views submitted to it by the Finance Committee ("the Committee").

3. At its meeting on 10 March 2009, the Committee agreed to adopt level three scrutiny in relation to the Bill.[1] At its meeting on 21 April, the Committee took evidence from the following organisations—

- Panel 1: Criminal Justice Authorities (CJAs), North Lanarkshire Council and Perth and Kinross Council;
- Panel 2: Crown Office and Procurator Fiscal Service (COPFS), Scottish Court Service (SCS), Scottish Police Services Authority (SPSA) and Scottish Prison Service (SPS); and
- Panel 3: Scottish Government Bill Team.

All of the organisations represented on the first two panels also provided written evidence.

4. In addition, the Committee also received written evidence from—

- Dumfries and Galloway Council
- East Ayrshire Council;
- Orkney Islands Council; and
- Scottish Legal Aid Board.

5. All written evidence received is published in the electronic version of this report.[2] The *Official Report* of the oral evidence session on 21 April can be found on the Parliament's website.[3]

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[1] Information on the Committee's three-level system of scrutiny for Financial Memoranda is available at: http://www.scottish.parliament.uk/s3/committees/finance/financialMemo.htm
[Link no longer operates]

[2] Scottish Parliament Finance Committee Report on the Financial Memorandum of the Criminal Justice and Licensing (Scotland) Bill available at: http://www.scottish.parliament.uk/s3/committees/finance/reports-09/fir09-CriminalJusticeLicensingBill.htm

[3] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009 available at:

THE BILL

6. The Bill provides for various changes under the general headings of criminal justice and licensing. The Bill contains around 85 distinct topics and is split into the following 10 main parts—

- Part 1 – Sentencing: creates a Scottish Sentencing Council and places on statute for the first time the purposes and principles of sentencing; introduces a Community Payback Order to replace the existing range of community penalties; and establishes a presumption against short periods of imprisonment;
- Part 2 – Criminal law: creates new serious organised crime offences and a new offence of possessing communication devices within prison; and creates new offences in relation to extreme pornography;
- Part 3 – Criminal procedure: raises the age of criminal responsibility of children from eight to 12 years old; implements Scottish Law Commission proposals on Crown right of appeals; and changes the system of retention and use of forensic samples, e.g. allowing fingerprints to be kept on the same basis as DNA;
- Part 4 – Evidence: confirms in statute that courts are able to allow witnesses to give evidence anonymously and via TV link (under certain circumstances); and allows all persons to be compelled to give evidence, ending the restriction that exempted spouses or civil partners could not be compelled;
- Part 5 – Criminal justice: increases the maximum age that someone is able to sit on criminal juries from 65 to 70; permits the police to close down premises associated with human exploitation; and permits public bodies to share information for the purpose of detecting fraud;
- Part 6 – Disclosure: provides in statute a regime for the disclosure of evidence in criminal cases;
- Part 7 – Mental disorder and unfitness for trial: modernises the law in the area of mental disorders in criminal proceedings;
- Part 8 – Licensing under Civic Government (Scotland) Act 1982: makes various changes to the Civic Government (Scotland) Act 1982 to improve the licensing of a number of businesses including metal dealers, entertainment operators and taxi and private hire firms;
- Part 9 – Alcohol licensing: places a duty on Licensing Boards to consider the detrimental impact of off-sales to under-21s, with a view to considering whether to apply a condition to some or all of the licences in their Board area requiring those purchasing off-sales alcohol to be aged 21 or over; and

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http://www.scottish.parliament.uk/s3/committees/finance/or-09/fi09-0902.htm#Col1049

- Part 10 – Miscellaneous: gives Scottish Ministers an enabling power to introduce a ‘Social Responsibility Levy’ to ensure that alcohol retailers and licensed premises whose activities can impact negatively on the wider community contribute towards the cost of this impact.

SUMMARY OF COSTS AND SAVINGS AS OUTLINED IN THE FINANCIAL MEMORANDUM

7. The Financial Memorandum estimates the total annual financial cost of implementing the Bill at £58.405 million, with a total non-recurring start-up cost of £2.633 million. In arriving at these figures, the Financial Memorandum identifies five topics in the Bill that carry a “significant financial impact” – defined as those estimated as costing over £0.4 million per year. These topics are dealt with in Chapter 1 of the Financial Memorandum and are as follows—

- creation of a Scottish Sentencing Council (costing £1.1 million per year, plus one-off costs of £0.45 million);
- introduction of Community Payback Orders, presumption against short periods of imprisonment or detention, and reports about supervised persons (costing £10.67 million per year, plus one-off costs of £50,000);
- new serious organised crime offences (costing £3.654 million per year, plus one-off costs of £5,000);
- placing on statute a regime for the disclosure of evidence in criminal cases (costing £4.105 million per year, plus one-off costs of £1.816 million); and
- provisions regarding the sale of alcohol to persons under the age of 21 (costing £38 million per year). (The Scottish Government has subsequently announced that it will seek to remove this proposal from the Bill at Stage 2[4].)

8. The Financial Memorandum estimates that other provisions in the Bill will also have cost implications, although each carrying a lesser financial impact than £0.4 million per year. These topics are described in Chapters 2 to 10 of the Financial Memorandum.

9. The Financial Memorandum contains substantial cost information, and explanation of policy background and assumptions underpinning the cost estimates. A brief summary of the cost implications is included in this report.

Provisions with significant financial impact

Scottish Sentencing Council

10. Based on the running costs incurred by bodies of a likely similar size, and the assumption that administrative functions will be provided by the Scottish Court Service (SCS), the Financial Memorandum estimates that an annual budget of

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[4] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1074. See also correspondence received from the Minister for Parliamentary Business, dated 26 March 2009.

£1.1 million will be required. These costs include fees and expenses for Council members; cover for judicial absence (Council membership will include a practising judge, two sheriffs and one justice of the peace); support office costs including staff salaries; and research, publications and website costs. One-off set up costs of £450,000 are also anticipated.

11. These costs will be met entirely by the Scottish Government as an element of its funding of the SCS. The Financial Memorandum states that no costs will fall on local authorities or other bodies, individuals or businesses.

Community Payback Orders etc.

12. The new Community Payback Orders will replace the existing court disposals of probation orders, community service orders, supervised attendance orders and community reparation orders. The Financial Memorandum estimates the likely cost of these Orders as £10.67 million per year, based on assumptions about the rate of change in sentencer behaviour away from imposing short prison sentences. This figure is given as the mid-point between an additional cost per year of £8.237 million (where there is a 10% increase in usage of Orders compared with existing sentences) and £13.103 million (where there is a 20% increase in usage of Orders). It is also anticipated that there will be one-off costs of £50,000 relating to IT development.

13. These additional costs will be incurred by local authorities (although the cost will be reimbursed by the Scottish Government through its ring-fenced funding arrangements for criminal justice social work); the Scottish Court Service; and the electronic monitoring contractor (although the additional cost will be covered by a revised commercial contract to be met by the Scottish Government).

Serious organised crime offences

14. The Financial Memorandum estimates that the new serious organised crime offences will incur total eventual additional costs of £3.654 million per year. These costs will fall upon the Scottish Court Service, the Crown Office and Procurators Fiscal Service (COPFS) and the Scottish Prison Service. These costs will, therefore, ultimately be met by the Scottish Government. The Financial Memorandum states that the Government does not anticipate any costs falling on local authorities or other bodies, individuals or businesses.

Disclosure

15. According to the Financial Memorandum, additional costs are expected to fall on the Scottish Government as follows—

- Scottish Police Service – additional operational and training costs as a result of the principles and changes to practices and procedures that will require to be adopted as a result of the legislation. The recurring costs are estimated at £2.2 million per year, with non-recurring costs estimated at £1.3 million;

- Scottish Police Services Authority – additional staff costs relating to training, administration and defence access to SPSA sites are estimated at £205,000 per year, with £143,000 in non-recurring costs;

- Scottish Crime and Drug Enforcement Agency – 10 additional Criminal Disclosure Officers. The cost is estimated £495,000 per year. However, the cost could vary from £340,000 – £650,000 per year, depending on whether police officers or field officers undertake these roles;

- Crown Office and Procurator Fiscal Service – costs relating to IT development, staff training, time taken to complete a schedule and the review of disclosure following receipt of defence statements are expected to be £485,000 per year, with non-recurring costs of £273,000;

- Scottish Court Service – additional court hearings are estimated to costs £164,000 per year and one-off IT development costs of £100,000;

- Scottish Legal Aid Board – the introduction of mandatory defence statements is estimated to cost £556,000 per year.

16. The Financial Memorandum states that the Government does not anticipate any costs to fall on local authorities or other bodies, individuals or businesses.

Sale of alcohol to persons under the age of 21
17. The Government has indicated to the Committee that it will seek to remove this proposal from the Bill at Stage 2.[5]

18. The maximum estimated costs contained in the Financial Memorandum assume that every Licensing Board introduces a ban on the off-sale of alcohol to 18-20 year olds across their entire Board area. It is anticipated that no costs will fall on the Scottish Government, but it is likely that there will be financial implications for local authorities and for other bodies, individuals and businesses.

19. The Financial Memorandum states that additional costs are expected to fall on local authorities in respect of the cost to Licensing Boards of considering the detrimental effect of alcohol sales to under-21s; and the cost of Licensing Standards Officers (LSOs) to ensure compliance with any conditions laid down by Boards. The Financial Memorandum states that these costs are likely to be marginal and suggests that the cost of running the licensing system, including costs of LSOs, is generally recovered by Licensing Boards from fee income. No further details on possible costs or specific estimations are provided.

20. The Financial Memorandum suggests that individuals aged between 18 and 21 who are restricted in buying off-sales may be affected to the extent of reducing their total alcohol intake, or alternatively spending up to three times more on alcohol purchases. The average cost of a unit of alcohol in on-sales purchases is £1.28, compared with 40p in off-sales.

21. The financial impact on business will depend on the extent to which Boards choose to establish such conditions and the extent to which purchasers switch to on-sales. The Financial Memorandum estimates that these provisions will result in a financial impact of £38 million per year, which represents a loss of 63% of

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[5] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1074. See also correspondence received from the Cabinet Secretary for Justice, dated 26 March 2009.

alcohol purchases made by 18-20 year olds. This figure includes £15 million in lost annual sales revenue to business and £23 million in lost VAT and alcohol duty per year to the UK Government.

Provisions with a lesser financial impact

22. The Financial Memorandum refers to the following provisions in the Bill as not having a significant financial impact—

- Extended supervision sentences for certain sexual offences: the estimated annual cost of £16,000 will be met by local authorities, which would be reimbursed by the Scottish Government through the criminal justice social work services funding;

- Offences aggravated by prejudice: annual recurring costs falling on the Scottish Court Service are estimated at £24,000, plus one-off costs of £5,000 for IT development;

- Articles banned in prison: the cost to the Scottish Prison Service is estimated at £215,000 per year;

- New offence of possession of extreme pornography: the estimated annual cost of £27,000 is expected to impact on the Scottish Crime and Drug Enforcement Agency, Scottish Legal Aid Board, Scottish Court Service and Scottish Prison Service;

- Witness statements and their use during trial: estimated annual cost to the Crown Office and Procurator Fiscal Service and Scottish Court Service of £218,000;

- Remand and committal of children and young people: eventual recurring costs of £65,000 are expected to fall on local authorities;

- Crown appeals: an estimated annual cost of £377,000 across the Scottish Court Service, Crown Office and Procurator Fiscal Service and Scottish Legal Aid Board;

- Retention and use of DNA and fingerprint samples: an estimated eventual annual recurring cost to the Scottish Police Services Authority of £25,000, plus one-off system change costs of £25,000;

- Limiting grounds for appeal on referrals from the Scottish Criminal Cases Review Commission: annual costs to the SCCRC are estimated at £30,000;

- Enabling evidence to be provided by television link: estimated annual cost to the Scottish Court Service of £47,000, plus one-off set up costs of £132,000 to equip courts;

- Amendments to Part V of the Police Act 1997: annual costs to Disclosure Scotland are estimated at £120,000, plus non-recurring costs of £150,000; and

- Taxi and private hire car licenses: annual cost to local authorities' licensing authorities is estimated at £8,000; and the cost to individual taxi firms is anticipated as being less than £1.00 per year.

Savings

23. The Financial Memorandum states that the Government anticipates overall cost savings in relation to the provisions on early removal of certain short-term prisoners from the UK; bail review applications; and jury service. These savings are estimated at £40,000; £6,000; £250,000 per year, respectively.

SUMMARY OF EVIDENCE

Community Payback Orders and presumption against short prison sentences

24. Evidence highlighted the potential impact that the twin proposals to introduce Community Payback Orders (CPOs) and a presumption against short term prison sentences will have on criminal justice social work. There was also some discussion about the potential impact of the proposals on the prison population, and in relation to whether the assumptions about social enquiry reports (SERs) are correctly identified in the Financial Memorandum. This evidence is summarised below.

25. While, on the whole, witnesses accepted that the assumptions in the Financial Memorandum were appropriate, some concerns were raised. Some evidence illustrated the difficulty in predicting sentencing behaviour and the extent to which the courts would use CPOs instead of short term prison sentences. Other evidence criticised the amount of core funding available for criminal justice social work and suggested that additional funding would be required in order to meet the management needs of offenders who would currently receive short custodial sentences.

Uptake of Community Payback Orders (CPOs)

26. Government officials confirmed that, in relation to the implementation of the Bill, the costings in the Financial Memorandum have been made on the assumption that all proposals will come into force in April 2010. Officials stated, however, that "at this stage, we have not set an implementation timetable for the whole Bill."[6] Officials referred to the spending constraints in the context of the current economic climate which affected prioritisation across Government and were unable to comment in any further detail about the resources that might be available to the Justice Department in order to implement the measures in the Bill.[7]

27. Specifically, in relation to the proposals introducing CPOs and a presumption against short-term prison sentences, Government officials explained that the Financial Memorandum makes two assumptions—

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[6] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1091.

[7] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, cols. 1091-2.

> "that the number of CPOs will essentially derive from a reduction in the number of short sentences, and that our best estimate of the extent of that shift in the initial years is between 10 and 20 per cent."[8]

28. The figures contained in the Financial Memorandum (and as confirmed in supplementary evidence) reflect an increase in the number of orders imposed by the courts of between 1939 (10% increase) and 3878 (20% increase), based on 2007-08 court figures.[9] Officials stated that, in the context of the number of prison receptions, these assumptions reflect a reasonable range of increases.

29. East Ayrshire Council stated that, in estimating a 10 to 20 per cent increase in the use of CPOs over the course of the years 2010-11 and 2011-2012, the Financial Memorandum accurately reflects the margins of uncertainty about costs and timescales.[10]

30. Perth and Kinross Council stated that, based on the additional demand that might be expected, the costings in the Financial Memorandum "are not inaccurate."[11] However, it recognised that the additional impact of 170 offenders currently serving sentences of six months or less receiving CPOs would be a significant additional cost.[12] In supplementary evidence, the Council added that—

> "although the prospective sum seemed realistic in relation to the number of additional staff who may be required on the ground to deliver the enhanced services, I do not think that sufficient allowance has been made for management, accommodation, clerical support and transport costs. These costs are equally important, have not always been accounted for in the past and impact directly on our ability to deliver fast and effective services"[13][14]

31. In written evidence, the Community Justice Authorities (CJAs)[15] referred to the estimated increase of up to 20 per cent in the use of CPOs and stated that "there is no evidence to suggest whether this will meet margins of uncertainty."[16] However, in oral evidence to the Committee the CJAs stated that—

> "What the Government has done in the [Financial] Memorandum is probably the best that it could do. It has made some reasonable assumptions. However, if the bill is passed, it will be necessary to monitor closely the first year or 18 months of implementation, because I am not sure

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[8] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1077.

[9] Criminal Justice and Licensing (Scotland) Bill, Financial Memorandum, paragraph 679; and supplementary written evidence from the Scottish Government.

[10] Written evidence from East Ayrshire Council.

[11] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1052.

[12] Written evidence from Perth and Kinross Council. See also Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1053.

[13] See also Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, cols. 1050 and 1059.

[14] Supplementary written evidence from Perth and Kinross Council.

[15] There are eight CJAs: Fife & Forth Valley CJA; North Strathclyde CJA; Northern CJA; South West Scotland CJA; Glasgow CJA; Lothian & Borders CJA; Tayside CJA; and Lanarkshire CJA.

[16] Written evidence from Community Justice Authorities.

> that anyone really understands yet how some of the measures will affect others. At this stage, it is difficult to predict that."[17]

32. With regard to the projected increase by courts in their use of CPOs, the CJAs accepted that although "it is a bit of a leap in the dark and it is difficult to come up with a figure... 20 per cent would not be an unreasonable figure for the sheriff courts."[18] It was suggested, however, in relation to justice of the peace courts that the 20 per cent figure might represent an underestimation of how JPs will use the power.

33. Although Government officials accepted that it is difficult to predict with any certainty changes in sentencer behaviour, they stated that "past experience suggests that sentencers are cautious in making changes to their sentencing behaviour" and considered that sentencing shift would be gradual.[19] Officials confirmed that if there is a larger than expected shift in sentencing behaviour then the costings in the Financial Memorandum would be exceeded[20]; and took the point made by the CJAs[21] about the need to monitor the usage of CPOs.[22]

34. When questioned on whether the cost estimates should be based on diverting 100% of short-term sentences to CPOs, officials referred to the Scottish Prison Commission's recommendation that there would have to be exceptions to any presumption against imposing a prison sentence. Such exceptional cases might involve sex offenders, violent offenders and multiple repeat offenders. Officials stated that they have examined this and concluded that around 50% of offenders likely to receive short sentences would not be subject to the presumption against imposing imprisonment.[23]

Impact on criminal justice social work and related costs

35. The Committee also heard evidence from the CJAs and Perth and Kinross Council about current core funding for criminal justice social work and, specifically, whether current levels could effectively meet a potential increase in demand for services.

36. The CJAs expressed concern about the assumption in the Financial Memorandum that current funding for probation, social enquiry reports (SERs), community service orders and supervised attendance orders is adequate. They indicated that six of the eight authorities have this year asked for approval to move money from non-core funding to core funding, citing this as evidence that existing core funding is not sufficient for purpose and told the Committee, "we are concerned that, if we have a large increase in the number of CPOs, we may have to vire further moneys from non-core to core funding."[24]

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[17] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1060.

[18] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1058.

[19] Supplementary written evidence from the Scottish Government. See also, regarding JP Courts, Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, cols. 1082 and 1093.

[20] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1078.

[21] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1060.

[22] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1076.

[23] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1085.

[24] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1051.

37. Perth and Kinross Council also expressed concern that Government funding for local authority core criminal justice functions has not kept pace with inflation and criticised the funding formula as "sometimes based on activity levels that are four, five or six years out of date and do not reflect current or immediately projected activity levels."[25] It also stated that costs of delivering services in rural areas can be considerably higher.

38. The Council also reflected on the specific needs and associated costs of providing an increased number of community disposals, most of which, as Government officials confirmed, "will be attributable to down-tariffing from short sentences."[26] It highlighted "the complex needs of those in the churn of short-term adult imprisonment" most of whom "require well-constructed care and supervision arrangements".[27] In supplementary evidence, the Council referred to the unit cost of probation orders and stated that—

> "The unit cost allowed for delivery of such services is unrealistic now and will become more-so as we endeavour to supervise people in the churn of short terms prison sentences who require ever higher levels of support and supervision if they are to escape the cycle of re-offending."[28]

39. In view of the complex needs of such offenders, the Council further suggested that, in some cases, the number of requirements attached to individual CPOs might need to be increased.[29] The Financial Memorandum states that, in Scotland, the average number of additional conditions imposed per probation order is estimated at 1.2 and that, because no significant increase by courts in the use of the available requirements is anticipated, proposes no increase in the core funding currently provided for this purpose.[30]

40. Government officials confirmed the assumption in the Financial Memorandum that no additional requirements will be imposed per CPO.[31] On the wider point about current levels of funding for criminal justice social work, the Government stated in supplementary evidence that "whether the existing baseline is sufficient is, we believe, a separate issue and outwith the scope of the [Financial] Memorandum."[32] East Ayrshire and Perth and Kinross Councils suggested that any potential shortfall in funding for criminal justice social work could be met, to some extent, by transferring savings from the prisons service.[33]

Impact on prison population and related costs

41. In relation to the specific proposals for CPOs and a presumption against short custodial sentences, the Scottish Prison Service considered that there could be some long-term benefits. It suggested that these could materialise in two ways—

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[25] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1050.
[26] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1075.
[27] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1050.
[28] Supplementary written evidence from Perth and Kinross Council.
[29] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1059.
[30] Financial Memorandum, paragraph 689.
[31] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1081.
[32] Supplementary written evidence from the Scottish Government.
[33] Written evidence from East Ayrshire and Perth and Kinross Councils.

> "If the measures contained in the bill have an impact on the average prison population such that… they reduce the average prison population to a point at which structural changes could be made, which would allow us to save significant amounts in relation to the prison estate or people, cash savings would materialise. We are not at that point yet, however – it is a long way off.
>
> "The second area where there would be benefits, and where those benefits would be much closer, lies in reducing the churn in the prison population... There would be benefits there, not in cash savings but in a better use of resources and a better sentence management regime."[34]

42. The CJAs suggested that the Financial Memorandum provides an incomplete picture because it does not capture any potential savings from the intended reduction in short term prison sentences.[35] The SPS stated, however, that a 50 per cent reduction in the number of short term prison sentences "would probably result, in the longer term, in some 300 prisoner places no longer being required."[36] However, a reduction of 500 prison places would be required before the prison service would be operating at design capacity, and SPS stated that a significant reduction on top of that would be required before it would be possible to close an establishment or a substantial part of one.[37] On this basis, the SPS suggested that, until an establishment opens or closes, the changes in costs will be marginal. The unit cost of imprisonment per prisoner per year is, therefore, simply indicative and not an illustration of savings that can be realised immediately.

43. East Ayrshire Council stated that there is uncertainty about the impact that the Bill will have on short term prison sentences to reduce the prison population. In written evidence, it stated that its "experience over the past few years is that there has been a considerable increase in the use of community sentences/ requests for reports, without making any significant impact on the levels of custodial sentencing."[38]

44. Government officials agreed with the evidence from SPS and confirmed that, while a reduction in short sentences would reduce churn and free up prison officer time, this would not save a huge number of prison places.[39] Officials suggested that, on average prisoners serving short sentences spend about three weeks in a prison cell and on this basis a 10 per cent reduction in the number of sentences of six months or less would only free up around 50 prison places.[40]

Social Enquiry Reports (SERs)

45. In evidence, the CJAs suggested that the Financial Memorandum may underestimate the number of additional social enquiry reports (SERs) that might be requested by the courts as a result of the Bill. They suggested that—

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[34] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, cols. 1065-6.
[35] Written evidence from Community Justice Authorities.
[36] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, cols. 1066-7.
[37] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1071.
[38] Written evidence from East Ayrshire Council.
[39] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, cols. 1076-7.
[40] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1077.

> “Given the presumption against short sentences, we are a bit concerned that sheriffs might ask for social enquiry reports in most cases. They might do that to have the full information about the community options that are available in order to make up their minds that none of those options is suitable, which would mean moving on to a short term prison sentence. If that were to happen, many additional social enquiry reports that have not been costed in the financial memorandum might be required.”[41]

46. Government officials confirmed that costings for additional social enquiry reports have not been built into the Financial Memorandum, and acknowledged that the Government will need to keep that under careful review.[42]

Scottish Sentencing Council

47. The SCS considered that the cost estimate for the establishment of the Scottish Sentencing Council shown in the Financial Memorandum is “in the right ball park”.[43] It stated, however, that due, for example, to the costs involved with integrating the district courts into its operations, it could not be expected to meet the costs associated with running the Council without additional funding from the Government.

48. The SCS also agreed with the statement in the Financial Memorandum that it had not been confirmed whether or not it would actually provide the administrative functions for the Council. It suggested that it will be for the new statutory body which will replace the SCS, under the Judiciary and Courts (Scotland) Act 2008, to discuss this with the Scottish Government in due course.

49. The Financial Memorandum states that the Government “will provide funding to the SCS in recognition of its support function.”[44] Government officials confirmed that the costs in the Financial Memorandum are illustrative, “based on the assumption that the Scottish Sentencing Council will be grafted on to the new, reformed Scottish Court Service”, but “do not say that the SCS will definitely provide the functions concerned.”[45]

50. Officials also referred to the costs associated with the post of the Council’s Chief Executive (the Financial Memorandum shows this as £97,055 per year). Officials confirmed that the cost as set out in the Financial Memorandum indicates the total cost to the Government rather than the total salary to the post-holder, but that, ultimately, it will be for the Council to decide at which level it pitches its chief executive post.[46] With regard to location, officials suggested that the bulk of the Council’s staff could be based in most places in Scotland and need not necessarily result in expensive accommodation and running costs. However, they suggested

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[41] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, cols. 1051-2.
[42] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1076.
[43] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1067.
[44] Financial Memorandum, paragraph 664.
[45] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, cols. 1078-9.
[46] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1086.

that Council meetings would most likely need to take place in Edinburgh or Glasgow.[47]

Remand and committal of children and young people

51. In written evidence, East Ayrshire Council referred to the proposals regarding the remand and committal of children and young people (section 47 of the Bill). The Council stated that it "remains unclear about the financial implications surrounding the additional burden that might fall on local authorities through increased demands for alternative remand accommodation most likely in the form of secure accommodation."[48] Perth and Kinross Council also stated that, although it makes minimal use of secure accommodation, where there is no available facility for a young offender to go to a secure unit the burden of finding an alternative way of supervising the person will fall on local authorities.[49]

52. Government officials stated that, under section 47, there will be a transfer of responsibility from the Scottish Prison Service to local authorities and that, as identified in the Financial Memorandum, there will be a cost to local authorities. Officials confirmed that, as a result, the provisions "will increase the demand for local authority secure accommodation" and at the same time, would produce a saving to the Scottish Prison Service (although see paragraph 42 on the realisation of savings in the prison service).[50]

Licensing provisions

53. Officials confirmed that it is the Government's intention to seek to remove two alcohol licensing measures from the Bill at Stage 2: section 129 (sale of alcohol to persons under the age of 21 etc.); and section 140 (licensed premises: social responsibility levy).[51] As a result of the Government's proposal to remove these provisions, the Committee has not considered the related financial assumptions in any detail.

54. From the evidence received, local authorities appeared to be largely content with the other licensing provisions in the Bill. In written evidence, North Lanarkshire Council suggested that the impact of the proposals in Part 8 of the Bill "is likely to be minimal in cost terms and would, in any event, be recovered through license application fees."[52]

55. Additional costs were anticipated, however, in relation to the administration process for licensing of taxi and private hire cars[53], and in relation to the associated consultation costs of making new licensing resolutions for premises selling food or drink, large-scale public entertainments and non-commercial market operators.[54] Also, Orkney Islands Council referred to the difficultly experienced by

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[47] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, cols. 1086-7.
[48] Written evidence from East Ayrshire Council.
[49] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1061.
[50] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, cols. 1089-90.
[51] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1074.
[52] Written evidence from North Lanarkshire Council.
[53] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1056.
[54] Written evidence from Dumfries and Galloway Council.

small, rural locations in absorbing the costs of the provisions, due to the existence of fewer traders resulting in smaller fee incomes.[55]

56. Government officials stated that with the removal of sections 129 and 140, “the licensing provisions that remain in the Bill are of a much smaller order in terms of finances”.[56] Officials confirmed that the Government’s intention is for the remaining provisions to be self-financing out of fees and suggested that “quite a few will lead to a more efficient licensing system and potential savings for the licensing boards and police in operating it”.[57]

CONCLUSIONS

57. The Committee acknowledges the detailed level of information contained in the Financial Memorandum to the Bill. On the basis of evidence received, however, the Committee wishes to draw the lead committee’s attention to a number of specific matters relating to the financial assumptions.

58. With regard to the Bill as a whole, the Committee notes that funding for full implementation has not been confirmed and suggests that the lead committee seeks further detail from the Cabinet Secretary on the proposed timetable for implementation and the source of funding for the measures.

Community Payback Orders and presumption against short prison sentences

59. The Committee recognises the difficulty in estimating the rate of change in sentencing behaviour from imposing short term custodial sentences to imposing Community Payback Orders (CPOs). The Committee has not, however, received any evidence to allow it to understand whether the estimated update of CPOs, of between 10 and 20 per cent, is accurate or whether this figure is likely to increase year-on-year, along with the cost implications. As far as the Committee understands, the legislation provides for a statutory presumption against short-term custodial sentences. The Committee draws the apparent disconnect between this and the assumptions in the Financial Memorandum to the attention of the lead committee.

60. Nonetheless, the Committee notes the potential financial impact on local authorities’ criminal justice social work services of dealing with the complex needs of offenders who would otherwise receive custodial sentences, particularly in the event that the volume of CPOs is above the estimates in the Financial Memorandum. The Committee, therefore, recognises the vital importance of monitoring the uptake of CPOs and the number of social enquiry reports requested by the courts and the associated financial impact on criminal justice social work services.

61. In relation to the potential impact of the proposals on the prison population, the Committee notes that the Financial Memorandum does not include any assumptions about potential savings resulting from these proposals. The Committee acknowledges that any savings will depend on the rate of change in

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[55] Supplementary written evidence from Orkney Islands Council.

[56] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1083.

[57] Scottish Parliament Finance Committee, *Official Report,* 21 April 2009, col. 1084.

sentencing behaviour, and accepts that a significant decrease in the prison population would have to take place before any sizeable cost savings would be likely to occur. If any savings were to occur, however, the Committee notes the concern of the Community Justice Authorities that Scottish Government should consider transferring additional funding to reflect the shifting demand.

62. The Committee recommends that the lead committee should consider these issues and, in particular, the methodology underpinning the assumptions about the expected take-up of CPOs, in greater depth in evidence with the Cabinet Secretary.

Scottish Sentencing Council

63. The lead committee may wish to seek further clarification from the Cabinet Secretary on the costs associated with the Scottish Sentencing Council, and the scope to minimise these as far as possible through, for example, the co-location of offices.

Remand and committal of children and young people

64. The Committee recognises that, as a result of the proposals regarding the remand and committal of children and young people, there will be an additional cost impact for local authorities, while there will be a saving for the Scottish Prison Service. The lead committee may wish to pursue with the Cabinet Secretary whether the SPS saving will be passed on to local authorities to ensure that sufficient resources are available for the provisions to be enacted successfully.

Licensing provisions

65. Subject to the Government’s commitment to remove sections 129 and 140 from the Bill, the Committee does not wish to raise any significant concerns with regard to the financial implications of the licensing provisions. The lead committee may, however, wish to pursue with a wider representation of local authorities the issues raised in evidence to the Finance Committee.

ANNEXE C: EXTRACTS FROM THE MINUTES

5th Meeting, 2009 (Session 3), Tuesday 10 February 2009

Decision on taking business in private: The Committee agreed to consider its work programme and an approach paper for the anticipated Criminal Justice and Licencing (Scotland) Bill in private at future meetings.

8th Meeting, 2009 (Session 3), Tuesday 10 March 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed to continue consideration at its next meeting. In addition, the Committee agreed its preferred candidates for appointment as advisers in connection with its consideration of the Bill at Stage 1.

9th Meeting, 2009 (Session 3), Tuesday 17 March 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed its approach to the scrutiny of the Bill at Stage 1.

11th Meeting, 2009 (Session 3), Tuesday 31 March 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed a revised approach to the scrutiny of the Bill at Stage 1.

13th Meeting, 2009 (Session 3), Tuesday 5 May 2009

Decision on taking business in private: The Committee agreed to take item 7 and any future consideration of written and oral evidence received on the Criminal Justice and Licensing (Scotland) Bill at Stage 1 in private.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed to accept into evidence written submissions received in response to the call for evidence.

14th Meeting, 2009 (Session 3), Tuesday 12 May 2009

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

The Right Hon Lord Hamilton, Lord President and Lord Justice General, The Right Hon Lord Gill, Lord Justice Clerk, and Carolyn Breeds, Deputy Legal Secretary to the Lord President;
Sheriff Michael Fletcher and Sheriff Nigel Morrison QC, Sheriffs' Association;
Johan Findlay, Chairman, and Robin White, Committee Member, Scottish Justices Association;
The Right Hon Lord Cullen and Professor Jan McDonald, the Royal Society of Edinburgh.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed to accept into evidence further written submissions received in response to the call for evidence.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence session.

15th Meeting, 2009 (Session 3), Tuesday 19 May 2009

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

The Right Hon Henry McLeish, Chair, Scottish Prisons Commission;
Councillor Margaret Kennedy, Convener, and Anne Pinkman, Chief Officer, Fife and Forth Valley Community Justice Authority;
Jim Hunter, Chief Officer, North Strathclyde Community Justice Authority;
Tony McNulty, Chief Officer, Lanarkshire Community Justice Authority;
Raymund McQuillan, Vice Convener, Criminal Justice Standing Committee, and Yvonne Robson, Professional Development Manager, Association of Directors of Social Work;
Contributors from the public gallery in an open session;
Professor Fergus McNeill, Professor of Criminology and Social Work, University of Glasgow, John Scott, Chairman of the Howard League for Penal Reform in Scotland, and Professor Alec Spencer, Honorary Professor, University of Stirling, Scottish Consortium on Crime and Criminal Justice.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed to accept into evidence a further written submission received in response to the call for evidence.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed to defer consideration of the main themes arising from the evidence session to its next meeting.

16th Meeting, 2009 (Session 3), Tuesday 26 May 2009

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Chief Constable Stephen House, Strathclyde Police, and Chief Constable David Strang, Lothian and Borders Police, Association of Chief Police Officers in Scotland;
Gordon Meldrum, Director General, Scottish Crime and Drug Enforcement Agency;
David McKenna, Chief Executive, Susan Gallagher, Director of Development, and Jim Andrews, Director of Operations, Victim Support Scotland;
Maire McCormack, Head of Policy, and Nico Juetten, Parliamentary Officer, Scotland's Commissioner for Children and Young People;
Tom Roberts, Head of Public Affairs, CHILDREN 1st;
Dr Jonathan Sher, Director of Research, Policy and Programmes, Children in Scotland.

The Committee agreed to take evidence from the Scottish Prison Service at a future meeting.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence session.

17th Meeting, 2009 (Session 3), Tuesday 2 June 2009

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Alan McCreadie, Deputy Director Law Reform, and Bill McVicar, Convener of the Criminal Law Committee, Law Society of Scotland;
Ian Duguid QC, Chairman of the Criminal Bar Association, Faculty of Advocates;
Professor James Fraser, Director of the Centre for Forensic Science, University of Strathclyde;
Tom Nelson, Director of Forensic Services, Scottish Police Services Authority;
The Rt Hon Lord Coulsfield, author, Independent review of the law and practice of disclosure in criminal proceedings in Scotland;
Professor Neil Hutton, and Dr Cyrus Tata, Centre for Sentencing Research, University of Strathclyde;
James Chalmers, Senior Lecturer, School of Law, University of Edinburgh;
Dr Sarah Armstrong, Senior Research Fellow, Faculty of Law, Business and Social Sciences, University of Glasgow.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed not to accept into evidence a further written submission received after the deadline for responses to the call for evidence.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed to defer consideration of the main themes arising from the evidence session to a future meeting.

19th Meeting, 2009 (Session 3), Tuesday 9 June 2009

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Mike Ewart, Chief Executive, and Rona Sweeney, Director of Prisons, Scottish Prison Service;
Councillor Harry McGuigan, Community Well-being and Safety Spokesperson, and Mike Callaghan, Policy Manager, COSLA;
The Rt Hon Elish Angiolini QC, Lord Advocate, and Frank Mulholland QC, Solicitor General;
John Logue, Head of Policy Division, Crown Office and Procurator Fiscal Service.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed to defer consideration of the main themes arising from the evidence session to a future meeting.

20th Meeting, 2009 (Session 3), Tuesday 16 June 2009

Decision on taking business in private: The Committee agreed that consideration of an issues paper and draft report on the Criminal Justice and Licensing (Scotland) Bill would be taken in private at future meetings.

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

> Alan McCreadie, Deputy Director Law Reform, and John Loudon, Convener of the Licensing Law Sub-Committee, Law Society of Scotland;
> Assistant Chief Constable Andrew Barker, Fife Constabulary, and Inspector Gordon Hunter, Lothian and Borders Police, Association of Chief Police Officers in Scotland;
> Paul Waterson, Chief Executive, and Colin Wilkinson, Secretary, Scottish Licensed Trade Association;
> Paul D. Smith, Executive Director, Noctis;
> Paul Smith, Vice-Chairman, Scottish Late Night Operators Association;
> Patrick Browne, Chief Executive, Scottish Beer and Pub Association;
> Councillor Marjorie Thomas, Chair, City of Edinburgh Licensing Board;
> Mairi Millar, Senior Solicitor and Assistant Clerk, City of Glasgow Licensing Board;
> Frank Jensen, Legal Team Leader, Fife Council;
> Sylvia Murray, Policy Manager, COSLA.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence session.

21st Meeting, 2009 (Session 3), Tuesday 23 June 2009

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

> Kenny MacAskill MSP, Cabinet Secretary for Justice; George Burgess, Criminal Law and Licensing Division, Wilma Dickson, Community Justice Services Division, Rachel Rayner, Scottish Government Legal Directorate, Rachael Weir, Criminal Procedure Division, and Denise McKay, Scottish Government Legal Directorate, Scottish Government.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence sessions, in order to inform the drafting of its report. The Committee agreed to delegate to the Convener authority to issue any requests for follow-up information.

22nd Meeting, 2009 (Session 3), Tuesday 1 September 2009

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Kenny MacAskill MSP, Cabinet Secretary for Justice, George Burgess, Criminal Law and Licensing Division, Tony Rednall, Criminal Law and Licensing Division, and Denise McKay, Scottish Government Legal Directorate, Scottish Government.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee agreed not to accept into evidence further written submissions received after the deadline for responses to the call for evidence.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence session in order to inform the drafting of its Stage 1 report.

23rd Meeting, 2009 (Session 3), Tuesday 8 September 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee considered a draft Stage 1 report and agreed to continue consideration at its next meeting.

24th Meeting, 2009 (Session 3), Tuesday 15 September 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee further considered its draft Stage 1 report, and agreed to continue consideration at its next meeting.

25th Meeting, 2009 (Session 3), Tuesday 22 September 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee further considered its draft Stage 1 report, and agreed to continue consideration at its next meeting. The Committee also agreed that the Convener would write to the Parliamentary Bureau seeking an extension to the previously agreed Stage 1 deadline.

26th Meeting, 2009 (Session 3), Tuesday 29 September 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee further considered its draft Stage 1 report and agreed to continue consideration at its next meeting.

27th Meeting, 2009 (Session 3), Tuesday 6 October 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee further considered its draft Stage 1 report and agreed to continue consideration at its next meeting.

28th Meeting, 2009 (Session 3), Tuesday 27 October 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee further considered a draft Stage 1 report and agreed to continue consideration later in the meeting.

Criminal Justice and Licensing (Scotland) Bill: The Committee continued its consideration of a draft Stage 1 report. Various changes were agreed to, one by division. The Committee agreed to continue consideration at its next meeting.

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Record of division in private: In relation to section 17 of the Bill, the Convener proposed inserting a new paragraph expressing the Committee's disagreement to a statutory presumption against short custodial sentences. The Committee divided: For 4 (Bill Aitken, Bill Butler, Cathie Craigie, Paul Martin); Against 4 (Robert Brown, Angela Constance, Nigel Don, Stewart Maxwell); Abstentions 0; amendment agreed to on Convener's casting vote.

29th Meeting, 2009 (Session 3), Tuesday 3 November 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee further considered a draft Stage 1 report and agreed to continue consideration later in the meeting.

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee continued its consideration of a draft Stage 1 report and agreed to consider a final draft at its next meeting.

30th Meeting, 2009 (Session 3), Tuesday 10 November 2009

Criminal Justice and Licensing (Scotland) Bill (in private): The Committee considered and agreed its Stage 1 report. In so doing, various changes were agreed to.

ANNEXE D: INDEX OF ORAL EVIDENCE

14th Meeting, 2009 (Session 3), Tuesday 12 May 2009

The Right Hon Lord Hamilton, Lord President and Lord Justice General, The Right Hon Lord Gill, Lord Justice Clerk, and Carolyn Breeds, Deputy Legal Secretary to the Lord President;
Sheriff Michael Fletcher and Sheriff Nigel Morrison QC, Sheriffs' Association;
Johan Findlay, Chairman, and Robin White, Committee Member, Scottish Justices Association;
The Right Hon Lord Cullen and Professor Jan McDonald, the Royal Society of Edinburgh.

15th Meeting, 2009 (Session 3), Tuesday 19 May 2009

The Right Hon Henry McLeish, Chair, Scottish Prisons Commission;
Councillor Margaret Kennedy, Convener, and Anne Pinkman, Chief Officer, Fife and Forth Valley Community Justice Authority;
Jim Hunter, Chief Officer, North Strathclyde Community Justice Authority;
Tony McNulty, Chief Officer, Lanarkshire Community Justice Authority;
Raymund McQuillan, Vice Convener, Criminal Justice Standing Committee, and Yvonne Robson, Professional Development Manager, Association of Directors of Social Work;
Contributors from the public gallery in an open session;
Professor Fergus McNeill, Professor of Criminology and Social Work, University of Glasgow, John Scott, Chairman of the Howard League for Penal Reform in Scotland, and Professor Alec Spencer, Honorary Professor, University of Stirling, Scottish Consortium on Crime and Criminal Justice.

16th Meeting, 2009 (Session 3), Tuesday 26 May 2009

Chief Constable Stephen House, Strathclyde Police, and Chief Constable David Strang, Lothian and Borders Police, Association of Chief Police Officers in Scotland;
Gordon Meldrum, Director General, Scottish Crime and Drug Enforcement Agency;
David McKenna, Chief Executive, Susan Gallagher, Director of Development, and Jim Andrews, Director of Operations, Victim Support Scotland;
Maire McCormack, Head of Policy, and Nico Juetten, Parliamentary Officer, Scotland's Commissioner for Children and Young People;
Tom Roberts, Head of Public Affairs, CHILDREN 1st;
Dr Jonathan Sher, Director of Research, Policy and Programmes, Children in Scotland.

17th Meeting, 2009 (Session 3), Tuesday 2 June 2009

Alan McCreadie, Deputy Director Law Reform, and Bill McVicar, Convener of the Criminal Law Committee, Law Society of Scotland;
Ian Duguid QC, Chairman of the Criminal Bar Association, Faculty of Advocates;

Professor James Fraser, Director of the Centre for Forensic Science, University of Strathclyde;
Tom Nelson, Director of Forensic Services, Scottish Police Services Authority;
The Rt Hon Lord Coulsfield, author, Independent review of the law and practice of disclosure in criminal proceedings in Scotland;
Professor Neil Hutton, and Dr Cyrus Tata, Centre for Sentencing Research, University of Strathclyde;
James Chalmers, Senior Lecturer, School of Law, University of Edinburgh;
Dr Sarah Armstrong, Senior Research Fellow, Faculty of Law, Business and Social Sciences, University of Glasgow.

19th Meeting, 2009 (Session 3), Tuesday 9 June 2009

Mike Ewart, Chief Executive, and Rona Sweeney, Director of Prisons, Scottish Prison Service;
Councillor Harry McGuigan, Community Well-being and Safety Spokesperson, and Mike Callaghan, Policy Manager, COSLA;
The Rt Hon Elish Angiolini QC, Lord Advocate, and Frank Mulholland QC, Solicitor General;
John Logue, Head of Policy Division, Crown Office and Procurator Fiscal Service.

20th Meeting, 2009 (Session 3), Tuesday 16 June 2009

Alan McCreadie, Deputy Director Law Reform, and John Loudon, Convener of the Licensing Law Sub-Committee, Law Society of Scotland;
Assistant Chief Constable Andrew Barker, Fife Constabulary, and Inspector Gordon Hunter, Lothian and Borders Police, Association of Chief Police Officers in Scotland;
Paul Waterson, Chief Executive, and Colin Wilkinson, Secretary, Scottish Licensed Trade Association;
Paul D. Smith, Executive Director, Noctis;
Paul Smith, Vice-Chairman, Scottish Late Night Operators Association;
Patrick Browne, Chief Executive, Scottish Beer and Pub Association;
Councillor Marjorie Thomas, Chair, City of Edinburgh Licensing Board;
Mairi Millar, Senior Solicitor and Assistant Clerk, City of Glasgow Licensing Board;
Frank Jensen, Legal Team Leader, Fife Council;
Sylvia Murray, Policy Manager, COSLA.

21st Meeting, 2009 (Session 3), Tuesday 23 June 2009

Kenny MacAskill MSP, Cabinet Secretary for Justice; George Burgess, Criminal Law and Licensing Division, Wilma Dickson, Community Justice Services Division, Rachel Rayner, Scottish Government Legal Directorate, Rachael Weir, Criminal Procedure Division, and Denise McKay, Scottish Government Legal Directorate, Scottish Government.

22nd Meeting, 2009 (Session 3), Tuesday 1 September 2009

Kenny MacAskill MSP, Cabinet Secretary for Justice, George Burgess, Criminal Law and Licensing Division, Tony Rednall, Criminal Law and Licensing Division, and Denise McKay, Scottish Government Legal Directorate, Scottish Government.

ANNEXE E: INDEX OF WRITTEN EVIDENCE

Evidence received in alphabetical order

Aberdeenshire Council (a) (19KB pdf)
Aberdeenshire Council (b) (28KB pdf)
Action for Children Scotland (38KB pdf)
Association of Chief Police Officers in Scotland (48KB pdf)
Association of Directors of Social Work (21KB pdf)
Association of Scottish Neighbourhood Watches (41KB pdf)
Audit Scotland (25KB pdf)
Ayrshire Criminal Justice Social Work Partnership (15KB pdf)
Allan Balsillie (34KB pdf)
William Beck (26KB pdf)
Aileen Campbell MSP (14KB pdf)
CARE for Scotland (35KB pdf)
Central Scotland Rape Crisis and Sexual Abuse Centre (13KB pdf)
James Chalmers, Senior Lecturer in Law, University of Edinburgh (20KB pdf)
Children 1st (48KB pdf)
Children in Scotland (15KB pdf)
Church of Scotland (13KB pdf)
Clydebank Women's Aid Collective (16KB pdf)
Community Justice Authorities (35KB pdf)
Consenting Adults Action Network (32KB pdf)
Convention of Scottish Local Authorities (26KB pdf)
Lord Coulsfield (17KB pdf)
Crown Office and Procurator Fiscal Service (19KB pdf)
Margaret Curran MSP (14KB pdf)
Dumfries and Galloway Council (a) Social Work Services (19KB pdf)
Dumfries and Galloway Council (b) Court and Licensing Service (44KB pdf)
East Lothian Council (15KB pdf)
East Renfrewshire Community Health and Care Partnership (14KB pdf)
City of Edinburgh Council Regulatory Committee (20KB pdf)
City of Edinburgh Licensing Board (15KB pdf)
Engender (25KB pdf)
Equality and Human Rights Commission (34KB pdf)
Equality Network (19KB pdf)
Faculty of Advocates (a) (20KB pdf)
Faculty of Advocates (b) (18KB pdf)
Fife Council (11KB pdf)
Fife Licensing Board (16KB pdf)
GeneWatch UK (25KB pdf)
Glasgow City Council (37KB pdf)
Glasgow Community and Safety Services (27KB pdf)
City of Glasgow Licensing Board (26KB pdf)
Sir Gerald Gordon (12KB pdf)
Her Majesty's Revenue and Customs (14 KB pdf)
Human Genetics Commission (22KB pdf)
Professor Neil Hutton (32KB pdf)
Information Commissioners Office (16KB pdf)

Joint Faiths Advisory Board on Criminal Justice (16KB pdf)
Judges of the High Court of Justiciary (84KB pdf)
Law Society of Scotland (a) (48KB pdf)
Law Society of Scotland (b) (29KB pdf)
Professor Clare McGlynn and Dr Erika Rackley, Durham Law School, Durham University (158KB pdf)
Helen McGregor (10KB pdf)
Mental Welfare Commission for Scotland (31KB pdf)
Midlothian Council (12KB pdf)
John Muir (14KB pdf)
National Gender-based Violence Programme Team (21KB pdf)
NOCTIS (42KB pdf)
North Ayrshire Council (24KB pdf)
North Lanarkshire Council (48KB pdf)
Nuffield Council on Bioethics (26KB pdf)
Orkney Islands Council (13KB pdf)
Punch Taverns (21KB pdf)
Rape Crisis Scotland (30KB pdf)
Renfrewshire Council (25KB pdf)
Anna Ritchie (12KB pdf)
The Royal Society of Edinburgh (49KB pdf)
Sacro (20KB pdf)
SAMH (31 KB pdf)
Scotland's Commissioner for Children and Young People (63KB pdf)
Scottish Beer and Pub Association (33KB pdf)
Scottish Borders Council (21KB pdf)
Scottish Centre for Crime and Justice Research (93KB pdf)
Scottish Childrens Reporter Administration (47KB pdf)
Scottish Consortium on Crime and Criminal Justice (43KB pdf)
Scottish Council of Jewish Communities (30KB pdf)
Scottish Crime and Drug Enforcement Agency (59KB pdf)
Scottish Grocers Federation (12KB pdf)
Scottish Justices Association (34KB pdf)
Scottish Licensed Trade Association (32KB pdf)
Scottish Police Federation (35KB pdf)
Scottish Prison Service (14KB pdf)
Scottish Taxi Federation (33KB pdf)
Scottish Womens Aid (57KB pdf)
Sheriffs' Association (133KB pdf)
SM Dykes Manchester (12KB pdf)
Mike Smith (11KB pdf)
South Ayrshire Multi-Agency Partnership to tackle Violence Against Women & Children (37KB pdf)
South Lanarkshire Council (37KB pdf)
Cyrus Tata, Centre for Sentencing Research, Department of Law, Strathclyde University (61KB pdf)
Trafficking Awareness Raising Alliance (38KB pdf)
Turning Point Scotland (25KB pdf)
Victim Support Scotland (26KB pdf)
Violence Against Women Strategy Multi-Agency Working Group (28KB pdf)

Lesley Walker (12KB pdf)
West Lothian Council (20KB pdf)
The Wise Group (51KB pdf)
Women's Support Project (36KB pdf)
Zero Tolerance Charitable Trust (29KB pdf)

Supplementary evidence received (in alphabetical order)

Association of Chief Police Officers in Scotland (48KB pdf)
James Chalmers, Senior Lecturer in Law, University of Edinburgh (18KB pdf)
Crown Office and Procurator Fiscal Service (27KB pdf)
City of Glasgow Licensing Board (16KB pdf)
Law Society of Scotland (19KB pdf)
Lord President (11KB pdf)
Scottish Government:
    Cabinet Secretary for Justice - 7 September 2009 (75KB pdf)
    Cabinet Secretary for Justice - 22 September 2009 (40KB pdf)
    Officials - 14 September 2009 (12KB pdf)
    Officials - 29 September 2009 (14KB pdf)
Victim Support Scotland (31KB pdf)

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Mike Smith

I notice that the anomaly of Sunday morning alcohol off-sales does not appear to be addressed in the Criminal Justice and Licensing (Scotland) Bill. Under present legislation we have had for a considerable number of years a situation where, in addition to general restrictions on off-sales, there is a further restriction preventing off-sales on Sunday mornings. I don't know the history of this particular clause but it may be a hangover from the days when public houses were not permitted to open on Sundays but hotel bars could open to the public. It certainly seems to date from the days of Church influence over such matters. The number of regular churchgoers in Scotland will soon be exceeded by the number of regular mosque attenders, who may have a legitimate complaint that the churches wield undue influence. We clearly couldn't pursue a course of inviting suggested restrictions from every religious group, particularly when they are all out numbered by those make no regular religious devotions. It seems to me that the common-sense solution would be to simply remove the Sunday morning off-sales restriction.

I look forward to your views and proposals on this matter.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Aberdeenshire Council

Part 1 - Sentencing

Scottish Sentencing Council
A judicially led Sentencing Council which will develop and review sentencing policy, and which will support transparency in sentencing is welcome.

Resource Implications
The proposed legislation on changes to sentencing has the potential to impose a significant impact on criminal justice social work resources. Examples of new costs include reports for Review Courts, community sentencing also prison sentences and release arrangements.

The Financial Memorandum, issued along with the Explanatory Notes, indicates that the majority of additional costs incurred by local authorities will be met through existing Section 27A funding. However the estimated future costs of core services appear to be based on 2007/08 costs and do not take account of cost of living increases.

Section 14 Community Payback Orders

This new sentence will provide court with an increased range of disposals that will combine restrictions, including payback to communities as the punishment element, along with activities which will support positive change .

Progress Reviews will allow courts closer monitoring of the offenders progress and will allow early intervention before formal breach proceedings

> Comment: Whilst both elements of the new community payback orders have positive elements their introduction is likely to have a significant impact on criminal justice social work resources. In particular the need to identify, and supervise, additional work placements. There will also be an increase in the number of reports which will be required by Progress Courts.

Where the offender is less than 18 years of age, a Community Payback Order will include supervision where the court is satisfied the local authority can provide support and rehabilitation

> Comment: This will require greater commitment from young offenders and may then result in an increase in their risk of failing to comply, however it may also be positive in that it will provide support to address other relevant issues.

The legislation aims to reduce the time limit for completion of unpaid work to 3 months for level 1 (up to 100 hours) and 6 months to complete up to 300 hours.

> Comment: The Community Payback Order has the potential to require a significant increase in the number of work placements required. Whilst Criminal Justice staff can promote the benefits of unpaid work, the availability of placements is determined by the willingness of community groups and statutory and voluntary agencies taking responsibility for offering suitable group and individual placements.
>
> The time taken to complete unpaid work is also determined by the availability of community service staff and other resources, also offenders availability (particularly relevant in areas of high employment and where offenders are employed as offshore workers and fishermen). Importantly the time taken for courts to progress breach proceedings also has a significant impact on the overall length of time to complete unpaid work hours.
>
> For example - in order to complete the proposed maximum number of 300 hours within six months offenders will be required to undertake 12 hours of unpaid work each week. Whilst this is not unreasonable, the Scottish average over the past three years is between 3.3 – 3.5 hours per week over a 12 month period. Without substantial increases in resources and more support from other agencies, the proposed reduced timescale is setting offenders and criminal justice staff a target that the majority will fail to achieve.

Section 17 Presumption against short periods of imprisonment
This will introduce a presumption against custodial sentences of less than 6 months.

> Comment: It is widely accepted that, in general, short sentences do little to achieve rehabilitation however the draft legislation makes no comment about possible alternative court disposals or the potential impact on community resources.

PART 3 Criminal Procedures

Section 47 Remand and committal of children and young persons
Children under the age of 16 years not released on bail or ordained to appear will be remanded to the local authority to be detained in either secure accommodation or a suitable place of safety.

> Comment: It is positive that the legislation will end the remand of children to prison. Although it is estimated there will be a fall in the number of children requiring secure accommodation, the Financial Memorandum notes that the burden to provide alternative remand accommodation will fall on local authorities.

Section 66 Witness anonymity orders

Comment: The introduction of measures whereby court can grant discretion to protect the anonymity of a witness in any particular case is welcome progress in addressing the rights of witnesses. In order to ensure parity for all witnesses national guidance should be introduced, also all witnesses should be given clear information regarding their right to anonymity where they have concerns for their own or other people's wellbeing.

Chris Booth
Acting Chief Social Work Officer
Head of Social Work (Child Care and Criminal Justice)

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Aberdeenshire Council

Proposals under Part 8
Licensing under the Civic Government (Scotland) Act 1982

General
We would prefer to see an overhaul of the Civic Government (Scotland) Act 1982 as a whole instead of further amendments to parts of the existing framework.

Boat Hire Licensing should be removed from the remit of local authorities and given to the Department for Transport who regulate all other forms of licensing for boats and yachts. They have the expertise to deal with this form of licensing.

Clarification is required as to whether standard conditions require to be set of new when the proposed changes are introduced. Also, whether Licensing Authorities will require to pass new resolutions to adopt licensing systems under the parts of the Act that licence optional activities.

We were disappointed to note that proposals to make display of licences mandatory do not appear to have been carried through to the Criminal Justice Bill proposals.

We would also like to see the introduction of a legal requirement for enforcement officers to be employed in the same way that the Licensing (Scotland) Act 2005 provided for licensing standards officer.

Mandatory licence conditions
This is welcomed. While normally all licences are processed and issued within 28 days, there are occasions where problems arise that make it difficult to issue a licence within the permitted six months. To be able to issue a licence by default with the same standard conditions that all other licences issued under the Act have, makes the licence enforceable where there are problems. This provision is long overdue.

Standard licence conditions
No comment.

Powers of entry and inspection for civilian employees
No comment.

Licensing of metal dealers
Aberdeenshire Council does not agree with making metal dealer’s licensing an optional licensing scheme. The price of metal is currently very high and

many communities are experiencing random theft of metal. This activity should remain mandatory.

Licensing of taxis and private hire cars

Aberdeenshire Council strongly supports the amendment to Section 13. The ethos behind the 1982 Act is public safety. The amendments to this section clarify the situation and act in the interests of public safety. This clarification is long overdue.

With regard to the proposed changes for setting and reviewing taxi fares, Aberdeenshire Council reviews fares on an annual basis. All the proposed changes are part of the process already carried out in practice as part of the fares review. These proposals are achievable.

Licensing of market operators

The definition of market should be extended to include car boot sales.

Licensing of public entertainment

This is long overdue. Many large scale events regularly get round licensing requirements by being "free". This often means that essential health and safety checks are not carried out and the applicants do not have the proper measures in place to ensure the safety of the events. Likewise the ability to be able to exclude small events is welcomed.

The legislation also requires to remove the exemption from the requirement to have a public entertainment licence where a liquor licence is held under the 2005 Act. An occasional licence cannot be controlled in the same way that a public entertainment licence can and both should be required for an event.

Licensing of late night catering

This is welcome in a time where licensing authorities are increasingly being required to look at the management of the night time economies within their localities and the effect that the night time economy has on the wider community.

Applications for licences

The proposed changes reflect the information that is now required to enable background checks to be carried out by the Police.

The extended processing time will slow down the issue of licences slightly but the longer time for responses to be lodged is welcomed as consultees sometimes struggle to meet the current 21 day deadline.

We note that it is proposed to insert a section (2A) into paragraph 5 of Schedule 1 to the Act. In the version of the Act we work to the following Section (2A) already exists –

"(2A) The conditions referred to in sub-paragraph (1)(b) above shall not relate to any matter in relation to which requirements or prohibitions are or could be imposed by virtue of Part 3 of the Fire (Scotland) Act 2005 (asp 5)."

Some clarification is required as to numbering or as to whether the proposed Section replaces the existing section.

Appeals under Schedule 1 and Schedule 2

Civic Government appeals invariably proceed on a detailed criticism of the terms of the Statement of Reasons. Furthermore, there is no provision allowing the Statement to be amended to address criticisms or otherwise clarify the licensing authority's reasoning, As a matter of law, then, the authority only has one opportunity to "get it right", and must be given sufficient time to compile reasons in sufficient detail. For that reason, we oppose the reduction in the time limit to produce the Statement of Reasons under the Bill.

Proposals under Part 9

Alcohol Licensing

General

We are disappointed that no effort is being made to amend the appeal provisions in response to criticisms already made (including criticisms from the shrieval bench) in order to better reflect Nicholson's intentions. As outlined above, this opportunity should also be taken to harmonise the appeal provisions in the Civic Government (Scotland) Act 1982.

With regard to the Bill provisions, it is not clear if the drafter intends to confer on the chief constable a general right to object. That would benefit from being clarified.

Opportunity should also be taken to amend and clarify the provisions within the Act relating to applications for variation as the Act as it currently stands poses more questions than answers.

Variation of premises licences procedures require to be completely re-written and the author of this response has provided the Scottish Government with views on what needs to be addressed.

Further, the appeal provision under the Act require to be revised. We are in agreement with the general consensus of opinion that the provisions under the 1976 Act require to be reinstated, with some thought to harmonising the approach with the appeal procedures given under the Civic Government (Scotland) Act 1982. The only provision that we would not wish to see repealed is the immediate imposition of a suspension or revocation of a licence pending an appeal.

Sale of alcohol to persons under 21 etc.

No comments

7A Duty to assess impact of off-sales to persons under the age of 21

Assuming this proposal remains in the current Bill, if it is the Scottish Government's intention to raise the minimum age for off sales, then it should do so within the primary legislation. It is unfair to devolve to Licensing boards a power that the Parliament itself is not willing to wield.

We see the proposals providing an opportunity for "booze cruises" across Board boundaries.

27A Power of board to vary premises licence conditions

It is difficult to comment on this without knowing what type of situation the subordinate legislation is to cater for.

130 Premises licence applications: notification requirements

This proposals under Subsection (2) clarifies an anomaly.

131 Premises licence applications: modification of layout plans

No comments

132 Premises licence applications: antisocial behaviour reports

No comments

133 Sale of alcohol to trade

No comments

Occasional licences

No comments.

135 Extended hours applications: variation of conditions

No specific comment. However we feel that the enthusiasm to define precisely when, and where, a Licensing Board is to impose or vary a condition is inevitably going to lead to arguments that, in the absence of an express power, then a Board has no power and thus the Board has no implicit authority. We are not confident about the Court's attitude on this issue.

136 Personal licences

The proposals outlined at Section (2)(c) – inserting new sub-paragraphs (7) and (8) into Section 74 – would appear to reduce personal licence applications to a mathematical exercise.
The proposals in subsection (4) seem to seek to address the possible black market in personal licences. This would be better achieved if personal licences were made specific to a Board and not Scotland-wide.

137 Emergency closure orders

No comments

138 False statements in applications: offence

No comments

139 – Further modifications of 2005 Act under Schedule 4

Paragraph 2 - This makes sense.

Paragraph 3 – No comments

Paragraph 4 – does this mean that the chief constable now has the same locus to object as "any person?" This needs clarification

Paragraph 5 – No comments

Paragraph 6 (1) & (2) – no comments

(3) – This should be dealt with along with the substantive amendments rather than being relegated to Schedule 4

Paragraph 7 - no comments

Paragraph 8 – no comments

Paragraph 9 - we hope this has been repealed because it has been superceded. This is not clear.

Paragraph 10 - we hope this has been repealed because it has been superceded. This is not clear.

Paragraph 11 – no comment

Paragraph 12 – no comments

Paragraph 13 – no comments

Paragraph 14 – no comments

Paragraph 15 – no comments

Paragraph 16 – no comments

Paragraph 17 – no comments

Paragraph 18 – we assume that this reflects an intention that the chief constable will now have the same locus as "any person" to make formal objection to an application.

140 – Licensed premises: social responsibility levy

We believe that these provisions are being transferred to the Health Bill.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the City of Glasgow Licensing Board

In relation to the draft provisions within the Criminal Justice & Licensing (Scotland) Bill ("the Bill") relating to the licensing of alcohol and the Licensing (Scotland) Act 2005 ("the Act"), the City of Glasgow Licensing Board has the following comments to make:-

Section 130: Premises Licence Applications: Notification Requirements

In relation to the proposed new notification requirements, in terms of the definition of "premises licence application" contained within section 20 of the Act, the appropriate Chief Constable will require to be sent a copy of the application form, operating plan and layout plan. This is not immediately clear on reading the amended wording proposed for section 21.

Given that the Fire Authority requires to be notified that an application for a premises licence has been received, it is advisable that they should also be provided with the same documentation as the Chief Constable in order that there is meaningful consultation. So as to avoid any issues arising as to whether or not there is a conflict with the role of the Fire Authority under the Fire (Scotland) Act 2005, the requirement to provide a copy of the premises licence application (which includes the operating plan and layout plan) should be expressly included within the new notification provisions as opposed to being left for individual Boards to make arrangements with the appropriate Fire Authority.

With regard to those persons and bodies who receive only "notice of an application", is any standard form of notification to be developed? One of the difficulties with the generic form of premises licence is that it is impossible to provide any meaningful information as to the nature of the proposed premises. The practice of the Glasgow Board has been to state whether the application is for on or off-sales, or both, and to specify the forms of activities indicated on the operating plan. However it has been very much evident that those persons receiving the notification do not understand the nature of the licence applied for, or are concerned as to the precise meaning of wide ranging terms such as "live performances" or "indoor/outdoor sports". One particular Community Council has objected to every single premises licence application in its area, and the majority of issues raised in their objections relate to uncertainty as to what is being proposed. In the view of the Glasgow Board the inherent uncertainty caused by the notification process has to be addressed, requiring a review of the fundamental aspects of the generic premises licence and the prescriptive, yet vague, form of operating plan.

Presumably it is intended to amend, or remove, paragraph 9 of the Licensing Procedure (Scotland) Regulations 2007 (SSI 453) which would contradict the terms of the proposed new section 21(2).

With regard to the deletion of the provisions contained in section 21(3)(b) regarding the provision of anti-social behaviour reports, the experience of the Glasgow Board has been that these reports are of little or no value in assessing the suitability of new premises licence applications given that there can be no causal link between anti-social behaviour which has occurred in the last 12 months and the future operation of premises which are the subject of the application. The deletion of this provision is welcomed by the Glasgow Board.

Section 131: Premises Licence Applications: Modification of Layout Plans

The effect of this amendment to section 23 of the Act would be that an application must be granted if the applicant accepts a modification to the layout plan suggested by the Licensing Board. However, in practical terms such an application cannot be granted "there and then" as amended plans would require to be lodged to reflect the modification. It is likely that any modification to the layout plan, for example, a change to the proposed alcohol display areas, would have an effect on the capacity figure to be included within the operating plan. Any such amended plan would require to be the subject of consultation with Building Control Officers, and possibly the Fire Authority, before it can be granted by the Licensing Board. It could be the case that the proposed modification, following such consultation, raises an issue which either the Licensing Board or the applicant would have a difficulty with, but the Act would require the application to be granted given the "*must grant*" provision. This proposal requires to be revisited so as to avoid this potential difficulty.

Section 132: Premises Licence Applications: Antisocial Behaviour Reports

It is noted that under the terms of proposed new section 22 (2A), the Chief Constable will have the ability to make representations concerning a premises licence application by providing the Licensing Board with an anti-social behaviour report in identical terms to the content of the current reports. For the reasons outlined above under section 130, the Glasgow Board would question whether there is any merit in retaining the Chief Constable's ability to provide such reports as their content adds no value to a Board's consideration of an application.

Similar comments are adopted in relation to new section 24A in relation to a Board's power to request an antisocial behaviour report.

Section 133: Sale of Alcohol to Trade

The Glasgow Board has no comments to make.

Section 134: Occasional Licences

The Glasgow Board accepts that the procedures set out in Part Four of the Act make the process of applying for occasional licences more complex and time consuming. However, it is concerned that the proposed additions to section 57 to allow the reporting period to be reduced down from 21 days *"where the Licensing Board is satisfied that the application requires to be dealt with quickly"* will be abused by applicants seeking to have the reduced reporting period in less than exceptional circumstances, with Clerks being accused of being "unreasonable" where they do not choose to exercise their discretion. It is not immediately apparent as to what type of event would require the shortened reporting procedure, other than funeral parties, which tend to be by way of an application for extended hours at licensed premises rather than at unlicensed premises. These provisions require to be tightened so as to avoid abuse.

The suggested amendments do not rest well with the requirement contained within section 59(2) that a Board "must grant" an application for an occasional licence where it has not received an adverse notice from the Chief Constable or a Licensing Standards Officer as there could be any number of reasons why the Police or a Licensing Standards Officer may not have been able to comply with the reduced timescale. It could be the case that they may have wished to visit the subject premises or interview the applicant but have been unable to do so, and intended to make a recommendation of refusal to the Board, or provide adverse comments or suggest appropriate conditions. However, despite these circumstances, the absence of such a report within the shortened timescale would require the Licensing Board to grant the application. This is not satisfactory.

It is not clear from the regulations how this provision will work in practice. For example, is the applicant to be advised of the reduced period? Can it be extended after it has been reduced? Can the Police or Licensing Standards Officers argue against the reduced period? Further guidance on these issues is required.

Furthermore, it is noted that the decision as to whether the reporting period should be reduced can only be taken by the Clerk and not any other member of staff employed to assist the Clerk, such as a Depute Clerk or an Assistant Clerk. This is impractical given the other pressures placed on Clerks' time together with short term periods of absence on holidays or on sick leave, etc. It is unclear why this particular decision making power cannot be capable of delegation in the same manner as other, arguably greater, responsibilities under the Act.

Section 135 – Extended Hours Applications: Variation of Conditions

The Glasgow Board has no comments to make.

Section 136: Personal Licences

The Glasgow Board welcomes the amendments to the personal licence provisions which generally deal with the issues of concern raised by its Clerk, Stewart Ferguson, since the Act itself was first drafted. It would, however, wish the following comments to be noted:-

The proposed amendment to section 74 of the Act would require the applicant to sign the application form. It is unclear how this could be achieved if alcohol licensing is determined to be within the scope of the EU Service Directive which would require Licensing Boards to accept applications submitted on-line. The Glasgow Board respectfully suggests that this provision should be considered alongside the terms of the EU Service Directive so as to prevent another anomaly occurring.

With regard to the proposed addition of section 74(7)(c) which requires the Licensing Board to hold a hearing to determine a personal licence application where the applicant has held a personal licence which has either expired in the last three years or was surrendered by the applicant within that period, it is unclear how a Licensing Board will know that information where such a licence may have been issued by another Board. The Glasgow Board understands that the development of the National Personal Licence Database is not the subject of 100% uptake by all Licensing Boards in Scotland, and nor is there any time-limits by which information has to be uploaded - therefore there will be no way in which a Board can properly satisfy itself as to whether or not there has been a previous licence. Further clarification on this issue is sought.

Proposed section 74 (8) is badly drafted in that it could be interpreted so as to suggest that a hearing is held *after* the application has been granted or refused, rather than that a hearing may be held to determine whether the application should be granted or refused.

Section 137: Emergency Closure Orders

The Glasgow Board has no comments to make.

Section 138: False Statements in Applications: Offence

While the Glasgow Board welcomes the introduction of an offence provision in relation to applicants who knowingly make a false statement in an application, it is unclear how this would be established if applications are to be submitted electronically, without a signature, as per the terms of the EU Service Directive referred to above. Further clarification of this issue is required.

Schedule 4 – Further Modifications of the 2005 Act

In relation to the proposed amendment to section 23 (determination of a premises licence application) while the Glasgow Board welcomes the widening of the grounds on which the Chief Constable may object to a premises licence application, it is concerned that this provision could be interpreted by the Courts as implying that in the absence of a conviction notice, Licensing Boards would have more difficulty in establishing that the granting of the application would be inconsistent with one or more of the licensing objectives given the reference to "*must in particular take into account any conviction".*

The reference to section 22(2) in the proposed amendment to section 23(6)(b) should be removed as this subsection would be deleted in terms of the proposed amendment at paragraph 4 of schedule 4.

In relation to paragraph 13 of schedule 4, amendments are proposed to section 74 (2) which have already been proposed under section 136 of the Bill. It would also appear that a further subsection 74(2)(c) is being introduced when a new section 74(2)(c) has already been proposed under section 136. These errors in drafting require to be rectified.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Scottish Taxi Federation

As you are no doubt aware, a task group was set up in 2001, by the previous Government and given the responsibility of reviewing the Licensing provisions of the Civic Government (Scotland) Act 1982. Their report was delivered during 2004, following more than 3 years of deliberations. While a few of their recommendations have been included within the abovementioned Bill, it is the view of the Scottish Taxi Federation that if the efforts of the task group are not to be lost and the '82 Act properly updated, then much more needs to be included. We suggest the following should be considered.

Section 10 (3)

This section is discretionary and not mandatory. It allows LA's, if they so choose, to impose a limit on the number of Taxi licences they issue provided they are satisfied that there is no significant current unmet demand. In view of the present Governments concerns with alleged criminality in the private hire sector of the Taxi/ Ph Car industry, the Federation believes this provision should be extended to include the right to limit the number of Private Hire Licences. At present not all LA's limit the number of Taxi Licences, it is therefore reasonable to assume that if the provision remains discretionary, not all LA's will impose a restriction on the number of Private Hire Car Licences. The Federation believes that the continuing unfettered growth of the Private Hire industry has made it simple for that section of the trade to be infiltrated by undesirable elements.

Attached in the Appendix to this submission is a letter from Tayside Police to Anderson Fyfe Solicitors who act on behalf of the Scottish Taxi Federation. In the circumstances of the letter, Anderson Fyfe Solicitors were acting for Dundee Taxi Association as members of the STF.

Additionally, no guidance is given in the Act or elsewhere, as to how LA's should assess demand. As a result, a range of practices are followed by those LA's who operate limits and regular legal challenges are made in respect of decisions by LA's to refuse applications for Taxi Licences on the basis that there is no unmet demand.

The Federation believes that LA's operating best practice is those, which instruct independent third party organisations to carry out surveys to assess demand every 2/3 years and supplement these with assessments carried out by licensing officials the intervening period.

This will assure consistency of approach whilst preserving a LA's power to determine what limit to impose taking into account the result of surveys and local circumstances.

Section 10 (6)

This section should be amended to make specific provision for the transfer of licences in the event of death or permanent incapacity of the licence holder, particularly where the licence holder leaves behind dependants. Some LA'S have demonstrated that the current legislative provisions are inadequate and open to interpretation.

Section 12- fees for Taxis and Private Hire Cars

This section should be amended to make it clear that LA's should only charge such fees as are sufficient to cover their expenses.

Section 14- Signs on vehicles other than Taxis

It is the view of the Federation that roof signs of any kind on Private Hire Cars should be expressly prohibited. This section should be so amended.

Section 17- Taxi Fares

Section 17 (1) should be amended to make it clear that any administrative charge made by the Taxi Company for extending credit facilities to account customers does not fall within the powers of LA's to control. It is the Federation's view that the Act does not give power to LA's to impose arrangements for credit since this is not a charge relating to the hire or arrangement for hire of the Taxi. As such Section 21 (5) does not apply.

The Federation is of the view that taxi fares scales should be reviewed annually. If a cost formula were agreed between trade representatives and the LA, such a review would simply be a case of checking the figures against the previous figures and calculating any percentage increase, which may apply.

In general it is not considered that Section 17 is effective since LA's regularly carry out reviews late in the knowledge there is no sanction, which can be imposed in the event that the review is not carried out timeously. Therefore, the Federation propose this section should be amended to allow an appeal by the taxi trade to an independent arbiter if a LA fails to carry out a fares review within the prescribed timescales.

Section 18 – Appeals in respect of Taxi fares

The Federation supports the proposed amendment that representative bodies should be allowed submit an appeal. Such an amendment would not in our opinion be to the detriment of the individual. However, it is felt that the proposed amendment to cause LA's to consult with every individual Taxi operator in respect of a fares scale review, will be administratively burdensome and time consuming for LA's.

Section 19-Taxi Stances

This section should place a responsibility on LA's to provide sufficient taxi stance places to accommodate at least two thirds of the taxis it licences. There should also be an obligation to ensure stances are placed and constructed in such a manner as to be easily accessed by the general public and to disabled persons in wheelchairs in particular. As an example Glasgow City Council currently provides approximately 350 taxi stance spaces to accommodate 1430 licensed Taxis

Section 20- Regulations relating to Taxis and Private Hire Cars

It is submitted that fitness of the vehicle should be the only criteria for determining whether or not a vehicle can remain in service as a taxi.

Section 21-Offence Provisions

The Federation is aware of a growing problem involving taxi drivers being detained for abduction when dealing with non-paying passengers. Traditionally drivers could rely upon Police assistance and consequently would drive such passengers to the nearest police station. Police assistance can no longer be relied upon as they now take the view that the driver may be guilty of the offence of abduction. The Federation's view is, that drivers require some form of statutory protection to allow them to take a non-paying passenger to a police station when the driver has reasonable grounds for believing a crime has been committed.

It is also our view that a new offence for non-payment of taxi fares based upon the balance of probabilities is most definitely required.

In general terms the offences provisions contained in section 21 are adequate. The difficulty that arises is that the burden of proof required "beyond reasonable doubt" is such that convictions are almost impossible to obtain. It is the Federations view that proof required in terms of section 21 should be on the balance of probabilities.

Section 133- Definition of Public Places

The terms of section 133 appear to be clear and unambiguous. However, certain LA's have managed to consider areas such as bus stations, supermarkets etc which have unrestricted public access, to fall out with the definition of a public place. It is therefore clear that some guidance and clarification is urgently required.

Enforcement

The task group's comments embody all that enforcement is or at least ought to be. In reality, however, neither effective enforcement nor indeed the principles of the Enforcement Concordat are to any real extent evident in the licensing of taxis or private hire cars through Scotland.

There are numerous examples of how enforcement or the responsibility for enforcement has entirely failed. Since the introduction of the ‘82 Act, no real attempt has been made by LA’s to recruit and properly train enforcement officers despite the obvious need for such a service. LA’s generally speaking have instead preferred to identify the Police as the agency with responsibility for enforcing the provisions of the 1982 Act. The police for their part have a tendency to reciprocate and highlight the LA’s as the bodies responsible for enforcement. This situation is replicated throughout Scotland and is detrimental amongst other things to public safety. I am enclosing a copy of a recent letter from Tayside Police, which highlights the difficulties in getting to the bottom of who is responsible for enforcement.

It is the Federation’s view that something stronger than mere guidance is required and that guidelines require to be issued which should be followed by LA’s when dealing with enforcement. It is also the Federations view that civilian enforcement will only really be effective if the enforcement officers operate under the jurisdiction of the Police.

I would have included further comment but the need to remain within 4 pages prevents my doing so.

Bill McIntosh
General Secretary

Appendix

Letter from Superintendent C. MacKay, Deputy Divisional Commander of Tayside Police, to Mr T. McEntegart, Anderson Fyfe Solicitors

Complaint against the Police

I refer to the above subject and your letters of 10 February and 25 March 2009 in which you raised a number of concerns regarding the actions of the police in dealing with complaints made by Dundee Taxi Association in respect of the operation of the private hire company Dundee Private Hire Ltd. Having now met with representatives of the Scottish Taxi Federation, including members of the Dundee Taxi Association, and reviewed the actions of Tayside Police to date, I would now comment as follows.

This whole matter has now been ongoing for a considerable length of time and I would firstly like to take the opportunity to apologise to you and your clients for any delays encountered which have either been the responsibility or have been perceived to have been the responsibility of Tayside Police. I would point out however that on previous occasions when both Chief Inspector Robbie and Chief Inspector Richard have responded to you, they have first had consultations with the local Licensing Authority and/or the Procurator Fiscal.

In respect of the initial complaint relating to Dundee Private Hire Ltd cars illegally picking up passengers from the yard in South Ward Road, Dundee who had not pre-booked a private hire car, I would advise you that Chief Inspector Richard previously wrote to Dundee City Council as the local Licensing Authority to establish their position on this matter. I would advise you, as previously confirmed in an e-mail to Mr Bill McIntosh of the Scottish Taxi Federation, that the position of the local Licensing Authority, as to the arrangements between Dundee Private Hire Limited and the various nightclubs in South Ward Road for making available private hire cars for the patrons of these establishments, is that these arrangements are sufficient to comply with the terms of the Civic Government (Scotland) Act 1982. I would advise you that I have also discussed this matter with the District Procurator Fiscal who is of the view that while the local Licensing Authority considers the operation is legal then the Procurator Fiscal would not be of a mind to bring such matters before a court. Whilst you may not be happy with this decision, I am sure you can also understand that in such circumstances it would not be possible for the police to take any alternative action against any of the drivers you have alleged are committing offences.

As your clients have previously been advised by the local Licensing Authority, if they do not agree with the position adopted by them, then the way to challenge this is by submitting a formal complaint under Paragraph 11 of Schedule I to the 1982 Act alleging that Dundee Private Hire Ltd are not fit and proper persons to continue to hold licences. If the Committee agrees with this complaint, Dundee Private Hire Ltd would have a right of appeal to the Sheriff and, conversely, if the Committee does not uphold the complaint, your clients could complain to the Sheriff and that way a formal legal ruling could be obtained.

In respect of private hire drivers who are found to be illegally plying for passengers who have not come from one of the night-clubs with whom a “block booking” arrangement exists, I can assure you that the police have and will continue to take enforcement action against such persons. I would point out however that although these persons are committing an offence under terms of Section 21(1) (a) of the said 1982 Act I cannot provide you with a guarantee that all such offences will be reported to the Procurator Fiscal. All such offences will be considered on their own merits and if appropriate the drivers may be reported to the Local Licensing Authority for them to consider the matter and take what action they deem necessary. I have also spoken to the Procurator Fiscal regarding this approach and it is one he is entirely comfortable with. I would advise you that all of the drivers as a result of the action undertaken by the firm of investigators recently engaged by your clients, were indeed reported to the local Licensing Authority. I can assure you that Tayside Police do not condone any illegal activity or breach of licence conditions by private hire drivers. I can also give you an assurance that if a driver who has already been reported to the Licensing Authority offends again in the same manner, or in instances where there is some other significant criminality or associated offence then these instances will be reported to the Procurator Fiscal for consideration.

If any person is found to be plying for trade without a taxi or private hire licence then such a person will be reported to the Procurator Fiscal on every occasion.

In respect of the point you highlight regarding possible contraventions of the Road Traffic Act in respect of driving without insurance, this is noted and I can assure you that on each occasion an offence under Section 21(1) (a) is detected a check will be made with the relevant insurance company to confirm or otherwise the validity of any insurance cover that exists. Any relevant offences detected will indeed be reported to the Procurator Fiscal. I would advise you that such checks were made in respect of the drivers identified by the investigators engaged by your clients and in each case they were found to have sufficient cover to meet the requirements of the Road Traffic Act.

I regret that you have found the actions or previous responses of Tayside Police, in general, or Chief Inspectors Robbie or Richard in particular, to be in any way unsatisfactory and can only apologise for this. I can assure you that we have no wish to have anything other than a positive relationship with Dundee Taxi Association and hope that the content of this letter clarifies our position for you.

I would like to thank you for taking the time to bring these matters to my attention and providing me with the opportunity to explain our position I trust you have found the information provided helpful.

Yours sincerely

Superintendent C MacKay
Deputy Divisional Commander
16 April 2009

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Dumfries and Galloway Council Social Work Service

Further to my letter of 23 March 2009 please find below the response from Dumfries and Galloway Council in respect of the above. Unfortunately it does not include comments on Parts 8, 9 and 10 and these will be sent directly to you by W Taylor from the Council's Court and Licensing Service.

The Council welcomes the broad principles of the Bill, in particular the framework for sentencing, the new Community Payback orders, the presumption against short sentences, the proposed changes to the age of criminal responsibility, the strengthening of the response to sex offenders and sections referring to Mental Disorder. In addition the following more detailed comments are offered.

The Proposed Sentencing Commission and associated Sentencing Guidelines should provide a more consistent and transparent system of sentencing. Whilst there may be some concerns about the possible impact on the independence of sentencers and their capacity to reflect the individual circumstances of offences and offenders in the sentences of the court there is also a clear need for the public to understand and have confidence in the criminal justice system. In addition the power of Scottish Ministers and the High Court to request a review of the guidelines should provide some scrutiny by the legislature and the courts. However there will still be a need for those agencies involved in the criminal justice system to promote a greater understanding of their roles in ensuring that the legislation is enacted not only to ensure the smooth running of the system but also in terms of good outcomes for communities and individuals.

The other sections of the Bill that relate to sentencing in respect of Community Payback orders and short sentences are welcomed. The new name for community sentences may find greater support amongst members of the public and at the same time the underpinning policy promotes good outcomes for both communities and offenders. As with the other challenges for Social Work contained within Changing Lives more of the same will not do.

This Council is committed to promoting changes in Social Work practice that promote good outcomes and the development of a confident and competent work force. The changes in community sentences, the above Social Work principles and the accreditation of Criminal Justice Social Work interventions should promote an environment where courts have the confidence to use alternatives to short sentences. However there is a need to ensure that the sections in relation to time limits for serving and managing orders are reflected in procedures and guidance for both Criminal Justice Social Work and the Scottish Courts Administration.

The increase in the Grant Allocation to Criminal Justice Social Work outlined in Financial Memorandum should also provide additional resources to Criminal Justice Social Work, other Council services and the third sector, however it is hoped that the particular issues faced in delivering services in a rural community are recognised in the disbursement of these new funds.

The creation of post custody supervision for shorter sentences may also create an environment where some of the challenges facing those returning to their communities might be addressed. However whilst the Bill indicates the need for Scottish Ministers to negotiate with Local Authorities about the terms of these licences this would have to be supported by clear guidance and additional financial resources. Further it needs to be recognised that services other than Criminal Justice Social Work may have to be accessed and this may be difficult at a time of conflicting demands on limited resources.

Parts 2 (sale and hire of crossbows and knives) and Part 3 (Prosecution of children, Remand and committal of children and retention of samples etc. from children referred to the Children's hearing) may all have an impact on Children, Young People and their Families.

The proposals regarding the sale of knives and crossbows whilst generally welcome also raise concerns about the potential to demonise Children and Young people. The possible use of Young people as part of an investigation will require clear guidance to ensure that the Young People involved are not put at risk.

The changes to the age of criminal responsibility are to be welcomed. However this may lead to changes in Grounds of Referral to Children's Hearings and also create more appearances in court by Children and Young People for proof hearings. This may not only delay interventions but will also require clear guidance and training for Sheriffs and court staff in managing such appearances.

The change to the age of criminal responsibility and the changes to remand and committal may also create additional demands on Children and Families Social Work resources through supporting families through court appearances and the cost of secure accommodation. The Financial Memorandum only seems to reflect part of this potential demand on Council resources.

Finally in respect of Children and Young people the proposed retention of samples in the view of this Council creates a cultural shift from a focus on work with Children and Young people based on needs to one with a greater focus on their deeds. This of concern and may be contrary to the principles set out in getting it Right for Every Child where the Child or Young Persons needs should be at the centre of interventions.

The proposed sections relating to Sexual Offences Prevention Orders, Foreign Travel Orders and Risk of Sexual Harm Orders would appear to further strengthen the response to sexual offending. However as with other parts of the Bill there is a need to ensure that these new sections are reflected in revised guidance, particularly in respect of Multi Agency Public Protection Arrangements as they reflect the terms of the management of offenders (Scotland) Act 2005.

Dumfries and Galloway has always supported the development of Victim support services and the suggested improvements in victim services will allow the Council to sustain this and should allow the Council and other services to meet the strategic objective to improve victim support set by the South West Scotland Community Justice Authority.

Whilst the impact of the public Defence Solicitor's office in Dumfries and Galloway has been limited the stated objective to provide long term certainty for its operations is welcomed. The sections relating to disclosure of information by prosecutors is also welcomed and should add to the transparency of the criminal justice system.

The sections relating to Mentally Disordered Offenders would appear to further strengthen the terms of the Mental Health Care and Treatment (Scotland) Act 2003.

John Alexander
Director of Social Work

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Dumfries and Galloway Council

Further to my letter of 20 April 2009 in relation to the above, please find below the response from Dumfries and Galloway Council in respect of Part 8 Civic Government Licensing.

1.1 The proposal contained in Paragraph 121 would empower Scottish Ministers to issue standard licence conditions which would be attached to licences granted by each local authority. Although this would have the advantage of consistency across Scotland with advantages for enforcement over Council areas it appears to fly in the face of current Scottish Government thinking. A Scottish Government consultation on the introduction of the licensed activity of non domestic knife dealing has recently been concluded where it was suggested to Scottish Ministers that fundamental aspects such as need for CCTV, locked cabinets, storage of knives under the counter or in display cabinets should be incorporated into national conditions. The response was "this should be a discretionary condition for authorities to consider at a local level" and "We consider it important to give local licensing authorities the discretion to establish schemes appropriate to their area and that have the flexibility to deal with the peculiarities on an individual applications. Therefore we intend to keep mandatory conditions to a minimum and leave most matters to local resolution via discretionary conditions".

1.2 The proposal to make a deemed licence have the licence conditions attached is welcome. At present where the local authority fail to determine an application within the required time limit a deemed one year licence comes into effect with no conditions. For example a late hours catering licence would be for the full 11pm to 5am until the local authority made a decision at a hearing to vary the licence by imposing conditions including times.

1.3 This paragraph also proposes that the licensing authority can itself approve standard conditions which would have to be published and could not be consistent with Scottish Ministers' conditions. Local authorities presently have "standard conditions". This would appear therefore to be formalising of present practice. However the provision that "Standard conditions will have no effect unless they are published" could have massive repercussions for licensing authorities and police. Consideration should be given to lightening this burden as the omission might be due to inadvertence or failure of communication in ensuring that the conditions remain on the Council's website.

1.4 Paragraph 123 would withdraw metal dealing from a mandatory licensed activity to one which the authority must agree to license (option or activity). It appears an odd time to introduce this provision during a downturn in the economy where opportunities to make "easy" money will be sought and also at a time when theft of metal is regularly reported in the press. In any event as it takes over 1 year to introduce a new optional licensed activity it must be guaranteed that those authorities wishing to retain the licensing of metal dealers will not experience a gap during which the activity would be unlicensed.

1.5 Paragraph 124 relates to taxi and private hire cars.

1.5.1 Presently an application for a taxi or private hire driver licence must have held a driving licence for any continuous period of 12 months. The proposal is to tighten this – “throughout the period of 12 months immediately prior to the application”. This is generally to be welcomed. However perhaps there might be discretion granted to the authority for example where a totting up disqualification followed several offences over a long period or a relatively short period of disqualification has been imposed over the last 12 months.

1.5.2 The Bill also proposes to amend the provisions relating to review of the maximum fare structure by:

- Clarifying that the review must be completed within 18 months of the last review
- Requiring the authority to advise all taxi operators of the new scales not only those organisations consulted. This reflects present practice
- Giving the authority 7 rather than 5 days to advise consultees and taxi operators of the coming into effect of the new scales.

1.5.3 Local taxi operators presently are entitled to appeal to the Traffic Commissioner in respect of a review of the Maximum Fare Structure. This would be widened to representative organisations.

1.6 Paragraph 125 withdraws a statutory exemption from the need of a market operator’s licence. Where the function is held by charitable, religious, youth, recreational, community, political or similar organisation a licence is not required. Withdrawal of this will necessitate publicity to make sure that local organisations are aware of the new licensing requirement. Locally this might be undertaken by fliers, notices in libraries and other Council buildings, the Council’s website, through Event Co-ordination and press advert. This will take up valuable time and resources. The Scottish Governments’ Explanatory Notes for the Bill states that “licensing authorities have discretion as to whether to charge reduced or no fee to such organisations”. Although impossible to calculate, specifically because they have been exempt, it is likely that the number of such markets will be substantial. Exactly the same consultation will be needed as for any other market operator’s application. Reduced, or waiver of fees would put an unfair burden on other applicants as the local authority must seek to cover costs by application fees.

1.6.1 By deleting “by retail” from the definition of private market (“a market, whether covered or not, carried on by any person other than a local or public authority at which goods are offered by more than one seller for sale BY RETAIL to the public”) makes it clear that it covers car boot sales where the participants are private individuals who are selling surplus household items. This clarification is constructive.

1.7 Paragraph 126 relates to licensing of places of public entertainment. The present provisions define places as only those where admittance is “for money or money’s worth”. The proposal is to withdraw this part of the definition. It will therefore relate to free events such as, locally, outdoor music events and firework displays. This will impact on local community groups. As the original resolution was based on the definition incorporating money or moneys’ worth a review may have to be undertaken to identify events which might be excluded. Again this will require detailed research, consultation and publicity with consequent need for time and resources. The publicity would be for any new resolution and for organisers presently exempt. The possibility of reduced or waived fees has been discussed under market operators.

1.8 Paragraph 127 would require a licence where food as defined in Section 1 of the Food Safety Act 1990. This is an extremely wide definition. However the present wording “meals or refreshments” has been considered imprecise and this proposal should be positive.

1.9 Schedule 1 to the Civic Government (Scotland) Act 1982 sets out the procedural framework for processing and determining applications. The following amendments are proposed:-

- The application form should include the date and place of birth of the applicant
- The period for objections to be extended from 21 to 28 days. Twenty one days is a reasonable time. This is backed up by a provision allowing the authority to consider objections outwith that time. From the applicants point of view it must be appreciated that the vast majority of applications do not attract objections and are dealt with under delegated powers. The licence can only be issued after the period for objections has expired, this proposal extends this period by 7 days during which time the applicant cannot operate. This proposal is unnecessary.
- The period of notice for a hearing would increase from 7 to 14 days. This will reduce flexibility where committee dates are set in advance rather than arranged as necessary
- If someone has a licence and applies for renewal before its expiry that existing licence will continue on until the renewal is fully dealt with. If the licence has expired any application purporting to renew it is an application for a new licence. The proposal is to give discretion to the licensing authority to deem a late renewal on time if up to 28 days late but only “on good cause being shown” “good cause” is a matter of judgement. The use of the word “may deem an application…… made up to 28 days after the expiry……to be an application made before the expiry” involves discretion.

  These are matters best determined by Members rather than delegated to officers whereas timescale would demand an almost immediate response otherwise the advantage of the new provision would be greatly diminished.

- The period of notice to the licence holder for a suspension hearing would reduce from 21 to 14 days. This would be of great advantage to the authority when setting Committee meetings
- The period during which a statement of reasons may be requested would be reduced from 28 days to 21 days. This would be of advantage to the authority especially in relation to issuing of a licence where an objection has been lodged. It is presently unfortunate that the period during which a statement of reasons can be requested equates with the period for lodging an appeal.

2 Part 9 Alcohol Licensing

2.1 The proposal to allow the Board to review its over provision statement at any time remedies an omission within the original drafting of the 2005 Act. A similar amendment is required to Section 6(2) relating to the Board's Statement of Licensing Policy as it only allows one Supplementary Report. The Board should be entitled to review its Statement of Licensing Policy when the Board deems it necessary.

2.2 A duty is imposed to make an impact assessment of off sales on persons under the age of 21. It is suggested that this is a kneejerk reaction to recent publicity and would merely add to the Board's workload and indeed may threaten to make infeasible the off sales premises affected. An added power would entitle the

2.2.1 This Impact Assessment would form part of the Board's Licensing Policy Statement (in fact would entail a supplementary report). As the legislation only allows 'a' supplementary report within the 3 year period and the proposal empowers the Chief Constable and the Local Licensing Forum to seek a review of the Impact Assessment it is difficult to see how this fits in with the restriction to one Supplementary Statement set out in Section 6.

2.2.2 Otherwise the power to vary premises licences en bloc in relation to matters determined by Scottish Ministers would be an important part of the Board's resource.

2.3 Paragraph 134 seeks to address an issue raised regarding occasional licences. Under the 1976 Act the procedure is simple and applications can be turned around in a few days and, where necessary, a matter of hours. The 2005 Act introduces a vastly detailed procedure including notification to the Chief Constable and the Licensing Standards Officer with each given 21 days to submit a response and a requirement to give notice of the application of the Boards' website. Any one may object within 7 days of the notice. It need not be a neighbour or other local person. If there is an objection or representation a hearing must be arranged for the Board to determine the application. This could all take at least 6 weeks. Representations have been made especially by local organisations that 6 weeks notice renders many events impossible to organise. The Bill's solution is to give the Board discretion to reduce the time for the Chief Constable's report and the LSOs report to 24 hrs. No mention is made of the need to advertise on the website and the right of anyone to object. This is not within the Act but is in Secondary Legislation (The

Licensing (Procedure)(Scotland) Regulations 2007 (SSI 2007 No 453) Regulation 18)

2.4 Paragraph 135 would allow the Board to vary any Extended Hours Applications granted. This will allow the Board to address concerns arising from the use of the additional hours without reviewing the premises licence and is therefore a positive step.

2.5 In respect of personal licences it has been noted that the existing legislation would not prohibit the applicant applying for a personal licence from more than one Board: if the applicant is 18 or over, possesses a licensing qualification, has not recently had a personal licence revoked and has no convictions for a relevant offence the Board must grant the personal licence. This provision seeks to address this lacuna.

2.6 Paragraph 137 relates to closure orders. The present wording of the section empowers a police officer of the rank of superintendant or above to apply to the Board for an order closing licensed premises or himself to make an emergency closure order. The Bill would reduce the qualifying rank to inspector. Although operationally this will assist the police, keeping it at a higher rank would underline the importance of what is being sought or imposed.

2.7 Paragraph 140 sets out the skeletal framework for a social responsibility levy – promoted as “the polluter pays”. The full detailed system would be set out in regulations. Licence holders would not be restricted to liquor licensed premises but would include street traders, food businesses, holders of public entertainment licences and late hours catering premises.

The way the paragraph is presently phrased could force the local authority into introducing the levy. Subparagraph (1) empowers Scottish Ministers to make regulations for the imposition on relevant licence holders of changes for the purpose mentioned in subparagraph (3). This purpose is to meet or contribute to expenditure incurred or to be incurred by any local authority in furtherance of the licensing objectives and which the authority considers necessary or desirable with a view to remedying or mitigating adverse impact on those objectives attributable to the operation of the businesses described. This has to be read with subparagraph (4)(K) which states that the regulations may confer a wide range of functions on the local authority.

This will impose a very stressful, inexact, unpopular and perhaps unenforceable levy on the hospitality industry which will unanimously advise that the economic down turn has hit it harder. The situation may feasibly arise where the administration for enforcement will outweigh the cost of addressing the deleterious impact on the licensing objectives. It could also be a vehicle for the police to seek reimbursement/resourcing for what would be ordinary policing duties.

2.8 Schedule 4 sets out amendments to the Licensing (Scotland) Act 2005 very few of which are consequential to the terms of Part 8 of the Bill

- Section4 which sets out the licensing objectives makes specific reference to the crime prevention objective. Representations have been made especially on behalf of the police that they are restricted to this objective whereas their role covers public nuisance, public safety, public health and protecting children from harm. The power of the Chief Constable to recommend refusal would therefore extend to the basis of any of the objectives and not merely “the crime prevention objectives”
- Of crucial importance to the police Section 22(2) would be repealed. This restricts the Chief Constable’s objection to the grounds of involvement in serious organised crime. The Chief Constable would therefore be entitled to object under any relevant ground.
- In respect of transfers of premises licences the Chief Constable may recommend refusal if the transferee has been convicted of a relevant offence. The Bill would widen this to allow the Chief Constable to make such a recommendation even if the transferee has not been convicted of a relevant offence. This appears to fly in the face of the philosophy of the Nicholson Report and the 2005 Act where reference should be made only to convictions. It is odd that this change of emphasis is not carried through to the determination of premises licences (S23). Although this section is amended no reference is made to the Chief Constable recommending refusal where there is no conviction for a relevant offence. Bizarrely the proposed amendment to Section 23 refers to reports by the Chief Constable underSection 22(2) – which would be repealed by the immediately previous paragraph - or Section 24A(2). Perhaps the reference should be to Section 22(2A)
- Paragraph 7 of the Schedule 4 purports to repeal S57(2) relating to the power of the Chief Constable to recommend refusal of an occasional licence application notwithstanding that paragraph 134 of the Bill in a new subsection (5) refers to subsections (2) and (3) having effect
- Paragraph 10 purports to repeal S.59(2)(a) which provides that inter-alia if the Board has not received an adverse report from the Chief Constable it must grant the application for an occasional licence and subsection (7) which refers to the Boards’ duty to consider the Chief Constable’s notice under section 57(2). The main text of the Bill (Part 9) does not otherwise seek to amend this section.
- Paragraph 12, similar to the proposal regarding transfer of a premises licence, widens the police powers to recommend refusal of a personal licence not only where the applicant has a conviction for a relevant offence and not only where refusal is considered necessary for the purposes of the crime prevention objective. This is a vast move from the original legislation. Although the present legislation following Nicholson which depends on a conviction flies in the face of the current policy of direct measures, with prosecution only seen as one option, the wording is extremely vague. What will be the basis of the Chief Constable’s recommendation – intelligence, direct measures? This should be clarified at least within guidance. Also it may be the re-introduction of “fit and proper person” criterion without that language. If so this should be made absolutely clear. If this is the case it must be questioned why it is being re-introduced around the time when the new licensing system will be coming into effect, and most personal licence applications determined on

the present legislation. The police have been seeking a continuation of the "fit and proper person" criterion since the issuing of the Nicholson Report.

- Paragraph 16 would introduce Section 84A giving the Chief Constable power to report a personal licence holder to the Board for conduct inconsistent with the licensing system. This power would address an awkward restriction imposed by Section 84 which would only allow the Board to consider such conduct if it was uncovered during a review hearing for a premises licence. It is therefore a positive proposal.

John Alexander
Director of Social Work

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Association of Scottish Neighbourhood Watches

Background to evidence gathering

In order to ensure that our evidence represented the views of Neighbourhood Watches across Scotland, we e-mailed individual coordinators giving them a link to the Bill and asking them to complete a questionnaire which highlighted some of the main proposals of the bill. Due to timescales and logistical considerations, only coordinators who had registered an e-mail address were polled.

Respondents were asked to Agree or Disagree with the 15 statements given as it was felt that this was the best way to gauge people's broad reactions to the proposals. They were also given the opportunity to submit additional comments on the bill. Respondents were asked, where possible, to consult with other members of their Neighbourhood Watch schemes, again to bring in as many views as possible.

Respondents

The questionnaire was sent to over 500 Neighbourhood Watch coordinators. We received **85** responses, covering the views of **256** people. Responses were received from 6 of the 8 police regions. Most responses were received from Lothian & Borders, although the responses from Strathclyde covered the views of more people.

	# Responses	# People Consulted
Central	5	15
Dumfries & Galloway	0	0
Fife	5	17
Grampian	2	21
Lothian & Borders	34	82
Northern	0	0
Strathclyde	27	101
Tayside	12	20
	85	256

	Responses	People
Central	6%	6%
Dumfries & Galloway	0%	0%
Fife	6%	7%
Grampian	2%	8%
Lothian & Borders	40%	32%
Northern	0%	0%
Strathclyde	32%	39%
Tayside	14%	8%

Responses to proposals

Proposal	Agree	Disagree	No Answer/ Don't Know
Create a framework within which sentencers can base their decisions on individual cases	91%	6%	4%
Create a Scottish Sentencing Council to provide a sentencing guidelines regime	84%	11%	6%
Introduce the Community Payback Order in place of existing community penalties	78%	8%	14%
Create a presumption against custodial sentences of six months or less	35%	56%	8%
Replace the custody-only provisions in the Custodial Sentences and Weapons (Scotland) Act 2007 with short-term custody and community sentences	38%	51%	12%
Create new offences to tackle serious organised crime	92%	6%	2%
Create a new offence which will criminalise the possession of extreme pornographic images	81%	12%	7%
Raise the age of criminal responsibility to 12	21%	74%	5%
Allow the retention, for at least three years, of fingerprints and other forensic data taken from persons proceeded against but not convicted of a serious sexual or violent offence	81%	18%	1%
Allow the retention of up to three years of forensic data taken where a child accepts or is found by a Sheriff to have committed certain serious or violent offences	95%	4%	1%
Make a spouse or civil partner a compellable witness	71%	24%	6%
Create witness anonymity orders	86%	5%	9%
Make changes to the law relating to mental disorders in criminal proceedings	69%	9%	21%
Modernise general licensing provisions and specific provisions relating to metal dealers, market operators, public entertainment and late night catering, taxis and private car hires	87%	4%	9%
Improve the operation of the Licensing (Scotland) Act 2005 through modifying a number of provisions to improve reduce costs and shorten process times as well as ensuring that Licensing boards receive sufficient information on which to base their decisions concerning licences to sell alcohol	88%	2%	9%

Additional Comments

Would be in favour of forensic data being kept longer than 3 years if possible.

1)Community service should be much more high profile, there appears to be no shame factor, and therefore no penalty in the tariff
2) Some feel that 12 is an unevenly balanced age. ie. some children know the difference between right and wrong, some have no idea, because of their background
3) Pornography (Hot potato !!) Across the board ban, with maximum penalties for possession or distribution
4) Licensing: Comment made, and I can support this having been in the licensed trade for thirty years: Many fundamental by laws controlling liquor licenses were lost in the reorganisation for Regions and Districts. These included " special offers, regular drinks promotions other than new products, serving alcohol in anything other than a glass (eg. jugs, pails, bottles), mixing two spirits in the same glass. (UKBG handbook 1974: no cocktail should contain more than one base spirit)
5) Another comment referred to the sale of computer games, music dvd's and films. some felt that the sale of these should be licensed to control piracy in order to prevent trading of same between inappropriately aged children

Definitely need more discipline on the under 16 age groups. When they get to 16 and come under the Justice system, they do not suddenly become model citizens. They have served their apprenticeship and are quite good at it and their knowledge of the Law.

More prison spaces

Discussion

The proposals which the majority of respondents disagreed with were:

- Creating a presumption against custodial sentences of 6 months or less
- Replacing the custody-only provisions in the Custodial Sentences and Weapons (Scotland) Act 2007 with short-term custody and community sentences
- Raising the age of criminal responsibility to 12

Views were split on:

- Allowing the retention, for at least three years, of fingerprints and other forensic data taken from persons proceeded against but not convicted of a serious sexual or violent offence
- Making a spouse or civil partner a compellable witness

The other proposals were agreed with on the whole by Neighbourhood Watch members who responded to the questionnaire.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Sir Gerald Gordon

I wish to make it clear that I associate myself with the comments made by the Royal Society of Edinburgh, having been involved in their preparatipn

I appreciate that one of the aims of s 1 may be to restrict the number and length of prison sentences, but there seems to be no reason in principle for not applying the principles of subss (2) and (3) to persons under 18, or indeed to non-custodial sentences.

This may be a question of principle or merely of presentation, but the phrase ‘community payback order’ seems to me to be inept. Why not just call them ‘community orders’. I should add that I am strongly in favour of replacing all the separate provisions for non-custodial orders by one set of provisions.

I am unhappy on principle with s 28(2). I appreciate that it is restricted to persons who have obtained a direct benefit, such as a share of the proceeds, from the criminal activity involved, but I doubt if it achieves that object. As it stands it could require children to report their parents just because the latter pay for their school fees. The whole idea of making it an offence not to report a crime has its problems, but this section (which does not define ‘material benefit’) goes too far. It could perhaps be cured, and could certainly be improved, by some limitation on ‘material benefit’. If it is indeed intended only to apply to a direct share in the proceeds of the crime, such an amendment might help to avoid the apparent creation of a society which encourages denunciation. As it stands it has totalitarian overtones.

For somewhat similar reasons, I do not like the removal of ‘matrimonial’ privilege. The problem of people getting married in order to avoid giving evidence can be dealt with in narrower terms.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Professor Clare McGlynn and Dr Erika Rackley
Durham Law School, Durham University

We are experts on the legal regulation of extreme pornography in English law. Our analysis of the English legislation, upon which the Scottish proposals are based, can be found at: ‘Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography’ (2007) *Criminal Law Review* 677-690 and ‘Criminalising Extreme Pornography: A Lost Opportunity’ (2009) 4 *Criminal Law Review* 245-260 (copy attached).

1. Justifications for action

1.1 **Cultural harm:**
Legislative action against extreme pornography is justified because of the ‘cultural harm’ of such material; by which we mean that the existence and use of extreme pornography contributes to a society which fails to take sexual violence against women seriously.

1.2 Our argument is not that the person who views extreme pornography, such as pornographic rape websites, will then go on to commit rape. Such arguments of direct, causal links between pornography and violence are over-simplistic. Rather, it is the proliferation and tolerance of such sites and the messages they convey which contributes to a climate in which sexual violence is condoned, a form of entertainment even. This in turn leads to a societal failure to take sexual violence seriously which is manifested in, for example, the continued prevalence of rape myths and the low conviction rate for rape.

1.3 **Targeting demand and recognising responsibility:**
We welcome the fact that these proposals place some responsibility for the harms of extreme pornography on the user. However, the effectiveness of this approach will require a pro-active prosecutorial policy.

2. Definitions of extreme pornography

2.1 The Bill defines an ‘extreme pornographic image’ (s51A(2)) as one which is obscene, pornographic and extreme.

2.2 Obscene

2.2.1 It appears that this part of the definition is included to limit the scope of the measures to material which is already prohibited by s51 of the Civic Government (Scotland) Act 1982.

2.2.2 The use of the term 'obscene' alone is preferable to the exceptionally vague and undefined reference in the English provisions to material which is 'grossly offensive, disgusting or otherwise of an obscene character' (s63(6) Criminal Justice and Immigration Act 2008 (CJIA)). However, we urge the Committee to reconsider the use of the language and concept of 'obscenity'. Obscenity laws have long been criticised on two main grounds:

2.2.2.1 the definition of 'obscene' is vague and opaque. Thus, including this in the new measures, purportedly to limit the scope of the offence, still means that there is a great level of discretion and lack of clarity.

2.2.2.2 the term is typically deployed to capture material which is not only harmful, but which also causes offence or disgust. Thus, obscene has been used to cover the depiction of activities which are not in themselves unlawful, yet may be viewed by some as morally wrong or disgusting (such as images of coprophilia). The criminal law should not be used to proscribe the depiction or viewing of acts which are not unlawful in themselves to carry out.

2.3 An extreme image

2.3.1 Severe injury:

We welcome the definition of extreme which encompasses 'serious injury' to *any* part of the body. The English legislation limits 'serious injury' to the anus, breasts and genitals (CJIA s63(7)(b)). This restriction may lead to potentially absurd results whereby the likelihood of prosecution and conviction will depend on which body part is depicted as being harmed. It also demonstrates the English legislature's lack of appreciation of the real harms of extreme pornography, which are not in the depiction of injury to specific, sexualised parts of the body, but in the justification and reproduction of sexual violence.

2.3.2 Depictions of rape:

2.3.2.1 This is a welcome addition to the definition of 'extreme'. Pornographic rape websites, which are easily and freely available[1], are paradigmatic examples of the material which should be covered by this proposed legislation.

2.3.2.2 The English measures only cover pornographic images of rape if they also depict life-threatening harm or serious injury to the anus or genitals. This is a serious and unjustifiable lacuna in the English law, as we have argued in detail in our article 'Criminalising Extreme Pornography: A Lost Opportunity' (2009) 4 *Criminal Law Review* 245-260.

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[1] Access to pornographic rape websites is straightforward and simple. No passwords, payments or other limitations are placed on access. A simple search can display thousands of such sites. It is not therefore true to suggest that one only finds this material if undertaking a persistent search and/or if one pays money.

2.3.3 Other non-consensual penetrative sexual activity:

2.3.3.1 This category covers a very broad range of images. Its inclusion brings within the scope of the measures the depiction of acts which may be extremely harmful. It will help to ensure that certain forms of sexual violence are not given greater protection than others.

2.3.3.2 However, although its remit is limited to that material which is also 'obscene' (s51A(2)(a)), it could be seen to extend the scope of the Bill too far. Moreover, as stated above in 2.2, we have reservations over the use of the term 'obscene' and would prefer not to rely on such a concept.

2.3.3.3 If the obscenity terminology is removed from the bill (as we suggest), pornographic depictions of 'non-consensual penetrative sexual activity' should not be included within the Bill to ensure that its scope is not overly broad.

2.3.4 Bestiality and necrophilia

The Bill covers a very wide range of pornographic images of bestiality and necrophilia. As with the English legislation, this means that the measures cover the depiction of acts which are not in themselves unlawful to carry out. This is regrettable: if there are not good reasons for criminalising the actual act itself, it is difficult to find a justification for proscribing the depiction of such an act. We have further concerns over including images of bestiality within the scope of such measures, as detailed in our (2009) *Criminal Law Review* article.

3. Targeting Extreme Pornography – not 'art or Shakespeare'

3.1 Claims have been made in the Scottish press that the Bill will encroach on popular, mainstream films and even Shakespeare or other works of art such as *Leda and the Swan*.[2] These claims are simply false. Recordings of Shakespearean work will be neither pornographic, nor explicit, nor realistic and will be excluded works. Paintings/drawings are not covered as they are not realistic. One further example will suffice:

3.1.1 *A Clockwork Orange*: This film includes an infamous rape scene. However, this film, and others like it, will clearly not be covered for the following reasons:

- BBFC classification: this film is classified as a certificate 18. It will therefore be defined as an 'excluded image' (s51B(2)) and an offence under s51A will not be committed (so long as the image (here the rape scene) has not been extracted for pornographic purposes: s51B(3)); and

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[2] 'Art will suffer under porn ban, warns MSP', *The Scotsman*, 20 January 2009.

- Pornographic: this film is extremely unlikely to be interpreted as being 'pornographic' under s51A(3); and
- Explicitness: an image is only 'extreme' if its depiction is 'explicit and realistic' (s51A(6)). In *A Clockwork Orange* there is no explicit display of the sexual activity involved; it is simulated and not shown clearly.

4. Context of the image

4.1 We welcome the inclusion of sections 51A(7) and 51B(4) which provide that when determining whether material is extreme, the overall context of the image, including accompanying words or sounds, are to be taken into account. There is no such provision in the English legislation.

4.2 The context of image is crucial in determining whether pornographic images are of consensual sexual activity (whether simulated or real). This provision will, therefore, be particularly relevant to the rape and non-consensual penetrative sexual activity provisions. Images on pornographic rape websites are typically accompanied by banners and text which glorify rape. The narrative of the 'story' similarly conveys such meaning, as do the sounds. Without them, the 'rape' becomes an image of sexual intercourse. That is, it may not be clear that it is a non-consensual act which is being depicted. The non-consensual aspect, or what makes it rape, comes from this overall context.

4.3 The provision is essential and makes prosecutions in relation to such images more realistic and possible.

5. Defences

5.1 Direct participant in material:

Section 51C(3)-(5) provides a defence for someone who is a direct participant in the acts depicted. This defence is withdrawn if the material is shown, given or offered for sale. This legitimate restriction on the defence, which is not included in the English legislation, will ensure that its aim - privately made materials for private use - is met.

5.2 Inclusion of a public good defence:

We recommend the inclusion of a public good defence. There is such a defence in the English Obscene Publications Act 1959 which provides a defence where the material in question is 'justified as for the public good in that it is in the interests of science, literature, art, learning or of other objects of general concern' (s4). The introduction of such a defence would further demonstrate that there is no intention to bring educational, legitimate artistic or similar works within the scope of the legislation.

6. Defining possession

The concept of possession is key to this offence. It is not defined in the Bill (nor in the English provisions). This is a serious omission. We suggest the legislation include a definition of possession to clarify exactly what will be covered. In particular, it will be important to determine whether an offence is potentially committed when images are viewed on screen (and stored in the cache), as opposed to being actively downloaded and saved, the impact of deletion (and potentially recoverable materials) and what is the requirement of knowledge on the part of the user. In practice, under English law, the person’s technical computer knowledge determines the scope of the offence, even though all those who view and/or download images, even if later deleted, ‘feed the trade’.

Professor Clare McGlynn and Dr Erika Rackley
Durham Law School, Durham University

Criminalising Extreme Pornography: A Lost Opportunity

By Clare McGlynn and Erika Rackley
Durham Law School, Durham University

[Keywords to Follow]

Summary: *This article considers provisions criminalising the possession of ''extreme pornography'' in the Criminal Justice and Immigration Act 2008. It begins by outlining the current criminal law regime governing pornography, before considering the new measures in detail. We highlight the areas which are most likely to witness challenges, and the areas about which confusion seems inevitable. We close by considering the arguments for proscribing the possession of extreme pornography and possible ways forward, while recognising that, regrettably, the legislative opportunity to take action in this field has most likely now been lost.*

Introduction

In May 2008, the Criminal Justice and Immigration Act (CJIA) received Royal Assent and a new offence criminalising the possession of ''extreme pornography'' was created. This new offence, expected to come into force in January 2009, is a pale imitation of that originally proposed, with the final measure representing a lost opportunity to take much bolder, and intellectually more defensible, steps towards proscribing extreme forms of pornography. In the face of sustained criticism from arch-liberals and ''sexual freedom'' organisations, the Government lost sight of the real harm in extreme pornography and failed to justify its actions in terms acceptable to constituencies beyond the moral-conservative. Further, last-minute amendments were introduced which all but erode the potential benefits of this legislation.

This article begins by outlining the current criminal law regime governing pornography, before considering the new measures in detail. We highlight the areas which are most likely to witness challenges, and the areas about which confusion seems inevitable. We close by considering the arguments for proscribing the possession of extreme pornography and possible ways forward, while recognising that, regrettably, the legislative opportunity to take action in this field has most likely now been lost.

Policing pornography

Prior to the CJIA, pornography itself (extreme or otherwise) was not directly regulated. Rather it fell within the remit of measures governing obscenity and indecency, principally the Obscene Publications Act 1959 (OPA). The OPA makes

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it a criminal offence, punishable by up to three year's imprisonment,[1] to publish, or possess for gain, obscene articles (defined very broadly). The OPA thus targets those who produce and disseminate obscene materials; simple possession for private use is not covered. Obscenity is defined as being material which, "if taken as a whole", is such "as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear . . . it".[2] The focus on depraving and corrupting the consumers of obscene materials clearly highlights the moralistic nature of this regulation. There is no requirement to demonstrate harm (other than (presumably) moral harm to the consumer) and no further elucidation as to exactly what types of material might have this effect. Notwithstanding such potentially sweeping coverage, material can be "saved" if it is "justified as for the public good in that it is in the interests of science, literature, art, learning or of other objects of general concern".[3]

We have three broad criticisms of the OPA which are relevant to the current discussion. First, the offence itself is notoriously opaque. No one really knows what constitutes obscene material. Only a jury decision provides certainty and with the number of obscenity trials drastically reducing in recent years,[4] there is little to go on. The "deprave and corrupt" phraseology comes from Lord Cockburn's proscription of material which contained "thoughts of the most impure and libidinous kind" in *Hicklin* in 1868,[5] which has been given precious little precision since. While guidance provided to the CPS and customs and excise officials provides some clarity regarding the scope of the offence, the point still stands.

This leads us to the second main criticism of the obscenity legislation, namely that the material which is generally thought to be covered ranges from exceptionally violent and misogynistic pornography to material which depicts perfectly lawful activities. There is no clear rationale behind the approach to what constitutes obscene material and the arguments for including some material can only come from notions of disgust and offence (which are considered further below). For example, the CPS guidance states that it is "impossible to define all types of activity which are suitable for prosecution", but lists the following as those most commonly appropriate: sexual acts/assaults with children; incest; buggery with an animal; rape; drug taking; flagellation; torture with instruments; bondage (especially where gags are used); dismemberment or graphic mutilation; cannibalism; activities involving perversion or degradation (such as drinking urine or smearing excreta on a person's body).[6] A study by Susan Edwards showed that in addition to materials depicting unlawful and extremely violent acts, obscenity prosecutions were also brought in relation to depictions of lawful and (typically) harmless activities, such as "fisting".[7] The problem is that if an activity is not unlawful in itself, then

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[1] The CJIA increases this to five years: OPA 1959 s.2(1), as amended by CJIA s.71 (not yet in force).

[2] OPA s.1.

[3] OPA s.4.

[4] The number of prosecutions has fallen from 131 in 1999 to 35 in 2005 (Ministry of Justice, *Criminal Justice and Immigration Bill Regulatory Impact Assessment* (2007), p.90).

[5] *Hicklin* (1868) L.R. 3 Q.B. 360 QB.

[6] Crown Prosecution Service, *Obscene Publications*, *http://www.cps.gov.uk/legal/l_to_o/obscene_publications/index.html* [Accessed January 30, 2009].

[7] Susan Edwards, "On the Contemporary Application of the Obscene Publications Act 1959" [1998] Crim. L.R. 843.

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proscribing its depiction raises serious issues of clarity and coherence and raises the question of where is the harm.

This brings us to the third criticism; that the obscenity legislation is inspired and underpinned by conservative and conventional views of "appropriate" sexuality. Thus, whereas once the OPA covered depictions of oral sex,[8] as noted above, it now appears to include images of sexual activity which may not be that common, or advisable, but is not unlawful, such as coprophilia. It is a paternalistic legislative regime, which seeks to protect the *consumers* of the obscene materials from themselves.[9] Nowhere in the legislation or practice of the OPA is concern expressed regarding harm to any other constituency.

Accordingly, when the Government proposed a new free-standing provision to address the "increasing public concern" about the availability of extreme pornography,[10] particularly one which moved away from the universally criticised obscenity provisions and focused instead on the links between pornography and sexual violence against women, there were grounds for a cautious welcome.[11] However, while this may have represented the Government's ambition in 2005, by the time the legislation had been adopted in 2008, things were very different.

Criminalising the possession of "extreme pornographic images"

The new measures in the CJIA are radical to an extent, for instance in the introduction of a possession offence, and yet, at the same time, antiquated in their reliance on the language of "disgust" and "obscenity". In addition, they differ considerably from the original proposals in 2005, the amended versions in 2006 and the Criminal Justice and Immigration Bill (CJIB) as first presented to Parliament in 2007.[12] Indeed, as is perhaps all too familiar, last-minute amendments to the legislation, purportedly in order to clarify, in fact obscure and render some parts of the final Act very unclear.

The CJIA provides that it is "an offence for a person to be in possession of an extreme pornographic image".[13] An image is one that is "moving or still", or is in the form of data capable of conversion into such a form.[14] The image must also be "explicit and realistic",[15] thereby excluding cartoons, drawings and written work.[16] There are three principal issues here: what are "pornographic", "extreme" and "possession"?

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[8] *Anderson* [1972] 1 Q.B. 304 CA (Crim Div).

[9] To the extent that the harm is conceived as harm to children viewing the material, then the paternalism is likely to be justified. But the principal criticism here of paternalism is its focus on the users of pornography rather than on others who might be harmed.

[10] Home Office, *Consultation: On the Possession of Extreme Pornographic Material* (2005), p.1.

[11] Indeed our article "Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography" [2007] Crim. L.R. 677 broadly supported the Government's proposals.

[12] See further McGlynn and Rackley, "Striking a Balance" [2007] Crim. L.R. 677 and McGlynn and Rackley, "The Politics of Porn" (2007) 157 N.L.J. 1142.

[13] CJIA s.63(1).

[14] CJIA s.63(8).

[15] CJIA s.63(7).

[16] Explanatory Notes to Criminal Justice and Immigration Act, para.459, *http://www.uk-legislation.hmso.gov.uk/acts/acts2008/en/ukpgaen_20080004_en_1* [Accessed January 30, 2009]

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What is "pornographic"?

An image is "'pornographic' if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal".[17] In determining whether an image satisfies this test, the overall context or narrative of the image will be relevant.[18] In its original form, the definition of pornographic had been based on the producer's intention. The Government, however, amended this, replacing it with a requirement that the material can be "reasonably assumed" to have been produced for pornographic purposes. This was based on the idea that it would be more certain than an inquiry into the mind and intention of the producer.[19] This may not be the case, but it may still be a better test. In order to make such a determination, the jury or magistrate will be taking into account more than just the expressed intention of the producer, for example the overall context of the material, such as the nature and form of publication. The downside is that there is likely to be considerable variance between juries as to what can be "reasonably assumed" to be pornographic, but it is difficult to see how this can be avoided.

What is an "extreme image"?

A pornographic image is "extreme" if it is "grossly offensive, disgusting or otherwise of an obscene character"[20] and portrays, in an explicit and realistic way, any of the following,

> "(a) an act which threatens a person's life,
> (b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals,
> (c) an act which involves sexual intercourse with a human corpse, or
> (d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive) and a reasonable person looking at the image would think that any such person or animal was real".[21]

Life-threatening and serious injury

These provisions gave rise to considerable debate and their current form reveals much about the legislative process. In the 2005 consultation, the Government proposed taking action against "serious violence in a sexual context" and "serious sexual violence".[22] There were many objections to these proposals, the most successful being the charge of imprecision.[23] Accordingly, by 2006, the Government had amended its proposals to cover life-threatening and "serious, disabling" injury,

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[17] CJIA s.63(3).

[18] CJIA s.63(4), (5).

[19] Lord Hunt, Parliamentary Under Secretary of State in the Ministry of Justice, *Hansard*, HL Vol.699, col.894 (March 3, 2008).

[20] CJIA s.63(6)(b).

[21] CJIA s.63(7).

[22] Home Office, *Consultation: On the Possession of Extreme Pornographic Material* (2005), paras 39–42.

[23] See, e.g. Parliament's Joint Report on Human Rights, *Fifth Report of Session 2007–08, Legislative Scrutiny: Criminal Justice and Immigration Bill.* HL Paper No.37, HC Paper No.269 (Session 2007/08), paras 1.45–1.51.

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further amended in the original Bill to life-threatening images or those resulting (or likely to result) in serious (but no longer disabling) injury to the "anus, breasts and genitals".

In pursuit of clarity and precision, much had changed. Images will now fall within the scope of the measures if they are of life-threatening acts (such as depictions of suffocation or hanging), or of acts which result, or are likely to result, in serious injury (for example the insertion of a sharp object) to the anus, breasts or genitals.[24] In practice, these provisions are likely to capture the depiction of many sado-masochistic practices, such as asphyxiation. While the intention of those involved in such activities is not to threaten or endanger life (though this may not be apparent when the images are viewed in isolation), such images are likely to be deemed depictions of life-threatening acts since serious injury or death could result.

Beyond images of life-threatening acts, s.63 also includes images of acts resulting or likely to result in "serious injury to a person's anus, breasts or genitals". "Serious injury" remains undefined, though images of "mutilation" of the genitals or breasts are likely to be covered.[25] It is important to stress the specificity of this provision: it does not include serious injury to any other part of the body. Pornographic images of harm to the buttocks, for example, will not be covered, nor will people having their limbs broken or suffering other lasting disabling injuries (unless they can be considered life-threatening) to other parts of the body.

Many criticisms can be levelled at this provision. The specificity of body parts can only lead to potentially ludicrous results with some images being proscribed, but others not, simply because of the possible injury to specific body parts, rather than due to the nature of the images as a whole, their harm and impact. As we shall argue below, this is, at least partly, a result of the Government's failure to set out and address directly the nature of the harm in extreme pornography.

Moreover, although non-statutory guidance on the sorts of images to be covered by these provisions will provide greater clarity,[26] as will CPS charging standards, there remains uncertainty about what images will be covered. This could have been avoided, at least to some extent, had greater clarity been expressed regarding the real target which should not be average depictions of consensual sado-masochistic activity but what might be seen as the really problematic pornographic images—that is images which normalise, even glorify sexual violence through, for example, the deliberate, misogynistic valorisation of rape.

For instance, it is unlikely that pornographic pro-rape websites,[27] which are freely and easily accessible online,[28] will be covered by these measures. This is lamentable,

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[24] Explanatory Notes to CJIA, para.457.

[25] Explanatory Notes to CJIA, para.457.

[26] The Government's intention to publish such guidance is confirmed in a Ministry of Justice letter to the organisation backlash to be found at *http://www.backlash-uk.org.uk/ruddell.html* [Accessed January 30, 2009].

[27] See further in McGlynn and Rackley, "Striking a Balance" [2007] Crim. L.R. 677 fn.67 and also Jennifer Gossett and Sarah Bryne, "Click Here: A Content Analysis of Rape Websites" (2002) 16(5) *Gender & Society* 689.

[28] A number of times in debate, it was stated that the type of material under discussion is very difficult to access. For example, Baroness Howarth stated that "one cannot get to it by accident; a determined effort has to be made" (*Hansard*, HL Vol.699, col.905 (March 3, 2008)). In fact, what is disturbing is how easy it is to access much of the material being called extreme. It is entirely straightforward to access, for free, without giving any personal

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not least because the "extensive availability of sites featuring violent rape"[29] was within the initial purview of the Government. Although some "violent" rapes may be covered (what is "non-violent" rape?), if they involve weapons or result in serious injury to the anus, breasts or genitals,[30] this excludes many pornographic rape images.

While many of the "rapes" on pornographic rape websites may not be "real", but staged, they nonetheless are often presented as real and certainly presented to valorise forced sex. Indeed, one deeply ironic aspect of the exclusion of pornographic rape websites from the scope of the CJIA is that the apparent evidence of a causal link between exposure to violent pornography and a propensity to commit acts of sexual violence (deployed by the Government) is based on research which invariably deploys images of rape as the basis for investigation.[31]

Rape sites, such as those described above, should have been brought within the scope of these measures, whether or not the rape involves additional physical violence, and their exclusion reveals the extent to which the Government has strayed from its initial ambition and lost sight of the harms to be addressed by these measures.[32]

Bestiality and necrophilia

The incongruity of pro-rape websites not being included is all the more evident, and deplorable, when consideration is given to the generally accepted inclusion of images of bestiality and necrophilia.[33] While debate has largely focused on life-threatening and seriously harmful acts, the bestiality and necrophilia provisions attracted little critical attention and slipped into the Act largely unnoticed. Although this may be explained on the grounds that these measures are, perhaps, of less significance than the others in terms of the number of people and images affected, their inclusion raises significant questions about the aim and scope of the new measures and has, it is suggested, paved the way for a full-on retreat to the disgust-based justifications of the OPA.

Both the necrophilia and bestiality provisions cover acts which are not in themselves unlawful to perform. Section 70 of the Sexual Offences Act 2003

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details, large amounts of material covering bestiality, necrophilia and other forms of violent pornography. Sometimes there are front web pages, warning of the nature of the content, but there is no mechanism to prevent further access.

[29] Home Office, *Consultation: On the Possession of Extreme Pornographic Material* (2005), para.5.

[30] Such focus on body parts excluding any possibility of bring psychological harm within "serious injury".

[31] Catherine Itzin, Ann Taket and Liz Kelly, *The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: a Rapid Evidence Assessment (REA)* (Ministry of Justice Research Series 10/07, 2007), *http://www.justice.gov.uk/docs/280907.pdf* [Accessed January 30, 2009].

[32] It is worth noting here that the Criminal Justice and Licensing Bill (due to be introduced into the Scottish Parliament in January 2009) will include measures which will criminalise the possession of extreme pornographic material which realistically depict "Rape and other non-consensual penetrative sexual activity, whether violent or otherwise" (Scottish Government, *Revitalising Justice—Proposals To Modernise And Improve The Criminal Justice System* (September 2008), p.18, *http://www.scotland.gov.uk/Publications/2008/09/24132838/0* [Accessed January 30, 2009].

[33] Home Office, *Consultation on the Possession of Extreme Pornographic Material—Summary of Responses and Next Steps* (2006), para.35.

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(SOA) proscribes sexual penetration of a dead person, while the CJIA extends to include "sexual interference with a human corpse".[34] In relation to bestiality, the Act criminalises the possession of pornographic material depicting "intercourse or oral sex with an animal (whether dead or alive)" which goes further than the SOA which proscribes only *penile* penetration of the vagina or anus of, or by, a *live* animal.[35] That it will be lawful to perform certain sexual acts with a corpse or animal, but not to view images of such acts is clearly anomalous. It is this sort of inconsistency between provisions which should have been ironed out in the legislative process, with either the SOA being amended or the extreme pornography provisions changed to mirror the current law.

It is likely that the Government's intentions were to capture as much pornographic material depicting acts of bestiality and necrophilia as possible. In the area of bestiality, in particular, depictions of oral sex are common and would not be caught if the provisions did not go beyond the SOA. However, equally common are images of manual masturbation of or by an animal, yet these are not covered. Users of such materials, particularly online, will have to take care to avoid encountering proscribed "extreme" images among those which fall outside the scope of the measures.

This only serves to raise another concern with the inclusion of the bestiality images. Sexual acts with animals may be viewed as disgusting and considered degrading or perverted by some people, but this alone should not be enough for the possession of such images to be criminalised.[36] There may be an issue of animal cruelty, but this is not best dealt with by pornography laws. There may also be an issue of participants' consent, but unless one is willing to say that there is no true consent in any pornographic images, it is difficult to single out bestiality. Finally, if the purpose of the new measures is justified on the basis of a concern about sexual violence, as we would suggest, then it is not always clear that the bestiality provisions fit within this paradigm.

Grossly offensive, disgusting or otherwise obscene

One further threshold must be satisfied before an image is considered to be "extreme": the image must be "grossly offensive, disgusting or otherwise of an obscene character".[37] This provision was added during the final stages of the parliamentary process as a response to criticisms and was acknowledged by the Government to constitute the "most significant" change to the original proposals.[38] This new clause taken, apparently, from a dictionary definition of what constitutes "obscene", is intended to "clarify the alignment between this offence and the Obscene Publications Act" and ensure that "only material that would be caught by" the OPA is caught by the new Act.[39]

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[34] This was the focus of much criticism after the 2005 consultation, but the Government remained with its original proposal in its 2006 document without specifying why (Pt II, para.12).

[35] SOA s.69

[36] It has been a continuing source of irony, and dismay, to us that while there has been a general consensus about including the bestiality provisions within the Act, this has not extended to the images of sexual violence against women and that people appear to find images of bestiality more abhorrent than forced sex or extreme violence against women.

[37] CJIA s.63(6)(b).

[38] Lord Hunt, *Hansard*, HL Vol.699, col.894 (March 3, 2008).

[39] Lord Hunt, *Hansard*, HL Vol.699, col.894 (March 3, 2008).

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This intention was not new. The Government had often stated that only those materials which were already included within the scope of the OPA would be covered by the new extreme pornography measures.[40] However, until this clause was introduced there was no explicit link in the text to the existing obscenity provisions and, given the malleability of the OPA, it was unclear exactly what would be covered. Its inclusion is retrograde for many reasons.

First, it makes an express link to the OPA, by its use of the terminology "obscene character" which is likely to be interpreted by reference to the current obscenity legislation. This is regrettable for all the reasons set out above regarding the current problems with the OPA. Thus, whereas there was potential for the CJIA to move from the OPA's disgust and offence-based terminology toward a harm-based standard, this has been lost. Secondly, while this threshold was, in all apparent honesty, introduced to provide clarity, it does nothing but obscure. We already know that what constitutes "obscene" material is notoriously vague, but there is even less clarity regarding what might be "grossly offensive" or "disgusting". Further, not only are such terms highly subjective and vague, they clearly import an offence-based charge. While offence is a basis for legal regulation of sexually explicit material, this is generally confined to zoning or shielding measures, keeping sexual imagery confined to specific spaces. It is not generally a sufficient basis for a criminal possession offence. Disgust, as Martha Nussbaum has clearly argued, is a wholly inadequate basis for law-making.[41] Liberty expressed similar sentiments stating that: "Extreme caution should be exercised when new criminal laws are imposed with the intention of imposing a subjective opinion of what is morally acceptable."[42] The focus should be on harmful, not disgusting, material.

What constitutes possession?

The concept of possession is key to the offence. However, the development of computer technology has, unfortunately, given rise to much complexity in determining when an individual will be held to be in "possession" of the particular image. What appears to be the case from *Porter*,[43] concerning possession of child abuse images, is that the answer depends on the extent to which the image is in the defendant's "custody and control". Where, for example, images have been deleted, though retrievable with specialist software (as in *Porter*), defendants will not be in possession of the image so long as they do not have the relevant software and/or the capability to carry out the retrieval. As Yaman Akdeniz explains, this "introduces a subjective element into the concept of physical possession in the context of computer images",[44] as well as raising the question, posed by David Ormerod, of whether a "defence" of deletion should really be available to the computer illiterate but not to the knowledgeable.[45]

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[40] Lord Hunt, *Hansard*, HL Vol.699, col.894 (March 3, 2008). See also Home Office, *Consultation: On the Possession of Extreme Pornographic Material* (2005), para.20.

[41] Martha Nussbaum, *Hiding from Humanity—Disgust, Shame and the Law* (2004).

[42] Liberty, *Liberty's Committee Stage Briefing on the Criminal Justice and Immigration Bill in the House of Commons* (2007), p.16.

[43] *Porter* [2006] EWCA Crim 560; [2006] 2 Cr. App. R. 25.

[44] Yaman Akdeniz, "Possession and Dispossession: a critical assessment of defences in possession of indecent photographs of children cases" [2007] Crim. L.R. 274, 283.

[45] David Ormerod, "Indecent Photograph of a Child" [2006] Crim. L.R. 748, 751.

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This leads onto the issue of whether there is possession when an individual is "just looking" at images on a computer screen. When viewing internet images on screen, the hard drive of the computer keeps a record of those images, what is known as a "cache". Ormerod states clearly that, following *Atkins*,[46] "any images that remain in the internet cache on a computer are in D's possession" and such a defendant can be convicted of the possession offence, subject to proof of knowledge.[47] Thus, unless it can be established that they knew about the existence of the cache (for example by admission or proof that they have accessed the temporary internet file off-line), computer illiterate defendants are able to "just look" at as many images of extreme pornography as they wish.[48]

This is in contrast to those who browse images of child abuse. The Court of Appeal in *Smith and Jayson* held that, following *Bowden*,[49] "the act of voluntarily downloading an indecent image from a web page on to a computer screen is the act of making a photograph or pseudo-photograph".[50] Although contentious,[51] this interpretation recognises the act of "just looking" for what it is: active participation in the abuse and sexual exploitation of children. Similar arguments can be made in relation to (some) extreme pornography (discussed further below). However, unlike in relation to child abuse images there is no corresponding "making" offence to catch the computer illiterate.[52] Thus, we would argue that "possession" should be interpreted broadly by the courts, and in line with the motivations of *Bowden*, to include images *unknowingly* stored in the defendant's "cache". These images remain in the "possession" of the defendant in that they are stored on their computer.

We recognise that our argument for a broad understanding of possession—to include those who are "just looking"—will mean that more people may be liable to prosecution under the extreme pornography measures. To the extent that this is unwarranted, the problem, and indeed remedy, lies not in the definition of "possession" but rather in what is considered an "extreme" pornographic image (which we would argue is in some respects too broad).

Excluded and extracted images

The provisions on excluded and extracted images both limit the scope of the measures and extend them far beyond what might have been thought reasonable.

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[46] *Atkins v DPP* [2000] 2 Cr. App. R. 248 DC.

[47] Ormerod, "Indecent Photograph of a Child" [2006] Crim. L.R. 748, 750.

[48] The Spanner Trust in its information leaflet about the new measures suggests that "just viewing an image or video on a web site does not constitute 'possession'. So you can browse the Internet quite legally" (Spanner Trust, *Is Your Porn Collection Still Legal*, *http://www.spannertrust.org/documents/possession_of_extreme_pornography_share.pdf* [Accessed January 30, 2009]). The leaflet goes on to suggest that what remains in the individual's cache "does not constitute possession". As we have seen, this is not necessarily the case. Not least because reading the leaflet (and its guidelines on how to delete a computer's hard drive) will, presumably, give the reader the requisite knowledge for the offence.

[49] *Bowden* [2001] 1 Cr. App. R. 438 CA (Crim Div).

[50] For the purposes of Protection of Children Act 1978 s.1(1)(a) (*Smith and Jayson* [2002] EWCA Crim 683; [2003] 1 Cr. App. R. 13 at [33]).

[51] The decision in *Bowden* means that, Akdeniz suggests, "prosecutors are more likely to opt for the more serious 'making charge' rather than the 'simple possession charge' [under s.160 of the Criminal Justice Act 1988] in cases where internet downloading is involved" (Akdeniz, "Possession and Dispossession" [2007] Crim. L.R. 274, 285–286).

[52] The OPA does not extend this far.

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In terms of excluded images, s.64 provides that films classified by the British Board of Film Classification (BBFC) will be exempt. This means that images of, for example, necrophilia shown in a classified film will not constitute an extreme pornographic image. This is because in classifying the film, the BBFC will have made a determination that the nature of the image, in the overall context of the film, was not pornographic nor contravened the OPA. This is a sensible limit on the scope of the measures.

However, the provisions on extracted images take the measures off in wholly new and uncharted directions. An extract of a classified film may fall within the scope of the measures if it has been extracted for pornographic purposes.[53] Where the extract is one of a series of images the question of whether it is pornographic will be determined by reference to the image itself and the context within which the image appears. In other words, many classified films contain images which may depict life-threatening acts, or acts of necrophilia, for example, but which by virtue of being in a classified film are exempt from the extreme pornography provisions. However, when the particular image is extracted from the overall film, and particularly when placed alongside other such extracts, this exemption is lost and it may fall foul of the CJIA if the collection of extracted images is deemed to have been produced for the purposes of sexual arousal.

No real explanation of this provision has been given by the Government justifying its inclusion and it has been subject to severe criticism and ridicule, especially by those against the measures more generally.[54] Despite the Justice Minister Lord Hunt's confident assertion that this measure will not capture "mainstream films",[55] presumably because the extracted image is unlikely to be sufficiently "explicit" or "obscene", much will turn on what is understood by these terms. Broadly construed, it is feasible that it could capture extracts of scenes from BBFC films, widely available on YouTube and similar websites (assuming they were extracted for pornographic purposes). This may not be a bad thing. Context works both ways. Devoid of their original narrative, these scenes become a ubiquitous, possibly more acceptable, and certainly more accessible, parallel of images found on pornographic websites. As Martha Nussbaum argues, what matters is the "overall context of the human relationship".[56] The "salient issue" is the degree of "harm, humiliation and subordination".[57] It is precisely for this reason that we can accept depictions of female sexuality in texts such as Lawrence's *Lady Chatterley's Lover* or Henry James's *The Golden Bowl*, whilst expressing rather greater doubt about *rapedbitch.com*.[58]

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[53] CJIA s.64(3).

[54] See, e.g. Liberty, *Liberty's Committee Stage Briefing on the Criminal Justice and Immigration Bill in the House of Commons* (2007), p.18; Julian Petley, "Something Must be Done" (Index on Censorship, 2008), *http://www.indexoncensorship.org/?p=435* [Accessed January 30, 2009].

[55] Lord Hunt, Letter to Rt Hon the Lord Kingsland, Q.C., *http://www.justice.gov.uk/docs/crim-justice-corres-gov-amends.pdf* [Accessed January 30, 2009].

[56] Martha Nussbaum, *Sex and Social Justice* (1999), p.227 and again at p.233.

[57] Nussbaum, *Hiding from Humanity* (2004), p.143.

[58] For Martha Nussbaum's particular discussion of Lawrence, James and *Playboy*, alongside Alan Hollinghurst's *The Swimming-Pool Library*, see *Sex and Social Justice* (1999), Ch.8, discussed in Clare McGlynn and Ian Ward, "Pornography, Pragmatism and Proscription", forthcoming.

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Defences

The defences for this new offence mirror those available in respect of child abuse images,[59]

> "(a) that the person had a legitimate reason for being in possession of the image concerned;
> (b) that the person had not seen the image concerned and did not know, nor had cause to suspect, it to be an extreme pornographic image;
> (c) that the person—
> (i) was sent the image concerned without any prior request having been made by or on behalf of the person, and
> (ii) did not keep it for an unreasonable time".[60]

The "legitimate reason" defence is designed to protect the police and prosecutors from falling foul of these provisions when carrying out their duties. It will also likely cover organisations such as the Internet Watch Foundation which acts as a portal for the reporting of obscene material. While it will be a matter of fact for the magistrate or jury to determine whether there is a legitimate reason, the courts have generally looked sceptically upon the claims of the necessity of possession of child abuse images for "academic research".[61] The "knowing possession" defence means what it says in that there can be no conviction if the defendant did not know, nor had cause to suspect, that the images were of the proscribed nature.[62] In relation to the unsolicited defence, the question of reasonableness is one for the jury or magistrate.

In addition, one new defence was added, as a last minute sop to the Bill's objectors, covering "participation in consensual acts".[63] This defence applies where the defendant participated in the acts depicted (excluding images of bestiality) and those acts did not involve infliction of any "non-consensual harm on any person" and that if the image is of a human corpse, that it was not in fact an actual corpse.[64] The relevant threshold here is that in *Brown* wherein it was held that an individual cannot lawfully consent to harm which constitutes actual bodily harm.[65] As a result, the defence will have a relatively narrow remit. While images of so-called "rape-play" or "vampirism" will be protected, it will not apply to other common images such as those involving sexual asphyxiation, or cutting (where the cut is minor but not superficial), severe whipping or beating.

Penalties

Listening to the concerns of those who have campaigned against the measures, particularly from the sexual freedom organisations, it is possible to fear that

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[59] Criminal Justice Act 1988 s.160(2).

[60] CJIA s.65(2).

[61] *Atkins* [2000] 2 Cr. App. R. 248 DC discussed in Akdeniz, "Possession and Dispossession" [2007] Crim. L.R. 274, 278–279.

[62] Discussed in relation to child abuse images: *Atkins* [2000] 2 Cr. App. R. 248 DC.

[63] CJIA s.66.

[64] CJIA s.66(3).

[65] *Brown* [1993] 2 All E.R. 75 HL.

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large numbers of people will suddenly be made criminals.[66] In practice, this seems unlikely. Proceedings for an offence may not be instituted without the consent of the DPP,[67] as is the current position under the OPA and other similar forms of legislation. While in the case of prosecutions of child abuse images this requirement has not halted large numbers of such actions, there is a different climate surrounding such images which makes it more acceptable for public prosecution. The same cannot be said at this time over images of adult pornography. Indeed, the Government's regulatory impact assessment suggested that the measures would cost little, largely because there would be so few prosecutions.[68] The effect (if any) of the measures may ultimately prove to be more symbolic than real.

Nonetheless, for those who are prosecuted, the maximum prison term following conviction on indictment for possessing images which portray acts that are life-threatening acts or serious injury is three years and/or a fine.[69] This decreases to two years in relation to images of bestiality and necrophilia and, at least initially, to six months in England and Wales in relation to all images covered by s.63 of the CJIA upon conviction by a magistrate. Sentencing guidelines will be published in due course which we hope will mirror the sentencing regime in relation to child abuse images[70] and differentiate between the possession of images of real acts of violence and those which are staged.

Justifying action: cultural harm, direct harm and disgust

The Government lacked clarity in its attempts to justify its actions. Three different, and somewhat contradictory, arguments were offered by the Government during the legislative process: the cultural context of sexual violence, arguments of direct harm, and those grounded in disgust. We suggest that as the Government came under pressure, it lost sight of the nature of the harm it was seeking to legislate against and reverted to the weakest possible justification for action, disgust. This has important effects not just in how the legislation is received, but also led to the last-minute introduction of problematic clauses and will affect enforcement and interpretation.

When first introducing the proposals to criminalise the possession of extreme pornography in 2005, the Government appeared keen to emphasise that extreme pornography may contribute to a cultural context in which violent sexual activity is encouraged or legitimated, what we would call a form of "cultural harm". Thus, at this stage, it was not making a claim that there was a direct link between viewing extreme pornography and committing acts of sexual violence. Indeed, it was upfront

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[66] The number could run to "millions" according to backlash, "Extreme Pornography Provisions: ill-conceived and wrong" in Clare McGlynn, Erika Rackley and Nicole Westmarland (eds), *Positions on the Politics of Porn* (2007), pp.9–14, at p.9, *http://www.dur.ac.uk/resources/law/research/politicsofporn/PositionsonthePoliticsofPorn.pdf* [Accessed January 30, 2009].

[67] CJIA s.63(10).

[68] *Criminal Justice and Immigration Bill: Regulatory Impact Assessments*, *http://www.justice.gov.uk/docs/regulatory-impact-assess-1.pdf* [Accessed January 30, 2009].

[69] CJIA s.67. Offenders who are sentenced to two or more years' imprisonment will also be subject to notification requirements if they are 18 or over (SOA 2003 pt II). (As confirmed by the Ministry of Justice in a letter to backlash at *http://www.backlash-uk.org.uk/ruddell.html* [Accessed January 30, 2009]).

[70] *Oliver* [2002] EWCA Crim 2766; [2003] 1 Cr. App. R. 463.

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in noting that no "definite conclusions" could be reached as to the "likely long term impact of such material on individuals generally".[71] Rather its argument was that extreme pornography "may encourage" an interest in "violent or aberrant sexual activity"[72] and, in so doing, contribute to a climate in which sexual violence is not taken seriously. This was closely aligned with other justifications offered at the time including a concern over images of "the torture of (mostly female) victims who are tied to some kind of apparatus or restrained in some other ways and stabbed with knives, hooks and other implements" presented in a "sexually explicit context"[73] as well as "material contain[ing] sexualized images of women hanging by their necks from meat hooks, some with plastic bags over their heads".[74] Further, the Government was also keen to "protect those who participate in the creation of sexual material containing violence, cruelty or degradation, who may be the victim of crime in the making of the material whether or not they notionally or genuinely consent to take part".[75]

This is the basis on which we would justify taking action in this field. It is a concept of harm which moves beyond arguments of immediate cause and effect and develops Martha Nussbaum's declaration that much pornography "directly conflicts with the ideas of equal worth and equal protection that are basic to a liberal social order".[76] It also considers again the classic liberal idea of harm taken from John Stuart Mill's work, deploying instead his *Subjection of Women*, which David Dyzenhaus argues shows us that "Mill would have been surprisingly sympathetic to the procensorship feminist case".[77] These arguments reflect on the harm which extreme pornography may cause indirectly, as suggested by the 1986 US Attorney General's commission which concluded that,

> ". . . substantial exposure to sexually violent material leads to a greater acceptance of 'rape myth' in its broader sense—that women enjoy being coerced into sexual activity, that they enjoy being physically hurt in a sexual context, and that as a result a man who forces himself on a woman sexually is in fact merely acceding to the 'real' wishes of the woman, regardless of the extent to which she seems to be resisting".[78]

They continued that, accordingly, they had "little trouble concluding that this attitude is both pervasive and profoundly harmful, and that any stimulus reinforcing or increasing the incidence of this attitude is for that reason alone properly designated as harmful".[79] Cass Sunstein describes this type of harm as harms to society through social conditioning which foster discrimination and other unlawful

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[71] *Consultation: On the Possession of Extreme Pornographic Material* (2005), para.31.

[72] *Consultation: On the Possession of Extreme Pornographic Material* (2005), para.27.

[73] *Consultation: On the Possession of Extreme Pornographic Material* (2005), para.5.

[74] *Consultation: On the Possession of Extreme Pornographic Material* (2005), para.5.

[75] *Consultation: On the Possession of Extreme Pornographic Material* (2005), p.2 and para.34.

[76] *Hiding from Humanity—Disgust, Shame and the Law* (2004), p.139

[77] David Dyzenhaus, "John Stuart Mill and the Harm of Pornography" (1992) 102 *Ethics* 534, 537.

[78] US Attorney General's Commission on Pornography (the Meese Report) (July 1986), para.5.2.1, *http://www.porn-report.com/* [Accessed January 30, 2009].

[79] Meese Report, para.5.2.1.

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activities.[80] It is these types of harm which the extreme pornography provisions should be seeking to reduce.

However, in the face of sustained criticisms of its proposals by arch-liberals demanding evidence of physical harm and direct, causal links, the Government retreated from the argument about cultural harm to one of direct harm. Just prior to the Bill being published in the summer of 2007, the Government published *The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: a Rapid Evidence Assessment* (REA), which investigated the possible causal connection between viewing extreme pornography and committing acts of sexual violence.[81] This research found "evidence of some harmful effects from extreme pornography on some who access it"[82] including "increased risk of developing pro-rape attitudes, beliefs and behaviours and committing sexual offences" which were more significant for "men predisposed to aggression, or [who] have a history of sexual or other aggression".[83] The REA, and the material on which it is based its conclusions, has been subject to much academic debate. Indeed, the whole premise of there ever being a research method that could reveal "direct" links is disputed by those both for and against the regulation of pornography. Nonetheless, the Government did utilise this research on a few occasions to justify its proposals.[84] To us, what this reveals is the Government's lack of belief in its purpose which should be about changing the cultural and social environment in which sexual violence is marginalised, in which rape conviction rates are at an all time low and in which pornography is becoming (if possible) even more ubiquitous. The Government was succumbing to the arguments of arch-liberals that the only form of harm to justify criminal action is that which, to use Vanessa Munro's phraseology, is concerned with "specifying a particular injury, typically inflicted upon the body, which can be identified independently of both the context in which it takes place and the understanding of the experience from the point of view of the people involved".[85] Further, arguments about privacy and free speech can equally be met with arguments about the freedom of expression of women which may be circumscribed in a society which condones extreme pornography and in which their privacy is invaded by unwanted sexual violence or objectification.[86]

Ultimately however the Government fell back on the easy tradition of the conservative-moralistic and disgust-based arguments which consume the OPA. This was nascent in the 2005 consultation, with references to "aberrant" sexuality, but was arguably not a primary plank of the Government's justifications.

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[80] Cass Sunstein, "Pornography, sex discrimination and free speech" in Larry Gostin (ed.), *Civil Liberties in Conflict* (1988), pp.152–169.

[81] REA, p.iii.

[82] REA, p.iii.

[83] REA, p.iii.

[84] Maria Eagle MP, Parliamentary Under Secretary of State Criminal Justice and Immigration Bill Committee, col.31 (October 16, 2007), *http://www.publications.parliament.uk/pa/cm200607/cmpublic/criminal/071016/am/71016s01.htm* [Accessed January 30, 2009]; Lord Hunt, *Hansard*, HL Vol.699, col.907 (March 3, 2008).

[85] Vanessa Munro, "Dev'l-in Disguise? Harm, Privacy and the Sexual Offences Act 2003" in Vanessa Munro and Carl Stychin (eds), *Sexuality and the Law—feminist engagements* (2007), pp.12–13.

[86] For similar arguments, see Cass Sunstein, "Pornography and the First Amendment" [1996] *Duke Law Journal* 589.

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Regrettably, however, it came to the fore as the legislative process wore on.[87] When introducing the Bill, Secretary of State for Justice Jack Straw referred to the "vile material" which the measures were seeking to address.[88] Others speaking in support of the measures referred to "obscene and disturbing material",[89] "nasty, horrible and unpleasant stuff",[90] and to material that "most people find abhorrent".[91] The Government appealed to exactly those sentiments underpinning the OPA and eschewed any vaguely "feminist" idea that regulating pornography was part of a programme to achieve equality for women.

Conclusion

Catharine MacKinnon has remarked that in the US porn debates, "discussion has increasingly regressed to its old right/left, morality/freedom rut, making sexual violence against women once again irrelevant and invisible".[92] This is precisely what happened during the parliamentary debates over extreme pornography in the United Kingdom. This was, as least in part, due to a failure of the Government to specify exactly where the harm lies in extreme pornography and, as a result, parliamentary debate became mired in assumed Millean ideas of harm and paternalistic standards of morality.[93] Aside from a few references by the Government to the REA, debate in Parliament failed to consider the broader arguments of harm, extreme pornography and sexual violence and to specify exactly where the harm lies in extreme pornography. As a result, the CJIA provisions on extreme pornography are both over- and under-inclusive. In allowing for a retreat to the moralistic and disgust-based justifications of the OPA, they include much within their scope which—though perhaps distasteful to many—is not harmful (and not even unlawful to perform), while, at the same time, failing to recognise and address material which contributes to cultural harms in our society which contribute to the prevalence and maintenance of sexual violence.

The final Act is therefore a lost opportunity to have taken bolder steps towards proscribing extreme pornography which has at its core a concern with the valorisation and legitimisation of cultural harms, particularly to women. It is a lost opportunity to make a break from the moralistic and paternalistic concerns of the OPA, though the measures should have included a public good defence along the lines of that in the obscenity legislation. It also represents a lost opportunity to reflect on the regulatory regime for pornography more generally. There is now, more than ever, an urgent need to review all legislation and practice regarding pornography

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[87] See, e.g. Explanatory Notes to Criminal Justice and Immigration Bill, para.803, *http://www.publications.parliament.uk/pa/cm200607/cmbills/130/en/2007130en.pdf* [Accessed January 30, 2009].

[88] The Secretary of State for Justice and Lord Chancellor, Jack Straw, *Hansard*, HC Vol.464, col.60 (October 8, 2007).

[89] Martin Salter MP, *Hansard*, HC Vol.464, col.93 (October 8, 2007). He continued: "If people want to do weird things to each other they still can, but I say 'Don't put it on the internet'" (col.113).

[90] Charles Walker MP, *Hansard*, HC Vol.464, col.117 (October 8, 2007).

[91] Lord Hunt, *Hansard*, HL Vol.699, col.908 (March 3, 2008).

[92] Catharine MacKinnon, *Women's Lives, Men's* Laws (2005), p.369.

[93] For a similar argument in respect of the SOA, see Vanessa Munro, "Dev'l-in Disguise?" (2007).

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and child abuse images, both in terms of the ever-advancing technology and the ubiquity of the images. The fact that the Government specifically wishes to retain the OPA, largely due to its ‘‘flexibility’’, and has indeed strengthened it by means of these measures, demonstrates a profound lack of understanding about pornography, its harms and the need for clarity in the criminal law.

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Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Professor Neil Hutton

Introduction

This evidence is focused on the provisions of the Bill which relate to sentencing and does not relate to other provisions relating to licensing or other matters of criminal justice procedure.

I support the introduction of a Scottish Sentencing Council and the development of sentencing guidelines. The Council provides an institutional space for judges to work with others to develop sentencing policy. Crime and punishment have become such sensitive political issues that many jurisdictions have found it helpful to develop an institution which provides an opportunity to develop a more rational, evidence based approach to policy making which can be pursued away from the media glare of the world of electoral politics. Guidelines will provide a clear and transparent structure within which judges can exercise their discretion at the level of the individual case. This will help the public to understand sentencing decisions and, over time, lead to enhanced public confidence in the courts.

The flowing comments refer to paragraphs in the Bill.

Part I Sentencing

1. Purposes and Principles of Sentencing.

(1) Paragraphs (a) to (e) list the traditional purposes of sentencing, retribution, deterrence, rehabilitation, protection of the public and reparation. There is no explicit mention of restorative justice although it could be argued that this is a reparative approach.

The central aim of a principled approach to sentencing should be to help judges to achieve an appropriate balance between attending to the facts and circumstances of the individual case and seeking a consistent approach to sentencing. It should also assist judges in balancing the sometimes contradictory purposes of sentencing.

To this end I would propose a revised approach to the articulation of the principles of sentencing. This approach ensures that the principle of fairness takes priority over other purposes of sentencing. Why should fairness take priority? Arguably, fairness is one thing that a systematic approach to sentencing can deliver and fairness is valued highly by the public. It is not so easy to make this claim about other purposes. The research evidence should cause us to be sceptical about the capacity of sentencing to deliver deterrence, rehabilitation or any other of the more substantive purposes. There is nothing wrong with trying to achieve these worthy aims, but because we cannot guarantee the delivery of any of them with an acceptable degree of certainty, we should ensure that at least our sentencing system is fair and consistent. Within the broad boundaries set by fairness, judges should be able to exercise their discretion to pursue what they judge to be appropriate purposes in individual cases, supported by information and advice from relevant experts. This approach is known in the technical literature as “limiting retributivism” and is generally attributed to Professor Norval Morris.

The approach to sentencing proposed in the McLeish Report (para 3.31) is a contemporary articulation of Morris’s ideas. The appropriate *level of penalty* should be set by reference to the seriousness of the offence (culpability of the offender and the harm caused to the victim). This will normally be set by a comprehensive set of sentencing guidelines. This answers the question “How much payback?” Within this broad level of penalty, a judge takes into account all of the facts and circumstances of the offence and the offender to decide the precise *amount of penalty* and the appropriate form of punishment. This answers the question, “What kind of payback?”.

This provides an overarching structure based on seriousness (as provided in England and Wales by the Overarching Principles of Seriousness guideline issued by the Sentencing Guidelines Council) which ensures a consistent approach to sentencing which will deliver consistency and fairness. Judges can make decisions about the appropriate nature of punishment to achieve particular penal purposes based on their judgement about the facts and circumstances of the case at hand. Of course the current Bill would allow the proposed Scottish Sentencing Council to produce such a guideline. My interpretation of section 2(2) of this Bill is that such a guideline would take precedence over section 1.

5. Sentencing Guidelines

The assumption underpinning the Bill is that guidelines will be produced incrementally. In my view there are significant advantages in establishing an initial comprehensive set of guidelines. This is not ruled out by the Bill. The SSC could in principle make a bid for resources to allow it to produce such a set of guidelines.

A comprehensive set of guidelines allows for proportionality across the full range of crimes and offences to be established. Thus for example, the relative severity of crimes against the person can be set with reference to crimes against property and regulatory offences.

A comprehensive set of guidelines sends a clear and transparent message to the public about the importance of consistency and fairness across the full range of crimes and offences. It would take many years for an incremental approach to guidelines to cover the full range and the intervening period would offer the media a clear opportunity to highlight apparently anomalous sentencing practices.

A comprehensive set of guidelines will allow the Sentencing Council to make reasonably accurate predictions about the use of penal resources. Guidelines can be adjusted, as they are in a number of US jurisdictions, to maximise the efficient use of penal resources .

It will be difficult to monitor compliance to guidelines produced incrementally. There is no data available on compliance with guidelines produced by the Sentencing Guidelines Council in England and Wales. We simply do not know whether the production of guidelines has had an impact on consistency in sentencing. If information on compliance rates is not available, it is difficult to see how guidelines can help to improve public confidence in sentencing,

5(5)

I support the requirement for the SSC to address the impact of its guidelines on penal resources. However, the SSC will require significant administrative support to enable it to address the potential impact of guidelines on prison and community sentence populations. This will require baseline data on existing sentencing patterns and estimates of future patterns based on guidelines. It is by no means clear whether existing data sets will be able to provide the necessary information. A recent pilot project in England and Wales showed that the desired sentencing information was not reliably available. A similar caveat applies to the possibility of monitoring judicial adherence to or departure from guidelines (see 10 below).

7. Effect of Sentencing Guidelines

(2) This paragraph allows judges to depart from the guideline sentence. Judges are required to state their reasons for departure, but no guidance is given in the Bill as to the nature of these permissible reasons. What kinds of reasons are judges likely to give? The obvious sources of information to address this question would come from the reports written by judges when a judgement is subject to appeal and the decisions of the Appeal Court itself. At the risk of caricature, a typical report or Appeal Court judgement will narrate all of the facts and circumstances of the case and conclude that under these circumstances the sentence of the court was either acceptable or not. Eminent legal scholars have noted that it has not been possible to develop a jurisprudence of sentencing in Scotland from the decisions of the Appeal Court. It would therefore be open to the judiciary to give a similar reason for departure from a guideline, namely that the guideline sentence range was not appropriate for the full facts and circumstances of the individual case. This would not necessarily help either the public, nor other judges, to understand what particular factors distinguished the case from the general guideline case and would not necessarily help to develop a jurisprudence of sentencing based on the guidelines. There is of course no reason why judges could not provide the sorts of explanation which would allow a jurisprudence of

sentencing to develop and which would at the same time enhance the capacity of the SSC to develop useful guidelines.

One might look to England and Wales to examine the impact of guidelines on sentencing practices. Unfortunately, there is no data available on the extent to which judges follow guidelines nor on what reasons they give when they decide to depart from the guideline range. This data is simply not routinely collected. One would hope that the SSC require SCS to collect data on adherence to and departure from guidelines issued by the SSC (see section 10).

8. This section ensures that the SSC is politically independent from the Scottish Ministers. This independence is vital to provide necessary distance between politicians and sentencing policy.

9. This section describes the relationship between the SSC and Court of Appeal. The SSC must review a guideline when asked to do so by the Court of Appeal when that court decides not to follow a guideline or decides that the guideline does not deal adequately with an issue raised by the appeal. It is not clear whether "must review" means "must change" the guideline , or simply "must have regard to" the reasoning of the court [(9) (5)]. Is the Court of Appeal or the SSC the final authority in sentencing?

10. The Bill states that SCS must provide the Council with such information relating to the sentences imposed by courts as the Council might reasonably require for the purposes of its functions. Not in the Bill, but in the accompanying Policy Memorandum (para 31), this information is defined as "compliance with and departure from sentencing guidelines" .

A key policy objective for the Government is to improve public confidence in the courts by providing "a straightforward and transparent framework within which sentencers can base their decision sin individual cases". (Policy memorandum para 8). In my view, public confidence is unlikely to be enhanced if the government is not able to provide information on the extent to which judges are adhering to and departing from the guidelines. Why have guidelines if we do not know whether they are being observed?

In my view it is important that the SSC have the power to collect data on compliance (through SCS). This will not necessarily be straightforward given the way in which data is currently collected. There will have to be changes to the way in which data is recorded and collected and there will be significant resource implications. The experience of the Sentencing Information System project in Scotland and the recent pilot study of sentencing data collection in England and Wales http://www.sentencing-guidelines.gov.uk/docs/pilot_report_update.pdf provide important lessons here.

227A Community Payback Orders

There is merit in the idea of replacing a wide range of community sanctions with a single community payback sanction (although DTTOs and RLOs remain separate). This arguably makes the sanction clearer to the public and reinforces the message that community sentences all involve punishment in the form of some sort of payback to the community. One disadvantage is the threat to proportionality posed by the potential to “pile up” conditions. The principle of proportionality states that punishment should be proportionate to the seriousness of the offence. As noted above, many would argue that proportionality should set upper limits for punishment beyond which additional constraints should not be introduced to satisfy other penal aims such as rehabilitation. (An exception is habitually accepted for public protection from serious violence or sexual offending). The community payback sanction carries the risk that sentencers will be tempted to combine a number of conditions in the hope of addressing multiple penal purposes (though without evidence as to the likelihood of any of these being successfully achieved). This is a difficult issue which should be subject to an early piece of work by the SSC.

The other issue which derives from the “piling up of conditions” is the significantly increased likelihood of breach. The more conditions which have to be observed by an offender, the greater the chance that one will be breached. This will be a serious issue for the courts when reviewing the progress of court orders. There is a significant risk that the prison population will increase as a result of offenders being given a custodial sentence for failing to observe one or more of the conditions of their community payback order.

Section 17

Judges are already required to use custody only when no other non-custodial option would be appropriate. If judges are not permitted to use sentences of six months or less, there will be a temptation for judges to use a sentence of seven months or more. They will do so because they take the view that only a custodial sentence is appropriate. This will produce the unintended consequence of a rise in the overall prison population. Where this happens, it is unclear what impact this might have on public perceptions of the effectiveness of criminal justice and the courts.

A more appropriate way of reducing the use of short sentences would be to ask the SSC to develop a comprehensive inaugural set of guidelines which paid particular attention to defining the custody threshold in a way which reduced the overall use of short sentences of imprisonment.

Professor Neil Hutton
Centre for Sentencing Research, University of Strathclyde

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from William Beck

I have serious concerns regarding the release of evidence proposed by Kenny MacAskill and Crown Office in criminal cases.

I would propose Crown Office not be allowed to Cherry Pick what it releases and that an FOI Officer like England has should be put in place to decide what Is Exculpatory.

Who should be gatekeeper of all the evidence ?

What Crown Office decides is not Exculpatory the Defence might see otherwise so how do we even the playing field ?

Simple: Disclose all material gathered by Police, Defence and Crown Office.

Make all the material available to the “Defendant” (Not the Defence Team) which is regularly not done in this country (Scotland) Speaking through experience, it was only after I was wrongly convicted did I see all the material my Solicitor held in connection with my case. This is totally unacceptable in today's society of openness and accountability. To ensure a fair hearing surely all evidence produced must be made available to the Accused.

How can it presently be said with confidence that every accused has seen all the evidence produced.

There are people in our prisons at present who cannot read or write.

What safeguards does the Parliament propose to protect such people ? Surely every Lawyer does not read out every statement to people in these situations, yet they have the right to know all the evidence against them to afford equality of arms.

I have never known a Lawyer yet to read or even show the accused every statement against them.

I would also propose that section 194 have additional amendments to include that when SCCRC review a case : If competent arguable grounds exist, SCCRC must refer such case.

At the moment and clarified in Razza, SCCRC can refuse to refer a case even if Prima-Facie Competent and Arguable grounds exist.

I am sure Parliament when they legislated under section 194 which created SCCRC, they never intended such abuse.

If competent and arguable grounds exist or are apparent in any case lodged with the sift panel at the High Court then the Court are duty bound to allow such case to proceed, Why should SCCRC be any different ?

It is suggesting that even when no grounds exist SCCRC can refer such case which is preposterous as any case reaching the High Court without Competent and Arguable grounds must surely be rejected.

I would also propose that section 194 incorporates a new “body” to investigate complaints levelled against any member of SCCRC for Misconduct, Malpractice and Dereliction of Duty.

Presently even our Justice Minister refuses to look at such complaints.

This safeguard should be set in motion to enhance Public Confidence in this body (SCCRC) to function properly, How can we have a public funded body with no-one to complain about their conduct ?

I would also propose that Like England our Criminal Justice Bill incorporates a practice of allowing Accused people access to a Solicitor while being Interviewed by Police.

To refuse such, Like England has, is a Breach and Abuse of Human rights and section 6 to a fair hearing.

Why should we be different from the rest of the UK.

At present this is only afforded to People south of the border in the UK, so I would propose this be changed to bring Scotland up to date with human rights regarding fair hearings.

I would also suggest that the proposed Law Change regarding abuse of disclosed material is a breach of our right to Freedom Of Speech and should not be allowed.

I object strongly to this proposed change of law as Oppressive.

I would also ask the Justice Secretary to confirm exactly what he would consider a breech of such ?

And why he feels it necessary to Propose Jailing some of these cases for up to 2 years.
Surely a fine would be sufficient ?

In light of recent Publicity here:

http://www.dailyrecord.co.uk/news/scottish-news/2009/04/18/exclusive-scotland-faces-human-rights-timebomb-after-experts-brand-confessions-illegal-86908-21286930/

Will the Justice Secretary rush Emergency Legislation to stop this human rights breach ?

People must be allowed access to Solicitors while being questioned by Police.

SCCRC hold their meetings in private and do not inform any Appellants who has made the decisions in their cases (Though it is widely accepted that Gerard Sinclair sits on every case) This is not compatable with section 6 and the right to a Fair, Independent and Impartial review.

At present and this has been said many times to me by people who have had cases rejected by SCCRC, No-One represents the interests of the Appellants.

Their legal officers are always at pains to point out they do not represent the Appellants so at present when a case comes before SCCRC board the appellants rights are not protected.

No One is allowed to be present to protect the interests of Appellants which in itself is Oppressive.

At the very least I would suggest to protect these rights A Solicitor be allowed to sit and protect his clients interests at any future board meetings of SCCRC.

All such meetings should be suspended at SCCRC till such safeguards are in place as to protect the interests of Appellants.

Talking from my own experiences with SCCRC:

I have no way of knowing who made the decision not to refer my case.

I Have no way of knowing if the Legal Officer presented my case in full to the board when they debated my case.

This is also not compatible with section 92 (1) of the criminal procedure (Scotland) act 1995 in that part of the tials are taking place outwith the presense of the Accused and they know not what is being discussed. (Andrew Page Drummond V HMA)

If the Legal Officers are not representing Appellants then their rights are not being properly protected, this culture must change to bring SCCRC into line with the courts who are not permitted to act in such a fashion.

It is imperative that Appellants feel comfortable that their full grounds will be debated, at present I have no confidence my case was properly debated because they ignored some of my issues completely which our High Court sift panel would have been duty bound to accept.

If the Appellants have no confidence how do we expect the public to have confidence ?

I hope my concerns are placed before the board when they next sit to discuss the proposed changes.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Scottish Beer and Pub Association

The Scottish Beer and Pub Association (SBPA) was originally formed in 1906. Our members are Scotland's brewing and large pub companies representing the licensed trade industry in Scotland. The main aim of the Association is to contribute to the economic and social well being of Scotland through employment, investment and training. Our members operate 1,500 of the 5,200 licensed public houses in Scotland.

The SBPA has been closely involved with the process of licensing reform and the policy aspects of tackling alcohol misuse in Scotland and served on the Nicholson Committee, which was established in May 2001. SBPA served on the Expert Reference Group (ERG), which was created by the Scottish Executive to advise it on the procedural aspects of the licensing reform and on the National Training Forum. SBPA has welcomed the opportunity to play an active and constructive role in the Scottish Government's consultations on licensing reform and continued that involvement through the Scottish Parliament's deliberations on the Licensing (Scotland) Act 2005, "the 2005 Act."

The SBPA is a member of the Scottish Government's Alcohol Industry Partnership.

The Association has considered the content of the Criminal Justice and Licensing (Scotland) Bill and would submit the following comments. We are content for our views to be made public.

Section 128 - Applications for licences

Whilst we have no objection to applicants' personal information and addresses, etc, being provided to Boards, police, and other statutory bodies this information must not be available in the public domain. This has already caused difficulties during transition.

Section 131 - Premises licence applications: modification of layout plans

We are opposed to this proposed amendment other than in the limited circumstances of doing so with the agreement of the applicant to tidy up anomalies and such like as arose during licensing transition. Under the 2005 Act Licensing Boards have the power to amend the detailed Operating Plans for licensed premises. This clause would also give Boards the power to amend the Layout Plan for a premises, and therefore effectively the physical layout of the premises. We do not believe this is proportionate and we are concerned the clause could lead if passed to Licensing Boards effectively having the power to "micro manage" the actual operation of a licensed premises, with significant likely cost and other implications such as planning, listed building consent and building warrant requirements.

We note the Scottish Government's expressed view that this would not be the case, nor is it their intention, but we cannot unfortunately concur with the view of Government on this issue given the experience of our members during the process of licensing transition. We would highlight that every Licensing Board has the powers to reject an application for a range of reasons if it feels the application relating to a premises is unacceptable, as such we would question what positive benefit the change proposed in this clause would actually bring.

Section 132 - Premises licence applications: antisocial behaviour reports

We would support this proposed change. Indeed we would comment at the time that the 2005 Act was being considered by the Scottish Parliament in 2005 we commented that the proposed obligatory "anti-social behaviour reports" for all licensed premises were unnecessarily onerous. This has now been recognised by the Scottish Government, although we would still appreciate clarification as to the extent of the "vicinity" intended by the clause.

Section 134 - Occasional licences

We would support this change, which seeks to resolve a problem with the 2005 Act, which we commented on in 2005, and request that consideration be given to extending this process to occasional extensions also.

Section 136 - Personal licences

We would question whether some of the provisions in this clause are required. We would comment specifically on the following sub-section within the clause:

(b) in subsection (3)—
    (i) the word "and" immediately following paragraph (b) is repealed, and
    (ii) after paragraph (b) insert—
    "(ba) the applicant does not already hold a personal licence, and",

We note the intention of creating a situation where an applicant can only hold one Personal Licence under the terms of the 2005 Act. We are not sure why anyone would wish to hold more than one Personal Licence, especially in light of the Scottish Government's intention of creating a National Database of Personal Licence Holders where it would be readily evident where there was duplication. We note the Scottish Government's suggestion that someone would be able to avoid sanctions on one Personal Licence by having more than one Licence, however we do not believe that this would be very likely given the vigilance of Boards and a National Database We would therefore question the relevance of this provision and whether it is needed.

Section 137 - Emergency closure orders

We welcome the clarification as to the rank of officer who can sanction these Orders.

Section 138 - False statements in applications: offence

We would appreciate some clarification during the course of the Justice Committee's consideration of this clause as to what is meant by "knowingly." We would highlight that it is possible that an applicant may make a statement in good faith in an application which is later proved to be incorrect, although the declaration was "knowingly" made at the time. We would hope that honest oversights or mistakes would not be caught by this provision and assurances to this effect would be welcome.

Section 139 – Further modifications of 2005 Act

We note the apparent intention of the Scottish Government to reintroduce the so-called "fit and proper" person test, which exists under the Licensing (Scotland) Act 1976 "the 1976 Act" using the detail of this clause. We would highlight that the implications of this clause if passed, although not on the face of the legislation, are very wide ranging and that these are subsequently developed over four pages in Schedule 4 of the Bill.

We would question whether some of the provisions in this clause are required, given the powers, which the police already have under the 2005 Act. By 1st September 2009 all Personal Licence Holders (PLHs) and holders of Premises Licences under the terms of the 2005 Act will have had to have been licensed and the police will have been fully involved and consulted during this process. Indeed they will have carried out criminal records checks on applicants. This seems to allow for the duplication of a process, which has already been undertaken.

Our primary concern is that the current provisions of the 2005 Act, which allow the police to make representations solely on the basis of the "preventing crime and disorder" objective, are to be extended to "any" of the five licensing objectives within the legislation.

Whilst our members have become accustomed to the novelty of senior police officers commenting during licensing transition at hearings by Licensing Boards on the lack of baby changing facilities within specific licensed premises or on other matters arguably within the competence of local councils, we must question the competence of the Police to comment on a very wide range other matters using other of the licensing objectives:

- *preventing crime and disorder,*
- *securing public safety,*
- *preventing public nuisance,*
- *protecting and improving public health, and*
- *protecting children from harm.*

We would suggest that allowing the police to comment on applications solely on the basis of the objective of “preventing crime and disorder” is entirely appropriate, adequate and proportionate. Extending this to all of the other licensing objectives risks the police acquiring the status of the catch all objector of last resort. We do not believe this would be appropriate nor reasonable and it could lead to the police commenting on matters which are more appropriately dealt with by other agencies with more relevant, or indeed the only, expertise. We would suggest that this could only weaken the status of the police in the process and indeed the credibility of their objections on legitimate criminal matters.

Section 143 - Orders and regulations

We note that the terms of this section are extremely wide and we have a concern that subsequent changes could be made to the Act and/or regulations made there under without proper and full public debate – simply by a resolution of Parliament.

Conclusion

Our Association welcomes the opportunity to comment on the proposals in the Criminal Justice and Licensing (Scotland) Bill. We would however note that major pieces of the legislation, Sections 129 and Sections 140 of the draft Bill, have effectively been withdrawn by the Scottish Government and will appear in a new Health Bill that will be considered by the Parliament’s Health Committee. We will of course comment on the detail of these in due course. However, we would suggest that the Justice Committee may wish to consider further changes, which it could make to the detail of the operation of the 2005 Act that have not yet been suggested by the Scottish Government in proposing the Bill.

There are a number of areas where we feel that the 2005 Act is deficient, indeed we highlighted a number of these at the time and since, and where we feel the Justice Committee could by tabling its own amendments to the Bill actually improve the operation of Scotland’s licensing regime going forward. There are a number of possible proposals for further change and are more than willing to supply further information if the Committee feels it would be appropriate to act. We would highlight some issues for initial consideration.

Under the current provisions of the 1976 Act, applications to Licensing Boards normally had to be made not less than 5 weeks before a Board sitting and on most occasions a decision was taken at that meeting. For new applications this was additional time on top of the planning process that was, and remains, a prerequisite to a licensing application.

Under the 2005 Act, there is a target of six months for a Licensing Board to reach a decision on an application, so in effect a timescale of up to six weeks has become six months, and much worse from our perspective, even if a Board goes beyond this target there is no sanction on the Board from having failed to reach this decision and no deemed grant such as is provided for in the Civic Government (Scotland) Act 1982 on other matters.

We would suggest in the interests of fairness and certainty for applicants, that there needs to be some form of similar deemed grant in the 2005 Act where Boards have been unable, or perhaps unwilling, to reach a decision. At the very least there need to be further safeguards to ensure Boards are actually required to reach a decision on an application within a reasonable timescale. This would help ensure more effective administration by Boards.

This is not an academic point. It has become evident during the current process of licensing transition that where Boards have six months to reach a decision many of them will take this time, and that some have been willing to “continue” applications beyond this target processing time using other administrative methods. The issue we would suggest needs to be addressed.

Another concern to our members is the time consuming, complex and very expensive procedures for obtaining a new provisional premises licence. There is no comparable application in the 2005 Act to the Section 26(2) provisional site only application in the 1976 Act. This means that once planning is secured, even just outline planning, detailed layout and operating plans require to be prepared to lodge for licensing. This is major and expensive task and may have to be done without the detailed knowledge of the final layout required or of the actual operators specific requirements. Once granted there is the ability to apply for a major variation but that is process akin to a new licence application and may easily take another three to six months in addition to the time already spent in applying for planning and licensing.

Likewise it is normally the case that during construction or conversion of premises, even small ones, that changes require to be made and whilst under the 1976 Act this could normally be dealt with at finality, under the 2005 Act these will again require a major variation with all the time cost and risk involved.

This is bad for our industry and indeed for the Scottish economy as it is a major disincentive to either invest in new projects or to improve existing facilities.

Further only having a two-year window (Section 45) from the provisional grant of licence to confirmation is completely unrealistic for any major development. Where it may take four to five years from planning to opening. It is our view that once the implications of Section 45 are understood, in particular by those providing funds for developments, that we will find that neither the trade nor their funders will reasonably be able to take the risk of not securing an extension of time to complete a development.

A practical and close to home example of the problems would have been the Parliament building which is licensed. If this were happening now and the funding for the project had been dependent on the liquor licence. The

Government would first to have secured planning consent, then have the detailed drawings for the layout plan prepared in accordance with the regulations (a costly and time consuming exercise and next to impossible as the final design of the building had not been confirmed), have a detailed operating plan drafted and have these approved by the Licensing Board all before building works began - another three to six months.

As the building grew there were constant changes to the layout and design. These would have required one or more major variation applications another three to six months for each. Unless the Licensing Board agreed to an extension of the two-year period from the date of grant the licence would have been revoked.

The Holyrood project started in July 1997 and opened in around August 2004 and whilst large and complex it rather underlines the problems our industry faces in adhering to a two-year cut off and some of the lack of practicalities of the new licensing regime.

There are a number of similar issues where the Justice Committee could facilitate further sensible changes such as some standardisation of application forms and improving procedures and we would be willing to comment further on these. If the Committee requires further information then please do not hesitate to contact me.

Patrick Browne
Chief Executive

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Allan Balsillie

A personal view challenging the competence of section 34

While there is no doubt that many people regard pornography as distasteful and even morally wrong, it is generally recognised that this is nothing more than subjective opinion. Legislation on the other hand must be objective and evidence based. When the government proposed to criminalise the possession of extreme pornography it gave its reasons or objectives for doing so. Principal among those, and that most often stated by the Justice Secretary is that the new laws are necessary to "protect society". As far as I'm aware there has been no explanation as to the way society is suffering or likely to suffer from "extreme" pornography being available. However the implication is that "extreme" pornography is somehow regarded as a danger or risk factor and the legislation is to be justified primarily on those grounds.

So, is there any evidence on the dangers of "extreme" pornography? Well, there has indeed been research on a variety of sexually violent material but certainly not on the full range of "extreme" images which have been selected for proscription. The general thrust of much of the research on pornography, violent or otherwise, is the attempt to link pornography with sexual offending. So essentially the evidence against extreme porn is the same as the evidence against pornography in general. Either attempts are made to correlate sexual offending with porn use, in which case, even if a correlation is found, there remains a question over cause and effect; or behavioural studies are carried out in a controlled laboratory environment. These often result in claims that negative attitudes to women or increased aggression can be measured in some individuals immediately after viewing pornography, and the suggestion is that these changes may make an individual more likely to sexually offend. Unfortunately these studies lack the depth which human behavioural research demands and the overal results remain inconclusive.

"A direct link between exposure to sexually violent media material and sexually aggressive behaviour has not been proven, and is unlikely to be proven in the near future given the nature of the problem and the research methodology available. A vast array of methodological problems are evident in the literature. These problems include the questionable applicability of the laboratory studies to the real world, the use of unrepresentative subjects (usually university students), material presented to subjects out of context and the use of laboratory measures of aggression not equivalent to sexual assault."

Australian Institute of Criminology, Trends and Issues No.9

It has to be said that many researchers do find the tentative links between pornography and sexual offending compelling evidence that there exists a potential risk from pornography use. However there is also the very significant problem that many of these studies are motivated by an anti-porn agenda; they are conducted not by the dispassionate sex researcher or psychologist, but by feminist academics ideologically opposed to pornography, and investigator bias is one of the most significant factors in reducing the reliabilty of any research.

Regretably politicians have a habit of developing a policy and then looking for evidence to support it, being comfortable to not only use poor quality and impartial evidence, but also to specifically commission it with the aim of justifying their own viewpoint. The Rapid Evidence Assessment on the effects of viewing extreme pornography, commissioned by the UK government, is a perfect example of this. It was commissioned after the extreme porn legislation was conceived and in response to demands for the government to justify its plans. So the government simply selected researchers with known anti-porn views and asked them to provide the evidence the government needed. The result was never in doubt, the evidence selected for assessment was almost exclusively suggestive of porn being dangerous to view, and evidence to the contrary was either absent or included simply to be critisised. This approach makes a nonsense of the concept of evidence based legislation.

Regardless of laboratory results, theories exist in order to make predictions. The theory presented is that pornography creates negative changes in attitude towards women, and that this will lead to more sexual crime. If there was any time that pornography was going to have an observable impact on sexual crime it would have been over the last decade, due simply to the internet allowing easy and cheap access to pornography. In other words the internet provided us with a natural experiment on a vast scale. The evidence from crime statistics matched with internet uptake in the USA, conducted by Todd Kendall 2006 does does not support the theory that pornography leads to sexual offending.

"The evidence that we have now ten years later, the most recent study of the correlation, for example, between crime and Internet adoption across the 50 US states, is interesting. It shows that, by and large, the Internet has a positive effect or a beneficial effect in that it reduces some crimes, crimes of sexual violence and crimes of prostitution, which are assumed to be linked with the increasing availability of pornography to young males."

Oral evidence taken by Home Affairs Committee 12/6/07, Part answer to Q192 on the effect of the internet

http://www.publications.parliament.uk/pa/cm200607/cmselect/cmhaff/uc508-iii/uc50802.htm

So the use of pornography as a risk factor is certainly unproven and even if it is a risk factor it may not be a significant one. It's therefore irrational to credit it with dangers which require punitive treatment for its users. Compare it for example with alcohol. Both may be used safely, but alcohol has proven links to serious health problems, anti-social behaviour, child neglect, domestic violence, sexual violence and truly horrendous levels of inter-male violence. The governments response is to suggest a few pennies onto the price of a pint but demand the porn user be imprisoned for years.

That is a staggeringly inconsistent and unjust philosophy. The government, fearful of unproven dangers, may argue that it is only extreme pornography being targeted but there's really no more evidence against extreme porn than there is against normal porn or indeed non-pornographic violence. Without further evidence there is no justification for picking out certain images, labelling them "extreme" and legislating against the possession of those alone. These "extreme" images naturally appeal to certain fetish groups or sexual minorities. The government should not apply evidence selectively and exclusively to target those groups.

It's an unfortunate fact that it's almost impossible to understand another persons sexual tastes if they differ markedly from your own. That lack of understanding finds expression as a distaste for those individuals. So, even today we still have significant homophobia: because homosexuality is harmful to those involved, because it doesn't belong in a decent society, because it's perverse, because it's ungodly, because it's a danger to vulnerable people. Always the same deluded reasoning founded entirely on a lack of empathy for people whose sexuality is different from the norm. It is sad to see our politicians fail so completely to rise above that pattern of thought. The message of an inclusive society appears to abandoned for those whose sexuality is a bit weird.

Despite its proposals the government insists that it is not targeting peoples sexuality:

"The proposed offence is not about individual sexual practices, it is about tackling the possession and circulation of extreme pornographic material which is a separate matter."

Sexual Offences Law Team, Criminal Justice Directorate

The reality is that a persons sexuality and their use of pornography are intrinsically linked, particularly so for sexual minorities who may find compatable partners somewhat thin on the ground. The suggestion that possession of an image of an act is immoral but the act itself need not be, is also nonsensical. The Justice Secretary Kenny MacAskill was perfectly clear when he said the purpose of the offence was to send a message that both the pornographic images and "*the people who look at them have no place in a civilised society*". Even the governments consultation document demonstrated this ostracise and shame mindset; it not only rued the fact that the internet allowed fetish groups to access their "extreme" pornography without the risk of public humiliation but stated that two of the aims of the legislation were to discourage abnormal sexual practices and reinforce "national norms of behaviour". Individual sexual practices are clearly being targeted, and without just cause.

Some will argue that the "extreme" images in question are those of sexual acts which are illegal, and therefore they should not be tolerated on that basis. But the problem with that argument is the clear case of double standards; after all, non-sexual criminal acts, however realistic or horrific, can be portrayed and viewed as legitimate entertainment. There is a tendency among opponents of pornography to promote the idea that the pornographic image actually portrays genuine victims of rape or violence. These are claims without evidence to back them up. Of course there remains the possibility that such things may occur, just as there remains the possibility that "snuff" movies may one day cease to be urban myth and become reality. There may well be a good enough argument to say legislation is necessary to prepare for that possibility. However, what is proposed makes no distinction between what is real and what is not. It will treat the person who owns an image of a real rape no differently than one who possesses one of a staged rape. That makes no sense, in fact it is simply wrong to regard them as moral equivalents.

The Scottish Law Commission also recommended that consent should be a defence for assault in order to free sado-masochists from the threat of prosecution. It recognised that society has become more liberal in its attitudes. Yet, the government refused, supposedly because of concerns that the defence could be exploited, but it was also likely that it knew such liberalism would drastically weaken its case for legislation on pornography. Ignoring the significance of consent, when it is otherwise accorded supreme importance in matters of sexual behaviour is probably the most appalling aspect of the proposals. Reviewing the moral basis of the legislation it's difficult to avoid the impression that it's the legislators who have lost touch with reality rather than the people who use porn.

Most of the pornography covered by the legislation is either simulated or consensual, and so the same basic argument applies to it all. By all means legislate against possession of genuine non-consensual acts; nobody would have a problem with that. It would be legislation with the same rationale as that for child porn and be entirely ethical. The one exception to the consent argument is beastility porn. The notion of consent does not apply to animals in any area of human/animal interaction. And rightly or wrongly, society is comfortable with the exploitation of animals. What does concern people is needless cruelty to animals. So legislation should be based on the dispassionate assessment of whether an animal suffered during the making of a pornographic image. With these amendments the proposed legislation would be free of the problems which currently beset it. It would be legislation based on actual harm, not imaginary risk factors.

Pornography allows people with unusual sexualities to understand that there are many just like them. That rather than the dangerous perverts often portrayed in the media, that they are simply normal people with unusual sexual tastes, and are therefore part of society just like everyone else. One would have thought that positive aspect of porn would be appreciated. It must be preferable than encouraging the self perception of being a dangerous freak; negative thoughts which could become self-fulfulling, as we now know that individuals can adopt the behaviour patterns which are attributed to them by other people. Yet depressingly, this "normalisation" as it appears to be called, is regarded with horror by opponents of "extreme" pornography. For them, the perverts must never be allowed to think of themselves or their sexuality as normal.

"We've always had people with heavy-duty sexual inclinations and perversions and fantasies, but years ago they were out of the mainstream. If someone was a sexual pervert, they were ostracized from society; they were avoided; they were shunned. Now, all of a sudden, the most inadequate personality, with the most outrageous sexual predilections, can meet online and validate the invalidatable. "*Oh, look, I'm not so screwed up. I met a bunch of people like me. We're perfectly normal.*" So the Internet proliferates the perversion and sexual homicide...." "....So when the ACLU touts "scientific data", I talk about and reference actual events. Some folks call my evidence "anecdotal," which means some Ph.D. didn't crunch a bunch of numbers together to obtain it. The bottom line is, I have actual cases and I know what I'm talking about......."

Vernon J Geberth, NYPD rtd, author of "Sex related Homicide and Death Investigation" interviewed by Mediawatch UK

Legislation will not change the people who use "extreme" porn and the damage to their lives is easy to predict. Being convicted, even arrested, for a sexual offence is no small thing and the discrimination they face will make their lives more dangerous, fearful and isolated. Peoples lives could easily be wrecked simply on the whim of politicians who are too lazy to rationalise the laws they create. Even if politicians are indifferent to the fate of those individuals, they have to recognise that there are few benefits to be had from this legislation. Airy dreams of changing human sexuality are unlikley to be achieved, and nor should they. A new law will at most send a message, abet a confused puritanical message, that the Scottish government doesn't like some types of sexual imagery. And for this the cost will be police, court and prison resources, an increasingly irrelevant sexual offenders register, sexual,artistic and individual freedoms, and finally Scotland's reputation for liberalism, which frankly needs all the help it can get. The benefits are nebulous, the potential costs are high.

In summary, the rationale behind the legislation on "extreme" pornography is so questionable that's it's impossible to escape the conclusion that it's basis is entirely ideological. Whether that comes from religious belief, or radical feminism or simple subjective morality, it has no place in the design of Scottish Law. Legislation should be based on solid evidence. That evidence must be reliable by being strictly objective and impartial. It should then be applied by government, again impartially, to create laws which do not unfairly impact minority sections of the community. Ignoring those principles, the government has instead chosen to legislate on the basis of weak evidence and has used it selectively to construct legislation of a discriminatory nature. It is legislation with ill-defined benefits but potentially great costs, both to society and the individual. Thus the proposed legislation fails on all points and the Justice Committee should reject these proposals from the Criminal Justice Bill.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Engender

Introduction

The Scottish Government's *Criminal Justice & Licensing (Scotland) Bill* contains provisions to criminalise the possession of material that is considered to be extreme pornography. Engender supports the introduction of these provisions, and welcomes the opportunity to submit written evidence, to the Justice Committee, with specific regard to said provisions.

The proposals

Section 34 of the bill – if passed by Parliament –will make it illegal to possess extreme pornographic material. For material to fit this definition it must be all of the following:

(a) Obscene
Subsection 51A (2) provides that an extreme pornographic image must be "obscene", "pornographic" and "extreme". The test of "obscene" means that the material must be of such a nature that it would fall within the category of the material whose sale etc. is already prohibited under section 51 of the 1982 Act.

It is our understanding that there is no definition of obscene, although courts apply a common law test of whether the material is 'calculated to deprave or corrupt persons open to depraving or corrupting'.

(b) Pornographic
Subsection 51A(3) defines an image as being "pornographic" if it is of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal.

(c) Extreme
Subsection 51A(6) provides that an image is extreme if it depicts, in an "explicit" and "realistic" way any of the following—
(a) an act which takes or threatens a person's life,
(b) an act which results, or is likely to result, in a person's severe injury,
(c) rape or other non-consensual penetrative sexual activity,
(d) sexual activity involving (directly or indirectly) a human corpse,
(e) an act, which involves sexual activity between a person and an animal (or the carcass of an animal).

Engender's response to the proposals

Engender takes a clear stance on pornography and indeed views ALL pornography as violence against women because it is a systematic practice of exploitation and subordination based on sex, which differentially harms women.

In terms of being both a cause and a consequence of violence against women pornography is central in creating and maintaining sex as a basis for discrimination. The bigotry and contempt it produces with the acts of aggression it justifies, harms women's opportunities for equality and rights of all kinds (Scottish Women against Pornography 2004).

We are aware that there is already legislation in place which criminalises the display, publishing, selling and distribution of extreme pornography, and possession with a view to onward sale or distribution. However, unlike child pornography, there is currently no legislation in place which makes it an offence simply to possess extreme pornography.

The proposed legislation sends a clear message to both pornography users and the wider public that accessing this material is unacceptable and is certainly not harmless. Engender holds that this legislation is needed to reduce the potential for broad cultural harm and address the demand for extreme pornography, which has led to the proliferation of rape pornography, in particular across the internet. Such sites are easily accessible for anyone, including young people, to find and because pornography is so incredibly powerful in creating and maintaining the distorted thinking, rape myths and child abuse myths that exist in society, these sites contribute to a culture where rape is not only condoned but validated.

Our objections to extreme pornography are based on cultural harm and its abusive and degrading portrayal of females and female sexuality and not simply on its sexual content or explicitness. In extreme pornography, sex is presented as abusive and violent towards women and sexualises their abuse, systematically exploits and portrays them as objects to be abused, degraded and bought. It perpetuates the myths that women are sexually available, can be persuaded or forced to have sex and are subordinate to men.

Pornography's presentation of violence and sexual abuse can support an environment in which the perpetrators of rape are rarely convicted (according to Scottish Government figures for 2006/07 only 2.9% of rapes recorded by the police led to a conviction). Pornography perpetrates myths about rape exist which can make it hard for sex offence victims to be believed or seen as credible and makes it more difficult for them to come forward and be treated with fairness.

Engender welcomes the specific reference to rape and other non-consensual penetrative sexual activity within the definition of extreme pornography. Unlike similar legislation in England & Wales, the bill does not make a distinction between ‘violent’ rape, and rape in general, a distinction which is extremely unhelpful and which we are glad to see is being rejected in Scotland.

Specific comments / recommendations for amendments to the proposals

Engender endorses Rape Crisis Scotland’s and the Women’s Support Project’s proposals that consideration should be given to the following changes / additions to the bill, which Engender agrees would make it stronger and more effective in tackling the proliferation of this type of material:

(1) Amendment to definition of extreme

Change wording to:-
(b) an act which results, or threatens to result, in a person’s severe injury,
The use of “threatens to “ instead of “likely to” would increase the proposals scope to cover all acts of rape which could all be said to threaten severe injury but not all are likely to result in severe injury.

(2) Broaden the scope of material covered to include non- photographic visual depictions of extreme pornography

As the bill is currently written, to meet the definition of ‘extreme’, the material in questions must be explicit and realistic. The terms “explicit” and “realistic” require that the act depicted in the image must be clearly seen, lifelike and convincing and appear to a reasonable person to be real. It is not required that the act itself is real.

There is a strong feeling that there is a missed opportunity in not including non-photographic representations of extreme acts in the bill. For example, depictions of extreme pornography on virtual worlds such as Second Life, where the pornography is violent, extreme and interactive, but where the images are not photographic. Engender also agrees that it would be vitally important to enact similar legislation in relation to child pornography.

(3) Broaden the definition of extreme to include depictions of incest

Although the legislation will cover depictions of rape and non consensual penetrative sexual activity which fit the definition of obscene and pornographic, this will not necessarily cover pornography which glorifies incest, unless it is clear that the young woman depicted is not of an age to consent. Serious consideration must be given to extending the definition of extreme to include depictions of incest which is an illegal activity to ensure these types of materials are covered by the legislation.

(4) Ensure a clear definition of possession

Clarity is required as to what “possession” covers. Will it cover those people who access pornography without downloading files? Although the bill does not criminalise accidental or single viewing, we believe it must cover repeated viewings of this type of material, whether or not the material was actually downloaded.

General comments

Engender welcomes the provisions in the bill which we believe are a good starting point for action to address the harm caused by pornography. There is little doubt that Scotland has set the standard in the UK for violence against women work yet it must be acknowledged that we cannot identify real progress in making women safer.

What is objectionable about pornography is its abusive and degrading portrayal of females and female sexuality and not simply about how ‘extreme’ it is, in sexual content or explicitness.
Further reform is certainly needed in order to change our culture. It must be widely recognised and accepted that pornography is a form of violence against women, a violation of their human rights and is intrinsically linked with the inequality of women in our society. Engender holds that there is a real and urgent requirement do something meaningful to address the issues of *both* cause and consequence.

Public education is a vitally important part of this, which includes public education on the introduction of the proposed legislation but also a broader public education campaign on the realities of accessing internet pornography. This is a ‘live’ issue at Engender and we are currently preparing to consult with our members on their thoughts and indeed awareness around issues of accessibility and the ‘normalisation’ of such material and related activities within our society today.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Scottish Council of Jewish Communities

The Scottish Council of Jewish Communities would urge Parliament to take the opportunity presented by the Criminal Justice and Licensing (Scotland) Bill to clarify that a post-mortem carried out by non-invasive methods such as Magnetic Resonance Imaging (MRI) is acceptable for all purposes for which a surgical post-mortem is generally accepted. This is not currently part of the published Bill, but we would ask that consideration be given to an amendment that could be incorporated among its miscellaneous provisions.

Background

Halachah (Jewish Law) regards the human body – including all body parts, and tissue – as sacrosanct, and requires that it should always be treated with dignity. According to *Halachah*, there should be as little interference with a dead body as possible, and burial should take place as early as possible, preferably before sunset on the day that death occurred. Any delay, or procedures such as a post-mortem examination, are therefore likely to be particularly distressing to the family of the deceased. In addition, the *shivah* (initial period of mourning) cannot begin until after the burial has taken place, and consequently any postponement will delay the grieving process, and inevitably cause great psychological stress to the bereaved. Much of this is also true of other faiths.

Post-mortem examination

We fully accept that there may be occasions, on which it may be necessary for a post-mortem examination to take place, for example, if the death is unexpected and the cause unclear, to ascertain whether there is any risk to public health, or to determine whether the death may have resulted from a criminal act.

At present all post-mortem examinations taking place in Scotland are conducted surgically (often referred to as "intrusive pathology" (IP)). There is, however, an alternative that has been employed in the Manchester area and elsewhere since 1997, namely the use of MRI. In those cases when a post-mortem examination is unavoidable, an MRI scan is much more acceptable to Jewish (and, we understand, to Muslim and other) families since the body remains intact. We have, moreover, been informed that it is frequently preferred by coroners since it can on occasion be even more informative than a surgical post-mortem – for example, deaths resulting from pneumothorax are instantly recognisable as such using MRI, but since the trapped air is immediately released when the chest cavity is opened, these are difficult if not impossible to diagnose by surgical methods.

We have been advised that prior to the introduction of this system there were approximately one hundred surgical post-mortems per annum in the Manchester Jewish community, but that this has fallen to fewer than ten per annum since the introduction of MRI post-mortem examinations.

The current situation in Scotland

We took the opportunity to raise this matter last year directly with the Lord Advocate who was sympathetic to the introduction of MRI post-mortem examinations and advised us to follow the matter up with Crown Office. We have since spoken to a number of members of the Procurator Fiscal Service, and have found that they too are sympathetic to the needs of the Jewish community. However, we have been informed on a number of occasions that they are powerless to assist since MRI is not currently recognised as a form of post-mortem examination in Scotland, and also that they have no authority to request anyone other than a pathologist to conduct a post-mortem examination. Since pathologists are generally not trained in the interpretation of MRI scans, this has prevented Procurators Fiscal from acceding to requests from Jewish families for their use as an alternative to a surgical post-mortem.

The legislative situation in England and Wales

At a recent meeting with faith leaders[1], the UK Justice Minister, Bridget Prentice, said: "*We have listened carefully to bereaved families and are pleased to propose these reforms which will allow coroners to consider the wishes of the family and faith issues and where possible conduct an MRI scan in place of an invasive post-mortem.*" The reforms to which she refers are the inclusion in the Coroners and Justice Bill[2] currently before the UK Parliament of a measure permitting a coroner to specify the kind of post-mortem examination that should be made (clause 16). According to the Explanatory Notes[3]:

> *148. The term "post-mortem examination" is not defined but it will include any examination made of the deceased including non-invasive examinations, for example, using Magnetic Resonance Imaging (MRI).*",
>
> *150. [the Bill] defines a suitable practitioner as either a registered medical practitioner or where a particular form of examination is required, such as an MRI Scan, a practitioner who the Chief Coroner has designated is suitable to carry out such examinations.*

Furthermore, in discussing compliance with the European Convention on Human Rights, the Explanatory Notes state:

> *810. A coroner may ask a suitable practitioner to make a post-mortem examination of the deceased (clause 16). This would include any examination made after the death of the deceased, whether invasive or non-invasive, for example, using MRI since an invasive post-mortem involves dissection of the body it runs counter to certain religious beliefs and could therefore engage the deceased‘s family members‘ right to manifest religious belief under Article 9. The Government*

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[1] http://www.justice.gov.uk/news/newsrelease210409a.htm *[Link no longer operates]*

[2] http://www.publications.parliament.uk/pa/ld200809/ldbills/033/2009033.pdf

[3] http://www.publications.parliament.uk/pa/ld200809/ldbills/033/en/2009033.pdf

> *considers that an invasive post-mortem examination would be justified, even where it infringes their religious belief, where it contributes to the purpose of an investigation in promoting and protecting public safety and health.*
>
> *811. In any event the Government considers that the provision is not disproportionate in effect. Regulations made under the Bill will enable the deceased's family members to make representations to the coroner about whether a post-mortem examination should take place. A coroner will be required to take into account representations from family members to use non-non-invasive procedures at a post-mortem although the final decision will be for the coroner.* "

The Criminal Justice and Licensing (Scotland) Bill

The Criminal Justice and Licensing Bill currently before the Scottish Parliament provides an opportunity to enact a similar provision to recognise MRI as a form of post-mortem examination, and permit Procurators Fiscal to request relevant practitioners to conduct such examinations where appropriate. An amendment to the current draft Bill in similar terms to the Westminster proposal would provide great comfort to the Scottish Jewish community, and we believe it would also be welcomed by the Scottish Muslim community and other faith communities.

We would welcome the opportunity to discuss this possibility in more depth with the committee and to provide more detailed information about the successful Manchester scheme and its potential impact if adopted in Scotland.

Note: The Scottish Council of Jewish Communities (SCoJeC) is the representative body of all the Jewish communities in Scotland comprising Glasgow, Edinburgh, Aberdeen, and Dundee as well as the more loosely linked groups of the Jewish Network of Argyll and the Highlands, and of students studying in Scottish Universities and Colleges. SCoJeC is Scottish Charity SC029438, and its aims are to advance public understanding about the Jewish religion, culture and community. It works with others to promote good relations and understanding among community groups and to promote equality, and represents the Jewish community in Scotland to government and other statutory and official bodies on matters affecting the Jewish community.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Orkney Islands Council

Orkney Islands Council Response to Criminal Justice and Licensing (Scotland) Bill Financial Memorandum

Costs

Q4 No account appears to have been taken of the additional costs associated with operating in island, rural or remote environments. The same base costs would be incurred and in such localities the turnover is not there to cover the base costs that must be incurred to provide the service. This should be recognised and the appropriate funding provision addressed.

Q5 The financial costs on the licensing side which is already affected cannot be met without further funding being made available.

Q6 Not known

Wider Issues

Q7 Not known

Q8 Yes – as with all new legislation future costs regularly arise and this should be recognised. One example on the criminal justice side is that there appears to be no indication of additional funding mentioned to address the training requirements of those involved in CJSW and related bodies.

Fiona MacDonald
Solicitor to the Council

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Scottish Borders Council

This submission has been prepared by officers of Scottish Borders Council and approved by the Council Leader.

Section 14 – Community Payback Order

General

The introduction of the Community Payback Order will replace Probation, Community Service and Supervised Attendance Orders with one order – Community Payback. New performance standards and performance outcomes will be set. The focus is on a range of sentencing options designed to support and compliment each other. The main elements are the supervision of an offender within the community and/or the offender completing unpaid work or other activity in the community.

Detailed guidance is included within the proposed legislation and new National Objectives and Standards for criminal justice social work with supporting guidance are being developed.

The Court will not be able to impose a CPO without "taking account of a report from an officer of a local authority". Given the possible conditions/requirements that can be imposed through a CPO the nature of the assessment undertaken by the officer of a local authority will be different to our current SER assessment practices. Staff will require additional training and guidance.

Definitions

There is no guidance within the Bill regarding the qualifications/skill set etc of the "officer of the local authority". Given the complexity of the assessment required and the potential to deprive an offender of their liberty I would suggest that the author of such a report/assessment should be a qualified social worker.

The Bill states that the "offender must attend appointment with the responsible officer" and that "the nature of the unpaid work or other activity to be undertaken by the offender is to be determined by the responsible officer". There is no guidance offered within the Bill as to the qualification levels of the "Responsible Officer". At the moment only social workers are recognised as supervising officers of probationers. Non social work qualified staff can and do act as supervising officers for offenders on community service and supervised attendance orders. It would be helpful to have guidance which allows for a combination of social work qualified and non social work qualified staff to be Responsible Officers for the supervision requirement of a CPO.

Unpaid work or other activity

The Bill proposes that unpaid work can also include “another activity”. This is a significant change as traditionally CS only allowed for unpaid work and is seen as a great improvement on the previous position. We anticipate being able to use social skills training, education and agreed programmed activity to increase the opportunities for offenders to improve their personal circumstances and to build on the skills development opportunities inherent in traditional CS placements. We hope this will eventually lead to an opportunity for offenders to gain SVQs whilst on a CPO. The introduction of this will have significant implications for staffing levels and training.

Supervision requirement

The Bill identifies various options available to the Court when considering a supervision requirement. This includes residence requirement, mental health requirement, drug treatment requirement and alcohol treatment requirement. An offender can only be made subject to certain requirements or elements of the CPO if they will also be subject to supervision. This will ensure that an offender with complex needs is not made subject to an unpaid work requirement and a mental health requirement without the appropriate support from CJSW.

The drug or alcohol treatment requirement might pose some issues around access to services particularly local NHS services as the current policy and principles of services is to engage with service users on a voluntary basis. This may compel offenders to engage with treatment and if they fail to do so their will be legal sanctions. Discussion will be required to explore this with NHS colleagues.

The Sentencing Council (Section 3 - 13

The Bill includes the proposal to set up a Sentencing Council to give guidance to Courts regarding sentencing levels. The political aspiration is to significantly reduce the use of short custodial sentences and to ensure any the need for any short custodial sentences is clearly demonstrated within Court. It’s difficult to address this specifically but the implication of the introduction of such an organisation is likely to mean more offenders sentenced to a CPO than are currently sentenced to CS/SAO or Probation.

Implications

The new NOS will state offenders have to be seen more quickly, to complete unpaid work more quickly and to be seen according to the risk (re-offending or harm to others) they pose. The Sentencing Council will issue guidance to Court on the use of short custodial sentences. This has serious implications for staffing. Although there will b some efficiency savings we can make, we can really only deliver significantly more quickly if we have additional resources. CJ would need additional staff and additional office space etc and it is unclear if there will be any additional resources allocated. The assessments required for a CPO will be different to the current SER assessments and in some ways will be more complex. A great deal of training will be required for all staff.

Whilst these are important considerations the introduction of a CPO will hopefully simplify the sentencing options, ensure greater consistency of requirements for community based sentences and reduce the number of short sentences imposed. Obviously an infrastructure is required to support this but the principle of reducing short sentences is positive one as offenders and offender’s families lives are disrupted by short sentences often to the detriment of the family and in the longer term to the community and the victims. The re-offending rate of offenders sentenced to custody is far higher than those where probation or CS is imposed.

Part 8

Part 8 of the Bill makes various changes to the general licensing provisions of the Government (Scotland) Act 1982, and to it’s specific provisions on metal dealers, market operators, public entertainment, late hours catering, and taxis and private hires.

A review of the legislation is overdue as the current legislation has been on the Statute Book since 1982. Any modernisation of the Civic Government (Scotland) Act 1982 is to be welcomed.

The provisions relating to licensing of taxis and private hire cars, in particular, are in need of urgent review.

The Bill contains helpful provisions relating to standard licence conditions.

With regard to licensing of taxis and private hire cars, there are helpful clarifications relating to review of fares. These are to be welcomed.

The Bill provides for licensing authorities to regulate car boot sales along with other types of market operators. Licensing authorities will have discretion as to whether to charge reduced or no fees to charitable organisations.

The Bill makes provision for licensing authorities to control large scale public entertainments that are free to enter but authorities will have discretion whether to licence events such as gala days or school fetes. They will also update some references to gambling legislation for premises which are exempt from the public entertainment licensing provisions.

With regard to licensing of late night catering, the Bill brings late night grocers and 24 hour stores within the scope of the licensing provisions. It will continue to be for licensing authorities to determine which classes of premises actually require to be licensed.

In general, the review of Part 8 of this legislation is to be welcomed.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Violence Against Women Strategy Multi-Agency Working Group

The Justice Committee has requested views on the Criminal Justice and Licensing (Scotland) Bill. The Violence Against Women Strategy Multi-Agency Working Group, as part of the Community Planning structure in Highland, is responding to a specific portion of this Bill - clause 34, “Extreme Pornography”.

We welcome the inclusion of Extreme Pornography as part of this Bill. The proposed legislation sends a clear message to both pornography users and the wider public that accessing this material is unacceptable and is certainly not harmless. We believe that this legislation is needed to reduce the potential for broad cultural harm and to address the demand for extreme pornography, which has led to the proliferation of rape pornography, in particular, across the internet.

Our objections to extreme pornography are based on cultural harm and its abusive and degrading portrayal of women and girls and female sexuality and not simply on its sexual content and/or explicitness. In extreme pornography, sex is presented as abusive and violent towards women and sexualises their abuse, systematically exploits and portrays them as objects to be abused, degraded and bought. It perpetuates the myths that women are sexually available, can be persuaded or forced to have sex and are subordinate to men.

Whilst we welcome this legislation, we have the following concerns and request clarification on these:

- The use of the term ‘obscene’ without definition
- Amendments to definition of ‘extreme’
- Classification of the image being in someone’s possession
- Non-photographic images
- In relation to images and sounds, text is not mentioned
- The image not being pornographic taken by itself, but would be if forming part of a wider narrative

Terminology – ‘Obscene’
We request a definition to be included as to what would constitute ‘obscene’ material.

We are also concerned that the Scottish Government has opted to choose to use the term ‘obscene’ within this Bill. Using this type of terminology comes across as moralistic and we would recommend focusing instead on the cultural harm the acceptance of pornography in Scotland causes. The fact that these images are created in the first place normalises sexual violence against women and feeds myths about rape which are pervasive in society.

Pornography is not only harmful to those involved in its creation and consumption but also to wider society.

Definition – 'Extreme'

We would recommend a change of wording in this section from "an act which results, or is likely to result in, a person's severe injury" to "an act which results in, or **threatens to** result in, a person's severe injury" – this would increase the scope to cover all acts of rape which could be said to threaten severe injury, but are not all likely to result in severe injury.

We would also welcome an extension to the definition of 'extreme' to include depictions of incest as these may not be captured under the legislation as currently drafted. There are many pornographic websites which glorify incest, but are unlikely to be caught by current legislation as they feature women who are 18, according to the information on the websites. We believe that serious consideration must be given to extending the definition of 'extreme' to include depictions of incest, which is an illegal activity.

Possession of Images

We would a welcome clarity on how an image could be in 'someone's possession'. We would assume that this would include print and electronic format and, therefore, would include images that had been viewed on the internet or sent as phone messages. However, this is not clear in the Bill as currently written. We hope that repeated viewing of material even if it was not downloaded would be covered by the legislation.

We urge the Scottish Government to ensure accessing internet sites that promote 'extreme pornography' is covered by this legislation. Many of these sites are identifiable as extreme pornography simply by their titles, which regularly include references to sexual violence and/or child sexual abuse.

Content of Images – Non-Photographic

We are concerned that the Bill as currently written will not cover the images of extreme pornography that are available on-line, but are not photographic. Images of extreme pornography are available on the website "Second Life, amongst others, and includes interactive content in violent and extreme pornography. We feel this Bill should be extended to clearly include this type of material.

Content of Images – Text

Mainstream pornography regular includes graphic sounds and accompanying text that is offensive to and derogatory about women. We would expect that under Sections 4 & 5 that not only sounds relating to the images be included, but that accompanying text (whether on a website or embedded in the image) also be included.

Image as Pornographic by Itself, but not as part of narrative

We would like more clarity on this section. Is the intention that, for example, images of 'extreme pornography' could be shown as part of anti-pornography campaigns or to raise awareness of what 'extreme pornography' constitutes and that this would not be an offence? Whilst we support these images being available for training and awareness purposes and we agree that this should not constitute an offence, we must still be wary that people can obtain images from a variety of sources and may use material not intended to provide any form of sexual arousal (because of the context in which it was produced), however, a third party may use the images for precisely this.

Conclusion

We welcome this Bill, which includes measures to tackle extreme pornography, but we must also be cautious that this remains the initial step in challenging the demand for pornographic material in Scotland.

Pornography is only one aspect of commercial sexual exploitation and we welcome the focus that this Bill has on the consumption of such material.

Gillian Gunn
Violence Against Women Development and Training Officer

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Scottish Consortium on Crime and Criminal Justice

The Consortium is a body which brings together leading voluntary sector organisations in Scotland concerned with crime and criminal justice and also leading academics and individuals working in the field. It organises conferences and seminars and publishes research and discussion papers. The Convenor of the Consortium is Baroness Vivien Stern.

The Consortium is not commenting on all the provisions of the Bill but only on those provisions, mainly in Part 1, which are closely related to its interests.

Part 1

Section 1: Purposes and principles of sentencing

The purposes of sentencing set out in Section 1 are those generally used in discussing sentencing. However, they raise almost as many questions as they answer. For instance, what happens when there is conflict between purposes? For example, rehabilitation of an individual might suggest one sentence, protection of the public another. What is the priority or precedence between the purposes when they are in conflict? There may, unintentionally, be a suggestion that the list is in some sense in order of priority. It would, therefore, be helpful if it were clearly stated that the order was in no sense to be seen as a hierarchy. It is also questionable what the purpose of punishment is if it serves none of the other four objectives in the list. For this reason, it could be dropped as a purpose. It is also suggested that a principle of ‘parsimony’ should be considered, that is, any sentence should be the least oppressive and intrusive consistent with the other aims of sentencing.

Section 3: The Scottish Sentencing Council

The Consortium does not have an agreed position on the merits of a Sentencing Council. The arguments are as follows.

Sentencing guidelines transfer some of the power over sentencing away from an independent judiciary and into the hands of state prosecutors and politicians. Unless proper checks and balances are introduced, it is possible for politicians to make very significant adjustments to the severity levels of sentences through the guidelines and this could have a great impact on the prison population. Critics of guidelines believe that retaining judicial control over sentencing provides a vitally necessary independence from greater political intervention in sentencing.

Prison populations have risen in most US states which have developed sentencing guidelines. However, one authoritative review of the research argues that guidelines may in fact have worked to slow down the rise in the rate of imprisonment in many of these state jurisdictions, particularly in comparison with the rates of imprisonment in jurisdictions without guidelines. A comprehensive system of guidelines does allow prison populations to be predicted more accurately and thus allows populations to be more effectively manipulated by politicians and policy makers. This could in theory be either upwards or downwards. However, in the current climate the establishment of a comprehensive system of guidelines runs the risk of the prison population being increased.

Critics of guidelines argue that they reduce judicial discretion and therefore carry the risk of unjust sentences being imposed in individual cases. Judges may feel obliged to pass a sentence which they feel is unjust because their desired sentence falls outside the guideline range. Critics also argue that guidelines are insufficiently sophisticated to take account of the wide range of factors which are relevant for sentencing, although most guideline systems make provision for departures.

It can be argued that it is legitimate for governments to set a sentencing policy designed to make the most effective use of scarce criminal justice resources. It may be preferable for government to seek to achieve this through a Sentencing Council which brings together judges and others with relevant knowledge and expertise, **provided** the body is sheltered from short term political pressures and has the time and resources to deal with the considerable complexities of sentencing.

All Western jurisdictions have seen a steep rise in rates of imprisonment over the last twenty years. In most of these jurisdictions, judges have retained a considerable control over sentencing levels. Thus, judges are at least partly responsible for the rise in prison populations. Even if they wanted to reverse this trend, there is currently in Scotland, no institutional capacity for judges to act together to achieve a change. There is therefore a lack of public accountability for the size of the prison population. Questions about the proper aims, levels and modes of criminal punishment (as distinct from questions about the proper sentence in individual cases) are not legal questions on which judges can claim sole authority: they are political questions that should arguably be decided by appropriate public debate of the kind that a Sentencing Council could make possible.

Sentencing has to balance two contradictory objectives: the desire to take into account the facts and circumstances of each individual case and the desire to ensure that similar cases receive a similar sentence. The current system of individualised sentencing does not provide specific provision for consistency in sentencing (although the ability to appeal against sentence and for the Appeal Court to issue guideline judgements does make some provision for this). A comprehensive system of guidelines, with provision for judicial departure from the guidelines so long as appropriate justification is given, could provide a better and more defensible balance between individualised sentencing and consistency.

The case for and likely effects of a Sentencing Council are far from clear. It is noted that it is estimated that a sentencing council would cost £1 million a year. Given the doubts, this does not seem the right time to introduce a Sentencing Council. Given the pressures on the criminal justice budget, the sum required for the establishment of a Sentencing Council could be spent more effectively in other ways.

If the Government does proceed to establish a Scottish Sentencing Council and sentencing guidelines, the Consortium would make the following recommendations:

- The Council should be funded to develop a comprehensive set of inaugural guidelines.
- The guidelines should be mandatory but judges should be able to depart from the guideline sentence and should be required to provide an explanation for their departure.
- The Council needs to have members with the skills, knowledge and experience to develop a comprehensive set of guidelines. Legal qualifications and experience do not necessarily provide the full range of necessary skills. Non- legally qualified people would bring an essential perspective and additional relevant skills.
- The Council should be independent and should not be used as a political instrument to react to short term political problems
- There should be regular monitoring of the Council's effect, effectiveness and level of compliance with its guidelines

Section 14: Community payback orders

The Consortium welcomes this implementation of recommendations by the Prisons Commission with their emphasis on flexibility, reparation and "problem solving" sentencing. It is also welcomed as an effective approach to reducing imprisonment. For this advance to work well, it will need to be properly resourced. In terms of penal effectiveness, resources spent in this area will have much greater beneficial impact in terms of the stated purposes of sentencing than increasing the prison population through the implementation of the Custodial Sentences and Weapons (Scotland) Act 2007. This is discussed more fully below.

For this reform to work well, it will need to be fully explained to the public and appropriate publicity given to the payback work carried out. This should not be done by identifying reparation work and those doing it while it is being carried out. Publicity should follow completion of the work, publicising through the press and signs at the site where appropriate, what benefit the community has got through the payback activity. This would build up public support for the sentence. It is recommended that there should be a requirement on the Criminal Justice Authority (CJA) to explain to the public locally the nature of the new sentence and to report regularly on tasks carried out, publicising the benefits to the community. There are already examples of CJAs doing this but it needs to be a continuous process and aimed particularly at the local press where the related offences are already fully reported.

It is important that there should not be a philosophy of “only one shot” at a community payback order. It should be seen as the proper sentence for use whenever it is proportionate and appropriate for an offence regardless of whether and how often it has been used before on an individual.

The voluntary sector has an important part to play in the provision of reparative work as part of payback orders in view of their experience in this field

Section 16: Short sentences

The Consortium supports the objective of reducing the number of short sentences which clog up the prisons and which allow little scope for work on changing behaviour. It has a concern about the unintended consequences which may result from the proposals in the Bill. Sentencers may make use of the provision to continue to impose short sentences by developing a set of reasons which would satisfy the statutory requirements. A precedent is the provision which required community service only to be used as an alternative to prison. However, in practice it became an alternative to fining to a much larger extent. Another unintended consequence might be the greater use of sentences of just over 6 months with a consequent increase in the prison population. A key to managing the reduction of short sentences is consultation with sentencers on the introduction of community payback orders and their proper resourcing. This is to deal with the constant complaint that community sentences are not available sufficiently quickly or adequately resourced. In this process Community Justice Authorities will have a key role and need to be properly resourced for this purpose.

The only assured way to achieve a reduction in short sentences is to cap the number of places available for sentences under, say, 6 months. When the cap was reached those sentenced to below 6 months would be put on a waiting list and their sentence suspended until a place was available. If the sentence was completed before a place was available, they would not need to serve the sentence. This too could have unintended side effects.

Section 18: Amendments to the Custodial Sentences and Weapons (Scotland) Act 2007

This is the provision of the Bill which most concerns the Consortium and it would recommend that Section 18 of the Bill be dropped entirely and the relevant sections of the 2007 Act be repealed. The objectives of clarity of sentencing and better supervision can be better achieved in other ways and without incurring the huge expense estimated through these proposals and the consequent large expansion in the prison population.

During the passage of the Custodial Weapons and Weapons (Scotland) Bill the Consortium submitted representations on the proposals for release and supervision of prisoners. The Consortium pointed out the impracticality, high cost and ineffectiveness of the proposals. Many other organisations did the same. However, since the Bill was going through Parliament just before an Election, no party opposed the proposals and they became law. They have not been implemented so far.

In its report, the Prisons Commission expressed their concerns about the 2007 Act, strongly echoing many of the points previously made by the Consortium and other organisations. The Commission recommended that if the 2007 Act was to be implemented, its implementation should only take place following the implementation of the Commission's other recommendations and the achievement of a reduction in the short sentence prison population. Clearly that point has not yet been reached and may not be for a few years. The Commission opposed its application to sentences below two years.

What is now proposed is an order making power which would allow the original provisions of the 2007 Act to be introduced, not at the 15 day sentence point, but at some other unspecified point, such as the one year sentence or some other sentence length. Although assured during the passage of the 2007 Act that the proposals which applied from the 15 day sentence point were workable, it has now clearly (but not explicitly) been accepted that the original proposals were unworkable. However, the order making power is open ended and there are no undertakings about the point at which the 2007 Act provisions would be implemented nor any way of knowing if they would be implemented initially at one level e.g. the one year sentence, and then at a future date be reduced to a sentence length below that.

The objections to the 2007 Act thus remain in relation to the provisions in the current Bill with the added objection of uncertainty.

The objections are:

- **Practicality** – prison governors would have to carry out risk assessments on a large (but so far unspecified) number of prisoners who at the moment have no such assessment. This extra task would distract from other work with prisoners. If the governors played safe (the usual course when considering risk), and refused release at the half way point in many cases, the cases would have to be considered by the Parole Board. This would involve a large increase in work by the Board which is already under considerable pressure dealing with more dangerous prisoners. The shorter the sentence, the less time to carry out the risk assessment in any meaningful way**.** The Parole Board would without significant extra resources find it difficult to carry out the proposed procedures within the time limits of short sentences leading to the risk of delays and injustice.
- **Negligible effect on public safety**- the difference between letting someone out on licence at the half way point or the three quarters point of a one year sentence is 3 months which is negligible in terms of public protection. At two years the difference is 6 months, again not

very significant in terms of public protection. Yet the effect, in aggregate, on the prison population is very significant.

- **Cost**- the financial memorandum estimates the annual cost of full implementation of the combined sentence applied at the 1 year point as £45.75m. The figure for applying the combined sentence at 2 years is £32.73m. These are very substantial sums and by far the largest part (82%) is additional prison costs, reflecting a rise in the prison population to 9,600. This money could be used on community payback, youth clubs, more police, community courts, drug and alcohol programmes to much greater effect. It is interesting to note that a community court proposed for Glasgow – a valuable development - has been cancelled on cost grounds although it would cost a fraction of the cost of implementing the 2007 Act.
- **Lack of evidence on effectiveness** – there is no evidence that this increase in the prison population will increase public safety when compared with spending the same very substantial sum on developing programmes and penalties in the community. The Bill proposes the development of payback orders. If instead of spending extra resources on more imprisonment (to implement the 2007 Act), the money went on community payback (as provided for in the current Bill) the overall benefit would be much greater. The Scottish prison population is already almost the highest in Western Europe. The change would almost certainly make Scotland the Western European country which imprisoned the highest proportion of its citizens. To increase Scotland's already high prison population in pursuit of an impracticable policy is poor value.

The Commission accepts that there is still an issue of public understanding of sentences. This should be taken seriously by explaining the nature of current sentences which are already "community sentences" although not called that. Sentences are already served in part in the prison, in part in the community with the risk of recall (although not a significant risk under 4 years). The community sentence of the 2007 Act does not abolish automatic release. Better explanation to the public and better supervision and support of all prisoners on release within the present framework would be much more likely to be effective.

Part 2

Section 25: Involvement in serious organised crime

Section 25 is headed 'involvement in serious organised crime' but the definition of the offences requires only an agreement to become involved. There is therefore a mismatch between label and offence, and an offence whose over-broad definition revives all the familiar worries about the law of conspiracy. At least some overt conduct towards becoming involved should be required.

Part 3

Prosecution of children

The Consortium supports the proposal reflected in Section 38 that no child under 12 can be prosecuted but further suggests that the discretion allowed to the Procurator Fiscal to prosecute children under 14 should be withdrawn. It is assumed that a child can still require a referral to a Children's Hearing on offence grounds which is denied to be proved according to the criminal standard of proof. However, it is noted that this change falls short of actually changing the age of criminal responsibility and the Consortium would press for the age of criminal responsibility to be increased to 12.

Part 9

Alcohol licensing

The Consortium does not comment in detail on the licensing proposals other than to strongly support measures to tackle the misuse of alcohol which lies behind so much of crime. The Consortium would hope that the protection of the public from alcohol- related crime would be give its proper weight against the commercial interests of the drinks industry. Robust measures to tackle alcohol misuse will be much more effective in protecting the public than a continuing increase in the prison population. Indeed, less alcohol misuse will reduce the need for prison.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Victim Support Scotland

1. Introduction

Victim Support Scotland is the largest agency providing support and information services to victims of crime in Scotland. Established in 1985, the organisation currently employs around 180 staff and 900 volunteers. In 2007-2008 our community based victim services and court based witness services supported around 175,000 people affected by crime. With the interest of victims and witness at heart, we are pleased to be given a change to provide a response to this important consultation. We have divided our comments below in accordance with the sections of the Bill.

2. Victim Support Scotland’s comments

Section 1-2 Purpose and principles of sentencing

Victim Support Scotland agrees with the proposed purpose and principles of sentencing. We believe that the introduction of statutory definition of the aim of sentencing will help to create more consistency in sentences, as stated in section 1(3)(d), which would benefit the whole justice sector, including victims and witnesses of crime. More consistency will subsequently make the criminal justice process more transparent, enabling parties to foresee and understand why a particular verdict is given.

Section 3-13 Scottish Sentencing Council

Victim Support Scotland agrees with the establishment of a Scottish Sentencing Council. For more details, see our previous consultation response on this matter.

Section 14 Community payback orders

Victim Support Scotland supports the introduction of payback orders and the aims set out in the bill. In addition, we would like to introduce the two following requirements:

a) an alternative (suspended) sentence should be set out by the court alongside the community payback order, which would announce what sentence would be given if the offender breaches the payback order. This would give more clarity to the victim, offender and the general community about the content of the sentence and what will happen if the order is not fulfilled.

b) a community payback order can only be given if the chosen treatment/activity is available at the time of sentencing. This will ensure that the offender will start the disposal straight away, instead of for instance waiting several months to begin a particular treatment, which gives a signal to the victim that nothing has happened. Confidence in the criminal justice system has been shown to form an important part in the recovery process for many people affected by crime; the belief that justice has been made greatly aids recovery. The effects of unclear and disproportionate sentences undermine this concept and have a damaging effect on both victims and communities. It is therefore of vital importance, both to the victim and for society as a whole, that the community payback order will provide an adequate and proportionate response to the crime and that each disposal will fulfil all the purposes of sentencing as set out in section 1(1) of the Bill.

Regarding the court's communication of the order, section 227B(4) states that

"before imposing the order, the court must explain to the offender in ordinary language –

(a) the purpose and effect of each of the requirements to be imposed by the order,
(b) the consequence which may follow if the offender fails to comply with any of the requirements imposed by the order"

Victim Support Scotland believes that this information should also be given to the victim, unless they have stated they do not want to receive this information. As an alternative, information can also be given to a representative of the victim. Keeping the victim informed is important for two reasons. Firstly, in order for the victim to feel justice has been done and that the offence has been given an appropriate sentence, it is important that he/she fully understands the community payback order and any associated requirements. Secondly, the victim is often in a very good position to report certain breaches of the order, for instance a requirement to not contact the victim. Similarly, section 227E(4) states that a copy of the order imposing the community payback order should be given to the offender and to the local authority within whose area the offender resides. We believe this information should also be given to the victim, unless they have stated they do not wish to receive this type of information. The victim has a right to be kept informed, and giving the victim a full explanation of the decision will also increase the likelihood of him/her accepting the decision and being more content with the overall justice process.

Section 17 Presumption against short periods of imprisonment or detention

Victim Support Scotland supports this section when suitable alternative disposals are immediately available.

Section 23 Offences aggravated by prejudice

Victim Support Scotland supports this change.

Section 24 Voluntary intoxication: effect in sentencing

Victim Support Scotland supports the introduction of this section.

Section 38 Prosecution of children

Victim Support Scotland supports this change.

Section 40 Witness Statements

Victim Support Scotland supports this modification.

Section 42 – 43 Bail

Victim Support Scotland supports these changes, including the demand on a person released on bail to participate in an identification parade. In reference to section 42(2)(2A) and 42(2)(2AA) we believe it is important to keep the victim fully informed of the possibility for the prosecutor to be heard. The victim should also receive full explanations of all implications where the prosecutor consents to the bail review application without having a hearing.

Appropriate attention should be given to the views and fears of the victim when deciding on whether or not to grant bail; there should be provisions to take account of the impact the crime has had on the victim. Bail conditions such as, for instance, abstaining from contacting the victim should if appropriate be set. It is also critical that bail conditions are communicated to the victim in a timely and appropriate manner. Being informed of the bail conditions could also help to reduce fear and concerns regarding the victim's personal safety.

Section 63 Spouse or civil partner of accused a compellable witness

Victim Support Scotland supports the legal principle of this suggestion, particularly is cases of serious and organised crime. However, when applying this section, we ask that the Crown Office considers the wider issue of maintaining family relations. We recommend the introduction of a test of proportionality, including a risk analysis, balancing the value of the evidence with the risk of not accessing the evidence statement to protect the integrity of the family. We believe that to access the witness statement, the Crown must be convinced it would improve the quality of justice. Guidance should be developed regarding how to balance the need to access witness statements without causing more distress than is necessary to the families involved.

Section 66 Witness anonymity orders

Victim Support Scotland supports the introduction of witness anonymity orders, but would initially recommend limited application to only include witnesses employed in information security service who will be put at risk if the anonymity orders were not available.

Section 80 Assistance to victim support

In addition to standard funding streams, Victim Support Scotland can see the value of section 80, making funds available for services in particular areas for particular crimes and circumstances. We see this section as an addition to current funding schemes and not a change in policy direction regarding the matter in which victim services are funded.

Section 84 Compensation orders

In principle, we support the possibility for courts to make a compensation order requiring the convicted person to pay compensation in favour of the victim or a person who is liable for funeral expenses. We recognise that the use of these orders require the cooperation and approval of the individual victim and family involved. However, we believe the provisions need further development and we would want to be involved in policy discussions and the set up of the orders.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Scottish Police Federation

I refer to the above and thank you for inviting the Scottish Police Federation (SPF) to take part in this consultation. For ease of reference our response follows the numerical sections of the proposed legislation. There are numerous areas of the consultation on which the SPF has not commented. On such areas, the SPF has, at this time, no strong objections.

Part 1 Sentencing

The SPF welcomes the general proposal for the courts to consider 'the effect of the offence on any person …' [1] and believes this requires to be carefully interpreted to exclude pressure and lobby groups or individuals whilst ensuring recognised representative bodies or organisations fall within the general definition of 'any person'. For example the Scottish Police Federation itself may wish the courts to consider the impact of serious assaults on our members, on the wider membership, prior to sentence being passed.

The SPF is supportive of the establishment of the Scottish Sentencing Council and believes its aim of bringing consistency in sentencing is long overdue. None the less and whilst recognising the significant challenges posed to Scotland's prison estate, believe consideration within the guidelines 'of the likely effect … on … the number of persons detained in prisons …' [2] to be incompatible with the wider and longstanding principle of ensuring the punishment fits the crime. Whilst on the face of it, having one of the highest incarceration rates in Europe is alarming, it is our view this is the incorrect test and what should be considered is the prison population as a percentage of the overall criminal and not the general population.

The draft Bill proposes a fine defaulter with a fine of up to £500 will have that sentence replaced with a Community Payback Order (CPO) at level 1 unpaid work (i.e. not in excess of 100 hours) [3] and that such a disposal can be imposed without the offenders consent. [4] It is the view of the SPF this approach will result in significant disregard for the provisions of the CPO and ultimately lead to a widening of the gap between commission of crime and the date on which justice is seen to be done and sentence served. It is our view that a fine should not be considered an appropriate disposal in any case in which an offender has previously defaulted on a fine and for a CPO to have any chance of being successfully completed, the offender must consent.

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[1] Section 1(3)(b)

[2] Section 5(b)(1)

[3] Section 14 [227M (1) and (2)]

[4] Section 14 [227M (7)]

In our consideration of the provisions governing restricted movement requirements [5] it is our view it would be an appropriate response to compel an offender subject to such an order to make himself available to a constable, at the place to which such a restriction applies at any reasonable time, in order that a constable can confirm adherence to the restricted movement requirement and that such a failure to make himself available in such circumstances be considered a breach of the restricted movement requirements in its own right. In addition it should be open to a constable to inspect without warrant such a place subject to the same criteria surrounding reasonableness.

When considering the matter of short term prison sentences, the accompanying explanatory note, at paragraph 86, suggests that there are no certified police cells in Scotland. This is at complete variance with the understanding of the SPF on this matter and it is our information certified police cells exist in the Orkney, Shetland and Western Isles areas. Indeed such cells are essential to deal with persons sentenced to periods of imprisonment where for example, severe weather prevents their transfer to the prison estate on mainland Scotland. In light of our understanding on this matter the SPF can not support repealing of section 206 Paragraphs (2) to (6) of the Criminal Procedure (Scotland) Act 1995. [6]

On the wider subject of short term prison sentences the SPF questions the appropriateness of an arbitrary figure, for example, six months (allowing for the necessary considerations) as the minimum period of imprisonment which should be considered. Clearly we recognise the evidence which supports the position of the relative ineffectiveness of short term prison sentences but do not believe this approach to present a logical solution. It is an unfortunate truth that there are many habitual offenders who have no desire to comply with any court disposal which may well render short periods of imprisonment necessary for even minor offences.

It is our view the consideration ‘as soon as a short term custody and community prisoner has served on half of the prisoner’s … sentence …the Scottish Ministers must release the prisoner on … licence’ [7] as a stand alone provision will not readily be understood or accepted. Any presumption for early release must only be with due consideration as to the conduct and contrition of the offender whilst imprisoned. It would seem illogical for a badly behaved or disruptive prisoner serving a short term sentence to automatically be released from prison. In addition it is our view the standard conditions of license [8] should include the requirement to notify of the address at which the offender is to reside and that such an offender makes himself available to a constable at a reasonable time at that address, in order to confirm adherence to the license. In addition it should be open to a constable to inspect without warrant such an address subject to the same criteria surrounding reasonableness.

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[5] Section 14 [227ZF – 227ZI]

[6] Section 16(3)(b)

[7] Section 18(3)

[8] Section 18 [29A]

Part 2 Criminal Law

No Comments

Part 3 Criminal Procedure

The SPF believes the standard bail conditions [9] should be extended to include ‘that the accused makes himself available to a constable at any reasonable time and at any place as may be specified by the court for the purpose of ensuring adherence to such bail conditions’. For example, bail conditions should specify an accused person must reside at a specific location between certain times and it would seem logical a constable should be able to confirm adherence to such a condition. In addition it should be open to a constable to inspect without warrant such a location subject to the same criteria surrounding reasonableness.

Part 4 Evidence

No Comments

Part 5 Criminal Justice

No Comments

Part 6 Disclosure

No Comments

Part 7 Mental Disorder and Unfitness for Trial

No Comments

Part 8 Licensing under Civic Government (Scotland) Act 1982

No Comment

Part 9 Alcohol Licensing

This part has not been commented on as we are aware it is now to be considered separately from this legislation.

Calum Steele
General Secretary

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[9] Section 43

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the City of Edinburgh Council Regulatory Committee

This response to the call for written evidence relates to those provisions in Part 8 of the Bill which is the responsibility of the Council's Regulatory Committee. Time has not permitted formal discussion of these proposals with the Committee itself, but the views of the Committee's Convenor, Councillor Colin Keir, have been sought, as have those of licensing and enforcement officers.

A separate response has been provided by the City of Edinburgh Licensing Board in relation to liquor licensing.

The opportunity to modernise licensing provisions currently provided by the 1982 Act is welcomed and will assist Councils to exercise their statutory responsibilities effectively.

(1) Section 128(3)(e) – Residence Requirement for Sex Shop Licence holders.

Paragraph 9(3)(e) of Schedule 2 of the 1982 Act presently prohibits the grant of a Sex Shop licence to a person who has not been resident in the United Kingdom for the 6 months immediately preceding the date of their application.

The Bill proposes to include residence in any member states of the European Community.

It is appreciated that there are European Community Treaty requirements to allow freedom of movement and the ability to work to all citizens within the European Community. We understand that reasonable restrictions can be imposed on the grounds of public policy, public security or public health. The restrictions on obtaining a Sex Shop licence would presumably be justifiable on the grounds of public safety so that persons operating such premises do not pose a threat to the public, particularly vulnerable groups, such as children.

(2) Proposed additional licensing restrictions for taxi and private hire car driver licences.

We would ask that some thought be given to introducing a similar but expanded restriction for non UK residents wishing to obtain taxi and private hire car driver licences.

Taxis and private hire cars often carry children and vulnerable adults, mostly without incident. However, licensing authorities and the police wish to ensure that all drivers are subject to rigorous background and criminal checks. These checks cannot be carried out effectively on persons who reside out with the United Kingdom. The 1982 Act requires the local authority to have evidence as to whether a person is not a fit and proper person to hold a licence. The onus is not on the applicant to show that he is a fit and proper person. If the applicant has not resided in the in the United Kingdom for a reasonable period of time, the police would not be able to check their criminal records and the licensing authority would be bound to grant the licence.

It may be possible for licensing authorities already to refuse to grant taxi or private hire car driver licences on the "other good reason" grounds set out in Paragraph 5(3) (d) of Schedule 1 to the 1982 Act. However, it would be preferable (to avoid legal challenge and to introduce uniformity across Scotland) if a specific provision could be entered into the Bill prohibiting the grant of taxi or private hire car driving licences to persons who have not resided continuously in the United Kingdom for a reasonable period, say, 5 years.

It is suggested that the period of 5 years would be sufficient to allow potential applicants to demonstrate a "clean record" so that they could safely be allowed to carry unaccompanied passengers. It is also suggested that only residence within the United Kingdom would be relevant, due to the present lack of comprehensive and uniform criminal record keeping system within the European Community.

It is suggested that making such a restriction applicable to non UK Residents would be compatible with the right of movement and employment within the European Community. This would be reasonable restrictions designed to ensure protection of the public and wholly appropriate, given the special nature of a taxi or private hire car driver's duties.

It is appreciated that this would represent a significant change in taxi/private hire car driver licensing legislation. However, this proposal would bring this element of taxi/private hire car licensing in line with the principles of the proposed legislation. It may be considered more appropriate to consult further rather than include it in the present Bill. It is intended that a more detailed letter on this issue will be sent to the relevant ministers in due course.

If it is considered appropriate to include such a provision in the present Bill, we would suggest the following amendment to S 124 of the Bill, by insertion after 124(2) –

(3) In section 13 (taxi and private hire car driving licences) insert the following subsection after subsection (3) –

> *"(3A) A licensing authority shall not grant a licence under this section to a person who is not resident in the United Kingdom or was not so resident throughout the period of five years immediately preceding the date when the application was made."*

(3) Minor Error in S 124(2).

Reference in this sub-section to “taxi and private hire car licences” should be changed to “taxi and private hire car driving licences”.

I hope this is of assistance. Should you have any further queries please do not hesitate to contact me.

Donald Macleod
Principal Solicitor (Licensing), Corporate Services

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Rape Crisis Scotland

1. Introduction

1.1 Rape Crisis Scotland welcomes the opportunity to provide written evidence on the Criminal Justice & Licensing (Scotland) Bill. The bill covers many issues, but we have focused our consideration on 2 areas: the criminalisation of the possession of extreme pornography and the provisions relating to disclosure.

2. Criminalisation of the possession of extreme pornography

2.1 Rape Crisis Scotland supports the move to criminalise the possession of extreme pornography. We believe that this legislation is needed to reduce the potential for broad cultural harm and address the demand for extreme pornography, which has led to the proliferation of rape pornography, in particular across the internet. These are sites with descriptions such as "innocent teen girls face their worst sex related nightmares", "these girls say no but we say yes", "here you will find only REAL rape pictures" and "it is time to become Tough Guys, Right now". These sites are easily accessible for anyone - including young people - to find. They glorify rape and in doing so contribute to a culture where rape is condoned and validated. The increasing availability of pornography online means that many teenagers are getting information about sex through accessing pornography – and sometimes pornography is their only source of information. We have grave concerns about what impact this has on young people's views of sexuality and of women. The American Psychological Association Taskforce on the Sexualisation of Girls[1] found significant evidence of harm to young women caused by the use of sexualized images of women and girls.

2.2 Rape Crisis Scotland strongly supports the inclusion in the bill of specific reference to rape and other non-consensual penetrative sexual activity within the definition of extreme pornography. Unlike similar legislation in England & Wales, the bill does not make a distinction between 'violent' rape, and rape in general, a distinction which is extremely unhelpful and which we are glad to see is being rejected in Scotland.

2.3 Non- photographic visual depictions of extreme pornography

As the bill is currently written, to meet the definition of 'extreme', the material in questions must be explicit and realistic. The terms "explicit" and "realistic" require that the act depicted in the image must be clearly seen, lifelike and convincing and appear to a reasonable person to be real. It is not required that the act itself is real.

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[1] Report of the APA Taskforce on the Sexualization of Girls, 2007

2.4 We believe that it is a missed opportunity to not include non-photographic representations of extreme acts in the bill. This means that the provision in the bill will not cover depictions of extreme pornography on virtual worlds such as Second Life or games online or other digital platforms, where the pornography is violent, extreme and interactive, but where the images are not photographic. Similarly, we would like to emphasis that there is still a need to enact similar legislation in relation to child pornography, as proposed by the Scottish Executive in early 2007.

2.5 Depictions of incest

Although the legislation will cover depictions of rape and non consensual penetrative sexual activity which fit the definition of obscene and pornographic, this will not necessarily cover pornography which glorifies incest, unless it is clear that the young woman depicted is not of an age to consent. For example, one pornography website is headed ‘Welcome to Daddy’s Whore’, and sub-titled ‘there is no stronger feelings than father’s love to his daughter’. This is unlikely to be caught by the legislation because there is a note on the website that the young women featured are ‘18 year old daughters’. We believe serious consideration must be given to extending the definition of extreme to include depictions of incest (which is in itself an illegal activity) to ensure these types of materials are covered by the legislation.

2.6 Further consideration of the harms of pornography

While RCS welcomes the provisions in the bill, which we believe are much needed, we are firmly of the view that this must be a starting point for action to address the harm caused by pornography. Pornography has the potential to cause serious harm in distorting people’s views of sexuality, and contributes to what has been called a ‘rape culture’. Further reform is needed.

3. Disclosure

3.1 RCS is very concerned by the increase in the frequency with which the medical records of complainers’ of sexual offences are accessed in the course of criminal trials. The introduction of such records is a serious breach of women’s privacy and can significantly exacerbate the extent to which they are exposed to spurious and idle speculation on many irrelevant (and highly private) aspects of their health, including sexual history and mental health. We believe the question of what protection complainers have in this regard under Article 8 (right to privacy) of the European Convention on Human Rights must form part of the consideration of any legislation on disclosure. We know that most women do not report rape (the British Crime Survey estimates that only between 1 in 5 and 1 in 8 women have reported rape to the police) and often the reason women give rape crisis for not reporting is fear of the justice system. We have grave concerns that the increasing use of medical records in sexual offence trials will act as another deterrent to people reporting rape. 7 out of 10 women are virtually guaranteed to be asked about their sexual history or character during a rape trial[2], and at the same time are facing the very real possibly of having their medical records scrutinised by the prosecution and potentially brought up in court by the defence. It is no wonder so many women are reluctant to report rape.

3.2 If the disclosure provisions of the bill are passed in their current form, there is a strong argument for complainers of sexual offences to have independent legal representation, to ensure they are able to access any legal protection offered under Article 8.

Sandy Brindley
National Co-ordinator

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[2] Impact of Aspects of the Law of Evidence in Sexual Offences Trials: an Evaluation Study, Scottish Government Social Research, 2007

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Consenting Adult Action Network

About CAAN

CAAN (Consenting Adult Action Network) was born in April 2008, in response to the present Government's legislation concerning extreme pornography. This may be found in sections 63 to 67 of the Criminal Justice and Immigration Act 2008 and in section 34 of the Criminal Justice and Licensing (Scotland) Bill 2009. CAAN believes in the right for consenting adults to enjoy their sexuality without fear of interference from the government. We support adults involved in consensual activities such as BDSM (bondage, discipline, domination and submission, sadomasochism), lap-dancing, pornography, sex toys, polyamory, and sexual equality between men and women, LGBT (Lesbian, Gay, Bisexual and Transgender) and heterosexuals, and between heteronormative sexualities and all others. We are against all non-consensual violence and sexual acts.

CAAN welcomes the opportunity to present these arguments in person for oral evidence.

CAAN's statement

'We believe in the right of consenting adults to make their own sexual choices, in respect of what they do, see and enjoy alone or with other consenting adults, unhindered and unfettered by government.'

'We believe that it is not the business of government to intrude into the sex lives of consenting adults.'

Summary

The proposed new law presented in section 34 of the Criminal Justice and Licensing Bill is incompetently researched, without any proper foundation, ill thought-out, bigoted and likely to have the opposite effect that its proponents claim it will have. We reject it entirely.

The likely effect of this law will be to increase – not reduce – death and injury associated with sexual play and we call on those supporting this law to accept responsibility for this horrific outcome.

Poorly researched

The two major pieces of "research" which the government seems to enjoy referencing, the joint Home Office/Scottish Executive 2005 "Consultation on the Possession of Extreme Pornographic Images" and the Home Office's 2007 "Evidence of harm to adults relating to exposure to extreme pornographic material (rapid evidence assessment)", are biased, ill-founded, un-representative, and should be dismissed from consideration.

Of the first 2005 Consultation, it is often quoted that most of the respondents agreed that the law should be strengthened.

Responses from the 2005 Consultation

	In support of the law	Against the law
UK results		
Individuals	90	223
Organisations	53	18
Total	**143**	**241**
Scottish Results (from Backlash)		
Scottish Individuals	12	26
Scottish Organisations	33	29
Total	**45**	**55**

These numbers hardly suggest an overwhelming majority in favour of the law as the Scottish Government has repeatedly asserted. The fact that individuals were more likely to be against the law suggests that this law is dominated by special interest groups rather than representation of the people's wishes.

The consultation was misleading in its construction. The original wording did not include non-violent rape as the current law proposes, and thus does not reflect views on that particular section. Questions about penalties assumed that a penalty was necessary. But most importantly, repeated references to child porn and harm to children encouraged people to equate the material with child porn, encouraging more emotional responses. Child porn is a red herring. This law is not about children, nor does it affect paedophiles. The entire consultation is tainted by these emotive hateful references.

In 2007 the Home Office rushed out a "rapid evidence assessment" that was even more flawed than the original consultation. This study has been severely criticised for flaws in its methodology. First, it was put together by three female academics with a known agenda around this issue. Questions of academic independence and evidence of objective scientific research have haunted this study since it was published. Second, it was based on a false and dishonest premise: the question that the academics were charged to answer was whether there was any evidence for harm resulting from watching certain images.

Such a biased question was capable of only one answer: yes. Just as a study looking for evidence of harm resulting from use of ladders or eating kebabs would also find evidence of harm, so this report found evidence of harm from pornography. The unasked responsible question was whether there was any evidence for net harm or overall harm.

Were the researchers to use balanced data, they may have found that countries with low levels of censorship appear to have lower levels of sex crime than those with greater censorship; countries that lighten their censorship burden appear to show an improvement in the net harm that individuals suffer.

In addition, it was very clear, from remarks made by the Sexual Offences Team that they had not truly understood the nature of the BDSM scene, the role that imagery plays within it, or the difference between commercially produced images, and images produced between consenting adults for personal use or educational purposes. They had not considered people with multiple partners, nor that people sometimes share pictures of past encounters with new partners. They seem to regard all images as commercial ones where the photographer is not a participant in the scene. This is ludicrous in amateur homemade images, and this commercially-focussed “defence” in section 51C is useless.

To be honest, we would expect government to have a better grasp of the subject it was legislating on, and if not, to obtain balanced, objective, scientific research.

Ill thought-out

The fact that government have not truly thought though either the justification for or the consequences of this proposal lie in the BBFC exemption and the couples defence.

If the material in question causes demonstrable harm, then it is totally utterly irresponsible on the part of government to insert the BBFC exemption – and suggests a bowing to commercial (film) pressure in preference to a genuine desire to protect members of society. Further, would not most BBFC material fail the “realistic” or “pornographic” test once it is known that the material is from a film? There is no reason for this section to be in there.

Again, if government genuinely believes in the “slippery slope” concept (soft core porn leads to hard core porn leads to extreme porn leads to child porn leads to abuse and murder), as their justification for this legislation implies – we reject this theory as being, again, without good academic foundation and unsubstantiated - they will no doubt have come across the hypothesis that individuals move from fantasy toward acting out. The closer individuals are to acting out, on this model, the more dangerous they become.

Yet the government proposes to ban possession of pictures, whilst inserting a defence that pretty much encourages couples to act out their fantasies with one another and record the result for posterity. If there were any basis to the slippery slope argument, or genuine belief in it, this defence would suggest a total lack of joined-up thinking on the part of government. If the government truly abhors pornography and believes it will eventually lead people to violence, let’s start at the beginning with Page 3, shall we?

Overall, the proposal is an exercise in elegant hypocrisy.

Bigoted

The Scottish government has refused to recognise that this law will affect the BDSM community in negative ways, and has on the contrary quite aggressively attacked the idea that BDSM between consenting adults is a legitimate sexuality. In both official releases and political pronouncements, government spokespeople have on several occasions gone to some lengths to equate the material in question with paedophile material (as mentioned above in the consultation and the impact inquiry, as well as comments made during the deliberations of the 2009 Sexual Offences (Scotland) Bill).

Either government spokespeople are unable to distinguish images of adults with leather and chains from those of children – and possibly raises other questions about their fitness on this issue – or that the alignment of the two issues is a cynical manoeuvre to justify their hatred toward individuals of a different sexuality.

The same techniques have been used in the past by homophobes. Homosexuals have frequently had to put up with slurs along the lines of: “but are they safe to employ as teachers?” and “don’t ask, don’t tell”. In words of one syllable: this has nothing to do with child abuse. There already exist more than adequate laws to deal with that issue – and therefore any mention of paedophilia in this debate is plain bigotry.

Unintended (and opposite) consequences

Expert consultations on the issue of BDSM, such as Scottish Law Commission’s latest recommendation, have argued strongly against use of criminal law in respect of this sexuality. The effect of such legislation is likely to be a blackmailer’s charter, as well as increase alienation between the BDSM community and proper authorities such as the police and health professionals.

Like other minorities, sexual minorities suffer from both perceived and actual persecution, which can have devastating effects on their mental health. Several studies have been done on the health problems associated with perceived and actual homophobia. Homosexuals, a more widely tolerated sexual minority, have been shown to feel alienated from the medical establishment, “reducing utilization of screening modalities, risking higher morbidity and mortality from infections, cancers, and heart disease”. These feelings can also internalised, where the individual turns on him or herself, which leads to socially negative attitudes towards the self, bringing on more mental distress. Perceived victimization, even if it is not actual victimization causes undue mental stress which causes distrust in institutions such as health care and public safety as well as personal health issues.

Large commercial producers will continue producing material within a whisker of the law, making money and promoting themes in ways government believes to be unhealthy and exploitative. Yet individuals will be unable to share pictures of themselves with their current partner under this law – an absurd proposition in an age where everything is made available to the world on Facebook.

As far as we are aware, government has made no provision for BDSM safety or sexual educational material. The Sexual Offences Team refused to state if such educational material would be legal. Although extreme play linked to, say, asphyxia (what happens when you do breath play wrong), and will carry on as ever, there will be a dearth of good films showing participants how to carry out the practice safely. There will however, be many commercially inspired films egging on people to experiment.

Only in government fantasy-land could this destruction of educational material and its supplanting by titillation be considered to be a positive thing.

The moral calculus

There has been a distinctly dishonest taint to many arguments for this law: when challenged for evidence, government spokespeople have tended toward the argument that there may not be evidence but given the risk of potential harm, they have a duty to take action. They assert that if even one life is saved, then the law would be valid.

This is deeply flawed argument, made more so by three aspects of the current debate: first, that there is some evidence that the availability of the material government is now seeking to ban actually reduces violence overall; second that a ban on this material will also damage educational efforts; and third that oppressing a section of society will cause mental health and relationship issues among that minority.

Government has relied in the past on an argument based on asymmetry: that legislation will either reduce some notional social harm, or have no effect. They have not considered the fact that this law may be harmful. There is a growing body of evidence that this legislation may well have a seriously negative outcome, to be measured in serious injury and death to innocent victims. If even one life is saved, then not passing the law would be valid.

We urge you to address this issue and err on the side of freedom rather than on the side of oppression.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from SAMH

SAMH

SAMH is Scotland's leading mental health charity and is dedicated to mental health and wellbeing for all. SAMH provides an independent voice on all matters of relevance to people with mental health and related problems (including homelessness and addictions) provides advice and guidance to a wide range of national bodies and delivers direct support to over 3000 people through 80 services across Scotland.

The SAMH Centre for Research, Influence and Change lobbies for the development of legislation, policy and practice that is based on the real life experiences of people with mental health and related problems and that respects their human rights. The Centre also provides a range of information, training and consultancy on mental health and mental health problems.

SAMH is committed to challenging the stigma and discrimination experienced by people who live with mental health problems. SAMH provides direct line-management to respect*me* (Scotland's anti-bullying service) and seeme (Scotland's anti-stigma campaign).

Comments

SAMH is grateful for the opportunity to provide evidence to the Justice Committee on the Criminal Justice and Licensing (Scotland) Bill. Our interest in the Bill lies specifically in sections 14 and 17 of Part 1 which deal with Community Payback Orders and Presumption Against Short Periods of Imprisonment or Detention respectively, and in Part 7, Mental Disorder and Unfitness for Trial.

Section 14 of Part 1 of the Bill states that where a person is convicted of an offence punishable by imprisonment, the court may, instead of imposing a sentence of imprisonment, impose a community payback order in respect of the offender. These orders can include the imposition of an order requiring mental health treatment. This provision seems to overlap with the Mental Health (Care and Treatment) (Scotland) Act 2003. Section 227R of the Bill acknowledges this and sets out the conditions that must be met in order for a mental health treatment requirement to be imposed. SAMH has long argued that people who have mental health problems should receive treatment rather than being imprisoned, and we hope that this Bill might present a mechanism for this. However, we are unsure about how this system would work in practice and specifically seek clarification about the role of judges. The Bill makes clear that the decision on whether an offender requires mental health treatment should be based on the opinion of medical practitioners. However, it is not clear who would make the decision to seek such opinions: would this rest with the defence, or would it be triggered by particular circumstances? What role would a judge then have in deciding whether treatment was required, and whether the offender should see a psychologist or other professional? Additionally, how would this option differ from a probation order with a condition of psychiatric treatment, an option that is already available to the court?

We are also unsure how this new system would relate to the existing Mental Health Tribunal, which deals with detentions and orders under the Mental Health (Care and Treatment) (Scotland) Act 2003. Is there a danger that Community Payback Orders would risk setting up a parallel system? Finally and most importantly, the Mental Health (Care and Treatment) (Scotland) Act is based on a set of principles such as reciprocity and least restrictive alternative. These principles underpin the Act and give it much of its credibility. Would mental health treatment ordered under these new Community Payback Orders be based on the same principles? If not, this would seem to create an unfair disparity which would cause SAMH great concern.

We would like to emphasise that at this stage, we are not necessarily against this new system: indeed it may be that it presents an opportunity to divert people from prison if they require support for a mental health problem. However, there are a number of areas where clarity is required before we can properly form an opinion on this area of the Bill.

SAMH welcomes the presumption against short periods of imprisonment or detention and would like to emphasise the benefits to mental health that this change could bring about. People with mental health problems are disproportionately found within the criminal justice system. The final report of the UK Equalities Review[1] states, 'in such cases the encounter with the criminal justice system can become a trigger for a series of further traumatising disadvantages which are the basis for persistent and damaging inequalities.'

A thematic review of the care and support of prisoners with mental health needs carried out in England and Wales[2] pointed out that the need for mental healthcare in prisons will always remain greater than the capacity, unless mental health and community services outside prison are improved and people are appropriately directed to them: before, instead of, and after custody.

National standards require prison-based social workers to prioritise prisoners who have mental health problems. But those on remand or on short sentences are often not able to access social work services, because of the high demand for these services. As well as the lack of consistent mental health services within prisons, prisoners' mental health can also be affected by their situation. Loss of social acceptance, of material possessions and separation from family, friends and other social supports can all have an impact. The UK Joint Parliamentary Committee on Human Rights stated in 2004 that "prison actually leads to an acute worsening of mental health problems".[3]

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[1] *Fairness and Freedom: The Final Report of the Equalities Review, 2007*

[2] HM Inspectorate of Prisons, *The Mental Health of Prisoners - A Thematic Review of the Care and Support of Prisoners with Mental Health Needs*, 2007

[3] Joint Committee On Human Rights - Third Report, 2004

For all of these reasons, SAMH commends the presumption against short-term sentences, and hopes that this will be accompanied by appropriate investment in and signposting to community-based mental health services both for current prisoners and those who in future may be diverted from prison. We are aware that NHS Scotland is due to take on responsibility for healthcare in prisons and we believe that this presents an opportunity to greatly improve the mental health of current and future prisoners.

Turning to part 7 of this Bill, we recognise that the proposals in this section appear to stem in part from the Scottish Law Commission's 2004 Report on Insanity and Diminished Responsibility. In general we see no difficulties with these changes and welcome the move to a more modern form of language.

However we wish to seek clarification of section 117 in Part 7 of the Bill, which proposes to amend section 51 of the 1995 Act to include the text

"But a person does not lack criminal responsibility for such conduct if the mental disorder in question consists only of a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct".

Given that this section of the law would mean that people with one particular type of mental health problem would have criminal responsibility where people with a different type of problem would not, it is important to be clear about the definitions used here. Therefore SAMH would like to see:

- a definition of "abnormally aggressive or seriously irresponsible conduct"; and

- clarification of the process that will be used to identify a personality disorder which is characterised in this why and in particular, who will be responsible for making this decision.

SAMH wishes to offer one final comment which relates to the perceived credibility of people with mental health problems within the criminal justice system. Although this Bill makes some provisions for vulnerable witnesses, it does not address the problem that people with mental health problems are too often assumed to be unreliable witnesses. The Mental Welfare Commission produced an excellent report highlighting this issue in 2008. The report, Justice Denied, set out the experience of a woman with a learning disability who was the victim of repeated assaults. No-one was ever prosecuted for these offences, in part because it was assumed that she was not a credible witness. Experiences like these are all too common for people with both mental health problems and learning disabilities and SAMH believes that this problem must be addressed.

SAMH trusts this evidence is of use and would be pleased to discuss it further with the Committee.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Margaret Curran MSP
Member of the Scottish Parliament for Glasgow Baillieston

I am writing to you to submit my views to the consultation process on the Criminal Justice and Licensing (Scotland) Bill, which was introduced in the Scottish Parliament on 5 March 2009.

I am making this submission in my capacity as Member of the Scottish Parliament for Glasgow Baillieston constituency and my submission concerns a change to the current charges that can be imposed, allowing public prosecutors to place charges that reflect the severity of a crime, based on the context of the crime as well as the nature.

I am particularly interested in the Bill following a case that was brought to me by a constituent. On 11 August 2007, Stuart Baillie was stabbed to death in Glasgow by Ian Lowrie, who has been convicted of Culpable Homicide and sentenced to 11 years and 4 months imprisonment. However, as Stuart lay on the ground, bleeding to death, there is sufficient evidence to suggest that Christopher Spence began kicking him in the head. It cannot be ascertained what actual part this played in Stuart's death but it is most likely that it did not contribute to his death. Therefore, Christopher Spence was *merely charged with Breach of the Peace* and a custodial sentence of 9 months' imprisonment was imposed.

Stuart Baillie's mother, my constituent, Christine Halley, is devastated and insulted that Christopher Spence has not been more severely reprimanded by the judicial system for his barbaric actions. Unfortunately, the offence with which Christopher Spence was charged only reflected the direct damage he inflicted on those around him at the time and not the savage context in which he committed the crime.

It is virtually impossible for victims such as Christine Halley to lodge an appeal under circumstances such as these because, according to the Court, *"It is clear that a person is not to be subjected to the risk of an increase in sentence just because the appeal court considers that it would have passed a more severe sentence than that which was passed in the first instance."*

It is so important that we create the scope for fair application of the law and that prosecutors are given the means to charge criminals with offences that reflect the barbarity of the crime and not simply the inadequate parameters of criminal law. This would then allow judges to pass more severe sentences *in the first instance*.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from GeneWatch UK

GeneWatch UK welcomes the opportunity to comment on the general principles of the Bill. Our comments are restricted to Sections 58 – 60 - Retention and use of samples etc.

In general we welcome the provisions in the Bill, however we note a number of areas where safeguards could be improved in order to ensure better governance and accountability and improve public trust.

In this context, we note that Scotland has a unique opportunity to set high international standards for the governance of forensic databases. The UK Government is committed to holding a consultation on a proposed Forensics White Paper before the summer, and members of the Westminster Parliament and the public are likely to draw on any examples of best practice set by Scotland. Further, the provisions already adopted by Scotland in relation to retention of forensic data are becoming a matter of debate across the globe in countries seeking to expand DNA databases (such as the USA and Australia) or establish new DNA databases (such as Ireland, South Africa, Malaysia, Tanzania, Jamaica, Russia, Uzbekistan and China). GeneWatch UK would therefore welcome any initiatives that the Committee takes to improve safeguards in this important area.

1. GeneWatch welcomes the Scottish Government's adoption of the principle that, in general, samples and records of forensic data must be destroyed once the decision is taken not to prosecute an individual for the offence the samples and records were collected in connection with, or, if the individual is prosecuted, when the proceedings end without a conviction. This principled stance has been vindicated by the judgment of the European Court of Human Rights in the case of S. and Marper v. UK, in which the UK Government's legislation was found to be in violation of Article 8 of the Convention. The Scottish Government's position on this issue was noted by the Court and is now supported by both main opposition parties at Westminster. The inventor of DNA fingerprinting, Professor Sir Alec Jeffreys, has warned that, in contrast, the UK Government is putting at risk public support for the National DNA Database by continuing to hold the genetic details of hundreds of thousands of innocent people.[1]

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[1] DNA pioneer Alec Jeffreys: drop innocent from database. The Guardian. 15th April 2008. Available on: http://www.guardian.co.uk/politics/2009/apr/15/jeffreys-dna-database-human-rights-police

2. GeneWatch accepts that temporary retention of forensic data from a small number of individuals following acquittal may be appropriate. We support the principles on which these exceptions are based, namely: retention is limited to persons proceeded against in connection with serious violent or sexual offences; is time limited; requires judicial oversight after the initial 3 years and allows a right of appeal. GeneWatch accepts that there is in principle no reason to prevent retention of fingerprint and other forensic data in circumstances where retention of DNA profiles is allowed, and that the Bill rightly seeks to achieve consistency in this.

3. GeneWatch accepts that the retention of some forensic data from children is appropriate, provided due attention is paid to children's rights and the special circumstances that pertain. We regard as proportionate the provisions in the Bill for the retention for three years of forensic data taken under existing powers where a child accepts or is found by a Sheriff to have committed one of certain serious violent and sexual offences, with discretion for the chief constable to apply to a sheriff for extensions of up to 2 years at a time to provide a means of managing high risk cases. However, we agree with the Children's Commissioner and others that care should be taken in regard to criminalising consensual sex between children who are both under the age of 16, or where there is a small age difference, and that the category of relevant sexual offence should therefore not be defined too broadly.

4. GeneWatch notes that if person is convicted, his or her forensic data may be retained indefinitely, subject to periodic weeding of records relating to old or minor offences. In England and Wales, similar weeding rules were abandoned without any parliamentary oversight of this decision, so that permanent records, linked to forensic data, are now retained for all recordable offences (until age 100). In GeneWatch's view this is disproportionate and open to abuse. Indefinite retention would be of particular concern in relation to minor offences committed by children and young people and/or protest-related offences (such as Breach of the Peace), in view of the fact that DNA profiles may be used to track individuals or their relatives, and retained records can lead to erosion of individuals' rights (for example, refusal of visas or employment). We therefore urge the Committee to consider putting the weeding rules for records relating to old and minor offences on a statutory basis, with a view to improving public trust in the system of oversight for police records and linked forensic data. Such an approach would also ensure consistency with the principles enshrined in the Data Protection Act, namely that personal data should not be retained for longer than is necessary, and

with the provisions contained in Recommendation No. R (92) of the Council of Europe Committee of Ministers.[2]

5. We note that, consistent with the principles enshrined in the Data Protection Act, personal data should not be retained for longer than is necessary, in relation to the purpose for which it has been obtained. We therefore question the lack of any provision in the Bill for the destruction of DNA samples once the computerised DNA profiles needed for identification purposes have been obtained. The Marper judgment states: "*Given the nature and the amount of personal information contained in cellular samples their retention per se must be regarded as interfering with the right to respect for the private lives of the individuals concerned*". DNA samples are destroyed immediately following analysis in some EU countries (Germany, Lithuania, Sweden and Belgium), reinforcing the view expressed by GeneWatch and others – including the Human Genetics Commission - in previous consultations that their retention is unnecessary.[3] In view of the sensitive nature of the genetic information held in samples, and the high cost of storing them, GeneWatch recommends that all DNA samples should be destroyed once the DNA profile has been loaded onto the Database, or after a temporary retention period specified in legislation, if this is deemed necessary for quality assurance procedures.

6. In principle, GeneWatch supports the proposal to restrict uses of forensic data. However, we are concerned that "the prevention or detection of crime" has been broadly interpreted in England and Wales to include a wide variety of research and operational uses of the database, some of which raise serious concerns, such as predicting ethnic appearance or other characteristics from an individual's DNA. GeneWatch therefore recommends that research using the database should be clearly restricted to assessment of its performance (for example, identifying false match rates etc.) and that legislation should explicitly outlaw attempts to correlate DNA profiles with individual characteristics or any other stored data (such as category of offence). There is no scientific or ethical justification for such studies to take place.

7. Further, we are concerned that the phrase "identification of a person" is also open to abuse, in circumstances where there is no reason to believe that such identification is necessary to enable the prevention or detection of crime.

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[2] Available on: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=573811&SecMode=1&DocId=601410&Usage=2

[3] Van Camp N, Dierickx K (2008) The retention of forensic DNA samples: a socio-ethical evaluation of current practices in the EU. *Journal of Medical Ethics*, **34**, 606-610.

8. The National DNA Database now benefits from the existence of a Forensic Regulator, supported by a Forensic Science Advisory Council (FSAC), the membership of which includes a representative of the Scottish Police Services Authority, and an Ethics Group. These bodies consider quality assurance standards and ethical standards for the storage and use of forensic data, respectively. GeneWatch recommends that the Committee considers the extent to which these or similar arrangements might be put on a statutory basis, bearing in mind the need to consider governance of both the Scottish DNA Database, and the National DNA Database (to which unmatched DNA profiles from Scotland are exported).

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Helen McGregor

I wish to add my support to the Criminal Justice & Licensing (Scotland) Bill which is being discussed in Parliament today. As a supporter of any cause which addresses any form of violence against women and prevents abuse of any kind, I wish my views to be noted.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Anna Ritchie

I am writing in response to the publication of the Criminal Justice and Licensing (Scotland) Bill: Criminalising the possession of extreme pornography.

I welcome the proposals to criminalise the possession of material that is considered to be extreme pornography. I believe that this legislation is required urgently in order to address the increasing amount of 'extreme' pornographic material which exists in the context of the prevalence and normalisation in popular culture of all forms of pronographic material.

The 'pornification' of our society means that women are increasingly treated as sex objects and the resulting harm to women is immeasurable.

The proliferation of the internet, coupled with the sex object culture in which we live, now means that many young people are getting their first information on sex and sexuality from internet pornography. The implications of this are that images shown in pornography become normalised and young people grow up with the distorted view around men and women and sexual acts, whereby men are dominant and violent and women are submissive and aroused by violence.

Pornography perpetuates myths about rape which can make it difficult for victims of sexual offences to be believed or seen as credible, and makes it harder for them to come forward and be treated fairly. In Scotland, we face a shameful 2.9% rape conviction rate; we must question what role pornography plays in feeding into a culture where sexual violence is normalised.

This legislation is the first steps in addressing the most extreme forms of pornography. However, I view the existence of this material as being enabled by the existence of all other pornography.

My views on this issue are not based on any moralistic judgements. My concerns are around the harm pornography causes to women and men, and how our 'sex object culture' underpins gender-based violence and discrimination.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Zero Tolerance

About Zero Tolerance

The Zero Tolerance Charitable Trust is pleased to have the opportunity to comment on this Bill. We are a small national charity promoting innovative policy and practice to address the root causes of male violence against women and children. We pioneered the 3 P's approach to tackling male violence – protection, provision and prevention. Of these, we believe that the prevention of violence through education is the key to changing the culture of endemic violence in which we live.

Since we began our work in 1992, we have run a number of campaigns to raise awareness about the prevalence of domestic abuse and child sexual abuse, the excuses people use for this violence, the failings of the criminal justice system in addressing these, and the need for people (and particularly young people) to develop respect as one way of eradicating this violence and preventing a new generation of abusers.

We continue to aspire to a world free of male violence against women and are working on a range of projects and initiatives towards that goal. Our 'Respect' programme teaches children how to develop healthy relationships, to understand concepts such a power, violence and control and to deconstruct gender stereotypes, through a teaching pack used in the majority of Scotland's local authorities and many across the rest of the UK. We are also developing a new violence prevention network to enable people working in this field to work more effectively together and to develop new violence prevention campaigns. As such, we take a keen interest in any legislative changes which impact on violence against women and this Bill in particular is of great interest.

Our views on this Bill

Zero Tolerance welcomes the government's proposals to criminalise the possession of material that are considered to be extreme pornography. Legislating on this issue is an important part of publicly naming this material as totally unacceptable, indeed harmful, and we are pleased that this first step has been taken to address the nature and prevalence of these images.

The acts considered to be 'extreme pornography' in this bill are defined as such when they can be identified as obscene, pornographic and extreme.

These are defined as:

(a) Obscene
The test of "obscene" means that the material must be of such a nature that it would fall within the category of the material whose sale etc. is already prohibited under section 51 of the 1982 Act.

There is no definition of obscene, but courts apply a common law test of whether the material is ‘calculated to deprave or corrupt persons open to depraving or corrupting’.

(b) Pornographic

(3) An image is pornographic if it is of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal.

(c) Extreme
An image is extreme if it depicts, in an explicit and realistic way any of the following—
(a) an act which takes or threatens a person’s life,
(b) an act which results, or is likely to result, in a person’s severe injury,
(c) rape or other non-consensual penetrative sexual activity,
(d) sexual activity involving (directly or indirectly) a human corpse,
(e) an act, which involves sexual activity between a person and an animal (or the carcass of an animal).

Why is this legislation needed?

Zero Tolerance believes that this type of legislation is urgently needed in order to address the increasing volume of what is referred to in this bill as ‘extreme’ pornographic material, which exists in the context of the prevalence and normalisation in popular culture of all forms of pornographic material.

In daily newspapers and in both male and female orientated magazines, women’s bodies are routinely portrayed as sexualised and available through the proliferation of homogenous images of the ‘ideal’ female form. This sexualised ‘ideal’ is at its most extreme in pornography and there is deep concern that these images are feeding directly into what young girls in particular, understand as expectations of how their bodies should be and what it means to be ‘sexual’. Men are also being sold a very narrow, prescriptive and extreme form of masculinity, where male dominance and control can be maintained through male sexuality, as depicted in pornography. We believe that this pressure and the expectations implied through the cultural prevalence of pornographic sexuality are harmful to men as well as women.

Our analysis of pornography is that is represents sex as domination, humiliation and as a way of pushing the female body to its physical limits. Women in pornography are not represented as individuals or sentient beings- they exist anonymously, purely for male sexual gratification where the focus of the images is male sexuality. In pornography, sex is depicted through violence; in the acts themselves- for example double vaginal and anal penetration is standard practice in mainstream pornography; and in the language used to describe the acts and the women they are enacted upon. (See Robert Jensen ‘Pornography and the End of Masculinity’, 2007)

Pornography also celebrates under-age sex and sex with young ‘barely legal’ girls. Those women that are not especially young are portrayed as so, in schoolgirl outfits and through the language used to address them. For example, on one site: "innocent teen girls face their worst sex related nightmares.”

Not only are men in control in front of the camera in pornography, it is predominantly men who direct pornographic films, who view pornography and who make profit from pornography. As a cause and a consequence of wider gender inequality, we view all pornography as violence against women; not only in the acts that are played out on the bodies of individual women, but in terms of the effects the normalisation of this violence and degradation has on the unequal status of all women.

There is much evidence to demonstrate that many women who are involved in the sex industry, including in pornography, have personal histories of sexual and other abuse, poverty, social and economic deprivation and exclusion. We believe that society has a responsibility to protect vulnerable groups and individuals; in the sex industry we see the opposite – vulnerable women being groomed and exploited for the profits of big business.

In the contemporary social and political climate, where rape conviction rates are as low as 2.9% in Scotland, (Scottish Government figures for 2006/07) we have to ask what role pornography plays in feeding into a culture where sexual violence is normalised and even glamorised. Pornography perpetrates myths about rape, which can make it hard for sex offence victims to be believed or seen as credible, and makes it more difficult for them to come forward and be treated fairly.

This legislation takes the first step in addressing the most extreme forms of pornography; specifically, those depicting rape and acts that are viewed as being without question, totally degrading and unacceptable to society. We view the existence of this material as being enabled and supported by all other pornography, which is in itself characteristically violent. We understand ‘violent’ in terms of the full meaning of the word; often physical violence, but also as violation; violation of the integrity and dignity of wider society, in the way pornography compromises wider gender equality, as well as violation of the individuals appearing in the images themselves.

Our objections are not based on a moralistic, religious, prudish or anti-sex perspective; they are focused on harm; and we would urge the committee to keep harm at the centre of its discussion on these provisions.

Specific comments

As well as drawing attention to the existence of such material, an important part of this legislation is turning the burden of responsibility onto those people who demand, consume and possess the material. There is already legislation in place which criminalises the display, publishing, selling and distribution of this type of material, and possession with a view to onward sale or distribution, but these new provisions will send a message that individual possession of such material is harmful, damaging and unacceptable.

We believe that this makes a clear connection between those who use extreme pornography and the actual acts perpetrated within the material. This recognises that demand for such material increases its production but also, that the very consumption and viewing of such material is fundamentally harmful to society as a whole, in its celebration of the inhuman and violent treatment of women.

We welcome the specific reference to rape and other non-consensual penetrative sexual activity within the definition of extreme pornography. Unlike similar legislation in England & Wales, the bill does not make a distinction between 'violent' rape, and rape in general, a distinction which is extremely unhelpful and which we are glad to see is being rejected in Scotland. All rape is violent.

Along with sister organisations in our sector we believe that consideration of the following amendments to the bill would strengthen the legislation and make it more effective in tackling the type of material it seeks to control.

(1) **Amendment to definition of extreme**

Change wording to:-
(b) an act which results, or threatens to result, in a person's severe injury,
The use of "threatens to " instead of "likely to" would increase the proposals' scope to cover all acts of rape, which could all be said to threaten severe injury but not all are likely to result in severe injury.

(2) **Broaden the scope of material covered to include non-photographic visual depictions of extreme pornography**

As the bill is currently written, to meet the definition of 'extreme', the material in questions must be explicit and realistic. The terms "explicit" and "realistic" require that the act depicted in the image must be clearly seen, lifelike and convincing and appear to a reasonable person to be real. It is not required that the act itself is real.

There is a strong feeling that there is a missed opportunity in not including non-photographic representations of extreme acts in the bill. This means for example that the provision in the bill will not cover depictions of extreme pornography on virtual worlds such as Second Life, where the pornography is violent, extreme and interactive, but where the images are not photographic. Similarly, we would like to emphasis that there is still a need to enact similar legislation in relation to child pornography, as proposed by the Scottish Executive in early 2007.

(3) **Broaden the definition of extreme to include depictions of incest**

Although the legislation will cover depictions of rape and non-consensual penetrative sexual activity, which fit the definition of obscene and pornographic, this will not necessarily cover pornography which glorifies incest, unless it is clear that the young woman depicted is not of an age to consent. For example, one pornography website is headed 'Welcome to Daddy's Whore' and other similar sites are easily found through search engines. This type of content is unlikely to be covered by the legislation because these sites usually state that the young women featured are over 18.

We believe serious consideration must be given to extending the definition of extreme to include depictions of incest, which is an illegal activity, to ensure these types of materials are covered by the legislation.

(4) **Ensure a clear definition of possession**

Clarity is required as to what “possession” covers. Will it cover those people who access pornography without downloading files? Although the bill does not criminalise accidental or single viewing, we believe it must cover repeated viewings of this type of material, whether or not the material was actually downloaded.

General comments

Zero Tolerance believes that this piece of legislation is a very important step in what we hope will be the beginning of a process to address the harm caused by pornography. It is a sad reality that many of our young people are getting their first pieces of information and experience on sex and sexuality from internet pornography. The implications of this on both their self-esteem and understanding of the nature of sex, sexuality and its place in their lives is massive. Most worrying is the message it gives to young people about the normative roles men and women act out during sex, men dominant and women passive; men violent and brutal, women aroused by violence and brutality.

Sex in pornography is portrayed through testing the physical boundaries of the female body and dressing this up as erotic and sexual; it is never about human relationships or intimacy. We believe there is a real case to be made for government’s attention to this, in terms of the consequences pornography is having on society as a whole, but particularly the next generation, the largest users of pornography and whose access to this material is virtually unchecked.

We also urge the Committee to consider the need for public education. This includes public education on the introduction of the proposed legislation to ensure people understand the new onus on tackling demand; but also a broader public education campaign on the realities of pornography. We know from the training and awareness raising work that we do that many parents/ carers are completely unaware of the type of material that young people can very easily gain access to, and that they are horrified once they know the reality of how easily available extreme pornography is and what it contains.

The youth workers, children’s outreach workers and teachers we speak to about this issue are beginning to understand the realities of contemporary pornography, and that it is a world away from the soft-focus films they used to know about, but we believe the wider public and especially parents need and deserve to know what is widely and easily available. We can offer an education session to the Justice Committee if members wish to gain further information about the realities of pornography and its saturation of popular culture, and hope that this offer might be taken up.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Aileen Campbell MSP
Member of the Scottish Parliament for South of Scotland

I would like firstly to indicate my support for the general principles of this Bill, which your Committee is considering.

In particular I wish to raise with the committee the importance of developing a sentencing policy which takes into account the best interests of any children of offenders when sentencing an offender who is a primary care giver.

As you may be aware, a decision last year by the South African Constitutional Court held that all sentencing courts must give specific consideration to how a custodial sentence will impact on any children that the convicted person has under their care. Thus, if a non custodial sentence is considered appropriate by the courts, this will be implemented in order to punish the perpetrator without unduly disrupting the family life of any children involved.

Adopting a similar policy in Scotland would have a number of benefits for Scottish society. Most importantly, it would reduce the severely negative impact on children when their sole parent or guardian is incarcerated. The disruption to the life of a child this can cause is harmful and often irreversibly damaging a child’s prospects for later life. Non custodial sentences for primary care givers in certain cases would keep a family unit together while also punishing the adult for the crime committed.

In addition, a change in sentencing policy along these lines could help tackle Scotland’s alarmingly high rate of imprisonment, in line with Government policy in this area and the general principles of the Bill. In particular, given that the majority of convicted criminals with dependent children are female this policy could help cut the female prison population which has almost doubled in the last decade.

I must stress that I am not advocating that convicted criminals who are also primary care givers should not be properly punished. Any person, whether they have children or not, that poses a threat to the public should be incarcerated.

However, imprisoning low level offenders who have children has a wider social impact as families are broken up. Through punishing such offenders in the community, justice could be served and Scottish society would not have to deal with the long term social consequences of family breakdown.

I have raised this issue directly with the Scottish Government, and with a range of organisations which support children in such situations, all of whom have indicated the importance of recognising this issue. I have also made a submission to the Sentencing Council outlining these points, and have mentioned it in discussion on the Education, Lifelong Learning and Culture Committee.

I hope the Justice Committee will be able to give due consideration to this suggestion as it examines the broader scope of the Criminal Justice and Licensing (Scotland) Bill.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Joint Faiths Advisory Board on Criminal Justice

The Joint Faiths Advisory Board on Criminal Justice brings together various strands of the engagement between Scotland's faith communities and the criminal justice system. Members are appointed to the Board by the main churches, by Action of Churches Together in Scotland and by the Scottish Inter Faith Council.

This submission relates only to the provisions on sentencing in Part 1 of the Bill.

Part 1: Sentencing

Sections 3-13 - the Scottish Sentencing Council

We welcome the creation of a Scottish Sentencing Council and broadly support the proposals made in this Bill.

However, we continue to recommend that in order to give the SSC the best chance of success it would be preferable to draw membership of the Council from a wider range of the professions involved in justice system. We would particularly welcome additional lay members from the Scottish Prison Service, criminal justice social work teams and Community Justice Authorities.

“Scotland’s Choice: Report of the Scottish Prison Commission” July 2008 highlights Problem Solving Practice in Scotland and Problem Solving Courts in Liverpool and New York (pages 34-5) where there is engagement by community stakeholders. Lay representation that involves those with the ear of Scottish communities would be of benefit.

More detailed views on the establishment of a Scottish Sentencing Council are available in the Joint Faiths Advisory Board on Criminal Justice response to the Scottish Government’s Consultation on Sentencing Guidelines and A Scottish Sentencing Council.

Section 14 – Community Payback Orders

We welcome the introduction of Community Payback Orders in line with the recommendations of “Scotland’s Choice: Report of the Scottish Prison Commission” July 2008.

"Payback" as a concept could be closely allied to Restorative Justice. We believe that "unpaid work and other activity" will have most meaning for all concerned when it is demonstrably restorative to the community or persons affected by the offending behaviour.

We would like to see restorative justice included as a possible part of the sentencing system and community programmes. At the heart of restorative justice is a focus not just on the offender but on the victim and the community. It creates the possibility for the victim, if they wish to do so, to have personal contact with the offender and for the offender to truly understand the consequences of their actions. Restorative Justice also allows the community to participate in the restoration of its own peace.

Section 17 – Presumption against short periods of imprisonment or detention

We strongly support the proposals to create a presumption against short periods of imprisonment or detention. We concur with the assessment of the of “Scotland’s Choice: Report of the Scottish Prison Commission” July 2008 that in order for this change to be effective it is necessary that there be dialogue between the Scottish Sentencing Council and judges to ensure that Community Payback Orders provide a practical and beneficial alternative to prison and that longer prison terms are used appropriately. We maintain that this dialogue will be more effective if there is a greater lay representation on the Scottish Sentencing Council.

Section 24 – Voluntary intoxication by alcohol: effect in sentencing

We support the provisions in the Bill to ensure that being voluntarily under the influence of alcohol cannot be considered a mitigating factor.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Church of Scotland

This response covers 2 of the 3 sections: Sentencing (alternatives to custody) and Criminal Procedure (prosecution of children)

Part 3: Criminal Procedure

Section 38 – Prosecution of Children

The Church of Scotland welcomes provisions in the Bill to raise the age of criminal responsibility by prohibiting the prosecution of children under 12 while still allowing them to be referred to a Children's Hearing on offence grounds. We are pleased that these provisions acknowledge the 2008 recommendations by the UN Committee on the Rights of the Child and hope to see the Government acting on the other recommendations of this report in due course.

However, we note with that these provisions in effect bring Scotland up to the minimum accepted international standards and that such a low aspiration creates inconsistencies with other current legislative changes. These provisions, when read in parallel with the provisions on Older Children in the Sexual Offences (Scotland) Bill, mean that a child aged 13 could be subject to criminal prosecution under the Criminal Justice and Licensing (Scotland) Bill provisions for sexual behaviour which, under the Sexual Offences (Scotland) Bill that child is deemed incapable of consenting too. We hope that the Justice Committee will review this issue and bring forward an appropriate resolution.

Part 1: Sentencing

The Church of Scotland engages with the Criminal Justice system through the work of prison chaplains, of local congregations, and of its Church & Society Council. All of these strands of work are brought together in the Joint Faiths Advisory Board on Criminal Justice, in which we share with other churches and faith communities.

The Church is therefore happy to endorse the response from the Board to the consultation on Criminal Justice and Licensing (Scotland) Bill.

In particular, we believe that these proposals broadly reflect the concerns expressed in a report "What's the Alternative?", presented to the General Assembly of 2007 and since then widely discussed in the Church.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Clydebank Woman's Aid Collective

Clydebank Women's Aid has been supporting women, children and young people who are experiencing domestic abuse since 1981. We provide refuge accommodation and drop in information and support, follow on and outreach support in the Clydebank area but accommodate women from all over. Women, children and young people and workers' experiences inform this response. We are part of the West Dunbartonshire Violence Against women partnership and campaign against domestic abuse and all forms of violence against women.

We also campaign to improve legislation and services so that the barriers that women and children face in trying to flee domestic abuse and live in safety are reduced and ultimately removed.

We are particularly interested in two aspects of the new Criminal Justice and Licensing Bill: Parts 16 and 17, Short sentences and section 34, Sexual offences, extreme pornography.

Parts 16 &17, short sentences

As a women's organisation, we understand that the above proposals may have a progressive impact on women's lives. For example, the very many women who are imprisoned for non payment of fines through being abused by prostitution or women with drug or alcohol dependency who receive short sentences for financial crimes do not benefit at all from short sentences. Much evidence is available to show that women in prison consistently have life histories that involve many forms of abuse including child sexual abuse, sexual violence and domestic abuse. When considering sentencing policy, we wish to emphasise that the Governments' gendered analysis of these crimes should be reflected.

An assumption against sentences less than 6 months will be gendered in its impact. For women facing sentencing themselves it is likely to be positive. However women affected by crimes committed against them by men may be affected detrimentally.

Currently, in the minority of situations where a man is successfully prosecuted for domestic abuse, even a short sentence can provide women and children the opportunity to obtain safe accommodation and protective legal orders with the rare certain knowledge that their abuser is not living in the community. It is likely, given the evidence of what generally happens that most men are unlikely to be at risk of receiving a sentence of more than 6 months. So, the policy would have the effect of removing prison as a consequence of perpetrating domestic abuse unless the conviction was very serious. This could increase the risks to safety for women, children and young people.

Abusers, who often even now have little fear of the criminal justice system, may well calculate accurately that they can continue to abuse with relative impunity and actually use this legislative change as a further tool of control. Specifically, it could undermine the work of the Domestic Abuse Courts.

For these reasons, Clydebank Women's Aid are opposed to a presumption against sentences of less than 6 months where there is violent crime and/or a background of domestic abuse. Courts should instead be obliged to consider context, past history and behaviour, evidence of patterns of abuse and controlling behaviour. This is particularly important as looking just at individual incidents does not always reflect the reality of the gendered nature *of* domestic abuse as a pattern of coercive control. Taking this approach would not be new but would join up Government policy on Domestic Abuse and 'Getting It right for every child'. It may be useful to consider what role and what impact the use of the 'data capture tool' may have in sentencing when there is domestic abuse.

Section 34; Extreme pornography

Generally, we associate with the submissions from Rape Crisis and The Women's Support Project. This legislation gives the opportunity to mainstream and imbed Government policy and strategy in the area of violence against women, children and young people. This violence is overwhelmingly (93%) perpetrated by men. The links between all forms of violence against women: domestic abuse, rape and sexual assault are now well understood and documented. Pornography's role in perpetuating that violence needs to be recognised more widely. This legislation could assist in raising awareness about the harm pornography causes to the women, children and young people directly abused in its production and to women, children and young people more generally in society as a whole. Andrea Dworkin commented "pornography is the theory, rape is the practice." Challenging pornography is integral to effectively challenging the attitudes that perpetuate inequality and the oppression of women, children and young people. The Scottish Government has defined pornography as violence against women. The law relating to pornography should reflect that.

We hope our comments are useful and that this legislation will be pivotal in the struggle against violence against women, children and young people.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Ayrshire Criminal Justice Social Work Partnership

From a Criminal Justice Social Work perspective the implications of the Part 1 of the Bill are generally welcomed. The emphasis on reducing the unnecessary use of custody and increasing the use of community disposals, which was highlighted in Scotland's Choice, is to be commended. Part 1 of the Bill proposes a range of actions to achieve this and the following specific comments are made.

The presumption against custodial sentences of less than 6 months (Section 17) is particularly welcomed and could be described as the basis on which the rest of the Bill relevant to Criminal Justice Social Work is built. Criminal Justice Social Work have been tasked since the introduction of National Objectives and Standards for Social Work Services in the Criminal Justice System eighteen years ago with reducing unnecessary custody through well targeted community disposals. However, this was completely premised on Criminal Justice Social Work through Social Enquiry Reports being able to persuade the judiciary that a community sentence would be appropriate in the circumstances. The introduction of a resumption against imposing custodial sentences of under 6 months, whilst clearly not restricting the judiciary's use of custody, should improve targeting of community disposals.

The establishment of a Scottish Sentencing Council (Section 3) is also welcomed. The aims of the sentencing Council of promoting consistency of sentencing, developing sentencing policy and promoting greater awareness and understanding in the public of sentencing policy and practice is much needed. In terms of consistency it had historically been the experience of Criminal Justice Social Work n the Ayrshire Partnership that sentencing at the two Sheriff Courts could be at odds with the rest of Scotland. There is a need to improve and develop sentencing practice and the introduction of sentencing guidelines by the Sentencing Council should minimise any sentencing lottery.

The major implication of the Bill for Criminal Justice Social Work will be the introduction of a Community Payback Order (Section 14). It is recognised that following the Government Review of Community Sentences and the Reforming and Revitalising Report there were concerns regarding the public's understanding of community sentencing. The ending of probation, community service and supervised attendance and replacement with a single Community Payback Order, with 7 possible conditions that can be added, may well be more understandable to the public, whether this improves the sentencing process is perhaps more difficult to answer. There are some concerns regarding the introduction of the unpaid work condition to District Courts [Sec 14, 227A(5)]. Community Service is currently not available to District Courts and potentially this important resource could be diluted through use with lower tariff offenders.

It is assumed that should this legislation be passed and Part 1 of the Bill implemented there will be significant costs incurred. The financial memorandum by using 10% to 20% assumptions of increases in workload reflects uncertainties of costs. Part 1 of the Bill's focus is the reduction of short custodial sentences and a commensurate reduction in the daily prison population. In order for this to be successful there will be a need to increase the amount of funding Criminal Justice Social Work receives. It is recognised that a reduction in custody would allow the transfer of resources from the prison to the Community.

Other aspects of the Bill in relation to targeting serious crime and changes in criminal justice procedures are also welcomed.

Fiona MacKinnon
Criminal Justice Partnership Manager

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Punch Taverns

Criminal Justice and Licensing (Scotland) Bill – Justice Committee Call for Evidence

Punch Taverns is the largest Pub Company in Britain and has over 450 licensed premises in Scotland.

We have expressed on many occasions, our views relating to licensing reform in Scotland. We welcome this opportunity to comment on The Criminal Justice and Licensing (Scotland) Bill in so far as it impacts on licensing.

We have considered the Bill and would submit the following comments on it:

Section 128 - Applications for licences

Whilst we have no objection to applicants' personal information and addresses etc. being provided to Boards, police, and other statutory bodies this information must not be available in the public domain.

Section 131 - Premises licence applications: modification of layout plans

We are strongly opposed to this proposed amendment.

The proposed amendment would enable Licensing Boards, when considering an application, to amend layout plans. This would mean that Boards could impose alterations to premises, thereby altering their physical layout. This could result in Boards effectively obliging applicants to incur significant building/development costs and to obtain, if they could, the necessary permissions/warrants (planning, building, etc.).

Boards already have the ability to reject applications for premises licences based on "the location, character and condition of premises..." (Section 23 (5) (d) (ii) Licensing (Scotland) Act 2005, "the 2005 Act").

Section 132 - Premises licence applications: antisocial behaviour reports

We support and welcome the proposed change in so far as it intends to remove the obligation on the Police to provide "Anti Social Behaviour Reports" in respect of all applications for premises licences but do note the obligation imposed on the Police by virtue of Section 21 (3) (b) of "the 2005 Act".

Section 134 - Occasional licences

We would support this change, which seeks to resolve a problem with the 2005 Act, and request that consideration be given to extending this process to occasional extensions also.

Section 136 - Personal licences

We are somewhat concerned that while Licensing (Scotland) Act 2005 is still in its infancy, amendments of this type are being considered. We say this with regard to the proposed intention of preventing a person from holding more than one personal licence. We are not aware that in the early stages of the current licensing reform there exists an issue in this regard. We believe there exists sufficient safeguards to prevent the issues which appear to cause the Government concern.

Section 137 - Emergency closure orders

We welcome the clarification as to the rank of officer who can sanction these Orders.

Section 138 - False statements in applications: offence

We would appreciate some clarification during the course of the Justice Committee's consideration of this clause as to what is meant by "knowingly." We would highlight that it is possible that an applicant may make a statement in good faith in an application which is later proved to be incorrect, although the declaration was "knowingly" made at the time. We would hope that honest oversights or mistakes would not be caught by this provision and assurances to this effect would be welcome.

Section 139 – Further modifications of 2005 Act

We note the apparent intention of the Scottish Government seeking to reintroduce the so-called "fit and proper" person test, which exists under the Licensing (Scotland) Act 1976 "the 1976 Act" using the detail of this clause. We would highlight that the implications of this clause if passed, although not on the face of the legislation, are very wide ranging and that these are subsequently developed over four pages in Schedule 4 of the Bill.

We would question whether some of the provisions in this clause are required, given the powers, which the police already have under the 2005 Act. By 1st September 2009 all Personal Licence Holders (PLHs) and holders of premises licences under the terms of the 2005 Act will have had to have been licensed and the police will have been fully involved and consulted during this process. Indeed they will have carried out criminal records checks on applicants. This seems to allow for the duplication of a process, which has already been undertaken.

Our primary concern is that the current provisions of the 2005 Act, which allow the police to make representations solely on the basis of the “preventing crime and disorder” objective, are to be extended to “any” of the five licensing objectives within the legislation.

We would suggest that allowing the police to comment on applications solely on the basis of the objective of “preventing crime and disorder” is entirely appropriate, adequate and proportionate. Extending this to all of the other licensing objectives risks the police acquiring the status of the catch all objector of last resort. We do not believe this would be appropriate nor reasonable and it could lead to the police commenting on matters which are more appropriately dealt with by other agencies with more relevant, or indeed the only, expertise. We would suggest that this could only weaken the status of the police in the process and indeed the credibility of their objections on legitimate criminal matters.

As mentioned above, “the 2005 Act” is still in its infancy and we would question the apparent belief that existing provisions within that act, need to be altered at this stage.

Section 143 - Orders and regulations

We note that the terms of this section are extremely wide and we have a concern that subsequent changes could be made to the Act and/or regulations made there under without proper and full public debate –simply by a resolution of Parliament.

We have seen the views expressed by the Scottish Beer & Pub Association in connection with the Bill under consideration. We are, as you may know, members of the Association. We support and endorse the views they have expressed about time scales Boards have been granted to determine applications for premises licences and variations of premises licences. We believe they are much longer than is required or necessary.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Scottish Grocers Federation

The Scottish Grocers' Federation (SGF) thanks you for the opportunity to provide written evidence to the Justice Committee on the general principles of the Criminal Justice and Licensing (Scotland) Bill.

SGF has limited it comments to matters relating to Section 130 to Section 139 which refer to alcohol licensing. SGF agrees with the modifications to the Licensing (Scotland) Act 2005 included within this section of the Bill. We believe the measures included within the Bill will continue to drive up standards and promote responsible retailing.

John Drummond
Chief Executive

SGF is the trade association for the Scottish Convenience Store Sector. It is the authoritative voice for the trade to policy makers. The SGF brings together retailers throughout Scotland, from most of the Scottish Co-operatives, SPAR, Keystore, Nisa and local independents who are our largest category of members. Our members sell a wide selection of products and services throughout local town centre, rural and community stores. According to recent statistics (2007) there are just over 5,600 convenience stores throughout Scotland, with annual sales in excess of £3.2 billion.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from SM Dykes Manchester

Evidence in respect of Section 34 of the Criminal Justice and Licensing (Scotland) Bill

Who we are

SM Dykes Manchester is a local community group who aims to support lesbian and bisexual women through meetings, workshops and play parties. We are based in Manchester England but have supported women from across the world.

Why we oppose this legislation

A strong focus of our group is enabling women to enjoy a consensual BDSM sexuality in the safest way possible. We believe that this legislation stigmatises people with a BDSM (bondage and discipline, dominance and submission and sadism and masochism) sexuality, showing a very poor understanding of consensually produced imagery depicting BDSM fantasy and/or reality.

The law is poorly written and difficult to understand which we believe will create fear within our community amongst people who have no desire to break the law but recognise that images depicting expressions of our sexuality may fall foul of it. Fear and suppression of expression will not help to keep members of our community safe.

We are also concerned that vital BDSM educational material may become illegal, which will put people’s welfare and even lives at risk. Far from preventing harm we believe that harm will be caused.

We write to express our solidarity and agreement with the more detailed arguments presented by CAAN (The Consenting Adult Action Network).

I cannot urge you strongly enough to consider the harmful effects this law may have.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Noctis

About Noctis

Noctis represents businesses operating in the UK late night economy. We draw our membership from night clubs, bars, live and student venues. We have been established since the 1950s and were previously known as the Association of British Ballrooms, the British Entertainment and Discotheque Association and the Bar Entertainment and Dance Association. In February 2008 we changed our name to Noctis after an extensive consultation with our committee and our members.

Noctis (in all its incarnations) has always engaged constructively with government, police and local authorities. We aim to find workable partnership solutions to the many challenges which are part of a vibrant late night market. We believe that the late night sector is an extremely important and valuable asset to the UK economy.

Background

Noctis worked with all the key stakeholders during the framing and implementation of the Licensing Act 2003 which came in to England and Wales in November 2005. Noctis continues to work very closely at a local and national level on issues relating to licensing. We believe our insight working with a number of UK operators, councils and police, give us a broad insight into the issues surrounding the implementation of the Licensing (Scotland) Act.

The trend in UK drinking patterns over recent years has been from principally on-trade consumption to one where the growth is all in the off-trade, whilst the on-trade consumption now continues to declines year-on-year. Noctis and many other organisations have argued that this is partly due to the high pricing differential between the off and the on-trade.

Clearly the twin factors of low pricing and the over-supply of venues are both going to be crucially important issues in this debate in Scotland as they have been elsewhere in the UK. Both of these issues are exacerbated by the below cost or heavily discounted selling of alcohol in the off-trade.

Issues around over-supply and discounted off-trade alcohol may have contributed to the widespread challenges we have seen in a number of English cities over the last couple of years. Recently we have seen particular issues in Warrington and Oldham where the council and police have piloted extreme solutions to deal with problems.

Shape of the Scottish market (CGA figures):

Circuit Young People's venues/nightclubs:
2003 (1,326/267), 2004 (1,322/277) 2005 (1,359/271) 2006 (1,486/275), 2007 (1,342/252), 2008, (1,353/245) 2009 (1,323/241). Please note that circuit bars and nightclub venues are both in decline over recent years.

"Pre-loading"

Another feature of "liberalising" licensing hours is that it has fostered an increase in pre-loading of off trade alcohol. It is true that pre-loading has been a factor in the night out for many years before the Licensing Act, but inevitably the Act, since it has given longer hours to some venues, has encouraged customers not to venture out until later. This has meant that customers are generally arriving at late night venues 1 -2 hours later than before the Licensing Act 2003. It is estimated (from CGA figures) that an astonishing 83% of people now pre-load alcohol before they go for a night out.

Obviously the late night venue (by its very nature) has always been the final destination for the evening and our sector has, for decades, been the most challenging in terms of managing difficult customer behaviour. Now however, according to other CGA statistics, people are consuming a greater number of (home poured) measures and this is making the management of the door a more difficult than ever.

Often the late night venue operator is the unfortunate recipient of these individuals – people who will not be admitted to the venue, but who nonetheless present problems and may commit offences. The difficulty for some late night venues is that they may be targeted as a problem venue for issues which are entirely beyond their control.

The creation of later licensing without a proper understanding of the local shape, size and scope for extending trading within the licensed trade market could lead to greater difficulties – not least relating to policing and public transport. We are supportive of the Licensing Scotland proposal to introduce cumulative impact policies.

In certain locations in England (where the number of premises has increased dramatically and the terminal hour is later for a large number of premises) this has led to additional pressures. For the premises owners this encouraged customers to venture out late into the night time economy. In turn this has prompted a need to produce attractive discounted offers to compete with the off-trade offers.

It might be perceived that this additional pressure on the licensee might lead to a reduction in the levels on corporate social responsibility. In practice, for most operators, these additional operational and financial burdens have been imposed at a time when there has been much higher levels of CSR activity. For instance, here are some of the refusal figures from some of our members during the summer last year.

Refusal figures

One UK high street pub company during August 2008 checked 89,234 people and refused service to 5910 people who were drunk and 4,908 refused as underage. One high street bar operator refused (or removed from the premise) over 23,000 people during August 2008. One UK night club operator with over a dozen venues refuses on average 3,900 people a week for being drunk, underage (or both).

One Scottish operator in one venue over the period of one month last year recorded these refusal figures:

Period	**Thursday no refused/no in/%**	**Friday no refused/no in/%**	**Saturday no refused/no in/%**	**Sunday no refused/no in/%**	**Total no refused/no in/%**
9	114/626/18	444/1025/43	874/3254/27	48/654/7	1480/5559/26
10	198/547/36	312/989/32	477/2965/16	87/784/11	1074/5285/20
11	132/399/33	321/899/35	451/3147/14	120/752/16	1024/5197/19
12	210/789/26	621/1463/42	524/3654/14	95/796/12	1450/6702/21
13	189/458/41	587/1324/44	987/4874/20	41/547/7	1804/7203/25
Total	837/2819/29	2285/5700/40	3313/17894/18	391/3533/11	**6826/29946/22**

On the Friday nights at the above venue, the door staff are refusing 40% of those who present themselves. This very high figure is partly because once refused, some people will re-join the end of the line to try again, since there is effectively no sanction against them not to do so. One London club operator says his refusal rates are nearer 1 in 17 over the last few months, although he states that he is refusing many more drunks, than two years ago.

These refusal figures are generally reasonably high, although as the Noctis member (who runs a chain of high street bars mentioned above) notes that his company's underage refusal figures are actually dropping - largely because of the reduced footfall generally, yet also because customers are now well aware that they require valid ID to enter premises and this will be rigorously checked.

Other reasons for a reduction in footfall, include a shift in consumer choice from on to off trade, the credit crunch and the smoking ban. Nonetheless even with reduced footfall problems of customers being too young/inebriated to be admitted - or needing to be removed from the premise - continue to play a significant part in the organisation of late night venues.

It is also important to note that Noctis operators regularly report back that door staff at their venues see people who are trying to gain admittance, consuming alcohol in the queue for the venue.

The difficulty for on trade retailers in the late night sector is that, even though they know from the conversations they are having with their customers and would be customers, that a very large percentage of alcohol is purchased from the off-trade and consumed before heading to our members venues, it is very hard to produce accurate statistics.

Cheap on trade alcohol is also beginning to force late night operators into the invidious and highly unhelpful situation of having to also deep discount in order to compete.

The smoking ban

The smoking ban was originally planned as a public health measure. However it is clear after a few years that it also represents significant additional challenges for operators in terms of managing customers in and out of premises. Our members tell us that managing customers who wish to exit the venue for a cigarette, can and sometimes does cause problems – despite the best endeavors of the venue staff.

For instance, when it takes a long time before customers are allowed out for a cigarette, because the venue staff are managing the flow of customers in and out, and when smokers outside engage in banter with those who are trying (and sometimes failing) to get in, problems can occur.

We would argue that operators should not be unduly penalised under one set of legislation for simply complying with another.

CSR/partnership schemes

The late night sector (as with the licensed trade as a whole) has seen an unprecedented number of pressures and a high degree of scrutiny, it has also seen a massive rise in Corporately Socially Responsible activity over the last 3 years. Good partnership at local level has been key to the success of the Licensing Act where there have been successes. For this reason we would ask that there may be a further conversation around slightly changing the remit and focus of the Licensing Standards Officers to be more focused towards the kind of role of council employed nighttime economy coordinators. This role has been particularly successful in a number of English locations, notably Bournemouth through the good work of John Shipp – the town's own NTE Coordinator.

We have included a section here outlining some of these CSR schemes. It is worth pointing out that many of these schemes pre-date the Licensing Act, although Best Bar None and Shine have reached much greater prominence in the last 3 years.

Shine

Shine is a corporate social responsibility initiative we have been running with Diageo for the last five years. Originally conceived as an award at our annual award ceremony, it was rolled out last to concentrate on community engagement. Diageo and Noctis produced a good practice guide to help other areas of the UK (including Glasgow) to devise best practice in partnership and community engagement.

Simon O Brien, from the Association of Chief Police Officer lead on licensing said of the guide: *"The good practice guide cuts to the heart of where a joined up approach need to be, it starts with communication and ends with communication. It is clear that it is in everyone's interest that we all work together to create safe environments for many customers to enjoy a night time economy.*

NOCTIS has been communicating with and working closely with The Association of Chief Police Officers(ACPO) for some time to ensure we work together in delivering end to end solutions and the good practice guide is but one example of this good working relationship".

Best Bar None
This Home Office backed scheme has been in operation now for several years with over 70 schemes now running throughout the UK. The aim of the scheme is to raise standards of operating practice.

Pub/Clubwatch
This voluntary organization, which currently has over 400 UK schemes in operation, continues to play a major part in delivering safe venues.

Conclusions

There are significant learnings which can be gleaned from the implementation of the Act in England and Wales.

- **Over-supply and off-trade deep-discounting need to be take into account**
- **An enlargement of the late night market needs to be managed**
- **Police and services such as late night public transport need to be factored in**
- **There needs to be a proper understanding of the local market for the sale of alcohol**
- **Partnership between the various parties needs to be a key factor in delivering the Licensing (Scotland) Act effectively**

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Community Justice Authorities

Community Justice Authorities

The then Scottish Executive established 8 Community Justice Authorities (CJAs) in Scotland in April 2007 under the Management of Offenders etc. Scotland Act (2005). The role of the CJAs is to provide locally a co-ordinated approach to the planning, monitoring and reporting on the delivery of offender services. Their aim is to reduce re-offending, improve the management of offenders and create safer communities by delivering the National Strategy for the Management of Offenders in their local area. CJAs are statutory bodies consisting of members who are councillors nominated from the constituent local authorities within the CJA area. CJAs have a wide range of statutory and other partners including local authorities, the Scottish Prison Service, Police, NHS and voluntary sector agencies.

Introduction

CJAs welcome the opportunity to provide views on the general principles of the Criminal Justice and Licensing (Scotland) Bill. Our response contains comments on the aspects of the Bill which are relevant to the CJAs:

i. Section 3 – The Scottish Sentencing Council
ii. Section 14 – Community Payback Orders
iii. Section 17 – Presumptions Against Short Periods of Imprisonment or Detention
iv. Section 18–Amendments of Custodial Sentences and Weapons (Scotland) Act 2007
v. Section 73 – Sexual Offences Prevention Orders

Section 3 – The Scottish Sentencing Council

CJAs have previously provided feedback to the consultation on “Sentencing Guidelines and a Scottish Sentencing Council” and welcome the establishment of a body for the purposes of promoting consistency, improving transparency and public understanding about sentencing in Scotland.

Section 14 – Community Payback Orders

CJAs broadly welcome the introduction of Community Payback Orders (CPOs), in particular, the focus on visibility, immediacy and speed and the general principle that allows the tailoring of the sentence to the needs and risks of individual offenders to tackle re-offending. The CJAs further welcome the clarity around support and compliance set out in the Bill.

We do note that while the CPO is designed to replace most existing community sentences, this does not include the DTTO and RLO which remain in place. We believe there may be potential for confusion particularly between the DTTO and CPO with requirement of drug treatment.

227B – Community Payback Order: further Provision

The CJAs consider the Bill to be unclear with regard to the information to be provided to the author of the required Social Enquiry Report where a court is considering imposing a CPO with an unpaid work requirement. The CJAs suggest that the Sheriff or Justice of the Peace should give clear direction on whether the court is considering a level 1 or level 2 order when referring the matter for a Social Enquiry Report.

227C – Community Payback Orders: responsible officer

CJAs welcome the clarity in the Bill around accountability and the distinction between the responsibilities of the Chief Social Work Officer and nominated responsible officer with the specific duty to promote compliance.

227K – Allocation of Hours Between Unpaid Work and Other Activity

CJAs welcome the introduction of the ability to combine unpaid work with tackling criminogenic need. The 30% non work activity will allow for preparation for employability for example. Careful consideration will need to be given to the combination of requirements placed on a CPO to ensure that they meet individual needs.

227P – Programme Requirement

CJAs welcome the requirement for offenders to participate in specified programmes aimed at addressing offending behavioural needs. However, the Bill does not make reference to the availability or prioritisation of programmes. This concern is extended to sections 227R – Mental Health Treatment Requirement, 227U – Drug Treatment Requirement and 227V – Alcohol Treatment Requirement. Suitable programmes to meet individual offender needs would need to be available to meet the requirements of the CPO.

227W – Periodic Review of Community Payback Orders

CJAs welcome the inclusion of reviews within the legislation but think further guidance on the purpose and practice for reviews should be issued following consultation with stakeholders. This should ensure consistency in the operation of reviews. We look forward to further discussion to clarify:

- the purpose of the review; and
- an expectation of frequency in relation to reviews.

227ZD – Restricted Movement Requirement

CJAs welcome the opportunity for the Bill to impact on offending behaviour by sanctions that fall short of imprisonment.

227ZJ – Local Authorities: annual consultations about unpaid work

CJAs welcome the requirement to consult prescribed persons on the nature of unpaid work and other activities and welcome further involvement in the mechanisms to achieve this. We would support the specific inclusion of victims in this consultation as well as the wider community and stakeholders.

Section 17 – Presumptions Against Short Periods of Imprisonment or Detention

CJAs are disappointed that the Scottish Government did not take account of the Scottish Prisons Commission's recommendations in full i.e. the abolition of short sentences and hold the view that the text within section 17 needs to be strengthened in order to endorse the title. For example at 17(2)(4A) the CJA view is that the text should read 'the court may **not** pass a sentence of imprisonment for a term not exceeding 6 months'. The text as it stands within the Bill is at odds with the text within the accompanying policy memorandum which states at Page 12, section 17, point 69:

"We want to make it clear that sentencers should ***not*** *impose a custodial sentence of 6 months or less, unless the particular circumstances of the case lead them to believe that no other option would be appropriate. We are also legislating to provide that the sentencer must explain in court the circumstances which made them conclude that only a custodial sentence could be imposed."*

CJAs are also concerned that Section 17 of the Bill may have results that have not been foreseen and need further clarification, for example, the section has the potential to result in a significant rise in the number of Social Enquiry Reports requested or an increase in up-tariffing.

Section 18 – Amendments of Custodial Sentences and Weapons (Scotland) Act 2007

CJAs broadly support and welcome the Amendments of Custodial Sentences and Weapons (Scotland) Act, particularly, as it extends the ability to support people in the community. However, the CJAs hold the view that there needs to be clarity within the Bill on 'prescribed periods'.

Section 73 – Sexual Offences Prevention Orders

111A – SOPO and Interim SOPO Requirements: Scotland

CJAs welcome the move away from simply **prohibiting** the defendant from doing anything described in the order to **requiring** the defendant to do anything described in the order and believe that this will strengthen our ability to positively influence offender behaviour.

Additional Comments – Victims Issues

In addition to the comments noted above on specific areas of the Bill, the CJAs believe that there was a missed opportunity to recognise victim issues within the Bill. We are aware that the accredited programmes and many other programmes address the understanding of victim issues but suggest that this could be a standard requirement of a CPO.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Scottish Justices Association

General

1. The Scottish Justices Association ("SJA") represents the majority of Justices of the Peace in Scotland. It wishes to offer written evidence on the following areas of concern:

    - the status of the purposes and principles of sentencing (cll 1, 2)
    - the composition and role of the Scottish Sentencing Council, and the applicability of sentencing guidelines to non-judicial disposals (cll 3-13)
    - the resourcing of "Community Payback Orders" ("CPOs"), and seeming conflicts of aims in relation to them, potentially producing restrictions in the information available before imposing them and an incentive to breach them (cl 14)
    - what constitute "appropriate reasons" for imposing a short prison sentence (cll 16, 17)

The status of the purposes and principles of sentencing (cll 1, 2)

2. The SJA considers that there should be a declaratory provision in the Bill, similar to that in s1 of the Judiciary and Courts (Scotland) Act 2008, expressing the Cabinet Secretary's welcome declaration in the *Sentencing Guidelines and a Scottish Sentencing Council* consultation paper that the "complete independence of the judiciary" was at "the heart of the criminal justice system in any society which considers itself free and fair".

3. It finds the lists of "purposes of sentencing" (cl 1(1), which it notes reproduces that for England & Wales in the Criminal Justice Act 2003, s 142) and of "other matters" (cl 1(3),(4)) appropriate, as is the requirement to "have regard to" them (cl 1(2),(3)) and the lack of prioritisation between them. Both provisions are considered conducive to judicial independence.

4. It also recognises the right of the legislature to lay down broad penal policy, within the boundaries of devolution (including human rights concerns). It is principally concerned that individual sentencing decisions should be taken freely within the constitutionally appropriate limitations.

The composition and role of the Scottish Sentencing Council, and the applicability of sentencing guidelines to non-judicial disposals (cll 3-13)

5. The SJA looks forward to the creation of a Scottish Sentencing Council. However, it considers that the membership of the Council should be 50% judicial, and doubts the need for representation of ACPO(S), or even of the legal professional bodies. It also observes that if they are to be represented, so should be the Prison Service (as it has responsibility for those sentenced to imprisonment) and perhaps COSLA (as local authorities have responsibilities in relation to “community sentences”).

6. Schedule 1, para 1(5) considers that [the Council should comprise] “one person holding the office of justice of the peace or stipendiary magistrate”. Considering that JPs preside over cases throughout most of Scotland (while stipendiary magistrates are in Glasgow), the lower sentencing limits of JPs, and the characteristics of the JP benches, the SJA consider it essential that there be a person holding the office of justice of the peace as a member of the Scottish Sentencing Council.

7. It also notes that the characteristics required of the “lay members” are very broadly drawn (Sch 1, para 1(5)) and further, that no provision is made for payment of those members who are not professional judges.

8. The SJA is pleased to see, however, that no provision is made for a Scottish Government observer. Such a person could not be regarded as independent, and the Council should be able to generate “evidence-based” guidelines free from the appearance of political pressure. This concern arises against the background firstly, of one of the “objectives” of the Council being to “assist the development of policy in relation to sentencing” (cl 4(b)), and secondly the requirements upon the Council (i) to consult the Scottish Ministers (cl 6(b)(ii)) without a reciprocal obligation upon them to consult it when considering relevant legislation; (ii) to accompany sentencing guidelines with assessments of both the “costs and benefits” likely to be incurred and “the likely effect” on the number of persons in prison (cl 5(5)); (iii) to give reasons for declining to issue a guideline requested by the Scottish Ministers (cl 8); and (iv) to produce for the Scottish Ministers a triennial “business plan” including “details [of proposed] sentencing guidelines” (cl 12).

9. In relation to the Council’s “function(s)” and “objectives”, the SJA notes its first-mentioned “objective” is to promote “consistency in sentencing practice” (cl 4). It is hoped that the requirement to produce guidelines on “the principles and purposes of sentencing” (cl 5(3)) means that the guidelines will also address “appropriateness”

10. In any event, the SJA considers that sentencing guidelines will be of particular use to JPs who are lay judges, and may sit infrequently and would value guidelines promoting “consistency”.

11. It is not clear that the sentencing guidelines will apply to “fiscal fines”, “fiscal compensation orders” “fiscal work orders” or any other form of “conditional offer”. The SJA strongly feels that, since more sentences are imposed by these means than by the courts, in principle, such non-judicial disposals should be informed by sentencing guidelines. It notes the apparent anomaly of the desire to publish judicial sentencing guidelines, while the internal Crown Office guidelines on “fiscal fines”, etc, remain firmly confidential.

12. The “objective” of “promot[ing] greater awareness and understanding of sentencing policy and practice” (cl 4(c)) is applauded as a means of reducing any “democratic deficit” in sentencing policy, but it is observed that sufficient funds for this purpose, and for training, will be required.

The resourcing of “Community Payback Orders” (“CPOs”), and seeming conflicts of aims in relation to them, potentially producing restrictions in the information available before imposing them and an incentive to breach them (cl 14)

13. The SJA can see that there may be value in the policy of, in effect, amalgamating Community Service Orders, Probation Orders and Supervised Attendance Orders into a single form of order. It notes three things, however. Firstly, it is unclear why Restriction of Liberty Orders, as such, and Drug Treatment and Testing Orders are not included. Secondly, more precise comment may be appropriate at a later stage in respect of the relationship of the proposed provisions to the existing equivalents. Thirdly the success of the policy will depend heavily upon the resources made available and detailed non-legislative arrangements made by Social Work Departments. It is assumed that the substance of the existing “community” disposals available to JP Courts will remain available.

14. It also recalls that the evidence base for the success of CPOs as alternatives to imprisonment, the target population, and the sentencing purpose, at least as revealed in the *Reforming and Revitalising: report of the review of community penalties* consultation paper, seemed uncertain. In particular, aims such as “immediacy” and “effectiveness” might conflict. For example, *Reforming and Revitalising* (p12) declares that, in the interests of immediacy, “it will not be necessary to a court to obtain a Social Enquiry Report before imposing a sentence of under 100 hours”. In other words, the price of a rapid decision is an uninformed decision.

15. It further notes possible confusion in the role of the CPO and its enforcement. Imposition of such an order requires that the offence be “serious enough to warrant [a CPO]” (cl 14/s 227A(3), which must be read in the light of the proposals in relation to “short [prison] sentences”). This clearly indicates that a CPO is intended to

be used for the upper range of summary offences only. Unsurprisingly, therefore, where a CPO is breached, the court may "deal with the offender … as it could have dealt with the offender had the order not been imposed" (cl 14/s 227ZB(5)(b)).

16. For an offence in the upper range, in the case of the JP Court, this would normally include the maximum of 60 days imprisonment. However, it is specifically provided that, in the case of this Court, the maximum sentence of imprisonment for breach of a CPO is reduced to 20 days (cl 14/s 227ZC(2)(a)). Thus, a JP Court, in respect of a person who might otherwise have received a sentence of any period of imprisonment greater than 20 days, would be obliged (in the absence of "appropriate" circumstances in terms of cl 17/s 204(4A)) to impose a CPO instead. But, if the CPO were breached that court would be restricted to a sentence of, at most, 20 days, seemingly providing an incentive to breach the CPO.

What constitute "appropriate reasons" for imposing a short prison sentence (cll 16, 17)

17. The SJA accepts that the Bill fulfils the Scottish Government's policy that (because the principal aim of imprisonment should be rehabilitation) there should only be prison sentences of six months or less "where the court considers that no other method of dealing with the person is appropriate" (cl 17/s 204(4A)), which appears to recognise that retributive or deterrent sentences of this magnitude may be used in "appropriate" circumstances. It also notes that where a court does pass such a sentence it must "state its reasons" which reasons are to be minuted (cl 17/s 204(4B)).

18. However, it further notes that the legislation gives no indication as to what an "appropriate" reason might be, but that *Scotland's Choice: report of the Scottish Prisons Committee* (the intellectual source of the proposal), at para 3.36, listed six circumstances in which it considered such a sentence would be justified (that is: violent and sexual offences; breaches of bail; failure to comply with an existing "community" disposal; existing release licence; non-consent to a "community" disposal; and existing imprisonment).

19. If this list is intended are intended to constitute the list of "appropriate reasons", the legislation should say so (though presumably, sentencing guidelines might be developed).

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Royal Society of Edinburgh

Summary

- The RSE considers that the proposals for the Scottish Sentencing Council are in conflict with the principle of judicial independence. That independence refers to both the independence of the individual judge and to the institutional independence of the judiciary. Both are indispensable if there is to be a fair trial in accordance with article 6 of the European Convention on Human Rights.

- We consider that the purpose of the Sentencing Council is objectionable on constitutional grounds. Sentencing policy is, and should remain, a matter for the Parliament on the one hand and the Appeal Court on the other.

- It would be inappropriate and unconstitutional for the Scottish Ministers or the Lord Advocate to be seen to be influencing the way in which sentences are imposed.

- It is wrong that in reaching its decisions any court should be subject to the determinations of a lay body such as the Sentencing Council. This would be a gross derogation from the independence of the judiciary and entirely unwarranted.

- We see the composition of the Sentencing Council as extremely important, and do not consider the proposed membership of the Council to be appropriate.

- While the purposes and principles of sentencing, as set out in the Bill, are well known, it is clear from the context that they may be affected by the sentencing guidelines issued by the Sentencing Council, and accordingly they should not be looked at in isolation. How they may be affected is not transparent.

- As regards the objective of consistency, we remind the Committee that the Sentencing Commission found that there was little empirical evidence of inconsistency in sentencing in Scotland. This consideration indicates that sentencing guidelines should, at most, be no more than advisory. We are also concerned that the public will assume that “transparency” means that there should be a “correct” sentence in any given case. Sentencing is not an exact science. It involves the exercise by a judge of his independent discretion in regard to the circumstances of the individual case.

1. The Royal Society of Edinburgh (RSE), Scotland's National Academy, welcomes the opportunity to comment on the *Criminal Justice and Licensing (Scotland) Bill* (hereinafter referred to as "the Bill"). This paper is concerned with the provisions of the Bill in regard to the purposes and principles of sentencing and the Scottish Sentencing Council. In preparing this paper the RSE has drawn on relevant parts of its response in November 2008 to the Scottish Government's consultation paper, *Sentencing Guidelines and a Scottish Sentencing Council* (hereinafter referred to as "the consultation paper") which foreshadowed these provisions. We have taken account of the extent to which the proposals in the consultation paper have been modified. We would be pleased to discuss the issues raised in this response.

Purposes and Principles of Sentencing (sections 1 and 2)

2. According to paragraph 8 of the Policy Memorandum the policy objectives of these sections are: "To create a straightforward and transparent framework within which sentencers can base their decisions in individual cases; thereby increasing general understanding of the purposes and principles of sentencing and improving confidence in the sentencing process and the wider criminal justice system." The RSE remains of the view that the purposes of sentencing are well known and do not require to be embodied in statute. How far the individual purposes listed in section 1(1) apply in the particular case will obviously depend on its nature and circumstances, and hence on the judgment of the sentencer. It appears, therefore, that the listing of such purposes in statute serves no practical purpose. A public information leaflet would suffice. Making that information available in electronic and hard copy format might have merit.

3. The same comment may be made in regard to section 1 (3) and (4), which presumably are intended to set out "principles" of sentencing. The RSE makes two further comments. First, we note that section 1(3) creates what appears to be an open-ended statutory duty, since it states that "Other matters to which a court must have regard in sentencing an offender…include", What are the other matters to which a sentencer is to have a statutory duty to have regard? The potential extent of a statutory duty should surely be clear. Secondly, we note that among the matters listed in section 1(3) there is no mention of the significance of a plea of guilty. It may be said that this is covered by section 2(4), or possibly section 1(3)(e), but the omission of a factor which may have a significant effect on sentence is surprising. The omission demonstrates the fact that these provisions deal with sentencing in a superficial manner, and do not facilitate public understanding.

4. While the purposes and principles of sentencing, as set out in the Bill, are well known, it is clear from the context that they may be affected by the sentencing guidelines issued by the Sentencing Council (see paragraph 6.1. below), and accordingly they should not be looked at in isolation. How they may be affected is not transparent.

The Scottish Sentencing Council (sections 3 – 13 and schedule 1)

5. The RSE considers that these proposals are in conflict with the principle of judicial independence. That independence refers to both the independence of the individual judge and to the institutional independence of the judiciary. Both are indispensable if there is to be a fair trial in accordance with article 6 of the European Convention on Human Rights. Institutional independence requires that the judiciary should be independent of the executive. The Commonwealth (Latimer House) Principles, which were endorsed by the Commonwealth Heads of Government in 2003, states in section IV: “An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice.” Among the steps to be taken to secure this aim is the following: “Interaction, if any, between the executive and the judiciary should not compromise judicial independence” (paragraph (d)).

6. It is our view that these proposals involve the kind of interaction between the executive and judiciary which would compromise the independence of the judiciary. We will set out our views in more detail below, by reference to certain salient features of the Bill.

> 6.1. The Sentencing Council would set sentencing policy, both as applied in its sentencing guidelines and more generally, with which courts would have to comply (see sections 4(b) and 5 (3) and (4)). Sentencing guidelines may relate not only to sentencing levels but also the principles and purposes of sentencing (section 5 (3)(a) and (b)). The powers of the Sentencing Council are so generally expressed as to enable it to lay down guidelines as to how statutory rules in regard to sentencing should be interpreted.
>
> 6.2. Before publishing sentencing guidelines the Sentencing Council must consult with the Scottish Ministers and the Lord Advocate (section 6(1)(b)), presumably in regard to their respective interests. Of particular interest to the Scottish Ministers would be the resources implications of sentencing guidelines, which the Sentencing Council must assess (section 5(5)).
>
> 6.3. In sentencing an offender or carrying out any other function relating to the sentencing of offenders, a court (including an appeal court) must “have regard to” any sentencing guidelines which are applicable in relation to the case. If the court decides not to follow the guidelines, it must state the reasons for its decision (section 7 (1) and (2)). Where the High Court of Justiciary passes a sentence in an appeal, and in doing so decides not to follow any relevant guidelines or concludes the guidelines do not deal, or deal adequately, with a significant issue raised by the appeal, it may refer the sentencing guidelines to the Sentencing Council and ask it to review them, giving reasons for its decision or conclusion. The Sentencing Council must then review the guidelines and have regard to the High Court’s reasons (section 9).

6.4. Of the total membership of the Sentencing Council the judiciary members (including the chairing member) are in the minority (five out of twelve).

6.5. Among the objectives of the Sentencing Council are to "to promote consistency in sentencing practice" and to "promote greater awareness and understanding of sentencing policy and practice" (section 4(a) and (c)). In this connection we note that the Policy Memorandum states that the policy objectives of the proposals are:

"To help ensure greater consistency, fairness and transparency in sentencing and thereby increase public confidence in the integrity of the Scottish criminal justice system".

7. The following are our comments on these proposals, which we set out by reference to the numbered sub-paragraphs above (6.1. – 6.5.):

7.1. We consider that the purpose of the Sentencing Council is open to grave objection on constitutional grounds. Sentencing policy is, and should remain, a matter for the Parliament on the one hand and the Appeal Court on the other, following, we may say, a public hearing. It is fundamentally wrong that sentencing policy should be determined by a Sentencing Council, for which it appears that the executive have disproportionate influence on the procedure for appointment of members (See paragraphs 1 and 2 of Schedule 1). It is also a constitutional principle that the interpretation of legislation is a matter for the judiciary and not the executive. It would be fundamentally wrong for the proposed Sentencing Council to lay down guidelines as to how statutory rules should be interpreted. That is pre-eminently a matter for the Appeal Court.

7.1.1. We would add that the Policy Memorandum states:

"The provisions create a Scottish Sentencing Council to provide a new sentencing guidelines regime for Scotland. This proposal originated in recommendations by the judicially-led Sentencing Commission, which examined the issue of consistency in sentencing".

However, examination of the Report[1] of the Sentencing Commission shows that it recommended in favour of a sentencing advisory body and against a sentencing guidelines council (paragraphs 9.14 et seq). Neither the Policy Memorandum nor the consultation paper contains an acknowledgement of this fact, let alone any justification for the decision that there should instead be a Sentencing Council.

7.2. It would be unconstitutional and wholly inappropriate for the executive to have any influence on the formulation of sentencing guidelines. The Parliament can pass laws which the courts must then follow and apply, but Ministers, the executive arm of the Government, have no right to tell the courts what to do in individual cases, and must not be seen to be doing so. It also has long been recognised in Scotland that the Lord Advocate and the prosecution service have no role in the determining of sentence. It would be wholly inappropriate and unconstitutional for the Scottish Ministers or the Lord Advocate to be seen to be influencing the way in which sentences are imposed.

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[1] The Scope to Improve Consistency in Sentencing, The Sentencing Commission for Scotland, 2006

7.3. It is wrong that in reaching its decisions any court should be subject to the determinations of a lay body such as the Sentencing Council. This would be a gross derogation from the independence of the judiciary and entirely unwarranted. Only recently the Parliament enacted a statutory commitment to judicial independence in section 1 of the Judiciary and Courts (Scotland) Act 2008[2]. It is nothing to the point that, as stated in section 7(2), it would be possible for a court to depart from a guideline in the circumstances of a particular case, since what is objectionable is that the court would have to justify departure from a guideline laid down by a body which was not made up, as to its majority, by judges. It would also be inappropriate for the Sentencing Council in advance to circumscribe the circumstances in which departure would be permitted (section 5(3)(d)). To do so would be to interfere with judicial independence. If there are to be sentencing guidelines, it should be for the Appeal Court ultimately to decide whether or not departure is justified.

> 7.3.1. While section 9 enables the Appeal Court to request the Sentencing Council to review its guidelines, this provision is in any event unsatisfactory. First, the Appeal Court cannot make such a request when it is refusing an appeal, and so is not passing another sentence. Secondly, it appears that if, after reviewing guidelines, the Sentencing Council determines that they should remain unchanged, there would be an impasse, with the Sentencing Council having the last word.
>
> 7.3.2. We should add that the proposals in regard to the Sentencing Council make no reference to the Appeal Court's own power to issue guideline judgments under section 118(7) and 189(7) of the Criminal Procedure (Scotland) Act 1995. In particular they do not address the potential conflict between them and the guidelines of the Sentencing Council.

7.4. We see the composition of the Sentencing Council as extremely important, and do not consider the proposed membership of the Council, as set out in schedule 1, to be appropriate. There is a need for the membership of the Sentencing Council to enjoy the confidence of the judiciary and the public. As such, it should call for a preponderance of judges and other members who have direct experience of the courts and the range of issues with which they have to deal. The proposals contrast strongly with the Sentencing Guidelines Council in England, in which there are eight judicial members (including the chairing member) out of a total membership of twelve. The remaining members have experience of policing, criminal prosecution, criminal defence and the interests of victims.

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[2] Received Royal Assent on 29 October 2008

> 7.4.1. We should add that we question the extent to which any useful contribution could be made by the two other members of the sentencing council, as referred to in paragraph 1(5)(b) of the schedule, unless they are to have knowledge and experience of the criminal justice system.
>
> 7.4.2. In response to the consultation paper we suggested the following membership which would be more suitable:
>
> - The Lord Justice General
> - The Lord Justice Clerk
> - Three Lords Commissioner of Justiciary
> - Two Sheriffs, one of which could come from an urban sheriff court district and the other from a more rural district to take account of court business in these different areas.
> - One justice of the peace or stipendiary magistrate
> - One nominee of ACPOS
> - One nominee of the Faculty of Advocates
> - One nominee of the Law Society of Scotland
> - One representative of a victim’s organisation or specialist in victim’s issues
> - One representative of social work services

7.5. As regards the objective of consistency, we remind the Committee, that, as is stated in paragraph 15 of the Policy Memorandum, the Sentencing Commission found that there was little empirical evidence of inconsistency in sentencing in Scotland. This consideration indicates that sentencing guidelines should, at most, be no more than advisory.

> 7.5.1. As to awareness and understanding of sentencing policy and practice, we note that paragraph 14 of the Policy Memorandum states that “it can be difficult for the public to properly understand the sentencing process”. However, we caution that it may well be even more difficult for the public to understand the process when there are sentencing guidelines in place. They will not supersede the need, or deny the opportunity, to refer to decisions of the Appeal Court, legislation, and textbooks. If the Bill’s proposals pass into law, future arguments in court will not only be concerned with the normal sentencing considerations but also the question whether a given sentence is or was in accordance with the relevant guideline or guidelines and, if not, whether there are or were good reasons why not.

7.5.2. We are also concerned that the public will assume that "transparency" means that there should be a "correct" sentence in any given case. Sentencing is not an exact science. It involves the exercise by a judge of his independent discretion in regard to the circumstances of the individual case. There is no such thing as the "correct" sentence for a given set of circumstances, and no sentencing guideline can provide for all circumstances, let alone the "correct" answer for any of them. It is, and will remain, entirely possible for two judges, in the proper exercise of their discretion, to reach different sentences in respect of the same set of circumstances. Both sentences would be justified.

Additional information and references

In responding to this consultation the Society would like to draw attention to the following Royal Society of Edinburgh responses which are relevant to this subject:

- The Royal Society of Edinburgh's submission to the Scottish Prisons Commission (April 2008)

- The Royal Society of Edinburgh's submission to the Scottish Government, *Sentencing Guidelines and a Scottish Sentencing Council* (November 2008)

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Central Scotland Rape Crisis and Sexual Abuse Centre

We believe that **all** pornography, mainstream or illegal/extreme, has a negative effect on society. From our work with survivors, we believe it contributes directly to all sexual violence by influencing the erosion of values and attitudes of respect, therefore, allowing those who believe treating others as sexual objects to be used for their pleasure is acceptable. In light of this, we believe, 'extreme pornography' has hugely detrimental effects not least on the women, children (predominately) and men being used, consensually or otherwise, to depict these images, and should not be tolerated under any circumstances. Extreme pornography further encourages disrespectful attitudes, incites hatred and reinforces an individual's violent fantasies by making them real. This reinforcement and implied acceptance of these fantasies only fuels people's imaginations – one fantasy is fulfilled and therefore they need more extreme and more violent depiction to satisfy their desires. This creates a cycle of more and more violent crime, continually pushing the limits and driving a black market trade in violent sexual crime limited only by people's imaginations. This is an exceptionally dangerous situation, which can only get worse under current legislation. The 'negative effects' of pornography can be kidnap, slavery, torture, enforced drug abuse, rape, sexual assault, disease and murder of the people used in the images. Those who survive these experiences may be subjected to all manner of consequences including long term emotional and mental health problems, physical scarring or disability, blackmail, extortion, rejection and exclusion by family and community members, further physical and sexual abuse. This list is by no means exhaustive.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Mental Welfare Commission for Scotland

Introduction

The Mental Welfare Commission welcomes the opportunity to respond to Criminal Justice and Licensing (Scotland) Bill. While we are happy to provide general comments on the overall Bill, our main comments are in relation to those offenders with recognised mental disorder.

General comments

Previous Scottish Government Criminal Justice reports, ‘Reforming and Revitalising’ (2007) and ‘Fair Fast & Flexible Justice’ (2008) acknowledged weakness in current sentencing practice and identified the negative impact of poor outcomes for those involved in the criminal justice system.

Both of these reports contained proposals to cut short term prison sentences; promote early intervention to break the generational cycle of offending; address poor outcomes; improve offender management and re-shape community based disposals across the following 4 themes:

- Reparation and payback
- Rehabilitation and Integration
- Quality and Enforcement
- Community Engagement

Short custodial sentences (under 6 months) have been found to have no tangible impact on reducing the risk of re-offending. Many offenders who are sentenced to custody experience significant disruption to their lives: jeopardising family and partner relationships, present and future employment prospects and physical and mental health problems. In addition for those with a substance misuse problem a short custodial sentence offers limited opportunities to address their dependence, often the underlying problem to their offending. We welcome the proposal to replace short term custodial sentences with robust and meaningful community based alternatives.

Section 64 makes reference to Special Measures for child witnesses and vulnerable adults. We would hope that this includes those witnesses with learning disability and other recognised mental disorders.

In addition, public understanding and confidence in sentencing is a key issue, hence proposals to create a Scottish Sentencing Council to promote greater consistency and transparency in sentencing is also welcomed.

We are of the view that this Bill makes significant inroads in converting into legislation the positive proposals contained in the Scottish Government’s previous reports and that these will hopefully facilitate sentencers, Community Justice Authorities, Local Authorities and Health Boards in delivering ‘immediate, visible, effective, high quality, flexible and relevant justice’.

The caveat is that, if and when the Bill becomes legislation, the additional burden placed on Community Justice Authorities, Local Authority Criminal Justice Services and Health Boards can only be achieved if these are matched with additional funding to allow enhancing of resources.

Mentally Disordered Offenders.

We welcome **Section 117** which introduces a new statutory defence to replace the common law defence of insanity and removes outdated and inappropriate terminology.

However, we note that the inserted section 51A (Subsection 2) of the 1995 Act excludes those with a psychopathic personality disorder alone and, while other personality disorders may give rise to the defence, we would ask that further advice on this be sought. **The Mental Health (Care and Treatment) (Scotland) Act 2003 in Chapter 1 under section 37 Definition** provides that a ‘mental disorder’ means any illness, personality disorder, or learning disability however caused or manifested’. We would urge caution on the ‘blanket statement in section 538 (Subsection 2).

A significant matter of concern is the lack of any recognition (in Sections 51A(1) and 51B(1)) that a mental disorder may not just impair an individual’s ability “to appreciate the nature or wrongfulness of the conduct”, but may also impair their ability to control their behaviour even though they may appreciate that their actions are wrong. For example, someone who commits an act in response to command hallucinations may be able to understand that what they did was wrong but not have been able to resist the compulsion of the hallucinations. Similarly, a person who kills their children whilst depressed may appreciate that their actions are wrong but believe that their actions are justified because of their view of life at that particular moment.

A further matter for concern is that the Bill makes little or no reference to those individuals appearing before the Court who have a learning disability or cognitive impairment, no matter to what extent this may be. Consequently their ability to understand and give informed consent to participate in community programmes may be limited and while they may give agreement, consequently they are almost certainly ‘set up to fail’. We believe further consideration should be given as to how individuals with a recognised learning disability/cognitive impairment appearing before the Courts may best have their needs met. This should be included in any future legislation.

Community Payback Orders

General Comments:

The impact of any order for compensation on an individual with mental disorder who may be already be having difficulty managing on benefits and who may be more vulnerable gives us cause for concern. We are not clear what the consequences might be for people who cannot or do not pay. While an SER might shed some helpful light on the relevant social circumstances, it might be worth considering whether a report on the individual's social circumstances from a Mental Health Officer - a specialist social work practitioner with expertise in assessing and working with people with mental disorder - might be more useful to the court in considering such a disposal.

Section 227R.

The Commission have significant concerns about the impact of this section and how it will operate. It is not clear what status people subject to a "mental health requirement" will have in respect of their potential treatment in hospital or indeed their treatment as an outpatient. The following concerns are noted:

- There does not appear to be any requirement for a report from a Mental Officer or other report from social work in order to assist with decisions.
- Generally speaking, the Commission believes that wherever an individual with mental disorder receives treatment on a compulsory basis this should be done under civil provisions or existing provisions of the Criminal Procedures (Scotland) Act 1995
- There does not appear to be any consideration of the individual's ability to consent to treatment, or what steps would be taken if they refused treatment.
- For those people who are subject to compulsion under either the Mental Health Act or Criminal Procedures Act, there are safeguards through either the Mental Health Tribunal or the Mental Welfare Commission. As the Commission has a clear responsibility in respect of all people with mental disorder we find it concerning that those subject to a "mental health requirement" would have no automatic recourse to independent or statutory review or to the safeguards that are available to people who are otherwise subject to compulsion in respect of mental disorder.
- If the person is admitted to hospital as part of the order and they are unwilling to stay and the medical practitioner responsible decides that they meet the criteria for detention in hospital, what is the impact of this on their order?
- Is it envisaged that an individual who is in hospital as a condition of their community payback order could be kept there and treated against their will without any additional authority? If so, what are the safeguards for the individual?

These matters require further consideration. At the very least there should be a requirement to notify the Commission if a community payback order with a mental health requirement is granted.

Section 227R is nevertheless helpful in specifying that a medical opinion is not required for out-patient treatment once the presence of mental disorder has been agreed.

It must be recognised that an initial pre sentence assessment (28 working days) will not and cannot identify the full raft of issues which may impact upon a person’s behaviour.

It is only when treatment is underway that some or many of the issues underpinning a person’s behaviour and their ability to fully grasp treatment concepts becomes apparent. For example, Mr X is found guilty of severely assaulting his partner. A community payback order is given with the psychologist having initially recommended treatment with cognitive behavioural therapy for anger issues. However, during the course of treatment it becomes evident that Mr X’s problems are part of a wider spectrum of Emotionally Unstable Personality Disorder and the psychologist considers that a dialectical behaviour therapy approach may be more useful: this addressing both the propensity for violence and the wider issues. In such a scenario would the psychologist have to return to Court to register a change in treatment or is this considered part of the overall programme? Clarity regarding this matter would be helpful.

Dr D Lyons
Director

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Sacro

Part 1, Section 14 – Community payback orders

Sacro is in agreement with the objectives of this part of the Bill, i.e. to clarify and simplify, for the benefit of the public, the range of community penalties available to the courts. The notion of Community Payback is welcomed and Sacro are of the belief that there are a number of benefits to be derived from the new system. These include the facility for sentencers to have flexibility in relation to the nature and purpose of the Community Payback Order [CPO], and the facility to have it “tailored” to meet various requirements. There are also real benefits in “responsible officers” having the power to allocate the balance of hours between “unpaid work” and “other activity”, within the ratios specified in the Bill. It is perhaps this area of the Bill which is of primary interest to Sacro in terms of the potential to use hours designated “other activity” in as effective way as possible.

Sacro strongly agrees with the Scottish Government’s objective of reducing the use of short prison sentences. It is our experience that the current high use of short prison sentences, i.e. those under six months (three months served) combined with the lack of statutory throughcare for this group of prisoners results in outcomes which undermine the main objectives of criminal justice policy which is to reduce reoffending and to reduce victimization. Short periods in prison frequently weaken the very factors which are known to help reduce reoffending, i.e. having a job, a home and a family. Breaking such links counters any short term benefit of the respite which may be provided to victims or communities by removing the individual from society. Short prison sentences can thus make rehabilitation, and the job of criminal justice agencies, more difficult and it encourages the public to believe that prison is a short term fix for problems which are frequently entrenched and long standing and which can only properly be addressed by partnerships which address the underlying disadvantages – economic social and health-related – experienced by many offenders. The Scottish Parliament is already showing leadership in tackling our country’s twin problems of alcohol use and violence. The Criminal Justice and Licensing (Scotland) Bill now provides Scotland with the opportunity to build on this more reflective response by choosing to deal with the problem of crime in a more effective manner. It must be viewed as a long term project and one which requires to be properly resourced. But it offers a more cost-effective way to reduce reoffending than to continue with the very expensive prison building programme. These resources would be more effectively used in developing and supporting community sentences.

Sacro shares the view that CPOs should represent a major means of reducing the use of short prison sentences whilst responding to the harm done to victims, whether these be individuals or communities. To achieve this requires that these orders gain the confidence of sentencers and the public and do not lead people placed on them to fail to comply as a result of indiscriminate or inflexible use. To meet both objectives of maintaining confidence and ensuring maximum compliance requires a flexibility in approach and implementation which takes account of individual circumstances in each case, with particular attention being given to offenders' capacities and motivation to participate.

This is particularly important in respect of the provision in the proposed order for 'unpaid work or other activity requirement'. It is Sacro's experience that Restorative Justice can provide an important and effective means of addressing this issue. The opportunity to learn first hand how their offence has affected individual victims or local communities can be a salutary experience which impacts positively on offenders' motivation to make amends and on their attitudes to their offending behaviour. Such effects mean that Restorative Justice offers an important additional dimension to reparative work orders, particularly in respect of those offenders whose compliance is more difficult to ensure or for whom second or subsequent orders are considered as a result of further convictions following imposition of an initial order. Restorative Justice thereby offers a means of (a) maximizing compliance and reducing breaches of orders and (b) providing opportunity for a graduated tariff of payback orders to reduce the possibility of imprisonment being seen as the most appropriate option as a result of subsequent reconvictions.

Sacro believes that the Bill should provide an opportunity to give increased attention to the needs of victims of crime; both direct victims and the local communities in which crimes are committed – as appropriate to each case. A major part of any payback initiative should involve provision for offenders to make amends to those most directly affected by their offending behaviour. Restorative Justice interventions differ from more generalised reparative activities by involving victims in the process and in focussing reparation on activities that benefit victims. Sacro considers this as being of sufficient importance as to merit specific mention in the Bill as a recommended component of unpaid work or another activity.

The involvement of victims in the process would of course be voluntary and should be focussed primarily on meeting their needs rather than those of the offender or the supervising officer. Care needs to be taken to avoid any re-victimisation and it is considered essential that trained facilitators are deployed for such interventions. It is anticipated that the Bill itself could encourage the use of Restorative Justice interventions and approaches by making reference to Restorative Justice and the principles thereof. It may be that specific reference could be made within the Bill to ensuring that part of the "other activity" element of the CPO is focussed on the effect of the offence or offending on victims. This could take a variety of forms as assessed by the responsible officer.

At the present time in Scotland there is insufficient focus on the harm impact of offending and individual offences by offenders, and the Bill should take steps to ensure that this focus changes. It is apparent that the Bill favours the use of reparative tasks within the area of Community Payback. Sacro are also in favour of the use of reparative tasks, specific to either the type of offence which has been committed, and/or following consultation with the person or persons who have been harmed. In instances where this may be inappropriate or difficult to facilitate, the Community itself should be provided with the facility to steer tasks undertaken by offenders as part of Community Payback schemes. Sacro considers that omission of this specific provision in the Bill will miss an important opportunity to gain widespread support for a refocussing of the objectives of our Criminal Justice system to give increased attention to repairing the harm caused by offending together with reducing the likelihood of re-offending.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Equality Network

The Equality Network is a network of around one thousand lesbian, gay, bisexual and transgender (LGBT) individuals and organisations in Scotland, working for LGBT equality. The Equality Network's policy work is based on consultation with LGBT communities across Scotland, and reflects the concerns that LGBT people have raised with us.

We welcome the opportunity to submit evidence to the Justice Committee on the Criminal Justice and Licensing (Scotland) Bill. We wish to suggest a provision which we feel should be included in Part 2 (criminal law) of the bill, under the existing heading 'sexual offences'.

The current Sexual Offences (Scotland) Bill removes gender and sexual orientation discrimination from sexual offences law. However, prostitution is outwith the scope of that bill, and is now the only remaining area of criminal law where some sexual orientation discrimination remains.

The Criminal Justice and Licensing (Scotland) Bill is the first general criminal justice bill to be considered by the Parliament for some years, and is therefore the first opportunity to deal with this discrimination. As a bill which makes general provision about criminal law, we assume that such a change would be within its scope.

Outline of the problem

The main legislative provisions on prostitution apply regardless of the gender of the prostitute or the gender of the person seeking to obtain the services of a prostitute. It is an offence for the prostitute or the person seeking their services to solicit in a public place.

However, for the case of a male prostitute offering services to a man, or a man seeking to obtain the services of a male prostitute, there is an additional offence which criminalises all soliciting or importuning, whether or not it is done in a public place. There have been no charges under that additional, gender and sexual orientation specific, offence for several years at least.

The Equality Network raised the issue of this discriminatory offence when the Prostitution (Public Places) (Scotland) Act 2007 was under consideration by the Parliament. The then Scottish Executive responded that the discriminatory offence could not be repealed by that bill, because the scope of the bill covered only public places, while the discriminatory offence applies also to soliciting and importuning in other places.

We believe that the opportunity should now be taken to remove this last sexual orientation discrimination from the criminal law.

More detailed explanation and suggested solution

Section 46 of the Civic Government (Scotland) Act 1982 criminalises loitering, soliciting and importuning, in a public place and for the purpose of prostitution, by a female or male prostitute.

Section 1 of the Prostitution (Public Places) (Scotland) Act 2007 criminalises soliciting and loitering, in a public place, for the purpose of obtaining the services of a prostitute. Again, this offence is gender-neutral.

Section 13 ('homosexual offences') of the Criminal Law (Consolidation) (Scotland) Act 1995 is largely repealed by the current Sexual Offences (Scotland) Bill. But the provisions in section 13 relating to prostitution are not amended by that bill. Some of those provisions extend the law on pimping and brothel-keeping to cover male prostitution, and are non-discriminatory in effect.

However, part of section 13(9) makes it an offence to solicit or importune any male person for the purpose of procuring the commission of a homosexual act. This criminalises both prostitutes and people seeking to obtain the services of a prostitute, wherever the soliciting or importuning takes place, in a public place or otherwise. Because it covers non-public places, the offence is wider in scope than the other prostitution offences. It discriminates on grounds of gender and sexual orientation, since it only applies where the prostitute and the person seeking to obtain their services are both men.

Parliamentary Question S3W-16008 asked: To ask the Scottish Executive how many charges brought under section 13(9) of the Criminal Law (Consolidation) (Scotland) Act 1995 have been (a) reported to procurators fiscal by police and (b) prosecuted in each year since 2003-04.

On September 17th 2008, the Solicitor General replied: The Crown Office and Procurator Fiscal Service has not received any reports containing charge(s) under Section 13(9) of the Criminal Law (Consolidation) (Scotland) Act 1995.

Our view is that the prostitution offences in the Civic Government (Scotland) Act and the Prostitution (Public Places) (Scotland) Act are sufficient to deal with male prostitution in just the same way as they deal with other prostitution. There is no reason to provide a separate, wider offence for male prostitution. The law should not discriminate on grounds of gender and sexual orientation unless there is good reason for it.

We recommend therefore that an amendment should be made to the Criminal Justice and Licensing (Scotland) Bill, along the lines suggested below.

This would repeal the soliciting / importuning offence in section 13(9) of the 1995 Act (and would consequentially repeal section 13(11), which is a time bar provision applying to that offence). It would leave the other provisions of section 13, on pimping and brothel-keeping, unchanged.

After section 34, insert–

<**Amendment of offences relating to male prostitution**

(1) Section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.

(2) In subsection (9), the words from “or” where it occurs for the second time to “above” are repealed.

(3) Subsection (11) is repealed.>

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the South Ayrshire Multi-Agency Partnership

About South Ayrshire MAP

The South Ayrshire MAP is pleased to have the opportunity to comment on this Bill. We are committed to addressing gender-based violence and to offering appropriate, high quality services to women and children, underpinned by a clear and unequivocal commitment to promote gender equality and inclusion across South Ayrshire. The partnership is made up of representatives from agencies working with women and children in South Ayrshire. The partnership aims to achieve positive outcomes for women & children experiencing gender-based violence by adopting the 3 P's approach to tackling male violence – protection, provision and prevention. Specifically:

- To provide consistent and appropriate responses to women and children experiencing gender-based violence in South Ayrshire
- To raise public awareness of issues around violence against women and children
- To promote and support good practice within and between agencies

To this end, we have developed a website with information for women, children and young people and workers; produced information cards for members of the public; produced a directory of services for agencies to tackle violence against women; and, run a number of awareness raising campaigns. As with likeminded organisations, we take a keen interest in any legislative changes which impact on violence against women and this Bill in particular is of great interest.

Our views on this Bill

South Ayrshire MAP welcomes the government's proposals to criminalise the possession of material that are considered to be extreme pornography. Legislating on this issue is an important part of publicly naming this material as totally unacceptable, indeed harmful, and we are pleased that this first step has been taken to address the nature and prevalence of these images.

The acts considered to be 'extreme pornography' in this bill are defined as such when they can be identified as obscene, pornographic and extreme.

These are defined as:

(a) Obscene
The test of "obscene" means that the material must be of such a nature that it would fall within the category of the material whose sale etc. is already prohibited under section 51 of the 1982 Act.

There is no definition of obscene, but courts apply a common law test of whether the material is ‘calculated to deprave or corrupt persons open to depraving or corrupting’.

(b) Pornographic

(3) An image is pornographic if it is of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal.

(c) Extreme
An image is extreme if it depicts, in an explicit and realistic way any of the following—
(a) an act which takes or threatens a person’s life,
(b) an act which results, or is likely to result, in a person’s severe injury,
(c) rape or other non-consensual penetrative sexual activity,
(d) sexual activity involving (directly or indirectly) a human corpse,
(e) an act, which involves sexual activity between a person and an animal (or the carcass of an animal).

Why is this legislation needed?

South Ayrshire MAP believes that this type of legislation is urgently needed in order to address the increasing volume of what is referred to in this bill as ‘extreme’ pornographic material, which exists in the context of the prevalence and normalisation in popular culture of all forms of pornographic material.

In everyday media women’s bodies are routinely portrayed as sexualised and available through the proliferation of homogenous images of the ‘ideal’ female form. This sexualised ‘ideal’ is at its most extreme in pornography and there is deep concern that these images are feeding directly into what young girls in particular, understand as expectations of how their bodies should be and what it means to be ‘sexual’. Men are also being sold a very narrow, prescriptive and extreme form of masculinity, where male dominance and control can be maintained through male sexuality, as depicted in pornography. We believe that this pressure and the expectations implied through the cultural prevalence of pornographic sexuality are harmful to men as well as women.

Our analysis of pornography is that it represents sex as domination, humiliation and as a way of pushing the female body to its physical limits. Women in pornography are not represented as individuals or sentient beings- they exist anonymously, purely for male sexual gratification where the focus of the images is male sexuality. In pornography, sex is depicted through violence; in the acts themselves and in the language used to describe the acts. (See Robert Jensen ‘Pornography and the End of Masculinity’, 2007)

Pornography also celebrates under-age sex and sex with young ‘barely legal’ girls. Those women that are not especially young are portrayed as so, in schoolgirl outfits and through the language used to address them. For example, on one site: "innocent teen girls face their worst sex related nightmares.”

Not only are men in control in front of the camera in pornography, it is predominantly men who direct pornographic films, who view pornography and who make profit from pornography. As a cause and a consequence of wider gender inequality, we view all pornography as violence against women; not only in the acts that are played out on the bodies of individual women, but in terms of the effects the normalisation of this violence and degradation has on the unequal status of all women.

There is much evidence to demonstrate that many women who are involved in the sex industry, including in pornography, have personal histories of sexual and other abuse, poverty, social and economic deprivation and exclusion. We believe that society has a responsibility to protect vulnerable groups and individuals; in the sex industry we see the opposite – vulnerable women being groomed and exploited for the profits of big business.

In the contemporary social and political climate, where rape conviction rates are as low as 2.9% in Scotland, (Scottish Government figures for 2006/07) we have to ask what role pornography plays in feeding into a culture where sexual violence is normalised and even glamorised. Pornography perpetrates myths about rape, which can make it hard for sex offence victims to be believed or seen as credible, and makes it more difficult for them to come forward and be treated fairly.

This legislation takes the first step in addressing the most extreme forms of pornography; specifically, those depicting rape and acts that are viewed as being without question, totally degrading and unacceptable to society. We view the existence of this material as being enabled and supported by all other pornography, which is in itself characteristically violent. We understand 'violent' in terms of the full meaning of the word; often physical violence, but also as violation; violation of the integrity and dignity of wider society, in the way pornography compromises wider gender equality, as well as violation of the individuals appearing in the images themselves.

Our objections are not based on a moralistic, religious, prudish or anti-sex perspective; they are focused on harm; and we would urge the committee to keep harm at the centre of its discussion on these provisions.

Specific comments

As well as drawing attention to the existence of such material, an important part of this legislation is turning the burden of responsibility onto those people who demand, consume and possess the material. There is already legislation in place which criminalises the display, publishing, selling and distribution of this type of material, and possession with a view to onward sale or distribution, but these new provisions will send a message that individual possession of such material is harmful, damaging and unacceptable.

We believe that this makes a clear connection between those who use extreme pornography and the actual acts perpetrated within the material. This recognises that demand for such material increases its production but also, that the very consumption and viewing of such material is fundamentally harmful to society as a whole, in its celebration of the inhuman and violent treatment of women.

We welcome the specific reference to rape and other non-consensual penetrative sexual activity within the definition of extreme pornography. Unlike similar legislation in England & Wales, the bill does not make a distinction between 'violent' rape, and rape in general, a distinction which is extremely unhelpful and which we are glad to see is being rejected in Scotland. All rape is violent.

Along with similar organisations we believe that consideration of the following amendments to the bill would strengthen the legislation and make it more effective in tackling the type of material it seeks to control.

(1) **Amendment to definition of extreme**
Change wording to:

(b) an act which results, or threatens to result, in a person's severe injury,
The use of "threatens to " instead of "likely to" would increase the proposals' scope to cover all acts of rape, which could all be said to threaten severe injury but not all are likely to result in severe injury.

(2) **Broaden the scope of material covered to include non-photographic visual depictions of extreme pornography**

As the bill is currently written, to meet the definition of 'extreme', the material in questions must be explicit and realistic. The terms "explicit" and "realistic" require that the act depicted in the image must be clearly seen, lifelike and convincing and appear to a reasonable person to be real. It is not required that the act itself is real.

There is a strong feeling that there is a missed opportunity in not including non-photographic representations of extreme acts in the bill. This means for example that the provision in the bill will not cover depictions of extreme pornography on virtual worlds such as Second Life, where the pornography is violent, extreme and interactive, but where the images are not photographic. Similarly, we would like to emphasise that there is still a need to enact similar legislation in relation to child pornography, as proposed by the Scottish Executive in early 2007.

(3) **Broaden the definition of extreme to include depictions of incest**

Although the legislation will cover depictions of rape and non-consensual penetrative sexual activity, which fit the definition of obscene and pornographic, this will not necessarily cover pornography which glorifies incest, unless it is clear that the young woman depicted is not of an age to consent. For example, one pornography website is headed 'Welcome to Daddy's Whore' and other similar sites are easily found through search engines. This type of content is unlikely to be covered by the legislation because these sites usually state that the young women featured are over 18. We believe serious consideration must be given to extending the definition of extreme to include depictions of incest, which is an illegal activity, to ensure these types of materials are covered by the legislation.

(4) **Ensure a clear definition of possession**
Clarity is required as to what “possession” covers. Will it cover those people who access pornography without downloading files? Although the bill does not criminalise accidental or single viewing, we believe it must cover repeated viewings of this type of material, whether or not the material was actually downloaded.

General comments

South Ayrshire MAP believes that this piece of legislation is a very important step in what we hope will be the beginning of a process to address the harm caused by pornography. It is a sad reality that many of our young people are getting their first pieces of information and experience on sex and sexuality from internet pornography. This has substantial implications on both their self-esteem and their understanding of the nature of sex and sexuality. Most worrying is the message it gives to young people about the normative roles men and women act out during sex, men dominant and women passive; men violent and brutal, women aroused by violence and brutality.

Sex in pornography is portrayed through testing the physical boundaries of the female body and dressing this up as erotic and sexual; it is never about human relationships or intimacy. We believe there is a real case to be made for government’s attention to this, in terms of the consequences pornography is having on society as a whole, but particularly the next generation, the largest users of pornography and whose access to this material is virtually unchecked.

We also urge the Committee to consider the need for public education. This includes public education on the introduction of the proposed legislation to ensure people understand the new onus on tackling demand; but also a broader public education campaign on the realities of pornography. We understand that many parents/ carers are completely unaware of the type of material that young people can very easily gain access to, and that they are horrified once they know the reality of how easily available extreme pornography is and what it contains.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Turning Point Scotland

Turning Point Scotland provides person centred support to adults with a range of complex needs. We learn from services and service users and seek to influence social policy. We provide services to substance misusers who find themselves in the criminal justice system, including a number of arrest referral services for people whose offending may be linked to drug misuse, as well as more general substance misuse services. We also offer a variety of support to people who experience mental health issues, including social enterprises providing employment opportunities, supported living housing support, one to one and group work based activities.

We have focused our evidence on Part 1 of the Bill, specifically on the Community Payback Orders. We broadly welcome the Orders, and make the following comments.

1. Partnership working

Turning Point Scotland feels that Community Planning Partnerships, Community Justice Authorities, and in particular the (often) voluntary organisations working directly with individuals, have a role to play in the development and delivery of Community Payback Orders. This applies to the design as well as the delivery of the necessary services.

The Road to Recovery, the Scottish Government's framework for tackling drug misuse, establishes the principle that treatment services must engage effectively with wider generic services to address the full needs of the individual, not just their addiction. We feel that this principle should apply to the design of the range of services that will be required under Community Payback Orders.

Community Planning Partnerships clearly have a role to play in this service design, as do Community Justice Authorities and independent organisations working directly with individuals. We are concerned that this section of the Bill makes no mention of partnership working.

CPPs can provide an opportunity for the involvement of voluntary organisations, who are often delivering public services on behalf of statutory bodies. The level of involvement will vary from area to area, as will the effectiveness of CPPs in promoting interagency collaboration, but it is precisely the joint working that they promote that is necessary in order to design the right infrastructure of services.

In terms of service delivery, the Bill concentrates on the responsibilities of the local authority, which will make recommendations as to the individual's suitability for a Community Payback Order, decide on the treatment they are to receive, and monitor their compliance with the requirements set out in the Order.

It is our experience that the best results are achieved when statutory authorities work in partnership with the organisations delivering services. Our knowledge and expertise will be invaluable to local authorities in meeting their responsibilities under this Bill. While it would be good practice to seek the input of experts in particular areas, involving organisations such as Turning Point Scotland when working with an offender affected by substance misuse for example, this Bill does not echo the requirement for collaborative working set out in the Local Government in Scotland Act.

2. Need for resources

It is clear that Community Payback Orders have a number of objectives to achieve. They must meet the needs of the court, providing the appropriate balance between punishment and rehabilitation. The public must have confidence in them as a quality and effective disposal, and they must also be effective in addressing the problems and behaviour that has resulted in the commission of the offence.

While Turning Point Scotland welcomes the focus on addressing the causes of behaviour, we will be unable to achieve the desired outcomes unless adequate resources are in place. We have not had sight of the Financial Memorandum to the Bill, but understand from the evidence taken by the Finance Committee that £10 million made available nationally for the delivery of Community Payback Orders. In our view this would not be adequate.

Turning Point Scotland’s experience of working in criminal justice, mental health and substance misuse services across Scotland is that the provision of these services varies dramatically. With the presumption against short term prison sentences and the aim of reducing the prison population, we can assume that the more offenders will be subject to Community Payback Orders than are subject to the current community disposals. Existing services are unlikely to have the capacity to absorb this increased demand, and the £10 million referred to by the Finance Committee would not be sufficient to address this.

The Road to Recovery sets the goal of a range of treatment and rehabilitation services being made available at a local level, as different people in different circumstances will take different roads to recovery. The same is true for individuals ‘recovering from’ offending behaviour. Each person will have specific needs that will need to be addressed if we are to truly tackle the causes of their offending, whatever they may be.

There is the additional concern that this increased burden will make these services even less accessible to people who are not currently involved in the criminal justice system. Having been found guilty of the theft of £67 worth of meat, Derek Nicholson requested a prison term of longer than six months so that he would be eligible for the prison drug programme. This case, reported in the Courier & Advertiser on the 7th April, highlights the current demand for drug treatment services, and our experience shows that it is reflected, to a greater or lesser extent, across Scotland. The same can be said for alcohol treatment and mental health services.

The Community Payback Orders would not help Mr. Nicholson in this case, as his offence was not serious enough. It is also true that the increased demands that the Orders will make on the already stretched services may make it even less likely that Mr. Nicholson would be able to access the services he requires.

When a Community Payback Order is made, and an offender is subject to its requirement, it is clear that the appropriate services must be in place if the goals of the Order are to be achieved. When they are not, or when the offender is forced into the wrong services, it is far more likely that they will be unable to address their issues, or even comply with the requirements. In this case they would be seen as having failed to meet the requirements under the order, when in reality the system has failed them.

The Bill assumes that these services will be in place, but consideration must be given to how the Government can ensure that this is the case if the goals are to be achieved.

3. Programme Requirement

We welcome the inclusion of a Programme Requirement. Turning Point Scotland's Turnaround service works with male offenders in Paisley, Irvine, Greenock, Dumbarton, Kilmarnock, and our 218 service works with female offenders in Glasgow, whose offending is persistent, high volume, low tariff and who are failing in other community-based alternatives, or who have had multiple remand or short-term prison sentences. We give priority to those affected by substance misuse, mental health issues or homelessness.

We hope that the inclusion of this Requirement will be an opportunity to highlight this way of working and promote the outcomes that could be achieved across Scotland. These programmes often rely on local authorities to commission them, but also on the criminal justice system to use them. There is great disparity in current provision and take-up.

4. Mental Health Treatment Requirement (MHTR)

We note that the Mental Health Treatment Requirement set out in the Bill focuses on medical and psychological treatment to enable an individual to improve their mental health condition, which we do not dispute.

An example of Turning Point Scotland's work in this area is our STABLE service in Aberdeen, where we provide support for people on Compulsory Treatment Orders as part of a package of support overseen by doctors and psychologists. We try and form a partnership with the individual so that the feeling of compulsion is minimized, which we find is more effective at achieving outcomes.

To really achieve the goal of improving an individual’s mental health medical, psychological and social support services must work together to address their holistic needs. The social support that we provide is plays an important role in enabling that person to not only overcome their mental health condition, but to integrate themselves into their community.
We do not believe that one approach can fully deliver without the other, and feel that recognition needs to be given to the holistic needs of the offender, if the Mental Health Treatment Requirement is to deliver their hoped for outcomes.

5. Drug Treatment Requirement (DTR)

Again, it is important that a holistic approach to supporting an offender to overcome their dependency on or propensity to misuse drugs is applied. Making further reference to Government’s framework, recovery should be the explicit aim of all services providing treatment and rehabilitation to problem drug users, and their wider circumstances that may contribute to their drug misuse must be recognised and included. We feel that the implementation of this Bill must be in line with the ethos of The Road to Recovery. There are a number of community rehabilitation services across Scotland, attendance at which could be considered part of this requirement.

We repeat our call that the expertise of all relevant organisations are called upon when the decision is being made as to the type of treatment to be required, and included in the design and planning of the treatment. It is only by including the people who work directly with an individual that we are able to gain a full insight into an individual’s circumstances, and identify the most appropriate treatment.

6. Alcohol Treatment Requirement (ATR)

We echo our comments made above, on the need for decision makers to work with people delivering front line services.

An issue that we would like to highlight is the difference between the Drug Treatment Requirement and the Alcohol Treatment Requirement. The Drug Treatment Requirement refers to reducing or eliminating the offender’s dependency on or propensity to misuse drugs, where as the Alcohol Treatment Requirement refers only to reducing a dependency on alcohol, and makes no mention of the propensity to misuse alcohol.

There are clear links between the propensity to misuse alcohol and criminal behaviour. We are concerned that an opportunity is being missed in this Bill to consider the inclusion of alcohol awareness courses or equivalent, with a view to reducing the misuse of alcohol.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Action for Children Scotland

Action for Children Scotland welcomes the opportunity to submit evidence to the Scottish Parliament's Justice Committee's Stage 1 consideration of the Criminal Justice and Licensing (Scotland) Bill ("the Bill"). Our evidence draws upon our strong track record of successfully engaging young people in robust community based alternatives to custody, which have significantly reduced the likelihood of re-offending. As part of this process, Action for Scotland projects in the Inverclyde and Inverness areas deliver *Constructs*, which is an accredited 26 session programme for young males aged 18+ at risk of re-offending. The programme supports the young people to address their offending behaviour, and to turn their lives around. Action for Children Scotland also works with families who have been affected by the imprisonment of family members.

The Scottish Sentencing Council (Sections 3 – 13, and Schedule 1)

Action for Children Scotland generally welcomes the Scottish Government's proposals to establish the Scottish Sentencing Council, and to introduce sentencing guidelines. This body can help to promote greater consistency and transparency in sentencing across Scotland. The proposed council can also make a significant contribution to progressing the Scottish Government's commitment to encourage the greater use of community sentences as an alternative to custody for the less serious offences. Action for Children Scotland takes the view that we need to see more disposals by courts that keep people out of the prison system for the less serious offences, and instead focus on rehabilitation. This is based on our experience of working with young people who have offended, which has proven that intensive community based interventions focusing on the causes of how the young people got involved in crime can prevent re-offending.

Schedule 1(1) of the Bill outlines the proposed membership of the Scottish Sentencing Council. We believe that the council's work would benefit from the inclusion in its membership of a representative from an agency working directly in the rehabilitation of offenders, and that this should be specified in Schedule 1(1).

Sentencing Guidelines (Section 5)

We note that the main function of the Scottish Sentencing Council is to "prepare and publish guidelines relating to the sentencing of offenders". Action for Children Scotland recommends that the sentencing guidelines should include a clear statement that children under 18 will be dealt with by the Children's Hearings system, except for the most serious offences.

Action for Children Scotland also believes it is vital that the sentencing guidelines should include a strong focus on community sentences for the less serious offences, given the presumption against short sentences in Sections 16-19 of the Bill, and the high level of prison overcrowding highlighted in the Chief Inspector of Prisons' recent annual report.

Action for Children Scotland recommends that the sentencing guidelines produced by the proposed Scottish Sentencing Council should highlight the impact of custodial sentences upon the lives of prisoners' children. A report published by Scotland's Commissioner for Children and Young People, *Not Seen. Not Heard. Not Guilty: The Rights and Status of the Children of Prisoners in Scotland,* outlines the negative impacts on children where a parent (or other principal carer) is detained or imprisoned. Against this background, Action for Children Scotland believes that these negative impacts should be reflected in the sentencing guidelines, particularly for the less serious offences where a community based sentence could be appropriate. We believe this would be beneficial for both male and female offenders who are parents or carers. It would, for example, help more young fathers to retain contact with their children and families. Given the fact that being part of a family is one of the key factors causing offenders to stop offending, we consider this could have a positive outcome for many families affected by imprisonment.

Action for Children Scotland also notes that the HM Chief Inspector of Prisons for Scotland's Annual Report states that the number of women in prison "are rising more quickly than the numbers of any other sector in the prison population". Against this background, Action for Children Scotland believes a much more consistent approach should be taken by the courts to the sentencing of male and female offenders who have committed the same, or similar, offences. Action for Children Scotland recommends that this issue should be reflected in the sentencing guidelines which will be developed by the proposed Scottish Sentencing Council. This factor, and the Scottish Government's commitment to replace short term sentences with the greater use of community sentences, can help both to reduce the number of women who end up in prison, and to improve the levels of rehabilitation amongst women in the criminal justice system. Community based sentences could, for example, assist female prisoners to meet their child care responsibilities while fulfilling the conditions of their community sentence, and to draw upon positive influences within their network of family and friends.

Community Payback Orders (Section 14)

We note from the Financial Memorandum accompanying the Bill it is anticipated that the proposed Community Payback Orders ("CPOs"), and the presumption against short sentences, will have a "*significant* financial impact". Action for Children Scotland believes that the provisions relating to CPOs must be adequately resourced if they are to be successful. In this respect, it would be helpful if the Scottish Government could clarify the funding which will be available to fund the management and implementation of the CPOs across Scotland.

Requirement to avoid conflict with religious beliefs, work etc.
Action for Children Scotland welcomes the provisions in the Bill that courts must ensure, as far as practicable, that any requirement imposed by a CPO avoids conflict with the offender's religious beliefs and work. We also take the view it is essential that the implementation of the CPOs must be flexible, given the importance of employment in helping to break the cycle of offending and of re-offending. This flexibility is particularly vital in situations where offenders secure full-time employment during the course of a CPO programme. In these circumstances we believe it is important that the appropriate court should act promptly to take into account the offender's changing circumstances, and to consider any changes which may be necessary to vary or revoke or discharge the CPO.

Drug and alcohol treatment requirements
With regard to the drug treatment requirement, we believe it is important that a consistent approach should be taken across Scotland. Our concern, however, is that not all offenders will be able to access local drugs rehabilitation services. It would, therefore, be helpful if the Justice Committee could clarify the number of people who offend, or are at risk of re-offending, whom the Scottish Government estimates will be able to access, as part of their compliance with a CPO, local drugs rehabilitation services under the recently announced reforms to the delivery of drugs and alcohol treatment.

Breach of Community payback order
We believe that the Bill should include a clear statement that courts, in determining whether or not an offender has breached an order, must take into account all of the relevant circumstances to enable them to fully evaluate the progress made by the offender in complying with an order. Action for Children Scotland considers that such a statement is particularly necessary where an offender has been subject to a number of requirements under a CPO. In addition, the sentencing guidelines relating to CPOs should include clear guidance to the courts about what circumstances would amount to a breach of a CPO.

Short Sentences (Sections 16 – 18)

Action for Children Scotland welcomes the provisions in Sections 16 – 18 which will introduce a presumption against short sentences, and promote the greater use of community sentences. We believe these measures can make an important contribution to breaking the cycle of offending and of re-offending, and to increase the level of rehabilitation amongst offenders. This cycle has given rise to a 'revolving door' syndrome through which many offenders, particularly young people, return to prison soon after leaving custody. To break this cycle we believe it is essential that the transitional support available to young people upon leaving custody must be significantly increased, and a more consistent approach taken, across Scotland.

Action for Children Scotland and our partners, including the Robertson Trust, Fairbridge and Youthlink, are helping to provide young people with such support in the Renfrewshire area through the Moving On Renfrewshire project. We help young males aged 16-21 who are in custody or have recently been liberated from HMYOI Polmont, HMP Greenock, or HMP Friarton. The young people engage voluntarily in the project, which aims to reduce the risk of re-offending, and to minimise the likelihood of the young people returning to custody. We provide a wide range of support services tailored to meet the young people's individual needs to assist them make positive changes in their lives. Action for Children Scotland and our partners help the young people to deal with personal problems, and issues around housing, benefits, substance misuse, and relationships. This flexible approach helps to promote more positive outcomes for young people, with the long term plan to move them into education, employment or training.

Supporting offenders into sustainable employment is another key area which needs to be considered as part of the process of breaking the cycle of offending and of re-offending. Significantly, HM Chief Inspector of Prisons for Scotland's Annual Report highlighted that "unchanging poverty, social exclusion and inequality" are the most powerful factors inhibiting the rehabilitation and transformation of prisoners. The often insurmountable difficulties faced by prisoners in securing employment remain at the heart of this cycle. Drawing upon the experience of our Youthbuild programme, Action for Children Scotland takes the view that employment opportunities are central to rehabilitation, and to preventing re-offending. Such opportunities are vital if prisoners are to acquire the necessary skills and experience to make something of their lives, and Youthbuild has demonstrated that real jobs offer real protection against further involvement in crime.

Action for Children Scotland's Youthbuild is a pre-vocational programme, which provides training and employment opportunities in the construction industry for disadvantaged young people aged 16 - 24, including those who have been in custody. There are currently three Youthbuild projects within the programme, with others planned for development. Action for Children Scotland is looking at the potential for developing a modern apprenticeship scheme within the organisation, which will lead to the development of further social care opportunities. The three existing Youthbuild projects work with a range of partner agencies to give young people work experience on local sites where they are building homes. These partners have included large construction companies, various housing associations such as Oak Tree, Cloch, Milnbank, and Govanhill, Glasgow City Council, Inverclyde Council, the European Social Fund and Scottish Enterprise.

In December 2007, an independent evaluation of the Youthbuild programme was commissioned. The evaluation confirmed that the Youthbuild programme had a 70-80% success rate across the three projects for helping young people move into employment following their involvement in the programme. Action for Children Scotland believes that the type of training provided by our Youthbuild projects should also be provided as part of community based disposals. Locking people up and failing to provide them with access to work and training opportunities, is denying many the opportunity to embrace rehabilitation. It is setting them up to re-offend. Introducing sentencing guidelines with a strong emphasis upon the need for more community based interventions can help to break the cycle of re-offending, and to address prison overcrowding which is undermining attempts at rehabilitating many prisoners. Action for Children Scotland would be willing to arrange a reporting visit by members of the Justice Committee to one of our Youthbuild projects if it would assist the Committee's Stage 1 consideration of the Bill. We also attach further information about the Youthbuild project.

Prosecution of Children (Section 38)

Action for Children Scotland welcomes the provisions in Section 38 of the Bill which will raise the age of criminal responsibility in Scotland to 12, and ensure that only the Children's Hearings System will be able to deal with children under the age of 12 who have committed offences. The big challenge is for the Scottish Government, local authorities, the police, the voluntary sector and other key agencies to continue working together to break the cycle through which neglected children end up as the next generation of criminals. Action for Scotland believes it is vital that there should be a continuing focus on the care and welfare needs of children through the Children's Hearings system, of which offending behaviour is often symptomatic. We consider that raising the age of criminal responsibility is one of the key steps necessary to deal with these issues on a more positive footing, the others being early intervention and intensive support to assist those who offend, or are at risk of offending, to address their behaviour, and to turn their lives around.

Remand and Committal of Children (Section 47)

Action for Children Scotland strongly believes that children under 16 should only be remanded as a last resort. The provisions in the Bill are, therefore, a step in the right direction. Section 47 will ensure that children under 16, if not released on bail or ordained to appear, will be remanded to the local authority to be detained in secure accommodation or "a suitable place of safety".

In terms of "suitable places of safety", Action for Children Scotland operates a remand fostering service for young people who have offended, or are at risk of re-offending. Action for Children Scotland's North Lanarkshire Youth Justice Fostering Service offers accommodation and support to young people by providing a short, structured and supported placement in a stable family environment as a positive alternative to being remanded in custody or in secure accommodation. The service has a proven track record in diverting vulnerable young people from crime, and from becoming more deeply entrenched in the criminal justice system. Against this background, Action for Children Scotland recommends that the Scottish Government and local authorities should give further consideration to the case for increasing the funding for, and availability of, remand foster placements to help reduce the number of young people in secure accommodation.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Scottish Centre for Crime and Justice Research

We are submitting this response as academics in law, criminology and philosophy, focusing on those aspects of the Bill where the evidence and approaches of these disciplines can offer insight. This response has been coordinated by the Scottish Centre for Crime and Justice Research, but has involved consultation and collaboration with other academic colleagues. We have commented on areas where we have knowledge and expertise but if time allowed would have covered more sections in greater depth. We would be happy to provide further evidence to the Committee if helpful.

We first present highlights summarising the main points of the commentary and organised by general topic. This is then followed by detailed comments on provisions in the Bill, section by section. Comments cover Parts 1, 2 and 3.

KEY POINTS

Sentencing

- Rational, principled and consistent sentencing provides the strongest ground for achieving penal aims of deterrence, rehabilitation and retribution, and so we support the Bill's aspiration to create such a framework in Scotland.
- Achieving this aspiration would be assisted by organising the list of sentencing purposes under an overarching value. Examples of substantive values that might guide efforts include enhancing safety and promoting justice. An example of a procedural value is parsimony which would ensure against non-proportional sentencing and excessive punishment.
- The Sentencing Council has the potential to make sentencing practice more consistent and just, but this depends on its powers and how it is organised. Evidence around the world shows that if organised and run well, sentencing councils bring improvements and control to punishment, but if organised badly they can be worse than doing nothing at all by locking in a trend of penal expansion.

Community Payback

- The ability to reduce unnecessary use of prison will be directly tied to the credibility and effectiveness of non-prison punishments. Hence, community payback, as an organising concept and a specific disposal, plays a crucial role in the achievement of the Government's plan to reform criminal justice.
- As a concept, the Bill should make the meaning of 'payback' more explicit to clarify that it can encompass reparative, rehabilitative and retributive aims. This will make it less susceptible to becoming an

ineffective and stigmatising means of seeking revenge or of shaming individuals.

- As a disposal, its effectiveness will be improved by acting on the research evidence about how to increase both public support for community penalties and behavioural change in offenders. The two key factors are **clarity** (as to what a community punishment is) and **speed** (with which the order is made and fulfilled). This evidence suggests careful consideration and some re-drafting is required of provisions on conditions (to prevent ‘condition loading’), progress reviews, the role of Responsible Officers, and continuing to have separate community orders (like RLOs and DTTOs).

Use of Imprisonment

- The Bill’s aspiration to reduce the use of prison for short periods of detention is in keeping with everything the international and UK research tells us about short stays in prison; they consistently fail to achieve penal aims of deterrence and rehabilitation, and are more likely to increase crime than reduce it. An emerging body of evidence tells us that the safety of communities is better secured by low prison populations than by high ones.
- Scotland’s use of prison is characterised by many people serving numerous short sentences over the course of their lifetimes. Changing this pattern will be important for community safety and justice goals, but also amounts to a major change in penal culture.
- We have concerns about the ability of the Bill’s provisions to secure this important change. Judges need only to provide a list of reasons to deviate from the presumption against short sentences, and this is likely to provide an insufficient stimulus to change current practices.

Custodial Sentences and Weapons Act

- There is no research to support the case that CSaW’s implementation in its original or revised forms would reduce crime by released prisoners or enhance community safety. Implementation is certain, however, to entail significant amounts of money, staff time and prison space.
- The Scottish Prisons Commission considered CSaW thoroughly after looking at all the evidence and recommended that if implemented, it should apply only to sentences of two years or more. There has been no explanation or evidence to support the subsequent provision that it would be implemented for sentences of one year or more.
- The potential of this provision to contribute to growing prison numbers and to absorb resources better spent in the community means it would be prudent to tie its implementation, again as recommended by the Scottish Prisons Commission, to implementation and evidence of achievement of the Bill’s other recommendations on sentencing and imprisonment.

Serious and Organised Crime

- We welcome the focus on the most serious and high level participants in organised crime networks.
- The definition of ‘serious organised crime’ is set too broadly, however, which could lead to both over- and under-enforcement problems. The proposed definition does not capture either what is serious or what is organised about serious organised crime but rather would apply to crime that is comparatively organised.
- By not clearly defining the target of the legislation, law enforcement may be encouraged to focus on easy wins, thus going after less serious or strategic targets.
- We are also concerned that the definition of ‘involvement in serious crime’ does not actually require involvement and therefore raises a risk of over-inclusiveness.

Bail

- Remand is a main driver of penal expansion in Scotland, and reducing its use is a prerequisite to tackling high prison populations generally.
- Unfortunately, the Bill’s targeting of breaches of bail and police undertakings risks adding to both remand and short sentence prison populations.
- These provisions may have emerged from a welcome interest in improving the credibility of the criminal justice system and respect for the law, but they are not based on the research evidence establishing that breaches of bail are not typically the result of wilful disrespect for law but of limiting economic circumstances and highly disorganised lives.

Children and Young People

- Increasing the age of criminal responsibility and repeal of unruly certificates bring Scotland into line with European countries with demonstrated commitment to human rights.
- This measure accords with the research we have on the harms and criminogenic effects of institutionalising young people but there is scope to raise this further and fully decriminalise prosecution of children under 12.

Sexual Offences

- There has long been a lack of clarity in the law regarding sexual offending, and the Bill goes some way to clarifying the issues.
- The provisions relating to possession of extreme pornography raise concerns about definitions. In particular, there needs to be specific and detailed definitions of ‘possession’ and ‘extreme’.
- As with the definitional problems of the serious organised crime provisions, the lack of specificity can lead to an unclear focus for enforcement.

PART 1: SENTENCING

In addition to comments made below, we are aware of and in broad agreement with the submissions of Professor Neil Hutton of the University of Strathclyde, and the Scottish Consortium on Crime and Criminal Justice.

Section 1 Purposes and principles of sentencing

S1 (1) We welcome the clarification offered concerning the purposes of sentencing. However, the Bill could go further than it does. For example, the Bill's provisions should make explicit that each of the stated purposes of sentencing should serve a larger purpose; i.e. the production of a more just and safer society for all of its citizens. This is important because it provides some basis on which to consider and determine the relationships between the purposes and principles listed at (a)-(e) and some means for choosing between them where they conflict. More generally, given the focus in other parts of this Bill on the importance of offenders' paying back to victims and communities, explicit reference to the role for restorative justice and restorative practices here would strengthen the concept of community payback.

We concur fully with Prof Hutton's argument that, given the very qualified claims that justice systems can make in terms of their capacities to reduce crime, to deter, to rehabilitate and to protect, the principle of doing justice should be paramount; in this respect the notion of 'limiting retributivism' to which Prof Hutton alludes is key. Whatever its form and intent, the measures imposed on the offender must never exceed that which is justified by their offence. It may be for this reason, that the Prisons Commission separated sentencing into two stages: the *level* of penalty would be set at stage 1, and the *form* of the penalty would be set at stage 2. The Bill lacks similar clarity about this process, and 'having regard' to seriousness (under subsection 3(a)) is neither a sufficiently strong statement of the proper limits of punishment nor much of a barrier to disproportionate sentencing practices.

A much stronger and more explicit commitment to the principle of parsimony in the punishment of offenders seems to us to be a necessary addition to this crucial section of the Bill. The deprivations of liberty inherent in punishment represent the state's most serious potential intrusions on the rights of its citizens. Though this may be a necessary evil, the recognition in liberal democracies that such intrusions are an evil entails a commitment to a parsimonious approach to punishment. This principle could be inserted between the current sections 1(1) and 1(2) and might be worded as follows:

'A court, in sentencing an offender in respect of an offence, must impose the least burdensome sentence that is consistent with the purposes of sentencing in section 1(1).'

S1 (2) The court should be required or encouraged to state which principle(s) are most important in any given sentence. Otherwise, this subsection simply provides a menu.

S1 (5) Subsection 1(5) under Part I lists a number of circumstances when the purposes and principles can be ignored, including when the person was under 18 at the time of the offence and where the penalty is fixed in law. These exclusions are unnecessary because the statement of sentence purposes should apply to the sentencing of young people being prosecuted through the adult criminal justice system as well as to fixed penalty punishments, which are, after all, motivated by particular penal aims.

Sections 2-13 The Scottish Sentencing Council

We are in full agreement with Prof Hutton's submission on these sections. In particular, we agree that comprehensive guidelines should be developed and published by the Council at its outset and not left to develop incrementally. The Bill's aspiration to reduce unnecessary use of prison can only achieve so much through provision of new sentences; it relies as much on the coordination of the judiciary. Given this, the organisation and authority of the Sentencing Council is crucial to the realisation of the aims expressed in Part One of the Bill.

S7 (2) The Prison Commission was explicit on the need for any Sentencing Council to prioritise the clarification of the importance of several of its recommendations – most notably those relating to the use of imprisonment as a sanction and, more specifically, the use of sentences of six months and less. As presently drafted, at subsection 7(2), the Bill is not sufficiently explicit on the key question of when it is justified (or unjustified) for a judge to impose custodial sentences in general and to impose short sentences in particular. Without such clarity the presumption against (short) custodial sentences is aspirational at best and meaningless at worst.

Section 14 Community Payback Orders

The term 'community payback', introduced in the Prison Commission's report, is a potentially useful one – but it carries some dangers too. The Commission was careful to define payback in constructive terms, perhaps being wary of developments in England and Wales where the same term has been used to refer to quite different developments that stress the visibly punishing aspects of community penalties rather than their positive potential. In order to avoid what some see as the punitive and vindictive connotations of the term 'payback', in our view the Bill would be enhanced by a more explicit adoption of the definition of the term provided by the Commission (Scottish Prison Commission 2008).

Such clarity would also help with a second problem which relates to public misunderstanding of the nature of payback. At present, the notion of offender's paying back in the community is most closely associated with community service. There is a risk that the reform proposed in the Bill might mislead the public into thinking that all community payback orders involve unpaid work whereas in fact many of them may not include such conditions.

A single community sentence has appeal in being able to communicate more effectively with sentencers and with the public. However, realisation of this goal will be undermined by the decision to retain as separate orders both DTTOs and RLOs. It is not clear why these specific community penalties should not be subsumed as particular conditions or combinations of conditions within the community payback order. We know from research on public perceptions of community sanctions that one factor explaining low public (and possibly also judicial) support for such sanctions is the lack of understanding about what a community punishment actually entails (Maruna and King 2008). Multiplicity in the types and combinations of community sanctions contributes to confusion.

S14 *Community Payback Orders (Section 227A(3) of 1995 Act)*

There is a danger of 'condition-loading', where judges offered a wide range of mix and match conditions for a generic community sentence tend to impose more conditions. The danger with this approach is that it may violate the principle of proportionality – exposing offenders to more onerous forms of payback than are merited by their crimes, thus potentially increasing the risks of default. For this reason, subsection 227A(3) should be amended to read:

'In imposing a community payback order, a court must not impose conditions which, taken together, constitute a more burdensome penalty than is warranted by the seriousness of the offence..'

S14 *Community Payback Order: Further Provision (section* 227B(5) *of 1995 Act)*

We welcome the provisions under S227B(5) to retain the principle of the necessity of the offender's consent to paying back in the community, although we note that in the Prison Commission's report, this principle was limited to the rehabilitative elements of paying back.

S14 *Community Payback Order: Responsible Officer (section* 227C(3) *of 1995 Act)*

We recognise the importance, as articulated in 227C(3), of the supervising officer's duty to (actively) promote compliance. In order to further reflect the constructive character of payback, however, we would suggest that the officer should also be obliged 'to provide such advice and assistance as may be required to support the offender's rehabilitation, where such support is necessary'. It may be that such a duty is particularly relevant where a supervision requirement is imposed. This builds on the growing research on desistance, showing that supportive activities have a powerful effect on a person's withdrawal from criminal activity (Scottish Prisons Commission 2008).

S14 *Fine Defaulters (section* S227M *of 1995 Act)*

We strongly support the provision requiring the court to use community payback as an alternative to custody for fine default.

S14 *Programme Requirement (section* 227P *of 1995 Act)*

Some reference should be made to the duty of the local authority in which the offender resides to ensure that programmes are in place for those sentenced to such requirements, or it should specify that such requirements can only be imposed where such provision exists. Otherwise there is a risk of offenders defaulting on court-imposed conditions through no fault of their own.

S14 *Periodic Review of Community Payback Orders (section* 227W *of 1995 Act)*

Under section 227W the provisions allow for the use of 'progress reviews'. However, the use of the progress review is optional rather than mandatory, and the functions appear to rest within existing court structures. In our view this represents a missed opportunity. The Prisons Commission, based on clear evidence, highlighted that because the business of desisting from crime (and complying with both community supervision and the law in general) is complex and challenging for offenders, the management of that process might be better remitted to a court in which specially trained judges and court social workers could better support it. In our view, removing that function from already busy generic criminal courts and placing it within a more specialised progress court made considerable sense and merits re-examination.

S14 *Breach of community payback order (section 227ZB of the 1995 Act)*

Given the increasing weight of evidence that the process of desistance from offending typically involves lapses and setbacks, and the related widespread recognition of the need to manage compliance realistically and constructively, there may be merit in amending 227ZB(5). We know from the experience of the drug courts in this and other jurisdictions that in many cases the mere fact of being held to account in court before a judge for non-compliance is enough in itself to secure future compliance. There would therefore be merit in inserting a new section 227ZB(5)a that allowed the courts to warn the offender but allow the order to continue un-amended. In line the principle of parsimony, this is the first option that is considered. Also, in line with that principle, the section option would be varying the order but allowing it continue (currently 227ZB(5)c); the third option might be imposing a fine but allowing the order to continue (currently 227ZB(5)a); the final option would be discharging the order and imposing a new sentence (currently 227ZB(5)b). This re-ordering of the section would send a clearer and stronger message to the courts about the importance of seeking to manage compliance constructively.

Section 16 Short periods of detention

We support this provision which is consistent with the Bill's general ambition to reduce the ineffective and costly use of prison for very short sentences.

Section 17 Presumption against short periods of detention or imprisonment

We strongly support the presumption against short periods of detention or imprisonment. The evidence is clear that short stays in prison are not effective for delivering programmes and facilitating behavioural change. It is also a very expensive way of punishing people for short periods of time, and limits the ability to direct resources more effectively. Evaluations of what works for offenders indicates very short sentences allow no opportunity for positive change while in prison and make it more likely the offender will have more, and more serious, problems within the criminal justice system and in the community (Maguire 1995, Gendreau 1999). Such sentences are also the key pressure towards overcrowding in Scotland (Scottish Prisons Commission 2008, Audit Scotland 2008).

It is difficult to know whether the Bill's provisions will realise the aims expressed in this section. A major concern is whether it is enough simply to require that a judge lists reasons in the record for allowing a six month or shorter sentence. It may be over optimistic to expect that having to make a list is an adequate mechanism for encouraging individual sentencers to move away from a deeply entrenched culture of short prison sentences. Nor is making a list much of a burden to discourage this practice, and in any case there are many ways to get around the requirement, for example by issuing a custodial sentence of seven months.

Section 18 Custodial Sentences and Weapons Act (CSaW)

We have great reservations about CSaW being implemented at all, and could only begin to consider support for it if the minimum sentence was raised to two years (as recommended by the Scottish Prisons Commission). The financial memorandum to the Bill notes that implementing the bill with the one-year floor as proposed would increase the cost of the criminal justice system by £45.75 million annually.[1] Implementing the bill with a two-year floor would reduce this by over £13 million annually.

It is not simply the enormous costs of implementation that raise concern, but also the minimal return likely to be gained from its application. We are aware of no research in Scotland or internationally which supports the case for blanket pre-release risk assessment policies. On the other hand, there is a substantial research literature on the limited reliability and constraints of risk assessment, and there is plausible evidence, as submitted by the various agencies during the original consideration of these provisions, that implementation would significantly increase prison populations, costs and associated workloads.

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[1] Financial Memorandum to the Criminal Justice & Licensing (Scotland) Bill 2009, pp. 123-4. The costs are indicative based on SPS prison population projections. They are a useful guide however for comparing the financial implications of implementing the bill at different minimum lengths of sentence.

The provisions of CSaW will tend to target less serious offenders, based on the shorter sentences they are serving, which reduces the capacity to focus on the most serious offenders. In this way, CSaW may have the effect of worsening current reoffending rates and community safety.

To limit the bill's potentially disastrous consequences on criminal justice services, we urge that legislators consider:

- Dropping this provision entirely from the bill, or at the very least raising the minimum sentence to which it applies to two years, recognising the lack of research evidence on the effectiveness for community safety of these kinds of measures; AND,

- Create statutory provision that its implementation can only proceed once there has been an observable trend in reduced use of prison for short sentence prisoners.

PART 2: CRIMINAL LAW

Section 25-28 Serious organised crime

We broadly welcome these provisions in so far as they attempt to get to 'backroom' players who have traditionally evaded law enforcement by distancing themselves from frontline criminality. However, the effectiveness and fairness of these provisions will depend on them being targeted appropriately at key specialists and nominals who are involved at the top end of the seriousness scale. **We are concerned that the definition of 'serious organised crime' is set too broadly and that we therefore run the risk of targeting the powers inappropriately and unjustly subjecting individuals to punishment. An equal danger would be that the broadness of the proposed powers discredits the legislation in the eyes of the public and the legal profession, leading to its under-utilisation.**

If these provisions are to be effective, and appropriately targeted, then it is important that this definition is clear and sufficiently precise. In this connection we want to raise a number of issues:

i) The definition of 'serious organised crime' sets a very low threshold for what might constitute serious organised crime. **Much of what would be captured by the definition given here is 'crime that is comparatively organised' *not* serious organised crime.** This over-inclusive definition could potentially inflate the impression that there is a lot of serious organised crime. There is no standard UK definition of organised crime but there are various informal working definitions in use. Whilst such definitions may be appropriate in the context of policing, it is not appropriate for a statutory definition. Given the lack of a standard definition it seems inadvisable to frame legislation that introduces one that is so over-inclusive.

ii) **The proposed definition does not capture either what is serious or what is organised about serious organised crime.** The definition of seriousness is both over- and under-inclusive. Many indictable offences may be committed for material benefit without being part of organised crime as it is conventionally understood; and serious crimes might be committed by or within a criminal organisation without the intention of securing a material benefit for any person. The definition of organised (‘involving two or more persons’) would again capture a large amount of ‘normal’ criminal activity, without specifically targeting organised crime.

iii) **It is not clear whether these new sections really add anything to existing offences such as conspiracy or incitement, or simply constitute a rather muddy overlap and ‘legislative creep’.** To the extent that, for example, incitement or conspiracy may already be prosecuted under the common law, new provisions are not required unless they are going to reach behaviour which is beyond the reach of the existing criminal law (e.g. those who distance themselves from frontline criminality or direct criminal enterprises). By defining serious organised crime so broadly there is too much overlap with the common law, so it is hard to see what is gained by the new offences, unless it is to allow target setting – but then this opens up the dangers alluded to above.

iv) We would argue that it would be more appropriate to adopt a ‘high end’ definition of seriousness that creates clear water between ‘everyday’ criminality and ‘serious organised crime’. **It would be preferable to reword the legislation to describe ‘involvement in the organisation of serious crime’.**

v) **The risk is that if organised crime is defined too widely this legislation will facilitate a repeat of what has happened in many areas of England and Wales under asset recovery legislation, where law enforcement in pursuit of asset recovery targets and cashback incentives have gone after easy wins, principally cash seizures from low level drug dealers.** The targeting of these powers should be strategically steered through existing arrangements for assessing the threat posed by organised crime groups and prioritising law enforcement action towards those groups ranked as representing the greatest threat. Any performance measurement of national agencies or individual forces should continue to focus on their overall effectiveness to disrupt these prioritised groups and the nominals within them (which may partly be achieved through the use of these legislative powers).

S25 **There is a mismatch here between the headnote (‘Involvement’) and the offence definition (‘a person who agrees to become involved’).** While involvement in serious organised crime may be a serious offence, agreement to become involved is not the same as involvement. These should be recognised as two different types and levels of offence. If the latter is to be criminalised at all, it would be more appropriate to make this a lesser offence than involvement (and with a much lower penalty), to deter those who are thinking about involvement but who might yet be dissuaded. To define the offence in terms of agreement, moreover, is very inchoate and the person may not yet have committed any directly criminal actions, or may indeed change their mind. The offence is very similar to common law conspiracy, and is open to the same sort of criticisms.

S26 This may be an appropriate aggravation to recognise in law, **but the broad definition of 'serious organised crime' means that the aggravation can be too easily applied or proved** – particularly given the proposal in s.26(4) to relax the requirement of corroboration in relation to proof of the aggravation. In fact, given the potential severity of the penalty it is not clear why this requirement is being relaxed, or that the relaxation is justified.

S27 We accept that there may be a problem in prosecuting individuals at the top of criminal networks who use others to commit criminal acts on their behalf (s.27(1) & (2)). **The definition of 'directing' in s.27(3) contains appropriate safeguards.** It is appropriate that some actions on the part of the accused person must be proven (though this may make it hard to prove the involvement of the 'high level' actors the provision is aimed at. It should also be clear that subsections a) to c) are cumulative i.e. that the Crown must prove a) that the person has done something, *and* b) that they intended this to persuade a person to commit an offence, *and* c) that they intended it to result in the commission of a crime or to enable the commission of a crime.

S28 **We have serious reservations about the provisions of this section, which seem unworkable and disproportionate.** We would argue that they are unworkable because **the requirement to report a suspicion is simply too broad and vague.** Many people may have a suspicion about the criminal activities of others but may be scared to report such suspicions to the police. Alternatively it is not obvious how clear or certain a suspicion should be before it gives rise to the duty to report. The approach taken here exposes people to the risk of prosecution. This risk may be limited to the extent that the section is aimed at those with specific relationships with professional criminals, however there may still be problems. It is not clear how close a 'close personal relationship' should be before it gives rise to the duty or what kind of material benefit should have been derived – or even if the person need be aware of the material benefit. In the case of professional relationships it may be more expedient to work with the various professional standards bodies to tighten up the existing codes on the reporting of suspicious client activity with resort to criminal law only as a last resort. **The section is disproportionate because the burden to report has a heavy penalty attached.** Either a person is complicit in some way, in which case they should be prosecuted as such, or they are not. If we must have failure to report provisions, they should be a much more minor offence.

Section 34 Extreme pornography

SCCJR generally welcomes the introduction of these provisions which formulate an offence of possession of extreme pornographic material.

The formulation of the s.34 offence of possession of extreme pornography avoids some of the inconsistencies contained in the offence legislated in the Criminal Justice and Immigration Act 2008 (s.63), while adopting a broadly similar legal regime.

We particularly welcome the extension of the definition of extreme pornography to cover images of rape and other non-consensual penetrative sexual activity. We also welcome the fact that Scotland has chosen not to follow the route adopted similar legislation in England & Wales, which makes a distinction between 'violent' rape and rape in general.

S34 (1) *Extreme Pornography (section 51 of 1982 Act)*

For reasons of clarity, we feel it would be better if the provisions were to clearly define the meaning of possession. Since, as is acknowledged in the policy memorandum, this is aimed at material produced and distributed in electronic form, it is important to be specific about what amounts to possession in these circumstances. Viewing an image online means that it is downloaded and (usually) stored on the hard drive of the computer of the viewer. Does possession extend to all images cached on the computer hard-drive? Would this require that the person have a subjective understanding that such images are stored? Should possession extend to cases where an individual has deleted the image, though it may still be recovered with specialist software (if the person possesses the requisite capability)? Alternatively is it intended that the possession should extend to all images stored on a computer, even if the accused person is unaware of this?

Will it cover those people who access pornography without downloading files? Although the provisions do not criminalise accidental or single viewing, should it not also cover repeated viewings of this type of material, whether or not the material was actually downloaded?

S34(2) *Extreme Pornography (section 51A of 1982 Act)*

Our concerns about the definition of 'extreme' are based on the following observations:

a) An act which threatens a person's life. This may include sado-masochistic activity such as asphyxiation, where the intention of those involved is not to threaten or endanger life. It may, on this basis, be too broad;

b) The term ‘severe injury’ is left undefined, and is accordingly vague.

Consideration should be given to amending it to:

> *‘an act which results, or threatens to result, in a person’s severe injury.’*

The use of ‘threatens to’ instead of ‘likely to’ would increase the proposal’s scope to cover all acts of rape which could all be said to threaten severe injury but may not result in severe injury.

Serious consideration should be given to extending the definition of extreme to include depictions of incest (which may not be covered by depictions of rape and non consensual penetrative sexual activity which fit the definition of obscene and pornographic).

As the Bill is currently written, to meet the requirement of ‘extreme’, the material in question must be explicit and realistic. The terms ‘explicit’ and ‘realistic’ require that the act depicted in the image must be clearly seen, lifelike and convincing and appear to a reasonable person to be real. It is not required that the act itself is real.

There is a missed opportunity in not including non-photographic representations of extreme acts. It means, for example, that the provisions as they stand will not cover depictions of extreme pornography on virtual worlds such as Second Life, where the pornography is violent, extreme and interactive, but where the images are not photographic.

S34(2)(2) *Extreme Pornography (section 51A of 1982 Act)*
In terms of the Act, extreme pornographic material must be all of the following:

(a) obscene
(b) pornographic
(c) extreme

It is not clear why images should need to be both obscene and pornographic. The second would surely include the first. Moreover, only the term ‘pornographic’ is defined in the Act (i.e. ‘if it is of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal’).

Presumably the intention is that the existing law will be followed on the meaning of ‘obscene’. There is no definition of obscene, but courts apply a common law test of whether the material is ‘calculated to deprave or corrupt persons open to depraving or corrupting'. The test of 'obscene' means that the material must be of such a nature that it would fall within the category of the material whose sale etc. is already prohibited under s51 of the 1982 Act, but given that this controls the sale and distribution (and visibility) of certain materials it is surely not relevant to the definition here.

S34 (2) *Extreme Pornography: Defences (section 51C of 1982 Act)*
It is a defence that the person did not keep the material for a unreasonable time, but this depends on the meaning of possession, which is not defined. **If the broad definition is followed (unknowingly storing), then this defence would become meaningless in many instances.**

PART 3: CRIMINAL PROCEDURE

Section 38 Prosecution of Children (section 41A of 1995 Act)

Currently, Scotland has one of the lowest ages (8 years) of criminal responsibility in Europe. The law as it currently stands allows children from the age of 8 to 16 to be prosecuted in the criminal justice system. This is considered by many to be too low and contrary to international standards. The Bill proposes to raise the age at which children can be prosecuted in the adult courts from eight to 12, whilst retaining the existing rule that children under 8 are presumed not to be guilty of any offence. **We generally welcome the Bill's intention to raise the age at which children can be prosecuted, although there is scope to raise it still further.**

The provisions in the Bill are an attempt to demonstrate adherence to international principles and standards and will bring Scots law more into line with jurisdictions across Europe. The UNCRC (1989) states that signatory states shall seek to promote "the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law." In 2007, the UN Committee monitoring compliance with the UNCRC published a General Comment that the minimum acceptable age at which children should be held accountable for their actions before full (adult) criminal justice proceedings should not be lower than twelve in any member state. The Beijing Rules - the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) – state that the age should not be too low, taking account of emotional, mental and intellectual maturity. They stress the well-being of the young person as paramount in decision-making as well as the importance of the independence of prosecutors in promoting diversion from criminal proceedings for those under 18 years. Their official commentary indicates that there should be a close relationship between the age of criminal responsibility and the ages at which young people acquire other civil and marital status. The Tokyo Rules (1990) set standards for non-custodial measures for young people, and; the Vienna Guidelines (1997) stress the rights of the child in criminal justice and endorse the development of child-focused youth justice.

The introduction of the restriction on prosecution of children under 12 implements the main recommendations of the Scottish Law

Commission's report (Report on Age of Criminal Responsibility 2002), yet falls short of the recommendation to abolish the existing conclusive presumption in relation to under 8 year olds. The age of criminal responsibility requires not to be set so low that children who do not have the necessary understandings are routinely criminalised. The Bill proposes that 8 years would be retained as the age below which children are incapable of committing crime; 12 would be introduced as the age below which children can no longer be prosecuted and 16 would remain as the (usual) age of automatic referral to the adult system. **The only difference, then, is the inability to prosecute those children aged eight, nine, ten and eleven.**

The provisions propose that, whatever the offence committed, a child under the age of 12 can only be dealt with by the Children's Hearings System (CHS), a more age-appropriate system. The CHS can, in principle, decriminalise young people whilst simultaneously dealing with their offences under compulsory measures. The CHS has a commitment to the paramountcy principle up to 16 years; thereafter young people aged 16 and 17 are routinely dealt with in the adult criminal justice system.

Currently, although Scots law allows for the prosecution of children under 12, no child can be prosecuted without the explicit guidance of the Lord Advocate, whose policy is not to prosecute children where it can be avoided. Yet, it is claimed that around 20 young people under the age of 13 have been prosecuted in criminal courts over the past five years (Whyte, 2009: 202). As long as Scots law allows for the prosecution of children under the age of 12, it will remain a possibility which will continue to contravene international standards.

The Bill would also allow samples (e.g. fingerprints, mouth swabs) obtained from children to be retained, in certain circumstances, where the offence ground is established at a Children's Hearing. Children aged eight and over could still be referred to the CHS on the offence ground. **The immunity from prosecution thus conferred is not quite the same as decriminalisation.**

Section 41 Breach of an undertaking

This creates a new offence of 'breach of an undertaking' for which it will be possible to receive a sentence of imprisonment.

We strongly object to Section 41 and believe it would be mistaken to think that it is a minor change which has the limited aim of providing a parallel offence to breach of bail. It requires much more careful scrutiny because it:

i) **Has not been exposed to a consultative process.** The Policy Memorandum to the Bill states incorrectly that this provision was included in proposals presented by the Revitalising Justice Report, and that no responses to this consultation were received. Revitalising Justice contains no reference to criminalising breaches of undertakings, and the Bill itself appears to be the first time this proposal appears.

ii) **Removes the rationale for having a system of undertaking in the first place.** Police liberation on an undertaking allows for the more efficient use of criminal justice time and resources by allowing police to divert less serious incidents out of the formal bail process. Creating the offence of breach of an undertaking makes it more formal, providing for more serious consequences, thus eliminating the conceptual distinction between bail and undertaking approaches. If consistency is the most important value, it would be more consistent to eliminate undertakings and require all arrests to be processed through the standard bail procedure. This implication emphasises the need of also valuing parsimony and proportionality.

iii) **Has a dangerous and costly net-widening potential**. The provision may have been motivated by a desire to keep arrestees out of the bail (and remand) system, but by hardening what happens at the softer end of the criminal justice system is 'uptariffing' arrestees and increasing the chances of their future long-term criminal justice entrenchment by creating more ways to lengthen criminal histories. This will make it more likely they will be treated harshly in future contacts with the system, being more likely to be remanded into custody and to receive custodial sentences. The more contact a person has with the criminal justice system, the more likely they are to have long-term contact with the system. As we have learned with Scotland's current excessive use of short sentences, this carries major costs to Government and taxpayers, in addition to its harmful effects on integrated and safe communities.

iv) **Is not supported by the evidence of what we know works**. Government commissioned research on the use of powers to aggravate sentences for those whose offences were committed on bail shows some troubling results. Brown et al. (2004) found that this option was taken up in widely inconsistent ways by different courts and even by different judges in the same court, and was never used for sentences of probation (non-custodial sentences being most likely for the kinds of offences for which a suspect is liberated on an undertaking).

v) **Undermines the Bill's overall aim of reducing the use of prison for people serving very short sentences**. The permissibility of a sentence of imprisonment (inserted section 22ZA(2)(b)) for a person who has breached an undertaking directly goes against the Bill's larger aspiration to reduce the use of short sentences in Scotland. How would the enforcement of this provision fit with the presumption against short sentences? Allowing short sentences of imprisonment for people convicted of this offence would create yet another exception to the rule, undermining the vision to end Scotland's use of prison for less serious offenders.

Section 46 Additional charge where bail etc. breached

While the section deals with a technical issue, allowing for the streamlined amendment of complaints to include a failure to appear, it goes to the larger issue of policing breaches of bail in ways that increase the numbers of people falling into the criminal justice system's 'nets'. Breach of bail has become the central focus for those concerned about respect for criminal justice agencies. While further offending committed while on bail now can result in an aggravated offence charge, 'technical' violations of bail conditions can be prosecuted as separate offences. Along with Section 41, we urge careful consideration of *how* such provisions might be expected to (a) improve compliance with bail conditions, or (b) increase respect by accused for the courts and other justice agencies.

There is no research suggesting that either of these aims has or is likely to be achieved in practice. The Government's own commissioned research (Brown et al. 2004) found highly inconsistent use of the power to aggravate offences committed while on bail, showing ambivalence among those whose position the law is designed to support.

Of equal concern is the growing number of ways that there is criminalisation by status exemplified by breach offences: in other words, we are seeing the criminalisation of behaviour based primarily on *who* you are, rather than *what* you do. An accused can go to prison for failing to make a telephone call, a behaviour which is perfectly legal for anyone else.

The Bill covers a diverse range of issues, and in the technical detail of sections such as this, we observe an emerging patchiness where the overarching ambition to reform Scotland's criminal justice system and link it more explicitly to a notion of a just society is being subtly undermined by a range of provisions that ostensibly are meant to be 'tidying' changes to the law.

Section 47 Remand and committal of children and young persons

These provisions will end the system of 'unruly certificates' under which accused children can be kept in adult prisons. The number of 'unruly certificates' received have been increasing in recent years (e.g. in 2006/07 there were 33 compared with 28 in 2005/06). In 2006/07, 15 year olds made up the majority of children held on unruly certificates. But close attention needs to be paid to the potential implications of these changes and, in particular the provision of suitable accommodation for children within local authorities. However, **we fully welcome the policy objectives of trying to ensure that children do not suffer the adverse effects of being remanded in adult prisons.** There is strong evidence that young people who enter the adult criminal justice system at an early stage get sucked into a repeat cycle of conviction and quickly become 'uptariffed' by sentencers who get frustrated by the lack of alternative options (Edinburgh Study of Youth Transitions and Crime 2009). In the most recent Edinburgh Study findings, it was found that young people who were convicted to a period of detention below the age of 22 had been sentenced to – on average – 4.4 separate periods of custody each (with one individual serving 21 separate custodial sentences).

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Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Scottish Crime and Drug Enforcement Agency

I refer to correspondence dated 13 March 2009 in connection with the above subject from Mr Andrew Proudfoot, Scottish Parliament, Justice Committee and would make the following comments. My observations are restricted to those parts of the Bill which I consider to have the most significant relevance to the SCDEA and for ease of reference those comments are outlined below. I am aware that the Association of Chief Police Officers in Scotland (ACPOS) have also been invited to make comment in respect of the Bill's provisions.

You may also wish to be aware that previous submissions, dated 12 February 2009 in connection with the provisions of the Bill, relating to RIPA and RIP(S)A, was forwarded to your colleague Mr Graham Waugh. A copy of that correspondence is attached for your consideration.

Part 1 – Sentencing – Drug Treatment requirement – amendments to the Criminal Procedure (Scotland) Act 1995 section 227

Part 1 – Sentencing – Alcohol Treatment requirement – amendments to Criminal Procedure (Scotland) Act 1995 section 227

The provisions proposed in connection with both Drug Treatment and Alcohol Treatment are supported and we have no further comment to make.

Part 2 – Criminal Law – Serious Organised Crime – sections 25 – 28

The introduction of the offences in connection with serious organised crime, under Part 2 of the Bill, are welcomed, however the following observations in regards to each of the individual sections is intended to seek clarity on the intentions outlined.

Section 25 (1) introduces the offence that 'A person who agrees with at least one other person to become involved in serious organised crime commits an offence'. It is unclear as to how such an agreement between two or more people will be proved to the satisfaction of the court.

Guidance on the standard of evidence or information required establishing such an agreement, including what will in itself provide evidence of or at least an inference of agreement between the accused to be involved in serious organised crime, would be welcomed.

Were an accused to state, in defence of their activity that their 'agreement' was secured under duress or coercion then this would provide an opportunity for the offence to be incomplete, even where such duress or coercion had not in actual fact occurred.

Where an accused's actions provide evidence of complicity in the commission of a serious offence this factor should be taken into account when establishing the extent of 'agreement' between the accused and thereby refuting any possible defence. Perhaps the word 'agrees' is too limiting when establishing the intended conduct of the accused and should be reconsidered with perhaps a phrase such as '…allows themselves to become involved in…' would be more appropriate.

The subsection should also perhaps make clear whether or not it is a necessary element of the offence that at least two persons need to be identified as parties to the agreement before the offence itself is complete. What, for instance, will constitute 'involvement' and will the extent of that 'involvement' have a bearing on whether an accused is proceeded against on indictment or on summary procedure?

Whilst it may be possible for evidence relating to the lifestyle of one or more individuals to be presented to show that an accused's standard of living is not commensurate with their established legitimate income, this in itself may be insufficient to establish involvement in serious organised crime, but should be a contributing factor to be considered when examination of the accused's activities is undertaken.

Section 25(2) introduces definitions for the terms 'serious organised crime' and 'serious offence' Section 25(2) (a) provides that one of two conditions must be met before a serious offence is committed. It would be preferable if the term 'serious offence' applied to any crime capable of being indicted which would enable instances of minor crime, motivated by serious organised crime, to be dealt with more effectively and provide the mechanisms through which those involved in pursuing their activity through acts of violence and intimidation can be brought to justice.

Section 25(2) (b) introduces the reference to '…an act of serious violence…' It is unclear what would constitute an act of serious violence. As alluded to earlier those involved in organised crime may achieve their objectives through fear and intimidation without necessarily resorting to serious violence, albeit it is acknowledged that violence may well occur. The use of the term appears to be unnecessarily restrictive and should be widened to include any behaviour which is used to further the activity of organised crime.

Section 26 introduces offences aggravated by connection with serious organised crime and these provisions are generally welcomed.

Section 27 – **28** introduce offences of both directing serious organised crime (section 27) and failing to report serious organised crime (section 28). Whilst acknowledging the privileges of client confidentiality and the right of a suspect to seek legal advice when potentially facing charges connected to serious organised crime, it appears that the offences created under section 1 subsections (1) and (2), are ineffective in those circumstances where an organised crime group employs the services of a solicitor or other legal adviser to further its own criminal activity or indeed in some other way attempt to legitimise its activity through legal instruments. By virtue of the defence afforded under subsections (4) and / or (5) a legal adviser could continuously evade prosecution.

It would be of greater effect if this subsection also contained provision to make it an offence on the part of the legal adviser to withhold information of a type that would reasonably cause the legal adviser to suspect that the provision of the information or advice was to enable an individual or group to evade detection from committing a serious offence or to conceal their involvement in serious organised crime.

This subsection should also make it clear that to aid or abet the commission of serious organised crime would be an indictable offence, punishable by a significant period of imprisonment.

It is recognised that the provisions provide for the evidence of single witnesses (or equivalent) to be taken into account collectively to help establish a prima facie case e.g. evidence against an accused spread across violence, drug trafficking, money laundering, etc, albeit insufficient to secure a conviction for any individual component crime may be sufficient to prove the new offences and this is welcomed.

In particular, as greater understanding of the scale and extent of serious organised crime is achieved through the Scottish Serious Organised Crime Mapping Project these provisions would have most impact if they were capable of being applied retrospectively in a similar fashion to provisions under the Proceeds of Crime Act 2002, albeit it would be entirely appropriate that a limit on how far, in retrospect, such offences would be considered, would apply.

Taking into account the need for reasonableness and proportionality, the legislation would be much more impactive if it empowered investigators to identify and consider retrospective evidence, otherwise, we will need to watch and wait for the criminals to reoffend

Part 2 – Criminal Law – Articles Banned in Prison – section 29

This provision is fully supported and the classification of mobile phones as banned articles within the prison environment is acknowledged as a very positive step against those who continue to be criminally active whilst serving a custodial sentence or on remand.

Part 2 – Criminal Law – Indecent Images of Children – sections 33 – 34

Members of the SCDEA **E** Crime Unit have had the opportunity to contribute to earlier debate on the provisions proposed under sections 33 – 34 of the Bill. Section 34 inserts into the Civic Government (Scotland) Act 1982 sections 51A, 51B and 51C which relate to Extreme Pornography and the offence of possession of extreme pornography.

The definition of an 'extreme image' presents practical difficulties. The use of the terminology "depicts, in an explicit and realistic way" would seem to include all images where such acts are depicted but are subsequently shown to have been staged or acted out. For example a realistic depiction of a rape or sexual murder, which is undoubtedly pornographic but where the "victim" is shown to have suffered no harm and to have been a willing participant in actions depicted, would appear to be included in the definition.

Thus for a forensic examiner or investigating officer the question is not whether the acts depicted, actually resulted in any physical harm to any individual, or whether rape, sexual activity with a corpse or bestiality has actually taken place, but whether the depiction is pornographic, explicit and realistic.

Furthermore, and again from a practical point of view, it is easier to see how such determinations may be possible from viewing moving images but it would be far more difficult and perhaps impossible in some cases, to reach competent conclusions based on this legislation where single images of the relevant activities are depicted.

Finally, the effect upon officers and professionals who are required to view indecent material involving children is starting to be documented and understood. Staff welfare measures are in place but the effect on staff having to view, what are, by definition, explicit extreme pornographic images can only be estimated, and perhaps early discussions with and involvement of relevant health professionals during such enquiries with a view to mitigating potential problems in this area should be catered for within the legislation.

In addition there may be too many opportunities for uncertainty as to whether or not a particular image may fall into the definition, given both the nature of the offence and the potential defences available under sections 51B and 51C.

The inclusion of a 'tracing' of a photograph or pseudo in the definition of an indecent photograph is a reasonable extension to existing legislation and assists in clarifying previous confusion around the definition of a pseudo-photograph.

Part 2 – Criminal Law – People Trafficking – section 35

The proposed amendments to the Criminal Justice (Scotland) Act 2003 and the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, as introduced by Section 35, are seen as very positive measures which strengthen the existing provisions and are welcomed.

Part 3 – Criminal procedure – Disclosure – section 52

Comments in regard to the disclosure generally are outlined later in this response.

Part 4 – Evidence – Witness Anonymity orders – section 66

Section 66 introduces into the Criminal Procedure (Scotland) Act 1995, witness anonymity orders under section 271N – 271Y. These provisions are generally welcomed The ability to protect the identity of witnesses who play a key role in the administration of justice, from both ends of the spectrum whether it involves undercover police officers or general members of the public, helps to provide an increased confidence in the justice system and foster public reassurance that there is a safer and stronger Scotland.

However there are a number of issues associated with these provisions which cause concern and are highlighted below for further consideration.

Section 271N Witness anonymity orders

The introduction of witness anonymity orders is supported however it would appear that where the court have considered an appropriate application (section 271P), which satisfies the conditions for making an order (section 271Q), the terms of section 271N subsection (5) could potentially expose a witness, who satisfies the foregoing criteria, but who stands before a jury constituted by local residents to be identified because in respect of section 271N the court is not authorised to require that the witness is screened from the jury or indeed an interpreter. This is unlikely to ensure that the witness is sufficiently satisfied that their identity will not be revealed either during the trial or at a later stage and may defeat the object of seeking the order in the first place.

Under subsection (5) (a) (i) the witness may be seen by ‘the judge or other members of the court’. This presumably will include the defence agent representing the accused and whilst it is recognised that in the majority of occasions this would not in itself present any issue, there may be occasions where the very fact that the witness can be identified by the legal team defending the accused, may compromise the safety of the witness and necessary provision requires to be taken of such potential. Furthermore there appear to be no provision for the protection of the witness from an accused who conducts his or her own defence.

It would be preferable that the section stipulate that where the court, having considered the application and granted the order, ensures that the witness benefits from the facility of giving evidence from within a screened area, perhaps visible only to the trial judge.

Section 271Q Conditions for making orders

This section specifies the conditions which must be present before the court may consider making witness anonymity order. The conditions are outlined in subsections (3) to (6) with further matters which may be taken into account by the court outlined in subsection (7).

It appears that **all the conditions** must be met before the court may give the application consideration. Furthermore the court is entitled to take Relevant Considerations, as outlined in section 271R into account. Is it the case therefore, that if any or part of a condition is not met, the fact that the remaining conditions are met would be irrelevant, by virtue of the wording of section 271Q (2)? If this is the case then it may have significant repercussions for the Crown, in some cases to proceed.

Furthermore the Bill states that the court may make an order only if it is satisfied that Conditions A to D are met. Condition D states that

> (a) the witness would not testify if the proposed order were not made,

or

> (b) there would be real harm to the public interest if the witness were to testify without the proposed order being made.

It would appear however, from the way in which this condition is framed, that it may present a barrier to those willing witnesses who may be denied anonymity only because they are willing to testify. The following scenario is presented by way of an example.

A member of the public, who has no connection to the crime or accused, observes the commission of a serious crime. This crime is committed by a known member of an Organised Crime Group. The witness however, is prepared to testify but given the previous knowledge of the suspect or those with whom the suspect is criminally connected, the police are of the opinion that it would be in the interests of the safety of the witness that their identity was concealed to the suspect.

It would appear that an application for a witness anonymity order would be unavailable to the police or the Crown because of the wording of this condition. The only avenue available may be for such a witness to go into Level 1 protection. This leads to their complete relocation, change of job, minimal family contact and severing of ties with friends. Such a restriction may ultimately lose the cooperation of the witness, unduly influence the standard of the evidence subsequently presented to the court and ultimately lead to the ends of justice being defeated.

In such circumstances it is submitted that there may be a disproportionate effect on the witness's Article 8 rights and that their interests could be better served by anonymity? Therefore, is the condition outlined at paragraph (a) too high a test to be satisfied for the order to be granted?

In terms of paragraph (b), it is unclear what would be considered '***real harm to the public interest***' and would the circumstances outlined above, where a willing witness is not afforded anonymity in the appropriate circumstances, potentially lead to such real harm occurring.

Under the provisions of **section 271Q (7),** the court in determining whether the measures to be specified in the order are necessary for the purpose mentioned in subsection (3)(a), the court must have regard in particular to any **reasonable fear** on the part of the witness—

(a) that the witness or another person would suffer death or injury, or
(b) that there would be serious damage to property,

What may be a reasonable fear on the part of one witness may not be on the part of another witness in the same circumstances therefore without any definition of what may be considered reasonable there may be considerable differences applied by the courts.

The reported case **R (A) others v Lord Saville of Newdigate (Widgery Soldiers) 2002/WLR/1249, 1261** reflected that the courts should consider the subjective fears of the witness balanced with the objective assessment of the threat. Subsequent decisions have also reflected on the courts responsibility to consider the potential effect on the witness's health. Such issues have to be balanced with the level of threat; this threat has to approach the threshold of impacting on witness's rights under Article 2 of the European Convention on Human Rights[1]

Consequently clarification and guidance on what is 'reasonable' would be valuable. Whilst it is recognised that decisions of the courts in England and Wales may only be persuasive and therefore not binding on Scottish courts, they may provide a suitable point from which appropriate guidance could be provided to enable relevant information to be provided for the court's consideration.

Section 271Q (7) (b) requires the court to have regard to any reasonable fear on the part of the witness that there may be '…serious damage to property' if the witness were identified.

Whilst the rationale for inclusion of this subsection is understood it is more likely that the courts would consider the potential impact on an accused's rights under Article 6 in granting an witness anonymity order and where the potential justification for granting the order may rest on the witness's reasonable fear of serious damage to property (his or anyone else's) it is likely that the court would favour the accused right to a fair trial over the likely damage to property.

Section 271R Relevant Considerations

Subsection 2(f) provides that the court must have regard to whether it would be reasonably practicable to protect the witness's identity by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court.

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms http://conventions.coe.int/treaty/en/Treaties/Html/005.htm

This would apply to Level 1 protection and it is submitted that the considerations outlined under 271Q can be equally applied.

A concern would have to be that the courts consider that witness anonymity is the final option and only contemplated where all others have been exhausted.

In the example given above, the witness's Article 8 rights would need to be considered with equal weight to the accused's rights under Article 6. If this was favourably assessed by the courts, anonymity would prevent an entire family being relocated.

In the 6 month trial of the emergency legislation in England and Wales 346 witnesses from 137 cases were referred to the Crown Prosecution Service (CPS) by the police for consideration of witness anonymity orders.

The CPS subsequently applied for orders for 135 witnesses of which 129 were granted with only 6 refused. Such figures would tend to support the genuine need for the legislation.

The concept of Investigation Anonymity Orders is also worthy of consideration due to the growing intrusive nature of journalism serving the public's insatiable appetite for "gangster" stories. In "gangland" murders involving Organised Crime Groups (OCG's) witnesses can often be exposed through the efforts of investigative journalists. Such reporting can act as a strong deterrent for potential witnesses who would otherwise engage with the police. If an Investigative Anonymity Order was put in place this would safeguard the interests of witnesses prior to proceedings becoming "live."

A parallel can be drawn with the provisions of s 86 of Serious Organised Crime and Policing Act 2005, which makes a specific offence of revealing details of a witness involved in a witness protection programme

Part 5 – Criminal Justice – Part 2A – Data Matching – section 26B + C (RIPA provisions)

The provisions outlined in this part of the Bill are fully supported and we have no further comment to make

Part 5 – Criminal Justice – Grant of authorisations for directed and intrusive surveillance – sections 77 - 79

The provisions of the Bill outlined within sections 77 – 79 are acknowledged as meeting the needs of the SCDEA in respect of authorising activity within joint operations in Scotland and are welcomed. In affording the Deputy Director General the same level of authority as that currently held by the Director General with regard to applications made under Part III of the Police Act 1997 and Intrusive Surveillance within RIP(S)A, the provisions recognise the importance of the need for resilience at Senior Authorising Officer level within the SCDEA and are welcomed.

Part 5 Criminal Justice – Sharing information with anti-fraud organisations - Section 71 and 83

The provisions outlined in Section 71 amend the Serious Crime Act 2007 sections 68, 69 and 71 which had previously led to Scottish specific legislation being outwith the scope of the 2007 Act. These amendments are welcomed.

Section 83 addresses the issue of providing clarity as to who can actually apply for a Financial Reporting Order. In the original legislation, this was silent which caused some confusion as to whether the prosecutor could make a request, or if it had to come from the Court. This amendment is fully supported.

Part 6 – Disclosure – sections 85 – 116 and Schedule 3

The introduction of the provisions relating to disclosure present some significant challenges for the SCDEA and the wider Scottish police service.

Following Lord Coulsfield's recommendations contained in his report 'Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland (2007)[2], ACPOS Crime Business Area established a National Disclosure Steering Group (NDSG).

The steering group, comprising representatives of the Scottish police forces, Crown Office and Procurator Fiscal's Service (COPFS), Her Majesty's Revenue and Customs (HMRC), the Serious Organised Crime Agency (SOCA) and Scottish Government was established to progress those recommendations including creation of a manual of guidance regarding disclosure.

In relation to criminal investigations the disclosure of relevant material to COPFS will be implemented in advance of the introduction of the legislation itself. The SCDEA, in partnership with COPFS has already begun to identify resources to lead on matters such as compliance and training.

Whilst it is acknowledged that until the legislation is completely introduced the full impact is difficult to quantify, it is of serious concern that the demand brought about by the provisions will put a significant strain on the already stretched resources of the SCDEA.

An initial assessment of the number of persons who would perform the role of Revelation/Disclosure Officer was set at 10. This would provide a spread of experience and support to the various business units across geographic locations within the SCDEA. Preferably this role would be performed by suitably trained members of police staff, as this would have a cost saving when compared to the employment of Police Officers. However, from further research with similar law enforcement partners, such as SOCA and given the complexity and prolonged nature of SCDEA investigations, where large enquiries would require more than 1 Disclosure Officer for resilience purposes, it is considered that as many as 15 persons may be required to fulfil organisational legislative requirements.

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[2] www.scotland.gov.uk/Publications/2007/09/11092728/37

Were it necessary to fund police officers to fulfil this requirement it is estimated that annual costs would amount to approximately £975,000 (based on average annual on costs of £65,000 per officer), or if police staff were to be employed to fulfil the role then the indicative annual costs would amount to £525,000, based upon average annual on cost of £35,000 per person).

Either way it is likely that these resources would need to be found from within the existing establishment and budget which would have a detrimental impact upon front line operational activity.

Gordon Meldrum
Deputy Chief Constable
Director General

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Her Majesty's Revenue and Customs

I write on behalf of Her Majesty's Revenue and Customs (HMRC) to offer our views on the stated purposes of the Criminal Justice & Licensing (Scotland) Bill and on the extent to which improvements can be expected from the Bill's proposed measures.

Many of the provisions, in streamlining criminal procedure or improving the criminal justice system generally, will offer benefits to HMRC law enforcement.

Two parts of the Bill will impact most directly on HMRC: Part 2, Serious and Organised Crime and Part 6, Disclosure. Below, we draw your attention to the specific issues in respect of which HMRC Criminal Investigation wish to comment.

Part 2 – Serious Organised Crime

We welcome these provisions which will enhance HMRC's ability to target serious organised criminals. We are satisfied that the definition of "serious crime" includes the principal types of offending with which HMRC is concerned in relation to serious organised crime.

We note that clause 28(7) has not extended the definition of "constable" in clause 28(3) to an officer of HMRC where the serious organised crime concerned relates to a matter in respect of which HMRC has functions. We think it should, as the obvious route for reporting tax-related offending in particular would be to HMRC directly. It would seem to us to be wrong in such cases for a person to be criminalised for reporting to HMRC instead of the police.

Part 6 – Disclosure

We welcome the creation of a statutory framework for disclosure. Disclosure can be a challenging issue for HMRC because of the size and complexity of many of the criminal cases we deal with, as well as the size and variety of functions HMRC performs. We believe a statutory scheme will lend clarity and focus to this complex area of our duties.

We note that the requirement to submit schedules will extend to HMRC only when the Scottish Ministers so prescribe in terms of clause 86(9)(b). Likewise, the code of practice to be issued by the Lord Advocate in terms of clause 114 would require to be applied specifically to HMRC. Provided HMRC can been allowed to contribute meaningfully to the development of the code of practice, and that full account is taken of any concerns and comments HMRC raises during the drafting process, we would not anticipate any difficulty in HMRC agreeing to have regard to the code.

We consider that there could be advantage to including the requirement to submit schedules in the code of practice rather than in primary legislation, as currently proposed. This would allow greater flexibility by enabling the Lord Advocate to respond quickly to changing requirements and circumstances.

From HMRC's perspective the distinction drawn in the Bill between "sensitive" and "highly sensitive" for the purposes of schedule preparation is neither necessary nor helpful. However, if the distinction is to remain, we note that the Bill does not define what is meant by 'highly sensitive' in clause 86(6). We believe this risks confusion and inconsistent application.

We hope this is helpful. HMRC would like to contribute to the progression of the Bill and would welcome the opportunity to remain engaged in consultation as the Bill advances.

Chris Harrison
Deputy Director
Criminal Investigation Scotland & East

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Renfrewshire Council

I refer to your letter of 2 April 2009 enclosing a revised call for written evidence in relation to the above Bill and would now provide the following response on behalf of Renfrewshire Council.

I would confirm that the comments are submitted primarily in relation to those aspects of the Bill relating to activities licensed under the Civic Government (Scotland) Act 1982. We offer no comment as regards the criminal provisions of the Bill.

In relation to Part 9 of the Bill which deals with liquor licensing, we would offer the view that the provisions set out in the Bill reflect a number of issues identified as requiring attention during the transitional period of operation of the Licensing (Scotland) Act 2005 and the proposals contained within the Bill for amending the provisions of the said Act will assist with addressing those issues.

As indicated previously, our particular comments are in relation to those provisions relating to the Civic Government (Scotland) Act 1982. In general we welcome these provisions and confirm that we support the modernising of the terms if the Act which have been recognised by local authorities as requiring updating since completion of the COSLA Review of Civic Government licensing several years ago. We do consider that the widening of specific provisions of the Act to increase the number of persons/organisations requiring public entertainment, late hours catering and market operators operators licenses will require, in particular, an increase in the enforcement activity carried out by councils as licensing authorities. This will accordingly impact upon already limited operational resources and cognisance of this should be taken by the Committee.

Finally, we would also draw attention to the requirements of the EU Service Directive which we understand will have a direct impact upon Civic Government licensing regimes in Scotland. A specific requirement of the Directive is that applications must be able to be completed and submitted electronically to licensing authorities. We would therefore specifically request that the procedural provisions of the Civic Government (Scotland) Act 1982 be amended to allow for the completion and submission of applications by electronic transmission.

Head of Legal Services

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from North Ayrshire Council

My comments on the effect of the proposed amendments are as follows:

S.121	a good proposal – this removes the automatic grant of a licence with no conditions to an applicant if a decision to grant/refuse has not been made within the permitted time.
S.122	does not affect local authorities.
S.123	This relates to licensing of metal dealers – the local authority has to determine the sum (if any) when an exemption warrant is to be granted (would need to be decided by Committee, but no guidance issued re criteria to be considered).
S.124	a good proposal – clarifies a grey area of law – applicants for taxi/private hire driver licences must hold a driving licence for the <u>whole</u> period of 12 months prior to the application being submitted.
S. 125	will have major effect if agreed – will mean that all markets/car boot sales where pitches are sold/leased will require to be licensed (includes events like church fairs, charity fundraisers which do not require licences at present).
S. 126	will have major effect if agreed – will mean that all events where entertainment is being provided (free or at a cost) will require to be licensed. At present only events “on payment of money or money`s worth” require to be licensed, so Marymass, and other events such as free fireworks displays, etc will require to be licensed.
S. 127	This relates to late Hours Catering – will have major effect if agreed. Definition of “food” to be amended. Will increase workload of Environmental Health Department. Any premises open after 11pm, where food, sweets, crisps, lemonade etc are sold or provided will require to be licensed (includes 24 hour supermarkets, petrol filling stations, etc.).
S. 128	a good proposal to standardise time limits for objections and notice of hearings.

Notes on Criminal Justice and Licensing (Scotland) Bill 2009 (as introduced)

Part 9 (Alcohol Licensing [129-139]) and Schedule 4 (Further modifications of 2005 Act)

[130(2)] is a good amendment - the existing procedure is sufficient, in that it informs interested parties that an Application has been made, leaving it to them to attend the Board office and ask to view the documents.

[131] welcome change.

[132] both the existing enactment and the proposed amendment do not address fundamental flaws of Anti-Social Behaviour Reports.

(a) The Board needs to be able to assess the weight to be given to the ASB report. It therefore needs, for each incident, details of the incident, its date and time, and details of any prosecution or other action, including the name and address of any person proceeded against and the eventual disposal.

At present, if the Police give an ASB report at all (and in NA, this has only been rare, in response to a request by the Clerk, as opposed to an initiative taken by the Police) the ASB report consists of a statement that in the previous year there were X assaults, Y vandalism offences etc. in or within a specified distance of the Premises.

(i) any incident outside Premises is of doubtful relevance. How can the Board know that the incident has any relevance to how these Premises are run? It would be unremarkable to record numerous crimes in a busy town centre, but that does not indicate that they are attributable to any particular establishment. There might be two premises in close proximity: one is well-run, while the other is not. A simple 'vicinity' report would risk tarring the innocent with the same brush;

(ii) an incident recorded in an ASB report might have nothing at all to do with the Premises, e.g. an assault by A on B in the street in the 'vicinity', where neither A nor B have recently been customers, or an incident in a nearby dwelling-house (since off-sales might well be in densely-populated residential areas, the value of 'vicinity' information is doubtful). Say a person is drunk and not able to care for himself or a child, and thus commits an offence under [50] Civic Government (Scotland) Act 1982 - why should this offence be relevant just because he happened to be 'near' premises when stopped by Police? Suppose a responsible manager ejects a drunk person and calls the Police, who arrive while the person is nearby - is the manager to be criticised, whereas if he had been less diligent the Police might well never have known and the ASB Report would be clear?

(iii) even offences within Premises do not necessarily show fault on the part of the Premises Manager. An incident may happen within well-run

Premises and the Manager might act promptly to eject the antagonists and call the Police. Is he to be blamed when the incident, which he did not cause, appears on Police statistics? Would he be better advised to follow the pattern of his less diligent neighbour, and neither intervene in the incident nor call the Police? If an 'agent' buys drink for an under-18 at a bar, and commits an offence there, should even the blameless licensee answer for it? Why should these offences by third parties be relevant if there was no prosecution of the licensee or a 'due diligence' defence either succeeded or in fact was never needed because the Police recognised that there was no case against the Premises?

Since the ASB report does not specify the date, time and place of the incident, the Applicant may be unable to ascertain whether the incident was relevant - possibly the use of the ASB Report in the current form permits a 'natural justice' appeal. Contrast the form with the Suspension Report under [31] 1976, which typically specifies each incident in detail; if the Applicant is faced with a ASB Report which says simply 'there were 50 incidents at or near the premises in 12 months', how can he begin to investigate and prepare a response?

(b) The definition of “relevant period” should be altered to one year beginning with the date the Police were notified of the Application. In practice ASB reports do not identify the date of receipt of the request although the existing provision has been pointed out.

[133] No comment.

[134] The power to deal with Occasional Licences quickly is welcome, but the amendment is rendered unworkable by the addition of [134(5)] - neither the Clerk nor any member of staff, even if legally-qualified, is empowered to determine applications quickly. Applications for funerals may well arise at short notice, when it is impracticable to convene the full Board in time. It is pointless allowing the Board to determine the application 'quickly' if the event which was to be catered for has already passed. It is suggested that it should be sufficient for a Board to authorise an officer to exercise delegated powers to determine any Application for OL whether it is 'quick' or not.

[135] No comment.

Suggested amendments

1. Copying

Notwithstanding anything in copyright law, a Licensing Board may:

(a) make available copies of the Application, Operating Plan and Layout Plan for inspection at any place within its area, and

(b) allow any person to make copies of such documents on request;

(c) issue to any person copies of such documents on payment of the Board's reasonable charges;

It might be objected that the surveyor or architect who drew the Layout Plan has copyright, and indeed the LP may contain an express prohibition of copying. However, the public at large already has the right to view the Application and supporting documents. Given that 'any person' can make an objection or representation, any person can already come to the Board office and view the documents.

(a) is appropriate where the Board area is widespread and travel to the Board office is difficult. For example, North Ayrshire includes the Isles of Arran and Cumbrae; it has already happened that neighbours, having received notification of an Application, ask to see the documents at the Council office in Lamlash or Brodick (commenting that travel from Arran may be time-consuming and expensive). The Board does not have any office outside Irvine, and they are told that viewing is only possible at the Board's offices in Irvine. Sending a plan to another office would involve making a fax or photocopy.

2. Variation

The definition of 'minor variation' in [29(6)] should be extended to an amendment of the Operating Plan which is limited to a variation of hours, where the hours requested are consistent with the LPS. At present, such a variation is not 'minor', and therefore requires intimation, publication, the possibility of objections and representations and a Board Hearing when, since the proposal was consistent with the LPS, the application would be very likely granted.

3. Occasional Licence

(a) [58] (Objections and representations) should be amended to limit O/R to Police and LSO where the officer is satisfied that it is appropriate to deal with the OL application quickly;

(b) the period for the LSO's response to an OL application in [57(3)] should be 10 days, not 21, consistent with [69(3)];

4. Extended Hours

[69(3)] should be amended to entitle, not oblige, the LSO to report on an Extended Hours Application.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Women's Support Project

Criminal Justice and Licensing Bill–Section 34 extreme pornography.

The Women's Support Project (WSP) broadly support the Scottish Government's introduction in the Criminal Justice & Licensing (Scotland) Bill for provisions to criminalise the possession of material that is considered to be extreme pornography.

Section 34 of the bill will make it illegal to possess extreme pornographic material. For material to fit this definition it must be all of the following:

(a) obscene,
(b) pornographic,
(c) extreme.

(a) Obscene
The test of "obscene" means that the material must be of such a nature that it would fall within the category of the material whose sale etc. is already prohibited under section 51 of the 1982 Act. There is no definition of obscene, but courts apply a common law test of whether the material is 'calculated to deprave or corrupt persons open to depraving or corrupting'.

The WSP believes that the inclusion of "obscene" in the criteria for extreme pornography dilutes the focus of the new proposals, retains a "moral" judgement and suggests that the intention behind the proposals is to prevent depravity or corruption. The WSP believes that the Scottish Govt should not rely on the 1982 Act for a definition of obscenity but develop a definition based on an understanding of the broad cultural harm to which pornography contributes.

(b) Pornographic
An image is deemed pornographic if it is of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal.

(c) Extreme
An image is extreme if it depicts, in an explicit and realistic way any of the following:

(a) an act which takes or threatens a person's life,
(b) an act which results, or is likely to result, in a person's severe injury,
(c) rape or other non-consensual penetrative sexual activity,

(d) sexual activity involving (directly or indirectly) a human corpse,
(e) an act, which involves sexual activity between a person and an animal (or the carcass of an animal).

Possession

The bill will not criminalise:

- Single / accidental viewings
- Situations where someone has a legitimate purpose for possessing the material
- Material which has received a classification from the British Board of Film Classification
- Situations where the person possessing the image directly participated in its creation, where the act depicted did not actually take or threaten someone's life or result in severe injury or involve sexual activity with a corpse or animal

The WSP supports the proposed maximum sentence of 3 years imprisonment for possession of this type of material.

There is already legislation in place, which criminalises the display, publishing, selling and distribution of this type of material, and possession with a view to onward sale or distribution. Until now there has been no legislation, which makes it an offence simply to possess extreme pornography. The proposed legislation sends a clear message to both pornography users and the wider public that accessing this material is unacceptable and is certainly not harmless. Extreme pornography contributes to negative attitudes against women and therefore must be limited, regulated and subject to restrictions to mitigate its effects.

We believe that this legislation is needed to reduce the potential for broad cultural harm and address the demand for extreme pornography, which has led to the proliferation of rape pornography, in particular across the internet. These are sites with descriptions such as "innocent teen girls face their worst sex related nightmares", "these girls say no but we say yes", "here you will find only REAL rape pictures" and "it is time to become Tough Guys, Right now". These sites are easily accessible for anyone - including young people - to find. They glorify rape and in doing so contribute to a culture where rape is condoned and validated, and as such, must be dealt with.

Our objections to extreme pornography are based on cultural harm and its abusive and degrading portrayal of females and female sexuality and not simply on its sexual content or explicitness. In extreme pornography, sex is presented as abusive and violent towards women and sexualises their abuse, systematically exploits and portrays them as objects to be abused, degraded and bought. It perpetuates the myths that women are sexually available, can be persuaded or forced to have sex and are subordinate to men. WSP endorses the view that:

"The bigotry and contempt it produces with the acts of aggression it justifies, harms women's opportunities for equality and rights of all kinds." (Scottish Women against Pornography SWAP 2004).

Pornography's presentation of violence and sexual abuse can support an environment in which the perpetrators of rape are rarely convicted (according to Scottish Government figures for 2006/07 only 2.9% of rapes recorded by the police led to a conviction). Pornography perpetrates myths about rape exist which can make it hard for sex offence victims to be believed or seen as credible and makes it more difficult for them to come forward and be treated with fairness.

We welcome the specific reference to rape and other non-consensual penetrative sexual activity within the definition of extreme pornography. Unlike similar legislation in England & Wales, the bill does not make a distinction between 'violent' rape, and rape in general, a distinction which is extremely unhelpful and which we are glad to see is being rejected in Scotland.

Specific comments for amendments to the proposals

WSP believe that consideration should be given to the following changes / additions to the bill, which we believe would make it stronger and more effective in tackling the proliferation of this type of material:

(1) Rationale for the Bill
The Scottish Government introduced the Bill to "help ensure the public are protected from exposure to extreme pornography that depicts horrific images of violence" and that it "will discourage interest in extreme pornographic material by breaking the demand/supply cycle." The WSP supports the principle of putting new focus on the demand for extreme pornographic materials and to address the issue of individuals mainly through new media accessing pornography that it is prohibited to sell or distribute. However the WSP believes the introduction of the Bill should be on the basis of reducing cultural harm and the impacts of pornography on views and attitudes towards women.

(2) Amendment to definition of *extreme*
Change wording to:

> (b) an act which results, or *threatens to* result, in a person's severe injury,
> The use of "threatens to " instead of "likely to" would increase the proposals scope to cover all acts of rape, which could all be said to threaten severe injury but not all are likely to result in severe injury.

(3) Broaden the scope of material covered to include non- photographic visual depictions of extreme pornography

As the bill is currently written, to meet the definition of 'extreme', the material in questions must be explicit and realistic. The terms "explicit" and "realistic" require that the act depicted in the image must be clearly seen, lifelike and convincing and appear to a reasonable person to be real. It is not required that the act itself is real.

There is a strong feeling that there is a missed opportunity in not including non-photographic representations of extreme acts in the bill. This means for example that the provision in the bill will not cover depictions of extreme pornography on virtual worlds such as Second Life, where the pornography is violent, extreme and interactive, but where the images are not photographic. Similarly, we would like to emphasis that there is still a need to enact similar legislation in relation to child pornography, as proposed by the Scottish Executive in early 2007.

(4) Broaden the definition of extreme to include depictions of incest

Although the legislation will cover depictions of rape and non-consensual penetrative sexual activity, which fit the definition of obscene and pornographic, this will not necessarily cover pornography which glorifies incest, unless it is clear that the young woman depicted is not of an age to consent. For example, one pornography website is headed 'Welcome to Daddy's Whore', and sub-titled 'there is no stronger feelings than father's love to his daughter'. This is unlikely to be caught by the legislation because there is a note on the website that the young women featured are '18 year old daughters'. We believe serious consideration must be given to extending the definition of extreme to include depictions of incest, which is an illegal activity to ensure these types of materials are covered by the legislation.

(5) Ensure a clear definition of possession

Clarity is required as to what "possession" covers. Will it cover those people who access extreme pornography without downloading files? Although the bill does not criminalise accidental or single viewing, we believe it must cover repeated viewings of this type of material, whether or not the material was actually downloaded.

(6) Further reforms

While WSP welcome the provisions in the bill, which we believe are much needed, we are firmly of the view that this must be only a starting point for action to address the harm caused by pornography. Further reform is needed and we will be interested to see future approaches addressing the sexualisation and portrayal of incest. Pornography is in and of itself is a form of violence against women and has the potential to cause serious harm in distorting people's views of sexuality, and contributes to what has been called a 'rape culture'.

(7) Public education and awareness raising

An additional important issue to be addressed is public education. This includes public education on the introduction of the proposed legislation but also a broader public education campaign on the realities of accessing internet pornography. Our sense is that many people in Scotland are completely unaware of the extreme types of pornographic material that is easily accessible and available via new media. Through awareness raising events, the WSP has identified strong concerns amongst attendees on the growing demand for pornography and the impacts of this on gender equality and cultural norms.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Fife Council

The amendments to the Civic Government (Scotland) Act 1982 contained in the Bill are generally welcomed.

It would be helpful, however, if an amendment could be made to Section 9 of the 1982 Act. Section 9, subsections (2), (8) and (9) make provision for a nine month lead in time for new resolutions and variations to a resolution which have a neutral effect on its scope or increase its scope. While clearly a suitable period of notice for any changes to a resolution is necessary, the period of nine months set out in Section 9(2) is not always appropriate. It is suggested that the, “day” specified in the resolution in subsection (2) be determined by the licensing authority so as to give reasonable and sufficient notice of the resolution or variation to the resolution.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Fife Licensing Board

1.0 Introduction

1.1 The Board generally welcomes the liquor licensing proposals in the Bill.

Specifically, the following comments are submitted for consideration.

2.0 Responses

2.1 In relation to Clause 130 and the amendment to subsection (2)(a) of Section 21 of the 2005 Act the word, "copy" perhaps requires further definition. Both the electronic administration and the electronic processing of applications will be done more effectively if the word "copy" is understood to mean the transference of the information contained in application forms and other documents, formatted appropriately, but not necessarily in replication of the application form.

2.2 In Clause 136 which relates to personal licences, the proposed amendments in sub-clause (2)(a) include a requirement that, "the applicant" has signed the application. As, "applicant" is defined as the person making the application, presumably a solicitor acting on behalf of the applicant or an employee of the applicant could make the application, on behalf of the applicant.

3.0 Notwithstanding the above, however, the requirement for a signature of any kind does not assist Boards in their electronic administration of applications and the move towards the electronic processing of applications. The requirement for signatures is generally absent from the provisions relating to other documents - notices, objections, licences, etc and it is not clear why signatures, facsimile or otherwise, are necessary on personal licence applications. For purposes of data security, signatures are usually redacted when sending or publishing electronically applications.

4.0 This point is raised in relation to paragraph 14 of Schedule 4 to the Bill which relates to the applicant's duty to notify the Licensing Board of convictions. Section 71 of the Act defines, "personal licence" as a licence which has been issued to the individual by the Board. Consequently, a personal licenceholder is someone who holds a personal licence that has been granted and issued. Section 75 imposes a duty on applicants to notify convictions beginning with the making of the application and ending with its determination. Paragraph 23 of the Transitional and Saving Provisions Order makes 1st September, 2009 the deemed issue date of personal licences issued during the transitional period. Beyond then there is a 28 day period in which to issue a personal licence which has been granted. In each/

each case, there is a gap or potentially a gap, between the granting of the licence and its issue during which a licenceholder is under no duty (under Section 82) to notify the Board of convictions.

Similarly, the holder of a personal licence would not be able to apply for an occasional licence under Section 56 until 1st September. It may well be the case that personal licence holders may wish to lodge applications for occasionals prior to that date.

A premises licence is also defined as one that has been issued although Boards have a discretion to set the date when it comes into effect.

Electronic administration of the licensing system should, after September, 2009, allow licences to be issued on the day that these are granted. During the transitional period, however, it would be helpful if personal licenceholders were deemed to be such when the licence is granted rather than issued, in order to close the convictions gap and allow applications for occasional licences to be made by personal licenceholders.

5.0 Along with colleagues elsewhere, I am also of the view that the somewhat time consuming appeal arrangements under the 2005 Act would be better repealed and replaced by a summary cause appeal process similar, but not necessarily identical, to that in the 1976 Act. Stated cases deal in facts and while in liquor licensing cases there are indeed findings in fact by the Board, a considerable amount of what they do is founded on possibilities and probabilities.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Faculty of Advocates

1. The Faculty of Advocates welcomes the opportunity to comment in this submission on the Licensing provisions in the Bill. It is not proposed to discuss every provision but confine our observations to those which merit comment from a legal perspective.

Part 8 - Licensing Under Civic Government (Scotland) Act 1982

2. Section 121- Conditions

The proposals (in section 121(2) and (6)(a) (i)) to do away with the unconditional grant or renewal of a licence are welcomed.

The introduction of mandatory licensing conditions prescribed by Scottish Ministers under section 121(3) does represent a radical departure from the current approach which is to leave the attachment of specific conditions to licensing authorities. The proposal would enable Ministers to impose conditions in respect of all licensed activities including those which are categorised as optional. By their very nature such conditions will not be capable of variation or relaxation by licensing authorities in the light of local or particular circumstances. The reason for such a change of approach is not explained. The terms of any prescribed conditions in statutory instruments may shed some light. It is appreciated that mandatory conditions are being introduced under the Licensing (Scotland) Act 2005 although that is in the context of Licensing Objectives which underpin the legislation. This is a significant change to the licensing regime under the 1982 Act, the reason for which is obscure.

The proposal that standard conditions or variations thereof have no effect so far as they are inconsistent with any mandatory condition, while inevitable in the context of mandatory conditions, does introduce the potential for issues to arise in particular cases as to whether a particular condition is indeed inconsistent with a mandatory one with consequent uncertainty. Ultimately the issue will be one for the court to determine in a particular case. That is only likely to arise if the licence holder challenges the condition by appeal. It may also arise where a licensing authority seeks to found on the particular condition or its breach in relation to a proposed suspension. Apart from these cases, the matter may not arise because the holder of a licence may simply do nothing about the condition and not comply with it on the basis that in his view the inconsistency means that it has no effect and may be ignored.

3. Section 122 – Powers of entry and inspection

Significant powers are granted under section 5 of the 1982 Act. These are conferred not only on constables but on authorised officers of the licensing authority which is responsible for administering and enforcing the licensing regime. With the availability of such officers and of police officers in appropriate case, it is not clear why it is sought to extend the powers to civilian employees of the police authority.

4. Section 127 – Licensing of late night catering

The substitution of “food” as defined in section 1 of the Food Safety Act 1990 for “meals and refreshment” will, of course, extend the coverage of section 42 of the 1982 Act.

5. Section 128- Applications

The amendment of paragraph 8 of Schedule 1 to the 1982 Act_ by the addition of sub-paragraph (5A) is welcomed.

Part 9 – Alcohol Licensing

6. Section 129(4) – power of Board to vary premises licence conditions

It is submitted that a right of appeal should be given to the premises licence holder against such a variation. Given that in the case of an application by the holder to vary the premises licence under section 29 of the 2005 Act there is an appeal against refusal (schedule 5), it would be appropriate that a right of appeal also be granted in respect of a Board variation.

7. Section 132(2) – premises licence applications: anti social behaviour reports

In the proposed section 22(2A) of the 2005 Act in both sub-sections (a) and (b) there should be added a reference to the extent to which such anti social behaviour in the vicinity is considered to be attributable to customers of the premises. This is frequently an issue in respect of applications and it is anticipated that this will be the case in respect of the content of such reports. For that reason, it is submitted that it would be helpful if it could be addressed in any report.

8. Section 140 – Licensed premises: social responsibility levy

It is noted that the levy is in respect of expenditure incurred by any local authority falling within subsection (3). It is nothing to do with the relevant licensing board or expenditure incurred by it. Where licence holders may be subject to the imposition of the levy where the local authority consider it necessary or desirable with a view to remedying or mitigating adverse impacts on licensing objectives attributable to the operation of licensed premises in their area, regardless of whether any of these impacts can be attributed in any way to specific premises, the levy may reasonably be viewed as a form of taxation imposed on all relevant licence holders. It will be payable regardless of how well managed particular premises are in relation to achievement of the licensing objectives.

The imposition of such a levy would be a somewhat drastic and, to an extent, a penal measure. How exemptions or remissions from charges may operate is left entirely to Regulations. It is essentially a source of funding for unspecified measures to address general adverse effects. There is, in the proposed legislation, no detail of such measures or any specific indication of how the expenditure shall be utilised beyond the general terms of the subsection. The authority is given a very wide discretion. All of this assumes that the expenditure is in respect of action which the authority has power to take.

It is also worthy of note that while holders of licences under sections 39, 41 and 42 of the 1982 Act will be subject to the levy, the licensing regime under the 1982 Act is not subject to any over- arching licensing objectives. While one can understand the thinking behind grouping these activities with licences under the 2005 Act, albeit they are not concerned with the sale of alcohol, it may be perceived as inappropriate to subject them to a levy which relates to an impact on objectives which have no express application to these activities.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Gender-based Violence Programme Team, Healthcare, Strategy and Policy Directorate, Scottish Government

Section 34 of the Criminal Justice and Licensing (Scotland) Bill: Provisions for criminalizing the possession of extreme pornography.

1. Background to GBV Programme

In line with a Chief Executives Letter (CEL) 41, the National GBV Programme Team has a role to support Health Boards to meet their responsibilities in responding to gender-based violence. Gender-based violence encompasses the spectrum of abuse aimed at individuals and groups based on their specific gender role in society. It is both a cause and consequence of gender inequality and is experienced disproportionately by women and perpetrated predominantly by men.

We have recently produced National Guidance for health workers, covering all forms of GBV, including but not limited to, domestic abuse, child sexual abuse, rape & sexual assault, harmful traditional practices such as female genital mutilation, forced marriage and so-called honour crimes, sexual harassment, stalking and commercial sexual exploitation.

The guidance cites that commercial sexual exploitation involves a wide range of often interconnected activities, including pornography, prostitution, lap dancing, trafficking etc. We recognise the exploitation of women and children through pornography as inextricably linked to gender inequality and sexual violence and are concerned that the current proliferation of pornography, especially through the internet, serves to create a distorted culture that normalises and glamorises the abuse and sexual exploitation of women and girls.

2. Response to the Bill

We broadly welcome the proposed provisions in Section 34 of the above bill, which aims to criminalize the possession of extreme pornography. We perceive the introduction of these legal provisions as a first step in addressing the harm caused by pornography per se and hope that in future, these can be built on to establish a more robust, harm based legal definition of this form of gender-based violence. In the meantime, it is our view that the current legal context and proposed criteria for possession of extreme pornography pose some limitations i.e. neither the proposed definition of pornography nor current obscenity legislation takes account of the fact that fundamentally, pornography is a gendered issue, premised on unequal power relations (between men and women and men and children of both sexes). Given that we define pornography as sexual violence, it is our view that the primary purpose of producing pornography is to sexualise inequality through the objectification and abuse of women and children, not merely to induce sexual arousal. For example, adult erotic literature premised on mutuality and respect may arouse sexual desire but this would not constitute pornography. Similarly, existing obscenity legislation is open to subjective interpretation in relation to whether or not material is ‘calculated to deprave or corrupt...’ It does not take account of the abuse and harm caused to women and children in the making of pornography or the perpetuation of harm when the images are used over and over again to inflict further abuse.

Despite the perceived limitations of the criteria, we welcome the fact that as with child pornography, it would be an offence to possess extreme pornography. We believe that this could send a clear signal to men using pornography and also the wider public that this material is harmful and that possession is unacceptable and illegal.

We think that this message is needed to counter the normalisation of sexual violence in pornography and the demand from men for extreme pornography, including rape pornography, which is widely available on the internet and easily accessible to anyone, including young people. Pornography censors and silences the reality of women’s experience of sexual violence and perpetuates myths about rape i.e. when women say no they mean yes. This misrepresentation of women’s sexuality serves to undermine the credibility of survivors of sexual offences within the criminal justice system and such myths are reinforced by the low conviction rate for rape as reflected in the Scottish Government figures for 2006/07 when only 2.9% of rapes recorded by the Police led to a conviction.

3. Recommendations for amendments to the proposed provisions

Amendment to the definition of extreme

Change wording to:

b) an act which results, or *threatens to* result, in a person’s severe injury.

The use of ‘threatens to’ instead of ‘likely to’ would increase the scope to cover all acts of rape, which could all be said to threaten severe injury, but not all are likely to result in severe injury.

Broaden the definition of extreme to include depictions of incest

Although the legislation will cover depictions of rape and non-consensual penetrative sexual activity which fit the criteria of obscene and pornographic, this will not necessarily cover pornography which depicts and promotes incest, unless it is clear that the young women depicted are not of an age to consent. Some websites that show graphic images of incest claim that the young women featured are ’18 year old daughters’. We advocate that the definition of ‘extreme’ needs to include such depictions of incest, which is a serious sexual offence.

Broaden the scope of material covered

As the bill is currently written, to meet the definition of ‘extreme’, the material in question must be explicit and realistic. This requires that the act depicted in the image is clearly seen, lifelike and convincing and appears to a reasonable person to be real. It is not required that the act itself is real.

Given this, it is unfortunate that the proposed bill does not extend to non-photographic representations of extreme acts e.g. it does not cover depictions of extreme pornography on virtual worlds such as ‘Second Life’, where rape pornography is violent and interactive but the images are not photographic.

Establish a clear definition of ‘possession’

There is a need to clarify what ‘possession’ covers. Although the bill does not criminalize accidental or single viewing, it is unclear whether it would cover repeated viewings of extreme pornography, whether or not the material was actually downloaded?

4. Public Education

In the short term, it would be helpful to have a public launch of the proposed legislation on extreme pornography and in the longer term, we think it would be important to devise a comprehensive public education campaign to raise awareness of the harmful nature of internet pornography. We feel it is highly likely that the vast majority of the general public and parents/carers in particular will be unaware of the violent, abusive and extreme nature of the material that can be easily accessed via the internet by young people and others.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Wise Group

Introduction

The Wise Group has direct experience of the capacity for offenders to develop positive lifestyles, resist pressures to commit further offences and become constructive members of society through the Routes out of Prison project (RooP). We welcome the opportunity to respond to the proposed *Criminal Justice and Licensing (Scotland) Bill* (hereafter 'the Bill') as a social enterprise that undertakes a range of projects that seek to improve the lives of disadvantaged communities and contribute to robust and cohesive communities.

The Bill draws on recommendations made by the Scottish Prisons Commission, headed by Henry McLeish, *Scotland's Choice* (2008) that recommends reducing the prison population to an average of 5,000.[1] The Commission visited the RooP project as part of its research, and our submission similarly draws on the lessons from RooP. RooP, an example of the notion of in-community support in practice, has been evaluated by the Criminal Justice Social Work Development Centre for Scotland based at the University of Edinburgh. RooP has enabled The Wise Group to garner considerable expertise in the area of offender rehabilitation, and we would be happy to expand on our comments should the Committee require additional information. Contact details are provided at the end of this submission.

Community Payback

This submission is focused on the concept of community based sentences, 'community payback sentences' to use the terminology of the McLeish report. The report defines payback as:

> finding constructive ways to compensate or repair harms caused by crime. It involves making good to the victim and/or the community whether by unpaid work, engaging in rehabilitative work that benefits both victims and the community by reducing reoffending, or some combination of these and other approaches.[2]

The Wise Group shares the Bill's ambition to reduce Scotland's prison population, and specifically we support efforts to reduce the use of imprisonment through increased use of short sentences.[3] Imprisonment is detrimental to individuals as well as families and communities:

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[1] Scottish Prisons Commission (2008)
[2] Ibid.

- Individuals: time in prison can have dramatic and negative effects on individuals, in terms of their family life and mental and physical health. As Hosking writes ‘the collateral damage of imprisonment is considerable – a third of prisoners lose their home while in prison, two thirds lose their job, over a fifth face increased financial problems and more than two-fifths lose contact with their family’.[4] Imprisonment also increases the chances of children going into care and reduces life expectancy; increasing the need for state benefits.[5] It also interrupts education, training or employment and can lead to the development of relationships that are not conducive to crime-free lives. A sequence of short sentences can lead to individuals who were hitherto troubling offenders becoming serious offenders.[6] Moreover, it is our experience that the stigma associated with having spent time in prison, even if all the negative effects on individuals just outlined are somehow avoided, will present barriers to employment and perhaps future relationships.
- Families and communities: community life is fragmented by individuals moving in and out of prisons, compounded by the negative impact of time in prison on individuals involved. Those families where one parent is in prison have a higher likelihood of other family members engaging in criminal activity, going to prison, relying on benefits, being placed in care and having high levels of emotional distress.[7] Social inequalities are therefore deepened by high rates of imprisonment, while undermining efforts to support those communities which are most in need.[8]

The Wise Group believes that expanding the use of community payback as an alternative to prison has the potential to avoid such deleterious impacts of prison. Community based payback schemes have proven capacity to reduce re-offending, with additional benefits of reduced expenditure on prisons[9] and the delivery of necessary work in communities. Moreover, victims and the wider public will have a sense that something positive is being contributed by offenders.

If the Scottish Government (and indeed the Scottish community) is serious about reducing reoffending and changing the life courses of individuals who otherwise might face ‘life by instalments’ – that is, a series of short periods in prison – there

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[3] In 2006/07 57% of prison sentences were for three months or less; and 83% in 2005/06 were for six months or less (Ibid)
[4] Hosking (2008)
[5] Scottish Prisons Commission (2008); Codd (2008) cited in Scottish Prisons Commission (2008)
[6] Scottish Prisons Commission (2008)
[7] Ibid.
[8] Ibid.
[9] The Scottish Prison Service estimates that housing a prisoner costs £31,000 to £40,000 each year.

is a need to address a suite of disadvantages invariably experienced by the majority of the short term prison population.[10]
In particular, The Wise Group believes that this means addressing in a holistic way the offender's health needs (mental and physical), education and skill deficits and supporting positive relationships with families where possible. Our experience of delivering a range of support to our clients who face complex disadvantages suggests that this is most effectively and efficiently done in supportive and constructive programmes in communities. There is evidence from Scotland that reconvictions are lower for those involved in non-custodial sentences than those who serve prison sentences.[11] Programmes to support offenders are better provided in the community than when provided in the prison.[12] This implies there needs to be parallel emphasis on rehabilitation, not simply payback.

We also note the warning from Houchin (2005) regarding a focus on the offending behaviour of individuals which can be counter-productive because it 'emphasises the non-affiliation of the client group to the norms to which it is hoped they will come to ascribe...Imprisonment makes membership of the dominant culture more tenuous and confirms the excluded identity'.[13] Instead, The Wise Group supports Houchin's call for encouraging individuals to participate in their communities to engender an affiliation and commitment to communities. This is vital in '[emphasising] their normality, their standing as members of the community'.[14]

Lessons from The Wise Group's Routes out of Prison project

Concerted support within the community can turn an individual's life around. This is a clear lesson from the RooP project. The RooP Life Coaches proactively link ex-offenders with relevant agencies and families (as appropriate). Assistance can take the form of attending interviews with clients, making appointments with housing authorities and liaising with employment support services. Effectively, the Life Coaches help ex-offenders get their life back on track after a period in prison, with expected significant reductions in re-offending rates. RooP experience thus supports the observation of the Scottish Prisons Commission that rather than a single punishment leading to desistance from crime, a process of small successes (and failures) will result in individuals reducing their offending.[15]

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[10] Houchin (2005) found that there is a 'systemic link between social deprivation'. One in nine young men from the most deprived areas of Scotland will spend time in prison when they are 23 (Houchin 2005). Prisoners are 13 times more likely to have been in care as a child and unemployed than the general population and ten times more likely to have regularly been absent from school. Four in five prisoners have the writing skills of an 11 year old and 65% have the numeracy skills of an 11 year old. Seven in ten prisoners in Scotland suffer from at least two mental disorders (Scottish Prisons Commission 2008). Those born in the most deprived parts of Scotland have a greater probability of spending time in prison (Houchin, 2005).
[11] Scottish Prisons Commission (2008)
[12] Ibid.
[13] Houchin (2005)
[14] Ibid.

We therefore envisage utilising community payback as a mechanism to deliver a suite of individualised assistance while individuals are actively contributing to their community. Proactive use of the opportunity presented by community payback sentences is the best way to give offenders this chance and support positive choices. The Wise Group feels this is a positive and constructive use of an unfortunate juncture in an individual's life.

An equally important lesson from The Wise Group's RooP project is the genuine desire of the majority of ex-offenders to desist from crime and contribute to society in a positive way. Many of the Life Coaches are ex-offenders themselves, which not only gives them a unique ability to engage with individuals leaving prison (the 'peer effect'), but also illustrates the capacity and willingness of former offenders to change their lives. In turn, communities need to give ex-prisoners a chance and a fresh start to life through reintegration.[16]

Enabling greater numbers of offenders to follow this lead through structured payback sentences that combine constructive atonement for the crime committed through useful community work with support in addressing challenges would, we believe, go a substantial way to achieving the goal of strong resilient communities from which all individuals can reach their greatest potential.

Lessons from Intermediate Labour Markets

Community sentences will be most effective when they impart skills and qualifications that lead to opportunities for work that represent a real alternative to crime.[17] The Wise Group has a strong track record of delivering community activities that enhance localities. For example, one of our Intermediate Labour Market programmes (ILMs) delivered the following impacts for individuals involved:

- Increased training and employability opportunities
- Movement into the local labour market
- Alleviating poverty through increased income to participants
- Increased access to support services

A study into our Cadder Housing Association Project that involved long term unemployed individuals in carrying out regeneration work found that the majority of participants reported an increased sense of self-respect and pride in their accomplishments. There was a strong sense of belonging to a group and working with that group to achieve something worthwhile, which would also be of benefit to the community.

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[15] Scottish Prisons Commission (2008)
[16] Ibid.
[17] Ibid.

The ILMs show that work experience in a supportive environment can help participants address barriers to work (such as low education, a history of unemployment, mental and physical health problems, drug misuse and homelessness). We therefore call for the design of community payback schemes to incorporate mechanisms that address barriers to work in order for participants to emerge with greater employability.

ILMs also deliver tangible benefits for communities:

- Improved amenity of the area
- Reduced maintenance costs of the improved areas
- Improved sustainability of community regeneration programmes
- Improved resident satisfaction
- Reduced vandalism by youths and damage by refuse collectors
- Reduced anti-social behaviour and crime

Additional Comments

Finally, The Wise Group feels that that Local Authorities are best placed to manage contracts for community payback schemes. For the rehabilitative and community benefit elements of community payback to be maximised, understanding of local communities – their challenges, priorities and affiliations – are fundamental in programme design. We have a long history of positive collaboration with Local Authorities which underpins our view that they are best placed to indentify worthy areas of work. Clearly, areas and tasks selected for community payback projects need to be cognisant to avoid any displacement of work that would have been undertaken by other organisations or individuals. For example, community payback should not carry out work that would have been carried out by other individuals who are seeking work.

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Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from East Renfrewshire Community Health and Care Partnership

Within East Renfrewshire we have actively progressed our local ‘partnership’ commitment to addressing alcohol issues, through working in collaboration with health and the wide range of our key partners. We welcome the Scottish Government announcement to introduce a health bill to take forward provisions on a range of alcohol measures, and feel that this will support local work around alcohol in relation to our Joint Alcohol Policy Statement. In light of the proposed health bill and the amendments to the above bill, our general view is supportive particularly in relation to the role of the Licensing Board, and the duties and powers available to the Boards to ensure support for the health agenda in working towards creating an environment conductive to the safe use of alcohol.

We further welcome the opportunity to comment on the general principles of the Criminal Justice and Licensing (Scotland) Bill, and note the three main purposes of the Bill’s provision, and note the Bill’s policy memorandum stating that the amendments to the Bill will seek to ‘improve the operation of the Licensing (Scotland) Act 2005 as well as ensuring that Licensing Boards receive sufficient information on which to base their decisions concerning licensing to sell alcohol. Ensuring that the health agenda is taken into account in relation to decisions made, is vital, and would want to ensure this is maintained. We would like to reiterate our views in relation to the public health concerns around alcohol consumption, and support that the minimum age for off-sales purchases being raised to 21 in Scotland[1]. The minimum age of purchase is a crucial component of a comprehensive alcohol strategy and there is a strong evidence base to support the increase of the legal drinking age from 18 to 21 in terms of substantial effects on youth drinking and alcohol related harm. Effective enforcement of the legislation is of vital importance, notably under age drinking and the sale of alcohol to intoxicated individuals.

The no proof no sale approach for Scotland for all licensed premises is welcome and consideration should also be given to asking the population up to the age of 30 for ID, adopted successfully in other countries, where asking for ID becomes part of the ‘norm’.

We trust that the above views and comment made are considered helpful in relation to the principles of the bill, in particular the duties placed on licensing boards.

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[1] Changing Scotland’s Relationship with Alcohol: A Framework for Action, Scottish Government 2009

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Nuffield Council on Bioethics

Introduction

1. In September 2006, the Nuffield Council on Bioethics appointed a Working Group, which was chaired by Professor Sir Bob Hepple QC and included members with expertise in law, genetics, philosophy and social science, to consider the ethical issues raised by the forensic use of bioinformation. As part of the inquiry, the Group held a public consultation, which elicited over 135 responses.

2. In September 2007 the Council published a report, *The forensic use of bioinformation: the ethical issues*. This response is drawn primarily from the conclusions and recommendations made in that report. The report can be downloaded at: www.nuffieldbioethics.org/forensic.

3. We put forward our own views and recommendations on these issues, not as the end of the debate, but hopefully as a contribution to the development of well-informed public engagement. We suggested means by which the public interest in crime control can be balanced in a proportionate way with other values such as liberty and autonomy, privacy, consent and equal treatment, and the legal protection of human rights and civil liberties.

Section 58 – Retention of samples etc*.*

> Extract from Policy Memorandum:
> *301. This section authorises the retention of fingerprints and any other forensic data already taken from persons proceeded against but not convicted of a serious sexual or violent offence. Data does not have to be destroyed for at least 3 years, and the relevant chief constable would have discretion to apply to a sheriff for extensions of up to 2 years at a time. This would bring the law on the retention of fingerprints and other forensic data into line with current law on DNA retention.*

4. In its report, the Council supported the current approach taken in Scotland to the retention of DNA for forensic purposes. The Council recommended that fingerprints, DNA profiles and subject biological samples should be retained indefinitely only for those convicted of a recordable offence. In all other cases, samples should be destroyed and the resulting profiles deleted from the database. Retention of samples and profiles should be allowed, for three years, from those charged with serious violent or sexual offences, even if there is no conviction. Thereafter the samples and profiles should be destroyed unless a Chief Constable applies to a court for a two-year extension, showing reasonable grounds for the extension [paragraphs 4.53-4.55]. These proposals are compatible with a recent ruling of the European Court of Human Rights in the case of *S and Marper v UK*. The

Court referred to the Council's report extensively in its judgment document. **The Council therefore supports the proposal to bring the law in Scotland on the retention of fingerprints and other forensic data into line with current Scottish law on DNA retention.**

Section 59 – Retention of samples etc. from children referred to children's hearings 302.

> Extract from Policy Memorandum:
> *302. This section authorises the retention for three years forensic data taken under existing powers where a child accepts or is found by a Sheriff to have committed one of certain serious violent and sexual offences, with discretion for the chief constable to apply to a sheriff for extensions of up to 2 years at a time to provide a means of managing high risk cases. This would align with current arrangements under section 18A of the 1995 Act for retention of DNA from individuals proceeded against for violent and sexual offences, but not convicted and aims to strike a balance between the need to manage risk and protect the public with regard to offending behaviour; and maintaining the core ethos of the Children's Hearings System – to address the needs of the child.*

5. The Council does not have any specific comments to make on the Scottish Government's proposals regarding children's hearings, except to point out that the policy of permanently retaining the bioinformation of minors is particularly sensitive in the United Kingdom, where the age of criminal responsibility is low (at age ten years in England and Wales and eight in Scotland) compared with many other countries.

6. There is a separate youth justice system, in recognition of the special protections that should be afforded to children and young persons. The European Convention on Human Rights recognises the special case of children in the criminal justice system. The UN Convention on the Rights of the Child requires special attention to be given to the treatment of children by legal systems, to protect them from stigma, and that if they have offended, opportunities for rehabilitation to be maximised. The destruction of relevant criminal justice records and accompanying body samples could comprise one element in such a rehabilitative process. The Supreme Court of Canada, while acknowledging the strong public interest in crime detection, has held that it was contrary to principles of the youth justice system to treat juveniles in the same way as adults, and that juvenile immaturity was a factor which militated against inclusion on the database. Parental consent for sampling would not, in our view, negate concerns surrounding the retention of samples and profiles of minors.

7. When considering requests for the removal of profiles from the NDNAD and the destruction of biological samples taken from minors (including from adults who were minors when their DNA was taken), we recommend that there should be a presumption in favour of the removal of all records, fingerprints and DNA profiles, and the destruction of samples. In deciding

whether or not the presumption has been rebutted, account should be taken of factors such as:

- the seriousness of the offence;
- previous arrests;
- the outcome of the arrest;
- the likelihood of this individual re-offending;
- the danger to the public; and
- any other special circumstances [paragraphs 4.71-4.72].

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from James Chalmers

I wish at this stage simply to express broad support for the general principles of the Bill and to make relatively minor comments on three aspects, as follows:

(1) Extreme pornography

I have some concerns about the breadth of section 34 of the Bill, which creates an offence of possession of an extreme pornographic image. The policy objective for this provision is expressed as being "[t]o help ensure that the public are protected from exposure to extreme pornography that depicts horrific images of violence" (para 153 of the Policy Memorandum). This is a strange suggestion: exposing the public to such material would already amount to a criminal offence. The lack of clarity as to what exactly this offence is expected to achieve makes it difficult to assess whether its scope is appropriate.

The consultation exercise which led to these proposals (carried out jointly by the Home Office and the Scottish Executive) proceeded from the outset on the assumption that there was no proposal to criminalise possession of depictions of non-consensual sexual material as such, but to use the criminal law only where "serious violence" was involved (along with cases involving animals or corpses). The Home Office summary of responses to the consultation clarified the reference to "serious violence", stating that "by serious violence we mean appears to be life threatening or likely to result in serious, disabling injury" (Home Office, *Consultation on the Possession of Extreme Pornographic Material: Summary of Responses and Next Steps* (2006) para 16).

The consultation exercise seemed to give no indication of significant pressure to broaden the definition of "extreme pornography", and this is reflected in the subsequent English legislation, which is in fact more restrictive that initially envisaged. It is limited (leaving aside animals and corpses) to instances of acts threatening a person's life, or which result or are likely to result in serious injury to a person's anus, breasts or genitals (Criminal Justice and Immigration Act 2008 s 63(7)).

The Bill goes significantly beyond the English definition and anything canvassed in the prior consultation exercises, with the Policy Memorandum asserting merely that this definition is "insufficiently broad" but without explaining why. The Policy Memorandum observes that the English legislation does not cover rape *per se*, but this is hardly an accident of drafting: there was a clear desire to limit the legislation to extremely serious cases. No doubt it is undesirable that any person should possess material depicting rape or other non-consensual sexual activity, but the Government has at no stage explained its rationale for *criminalising* such possession. It can hardly be the simple fact that the activity depicted is criminal: murder is regularly depicted on terrestrial television without objection.

(2) Prosecution of children

While agreeing with the general thrust of section 38 of the Bill, there is one surprising omission here. In its *Report on the Age of Criminal Responsibility* (Scot Law Com No 185, 2002), the Scottish Law Commission recommended that – alongside the introduction of a rule that a child under the age of 12 could not be prosecuted for a criminal offence – the rule that no child under the age of 8 could *commit* a criminal offence should be repealed. This is because there might be circumstances in which a child under that age had committed a crime, ought therefore to be referred to a children's hearing, and could not be referred on any other ground (as in *Merrin v S* 1987 SLT 193). The Commission noted that virtually all consultees who had responded to the proposals in their Discussion Paper on this point agreed with this proposal (*Report*, para 3.24).

The Bill, as introduced, would not implement this recommendation, and the Policy Memorandum states only that this recommendation "is not taken forward" (para 192), without offering any reason. The Commission's original observation that it is "paradoxical that children who commit offences, and who might be thought to form the most suitable cases to come within the hearings system, are beyond the scope of *both* the criminal justice system and the hearings system solely because of their age" (*Report*, para 3.23) remains valid and – in the absence of good reason to the contrary – this recommendation should be implemented in the Bill.

(3) Mental disorder and unfitness for trial

I am pleased to see that the Bill will implement the Scottish Law Commission's recommendations on the defences of insanity and diminished responsibility. I have, however, a minor concern about section 117(4), which provides that a defence of insanity "may be stated only by the person charged with the offence", as recommended by the Commission. In my view it should be open to the Crown to raise this plea in some circumstances, for the following reasons:

First, an accused may put his mental state in issue by raising the defence of diminished responsibility or automatism. If he does so, it would seem essential that the Crown be permitted to argue that the accused's mental state in fact amounted to insanity rather than one of the other defences. English law expressly permits the prosecution to allege insanity where the accused pleads diminished responsibility: Criminal Procedure (Insanity) Act 1964 s 6.

Secondly (and related to the first point), there are some conditions which fall on the borderline between automatism and insanity, such as physical illnesses which affect an accused's ability to control his actions. These might be regarded by the courts as "mental disorders" within the terms of the statute in appropriate cases, particularly if they are liable to recur and so potentially render the accused a danger to the public. If the accused pleads, on the basis of such a condition, that he should be acquitted on the ground of automatism, but the prosecution are not permitted to raise insanity as an issue, and the judge rules that the accused's condition amounts to insanity rather than automatism, it would seem to follow that the accused must be convicted even if all concerned believe that he should be acquitted.

Thirdly, an accused cannot be convicted of any serious criminal offence unless he has the requisite *mens rea* (fault element, or mental state). Insanity may often involve a denial of *mens rea*. To take a very simplistic example: if an accused kills another person while under an insane delusion to the effect that he is attacking the devil or an animal, he lacks *mens rea* as he has no intention to harm another person, which is an essential element of the *mens rea* of murder (*HM Advocate v Purcell* 2008 JC 131). If the prosecution cannot allege insanity, it follows logically that the accused in such a case could simply deny *mens rea* and secure an unqualified acquittal. In *R v Cottle* [1958] NZLR 999, the New Zealand Court of Appeal avoided this problem by holding that the defendant had "in substance and in fact" pled insanity, but it would be difficult for the Scottish courts to take this course given that insanity is a special defence and subject to a requirement of pre-trial notification.

James Chalmers
Senior Lecturer in Law, University of Edinburgh

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Lesley Walker

I am writing to let you know that I very much welcome the provisions in the bill, which I believe are much needed, but am firmly of the view that this must be a starting point for further action to address the harm caused by p—nography. I view p—nography as seriously harmful and damaging to all women and men, not limited to those who participate in it or view it.

I am sure the Committee will receive many submissions from those who profit from this industry or who have extreme libertarian views that allow the promulgation of almost any materials, no matter how violent or degrading to women.

I would like to add my voice to the wide support for addressing the harms caused by this industry.

Lesley Walker
Senior Health Promotion Specialist, NHS Lothian
Friend of Zero Tolerance

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Scottish Children's Reporter Administration

Introduction

SCRA welcomes the opportunity to provide written evidence to the Committee on this important piece of legislation. The Bill contains a number of provisions which impact on the Children's Hearings System and our submission deals with each in turn. Due to the significance of these proposals to the Children's Hearings System, SCRA would welcome the opportunity to speak to this submission

SCRA background

Established in 1996, the Scottish Children's Reporter Administration (SCRA) assumed responsibility for the Children's Reporter service across Scotland and operates as a Non-Departmental Public Body (NDPB), funded by the Scottish Government. While the Principal Reporter is independent in terms of his/her decision-making powers in relation to children referred, the organisation and Board of SCRA is responsible and accountable to Scottish Ministers.

In 2007-08, 50,314 children were referred to the Children's Reporter. This figure represents 5.5% of all the children in Scotland. 40,204 of these children were referred on non-offence grounds, while 14,506 had allegedly committed an offence. 4,396 children were referred on both care and protection and offence grounds.

Section 14 – Community payback orders

Response

Section 14 of the Bill inserts a section (s.227G) into the 1995 Act which creates an order termed a "supervision requirement", which is defined as follows:

- *In this Act, a "supervision requirement" is, in relation to an offender, a requirement that, during the specified period, the offender must attend 5 appointments with the responsible officer or another person determined by the responsible officer, at such time and place as may be determined by the responsible officer, for the purpose of promoting the offender's rehabilitation.*

Committee members will be aware that "Supervision Requirement" is also the name given to an order made by a Children's Hearing under s.70 of the Children (Scotland) Act 1995. As it is possible that both types of Supervision Requirement might apply to an individual child or young person, SCRA suggests that another name is found for the order created under s.14 to avoid confusion.

Section 38 – Prosecution of children

Background and context

Section 38 of the Criminal Justice and Licensing (Scotland) Bill proposes to raise the threshold age at which children can be prosecuted from 8 to 12 years. We note that the Scottish Government's proposals are based on some of the recommendations of the Scottish Law Commission's report on the subject in 2002.

In effect, section 38 of the Bill would result in two distinct ages of criminal responsibility. The age of criminal capacity, below which no child is considered capable of formulating the mens rea of an offence, is set at 8, and the Scottish Government does not propose any change here. The age below which children are immune from criminal prosecution is also 8 at present, but the Bill proposes to raise that age to 12.

Summary of response

SCRA is supportive of the Scottish Government's proposals, as we firmly believes that the Children's Hearings System is the best way to deal with children who offend. Many of these children also come to the attention of the Reporter due to concerns about their welfare and the Hearings System is able to ensure they get the most appropriate form of intervention and support, while addressing concerning behaviour.

However, if the System is to deal with the small number of very serious offences committed by 8-12 year olds it must be properly resourced and interventions must be focused and effectively delivered.

Current system

Currently, s.42 of the Criminal Procedure (Scotland) Act 1995 states that:
"no child under the age of 16 years shall be prosecuted for any offence, except on the instructions of the Lord Advocate"

The Lord Advocate's Guidelines direct the police as to when cases involving children need to be reported both to the Procurator Fiscal (PF) and the Reporter. Where a case is jointly reported, the Procurator Fiscal and the Reporter will discuss the case and a decision will be made by the PF on whether to prosecute.

Various factors will be taken into account in reaching this decision – the seriousness of the offence, the current situation for the child and an assessment of evidence required to support the alleged offence.

Scottish Government and Crown Office figures suggest that there were less than five prosecutions of under-12s in the years 2002/03 to 2006/07.

It is important to bear in mind, that even where a child is prosecuted, the Sheriff may still remit the matter back to a Children's Hearing for advice or disposal. Indeed, if the child is subject to a Supervision Requirement at the time of the offence, the Sheriff is obliged to ask a Hearing for advice.

Children's Hearings System – key principles

It is important to understand the differences between the Children's Hearings System and the criminal justice system.

The Children's Hearings System has been in operation since 1971 and is centred on the welfare of the child. The fundamental principles are that the needs of the child should be the key test; that children who offend and children who are in need of care and protection should be dealt with in the same system (as they are often the same children).

As each child is unique, Hearings make decisions on the basis of the needs and circumstances of the individual child who comes before them. As the Hearings System is designed to be relatively informal and child focused, it requires an individualised and more informed approach to the needs of the individual child in the family and community context.

Possible implications for the Children's Hearings System

We note that, as a result of the changes proposed in the Bill, the Children's Hearings System might be required to deal with a very small number of children referred for committing very serious offences. The way in which it does so will be no different in practical terms to the way the System currently deals with children referred on offence grounds. In other words:

- The criminal standard of proof would apply
- Criminal rules of evidence would apply
- The Reporter and the Hearing would be concerned with the requirement for compulsory measures of supervision, rather than questions of guilt
- Acceptance or establishment of offence grounds for referral would not be a determination of a criminal charge

There are however questions around whether certain police powers, e.g to detain and arrest the child; carry out a formal interview of the child as a suspect; charge the child with an offence; and seize productions and obtain DNA and fingerprints where relevant are linked to the prospect of prosecution.

We believe that the Hearings System continues to be the best way to deal with children who offend, as it can ensure they get the most appropriate available form of intervention and support to address their behaviour and needs.

For example, one of the strengths of the Children's Hearings System is that a Supervision Requirement made by a Children's Hearing is subject to review at minimum once every 12 months in order to consider the child's circumstances and the appropriateness of the measures in place. In addition, a review can be requested by the child or family as well as the local authority (no earlier than 3 months after the Hearing date), which allows the compulsory measures put in place for the child to be revisited regularly. It means that there can be an appropriate and timely response to any change in the child's circumstances, behaviour and needs.

Resources and partnership working

SCRA notes that the kinds of interventions required by the small number of children to whom the provisions of section 38 apply are likely to be resource intensive. The ability of the Children's Hearings System to respond effectively to children's needs and behaviour and needs is dependent on fully resourced, focused and effectively delivered interventions. The Children's Hearing can place a child on Supervision, with conditions that it considers will address his/her behaviour, but implementation of that Supervision Requirement is the statutory responsibility of the local authority. Indeed, some programmes for young offenders may be delivered by the voluntary sector, contracted by the local authority.

It will be important for good practice in this area to be identified and disseminated. The Scottish Government's Preventing Offending by Young People Framework includes a strand, led jointly by SCRA and COPFS, which is focused on supporting the development of effective assessment and interventions for high risk young people and disseminating good practice on multi-agency responses. The work of this group will be important in ensuring that the Children's Hearings System is able to respond appropriately to the particular challenges presented by this group of young people.

Section 47 – Remand and committal of children and young persons

Response

SCRA is supportive of the policy objectives of the provisions, which are defined in the Policy Memorandum accompanying the Bill as being:
"…to ensure children (accused of offences) no longer suffer the adverse effects of being remanded in adult prisons alongside convicted adult criminals".

We note that the recent report of the Securing Our Future Initiative (SOFI) recommended a planned reduction in the capacity of the secure estate from 124 beds to 118, but also suggested that the needs of some high risk young people could be met safely and cost-effectively in their communities using programmes such as the Intensive Support and Monitoring Services (ISMS) model. These recommendations will be important in ensuring that the most effective and appropriate interventions are provided for children and young people, whether that is within the secure estate or via a community-based programme.

In addition to those young people who present a risk to others, secure accommodation also offers a safe and secure environment to young people who are a risk to themselves (often the same young people). It will be important to ensure in implementing any changes to the legislation that the nature or purpose of secure accommodation does not change or shift focus away from the individual needs and welfare of each child placed there. The SOFI report was clear about the need to retain the welfare focus of secure accommodation, and made some recommendations around earlier, more effective care planning and better provision of services for children with particular needs which will help to ensure that this remains the case.

Section 59 - Retention of samples from children referred to children's hearings

Response summary

SCRA recognises that there is a small group of children and young people who may pose a risk of serious harm to themselves or to others.

We also recognise that there may be some circumstances where children's DNA and forensic evidence requires to be retained for a limited period of time in order to serve the needs of public protection. SCRA believes however, that while some of these children may present within the Children's Hearings System due to their offending, it is not the appropriate place for a decision on the retention of DNA and forensic evidence to be taken as it might delay or inhibit the ability of the system to respond to the needs and behaviour of children who offend.

The Multi-Agency Public Protection Arrangements (MAPPA) set out in the Management of Offenders (Scotland) Act 2005 are an established means of identifying, risk-assessing and managing those children and young people who are prosecuted via the criminal justice system and are considered to pose a risk of serious harm. The Scottish Government's best practice guidance *'Getting it right for children and young people who pose a risk of serious harm'*[1] states that these principles should also be applied to children who are dealt with solely by the Hearings System. SCRA agrees with this approach.

If, as part of that assessment and management of risk it is considered necessary to retain DNA or forensic evidence from a child, SCRA believes that there should be a judicial process, separate from the Children's Hearings System, which allows all parties, including the child, to be heard and which incorporates all necessary legal protections. Each case should be considered on its own merits and decisions should not be based solely on a specific offence or type of behaviour, although a list of offences might provide a trigger for consideration. Application to the court could be made by the police.

This would ensure that DNA and forensic evidence would only be retained where there was a clear and justifiable reason for doing so, based on sound and established risk management principles. It would also ensure that the ability of the Children's Hearings System to respond to the needs and behaviour of children who offend is not compromised or inhibited.

Possible impacts on the Children's Hearings System

Children who offend are treated differently from adults who offend, because of their vulnerability, lack of maturity and experience, and other factors related to their youth. The child's welfare is the paramount consideration [unless the *risk of serious harm principle* in section 16(5) of the Children (Scotland) Act 1995 applies].

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[1] *Getting it right for children and young people who pose a risk of serious harm – Scottish Government (2008)*

The taking and retention of a DNA sample could be considered to constitute a serious intrusion on a person's right to privacy. The UNCRC states the need to provide children with special legal protections. This is found in the Convention's preamble, which states: "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection."

The operation of Scotland's Children's Hearings System is consistent with these principles. If children's DNA or forensic evidence were to be retained via the Children's Hearings system, there would be a need to extend the availability of legal representation to ensure appropriate safeguards were provided for children in terms of the consequences of admitting grounds at a Children's Hearing.

It should be noted here that there has been a longstanding concern that the introduction of legal representation more widely within the Hearings System would lead to a more adversarial process and result in a system which placed less emphasis on the child's participation, becoming less effective as a result.

SCRA has previously expressed concern[2] that one of the unintended consequences of the Scottish Government's proposals might be that more children and families choose or are advised not to accept grounds of referral due to the consequences of doing so. This would lead to more grounds requiring to go before the Sheriff for proof, consequent delays in the resolution of cases and in the provision of intervention and support for children and families.

Decision making in the Children's Hearings System

When deciding whether to refer a child to a Hearing, the Reporter considers other factors as well as the referral and the sufficiency of evidence (e.g. the offence incident). Even where the Reporter has concluded that evidence is sufficient, there may not be a requirement for compulsory intervention, for example, because the incident is entirely out of character, there are no other significant concerns about the child and the parental response has been both appropriate and proportionate to the incident. In other circumstances, compulsion may not be needed because the child and family are accepting of the problem and are engaged in work with agencies such as restorative justice or social work.

In making the judgement on the need for compulsion, the Reporter will consider a range of factors which may be present in the child's background, which might include issues such as parental substance misuse or exposure to domestic violence.

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[2] *Consultation on the acquisition and retention of DNA and fingerprint data in Scotland – Scottish Children's Reporter Administration Response*

As a result, the establishment of a defined list of offences which automatically trigger the retention of DNA or forensic evidence **if grounds are accepted or established** does not represent an effective or proportionate method of identifying those children who may pose a risk of serious harm to themselves or others. In reality, the proposals are likely to result in the retention of the DNA or forensic evidence of the most vulnerable children, as the retention provisions could only be triggered for those children who go to a Hearing. Conversely, those children who commit a relevant offence but are dealt with on a voluntary basis will not be covered at all by the Bill's proposals.

Providing for a separate judicial process, entirely outwith the Hearings system, whereby the police may apply to the Sheriff for the ability to retain DNA or forensic evidence allows any list of relevant offences to be used as a threshold for consideration, rather than as an automatic trigger for retention.

List of relevant offences
We note that s.59(6) of the Bill says:
"A relevant offence is such relevant sexual offence or relevant violent offence as the Scottish Ministers may by order made by statutory instrument prescribe"

However, s.59(10) says
"In this section—
'relevant sexual offence' and 'relevant violent offence' have the same meanings as in section 19A(6) and include any attempt, conspiracy or incitement to commit such an offence."

If such a list is to be produced, either as a starting point for a more detailed multi-agency risk assessment, or as an automatic trigger for DNA retention, we believe that it should be developed by an expert working group representing all interests, including those of children and young people themselves.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Scotland's Commissioner for Children and Young People

1. The Role of the Commissioner

1.1 The office of Commissioner was established by the Commissioner for Children and Young People (Scotland) Act 2003. The general function of the Commissioner is to 'promote and safeguard the rights of children and young people'.

1.2 In particular, the Commissioner must review law, policy and practice relating to the rights of children and young people with a view to assessing their adequacy and effectiveness, having particular regard to the United Nations Convention on the Rights of the Child (UNCRC).

1.3 The Act puts a particular emphasis on the involvement of children and young people in the Commissioner's work, particularly those groups of children and young people who do not have other adequate means by which they can make their views known.

2. United Nations Convention on the Rights of the Child

2.1 The United Nations Convention on the Rights of the Child was passed by the UN General Assembly in 1989 and ratified by the UK in 1991. Ratification commits the UK to bringing its law, policy and practice into line with the Convention and this represents a promise to the children and young people of Scotland to make life better for them by respecting and promoting their rights as set out in the UNCRC.

2.2 The UNCRC sets out the fundamental human rights that all children around the world, without discrimination, are entitled to. It sets out minimum standards for the rights for children, rather than "best practice"; state parties are thus encouraged to exceed the standards laid out in the Convention, but must not fall short of its basic requirements.

3. Relevant UNCRC Articles

3.1 The following articles of the UNCRC are particularly relevant to this Bill:

Article 3 – The best interest of the child must be a primary consideration
Article 12 – The child must be given a say in decisions that affect their lives
Article 16 – Right to privacy

Article 37 – Freedom from torture, inhuman and degrading treatment and punishment
Article 40 – Juvenile justice, especially 40 (3) on specific systems and procedures to deal with children who offend, outwith the criminal justice system, and 40 (3)(a) on the age of criminal responsibility.

Further, the UN Committee on the Rights of the Child, which oversees the implementation of the Convention by state parties, from time to time issues General Comments to facilitate best practice in UNCRC implementation. General Comment No. 10 (2007), *Children's Rights in Juvenile Justice*[1] includes the Committee's views on the age of criminal responsibility, including that an age of criminal responsibility lower than 12 is 'not internationally acceptable'. It is referred to in more detail below.

3.2 Other relevant international law

Articles 3 (Prohibition of torture, inhuman and degrading treatment and punishment) and 6 (Right to a fair trial) of the European Convention on Human Rights (ECHR) are also relevant. European Court of Human Rights jurisprudence further contributes to our understanding of the notion of the age of criminal responsibility.

In the virtually identical judgments in *V v UK* and *T v UK* (2000), the Court held that the child's ability to understand and participate in the proceedings is the critical factor[2] in determining the Convention compliance of the criminal justice process and found a violation of article 6 (1) ECHR.

4. Introduction

4.1 We welcome the opportunity to comment on the important proposals in the Criminal Justice and Licensing (Scotland) Bill and the opportunity to contribute to the Committee's deliberations. The Bill is very wide-ranging and our comments will focus on only a few proposals contained within it, which are most pertinent to the rights of children and young people. Critically, the Bill provides a platform to address a number of important issues concerning children and young people's rights: raising the age of criminal responsibility[3], addressing the issue of DNA retention, the abolition of 'unruly certificates' to end (or, as the fact may be, further limit) detention of under-16s in adult prisons, and issues around sentencing of parents. We would be delighted if the Parliament and the Scottish Government would adopt the suggestions we make in our submission.

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[1] UN Committee on the Rights of the Child, *General Comment No 10 (2007): Children's Rights in Juvenile Justice*, CRC/C/GC/10. Available online at http://www2.ohchr.org/english/bodies/crc/docs/ GC10_en.doc.

[2] *V v UK* (2000) (application 24888/94), paras 88-91; *T v UK* (2000) (application 24724/94), paras 88-89.

[3] We note that there are two concepts that are often used interchangeably; the age of criminal responsibility and the minimum age for prosecution. These two concepts are not the same (for a discussion of the differences see e.g. Gerry Maher (2005), 'Age and Criminal Responsibility', *Ohio State Journal of Criminal Law*, 493-505) and the proposal contained in Part 3 of the Bill is mainly concerned with the minimum age for prosecution, in the sense that it is about the legal system's response to children who offend rather than the attribution of moral responsibility for children's offending.

4.2 Our thinking and understanding of the complexities around the key issues of the age of criminal responsibility and the minimum age of prosecution is still developing and we are consulting with partners and stakeholders in advance of our oral evidence to the Committee on 26 May. Our comments below reflect our position at present and we trust they will stimulate the Committee's debate on the four main issues in the Bill from a children's rights perspective.

5. Section 38: Minimum Age for Prosecution and the Age of Criminal Responsibility

5.1 We are delighted to see the proposal to raise the minimum age for prosecution from 8 to 12 in this Bill. While the number of prosecutions of children under 12 has been negligible[4], the very low age has been a dark spot on Scotland's otherwise relatively strong record of UNCRC implementation for two decades. The UN Committee on the Rights of the Child urged the Government to raise the age in its Concluding Observations on the UK State Party report in 1995, 2002 and 2008[5]. Raising the age to 12 will bring Scotland in line with the absolute minimum acceptable standard set by the UN Committee.

5.2 It is worth noting that the Scottish Government's approach to raising the age in the present Bill has departed significantly from that proposed by the Scottish Law Commission (SLC) in its report on the issue in 2002[6]. The SLC recommended raising the minimum age for prosecution to 12, and repealing s.41 of the Criminal Procedure (Scotland) Act 1995, thereby removing any lower age limit for referral to the Children's Hearing on an offence ground. The Scottish Government's proposal in the current Bill is to retain s.41 and therefore the minimum age for referral of a child to the Children's Hearing System at eight. It further inserts a section (s.41A) into the 1995 Act, which raises the minimum age for prosecution to twelve. Finally, it retains s.42 of the Act to the effect that a child aged 12 to 15 may be prosecuted only on instruction of the Lord Advocate.

5.3 This is a rather complicated matter and indeed one where there is a degree of confusion about key concepts. It is SCCYP's view that the Bill requires amendment if it is do what the Scottish Government intends it to do – the Policy Memorandum that accompanies the Bill states the policy objective as follows:

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[4] There have been four prosecutions of children under 12 between 2004/05 and 2006/07; Source: HM Government, *Implementation of the UN Convention on the Rights of the Child: Response to the list of issues raised in connection with the consideration of the third and fourth periodic report of the United Kingdom of Great Britain and Northern Ireland (CRC/C/GBR/4), para 176.*

[5] *Concluding Observation on the United Kingdom and Northern Ireland*, 15 February 1995, CRC/C/15/Add 34, paras.40-43; *Concluding Observation on the United Kingdom and Northern Ireland*, 9 October 2002, CRC/C/15/Add.188, paras.59 and 62; *Concluding Observations of the Committee on the Rights of the Child on the United Kingdom of Great Britain and Northern Ireland*, CCR/C/GBR/CO/4, 3 October 2008, para.78.

[6] Scottish Law Commission (2002), *Report on Age of Criminal Responsibility* (SE/2002/1).

> Section 38 – Prosecution of children
> *Policy objectives*
> 188. To ensure Scotland meets international standards as regards the age at which children can be prosecuted.

It then goes on to explain how it is going to achieve that objective:

> 189. The provisions will raise the age of criminal responsibility by prohibiting the prosecution of children under 12 while still allowing them to be referred to a Children's Hearing on offence grounds, whilst retaining the existing rule that children under 8 are conclusively presumed not to be guilty of any offence.

This would appear to conflate the two distinct, yet related issues of the age of criminal responsibility and the minimum age for prosecution. It is our view that the international requirement – while focusing on criminal law and procedure – includes criminal consequences as well. The paragraph above suggests that while criminal prosecution of 8-11 year-olds will be out of bounds, referral to the Children's Hearing on an offence ground with criminal consequences will not be.

5.4 We believe that the Bill in its current form would continue to allow for children between 8 and 11 years of age to face 'criminal' consequences despite the new minimum age for prosecution set at 12. With s.41 retained in its present form, disposals of the welfare-based Children's Hearing relating to this age group count as a conviction for the purposes of the Rehabilitation of Offenders Act 1974. In other words, despite the fact that the child is not dealt with by the criminal justice system but by the welfare-based Children's Hearing System, s.3 of the 1974 Act means that they will have a criminal record if they and their relevant adult accept an offence ground or an offence ground is established by a Sheriff.

5.5 If the Bill passes as it currently stands, questions would therefore remain as to whether the age of criminal responsibility has actually been raised – it could be argued that in terms of the criminal consequences for children who commit offences this remains at the unacceptably low level that is at present. We make suggestions as to how this dilemma could be resolved at the end of this section (5.10).

Why 12?

5.6 We would like to reiterate our support for the Scottish Government's intention to raise the age of criminal responsibility in Scotland using this Bill. In determining what the new age of criminal responsibility should be, it is useful to consider the text of the international standards in more detail at this stage.

5.7 In its General Comment No 10, the UN Committee on the Rights of the Child states that '[t]he reports submitted by State parties show the existence of a wide range of minimum ages of criminal responsibility. They range from a *very low level of age 7 or 8* to the *commendable high level of age 14 or 16*'[7]. It concludes that 'a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable'[8]. Finally, the Committee formulates its expectation that the age should continue to be progressively increased and we call on the Parliament and the Scottish Government to aim closer to the 'commendable high level' called for by the UN Committee in its *General Comment*.

5.8 In our view the Parliament should not settle for the minimum internationally acceptable standard but aim higher for Scotland's children. In the Children's Hearing System Scotland has got a robust, welfare-based, specialist juvenile justice system that works well. The Children's Hearing can impose compulsory measures to address offending as well as the underlying causes, and it can and does authorise detention of children and young people in secure accommodation for the protection of themselves and of others where this is necessary.

5.9 Finally, as a specialist system for children and young people, the Children's Hearing System can deal with children and young people who offend in an appropriate way and enable them to participate in the process – a key element of their right to a fair trial or process according to European Court of Human Rights case law[9]. It is important to ensure sufficient resourcing for the system and to maintain and increase public confidence in it by reinforcing the view that referral to the Hearing is not a 'soft' option or 'letting off' children and young people who commit offences.

SCCYP's Suggestions on the Age of Criminal Responsibility

5.10 The following suggestions represent SCCYP's current thinking around these issues and we will be delighted to discuss these further in our oral evidence in May.

5.10.1 Proceeding without repealing s.41 of the 1995 Act would mean the retention of the age of criminal responsibility at 8. We would suggest that s.41 be repealed subject to our further suggestion below (5.10.2).

5.10.2 A new non-offence ground should be introduced to allow for children under 12 to be referred to the Children's Hearing so that their behaviour and their needs can be addressed without the prospect of 'criminal' consequences. We believe that it would be an abdication of responsibility towards children who offend, their victims and the wider public if the needs and behaviours of those children would not be addressed appropriately, including by means of compulsory measures where this is required.

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[7] *General Comment No 10 (2007)*, cited above FN1 ; para 30 (italics ours).

[8] Ibid, para 32.

[9] See above, FN2.

This is not an entirely new idea; the creation of a new (non-offence) referral ground that catches behaviour that would otherwise be an offence if the child was 12 or over have previously been discussed in the context of the draft Children's Services (Scotland) Bill[10]. We would invite the Committee and the Scottish Government to revisit these proposals.

5.10.3 In summary, our proposals are:

- Minimum age for prosecution: we endorse the proposal in the Bill that prosecution of children under 12 (or, as is our preference, of a higher age) is not competent.
- The age of criminal responsibility (in the sense that children under that age do not face the force of the criminal law or its consequences) should be 12 (or, as is our preference, a higher age) as well – there should be no criminal consequences under the minimum age for prosecution.
- Children under the age of 12 who display behaviour that would otherwise be an offence if the child was 12 or over should be referred to the Children's Reporter on a new non-offence ground. The referral or any disposal by the Hearing should have no criminal consequences under the Rehabilitation of Offenders Act 1974.

6. Retention of DNA Samples from Children referred to the Children's Hearing

6.1 We note that the number of children under the age of 16 who currently have their DNA profile stored on the Scottish DNA Database may be substantially higher than we would have anticipated. In response to a parliamentary question on 25 June 2007, the Cabinet Secretary for Justice stated that there were 2,386 profiles of under-16s on the database, the youngest of whom was 9 years and 4 months old at the time[11]. In the absence of a power to retain the DNA profile of children dealt with by the Children's Hearing System, and against the background of 474 children under 16 who were proceeded against in the courts between 2004/05 and 2006/07[12], we would be interested to hear how this high number of children under the age of 16 came to have their DNA profile retained on the database.

6.2 We recognise that in a significant share of offences committed by children and young people, the victim is another child or young person. As we pointed out in our recent response to the *Consultation on the Acquisition and Retention of*

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[10] Scottish Executive 2006, *Draft Children's Services (Scotland) Bill Consultation*. The proposal referred to is contained within s.15 of the draft bill (p44).

[11] S3W-1073 – S3W-1075 in the name of Jeremy Purvis MSP.

[12] HM Government, cited above FN4; para 176.

DNA and Fingerprint Data in Scotland, the UNCRC allows for the rights of others to be taken into account – the child's best interest must be a primary consideration, but it is not focusing on the best interest of an individual child at all times and at all cost. The balancing act between competing rights must, however, be explicit and proportionate.

6.3 While we accept some of the premise for the proposal in s. 59, we consider that automatic retention of the DNA profile of children dealt with by the Children's Hearing on offence grounds in the database would be disproportionate, even where this is limited to a list of specified offences. There are questions about how such a change could impact on the character of the Children's Hearing System as a welfare-centred forum rather than one focused on establishing criminal guilt or otherwise; and about thresholds, for example in relation to assaults, and consensual underage sexual activity. Further questions remain with regards to children who are looked after in residential settings, where their behaviour is under much closer scrutiny and police involvement in incidents is much more likely, where these incidents might be resolved informally if the child had not been in care. Finally, the Scottish Children's Reporter Administration (SCRA) makes an important point in its written submission regarding the decision-making process at the Children's Hearing. Its concern is that the process that is proposed in s.59 of the Bill would lead to the most vulnerable children and young people having their DNA retained, not necessarily those who pose the most significant risk to the public.

6.4 For these reasons, we would suggest that the Bill be amended to the effect that the DNA profile of a child who is dealt with by the Children's Hearing system can be retained only if the following conditions are met: (1) the child has been referred on an offence ground; (2) the offence is one of a list of 'trigger offences' to be specified in the Bill; these should be serious violent and sexual offences; (3) the child and their relevant adult have accepted the ground, or it has been established by a Sheriff; (4) the police or another relevant agency has made an application to the Sheriff for an order to retain the child's DNA for a period of up to three years; and (5) the Sheriff makes a decision based on the risk that the child poses to public safety.

7. Remand and Committal of Children

7.1 We welcome the abolition of 'unruly certificates' in s.47 of the Bill and the resulting changes to the detention of children under 16 in adult prisons. We agree with the Cabinet Secretary for Justice that 'Prison is no place for children'[13].

7.2 There is a further, related issue, regarding the detention of children aged 14 and over who have been convicted under s.205 or s.208 of the Criminal

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[13] Kenny MacAskill, cited in *Criminal Age to be Raised to 12*, Scottish Government Press Release 1 March 2009; available on http://www.scotland.gov.uk/News/Releases/2009/03/27140804.

Procedure (Scotland) Act 1995. This retains the possibility of children being detained in adult prisons, which is entirely unacceptable. If 'prison is no place for children', it is no place for any child.

8. Sentencing

8.1 Last year, SCCYP published the report, '*Not Seen. Not Heard. Not Guilty. The rights and status of the children of prisoners in Scotland*'[14], in which we argued that the children of prisoners are the invisible victims of crime and of our penal system. One of the report's key recommendations is that when courts take sentencing decisions regarding a parent, the rights and interests of the children should be taken into account. At present, decisions to imprison a parent rarely take account of the potential impact on children.

8.2 SCCYP believes that this current approach to the sentencing of parents, seen from the point of view of the child, is contrary to the European Convention on Human Rights (ECHR) and the UNCRC. Children have the same rights as adults to respect for their private and family life under Article 8 of the ECHR. The imprisonment of a parent is a prima facie interference with that right. Such interference may, however, be justified if it is in accordance with the law, necessary in the pursuit of a legitimate aim (which includes the prevention of disorder or crime and public safety) and if the interference is proportionate to the aim sought. Applying article 8 to sentencing decisions involving parents would require courts to assess the impact of sentencing options on the rights of any children affected to ensure that any interference with their rights is proportionate. It is fair to say that, at present, this balancing of the children's rights and the wider public interest is not carried out in all cases.

8.3 We therefore welcome the Bill's statement of the purpose and principles of sentencing, in particular ss.1(3) and (4), which list matters to which a court must have regard in sentencing an offender. These matters include 'the offender's family circumstances' (s.1(4)(c)). This section provides a further statutory basis for courts to take account of the impact of the sentence on an offender's children when considering sentencing options. We also welcome the Bill's establishment of a Scottish Sentencing Council and its ability to produce sentencing guidelines. We hope that such guidelines will reflect the rights of children and young people, either in the context of being sentenced themselves, or when they will be affected by decisions regarding an offending parent.

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[14] The report was laid before Parliament on 7 February 2008 (CCYP/2008/1) and is available from SPICe and online at http://sccyp.co.uk/admin/04policy/files/spo_061937Children%20of%20Prisoners%20Report.pdf.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Children in Scotland

Children in Scotland appreciates the opportunity to submit written evidence to the Justice Committee in respect of the *Criminal Justice and Licensing (Scotland) Bill*. Children in Scotland represents over 450 statutory, voluntary and independent members promoting children's wellbeing and best interests.

We are confining our comments to the aspects of the Bill relating specifically to children and to a broad outline of our position. Our Director of Research, Policy and Programmes (Dr Jonathan Sher) has been invited to appear before the Committee on 26 May. At that time, more detailed evidence will be offered.

We support the additional safeguards contained in the Bill for children who become involved, in various ways, with the criminal justice system. The ending of 'unruly certificates' and the requirement on courts to use detention for a child only in exceptional circumstances [Section 17 (3) and Section 47] are welcome.

We also agree with the Bill's provision that the Court will be required to document its reasons for believing that no other option would be suitable. We believe that placing children in prison is both entirely inappropriate and detrimental to their future welfare. Children placed in adult prisons are frequently subject to assault and intimidation by adult prisoners, as well as being more likely to re-offend.

The extension of the circumstances in which indecent images of children constitutes grounds for prosecution [Section 33] is welcome. We hope that it will have a deterrent effect. It is critical that children who have been abused in this way will be dealt with through child protection procedures. An unambiguous connection needs to be made between criminal prosecution procedures and child protection systems.

We commend the measures proposed to deal with human trafficking [Section 35]. We are, however, particularly concerned about the trafficking of children, the inadequacy of the systems for investigation and support of such children, and the complications of prosecuting those responsible. Many unaccompanied children arrive in Scotland, some of whom have been trafficked and some of whom have been smuggled into the UK and abused en route. The Bill would be strengthened by specific reference to, and specific remedies for, this problem.

The policy intent of additional protection for child witnesses [Section 64] and of specified time limits for the retention and destruction of samples taken from children [Section 59] are heading in the right direction. Particularly, on the latter issue, there are further safeguards for children and young people that should be put in place.

Increasing the age of criminal responsibility [Section 38] is strongly endorsed. We continue to believe that the term ‘criminal responsibility’ is an unhelpful euphemism. The underlying issue is the age at which children become subject to criminal prosecution, criminal penalties, criminal status and criminal records. While many aspects of Scotland’s policy and law in relation to children and young people has been ground-breaking and progressive, notably the welfare-based Children’s Hearings system), allowing 8-year-olds to be regarded and treated as criminals has long been out of step.

Raising the age significantly will bring Scotland into line not only with its own general approach to the rights of children and young people, but also with the majority of European states. While the UN rapporteurs found many elements of Scottish policy for children commendable, they expressed deep concern over this question, and strongly recommended that the age be raised. The Scottish Government has publicly endorsed the UN Convention on the Rights of the Child. Significantly raising the age through this Bill demonstrates a step toward the appropriate implementation of the UNCRC.

Marion Macleod
Senior Policy and Parliamentary Officer

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from CARE for Scotland

Introduction

CARE is a charity and has over 30,000 registered supporters from all Christian denominations throughout the UK. CARE's Public Affairs Department acts as a think tank on ethical issues in biology and medicine, as well as in education and social issues. CARE also briefs supporters and Parliamentarians as relevant issues are considered in Westminster, Brussels and the devolved Parliaments and Assemblies.

CARE for Scotland has an office in Glasgow. CARE for Scotland has approximately 3,000 registered supporters drawn from across the main denominations in Scotland. Since 1999 CARE for Scotland has maintained a significant public policy presence with a parliamentary officer liaising with the Scottish Executive/Government and the Scottish Parliament. We have responded to many consultations and frequently given evidence to parliamentary committees.

CARE is supportive of the measures in the Bill. We limit our specific comments to Sections 34 and 35 of the Bill which deal with extreme pornography and people trafficking.

Extreme Pornography

CARE welcomes the proposal in Section 34 of the Bill to criminalise the possession of extreme pornography. We are conscious that this new offence is similar to that introduced by Section 63 of the Criminal Justice and Immigration Act 2008 which applies in England & Wales. Section 34 of the Bill largely replicates the relevant sections of the Criminal Justice and Immigration Act, 2008. However the Bill goes further that that Act and we are supportive of the Scottish Government's aim to legislate also for an offence which will cover "all obscene pornographic images which realistically depict rape or other non-consensual penetrative sexual activity."

However, there are a number of issues which the Committee may wish to consider in relation to section 34. Whilst the new offence is to be commended, the devil is in the detail with significant new definitions introduced in this clause. Specifically there are two thresholds to this offence – 'pornographic' and 'extreme image', defined by three rather complex sub-clauses.

Firstly section 34(2) defines a **"pornographic"** image if **"it is of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal".** This section makes clear that if the image is one of a series it must be considered in context. If it is taken out of context and the rest of the images were not pornographic, then the single image is not considered pornographic. The significant points to note here are:

- The use of the word "pornography" has, in the past, been resisted as part of obscenity legislation. In particular, it does not feature in section 51 of the Civic Government (Scotland) Act, 1982. Moreover, the definition of pornography in the Criminal Justice and Immigration Act 2008 (and in this Bill) differs from the definition of pornography in section 51 of the Sexual Offences Act 2003 which applies in England & Wales, that is **"a person is involved in pornography if an indecent image of that person is recorded; and similar expression and 'pornography' are to be interpreted accordingly."** At the time that the UK Government announced this new definition in August 2006, they acknowledged that the joint Home Office and Scottish Executive consultation had raised concerns about how to interpret the term "pornography".[1]

- It is up to the jury to determine whether an image is pornographic, but it is not clear how – will there be a question about the *intent* of the original publisher if they are not the person being prosecuted. In Lord Halsbury's Obscenity Bill debated in the House of Lords on 18 Dec 1996, he used the term **"in a manner which a reasonable person would regard as grossly offensive".** This suggestion was criticised by the Labour opposition of the day because of the difficulties of defining both a reasonable person or grossly offensive and the Government said that the **"personal moral code of the individual concerned could fundamentally affect the judgement reached"** and would therefore not provide the courts with any certainty. The definition in Section 34 of this Bill seems similar to that contained in Lord Halsbury's Bill and the same concerns arise – will the judgement depend on how easily the jury are sexually aroused?!

- There is no power for the police to confiscate (forfeit) the material, so that even if a person is prosecuted the images can remain in circulation.

2. Secondly, section 34(2) defines an "extreme image" by use of a list approach, which in the past has been deemed unworkable by the Home Office[2]. The images to be restricted are those that are realistic in their

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[1] Ibid, page 5, para 4

[2] Note this was not the major criticism of Lord Halsbury's Bill in the debate, but was expected to be because of previous Home Office statements.

depiction of the activities contained in the list. The points to note on this sub-clause are:

- Images of sexual violence towards a live person where consent is involved and severe injury is not caused, or likely to be caused, are not prohibited.
- The question of realism is tricky. Does this definition this mean an image that is "photo-realistic" or could it cover extremely violent cartoon material or material derived from a photo?
- Films classified by the British Board of Film Classification under the Video Recordings Act 1984 are specifically excluded from the legislation, unless a part of a classified work has been extracted for the purpose of sexual arousal.

3. Thirdly, section 34(2) defines an "image" as a moving or still image, or data that can be converted into such an image. It is not clear if a series of images as described in clause 34(2) will be lead to more than one count of possession or not, ie is a film one image or a series of images?

Human Trafficking

We welcome Section 35 of the Bill, which tightens the law on human trafficking. However, we do feel that an opportunity has missed to really tackle one of the root causes of human trafficking.

Economic poverty, gender discrimination and social vulnerability are all root causes for human trafficking. In addition, the high level of profit to be made – due to the rising demand for prostitution - is a major pull factor for criminal gangs to engage. Until the root causes of sex trafficking and other forms of sexual exploitation through prostitution are sufficiently addressed, attempts to diminish the phenomenon will be limited.

We are encouraged that the Scottish Government, along with the UK Home Office, has ratified the *Council of Europe Convention on Action against Trafficking in Human Beings*, which came into force on 1st April 2009. Article 6 of the convention clearly indicates the necessity of tackling demand in order to reduce this type of exploitation. In Scotland's commitment to tackle human trafficking, this must be a priority. Article 19 of the Convention stresses the importance of criminalising the use of services of a victim of trafficking.

It is important to note that this legislative move alone will not end exploitative prostitution. It is a complex issue which requires a multi-faceted approach including safe exit strategies and support, education, funding for local projects and awareness raising initiatives. Moreover, even when legislation exists it can be difficult to secure successful prosecutions as evidenced by the fact that there have been no successful prosecutions in Scotland under the offences introduced by the Criminal Justice (Scotland) Act 2003. However, criminalising the purchase of sexual services is a significant part of reducing exploitative prostitution and sex trafficking as it directly tackles the demand which cultivates the industry.

The UK Government has included in the Police and Crime Bill a proposal to outlaw the purchase of sexual services from someone controlled for another person's gain. Whilst this is welcome, it does raise questions as to how it will be enforced. CARE is of the view that it would be more effective to simply outlaw the purchase of sexual services. Moreover, not to do so suggests that society is willing to condone male exploitation of women who are not trafficking victims and/or are not controlled for another person's gain, but find themselves through drug addiction or other life circumstances driven into prostitution. This is the case in relation to off-street prostitution as the measures introduced to counter kerb-crawling by the Prostitution Public Places (Scotland) Act 2007 do not apply.

The Scottish Government are considering their position on these matters and are yet to indicate if they will bring forward legislation. This raises the prospect of more people being trafficked into Scotland, which ACPOS estimates already receives a disproportionate number of trafficked persons compared to the rest of the UK, if the UK Government legislates for England & Wales and the Scottish Government chooses not to legislate in this area. Even if a delay is involved before the legislative framework north and south of the border is brought into line, there is likely to be an increase in people trafficking for the purpose of sexual exploitation into Scotland.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from West Lothian Council

A separate response has been provided by the West Lothian Licensing Board in relation to liquor licensing. This response relates to those provisions in Part 8 of the Bill dealing with licensing under the Civic Government (Scotland) Act 1982.

Time has not permitted formal discussion of these proposals by the Council. The views contained herein are therefore the views of officers within Legal Services and the Licensing Standards Officers.

The amendments to the 1982 Act set out in the Bill are welcomed and will assist the Council to exercise its statutory responsibilities.

I have the following additional comments –

(1) S 124(2) – Reference to “taxi and private hire car licences” should be changed to “taxi and private hire car driving licences”.

(2) The proposals contained in Section 128(3) (e) are of interest. Paragraph 9(3)(e) of Schedule 2 of the 1982 Act presently prohibits the grant of a Sex Shop licence to a person who has not been resident in the United Kingdom for the 6 months immediately preceding the date of their application. The Bill proposes to include residence in any member states of the European Community.

It is appreciated that there are European Community Treaty requirements to allow freedom of movement and the ability to work to all citizens within the European Community. We understand that reasonable restrictions can be imposed on the grounds of public policy, public security or public health. The restrictions on obtaining a Sex Shop licence would presumably be justifiable on the grounds of public safety so that persons operating such premises do not pose a threat to the public, particularly vulnerable groups, such as children.

We would ask that some thought be given to introducing a similar restriction on persons seeking to obtain taxi and private hire car driver licences. Taxis and private hire cars often carry children and vulnerable adults, mostly without incident. However, licensing authorities and the police wish to ensure that all drivers are subject to rigorous background and criminal checks. These checks cannot be carried out effectively on persons who reside out with the United Kingdom. The 1982 Act requires the local authority to have evidence as to whether a person is not a fit and proper person to hold a licence. The onus is not on the applicant to show that he is a fit and proper person. If the applicant has not resided in the in the United Kingdom for a reasonable period of time, the police would not be able to check their criminal records and the licensing authority would be bound to grant the licence.

It may be possible for licensing authorities to refuse to grant taxi or private hire car driver licences on the “other good reason” grounds set out in Paragraph 5(3) (d) of Schedule 1 to the 1982 Act. It would be preferable (to avoid legal challenge and to introduce uniformity across Scotland) if a specific provision could be entered into the Bill prohibiting the grant of taxi or private hire car driving licences to persons who have not resided continuously in the United Kingdom for the 5 years immediately preceding their application.

It is suggested that the period of 5 years would be sufficient to allow potential applicants to demonstrate a “clean record” and that they could safely be allowed to carry unaccompanied passengers. It is also suggested that only residence within the United Kingdom would be relevant, due to the present lack of comprehensive and uniform criminal record keeping system within the European Community.

It is suggested that the above provision would not be incompatible with the right of movement and employment within the European Community. Non UK resident applicants would only be being placed into the same position as those who had resided within the UK in the preceding 5 years and these would be reasonable restrictions designed to ensure protection of the public and wholly appropriate given the special nature of a taxi or private hire car driver’s duties.

It is appreciated that this would represent a significant change in taxi/private hire car driver licensing legislation. It may be considered more appropriate to consult further rather than include it in the present Bill. It is intended that a more detailed letter on this issue will be sent to the relevant ministers in due course. However, if it is considered appropriate to include such a provision in the present Bill, we would suggest the following amendment to S 124 of the Bill, by insertion after 124(2) –

> *(3) In section 13 (taxi and private hire car driving licences) insert the following subsection after subsection (3) –*
>
> *“(3A) A licensing authority shall not grant a licence under this section to a person who is not resident in the United Kingdom or was not so resident throughout the period of five years immediately preceding the date when the application was made.”*

(3) In relation to the changes proposed by Section 125 - market operators. There is a significant change suggested to the definition removing the exemption from requiring a licence for charitable, religious, youth, recreational, community, political or similar organisations running markets at which goods are offered for sale by more than one seller. This will impact on a number of community groups who run car boot sales or joint fundraising events and who rely on volunteers to fundraise. These groups are unlikely to have the benefit of legal advice and thus be unaware that they will now

require to be licensed. This change in the law will require to be widely publicised and we would welcome national publicity in this regard (to supplement publicity organised by the Council) and a long enough lead in time to bring this to the attention of such organisations who would otherwise be difficult to reach out to.

Audrey Watson
Senior Solicitor

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from North Lanarkshire Council

In response to the Scottish Parliament Justice Committee call for evidence, this written submission sets out comments from North Lanarkshire Council Officers on provisions contained in the Criminal Justice and Licensing (Scotland) Bill.

PART 1 - SENTENCING

Section 14

The development of a single reparative community penalty (between 20 - 300 hours) under the community service brand, combining the best elements of current community orders is generally welcomed and is in line with the authorities Action Plan and its move several years ago to establishing a Restorative Justice Approach to delivering community service. The reports “Reforming and Revitalising” published in November 2007 and “Protecting Scotland’s Communities - Fair, Fast and Flexible Justice” in 2008 set out the Government’s aspirations for immediacy and visibility and have given North Lanarkshire Council and the Lanarkshire Community Justice Authority the opportunity to consider and prepare for the changes in legislation.

A number of initiatives have been introduced and developed. Community engagement has been enhanced with links to North Lanarkshire Council Partnership Community Planning Structure and six local Community Safety Sub-Groups. This informs the work scheduling and ensures that it is meaningful to community safety and aesthetics. It also gives the offender a stakehold in the community and enhances their skills, work discipline and employability with the aim of reducing re-offending. The introduction of Mandatory Supervision Orders in September 2007 has resulted in Restorative Justice developing a range of expertise and a portfolio of placements and opportunities for the rehabilitative element in the new Community Payback Order.

The change in timescale of completion of an Order from twelve to six months poses the greatest challenge and is not as simplistic as doubling the capacity and budget. There are a number of practical difficulties, one example is that a service user in full time employment with a 300 hours order would require to work two days per week in addition to their paid employment to complete within six months and this would raise a significant number of difficulties. Despite these challenges, North Lanarkshire Council is currently exploring a range of initiatives and methods to effect this change in legislation but this may have a significant impact on resources. This impact will be especially felt by North Lanarkshire Council given that unlike other local authorities, North Lanarkshire Council services more than one court.

Section 21

If the government goes ahead with this proposal there may be an unintended knock-on effect. If a case has such a significant sexual element that would allow the imposition of a SOPO, then the court would be mandated to give serious consideration to Paragraph 60 of Part II of the Sexual Offences Act 2003 - this may cause a degree of confusion about how long the subject requires to be subject to notification.

Sections 58 - 60

Use of DNA and Fingerprint Data

There remains a lack of clarity about the database which retains DNA information about convicted offenders. To extend this facility at this time to non-convicted persons would likely constitute a violation of their human rights - this would undermine public confidence in the justice system.

Section 63

The compelling of spouses to give evidence against a partner is more than likely to place the non-offending spouse in a situation where they are at greater risk from, for example, violent partners.

The vast majority of the currently ‘non-compelled’ witnesses are women experiencing domestic abuse. If the woman is then “compelled” to give evidence by statute and thereupon refuses to do so, she will be held in contempt of court, i.e. she will become an offender. This form of Hobson’s choice of a rock and a hard place has no locus in a modern justice system.

Section 71

As an agency that has empowerment at the heart of its core values, caution must be applied in terms of the wholesale support of this proposed change in law. Social Work will never seek to shy away from issues that involve criminal behaviour but it also must have confidence in the agencies to which it supplies any information – especially in relation to those members of the public (service users) who are marginalised and excluded. The function and role of any such ‘anti-fraud’ organisations would have to be clearly identified before Social Work could from such partnerships.

PART 3 - CRIMINAL PROCEDURE

Section 38

The rise in the age of prosecution from 8 to 12 is a positive move. It is important to minimise contact with adult criminals and to address their needs as well as their offending.

PART 8 - LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982

With reference to Section 123 (licensing of Metal Dealers) Sub-section (3) of the Bill reference is made to Section 29 of the Civic Government (Scotland) Act 1982 (Metal Dealers' exemption warrants) which states:-

(1) In Sub-section (1) - (iii) for the words from "£100,000" to the end substitute "such sum (including nil) as the Licensing Authority may determine".

It is agreed that that the monetary sum (including nil) in respect of an "exemption warrant" should be a matter for the Licensing Authority to determine. Such an amendment to the present Act would allow objections to be received which are precluded under the terms of Section 29 - (1) of the existing Act, if the total amount received by the dealer as principal in the ordinary course of his business in respect of metal sold or supplied by him, without deduction being made, exceeded £100,000.

Apart from the above comments, the remainder of the amendments in Part 8 of the Bill relative to the Civic Government (Scotland) Act 1982 are concurred with.

PART 9 - ALCOHOL LICENSING

Section 129

Views on Raising the Age of Purchase of Alcohol to 21

62% of organisations who responded to the Scottish Government discussion paper "Changing Scotland's Relationship with Alcohol" expressed opposition to the proposal to raise the minimum age for off-sales purchases to 21. While 52% of health organisations welcomed the proposal, less than 30% of local government organisations were in favour.

Arguments for raising the age

There are significant levels of health and social harm problems associated with young people drinking*:-

- Young people who begin drinking before age 15 are 4 times more likely to develop alcohol dependence than those who begin drinking at 21 years
- Drinking in adolescence is a factor in ischaemic strokes
- Increasing the age of purchase has had a positive impact on youth drunk driving
- The highest rate of drunk drive accidents are in the 17-19 age group followed by 20 to 24 age group
- 76% of young offenders reported that they were drunk at the time of their offence compared to 41% of older offenders

- Alcohol was a factor in 669 attendances at emergency departments by young people
- 98% of these were aged 13-17 and 2% were aged 8 - 12
- The average amount consumed was 13 units
- 1,962 emergency admissions involved 15-19 year olds and 2,204 involved 20-24 year olds
- A significant number of presentations involve alcohol poisoning and there are 110 assaults requiring treatment every day of which 70% involved alcohol
- Those in the youngest age range (18-29) and in the oldest (65+) are the least likely to identify recommended drinking limits
- 60% of both men and women aged 16-24 years reported binge drinking
- Binge drinking in men and women decreased as the person got older
- Of the 50 million litres of pure alcohol sold in Scotland, 31.5 million was off sales and 18.2 million was on sales
- 10% of 13 year olds and 19% of 15 year olds had made an attempt at buying alcohol from a supermarket/off-license and more than 50% reported they were successful
- Attempts to buy at a bar or club was 5% for 13 year olds and 15% for 15 year olds
- 21 year olds may be less likely to purchase alcohol for under 18s
- The person would required to drink alcohol in a more controlled, regulated environment

**Statistics taken from "Alcohol Statistics Scotland 2009", the Scottish Government's paper "Changing Scotland's Relationship with Alcohol", "Binge Drinking and Europe Report" – Institute of Alcohol Studies, London.*

Arguments against

- This could potentially criminalise more young people and put significant demands on the justice system
- The government should be focusing on other measures to reduce the harm associated with younger age groups drinking including:
    - Extend alcohol information to the over 18 i.e. further education establishments, places of work
    - Raise awareness of drink driving and potentially reduce the legal driving limit for newly qualified drivers or drivers under 21
    - Increased effort to ensure responsible practice in off-sales
    - Increased proof of purchase schemes, test purchasing
    - Enforcement of penalties if establishments breach this
    - Systematic evaluation of recent pilots or analysis of benefits in other countries i.e. some countries already have different age limits for on and off-sales, the strength of alcohol being purchased and if accompanied by a responsible adult
    - Support other measures such as minimum pricing

Views in relation to Overprovision Statements

In relation to overprovision which the Board are bound to assess, the amendments are cosmetic although it is noted that the Board is empowered at any time to review any over provision assessment. Allowing the Board to do this acknowledges that any determination made by the Board regarding over provision is subject to change/modification at any time.

Views on the Duty to Assess the Impact of off-sales to Persons under the Age of 21

In preparing a detrimental impact statement regarding the extent to which the Board considers that off sales to persons under that age has a detrimental impact in an area or locality, the Board are required to conduct consultations with designated persons. The only comment on this point is whether the Scottish Government would intend to provide a style questionnaire for Boards to utilise when conducting such consultations or whether Boards will be left with a total discretion as to the manner in which they make their enquiries. The request that the appropriate Chief Constable or relevant Council provide the Board with statistical information for the purpose of preparing a detrimental impact statement is useful and it is simply enquired as to whether the Government would intend by regulation stipulating any timescale for this. It is noted that there is a timescale imposed regarding the Board being bound to consider reviewing the detrimental impact statement at the request of either the Chief Constable or the Local Licensing Forum. The acknowledgement that it is for the Board to determine “a locality” for the purposes of preparing a detrimental impact statement acknowledges the Board’s expertise and local knowledge regarding localities in their area.

Views on Provisions regarding the Board being empowered to Vary Premises License conditions, the Various Procedural Requirements and the Board being Vested with Powers to Revoke any Variations

It is enquired whether there is an intention that any person whose licence may be the subject of any such variation will be afforded an opportunity of making representation regarding whether he/she feels the variation is appropriate in relation to the furtherance of the licensing objectives.

Section 130

The amendments made regarding notification requirements in relation to premises licence applications impose less onerous requirements on staff who service Licensing Boards. It is simply enquired whether such staff will be afforded total discretion as to what other persons apart from the Chief Constable will be given copies of any premises licence application.

Section 131

The provision allowing a Licensing Board to consider granting an application if a modification proposed by them were made to the operating plan or layout plan provides clarity and is welcome.

Section 132

The provisions regarding anti-social behaviour reports being provided gives a degree of flexibility since the legislation as originally drafted envisaged such reports having to be prepared and considered in every case when this may not always be necessary. Allowing the Chief Constable if he sees fit to produce such reports or the Board at any time prior to determining applications to request such reports from the Chief Constable will avoid any unnecessary work being undertaken regarding the preparation of such reports. Clearly the thinking has to be that such reports will only be prepared if it is thought helpful to the Board in their determination of applications.

Section 133

The provision of Section 133 of the Bill amending Section 63 makes it clear regarding alcohol being sold or taken away from licensed premises outwith licensed hours being, subject to certain exceptions, an offence.

Section 134

The proposed alterations regarding the processing of occasional licences allows, in certain circumstances, the expeditious processing of such applications and is to be welcomed. Clearly in the case of provision being made for events like funerals it would be impracticable to adhere to the timescales originally laid down in the legislation. It is enquired, however, as to why the function of deciding whether an occasional licence application can be fast tracked cannot be delegated to staff who service the Licensing Board since precluding this happening could, on occasion, cause unnecessary delay.

Section 135

The provisions in the Bill regarding the Boards being empowered to vary conditions of extended hours applications are broadly welcomed but it is again enquired as to whether any licence holder will be afforded an opportunity of commenting on/making representations about any variation that he does not consider necessary or expedient for the purposes of any of the licensing objectives.

The provisions regarding personal licences are sound. The incentives of persons holding such licences being required to surrender them to the Board and the failure to do so constituting an offence are welcomed. This will help licensing staff maintain an accurate and up to date register of all extant personal licences.

Section 137

With regard to the provisions on Emergency Closure Orders, it is helpful that the rank of the particular police officer be specified. In addition, it is useful that any police officer (rank of inspector or above) is vested with the power to extend any closure order for a further period not exceeding twenty four hours if the officer reasonably believes that the matters which led to the original order being imposed continue.

Section 138

The provision whereby persons knowingly make false statements in applications are deemed to have committed an offence is welcomed since this will be an incentive for applications to be completed honestly and accurately.

Section 139 and Schedule 4

The alterations to Section 23 of the Act in extending the grounds of refusal to include all licensing objectives and not just the crime prevention objective are welcomed. There was always a feeling that the Board's powers were unnecessarily restricted in this area with the legislation as it was originally drafted. The extension of the Chief Constable's powers to recommend refusal on the grounds that granting the application would be inconsistent with any licensing objective is also welcomed. The provisions regarding allowing a Licensing Board to grant an application (without a hearing) in the event of the Board not receiving the specified notice from the Chief Constable or any recommendation from the Chief Constable will allow for applications to be processed more expeditiously without arrangements having to be made for the applications to call before the full Board. On a similar theme in relation to personal licence applications and their determinations, the inclusion of all licensing objectives having significance is welcomed. The provisions regarding the Board not having to hold hearings in certain circumstances again are welcomed and will allow for the smoother operation of Licensing Board business.

The proposed new power of the Chief Constable to report conduct inconsistent with the licensing objectives will, of course, be welcomed by the police and it is a positive measure since it allows for the ongoing monitoring of the operation of premises and personal licences and is a clear indicator to those involved in the licensed trade that if the police in their monitoring of matters have concerns regarding anything inconsistent with any licensing objectives there is provision for them to refer the matter, as they see fit to the Licensing Board.

I trust you will find the foregoing comments to be of interest and relevance to Parliament when scrutinising this Bill.

June Murray
Head of Legal Services

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Children 1st

For 125 years CHILDREN 1ST, the Royal Scottish Society for Prevention of Cruelty to Children, has been working to give every child in Scotland a safe and secure childhood. We support families under stress, protect children from harm and neglect, help them recover from abuse and promote children's rights and interests. We provide over 40 local services as well as five national services including ParentLine Scotland which is the free, national telephone helpline for parents and carers and ChildLine in Scotland which is operated by CHILDREN 1ST on behalf of the NSPCC.

General comments

We welcome the opportunity to comment on this Bill. The provisions within these proposals will have a significant effect on the children and young people we work with. This includes victims and/or witnesses to crime, children referred to the hearings system and children who have been dealt with by the adult courts. The proposals on licensing have the potential to affect many young people in Scotland.

This is a wide-ranging bill and CHILDREN 1ST has been keen to consider the impact on children of its provisions. There are many aspects of the proposals that we welcome although there are areas where we feel the Scottish Government could take more radical action.

In particular, proposals to raise the age of criminal responsibility in Scotland are long overdue. We welcome an increase to twelve but do feel this is the bare minimum and still leaves Scotland with a low age in comparison to many other European states.

The Justice Committee has indicated that it wishes to hear views on the general principles of the bill. This submission highlights a number of areas that are of concern or interest to CHILDREN 1ST. As ever, we are happy to provide more detail on any of these issues.

Sentencing (section 32)

We recognise the need to ‘tidy up’ the law relating to offences relating to the sexual services of children and child pornography. We are content that these provisions allow the imposition of a fine as well as, or instead of, a custodial sentence but we also welcome the statement in the accompanying policy memorandum which states “custodial sentences are likely to be appropriate for most offenders[1]”

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[1] Criminal Justice and Licensing (Scotland) Bill, Policy memorandum, page 23, para 143

Indecent images of children (section 33)

We support this provision to clarify the law and close a gap in legislation which has emerged as technology has developed.

CHILDREN 1ST firmly believes that possession of any material where child sexual abuse may have taken place in order for the material to exist should be prohibited. This would include manipulated images where a photograph had been altered to create a drawing or cartoon and where material has been produced to look like a photograph.

Downloading, accessing or possessing such images is not a victimless crime. By contributing to demand, anyone who buys, downloads or distributes indecent images of children, whether these are photographs or manipulated images is directly contributing to child abuse.

CHILDREN 1ST believes that such images may fuel inappropriate feelings towards children and young people, and that they may be used to groom children. From its work with children and young people who have been abused, CHILDREN 1ST knows how devastating the effects of sexual abuse can be.

However, in order for the legislation not to inadvertently criminalise legitimate use of such images (medical text books for example), we believe that the purpose for which such images are created and/or used should be a key consideration in deciding whether or not their possession should be banned, or whether or not they should be confiscated.

Prosecution of Children (section 38)

The stated policy objective of this section is to "ensure Scotland meets international standards as regards the age at which children can be prosecuted"[2]

It is therefore disappointing the Scottish Government has chosen the minimum interpretation of "international standards" and only propose to prohibit the prosecution of children under 12.

CHILDREN 1ST believe that children have the right to be treated first and foremost as children and that this should never include criminal prosecution and all of the consequences of this. We view children as being up 18 years of age.

We recognise that there are already a low number of criminal prosecutions of under 12s and most children over that age are referred to the Hearings System. However, we believe that the age of criminal responsibility sets an important principle of how we see children in law and in our society. At a time when we have raised the legal age to buy cigarettes to 18 and are discussing restrictions of off-sales to under 21s, it does seem incongruous that we are seeking to set the age of criminal responsibility so low.

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[2] Criminal Justice and Licensing (Scotland) Bill, Policy memorandum, page 30, para 188

The hearings system is internationally recognised as a model of balancing justice and welfare requirements when it comes to children. CHILDREN 1ST believe that children under 16 (and debatably under 18) should be dealt with by the Hearings System. In most cases, the hearings system has adequate disposals already but we would welcome discussion of any further powers that would be required to allow it to deal with more serious offences in these older age groups.

This reform would be more in keeping with the spirit of the international recommendations that have been made. This is clearly indicated in a recent report by the United Nations Committee on the Rights of the Child. They state:

"the Committee urges States parties not to lower their MACR <Minimum age of criminal responsibility> to the age of 12. A higher MACR, for instance 14 or 16 years of age, contributes to a juvenile justice system which, in accordance with article 40 (3) (b) of CRC, deals with children in conflict with the law, without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected."[3]

In addition, the UN's consideration of the report submitted by the UK to the Committee on the Rights of the Child under article 44 of the Convention (a report to the UN on how states have progressed in implementing the rights in the UN Convention on the Rights of the Child) also highlights their "concern" at an age of consent of 8 in Scotland and re-iterates a need to raise this to 14 or 16.

Remand and committal of children and young persons (section 47)

An end to the provision for 'unruly certificates' to be used to detain children aged 14 or 15 in the prison system is welcome and long overdue. There is clear, long-standing research evidence to show the damaging effects of mixing adult prisoners with children. Moreover, it simply does not represent a 21st century justice system. CHILDREN 1ST welcome reform of the law to remove this provision and, where necessary, use secure accommodation or a suitable place of safety.

Retention and use of samples (sections 58-60)

CHILDREN 1ST has previously commented on the 'Fraser Report on Retention of DNA and fingerprint data' and we re-iterate some of our concerns below.

We share the view of the Scottish Government that the retention of DNA and fingerprints must strike a balance between protecting the rights of the individual and promoting effective law enforcement. In considering this issue, CHILDREN 1ST have attempted to explore the potential benefits and/or drawbacks for society of retaining DNA and fingerprint data, and any potential risks to children and childhood from doing so.

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[3] United Nations Committee on the Rights of the Child, 44th session, Geneva, General Comment no.10 (2007, "Children's rights in juvenile justice", page 11, para 33

In our comments on the Fraser report, CHILDREN 1ST concluded that it is not appropriate or necessary to retain any child's DNA or fingerprints for any length of time.

The reasons for this position are:

- **A child's right to be treated as a child**

In striking the balance between protecting the rights of the individual with the need for law enforcement, we emphasise that children are not the same as adults in law or in the rights that they hold. As more vulnerable members of society who have yet to fully develop and thus only have developing responsibilities, they have the right to special protection for their liberty and welfare. This principle is reflected in the United Nations Convention on the Rights of the Child, and in Scots law through the Children's Hearings system where children who commit criminal offences are treated differently from adults who commit criminal offences.

There is therefore, a very good case for striking a different balance between the protection of a child's liberty and rights, and law enforcement, than applies to adults.

- **Undermines the welfare basis of Children's Hearings**

We are concerned that the introduction of long term criminal consequences to Children's Hearings that would follow a child into adult life would undermine the welfare-based, non-adversarial and child-centred nature of these proceedings. In particular we highlight that the standards of evidence in Children's Hearings are less than those required in a sheriff court. Furthermore, when children agree to an offence-related ground for referral, they are agreeing to the issue being dealt with by the Children's Hearings in its non-adversarial approach, and not to all the consequences of a criminal act.

- **Effectiveness of treatment for child offenders**

Treating children's fingerprint and DNA data differently also makes sense in reality. Children who offend, even when they have committed sexual and violent assaults, are still developing and are far more likely than adults not to re-offend if they are given treatment, supervision and support. This is a key understanding underpinning the Children's Hearings system. As children are still developing as individuals, they respond well to interventions targeted at developing empathy, conscience and ability to form healthy relationships[4]. The increased risk to society and potential lost benefit for crime detection of not retaining their DNA or fingerprint data is therefore minimal given the greater chances of children never re-offending in adulthood. This fact tips the balance towards the retention of DNA and fingerprint data being an unnecessary infringement of an individual child's rights.

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[4] See Hutton, L. Children and Young People with harmful, Abusive or Offending Behaviours: A review of Literature, CJSW Development Centre for Scotland, for further discussion

Where a child has committed serious violent or sexual offences there may be a case for reviewing their progress and rehabilitation before they leave the children's system so that any continuing risk can be assessed.

We note that Section 59 allows for the retention of samples for three years from children referred to the children's hearings system where a child accepts or is found to have committed one of "certain serious violent and sexual offences". The list of these offences are still to be developed and prescribed in secondary legislation. While we welcome the commitment to consult on the list of applicable offences we regret that the list is not available now as it makes comment on the scope of this power difficult.

In summary, we advise a strong presumption against the retention of samples from children for the reasons outlined above.

Special measures for child witnesses and other vulnerable witnesses (section 64)

We welcome the further extension of the provisions for vulnerable witnesses to all hearings in criminal courts where a witness may be called to give evidence.

CHILDREN 1ST is a member of the Justice for Children Alliance and we would highlight that this group believe there is still work to be done to allow vulnerable witnesses, particularly children, to give their best evidence in court. We highlight our submission to the "Consultation on the use of intermediaries for vulnerable witnesses in Scotland"[5] where we highlighted many aspects of court practice.

In summary, Justice for Children:

- Believes that there are still significant barriers to communicating effectively with vulnerable witnesses
- Believes that the problems posed by inappropriate questioning are endemic to the legal system and cannot be solved by training and guidance alone
- Believes that intermediaries should be introduced as a standard measure for all children required to give evidence in court

The barriers that exist include confusing language, confusing or repetitive forms of questioning, unrealistic demands on memory, distressing questioning and leading questions. Our experience also tells us that inappropriate questioning is still a problem.

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[5] "Consultation on the use of intermediaries for vulnerable witnesses in Scotland", Comments from CHILDREN 1ST, January 2008

Sexual offences prevention orders (section 73)
Foreign travel orders (section 74)
Risk of sexual harm orders (section 75)
We welcome these provisions as they implement key aspects of the Irving Report. In particular, the adjustments to the Sexual Offences Prevention Orders (SOPO) regime to allow the police to more easily check whether an offender is living in the same household as a child is an important reform.

Sale of alcohol to persons under 21 etc. (section 129)
CHILDREN 1ST adopts a definition of a child as being anyone up to age 18 years old. We question whether introducing a significantly different age threshold for one specific aspect of alcohol purchasing would respect young adults' rights, be workable or clear. Instead, could more be done to increase prosecution of those who buy alcohol for those under-age, noting that there were only 69 such prosecutions in Scotland in 2005-06.

The proposals allow for restrictions to be introduced in certain localities. We question whether this is the best approach to tackling problematic drinking in disadvantaged communities. It may actually have the effect of further marginalising already excluded young people.

Moreover, there is already a strong emphasis on 'teen' drinking in discussions about Scotland's relationship with alcohol. In fact, the problematic use of alcohol exists across all age groups and, we would argue, is merely more hidden amongst older parts of the population as it happens at home or in licensed premises. We caution that singling out young people as having problems with alcohol further reduces the responsibility and actuality of alcohol consumption and misuse in the older population.

Tom Roberts
Head of Public Affairs

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Scottish Licensed Trade Association

We refer to your request for written evidence on views on the general principles of the Criminal Justice and Licensing (Scotland) Bill. The SLTA's response will focus on matters relating to the operation of the new Licensing system in Scotland.

We note that opinions are no longer sought at this time on the matters of a social responsibility levy for the licensed trade and the off-sale transaction of alcohol to persons under the age of 21.

The Justice Committee's amended request for views on how to improve the operation of the Licensing (Scotland) Act 2005 in respect of reducing costs and shortening processing times is noted. However, there are a great deal of legal technical issues to be considered, which quietly frankly, those dealing in the legal process of applying for liquor and associated licences, i.e. lawyers, are far better informed and are more experienced, to make comment on. The SLTA is currently communicating with solicitors experienced in such matters and would respectfully ask that any additional response would be considered by the Committee.

The SLTA would, however, reiterate views previously expressed to the Scottish Government in general and directly to the Cabinet Secretary for Justice.

With regard to the costs imposed on the licensed trade for the basic licensing system An extract of The SLTA's response to what was then the Draft Regulations on Licensing Fees was as follows:-

"The proposal to base fees on a Rateable Value system is not perfect, but in our experience no other alternative has been found which distributes the burdens of cost or fees on a more even basis. However, in this instance, we totally disagree that a "fair and equal distribution" of fees has been achieved. We will address this later in our response.

Whilst the proposed levels of fees, as indicated in the draft regulations, are not as excessive as was anticipated, the initial cost to the licensed trade is still a substantial amount, when the additional burden of solicitors fees and architect fees are added. It is our view and recommendation that licensees will require solicitors to act on their behalf with regard to applications for a premises licence due to the possible complexities of completing an accurate operating plan. We note in your research that under the new system, 82% of licensed premises would fall in line with the two lowest categories for licensed premises, either £400 or £550 for a premises licence. However, when legal and architectural fees are added and the first year's Annual Fee is taken into *account, we estimate, at best, the cost will be in the region of £2,000 to £2,500 – a substantial amount for any Small Medium Enterprise.*

The Scottish Licensed Trade Association strenuously disagrees with the proposal that Registered Clubs, who have eventually been brought under the same regulatory body as licensed premises, are now to be given special treatment in covering the costs of maintaining that body. To suggest that the fees (category one) attached to Registered Club premises licences and annual fees are to be capped at a mere £100 and £90 respectively, is quite simply discriminatory to the genuine licensed trade. To give an example, it is rather ironic that the day after this consultation document was launched, the Wallyford Miners Club, which has a rateable value of £24,900, announced that the smoking ban had led to their bar takings falling by £100,000 to around £450,000 from January 2006 to January 2007.

What SME would still be in business if they experienced a similar reduction?

Yet Registered Clubs are expected to contribute, what is effectively a token gesture, to cover the costs of running the new licensing system. To suggest that Registered Clubs should be "automatically included in the lowest category of fees regardless of their rateable value" and then continue that such an approach "is considered proportionate and reasonable" displays extreme naivety by The Scottish Government of the financial benefits the sale of alcohol brings to Registered Clubs. We would also draw attention to the fact that, under the new licensing regime, Registered Clubs will be able to apply to ***open their doors to the public****, up to a maximum of 56 days per year and* ***legitimately*** *compete with licensed premises. Considering the aforementioned, why should Registered Clubs not be treated on a level par with licensed premises when the issue of licensing fees is being considered.*

We would now comment on the scale of fees and those to be levied at large off-sales premises, i.e. supermarkets. The Association finds it absolutely absurd that supermarkets will simply fall into Category 6 in the scale of fees and the costs levied at such premises, for a Premises Licence and subsequent Annual fees, will only be a token £1,000 and £450 respectively. It is our opinion that such premises should make a far greater financial contribution to the running of the new licensing regime. According to the Scottish Government's own figures, there are 759 supermarkets in Scotland who sell alcohol. Recent figures also show that 61% of all alcohol sold, is sold through the off-sales sector and of these sales, the top five supermarkets are responsible for 73%. This sector of the market, which hugely benefits financially from the sale of alcohol, will only contribute a mere £759,000 in the first year of the new system. This equates to only 7.5% of the total running costs for the transitional period, yet these 759 premises sell over 61% of all wine, 56% of all spirits and in fact nearly 45% of all alcohol sold in Scotland.

In our view it is inherently unfair that the on-trade yet again is being targeted by the Scottish Government, in this case, to bare the greater burden of the cost to regulate the sale of alcohol. How can the Scottish Government justify levying a fee of only £1000 for a premises, such as Asda on the east side of

Edinburgh, which has a rateable value in excess of £2,000,000, and expect the rest of the licensed trade to pay the average proposed charge of £460 based on rateable values of less than £35,000, if, as the Scottish Government suggests, using a system based on rateable values is "the most suited" as it "provides a measure of business size". It is imperative that further consideration be given to the number of bands used to calculate fees to incorporate a level specifically for supermarkets in order that such premises shoulder a more "fair and equal distribution" of the costs involved. We would suggest their should be a Category 7 for Off-Sales premises with a total rateable value of over £1,000,000 and the fee should be, as in the words of the Scottish Government's research on fees, "proportionate and reasonable".

Following the Scottish Government's consultation it then formally announced the details of what the new licensing fees would actually be. The SLTA communicated the following in response:-

"Dear Cabinet Secretary,

The Scottish Government's recent announcement detailing the fees which will be levelled at the licensed trade in Scotland, in respect of the new licensing regime, has been received with utter consternation by members of The Scottish Licensed Trade Association.

Despite our response to the original consultation on the issue of fees and our concerns that again the "small independent pub" seems to be targeted disproportionately in the scale of fees, you have chosen to simply ignore our pleas and tighten the noose currently around the small independent licensee's neck.

For a political party supposed to represent, more than others, the interests of the Scottish people and Scotland's commerce, your actions have penalised yet again a Scottish industry already reeling from the negative commercial effects of the smoking ban. In addition, the introduction of a licensing system, confused in the extreme with mountains of subordinate regulatory legislation is also proving to be detrimental to the future prosperity of this industry. Under the previous Holyrood administration the licensed on-trade sector was sick and tired of being blamed for all society's ails and we believed that the current administration had adopted a more supportive attitude towards the "pub".

However, bearing this in mind, how can you possibly justify setting these exorbitant maximum fee levels and allow Licensing Boards to independently determine what they will charge when consultants were contracted by the Scottish Government to ***"define a system"*** *which would* ***"allow for a full cost recovery, have the same scale of charges across Scotland as a whole and which would not be unfair to SME's ……".*** *With Licensing Boards having the ability to set their own fees, this will lead to inconsistency and confusion throughout the country and you could in effect have two similar premises facing each other, but in different council areas, being charged* *different fees. This highlights again the problems with passing decision making to individual Licensing Boards.*

The initial consultation document was obviously based on the research carried out and proposed a scale of fees which The SLTA considered were "not as excessive as was anticipated" and further comments were made in our original submission highlighting that we totally disagreed that a "fair and equal distribution" of fees had been achieved. (We attach a copy of our original submission for your information).

The Scottish Government's consultation document highlighted that your consultants "carried out case studies involving a representative sample of 5 local authorities - using the proposed model it was established that 4 out of 5 (boards) would achieve cost recovery". The consultation document then continued that "Nevertheless further consideration of the one case where there may potentially be less than full cost recovery shows that their unit costs per licence are likely to be less than the national average; and therefore that full cost recovery would be likely". Considering the above conclusions, again we ask, how do you justify setting the new licensing fees (maximum) at such extortionate levels? Whilst we appreciate these levels are maximums, it is naive in the extreme to suggest that Licensing Boards will not charge the full amount when we continually hear how Councils are strapped for cash. We are quite convinced Licensing Boards will find some way to justify why the maximum fees are being applied".

It is plainly obvious you have made the decision to completely ignore the findings of the research carried out by your consultants and it would be interesting to know how much this wasted research has cost Scottish Tax payers, which of course includes licensees.

It is not often we envy are English neighbours, but for the 82% of licensed premises in Scotland who will now have to pay up to either £800 or £1100 for a premises licence and then an annual charge of either £220 or £280, such amounts are discriminatory in a UK context. Our fellow licensees in England and Wales, with similar rateable values are faced with a mere £100 or £190 for a premises licence and an annual charge of £70 or £180. In addition a personal licence in Scotland will be over 35% dearer than in England and Wales.

Again how can you justify the fees applicable in Scotland or is this, as many now believe, another stealth tax, aimed this time at Scottish licensees, to introduce your "polluter pays" policy, which we are sure you will remember your party opposed when in opposition and the Licensing (Scotland) Act 2005 was going through its parliamentary process.

In addition to the comments above, your complete lack of consideration to address the fees applicable to Registered Clubs and Supermarkets, as highlighted in our original submission, displays a complete disregard for the Scottish SME's your party claims to support. You have stated that you are a "politician of conscience" and this has been demonstrated by your views on *cheap drink promotions in Supermarkets. However, on the issue of fees, it would appear there has been a lapse of conscience and common sense.*

We trust this letter will impart the strength of feeling The SLTA has experienced from the small independent licensed traders of Scotland who now demand justification for the setting of these extortionate fees.

With regard to the running costs of the new Liquor Licensing system, we would also draw your attention to further correspondence sent to the Cabinet Secretary for Justice:-

"Dear Cabinet Secretary,

Thank you for your letter of 24th January, which we received yesterday, in response to our letter regarding the Liquor Licensing Fees.

We note the comments made, but considering the vast majority of Licensing Boards have stated they will be applying the maximum fee, our members are still of the view that this will be a money making exercise for Local Councils who we are sure will find some way of justifying the fees set.

Another matter has come to light which only exacerbates our anger at the high level of fees imposed on the Licensed Trade. At a recent meeting of a Local Council Licensing Forum, which at this time will remain anonymous, the matter of liquor licensing fees was discussed. The Licensing Standards Officer astounded the forum members when he revealed that his remit, as a Licensing Standards Officer, not only covered liquor licensing but all licensing matters under the Civic Government (Scotland) Act, 1982.

Our understanding is that Civic licences are required for Cinemas; Fairgrounds; Gaming Machines in non-liquor premises; Houses in Multiple Occupation; Indoor Sports Entertainment; Late Hours Catering; Market Operators; Marriage Places; Metal Dealers; Public Entertainment; Raised Structures; Safety of Sports Grounds; Second Hand Dealers; Street Traders including food vans; Mobile shops; Stalls; Wheelie bin cleaners; Taxi drivers; Taxi vehicles and Private Hire Cars; Theatres and last but not least, Window Cleaners.

If this is indeed the case, it is an absolute outrage that the Licensed Trade is to bear the overwhelming costs for these officers when their duties and responsibilities will encompass other forms of licensing requirements. Or is it the case that licensing fees, for the licences referred to above, will also be increasing to proportionately cover the costs of the newly employed Licensing Standards Officers?"

With regard to Local Councils justifying the fees set, we are aware of one Council which has used the additional fee income to vastly increase staff and internet resources and still have a budget surplus for the transition year. It will be interesting to hear what they now intend to do with the remaining surplus!

As previously stated there are a great deal of legal technical issues to be considered, and we trust those dealing in the legal process of applying for liquor licences will also have been afforded the opportunity to make comment.

Colin A. Wilkinson
SLTA Secretary

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Association of Chief Police Officers in Scotland

ACPOS is broadly supportive of the overarching aims of the bill and welcomes the move toward positive and practical improvements in sentencing, criminal procedure and licensing.

In relation to specific sections of the legislation the following comments are offered:

Section 14 & 20 – Community Payback orders, Reports about Supervised Persons

This development may have an impact on the nature of post conviction reporting by the police to monitoring agencies but should not be any more onerous than that work already carried out.

Section 17 – Presumption against short periods of imprisonment or detention

This proposal will ensure that only people who deserve to be in prison should be sent there. The greater use of “Community Payback Orders” may encourage low level offenders to discontinue their offending behaviour, when they realise how damaging their behaviour has been to the Community and the people therein.

In relation to the intention to repeal Section 169 and Section 206 (2–6) of the Criminal Procedure (Scotland) Act 1995 which permit a summary court to detain a person at court or a police station until 8 pm in lieu of imprisonment, or any “certified police cell” for up to four days. ACPOS believes both provisions are archaic and indeed there are not thought to be any such “certified cells” in Scotland (not to be confused with “legalised cells” under the Prisons (Scotland) Act 1989).

Section 18 – Amendments to the Custodial Sentences and Weapons (Scotland) Act 2007

In reference to the automatic release at the half way point for those imprisoned for less than 1 year, the Bill proposes that conditions may be imposed that “a serious breach could” mean the offender returning to custody. Members suggest that consideration to changing this phrase to should lead to a return.

Although the Bill contains proposals to move away from imposing a custodial sentence for less than 12 months, the good work achieved to date in relation to the deterrence of knife crime would be lost if knife crime is not separated from this legislation.

Section 23 – Offences aggravated by racial or religious prejudice

It is felt that it may have been more useful to have all hate crime legislation in one place. That said this enactment will harmonise the operation of hate crime in Scotland into line with England and Wales.

It is positive that in tackling hate crime, offenders are clear that elements of the sentence are based upon aggravating factors.

ACPOS wish to again highlight the opportunity for the Scottish Parliament to include the sexual orientation, gender identity and disability aspects of the Offences Aggravated by Prejudice Bill in this bill, to provide one piece of legislation for all hate crime. This was alluded to, both in the written and oral evidence given to the Justice Committee on the Offences Aggravated by Prejudice Bill. It appears the opportunity has not been taken.

In advance of the introduction of these amendments, consideration should be given to a publicity campaign for public awareness with a view to challenging attitudes and behaviour.

Clarification is also required as to the exact classifications being used to identify ethnicity and religion.

Section 24 – Voluntary intoxication by alcohol: effect in sentencing

Victims of offences will benefit most from this proposal when they see that voluntary alcohol intake will not play a part in the defence of the crime, especially when the offence is of a violent nature and the victim has been left traumatised. There are many people who consume alcohol sensibly and do not commit offences. Those persons with a proclivity toward offending should be encouraged to follow this example and learn to know their limitations, particularly when they are no longer able to rely on alcohol in their defence.

It is suggested that this proposal should be widened to include all intoxicants, whether legitimate, prescribed or otherwise.

Section 34 - Extreme Pornography

Members feel clarification over what constitutes *‘extreme pornography’* is needed as the term is subjective and open to interpretation by legal experts.

It must be highlighted that although criminalising possession of such material strengthens the current legislation, there are real challenges around being able to monitor and police this. Ongoing capability and capacity issues could impact on the ability of the Scottish Police to be pro-active in this area. Such material can be easily accessed via the internet, most sites containing material are located out with UK Law enforcement jurisdiction and may in fact be legal in their country of origin.

The Scottish Police may also face challenge in managing the expectations of interested agencies, such as Rape Crisis and Violence Against Women Groups, regarding the resource committed to and effective policing of this issue.

Section 35 - People Trafficking

ACPOS is supportive of the changes to this legislation but would suggest that amendment should also be made to ensure any offences created are inclusive of persons **'within'** the UK who undertake trafficking activities (i.e. Internal Trafficking) and, not limited or exclusive to those persons orchestrating trafficking from a foreign destination.

It is also felt that the definition of facilitation should include activity around the transit process i.e. the purchase/procurement of travel documents, ground transport, offers of work and accommodation. This should also extend to the definition for internal trafficking.

It is vital that further consideration should be given to extending the legislation to include labour exploitation, sexual exploitation and domestic servitude rather than being exclusive to prostitution. In this regard the definition of 'sexual and non-sexual exploitation' should be clarified further.

In historical English legislation (prior to the UK Borders Act 2007), 'sexual exploitation' included any offence under the Sexual Offences Act (inclusive of prostitution etc) and indeed acted as an aggravation to that offence. In Scots Law, common law crimes of rape or indecent assault etc would be considered independently for investigation and prosecution (and with weighty penal consequence for offenders). These charges however take no statutory account of the victim’s trafficked status for sentencing purposes.

Section 40 & 62 – Witness Statements: use during trial

It is not clear yet if the practicalities of this change have been considered. It may have onerous implications for the Police, particularly Process Servers and/or Case Management staff.

Section 41 – Breach of Undertaking

This proposal will have no significant operational impact on the Scottish Police. It should reduce the number of offences created but will require amendment to IT systems and also amendment to force guidance.

There might also be a requirement to seek clarification on the Lord Advocate’s Guidelines which currently direct that such an offence be treated as a unique offence.

Section 47 – Remand and committal of children and young persons

Members feel there will be a challenge in identifying appropriate places of safety, ensuring these are readily available and fit for purpose. There will be an onus on local authorities to provide these services.

Section 58 - 60 – Retention and use of samples etc

While ACPOS is supportive of the measures proposed, members note that the Bill is silent on persons who have committed an offence and are subsequently offered a Procurator Fiscal direct measure or are processed by Police and then issued with a FPN. In previous consultations on this matter, ACPOS has requested that clarification be made regarding the retention of samples from FPN recipients for the full comparison process. Members are disappointed that this has not been addressed in the Bill.

The recent judgement from the European Court of Human Rights (ECHR), in the case of S and Marper v UK commented favourably on the current Scottish position on retention of DNA. It was also recognised that DNA is classed as more sensitive personal information than fingerprints and other relevant physical data. ACPOS is fully supportive that the retention of fingerprint information is placed on an equal basis as DNA.

Section 63 – Spouse or civil partner of an accused a compellable witness

The proposal to remove this condition will be an advantage. Many offences where a 'spouse' is a 'competent' witness are incidents that have occurred within the family home, where their evidence may well be crucial for a conviction however currently they cannot be compelled. Where the 'victim' of the offence is a child within the home this change will ensure they are better protected by the criminal justice system.

Section 64 – Special Measures for child witnesses and other vulnerable witnesses

This will enhance the ethos of the Vulnerable Witnesses (Scotland) Act 2004 and ensure the benefits are available for all Court proceedings rather than just trials. This will reassure vulnerable witnesses that they will be afforded the level of protection they require when in contact with the criminal justice system, from start to finish.

Section 67 – Television link evidence

The Bill comments on the difficulties requiring someone travelling from another jurisdiction to a Scottish Court (Paragraph 350) and extends Section 273 to cover those jurisdictions out with Scotland but within the UK. Whilst this appears a common-sense approach, it seems strange to put provisions in place for a witness attending the Scottish Borders from Northumbria but not consider making similar arrangements for a witness from Orkney giving testimony at Dumfries. It may be appropriate to consider such measures on a case by case basis with applications being viewed objectively and considering the interests of justice.

Section 71 - Sharing information with anti-fraud organisations

The proposal brings Scotland to a consistent position with that in England and Wales and is consistent with the current drive to better align and coordinate counter fraud arrangements across the UK. This is entirely consistent with the ACPOS view of the future UK arrangements and recognises that a significant amount of fraud activity operates across jurisdictions. Enhanced information sharing arrangements inform assessment of trends and threats in that regard and ACPOS are supportive of the introduction of such a measure.

The Serious Crime Act 2007 contains provisions to enable public authorities to share information with each other and with anti-fraud organisations to help prevent and detect fraud. At present this does not relate to any powers devolved to Scotland.

It should be noted that the Serious Crime Act 2007 includes a section named - Schedule 3, Data Protection Act 1998 (c.29) (conditions for processing sensitive personal data).

It is suggested that in order to cover the wording contained within that schedule in this Bill, the following text should be inserted after paragraph 7;

"7A (1) The processing—

(a) is either—

(i) the disclosure of sensitive personal data by a person as a member of an anti-fraud organisation or otherwise in accordance with any arrangements made by such an organisation; or

(ii) any other processing by that person or another person of sensitive personal data so disclosed; and

(b) is necessary for the purposes of preventing fraud or a particular kind of fraud.

(2) In this paragraph "an anti-fraud organisation" means any unincorporated association, body corporate or other person which enables or facilitates any sharing of information to prevent fraud or a particular kind of fraud or which has any of these functions as its purpose or one of its purposes."

The proposal is that these provisions will extend the Serious Crime Act 2007 Act to cover all of Scotland's public authorities; in effect repealing the restrictions relating to devolved powers in the Act.

Although the key information detailed in the Bill refers to 'public authorities' it goes on to say that the Serious Crime Act 2007 also has 'specified anti-fraud Organisations' detailed in SI 2008/2353 which specifies 6 anti-fraud organisations. It is not clear from the 'key information' if this SI would also apply to Scotland. The Act also contains safeguards and makes it an offence to further disclose information obtained under the powers of the Act for any other purpose.

Providing that it is clear that both the aforementioned provisions under the Serious Crime Act 2007 also relate to Scotland then the sharing of information would be legitimate in terms of Data Protection.

It should also be made clear that the provision with regard to the sharing of information relates to 'Serious Crime' only. Those who have commercial interests might otherwise be in a position to request information relating to individuals who they are involved with on a day to day commercial basis by making the representation that they require the information since it 'is necessary for the purposes of preventing fraud or a particular kind of fraud'.

Section 84 – compensation orders

The proposals in relation to compensation orders against an uninsured driver would be a welcome step forward and should compliment the work of the Motor Insurers Bureau. The MIB provides the means for the victim of an uninsured driver to receive compensation for any loss resulting from the incident. This service is funded by motor vehicle insurers and generally the uninsured driver is not pursued in order to make good the compensation paid out by the MIB.

The proposal to allow the court to make a compensation order against the uninsured and offending driver restores the balance somewhat in attempting to get the offender to financially recompense the victim. However, in practice, the victims of a serious or fatal road crash would always approach the MIB or perhaps the Criminal Injuries Compensation Board first. Proposals for the award of court imposed compensation may more readily be applicable to the less serious cases where minor injury or damage is caused. Recompense in respect of the loss of a no claims bonus, a policy excess, or even simply higher premiums would obviously be most welcome for those who are victims of uninsured drivers.

ACPOS has asked the Motors Insurers Bureau (MIB) for their observations in respect of this and particularly into claims against uninsured drivers, for which the MIB already make restitution in respect of loss sustained by affected drivers. They advise that any claim received for uninsured loss requires the claimant to make a declaration that they have/have not received restitution from elsewhere. Any such restitution would be taken into account by the MIB and would likely reduce the compensation paid out by them. In view of this, they do not see the proposed legislation impacting on their day to day basis. They do point out however, that this very much relies on the honesty of the claimant who may make a false declaration in order to receive additional monies.

With regard to a road death, members believe the wording of this section requires careful consideration as those who have suffered bereavement as a result of such a collision will be emotionally vulnerable and in some cases hostile to the thought of the person who caused the death of a loved one having anything to do with their funeral. They may also see any compensation order as the value the State puts on their loved one’s life.

Section 86 (Disclosure) - Provision of information to prosecutor

A definition of ‘sensitive’ is given however there is no definition of ‘highly sensitive’. If police officers are to be required in law to apply such categories then a definition of highly sensitive is necessary.

Using schedules to list each item of (relevant) information to a prosecutor will be very time-consuming. It may not be the most effective method in all cases and, the draft legislation is non-specific as to the means by which the prosecutor may disclose information to the accused (section 97). ACPOS would seek clarification on the need for a statutory requirement for scheduling of information. Developments in police information management may result in more effective systems available to police forces (and prosecutors) but legislation would require the continued use of schedules.

Overall, it is felt that the method by which police forces reveal the existence of information to prosecutors can be competently and effectively addressed within the Code of Practice which will underpin the implementation of Part 6 of the Bill.

Section 88 (Disclosure) - Review and adjustment of schedules of information

ACPOS is of the view that the person who is best positioned to make a judgement on the likely impact should potentially sensitive information be released to the accused, is the police officer. It is entirely appropriate that the prosecutor should objectively review the judgements of the police and it is to be expected that they will disagree on occasions.

Should the prosecutor disagree with police assessment of levels of sensitivity and, after review there is still disagreement, then it should be possible for the prosecutor to amend the schedule(s) accordingly without a police officer being required to alter their professional judgement. It may be more appropriate for scheduling processes to be detailed within the Code of Practice rather than in the primary legislation.

Section 121 - Conditions to which licences under 1982 Act are to be subject.

It is suggested, in respect of licences that relate to activities in particular geographical areas (such as street traders) that if a council used its discretionary power the badge as it currently stands – unlike the licence – will not stipulate the area within which the trader is licensed to operate.

Section 126 - Licensing of public entertainment.

The provisions, if introduced, will assist not only the police but the council when dealing with public safety issues in connection with such events.

Section 127 - Licensing of late night catering

The Bill’s provisions extend the part of the 1982 Act covering late hours catering to ensure that licensing authorities have the power to license any premises selling food or drink at late hours. This amendment will give licensing authorities the option of licensing all such premises, if they consider it necessary to do so. Going forward, this may have fairly significant implications for additional workload for the police in relation to the both the administrative process and in relation to any requests by the local authority for analysis to be carried out by the police in relation to crime / disorder profiles with regards to premises that may be included in this new category. That said this is this is a section of the Act that should be fully supported.

Section 132 - Premises licence applications: antisocial behaviour reports.

This section amends the requirements contained within the Licensing (Scotland) Act 2005 obliging a Chief Constable to provide the licensing board with an antisocial behaviour report and, instead, an antisocial behaviour report will only be required if the licensing board requests one, or if the Chief Constable wishes to forward a report for the Board's consideration. This much reflects the situation that has pertained during the Transition Period and the amendment is welcomed. As ACPOS has maintained consistently, information in relation to anti-social behaviour in the vicinity of premises is, in itself, meaningless to a significant extent, unless a detailed evaluation of each and every incident is carried out. While it is recognised that there will always be a number of premises dependent on geography which will not feature to any significant extent on Crime Management and Command & Control Systems, there will, inevitably, be a large number of premises that will do.

Importantly, it is not, nor has it ever been, suggested that such incidents of antisocial behaviour should be directly attributed to premises and, clearly, where a licence is sought for premises not previously licensed, the usefulness of attributing antisocial behaviour then occurring within the vicinity to those premises (or as previously indicated any specific premises) is dubious. What will be more effective is close monitoring of activity in, or within the vicinity of, **existing** licensed premises; examining **recorded** crimes and incidents that can be related to existing licensed premises and seeking a review of the premises licence. Going forward, that will remove premises that do not operate in conformity with the licensing objectives and help to decrease significantly the negative impact that the antisocial behaviour associated with the operation of licensed premises has on our communities.

Section 136 - Personal Licences
Related amendments to Section 74 of the Act

A Chief Constable **may make a recommendation that the licensing board refuse** a personal licence application if he considers it necessary for the purposes of any of the licensing objectives. There is however no opportunity for a Chief Constable to make a formal 'representation' to the licensing board regarding issues related thereto that may not merit a recommendation to refuse but would nonetheless be relevant to the licensing board's consideration of the application.

It should be noted that ACPOS has not reviewed nor provided comment on Sections 2 -13, 16, 19-22, 44, 48-57, 61, 62, 65, 76, 80-82 and 117-120.

John Pow
Interim General Secretary

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Glasgow City Council

Part 1 – Sentencing

Section 2 (4) - The stated objectives of achieving consistency in sentencing practice and promoting greater awareness and understanding seem entirely appropriate. The third objective of assisting the development of policy is less clear. The policy is presumably that of the Scottish Government although this is not stated. Policy will vary over time and will be dependent upon the Government of the day.

Section 5 (5) – The Sentencing Council's assessment of the costs and benefits of guidelines should seek to encompass an analysis of the costs and benefits to society in general and not simply those related to the Court process.

Section 6 - The proposed consultation on guidelines is extremely narrow. This contradicts the objective of promoting "greater awareness and understanding of sentencing policy and practice" as stated at section 4.

Section 10 - The Bill stipulates that the SCS must provide the Council with information relating to sentences imposed by Courts. If analysis of costs and benefits is to cover the wider implications for local authorities and society in general how is the Council to be expected to obtain this information and who would be responsible for the provision of such information. Section 10 (3) might benefit from a more prescriptive timescale.

Section 11 - "Scottish Ministers" are required to have regard to any advice or proposals from the Council. This provision could be used to change arrangements in relation to the early release of prisoners on Home Detention Curfew. This provision currently allows SPS to commute sentences without reference to the sentencing Court or the Parole Board.

Section 13 – The provision for an annual report to Parliament appears to ensure appropriate scrutiny and accountability. Parliamentary debate will in itself assist in raising public awareness of sentencing policy and practice.

Section 14 - The new CPO may include 1 or more of 7 conditions listed. There is no reference to other conditions which SER authors may deem appropriate for include as a condition of a CPO. This needs clarification. The use of multiple conditions may raise resource issues.

Section 15 - Existing legislation stipulates that a precondition for granting an NHO is that there must be a course of conduct amounting to harassment in considering an NHO (2 relevant incidents which result in prosecution). The provisions of the Bill will remove this, a very positive development.

This Bill will amend legislation to ensure that courts consider previous convictions and have access to relevant information to demonstrate the propensity for an offender to commit crimes of harassment.

In respect of domestic abuse where harassment of victims is not uncommon and part of a pattern of abusive and violence, the changes to current legislation are positive.

Section 16 – Minimum term of imprisonment is now 15 days (not 5). Depending on success of other elements of the bill this could obviously result in those previously detained for 5 days being detained for 15.

Section 17 - The language may not be strong enough to enact the change the Government is looking for here. May result in longer sentences being passed e.g. where judge previously considered a 3 month sentence they may now look at a 6 month.

Section 18 - There is a new definition - "short term custody and community prisoner". This might result in more offenders being released under statutory supervision. Those who are currently released automatically half way through a short term prison sentence would require supervision under the new bill. This would have resource requirements for CJSW.

Slight confusion around parts 4-6 of section 18. This may mean more statutory supervision (on short term community license).

Section 19 - It seems in most cases that removal will be after they have served one half of their sentence (there will not be a community element). In practice this will apply to very few cases.

Section 21 - This provision would significantly aid risk management and ultimately child protection/public protection for offences with significant sexual element. The provision would also ensure that offences such as Breach of the Peace are not viewed as ‘low tariff’ offending behaviour.

Section 23 – Welcome the requirement that the Court must now record how an aggravation has affected the sentence (if at all- and if not the reasons must be stated)

Section 24 – Refer to the CJA response to the consultation paper-Sentencing Guidelines and a Scottish Sentencing Council (Question 16) http://www.scotland.gov.uk/Resource/Doc/258411/0076649.pdf
This is something which could be considered by the Sentencing Council once it has been established.

Part 2 – Criminal Law

Sections 25-28 – Glasgow City Council (GCC) agree with comments made by Glasgow Community Safety Services (GCSS) that the links between trafficking and serious organised crime are already well documented. Prostitution and trafficking of women is the third highest “black market” income earner globally after drugs and arms. Therefore, we would also support any measures which would strengthen the law linked to organised crime.

Section 29 - The Council welcomes the efforts to reduce the opportunities for serving criminals to have access to information and communication devices (mobile telephones etc) which allows their continued involvement in offending behaviour or permit further intimidation or targeting of witnesses and victims. The introduction of penalties for those introducing such devices and other prohibited items is welcomed.

Section 32 - The imposition of considerable financial penalties may deter companies/bodies being involved, directly or indirectly in sexual exploitation of children. This would also make individuals within companies/bodies accountable – individual and corporate responsibility. A financial deterrent may also significantly reduce the resources which are made available to facilitate sexual exploitation of children. This legislation would also reinforce on a national and international level the criminality of child exploitation.

Section 34 - The proposal to increase the sentencing powers of Courts in relation to publishing, selling or distribution of extreme pornographic material will confirm the seriousness of this offence. In turn, this may increase the level of reporting of sexual offending against women.

We agree with GCSS comments that challenging the demand for extreme images is a step in the right direction towards generating public discussion on the issue of commercial sexual exploitation, raising awareness and changing attitudes towards pornography. We also support the fact that the Scottish proposals are going far beyond the arguably narrow definition of “extreme pornography” adopted in England and Wales. The Scottish offence, by covering all obscene pornographic images which realistically depicts rape or other non-consensual penetrative sexual activity, whether violent or otherwise, is necessarily broader which in turn increases the scope of images which can be targeted. We support proposed maximum sentence of 3 years for possession of extreme pornography. If effectively enforced this could provide a deterrent.

We also need to make sure that by only focusing on extreme pornography, that we are not sending out the message that other pornographic images are acceptable and any less harmful.

Section 35 - GCSS welcomes the Scottish Government's intention to bring Scots Law in relation to trafficking of persons in line with England and Wales and ensure consistency in the protection of victims across the UK and GCC would agree with this. Glasgow has the highest number of people involved in the sex industry outside of London, and approximately 50% of those involved are from overseas (*Scotland's Slaves: An Amnesty International briefing on trafficking in Scotland, 2008*).

It is clear that despite provision in the Criminal Justice (Scotland) Act 2003, there are still definite gaps in the current legal framework to protect victims of trafficking. It must be noted that we believe the only way that trafficking activity can truly be halted is to disrupt the market by challenging demand.

Part 3 – Criminal Procedure

Section 38 - We welcome any attempt to remove children from Criminal Justice Systems. It provides a guarantee for the small minority that this affects.

Section 47 - Would agree with reducing the number of remands.

Part 5 – Criminal Justice

Section 72 – We support GCSS view that the introduction of new powers within the Anti Social Behaviour (Scotland) Act 2004 for the closure of premises associated with human exploitation. We recommend that the new measures include not just only closing premises associated with trafficking, but covers flats and brothels in general where prostitution occurs. We believe that at the same time as instructing a closure order on premises, those caught purchasing sex indoors should be penalised and ask that consideration be given to criminalising the purchase of sex in any venue.

Section 73/Section 74 - Proposed changes to current legislation would undoubtedly aid risk management and place greater responsibility on the offender to engage in managing his own risk. Currently the legislation focuses on restrictions within SOPO/RSHO, e.g. no contact with children under the age of 16 years, however, this proposal would permit incorporating requirements of the individual, e.g. you shall participate in risk assessment process and report changes to circumstances.

In removing age restrictions, Courts will have discretion to impose SOPO based on assessed level of risk of sexual harm as opposed to age of offender or sentence imposed.

Section 80 - The Government's intention here is not clear. This section may refer to any organisation which provides assistance to persons affected by an offence. It does not appear to apply specifically to Victim Support Scotland although this section may be used to provide grants to that organisation. If the Government's intention is to provide security of funding to victim support organisations then this is a welcome development. However the wording of this section does not guarantee that outcome.

Part 7 - Mental Disorder and Unfitness for Trial

Sections 117-120 - This introduces a more explicit “test” for the courts in relation to diminished responsibility and the new term of unfit for trial.

Part 8 – Licensing under Civic Government (Scotland) Act 1982

Section 121- Subsection (3) introduces the concept of “mandatory” and “standard” licence conditions”. New section 3B indicates that licensing authorities “may determine conditions to which licences granted by them under this Act are to be subject”. These are the new “standard conditions”. The licensing authority are required to publish any standard conditions proposed by them. That being so there will have to be some “transitional provisions” to allow licensing authorities the time to draft, consider, publish & determine standard conditions for all licence types.

Section 123 – Makes the licensing of metal dealers one of the “optional provisions” requiring a resolution of the licensing authority to be of effect. Presumably this would retrospectively de-license metal dealers in areas where such a resolution is not made. Again would this require some transitional provisions for those areas wishing to retain the licensing of metal dealers?

Section 124 – Subsection (2) amends section 13 of the 1982 Act to require that anyone applying for a taxi or private hire car driver’s licence has to have held a “full driving” licence for the period of 12 months immediately prior to the date of application. This will further penalise anyone whose licence has been suspended by the Courts. The 12 month period will only start from the point when they are given back their licence. The previous provision did not penalise in this way.

Subsection (3) changes the requirements relative to the review of taxi fares. Previously the review had to be commenced within 18 months from the date when the previous fare tariff came into effect – so the outcome and the new fares thus fixed could come into effect well after the 18 month period. The new provision requires the process to be completed within the 18 month period. This could be problematic given that the consultation process etc can be long and tortuous. There seems to be a right of appeal given to taxi operators whether or not they made any representations to the licensing authority when publicising the proposals. It would seem better to only give such a right of appeal to those who responded to the consultation exercise. Subsection (5) deals with the requirements for the publication and coming into effect of taxi fares. It includes a requirement to publish in a newspaper which is curious given the ‘modern’ approach of the Licensing (Scotland) Act 2005 which permits advertising via a web-site.

Section 125 – This appears to repeal the Exemptions from the need to hold a market operators licence for such as charitable or community organisations. That being so, such organisations may in future consider that the cost of obtaining a licence, together with the costs of meeting the various requirements of the statutory consultees, are prohibitive and may thus lose out on established fund-raising ventures. Curious drafting would seem to repeal subsection (2) (a) of the current section 40 whilst leaving in a subsection (b).

Section 126 - In terms of the current provisions of the 1982 Act only those forms of entertainment for which a charge is made are license-able. This amendment would require the licensing of events which would be free to the public. Again the cost of applying for and obtaining a licence may prove prohibitive for such as community organisations that have previously held local events providing forms of entertainment. Curious drafting again re the amendment to current section 41(2) (d) – why not simply repeal "or Part II of the Gaming Act 1968"?

We agree with GCSS suggestion for a further amendment to section 41 of the Civic Government (Scotland) Act 1982 instead of just focusing on removing the existing exemption for free events.

The Criminal Justice and Licensing Bill also provides a valuable opportunity to reassess the current licensing of lap dancing venues.

Section 127 – This changes the requirement for a late hours catering licence from relating to the sale/consumption of "meals or refreshment" to the sale consumption of "food" – as defined in section 1 of the Food Safety Act 1990. This includes "drink" & "chewing gum" – but presumably not alcoholic drink as that can only be sold via a licence under the 2005 Act.

Section 128 – This amends various provisions of schedule 1 to the 1982 Act. Applications will now have to include the applicant's date and place of birth. 28 days rather than 21 days will be given for the receipt of objections or representations. 14 days notice of any hearing of the application is to be given rather than the current 7 days. A new paragraph 8(5A) is to be introduced to allow a licensing authority "on good cause shown" to deem an application as being one of renewal notwithstanding that it is made up to 28 days after the expiry of the licence. This is very concerning from a regulatory perspective. It is assumed that it is being introduced due to some concept of saving applicants from the results of their own inadvertence in not renewing timeously. It is not know why they are less likely to forget 28 days after the expiry date than at the actual expiry date. Also knowing the date of the expiry of a licence is fairly crucial – both generally as regards whether an offence is being committed and also in taxi licensing terms (having regard to the power given to licensing authorities to limit the number of taxi licences for their area) as regards whether one of the limited number of taxi licences is now "available"? And at what point is "good cause shown"? Does there have to be a hearing? The period of notice as regards the date of a hearing is to be reduced from 21 days to 14 days. Reasons for decisions are to be sought by a failed applicant or objector within 21 days rather than 28 days. Also changes are made to applications for sex shop licences as regulated by schedule 2 of the 1982 Act whereby applicants must also now given their date and place of birth.

Part 9 – Alcohol Licensing

Sections 130 – 138 - Glasgow City Council adopts the comments made by the City of Glasgow Licensing Board with regard to the liquor licensing aspects of the Bill, particularly as many of the substantive issues have been removed from this Bill and are to be included within a Health Bill later in the year.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Information Commissioner's Office

Introduction

The Information Commissioner's Office (ICO), the regulatory body for the Data Protection Act 1998 (DPA) throughout the whole of the UK, welcomes the opportunity to respond to the Call for Evidence on the Criminal Justice and Licensing (Scotland) Bill. Our interest in the Bill primarily relates to issues surrounding the retention of biometric information and we are pleased to note that many of the views we expressed in our response to the Scottish Government's Consultation on the Acquisition and Retention of DNA and Fingerprint Data are reflected in the Bill. We also have an interest in the proposed amendments to the Public Finance and Accountability (Scotland) Act 2000 relating to data matching exercises undertaken by Audit Scotland and we welcome the proposed requirement that this office be consulted as part of the development of a code of practice on data matching.

Sections 58 – 60 - Retention and use of samples etc.

Section 58

Section 58 amends the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") to provide consistency between the retention periods applied to DNA samples and that applied to other other forensic material. This appears to be an appropriate approach to take.

Section 59

In our response to the Scottish Government's consultation on the Acquisition and Retention of DNA and Fingerprint Data, we indicated that whilst our preferred position was that there should be no change to the current position relating to the retention of biometric data from children dealt with through the Hearings system, we recognised that an element of retention would provide a balance between the public interest in retaining relevant material of those who have committed violent or sexual crimes and the recognition that offences committed by children may not be replicated in adulthood.

The proposal contained within Section 59 of the Bill reflects that balance. Relevant physical data taken from those found to have committed a relevant offence would normally be held for a period of three years only, and we support this approach. However, we further recognise that chief constables on occasion may have valid grounds to require that such data are held for longer than three years. Hence we are also in agreement with the proposal that under such circumstances an application for an extension of the retention period may be made to a Sheriff but we would stress that such applications ***should not*** become the norm.

We are pleased to note that the Bill provides for strict parameters relating to the timing both of an application being made to the Sheriff and the destruction of the data if the appeal is unsuccessful.

Section 60

Section 60 states the purposes for which relevant physical data may be used. It restricts the use of samples to the prevention, detection, investigation and prosecution of crime and to the identification of deceased persons. The introduction of clear limits to the use of what can be highly intrusive information is welcomed but, as indicated in our response to the Government's consultation, we are unsure how such information can be used for the ***prevention*** of crime.

We recommend that the statutory provision should be extended to include research purposes. However, such research ***must*** be strictly limited to projects related to the other defined uses (for example, to determine the effectiveness of the database); most importantly, the database ***should not*** be used for highly intrusive research into genetic structures and related activities.

Section 70 - Data matching for detection of fraud etc.

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The ICO notes that the Bill contains proposals to introduce provisions consistent with those contained in the Serious Crime Act 2007 to provide a statutory basis for the National Fraud Initiative in Scotland. We welcome the clarification of practice in Scotland and note the attention paid to protection of privacy within this section of the Bill which is particularly important given the breadth of information which may be sought by Audit Scotland in fulfillment of this function. We also welcome the requirement that Audit Scotland produce a data matching code of practice and that the ICO must be consulted prior to its publication and subsequent amendments.

Ken Macdonald
Assistant Commissioner

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from East Lothian Council

I refer to the above Bill dealing with criminal justice matters, modernising general licensing provisions and specific provisions under the Civic Government (Scotland) Act 1982 and improving the operation of the Licensing (Scotland) Act 2005.

I now note that Sections 129 to 140 of the Bill relating to the Licensing (Scotland) Act 2005 have been withdrawn. My remaining interest in the Bill is only in connection with Sections 121 to 128, Part 8 in relation to licensing under the Civic Government (Scotland) Act 1982. My comments are made by me in my officer capacity of Head of Law and Licensing.

I note that Part 8 of the Act inter alia proposes to introduce mandatory licence conditions prescribed by Scottish Ministers by statutory instrument, add to those permitted rights of entry and inspection "an authorised civilian employee" employed by a police authority and authorised for that purpose and others by the Chief Constable, make various amendments to the licensing of taxis and private hire cars, amend some of the timescales relating to the publication and coming into effect of taxi fares and make amendments in respect of the licensing of market operators, public entertainment and late night catering licensing.

All of the proposals under these sections appear to be sensible or at lease unobjectionable, in particular I would support the amendments of the following:-

Section 125 – Licensing of Market Operators

The deletion of Section 40(2)(a) which currently exempts markets held by charitable, religious, youth, recreational, community, political or similar organisations from the requirement to be licensed, has meant that until now markets held by such organisations could be held outwith the framework of control with suitable licensing conditions and therefore such events were not regulated, which could easily be to the detriment of the public with regard to safety and lack of measures for public protection. In addition the removal in sub-section (4) of the words "by retail" removes another loophole as "private market" will be defined to include where goods are offered by sellers by any means to the public.

Section 126 Licensing of Public Entertainment

The removal of the words "on payment of money or monies worth" which defines situations where the use of premises as a place of public entertainment requires a licence is a worthy amendment. Without it for such events where the public are admitted without charge would not need a licence and hence would be unregulated.

Section 127 Licensing of Late Night Catering

The substitution of the word “food” for “meals or refreshment” as a definition of when the use of premises for late hours catering licenses are required has the effect of widening the definition (excluding liquid refreshment) and therefore removes potential argument as to whether such use of premises for the supply of a particular category or type of food is something less than a meal and therefore does not require to be licensed ie. is a kebab a meal or not?

Sections 121 to 128 make a number of other technical amendments including changes to notice periods and periods by which certain procedures must be completed. All of these appear to me to be satisfactory.

Keith MacConnachie
Head of Law and Licensing

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Scottish Women's Aid

Foreword

Scottish Women's Aid ("SWA") is a national organisation working for change on issues of domestic abuse, and an umbrella body to a membership of 39 autonomous Women's Aid groups throughout Scotland which provide temporary accommodation (refuge), information and support to women, children and young people who experience domestic abuse.

Introduction

We welcome the opportunity to comment on these proposals. While there is much to commend in this Bill, we have concerns on certain aspects of the proposals, specifically on sentencing guidelines, the operation of the Scottish Sentencing Council ("SSC"), Community Payback Orders, the introduction of a presumption against short periods of imprisonment or detention and the disclosure of Crown evidence to the defence. We would be pleased to discuss our comments further with the Justice Committee.

Section 5 Sentencing guidelines

This section states, inter alia, that "*5) The Council must include in any sentencing guidelines— (a) an assessment of the costs and benefits to which the implementation of the guidelines would be likely to give rise, (b) an assessment of the likely effect of the guidelines on— (i) the number of persons detained in prisons or other institutions, (ii) the number of persons serving sentences in the community, and (iii) the criminal justice system generally"*

The statute must also, however, place a duty on the SSC to ensure that the guidelines include an assessment of the costs, likely effect and risk, including risk of further offending, to the public generally and victims and witnesses of specific crimes, arising from the implementation of the guidelines.

Section 6-Procedure for publication and review of sentencing guidelines

The section states*, inter alia,* that *…"(1) The Council must, before publishing any sentencing guidelines or revised sentencing guidelines, (a) publish a draft of the proposed guidelines, and (b) consult the following persons about the draft—*
(i) the Scottish Ministers, (ii) the Lord Advocate, (iii) such other persons as the Council considers appropriate."

It is crucial for the acceptance of the guidelines, and to promote transparency and consistency in their production that both the public and all organisations involved in supporting victims of crime, particularly those in the voluntary sector, are able to comment on draft guidelines before they are produced. Therefore, it is not sufficient for the section to simply state" *such other persons as the Council considers appropriate"* as this has the potential to limit the extent of consultation and the consultees.

Section 11 The Council's power to provide information, advice etc.

This section provides that the Council **may** publish or otherwise disseminate information about sentencing matters, provide advice or guidance of a general nature about such matters, and conduct research into such matters.

In the consultation paper on sentencing, consultees were asked whether they agreed that the SSC's statutory functions should include providing information to the public about the sentencing process and if so, how that process could be made clearer and more understandable to ordinary members of the public and what measures might be taken by the SSC to make the sentencing process more transparent.

It was, therefore, understood that any Sentencing Council would have these duties prescribed as a mandatory part of their function. However, section 11 does not lay this duty on the SSC and falls short of giving the commitment needed.

We would reiterate the comments we made in our response to the consultation in that the SSC must provide information to the public on the sentencing process, the provision of information in itself resulting in a more transparent process.

Section 12 Business plan

Again, with reference to our comments on section 11 above, section 12 also fails to state that the SCC will accept comments or representations from the public or other parties as to issues that they may wish to consider. The planning process must be open and transparent to achieve the success of the SSC and its work.

Schedule 1 The Scottish Sentencing Council

Section 9 of this Schedule states that the SSC may determine its own procedure and that of any committees established by it.

Further details and clarity on how the SSC will operate is required. In our response to the consultation paper, SWA stated that while we agreed that the SSC should be given the functions proposed, for reasons of transparency, the legislation establishing the SSC on a statutory footing must be more than a basic framework and should set out how the SSC will establish its method of working; this should include detailed procedures for producing sentencing guidelines and carrying out its other functions so that the public, in particular, know what the SSC is doing, why and how.

14 Community payback orders

- **227N Offenders subject to more than one unpaid work or other activity requirement**

Section 227N(1) indicates that where a court is considering imposing an Unpaid Work and Other Activity requirement on an offender already subject to an existing such requirement(s, the court has discretion to direct that the new requirement can be concurrent to any existing requirement(s).

This would not follow policy intent that the sentence should act as an effective deterrent. Firstly, the sentences should run consecutively, not concurrently, as the net effect otherwise is no additional punishment whatsoever for the offender, and secondly, if an offender has re-offended whilst undertaking an existing unpaid work requirement, this indicates that they are not suitable for this disposal and a more robust approach by the court should be taken.

- **227O Rules about unpaid work and other activity**

These need to be scrutinised under the current review of the Bill and not dealt with subsequently by statutory instrument.

- **227P Programme requirement**

We are pleased to see that the section includes the wording *“ (4) If an offender’s compliance with a proposed programme requirement would involve the co-operation of a person other than the offender, the court may impose the requirement only if the other person consents.”* Where the court is considering referring the abuser to a perpetrator programme, this will offer protection to women and children experiencing domestic abuse as the court will be required to hear from them as to any concerns about their safety or other issues which may arise as a consequence.

In situations where a custodial sentence is not imposed, it would be helpful to see the courts making use of the residency requirement under the new section 227Q introduced by section 14 of the Bill. This would be useful in ensuring that abusers given community payback orders are, if necessary, required to live away from the family home. While this does not give anything like the protection afforded by a custodial sentence, it may be useful in these circumstances.

- **227S Mental health treatment requirements: medical evidence**

This section proposes that a written report purporting to be signed by an approved medical practitioner may be received in evidence without the need for proof of the signature or qualifications of the practitioner.

This proposal is not acceptable. Any report which attributes the offender’s behaviour to a mental condition must be submitted by a credible, accredited practitioner operating in the field relative to the offence, and be signed by them.

We would also be concerned about any move to refer perpetrators of domestic abuse to “medical health treatments” as an alternative to either a custodial sentence or referral to a perpetrator programme. This is particularly relevant as we have seen increasing evidence of the pathologising of the behaviour of perpetrators of domestic abuse. However, arguing that the behaviour is due to psychological factors simply diminishes the abuser’s criminal responsibility and does not take does not take into account their personal responsibility for perpetrating the abuse, or the dynamics of power and control in domestic abuse.

Any suggestion that the abuser’s cultural background should excuse crime, mitigate responsibility or reduce the penalty for criminal behaviour or that they are in need of medical “treatment” or “therapy” is dangerous to the women, children and young people who have experienced domestic abuse, belittles the crime and provides abusers with a regrettably convenient excuse.

- **227W Periodic review of community payback orders**

This section indicates that on imposing a community payback order in respect of an offender, the court **may include in the** order provision for the order to be reviewed at such time or times as may be specified in the order. Since the rationale behind community payback orders is that the offender will be “visible” to the court, it is therefore important that these reviews are held by the court to inform them of the offender’s compliance or otherwise with the order, the risk they pose to the community and, thus, their suitability to continue on order.

- **227ZB Breach of community payback order**

If the offender fails to appear as required by a citation to the offender, the court must issue a warrant for their arrest unless there are mitigating circumstances such as illness.

Section 17 Presumption against short periods of imprisonment or detention

We acknowledge that these proposals may have a positive impact on certain offenders with chaotic lifestyles for whom prison is a “revolving door” and not appropriate for addressing the issues behind their criminality.

However, the criminal behaviour of perpetrators of domestic abuse does not fall into this category and the proposals to discourage the use of short term sentences are likely to have a negative impact on women, children and young people experiencing domestic abuse.

Any presumption in sentencing against the use of prison in cases involving domestic abuse will only serve to increase the risks to safety for women, children and young people experiencing domestic abuse; further, it will undermine the work done within the criminal justice system and in public awareness- raising on the seriousness of domestic abuse and how it should therefore be dealt with by the courts. It would be disastrous if the proposals were to foster an attitude amongst abusers that their behaviour was no longer being taken seriously in terms of sentencing and that they could, to all intents and purposes, abuse with impunity.

In preparing this response, SWA consulted our member groups and the women they support and these are some of the responses we received:-

- *"Any violent crime should be custodial .. to send a message out to the men that violence is never acceptable, especially when you think of the scale of domestic abuse. The courts should be treating it more seriously and a year or over should be mandatory. If the Scottish Government want to incarcerate the most "dangerous and violent "then they should start with men who abuse their partners and children. What do they define as dangerous and violent? Is it not enough that women and children are systematically abused?*

- *The ordeal of a court appearance is only made bearable by the thought that the perpetrator will receive a sentence that relates in some way to the severity of the crime.*

- *She feels that a custodial sentence will give her and her children time to adjust, and prepare for the perpetrator being at large.*

- *It could be argued that that if it has reached the level that the abuser has been charged with assault or other that they are a dangerous person. Are individuals- woman and children any less in need of protection because the assaults take place usually in the home and it is named domestic abuse?*

- *They (the women in refuge) felt that short term prison sentences were sending out a message to society that DA is unacceptable and if there is a problem with overcrowding in prisons then the Govt. should find a way of dealing with that issue. The women felt short term sentences were a breathing space for women to move on or otherwise make themselves safe….*

- *Domestic abusers are some of the most dangerous and violent offenders in society. Any family who have experienced abuse know that these proposals will not work and most likely make matters worse…make sure they actually serve 6 months and not only a part of that because of the way the system works at the moment.*

- *We have fought so hard and long to have DA recognised as a serious crime, this is going to be a backward step. .. It is so important for abuser, and the children and young people in the family to get the message that the courts are taking it seriously loud and clear- if we don't, what are we saying they or their mums are worth? Giving the family the space to know what life is like without the abuser (even for a short time) can not only* *bring respite but gives the woman a chance to call in support for herself and her children, move to another area, it also keeps them safe from his continued harassment and abuse. We encourage women to contact the Police saying that they will be believed and that the abuser will not get away with it. Will they still report if they think all he will get is a slap on the wrist? What do we say to them now?*

- *I feel that six months or less still shows the perpetrator that the crime is taken seriously and is being treated as so. Hopefully it will impact on his future behaviour. It also helps the victim of the attack believe that they are worthy of being protected and that they did the right thing by reporting the incident.*

- *We have always felt that custodial sentences for perpetrators of domestic abuse) are an effective way of showing that the justice system and society find domestic violence as totally unacceptable as any other form of violence. Community service… utterly fails to recognise the seriousness of domestic abuse and its effects, not just on the women and children concerned, but on the values and attitudes filtered through our whole society.*

Consequently, where the crime involves violence and/or there is a background or history of domestic abuse, sentences of 6 months or less must be retained as an option. Since individual incidents do not always reflect the ongoing nature of the abuse perpetrated by a particular abuse, it is vital that the courts consider history and behaviour, evidence of patterns of abuse and controlling behaviour.

18 Amendments of Custodial Sentences and Weapons (Scotland) Act 2007
This section proposes that those sentenced to a custodial sentence of a year or less would subsequently, on release, be subject to licence conditions, which is a positive move. However, since prisoners currently serving a year or less are not released until they have served half of their sentence, we are very concerned with the additional proposals in this section to extend the use of Home Detention Curfew (i.e. electronic tagging), which would allow the discretionary release of these prisoners before the half way period of their sentence.

This is not acceptable and does not reflect either the intention of the court in imposing the sentence it considers appropriate and, in terms of domestic abuse, does not provide certainty and clarity for those women or children who have experienced the abuse as to how long the perpetrator will be out of their lives.

We also note that Scottish Ministers and local authorities will be required to put in place joint working arrangements in relation to the assessment and management of the risks posed by short-term custody and community prisoners. These joint working arrangements should be documented in a policy document available to the public, should involve extensive training of those involved and must contain mandatory provisions for consultation with the partners of the local Multi-Agency, Violence Against Women, Community Safety and other fora; similarly, if the discussions are undertaken by community Justice Authorities or Criminal Justice Boards, the same consultation must be undertaken.

Section 32 – Certain sexual offences by non-natural persons
Under the provisions it will be competent for the court to impose an unlimited fine following successful prosecution on indictment, instead of or as well as, imprisonment. While the availability of a fine in solemn procedure will now allow the courts to penalise corporate offenders, we would be concerned that any change of the law in this way, particularly in relation to the policy in keeping people out of prison, would result in offenders being given fines instead, a punishment which they may be easily able to afford given the amount of money made internationally in relation sexual exploitation of children.

Section 34 – Extreme pornography
We would agree with the comments in the briefing on this section prepared by Rape Crisis Scotland and the Women's Support Project.

Further, we would add that certain terms in the section require explanation. It will be a defence for person accused to prove that they a legitimate reason for being in possession of the image concerned, but "legitimate" is not defined and for the avoidance of doubt this must be clarified- e.g. for the purposes of prevention and detection of crime?

An additional defence under this section is that the accused was sent the image concerned without any prior request having been made by or on behalf of them and that they did not keep it for an unreasonable time. Again, what is "unreasonable" and in what circumstances would retention be deemed reasonable?

Section 62 Witness statements: use during trial
We agree with these proposals and would comment that for the avoidance of doubt and to ensure that there are no misunderstandings, the section should also read that the statement should have been read and agreed by its author.

Section 66 Witness anonymity orders
We agree with this section, subject to the caveat that, for the protection of witnesses, the wording in proposed section 271P(4) should be amended by replacing " may", as highlighted below, with "must", viz *" Accordingly, where the prosecutor or the accused proposes to make an application under this section in respect of a witness, any relevant material which is disclosed by or on behalf of that party before the determination of the application* ***may*** *be disclosed in such a way as to prevent— (a) the identity of the witness, or (b) any information that might enable the witness to be identified, from being disclosed except as required by subsection (2)(a) or (3)(a)."*

Section 80- Assistance for victim support

We welcome the indication in the Bill's Policy Memorandum that this section may empower the Scottish Government to provide funding for the support of victims beyond the limits of current section 10 provision. We are particularly interested to note the reference to support for those with no recourse to public funds. However, we assume that this provision would require an increase in the funds currently available through the section 10 funding stream.

Section 85 Meaning of "information"

This intention of this section requires clarification as the wording is contradictory. Subsection (1) begins *" In this Part "information", in relation to an accused, means material of any kind (**other than precognitions and victim statements**) given to or obtained by the prosecutor in connection with the case against the accused."*

However, subsection (2) then goes to define information and states *" In particular, "information" includes— (a)* ***information contained in precognitions, (b) information contained in victim statements****…"*

We understand that anomaly has already been identified by the COPFS and that their position is that victim statements should be regarded as information which will not routinely be disclosed and if disclosure is required, then only the relevant and material information will be extracted and disclosed.

Section 98 Confidentiality of disclosed information

This section applies the prosecutor is required to disclose information to an accused. Section 97 allows the prosecution to limit disclosure of sensitive material to "access only", in cases where the accused is representing themselves. Strictly speaking, there is nothing in section 98 to prevent a self-representing accused demanding a copy of sensitive material for the preparation of their own defence, or for a defence representative to give a copy of such material to an accused ostensibly for the same purpose.

In order to protect those victims and witnesses whose personal information may be open to such scrutiny, section 98 must be unequivocal in forbidding, in cases where such accused have a personal connection with the victim and or witnesses, cases involving sexual offences, or cases where there is a sexual element to the crime, the accused from obtaining or retaining a personal copy of any material.

Section 100 Order enabling disclosure to third party

Where an accused applies to the court for an order enabling the accused to disclose specified information to a specified person for a specified purpose, the section requires the court to give both the prosecutor, and any person appearing to the court to have an interest in the information to which the application relates, an opportunity to be heard.

The section must clarify the procedure, how the parties will be notified, whether this notification will be served by the court or by the accused, the grounds on which the court will allow or disallow the application and the appeal process available to the prosecution.

Section 114- Code of Practice

We agree with these proposals and it is encouraging to see that the Code of Practice will be placed before the Scottish Parliament, thus, presumably, being available to public scrutiny.

We note while that the section states that police forces, prosecutors, those submitting reports to prosecutors and those engaging in the investigation of crime or sudden deaths must have regard to the Code, there is no reference to its application to defence agents or self-representing accused. It may be that the Code is not appropriate but given that the legislation places obligations and rights on the accused, the section must clarify how practice and procedural guidance will be produced for defence agents or self-representing accused.

The Code of Practice should be incorporated into the working practices of the COPFS, the police and any other relevant agencies and must cover:-

- the obtaining and disclosure of medical and dental records, etc,
- the obtaining and disclosure of visually recorded interviews and CCTV footage
- how disclosure will dovetail with the restrictions on sexual offences evidence and applications under section 275
- cases where the accused can represent himself but there is still a sexual element to the case
- responsibilities of the investigating officer in conducting reasonable lines of enquiry and the identification of possible exculpatory evidence

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Cyrus Tata, Centre for Sentencing Research, Department of Law, Strathclyde University

PART 1: Sentencing

The Scottish Sentencing Council (s3-6) : Merit in Principle but Will it be Truly Independent?

Although I have some major concerns about the particular proposals in the Bill, there is merit to *the principle* of a Sentencing Council. A Sentencing Council could assist the informed reflection on sentencing policy and practices. A Sentencing Council can *potentially* be a way of trying to develop an informed sentencing policy by creating 'buffer' between judges and ill-informed criticisms by the media and some politicians. It can also be a way of communicating with the public and informing the public about the reality of sentencing practices. Research (including that in Scotland) shows clearly that public attitudes and opinion about sentencing are partly a consequence of low levels of knowledge about sentencing the justice system more generally. There is an urgent need to address low levels of public knowlegde about sentencing and criminal justice. A Sentencing Council *can* be a way of addressing low levels of public knowledge about sentencing and also encouraging public consultation about some of the thornier issues in sentencing.

Is a Sentencing Council *necessarily* a threat to judicial independence? Unless one takes the unsustainable posture that there can be no such thing as policy in sentencing, then a Sentencing Council need not necessarily threaten judicial independence at all. Indeed, *if* suitable arrangements are made a Council could strengthen public confidence in the justice system and the judiciary, and thereby its long-term independence from (especially) the executive. To say that any forum such as a Sentencing Council *necessarily* threatens judicial independence would be a misunderstanding of what judicial independence means. Constitutionally, sentencing in *individual cases* is a matter for judges to decide within the law, but sentencing *policy* is and always has been a matter on which the public can have a role. Sentencing is not fundamentally a technical matter (although there are technical aspects, of course). Most judicial sentencers readily acknowledge that they do not have a monopoly of knowledge about punishment and penal policy: other professions have much to contribute. Sentencing is conducted in the name of the public, to serve the public and paid for by the public. It is entirely constitutional for Parliament to make arrangements for a body such a Sentencing Council to assist in the development of principles and policy. However, while the principle of a Sentencing Council has much potential, I have concerns about the particular arrangements being proposed.

The Proposed Relationship between the Sentencing Council and the Courts

There are two key issues here:

1. *Departures*.

   Section 7 states that judicial sentencers can depart from guidelines as long as they state their reasons for doing so. As it stands, this sounds so permissive as to render guidelines worthless: all a judicial sentencer would need to do would be say that the guidelines are not applicable in the instant case because of the particular facts and circumstances. There has been considerable scholarship on previous attempts to require judicial sentencers to provide formal reasons for departures and what we know from this should feed into any new attempt to require reasons to be given.

   This remarkably permissive approach to departures will contradict what is described as one of the two main aims of the proposals – encouraging consistency in sentencing. If the grounds for departure are not specified by the Council or the Court of Criminal Appeal, it is likely that there will be *greater inconsistency* in sentencing for like cases – it is likely that different sentencers will develop different compliance/departure practices in similar cases. Some will be minded to comply whereas in the same case others will find that departure is possible. The practical effect of such guidelines would depend heavily on the Court of Criminal Appeal.

Will the Sentencing Council be sufficiently independent from the executive?

1. *The arrangements (sections 8 and 12) do not show sufficient independence from the executive branch of the state.*

On the one hand the Scottish Government has argued for flexibility in how the Council approaches the production of guidelines and associated matters. On the other hand, there is a real danger that the arrangements will not ensure the Sentencing Council's independence from the executive branch of the state. Named office holders (including Ministers) would be able to invite the Council to consider producing guidelines in certain areas, and while the Council could decline to do so, it would in effect be answerable to Ministers. There is a danger that this arrangement will not *display* genuine independence.

2. *The arrangements could come to be viewed with suspicion which will damage the work of the Council.*

A second danger is that the proposed arrangements between the Council and government may come to be viewed (whether rightly or not) with suspicion and cynicism. It will not be long before it is alleged that the apparent independence of the Council is not real and that the Council is being *surreptitiously* leant on by Ministers (or others). For this reason, critics are likely to claim that independence is a merely a pretence.

Section 18: Amendments to the Custodial Sentences and Weapons (Scotland) Act 2007

This 2007 Act relates to the release of prisoners (and implicitly deals with judicial sentencing). I have previously submitted evidence both orally and in writing to Justice 2 Committee (see Annex), which, if implemented as it stands, would make a unsatisfactory situation even worse. The Act has not yet been implemented. Section 18 of the current Bill sets out amendments which generally speaking mitigate some (though not all) of the most perverse effects of the 2007 Act (for example the 15 day cut-off anomaly– see annex).

While, the current Bill cannot be said to make release arrangements much clearer or more transparent, the apparent intention (as set out in the policy memorandum) to increase the 15 day cut-off to 12 months makes sense (similar to the position which was proposed by the now-defunct Sentencing Commission). It is sensible that such a cut-off should be in line with the new summary sentencing powers (see annex for further explanation). In addition, the proposal to create ‘short-term custody and community prisoners’ (s18) is an improvement on the 2007 Act, in as much as it appears not to be making unrealistic promises which accompanied the 2007 Act about supervision of released short-sentenced prisoners.

Section 6 of the 2007 Act is one of the more illogical elements of that legislation. The current Bill does not appear to seek to repeal or amend it.

That would be mistake. Section 6 of the 2007 Act provides that the custody part must be a minimum of 50% of the overall sentence, but that this may be increased to 75% if the individual sentencing judge considers it appropriate. *What is the rationale for allowing individual sentencers to increase the custody element to 75%?* None of the accompanying documentation to that Bill (not in the current Bill) has provided any explanation. *S6 is bound to create less clarity in sentencing – not more.* Section 6(4) provides that an individual sentencer may increase the custody element to 75% in view of: the seriousness of the offence/s; previous convictions; the timing and nature of a guilty plea. *Yet all three of these criteria currently form (and will continue to form) the basis of determining the overall headline sentence. Why should individual sentencers now be asked to make the same assessment twice?* At best this seems to provide for unnecessary duplication and confusion. Moreover, this would often cut the time for supervised rehabilitation in the community to help the offender not to reoffend (see Annex).

ANNEXE

WRITTEN EVIDENCE SUBMITTED TO THE JUSTICE 2 COMMITTEE OF THE SCOTTISH PARLIAMENT ABOUT THE CUSTODIAL SENTENCES AND WEAPONS (SCOTLAND) BILL, SUBMITTED 20TH NOVEMBER 2006

1. THE BILL IGNORES THE KEY TO ACHIEVING CLARITY IN SENTENCING

The Bill deals with the management of sentences without tackling sentencing itself – once again changing exit points without looking at entry. The Bill has shied away from looking at sentencing policy. While it is accepted that the allocation of punishment in individual cases is a matter for the courts, *the overall objectives and shape of sentencing policy is a matter for Parliament*. The Bill will not achieve greater transparency because ultimately, in and large part, the 'disjuncture' between time announced and time served is a practical consequence of not tackling the question of who goes into prison and for what. By ignoring that question of who we should send to prison (i.e.: especially where persons are not a danger to the public) and for what, governments will continue to find that they have to manipulate release arrangements so as to relieve pressure on prisons caused by the throughput of huge numbers of very short term prisoners.

2. ISSUES ARISING FROM THE 15 DAY CUT OFF.

ANY period in custody is extremely serious and has damaging effects leaves one in two homeless; breaks social and familial ties etc which are so vital to desistance.

There are also serious equal treatment considerations:

1. *The perverse effects of the 15-day rule*. This means that a person sentenced to custody for 21 days will serve less than a person sentenced to custody for an apparently less period (eg 14 days). This is plainly absurd and undermines the objective of clarity and intelligibility.
2. In addition to the perverse effects of the 15 day cut off, some sentencers may feel it is a matter of justice (comparative proportionality) that someone who would have been sentenced to 21 days imprisonment would serve less than someone who is sentenced to 14 days. It will be tempting (and in some respects understandable) for individual *sentencers to inflate their sentence to try to avoid this comparative injustice*. Other individual sentencers may feel that they cannot do this.
3. Given that the Scottish Executive acknowledges that between 15 days and 6 months the licence will be nominal , *why have the 15 day cut off point at all*?

3. UNINTENDED INFLATIONARY PRESSURES ON SENTENCING

Many (though not all) individual sentencers will feel that supervision after release from custody (i.e. combined sentence) is desirable in many cases. The policy memorandum tells us that only those serving 6 months or more will be expected to be in supervision (and it may well be that in time 6 months comes to be seen as too low to provide meaningful supervision). Consequently, **many individual sentencers will choose to add the extra time necessary in order that the person before them will definitely get the supervision and support**. With the new summary sentencing powers being increased to 12 months[1], this will be very tempting. It would have been more sensible to have kept the 12 month cut off recommended by the Sentencing Commission since this would coincide with maximum summary powers. Alternatively, the maximum summary powers should be kept at 6 months.

4. NOMINAL LICENCE PRACTICE WILL DAMAGE PUBLIC CONFIDENCE IN COMMUNITY SENTENCING IN GENERAL

The Policy Memorandum concedes that those sentenced to custody for six months or less (and we suggest probably more than 6 months in practice) will be subject to only a nominal licence. *This will set the reputation of community punishment up for failure*. Inevitably, it will not be long before one or more persons on a nominal licence commits a serious offence, which attracts considerable public attention. When it is discovered that in such cases s/he was ‘on licence’, the reputation not only of licence but (by association) community punishment more generally will be damaged. While this ‘failure’ would, of course, not be a failing of community punishment or criminal justice social work *per se*, it will be portrayed as such in the inevitable media furore, which will point the finger at criminal justice social work. *Public confidence in punishment in the community will, as a result, be undermined by its association with the nominal licence*. In other words, by making licensing so wide, universal and nominal, it and all community sentencing is being set up for repeated public relations failures.

5. SETTING OF THE ‘CUSTODY PART’ IN THE PROPOSED COMBINED STRUCTURE (SECTION 6)

Section 6 of the Bill is one of the most unclear and contradictory parts of the Bill.

A. Section 6 provides that the custody part must be a minimum of 50% of the overall sentence, but that this may be increased to 75% if the individual sentencing judge considers it appropriate. *What is the rationale for allowing individual sentencers to increase the custody element to 75%?* None of the accompanying documentation provides an explanation.

B. S6 creates less clarity in sentencing – not more

Section 6(4) provides that an individual sentencer may increase the custody element to 75% in view of: the seriousness of the offence/s; previous convictions; the timing and nature of a guilty plea. *Yet all three of these criteria currently form (and will continue to form) the basis of determining the*

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[1] Criminal Proceedings (Scotland) Bill s33

overall headline sentence. Why should individual sentencers now be asked to make the same assessment twice? At best this seems to provide for unnecessary duplication and confusion.

C. S6 will create exacerbate disparities in sentencing

The policy memorandum supposes that 50% will be the normal ‘punishment part’ set by the court. This appears to amount to wishful thinking: there is nothing in the Bill which will ensure that this is likely to be the case. Indeed, individual sentencers are likely to deal with very similar cases in dissimilar ways (disparity).

D. S6 means that the aim of long-term public protection will be undermined

“Public protection is of paramount importance.”[2] This is why the new combined structure is proposed for all custodial sentences of 15 days or more: to be subject to licence in the community. Community supervision and licence conditions are intended to reduce the risk of re-offending both during the community part of the sentence and after the expiration of the sentence and thereby increase public protection. *Yet the proposal in section 6 to allow individual sentencers, in effect, to decrease to 25% the period of community supervision will undermine the very efforts to increase public protection, through a supported and supervised transition back into the community.* It is likely that practices will vary between individual sentencers dealing with substantively similar cases.

The Bill proposes that individual sentencers should be allowed to increase the custody part of a sentence to up to 75% because they wish, in effect, to punish the offender twice: once in terms of the overall sentence and again by limiting the time for structured community supervision and support. *Yet ironically, in many of those very cases where the offender and the community will most need community supervision the community element will have been reduced. Unlike indeterminate life sentenced prisoners*, determinate sentenced prisoners cannot be held or subject to licence beyond 100% of their sentence. Therefore, by allowing individual sentencers to reduce the community part to just 25% it will in fact make management and supervision of offenders both more difficult and shorter. Thus, enabling individual sentencers, to reduce the community element to 25% will undermine the very reason for ending automatic unconditional release: public protection, which is claimed to be of “paramount importance”.

Square Peg in a Round Hole. The Bill has attempted to apply the logic of indeterminate sentence arrangements (e.g. for life sentence prisoners) to all 15 day-plus determinate sentence prisoners. The Bill appears to rely on the rationales used for indeterminate sentence prisoners and apply this to all determinate sentence prisoners sentenced to 15 days or more. The key difference is that determinate sentence prisoners must be released from all restrictions after the completion of 100% of their sentence.

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[2] *Policy Memorandum*, p2 paragraph 7.

E. Artificial distinction between ‘seriousness’ and ‘protection of the public’ leads to more confusion not less.

S6(5) provides that in setting the custody part, the court "must ignore any period of confinement which is necessary for the protection of public". Background documentation indicates that this is supposed to require sentencers only to include the 'punishment part' of sentencing and thereby subtract the 'risk part' from the sentence. In practice I cannot see that this will work. In practice, the categories of 'risk' and 'seriousness' will continue to be very difficult to distinguish in determinate sentence cases. The Bill’s attempt to draw this distinction will be seen to be artificial and un-transparent.

I would recommend, therefore, that the Bill should ***not*** *enable individual sentencers to vary the custody percentage for determinate sentenced cases. The purposes of retribution, deterrence, culpability and seriousness can be (and are) achieved more transparently through the setting of the appropriate overall headline sentence.*

6. *IF* S6 IS RETAINED THEN THERE WILL NEED TO BE A REQUIREMENT FOR SENTENCE RECALIBRATION

In its report[3], the judicially-led Sentencing Commission explicitly recommended that to take account of increases in real time served in prison, there should be recalibration of sentencing:

> “We therefore recommend that, in any new statutory regime, Parliament expressly provides that a sentencer, when having regard to sentences imposed under the previous regime, must also have regard to the right to early release under that previous regime. Accordingly, it will be appropriate for sentencers acting under the new regime…to recalibrate and reduce them by the extent necessary…”[paragraph 5.8, sic]

Currently, it is understood that the sentenced person would be released after 9 months of an 18 month sentence. (50%). However, section 6 will allow the individual sentencer to pass the same headline/official sentence (18 months) for the same case, but to increase the effective period in custody to 75% (in this example 12 months). Thus, the effective (or real) custodial sentence will be 3 months longer, although the official/headline sentence remains the same.

For reasons not explained by the background policy documentation, **the recommendation by the Sentencing Commission that “Parliament expressly provides” for recalibration has been completely omitted from the Bill.**

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[3] The Sentencing Commission for Scotland (December 2005) *Early Release from Prison and Supervision of Prisoners on their Release*

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from South Lanarkshire Council

The Council welcomes the Bill and supports the general thrust of the Bill which, in broad terms, aims to reduce re-offending by supporting rehabilitation at the same time as ensuring that risks to the public are properly managed. The principle of reducing the number of short-term sentences and strengthening community based alternatives is also welcomed.

The establishment of a Sentencing Council should lead to greater transparency and also has the potential to raise public understanding of the effects of sentencing.

From a Social Work Resources' perspective, there is a concern that there is a wide perception, supported by some elements of the media, that any sentence other than prison is a soft option. In fact, imprisonment contributes significantly to alienation from the community and increases the risk of further offending.

There is evidence that well resourced community based orders can make a significant difference in helping individuals understand the consequences of their behaviour, take responsibility for their behaviour and change their pattern of behaviour. Ultimately, this makes communities safer.

Sections 3 – 8 on the establishment of a Scottish Sentencing Council have the potential to increase understanding of the impact of sentencing within the community.

The Council welcomes the sections of the Bill that require ongoing review of sentencing guidelines which will help ensure that sentencing remains relevant.

In relation to Section 6 on the requirement to publish and review sentencing guidelines and Section 12 on the publication of a business plan, we would welcome guidance that clarifies who should be consulted on these with the aim of ensuring that relevant agencies, such as those representing victims, local authorities and other interested groups have the opportunity to express a view.

The following are areas in which the Council would request clarification:-

- **Section 227a (2)** - advises that a court must receive a report from an officer of a local authority before imposing a Community Pay Back Order. This should be done by a qualified Social Worker.
- **Section 227f (1)(a**) - establishes that an Order should not interfere with the person's religious beliefs. While we support that principle, we

suggest that further definition is required in order to ensure that the position is not abused.

- **Section 227f (2)** - this and other sections suggest that there will be different components to a Social Enquiry Report, for example, assessment of the criminogenic behaviour and of defining some of the practical arrangements surrounding the person's life. Guidance needs to ensure that the correct check list is in place.
- **Section 227g (2)** - in providing information to the court, will the officer of the local authority be able to make a clear statement of what cannot be provided? This is particularly important in relation to the number of the treatment requirements outlined in section 227g (2)(b) where support will be required from partner agencies in other Social Care and Health Services to, in some instances, provide the treatment. We need to clarify what their responsibility is in providing such services. This could have financial or other resource implications for providers.
- **Section 227h (5)** - the requirement to pay compensation should be treated as part of the supervision requirement – does the responsibility for the supervising local authority extend to the collection of compensation payments?
- **Section 227i (1)** - advises that the offender must, for the specified number of hours, undertake unpaid work and another activity. In relation to another activity, does this include the ability to participate in education or some other form of learning? In relation to unpaid work, if this is the only disposal of the court, does this require an assessment prior to being ordered?
- **Section 227l (1)** - specifies the time period in which unpaid work or other activity requires to be completed. In other parts of the legislation, it talks about the importance of sequencing activity. Does this mean that, in terms of the assessment, it would be possible for the local authority officer to determine when the unpaid work activities should start to allow completion within the time sequence? For example, if someone has an alcohol or drug problem they may require treatment before they are fit to start on the unpaid work activity.
- **Section 227m** - appears to be a replacement for the current Supervised Attendance Order for non payment of fine. Is there an assessment required before this can be imposed, and can this order be imposed without an offender's consent?
- **Section 227p (3)** - this states that suitability for a programme requires to be part of the assessment process. Will this ensure that, if a person is seen as being unsuitable, the court cannot impose such a condition? What are the rights of the authority to return to court if an unsuitable condition is imposed?
- **Section 227s (1)** - does this allow for electronic submission of reports?
- **Section 227u (1)** - requires clarity on the responsibility of Health and Social Care providers where a person is finding it difficult to comply with the treatment element of the Order and are then refused services. Experience suggests that sometimes individuals require a level of support in order to be able to accept the treatment component. Therefore, if a drug treatment requirement is one element of a condition, and the offender is complying with other parts of the Order, is

there the possibility of the supervising officer having the discretion to suspend an element of the condition until the person can be supported to accept the treatment?

- **Section 227w (3)** - the views are welcomed as a way of enabling compliance. It would be helpful if guidance clarified whether the court prescribes the review period; the local authority suggests within the initial assessment what is a realistic period. In other words, can the review period be negotiated?
- **Section 227za** - we require further clarification of the detail of transfer arrangements and how particular Orders could be managed if a person is moved some distance from the original authority.
- **Section 227ze** - is there a timescale for completing the report, and can the report be verbal?
- **Section 227zg** - imposes a new duty on an annual consultation about unpaid work. Further guidance is required on how this is managed, and how it fits in with some other activities within the local authority area.

We also need to consider that there are currently significant issues regarding the management of offenders who cross jurisdictions. It would be helpful if the current legislation could clarify responsibilities in relation to that.

Part 2 Sections 25-28 deal with serious organised crime - Section 28 provides that certain classes of individuals have a duty to report suspicion of possible criminal activity to Police, particularly those who hear about the offences in relation to their trade or professional business. The only specific exclusion is the Legal Profession. Are Social Workers who receive information obliged to report it to the Police? If so, we need guidance on rules and responsibilities.

Section 29 - provides a clearer definition to prescribed articles.

Section 34 – Extreme pornography - introduction of the provision is welcomed. However, we support the view that has been expressed by Rape Crisis and the Women's Support Project that it could be stronger and more effective by:-

- amending the definition of extreme by changing the wording to an act which results or threatens to result in a person's severe injury
- broadening the scope to cover non photographic visual depictions of extreme pornography. This would cover the use of virtual technologies
- broadening the definition of extreme to include depictions of incest
- making clearer definition of possession to include repeat viewings of material without actually downloading files

Section 38 in relation to the prosecution of children - we welcome the raising of the age of criminal responsibility from 8 to 12 years.

We believe this should be accompanied by increasing the powers available to the Children's Hearing by extending the definition of a child to include those aged up to 18 years, ensuring this definition is applied to all legislation relating to children and ensuring that all children and young people are dealt with in a separate court, where their best interest should be the primary consideration.

Section 47 - the remand and committal of children and young persons - we welcome the step that repeals the power to remand a child into custody. We should ensure that children are not placed in adult establishments and, where secure accommodation is seen as the only option by a Children's Hearing or Court, they should be placed in specialist units for the shortest possible period governed by GIRFEC principles.

Section 63 - which refers to the spouse or partner accused being a compellable witness - although we agree with the principle, it's important that sufficient safeguards are in place to protect those individuals who may be subject to abuse or threat by a partner.

Licensing under Civic Government (Scotland) Act 1982

Section 121(2)

The deletion of the word "unconditionally" is generally welcomed.

Section 123(3) – Licensing of metal dealers

The proposed changes to the metal dealers' exemption warrant limits are to be largely welcomed.

Section 125 – Licensing of market operators

These amendments could have an impact on small charitable organisations which may want to have car boot sales, etc, but would find the cost of a market operators' licence prohibitive.

Section 126 – Licensing of public entertainment

This could have severe implications for small organisations which perhaps put on entertainment at no cost and the need to apply for a public entertainment licence could make the cost of providing entertainment prohibitive.

Section 127 – Licensing of late night catering

This should provide some clarity and end previous dubiety as to what was meant by 'meals or refreshment'.

Section 128 – Application for licences

The requirement to add the date and place of birth is one which is generally welcomed and a practice which South Lanarkshire Council has already adopted.

Section 128(b) - which increases the objection period from 21 to 28 days will cause delay for persons wishing to obtain a licence although it may make it easier for partner organisations to submit timeous reports.

Section 128(d) - this increases the notice given to applicants when they are invited to attend a hearing. This will affect the ability to set up a hearing at relatively short notice, however, from an applicant's point of view it will give them longer to prepare their case.

Alcohol Licensing

Section 130 – Premises licence applications – notifications requirements

This amendment is to be welcomed.

Section 134 – Occasional licences

While the amendment is generally welcomed, it is suggested that the Licensing Board be given the power to delegate the functions of deciding whether an occasional licence application requires to be dealt with quickly to the Clerk as, if not, the benefit of this amendment will be severely hampered and will in effect defeat the purpose of the amendment.

Archibald Strang
Chief Executive

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Glasgow Community and Safety Services

Glasgow Community Safety Services (GCSS) is charitable organisation formed in partnership with key stakeholders such as Glasgow City Council, Strathclyde Police and voluntary sector bodies to provide an integrated multi-service response to community safety issues. GCSS welcomes the opportunity to respond to the principles of the Criminal Justice & Licensing (Scotland) Bill which is seen as a significant and positive development in the delivery of justice and care to all of Scotland's citizens.

As an integrated multi-service provision, GCSS has build up considerable experience and expertise on various issues which can inform to the consideration of the Criminal Justice & Licensing (Scotland) Bill and future developments at Stage Two of this process at the end of the year.

We have broken our response down into key areas and kept to the limited response requested:

	Response Title	Articles Considered	Key points
1	GCSS general response including: ASSIST (Advocacy, Support, Safety, Information, Services Together) and VAW (Violence Against Women)	14 15 17 23 28 47 63	Community payback Short sentence provisions Prosecution / remand of children. Racial / religious prejudice Non harassment orders Compellable witnesses
2	TARA (Trafficking Awareness Raising Alliance).	34 35 72 126 21 80 25-28	Extending sentencing Serious crime (various) Child pornography / people trafficking. Closure of premises. Assistance for victims. Public entertainment.

GCSS GENERAL RESPONSE

SECTION 14: COMMUNITY PAYBACK ORDERS

We welcome the Scottish Governments proposal to establish the use of Community Payback Orders which will replace existing community penalties. This proposal highlights a commitment to increase the effectiveness of community penalties with a focus on reparation to communities and robust procedures for the rehabilitation of offenders.

The order will provide access to a range of services which can be tailored to meet the criminogenic needs of each offender which is crucial to reducing reoffending and making Scotland safer. The reparation elements of the order will provide the opportunity for offenders to make amends for the harm caused to the community, allowing them to move on from the offence whilst acting as visible justice for the community affected by anti social and offending behaviour.

SECTION 15: NON-HARRASSMENT ORDERS

Overall we are pleased that key objective is to make it easier for prosecutors to obtain criminal NHO's against offenders. Women who have been subject to domestic abuse often report repeated threats and continued harassment long after they have exited the relationship. It is therefore helpful that Sheriff's will be able to see pertinent details of previous offences. We are hopeful that this will offer greater protection to women and deliver a clear message to offenders that their behaviour will no longer remain invisible to authorities and they will be held accountable.

There is one area of concern, in section 2B 'The court must give the offender an opportunity to make representations in response to the application'. Given that NHO's are granted only once a conviction has been secured, we wonder why this exception has been created, to the best of our knowledge this does not exist elsewhere in criminal law.

We would also propose that if a criminal NHO has been granted in one Sheriffdom that the NHO also applies in other Scottish Sheriffdom's. This offers more consistent protection for women, this is important especially if women move from one area to another.

Robust monitoring is always key to gauging effectiveness of any proposed changes and we would urge the Scottish Govt. incorporate this within the soonest possible timescale.

SECTION 17: PRESUMPTION AGAINST SHORT PERIODS OF IMPRISONMENT OR DETENTION

We support the Scottish Government's intention to suggest that custodial sentences under 6 months should not be imposed unless particular circumstances of the case lead sentencers to believe that no other option would be appropriate.

We acknowledge that imprisonment or detention is necessary for some offenders who pose a real risk to the public or themselves. However, we also believe that short term prison sentences have limited capacities to address each offender's issues and therefore reduce reoffending. It has also been acknowledged that, in some cases, short term periods of imprisonment can lead to an increase in factors which contribute towards reoffending on release from prison.

GCSS agrees that community sentences can be effective alternatives to short periods of imprisonment by acting as a punishment and also providing the opportunity to address the needs of the offender, reducing recidivism rates.

SECTION 23: OFFENCES AGGRAVAGED BY RACIAL OR RELIGIOUS PREJUDICE

We agree with the content of this proposal as it serves to highlight the further seriousness of the aggravated offences and gives the Courts added options in dealing with racism/religious prejudice.

SECTION 38: PROSECUTION OF CHILDREN

We welcome the proposal to raise the age of criminal responsibility from 8 to 12 whilst still allowing children under 12 to be referred to the Children's Reporters Administration on offence grounds.

It is well documented that the current laws surrounding the prosecution of children in Scotland set the age for criminal responsibility significantly lower than recommendations of the UN Convention on the Rights of the Child. GCSS agrees that the prosecution of children under 12 does not fit well with the rights of the child. However we do believe that children over 8 years of age should be deemed to be responsible for their actions.

We fully support the intention to ensure that children aged 8-12 can be referred to the Children's Reporters Administration on offence grounds. In Scotland, we have an effective structure for dealing with youth offending through an integrated welfare system. We believe that restorative justice services play an important role in addressing issues of youth offending providing an opportunity for children to learn about the consequences of their behaviour, and allowing victims to have a voice in the process. Restorative processes play an effective role in dealing with low level and minor offending by children but can be used on a limited basis for children involved with social work services or with a number of previous offences. GCSS would like to see more robust guidelines for the use of restorative processes where a child is subject to a supervision order.

SECTION 47: REMAND AND COMMITTAL OF CHILDREN AND YOUNG PERSONS

GCSS agrees with the policy suggestion of ensuring that children are no longer imprisoned with convicted adult offenders. We believe that children under 16 should be treated as such and that more suitable arrangements are made for remand and committal purposes which takes more regard to the welfare of the child.

SECTION 63: SPOUSE OR CIVIL PARTNER OF ACCUSED A COMPELLABLE WITNESS

We agree with all aspects of this policy section.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Trafficking Awareness Raising Alliance

SECTION 34: EXTREME PORNOGRAPHY

We welcome the Scottish Government's intention to criminalise the possession of extreme pornography as it highlights a growing commitment to challenging the demand for such extreme images and is a step in the right direction towards generating public discussion on the issue of commercial sexual exploitation, raising awareness and changing attitudes towards pornography. We believe that pornography creates the culture and conditions where violence against women can thrive. Undoubtedly, pornography results in a broader cultural harm by dehumanising women, reducing them to body parts seen to enjoy pain, humiliation and subordination. We know that women involved in prostitution are frequently used to make pornography and research into the methods of human traffickers indicate that pornography is used to "teach" women how to act. Pornographic pictures of trafficked women are also taken by traffickers and are then used to coerce women into sexual exploitation.

What was once regarded as extreme in the porn industry has now become mainstream, which is leading to distorted images about gender among young people and will ultimately have an impact on their ability to form healthy, respectful relationships.

Examining the proposed legislation more closely it is important that we acknowledge our support for the fact that the Scottish proposals are going far beyond the arguably narrow definition of "extreme pornography" that was adopted in England and Wales. The Scottish offence, by covering all obscene pornographic images which realistically depicts rape or other non-consensual penetrative sexual activity, whether violent or otherwise, is necessarily broader which in turn increases the scope of images which can be targeted. It also prevents the unhelpful myth, that rape has to be violent from being further perpetuated. We hope Scotland will learn lessons from the English model in order to produce a stronger, more credible piece of law. Seemingly, in England and Wales there have been few prosecutions and we would hope the proposals here will be more than just of symbolic value. We are happy with the proposed maximum sentence of 3 years for possession of extreme pornography, as if effectively enforced this could provide a deterrent to users of such material.

SECTION 34 (6)

- Defines an image as extreme if the material in question is "explicit and realistic", we believe there may be scope for a broadening of definition. As it stands, non photographic representations of extreme, violent sexual acts are not covered in the Bill for example such as on virtual

worlds such as Second Life. Although not photographic, we believe these images are equally as harmful and the Bill would provide an opportunity to also sanction against this type of pornography.
- Similarly, within this section we think there is a missed opportunity here to include depictions of incest which are increasingly common on pornography sites.
- It is crucial that clear guidance is issued to the relevant agencies that will be implementing and enforcing the legislation, to ensure that it does not become a dormant instrument.
- We are concerned that there may be difficulty in proving images of rape, due to the issue of consent. It is clear that some images will clearly be criminal; however there is the concern that those in the middle which are harder to prove might simply slip under the radar.
- There is an inherent lack of consent among all those persons who appear in pornography due to the underlying exploitation and harm involved. However, this may be difficult to show when women are generally portrayed as “enjoying” rape, pain and humiliation.
- Clarity is also required as to what “possession” covers and a concise definition is needed, so for example those that view material without actually downloading it do not slip through the net and avoid criminalisation.

We also need to make sure that by only focusing on extreme pornography, that we are not sending out the message that other pornographic images are acceptable and any less harmful.

Recommendation: Although it is out with the scope of this Bill, ideally we would be in favour of legislative sanctions banning all forms of pornography due to our belief that it is degrading to the women involved, harmful to users and complicit in violence against women both in its production and in its consumption.

To conclude, although ultimately a narrow measure, by only focusing on extreme pornography, as opposed to the industry as a whole, we are still wholly in support of this move which hopefully will reduce the demand for extreme images and send out a clear message that they and the people who look at them have no place in a civilised society. We hope this legislation has the “teeth” to do this, and recommend that it is backed up by clear guidance and a public education campaign. Young people must be educated on the difference between porn related sex and healthy sex which is based on values of respect, equality and mutuality.

SECTION 35: PEOPLE TRAFFICKING

We welcome the Scottish Government’s intention to bring Scots Law in relation to trafficking of persons in line with England and Wales and ensure consistency in the protection of victims across the UK. Glasgow has the highest number of people involved in the sex industry outside of London, and

approximately 50% of those involved are from overseas (*Scotland's Slaves: An Amnesty International briefing on trafficking in Scotland, 2008*).
It is clear that despite provision in the Criminal Justice (Scotland) Act 2003, there are still definite gaps in the current legal framework to protect victims of trafficking. We support an extension of provisions to include facilitating the arrival or entry into the UK of a person for the purposes of exploitation, regardless of where the facilitation took place and irrespective of the nationality of the facilitator. This extra-territorial measure widens the scope of the law to target the perpetrators of modern day slavery. However, it must be noted that we believe the only way that trafficking activity can truly be halted is to disrupt the market by challenging demand.

SECTION 72: CLOSURE OF PREMISES ASSOCIATED WITH HUMAN TRAFFICKING

GCSS strongly supports the introduction of new powers within the Anti Social Behaviour (Scotland) Act 2004 for the closure of premises associated with human exploitation. Street prostitution, although the most visible, is only a small percentage of prostitution activity in the UK today. The covert nature of the indoor trade means that the numbers of women involved in the off street sex industry can be hard to quantify combined with the difficulties in gleaning intelligence to support law enforcement agencies in their efforts. The TARA Project has estimated that upwards of 700 women have been brought to Scotland for the purpose of commercial sexual exploitation, with over 40 different nationalities of women engaged in off street prostitution in Glasgow alone.

- We recommend that the new measures include not just only closing premises associated with trafficking, but covers flats and brothels in general where prostitution occurs. It is deceptive to see prostitution and trafficking as two separate issues, as if one is "free" and the other "forced". This fails to take into account the lack of choice evident in all types of exploitation, and implies it is the time or distance that is the important thing, not the abuse.

- It is not clear from the Bill as to whether the closure orders would be temporary or permanent; no period of time is specified. It would be useful to have some clarity here in order to act as guidance to the relevant agencies who would be involved in enforcement.

- Although, a closure order is undoubtedly a worthy tool, as closing such premises sends a message out to society that such anti-social behaviour and exploitation of people will not be allowed to flourish in our communities, there may also be merit in seeking to impact on the behaviour and activities of the owner and operator of these premises.

- Particularly in relation to brothels and "massage parlours", options should be made available to police and relevant authorities to prevent those who own or operate such premises from simply relocating, or nominally transferring ownership or licence.

- We believe that at the same time as instructing a closure order on premises, those caught purchasing sex indoors should be penalised and ask that consideration be given to criminalising the purchase of sex in any venue.

Furthermore, we believe that although the proposed amendment is a valuable shift in the right direction, the implementation of closure orders for premises associated with exploitation is only a half measure in terms of truly challenging the demand which fuels the UK sex industry.

In practice, as long as the demand exists, vulnerable women will continue to be drawn into prostitution as a form of "survival behaviour" due to addiction issues, homelessness, poverty and experiences of abuse. Scotland has gone some way towards tackling street prostitution with the introduction of the Prostitution (Public Places) Scotland Act 2007 which ensures that those who buy sex on the street face the full force of the law. Conviction rates are high and initial signs show that the law has had some deterrent impact on those who consider paying for sex on the street or in a public place. However, under the current legal framework men can still purchase a woman indoors without committing an offence. This is clearly an unsatisfactory situation.

Recommendation: In response, therefore, to this gap in the law, we consider that there is opportunity within the Criminal Justice and Licensing Bill to rectify this through the introduction of a specific offence which criminalises buying sex in all settings. A Swedish delegation of experts visited Glasgow in March 2008 advocating this approach, which has not only dramatically reduced prostitution, but it is also no longer an attractive destination for traffickers. For example, the Swedish Government has estimated that in the last few years only 200 to 400 women and girls have been annually trafficked into Sweden for prostitution, while in neighbouring Finland the number is 15,000 to 17,000.

SECTION 126: LICENSING OF PUBLIC ENTERTAINMENT

Recommendation: We suggest a further amendment to section 41 of the Civic Government (Scotland) Act 1982 instead of just focusing on removing the existing exemption for free events. The Criminal Justice and Licensing Bill also provides a valuable opportunity to reassess the current licensing of lap dancing venues. The licensing of lap dancing clubs is currently regulated under Section 41 which outlines the need for a "public entertainment licence" in order to legally operate.

- We consider the term "entertainment" wholly misleading in the context of activities which so clearly denigrate women in an environment of male power and control. Portraying women as sexual objects plays a part in normalising sexual violence and contributes to the male abuse of women being acceptable, tolerated, condoned and excused.

- We would strongly welcome the move to re-categorise the licensing of lap dancing clubs away from the “entertainment” provision towards “sex shop” licensing (Schedule 2 of the Civic Government Act 1982) as this would give local authorities greater powers to apply conditions and restrictions on such clubs.

Indeed, in Glasgow the local authority has set the provision for sex shops at nil due to the underlying belief that there would be an overwhelming contradiction in licensing such exploitative activities while at the same time trying to promote a Scotland grounded on human rights and equality for all. We believe that local authorities must have the option to refuse to license such establishments.

SECTION 21: EXTENDED SENTENCES FOR CERTAIN SEXUAL OFFENCES

We would be overwhelmingly in support of this provision which would allow the courts to protect public safety to a greater degree by giving them the power to impose an extended sentence for an offence which discloses a significant sexual aspect to the offender’s behaviour. This may be utilised when prosecuting trafficking offences when the victim has been trafficked by the perpetrator for the purpose of sexual exploitation. Often the agent may themselves have subjected the victim to rape and sexual assault. Similarly, this may be used against pimps and men who exploit women involved in prostitution.

SECTION 80: ASSISTANCE FOR VICTIM SUPPORT

We would support any measure which would improve support for victims of crime. In particular, in relation to victims of trafficking and sexual exploitation emergency support is often required when they are recovered. Locating suitable emergency accommodation can often be challenging and funds in place for this type of resource would be valuable.

SECTIONS 25 – 28: SERIOUS ORGANISED CRIME

The links between trafficking and serious organised crime are already well documented. Prostitution and trafficking of women is the third highest “black market” income earner globally after drugs and arms. Therefore, we would support any measures which would strengthen the law linked to organised crime. In particular, section 26 “offences aggravated by connection with serious organised crime” is relevant and we would hope that this provision would mean increased sentences for those that organise and facilitate the buying and selling of human beings.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from COSLA

Introduction

COSLA welcomes the opportunity to provide a response to the Criminal Justice and Licensing Bill. We are supportive of the principles underpinning the Bill, albeit we have highlighted the potential implications of implementation in relation to resource issues.

Our response to the Bill's provisions is set out under three sections relating to the criminal justice and the licensing sections of the Bill along with resource issues.

Cllr Harry McGuigan
COSLA Community Wellbeing and Safety Spokesperson

Criminal Justice Section of the Bill

The Scottish Sentencing Council: COSLA welcomes the establishment of the Scottish Sentencing Council. However, it is important that this new Scottish Sentencing Council works alongside Community Justice Authorities as part of the wider Local Government Family to ensure that community sentences operate in a manner that enhances their credibility with the Courts and with the general public. As such, close working between the Sentencing Council and the CJAs will add value to what both organisations can do in relation to this remit and any failure of either organisation to do so will result in potential public confusion.

Community Payback Orders: COSLA looks forward to working with the Scottish Government and other partners in implementing its proposals, in particular "Community Payback" which will provide the courts with credible alternatives to prison sentences. However, it is imperative that arrangements for Community Payback Orders are robust and reliable to allow the general public to have confidence in them.

We believe that there may be potential for confusion between the Drug Treatment and Testing Orders and Community Payback Orders with the requirement of drug treatment. As such, there is a need for clarity to define theses differences. In addition, the Court will not be able to impose a Community Payback Order without "taking account of a report from an officer of a local authority". Given the possible conditions/requirements that can be imposed through a CPO the nature of the assessment undertaken by the officer of a local authority will be different to current Social Enquiry Report assessment practices of councils. As a result, staff will require additional training and guidance.

In relation to Community Payback Orders there is no guidance within the Bill regarding the qualifications/skill set etc of the “officer of the local authority”. Given the complexity of the assessment required and the potential to deprive and offender of their liberty we suggest that the author of such a report/assessment should be a qualified social worker.

The Bill also states that the “offender must attend appointment with the responsible officer” and that “the nature of the unpaid work or other activity to be undertaken by the offender is to be determined by the responsible officer”. There is no guidance offered within the Bill as to the qualification levels of the “Responsible officer”. At the moment only social workers are recognised as supervising officers or probationers. Non social work qualified staff can and do act as supervising officers for offenders on community service and supervised attendance orders. Therefore, it would be helpful to have guidance which allows for a combination of social work qualified and non social work qualified staff to be Responsible Officers for the supervision requirement of a Community Payback Order.

Further, COSLA welcomes the requirement for offenders to participate in specified programmes aimed at addressing offending behavioural needs. However, the Bill does not make reference to the availability or prioritisation of programmes.

In relation to the periodic review of Community Payback Orders we note the inclusion of reviews within the legislation but think further guidance on the purpose and practice of reviews should be issued following consultation with stakeholders. This should ensure consistency in the operation of reviews.

Presumptions Against Short Periods of Imprisonment or Detention: COSLA is disappointed that the Scottish Government did not take account of the Scottish Prisons Commission’s recommendations in full i.e. the abolition of short sentences. As such, we believe that the text within section 17 needs to be strengthened in order to endorse the title. We are also concerned that Section 17 of the Bill may have results that have not been foreseen and need further clarification, for example, the section has the potential to result in a significant rise in the number of Social Enquiry Reports requested or an increase in up-tariffing.

Custodial Sentences and Weapons (Scotland) Act 2007: COSLA broadly supports the Amendments of the Custodial Sentences and Weapons (Scotland) Act, particularly, as it extends the ability to support people in the community. However, there needs to be clarity within the Bill on ‘prescribed periods’.

Sexual Offences Prevention Orders: COSLA welcomes the move away from simply **prohibiting** the defendant from doing anything described in the order to **requiring** the defendant to do anything described in the order and believe that this will strengthen our ability to positively influence offender behaviour.

Victims: COSLA believes it is hugely important that victims should be recognised in the Bill, given victims and potential victims are customers of the criminal justice system. As such, we are of the view that they should be taken into account otherwise this will be a missed opportunity. We are aware that the accredited programmes and many other programmes address the understanding of victim issues but suggest that this could be a standard requirement of a Community Payback Order.

Young People Who Offend: The Criminal Justice and Licensing (Scotland) Bill will abolish the legislation that allows 14 and 15 year olds to be remanded to adult prisons. Nevertheless, it is recognised that some young people cannot remain in their communities as the risks they present, both to themselves and others, are too great and may need to be managed within a secure environment. COSLA is committed with the Scottish Government to ensure that secure care is provided. However, this is a very specialist and costly intervention and should be targeted at the very few young people who need it.

COSLA supports the increase in the age of criminal responsibility to 12 years of age. Also, we support in principle Section 59 of the Bill in relation to the retention of forensic samples from children charged with serious violent and sexual offences with the caveat that the criteria are specific and restricted to **serious** sexual or violent offences only.

Serious and Organised Crime: We support the proposals outlined in the Serious and Organised Crime Sections (25-28) of the Bill whilst recognising that the statutory supervision of such offenders on licence may place further demands on local authority social work services.

Licensing Section of the Bill

COSLA has general support for the proposals and the majority of the comments made through our member councils to the licensing section of the Bill. We seek either clarification or request further consideration of issues stemming from the proposals that relate to licensing of metal dealers, licensing of market operators, licensing of public entertainment, premises licence applications, premise licence applications: antisocial behaviour reports, occasional licences, extended hours applications: variations of conditions and emergency closure orders on behalf of local authorities.

Resource Issues for Local Government

COSLA is very clear that for the provisions of the Bill to be implemented effectively in relation to the criminal justice elements of the Bill there is a need for a radical shift of resources. These resources should be transferred on an incremental basis to councils and the wider Local Government family in terms of Community Justice Authorities and the Police. As a result, interim transitional financial arrangements should be established following a resource redistribution review.

As it stands the Bill has significant specific financial implications for councils. Section 14 ‘Community Payback Orders’ and Section 17 ‘Protection against Short Periods of Imprisonment or Detention’ are the areas with greatest implications for councils. These arise from the need to increase average unpaid work hours per offender per week by a factor of almost 100%. In addition, the need to make new Community Payback Orders available for a significant number of persons currently the subject of short sentences of imprisonment. As such, the proposed legislation on changes to sentencing has the potential to impose a significant impact on criminal justice social work resources. Examples of new costs include reports for Review Courts, community sentencing also prison sentences and release arrangements. The Financial Memorandum, issued along with the Explanatory Notes, indicates that the majority of additional costs incurred by local authorities will be met through existing Section 27A funding. However, the estimated costs of core services appear to be based on 2007/08 costs and do not take account of the cost of living resources.

Potentially the resources needed to support ‘progress courts’ are considerable. As such, the effective targeting of this provision will be critical to ensure best use of staff time and court time. Similarly where a court considers a Community Payback Order appropriate for an offender under the age of 18 years, the supervision requirement will become mandatory. This age group often have difficulty engaging with services and non compliance can be higher. Therefore, sufficient and age appropriate resources alongside access to universal services will be critical to break the ‘cycle of offending’ that results in a disproportionate number of young people being remanded or sentenced to imprisonment. This will have implications for local authority social work services including Children’s Services and Criminal Justice Services.

The financial implications of implementing revisions to the Custodial Sentence and Weapons Act (S18) are significant and will require a considerable increase in staff resources. Should the Bill confirm the introduction of post release statutory supervision on all sentences of 12 months or more we would urge a gradual introduction, initially targeted at offenders assessed as presenting a high risk of harm and those sentenced to imprisonment in excess of 2 years.

Further, any resource implications relating to the implementation of the provisions of the Bill relating to the licensing should be fully taken on board to ensure the effective implementation of the aims of the Bill.

Mike Callaghan
Community Resourcing

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Equality and Human Rights Commission

1. The Equality and Human Rights Commission was established by the Equality Act 2006 and came into being on 1 October 2007. We are the independent advocate for equality and human rights across the three nations of Great Britain, and we work to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights. We enforce equality legislation on age, disability, gender, gender reassignment, race, religion or belief, and sexual orientation and encourage compliance with the Human Rights Act. In Scotland, we co-locate and work in partnership with the Scottish Human Rights Commission.

2. We welcome the opportunity to comment on the Criminal Justice and Licensing (Scotland) Bill at Stage 1. The Bill is very timely for the Commission's work in Scotland in its first year, as we have been very active in relation to criminal justice, having given written and oral evidence on both the Sexual Offences (Scotland) Bill and the Offences (Aggravation by Prejudice) (Scotland) Bill. We have also commissioned research on policy responses to gender-based crime in Scotland, which we hope to publish by mid May, and criminal justice will continue to be a significant theme in our work planned for 2009-10.

3. The Bill contains a great number of provisions, many of which the Commission welcomes, such as the clarification of the Anti Social Behaviour (Scotland) Act 2004 Act to allow for the closure of premises associated with sexual exploitation and human trafficking, and the tightening of the law on sexual images of children. We also very much welcome the proposals to harmonise statutory aggravations across all areas (making sure that courts appraise offenders of the seriousness of religious and racially aggravated crimes at the point of sentence in the same way proposed for disability, homophobic and transphobic hate crime. There are however two areas where we would like to make specific points. These regard the provisions for Community Payback Orders (CPOs), specifically in relation to a requirement for mental health treatment, and provisions relating to possession of extreme pornographic material.

4. **Community Payback Orders and Mental Health:** the Commission welcomes proposals at Section 17 for a presumption against short periods of imprisonment or detention. As the report of the Scottish Prisons Commission makes clear, Scotland already has one of the higher prison populations in Europe, imprisonment does little to reduce reoffending, and an approach weighted towards payback to the community would be more beneficial for victims and offenders in all but the most serious types of crime[i].

5. We would welcome further detail on the proposal at Section 14, to amend Section 227 of the Criminal Procedure (Scotland) Act 1995 to allow for

a Community Payback Order (CPO) to require mental health treatment. The policy intention behind this appears sensible, providing for a more tailored response in cases where offending behaviour is a symptom of underlying mental health issues, and where imprisonment could further exacerbate an existing condition, causing both additional distress to the sufferer and increasing the likelihood of further offending. However, the Mental Health (Care and Treatment) (Scotland) Act 2003 already has extensive provisions (Part 8 to Part 13) for persons who become subject to mental health legislation through criminal justice orders.

6. There is no information in the Bill, Policy Memorandum or Explanatory Notes on how a mental health treatment CPO would sit alongside Parts 8 to 13 of the 2003 Act; there may be understandable reasons why this is so, but it would be useful if ministers could elaborate on how these two sets of provisions will work in tandem.

7. **Possession of extreme pornographic material:** Section 34 the Bill proposes mirroring, with some modifications, Section 63 of the Criminal Justice and Immigration Act 2008 in England and Wales[ii]. We would like to raise two issues in relation to this: How the creation of a specific criminal justice response to the possession of extreme pornography relates to the wider issue of pornography in the public sphere and online; and the Scottish Government's proposal to go beyond the England and Wales Act by criminalising possession of depictions of rape.

8. The Scottish Government's proposals follow the joint Scottish Executive/Home Office consultation of 2005[iii]. Many submissions to that consultation raised important questions about how to define 'extreme' pornography, and suggested that there are clear links between all pornography and wider gender inequality. Women's organisations have pointed to studies which implicate pornography at every stage of the sexual abuse cycle, from predisposing men to abuse, to legitimating abuse, to reducing internal and external inhibitions to abuse, and in initiating and carrying out abuse[iv].

9. There are concerns then that any attempt to define in law what constitutes 'extreme' pornography should not inadvertently legitimise or normalise less extreme pornography. At the same time, the last two decades have seen an exponential growth in pornography on the internet; some of this material can only be described as violent and extreme, depicting degradation, violence and rape. It would seem reasonable then to have a strengthened criminal justice means of responding to an internet-driven explosion in extreme and violent pornography. The Commission would therefore welcome further clarification from ministers on how they see the law working in practice, and on how changes to the criminal law might sit within a wider policy debates on pornography and gender inequality.

10. In addition, unlike the 2008 Act in England and Wales, the Bill proposes extending the definition of 'extreme' to include depictions of rape. Whilst this recognition that the depiction of rape constitutes an extreme image

sends a very welcome message, it would be useful to give thought to how this will fit with the statutory definitions of rape and consent in the Sexual Offences (Scotland) Bill also currently before the Parliament.

References

[i] Scottish Government, *Scotland's Choice: report of the Scottish Prisons Commission,* July 2008, www.scotland.gov.uk/Publications/2008/06/30162955/0

[ii] The passage of the 2008 Act in England and Wales prompted debate on the civil liberties issues raised by the potential criminalising of consensual sexual practices in a private setting. See the papers from a Durham University seminar, *Positions on the Politics of Porn: a Debate on Government Plans to Criminalise the Possession of Extreme Pornography,* 15 March 2007, www.dur.ac.uk/law/research/politicsofporn/

[iii] Home Office/Scottish Executive, *Consultation: On the possession of extreme pornographic material,* August 2005

[iv] Scottish Women's Convention, response to Home Office/Scottish Executive Consultation, November 2005: www.scotland.gov.uk/Resource/Doc/1099/0021439.pdf

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Human Genetics Commission

The Human Genetics Commission (HGC) is grateful for the opportunity to contribute evidence to the Justice Committee in relation to the general principles of the Criminal Justice and Licensing (Scotland) Bill. The HGC is the UK-wide advisory body on developments in human genetics and their ethical, legal, social and economic implications. As Chair of the HGC's Identity Testing Monitoring Group, I have been asked to respond on behalf of my fellow Commissioners. As requested by the Committee, our comments relate to general principles underlying the Bill. In line with our remit, our response arises from reflections on provisions relating to DNA retention, as considered in Professor Fraser's report and subsequent policy documents, and provided for in clauses 58-60 of the Bill.

Since its establishment, the HGC has had a close and continuous involvement with policy issues relating to the collection, retention and use of genetic information for forensic purposes, and has contributed to a number of consultations on proposals to revise legislation both in England and Wales, and in Scotland. Forensic use of genetic information was the subject of a chapter of our first report, *Inside Information, balancing interests in the use of personal genetic data*[1] (2002) and, last year, the HGC commissioned a "Citizens' Inquiry", involving two panels of citizens in Glasgow and Birmingham, to explore public concerns about forensic DNA databases.[2] This was followed by a broader public consultation in the second half of 2008. The Commission is currently in the process of drawing together a report on forensic DNA databases to be published later this year. More particularly, we recently made submissions both to Professor Fraser's review of DNA and fingerprint retention and to the Scottish Government's consultation on proposals arising from that report.[3]

There are two issues raised in the Bill to which we wish to draw the Committee's attention.

The presumption of innocence

We recall that the Commission has, on previous occasions, expressed a preference for the arrangements for retention of DNA data in Scotland over those that apply to records from England and Wales retained on the National DNA Database. We recognise that the approach adopted in Scotland is a pragmatic one that seeks to strike a balance between the benefits of retaining personal data for possible use in future investigations and interference with the civil liberties of those whose data is so retained. However, the difference between the approach in Scotland and that taken in England and Wales is, in this respect, one of magnitude rather than principle. Whilst we recognise that there are pragmatic arguments for the retention of records, for a limited time, relating to those proceeded against, but not ultimately convicted of, certain serious violent or sexual offences, in the absence of a finding of guilt by a court (or at the outcome of children's hearings) a sufficient justification must be produced for any interference with the right to privacy of such persons. One of the concerns that has been raised with us repeatedly is the lack of publicly available evidence for the utility of retaining records relating to people not convicted of an offence. We expect to consider this further in our forthcoming report.

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[1] See especially chapter nine ('Forensic uses of personal genetic information'), available at: www.hgc.gov.uk/Client/document.asp?DocId=131&CAtegoryId=10 *[Link no longer operates]*

[2] The Citizens' Inquiry was commissioned by the HGC in partnership with the ESRC Genomics Policy and Research Forum in Edinburgh and the Policy, Ethics and Life Sciences (PEALS) Research Centre in Newcastle, with funding from the DIUS Sciencewise Programme and the Wellcome Trust. The citizens' findings were published in July 2009. Full information is available at: www.hgc.gov.uk/Client/Content.asp?ContentId=755 *[Link no longer operates]*

[3] These submissions can be found on the HGC website at: www.hgc.gov.uk/Client/document.asp?DocId=141&CAtegoryId=4 and *[Link no longer operates]* www.hgc.gov.uk/Client/document.asp?DocId=182&CAtegoryId=4 respectively. *[Link no longer operates]*

We would therefore take issue with the conclusion in paragraph 301 of the policy memorandum in which it is argued that "DNA is classed as more sensitive personal information than fingerprints and other relevant physical data. So, if DNA can already be retained… it is logical to retain any fingerprints and other material…" We agree that issues relating to DNA certainly differ from those relating to fingerprint data, and there can be no more of an objection to holding information that is less sensitive than to holding information that is more sensitive. However, notwithstanding inferences that can be drawn from certain *obiter dicta* in the judgement of the European Court of Human Rights in the case of *S and Marper v. The United Kingdom*, we believe that the case for retention of any samples from persons not convicted of an offence requires very substantial justification and we would urge the Scottish Government to place any evidence on which they rely in support of this approach in the public domain.

The list of applicable violent and sexual offences still to be developed in relation to the retention of samples from un-convicted children will be of particular significance. In the case of children, the difference between the conclusions one might draw from different perspectives is likely to be most pronounced, given the greater potential of their future lives and their greater vulnerability. We here reiterate the advice in our earlier submission to the Scottish Government consultation: namely, that we would wish the definition of the crimes for which samples may be kept without conviction to include a reference to their seriousness, as well as the fact that they are sexual or violent, in a way that could be consistently operationalised.

The purpose of DNA retention

We appreciate that an underlying aim of the draft legislation is to provide clarity on the purposes for which biological samples and records of forensic data can be used (policy memorandum, para.305; explanatory notes para.309). This is consistent with advice in our earlier submissions. However, we are not sure that the provisions, as drawn, provide that clarity.

In particular, the use of a biological sample, or DNA information derived from it, "for the identification of a deceased person or a person from whom the relevant physical data, sample or impression came" (cl.60 inserting new section 19C(2)(b)) seems somewhat broad. We believe that this is likely to be of very little practical utility (and of benefit mainly to convicted offenders) and that it extends the possible use of samples beyond the ambit of the purpose for which they were originally collected, namely, the investigation of crime. The scope of use of DNA information retained on the database is also something to which we expect to give consideration in our forthcoming report.

Finally we note that the draft legislation does not contain provisions to place on a statutory basis the governance of repositories for biological samples and DNA records. This is something we suggested in our earlier submissions and to which we also intend to return in our report.

I am happy for you to reproduce this response and to quote from it in any report you publish in relation to the consultation. To comply with our open working style a copy of this response will be placed on the HGC's website.

Dr Alice Maynard
Chair, Identity Testing Monitoring Group
Human Genetics Commission

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Midlothian Council

The proposals as regards the licensing provisions are generally acceptable here.

The Members of the Council's General Purposes Committee when discussing the matter expressed concern about Public Entertainment – the proposal to give local authorities the discretionary power to regulate free-to-enter public entertainment activities, particularly in relation to gala days and fetes, etc. The Members considered that there is a need to ensure that the volunteers who organise these events are not over-burdened by regulation. Whilst it is recognised that Local Authorities will have the discretionary power to licence these activities, caution is urged as regulation may lead such activities being discontinued and therefore a diminution of local traditions and special events and occasions. Volunteers need to be supported rather than potentially place obstacles in their path.

As regards Applications**,** it is noted that the Bill extends the periods for receipt of representations and notice of Hearings. Whilst this is acceptable, the introduction of a transitional period after licences have expired when application can be made for renewal, appears to be a backward step. It is likely to lead to confusion and a brake on enforceement.

It is noted that no clarification has been given about the other issues contained in the Task Group's report which have not survived in the Bill.

Also, a number of other issues have been raised in the meantime, including knife dealers. Can such regulations be added to this Bill?

Bob Atack
Corporate Services Division

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Judges of the High Court of Justiciary

PART 1: SENTENCING

Purposes and principles of sentencing

1. We are content that the purposes and principles of sentencing should be set out in statute. Only two matters call for comment. First, it is not clear why the purposes and principles should not apply where the offender is at the time of the offence under 18 (subsection 5(a) of section 1). In the case of such an offender account will, of course, require to be taken of his or her age but the considerations referred to in subsections (2) and (3) appear to be equally apt for the sentencing of any person who has attained the age of criminal responsibility. Secondly, we refer to section 2(2) in our discussion of the proposed Scottish Sentencing Council (below).

The Scottish Sentencing Council

2. The Financial Memorandum accompanying the Bill states that it is anticipated that an annual budget of approximately £1 – £1.1m will be required to fund the proposed Sentencing Council; in addition there will, it is estimated, be an initial set up cost of £450,000. These costs do not take into account the provision of back office functions such as IT and human resources services which, it is suggested, will be provided by the Scottish Court Service. All these costs are to be borne by the Scottish Government.

3. We are profoundly concerned that, at the present time of financial stringency, when the justice system has other very pressing demands for funding – not least of judicial training and of the provision of judicial manpower – the Government is promoting and the Parliament is contemplating such expenditure on such a Council.

4. The function of the proposed Council is, according to the Bill, "to prepare and publish guidelines relating to the sentencing of offenders" (section 5(1)). We acknowledge that the preparation and the publication of sentencing guidelines have their place in a well-ordered criminal justice system. It is important that sentencers, while deciding individual cases on their own facts and circumstances, should have a reference framework against which such decisions can be taken. The traditional framework is the body of prior decisions made in analogous cases by the High Court of Justiciary, sitting as a court of criminal appeal. Many such decisions are reported in Green's Weekly Digest and are collated in *Morrison – Sentencing Practice*. They are thus readily available to the legal professions, including to sentencers. Sentencing is also the subject of training on courses run by the Judicial Studies Committee. The judgments in cases on appeal may also

include statements of wider application than to the cases under immediate consideration.

5. Where a sentence, imposed at first instance or considered on appeal, is of a sensitive character or otherwise appears to be of particular public interest, it is the practice of the courts to issue a "sentencing statement" explaining the circumstances. This practice, which is relatively recent, has, it is believed, led to a significantly better understanding, by the public and the press, of sentencing decisions. There may be room for extending this practice.

6. Apart from deciding appeals against sentence, the High Court also has power (under sections 118(7) and 189(7) of the Criminal Procedure (Scotland) Act 1995) to pronounce "guideline judgments" on sentencing matters. Any court subsequently passing sentence is obliged to have regard to any relevant opinion pronounced under either of these subsections (section 197). The power to pronounce guideline judgments was initially used somewhat sparingly – though important judgments were pronounced with reference to child pornography and to discounts for early pleas of guilty. In more recent times the power has been used where a particular class of sentencing situation appeared to require more general guidance. Recent examples relate to "cannabis farmers" and to a particular aspect of discounting for an early offer of a plea. The court is now taking a pro-active attitude by seeking to identify cases which would benefit from guideline judgments. Lord Macfadyen was initially tasked with identifying such cases. This work is currently being carried on by Lord Carloway.

7. Other mechanisms also exist for examining general approaches to sentencing practice. For example, towards the end of last year, the Lord Advocate marked appeals (on the basis of alleged undue leniency) against the punishment parts specified for certain persons convicted of murder. She is taking the opportunity to seek from the court general guidance on the current levels of such punishment parts. These cases are scheduled to be heard before an enlarged court later this year.

8. Thus a range of mechanisms already exist for exploring and developing sentencing issues. These could no doubt be improved and, perhaps, as suggested below a wider participation be engaged. However, the central and essential element of these arrangements is the constitutional principle that, with limited and specific statutory exceptions, the High Court has always been and remains the body ultimately responsible for decision-making in the development and implementation of sentencing policy. We regard that principle, which is well-noted in Scotland, as of the first importance.

9. That principle was recognised by the Sentencing Commission for Scotland (chaired by the late Lord Macfadyen) when in August 2006 it recommended, in its report "The Scope to Improve Consistency in

Sentencing", the creation of an Advisory Panel on Sentencing in Scotland (APSS) – see, in particular, paras. 9.14 – .16 of that report. In his Foreword Lord Macfadyen observed:

> "The APSS would be responsible for the necessary research and consultation, and for framing the draft guidelines. The adoption of these guidelines, however, with or without modification, would be a matter for the Appeal Court. The membership of the APSS would have a strong judicial component, but it would also include people who would bring other relevant skills and experience to its work. In that way, the recommendations of the APSS would reflect a breadth of experience and thorough investigation, while the role of the Appeal Court in deciding whether to approve draft guidelines would ensure that sentencing remained essentially a judicial function."

10. The current proposals in the Bill fundamentally undermine that principle. The proposed Scottish Sentencing Council (of which only a minority, it seems, are to be judicial office holders and only two out of twelve are to be of High Court status) will prepare and publish guidelines which will have direct legal effect, thus restricting the sentencing discretion and power not only of all courts, including the High Court sitting as a court of appeal (section 7(1)(a)), but also of that court when carrying out its other function of issuing guideline judgments (section 7(1)(b)). The proposed Council is to have power to prescribe the circumstances in which its guidelines may (and presumably where they may not) be departed from (section 5(3)(d)). Even the sentencing purposes and principles formulated in section 1 are to be subordinated to the Council's sentencing guidelines (section 2(2)). Whatever may be asserted about the residual discretion of individual judicial office holders when passing particular sentences, the Bill's proposals strike directly at the independence of the judiciary (and in particular of the High Court) as the arm of Government essentially responsible for the setting of sentencing policy. The proposals (as framed) are fundamentally unacceptable both on domestic constitutional grounds and because mandatory directions to the court by a non-judicial body undermine the judicial independence required of courts by Article 6 of the European Convention on Fundamental Rights and Freedoms.

11. The Bill's proposals may be contrasted with the legislation which currently applies in England and Wales. While a Sentencing Guidelines Council is established there under section 167(1) of the Criminal Justice Act 2003, it is constituted by a majority of judicial members (eight out of twelve) and is headed by the Lord Chief Justice, the most senior member of the English criminal judiciary; its constitution can thus be regarded as essentially judicial. Further, that arrangement goes at least some way to reducing the risk of clashes on sentencing matters between the Council and the Court.

12. If it is thought necessary or appropriate to establish a Sentencing Council in Scotland, we strongly urge the Parliament to adopt a function for it of the kind envisaged by the Sentencing Commission for Scotland – namely the function, after appropriate research, of drafting guidelines for consideration by the "Appeal Court" (that is, the High Court sitting with a quorum of at least three judges) with power to the Appeal Court to approve such draft guidelines (see its report, paras. 9.22 – .26). On such guidelines being approved sentencers would require to have regard to any guidelines which were relevant and to state, at the time of sentencing, their reasons for any departure from such guidelines (para. 9.27). As to the constitution of such a Council, we suggest that its membership should include a significant number of persons who do not hold judicial office but strongly urge that there be a majority of judicial office holders. The practical experience of actual sentencers – at all levels – must surely be of primary importance.

13. The Council, whatever its membership, would have added prestige and influence if it were chaired by the Lord Justice Clerk, the second most senior member of the Scottish judiciary. We note that para. 1(5) of Schedule 1 (lay members of the Commission) requires one member to have knowledge of the issues faced by victims of crime. There is no equivalent provision for a person having knowledge of the effect on offenders (such as a criminologist). It will be important that this be borne in mind in the appointments of the remaining lay member or members. The paragraphs in the Commission's report referred to in paragraphs 9 and 12 are reproduced in the Appendix to this submission.

14. The establishment of such a Council would, like the Bill's proposals, involve significant expenditure – not least if its functions were to include those specified in section 5(5) (assessment of costs and benefits and of the likely effect of guidelines on the numbers of persons detained in prisons etc.). A much less expensive course would be to develop and expand the present arrangements under which the court itself identifies cases which are suitable for guideline judgments. At present such identification depends solely upon judicial initiative. However, Lord Carloway, who now has responsibility in this field, is at present considering whether there would be advantage in enlarging the personnel who might be involved – possibly the legal profession or even wider interests. If the Parliament were interested in this approach, we would be happy to explore the matter further.

15. If there were to be a Sentencing Council of the kind envisaged in the August 2006 Report or a development of the kind envisaged in the immediately preceding paragraph, the necessary administrative arrangements could be embraced within the Scottish Court Service as constituted by the Judiciary and Courts (Scotland) Act 2008. However, a body as envisaged by the Bill, with the potential for conflict with the

Court, could not, in our view, be accommodated within the new, judicially – led Service.

Other aspects of Part 1

16. We have the following observations to make on the remaining proposals in Part 1.

(i) *Section 17*

While the sentencing of offenders to imprisonment for less than 6 months is a matter primarily for sentencers in courts of summary jurisdiction, we have experience of it when considering cases on appeal. Our experience is that under existing arrangements courts resort to short custodial sentences only where there is no realistic alternative – for example, when all non-custodial measures have already been tried but failed or where the offender's criminal record is such that only a custodial sentence is likely to bring home to the offender the unacceptability of his or her repeated conduct. We doubt whether the proposed legislative changes will in practical terms achieve much.

(ii) *Section 24*

We are concerned about the absolute terms of this proposal. Circumstances can arise where a person consumes alcohol voluntarily but in a situation of personal stress (say, bereavement or other trauma) and then goes on to commit an offence. This provision as framed would prohibit a court from taking into consideration the background to the consumption.

PART 2: CRIMINAL LAW

Serious organised crime (sections 25-28)

17. We recognise that concerns about the growth of organised crime, which senior officers on the SCDEA among others have articulated, may lie behind these provisions. Criminal activity which is carefully planned, which involves a significant number of people and which is designed to fund an affluent lifestyle would clearly fall within the concept.

18. The law as it stands allows the court to punish involvement in such activity, when it is identified, by taking it into account when fixing a sentence for the particular criminal activity of which an accused person has been convicted. We would not want the enactment of these provisions to inhibit the court when sentencing from taking into account the level of sophistication in planning and the potential financial gains to be realised from criminal activity, where the accused in future has not been charged under these sections.

Section 25: Involvement in serious organised crime

19. A person who agrees to become involved in serious organised crime under our existing law commits the offence of conspiracy to commit a

crime. It will be important for those who propose this legislation to explain to the Parliament and more widely what it is designed to achieve which the existing law does not already provide for. It is desirable also that the drafting of the provisions should not restrict in any way the flexibility of the existing criminal law to punish such activity when it is shown to exist in the context of another indicted crime but where these provisions are not libelled.

20. We are puzzled by the policy behind section 25(3). Involvement in serious organised crime must entail involvement in a conspiracy to commit at least one serious offence or acting with others to commit such an offence - see the definitions of “serious organised crime” and “serious offence” in section 25(2). Even if such involvement were to be peripheral, we doubt that it is appropriate that it should be prosecuted on summary complaint as the involvement relates to an indictable offence. If “material benefit” (in the definition of “serious offence”) is to be interpreted so widely as to render a summary complaint appropriate, that begs the question whether the definition goes far beyond what the public would associate with serious crime.

21. We think that there may be a danger of bringing within these provisions a wider range of offenders than is appropriate. If this is correct, we doubt that it is a principled approach in the criminal law simply to leave it to the discretion of the prosecuting authorities when to invoke provisions which are themselves unduly wide in their scope.

Section 26: Offences aggravated by connection with serious organised crime

22. In our view what this section seeks to do reflects current sentencing practice. The court takes into account the intention of the individual in perpetrating a particular offence, where that intention can be reliably inferred from the proven circumstances. Often the only source of the relevant information is what the accused has said to the police or another person. Evidence from a single source is sufficient under the existing law to establish an aggravating intention. We doubt the need for this provision.

23. If the proponents of this Bill consider this provision is desirable as part of a new statutory regime in relation to serious organised crime, it will be necessary to preserve the flexibility which the existing law gives to treat such matters as aggravations even when this provision is not libelled. We have difficulty in seeing the need for the requirements set out in section 26(5) which might give rise to the implication that without the libelled charge and the express statement of aggravation in both the sentencing speech and the record of the conviction, the court could not take account of such circumstances in sentencing.

Section 27: Directing serious organised crime

24. This provision is consistent with the other provisions on this subject. It appears from section 27(3) that this offence is essentially the same as

the existing crime of inciting another to commit an offence as it would be perpetrated in the same way.

25. We doubt the need for section 27(4) as it is simply a statement of the way in which intention is ordinarily established in any case where it is relevant. The context includes what people said and did. As neither judge nor jury can look into a person's mind and have to rely on the context to infer intention, we see no benefit in stating the obvious.

Section 28: Failure to report serious organised crime

26. We have considerable concerns as to how these provisions will work.

27. First, while actual knowledge of the commission of a relevant offence, although hard to prove, may justify treating non-disclosure as a criminal offence, difficulties will arise in relation to the level of suspicion needed to render criminal any failure to disclose such suspicion.

28. Secondly, given the wide definitions of "serious organised crime" and "serious offence" in section 25 the duty to disclose will cover most common law crimes and many statutory offences where a person acts with another with the intention of securing a material benefit. Is it intended to cast the net so widely?

29. Thirdly, we are concerned about the breadth and lack of definition of some of the concepts in the context of a proposed statutory criminal offence. For example, is "material benefit" in subsection (2) (which is a pre-condition of the obligation of disclosure by the person in the close personal relationship) the same as or different from the same term in the definition of "serious offence" in section 25(2)? Further, will "reasonable excuse" in subsection (4) cover fear for one's safety or job?

Section 29: Articles banned in prison

30. We have no comments on the principle. We assume that it is envisaged that members of the public will surrender their mobile phones etc in a designated area at the prison.

Section 32: Sexual offences by bodies corporate

31. Section 32(3), by covering the acts or omissions of a person who purports to act as a director, manager or partner, will impose criminal liability on the non-natural person even where the natural person is unconnected with the entity but misrepresents his authority. While we recognise that there are precedents for the provision (such as section 130 of the Civic Government (Scotland) Act 1982), we consider that it would be appropriate that there should be a more significant connection between the offending natural person and the entity than merely his misrepresentation of authority.

Section 34: Extreme pornography

32. We have some concerns about the policy in these provisions relating to the definition of pornography. The definition of pornographic image in subsection (3) could, and in the minds of many, will extend to what others would regard as works of art. While we recognise that the provision is concerned with extreme pornography and that extreme is defined in subsection (6), we question the policy of allowing a designated body to exclude from the scope of the criminal law an image which meets the definition of extreme pornographic image. Why should such a body, in the context of criminal law, decide that such material, the possession of which would otherwise be criminal, is acceptable as a part of or as being in its entirety a work of art?

33. We are also at a loss to understand the defence in proposed section 51C of the 1982 Act protecting the persons who directly participated in the act depicted. If the depiction is unacceptable as amounting to extreme pornography, we do not see why the participant who retains the material for private use should have the defences available in subsection (4) of section 51C when other possessors, for good policy reasons, do not.

PART 3: CRIMINAL PROCEDURE

Section 39: Liability of partners

34. We think that this provision is effective but note that the use in subsection (1) of “corporate offence” may be misleading as the definition of what subsection (2) covers. We understand that the purpose of the provision is that where a partnership is guilty of an offence to which subsection (2) applies, namely an offence which if committed by a body corporate would give rise to criminal liability also on the part of the director, the partner also will be guilty of the offence in such circumstances.

Section 40: Witness statements

35. The section gives the prosecutor a discretion to give a witness a copy of a statement which he or she had made. By adopting the definition in section 262 of the 1995 Act, the statement does not include a precognition but includes part of a statement.

36. We recognise that there may be value in allowing a witness to read a prior statement before giving evidence in court. It is not uncommon for a witness when being examined to be referred to a very small proportion of a statement without having the opportunity to appreciate the context and thereby remember what he or she was trying to convey. To prevent abuse in this way, judges regularly demand to have sight of copies of such statements before a witness is examined on them. Nonetheless, we have concerns about the proposal which we set out more fully in our response to section 62.

37. In particular the reference to prior statements is one of the factors which has increased the average time which it takes to complete a trial. Where a witness has given more than one police statement a considerable time can be spent picking over the precise differences between the statements, which may not be productive when it is recalled that the words in the statement are often a police officer's summary or rationalisation of what the witness has said in response to a question.

Sections 54 to 57: Crown appeals

38. We have already expressed support for the proposal for a Crown appeal in our response to the Scottish Law Commission's paper on this subject.

Section 61: Referrals from the SCCRC

39. We support this proposal as we see no good policy reason for allowing an appellant, without the leave of the court, to raise new grounds of appeal or re-open unsuccessful grounds of appeal which are not related to the reasons contained in the Commission's statement of reasons. We consider that this innovation may affect the way in which the Commission carry out their work and would wish to be assured that the change in policy has been discussed with them.

PART 4: EVIDENCE

Section 62: Witness statements – use during trial

40. This clause seeks to add a new section 261A to the Criminal Procedure (Scotland) Act 1995 ("the Act"), which would confer on the court a power to allow a witness to refer to a prior statement while the witness is giving evidence. The proposal is one that gives us real cause for concern.

41. Most prior statements of witnesses take the form of police statements. When the witness is a police officer the statement is normally prepared by the witness himself. Expert witnesses tend to do the same. However when the witness is a civilian witness, the statement is written down by a police officer as the witness explains to him what he knows about the matter under investigation.

42. The statements of civilian witnesses are frequently taken shortly after the incident to which they relate. Whilst they are framed as if they are in the words actually spoken by the witness, it is not uncommon for the language used to suggest that the taker of the statement may have exerted some influence over the terms in which the witness' recollection of events is phrased. Whilst some police statements are read back to the witness and the witness is then asked to sign the statement, that does not always happen. A further factor to be taken into account is that some witnesses provide a series of police statements. On occasion the terms of later statements are difficult, if not impossible, to reconcile with the terms of earlier statements

43. The Scottish system has traditionally looked with disfavour on the practice of “trial by prior statement”; a practice which has given rise to serious problems in other jurisdictions. The emphasis in our system has always been on the value and importance of evidence given under oath in the witness box; subject to certain limited exceptions, prior statements have generally been excluded as hearsay evidence,. Evidence given from the witness box, based on the witness’ recollection of what happened, in contrast to the adoption of the contents of statements made at some pre-trial stage, tends to be the best evidence. It has the added quality of being more readily tested by cross-examination.

44. We have a number of serious concerns. We apprehend that the proposed section 261A, in tandem with clause 40, will lead to a significant increase in the use of prior statements in criminal trials. We anticipate that witnesses will enter the witness box armed with copies of their police statements and that whether the request to look at the prior statement comes from the Crown or from the witness himself, control over reference to prior statements will, in practical terms, pass from the Court to others, in particular to the witness. We anticipate that the witness may volunteer that the answer to the question he has been asked is to be found in his police statement, which he has with him and would like to read out. If that were to become a common practice, it would not only lengthen some trials. As police officers become aware of the greater reliance on evidence contained within police statements, it might affect the manner in which police officers take statements from civilian witnesses, resulting in a further emphasis being placed on framing the statement in clear and comprehensible terms – whatever language may have been used by the witness when the statement was taken.

45. In our opinion, the limited circumstances in which the common law and the provisions of section 260 of the Act enable the Court to allow reference to prior statements are more than sufficient to ensure that a witness can be questioned as to the contents of a prior police statement should the interests of justice require that to happen.

46. In our experience, it is often difficult for a jury (and indeed for the judge who has to direct the jury) to disentangle evidence given by a witness in court from what the witness is reported to have said on some previous occasion, often (but by no means always) in a statement to the police. This frequently arises when a witness is asked to adopt a prior statement under the procedure set out in section 260 of the Act. The Court can be left in a state of uncertainty about the extent to which the witness has adopted the contents of the previous statement; often the witness agrees with some parts of the earlier statement, but disavows other parts. The position is all the more complicated when the witness has given more than one police statement. Moreover the witness’ position may fluctuate in the course of his evidence. The

matter then requires to be made the subject of careful (and inevitably somewhat complex) directions by the trial judge. We expect that juries often find it difficult to understand how much of the previous statement the witness has actually incorporated into his evidence. They may then be left in a state of uncertainty about which version of events properly counts as the evidence of the witness.

47. In recent years the practice of putting previous statements to witnesses has undoubtedly increased. On occasion, that practice is pursued for no obvious purpose and to little practical effect. It has, however, increased (often unnecessarily) the complexity and the length of trials.

48. The practical difficulties to which we refer are liable to be accentuated, in our view, by the new provisions, which appear to contemplate that an even greater use will be made of witness statements. This would be a detrimental development.

49. The purpose of the proposed new rule is stated as being to allow the witness to "refer" to a previous statement in the course of giving his evidence. What is not clear is what is intended to be the evidential effect of such a reference, or indeed what the purpose of the witness making such a reference is intended to be. If the purpose is merely to assist the witness to remember what he said nearer the time of a crime or some other event, the procedure under section 260 of the Act is already available to enable the witness to adopt the more contemporaneous version of events as part of his evidence in court. As presently framed, the provisions seem to us to suffer from a lack of clarity and focus as to the purpose and effect of allowing a witness to refer to a prior statement.

50. In the circumstances, we consider that there is a real danger that the new provision will encourage a greater reliance to be placed on the contents of police statements, as opposed to a witness' recollection of what happened and that this may complicate and lengthen trials.

51. In addition, we have some concerns about certain aspects of the drafting of the provisions.

52. The heading to the section uses the expression "witness statements". The same expression is employed in section 40, which allows the Crown to provide a witness with a copy of his statement or to give him access to it, before and during a trial.

53. Section 40(1)(b) makes it clear that the "witness statement" has to be contained in a document.

54. It should be noted that section 262 of the Act is proposed to be amended so as to apply to the new section 261A. Section 262(1)(a) provides that a "statement" includes "any representation, however made or expressed, of fact or opinion. From this it would appear to

follow that it would be possible for a prior statement for the purposes of the new section 261A to include an oral statement. It seems clear that this is not what is intended. Section 261A envisages that the witness statement will be a written document. This can be inferred from sub-clauses (1) (c) and (d), which refer to the prosecutor and the accused having seen or having been given an opportunity to see the statement.

55. We would suggest that it should be made clear, on the face of the legislation, that for the purposes of the provisions in the proposed new section 261A the expression “witness statement” means only a statement contained in a document. This would be consistent with the approach reflected in section 40.

Section 63: spouse or civil partner of accused a compellable witness

56. We are in agreement with the policy reflected in these provisions whereby a spouse or civil partner will be treated no differently from any other witness in criminal proceedings when cited to give evidence. We agree that the public interest today requires that spouses and civil partners are compellable witnesses for the prosecution, accused or co-accused. The proposed reform may prove to be of particular value in cases where children are the victims of crime.

Section 64: special measures for child witnesses and other vulnerable witnesses

57. We agree that special measures for vulnerable witnesses should become available in all types of hearings at which such a witness may be required to give evidence and that such measures should no longer be limited to trials.

Section 65: Amendment of Criminal Justice (Scotland) Act 2003

58. We have no comments to offer on this provision, which is consequential on the extension of special measures to any type of evidential hearing in criminal proceedings.

Section 66: Witness anonymity orders

59. In view of the decision by the House of Lords in *R v Davis* [2008] UKHL 36, we support the view that it is appropriate to introduce statutory provisions regulating the court’s powers to permit a witness to give evidence anonymously. It would be unsatisfactory to leave the matter to be governed by the common law in Scotland when the House of Lords has held that no such common law power exists in England and Wales. Although not directly applicable in Scotland, the decision in *Davis* may be thought to have introduced a measure of uncertainty about the position here.

60. We note that the provisions in the Bill broadly replicate in Scotland those of the Criminal Evidence (Witness Anonymity) Act 2008.

61. We have the following observations about the drafting of the section in its present terms.

- The proposed section 271N refers, in sub-section (5)(a)(i), to “the judge or other members of the court” in the context of providing that the court is not authorised to require the witness to be screened to such an extent that he cannot be seen by such persons. We are uncertain as to who exactly is intended to be covered by the reference to members of the court other than the judge. We recommend that this be made clear on the face of the legislation.

- The proposed section 271Q(6) provides that Condition D (one of the four conditions which must be satisfied before an order can be made) is that (a) “the witness would not testify if the proposed order were not made”. Taken literally, this condition might be thought to be almost impossible to satisfy since any witness is obliged to testify when validly cited and called upon so to do. The point might be met by making it clear that the condition is to the effect that the witness would not willingly testify if the proposed order were not made.

- In the proposed section 271R the considerations to which the court must have regard when deciding whether Conditions A to D are met are set out in some detail. In sub-section (2)(b) reference is made to assessment of the “weight” of the witness’s evidence. We would question whether it is necessarily helpful to introduce the notion of “weight” in the context of an assessment of credibility. In sub-paragraph (c) reference is made to the evidence given by the witness being the “sole or decisive evidence implicating the accused”. Having regard to the doctrine of corroboration, we have difficulty in understanding how circumstances could arise where the evidence of a single witness might be the sole evidence implicating the accused. For similar reasons, we would question whether use of the word “decisive” is appropriate in this context. It might be preferable to refer to whether the evidence “might be material evidence implicating the accused”.

- The proposed section 271S requires a “warning” to be given by the judge to the jury when evidence has been given by a witness at a time when a witness anonymity order applied to the witness. Having regard to modern practice, we suggest that it would be more appropriate to refer to a “direction” from the trial judge.

Section 67: Television link evidence

62. We agree that it is appropriate to introduce provisions extending the existing procedures for the giving of evidence by live television link to witnesses who are outside Scotland, but within the United Kingdom.

63. We note that while there has been no formal consultation in relation to this proposal, it has the support of the Scottish Court Service and the Crown Office and Procurator Fiscal Service.

PART 5: CRIMINAL JUSTICE

64. Having considered the provisions contained in this part of the Bill, we would wish to comment only on sections 68 and 69.

Section 68: Upper age limit for jurors

65. This seeks to increase the age limit for jurors in criminal trials from 65 to 70 years. It will be recalled that we supported this proposal in our response to the consultation paper entitled "The Modern Scottish Jury in Criminal Trials".

66. While we appreciate that the scope of the Bill does not extend to civil as opposed to criminal procedure, we would observe that it may be thought to be anomalous to have different age limits for jurors in criminal and civil cases.

Section 69: Persons excusable from jury service

67. Again, we would refer to our response to the consultation paper in which we supported this reform.

PART 6: DISCLOSURE

Introductory

68. By way of a general observation at the outset we would remark that the proposed provisions appear overly complicated, given that the principle of disclosure confirmed in *McLeod* v *HM Advocate (No.2)* 1998 J.C. 67 can be shortly stated, and that the style and structure of the drafting of the provisions are also, in our view, often unnecessarily complicated and "user unfriendly". To give an example, section 93(1) states:

> "(1) Subsection (2) applies where the prosecutor is obliged to comply with the requirement imposed by subsection (5) of section 89 in relation to an accused such as is mentioned in paragraph (a) or (b) of subsection (1) of that section."

69. Reference back to paragraphs (a) and (b) section 89(1), in itself an unnecessarily detailed provision, reveals that in the complicated wording of the quoted provision what was simply intended was the case of a person being prosecuted on solemn procedure.

70. There are many more possible examples of both drafting and structural complexity, to some of which we shall advert in these observations. Subject to that general remark, we make the following, more detailed observations and expressions of view.

Section 85: Meaning of information

71. Subject to the foregoing general observation, we have concerns respecting the terms of paragraph (c) of subsection (2). We appreciate that the draftsman has sought to restrict the obligation to disclose the

previous convictions and outstanding charges of Crown witnesses to those "material to the accused's case". That phrase carries the possible implication that what is to be disclosed should be material to a particular defence. However, the reason for which details of previous convictions of prosecution witnesses are sought is almost invariably to discredit the witness by revealing his or her criminal past, not to provide support for a particular line of defence. In that regard it should be borne in mind that as the law of evidence is currently thought to stand, a witness may only be cross-examined on previous convictions of, or inferring, dishonesty[1]. The previous conviction of a witness is thus deployed to weaken the Crown case.

72. While we appreciate of course that in *Holland* v *HM Advocate* 2005 S.C. (PC) 3 the Judicial Committee held that details of an outstanding charge against a witness ought to have been disclosed, we have to say, with respect, that it is not immediately apparent why it should be proper to attack a witness' credibility or reliability on the basis of an outstanding charge. The witness enjoys the presumption of innocence just as much as does the accused, who also, by definition, has an outstanding charge or charges.

73. Clearly, witnesses also have rights, particularly under Article 8 ECHR. Nor is it evident that a witness should be put in the position of having to respond to an unproved allegation at the trial of the accused.

74. The legislature may therefore wish to consider the principle of disclosure of outstanding charges in its examination of this section.

Sections 86 to 89: Schedules of Information

75. In our view the inclusion in the Bill of these somewhat convoluted sections is not appropriate or necessary. Police forces act subject to the direction of the Lord Advocate and it appears to us that the practical arrangements for the provision of information to Crown Office by the police and any other investigating agency, whether by schedules or otherwise, should be a matter of administrative arrangement, no doubt within the framework of the code of practice which section 114 requires the Lord Advocate to draw up. To attempt to address such practical, administrative arrangements by means of detailed provision in primary legislation risks creating an undesirable lack of flexibility and the possibility of raising objections and questions of a highly technical nature.

Section 89: Prosecutor's duty to disclose information

76. The duty of disclosure resting on the prosecutor , as recognised since *McLeod,* can be stated shortly and simply as being a duty to disclose all evidence or information of which the prosecutor is aware which would tend towards exculpating the accused, either by weakening or

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[1] Cf Wilkinson *The Scottish Law of Evidence* pp31-32

undermining the prosecution case or by providing or supporting a defence for the accused.

77. We think it regrettable that the Bill does not contain a clear, principled statement of that duty but instead, by a process of *dépeçage* or dismemberment, seeks to state the duty in discrete provisions, including some described as examples. While it may well be that the whole of the duty is covered by the various provisions, the drafting appears unnecessarily complicated and tends to obscure the essential singularity of the duty to disclose material tending towards exculpation.

78. We would add that example (b) in subsection (4) – "information that would be likely to be of material assistance to the proper preparation or presentation of the accused's defence" – may go wider than the scope of the Art 6 ECHR obligation of disclosure set out in *McLeod*. It adopts the test applied by the courts in deciding whether to grant an order for the recovery of documents from the Crown or a third party. As the opinions of the members of the Privy Council in *McDonald* v *HM Advocate* [2008] UKPC 46; 2008 S.L.T. 993 indicate,[2] there may be material which is not subject to the prosecutor's obligation of spontaneous disclosure, but which may be recoverable if it would be of assistance in the proper preparation or presentation of the defence. It is thus not accurate, as matters currently stand, to list example (b) as exemplifying the disclosure obligation. Further, from the point of view of the prosecutor – and indeed the court, if called upon to review the disclosure – the exercise of identifying material tending to exculpate the accused and the exercise of identifying materials which might assist in the preparation or presentation of the defence are different. The latter exercise potentially requires much greater anticipation of possible ways of presentation, as opposed to the identification of exculpatory material.

79. We also have difficulty in understanding the inclusion of the provision in paragraph (c) of each of sub-sections (3) and (4) of "information likely to form part of the prosecution case". If it is to form part of the prosecution case it is presumably incriminatory, and thus would not be part of the duty to disclose exculpatory material. This difficulty is perhaps another reflexion of the overly complicated drafting of this Part of the Bill and creates potential difficulties to which we shall later allude.

Section 93: Additional disclosure requirement

80. Given our views on the inappropriate nature of the inclusion of provisions relating to the providing of schedules of information in primary legislation, this section would fall to be omitted.

Sections 94 and 95: Defence statements

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[2] See paragraphs 50, 62, 64 and 67 to 69

81. We are opposed to the notion that in any case there should be any requirement to lodge a "defence statement".

82. There is a well established system of requiring the defence to lodge a "special defence" in cases where, in essence, the defence line indicates or requires notice to the prosecutor. The Crown's obligation of disclosure will obviously be exercised against the existence of a notice of special defence, and to that extent a further requirement for a "defence statement" adds little other than the inclusion of a further piece of paper-work in the pre-trial procedures.

83. Moreover, the status of such a statement is unclear. Is it to be held as binding on the lines of defence or contestation at the trial?

84. We appreciate that at base the concern may be that implement of the Crown's duty of disclosure is to an extent dependent on awareness of the line of defence. But in our view the perception of that concern may be largely over-stated. Practitioners in the criminal courts in Scotland are well aware of the practical realities and of the respective evidential strengths and weaknesses of their respective cases. The prosecutor will normally have little real difficulty in envisaging the possible lines of defence (indeed, it would be his duty to consider those, both prior to the initiation of the prosecution and continually thereafter). Were there to be any particular matter upon which the defence sought disclosure, that can be intimated other than by the formal means of a defence statement.

85. The provisions on defence statements are a further example of the introduction in this Bill of unnecessary legislative complexity into what is essentially a matter of practice and procedure.

86. It may also be observed that the provision in the envisaged section 70A(5) for the lodging of a defence statement "at any other time before the trial diet" presents scope for prompting the review exercise under section 94 on the eve of the trial and thus scope for deferring the trial.

87. This is but one of the possible consequences of these provisions.

Section 96: Effect of guilty plea

88. We have some difficulty in understanding the purpose of this section, which on the face of matters seems unnecessary. The information which the section contemplates is [in sections (2)] "... information which is likely to form part of the prosecution case". As already mentioned in our observations on section 89, information likely to form part of the prosecution case is incriminatory information and those observations apply also here. But it is self evident that once the plea of guilty has been recorded there would be no reason whatever to disclose further incriminatory material (except in so far as necessary for the Crown narration of the circumstances of the offence). If however what is

contemplated is somehow exculpatory material it is difficult to see why the obligation to disclose is removed by a likelihood that it might be part of the evidence led in the prosecution case but is not removed if the information would not be likely to be included in the Crown case.

89. We would add that in solemn proceedings it is not competent to withdraw a plea of guilty after it is recorded, but subsection (3) is not restricted to summary cases.

Section 97: Means of disclosure

90. Is this section necessary? There is nothing in the provisions elsewhere which suggests any restriction on the means of disclosure.

Sections 98 and 99: Confidentiality of disclosed information

91. While it is appreciated that it is desirable to have provision for the maintenance of confidentiality and the prevention of the misuse of information which has been disclosed, the scope of section 98 is very wide, particularly if section 89 is to extend to information "likely to form part of the prosecution case", and thus embrace information which is incriminatory. It would also embrace information which is essentially in the public domain or which would not be regarded as confidential in any real sense. One possible way of keeping the offence under section 99 within reasonable bounds would be to confine it to information which the Crown has categorised as confidential when disclosing it.

Section 100: Order enabling disclosure to third party

92. It is not apparent what end this section is truly intended to serve. Section 98(3) allows the accused to disclose information, disclosed to him by the Crown, to third parties for the purposes of the proper preparation and presentation of his case. So this section must envisage a purpose other than the proper presentation or preparation of the case. But what kind of purpose? If it were the intention (which we doubt) to mitigate the width of the criminal liability created by section 99, we think the problem would be better addressed by the primary step of reducing the ambit of the information to which section 98 extends.

Sections 102 to 113: Orders restricting disclosure

93. We agree that it is appropriate to have some provision on the taking by the Crown of a public interest objection, but the terms of these sections strike us as on the one hand, overly complicated, and on the other hand perhaps insufficiently broad in the respect that they do not provide for the taking of a PII objection by a public authority or person or body whose interests the Lord Advocate does not represent.

94. It is also noted that nothing is said about the funding of special counsel.

APPENDIX

Extracts from the report of the Sentencing Commission for Scotland, "The Scope to Improve Consistency in Sentencing" (August 2006)

"Foreword

We have made a number of recommendations, the central one being the introduction of a procedure for giving effect to sentencing guidelines. We recommend the creation of a statutory body, the Advisory Panel on Sentencing in Scotland (APSS). That body would be responsible for the preparation of draft sentencing guidelines for consideration by the Appeal Court of the High Court of Justiciary. The APSS would be responsible for the necessary research and consultation, and for framing the draft guidelines. The adoption of these guidelines, however, with or without modification, would be a matter for the Appeal Court. The membership of the APSS would have a strong judicial component, but it would also include people who would bring other relevant skills and experience to its work. In that way, the recommendations of the APSS would reflect a breadth of experience and thorough investigation, while the role of the Appeal Court in deciding whether to approve draft guidelines would ensure that sentencing remained essentially a judicial function. We envisage that the introduction of sentencing guidelines would be a gradual process. Particular guidelines, once adopted by the Appeal Court, would guide the sentencer, but would not dictate the sentence in the individual case. They would, we consider, promote and encourage consistency of approach, and thus improve consistency in sentencing, while preserving the important element of judicial discretion. We see the system for the preparation and adoption of sentencing guidelines which we have recommended as complementary to the existing, but little-used, power of the Appeal Court to pronounce guideline judgments."

Paras 9.14 - .16

"9.14 To assist the Court in providing further guidance to sentencers, and in particular handling the introduction of sentencing guidelines into sentencing practice, we **recommend** that a sentencing advisory body, to be known as the Advisory Panel on Sentencing in Scotland ("APSS"), should be created. The APSS should be of similar composition and have similar powers to those of the Sentencing Advisory Panel in England and Wales. The creation of such a body would ensure that sentencing would continue to be a judicial function, but that the Appeal Court would have the benefit of advice from a body drawing on a range of relevant skills and experience, including, possibly, members of the public with the necessary knowledge and experience. We consider that those who contribute to, and manage the outcome of, the sentencing process, including sentencers from all levels of the judiciary, are in a position to have some involvement in and make a valuable contribution to the development of sentencing policy in Scotland.

9.15 We regard this approach as preferable to the creation of a sentencing commission, or a body like the Sentencing Guidelines Council in England and Wales, in which other individuals are involved along with judges not only in the drafting of such guidelines but also in their finalisation and promulgation. We do not support such an innovation. While different models to that which we propose operate in other jurisdictions, we consider that in Scotland the Appeal Court should be allowed to remain in overall control of sentencing policy, subject of course to any legislation that either the Westminster Parliament or the Scottish Parliament may enact.

9.16 However, we also consider that judges in Scotland should be aware of, and take account of, how their sentences are perceived by the public and moreover of the responsibility, which they share with many others, to do all that can be done to maintain respect for, and confidence in, the law of our country. An advisory body, comprising a reasonably compact group drawn from across the criminal justice spectrum, including sentencers from every level, and other individuals with relevant experience and expertise, would, we consider, provide material assistance to the Appeal Court in carrying out the vital duties which the Appeal Court requires to perform. It should be noted that we did consider whether the proposed body should comprise only individuals drawn from the various levels of the judiciary, but we rejected that model in favour of that which we have recommended."

Paras 9.22 - .27

"9.22 We **recommend** that the APSS should draft guidelines for the consideration of the Appeal Court on general topics relating to sentencing, such as the issues covered in the Sentencing Guidelines Council's Guideline on "Overarching Principles: Seriousness", which is reproduced in Annex E, Discounts in Sentences following Pleas of Guilty and new sentencing disposals introduced by parliamentary legislation. As far as new sentencing disposals are concerned, we consider that before the relevant statutory provisions come into force, it would be beneficial to sentencers to have guidance from the APSS, as approved by the Appeal Court, as to how the statutory powers could be applied. We also envisage sentencing guidelines dealing with particular categories of crimes and offences.

9.23 We anticipate that in preparing draft sentencing guidelines the APSS will wish to carry out such research or other investigations and undertake such discussions as it considers necessary. The statute creating the APSS should provide details of those whom the APSS should be obliged to consult in the context of drafting guidelines and we so **recommend**. That would not prevent the APSS from consulting more widely if it deemed that desirable in the context of the development of any particular guidelines.

9.24 In the light of its deliberations, and where relevant its consultations, we envisage that the APSS would submit draft guidelines, together with a memorandum explaining the background to, and any comments on, the detailed terms of the draft guidelines, to the Appeal Court for its consideration. Guidelines for categories and types of crimes and offences would have both narrative and numerical aspects although guidelines on sentencing principles, for example, would be in purely narrative form. We stress that it would be for the APSS to determine the format and style of the sentencing guidelines it decided to place before the Appeal Court for approval. We are not suggesting that they would necessarily wish to follow the approach taken by the Sentencing Guidelines Council in England and Wales.

9.25 We **recommend** that the Appeal Court, sitting with a quorum of at least three judges, should be able to approve the draft guidelines. The Appeal Court should also have power to remit the draft guidelines back to the APSS, for that body to re-consider the draft guidelines and to amend them, if it chose to do so, in the light of any points raised by the Court. On that having been done, the APSS would be able to resubmit the draft guidelines to the Appeal Court for its further consideration.

9.26 The Appeal Court, having re-considered the draft guidelines and any further advice from the APSS, should have power to approve the draft guidelines, subject to any amendment it considers appropriate. It should also have power to decline to approve the draft guidelines. We so **recommend**. We would expect that in the event that the Appeal Court declined to approve draft guidelines, or approved them subject to amendment, it would issue an Opinion making clear the reasons for its decision. In the event that the Appeal Court declined to approve sentencing guidelines drafted by the APSS, we would not envisage the Appeal Court drafting and issuing its own guidelines. We consider that it would be inappropriate for there to be two categories of guidelines, one drafted by the APSS and approved by the Appeal Court and the other drafted and issued by the Appeal Court. In the event that the Appeal Court declined to approve sentencing guidelines drafted by the APSS, any guidance that the Appeal Court deemed it appropriate to provide on issues covered by the rejected draft guidelines could be included in a guideline judgment issued by the Court under its existing statutory powers.

9.27 It would thus be sentencing guidelines approved by the Appeal Court to which sentencers would require to have regard. We **recommend** that statutory duties should be placed on sentencers to have regard to relevant sentencing guidelines and to state in open court, at the time of sentencing, their reasons for any departure from such guidelines. There is, of course, already a statutory requirement on sentencers to have regard to the terms of guideline judgments issued under sections 118(7) and 189(7) of the 1995 Act."

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Sheriffs' Association

1. Preliminary observations

1.1. We were concerned, once again, at the limited time given to digest, analyse and comment on far-reaching changes to criminal justice. If our comments are regarded as important, we should be given time to prepare them. We are pleased that we were subsequently given an extension of time to do this. We recognize that we were able to comment on proposals contained during earlier consultation. We have not previously, however, been able to comment on all the detailed legislative changes in the Bill, which require careful scrutiny.

1.2. Because we do not comment on all the provisions in this Bill, it should not be taken that we agree with those on which we do not.

1.3. It is disturbing that provisions for the Sentencing Council are contained in the Bill when the Policy Memorandum acknowledges (para. 40) that the responses to the proposals in the consultation document have not yet been analysed.

1.4. With so many amendments to and additional sections in the Criminal Procedure (Scotland) Act 1995 in legislation over recent years (with this Bill there is a section ZK), a further consolidation of criminal procedure legislation is a priority.

2. Part 1 - Sentencing

2.1. We attach and adopt as part of our evidence our response to the consultation paper "Sentencing Guidelines and a Scottish Sentencing Council".

2.2. In relation to sentencing, the Policy Memorandum states (para. 8) that the objective is "to create a straightforward and transparent framework within which sentencers can base their decisions; thereby increasing general understanding of the purposes and principles of sentencing and improving confidence in the sentencing process".

2.3. Public confidence, however, is not enhanced when, for example, a sentence of imprisonment, which is imposed by a court and publicly announced, bears no relation to the time served by the offender and a prisoner is released by executive order (i.e. home detention curfew) long before the offender has served the statutory minimum period of sentence (for a short-term prisoner, that is one half of the sentence). Under the home detention curfew provisions, a prisoner may be released from as early as four weeks after starting a prison sentence. This does not make sentencing transparent. It does not make sentencing consistent; and if the aim is to make sentencing consistent, it undermines it. In fact, it makes a mockery of the sentencing process. This situation is not improved by the Bill.

2.4. We draw attention again to the fact that there is little empirical evidence that there is widespread inconsistency in sentencing. If, as the Policy Memorandum accepts, a sentence is a decision in individual cases, then consistency is a pipe dream, an unachievable goal unless sentencing takes no account of individual circumstances and is sentencing by numbers on a grid. An un-researched public (mis)perception is hardly a basis for interference with the sentencing process and the independence of the judiciary.

2.5. We now turn to consider certain provisions of this Part.

Purposes and principles (clauses 1 and 2)

2.6. We do not consider that it is necessary to set out some of the purposes and principles of sentencing. It is not possible to include all of them. Not to do so, however, implies that those not mentioned are less important than those that are. In so far as clause 1 contains principles which judges currently take into account, we do not object to them. We accept that the principles to which the court must have regard in clause 1(3) are not exclusive or exhaustive. We do wish to draw attention to some principles that ought to have been included: -

- Denunciation. This has been one of the purposes in sentencing in certain circumstances, but is not included as a purpose in clause 1(1). As is clear from Nicholson on Sentencing Law and Practice, second edition, para 9-07, it is a legitimate part of a sentence to express society's abhorrence of a particular crime.
- Nature or character of the offence. Only seriousness is mentioned.
- Local circumstances. A local problem may require inconsistency with national "consistency".

2.7. Clause 1(3)(d) refers to regard being had to "the desirability of consistency in sentencing". "Consistency in sentencing is not stated in the Bill as a purpose of sentencing. This provision assumes a purpose that is not stated. Under the proposal, if the court considers that consistency is not desirable, it may be ignored. How is a court to ascertain what the consistent sentence is if there is no guideline published? We also refer to what we say in paragraph 2.4 above. This provision should be removed as containing no principle that can be applied in practice.

2.8. It is not clear, and the explanatory notes do not explain, why subsections (2) and (3) of clause 1 do not apply in relation to young offenders or those subject to a life sentence (in respect of which the judge will require to pronounce the appropriate punishment part of the sentence). If different considerations are to apply in respect of these groups of offenders, where are they to be found? In relation to the punishment part of life sentences, Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 will be repealed by the Custodial Sentences and Weapons (Scotland) Act 2007.

2.9. Having gone to great care to set out the principles and purposes of sentencing to which the judge "must" have regard in order to "create a straightforward and transparent framework", clause 2 then provides three opt-outs from compliance with clause 1, thus restoring opaqueness.

2.10. We assume, from the introductory words of subsection (3) of clause 1, that it is not intended by clause 1(3)(b) (effect on any person other than offender) to exclude from consideration any information about the effect on the offender that may be relevant. If our assumption is incorrect, then such information, where relevant, should be clearly stated as included.

Sentencing Council (clauses 3-13)

2.11. We remain unpersuaded that the responsibility for sentencing guidelines should be taken from the judiciary. We opposed it in our response to the consultation paper referred to in paragraph 2.1 above. We do not see how public confidence is enhanced by passing the decision-making to a body outside the judiciary that will set the tramlines in which individual decisions by the judiciary must be made. Rather than improving public confidence, it is a statement that judges cannot be trusted to make the right decisions either at first instance or on appeal. If such a council is required to propose guidelines, it should make its final proposals to the High Court of Justiciary sitting as the Court of Criminal Appeal or Justiciary Appeal Court for approval. A situation could develop whereby the Council (given its non-judicial majority) and the appeal court disagree over a sentencing matter. Apart from the constitutional significance of this, it cannot promote public confidence in and understanding of sentencing policy and practice. We note that the Sentencing Commission recommended that adoption of the guidance issued by the Council, with or without modification, should be a matter for the Appeal Court.

2.12. We are concerned about the implication that the Council will in fact have to take into account the cost of custodial sentences in setting an appropriate guideline. Under clause 5(5) the Council must include the cost in any guidelines. Cost is not actually relevant to the imposition of an appropriate sentence. It is not clear why it must be included in the guideline itself unless it is to have an effect on the creation of the guideline or, worse, to influence the court.

2.13. We note that in clause 5(3) the Council *may* have regard to the purposes and principles set out in clause 1. We find it unacceptable that, while the judiciary is obliged to have regard to them in imposing a sentence, the Council is not obliged to have regard to them in setting the guideline. It is contrary to the objectives of the Bill, and contrary to the statement of purposes and principles in clause 1, that the Council is not required to have regard to them.

2.14. Any guidelines will lack credibility unless based on proper research. We note that the estimated cost for the first year for research, publications and website will be £270,000 (para. 670 in the Financial Memorandum). How much of that sum is in fact for research is not disclosed. The research to be undertaken by the Council is not limited to determining appropriate sentences, but also the costs and effects mentioned in clause 5(5). The cost of research will be even less than the undisclosed cost. Notwithstanding that it is said to be based on figures for the Sentencing Guidelines Council for England and Wales, we would be surprised if guidelines could be researched so cheaply and satisfactorily as to increase public confidence.

2.15. We are concerned that guidelines may provide for “the circumstances in which the guidelines may be departed from” (cl. 5(3)(d)). This is an unwarranted restriction on sentencing in individual circumstances. On the one hand the judiciary *appears* to be given the discretion to depart from guidelines (cl. 7(2)). On the other hand, it is clear that the Council may exclude it. The Council cannot possibly foresee every circumstance in every case. It is the function of the appellate courts to determine whether a sentence is appropriately within or outwith a guideline. If not, what is the function of the appellate courts to be?

2.16. We are concerned that there is a specific reference to the Lord Advocate as a person who *must* be consulted about any draft guidelines, while the judiciary is not a body that must be consulted because it will fall into the category of “such other persons as the Council considers appropriate”. There will be a prosecutor on the Council. The Lord Advocate is head of the prosecution service; and prosecutors are not concerned with sentencing. Although the judiciary is represented on the Council, it is in the minority. We fail to see why the judiciary, such as the Lord Justice General of Scotland, is not one who must also be consulted.

2.17. The Government’s paper “Protecting Scotland’s Communities – Fair, Fast and Flexible Justice” stated that the Sentencing Council would be “judicially-led”. Having a judicial chairman on a Council of 12 members of which only five are judicial members, is paying only lip service to the concept of a judicially led Council. It is not “judge led”. There must be a majority of judicial members on the Council.

2.18. The Council is to have two judges who are either sheriffs principal or sheriffs: Sch. 1, para. 1(3)(b). It would be possible, therefore, to have no sheriffs or only one. Sheriffs principal rarely undertake criminal work and cannot be said to have relevant experience that would justify either membership on the Council or membership that is equal in number to or instead of sheriffs. Since the vast majority of sentences are imposed in the sheriff courts, we find it staggering that it can be contemplated that the Council could have no sheriffs on it. There must be at least two sheriffs on the Council if there is to be such a body. The sheriffs could have no confidence in a Council that did not have sheriffs on it.

2.19. We do not oppose the presence of a police constable on the Council, but are surprised to find such a person categorized as a “legal” member.

Community payback orders (clause 14)

2.20. The Sheriffs' Association welcomes proposals that provide for further and better community disposals as an alternative to imprisonment, such as those proposed in clause 14. We support the idea of one order that may include one or more elements as proposed. We support the reduction in the minimum number of hours of unpaid work to 20 hours. The current minimum of 80 hours is too high and can prevent, for example, the imposition of consecutive orders.

2.21. It is imperative, however, for community disposals to be at all effective, and to receive public confidence, for there to be substantial financial provision and other resources available.

2.22. In proposed section 227A(3) of the 1995 Act, we consider it an unnecessary addition and complication that the offence in respect of which it is imposed must also be "serious enough to warrant the imposition of such an order". Where a community payback order is imposed instead of imprisonment for an offence, it is already serious enough to warrant its imposition.

2.23. In relation to the proposed new section 227F(1) of the 1995 Act, we do not envisage and do not propose to enquire into a person's religious beliefs in court before imposing a sentence. We expect any relevant information to be provided in social enquiry or other reports or by the defence.

2.24. Payment of fines is looking as if it is becoming increasingly voluntary. The impact of supervised attendance orders as obligatory for payment of fines under £500 and discretionary in other instances has been reduced because the maximum sentence of imprisonment for breach is 30 days. We note that, under proposed new section 227M(2), such an order will be replaced by a level 1 community payback order with 30 days again being the maximum period of imprisonment for breach. The only means available of making offenders do what they do not want to do is to impose a period of imprisonment if they do not do it. If the maximum of that period is too low, it is no longer a means of enforcement or punishment for breach. If the maximum is 30 days, the maximum term served is 15 days. Some offenders think it is worth the breach. If one were to include a discount for admitting the breach, the punishment is rendered meaningless and of no effect.

2.25. Proposed new section 227N(5) states that, where a community payback order is already in effect, the maximum number of hours that may be imposed in another consecutive order is 300 less the number of hours *specified* in each existing order. Thus, if the total hours specified in the first order were 300, another order could not be imposed. It would be better if the court were able to impose "300 less the number of hours *remaining* in each existing order". Thus, if the offender had completed 50 hours of an existing 300-hour order, the court could impose 50 hours on the new order. This is the current position in section 238(9) of the 1995 Act. This should remain the position.

2.26. In proposed new section 227Y(5) and (6), there are limitations to variation of orders, other than for breach, by an extension of time or an increase in hours, as the case may be, to the maximum that could have been *specified* when the order was imposed. There are circumstances in which it may not be appropriate to breach an offender for failure to complete a programme timeously; but if the offender were near the end of a three-year order, it would not be possible to extend it. Section 227Y(5) is the same as at present for extension of time of probation orders (s.232(2)(c)). In relation to increase in hours on community service, the court may use up what is remaining out of the maximum hours (s. 240(1)) and the new provision will change that.

2.27. Currently, when a community service order is breached, the hours can be varied under section 239(5) of the 1995 Act up to the maximum and, where a probation order is breached, the time may be varied but not so as to increase the period beyond three years from the date the order was imposed (s. 232(2)(c)). In breach of a community payback order it looks as if the only limit appears to be that the variation cannot be such as could not have been imposed originally (proposed new s. 227Z(6) and (7)). Thus the position as proposed by the Bill would be the same as for increase in hours for community service but, in relation to extension of time, no similar restriction as before. It may be, however, that there is no restriction under new section 227ZB(5)(c).

2.28. If this all sounds confusing, it is. It should not be. We think that it would be better to have one of two options: - (a) the same rule for all situations, i.e. the hours or time in respect of a consecutive order, a variation of an order at a review, on application to the court or variation on a breach; or (b) one rule for variation on a breach and another rule for the other situations. At least in relation to breach, we think that the court should be able, if allowing the order to continue and varying the time or hours, to extend the time up to a further three years or increase the hours up to a further 300 hours.

2.29. We note with some relief that periodic reviews of community payback orders are not to be mandatory. For them to be mandatory would be unduly burdensome to the system financially and take up already precious court time. The Financial Memorandum notes (paras. 687-688) that the estimated cost of one review per order for all orders would be over £1 million. We would point out that it is unlikely, however, for orders of 12 months or more, that there would be as few as one review.

Presumption against short periods of imprisonment or detention (clause 17)

2.30. Clause 17 proposes to insert subsection (4A) in section 204 of the 1995 Act so that a sentence of six months' imprisonment or less may be imposed only if there is no other method of dealing with the offender. Where a discount of one-third is applied for pleading guilty at the first opportunity, this means in effect a sentence of nine months or less. It would be better to provide that the six–month period is the sentence that would have been imposed but for any discount.

2.31. We note, and support the fact, that sentences of imprisonment of six months or less are not to be prohibited. It is said by some that short prison sentences are ineffective and they point out that the prisons can do little with such short-term prisoners. This is to misunderstand the point of such sentences. A custodial sentence is the only punishment that an offender cannot avoid undertaking. Community disposals may be avoided and, without the option of custody for breach, would be rendered voluntary. It is clearly recognized that short sentences have a value since a custodial sentence of up to 30 days is to be a sentencing option for breach of a level 1 community payback order. We are frequently told by defence agents and the authors of social enquiry reports that a short period in custody has been a salutary lesson for the offender. Short periods in custody are clearly of use. As a means of dealing with breaches of court orders, as a sharp reminder to some offenders of the consequences of breaking the law for repeated offending when all else has been tried, or to give the public some measure of relief from their activities, short prison sentences have a purpose.

Amendments to the Custodial Sentences and Weapons (Scotland) Act 2007 (clause 18)

2.32. We attach and adopt our response in 2006 to the consultation document on the Custodial Sentences and Weapons (Scotland) Bill. Apart from the creation of short-term custodial and community sentences, the abolition of custody-only sentences and consequential amendments, the Custodial Sentences and Weapons (Scotland) Act 2007 is not altered. Our response then is as relevant now as it was.

2.33. There will be three types of sentence of imprisonment: short-term custody and community sentences, other custody and community sentences, and life sentences. A short-term prisoner will be automatically released from prison after one-half of the whole sentence and will be on community licence for the remainder of the sentence (new s. 5 of the 2007 Act). A prisoner serving any other custody and community sentence will normally be released after serving the custody part of the sentence (unless the Scottish Ministers determine that the offender would be likely to cause serious harm to a member of the public) and on community licence for the remainder (s. 11 of the 2007 Act). Life prisoners must be released on life licence after the end of the punishment part unless the Parole Board determines that the prisoner would be likely to cause serious harm to a member of the public (ss. 22 and 23 of the 2007 Act).

2.34. We note that a short-term custody and community prisoner will now not be a person serving a sentence of less than four years, but a person serving a sentence for less than the period prescribed by Scottish Ministers by statutory instrument. Thus, the meaning of a short-term sentence may vary from time to time, the period no doubt being determined by such factors as the size of the prison population. From paragraph 75 of the Policy Memorandum we glean that it may be presently intended that the period may be any sentence of less than 12 months.

2.35. Section 6 of the 2007 Act, which deals with the length of the custody part, applies only to custody and community sentences of a term of at least the prescribed period. Accordingly, it would appear that when the court imposes a short-term custody and community sentence, it simply imposes a sentence of imprisonment of X months; if that is less than the prescribed period, the prisoner will serve half of it in prison. Under section 6, if the court imposes a sentence of imprisonment of at least the prescribed period other than a life sentence, the court must specify the custody part of the sentence. The custody part of any such custody and community sentence normally will be half of the sentence (but in certain circumstances may be more though not more than three-quarters). There is also the possibility of the offender being released even earlier on either sentence under curfew licence, a topic to which we now turn.

2.36. With the repeal of Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993, and section 3AA in particular, when the 2007 Act comes into force, the curfew licence provisions of the 2007 Act (ss. 47-49) will apply as amended by the current Bill. They will replace, in name, the home detention curfew. This will mean that a prisoner may be released on curfew licence (a) where the sentence (we assume this means the whole sentence) is three months or more and (b) after the later of the greater of one-quarter or four weeks of the sentence, or before the day 166 days before the expiry of one half of the short-term sentence or the custody part of any other custody and community sentence, and (c) in any event, only before the day 14 days before the end of one-half of the short-term sentence or the custody part of any other custody and community sentence. These provisions are similar to those in the 1993 Act and, again, the Scottish Ministers may alter the periods of time mentioned (s. 47(9)(b) of the 2007 Act).

2.37. It hardly makes public sentencing decisions of the courts clear to the public or enhances its confidence in the system, if the public has no idea what the time served will be and if the actual time served bears no resemblance to sentence imposed in public by the court. It involves an unseen, unaccountable exercise of executive discretion in contrast to public sentencing in open court.

2.38. We note that the judges will be required under section 8 of the 2007 Act to provide a report to the Scottish Ministers about the offender and the circumstances of the case as it considers appropriate in every custody and community sentence other than a short-term sentence. If this means every sentence of 12 months or more, this will be a very onerous and time-consuming obligation on the courts.

2.39. It would appear that, if a short-term custody and community prisoner commits an offence punishable by imprisonment while on community licence, it will not be possible, as at present, to sentence that person to serve the portion of his sentence remaining from the commission of the offence to the expiry of his or her community licence. This is because of the repeal of section 16 of the 1993 Act and the fact that there is no substituted provision. In relation to any other custody and community prisoner, the Scottish

Ministers must recall the licence if the person is not of good behaviour: s. 37 of the 2007 Act. We are of the view that the courts should continue to be able to return offenders to prison to serve the unexpired portion of a sentence when convicted of committing an offence after early release and during the period of the unexpired portion.

Voluntary intoxication by alcohol (clause 24)
2.40. It is already the common law that intoxication is not generally an excuse. The Policy Memorandum states (para. 103) that the statutory provision is to “make it clear to offenders and the courts”. Offenders, and, most certainly, we, already know; we do not need to be told.

2.41. We do not think it serves any useful purpose to state this as a mandatory and inflexible rule of law. If, for example, someone’s voluntary alcoholic drinks have been spiked with stronger liquor, and he or she then commits a breach of the peace, why should not that intoxication (if the court is satisfied of it) be taken into account by way of mitigation?

2.42. We do not think it wise for the law not to take account of intent or at least knowledge. We do not understand why the usual legal concept of “knowingly” is not used. We think that the expression used should be “*knowingly* and voluntarily consumed alcohol”.

3. Part 2 - Criminal law

Serious organised crime (clauses 25 – 28)
3.1. We are not clear that the offence of being involved in serious organised crime adds anything to the substantive crimes for which persons may currently be prosecuted or to the sentence that could otherwise be imposed. Court time will be taken up unnecessarily.

3.2. We note that, whereas a crime of conspiracy could attract a sentence of life imprisonment, the new statutory offence of being involved in serious organized crime under clause 25 attracts a maximum sentence of only 10 years’ imprisonment and directing it attracts a maximum of 14 years.

3.3. The definition of serious organized crime in clause 25 is very wide and vague. Thus, if two people agree to steal a meat pie from a shop to give it to a starving beggar, they commit the crime of being involved in serious organised crime. This is because the beggar will have received a material benefit.

3.4. Having regard to the wide definition, the offence of failure to report serious organised crime under clause 28 is a frightening prospect. It is of some concern that a person may unwittingly fall foul of this provision.

3.5. It is not always appreciated that courts can take aggravating circumstances into account in sentencing without there having to be a statutory aggravation as in clause 26. There may be a desire for statutory aggravations for statistical purposes, but they are not necessary.

4. Part 3 – Criminal procedure

Prosecution of children (clause 38)
4.1. We note the proposed raising of the age for prosecution of children from 8 to 12. This change will have no significant impact on the work of the Sheriff Court.

Witness statements (clause 40)
4.2. This clause provides for a witness, who has not seen a statement he or she has made, to see it before giving evidence. Contrary to the implication of paragraph 203 of the Policy Memorandum, some witnesses do see their statements before giving evidence, accordingly we accept the policy objective of fairness. It must be recognized, however, that having seen the statement before giving evidence may be used as a criticism of credibility. We have more to say about witnesses seeing their statements during the trial in paragraphs 5.2 – 5.7 below.

Breach of undertaking (clause 41)
4.3. We understand the wish to put breach of undertakings on the same statutory basis as breach of bail. We note that the penalties will be the same. There is, however, this distinction between bail and the proposal in the Bill. Under section 25 of the 1995 Act, the court must explain the effect and consequences of breach of bail conditions to the accused in ordinary language and the accused must be given a written explanation of all that in ordinary language. There is no such requirement currently under, or proposed in this Bill by amendment to, section 22 of the 1995 Act under which provision the accused is released on an undertaking by a police officer. If a person is to be liable to the same penalty for breach of an undertaking as for breach of bail, we think that the same explanations must be given. Section 22 should be amended accordingly.

Bail condition for identification procedures etc. (clause 43)
4.4. The usual condition imposed by a court is to attend an identification parade on being given 48 hours notice. If “reasonably instructed” in this provision includes “reasonable notice”, this provision would accord with current practice.

Disclosure of convictions and non-court disposals (clause 52)
4.5. Fixed penalties do not appear on someone’s record as a previous conviction. For that reason, and because sometimes it may be more of a hassle to challenge it, a fixed penalty is paid (sometimes the notice is not received but becomes payable). The basis on which a fixed penalty is paid or becomes payable may, therefore, be different from that of a conviction. It may not be appropriate, therefore, to treat a fixed penalty as if it were a conviction for the purposes of sentencing.

Time limits for lodging certain appeals (clause 53)
4.6. The time limit for an appeal against a decision at a first diet is to be increased from two to seven days. We are not in favour of this proposal for

the sheriff court. Under section 66(6) of the 1995 Act, a first diet must be held not less than 10 days before the trial diet (and not earlier than 15 days after service of the indictment). Both the first diet and the trial diet are fixed at the time the indictment is served on the accused. The first diet is usually held 14 days before the trial diet. It is common for there to be a continued first diet within seven or even a few days of the trial diet. Increasing the time limit to seven days would mean that the accused could seek leave to appeal against a decision made at a continued first diet on the day of the trial diet or later. Witnesses (possibly vulnerable witnesses) and jurors cited to attend for the trial diet will, to say the least, be inconvenienced, the trial will be postponed and the court programme will have to be re-written. Furthermore, by extending the time limit, it will be less likely than before that leave to appeal would be granted. The purpose of the two-day time limit was because, and to ensure that, any appeal could be dealt with expeditiously without interfering with the date of the trial.

4.7. The situation in the High Court is different. A trial diet is not fixed in the High Court until the preliminary diet: s. 72A(1) of the 1995 Act. There may be more than one preliminary diet. It is possible, therefore, for a decision to be made on a preliminary issue before a trial diet is fixed in the High Court. A seven-day rather than a two-day time limit is, therefore, unlikely to affect a trial diet in the High Court. In the sheriff court, on the other hand, an increase in the time limit could seriously disrupt the course of justice.

Crown appeals (clauses 54 – 57)
4.8. These provisions in relation to jury trials are claimed to enhance public confidence. We fear that they will have the reverse effect. By allowing for appeals *during* a trial, trials will take longer (they will seem to be never ending), and the practical difficulties of keeping jurors waiting and available will result in aborted trials.

Submissions as to sufficiency of evidence (clause 54)
4.9. At present the defence may make a submission of no case to answer at the end of the prosecution case under section 97 of the 1995 Act. That submission is restricted to the sufficiency of the evidence. At the end of all the evidence the defence may make a common law submission that is not so limited to persuade the judge to withdraw some or all of the indictment from the jury, to amend or reduce a charge or to make some other direction. The proposed new section 97A of the 1995 Act does not interfere with the no case to answer submission. The Policy Memorandum states (para. 273) that the purpose of this new section is to replace the common law submission with a statutory submission (see s. 97A(3)) but that it is not intended to implement the Law Commission's recommendation to include a submission that no reasonable jury properly directed could convict (paras. 284-286). The proposed new section 97A(2) is not the common law submission in statutory form, and subsection (2) is, therefore, not co-extensive with a common law submission. We are relieved to see that it will remain possible for the defence to make a common law submission that no reasonable jury properly directed could convict. For example, it would remain possible to make a submission of

oppression of the kind mentioned in *HM Advocate v. McGill,* 1997 S.L.T. 1156, 1159L; 1997 S.C.C.R. 230, 239E. Subsection (3) would not exclude it.

4.10. It is not clear why it is provided in proposed new section 97C of the 1995 Act that the judge must direct the prosecutor to amend the indictment when a successful submission to have it amended is made. The present position is that the judge directs the jury. We do not see why that should not remain the position. It is right that this be so because it is the judge who has made the decision, not the prosecutor.

Prosecutor's right of appeal (clause 55)

4.11. It is proposed to give the prosecutor a right of appeal against a submission of no case to answer under s. 97, a statutory submission under s. 97A and against decisions on admissibility of evidence during a trial (proposed new ss. 107A and 107B). An appeal against a decision on admissibility will be exercisable only with leave. The prosecutor is to have a right to appeal without leave against decisions under sections 97 and 97A if it is practicable for it to heard (an expedited appeal). Where the right of appeal is sought to be exercised, and even where leave is granted, there are the further hurdles of ascertaining whether it is practicable for the appeal to be heard during an adjournment of the trial and, even if it is apparently, the court deciding whether the appeal should be heard during that adjournment: proposed new s. 107D.

4.12. We have very serious concerns about the effect these provisions, exercisable *before* the verdict of the jury, will have. The proposals go too far in redressing any perceived imbalance of unfairness to the Crown. They fail to recognize the realities and practicalities of jury trials. They will result in substantially increased cost of jury trials to the public purse. The suggestion in paragraph 292 of the Policy Memorandum that these reforms will improve the law at a low overall cost is questionable.

4.13. If it is thought desirable to give the prosecution equal rights of appeal with the accused, it could be given a right of appeal exercisable at the conclusion of the trial (though it would be necessary to face up to the difficulty of the Crown having a right of appeal against an acquittal by a jury). If the prosecutor is to have these rights, why not the accused? The defence has and is to be given no equal right of appeal before the jury verdict (it cannot appeal until sentence has been passed). The proposed provisions give the prosecution greater rights than the accused, could prejudice a fair trial under article 6 of the European Convention of Human Rights, and will disrupt, delay and extend the course of justice. The principles of fairness, finality, certainty, expedition rather than delay in trials, and the rule against double jeopardy must trump the Crown being given greater rights than the accused.

4.14. It is stated in paragraph 278 of the Policy Memorandum that it is not anticipated that these rights of appeal without leave will be used except in a very limited number of cases. One generally finds that if a person is given a power, it will be exercised. Interested parties in individual cases may lobby the prosecutor to exercise that power. Unless the Lord Advocate is to give a direction to prosecutors to exercise the right of appeal only in exceptional circumstances, it will be sought to be used often.

4.15. We cannot have trials peppered with interruptions for consideration of appeals. It will lead to a nightmare that criminal justice can do without if the court makes a decision that the prosecutor does not like. No doubt the prosecutor will want an adjournment to consider whether to appeal or ask for leave to appeal. If leave is to be sought, there will be further delay while there is argument in court about whether leave should be given. Then the court has to adjourn to discover whether there is the remotest chance of an appeal being heard expeditiously. Then the court has to hear argument about whether, even if an appeal can be heard expeditiously, there should be a further adjournment for it to be heard. Then the judge has to write a report for the appeal court. Then there has to be an adjournment for the appeal to be heard. After that the parties will require time to consider the consequences of the result of the appeal on how to present their cases. This process will take at least two days, assuming that the appeal can be heard immediately. After that, if there are any of the jurors – and witnesses - still around, the trial can be resumed.

4.16. While all this is going on, what are the jurors to do, as they will not be in court while all this is going on? Are they to sit around waiting in the jury room or at home? Can they return to work meanwhile; if so can they all be got back? It is difficult enough to keep jurors contented and to avoid them becoming frustrated and irritated at frequent disruptions and adjournments, without such additional delays. A two–day trial will inevitably become a five-day trial. It is in the realms of fantasy to expect jurors to keep themselves available while the prosecutor goes off at intervals for days to appeal decisions he or she does not like during a trial.

4.17. One redeeming feature is that proposed new section 107D(2) of the 1995 Act permits the court to refuse to allow an appeal that the prosecutor has of right or even where leave has been granted. It appears that the court at first instance may refuse to allow the appeal to be heard even if it can be heard expeditiously. It is not at all clear on what ground the court may refuse it. We would like to point out that the High Court is unlikely to be able to hear these appeals expeditiously: it has such a burden of work that it finds it difficult to hear appeals on preliminary issues from the sheriff court at first diets expeditiously.

4.18. In proposed new section 107D(6), it appears to be thought that it is a simple matter, if an expedited appeal is successful, of sending the case back for the trial to proceed. There will, of course, be the problem of getting everyone back together again, including the jurors, to which we alluded in paragraphs 4.15 and 4.16 above. There could be prejudice to the accused, for example, resulting from a break in the flow of the evidence or evidence in chief and cross-examination being separated by a period of days.

4.19. Proposed new section 107F is somewhat curious. If the Crown, for example, appeals as of right (i.e. without leave) against a decision to delete part of the circumstances in an indictment but the decision does not result in an acquittal by the trial judge of a charge, the court must desert the diet *pro loco et tempore* in respect of that charge, i.e. reserving the right of the prosecutor to raise it afresh, subject to the appeal court's refusal under s. 107F(4). The trial is to proceed in relation to anything else.

5. Part 4 – Evidence

5.1. The provisions in this Part follow on from consultation documents published in 2006 and 2008. We have observations to make about one issue in these provisions.

Witness statements: use during trial (clause 62)

5.2. There are at present four situations in which prior statements of witnesses other than the accused may be used during a trial. One is where the evidence of the witness is inconsistent with a prior statement (s. 263(4) of the 1995 Act). The purpose is at least to challenge the credibility and reliability of the witness and also in the hope that the witness might accept the truth of the prior statement. Any part of the prior statement becomes evidence only in so far as the witness accepts it to be the truth. The second is where the witness adopts a prior statement in a document of which the witness was the originator as his or her evidence in court (s. 260). The third is where a witness cannot remember everything, accepts that he or she made a prior statement to someone and accepts that if he or she said what he or she is alleged to have said, it must be the truth. In that case the person to whom the statement was made may give evidence of it and it becomes part of the evidence of the witness: *Jamieson v. HM Advocate,* 1994 J.C. 251; 1994 S.C.C.R. 610. The fourth is where the statement was recorded by the witness at the time of the incident to which it relates and is used to refresh the memory of the witness.

5.3. In *Hughes v. HM Advocate,* 22nd January 2009, XC268/07, at para. [13], the Appeal Court stated that "the starting point in all criminal trials remains parole evidence. To put a written statement before a witness for the purpose of leading him in chief is clearly unacceptable and before, therefore, reference is made to any written statement the purpose of doing so should be clear."

5.4. The proposed new section 261A of the 1995 Act would permit the court to allow a witness, while giving evidence, to refer to any prior statement he or she made. The section does not explain the purpose of doing so or if there are any limitations other than that the court has a complete discretion whether to allow the witness to look at it. The provision is not limited to statements made at the time of the incident to which the statement relates. It is an extension of the fourth rule mentioned in paragraph 5.2 above. It is clearly related to clause 40 which permits a witness, before giving evidence, to see a statement he or she made. It appears that it is to be permitted as an *aide memoire.*

5.5. The Policy Memorandum states (para. 205) that the provision is intended to allow prosecution witnesses to refer to their statements "in the same way as police witnesses have long been *assumed* to be able to consult their notebooks" (emphasis added). The proposed new section is not limited to prosecution witnesses; there would be no justification for limiting it to prosecution witnesses. There is no *assumed* improper or unfair advantage given to certain witnesses such as police officers. The common law is that *any* witness can refer to a statement or notebook (a) if he or she recorded that statement himself or herself, (b) if he or she did so *at the time of the incident to which it refers* and (c) for the purpose of confirming something or checking something forgotten. It is one thing to allow a witness to read a statement before giving evidence, it is quite another to extend the rule just mentioned to include a witness refreshing his or her memory from a statement made at any time. We do not wish evidence in chief of a witness to consist of the answer to the question "Is that your evidence contained in that statement?" It will be recalled from what we said at paragraph 4.2 above that being given the opportunity to look at the statement will not make the witness immune from being challenged on credibility and reliability.

5.6. If the common law position is to be extended, then the statement should at least be one that complies with the recommendation of Lord Coulsfield in his Review of the Law and Practice of Disclosure Proceedings in Scotland at paragraphs 10.6.1 and 10.8, i.e., that it is signed by the witness when made, and, we think, having been read by the witness when made. This has not been followed up in the proposed provision.

5.7. We think that this provision in clause 62 will lead to a number of appeals to define its parameters, possibly even under the proposed new section 107B.

6. Part 6 – Disclosure

6.1. This Part contains detailed, complicated and time-consuming rules about disclosure that will further delay trials. The Crown already has difficulty providing disclosure in time for first diets, intermediate diets and even trial diets.

6.2. No doubt the rules will provide a paper trail so that in any audit, perhaps after a challenge, it can be ascertained whether the rules have been followed. The trouble with detailed statutory rules of this kind is that they can result in the letter of the law being followed while the spirit of it gets lost sight of.

Meaning of "information" (clause 85)
6.3. We note from the terms of subsection (1) and (2) of clause 85, perhaps to preserve the sanctity of the precognition and to protect the victim statement, that these documents are not themselves "information", but that the *contents* of them are.

Provision of information (clauses 86 – 93)
6.4. As soon as practicable after the accused appears on petition or indictment, the prosecutor must serve a notice on the investigating authority requiring it to send, as soon as practicable, schedules listing all relevant information for or against the accused, categorising the information as

sensitive, highly sensitive and non-sensitive and giving a brief description of each item of information (cl. 86). Whenever further information comes to light, this exercise must be repeated in respect of it. The prosecutor may challenge the categorisation and require the investigating authority to change it. As soon as practicable after the accused appears on petition or indictment, or pleads not guilty on summary complaint, the prosecutor must disclose the information of the kind mentioned in clause 89(3) to the accused, and has a continuing duty to do so as more relevant information comes to light (cl. 90). In relation to solemn proceedings, the prosecutor must also disclose the schedules of information which are categorised as non-sensitive.

6.5. We foresee delays created by information having to be categorised, the information having to be described, and with inevitable arguments between the prosecutor and the investigating authorities over the correct categorisation. While the prosecutor has to disclose to the defence all information within the meaning of clause 89(3), under clause 93 it has only to disclose a schedule of information falling within the non-sensitive category. It is not clear from the statutory provisions why there is a need for two categories of sensitive information. There is no hint of it in Lord Coulsfield's Review of the Law and Practice of Disclosure Proceedings in Scotland or in the subsequent consultation paper, or analysis of the responses and next steps document.

Orders restricting disclosure etc. (clauses 102 – 113)
6.6. In a democratic society such provisions are likely to be regarded as disturbing. We anticipate time taken up with challenges under the European Convention of Human Rights.

6.7. If disclosure of information would be likely to cause serious injury or death, obstruct or prevent the prevention, detection, investigation or prosecution of crime or causes serious prejudice to the public interest, the prosecutor may apply to the court for non-disclosure. The prosecutor may also apply for an order not to tell the accused about the application for non-disclosure (a non-notification order) and for the accused not to be to be allowed to attend or make representations at the application for non-disclosure (an exclusion order) or simply for an order for the accused not to be allowed to attend or make representations at the application for a non-disclosure order (exclusion order only). If the prosecutor applies for a non-notification order, the accused is not even allowed to attend or make representations at it either.

6.8. The tests for granting non-notification and exclusion orders are lower than that required for a non-disclosure order: in relation to public interest, it is simply whether "it is not in the public interest that the nature of the information be disclosed", instead of "likely to cause serious prejudice to the public interest". We are not clear why the test is lower for non-notification and exclusion orders.

6.9. We note that there is provision for the appointment of special counsel if the court considers it necessary to ensure that the accused receives a fair trial (cl. 107). We think that such an appointment may be inevitable for an application for a non-notification order, an exclusion order or a non-disclosure order where either of the first two has been granted. The task of special counsel will be difficult because he or she will not be familiar with the details of the defence case and because the accused is not to be made aware of the contents of these applications (cl. 113(4)).

Defence statements (clauses 95 and 95)

6.10. Lord Coulsfield, in paragraphs 7.7 and 7.8 of his Review, suggested *voluntary* defence statements for the purposes of helping the Crown identify information that the defence wished to have. The proposal in the Bill in solemn proceedings goes much further and new section 70A of the 1995 Act states that the accused *must* state his *defence* to the indictment at least 14 days before the first diet in the sheriff court. It was never intended that the defence statement was to be anything more than to assist in the disclosure process and to provide a means for the accused to seek specific information.

6.11. There is no time limit for the prosecutor to disclose any information; the prosecutor is required only to do so “as soon as practicable”. A first diet must be held no less than 15 days after service of the indictment (s. 66(6) of the 1995 Act). Accordingly, firstly, if the first diet was on the fifteenth day, an accused would have one day to prepare and lodge a defence. That does not meet the object of fairness mentioned in paragraph 468 of the Policy Memorandum. Secondly, while it is said at paragraph 265 of the Policy Memorandum that, in order properly to consider whether to appeal certain decisions, parties need seven rather than two days, it is not clear why it is regarded as legitimate to envisage almost no time at all for an accused to consider and lodge a defence.

6.12. The accused could find himself in the position of having to lodge a defence to the indictment, not simply a request for information, *before* the prosecution has provided any information about the prosecution case, or anything relevant to the defence, through disclosure. As we have indicated in paragraph 8.1, the Crown has difficulty in providing disclosure of the prosecution case in time for first diets and trial diets. If the prosecution has not disclosed its case, how and why is the accused to state a defence? It will no doubt be regarded as repugnant to our legal system that an accused must state a defence before the prosecution has disclosed its case. It is contrary to the principles of our law, the right to silence and article 6 of the European Convention of Human Rights. It is unnecessary to achieve the object of assisting the Crown to disclose information that the defence wants. We foresee challenges and difficulties in the conduct of trials.

6.13. What is to happen when, having lodged a defence after the prosecutor discloses the prosecution case or more of it, and the accused changes his defence? Is the accused to be able to be cross-examined on it? Is the accused to be denied cross-examining on a point not in the defence statement? All this would be contrary to the proper purpose of lodging the defence statement.

6.14. We note, fortunately, that there is to be no requirement on the accused to lodge a defence in summary proceedings: it is entirely voluntary under clause 95. There may, however, be consequences for not doing so.

6.15. While there are no direct sanctions for the accused not lodging a defence (and there could not be), there are consequences in solemn proceedings. The first consequence appears to be that the prosecutor may not have to try so hard to make further disclosure. While there is a continuing duty on the prosecutor to disclose until the end of the proceedings under clause 90, the further duty to review all relevant information for or against the accused only arises if the accused lodges a defence: see cl. 94(1) (solemn) and cl. 95(3) (summary). There is a danger that if the accused does not ask for a document or does not disclose a defence to which there is relevant information, that the information may be overlooked. There will continue to be delays and arguments, or aborted trials, because of apparent non-disclosure.

6.16. The second consequence appears to be the intention that, in order to get information it wants, the defence has to state in the defence what information disclosed. Since commission and diligence for the recovery of documents will be available, however, this consequence may be less damaging.

6.17. We would be concerned if there were to be a third consequence in that any grant or continuation of legal aid were to be affected. That would result in delay in, and longer, trials.

6.18. In relation to summary proceedings, the defence statement may be lodged at any time up to the conclusion of the proceedings. This means that it could be lodged at the beginning of or during the trial. This will result in postponements of trials. Even if lodged as early as the intermediate diet, there will be an increase in postponements.

7. Part 7 – Mental disorder and unfitness for trial

7.1. We note that this Part follows substantially the recommendations of the Scottish Law Commission in its “Report on Insanity and Diminished Responsibility” in 2004. We support the proposals in the Bill in principle. We support the wider definition of “mental disorder” using the definition in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

Criminal responsibility of persons with mental disorder (clause 117)

7.2. We are not sure if the proposed new section 51B(3) of the 1995 Act in clause 117 of the Bill, achieves the object, stated in paragraph 534 of the Explanatory Notes, with the greatest clarity. That object is that intoxication will not preclude a defence of diminished responsibility provided that there is an independent basis for the plea. We are aware that the provision is as proposed in the draft Bill in the Scottish Law Commission report. In the proposed section 53B(3)(b) of the 1995 Act, it might be better if the word “it” were replaced by “abnormality of mind”.

Unfitness for trial (clause 119)

7.3. We note the removal of the requirement of the evidence of two medical practitioners in section 54(1) of the 1995 Act in clause 119(2)(a)(i) of the Bill, and the wider statutory test of "mental or physical condition" in the new section 53F(1) of the 1995 Act in clause 119(1) of the Bill. While accepting the appropriateness of this, we simply wish to record that we anticipate more applications to the court and more protracted proceedings as a result.

1st May 2009

RESPONSE BY THE SHERIFFS' ASSOCIATION TO THE CONSULTATION DOCUMENT: SENTENCING GUIDELINES AND A SCOTTISH SENTENCING COUNCIL

The Sheriffs' Association welcomes the opportunity to respond to this consultation document. The Sentencing Commission Report published in August 2006 recognised that 96% of sentences imposed in Scotland are imposed in the summary courts and, when account is also taken of sentences imposed in the sheriff courts under solemn procedure, only around 2% of sentences imposed in Scotland are imposed in the High Court. The Sheriffs' Association, representing the body of the judiciary, which imposes the vast majority of sentences, considers it is uniquely placed to respond to the proposals in this consultation document.

We are concerned that the proposals proceed in the absence of any evidence that there exists any inconsistency in sentencing or lack of public confidence in the system of sentencing. The Sentencing Commission did not commission independent research to establish if there existed any inconsistency in sentencing and recorded that research into inconsistency in sentencing in Scotland is virtually non-existent. The Sheriffs' Association therefore considers that before any proposals are introduced proper independent research needs to be carried out to establish whether or not there is any significant inconsistency in sentencing in Scotland.

The Sheriffs' Association believes the current procedure for dealing with any sentences that are imposed outside the normal parameters is effective and commands respect. Any sheriff, or other judge, subject to an appeal against sentence has to give cogent reasons for the decision made and, if that reasoning does not stand up to scrutiny, the sentence will be reduced, or increased.

We do not accept that the solution to those cases where a sentence falls outside the recognised parameters is by way of the burdensome and, we suspect, expensive bureaucracy that will be the result of these proposals.

The consultation document at paragraph 1.1, quotes the late Lord Macfadyen that,

> "a perception of inconsistency in sentencing is likely to lead to a loss of public confidence in the criminal justice system".

The consultation document leaps from that hypothesis to the conclusion expressed at paragraph 1.5, that because sentencing works on an individual case basis, supplemented by recognised sources relied upon by judges, the public do not understand the sentencing process, or the reasons behind decisions and states that,

> "This has helped to create a common perception that sentencing in our courts is inconsistent which, consequently, has had a negative effect on confidence in the criminal justice system".

No evidence is produced to support these claims. They are contradicted at paragraph 1.7 where it is recorded that particularly amongst practitioners the view is held that sentencing is not inconsistent but is dealt with on an individual basis. The Sentencing Commission found little empirical evidence to support the view that there was widespread inconsistency in sentencing in Scotland.

The Sheriffs' Association is concerned that, in the absence of any evidence to support the notion that there exists widespread inconsistency in sentencing which require guidelines to be introduced, the aim of this policy is more to do with Government concerns over a rising prison population and thereby to interfere with judicial independence by limiting the number of offences which merit a sentence of imprisonment. We note in paragraph 1.10 the comment that sentencing decisions are not made in isolation but have consequences for other parts of the criminal justice system which have to implement the sentence. That comment is open to the interpretation that in imposing a sentence the judiciary should take account of the impact on the Scottish Prison Service of sentencing an offender to custody. In our view it is essential that the judiciary remain free to impose the appropriate sentence for the offence committed, regardless of the impact that sentence may have on the prison population. Any attempt to influence any sentencing decision in that way would be an attack on judicial independence.

While the consultation document claims to recognise that sentencing is a complex matter and has become more complicated, as a result of legislation and decisions of the Appeal Court in recent years, what is proposed will, in the view of the Sheriffs' Association, make sentencing even more complex. The proposals will also, in our view, have a significant impact on judicial, particularly shrieval, resources.

It is proposed in paragraph 1.13 that where any sentence is outwith the range provided by the guidelines the judge has to explain in full the reasons for departing from the guidelines. Those reasons have to be given at the point of sentencing, see paragraph 2.11.

The impact of the proposals on court time will be considerable particularly in the sheriff court. It is not uncommon for a sheriff in a busy court to impose in excess of 50 sentences a day. In addition to all the factors which that sheriff already has to take into account before imposing any sentence it is proposed that guidelines will also have to be consulted before sentencing. That will be time consuming and will have to be taken into account in every case. It will be impossible to do so without allowing for out of court preparation time. Moreover, since a departure from the guidelines will require the judge to state full reasons for doing so at the point of sentencing, it is envisaged the court will have to adjourn to allow that judge to prepare his statement. That will have an impact on the number of cases it will be possible to deal with in a day. The cumulative effect of these proposals will result in the need for additional judicial resources to cover the additional courts that will be required to dispose of business, or current targets for disposal of cases will be greatly exceeded.

While the Sheriffs' Association remains opposed to the introduction of sentencing guidelines we wish to comment on the proposed model for any Sentencing Council, which will draft such guidelines.

While the Sentencing Commission referred to the existence of sentencing guidelines in other jurisdictions, such as England and Wales, some USA States and countries in Western Europe the consultation document has rejected those in favour of the New Zealand model. We have reservations about the reasoning behind that choice. The consultation document explains that the creation of a Sentencing Council in New Zealand was due to concern over "a burgeoning prison population" as a result of which its Sentencing Council has to prepare a statement on the likely impact of sentencing guidelines on the prison population. The Sheriffs' Association is concerned that the preference for the New Zealand model may lie in a desire to achieve a reduction in the prison population. For the reasons already stated we consider attempts to achieve that end by means of sentencing guidelines is a potential threat to judicial independence.

The consultation document goes on to argue that the New Zealand model is attractive because of New Zealand's similarity to Scotland in terms of population and its legal system. We do not find these arguments convincing as a reason for adopting the New Zealand model. It seems to us that any model which is adopted should be one from a country with a strong connection with Scotland in terms of suffering from the same social and cultural problems which lead to offending. New Zealand does not satisfy that criteria.

While New Zealand has a population of 4.5 million it has an economy based on agriculture and tourism. We are not aware of New Zealand being a society that suffers from the effects of binge drinking, a drugs culture, a culture of carrying weapons or of gang culture, and the crimes committed as a result thereof. These problems are prevalent in Scotland and underlie the commission of a considerable number of offences. In our view a more appropriate model is to be found in that of England and Wales, which has similar social problems to that of Scotland.

It is also of concern that the New Zealand model was introduced as recently as November 2007 by the New Zealand Sentencing Council Act, and its effectiveness, or otherwise has not been tested. Indeed we believe that, following the recent election in New Zealand leading to a change in Government, the Sentencing Council may be abolished. It is understood the new Government does not agree with the Sentencing Council's aim of reducing sentences by 25%, and intends to divert the $1.5 million funding for the Sentencing Council into providing services for victims of crime.

We note that the Sentencing Council in New Zealand has a minority of judicial members. The Sheriffs' Association is opposed to any Sentencing Council which does not have a majority of judicial members. As the consultation document points out in paragraph 3.1 the composition of the membership of any Sentencing Council is important since those who have to comply with the guidelines have to have confidence that the guidelines are drawn up by those with the appropriate expertise, experience and skills. The Sheriffs' Association is of the view it is unlikely that the shrieval branch of the judiciary would have confidence in any Sentencing Council that did not have a majority of judicial members.

If a Sentencing Council is to be introduced it would be appropriate, in our view, to adopt a similar membership to the structure in England and Wales set out in Annex B of the consultation document, which has a majority of judicial members.

The Sheriffs' Association however remains opposed to the proposal that a Sentencing Council be created to draft sentencing guidelines. If sentencing guidelines are to be introduced, which for the reasons stated we are convinced are unnecessary, we prefer the model recommended in 2006 by the Sentencing Commission, chaired by the late Lord Macfadyen. It recommended that a sentencing advisory body, the Advisory Panel on Sentencing in Scotland ("APSS") be created to frame draft sentencing guidelines with the adoption, or otherwise, of those guidelines being ultimately a matter for the Appeal Court. That recommendation recognised the importance that the Appeal Court remain in overall control of sentencing policy.

The omission of any reference in this consultation paper to the recommendation of the Sentencing Commission that an Advisory Panel on Sentencing in Scotland ("APSS') be created, as opposed to a Sentencing Council, is an omission we find surprising. The notion of creating a Sentencing Council was rejected by the Sentencing Commission. We agree with the reasoning behind that decision, see paragraph 9.15 of its report. The Sheriffs' Association regard it as fundamental to the constitutional principle of judicial independence that sentencing remains a judicial function, and maintaining the role of the Appeal Court in overseeing that function would ensure the protection of judicial independence.

The Sheriffs' Association, subject to the observations made in our introductory remarks, responds to the questions in the consultation document as follows:

Remit of the Scottish Sentencing Council
Question 1 – Do you think that this proposed remit is appropriate? If not, what alternative would you suggest?

No. The Sheriffs' Association does not consider that the proposed remit is appropriate for the following reason.

Since the aim of the Sentencing Commission in proposing sentencing guidelines is to promote and improve consistency in sentencing, to increase public confidence and to recognise the final decision on sentence is based on the fact of the case and is for the judiciary, we consider the proposed remit should be restricted to those aims. We are of the view that if there is to be a

Sentencing Council then the principle of promoting greater understanding and enhancing public confidence in the criminal justice system may be worthwhile including in the remit.

We suggest the remit of any Sentencing Council should be to:

"Promote consistency in sentencing practice; to ensure that sentencing practice is transparent and understandable, while preserving the important element of judicial discretion;
"Inform and educate the public about sentencing decision making, with a view to promoting greater understanding and enhancing public confidence in the criminal justice system."

We consider the references to policy should be removed from the remit, as should the reference to developing sentencing policy, and the reference to informing the Scottish Ministers and Parliament on sentencing practices and areas for reform. This would recognise that any Sentencing Council should be judicially led and should not encroach into the area of policy.

Question 2 – Do you think that these proposed functions are appropriate? If not, what alternatives would you suggest?

No. The proposed functions are not appropriate. So far as sub-head one is concerned sentencing levels for particular offences are already prescribed both for common law and statutory offences. Any attempt to have sentencing powers more narrowly circumscribed within the parameters already set is an interference with judicial independence and would be contrary to section 1 of the Judiciary and Courts (Scotland) Act 2008.

The requirement in sub-head two that judicial guidelines should be produced on particular types of sentences, disposals and other orders available at the time of sentencing is unnecessary since judges are aware of their sentencing limitations at present.

We consider sub-head three is an attack on judicial independence. The notion that judges be faced with a list of grounds justifying a judge's departure from sentencing guidelines is also offensive. The consultation document fails to recognise that at present there exists a perfectly adequate system for dealing with any sentence imposed which is outwith the recognised parameters, and that is by appeal to the Court of Criminal Appeal.

Sub-head four is objectionable. It could allow a provision to be introduced that the judiciary had to take account of prison capacity when considering the appropriate sentence to impose.

Sub-head five refers to guidelines being produced to support research and academic work relevant to the Council's remit. This is inappropriate at this stage. The time to carry out research is before considering implementing proposals thereby ascertaining whether there is any need for these reforms.

The purpose of sub-head six is objectionable in its suggestion that information on, compliance with, and departure from sentencing guidelines is to be collected and that information is to be published. The proposal is a potential attack on the independence of the judiciary particularly if the identity of the judges who do not comply is included.

Sub-head seven and the proposal that the public should be provided with information about sentencing is too vague. If implemented it will lead to confusion and misunderstandings.

The Sheriffs' Association does not suggest any alternative function. We suggest that proper independent research is carried out to establish whether there is any inconsistency in sentencing which would justify the establishment of a Sentencing Council to produce sentencing guidelines.

Question 3 – Do you think our proposals in relation to the production of sentencing guidelines are adequate?

No. While the consultation document professes to allow the Sentencing Council to establish its own method of working including procedures for producing sentencing guidelines it then goes on to impose controls on how the Council is to work. The Sheriffs' Association considers that a Sentencing Council has to be a judicially led body with a majority of judicial members and what is proposed does not provide for that essential element.

The Sheriffs' Association finds it objectionable that office holders including the Scottish Ministers, the Lord Advocate, possibly the Secretary of State for Scotland and the Advocate General for Scotland would have to be consulted in relation to the business plan. Any Sentencing Council must remain independent and to carry out its function in accordance with this remit it should be adequately funded.

The introduction of the role of Lord Advocate to the sentencing process is objectionable given her role as head of the prosecution service.

The Sheriffs' Association finds objectionable the suggestion that Ministers, including the Lord Advocate, should be able to ask the Sentencing Council to produce guidelines on particular issues and, if the reference were not taken up, the Sentencing Council would have to explain its reasons for not doing so in its annual report. That could allow political interference in the sentencing process. For any Sentencing Council to have any credibility it must remain free of political interference.

Question 4 – Do you think that we are proposing the correct level of consultation on draft sentencing guidelines?

No. Certain office holders are named as being required consultees. For the reasons given above we consider that those office holders should not be consulted.

We note in particular that the judiciary is conspicuous by its absence as one of the parties to be consulted. As the sentencing process is in our view solely a judicial function it is obvious it should be the main consultee.

The suggestion that the public should have the opportunity to comment on draft guidelines before they are finalised is mistaken. It could be abused by special interest groups with their own agenda.

We regard as unacceptable the proposal that any Sentencing Council will require to have in mind when framing guidelines the costs of particular disposals and the likely impact on the prisoner population. The judiciary currently do not consider such factors when selecting sentence as such considerations interfere with judicial independence. In imposing any sentence, whether it is a custodial or non-custodial sentence, a judge has a number of important principles to consider but the cost of any such disposal should never be a consideration. The judiciary must remain free of any attempt by the Executive to influence judicial decision making because of cost implications.

Question 5 – Do you consider that our proposals for the relationship between the Sentencing Council and the courts are appropriate?

No. The proposal that judges of all courts, including the Court of Criminal Appeal should be under an obligation to adhere to the sentencing guidelines effectively elevates the Sentencing Council above the courts and is a clear interference with the independence of the judiciary.

The suggestion that if the guidelines are departed from the judge is required to formally state, and also record, detailed reasons for doing so when sentence is imposed will have a considerable impact on the running of the courts and will inevitably lead to a need for more judicial resources particularly in the sheriff court where the majority of sentences are imposed. Since the proposal demands a record with detailed reasons, this will involve a written report by the judge. That report will require to be compiled prior to imposing the sentence and will lead to courts being adjourned on a regular basis for the judge to prepare that report. The notion that a judge should provide a report to the Sentencing Council is objectionable in principle. It is to the Appeal Court that any judge has to justify the reason for his sentence and not a Government sponsored body.

Question 6 - Do you agree that the Scottish Sentencing Council should have the power to carry out, commission and coordinate research?

Yes. Sentencing guidelines would have no credibility unless based on research and carried out by truly independent researchers.

Question 7 – a) Do you agree that the Scottish Sentencing Council's statutory functions should include providing information to the public about the sentencing process?

b) If yes, how do you think that process could be made clearer and more understandable to ordinary members of the public?

7(a) We have no difficulty with this proposal and see no harm in explaining the sentencing process so long as it does not interfere with the process itself.

7(b) The proposals are so complicated that in our view the process is likely to be less clear and less understandable to the public but how any Sentencing Council sets about achieving a process that is clearer and more understandable to the public would be a matter for them.

Question 8 – What measures might be taken by the Scottish Sentencing Council to make the sentencing process more transparent?

We do not understand what is meant by this question. We consider the sentencing process is already transparent and is enhanced by accurate and adequate press reporting. The judiciary in imposing sentence is obliged to explain the reasons for imposing any particular sentence and does so in a clear and concise manner.

Question 9 – Do you agree that the Chair of the Scottish Sentencing Council should be a senior member of the Judiciary? If not, who do you think would be a more suitable chairperson?

We are emphatically of the view that the Chair of the Scottish Sentencing Council must be a senior member of the judiciary.

Question 10 – Do you consider the proposed membership of the Council to be appropriate? If not what alternative membership do you think would be more suitable?

No. It is essential that a Scottish Sentencing Council has a majority of judicial members. The proposed composition of the Sentencing Council in the consultation document is unacceptable. It proposes a Council with a minority of four judicial members with seven non-judicial members. That composition flies in the face of the statement in the consultation document which claims to recognise that for judges and others to have confidence in sentencing guidelines they should be drawn up by those with the appropriate expertise, skills and experience. Those with that experience are the judges who impose sentences as they have the detailed and up to date experience of sentencing, while remaining an independent body not representing any faction or single interest group.

Sentencing is a wholly judicial function. We therefore propose that the model in England and Wales is the appropriate model to adopt which has a majority of judicial members comprising eight judicial members representing every tier of the court system.

Suggested Membership of a Scottish Sentencing Council
The Sheriffs' Association considers that any membership of the Scottish Sentencing Council should reflect that the function of sentencing is wholly judicial. We propose that the Chairperson should be the Lord President, in his capacity as Lord Justice General, or the Lord Justice Clerk. There should be in addition one Inner House Judge with experience of sitting on sentencing appeals, and one Outer House Judge with experience of presiding over High Court trials and sentencing at first instance.

In addition the number of sheriffs on any Sentencing Council should be increased to reflect the position that the majority of sentencing in Scotland is carried out by sheriffs, both at summary and solemn level. We propose that there should be six sheriffs to reflect the number of sheriffdoms in Scotland, and the diversity of local communities within those sheriffdoms.

In addition there should be one Justice of the Peace or Stipendiary Magistrate.

We propose that the four non-judicial members are appointed conform to the English model. Those four non-judicial members would be individuals restricted to one each of those with experience of policing, criminal prosecution, criminal defence and the interests of the victims.

Question 11 – Do you agree that there should be a Scottish Government observer at meetings of the Council? If not, it would be helpful if you could provide your reason(s).

No. Such a presence would interfere with the requirement for total independence of the judiciary and of the sentencing process. Having a Government observer would give rise to the grounds of suspicion that the Sentencing Council was Government controlled or at least influenced. Any Sentencing Council has to be, and be seen to be, independent of Government.

Question 12 – Do you agree with the proposed appointments process? If not, how do you think the process could be modified to make it more effective?

No. We find the notion that the Lord President should consult with the Scottish Ministers before appointing judicial members objectionable.

The Lord President should be free to appoint whoever he wishes as judicial members without any political or other outside input.

The Sheriffs' Association agrees that it is appropriate that appointments be for a fixed term of five years to ensure independence and impartiality. This should not include the chairman who will be there ex officio.

We agree with the proposal that Ministers will appoint non-judicial members after consulting with the Lord President.

Question 13 – Do you agree with our proposals for how the Scottish Sentencing Council should be resourced and supported? If not, what alternative arrangement do you think would be more appropriate and/or effective?

We are not convinced that it is appropriate to give the financial and administrative responsibility for a Sentencing Council to the Scottish Court Service.

We are of the view that whatever organisation or model is adopted it should not be allowed to impinge on the current services provided by Scottish Court Service or the resources of that service.

We are particularly pleased to note that the consultation document states that the Sentencing Council should be set up in such a way as to ensure its independence from Government. It is therefore crucial in our view that the points we have already made which indicate a lack of distance from Government in the operation of the Council is recognised.

Question 14 – Do you agree with our proposals for a statutory statement on the purpose of sentencing? If not, how do you think these proposals could be modified to make them more effective?

No. Enshrining the purpose of sentencing in statute is unnecessary. The factors enumerated are all ones which every judge considers when imposing a sentence.

Question 15 – Do you agree with our proposals for a statutory statement on the principles of sentencing? If not, how do you think these proposals could be modified to make them more effective?

No. We regard the proposals for a set of statutory principles as unnecessary. What are described as statutory principles are the factors which all judges currently have regard to when selecting an appropriate sentence to impose. It is apparent to many judges when they impose a sentence in open court that not only the accused person but also the victims and indeed the accused's family understand the reasons for the sentence imposed.

We are concerned that the sub-headings of paragraph 4.5 do not specifically include the danger that an offender may present to the public but is relegated along with the general consideration of other factors. In our view the danger that an offender may present to the public is of paramount importance and together with the seriousness of the offence should be included at sub- head one.

The circumstances of the offender, their willingness to reform etc. as encompassed in a Social Enquiry Report are factors which are always considered by judges and have a major significance on the sentence which is ultimately imposed. It justifies a higher priority.

The desirability of consistency with sentencing levels is of lower priority to public danger or willingness to reform.

Question 16 – Do you agree with our proposals to state explicitly in statute that voluntary drunkenness or intoxication can never be considered a mitigating factor by the courts? If not, it would be helpful if you could provide your reason(s).

No. We consider it is unnecessary as there is already sufficient guidance from the Appeal Court.

December 2008

THE SHERIFFS’ ASSOCIATION

COMMENTS OF THE COUNCIL OF THE SHERIFFS’ ASSOCIATION TO THE JUSTICE 2 COMMITTEE ON THE CUSTODIAL SENTENCES AND WEAPONS (SCOTLAND) BILL

The Council of the Sheriffs’ Association does not consider that the provisions of this Bill will achieve the objective of delivering clarity and transparency in sentencing.

The Council recognises that the policy and policy objectives of the proposed legislation are for the Executive and Parliament and not for the Association. However, the Council has serious concerns about aspects of the proposals for the implementation of the policy and policy objectives.

The Council has no difficulty with the proposal that sentencing judges will have a role in setting the custody part of sentences of imprisonment ("custody and community sentences”) and recognises that this role may, to a certain extent, make the process more transparent. However, in relation to transparency, clarity and certainty the Council has concerns about the role of the Executive and the Parole Board in reviewing and altering the custody part, as well as determining the conditions of community licence. The Council also has concerns about the operation of the Bill's provisions in relation to the judicial decision-making process.

So far as the judicial decision-making process is concerned, we note that in deciding on the appropriate custody part the sentencing judge will not be permitted to take into account a factor that has customarily figured commonly in the judicial sentencing process. Clause 6 (5) requires the sentencing judge in specifying a custody part “to ignore any period of confinement which may be necessary for the protection of the public”. That appears to suggest that risk of re-offending is not be a factor that may be taken into consideration. Indeed the Explanatory Notes (Para.16) state in relation to subsection (5) – “The question of risk (or the protection of the public) will be assessed during the custody part and, if necessary, will be decided by the Parole Board.”

The Policy Memorandum states that “Public protection is of paramount importance” (Para.7). The protection of the public is a factor to which sentencing judges have customarily attributed high importance in determining the appropriate sentence to impose. The question arises of whether it is the intention of this proposed legislation to remove that factor from the judicial sentencing process.

It is not clear how the provision of clause 6(5) would affect the sentencing process so far as concerns the selection of a custodial sentence, rather than an alternative to custody, or as regards the setting of the overall “headline” sentence of “imprisonment”. Nor – in relation to the setting of the “custody part” - is it clear how the provision sits with the requirement in clause 6(2) to set the custody part as the appropriate period to satisfy the requirement of deterrence. Assuming this to be a reference to individual and not general deterrence (although this is not made clear), it might be thought that the sentencing aim of deterrence involves protection of the public (from further offending by the offender) and that the sentencing judge's assessment of the period of custody appropriate to deter the particular offender from re-offending may require to involve assessment of risk of re-offending as a factor in that calculation.

There may be a further difficulty for sentencing judges in calculating the appropriate sentence, created by clause 6(4)(c). If the intention is that the provisions of section 196(1) (a) and (b) of the 1995 Act, in conjunction with the case law from the case of *Du Plooy v HM Advocate,* should operate in such a way that any proposed increase in the custody part (in terms of clause 6(3)) is to be reduced in recognition of an early plea of guilty, does this mean that the sentencing judge in such circumstances is to give an offender the benefit of a double discount, with both the overall "headline" sentence and the custody part being reduced ?

The point about double application of the same factors would also seem to apply to the other matters relevant to the imposition of a higher custody part in terms of the proposed section 6(3) and (4). The seriousness of the crime and the accused's record are likely to be taken into account in setting the overall "headline" sentence as well as being matters relevant to specifying a custody part that is greater than half of the overall sentence.

As we have said, the policy of the proposed legislation is a matter for the Executive and not for this Association. In fact we have no difficulty with what is stated in the Policy Memorandum about creating a transparent sentencing regime that will improve public confidence and provide transparency and certainty for victims. However, we do not believe the proposed legislation will achieve that and we think it appropriate to offer comment because we believe this will create difficulties for the judiciary, as well perhaps as for victims and the public. Although the custody part of a sentence of imprisonment will be imposed and announced at the public sentencing hearing, it will not be possible to predict or state at that time what the duration of the period that will actually be spent in prison will turn out to be or what the conditions of licence during the community part of the sentence will be. The only part of the sentencing process that will be in public will be this hearing. This situation would not appear to be conducive to or consistent with a policy of clarity, certainty and transparency, and it will create a difficult situation for the sentencing judge at the time of sentencing.

Although there is no specific provision to this effect in the Bill the Policy Memorandum states that "the court will explain the consequences of the combined structure when imposing sentence." (Para. 11) Is not clear how that is to be achieved, in the absence of specific statutory provision. However, such an explanation may present a difficult task, so far as clarity and certainty are concerned.

An example of the sort of explanation that may require to be given follows. It supposes a sentence imposed by a sheriff on indictment in respect of a crime of assault to severe injury and permanent disfigurement in a case where a plea of guilty has been tendered at the First Diet.

> Sheriff – "The sentence of the court is a sentence of imprisonment - that is a custody and community sentence - of three years. The sentence takes account of your early plea of guilty, in accordance with the requirements of the law. It would otherwise have been a sentence of four years, but a discount of one quarter has been given.
>
> The custody part of your sentence will be one half - that is eighteen months - in accordance with the relevant statutory provision. I consider that to represent an appropriate period to satisfy the requirements for retribution and deterrence. In specifying the custody part I have been required by statute to ignore any period of confinement which may be necessary for the protection of the public, and I have not therefore taken into account the risk of you endangering members of the public by re-offending.
>
> I cannot tell you (or your victim or the public) at this stage whether you will in fact actually spend 18 months in prison. It is open to the government to release you from prison on curfew licence before you have served 18 months. It is also open to the government and the Parole Board to delay your release from prison beyond the expiry of 18 months. The period of imprisonment may be extended up to a maximum of 27 months if the government and the Parole Board consider that you would, if not confined, be likely to cause serious harm to members of the public.
>
> Part of your sentence will be served on community licence. In terms of the sentence I have imposed the period in the community on licence will be for one half of your sentence – namely 18 months. However, you will appreciate from what I have just said that it may turn out to be for more or less than that. I cannot at this stage tell you what the conditions of your licence will be when you are serving the community part of your sentence. These conditions will be set by the government or the Parole Board. If you breach the conditions of licence your licence may be revoked and you may be re-imprisoned, although you will not be further detained if the Parole Board determines that you would not, if not confined, be likely to cause serious harm to members of the public.
>
> This is the only public hearing at which your sentence will be announced. I hope the consequences of the combined structure of your sentence are clear to you."

As regards early release on Curfew Licence, we note that the Policy Memorandum makes clear (in Para.36) that the Bill re-enacts the arrangements introduced through the Management of Offenders etc (Scotland) Act 2005, known as Home Detention Curfew. These measures are seen as providing "a useful incentive in appropriate cases", but would be subject to strict controls, prescribed in the Bill, such as the exclusion of high risk offenders and sex offenders. Clarification of clause 36(1)(b) would be helpful, as regards its meaning and the Executive's intentions.

The Council would also wish to comment on the question of reports by sentencing judges, which has been raised in comments submitted by Sheriff Reith QC, who is a member of the Parole Board. The need for such reports is very limited at present, particularly so far as sheriffs are concerned. Reports are mainly required in cases where a custodial sentence of 4 years or more is imposed. (They are also required where a consecutive sentence is imposed which takes the accused into the category of a long-term prisoner or where a supervised release order or extended sentence takes the overall sentence into the 4 years or over category.) It is unclear what implications the proposed new statutory provisions may have for the provision of reports by sentencing judges. The Council would strongly oppose any suggestion that sentence reports should routinely require to be provided by sentencing sheriffs as a result of this proposed legislation. Any such requirement would add an unacceptable additional burden to the work of sheriffs and would be quite disproportionate to what would be likely to be the actual need for reports. We would expect that the number of cases in which the Executive thinks it appropriate to refer the sentence to the Parole Board would be only a small proportion of the total number of cases in which a custody and community sentence is imposed. In any case, as noted above, the matters to be taken into account by the sentencing judge in deciding whether it is appropriate to set a longer custody part are not to include any period which may be necessary for the protection of the public (clause 6 (5)). The test for consideration of denial of release at the end of a custody part that is less than the maximum will be the protection of the public (from serious harm). There should therefore be no need for any reports from sentencing judges, as the criterion for consideration of refusal of release at the end of the original custody part will be one that the sentencing court will not have considered (or indeed been permitted to consider).

The Council would also associate itself generally with the other comments submitted by Sheriff Reith, so far as relevant to the interests of sheriffs, including those relating to the abolition of the power of the court to decide to require an early-released re-offender to serve the unexpired portion of the sentence.

20 November 2006

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Law Society of Scotland

INTRODUCTION

The Law Society of Scotland (the "Society") welcomes the opportunity to comment upon the Criminal Justice and Licensing (Scotland) Bill as introduced in the Scottish Parliament on 5 March 2009 and has the following comments to make upon its terms.

GENERAL COMMENTS

The Society has responded to a number of Scottish Government consultation papers containing proposals which are now upon the face of the Bill.

In particular, the Society's Criminal Law Committee responded to the Scottish Government's consultation paper on sentencing guidelines and the Scottish Sentencing Council in November 2008, the Scottish Government's consultation paper upon a statutory basis for disclosure in criminal proceedings in Scotland which contained proposals for legislation to implement the recommendations in the Coulsfield report in January 2008 and the Scottish Executive's consultation paper on proposals to amend the law on the compellability of spousal witnesses in September 2006. The Society's Criminal Law Committee also responded to the Scottish Law Commission's discussion paper on Crown appeals in May 2008.

The Society's Licensing Law Sub-Committee would wish to respond to Parts 8, 9 and 10 of the Bill under separate cover.

Reconsolidation of the Criminal Procedure (Scotland) Act 1995

The Society is of the view that the Criminal Justice and Licensing (Scotland) Bill has been presented as a miscellaneous provisions type Bill with a number of wide-ranging proposals. The Criminal Procedure (Scotland) Act 1995 has been amended on a number of occasions since 1995. A reconsolidation to make the law accessible and easier to understand is required.

SPECIFIC COMMENTS

Part 1 Sentencing

Section 1 Purposes and Principles of Sentencing

The Committee agrees with the purposes and principles of sentencing which more or less reflect the terms of Section 142(1) of the Criminal Justice Act 2003 (England) but suggests that the purpose as outlined at Section 1(1)(b) should be the deterrence of crime as opposed to the reduction of crime (including its reduction by deterrence). The Society also believes that one of the main principles of sentencing is to serve the interests of justice and that should be reflected on the Bill. The Society agrees with the proposals for a set of Statutory Principles in relation to sentencing on the basis that judicial independence would not be compromised in applying these principles.

Section 3 and Schedule 1 The Scottish Sentencing Council

The Society can see merit in a transparent arrangement for sentencing. However, any Sentencing Council should operate in a way which does not detract from judicial independence.

Section 4 The Council's Objectives

Consistency in sentencing practice should be distinguished from uniformity so that judicial independence remains. What has to be taken into account is that different courts throughout the country will sentence according to local issues. With particular reference to Section 4, the Society notes Section 4(c) which will help to ensure that non-lawyers in the sentencing process, i.e. the accused, the complainer and the public will have an enhanced understanding of sentencing practice and policy.

It is unclear from the Bill if a Scottish Sentencing Council would function in respect of reserved offences under the Scotland Act 1998 e.g. terrorism, firearms and drugs, company law, intellectual property, insolvency and corporate homicide offences. Accordingly, will the Council propose guidelines with regard to reserved offences as inconsistencies will no doubt arise in sentencing practice with regard to these offences in Scotland as opposed to elsewhere within the United Kingdom?

Section 5 Sentencing Guidelines

With particular reference to Section 5(5), the Society is concerned about the assessment of the costs and benefits under Sections 5(5)(a) and (b). This seems to predicate sentencing on financial issues rather than fulfilment of the sentencing purposes under Section 1. The Society is concerned if sentencing guidelines are to be produced by the Sentencing Council on the basis of a perceived need to reduce the prison population in Scotland.

The Society also notes the position in England and Wales and particularly the findings of the Sentencing Commission Working Group chaired by Lord Justice Gage which recommended the placing of a duty on the Sentencing Guidelines Council to estimate the effect of guidelines in terms of the prison population or other correctional resources. Lord Justice Gage also recommended that the Council provide an overview of all the factors that impact on the prison population and alert the UK Government to significant developments and to oblige the UK Government, when introducing a Bill, or launching a new policy, to invite the Sentencing Guidelines Council to assess its impact on correctional resources. The Society believes that Scottish Ministers should be under an analogous duty subject however to the Scottish Sentencing Council also taking into account the application of the sentencing purposes.

Section 6 Procedure for Publication and Review of Sentencing Guidelines

The Society does not agree that the level on consultation on draft sentencing guidelines is correct. Section 6(1)(b) should include the Lord Justice General. The Society agrees that the Council should have a discretion to consult with such persons or bodies as it considers necessary as stated in Section 6(1)(b)(iii).

Section 7 The Effect Of Sentencing Guidelines

The Society notes that, in terms of Section 7(2), reasons must be stated by the court for a departure from the guidelines. The Society is concerned that this would result in a ground of appeal against sentence on the basis of such a departure.

Section 8 Ministers' Power to Request that Guidelines be Published or Reviewed

The Society welcomes the provisions at Section 8 whereby Scottish Ministers may request that the Council consider publishing or reviewing sentencing guidelines on any matter.

Section 9 High Court's Power to Request a Review of Guidelines

The Society believes that it would be more appropriate for the Lord Justice General to refer sentencing guidelines to the Council than the High Court of Justiciary. It should be a matter for the Lord Justice General rather than individual courts as to whether sentencing guidelines should be referred to the Council.

Section 10 Scottish Courts Service to Provide Sentencing Information to the Council

The Society agreed that the Scottish Courts Service must provide the Council with sentencing information and welcomes this provision.

Section 11 The Council's Power to Provide Information, Advice, etc

The Society welcomes this provision which will allow the Council to provide information and advice about sentencing matters.

Section 12 Business Plan

The Society is of the view that, in preparing a business plan, the Council must also consult with the Lord Justice General.

Section 13 Annual Report

At Section 13(5) the Society is of the view that a time limit should be prescribed within which Scottish Ministers must lay before the Scottish Parliament each report submitted to them by the Council.

Section 14 Community Payback Orders

The Society notes the policy intention of the Bill to introduce a new style easy to understand "Community Payback Order" to replace what is considered an unnecessarily complex range of sentencing options currently available which are not readily understood by the public. The Society highlights, however, that these provisions are likely to be resource intensive and notes at paragraph 698 of the Financial Memorandum that additional costs which will be incurred by local authorities will be reimbursed by the Scottish Administration through ring-fenced funding arrangements for criminal justice social work. It is important that local authority social work departments are geared for the implementation of this section if this proposal is to be successful.

Section 24 Voluntary Intoxication by Alcohol: Effect in Sentencing

The Society refers to the case of *Brennan v HMA 1977 JC38* where Lord Justice General Emslie stated at Page 46, "In the law of Scotland, a person who voluntarily and deliberately consumes known intoxicants, including drink or drugs, of whatever quantity, for their intoxicating effects, whether these effects are fully foreseen or not, cannot rely on the resulting intoxication as the foundation of a special defence of insanity at the time nor, indeed can he plead diminished responsibility".

In the law of Scotland, a plea in mitigation is a speech made by the accused (or more commonly his legal representative) at the sentencing stage presenting the arguments for a lenient sentence. Although Lord Justice General Emslie was referring to defences, the Society is of the view that the statement would apply to mitigation but not to a mere *explanation* of the commission of the offence. With particular reference to Section 1(4)(e) of the Bill, the courts must have regard to, "the offender's willingness to reform". The court cannot take voluntary consumption into account but the court will need to know this information to conform with Section 1. This provision does not include a reference to drugs; both alcohol and drugs should be considered.

Part 2 – Criminal Law

Sections 25-28 – Serious Organised Crime

The Society welcomes appropriate provisions put in place in order to tackle those involved in serious organised crime.

Section 28 – Failure to Report Serious Organised Crime

The Society refers to the judgement in *Niemietz v Germany 1992 ECHR application number 13710/88* where the court held that there had been a breach of Article 8 of the European Convention on Human Rights, Article 8 states "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and as necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In this case, which involved the unlawful search of a lawyer's office in Germany to find documents revealing the identity of a supposed associate of the lawyer, the court held that the search was a violation of Article 8 and commented that the notion of "private life" should not be taken to exclude activities of a professional or business nature. The Society questions whether the provisions of Section 28 comply with Article 8.

Section 29 – Articles Banned in Prison

The Society notes the policy objective of Section 29 is to provide an effective deterrent against the use (often for illegal purposes) of personal communication devices within prison.

With particular reference to the definition of "personal communication device", this includes a mobile telephone or any other portable electronic device that is capable of transmitting or receiving a communication of any kind. The Society notes the provisions as contained in the Prisons and Young Offenders Institutions (Scotland) Rules 2006 at Part 8 entitled "Communications". At paragraph 59(1) any letter or package, other than one to which Rule 57 or 58 applies (correspondence to and from the court and correspondence to and from legal advisers) which a prisoner wishes to send or which is addressed to the prisoner may be opened by an officer. The Society highlights the potential for communications by email from a desktop computer in for example the prison library which is not included in the definition of "personal communication device".

Section 30 – Sale and Hire of Crossbows to Persons Under 18

The Society notes that this provision will allow a test purchasing scheme with regard to age restrictions on the sale of crossbows. The Society notes that there appears to be no similar provision with regard to the sale and hire of bow and arrow.

Section 34 Extreme Pornography

The Society supported the policy objective of seeking to help ensure that the public are protected from exposure to extreme pornography that depicts horrific images of violence in its response to the Home Office and Scottish Executive joint consultation in 2005.

At that time, the Society took the view that, if the policy intention is to free the public from this material, then the law must target producers *and* suppliers. The Society notes that the intent is to discourage interest in extreme pornographic material by breaking the demand/supply cycle by creating the new offence of possession of extreme pornography. This section may achieve that objective.

The Society also notes that similar provision is found in Section 63 of the Criminal Justice and Immigration Act 2008 which applies to England, Wales and Northern Ireland.

The Society further notes that the provisions here will cover all obscene pornographic images, but would question the possibility of the unintended effects of these provisions in that it may be argued that certain works of art may depict aspects of what the section describes as either obscene, pornographic or extreme. Further clarification of the extent to which the definition will operate is needed.

PART 3 – CRIMINAL PROCEDURE

Section 38 – Prosecution of Children

The Society notes that Section 38 provides that a child under the age of 12 “may not be prosecuted for an offence” and there is no proposal to raise the age of criminal responsibility. The United Nations Convention on the Rights of the Child requires that an age of criminal responsibility should be identified, it does not specify what that age should be. It should be noted that the UN Committee on the Rights of the Child expanded upon this in April 2007 and that, whilst noting that there was a wide range of ages of criminal responsibility amongst states parties, this Committee made its position clear when it described them as ranging ‘from a very low level of age 7 or 8 to the commendably high level of 14 or 16’ and found that setting the age below 12 ‘not to be internationally acceptable’.

The Society further notes that in 2000, an advisory group to the Scottish Parliament recommended that the age of responsibility be raised to 12. The then Scottish Executive referred the matter to the Scottish Law Commission who recommended that any rule on the age at which children cannot be found guilty of an offence should be abolished, albeit it also recommended that it should no longer be competent to prosecute a child below the age of 12. This finding seems to be set against the background of the welfare based Children's Hearing system but it should be noted that the UN Convention mandates providing for an age of criminal responsibility below which no child can be guilty of an offence. It does not allow for the abolition of the age of criminal responsibility due to a welfare based system being in place.

The Society welcomes the policy intention behind Section 38 that it should no longer be competent to prosecute a child below the age of 12, nor to prosecute a person for an offence committed while he or she was below the age of 12. The interests of the child should be paramount and the child's welfare must be the focus of attention even in the difficult circumstances of "offending" behaviour. The Society suggests that it would be appropriate to raise the age of criminal responsibility to 12 and to create a new, non-offence ground of referral to a Children's Hearing along the lines of "the child has behaved in such a way as to cause (or risk causing) harm to himself/herself or another person or damage to property". The Society suggests that social work intervention would then be possible in respect of the child. The benefits of this proposal would be that the child would not carry the taint of criminality for the rest of his or her life and that he or she would receive early intervention.

Section 46 – Additional Charge where Bail etc. breached

The Society suggests that the accused be given more notice of an additional charge. Section 27 of the 1995 Act should be amended to allow an additional charge to be added to the complaint, either at the intermediate diet or at any time before the trial on cause shown.

Section 54 – Submissions as to the sufficiency of evidence

The Society welcomes the introduction of a statutory replacement for the Common Law Submission at the close of all criminal defence evidence as reflected in Section 97A of the Bill at Section 54.

Whilst the Society is of the view that finality and certainty in criminal proceedings are important, nevertheless the arguments for crown rights of appeal are substantial and justify a change in the current practice subject always to sufficient safeguards being in place. With reference to Section 107B, (Procurator's Right of Appeal: Decisions of Admissibility of Evidence) the Society welcomes sub-section 4 which ensures that Procurators Fiscal do not make routine appeals against decisions on admissibility of evidence where the court has initially made a finding that the evidence the prosecution seeks to lead is inadmissible. The Society however highlights the certain procedural difficulty in that the court, in determining whether leave to appeal should be granted, is required to take into account the effect that the finding has on the strength of the Procurator's case.

The Society would also highlight the issues surrounding time limits where an accused remains in custody.

Section 58 – Retention of samples etc.

The Society welcomes the proposal as set out in Section 58 of the Bill which amends Section 18A of the 1995 Act to authorise the retention of fingerprints and any other forensic data already taken from persons proceeded against but not convicted of a serious sexual or violent offence for a three year period.

The Society's view is that the acquisition and retention regime for fingerprints should reflect that of DNA given the primary purpose of both DNA and fingerprints is the same i.e. to assist the police with the investigation of an offence by identifying individuals who are connected with criminal enquiries.

The decision of the European Court of Human Rights on the Marper case is relevant. The Grand Chamber of the ECHR found that the retention of DNA profiles, cellular samples and fingerprints was disproportionate and therefore unjustified under Article of the European Convention of Human Rights and that this decision would require new legislative measures to meet a requirement while the Convention. Whilst the position in England and Wales under Section 64(1)(a) of the Police and Criminal Evidence Act 1984 allows the police to hold fingerprints and DNA samples of persons investigated for a crime for an indefinite period, contrary to the three year rule in Scotland, the Society is of the view that Section 58 has to be properly considered against the terms of the Marper judgment.

Section 59 – Retention of samples etc from children referred to Children's Hearings

The Society is of the view that there should be no change in the present arrangements, on the basis that it is not appropriate as a matter of principle to take and retain DNA and fingerprints from children who are dealt with by Children's Hearings as opposed to the criminal courts.

The Society notes from the terms of Section 18B(6) that a relevant offence is such relevant sexual offence or relevant violent offence as the Scottish Ministers may by order made by statutory instrument prescribe and is concerned that such offences are to be prescribed in secondary legislation albeit under affirmative procedure rather than placed on the face of the Bill.

Section 61 Referrals from Scottish Criminal Cases Review Commission: Grounds for Appeal

The Society is concerned that these provisions with limited appeal following upon a reference made by the Commission to be based only on the Statement of Reasons given in the referral although it is noted that the court can allow other grounds to be argued.

Section 62 Witness Statements: Use during trial

The Society reiterates its concerns as set out in its response to the Scottish Government consultation paper entitled "A Statutory Basis for Disclosure in Criminal Proceedings in Scotland Proposals for Legislation to Implement the Recommendation in the Coulsfield Report". The Society's Criminal Law Committee disagreed with the proposal that witnesses should be able to refer to copies of their statements when giving evidence. Differences in the practices and procedures for taking of statements are such that there is no guarantee that consideration of such statements as are noted in Scotland prior to the giving of evidence would lead to more accurate or reliable information being given. Indeed, the Society highlights that material discrepancies between statements given to the police and evidence given in court at a later date can call into question the credibility and reliability of a witness.

Part 4 Evidence

Section 63 - Spouse or Civil Partner or Accused Compellable Witness

The Society does not agree with these proposals to amend the law on compellability of spousal witnesses. Section 264 of the Criminal Procedure (Scotland) Act 1995 should not be repealed because this would ignore the long-established purpose behind the rule on compellability of spousal witnesses as established in common and statute law, which attaches to the status of marriage and the risk of perjury by the spouse as a compellable witness. It is the common experience of practitioners who serve on the Society's Criminal Law Committee that spouses or partners rarely give evidence against their partner nor speak out even when compelled to do so by law.

Were the law with regard to compellability of spousal witnesses to be changed, then perhaps a fairer approach would be to remove the right not to give evidence against a spouse or civil partner where the offence is one against a child. It should be noted that this would equate with the statutory position in England and Wales in terms of Section 80 of the Police and Criminal Evidence Act 1984 where the spouse of an accused in England and Wales is a compellable witness for the prosecution where the offence charged involves:

1. Personal violence against the spouse or against a child under the age of 16

2. A sexual offence against a child under 16 or;

3. Attempting or conspiring to commit or aiding and abetting or inciting the commission of an offence with regard to types of offences set out above.

Section 66 Witness Anonymity Orders

The Society notes the policy intention of witness anonymity orders to permit witnesses to give evidence in court using measures designed to preserve their anonymity. It further notes that legislation was introduced in England and Wales in July 2008 following upon the decision of the House of Lords in the case of R V Davies 2008 UK HL36. With regard to a new Section 271(N)(4)(c) inserted into the Criminal Procedure (Scotland) Act 1995 by Section 66 of the Bill, the Society highlights a practical issue. With regard to courts making orders requiring special measures to be taken in relation to a witness in criminal proceedings in certain cases, it may be necessary for the defence to ask a question which may result in the witness's identity becoming known. How will Section 66 operate in compliance with Article 6 of the ECHR to ensure that the accused receives a fair trial?

Part 5 Criminal Justice

Section 68 – Upper Age Limit for Jurors

The Society has no objection in principle to allowing persons aged 65 – 70 to serve on juries. It is important that the age balance of jury composition is considered carefully.

Section 69 Persons Excusable From Jury Service

The Society agrees with the proposal to reduce the entitlement to excusal as a right from five years to two years for those jurors who attended court but who are not selected by ballot to sit on a jury.

The Society notes with interest that the Scottish Government has commissioned an independent review under Edward Bowen QC, Sheriff Principal for the Sheriffdom of Lothian & Borders, for the more efficient and cost-effective operation of Sheriff as Jury Courts in the interests of justice and to reduce inconvenience and stress to witnesses and victims.

Section 81 – Public Defence Solicitors

The Society notes that Section 81 of the Bill is in effect a tidying up measure to remove reference to a feasibility study into the Public Defender Solicitors Office that must be laid before the Scottish Parliament before 31 December 2008. The study was completed and submitted to the Scottish Parliament in December 2008. Under Section 81(2), the Society notes that Section 73 of the Criminal Justice (Scotland) Act 2003 (which requires Scottish Ministers to lay a report on the feasibility of the PDSO before Parliament before 31 December 2008) will be repealed.

The Society believes that in criminal legal assistance funding should be invested in the legal aid system in order to ensure access to justice for those who cannot afford their own defence. The Society is of the view that Scottish solicitors provide an independent service which is good value for the taxpayer whether they are employed in the PDSO or work in the private sector.

Part 6 – Disclosure

The Society welcomes the Scottish Government's initiative to put in place a statutory basis for disclosure with regard to criminal proceedings in Scotland following upon the decisions in Holland v HMA 2005 SCCR417 and Sinclair v HMA 2005 SCCR446 and Gair v HMA 2006 SCCR419. The Society's position is that a full and fair system of disclosure to the accused is an essential element of a fair trial and without such a system there can be no guarantee of an accused person receiving a fair trial.

The Society would, however, highlight a concern with regard to Section 94(2) (entitled Defence statements: solemn proceedings) which inserts a new Section 70A into the Criminal Procedure (Scotland) Act 1995 entitled "Defence statements". The Society notes that new Section 70A(2) provides that an accused must lodge a defence statement at least fourteen days before the first diet and at least fourteen days before the preliminary hearing. It is the Society's view that the lodging of defence statements are unhelpful. The Society would refer to paragraph 7.7 to 7.12 of Lord Coulsfield's report as follows:-

The Role of the Defence

7.7 A further important question is how to allow the Defence to convey information about their thinking to the Prosecutor, in order to inform and stimulate decisions on disclosure which accurate reflect the intention of the Defence. In most cases it is likely to be obvious to the Crown whether any material they hold is potentially exculpatory, but sometimes there will be unexpected lines of defence which the Prosecutor could not reasonably foresee, and in these cases advance notice by the Defence will put the Prosecutor in a better position to judge what material needs to be disclosed. There is no doubt that it was be to the advantage of the Defence to provide such a statement if there is a particularly positive line of defence and the Defence are looking for material to support it. Any system of disclosure therefore needs to enable and encourage the Defence to make an advance statement of their position whenever they perceive that this would help to secure fuller relevant disclosure and a fair trial for their client.

7.8 The statutory system in England and Wales goes further than this. Under the CPIA, the provision of a defence statement in response to the initial disclosure is mandatory in all Crown Court cases, and the statement is required to specify the respects in which the Defence takes issue with the Crown case. As I understand the position, that requirement was intended not only to assist in the process of disclosure, but also to help in Case Management. However, discussion with practitioners has indicated that in the majority of cases defence *statements are late, unspecific and unhelpful. It has been argued to me that that is not a reason for not insisting on the provision of defence statements, and that the obligation to provide them could be more rigorously enforced. Experience suggests, however, that it would be difficult to enforce a requirement without either causing delay, or prejudicing a legitimate defence, or both. In Scotland there are well established rules defining the cases in which notice of a special defence has to be given. If it is necessary for the Defence to apply to the Court for additional disclosure, as discussed later, it will be necessary for them to explain the reasons for the request. I have not been convinced that a general requirement for a defence statement would give any significant additional benefit, to justify the additional work and cost which would be generated.*

Recommendations

7.9 A system of schedules of material and solemn cases should be introduced, along with lines of the system in England and Wales.

7.10 The legislation or the statutory Code of Practice should explicitly place on the Crown a responsibility to review disclosure decisions in the light of any new information provided by the Defence.

7.11 The Code of Practice should set out a standard recommended form for a defence statement for this purpose.

7.12 Again, I make further recommendation about police training and other matters necessary for the implementation of the duty of disclosure in Part III.

The Society believes that the accused's ability to lodge a defence statement depends on proper disclosure by the Crown in the first place. It is the experience of practitioners of the Society's Criminal Law Committee that full disclosure has sometimes not been obtained even after First Diet or Preliminary Hearings. It will be incumbent upon the Crown to discharge its duty to disclose information in terms of Section 89 of the Bill in order to allow Section 70A to function properly.

The Society notes that the prosecutor's duty to disclose is to remain upon the face of this Bill as contained in Sections 89 to 93 of the Bill yet provision with regard to defence statements is to be contained in the Criminal Procedure (Scotland) Act 1995.

The Society notes the terms of Section 70A(6)(a) where the definition of "defence statement" means a statement setting out the "nature of the accused's defence, including any particular defences on which the accused intends to rely". The Society believes that ordinary defences such as mistaken identity etc are clearly well defined and in appropriate cases where notice is felt to be helpful to the Court or the Crown, this is covered by the rules of the current special defences as set out in Section 78 of the 1995 Act.

With particular reference to Section 70A(6)(b) the defence statement requires to set out “any matters of fact on which the accused takes issue with the prosecution the reason for doing so”. The Society highlights the practical difficulty in that the defence will not know which facts the prosecutor intends to rely upon. The Society believes that sub-paragraphs (c)(d)(e) are already well covered by Lord Coulsfield’s observations at paragraph 7.7 of his Report about the necessity of the Defence applying to the Court for additional disclosure which would require reasons for the request to be given. The Society believes that such procedure could have been enacted by way of Minute of procedure without any undue disruption.

In all the circumstances, the Society believes that there is no reason to depart from the terms of Lord Coulsfield’s recommendations.

The Society notes that there is no sanction contained within the new Section 70A for non-compliance.

Part 7 – Mental Disorder and Unfitness for Trial

The Society welcomes the reformulation in Part 7 of the Bill of the Test of Insanity. It believes, however, that a further volitional element should be included. The Society previously commented in its April 2003 response to the Scottish Law Commission discussion paper entitled “Insanity and Diminished Responsibility”, that

To frame the defence of mental disorder solely on a cognitive test rooted in the accused’s appreciation of the effects of his or her conduct at the time of the offence does not adequately reflect the variety of ways in which a person’s mental disorder might impact on his or her actions…. Adding the volitional test to the cognitive test would …. more closely reflect the established common law of Scotland and would more appropriately define the situations in which a person should be relieved of criminal responsibility as a result of the effects of mental disorder.

For example, a person who kills his or her children while suffering from a depressive illness may be able to appreciate what he/she is doing and understand that it is wrong in the eyes of the law, but nonetheless be driven to commit the crime by his or her illness. In such a case his or her illness overcomes his or her volition. The Society notes that the Bill does not allow a special defence in these circumstances.

FINAL COMMENTS

The Society trusts that these comments will assist the Scottish Parliament’s Justice Committee at Stage 1 of the Bill.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Law Society of Scotland

PART 8 – LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982

Introduction

The Law Society of Scotland ('the Society') welcomes the opportunity to comment upon Parts 8 and 9 of the Criminal Justice and Licensing (Scotland) Bill as introduced in the Scottish Parliament on 5 March 2009 and has the following comments to make upon its terms.

General Comments

The Society has submitted a response to Parts 1 to 7 inclusive of the Bill under separate cover.

The Society notes that Section 129 of the Bill (Sale of Alcohol to Persons Under 21 etc.) and Section 140 of the Bill (Licensed Premises: Social Responsibility Levy) are to be removed from the Bill at Stage 2.

The Society further notes that these provisions may be introduced in a Health Bill in future and would welcome the opportunity to comment at a later stage.

With regard to part 9 of the Bill the Society is concerned that the Bill does not seek to repeal the appeal provisions contained within Sections 131 and 132 of the Licensing (Scotland) Act 2005 and the Act of Sederunt (Summary Applications and Appeals etc Rules) Amendment (Licensing (Scotland) Act 2005) 2008 where there has been a departure from appeal by way of summary application to the sheriff to one where appeal is made by application by way of stated case. It is the Society's view that the new procedure is both cumbersome and time consuming. The Society is of the view that appeals against decisions of the Licensing Board should revert to summary application procedure. The Society understands that this view is supported by other stakeholders.

The Society is further concerned that that the Bill does not amend the 2005 act by the re-introduction of the site only application procedure under Section 26 (2) of the Licensing (Scotland) Act 1976. In terms of section 26 (2), an applicant could make an application to the board having obtained only planning permission. The difficulty now is that applicants require to incur the expense of an operating plan, a layout plan and all statutory consents before the Board can consider the application for premises licence. The current provisions discourages applicants from applying for a premises licence where one may well be granted without objection.

The Society's Licensing Law Sub-Committee responded to the Scottish Government consultation entitled 'Changing Scotland's Relationship with Alcohol: a Discussion Paper on our Strategic Approach'. It would appear to the Society that the main aspects of that consultation paper may be carried forward in any separate Health Bill. The Society's Licensing Law Sub-Committee stated at that time that it would welcome any initiative brought forward to improve the nation's health and to encourage both the sensible retailing and consumption of alcohol. The Society's Licensing Law Sub-Committee notes that Parts 8 and 9 seek to amend both the Civic Government (Scotland) Act 1982 and the Licensing (Scotland) Act 2005 respectively and would wish to make specific comment upon its terms.

SPECIFIC COMMENTS

PART 8 – LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982

Section 121 – Conditions to which Licences under 1982 Act are to be subject

The Society notes that this Section inserts new Sections 3A, Mandatory Licence Conditions and 3B, Standard Licence Conditions into Section 3 of the 1982 Act. The Society notes that the existing 'deemed grant' provisions whereby a licence is deemed to have been granted where the licensing authority has failed to reach a final decision on a grant application before the expiry of the statutory period is to be retained. The Society notes that thereafter, Scottish Ministers may prescribe mandatory licence conditions by order and licensing authorities may determine conditions to which licence is granted by them are to be subject to 'standard conditions'. The Society also notes that licensing authorities are required to publish such standard conditions proposed by them. The Society is of the view, therefore, that a transitional period will be required in order to allow licensing authorities the time to draft, consider, publish and determine standard conditions for all licence types.

Section 122 – Licensing: Powers of Entry and Inspection for Civilian Employees

The Society notes that the Bill seeks to extend the rights of entry and inspection under the 1982 Act to include civilian staff employed by the police under the provisions of Section 9 of the Police (Scotland) Act 1967. The Society would consider this to be a helpful measure with regard to police allocation of resources, but has no specific comment.

Section 123 – Licensing of Metal Dealers

The Society notes that the Bill seeks to replace the mandatory licensing scheme for metal dealers with an optional scheme allowing it to the discretion of local authorities to determine whether or not licences are required in their areas. This requires a resolution of the licensing authority to be of effect. The Society would anticipate the retrospective de-licensing of metal dealers in areas where such a resolution is not made and accordingly a transitional period would be required for those areas wishing to retain the licensing of metal dealers.

Section 124 – Licensing of Taxis and Private Hire Cars

The Society notes that Section 124 (2) amends Section 13 of the Civic Government (Scotland) Act 1982 to require that anyone applying for a taxi or private hire car driver's licence now has to have held a full driving licence for the period of 12 months immediately prior to the date of application, as opposed to having held it during any continuous period of 12 months prior to the date of his application (Section 13(3) of the 1982). The Society is unsure as regards the policy intent of this provision as it may unduly penalise applicants who have not held a full driving licence for the period of 12 months immediately prior to the date of application.

Section 13 (3) of the 1982 Act ensures that an individual has at least 12 months' driving experience before being able to apply for a taxi or private hire car driver's licence and was not enacted to "double penalise" an individual who had already been disqualified by the court from holding or obtaining a driving licence. By way of practical example, under the current provisions, a taxi driver disqualified for six months on 1st January 2009 under the "totting up" provisions would be in a position to make application on or after 1st July 2009. While it is clearly a matter for the licensing authority as to whether his taxi driver's licence is granted, under the new provisions, he would have to wait until 1st July 2010 before he could make application. In effect, he cannot earn a living as a taxi driver for 18 months following upon being disqualified by the court from holding or obtaining a driving licence for only 6 months. Should this provision be taken forward, the Society believes that licensing authorities should have discretion to grant on cause shown by the applicant.

Section 124(3) amends Section 17 of the 1982 Act by changing the requirements relative to the review of taxi fares. The Society notes that the review at present is to be commenced within 18 months from the date when the previous fare tariff came into effect and that the outcome and new fares fixed can come into effect well after the 18 month period. The Society notes however that this new provision requires that the process be completed within the 18 month period and would highlight the practical issue of this 18 month period requiring to take into account the consultation process which can take a considerable period of time.

The Society further notes that Section 124(5) inserts a new Section 18A into the 1982 Act entitled Publication and Coming into Effect of Taxi Fares. The Society notes that in terms of the new Section 18(A)(3) the licensing authority must give notice of the scales by advertisement in a newspaper circulating in its area and specify in that advertisement the date on which the scales are to come into effect. The Society would consider requirement to publish a newspaper somewhat anomalous and expensive given the modern approach of the Licensing (Scotland) Act 2005 which permits advertising via a website.

Section 125 – Licensing of Market Operators

The Society notes that this section amends Section 40 of the 1982 Act by repealing the exemption from the requirement to hold a market operator's licence for functions held by charitable, religious, youth, recreational, community, political or similar organisations. The Society further notes that an exemption is still in place for markets held only for the sale of livestock, fodder or grain.

It is unclear as to the policy intent of this particular provision as charitable and community organisations in future will require to consider the cost of obtaining a market operator's licence and associated costs and that this may well prove to be prohibitive and consequently such organisations may consider it unviable to hold such functions. The Society questions whether this amendment is in the public interest.

Section 126 – Licensing of Public Entertainment

The Society notes that in terms of the current provisions as contained in Section 41 of the 1982 Act, only those forms of entertainment for which a charge is made require a Public Entertainment Licence and this amendment would require the licensing of events by public entertainment for such events which are free to the public. The Society notes that this should allow licensing authorities to control large scale public entertainments which are free.

With reference to the comments at Section 125 above, the cost of applying and obtaining a licence would no doubt prove prohibitive for such community organisations which have previously held local events providing forms of entertainment for free. While the Society recognises that certain large scale free events may sensibly require to be licensed, it questions the need to license small scale free community based events.

Section 127 – Licensing of Late Night Catering

The Society notes that this amends Section 42 of the 1982 Act by substituting the word 'food' for 'meals or refreshment'. This means that premises providing meals and refreshments between 11pm and 5am which at present require to be licensed will now require to be licensed if they sell food.

It should be noted that the definition of food as defined in Section 1 of the Food Safety Act 1990 includes both drink and chewing gum. The Society is of the view that Section 42 of the 1982 Act was enacted in order to regulate the sale of meals or refreshments from take-away establishments located in the main in city centres and in residential areas with potential for disturbance. The Society would therefore question why late night grocers, 24-hour stores and motorway service stations etc should be brought within the scope of these provisions and questions whether the regulation and cost is proportionate to the perceived benefit.

Section 128 – Applications for Licences

The Society notes that a number of provisions of Schedule 1 to the 1982 Act are to be amended in terms of Section 128 of the Bill which include extending the time allowed for making representations or any application for the grant or renewal of a licence from 21 days to 28 days, increasing the period of notice which licensing authorities must give for attendance at the hearing from seven days to 14 days and allowing licensing authorities to consider licence renewal applications received after the expiry date as renewals rather than applications for a new licence for up to 28 days after the expiry of the previous licence.

With particular reference to Section 128(2)(e) which inserts paragraph 5A into Schedule 1 of the 1982 Act, the Society is concerned that a licensing authority may, for the purposes of sub-paragraph 5 of the 1982 Act (grant or renewal of a licence) deem an application for renewal of a licence made up to 28 days after the expiry of the licence to be an application made before the expiry. Whilst this provision appears to save an applicant from his or her own inadvertent failing to renew timeously, there are practical difficulties. The date of expiry of a licence is crucial both as regards to whether an offence has been committed and also, in taxi licensing terms, having regard to the power given to licensing authorities to limit the number of taxi licences for their area, whether one of the limited number of taxi licences is now available. The Society would further highlight that there is no test for ‘on good cause being shown’ nor does there require to be a hearing of such good cause.

PART 9 – ALCOHOL LICENSING

Section 130 – Premises Licence Applications: Notification Requirements

The Society welcomes the amendment to Section 21 of the 2005 Act whereby Licensing Boards no longer require, when notifying the range of interested parties as required by the 2005 Act to include with that notification a copy of the application, except in respect of the Chief Constable who requires to be provided with a copy of the application. Whilst it is noted that the provision of a copy of the application to any other person to whom notice is given is discretionary, the Society would suggest that such person to whom notice of an application has been given can of course inspect the application at a local authority office during normal working hours.

Section 131 – Premises Licence Applications: Modification of Layout Plans

The Society notes that this amendment to Section 23 of the 2005 Act would be that an application must now be granted if the applicant accepts a modification to either the operating plan or the layout plan (or both). From a practical point of view, an amended layout plan would require to be lodged in order to reflect the modification and proceedings would require to be continued to allow this to take place. It should be noted that such a modification may have a consequential effect upon capacity which requires to be included within the operating plan and also the amended plan might require local authority consent, from planning, building control and environmental health. It may also require listed building consent. The Society would highlight potential difficulties in Licensing Boards either proposing modifications to layout plans which had received the statutory consents which would then no longer be capable of obtaining such consent or, conversely, Licensing Board refusing applications accompanied by layout plans which had received the appropriate statutory consents. The Society would suggest that this proposal requires further clarification.

Section 132 – Premises Licence Applications: Anti-Social Behaviour Reports

The Society notes that Section 132 inserts a new section 2A into Section 22 of the 2005 Act by allowing the Chief Constable to make representations concerning a premises licence application by providing the Board with an anti-social behaviour report. The Society has no particular comment with regard to this provision as it is a matter for the appropriate Chief Constable to make such a representation. The Society also notes that the Board itself can request such a report from the appropriate Chief Constable in terms of the new Section 24A of the Act, and has no comment to make with regard to this provision.

Section 133 – Sale of Alcohol to Trade

The Society welcomes this provision which corrects an unintended consequence of the 2005 Act, and will now allow the trade to purchase alcohol from a premises holding a premises or occasional licence.

Section 134 – Occasional Licences

The Society welcomes this provision which will enable the fast tracking of some occasional licences where there is very limited notice of a need for such a licence, e.g. a funeral but would question why similar provision has not also been applied to extended hours applications.

Section 135 – Extended Hours Application: variation of conditions

The Society welcomes this provision. It notes that there does not appear to be a change to the position as set out in the Licensing (Scotland) Act 1976 with regard to Licensing Boards having the flexibility to apply additional conditions to granting extended hours applications.

Section 136 – Personal Licences

The Society welcomes the provision to amend Section 74 to allow a Licensing Board to refuse to process or issue a personal licence if the applicant already holds a valid personal licence and the creation of a new offence to apply for a second personal licence under the 2005 Act if the applicant already holds a personal licence. The Society is, however, of the view that a personal licence application should not be required to be signed by the applicant and that the applicant's properly instructed agent should also be in a position to sign the application on the applicant's behalf. The Society believes that Licensing Boards should be obliged to participate in providing information to the National Database.

Section 137 – Emergency Closure Orders

The Society notes the policy intent of this provision and welcomes the amendment of the definition of a senior officer from being a Constable over above the rank of Superintendent to the rank of Inspector or above. Whilst this is more a matter for police priorities and resources, the Society would consider this to be a sensible proposal.

Section 139 and Schedule 4 - Further Modifications of the 2005 Act

The Society notes that further modifications are made to the 2005 Act including extending police powers to object and has no particular comments to make upon the terms of Schedule 4.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Scottish Prison Service

The Scottish Prison Service supports the measures contained in the Bill. In particular, it welcomes the potential longer term benefits of the package of community based measures, including the presumption against short sentences, and the proposals for tough alternatives to custody. These have the potential to reduce churn and allow resources to be focussed on achieving a workable sentence management regime for those offenders who are sent to prison.

SPS is committed to working with the Scottish Government to deliver and realise the benefits of the Offender Management Strategy. We are already actively contributing to the new programme of work in addition to strengthening our approach to offender management, continuing to work at improving joint working with CJAs, local authorities, statutory and other partners.

The SPS believes that excessive use of prison and overcrowded prisons reduce public protection rather than contributing to public safety. Prison can do good for some offenders, in particular those that present a serious risk of public harm. But prison itself can do harm; and the biggest harm is to people serving short sentences.

Imprisonment impacts on the life not only of an offender but of their family, the very act of imprisonment can reduce the positive factors which would contribute to reduce re-offending in the future. An offender is removed from employment, suffers disruption to the relationships and controls offered by family and community, and can lose access to their home. It is difficult to promote inclusion from an excluding process and use of short term imprisonment is likely to take the most deprived and make them even harder to reach in the future. Indeed the pressure of numbers created by short term churn makes effective rehabilitative work with longer term prisoners more difficult because time is spent managing the population, diluting the focus of resources on rehabilitation.

It is only right to take every opportunity to find effective disposals which stop or reduce offending and re-offending at the earliest stage, diverting minor of first offenders from the “conveyor belt” of the criminal justice system and tackling offending behaviour without the added negative impact that prison produces. Research suggests that early intervention and a care based model is more effective with young people than a justice based approach, that desistance is best supported in the community and that effective community based disposals have positive impact on public protection.

We are all committed to making Scotland a safer place this can be better achieved by breaking the cycle of re-offending at the earliest possible stage.

Diverting some of these offenders into meaningful community alternatives and leaving Prisons to those whom we know can benefit from the range of interventions we have to offer, would be a very positive step in making Scotland safer and stronger.

Mike Ewart
Chief Executive

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from John Muir, Damian's Law Campaigner

The importance of Damian's Law was never specifically the absolute introduction of mandatory sentencing, but more importantly an attempt to shake the government, the judiciary, the police and the public out of their complacency and the sanitised academic approach to the serious violent crime which is largely responsible for the situation Scotland the indeed the UK are facing.

We have perhaps become so used to violent crime over such a long period of time that our resolve and horror is not truly reflected in the punishment and sentencing or the lack of and regardless of political gesturing. Is it any wonder that the criminal fraternity are laughing at our miserable efforts to enforce current laws. Have we really become that sanitised to violence.

We have a clear and present danger on our streets. Violent recidivist criminals are all too often in and out of prisons on a relatively short term revolving door basis. This has to stop! So what are you, the politicians, going to do about them? That is why I went to Parliament with our petition and in doing so my composure was ruffled at the way the debate lost sight of the essential fact that we are having people murdered and mutilated by knife crime. My annoyance is clearly representative of the public anger.

Because an individual holds a public office or rank it should not be assumed that they know best. It seems to me that some in this debate think this precisely. The politicians and authorities must have the support of the collective public and if you fail to deal with the current problems while whistling the praise of untested solutions the entire venture will fail – not least from lack of confidence from the electorate and the general public.

Self accountability must be reintroduced. Why is it when all of us in decent society make a mistake we have to explain ourselves – but commit a crime they can elect to say nothing. This is utter nonsence and that can be described as a true criminal charter. The foundation stones and corner stone of Scottish Law where violent crime is concerned have crumbled and as a consequence the building which has been built upon it has devalued. The time to act is now or step aside.

As I clearly stated blame is not the game but in order to understand the way forward we must understand where we are – and where we have come over the last few decades where violent crime is concerned. There are many truths within every argument and as the petition clearly demonstrated all points of view must be considered but not at the expense of common sense. However to be perfectly frank much of the debate was taken by the morally righteous who have completely missed the point and where the debate was hijacked by the long term social do-gooders. There was a complete failure to address the here and now. We have to sort out the here and now before we can have any mandate to address the future. It is earnestly requested that the sentencing policy be stricter and more severe, and the community service is more strictly supervised, and also invoke and demand that high visibility clothing should be provided and worn. The other legal suggestions which we have discussed should also be implemented forthwith.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Association of Directors of Social Work

The Criminal Justice and Licensing (Scotland) Bill, (the Bill) reflects proposals highlighted in several documents published in 2007 - 2008 including; ‘Reforming and Revitalising’, the Review of Community Sentences, ‘Scotland’s Choice’ the Report of the Independent Prison Commission and the Scottish Government response ‘Fast, Fair and Flexible Justice’.

ADSW supported the principles underpinning all of the above Reports, as well as, highlighting the potential implications of implementation.

ADSW supports the criminal law, court procedures and licensing implications outlined in the Bill, whilst recognising the demands and resource impact on Local Authority and other Services providers.

The Bill is structured into 9 Parts; ADSW will focus comment on those sections relevant to LA social work services.

Part 1 - Sentencing.

S 3 - 13 - Scottish Sentencing Council

ADSW supports the principle of a judicially led Scottish Sentencing Council (SSC). To improve public confidence in the Criminal Justice System it will be imperative that the SSC has the authority to address inconsistent application of the guidance thereby ensuring a more consistent and transparent approach in the disposal of justice.

S14 - Community Payback Order (CPO)

The CPO will provide a single sentence to replace the existing range of community sentences - Probation, Community Service and Supervised Attendance Orders.

The new order will enable the courts to impose one or more of seven requirements including unpaid work with activities, and supervision alongside a range of treatment or specific interventions. In addition, the court will be able to impose a compensation order.

The intention is that once a CPO is made the Order will begin immediately. The unpaid work and other activity requirements will commence within 7 days and be completed within 6 months. Local Authorities will be required to consult with communities on an annual basis to determine the nature and type of unpaid work that will be undertaken and of benefit to the community.

ADSW recognises it is important for the court and public to have confidence in the range of community sentences. The Association is working with Local Authorities and Scottish Government to improve current arrangements.

ADSW supports the introduction of progress courts, but considers the resource should be targeted rather than universally applied to all offenders.

The Association supports the use of the supervision requirement for those under 18 years sentenced by adult criminal courts for offences that justify the imposition of a CPO. ADSW considers it essential that the interventions reflect the age and maturity of such offenders along with the risk of reoffending.

ADSW supports the use of a CPO as an alternative to expensive and ineffective short sentences of imprisonment. The profiles of offenders who receive such sentences are well recorded. It must be acknowledged however that this will place increased demands on a range of specialist and mainstream services including LA social work, housing and education services; Health; Jobcentre Plus and others. In order to ensure Services have sufficient capacity to take on this additional work, a review of existing structures and resources will be required as well as the provision of additional resources. The intended reduction in the prison population will be a gradual process, therefore a transfer of resources from SPS to community services is not realistic in the foreseeable future

ADSW unreservedly supports the presumption against short periods of imprisonment or detention. Currently LACJSWS supervise post sentence statutory licenses for all offenders sentenced to imprisonment of 4 years or more and other specific shorter sentences, e.g. Supervised Release Orders, Extended Sentences and Short Term Sex Offender Licenses.

‘Scotland’s Choice’ Report proposed that statutory supervision on License be imposed on sentences of 2 years or more. This Bill proposes the introduction of short custody and community licenses for those sentenced to 12 months or less and custody and community licenses for those sentenced to more than 12 months. The implications of introducing the new custody and community licences and extending formal supervision to all prisoners sentenced to more than 12 months will have massive implications for LACJSWS. It is also anticipated that breach of such licences would be considerable thereby placing additional demands on the resources of the police, courts, SPS and the Parole Board.

ADSW supports the revision to Extended Sentences for sexual offenders and offences aggravated by racial or religious prejudice.

Implications of Part 1 for the LA

Criminal Justice Social Work Statistics produced by Scottish Government have shown an annual increase in the use of community sentences. The latest figures 2007-08 show both Community Service and Probation Orders increased by 4.5% and 4% respectively. 9255 Community Service and Probation Orders with unpaid work conditions amounting to 1,331,365 hours were imposed whilst during the same period the successful completions of Orders increased.

A recent audit of community service highlighted variations in the commencement and completion of orders. LACJSWS confirm significant increases in the number of orders, offenders in employment or training restricting availability for unpaid work and staffing issues including medical absences, vacancies and recruitment difficulties. The consequences of ‘Single Status’ for several areas cannot be underestimated.

The additional £2m made available to meet increased Community Service numbers and expectations is welcomed. The anticipated increase in numbers is uncertain. To ensure LA’s have the infrastructure to support increased capacity to deliver appropriate services, ADSW will support a resource scoping exercise to ascertain accurate unit costs for Community Service and other community sentences, where expectations and interventions may have exceeded allocated resources, (Sexual Offenders / MAPPA, accredited programme interventions and risk assessment processes).

Potentially the resources needed to support ‘progress courts’ are considerable. Effective targeting of this provision will be critical to ensure best use of staff and court time.

Similarly where a court considers a CPO appropriate for an offender under the age of 18 years, the supervision requirement will become mandatory. This age group often have difficulty engaging with services and non compliance can be higher. Sufficient and age appropriate resources alongside access to universal services will be critical, to break the ‘cycle of offending’ that results in a disproportionate numbers of young people being remanded or sentenced to imprisonment. This will have implications for LA social work services including Children’s Services and Criminal Justice.

The financial implications of implementing revisions to the Custodial Sentence and Weapons Act (S18) are significant and will require a considerable increase in staff resources. Should the Bill confirm the introduction of post release statutory supervision on all sentences of 12 months or more ADSW would urge a gradual introduction, initially targeted at offenders assessed as presenting a high risk of harm and those sentenced to imprisonment in excess of 2 years.

Part 2 Criminal Law

ADSW supports the proposals outlined in the Serious and Organised Crime sections, (25 - 28) whilst recognising that the statutory supervision of such offenders on licence may place further demands on LACJSWS.

Amendments proposed in Sections 33 - 34 the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 are supported. Such amendments could result in more offenders being placed under the statutory supervision of LACJSWS whilst S33 - 34 could result in further demands on the MAPPA process and have implications for the LA, police and SPS

Amendments in S35 are supported.

Implications of Part 2 for the LA

The amendments proposed may increase the demands on LA services especially those of Social Work.

Part 3

ADSW welcomes and fully supports the increase in the age of criminal responsibility to 12 years of age.

S59 Retention of forensic samples from children charged with serious violent and sexual offences is supported in principle with the caveat that the criteria are specific and restricted to **serious** sexual or violent offences only.

Part 4

Implications of Part 1 for the LA

S 63 Spouse or civil partners as compellable witnesses is supported especially in cases involved child abuse or violence.

ADSW endorses the amendments in S64 - 67 intended to reduce the trauma or distress of giving evidence to witness especially child witnesses.

Part 5

ADSW supports the amendments made in S72 - 75 and is mindful that those referring to sexual offenders (S73 - 75) may place further demands on LA within MAPPA arrangements.

S84 Compensation Orders can be an addition requirement of a CPO. This will place additional responsibilities on the LACJSWS to encourage payment of the compensation or instigate enforcement and breach proceeding such the compensation not be paid.

Sandy Riddell
Convenor, Criminal Justice Standing Committee

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Lord Coulsfield

1. In order to overcome the problems which have arisen over the disclosure of prosecution material to the accused, it is necessary to ensure that investigators and prosecutors at all levels understand and accept the duty which lies upon them. It is, therefore, in my view, important to state the fundamental duty of the prosecution clearly and in a simple and memorable form at the start of the relevant part of the statute.[1] The provisions of the Bill are much too elaborate and diffuse and tend to confuse rather than clarify the statement of the fundamental duty. The first provision of the part of the bill dealing with disclosure should simply say:-

> "The prosecutor must disclose to the accused all material evidence or information of which he is aware which would tend to exculpate the accused, whether by weakening the Crown case or by providing a defence for the accused.
>
> This duty applies both to material of which the prosecutor is aware before or at the commencement of criminal proceedings and to any material of which he becomes aware at any subsequent stage of proceedings.
>
> If there is no such material, the prosecutor must so inform the accused."

That simple formulation would cover everything at present contained in sections 85, 89 and 90 of the Bill. I prefer the above wording to that of the English legislation because it emphasises that the onus to disclose exculpatory material is on the prosecution, so that if there is such material it must be disclosed whether or not the accused has put forward any particular line of defence. The reference in the CPIA may suggest that there is some limitation on the duty of the prosecution by reference to the line of defence which the accused has actually adopted. Emphasising the positive duty on the prosecution to identify exculpatory material, whether or not the accused has any idea of it, is also likely to be valuable in conveying to the police the extent of the duty which is incumbent on them.

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[1] This is done in the English legislation, in section 3 of the CPIA 1996 which provides (as amended):-

"The prosecutor must –

> (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, or
> (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a)"

"Prosecution material" is defined as material which has come into the possession of the prosecutor which has been inspected by him.

2. I recommended that in disclosing relevant information police and prosecutors in Scotland should adopt the practice, similar to the exising English practice, of listing the material in various categories set out in schedules. The Bill makes the provision of schedules, both by the police to the prosecutor and by the prosecutor to the accused, a statutory requirement. That was not my intention and it is, I think, a serious error. The use of schedules is only a method of carrying out the duty of disclosure. It is an inconvenient and cumbersome method. One should not exclude the possibility that, with experience, better methods may be devised. If any prescription is required, it should be done by a code of practice or by regulation: it is easy to amend a code of practice but much harder to amend a statute. There may even be cases in which it is inconvenient or harmful to use schedules even where adequate disclosure could be made in a different form. In England, the statute does not include any requirement for schedules.

3. In any event, there is no need for statutory regulation of the arrangements between the police and the Procurator Fiscal: they are supposed to be working together. The purpose of any schedules prepared by the police is to tell the PF what material the police have. The police are to be encouraged to put everything into those schedules which could possibly be thought disclosable, and the PF/Crown will then have to decide what should actually be disclosed. There should be no question of sending a schedule back to the police to be adjusted, as is envisaged in section 5 (4).

4. I understand that a policy decision may have been taken to include provision for defence statements in the legislation, but I would nevertheless observe that, for the reasons set out in my report, I think that requiring a defence statement in every case is not necessary and is liable to cause expense and delay. The position in Scotland is different from that in England in that there is already a requirement to lodge a special defence in certain cases. There was no similar requirement in English procedure and the requirement for a defence statement may do something to limit the use of "ambush" defences there. Even so, there is little enthusiasm for defence statements. There is something to be said for providing for an option to lodge a defence statement where the defence are proposing to ask for some particular disclosure where the reasons for asking for the information would not appear from the material available to the prosecutor, although in practice in Scotland the defence would proceed by a specification of documents and would have to give reasons for their request in the course of that procedure.

5. The provisions dealing with the withholding of information are also very much too complicated. The English legislation allows for information to be withheld on public interest immunity grounds where it is "not in the public interest." Is it necessary to have more elaborate provisions in section 102 (2) and other similar contexts? Section 102 and following also appear to me to be much too elaborate and complicated. Section 3 (6) of CPIA 1996 merely provides that material is not to be disclosed "to the extent that the court on the

application of the prosecutor concludes that it is not in the public interest to disclose it and orders accordingly." If detailed provision for the procedure in relation to applications and orders is necessary, it should be in an Act of Adjournal.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the Crown Office and Procurator Fiscal Service

I thought it would be helpful, ahead of the Lord Advocate's appearance before the Justice Committee on 9 June, to provide some general information about the involvement of the Crown Office and Procurator Fiscal Service in the development of this important Bill and the provisions which will have a particular impact on the work of COPFS.

As part of the Scottish Government, COPFS has been fully involved in the development of the provisions in the Bill and, as is normally the case with Government Bills, would not normally provide separate written evidence to Parliamentary Committees in the way that stakeholders beyond Government are usually invited to do.

The Lord Advocate, however, regards this Bill as one of the most important pieces of criminal justice legislation to come before the Scottish Parliament. For that reason, she has asked COPFS officials to provide as much assistance and information as possible to the Justice Committee as part of its consideration of the Bill. In addition, if the Justice Committee agrees, the Lord Advocate thought it would be helpful if I were to accompany her on 9 June to answer any questions which the Justice Committee might have about the impact of the Bill on the work of COPFS.

In that connection, there are a number of different parts of the Bill which COPFS regards as particularly important to its work.

Part 6 of the Bill relates to the disclosure of evidence in criminal proceedings and enacts almost all of the recommendations of Lord Coulsfield's Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland from 2007. The Lord Advocate strongly supported the setting up of Lord Coulsfield's review and welcomed Lord Coulsfield's conclusions as a basis for bringing greater certainty and transparency to the operation of disclosure in Scotland. COPFS also seconded an experienced prosecutor to Lord Coulsfield's review team.

The Justice Committee will be aware that Lord Coulsfield's Review was initiated in response to a sudden and significant change in disclosure practice in 2005 brought about by decisions of the Judicial Committee of the Privy Council in two Scottish criminal appeals, *Holland v HMA [2005] SC(PC) 3* and *Sinclair v HMA [2005] SC(PC) 28*. Subsequent decisions of the High Court of Justiciary and the Judicial Committee contributed to the development of the law in this area after 2005 but Part 6 of the Bill offers, for the first time, a clear procedural and legal framework for disclosure within which the police, the Crown and the accused can operate with certainty.

The statutory provisions in the Bill will be supplemented by a Code of Practice which the Lord Advocate will issue in terms of section 114 in her capacity as head of the system of prosecution and investigation of deaths in Scotland. As such, in terms of the Lord Advocate's independence in carrying out these roles, the Code of Practice will not be subject to the approval of any other individual or organisation, including Scottish Ministers or the Scottish Parliament, although it will be prepared in consultation with the police and other reporting agencies and will be made public in terms of section 114(4).

The purpose of the Code of Practice is to set out publicly the procedures to be adopted by investigators and prosecutors which might be thought to be less appropriate for primary legislation such as the conduct of lines of enquiry during an investigation, the detailed responsibilities of key roles in the investigation and prosecution and the consequences for completion of reports and witness statements. It will apply to all agencies which report deaths and offences to Procurators Fiscal, including the police, as well as all prosecutors in Scotland. Work has started in preparing a draft Code of Practice and, although this will not be complete by 9 June, the Lord Advocate is happy to confirm that a copy of the first draft can be provided to the Committee as soon as it is available to help the Committee's consideration of this important area of law and practice.

There are also a number of parts of the Bill where the Scottish Government is taking the opportunity to update Scots criminal law as a result of experience in Scotland or elsewhere. Important among them is the new Witness Anonymity Order in section 66 which, following a recent decision of the House of Lords in an English criminal appeal, will give greater certainty to vulnerable witnesses or undercover law enforcement or intelligence officers whose safety would be compromised by the disclosure of their identity. Protective measures such as those referred to in section 66(4) of the Bill have been used before in Scotland and while there have been no judicial decisions in Scotland against their use following the House of Lords decision, the current position is that no guarantee can be given to witnesses that there are steps which can be taken to protect their identity. This new provision will allow that guarantee to be given, with an explanation that it is for the court to decide on the appropriate measures, which will provide a welcome degree of reassurance for witnesses who fear for their safety, particularly vulnerable members of the public giving evidence against those in their local community. While it is difficult to give a precise estimate of the number of cases in which they would be used, COPFS envisage these orders being sought, as they have been in the past, in serious cases.

Similarly, sections 54 to 57 introduce new provisions on submissions of sufficiency of evidence in solemn cases and new powers of appeal by the Crown against judicial rulings in that regard. These provisions follow a report of the Scottish Law Commission in July 2008 on a reference under section 3(1)(e) of the Law Commissions Act 1965 by Scottish Ministers. The provision in relation to expedited appeals will be helpful in ensuring that such issues can be dealt with promptly and with minimum inconvenience to jurors, witnesses and court officials in any case where an appropriate judicial ruling is appealed in this way.

There are also a number of provisions in Part 2 of the Bill which introduce new criminal offences in response to new or changing criminal behaviour. COPFS has been fully involved in the development of the new offences and has been able to contribute recent prosecution experience to consideration of new offences, including those relating to serious and organised crime and sexual offences.

In relation to serious and organised crime, the new offences are regarded as additional tools for investigators and prosecutors to tackle more effectively the networks which are now understood to direct and support serious and organised crime. They are designed to allow easier and more effective interruption of activities which are carried out to direct or in support of wider criminal activity.

As for sexual offences, in particular the new offence of extreme pornography, COPFS recognises the compelling reasons for the introduction of the new offences. The availability and circulation of such images, it can be argued, normalises extreme and violent sexual acts including sexual crime and life threatening activities. The policy intention behind the provisions is to help to ensure that the public are protected from exposure to extreme pornography that depicts horrific images of violence. Although the offence is broad in its terms and allows for a wide latitude of discretion in determining what amounts to a prohibited image, careful consideration will be given, if it is enacted, to the development of clear guidance for police and prosecutors to ensure that it is enforced consistently and fairly.

John Logue
Head of Policy Division

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from Audit Scotland

The Policy Memorandum and Explanatory Notes provide some information on the purpose and operation of this section. However we thought that the Committee may be interested to understand a little more about the National Fraud Initiative and how it is operated.

Data matching exercises have been carried out by The Audit Commission in England for some years using auditors' powers to obtain information from audited bodies and others for the purposes of their audit. Audit Scotland taken part in the last three of these biennial exercises and publishes summary reports on the results of the work. The latest report, on the 2006/07 exercise, is available at http://www.audit-scotland.gov.uk/work/nfi.php . Hard copies are also enclosed for your convenience. The Public Audit Committee of the Scottish Parliament took evidence from Audit Scotland on the last NFI report and indicated its support for legislation in this area.

These exercises have identified outcomes valued at £37 million in Scotland and led to bodies aiming to recover significant sums, where practicable. At least 75 prosecutions have been achieved to date. Examples of the types of fraud and error detected by the exercise are:

- Public pensions continuing to be claimed after the pensioner has died
- Housing benefit claimed by public sector staff or pensioners without declaring their income
- Housing benefit claimed by ineligible students
- Individuals receiving student awards who are not entitled to be in the UK (with attendant potential implications for public safety in certain cases)
- Care homes claiming payments after the resident has died

The exercises have been carried out using a Code of Data Matching Practice which sets out the protocols for the ways in which data subjects are informed that their data will be used, for how that data is handled and stored and when the data will be destroyed. The Code is reviewed by the UK Information Commissioner before it is issued. Along with the other UK audit agencies, Audit Scotland meets regularly with the Inforrmation Commissioner's office to ensure that data protection issues, including proportionality, are properly considered. For example, data matches are not derived from random matching of the information collected. Information is only compared between specific datasets where previous pilot exercises have yielded good results.

All data is submitted for matching over secure electronic links and matches are available to audited bodies to view on a secure website with strong access controls. Data is not sent by hard copy or on disks. The Code of Data Matching Practice and Fair Processing Notices are also published on our website.

The Serious Crime Act 2007 contains provisions that placed the NFI on a statutory footing in England, Wales and Northern Ireland. It also clarified some issues such as the power for data to be matched across borders.

Without similar explicit powers in Scotland Audit Scotland would have to continue to rely on its existing powers to obtain the relevant information. These powers are not consistent across the different parts of the public sector and do not allow for cross border matching. For example if a resident of a local authority area bordering England claims housing benefit in Scotland but fails to declare income earned from a public body in England this will not be detected by the current exercises as there is no power to use or share data in this way. With the proposed powers such cases would be detected and the relevant national audit agencies would be able to share the appropriate matches.

In the absence of similar clear legislation in Scotland it will undoubtedly be the case that fraud and error will be less likely to be detected in the public sector in Scotland than elsewhere in the United Kingdom and cross border cases will not be detected at all. The fact that the exercise takes place also acts as a deterrent and so the impact of the work is potentially far greater than the amounts identified by it. This work will continue to develop elsewhere in the UK and, in our view, it is essential that Scotland does not fall further behind in the powers available to conduct such exercises.

We recognise that there is a balance to be struck between the rights of the individual and the powers of public bodies to obtain and use data but we do not believe that it is appropriate for public sector employees and pensioners to be able to make invalid claims for scarce resources without their employers being able to access modern methods to detect such cases. We also recognise that the vast majority of public servants are entirely honest and we therefore take great care to ensure the security of the information at all times. In addition, it is made clear that a match arising on any of the reports is only an indicator that further enquiries are required to identify the reason for it, which may be entirely innocent. The Committee may wish to be aware that all of Audit Scotland's own staff are included in the exercise.

Whilst it would be possible to construct legislation allowing each individual body to conduct such exercises Audit Scotland believes that the approach of using the national audit agencies to conduct the exercises working together, with similar Codes of Practice and using one party to carry out the matches, is the most efficient, effective and secure way to minimise fraud and error in this area.

Russell Frith
Director of Audit Strategy

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from the City of Edinburgh Licensing Board

I refer to your letter of 2 April addressed to Chief Executives of local authorities and would confirm that the Licensing Board of the City of Edinburgh discussed the sections of the above Bill looking to improve the operation of the Licensing (Scotland) Act 2005 at a recent meeting.

The Board have instructed me to make the following submissions:

1. Section 130 – Premises licence applications: notification requirements

   The Board agreed with the proposal to reduce the requirement to notify interested parties with copy applications but suggests that it would be appropriate to retain a requirement to notify Licensing Standards Officers with a copy of the application. It is the Board's intention that the copy application will be available on its website at a future date and in the meantime, the copy application will be available for examination at the Board's offices. The letter notifying applicants should contain a statement giving a broad outline of the terms of the application, e.g. variation of licence to add function suite, as a means of providing some basic information.

2. Section 131 – Premises licence applications: modification of layout plans

   The Board welcomed this amendment which gives effect to the practical reality that where the Board and applicant accept that the plan requires to be modified, the Board is allowing applicants to submit a modified layout plan.

3. Section 132 – Premises licence applications: antisocial behaviour reports

   This was extensively discussed by the Board who had the benefit of the views of the local Police Inspector. The Board is conscious that in its work it receives extensive support from Lothian and Borders Police and that information concerning premises is made available as a matter of course. Whilst the Board is satisfied that it retains the power to request a report, it was concerned to emphasise that reports must be relevant to the premises under examination and that this requires a subjective judgement on the part of the Police making a representation or objection in relation to a licence application. Such a report is felt to be more valuable than the type of antisocial behaviour report specified in the Act. The amendment proposed to the Act has been driven by financial and resource considerations and this Board would emphasis the need for consideration of the type of report that would be of most value.

4. Section 133 – Sale of alcohol to trade

   The Board had no comment to offer on this proposal.

5. Section 134 – Occasional licences

   The Board accepted the need for this amendment but questioned whether extended hours applications might require similar provision.

6. Section 135 – Extended hours applications: variation of conditions

   This amendment was welcomed by the Board.

7. Section 136 - Personal licences

   These provisions were welcomed by the Board.

8. Section 137 – Emergency closure orders

   The Board had no comment to offer.

9. Section 138 – False statements in applications: offence

   This provision was welcomed by the Board.

10. Schedule 4 – Further modifications of 2005 Act

    This provision was welcomed by the Board.

The Board has become aware that the Government may also seek to amend the current appeal arrangements in the Licensing (Scotland) Act 2005. It would suggest to the Committee that the current arrangements are cumbersome and that thought should be given to reverting to the arrangements for summary appeals under the Licensing (Scotland) Act 1976. In doing so however there should be no question of losing the ability to suspend licences with immediate effect.

The Board has considered your policy for handling information received in response to calls for evidence and does not require the evidence submitted to be treated as confidential or to be published anonymously.

Gill Lindsay
Clerk of the Licensing Board

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Letter from the Minister for Parliamentary Business

Dear Convener

As you are aware, there has been discussion recently about the level of Parliamentary scrutiny proposed for the Government's alcohol reforms and both Robert Brown MSP and yourself, on behalf of the Justice Committee, wrote letters to the Cabinet Secretary for Justice on the issue. This discussion has focussed in particular, on the Government's proposals for minimum pricing of alcohol.

Scotland's alcohol misuse problem is estimated to cost our country at least £2.25billion per year in extra services and lost productivity and professionals are agreed that the threat posed to our national health from current levels of consumption is very great. Alcohol-related hospital admissions and deaths have increased markedly in recent years and this Government has already set out our framework for addressing the root causes behind these statistics.

Having taken account of the representations made the Government now proposes to introduce a new health bill that deals with a range of alcohol measures, including minimum price per unit of alcohol, alcohol promotions, limiting the use of marketing material, wine glass sizes, sale of alcohol to persons under 21 and the social responsibility levy.

A new bill to take forward these provisions collectively will give this issue the prominence required and the Government welcomes the fact that the proposals in the Bill will be subject to full Parliamentary scrutiny.

I am copying this letter to Christine Grahame, Convener of the Health Committee, business managers and opposition Justice and Health spokespersons.

Bruce Crawford MSP
Minister for Parliamentary Business
24 March 2009

Scottish Parliament

Justice Committee

Tuesday 12 May 2009

[THE CONVENER *opened the meeting at 10:03*]

Criminal Justice and Licensing (Scotland) Bill: Stage 1

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I begin the meeting with my usual admonition for mobile phones to be switched off. We have received no apologies; we have a full turnout.

Item 1 is consideration of the Criminal Justice and Licensing (Scotland) Bill. Members should have with them written submissions from the judges of the High Court of Justiciary and briefing papers from the Scottish Parliament information centre. I welcome to the meeting Lord Hamilton, Lord President of the Court of Session and—perhaps more appropriate, given the focus of our questions this morning—the Lord Justice General; Lord Gill, the Lord Justice Clerk; and Carolyn Breeds, the deputy legal secretary to the Lord President.

Lord President, I am aware of your commitments at the appeal court this morning. We will attempt to get through our business as expeditiously as possible, so we will move straight to questions.

In your written submission, you state that the current

> "range of mechanisms … for exploring and developing sentencing issues … could … be improved".

Will you give us a brief overview of those mechanisms and suggest how they could be made better?

Right Hon Lord Hamilton (Lord President and Lord Justice General): I am not sure whether I am wired up or not.

The Convener: You are completely wired for sound.

Lord Hamilton: That is splendid.

As we indicate in our paper, there are a number of existing mechanisms for seeking to secure consistency of sentencing. They include the general framework of decisions by judges—particularly judges of the High Court sitting on matters of appeal—and the facility that the High Court has to issue guideline judgments, which it did to only a limited extent initially but in relation to which a measure of momentum is now building up.

There are other mechanisms. The Lord Advocate is currently making use of Crown appeals in two murder cases to seek general guidance from the court in relation to the range of punishments for those who are sentenced to life imprisonment for murder. A system has also been in place for some time in which Lord McFadyen and now Lord Carloway have sought to identify cases that are coming to appeal that might be suitable for guideline judgments. We are therefore being alerted to that.

There is a prospect of improving on and extending that system. I have suggested to Lord Carloway—he is now considering it—that a reference body should be set up. It could include members of the profession, other judicial office-holders such as sheriffs or justices and, conceivably, persons from the outside community. Those people would make their particular contributions to that exercise and identify particular areas in which it might be useful if we issued guideline judgments on matters on which we have not done so already. That is the sort of line that I envisage.

The Convener: I note with interest that Lord Carloway is now carrying out that exercise. What criteria is he applying in identifying appropriate cases?

Lord Hamilton: I am not sure that I have identified any specific criteria. The exercise covers cases in which there would appear to be a generality of concern: cases in which general matters arise rather than matters that are simply special to the particular circumstances of a case.

The Convener: It appears—and your paper mentions—that there is a view that there is scant evidence of inconsistency in sentencing, although the public perception is perhaps that such inconsistency exists. Have you any views on what action could be taken to overcome that perception?

Lord Hamilton: As we say in our paper and as has been recognised, there is no empirical evidence to suggest that there is inconsistency in sentencing. Of course, one needs to understand what consistency of sentencing is in the first place. I have no difficulty with people understanding that broadly similar circumstances of offence and offender should in general attract a broadly similar sentence. That appears to me to be an appropriate part of a well-ordered criminal justice system.

I am not aware of, and no one has brought to my attention, any empirical evidence to suggest that there is inconsistency of sentencing in Scotland. I am concerned that the bill may involve the expenditure of a substantial amount of funds on a particular exercise without the truth of the premise that there is an inconsistency in sentencing being examined.

On more than one occasion I have made an offer to the Cabinet Secretary for Justice to open the doors of the justiciary office so that the records can be examined of cases in which either the prosecutor or the convicted person has appealed against the sentence—whether or not leave to appeal has been granted; what has happened if leave has been granted and the matter has been dealt with in the appeal court; and, lastly, what the appeal court has done in those particular circumstances. An empirical exercise could be carried out to identify whether there is any true inconsistency of sentences across the board.

If that was done—and I make the offer to the Parliament now—one could discover whether there is in fact an inconsistency of sentences. If there were no inconsistency, the appropriate exercise would be to dispel the false impression that there is an inconsistency; if there were an inconsistency, the appropriate exercise would be to address that matter and determine the best way to cure it. That offer is open.

The Convener: We will take that into consideration.

Another concern that you express in your paper is that the sentencing council would undermine the independence of the judiciary. Clearly, it would be inappropriate for politicians to interfere in individual cases, but why might it be considered unconstitutional for a Parliament to establish an independent body to produce general sentencing guidelines? That has been done in other jurisdictions.

Lord Hamilton: One has to recognise the radical difference between the proposals now made and the proposals that were made by the Sentencing Commission for Scotland, chaired by Lord Macfadyen. The commission recognised the importance of the High Court of Justiciary, as the senior criminal court in Scotland, being the ultimate body responsible for laying down sentencing guidelines. It saw the advantage in there being an advisory body with a research facility for undertaking exercises and putting matters before the appeal court for endorsement or otherwise. However, I think a situation in which an outside body that is not itself elected and which comprises, as the present proposals indicate, a majority of non-judicial office-holders impinges on the independence of the judiciary, if that body is to lay down what are, in effect, prescriptive guidelines.

I understand that, in England and Wales, a majority of judicial office-holders sit on the Sentencing Guidelines Council. In our jurisdiction, it has been recognised—most recently in the Judiciary and Courts (Scotland) Act 2008—that the judiciary is itself an arm of Government and has important functions to fulfil. That would properly be recognised by a scheme in which, ultimately, the laying down of the guidelines were reserved to the highest criminal court in this country, which is what has happened traditionally.

The Convener: Lord Gill, would you like to introduce anything into our discussions at this stage?

Right Hon Lord Gill (Lord Justice Clerk): I am slightly troubled by the term “inconsistency”. Forgive me for going back to a slightly earlier point, but it relates to the point that has just been raised with the Lord Justice General.

If the legislation sets out to achieve what is described as consistency, it seems essential that it should define what it means by consistency and inconsistency. The consultation paper started off by talking about inconsistency and then spoke about a perception of inconsistency, which is rather a different thing. It is not quite clear yet what the legislation seeks to achieve. There is no definition of consistency in the draft, and it seems to me that those who would form a sentencing council would find some difficulty in knowing exactly what they were trying to do unless the legislation gave them a clear definition by which to judge their own views and decisions.

That raises in a clear way the constitutional issue that underlies this legislation. It is part of the constitution that it is for the appeal court to determine sentencing, except to the extent that legislation lays down what the sentence should be. To read the bill, one might think that it involved merely the creation of some quango but, in fact, there is a huge constitutional question underlying the bill. That is what troubles me.

10:15

Nigel Don (North East Scotland) (SNP): I am grateful to Lord Gill for reaching that point, which is where I wished to come in. Your submission states at paragraph 8:

> “the High Court has always been and remains the body ultimately responsible for decision-making in the development and implementation of sentencing policy.”

Although penalties such as prison, fines, admonition and discharge—and indeed execution and transportation—predate any Parliament, is it not fair to say that anything to do with probation, community orders, drug treatment and testing orders and so on is a creature of Parliament? Therefore, is it fair to say that the development of sentencing policy has been parliamentary, rather than judicial, over recent history at least?

Lord Hamilton: There is no doubt that statute—acts of Parliament—has brought into range for the sentencer a number of sentencing options as to what, in the modern community, are thought to be appropriate disposals. However, the question whether the sentencer has the option of prison or a community service order or the like is different from the matter of what his actual decision making is, or what the range of his decision making is. The range of decision making is one question that has been truly germane to the exercise of authority by the courts hitherto.

Nigel Don: My point is about the constitutional issue, which is at the nub of the question. I understand entirely the sentiments that you have recorded. Parliament has decided that capital punishment is no longer appropriate, and it has moved the boundaries. I am not suggesting that anybody should do this, but surely it is open for Parliament to say that nobody will ever be put in prison again. That is absolute nonsense, but we could theoretically do that. That is surely a matter of policy and, if we were to do that, that would be sentencing development—undevelopment, we might say for that example. Surely it is for us to do that, rather than yourselves, and if we were to do that, you would be stuck with it. I apologise for using an extreme example, which you will obviously see straight past, but I am trying to distinguish between policy development, which I think is for us, for better or for worse, and individual sentencing, which is clearly and unambiguously for yourselves.

Lord Hamilton: There may be a question of propriety as to in which arm of government particular functions properly lie. We are not being asked, under the bill, to contemplate Parliament itself dealing with guidelines. It is not that Parliament will make the guidelines; Parliament is going to strip the High Court of Justiciary of powers that it otherwise had and pass on to a non-elected non-judicial body the function that the High Court has exercised hitherto. That is where I see a particular difficulty.

Nigel Don: So if we—in this committee, let us say for practical purposes—were to retain the development of policy and the processes of the proposed Scottish sentencing council, you would be happy as it would then be a matter of Parliament developing policy.

Lord Hamilton: The question is whether you could do that practically in any meaningful way—and I would still have an issue with the propriety of that course. There is a debate here: although it is technically within the powers of the Parliament to say that there shall no longer be imprisonment, there is a question as to whether it would be proper for it to do so. Likewise, there is a question as to whether it would be proper for it to remove from the High Court the powers that it has exercised hitherto.

Angela Constance (Livingston) (SNP): I wish to pick up on the panel's point that there has been no empirical evidence for inconsistency in sentencing. The panel is aware of the 2006 report by the Sentencing Commission for Scotland, which I believe was chaired by a High Court judge and whose membership included other judges and sheriffs. The report stated:

> "such research evidence as does exist, limited though it is, supports the view that there is some inconsistency in sentencing in Scotland".

Lord Hamilton: I think that the commission made it clear that, in so far as there was any evidence, it was anecdotal rather than from a study into the particular matter. It took the view that, given the time constraints that it had to deal with, it would take too long for such an exercise to be carried out. I am not sure that I accept that that would take long: it appears that if the right materials were made available the exercise could be quite short. The commission recognised that there was no study that supported the proposition that there was an inconsistency in sentencing.

Angela Constance: The report stated that there was some evidence. Is it not the case that one proposal is for the sentencing council to undertake some more in-depth research?

Lord Hamilton: I suppose that, to some extent, the in-depth research would be about whether there is inconsistency in sentencing. However, in a sense, that puts the cart before the horse, because we should want to know that there is truly an inconsistency in sentencing before undertaking the very expensive exercise of setting up a body of the kind envisaged in the bill, with operating funds that have been identified of more than £1 million a year.

Angela Constance: I would accept that if that were the only case for establishing a sentencing council, but, as I am sure that other members will explore, it is also about society having an input into the core values of our criminal justice system.

Lord Hamilton: I have no problem with society having an input. If it is thought to be financially justifiable to have a sentencing council, I can see an advantage in persons from society in general being involved. However, they should be involved on an advisory and informing basis, rather than on a determining basis, which should be left to the High Court itself.

The Convener: Having dealt with that section, we must turn to the purposes and principles of sentencing.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Lord Hamilton, you say in your submission:

> "We are content that the purposes and principles of sentencing should be set out in statute."

Do you think that that would be helpful or necessary? As a lay person, I would expect the purposes and principles to be widely known by the people sitting in judgment.

Lord Hamilton: I do not think that it is essential. I am not sure to what extent people who are otherwise ill-informed would read an act of Parliament to discover the purposes and principles of sentencing. Such purposes and principles have been set out in statute in a variety of jurisdictions. The proposals draw on the English experience, although one or two aspects are perhaps new. They also reflect to a large extent what the courts do. I have no particular difficulty with having the purposes and principles of sentencing set out in an act of Parliament if it is thought that that will assist members of the public to understand what courts do and what principles they look to in deciding on particular disposals, but I do not regard it as critical.

Cathie Craigie: You said that that had been done in other jurisdictions. Has it been done only in England? Has research been carried out to see whether it has made any difference?

Lord Hamilton: I am not aware of any research on that.

Cathie Craigie: In your submission you say that there are two matters of concern to you. One is section 1(5)(a), which provides that the purposes and principles do not apply to people who are aged under 18 at the time of committing an offence. Will you expand on your concerns about that?

Lord Hamilton: I think that the provision is drawn from English experience and the Criminal Justice Act 2003, but as I understand it the English have a quite separate system of youth criminal justice. In Scotland, the children's panel takes a non-criminal approach to problems that arise in relation to young people, but in more serious cases we bring people who are under 18 before the ordinary criminal courts. In such circumstances—for example, if a 17-year-old is brought before the criminal courts because they have committed murder or a robbery—we do not see in principle why the purposes and principles that are set out in section 1 should not apply. Of course the courts must take into account the person's youth, but it seems equally apt to consider, for example, whether a sentence would help in

"the reform and rehabilitation of offenders"

in relation to a 17-year-old as it does in relation to a 19-year-old or 21-year-old.

Cathie Craigie: You said that it is not essential to set out in statute the purposes and principles of sentencing, but would you want to add anything to section 1?

Lord Hamilton: I do not think that there is anything that I would press for. I noticed that the Sheriffs Association talked about denunciation in its submission—the importance of a judge's expressing society's condemnation of what has been done when they sentence in a particularly atrocious case. I suspect that that is not as much a purpose and principle of sentencing as it is an appropriate mechanism to be used when a judge is expressing why they are doing what they are doing.

The Convener: Paul Martin will explore unresolved issues to do with the proposed Scottish sentencing council.

Paul Martin (Glasgow Springburn) (Lab): A function of the proposed sentencing council will be to prepare sentencing guidelines to which a court must have regard. How do you interpret the phrase, "have regard to"?

Lord Hamilton: It does not bind absolutely, but it is constraining to a significant extent, as I think it is intended to be. Currently, the lower courts require to have regard to a guideline judgment that has been issued by the appeal court. Likewise, if the bill were passed, not only the initial sentencing courts but the appeal court, which would deal with sentencing guidelines and the like and with cases on appeal, would be constrained by the provisions and would require to apply them unless there was good reason not to do so.

Paul Martin: Do you welcome the inclusion of such a phrase in statute?

Lord Hamilton: I do not welcome the concept if the situation is that guidelines are to be laid down by the sentencing council, as distinct from being laid down by the appeal court on a recommendation by the sentencing council.

Paul Martin: Although the bill uses the phrase, "have regard to", the judiciary could ignore the guidelines. There could be circumstances in which a court said, "We had regard to the guidelines but we took a different decision."

Lord Hamilton: We must proceed on the premise that the courts will implement acts of Parliament that exist to be applied. There will no doubt be circumstances such as you describe, but they will require to be carefully examined. If a lower court stated that it had had regard to the guidelines but thought that the circumstances were special and therefore that it should not apply a particular guideline, that would be open to examination, in the same way as it would if the guideline had been laid down by the court.

Paul Martin: Does more need to be done to provide sentencers with sentencing guidelines and to provide the general public with accurate information on the sentencing process?

Lord Hamilton: As I say, sentencing guidelines are used increasingly by the court. On alerting the public to what is happening, there have been important developments in our dealings with the press and the public in relation to what we do in the process of sentencing. Sheriffs and judges much more frequently issue sentencing statements in cases that are likely to give rise to public concern, anxiety or interest. That could involve an explanation of why a particular principle of sentencing was adopted.

10:30

Paul Martin: Could the sentencing council play a role in developing information for public consumption about the sentencing process?

Lord Hamilton: It could be a source of information as to what it was doing in that regard. If it were an advisory body—as I suggest it should be, if there is to be a council—it could publicise what it was doing so that the public could understand it.

Nigel Don: If we accept the premise that the sentencing council is to be established in some form or other, what changes would you make in respect of its proposed composition or membership?

Lord Hamilton: I urge strongly that the council should have a judicial majority—the proposals are short of representation from among senior members of the judiciary. It would be inappropriate merely to have the Lord Justice Clerk as the chairman and one other judge—in effect, a first-instance criminal judge—as the only two senators on the council. I would be minded to double that to four senators. I would leave the number of sheriffs and justices the same, but I would remove the constable, because I do not recognise the function of the constable in that regard. I would reduce the provision in paragraph 1(5)(b) in schedule 1 from "two other persons" to "one other person", which would mean council membership of 12, with judicial office-holders being seven of the 12.

Nigel Don: We could spend the next half hour picking over that. I want to pick up on the general principle of the council including lay people, which brings me back to the basic principle behind the proposals. Surely—although we are clear that this should not happen in individual cases—society should have a say in sentencing policy. Sentencing policy concerns the man and woman in the street. Although it would be wholly inappropriate simply to pick two people off the street, surely there are people outside the legal system who can bring their life experience to the council, as MSPs do to our role. I am not suggesting that lay members of the council should be MSPs or ex-MSPs, but we represent, and sometimes meet, people out in the world. It is surely not inappropriate for representatives of society to be part of the process of policy development.

Lord Hamilton: I am content with that, but the issue is the degree of involvement. There could be very important input from somebody who has particular knowledge of the issues that victims of crime face or from a penologist who has particular knowledge of the effects on convicted persons who are given particular disposals. Such knowledge could usefully be brought into an exercise that would give rise to informed advice on what the courts should do.

Nigel Don: You have spoken a bit about the process of establishing guidelines. How would you—assuming that we will have the sentencing council and that it will produce guidelines—like the proposed legal effect of the guidelines to be changed?

Lord Hamilton: I might be repeating myself: the critical difference is that the sentencing council should be an advisory body that does research and prepares draft guidelines that it presents to the appeal court, which endorses the guidelines if it thinks fit and sanctions them, such that sentencing courts are bound to have regard to them. That is how I would organise it.

Nigel Don: If the appeal court chose not to sanction guidelines, where would we be?

Lord Hamilton: I have no doubt but that the appeal court would have to explain why it was not sanctioning the guidelines. It might have a power to remit guidelines to the council for reconsideration in the light of the court's views, after which an amendment might be made. Another possibility is that the court could sanction guidelines subject to amendment.

Cathie Craigie: You have told us what happens when guidelines are prepared and issued now. Is any account taken of informed representatives' views by whatever panel of judges considers guidelines?

Lord Hamilton: We do not have input from members of the public generally. We take into account representations that might be made by the Lord Advocate as prosecutor, for example. I can think of an appeal against an allegedly unduly lenient sentence in a rape case in which the Lord Advocate put before us several factors in relation to public concerns and so on. We had, under the new regime on the constitution of rape, to make a distinction between rapes that are of a particularly brutal character and those that are not. Information from the prosecutor, as well as anything that might be said on the accused's behalf, is input into such matters. However, we do not receive information from the public in general.

The Convener: Does the Lord Justice Clerk have anything to add? I have no doubt that you wish to make the point that judges, too, are members of the public and speak to people in their everyday lives.

Lord Gill: Contrary to any other popular belief, there is no doubt that we have our finger on the pulse, simply because of our long experience as practitioners and judges and because of the number of cases that we deal with in the appeal court day in, day out.

I will mention one point in supplement to what the Lord Justice General has said. There is a role for a sentencing council in Scotland, but it is not what is proposed in the bill. We need hard research to establish the effects of sentencing. The courts have before them a wider range of disposals than they have had at any stage in history. We need to know how to measure the success of those disposals and, if a criterion exists for their success or failure, to know what is happening out there in the field. Useful research could be done on that.

A sentencing council could do much on that matter. It could also consider developments in sentencing in other jurisdictions in the world and see what other imaginative ways have been devised in other countries. That would provide a basis to enable sentencing by the High Court and by sheriff courts to be better informed. Of course, such a council would, in essence, be a research and advisory body, which would be different from the conception in the bill.

Robert Brown (Glasgow) (LD): I have one or two points to make on short custodial sentences. Again, a constitutional issue underlies the matter. Section 17 talks about replacing short sentences with community sentences, to an extent. Does that raise the prospect of undue interference with the judiciary's freedom on sentencing? That is a relatively substantial policy direction.

Lord Hamilton: I approach the matter with some hesitation, because the High Court's experience relates mainly to dealing with High Court sentences rather than with short sentences, which are closely associated with the exercise of shrieval and justices' jurisdictions.

I do not think that I have a particular problem with that aspect of the bill, if it is simply regarded as a presumption. The present position—which the sheriffs will no doubt be able to expand on—is that although the sheriffs do not readily sentence people to short sentences, they recognise that such sentences are, in a range of circumstances, the only option that is truly available to them. That is particularly the case with people who have been given all manner of non-custodial disposal options in the past and who have simply set their faces against being prepared to answer to the community for their failures. There are other cases—involving, for example, repeat offenders or people who have committed road traffic offences such as continuing to drive without a licence—in which a short and, one hopes, sharp sentence might bring home to the individual concerned the importance of complying with the law. I do not think that I have a difficulty in principle with what is proposed.

Robert Brown: I would like to develop some of the points that you make in paragraph 10 of your submission. You express the fear that the provision of mandatory directions to the court by a non-judicial body might undermine judicial independence under the European convention on human rights. Will you give us a flavour of your concerns in that area?

Lord Hamilton: The ECHR is concerned with the requirement that every person whose criminal as well as his civil position is to be adjudicated on is entitled to an impartial and independent tribunal. That includes circumstances in which a person who has been condemned in a criminal case is disposed of by a judicial office-holder, so the judicial office-holder must be an independent tribunal. I am concerned that if the judicial office-holder is constrained to a significant degree by the dictates of a body that is neither a judicial nor—in the sense that it is not elected—a democratic body, an issue might well arise about whether the person who is sentenced has had the benefit of having their disposal dealt with by an independent tribunal.

Robert Brown: The issues of principle aside, is it fair to say that that casts an element of uncertainty on proceedings?

Lord Hamilton: It certainly raises a question about them.

Robert Brown: I wish to develop a slightly different point that follows on from that. The Sheriffs Association expressed some concerns about the composition of the proposed sentencing council and have referred to the fact that the Lord Advocate must be consulted on the draft guidelines, whereas the judiciary does not have to be. In addition, they feel that the fact that there is to be a prosecutor on the council means that there is a suggestion that arrangements will have a prosecutorial bias. Do you have any concerns about those aspects?

Lord Hamilton: I suppose that one starts from the premise that in general—at least, traditionally—the prosecutor or the Lord Advocate has not been concerned with sentencing. In our jurisdiction, the prosecutor does not, as happens in other jurisdictions, propose that a particular sentence be imposed by the court. Nonetheless, the Lord Advocate has an interest in what the courts do, as is illustrated by the fact that statute allows her to appeal, without leave, to the High Court against a sentence that she contends is unduly lenient. I therefore have no particular difficulty with recognising that she, or someone on her behalf, should have an interest in the matter.

10:45

Robert Brown: It says in section 2(2) that where the guidelines from the Scottish sentencing council are inconsistent with section 1,

“the court need not comply with section 1”.

Does that not raise a question about what principles should be applied by the sentencing council in that regard? Will you elaborate on that?

Lord Hamilton: I have a concern about that. If the principles are to be recognised as being applicable in the criminal justice system, they should also be applicable to the sentencing council. It should not be free to deal with the matter without regard to those principles.

Robert Brown: I am conscious of the time, but I have a final question, which relates to the issue about alcohol in section 24. You suggested in your submission that bereavement would be a possible mitigating factor. Voluntary intoxication is not a mitigating factor under the bill, but should that exclude consideration of bereavement in the background as a factor of which account should be taken? In other words, would the provisions in that section be as practically restrictive as you suggest in your submission?

Lord Hamilton: If there is an absolute prohibition on taking into account the existence of voluntarily ingested alcohol, I do not think that the sentencer would be allowed to take into account background circumstances such as a personal tragedy of that sort.

One can think of other examples. A recent case gave rise to a lot of controversy: a young woman who had been sexually assaulted outside a club of some sort had driven off while she was affected by alcohol and was ultimately prosecuted. There was a question about whether she should have been prosecuted and about what the ultimate disposal should have been. If the terms in section 24 were to apply, it would not be possible to take into account that that young woman had driven off under the influence of alcohol, but in circumstances in which most people would recognise that there was a mitigating factor.

Robert Brown: That is perhaps a salutary example of the kind of difficulties that one can get into when trying to be too prescriptive about such matters in statute.

Lord Hamilton: Yes—that is true.

The Convener: Robert Brown might think that; the Lord Justice General cannot possibly say it.

Stewart Maxwell (West of Scotland) (SNP): On Robert Brown’s question, I am not sure that I follow the line of argument. Section 24 talks about “voluntarily consumed alcohol”, which must not be taken into account as a mitigating factor. Section 24 does not suggest in any way, shape or form that you could not take into account as a mitigating factor other circumstances—for example, if the person had been recently bereaved, sexually assaulted or any other circumstance. Because you cannot take into account the fact that the person was under the influence of alcohol, I do not follow why you cannot take into account that they were emotionally disturbed or had acted in an abnormal way because of other circumstances.

Lord Hamilton: I see your argument, but it seems to me that section 24, as it is framed, gives rise to an ambiguity that ought to be addressed.

The Convener: Surely the argument would be that the proximate cause of the intoxication was the traumatic experience that the individual had had and it would be competent to introduce that experience in mitigation.

Lord Hamilton: I will leave that matter for the committee to consider.

The Convener: We are aware of the time constraints this morning. Lord Justice Clerk, do you wish to add anything in conclusion?

Lord Gill: No—there is nothing that I wish to add.

The Convener: Lord Justice General, do you wish to add anything?

Lord Hamilton: No thank you.

The Convener: I take it that if any issues arise, you will be happy to respond to them in correspondence.

Lord Hamilton: Certainly.

The Convener: I thank you very much for your attendance this morning; we appreciate the pressures on your time. It has been an exceptionally useful evidence session.

10:49

Meeting suspended.

10:51

On resuming—

The Convener: The committee will continue consideration of the Criminal Justice and Licensing (Scotland) Bill. Members should have the written submissions from the Sheriffs Association and the Scottish Justices Association.

I welcome from the Sheriffs Association Sheriff Michael Fletcher, who has attended the committee previously, and Sheriff Nigel Morrison QC. Sheriff Morrison, who sits in Edinburgh as a sheriff, is the general editor of "Sentencing Practice" and the author of "Greens Annotated Rules of the Court of Session".

The representatives of the Justice Association are Johan Findlay, who is a justice of the peace and the association's chairman, and Robin White, who is a committee member. I thank you for your attendance. We will proceed to questioning.

Cathie Craigie: Part 1 of the bill sets out the purposes and principles of sentencing. Is it necessary to set that out in legislation?

Sheriff Michael Fletcher (Sheriffs Association): The view of the association is that it is not necessary to set out those principles as has been done in the bill, because all sentencers are well aware of those principles. I doubt that it assists the public to know that those are the principles by which sentencers impose sentences, and I doubt whether the public would look at section 1 to find out why a sentence had been imposed as it had been.

Cathie Craigie: Would having the principle in statute in any way help those of you who have to sit in judgment?

Sheriff Fletcher: It could help only if it was necessary for people who were sentencing to justify the sentence using such principles. When an individual sentence has been imposed, and is perhaps not approved of, I cannot imagine that it would be possible to justify it simply by saying, "We followed the principles that are set out in the act." I doubt very much whether it would be helpful to have those principles in statute.

Cathie Craigie: The submission from the Sheriffs Association says that the list in part 1, section 1 of the bill is not exhaustive and that many more purposes could be included. If section 1 is to stay in the bill, should we add to the list? Should we delete section 1?

Sheriff Fletcher: We suggested one possible addition, but that is all it was—one possible addition. We also tried to show that many other principles should perhaps be followed too, but that it would be very difficult to define them all. However, I doubt that we would change the principles that have been set out, if they are to remain in the bill and be enacted.

Johan Findlay (Scottish Justices Association): I do not have much to add to that. It is clear that justices, in particular, are trained very highly in sentencing—we use those principles all the time.

Cathie Craigie: Aside from what is in the legislation, should there be publicity so that the general public understand the purposes and principles behind sentencing?

Sheriff Fletcher: The general public might not take kindly to being lectured on the principles behind sentencing. Some people will be interested anyway, and will want to inform themselves about the principles in different ways, but I doubt very much whether the general public would be interested in seeing the principles.

Robin White (Scottish Justices Association): I take a slightly different tack from my colleagues: I see no harm in a statement of principles such as that in section 1. We could argue for a long time about what should go in the list—I would add "denunciation" as another aim of sentencing—but I do not think that there is any great controversy about the aims of sentencing. Various authors have produced various lists, but they all boil down pretty much to the list that is in the bill—which appears, incidentally, to have been lifted from the English legislation.

The list in section 1 perhaps suffers because it contains the sort of things that sentencers obviously take into account when sentencing. However, I do not see any particular harm in stating the principles.

I feel—pace Sheriff Fletcher—that the list may have more value from the public's point of view. We will, no doubt, discuss the proposed sentencing council, but one of its functions will be to provide public information and education. I think that it is generally agreed that there is a good deal of public ignorance about the purpose of sentencing, so it would be useful to have an authoritative and orthodox statement of the principles, if only to allow a sentencing council to use its terms when talking to the public.

The Convener: That possibility already exists, because an official is employed by sheriffs and judges to ensure that appropriate statements are publicised. Is not that the case, Sheriff Morrison?

Sheriff Nigel Morrison QC (Sheriffs Association): Yes—that is true.

I would like to add that the purpose of setting out the principles in the bill was not simply to set them out. As the policy memorandum indicates, the purpose was to achieve consistency, transparency and confidence. However, we do not think that that purpose has been achieved.

Cathie Craigie: I think that other committee members will ask about that in more detail later.

The Convener: We turn now to the somewhat more vexed issues of consistency in sentencing and the proposed Scottish sentencing council.

Bill Butler (Glasgow Anniesland) (Lab): Good morning Ms Findlay and gentlemen. What is wrong with asking the courts to exercise their discretion, in individual cases, within a general sentencing framework that has been established by some other body?

Sheriff Fletcher: It is not correct to say that we think that it is wrong to have a sentencing council, or that we think that it is it wrong that members of the public should have an input to allow consistency of sentencing to be achieved—or to be seen to be achieved, as it is perhaps more correct to say.

As we said in our written response, the difficulty that we are concerned about is the constitution of the proposed body. It is fair to say that it would be difficult for the main sentencers in Scotland—the sheriffs—to have confidence in a body that did not have a judicial majority.

11:00

Bill Butler: Do other members of the panel wish to add anything to that?

Sheriff Morrison: The Lord Justice General and the Lord Justice Clerk made the point that, under the European convention on human rights and the decisions of the European Court of Human Rights, sentencing is for judges, and, as Mr Don said earlier, the principle of policy—with a capital P—is a matter for Parliament. However, the proposed sentencing council would take away from Parliament from the judges the policy making, to an extent, and the decision making.

Bill Butler: Parliaments create criminal offences that the judiciary then applies in individual cases. If that is all right, why should it be undesirable for a non-judicial body to be involved in establishing sentencing guidelines that the judiciary then applies in individual cases? Is the problem the type of body that the bill proposes? Lord Gill said that there is a place for a sentencing council, but not the one in the bill. He went on to sketch briefly his thoughts on a research and advisory body. Would you be more comfortable with such a body? Is the problem the sentencing council that is outlined in the bill?

Sheriff Morrison: Lord Gill's suggestion would be more palatable.

Bill Butler: The proposed sentencing council is indigestible, then. Is that because there would not be a judicial majority on the council and that, rather than being an advisory body, it would take over what the court of criminal appeal does as a determining body? Is that correct?

Sheriff Morrison: Yes.

Sheriff Fletcher: Yes, that is the difficulty. Sentencing has been described as an art rather than a science. I do not think that everyone realises the amount of time that it takes to come to a decision about an individual sentence. That is why it is so attractive to other people to have guidelines, which they think would be relatively straightforward to apply to cases. In fact, the circumstances in every case are so different that guidelines are difficult to apply. I am not suggesting that we should not have guidelines because I or other sheriffs find them difficult. I am simply trying to illustrate the fact that guidelines are not the be-all and end-all.

However, if guidelines are to be prepared, that should be done by a body in which the majority of people deal with sentencing all the time. Sheriffs, judges and justices of the peace are regularly subjected to training, involving all sorts of sentencing exercises in which skilled people discuss sentences. It is important that such training also involves lectures from a variety of people—psychologists, psychiatrists, social workers, victim support people, police officers and academic lawyers—who describe the purposes of sentencing. The skill that those people have is gathered over a long time, and it seems to me that that is the skill that should be employed to create sentencing guidelines. That work has to be informed by the wider public, and I have no difficulty whatsoever with the wider public being involved in helping to create those guidelines. However, it is not so easy to have confidence in a body in which the majority of the people who make the guidelines do not have that skill.

Johan Findlay: I often describe sentencing as neither an art nor a science but as an impossible equation in which one balances the means of the offender against the seriousness of the offence. As Sheriff Fletcher said, it is very difficult to lay down guidelines on that.

I am never very sure what we mean by public opinion. It is very often that which is reported in the press; we do not know who exactly has said something in the beginning or where it is leading.

Bill Butler: It may be editorial opinion.

Johan Findlay: It could be that or anything else. It is very difficult to get public opinion. A lay person on the Scottish sentencing council, depending on what background they come from, may be very biased, nevertheless theirs would still be a lay opinion. Justices are lay people, but we have had years of training. I have been a justice for 22 years and—as Sheriff Fletcher said—we are pretty expert on sentencing.

Bill Butler: Does the panel agree with Lord Hamilton's comment that the need for guidelines, as set out in the bill, will constrain sentencers and the appeal court to a significant extent?

Sheriff Morrison: I agree with him. There are elements in the bill that would make guidelines prescriptive—I think that that was the word that he used—and I agree.

Bill Butler: Are we all in agreement?

Robin White *indicated agreement*.

Sheriff Fletcher *indicated agreement*.

Johan Findlay *indicated agreement*.

Bill Butler: I am obliged.

Robin White: I was hoping to say something about some of the other matters that have been raised in the past few minutes, particularly the constitutional issue. Certainly, two constitutional issues are involved—we might call them the internal and the external.

The internal is the actual constitution of a Scottish sentencing council. Our evidence has spoken in favour of a 50:50 split between judicial and non-judicial members. One can argue until the cows come home about the appropriate level. We ended up with 50:50 having tried to square a circle by giving confidence to the judiciary, which might argue for a judicial majority, but also confidence to the public at large—

Bill Butler: Could that not lead to stasis?

Robin White: That is precisely my next point, if I may say so. Public confidence might require a judicial minority—

Bill Butler: Why should that be so?

Robin White: With the greatest respect to all members of the judiciary, it is because there is a danger of a certain amount of conservatism—with a small c—in sentencing, by which I mean that, on the whole, most sentencers are pretty satisfied with sentencing at present. However, if one wants a few new ideas or some public reaction one might not want a judicial majority.

Bill Butler: What is your evidence for that assertion?

Robin White: Which assertion?

Bill Butler: About small-c conservatism.

Robin White: I have no evidence at all.

Bill Butler: Therefore, it is your opinion.

Robin White: As are most of the things that are said from this side of the table.

I mentioned the internal. Might I say something about the external, which the Lord Justice General said something about? The proposed sentencing council would be a constitutionally interesting body externally because clearly the Parliament can tell the courts what to do—full stop. You made the point about the creation of new criminal offences, for example. The Parliament could decide that there should be a fixed penalty for every single offence in the calendar and the courts would loyally have to obey that. It would not be good policy, but it would be perfectly sound constitutionally. That is not true for the Executive. The courts do not do what the Executive says. If the Executive wishes a particular policy to be followed, the appropriate course is for it to introduce legislation. The proposal falls somewhere between those two; guidelines are not exactly a nudge and a wink, but they have an interesting status. We are used to the idea of guidelines in legislation—they have been around for a very long time.

Bill Butler: What is your reply to what Lord Hamilton said about the phrase "have regard to" being too prescriptive, with which Sheriff Morrison agreed?

Robin White: I would always defer to the Lord Justice General, but I should have thought that the phrase "have regard to" was not inappropriate. You can interpret it as you wish, but it means something like "must have in your mind".

Bill Butler: If you can interpret it as you wish, why have it at all?

Robin White: Because you have to have something.

Bill Butler: Okay.

Robin White: You could use alternatives such as "must take account of", which racks things up slightly, or "is obliged to". If one is to have principles, there must be a verbal form for the notice that the courts should take of them. With great respect to the Lord Justice General, I should have thought that "have regard to" was at the lower end of the requirements.

Bill Butler: I am obliged.

Nigel Don: Some of the questions that I wanted to ask have been pre-empted. Sheriff Fletcher's comments about the people who train sheriffs seemed to reflect precisely the description of those who would be appointed to the sentencing council. Is there a synergy that may have eluded you?

Sheriff Fletcher: That is partly why I chose to mention those people, although there are others who give us lectures. I was trying to illustrate the fact that judges have training that extends beyond what you might think of as our little world—if some people think that we have one—into the wider world, not just of the general public but of experts who know how things work and tell us about the difficulties and advantages of dealing with people in the way in which we are required to deal with them.

Nigel Don: Is there not an advantage in constituting a body that can provide guidelines regularly to everybody, rather than putting up with what is necessarily intermittent training? I nearly used the word sporadic, but there is nothing random about it. If there were such a body, guidelines could be issued generally, rather than being issued occasionally to those who happen to be being trained at a particular time.

Sheriff Fletcher: The advantage of training is not just that it gives people knowledge but that it allows them to absorb that knowledge in a way that enables them to form the skill that they need to do the job. That is different from having a body of people who have a skill because they are experienced and trained and live in the real world, which we do. It is better for guidelines to be produced by people with that body of knowledge than by people such as psychologists, psychiatrists and policemen, who add just one aspect of their knowledge.

The Convener: Ms Findlay, do you have anything to add?

Johan Findlay: No—Sheriff Fletcher's answer is quite clear.

Robert Brown: Do both the justices and the sheriffs accept what I understand to be the view of the senators: first, that there is a place for research into the effects of sentencing, on which we could be better informed; and, secondly, that the nub of the matter is who has the final decision on sentencing guidelines? Should it be the body that will be set up under the bill or should it be the High Court in its appeal capacity, with the sentencing council acting just as an advisory body? Is that not the nub of the constitutional point? What is your view on that?

Sheriff Fletcher: Sheriffs think that the High Court of Justiciary, advised by guidelines, should have the final say.

Robert Brown: Is there a place for better research into the effects of sentencing?

Sheriff Fletcher: Definitely. A wide variety of sentences are available to us, and we use them pretty regularly. We see the results of those sentences: in some cases community service is successful, but in others it is completely unsuccessful. However, we have no research that tells us whether, overall, that is the correct course for us to take. It would be helpful to have such research.

11:15

Robin White: For precisely the reasons that Sheriff Fletcher has highlighted, I absolutely agree that it would be enormously valuable for the bill to give the sentencing guidelines council the function to carry out or commission research.

I have to say that I defer to the Lord Justice General on the point about constitutional status. I suppose that, from a judicial point of view, it would be a good deal more satisfactory for the guidelines to have the imprimatur of the High Court acting as a court of appeal.

Paul Martin: Why has no research been carried out? After all, some of you have significant experience in the judiciary and I am sure that over the years sheriffs and various authorities have made representations on that matter. Why are you asking for research now?

Robin White: A good deal of research has been carried out, but there is plenty of room for more. New sentences keep being introduced; for example, community payback orders might well come in as a result of the bill, and research will have to be carried out on their effect, on variations within unpaid work and so on. No one will argue that there is no research; it is just that there needs to be a lot more.

Paul Martin: So some research has been carried out.

Robin White: Yes, but it is constrained by funders funding people to do it.

Paul Martin: I appreciate that, but you said that new legal remedies such as CPOs are going to be delivered—

Robin White: I am sorry. My point is that when new sentences such as drug treatment and testing orders and restriction of liberty orders are invented and introduced someone early on has to find out whether they are having their intended effect.

Paul Martin: So is there a failure in—

Robin White: I am not saying that there has been a failure. I am just saying that there could be more and better research.

Paul Martin: Please let me finish my question. Has there been a collective failure in this respect, perhaps by Parliament, the justice directorates and so on? In almost every evidence session, someone says that we need more research. Surely we need first to clarify the research that already exists and secondly to think about the action that needs to be taken as a result of any research that is carried out. After all, if, in light of research showing that a particular sentence has been effective, we say that you will be required to deliver it, you will simply say that we are taking away the judiciary's independence. In that case, what purpose will research have?

Robin White: With respect, that sounds like a counsel of despair.

Paul Martin: It does not.

Robin White: I do not wish to monopolise the discussion, but let me address the two points that you have raised. On the question whether enough research exists already, that is a matter that needs to be discussed and on which we will end up with our own opinions. It certainly is an issue, but I doubt that it can be resolved today. As for the question of what happens as a result of research, that is a matter of political will.

Johan Findlay: An amount of research has been done, but it is not always easy to get hold of it. It depends on who has commissioned it or carried it out. A sentencing council or advisory board would be able to gather that research together and give it to the people who need to see it.

Paul Martin: So you are not able to access the existing research.

Johan Findlay: It depends on where you come from. Some—but not all—research will go to the courts or the various training bodies.

Paul Martin: So is there nothing available on the internet, for example? I am sorry to labour this point, but the question is whether or not we can access research.

Johan Findlay: We can access some.

Paul Martin: I suppose that my point is that if we are seeking to procure new research we have to ensure that it will be used. I am sure that, with Google, you could find quite a substantial volume of academic research; I am also sure that a number of you are able to access other academic research. We need to ensure the quality of that research and that, when it is carried out, its conclusions are taken forward.

Johan Findlay: That is right.

The Convener: On the question of research, surely the effectiveness of different sentences can be determined by the recidivism rates of those who have received them.

Sheriff Fletcher: That is certainly one way of checking the effectiveness of sentences.

Paul Martin wanted to know who would make use of the research. I can tell him that the judiciary certainly would, because we want to know which of the sentences available to us is the most effective in preventing reoffending. We are finding ways of doing that and, if you like, looking for scientific reasons behind our choice of sentence instead of relying on what seems best to the individual sentencer.

Stewart Maxwell: Let me take you back, Sheriff Fletcher. A moment ago, in your answer to Mr Butler, you seemed to suggest that the bill changes who has the final say—that it will not be the appeal court, but the sentencing council. However, that is not strictly correct, is it? Although you will have to have regard to the guidelines, the final say will still rest with the judiciary.

Sheriff Fletcher: Sorry. I did not mean to say that the final say will not rest with the appeal court. I thought I said that I thought that it should rest with the—

Stewart Maxwell: I understand. You are saying that the final say should rest with the appeal court, as it currently does. However, surely the final say will still rest with the appeal court, even if the envisaged sentencing council is brought into being?

Sheriff Fletcher: I suppose that it will, except that the judges in the appeal court, like all other judges, will be required to follow the law, and the law requires them to have regard to the guidelines rather than whatever other things they might think it more appropriate to have regard to.

Stewart Maxwell: You will have to have regard to the guidelines but, as we explored with Lord Hamilton and Lord Gill, that does not necessarily mean that you must obey them absolutely. There could be circumstances in which, although you would have regard to the guidelines, you would come to a different conclusion. Is that not the case?

Sheriff Fletcher: Yes. "Have regard to" means exactly what you say that it means.

Sheriff Morrison: There is, however, a provision in the bill that will allow the sentencing council to exclude departure from the guidelines. It is not simply a matter of the judges having regard to them, because the sentencing council will be given that power.

Angela Constance: It could be argued that consistency in sentencing is not achievable without removing the freedom of the sentencer to take into account the various individual circumstances of a case. However, it could also be argued that that would be overstating the case, given the fact that well-formed sentencing guidelines could help to achieve greater consistency without unduly limiting the ability of the sentencer to deal with individual circumstances. I would be interested to know the views of the panel about that, starting with Mr White.

Robin White: It is interesting that consistency is seen as the prime virtue in all of this. As our written evidence suggests, there is at least one other criterion that might be applied—appropriateness. A judge can clearly be consistent in error. Nevertheless, consistency is the prime criterion because that is perceived to be the public concern.

The problem with consistency is that, as Sheriff Fletcher said, every sentencing decision is multi-dimensional. There is a large, although not infinite, number of considerations that one might wish to take into account. We have talked about whether such decision making is an art or a science, but the phrase that I would use is "arbitrary and intuitive". I mean arbitrary not in the sense of capricious, but in the sense that there is a decision, and I mean intuitive in the sense that there is no arithmetic or accountancy to the decision—it is a decision that one must take on the basis of what one thinks is appropriate in terms of the principles of sentencing.

Therefore, although consistency is not a thing to be discarded—it is something to be concerned with—the question is: consistency with what? We have our list of half a dozen principles, which are not ranked. One clear decision that anybody who passes a sentence must take into account is which of those principles—which are often inconsistent—is the prime principle to apply. There is then the possibility of aggravating factors, mitigating factors and so on. I do not know whether that answers your question.

Angela Constance: Given the fact that the sentencing guidelines offer a framework rather than a chart, do you think that they could be helpful in achieving consistency and appropriateness?

Robin White: Indeed they could. That is their value. You spoke of charts, and you might know that in some American states, sentencing commissions produce charts from which judges can read off the appropriate sentence. Judicial discretion for anyone there is minimal. That system is conceivable—it operates—but I do not think that we would want it here. What do we have instead? We have guidelines that one would hope would demonstrate appropriateness as well as consistency.

Sheriff Fletcher: I agree. I do not think that I am suggesting that guidelines are not helpful or that they should not exist. I am worried not about the guidelines but about who gives them. We are perfectly used to guidelines being given by the High Court of Justiciary. We regularly find ourselves following them because we are aware of them, or being challenged because we have not followed them. That is not a problem; it is not difficult. I just suggest that the people who give the guidelines should be the ones with the skill to do that.

The Convener: Before we leave this point, there is one issue around the guidelines that concerns me. I would be interested to hear whether the witnesses think that the wording in the bill is inconsistent with my concern.

In your commission areas, there will be differing criteria and sentencing policies for the same offences. For example, someone who drives at high speed through a small village in the country would obviously attract a great deal more localised odium than someone who does the same thing along Great Western Road in Glasgow. As such, the penalty would be increased. In fact, within your jurisdiction, Sheriff Fletcher, it could be argued that disorder in the centre of Perth would be viewed more seriously than disorder in certain parts of Glasgow. Therefore, members of the bench might well feel that sentences should reflect the degree of public concern about certain issues.

As I see it, that point would not be picked up within the requirements of the consistency approach that is demanded by any potential sentencing body.

Sheriff Fletcher: No, and of course there have been occasions when people have thought that a serious offence in one part of the country, where there was a particular problem, required to be dealt with even more seriously than the same offence in another part of the country. I do not think that there is anything wrong with that. It is a reflection of the judiciary's ability to recognise both what is going on in their own area and what might be necessary to improve life in that particular part of the world.

The Convener: Does Sheriff Morrison consider that the wording in the bill would allow for different sentences for the same offence, bearing in mind the locus of the offence?

Sheriff Morrison: I am not sure that it does, actually.

The Convener: Yes; I think that that is a problem.

Johan Findlay: With guidelines, there is always a danger that we lose a lot of local discretion, which is so important to justices and sheriffs who sit in a local sheriffdom.

The Convener: I think that we have largely covered the material that the next two questions would have looked at. I will go to Stewart Maxwell.

Stewart Maxwell: Thank you, convener. I turn to section 5(5) of the bill, which says that the

Scottish sentencing council must include in any sentencing guidelines an assessment of the likely impact of those guidelines on various aspects of the criminal justice system, including:

> "(i) the number of persons detained in prisons or other institutions,
>
> (ii) the number of persons serving sentences in the community, and
>
> (iii) the criminal justice system generally."

What are your views on that provision?

11:30

Sheriff Fletcher: That is partly why we are constitutionally concerned about the bill's provisions. There is little doubt that sentencers consider themselves unable to take into account—it would be inappropriate for them to do so—the kind of matters that are set out in section 5(5), such as,

> "(i) the number of persons detained …
>
> (ii) the number of persons serving sentences in the community, and
>
> (iii) the criminal justice system generally."

We think that we should be dealing with the individual with regard to the individual offence that that individual has committed, taking into account society's view of what the sentence should be. However, we should not take into account whether there is enough room in the prison, whether there are enough community service places or what the situation is in the criminal justice system generally. We think that the person who is being sentenced is entitled to be sentenced by someone whose attention is not directed at whether there is a place available for them.

Stewart Maxwell: I think that section 5(5), which sets out the context for the guidelines, is not as prescriptive as you suggest. Do you agree that the factors that you mention are taken into account in the general thinking of sentencers? I can remember sheriffs complaining that there were not enough community service places and saying that that impacted on their ability to sentence people in that way.

Sheriff Fletcher: That is a complaint that has been made. We are forced to take that consideration into account because we cannot sentence someone to do community service if we know that they are not going to be able to do that for nine months, which was the position at one point. In such a situation, we might decide that we should send the person to prison instead. However, that consideration should never be in a sentencer's mind or, in my opinion, the minds of those who are setting the guidelines.

The Convener: Do you have anything to add, Ms Findlay?

Johan Findlay: No. I totally agree with what Sheriff Fletcher said.

Robin White: One purpose of section 5(5) might be to inform the Scottish ministers.

The Convener: That is a perfectly valid point, and I assure you that we will raise it with Scottish ministers in due course.

Paul Martin: What changes would the panel like to be made to the provisions on the Scottish sentencing council? For example, would the panel recommend any changes to the membership of the council?

Sheriff Fletcher: Sheriffs are the main sentencers in Scotland. However, as it stands, there will be two members of the council who are either sheriffs or sheriffs principal. That means that it is conceivable that the council might have no sheriffs at all but instead have two sheriffs principal, who have probably not sentenced anyone recently, as they do not carry out criminal work. They are the administrative heads of sheriffdoms and deal with civil appeals, not criminal work, except on extremely rare occasions. Some of them might be temporary judges, but that is a different matter. It seems to us that there ought to be two sheriffs on the council.

Paul Martin: Are there any other views on the membership of the council?

Sheriff Fletcher: I think that I have made it clear that sheriffs consider that there should be a judicial majority, and that that should involve at least one other High Court judge.

Paul Martin: Are there any views about the bill's proposals regarding the process for establishing guidelines?

Sheriff Morrison: As we stated in our paper, you will not be able to create a guideline unless you have researched it properly. As we point out, a considerable amount of money would have to be spent on carrying out proper research in order to produce a guideline with any value or credibility, and in which the public could have confidence. That is the critical element of the process that we emphasise.

Johan Findlay: We are very concerned that there should be a judicial majority. We mention the figure of 50 per cent in our paper, but we would probably prefer there to be a majority. Like the sheriffs, we were concerned that the bill refers to a

> "justice of the peace or stipendiary magistrate."

They do very different work. There are approximately 470 justices in Scotland, and we deal with a vast amount of criminal justice. There are only four or six stipendiary magistrates, and they are in only one area, Glasgow.

The Convener: There will be four of them, full time.

Johan Findlay: Thank you. We do far more work than those four stipendiaries. We would be extremely concerned if we did not have a say or a place on the sentencing council.

Robin White: I will reinforce that point. For what it is worth, the equivalent legislation for England and Wales concerning the Sentencing Guidelines Council specifically requires separate representation for justices. That is to say, there must be a justice of the peace on the council, as opposed to a district judge, who is the rough equivalent of a stipendiary magistrate.

As I think the Lord Justice General observed, it is not obvious why there should be any police membership of the Scottish sentencing council, or prosecution membership, for that matter. If there were to be such membership, the Scottish Prison Service should also be represented, as it has a lot more to do with sentencing than the police do. The Convention of Scottish Local Authorities should be represented, too, as community sentences are carried out by local authority employees, broadly speaking.

Stewart Maxwell: You said that proper research should be carried out before any guidelines are issued by the sentencing council. Is proper research undertaken for any guidelines that are issued currently? Could you point to that research?

Sheriff Fletcher: I do not think that it is correct to say that academic research is carried out, but the guidelines that are currently issued by the High Court of Justiciary are issued after both sides have addressed all the matters that might concern the High Court. Counsel will have researched their position.

The example that the Lord Justice General gave showed that a great deal of trouble is gone to in order to carry out research on behalf of one side or the other, so that the High Court of Justiciary can be informed in the guidelines that it issues.

Stewart Maxwell: Is it your view that the sentencing council will not carry out an equivalent level, if not a greater level, of research, whether it is academic or other research, before coming to a decision about issuing guidelines?

Sheriff Fletcher: No, we hope and expect that it will do that.

The Convener: If there are no further questions on that subject, we will now turn to the somewhat more vexed problem of short custodial sentences.

Robert Brown: In their submission, the High Court judges expressed the view that the proposed change in section 17 regarding short-term sentences will be unlikely to affect existing sentencing practice. The Sheriffs Association has also expressed a number of views in its submission about the reasons why short-term sentences, in various circumstances, have a fairly significant part to play.

Could you give us some insight into what you think the results of the changes that are contained in section 17 might be? Do you agree with the High Court judges on that matter? Do you think that any practical steps could be taken to reduce the number of short custodial sentences?

Sheriff Fletcher: It must be clear to most people that sheriffs and justices use a custodial sentence only as a last resort—I am sure that that is the case. It might be difficult always to be sure that a custodial sentence is a last resort, but that is an individual decision in an individual case. We impose a custodial sentence only when we can do nothing else, or when we think that society requires that, because it will not put up with repeated offending by someone while, apparently, nothing is done about it.

Robert Brown: Does that boil down to saying that you agree with the High Court judges that the provision might not make much difference?

Sheriff Fletcher: I do not think that it will make much difference. However, it will make a difference to the practice, because the sheriff or anyone who is sentencing somebody to less than six months will have to state their reasons for doing so. That might sound simple because, usually, when one is sentencing someone to imprisonment, one says something like, “There is nothing else that I can do with you, so I’m going to send you to prison.” However, if we are required to do that by statute, the unintended result might be to slow down the court system while the judge makes up the statement that he has to make. If he has to do that regularly, that will slow down the process. Throughout the bill, there are many other provisions under which sheriffs will have to give reasons for what they do when they do it. Each time they have to do that, that will slow down the court process.

Robert Brown: We will take that warning seriously but, nevertheless, do you not accept that, for reasons to do with the public perception of consistency and appropriateness of sentence and with the ability to consider the effectiveness of sentences, there is a considerable advantage in a requirement to state reasons for the decisions that are made?

Sheriff Fletcher: As I said, reasons are almost always stated. I do not think that people are sent to prison without the judge giving reasons. Those might not be the type of reasons that will have to be given when the bill is enacted but, nonetheless, reasons are given. The trouble is that the audience is not necessarily the general public. In many cases, nobody hears the sentence except the person who is the recipient of it. I am not sure that the general public will be helped by the measure, because they might not find out about the reasons.

Johan Findlay: Sheriff Fletcher is absolutely right. I have heard sheriffs say that they write up a reason carefully for specific offences but there is nobody in the court to hear it. The newspapers publish what they want to anyway—they do not always publish exactly what the sheriff said. The same is true of justice of the peace courts. It is rare to have a press presence in those courts, so it is difficult to know who will hear the reasons.

Robert Brown: Your submissions mention the important issue of funding for community sentences. If there is to be an emphasis on community payback orders, they will need to be funded. Sheriff Fletcher said that funding issues ought not to affect the judgment of sentencers but, in practice, they sometimes do. Will you elaborate on your concerns about the important issue of funding?

Sheriff Fletcher: When we deal with a community service order, which is the equivalent of the order that you mention, it is extremely important that the person who is put on community service starts it quickly after the sentence is imposed. It is fair to say that, for a time, that did not happen in most parts of the country. When the community service does not start quickly, the impetus to carry out the sentence is lost. One of the main impetuses is that the person is relieved to be told that they are getting a community service order instead of a custodial sentence. The result was that they were in the mood, if you like, to carry out the order. If the community service starts a long time later, that impetus is lost. We think that a large number of orders are breached as a result. If, once you make the order, off the people go to do the community service, there is a much better chance that the order will be fulfilled.

11:45

Robert Brown: I want to ask about the suitability of the sentence. The point was made earlier about research. Under the general heading of community disposals, there are quite a lot of different types of disposal ranging from probation to drug treatment and testing orders, with various nuances in between. The purpose of getting rid of short-term sentences is to try to reduce the reoffending rates, which are said to be lower with community sentences. In making judgments on these matters, do sheriffs and magistrates have a clear view in their own mind about the potential effectiveness of different sorts of community sentence for particular individuals? How do you inform yourself about that and about the availability, if appropriate, of particular forms of treatment? DTTOs are a fairly obvious form of treatment, but there is also alcohol treatment and anger management. A series of issues can lie behind the referrals to community disposals.

Sheriff Fletcher: Yes. We are not able to impose any of the sentences that you mentioned without first obtaining a social inquiry report, which deals with the background of the person and, more important, deals with problems that the social worker identifies as ones that might have caused the offence to be committed or which might be likely to cause the offender to reoffend. The report helps the sentencer to decide which disposal is appropriate. The report might say that the offender has a drug problem that they might consider trying to do something about, and that we could consider using a drug treatment and testing order. It might say that an offender is ineffective at running their life, which is in a shambles, and that we could try a probation order to see whether that will help. Such recommendations are made in the report to help the sentencer to decide which disposal is appropriate.

Robert Brown: On the information that comes before the court, to what extent is the availability of certain types of community sentence made known to you? Would you become aware of that through previous practice and difficulties and through people coming back to you later?

Sheriff Fletcher: The local sheriff in Perth, for example, will know about the times when there have been difficulties with community service. Social inquiry reports have told us that community service would be a good idea but that it would be nine months until the person could do it.

Robert Brown: Do you have a different view on that, Sheriff Morrison?

Sheriff Morrison: No.

Robert Brown: There have been issues in Edinburgh, have there not?

Sheriff Morrison: We get information packs that tell us about the particular types of programme that are available. Individual courts hold meetings with the sheriffs and the social work department to tell us about new initiatives or changes in current initiatives. As well as relying on social inquiry reports to indicate what might be an appropriate disposal, we are also made aware of and kept up to date about individual programmes.

Robert Brown: Is the position in your jurisdiction the same as the position that Sheriff

Fletcher described in respect of the availability and timeousness of community sentences?

Sheriff Morrison: Yes. We are told occasionally that there is a problem and that there will be a delay. There is no problem currently in Edinburgh. I believe that there is a problem in Glasgow, because of a strike—such things can affect the situation. A programme might stop. A community programme for sexual offenders was stopped when the people who had been running it stopped, and it was some time before it was replaced. Such problems arise from time to time.

Johan Findlay: We do not have community service. I believe that only one court in Scotland has it. Under summary justice reform, we have been promised that we will have different types of community disposal, and we look forward to that. However, at the moment, courts have very few disposals available to them. We have argued long and hard—indeed, for more than 400 years—that we need more disposals.

The Convener: I am sure not you personally.

Johan Findlay: Sometimes it feels like it.

The Convener: I will play devil's advocate for a moment, Sheriff Fletcher. You dealt with the increased time on report writing that will be necessary under the proposals. Surely the matter is fairly simple. The most telling phrase for a sheriff to use is, "In light of the seriousness of the offence and the accused's pattern of offending, a custodial sentence is justified." Would that not fit the bill?

Sheriff Fletcher: I do not know the answer to that. I do not know what the High Court of Justiciary would think—

The Convener: I am interrupting you but, when I did these things, I used that phrase consistently in my stated cases and notes of appeal, and I never had any problem.

Sheriff Fletcher: Perhaps we can follow your example.

Angela Constance: I want to follow up on Robert Brown's question on the wide body of research informing decision making. As someone who, in a former life, has written more social inquiry reports than you have had hot dinners, I understand how such reports may—or may not—inform the decision making. We know fairly conclusively that only one in four of those who are given short sentences will be conviction free two years on. However, if they are given a community disposal, the figure goes up to three in five. How does the broader information inform decision making? Of course, I understand that it has to be balanced with the individual circumstances of the case.

Sheriff Fletcher: I understand what you mean by the research, but we have to take into account the fact that people who get non-custodial sentences are those who have not reached the same stage in their criminal career—if I can call it that—as those who are sent to prison. By the time someone is sent to prison, it is probably less likely that they will not reoffend. They will have been through all the non-custodial sentences and are now being sent to prison—neither the non-custodial sentences nor their time in prison has stopped them. I am not surprised at that. It happens. On the other hand, a number of people who get caught further down the scale can be reformed and do stop offending. I do not find the statistics as convincing as others do. We continue to require the ability to send someone to prison for a short sentence. On some occasions, it works wonders. Despite what the statistics say, we will never see that person again. I am sure that that is the experience of every sheriff.

What do we do with someone who does not carry out their community payback order? Every week, we have boys like that standing in front of us. We can tell from the way that they look at us that they are not going to do it.

Angela Constance: Perhaps there is a role for the Scottish Prison Service in any sentencing council. Mr White picked up on that earlier. We have had much discussion this morning about training and the need to listen to the experience and knowledge of those in other disciplines, whether psychology or social work. What contact do sheriffs have with the Prison Service? As part of their training, do sheriffs go into prisons and look at the impact of short-terms sentences on the individual and the churn in prisons, with all the difficulties that that causes?

Sheriff Fletcher: Part of a sheriff's training is to visit the nearest prison. I am not suggesting that it happens regularly, but sheriffs are always asked to visit a prison at some point in their training. Some sheriffs continue to make such visits, simply to keep themselves informed of what is going on in prison. Sheriffs have contact with the Prison Service at least once in their careers, but probably more often than that.

Angela Constance: Would the views of prison officers be thought to be valid? You said that social workers and psychologists would be listened to.

Sheriff Fletcher: If they came and gave a talk to sheriffs during their training, they would certainly be listened to.

Sheriff Morrison: In my time as director of judicial studies, people from the Prison Service lectured to sheriffs regularly.

The Convener: Are there any other questions at this stage?

Cathie Craigie: I have one about short periods of imprisonment. In your submission, you point out that sometimes a

> "custodial sentence is the only punishment that an offender cannot avoid undertaking."

You also say that it is clear that

> "short sentences have a value since a custodial sentence of up to 30 days is to be a sentencing option for breach of a level 1 community payback order".

Will you say a bit more about how that will balance out?

Sheriff Fletcher: The point is that the bill suggests that custodial sentences are a possible disposal when such orders are breached. I tried to make the same point earlier—if we have such orders, we must remember that there are some people who will simply not do them. The fact that some people will not do them gets around in places such as Perth and Dumfries, where I sat as a sheriff. The tic-tac was obvious. If something was going wrong with the system, the people who were used to coming to the court soon got to know that. The result, quite frankly, is that we are left a laughing stock.

Robert Brown: I have a comeback that is inspired by what you have just said. At the end of the day, the Scottish Prisons Commission and others have laid down a challenge for us to address, which is that short-term prison sentences, aside from whatever deterrent effect they might have, are not long enough to allow anything useful to be done with offenders. Something like two thirds of people reoffend within two years of serving a short-term sentence, and I think that I am right in saying that about 92 per cent of the prisoners at Polmont prison have been there before. By anyone's reckoning, those figures do not indicate that short-term prison sentences are a success, however one defines that. Do you have any views on how we can improve what happens in prison or develop alternatives that are more effective in achieving society's ends?

Sheriff Fletcher: The problem, of course, is the short-term nature of sentences. We recognise that people do not have time to settle into prison and do a course of any length or significance. I do not think that it is for me to suggest how prison ought to be run.

I agree that many people who serve short-term sentences return to prison, and I have given one possible reason for that, but there is another group of people for whom prison is a much more serious problem than it is for most of the short-term prisoners whom we are talking about. Some of the people in that group might be relatively young or at a relatively early stage in their criminal careers. Sometimes everything can be nipped in the bud through the use of a short-term sentence, because the person suddenly realises that we mean business and that they will not be able to carry on living in the way that they have done because, if they do, they will end up in prison. Every now and then, a success is achieved that is a shock to the system, in that a complete change in a person is suddenly observed, simply because they went to prison or into detention at an earlier stage than one might think.

12:00

The Convener: To follow up Robert Brown's point that short prison sentences can be ineffective, do you adhere to the argument that is made in paragraph 2.3 of your submission, in which you point out the issues that arise when a prison sentence is in fact much shorter than the sentence that has been imposed by you in court?

Sheriff Fletcher: Yes.

Sheriff Morrison: I do not want anybody to think that we as sheriffs want to impose prison sentences—even short ones—but sometimes we have to do it. I accept that not much can be done with people when they are sent to prison for short-term sentences but, as we explained in our paper, to which the convener has just drawn attention, we sometimes have to impose such sentences.

Sometimes it does work. My attention was drawn the other day to someone who was given a drug treatment and testing order. He was not following it properly, and he committed an offence of house-breaking for which he was sentenced to a short period of imprisonment. During that time, he reflected on his life and his offending and, according to the social worker's report, saw the error of his ways. He came out of prison, and he is now doing extremely well on his drug treatment and testing order and making a success of it. A short sentence is not always negative.

Cathie Craigie: I just want to clarify something. As has been mentioned, the bill states that there will be a presumption against imprisoning someone for less than six months. However, given that an accused who pleads guilty is allowed a discount on their sentence, does the presumption in effect cover sentences of nine months?

Sheriff Fletcher: Yes. If a person pleads guilty at a very early stage, a discount of one third is not uncommon. That means that if we were to sentence someone to nine months, the actual sentence that would be imposed would be six months. We are telling them, "I would have given you nine months, but I am giving you a discount of three months, so you will go to prison for six months." That would bring us within the realm of that section of the bill.

The Convener: But that person would serve a maximum of three months.

Sheriff Fletcher: Yes, he would serve three months at the most.

The Convener: Are there any other questions?

Stewart Maxwell: Just for clarification, with regard to the circumstances that you mention—or circumstances in which someone might be sentenced to less than six months—you would, even if the bill was passed unamended, still have the right to impose short sentences. There would be a presumption against it under the bill, but you would still have that right. Just because a sentence might happen to be six months, or end up as six months because of various procedures, it would not mean that a person would automatically not get a prison sentence.

Sheriff Fletcher: They might not automatically—that is true. However, all sheriffs and justices would have regard to that rule, because we are bound to do so. It would cause us to hesitate, because we would have to think about whether we can truly justify giving such a sentence.

The Convener: As there are no further questions, I ask Ms Findlay whether she has anything to say in conclusion.

Johan Findlay: No, thank you—everything has been said.

The Convener: Sheriff Fletcher?

Sheriff Fletcher: I have nothing to add—thank you.

Robin White: I would like to add something that has not so far been touched on. It is not often realised that the majority of criminal sentences these days are passed not by courts but in the form of conditional offers. If there are to be guidelines on court disposals, it seems that there should be guidelines on conditional offers, including fiscal fines and so on. There are guidelines, but they are of course unpublished, as they are internal to the Crown Office. It seems strange that we are arguing for open and transparent sentencing by courts, while accepting behind-closed-doors sentencing by fiscals and police.

The Convener: You have included that in your submission to the committee, Mr White.

I thank Mr White, Ms Findlay, Sheriff Fletcher and Sheriff Morrison for their contributions this morning, which have been extremely valuable. I suspend the committee briefly.

12:04

Meeting suspended.

12:07

On resuming—

The Convener: We resume consideration of the Criminal Justice and Licensing (Scotland) Bill. I welcome our third panel of witnesses. The right hon Lord Cullen is a former Lord President of the Court of Session and Lord Justice General. Professor Jan McDonald, from the Royal Society of Edinburgh, is a retired professor of humanities. I understand that Professor McDonald will give a brief opening statement.

Professor Jan McDonald (Royal Society of Edinburgh): The Royal Society of Edinburgh is a rather different organisation from those that you have met this morning. Founded in 1783, it was a product of the Scottish enlightenment. We see ourselves as Scotland's national academy of science and letters, and our fellowship is about 1,400 people who are appointed by peer review. It is particularly germane to our discussions today that those fellows are drawn from a very wide range of disciplines—science, medicine, theology, the arts and humanities, the social sciences, business and industry, and the law.

The Royal Society of Edinburgh is a completely independent body with no political affiliations whatever. Our principal function is to provide public benefit through research and scholarship and to promote research and scholarship within Scotland and internationally. We also have a strong outreach programme in primary and secondary education, as well as in the higher echelons of research. In addition, we instigate and carry out major inquiries on our own initiative.

We also respond to Government consultation papers, the process of which may be of interest to the committee. Once senior officers decide that a consultation is germane to our interests and that we have the expertise to deal with it, the general secretary and the appropriate vice-president instigate a consultation. All the fellows are contacted and any fellow may respond. As is natural, people cluster to their expertise, but it will have been by no means uncommon for non-lawyers to contribute their views on the bill. After views are submitted, a small committee is usually established—Lord Cullen chaired the committee on the bill. A report is then prepared, sent for consultation to those who contributed their views and formally passed by the general secretary and the appropriate vice-president.

That is all that I want to say to give members an idea of the context of our submission and the procedures that gave rise to it.

The Convener: Thank you. It is important that we know the basis on which the society operates.

Cathie Craigie: Good afternoon. I note from your submission that you are concerned about the validity of setting out in section 1 the purposes and principles of sentencing. Will you say a bit more about that?

Right Hon Lord Cullen (Royal Society of Edinburgh): Our view is that there is no need for the statement, which is probably incomplete, as it misses out at least one quite important factor. We wonder what benefit the public will obtain from knowing of the statement.

We notice that the proposed sentencing council will have the power to issue guidelines that might have something to do with sentencing policy and principles. That might suggest that what is in the bill is not the complete statement, as it might be altered by the body whose formation is under consideration.

Cathie Craigie: Would leaving the statement in the bill benefit the justice system and the public?

Lord Cullen: No.

Cathie Craigie: If the statement were left in the bill, should anything be added to it?

Lord Cullen: The trouble is that that would be like adding one unnecessary thing to a lot of other unnecessary things. However, I can think of a few additions. For example, we mention in our submission the absence of any reference to the significance of a guilty plea, which is a potent factor.

The Convener: That is fairly clear.

Stewart Maxwell: Lord Cullen says that the statement has no benefit. Would publishing such a list or putting it in statute do any harm? Would having such a list in the public domain do the public any harm?

Lord Cullen: Probably not, apart from the fact that—as I mentioned a moment ago—the sentencing council might be able to alter the principles and purposes in a way that none of us sitting round the table knows.

The Convener: We turn to consistency in sentencing and the sentencing council's activities.

Bill Butler: Good afternoon. The Sentencing Commission for Scotland suggested that, although the empirical evidence for significant inconsistency in sentencing is limited, there is a public perception of inconsistency, which needs to be addressed. Do you agree with that assessment?

Lord Cullen: I am not aware of anything that would give a foundation for that view, and I wonder where it was drawn from. What is in the press does not perhaps represent an accurate picture of what the public think. I cannot confirm whether a perception of inconsistency exists. If it does exist, there might be ways of tackling it, but that is another matter.

Bill Butler: Is the view that I described mere assertion?

Lord Cullen: I would not accuse the Sentencing Commission of mere assertion; I just wonder what the basis for the view is.

Bill Butler: The commission's comment is baseless—you can find no basis for it.

Lord Cullen: I am not sitting in judgment on that matter; I am simply saying that I am not aware of any general lack of confidence in the consistency of the sentencing process. That is purely a personal view.

Bill Butler: I understand that, Lord Cullen. Do you want to comment, Professor McDonald?

12:15

Professor McDonald: One of the earlier witnesses made a sensible point when asking whether inconsistency would be a bad thing, were it to exist, because each particular case might require a particular judgment.

As far as perception is concerned, I agree with Lord Cullen, but managing perception is rather more subtle than the bill perhaps allows.

Bill Butler: I take that point. I will move on to another issue. It has been argued that the bill's proposals for a Scottish sentencing council would undermine the judiciary's independence. Of course, we all agree that it would be inappropriate for politicians to interfere directly with sentencing decisions. However, why might it be considered unconstitutional for a Parliament to establish an independent body to produce general sentencing guidelines?

Lord Cullen: If you are talking about a body to produce general sentencing guidelines, that is a statement in the abstract, so to speak. Our view on the proposed sentencing council is rather different from our attitude to a possible advisory body. I know that earlier witnesses took you over much of this ground, but I think that we could see a case for an advisory body. Our concern is about the bill's proposal for a sentencing council, which raises the crop of difficulties to which you just referred.

Bill Butler: Do you agree with Lord Gill's statement earlier that there is a place for a sentencing council but not the one in the bill? He suggested that a research and advisory body might be more appropriate.

Lord Cullen: That is more or less the view that I have just expressed.

Professor McDonald: I agree with that view, although I sympathised with the committee member who made the point earlier that when in doubt, say research. A research and advisory body might play a larger role in disseminating information to improve public perception than in researching and advising. More informed dissemination might give us a more informed public with more acute perception.

Bill Butler: Yes, and that is worth striving for.

Professor McDonald: Indeed.

Bill Butler: I am obliged.

Lord Cullen: I do not want to take the committee over ground that it has already gone over this morning, about what inconsistency is, but one could identify it if one found that a sentence in a particular case was significantly out of line with what one would expect for similar circumstances. That is perhaps a clear way of putting the question of inconsistency, and that is what the appeal court effectively exists for. In other words, if a sentence appears to be excessive for the given circumstances of a case, the appeal court will deal with it and substitute an appropriate sentence.

Bill Butler: So you are saying that it should be left to the appeal court.

Lord Cullen: That is one way of approaching the matter. However, if one has a vague idea that there is something inconsistent in sentencing, one must be specific as to what inconsistency is.

Nigel Don: Lord Cullen, I think that you were in the public gallery earlier when one of the sheriff witnesses said that he thought that it was appropriate for the local situation to be taken into account in sentencing. The inference is that a particular behaviour might be penalised differently in different places. I did not challenge that view at the time, but does it strike you, as it now strikes me, that that would be an unfair inconsistency in sentencing? For example, if I did something illegal in the middle of Perth or Edinburgh—of course, I would not do so—surely I should expect that, at least in principle, I would receive the same penalty in either place.

Lord Cullen: I was not surprised by the sheriff's comment, and I think that he was probably correct. After all, the local sheriff knows the local conditions and he knows the sort of things that are causing trouble locally and need to be stamped on. I can quite understand that the significance of an offence committed in a particular part of Scotland may be far greater than the significance of the same offence committed somewhere else.

Nigel Don: Is that not inconsistency?

Lord Cullen: No, not at all.

Nigel Don: Discrimination?

Lord Cullen: Absolutely not. It is bringing in a local factor that has a bearing on what the appropriate sentence should be.

Bill Butler: So it is simply a matter of using good judgment.

Lord Cullen: Yes—and that illustrates how wide and varied the factors are that any sentencer has to take into account. The local impact of a particular kind of offensive conduct is one of many such factors.

Robert Brown: Underlying the approach that the committee and others take to the bill and to other matters of criminal justice is the question of the effectiveness of the remedies that are imposed by sentencers. That is one reason why research is so important.

Will Lord Cullen or Professor McDonald comment on the general pessimism that is caused by the unpleasant statistics on the high reoffending rates of short-term prisoners and the high, but not quite so high, reoffending rates of people serving community sentences? In considering the effectiveness of sentencing, the statistics are pretty depressing. Has the Royal Society of Edinburgh researched how to increase the effectiveness of disposals that are given to people who cause society problems at various levels? Have you any general comments?

Lord Cullen: I find it hard to give a firm answer to your point, as it is some three years since I was a sentencer. However, before one embarks on profound changes to any disposals system, there ought to be well-informed research. That is really all that I can say.

Robert Brown: Does the Royal Society of Edinburgh believe that there is a considerable need for different kinds of new research?

Professor McDonald: As it happens, we are holding a forum on this topic on Thursday. The sheriff made a very good point earlier.

Robert Brown: The sentencing council would prepare guidelines. Is it the case that while you are not against there being guidelines, you are concerned about the constitutional issue of where the guidelines come from and what their standing is in relation to sentencers? Is that a fair interpretation of your views?

Lord Cullen: That is accurate. An advisory body is one thing, but what is being proposed is another.

Robert Brown: How do you interpret the phrase "have regard to", which we discussed earlier? In other words, how much discretion would a court have to depart from that phrase—and from the guidelines—when applying justice in individual cases?

Lord Cullen: I heard the previous discussion, which was quite interesting. One has to bear in mind the fact that the expression "have regard to" may be used in a number of completely different contexts. One context—although not the one that is in the bill—is that of a court being required to take something into account as a factor. In such a context, the court can attach as much or as little significance to the factor as it thinks appropriate. All the court has to do is honestly apply its mind to the factor.

The context here is rather different. If we consider section 7, we see that the court must not only "have regard to" the sentencing guidelines but state its reasons for not following them. In effect, the court will be much more restricted: if it decides not to follow the guidelines, it will have to give positive reasons for its decision.

If we read on in the bill, we see that if the court does not approve of the guidelines, it may ask the sentencing council to review them—which I think means have another look at them. However, there is no way in which the court will have the last say; the council will have the last say.

Robert Brown: I think that Lord Cullen mentioned section 2(2) and the situation of the sentencing guidelines being inconsistent with the guidelines in section 1. Do you envisage any real limitation—if I may put it that way—in the power of the proposed sentencing council's sentencing guidelines to depart from the theme of section 1?

Lord Cullen: It is plain that the council will be given wide powers. In that context, I point out that guidelines may include a statement of the circumstances in which guidelines may be departed from. The council will be able to restrict the scope of a court to depart from guidelines.

Robert Brown: One submission made the point that guidelines may specify the circumstances in which they may not be departed from, which might have even more significant consequences.

Stewart Maxwell: I would like to follow up on the issue of who has the final say, which we discussed earlier. Are you making the point that the sentencing council will have the final say on guidelines? Surely you are not suggesting that it will have the final say on sentences. At the end of the day, that is a matter for the judiciary—the sentencer—which can depart from guidelines.

Lord Cullen: Of course, the overall position is that the court has the final say on sentences. However, the guideline that restricts the scope of the court's discretion has now entered the scene, in such a way that the court has no ultimate way of displacing it. Even if the court asks the sentencing council to review the guidelines, the council does not have to comply with any view that the court expresses.

Stewart Maxwell: Is that any different from the current situation with regard to guidelines?

Lord Cullen: At present, guidelines are issued by the appeal court. From time to time, they may be modified or altered, but the court remains in charge of them. The significance of the guidelines is that they are applicable to and require to be obeyed by sentencers in the High Court, the sheriff court or the justice of the peace court, as the case may be. We are dealing with a constitutional point—whether the court remains in charge of its original and proper constitutional responsibility to determine sentences.

Stewart Maxwell: We are also discussing the right of Parliament to determine policy on sentencing, as opposed to individual sentences, which the judiciary has the absolute right to impose with variation. The bill does not take away that power.

Lord Cullen: The route is through Parliament, but it will produce a body that is neither Parliament nor judiciary and that will be given the degree of control and latitude for which the bill provides.

Stewart Maxwell: In other words, the body will be independent of both the judiciary and Parliament.

Lord Cullen: It will not be subject to control. Parliament could decide to abolish the sentencing council, but for the moment it has let loose the tiger.

Stewart Maxwell: I am not sure that I agree that independent bodies are necessarily tigers in such situations, but I will move on.

The Convener: Before you do so, Paul Martin has a question.

Paul Martin: You will have noted from my questions to previous witnesses that I am interested in the research. First, what research would you like to be done? Secondly, have we explored the research that is currently available to us? I would be astounded if research had not been done into community disposals—in fact, I have seen many such studies.

Lord Cullen: I do not pretend to be aware of what research is available. I am not saying that I want research to be done, only that it would be useful for you to ensure that you have a sound evidence base for any important change to the control of the sentences or sentencing practice that you are considering.

Paul Martin: So you are suggesting that we explore the evidence base, rather than that we procure or launch a new academic research programme.

Lord Cullen: Indeed.

Professor McDonald: Some research centres already exist; there is one at the University of Strathclyde.

Paul Martin: Given what we have heard from previous witnesses, do you accept that we are not always best at exploring the research that is available and that we are too quick to launch new research?

12:30

Professor McDonald: There could be more opportunities for knowledge transfer than exist at present.

Lord Cullen: I seem to recall from the consultation paper—it may also be in the bill—that it is intended that the proposed sentencing council will carry out research to underpin what it does. No doubt, the same would apply—perhaps even more strongly—to an advisory body.

Stewart Maxwell: You will be aware of the existing guidelines regime in England and Wales and the Coroners and Justice Bill that is going through the Westminster Parliament. That bill includes provisions that would alter the legal effect of guidelines in England and Wales. Instead of the courts being required to have regard to the guidelines, they would be required to follow the guidelines unless

> "it would be contrary to the interests of justice to do so".

Do you have any thoughts on the proposed changes in England and Wales, particularly in relation to the bill that we are discussing?

Lord Cullen: It would take some time to work out the precise difference between the proposed English formula and the proposed Scottish formula. The English version is perhaps slightly stronger than the proposed Scottish version, but I would not go any further than that.

Stewart Maxwell: I have not been involved with the Coroners and Justice Bill, but I assume that a direction to follow guidelines would be stronger than a direction to have regard to them.

Lord Cullen: Yes. It all depends on how much is built into the tail-end of the proposition, about it being not in the interests of justice. It depends on how that is interpreted.

Stewart Maxwell: Does Professor McDonald have any knowledge of or views on that change?

Professor McDonald: I am sorry, but I do not.

Cathie Craigie: Lord Cullen pointed out that the bill as it stands would give the sentencing council the power to amend the guidelines and come up with different guidelines. Is that right?

Lord Cullen: Yes, the sentencing council will do that. I think that it will have to review guidelines from time to time. That will be part of its practice.

Cathie Craigie: Stewart Maxwell talked about the situation in England and Wales. There, instead of being asked to have regard to the guidelines, the courts will be asked to follow them. Is there any chance that we could find ourselves in the same circumstance?

Lord Cullen: I think that that would be a step too far for the sentencing council. It would have to seek some legislative alteration, but that would be to alter the basic framework within which it had been created.

Paul Martin: Should the public be provided with more information on the sentencing of offenders?

Lord Cullen: There is a case for providing more information to the public on the range of sentences that is passed. That might address some of the concerns that have been expressed with regard to the bill and the consultation paper. It may get rid of the perception that there is inconsistency in sentencing or that the public do not quite understand what might be expected if a person comes before the court on a certain charge. I think that there is something to be said for that.

Paul Martin: Do you believe that the sentencing council will have a role to play in providing that information?

Lord Cullen: It probably will. However, equally, the information could be provided by any other means, such as good public information leaflets. Something for the public to read, with all the information in one document, might be a useful thing to produce. I do not know how a sentencing council or an advisory body would go about its work, but it might do it in a piecemeal way and it might be useful for the public to get the complete picture by looking at figures that indicate the range of possible sentences. As they will realise, every case will depend on its individual circumstances and the various factors in operation.

Nigel Don: Paragraph 7.4.2 of your written submission suggests what the membership of the sentencing council might be. You heard the previous discussion—in particular, I am thinking of Mr White's comments about the sentencing council being given a certain independence and natural respectability if the judiciary were to form a minority of its membership, and the point about the SPS. Is that a reasonable argument? Has your take on the membership, as expressed at paragraph 7.4.2, changed slightly?

Lord Cullen: No. I am not persuaded that having a minority of people with experience of sentencing would be a good idea. We are talking about a body that will have to reflect, for certain purposes, what actually happens; it is not being introduced to bring about change, and it will not change practices. In essence, it will simply reflect what happens. If we are to have a sentencing council, surely we would look to sentencers as the people who are best equipped to play a part in the formation of guidelines.

Nigel Don: Thank you; that is very clear.

The Convener: Is there anything that you would like to say in conclusion, Professor McDonald?

Professor McDonald: I agree strongly with Lord Cullen's last point. There is very little point to involving non-experts in making expert decisions. If the problem is public perception, and we then involve members of the public without improving public perception, perhaps we need to educate our masters, if such they are to be.

Lord Cullen: One matter that is reflected in our submission, but which has not been touched on, is the possible influence of the Scottish Executive. We have noticed that the proposed sentencing council will have a duty, in preparing guidelines, to consult Scottish ministers and the Lord Advocate. As you have heard this morning, the proposed sentencing council will be concerned with such matters as the effect of sentences on prison populations. The impression has been given that the Scottish Executive will have some influence on the shape of guidelines. As we say in our submission, that seems to us to be inappropriate, unconstitutional and wrong.

Bill Butler: I have a question regarding something that Professor McDonald said. If there is to be such a body, are you against any non-expert being on it? I am sure that you did not intend it to be so, but your assertion seemed very antidemocratic. You used the phrase "educate our masters" and, as you know, that phrase was used against the Reform Act 1832. I am sure that you did not mean that, did you?

Professor McDonald: I think it was the later act, but that does not matter.

Bill Butler: It might have been 1868.

Professor McDonald: It was 1867, but that does not matter.

Of course I am not against the body having lay members. However, considering that we have a body of High Court judges, it is important that the expertise of lay members is not dominant in the proposed body. That must be the case.

Bill Butler: Thank you for clarifying that for me.

Professor McDonald: I am sorry if I misled you.

Lord Cullen: The proposed composition of the sentencing council is a bit of a mixture, in the sense that it will be a hybrid that is made up of a body that is controlled by the judiciary and an advisory body. We might well expect an advisory body to include members of the community, but what would they be doing on a body that will lay down the law and have the final say? That is one of the problems that is fleshed up when we consider the proposed composition of the body. There is certainly room for using the expertise of members of the community, but in a different way.

The Convener: Thank you, Professor McDonald and Lord Cullen. We are much obliged to you for giving your evidence so clearly and, if I may say so, in a very entertaining manner. Thank you.

12:39

Meeting suspended.

10:16

On resuming—

Criminal Justice and Licensing (Scotland) Bill: Stage 1

The Convener: Item 5 is consideration of the Criminal Justice and Licensing (Scotland) Bill. This is our substantive business for today. We shall take evidence particularly on the provisions in part 1 around sentencing and community payback orders. The committee held its first evidence-taking session last week, when we took evidence from judges, sheriffs and justices of the peace on the proposal to create a Scottish sentencing council. Today's session will build on that evidence.

Our first witness is the right hon Henry McLeish, who was the chair of the Scottish Prisons Commission. He is well known to most of us around the table. I welcome Mr McLeish and invite him to make a short opening statement, after which we shall move to questions.

Right Hon Henry McLeish (Scottish Prisons Commission): Thank you, convener and committee members, for the invitation to speak to the committee in this evidence-taking session. As you pointed out, convener, I chaired the Scottish Prisons Commission, which reported last year. There has been a great deal of debate since then. We have a unique opportunity for significant and radical reform of the criminal justice system. We tried to base our work on evidence because it was clear that, over the past 10 or 20 years, we had built up an enormous amount of research in Scotland and we were keen to take that forward. Importantly, we have the opportunity, in Scotland, to move to a greater degree of bipartisanship on the issues that are before us.

I have the benefit of having been in politics for 30 years—I was one of you, although I am no longer so—and I understand the pressures that you face from the public, the press and a complex constituency of criminal justice interests for certain things to be done and said. Members of the Scottish Prisons Commission felt that we were an impartial group, and we provided 23 recommendations on ways in which to take matters forward in the public interest. At the end of the day, whether we are in government or out of government, in Parliament or out of Parliament, we are essentially serving the public. We believed that we have a great opportunity to reform the criminal justice system; therefore, our proposals were designed largely to take practical steps towards that on the basis of the available evidence.

I am pleased to participate in the debate and will seek to answer your questions to the best of my ability.

The Convener: Thank you for that, Mr McLeish. We move to questioning specifically on the Scottish sentencing council.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, Mr McLeish. You said that the Scottish Prisons Commission's report was evidence based. The report suggests that there are inconsistencies in sentencing. However, the Justice Committee has heard that there is very little, if any, empirical evidence to suggest that inconsistency exists. How would you address that seeming paradox? How would you respond to the charge that there is little empirical evidence of inconsistency?

Henry McLeish: I do not accept the premise that there is a paradox. There is sufficient evidence from various sources to suggest that there are inconsistencies in sentencing throughout Scotland. In a way, much of that is part of the judicial system. We have one of the best court systems and benches in the world. The judiciary's impartiality and the division between the judiciary, Parliament and Government are sound. In that sense, it is no surprise that different decisions will be taken on different cases in different courts throughout Scotland.

Society, parliamentarians and the Government have the right to look at issues surrounding court decisions. I do not believe that the sentencers are being undermined. Society, through parliamentarians and, eventually, through the Government and legislation, is looking for transparency in decisions. If there is one thing that I recognise from my sojourn in politics, it is that the general public, if they are interested, are largely confused about why certain decisions are taken and why certain outcomes happen. Transparency is one issue.

Secondly, we as a society surely have the right to outline a framework within which the judges and sheriffs operate. In a sense, that is the kind of accountability that we would talk about in other areas, and it is part and parcel of what we are discussing.

Thirdly, if we can get to a point at which there is a framework and transparency, the public will start to understand more fully some of the issues involved. What perplexes me about the public response, which is, nevertheless, often understandable, is that the public fail to understand why certain cases with characteristics that are similar to those of previous high-profile cases end in a completely different outcome. It is incumbent on us all—me, at one step removed, you and the Government—to ensure that the system is understood much more clearly.

Overall, I do not think that there should be any real issues of division between the bench, parliamentarians and the Government about setting a framework. If the sentencing council works effectively, there might be fewer concerns as we see what is happening. There is fear and apprehension at the moment. Of course, there is the traditional view among the bench that it would rather get on with things with less meddling from the political classes.

Bill Butler: I hear what you are saying, but you said in response to my initial question—I think that I am quoting you correctly—that there is "sufficient evidence" from various sources of inconsistency. Will you outline those sources and back up your assertion that there is sufficient evidence?

Henry McLeish: Different levels of sourced evidence were not in the commission's report—I hope that the report was brief and crisp. The first generalised level is publicly recorded cases that generate public debate in Scotland. That is one area. Perhaps, like committee members, I would not set a great deal of store by what is covered in the annals of the press. Secondly, there are court decisions—volumes of material emanate from the courts and come through the Government and the statistical research side. Those decisions illustrate how certain cases are dealt with. Thirdly, there is anecdotal evidence, which I do not take as seriously as the sourced evidence that you would find in Government and Parliament publications, but which illustrates that there are genuine concerns.

I do not accept for a minute that we want to meddle with the court system. I cannot say that the court system is one of the best in the world while also saying that we have to be radical in our approach to it. However, there is a case for the sentencing council. In an ideal world, that should not be an issue that divides the bench from parliamentarians or from the public.

Bill Butler: I think you said that there were four sources. Let us set to one side the anecdotal evidence and, as you put it, the publicly recorded cases or those that are covered in press reports. You talked about two other sources: court decisions and statistical sources. Are you saying that the recommendations of the commission are based absolutely on court decisions and statistical sources? How much credence, investigation and examination did the commission give the court decisions and statistical sources in making its recommendations?

Henry McLeish: In the work of the commission, the sentencing council and the other national agency that we suggested were not the most important considerations. The commission made 23 recommendations. I would argue that, in the grand scheme of things—I mean no disrespect to the Government's concern about this—the sentencing council was not a high priority for the commission. Given what is before the committee, I still believe that it is not a priority.

Bill Butler: You said that transparency was one of the objectives of the commission's report and of the proposed sentencing council. Other objectives were to promote consistency in sentencing and to assist in the development of sentencing policy. Do you think that the proposed measures represent significant progress from the present situation?

Henry McLeish: My view, as chairman of the commission, is that the sentencing council did not figure overprominently in the commission's considerations. I say that not to escape the question, but because it was the reality. We felt—and I still feel—that the bench in Scotland faces much more important issues than just this issue around sentencing. I understand fully the emotions and concerns that the issue generates, but, for me, it is not a priority.

Bill Butler: That is very clear. Thank you.

Stewart Maxwell (West of Scotland) (SNP): Good morning, Mr McLeish. I want to take you back to the independence of the judiciary, which you touched on in your answers to Mr Butler. We heard oral evidence from judges and sheriffs last week in which they questioned the statement that the sentencing council would not affect, undermine or impinge on their independence. Do you accept their line of argument? What is your general view on the issue?

Henry McLeish: I do not accept that line of argument, because, as I said in my responses to Bill Butler, I do not think that the sentencing council is an important issue in the criminal justice system in Scotland. Secondly, that argument is a natural response from the bench, given its perception that the Parliament or Government wants to meddle in what it has regarded as its own sphere of activity. Leaving aside those two considerations, society as a whole has to be part of the process. I do not mean that society will be involved in any way in making judgments or decisions, but, in 2009, it is important that the public understand and appreciate more fully the workings of the system. Given what I have read and given what the make-up of the sentencing council will be, I do not think that the council can be regarded as a threat to the independence of the judiciary.

If you do not mind, convener, I will give an example of an area about which we hear a huge number of contradictory views. The presumption against six-month sentences is seen as a threat to the independence of the judiciary, but, at the same time, parliamentarians talk about having mandatory sentences for knife crime. My logic suggests that having a mandatory sentence for knife crime takes away completely the independence of the judiciary in one area of crime. The arguments about the independence of the bench have become overemotional. That independence has been safeguarded and is respected. No one around the table or in Government wants to undermine it in any way. We are adding a bit of transparency, which will help the criminal justice system to operate effectively.

10:30

Stewart Maxwell: To sum up, your view is that a sentencing council would provide not complete, but greater, clarity for the public on the processes, enabling people to understand them to a greater degree. You rather pre-empted my next question, which was about the strange anomaly of those who call for mandatory sentences calling for judicial independence at the same time, so I will not ask it.

In evidence last week, judges and sheriffs asserted that the creation of a sentencing council would lead to their ability to sentence being constrained to such an extent that they would, in effect, have given up the flexibility that they have currently to the council, which would have the last word on sentencing. Do you accept that assertion?

Henry McLeish: I do not accept it as a premise for the future activity of the sentencing council. If I were asked today which of the 23 recommendations I would leave out, it would be the recommendation that a sentencing council be established. I am not surprised that the bench is making a song and dance about the issue, because it sees anything that it thinks threatens its independence as an issue. For the bench it may well be an issue, but in the greater scheme of things it is a modest measure. It has been discussed for some time, will not undermine the independence of the judiciary and will open a window for society generally. Other countries that have mandatory sentences are beginning to encounter problems—I am thinking of California's three-strikes-and-you're-out policy. We have a judiciary that is as independent as any judiciary in the democratic world could be. All of us, including members of the committee and the Government, value and prize that. Although I understand the bench's reaction, I would not lose much sleep over the proposal.

Stewart Maxwell: You said that if you were to leave out one recommendation it would be the proposal for the establishment of a sentencing council. However, I presume that you support the 23 recommendations and would prefer all of them to be implemented.

Henry McLeish: Indeed. I was trying to give an indication of my priorities—nothing more. I fully support the 23 recommendations.

Robert Brown: As I understand it, you are saying that inconsistency in sentencing and the need for guidelines are largely a matter of perception and that, in reality, there may or may not be inconsistency. Is my interpretation of your position correct?

Henry McLeish: There are both perceptions and realities. Bill Butler asked a fair question about the corpus of evidence. Our discussions with an enormous number of people indicate that there is evidence of inconsistency. It is important that the bench's perceptions of what a sentencing council would do and some politicians' perceptions of the benefits of having such a council are handled more reasonably, as there are extremes at both ends. The establishment of a sentencing council is a modest measure that should not get too many people too excited.

Robert Brown: Two arguments are entwined here. First, are guidelines needed in the first place? Secondly, if there are to be guidelines, under whose authority should they proceed? Do you accept that there is a difference between the Parliament passing legislation that lays down policy and the range of sentences that are available in particular cases, a quango such as the Scottish sentencing council giving instructions to judges, and the judiciary deciding matters with advice of a sentencing council? There are three different levels.

Henry McLeish: I share the concerns of many of my former colleagues in the Parliament about quangos. I would not want to talk about the sentencing council issuing instructions, as "instructions" is a value-loaded and threatening word. I am not yet convinced that the Government thinks that setting up a sentencing council is the most important issue on the agenda, but it would help in relation to the view of society at large. I see no threat to the independence of the judiciary. There is a widespread perception of inconsistency, which can be supported by evidence. However, I would hate the proposal for a sentencing council to dominate the important work that the committee has ahead of it. There is a grave danger of the issue becoming distorted.

Robert Brown: At the end of the day, if the sentencing council were an advisory council whose recommendations were considered by the appeal court in some appropriate way and sanctioned at that level, we would not face the constitutional issue that has caused so much angst in the higher and lower ranks of the judiciary. That is the key point that I am trying to get at.

Henry McLeish: You are absolutely right. We must debate, discuss and arrive at a format for the sentencing council. My low prioritisation of the recommendation revolves around society generally having better insight into what is happening. It is entirely up to members and the Government to decide the procedure for the council's operation. I have no strong views on the issue. My only concern is that the sentencing council should not appear as an ultra-quasi-legal body that looks like it is imposing its individual judgments on the work of the courts. That would be reprehensible and a backward step that would not help us to maintain the independence of the system that we value so much.

Robert Brown: Thank you for those helpful comments.

The Convener: In a moment, we will move on to the issue of community payback and alternatives to custody, which is of particular interest, but I am still slightly troubled by the fact that there appears to be a lack of empirical evidence of inconsistency in sentencing. Much of the evidence is apocryphal. Do you know of any research that has demonstrated the existence of inconsistency? You say that you spoke to a number of people; can you give us examples that arose in those discussions and inquiries?

Henry McLeish: I will try to be up front with the committee. First, the issue did not take up a great deal of the commission's time during its work, which lasted about nine months. Secondly, there is an amazing array of court statistics in Scotland that could provide the committee with the evidence that it requires. Thirdly, it is clear that the issue has been rumbling around in parliamentary and Government debate for some time. For that reason, the commission and I thought that the proposal had merit. The laws that parliamentarians make provide frameworks for what the bench does anyway, so the establishment of a sentencing commission seemed to be a modest step forward, especially in relation to the public, who figured prominently in other aspects of our work.

Bill Butler: Are you saying that no analysis of the evidence took place and that there was no real research? If so, there is no evidential basis for the recommendation.

Henry McLeish: That is not entirely true. I have indicated that the establishment of a sentencing council was not a priority for the commission. After analysing the criminal justice and prison systems, we came up with recommendations. The proposal fitted in with the thinking of the commission, which wanted far more transparency to be injected into the criminal justice system in Scotland.

Bill Butler: With respect, the committee recognises that point; no member has trouble with greater transparency. I will break the question down. Was any research undertaken?

Henry McLeish: We did not commission any research.

Bill Butler: So there was no scientific analysis of the data that you say are lying about in the court system.

Henry McLeish: We did not—

Bill Butler: Am I right in saying that there was no scientific analysis?

Henry McLeish: Let me answer your question. We did not seek any original research. However, the commission thought that the establishment of a sentencing commission was a sound idea, as part of wider society's view of the criminal justice system. That is why we supported it.

Bill Butler: You are telling the committee this morning that there is no scientific or evidential basis for the recommendation.

Henry McLeish: We did not seek any evidence base. As I have said to you, there are sources that would show inconsistencies. We happily acknowledged and accepted that. However, within the commission, we discussed issues—

Bill Butler: With respect, what were those sources? If you sought them out, did you look at them so that you were content to make such a recommendation? If you did not seek them out, look at them and analyse them as a committee and if there is no independent research analysis, your recommendation is mere assertion, is it not?

Henry McLeish: No, it is not mere assertion. It is confusing to suggest that we did not have any evidence. We did not seek any evidence.

Bill Butler: Therefore, you did not have any evidence before you. If you did not seek it out, you did not have it before you—is that right?

Henry McLeish: In our nine months of work right across the criminal justice system, the issue intervened at different levels, at different times and on different subjects. We did not commission any independent research because we did not consider the matter a priority. We know, however, that the court statistics in Scotland—I have seen a lot of them—show inconsistencies.

To answer Bill Butler's question directly, we did not have evidence on which we based the recommendation, but it was consistent with the wider thinking on most of the recommendations that we made. As a consequence, we were happy to make the recommendation.

Bill Butler: So, at best, you could argue that the recommendation—you say that it is not a priority, so I am astonished that it is a recommendation—

was based on an impression. Would that be correct?

Henry McLeish: No, it would not.

Bill Butler: What would you say, then?

Henry McLeish: It goes well beyond an impression. In looking at the vast array that is the criminal justice system, you are focusing on the issue of the proposed sentencing council. However, we were looking at the whole panoply of sentencing, including specific issues such as sentences of six months and less. We knew that there was significant variation in the court system in Scotland in relation to six-month sentences. We did not say, "The sentencing council is to be discussed today—let's have all the evidence," but it permeated our work on other considerations that there was a clear case to be made for a sentencing council.

Bill Butler: Would you recommend such an approach to a student who was writing a PhD?

Henry McLeish: I do not accept the inference of your questions. I started off by saying that the issue was not a priority for the commission. We did not need a PhD-type research programme to inform the commission members that, right across the board of our considerations, there was inconsistency in the court system.

Bill Butler: It seems that you did not need any research programme at all.

Henry McLeish: No, that is not true. I have tried to explain. If I may be robust, convener, this is a very unproductive line of questioning. I have said that the issue was not a priority for us. I have also said that, in coming to the 22 other recommendations and in undertaking nine months of work, we came across issues in every court in Scotland. Some of our recommendations are about the efficiency of the court system. I do not accept that there was no basis for including the recommendation in the commission's final report.

Bill Butler: I am obliged.

The Convener: We will leave that line of questioning and move on to the use of imprisonment and community payback.

Robert Brown: In many ways, this is at the heart of the commission's report. You had in the back of your minds issues such as overcrowding in prisons and the ineffectiveness of certain sentences, not least prison sentences. The report states that prison should be used for those offenders whose crimes are serious and violent and for those who present a risk to public safety. Can you give us some examples of how such an approach would change the current use of custodial sentences?

Henry McLeish: We were keen to find out the profile of the prison population. It seemed elementary to find out, first, who was in prison and why they were in prison. It is self-evident that for society, for the press, for politicians and for the public in general, people who commit serious crimes—we can define those—should be in prison, for serious reasons to do with the need for rehabilitation and, more important, public safety.

10:45

When we looked at the profile of the prison population, we found that the category that I have just described did not make up the majority of the prisoners in Scotland. For example, we found that, in 2007-08, there were more people on remand in prison than people who had been sentenced. Moreover, the 2007-08 figures confirmed that 76 per cent of those who were given a custodial sentence received a sentence of less than six months. Prisons were being used to warehouse people who had incredibly deep alcohol and drug abuse problems. We also found that, in most of our prisons, 75 to 80 per cent of prisoners had some mental or physical illness. The profile of the prison population in that respect again suggested that prisoners were being warehoused.

The next issue that we examined was compliance. We discovered that there had been a vast increase in the number of people who returned to prison not because they had committed further crimes but because they had broken the rules. The problem of prisoners serving life sentences by instalments was another major facet of the prison population—so much so that, in 2005-06, the 7,000 prisoners who were given a custodial sentence had between them 45,000 previous custodial convictions. That leads to the revolving-door syndrome.

The prison officers were keen to tell us that the more space there is in prisons and the less time they have to spend on churning and the administration of short-term prisoners, the more they can do with the serious offenders in our prisons who need rehabilitation and who need to be there for long periods to protect the public. The initial phase of the commission's work was to analyse the prison population and gauge what we could do with the group of offenders who need not be in prison.

Robert Brown: Many of us would accept the general logic of what the commission found in that direction. However, is there not a significant resource issue in terms of long-term savings in expensive prison costs versus the short-term need to fund the alternatives that you seek to put in place? How important was the resource issue in the commission's thinking on such matters?

Henry McLeish: Very important. In the final part of the report, we made it clear that no one should be under the impression that the proposed changes could be made without considerable input of new resources—the statement was as bald as that. There must be new resources. If we are successful in the long term, there could conceivably be a transfer of resources from prisons to the community, but that cannot happen in the short term. Therefore, we argued—I have argued this with the minister, too—that we need new resources. For community sentences to work, parliamentarians, the public and the bench must be assured that they can trust the alternatives. We need new resources to send a powerful message that community sentences can work and do not pose the risks that some people have implied. Resources are critical. We cannot move down the proposed path to any significant degree unless we have the resources—not money just shuffled around in a budget or produced through creative accounting in either the Parliament or the Government, but new resources physically on the ground to make community payback a genuine option.

Robert Brown: In fairness to the Government, I point out that £2 million has been invested to get current community sentences up to scratch. Do you agree, however, that that does not deal with the new community sentences that would result from the policies that you advocate in the commission's report? Are you able to give us any ball-park figures for the cost of those?

Henry McLeish: I do not have any figures, partly because we were not asked to consider that. The commission was seeking ideas and recommendations.

We looked at the cost—whatever it is—in this way. Let us take, for example, the issue of drug and alcohol abuse. Alcohol abuse is an embarrassment to us on a global scale. We have the eighth largest consumption of alcohol in the world, and there are those who abuse it. In prisons, there are enormous problems with drugs and alcohol. If we want any form of payback in the community, we must provide facilities for drug rehab and detox. In Scotland, there are simply not enough of those facilities to tackle the current problems, without planning ahead. That is why I say that significant resources are needed; £2 million is a start, but the indications are that much more is needed even to tackle the health issues that are related to the policy.

The problems of criminal justice cannot be solved by the criminal justice system alone. Drug and alcohol abuse are major health matters, so I see no reason why the health budget should not provide facilities and resources for the community payback scheme in each community. It would be less significant to take a few million pounds from the health budget than it would be to redirect a few million pounds within the criminal justice budget, which is very small.

On a wider theme, three quarters of Scotland's prisoners come from one quarter of Scotland's local government wards. Those areas, by definition, suffer the most crimes, have the most victims and produce the most prisoners. We, as a society, must appreciate that the criminal justice system deals only with the symptoms and effects and that the wider causes of the problems are deeply rooted in inequalities in our communities. In Scotland, the inequalities are as bad as those in England, where the situation is only slightly better than the situation in America.

We have massive problems with inequalities and with alcohol and drug abuse. Unless and until resources are allocated to tackle those problems, there will be a shallow feel to recommendations that say that community payback and community options are the best way forward.

Robert Brown: We have heard evidence about the use that is made of short-term sentences. The sheriffs, in particular, have given us oral and written evidence to the effect that short-term custodial sentences can be effective and are necessary in some circumstances. They have also told us that the current use of such sentences is generally appropriate. Those people deal with sentencing at the sharp end, day in, day out in the courts. Do you have a view on that? Can you give us a feel for the circumstances in which, in your view, short-term custodial sentences will continue to have a place?

Henry McLeish: Yes. That takes us back to earlier discussions about the independence of the judiciary.

Certain countries have gone so far as to legislate to ensure that no custodial sentence is less than six months. That was an option for us—to legislate, and that would be it. However, to preserve the independence of the judiciary and to take a commonsense approach, we rejected that option. Of the people who go to prison for less than six months, a small group have committed what I would regard as serious offences, one of which is domestic violence. I will not go into it, but that is a heinous crime yet, for this, that or the other reason, a tougher sentence is often not imposed.

The policy memorandum to the bill states:

> "We want to make it clear that sentencers should not impose a custodial sentence of 6 months or less, unless the particular circumstances of the case lead them to believe that no other option would be appropriate."

That respects the independence of the bench but gives a hint that society wants the judiciary to look more closely at custodial sentences of less than six months. Nevertheless, if the bench and the public are to have confidence in the alternative, we need the resources and a new mindset, and we must ensure that the alternative works.

In 2007-08, 16,700 custodial sentences and 16,700 community sentences were given in Scotland. It is not that community sentences are not playing their part, but the prison population has risen steadily whereas community sentencing has plateaued over the past four years. There is a good mix of sentencing, but we could go much further.

Robert Brown: The sheriffs argued that, at the moment, they do not send anybody to jail whom they do not have to send to jail. If all that the statute does is formalise that, we ain't going to make much difference to what happens. I assume that that was not the intention of the commission.

Henry McLeish: It certainly was not. There are circumstances in which six-month sentences have been applied and should continue to be applied. However, we proposed a presumption against short-term sentences, as there are other ways of dealing with offenders. If prison were working for a large section of the population, there would not be so much reoffending and so many reconvictions. Those outcomes show that we are not best served by the current practice. We believe that the bench could do more but, to be fair to them, they need alternatives, and the range of alternatives varies across Scotland. I would not like to think that they would imperil anybody in a community by placing an offender in the community when the full range of facilities was not available to them.

Robert Brown: Let me sum up the resource issue. If there were no more resource available bar the £2 million that has been allocated for community sentences, would you still recommend the substantial change in the law that you have proposed, which is a presumption against short-term sentences?

Henry McLeish: Yes, I would. I accept the basis of the recommendation, as there are solid ideas that we think can be pursued. As I have said, community sentences are equivalent to custodial sentences. However, if you speak to the public, to parliamentarians or to the bench, you will encounter a degree of scepticism or cynicism about community sentences and a degree of concern for public safety. Unless and until we overcome that, we will not get the full benefits of the commission's recommendations. That is why resources are a critical factor in moving us down that road.

Dr Richard Simpson (Mid Scotland and Fife) (Lab): Thank you, convener, for allowing me to speak even though I am not a member of the committee. I was the Deputy Minister for Justice and have worked in the prison service, so this is a particular interest of mine. I also acknowledge Henry McLeish's views on the sentencing of women, which is where some of the debate started.

Things have already been tried in the sentencing of women. As the Deputy Minister for Justice, on the basis of "Women Offenders: A Safer Way", which was produced by Sheila McLean, I introduced the time-out facility in Bath Street, Glasgow, which now treats 500 drug addicts who would otherwise have gone into custody. However, at the same time that the number of women who are admitted to prison on fine default has fallen, the number who are on remand has increased substantially. The changes made—which were, in effect, to introduce the sort of community sentences to which you have referred in treating the major drug problems that we have—have not led to a reduction in the number of admissions to prison. We are still faced with the situation of more women going to prison and the number of daily residents also doubling—both factors are important. In a sense, community sentencing has been tried with women and is evaluated as helping to reduce reoffending by taking those people out of their drug problems. Nevertheless, how will it alter the continued build-up in prisons if it is used similarly for male prisoners with the same results? The logic of pursuing it seems problematic, to say the least, unless there is a huge increase in resources to introduce multiple time-out centres and alternative community sentences for those with alcohol addiction.

11:00

Henry McLeish: I will briefly give some context. Over the past decade, if the crime level has gone down, the prison population has gone up; if the crime level has stayed the same, the prison population has gone up; and if the crime level has gone up, the prison population has gone up. Those are the facts. There is therefore no correlation between the level of crime and the prison population.

Secondly, the bigger issue is that, although we did some in-depth analysis, we could not explain why the prison population at Cornton Vale has increased by well over 120 per cent in the past decade. There are issues to do with women on remand and younger women getting more involved in violent street scenes as a result of alcohol. To address Richard Simpson's point about the prison population, like most prisons, Cornton Vale is a very depressing place. We do not deny that there are some serious criminals in Cornton Vale who need to be there for their own benefit and for public safety. However, there is a more substantial group of people in Cornton Vale who I believe need not be there. They have committed crimes, so they should be punished, but their punishments in Cornton Vale only add to their career in crime. They are pathetic and, in the main, they are some of the most serious drug addicts; their alcohol problems and the damage that has been done are also enormous.

Richard Simpson is right to say that community sentences have been tried. However, we see no conceivable reason why the female prisoner population should have increased. Does it have something to do with the Scottish mindset? The male prisoner population did not increase to the same extent. If the problem is alcohol and drugs, the offenders need significant rehab facilities. It is clear to me that, although there is the time-out facility in Glasgow, there are no comparable facilities elsewhere in Scotland. For drugs, there is a postcode lottery, which is an issue that we can tackle. Why has Scotland’s women prisoner population increased by 120 per cent? I do not know the answer; I am posing the question.

Ten years ago, when I was the minister responsible for home affairs, I wanted the prison population at Cornton Vale to be halved from 200 to 100. That was to ensure that the serious prisoners would still be looked after but the rest of the prison would be part hospital, part detox facility and part rehab facility. It was also partly to ensure that serious support was provided for the women, some of whom were there because it provided respite from barbaric partners and domestic violence.

I went to Cornton Vale not long before we published the report. There was a young woman there who was in for alcohol and drugs offences. It was not the first time that she had been in. There was a round-table discussion with the governor and she said that she was getting out the next day. I asked whether she was pleased about that and she said, “No, because I’ll be back.” I asked the governor what support she was getting. She did not have a doctor or a house—or a family, because they had disowned her. The governor said, “This is only Wednesday. She’s going out on Thursday.” I upbraided the governor and said that that was a pathetic answer. Two weeks later, Lesley Riddoch, who was on the commission, found the woman lying in the gutter outside Starbucks. Please tell me how prison worked for her.

In Cornton Vale and Barlinnie, we see dysfunctional people who are suffering from a wide range of mental and physical illness. That is not an excuse for committing crime, but it suggests that different forms of punishment might be beneficial to them as well as to society.

Dr Simpson: I was not saying that the community sentences are not working. You have made the point extremely well, but I would like you to comment a little further. The problem is that if someone has a sentence of less than three months, they will not get on to any sort of treatment programme in the prison. As you said in your opening remarks, it is about warehousing for the prison. The prison concentrates on prisoners who get sentences of more than six months. Is the answer not to have the community justice authorities commence assessment and in-reach programmes in the prison, which will continue outside, rather than taking these people out of the prison? Many people need the boundaries of prison to start with. They need the containment of prison to get to the point where they can engage.

One illustration is the Airborne Initiative, which the Labour Government abandoned after I left office. It was abandoned because those with a drug problem who were sent to Airborne could not engage in treatment to tackle their drug problem and the default rate was therefore massive. The situation of short-term offenders is exactly the same. If they are not treated and managed and do not begin a treatment programme, we will have difficulties. Surely the key thing is to link the community justice authority and the prison and not going into all this stuff on different sentences.

Henry McLeish: We need both. The sentencing issue is important. The mindset that we are locked into in Scotland is that prison is a discrete alternative: it has walls, barbed wire and fences and it has been around for 100 years or longer. Community justice is a more complex and difficult alternative for the public and bench alike. That said, why can we not move to a situation where the prison and community sentences are merged? People have similar problems, whether they are dealt with in the community or in prison.

Why can there not be a major national health service provision at Cornton Vale? Why can we not offer a range of alternative services in the community? Why not have proper rehabilitation for serious offenders? We need to accept that remand prisoners do not get access to anything. The 2007-08 figures show that 50 per cent of prisoners got a sentence of less than three months and 76 per cent got a sentence of less than six months. In that short time, it is not possible to do anything coherent by way of the prisoner rehabilitation that we are discussing.

I want to see a complete shake-up in our thinking so that it is no longer a case of behind closed walls for some and in the community for others. We need an integrated criminal justice system, we need to change the mindset and we need to be able to shift resources more easily. Society as a whole needs to be involved, through

Government departments such as health and education.

Huge energy is involved in running Polmont young offenders institution. However, when you ask about the educational background of the young men there, the answer is that it was really hit and miss. Most of them either rejected school or were rejected by school. One would think that their arrival at Polmont would be seen as an ideal opportunity for second-chance basic learning, but no—not in Scottish prisons. We can do a lot in our prisons that we are not doing at present. More positive outcomes would result from people taking a more flexible view of the whole system.

Nigel Don: If I heard correctly your answer to Robert Brown's last question, you suggested that, even if it was unclear where resources for community sentences would come from, we should still push in that direction. I will put the question the other way round. If there were more resources in the community, would there be any need to do any of the things that you suggest? Would it not be clear to the bench that they should use community sentence disposals?

Henry McLeish: No. That is my bigger concern. As I have said in other fora, much of what we suggested in our report is common sense, and our view is that some of it could have been implemented some time ago. In talking of resources, we are talking about mindset. At Cornton Vale, there is also the mystery package—the vastly increased numbers—for which people, as yet, have no explanation.

We need both resources and the proposed changes. What I have tried to say honestly to the committee today—and I have been strong on resources—is that we can proceed with our recommendations. There are community options, and they can be used more greatly than at present. Criminal justice is a question of trust. I am worried about what the public, bench and press think, and politicians, too, clearly have to be reassured that this is the right step to take. For that to happen, trust has to be translated through physical developments including resources. We can do that, but resources would be a real help.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): If the presumption is against short custodial sentences, could that lead to the imposition of longer sentences?

Henry McLeish: We have an intelligent bench. One of our fears was that, if we said that there should be no sentence of less than six months, people would find a way of getting round that. That is why we came to the conclusion that we would rather work in a politically bipartisan way and with the support of the bench and the public by legislating for only a presumption against sentences of less than six months. Essentially, if the sheriff felt that a non-custodial sentence would be inappropriate, he could make a case for applying a sentence of less than six months. That is the best explanation that I can give of that.

Cathie Craigie: Will we just need to wait and see on that issue?

Henry McLeish: I am an optimist in life. The judiciary on the bench have operated for a considerable time, they have lots of experience and they are concerned about their independence. The reason why we opted for six months—some people might call that a compromise, as other countries do not have six-month sentences—is that we do not want tariffs just to drift up.

We have issued a challenge to everyone to make the proposals work, and we believe that they can work. As at the end of 15 May, we had 8,300 people in our prisons. The American experience suggests that—for a variety of reasons, known and unknown—the prison population will just go up and up. We have identified ways of keeping imprisonment for those who need it and providing other alternatives for those who could be better cared for. However, we will still punish people: our report suggested not alternatives to punishment but alternatives to prison.

Cathie Craigie: Let me move on to those alternatives. The commission's report stated:

> "the key challenge is to make community sentences more meaningful, visible and immediate in their operation and impact."

Will the community payback orders that are provided for in the bill offer the immediacy and impact that the report rightly identified?

Henry McLeish: That is very much what we had in mind. First, we want to see the courts operate in a different way. Secondly, we want more payback options in the community.

Indeed, perhaps I have been listening to the convener too much—we agreed about this over a few refreshments at a dinner in Edinburgh—but I want a very tough line to be taken with those on community sentences. By that, I mean that, whereas a custodial sentence is dramatic, reportable and accountable—the offender leaves in a white van—a community sentence does not seem to the public to have the same seriousness, immediacy or urgency. An offender is not sent down to a community sentence as happens when a custodial sentence is given.

One of our recommendations that is meeting resistance—I want to explain this—is that we want the courts to act in the same way whether they impose a custodial or community sentence. We want a message to be sent to the public that a community sentence is a real sentence. The person given such a sentence should also disappear in a van to start it, although they will then, of course, go back into civvies.

We want social workers to provide fewer reports. It was instructive that in America—justice is a bit rougher justice there—the judge who is equivalent to our sheriff has a computer in front of him with four parts to the information. He does not have a "This Is Your Life" report if the person has been involved only in some minor crime. The system there is much more efficient, and we want to see the same here. We think that the Government hands down far too many instructions about when reports are needed and what length they are required to be. Such reports are not needed in all cases but, sadly, they are often provided. There is a massive bureaucracy.

On another problem in the criminal justice system, we suggested to the Association of Directors of Social Work and local government that there should be a single-day response, but that has not been accepted. The latest suggestion is that community sentences should start within three weeks or 12 days.

On the efficiency of the courts, I think that we could do an awful lot to send powerful messages that the offender will be punished. Although a different sentence might be given, the sentence should look to all intents and purposes solid and secure.

In addition, we recommended that progress courts should be part of the sheriff court apparatus. Over the past decade, the biggest increase in people going to prison has been in those who are recalled for breaking rules of probation or whatever. We have had a 1,000 per cent increase in the number of recalls to prison over the past decade. Essentially, that means that, as a society, we are asking people who are totally dysfunctional to turn up for this or that meeting. We are asking them to do things that they have never done in their life, and if there is a breach the next step is to send them back to prison.

11:15

The Pew Center in the States has published a very good report on Kansas, which is a very conservative state—nearly a southern state, but not quite. Over the past two or three years, there has been a remarkable reduction in recalls through a series of incentivisations, some of them financial. As a result, the prison population has gone down.

If our progress courts are to come into play, what should happen is this: if someone is asked to turn up, somebody will go and drag them out of bed—and I know that there will be human rights considerations—so that they are at the meeting. The system that we suggest does not pretend for a minute that people will just turn up, because that would be fanciful and ridiculous, but it will be tough in getting people to where they need to be. People should not need that, but those in question are so dysfunctional that they have probably never turned up for a meeting in their life.

Along with the progress courts and the way in which we deal with people, the third point about payback is that a wide menu of appropriate choices should be available to the bench. There would then be less pressure on sentencers to put people inside if they felt that it was a good idea not to do so.

Cathie Craigie: Robert Brown focused on resources. I think that the majority of committee members will agree with what you said, but making community sentences work with immediate effect will take resources. I do not think that the figure of £2 million that has been mentioned in relation to this bill will do the job. Without resources, and without the people to go to somebody's door and say, "Right, come on—you're coming along," the ideas are meaningless. We are kidding ourselves on. What can be done without financial resources?

Henry McLeish: Powerful recommendations have been made, but I have made it clear that we need resources to make them work effectively and to give a wide choice to the bench.

In the era of austerity that we have been promised post-2011, public expenditure will be tight. I am not convinced that the money that we spend on criminal justice in local government or in central Government is being spent effectively. I have spoken about having more efficient court systems, fewer social work reports and less bureaucracy. Such things may have only marginal significance, but in the current economic climate I would like to think that, with new resources, every pound that we invest in criminal justice will yield a far better return.

The challenge is not only to central Government but to local government—to the 32 councils and to the community justice authorities. They have a contribution to make.

The recommendations are sound and should be taken up. My concern is that they will not obtain the maximum advantage for society unless a sensible level of resources is available.

Cathie Craigie: So, investment now would pay off in later years, when money might be redirected from the prison service.

Henry McLeish: Cathie, you probably know as much as I do about these issues. What you say is logical, but it is also illogical in a sense. If we could redirect funds now, it would be helpful. However, given the prison population and the prison budget, it would be hard to transfer any resources until there were significant changes in prison numbers.

Even if we reduce—by a handful or even more—the population in any one prison, we will still not be able to shift resources because the capital asset and the overheads and staff will still be there. A huge transformation is required in the longer term.

I have spoken about bipartisanship, and I do not like the fact that Scotland is out of line with most developed, western European countries. I do not like the fact that we are suggesting policies that make no sense to people in any other country. If our policies were working and the outcomes were positive, we would not need to worry, but this is another benchmark of lack of progress. If we are interested in Scotland the brand, we should seek to have the best court system in the world. On many criminal justice activities, we are currently Europe's poor neighbour.

Paul Martin (Glasgow Springburn) (Lab): You raised the issue of fast-track disposals. Would community courts provide us with an opportunity to develop that principle?

Henry McLeish: We visited Finland and New York, where we saw the original Red Hook, whose equivalent is in Liverpool. We went to the Bronx, Brooklyn and downtown Manhattan, where we discussed the possibility of setting up special courts of one sort or another to deal with specific problems. The commission's view, to which I subscribe, is that radical reforms in every court in Scotland are preferable to creating special courts such as knife courts and drugs courts. From my political experience, I know that establishing a special court is good, generates publicity and moves matters forward for a while, but why can we not have a system in which more radical ideas—the best ideas in the world—are implemented in every court, so that every court becomes a special court in relation to the totality of problems that it faces? We judged that changes could be made in every court, with the co-operation of the bench and criminal justice social work.

Paul Martin: I appreciate your point—that existing courts should be more efficient—but if we established community courts some of the resources that are provided currently could be redirected to delivery in the community. The Lord Advocate and others with experience in the judiciary have advocated that approach on many occasions. You may have advocated a similar approach in your long political history.

Henry McLeish: I may have been there before—my memory is not as good as it used to be. The commission thought that resourcing courts throughout Scotland—getting changes in every court—was important. On the other hand, we know where the bulk of crime, victims, prisoners and those serving community sentences in Scotland are located. It comes back to the point that Richard Simpson made—should we invest resources in community sentencing or in prisons? Should we put resources into the poorest areas in Scotland, which suffer from massive inequalities—from his experience, Paul Martin knows more about that than I do—and intervene before matters reach the courts? I would rather see all the courts develop and invest more resources in the courts that serve the areas with the biggest problems.

Paul Martin: You expressed concern about the timeframe for fast-track justice. Would the community court model not give us the ability to deliver fast-track, same-day justice in practice, as it would allow us to deal with the individuals who commit crimes in the communities in which they committed them? Might that not save considerable resources in the long run?

Henry McLeish: You are right to make the point that community is a powerful concept. The scenario that you have described could happen. I suggest three measures to ensure consistency throughout Scotland: first, we should establish progress courts to chase people up; secondly, we should offer a wide choice; and thirdly, the same-day justice that is provided for custodial sentences should be available in every court. However, I accept your point that there is a need to ensure that the maximum amount of resources go to the areas where they are needed. From the evidence base, we know where the problems are, but we are not doing a great deal, as a society, to tackle basic inequalities.

The Convener: You have pre-empted some of my questions. You dealt with the issue of offenders who lead chaotic lifestyles not turning up to meetings. I think that you would concede that the existing community service order compliance rate is much less than satisfactory, even though, for perfectly sound reasons, social workers are in many cases reluctant to report a breach. Some people simply have no intention of carrying out their community service order. How will the proposed legislation tighten that up?

Henry McLeish: We have to take as our premise that, for some people, there is no action that we—those who are here or the Government—could devise that would be of benefit.

You made a point about recall, breaches and rule breaking. In a modern society, it is ridiculous that we put people in a situation when we know that they will be unable to abide by its conditions. If they frequently break the rules, a custodial sentence is ultimately available. However, the commission's view is that not enough is being done. I agree that, in our so-called sophisticated society, there has to be a rougher end of justice. If we want to stop people being recalled, breaching or going into prison, some tough action in the community would help considerably.

The Convener: Yes, but those offenders are not prepared to co-operate. We must remember that they have been sentenced to community service as an alternative to custody. They are drinking in the last chance saloon, and they are carrying on drinking—it would probably be more appropriate to say that they are taking drugs—and reoffending. How do you cope with such people? I see nothing in the provisions that you are suggesting that is likely to cope with that element.

Henry McLeish: Again, I would caution you on that. Although we have specific recommendations, they are interlocking. What I have tried to do—this answers one of Cathie Craigie's points—is to get certain measures to start to interlock to provide a better result. While I do not disagree with the cynical view, which is that for some people community sentencing will never be appropriate, I do not think that we have given community sentencing, in its widest sense, our best shot. By implementing the recommendations we can start to do that.

When a sheriff gives someone an order, it is often the last time that the sheriff will have any involvement until that person is sent away. Taking the criticism that we are talking about, we are trying to fill that gap. That is why the progress courts have a different role for social workers.

I saw something in Barlinnie that I fully support. Prison officers there have various forms of what they call buddying schemes. Why do we need fully qualified, skilled, professional social workers involved in the community when we can deploy resources on new ideas that have proven their worth elsewhere? To describe it as hard-line or tough is fair enough, but there are lots of things that we can do that we are not doing. I am confident that, in that sense, the recommendations can help.

The Convener: All of us around the table—I include you in that—have a duty to the victims of crime. In many instances, the victims of crime do not accept that community sentences work. You have outlined the lack of visibility and the lack of feedback into the community about what precisely happens. In short, the public think, "They're getting away with it." Is there anything in the report that would provide reassurance to the public?

Henry McLeish: Yes. I return to my earlier point. First, the interlocking nature of the recommendations, especially on the efficiency of the court system, will give that perceptible reassurance that justice is happening and that offenders are not walking away. The opposite perception worries me as much as it worries you.

Secondly, we have a situation in which the outcomes, whether in custody or in the community, are not good. We must improve those outcomes, and the recommendations can work to tackle some of those issues.

11:30

Bill Butler gave me a hard time about the evidence base, but we took an awful lot of evidence and considered an awful lot of reports on the public perception of crime. I do not mean to be critical when I say that it is interesting that, often, the view of the press and politicians does not square up with what the public actually think.

There have been recent cases in Scotland in which the public thought that the sentence did not match the crime. The public want longer and harder sentences to be handed down to people who commit heinous crimes, but they are often a bit more sympathetic than the press would have us believe when people who are involved in drugs and alcohol are given prison sentences of less than six months.

There is something out there that we can tackle. On sentencing and consistency, many of the people whom I used to represent would say, "Why did he get that sentence? I want longer sentences for crimes that matter", but they would not want someone to be locked up in Cornton Vale for six months whose crime was theft but whose problem was that their brain was awash with alcohol and probably that they had been beaten by their partner. I am not a sentimentality merchant. We covered the whole prison population and did not single out Cornton Vale in our report. There are big questions for us all.

The Convener: I think that we can agree that the outcomes are not good under either heading. However, sometimes our communities require a little respite from the shoplifter who has offended 40 or 50 times, the person who has driven for the fourth time while drunk and disqualified and the small-time drug pusher who has previous convictions. Such offenders normally attract sentences of six months or less. Is the community not entitled to look to us to provide protection from such people, albeit in the short term?

Henry McLeish: That argument was put to us and we can see merit in it in the short term, but I reject it because what people want in communities throughout Scotland is a long-term future in which the crime figures go down and people are less afraid of crime and can have a sense of security. The respite approach is no more than a short-term consideration. When I was a member of the Parliament, the chief constable of Fife Constabulary said to me that if he could get authorisation to take 90 kids to Blackpool there would be no crime in Fife that weekend. That would provide respite for the community, but it would not be a long-term solution.

The public want solutions for the long term. They want harder, stiffer, more appropriate sentences for serious offenders and they can be quite tolerant of short-term approaches that are seen to work and that involve some payback.

The Convener: We will not go down the road of considering the temporary increase in the Blackpool crime rate that might have arisen if the chief constable's suggestion had been taken up.

Henry McLeish: That would have been an English problem.

The Convener: Exactly—not our problem.

As there are no more questions for Mr McLeish, I thank him for giving up his time this morning, which we have greatly appreciated.

11:33

Meeting suspended.

11:37

On resuming—

The Convener: We welcome panel 2: Councillor Margaret Kennedy, convener, and Anne Pinkman, chief officer, of Fife and Forth Valley community justice authority; Jim Hunter, chief officer, north Strathclyde community justice authority; Tony McNulty, chief officer, Lanarkshire community justice authority; and Raymund McQuillan, vice-convener, and Yvonne Robson, professional development manager, from the Association of Directors of Social Work.

Councillor Kennedy is the Liberal Democrat member for Cupar in Fife Council and, since 2007, she has been vice-chair of the council's police, fire and safety committee. However, she attends today in her capacity as convener of Fife and Forth Valley community justice authority. I invite her to make some brief opening remarks.

Councillor Margaret Kennedy (Fife and Forth Valley Community Justice Authority): As convener of Fife and Forth Valley community justice authority, I welcome and thank you for your decision to come to Alloa to take evidence on the Criminal Justice and Licensing (Scotland) Bill. The proposed legislation is important. It has its roots in the Scottish Government's review of community penalties and the recent Scottish Prisons Commission's review, led by Henry McLeish. The CJAs positively welcomed the reviews and, likewise, we welcome the opportunity to participate in the bill process. The CJAs support and endorse the intentions of the bill, as outlined in the written evidence that we submitted. We will be pleased to answer questions on our written evidence and any other questions that you wish to ask.

The Convener: Thank you. We will proceed to questions. The panel is fairly formidable, so I suggest that we pose the questions through you, Councillor Kennedy. If you feel the need to invite one of the officials to respond, please do so. We will obviously want to hear from them under specific headings that are part of their remit. Paul Martin will start the questioning.

Paul Martin: What are your views on the purposes and principles of sentencing as set out in the bill?

Jim Hunter (North Strathclyde Community Justice Authority): The principles of sentencing are always two or threefold. Punishment is certainly always part of sentencing considerations; rehabilitation and restoration to victims or the community are the other principal considerations.

Paul Martin: Do you want to highlight any areas of sentencing that could be added to the bill?

Jim Hunter: No—the purposes and principles of sentencing are covered fairly fully in section 1.

The Convener: We move on to the Scottish sentencing council, which was a fairly vexed issue this morning.

Bill Butler: Good morning, colleagues. Does more need to be done to provide sentencers with sentencing guidelines, and to provide the public with accurate information on the sentencing process? If so, could the proposed sentencing council play a role in that?

Would Councillor Kennedy like to lead, or direct someone else to do so?

Councillor Kennedy: I am happy for Ms Pinkman to lead.

Anne Pinkman (Fife and Forth Valley Community Justice Authority): The CJAs—both the conveners and the chief officers—support the recommendation on the establishment of a sentencing council. That is not to say that we wish to undermine the independence of the judiciary, but we feel, for some of the reasons that the right hon Henry McLeish outlined this morning, that it would add to the level of knowledge and understanding of the general public and to the level of transparency in the system.

The court sentencing statistics that are published annually bear out the fact that there are inconsistencies in sentencing throughout Scotland—those are reflected in the statistics for both males and females. My colleague Mr McNulty has some statistics.

Bill Butler: What are those inconsistencies? The committee and I would be grateful if you could outline them for us based on evidence.

Tony McNulty (Lanarkshire Community Justice Authority): The Government publishes statistics annually on sentencing in every sheriff court in Scotland. The sentences are listed, and the percentage of custodial sentences, probation orders, community service orders and fines that are imposed are highlighted. I will not mention the courts by name because you can look them up yourselves, but in some courts 22 per cent of the sentences that are imposed are custodial, whereas in other courts custodial sentences account for 11 per cent of sentences. There seems to be no rhyme or reason for such variations in sentencing. That is the main evidence: those statistics are published every year.

Bill Butler: What role could the proposed sentencing council play in providing accurate information for the public's delectation?

Jim Hunter: The sentencing council would have a major role in relation to the transparency of the system. That would involve explaining the purposes and the principles of sentencing in ordinary language; monitoring sentencing across the different courts and judiciaries in Scotland; and performing some kind of evaluation of that monitoring, and being able to comment on it and explain why sentencing in certain parts of Scotland may differ from sentencing in other parts.

The idea is not that we should have complete consistency throughout Scotland—that would probably be too ambitious and not a good thing in any case, because local circumstances differ. Someone needs to explain that.

Bill Butler: That is exactly what Lord Cullen said last week. Are you saying that we are seeking coherence, and not necessarily uniformity, in sentencing?

Jim Hunter: Yes, absolutely—I agree with what was said on that. The sentencing council, or another such body, should be able to explain that to people. The bill includes a requirement for the sentencing council to report annually; it should be able to use that and other mechanisms to explain that idea, so that the public understand why those differences occur.

Bill Butler: If a Scottish sentencing council is established, would you like any changes to be made to the proposals that are set out in the bill? Are there any ways of modifying that particular proposal?

Raymund McQuillan (Association of Directors of Social Work): At this stage, there is no great desire for any alteration to the proposals. We will have to see how the sentencing council develops before we produce strong proposals or make our views known on how it is operating. However, I support the view that has been expressed on the statistical base that is available on inconsistencies in sentencing. The statistics to which Tony McNulty referred are widely available and highlight clearly the inconsistencies in sentencing across courts, a range of disposals and a range of similar types of offences. It is widely known that inconsistencies exist.

11:45

Bill Butler: Are not those bare statistics? Is it not the case that we would have to analyse the statistics and that we cannot simply infer from them that there is inconsistency?

Raymund McQuillan: I do not agree that that is the case.

Bill Butler: Why not?

Raymund McQuillan: Because the knowledge of inconsistencies is available from the statistics themselves.

Bill Butler: But we have to analyse, examine and interpret the statistics—we cannot simply take them at face value, can we, Mr McQuillan?

Raymund McQuillan: In some cases, we can. When we have statistics that show clearly differences in sentencing for similar types of offences across a range of courts in Scotland, we can take them at face value. I agree that further analysis is needed, and I suggest that the sentencing council will give us the basis for that.

Bill Butler: Last week, the suggestion was made by, I think, the Lord President and certainly by Lord Cullen that, if there is to be a Scottish sentencing council—of course they do not see the need for it, whereas you do—it should have a judicial majority. There would be a majority of people who have expertise and experience as sentencers, which is not what is proposed in the bill. What do you think about that?

Jim Hunter: I can give a personal view.

Bill Butler: That is what I am asking for.

Jim Hunter: I do not think that that would be a problem, provided that there were lay members on the council. That issue is not a major sticking point in progressing the matter.

Tony McNulty: One theme in community justice authorities is that our customer is the victim—that is who we are there for. I have no problem with that suggestion on the make-up of the sentencing council, but it is important that victims are well represented on the council because, just as we are, the courts are there to serve victims. That would be my only proviso.

Bill Butler: I hear you loud and clear.

Raymund McQuillan: I do not regard that as a major difficulty. We must focus on the sentencing council's major purposes. If a majority of the members of the sentencing council were judicial members, that would not necessarily deflect the council from its major purposes. Those major purposes have been highlighted: they are to introduce a degree of transparency and greater clarity in sentencing and to provide an ability to analyse sentencing patterns—the need for which Bill Butler has highlighted several times—and a greater understanding of sentencing processes and patterns throughout Scotland.

Robert Brown: I am intrigued by Mr McQuillan's suggestion that we can use the bare statistics. Surely, among other things, the pattern of crime in different sheriff court areas must be taken into account, which requires deeper analysis. The pattern in Orkney must be different from that in Glasgow.

Raymund McQuillan: There are different patterns, but the available statistics break down sentencing patterns by type of offence. That gives us greater consistency in interpreting what is taking place.

Robert Brown: Yes, but my point is that the mere fact that 11 per cent of those who commit certain sorts of crime go to prison in one place whereas in another area the figure is 22 per cent does not tell us anything without further analysis. The real question is to do with the breakdown of crimes. Some research on or information about the situation is needed. For the sake of argument, assault can involve a fairly minor incident up to something approaching a murder—there is a range. Without a breakdown, how can we possibly draw conclusions about those matters?

Raymund McQuillan: I am not arguing that further analysis is not required; I am saying that we can draw conclusions from the available statistics. The statistics do what you suggest they do not do—they give a direct comparison by type of offence. For example, we can compare custodial sentence rates for housebreaking in one part of the country with those in another part of the country.

Robert Brown: The ADSW's written submission states:

> "To improve public confidence in the Criminal Justice System it will be imperative that"

the Scottish sentencing council

> "has the authority to address inconsistent application of the guidance".

I am bothered about that, because it refers not to producing guidance and general policy, but to monitoring, which does not sound as if it ought to be done by the sentencing council. In other words, that seems to refer to instruction to judges or a supervisory role over the courts. Will the ADSW witnesses elaborate on that point?

Yvonne Robson (Association of Directors of Social Work): As has been said, some analysis is required. If there is clear evidence of varying sentencing patterns throughout the country, the sentencing council could provide some guidance to try to eradicate anomalies where they are pronounced.

In one court, over a period of time, there were pronounced differences in custodial sentences. Following discussions with the bench about confidence in community sentences, those differences were reduced quite substantially. Mr Hunter will substantiate that. That example shows that trends can be changed when discussions take place and confidence in community sentences is improved.

Robert Brown: But is that a matter for the sentencing council? You are talking about relationships with judges and how the general guidance that is set is applied on the ground. There would be all sorts of implications for the separation of powers if a quango, which is what the sentencing council will be, had such a power or influence over the judiciary. Are you not concerned about that approach?

Yvonne Robson: The intention is to ensure that there is dialogue so that serious anomalies are addressed by people with expert knowledge.

Stewart Maxwell: Can I take you back to the point about inconsistent sentencing and statistics? Do you agree that, if there was no inconsistency in sentencing, that would be obvious from the statistics because, given the range of cases that go through the courts over a period of time, the sentences would average out? Do you agree that the statistics show a range of different sentences between different courts because there is an underlying problem of inconsistent sentencing and not because all the less serious assaults occur in one part of the country and all the serious assaults occur in another part? Do you agree that the averaging out deals with the problem and that the statistics can be relied upon to show that we do, in fact, have inconsistent sentencing?

Anne Pinkman: I agree.

Dr Simpson: I would like to hear your comments on the disjunction between prison and the community. For example, only 1,000 of the 18,000 offenders with custodial sentences are placed on alcohol reoffending programmes in any year, and a number of individuals in prisons cannot be started on drug treatment programmes because they are not guaranteed to get a community place when they come out. Much of what is proposed does not address the problem, which is the disjunction between the community element and the prison element.

Can we improve the situation without changing the law—for example, can we ensure that someone who serves half a sentence in prison is placed on a community programme immediately when they come out? At present, people who could begin reoffending programmes while they are in prison do not do so because there is not enough time for them to complete the programme before they come out. Why are they not placed on a programme that is subsequently taken over by the community side, or does that already happen?

The Convener: Who will take the first cut at that question?

Councillor Kennedy: Dr Simpson's point is correct and well made. There is perceived to be a wall or barrier between the SPS and the wider community. Obviously, the prisons or the CJAs should remove that. In our CJA, we recognised early on that we needed to bring together health and the prison service. The drugs and alcohol programmes are a key part of that role, and mental health is inextricably linked to both issues.

I ask Anne Pinkman to expand on that and comment on our health forum.

Anne Pinkman: Fife and Forth Valley community justice authority puts great effort into bringing together the three Forth Valley prisons and our colleagues in NHS Forth Valley and NHS Fife. We are addressing the issues that Dr Simpson raised. That said, issues arise around short-term prisoners, one of which relates to attempts to put in place arrangements before an individual is released. It is easier to do that for those who are serving longer sentences.

We have made great strides in ensuring that treatment can continue when an individual goes into prison. One example is the maintenance of an individual's methadone script. People might ask why someone who is serving a short sentence should be maintained on methadone. The answer is that interrupting someone's methadone treatment over the course of a short sentence can be disruptive to the individual. On their return to their community at the end of their sentence, or on its expiry, the individual can be placed on a waiting list and, in some areas, they may have to wait considerable months before they can continue with their treatment.

We have made great strides in that direction. We now need to make a significant effort to ensure that we can replicate that progress for all individuals when they come out of prison. That will be extremely challenging, given the increasing number of individuals who are serving short-term sentences.

The Convener: Would that be the general view in the CJAs?

Jim Hunter: Yes.

Tony McNulty: I think that what Dr Simpson suggested relates more to the previous legislation—the Management of Offenders etc (Scotland) Act 2005. Among other provisions, that act encouraged the CJAs to talk to the Scottish Prison Service about having what are called community-facing prisons. Previously, 400 of the 1,700 prisoners in Barlinnie prison were from Lanarkshire. The majority of prisoners in Barlinnie were from Glasgow, so most services were geared towards them—the focus was on Glasgow housing, social work and so on.

Those Lanarkshire prisoners are now in Addiewell. In all, 85 per cent of the 700 prisoners in the new Addiewell prison are from Lanarkshire. Lanarkshire housing and Jobcentre Plus staff are going into the prison, along with colleagues who specialise in literacy programmes, financial advice and help for families. Community people in Lanarkshire are no longer saying, "We can close the book, because that person is in prison. They will not be back for three months, so we don't need to worry about them until then." Instead of that, we are getting continuity.

The fact that someone has become a prisoner for six months does not mean they will not return to the community, that their families do not still live in the community or that the community no longer has a responsibility to try to reduce the chance of the individual reoffending on their return. That needs to be recognised, and that cultural change is far more important to the community justice authorities than formal programmes are.

Raymund McQuillan: In principle, I do not disagree with the contention that there should be greater joined-up working between prisons and community-based social work on the continuity of programmes. Community justice authorities across Scotland are working actively towards restoring greater consistency in the work of prisons and communities. In the context of today's discussion, however, that does not provide a solution. The problem with the current situation is the greater number of short-term prisoners who are released into the community with little or no supervision. Dr Simpson's proposal regarding short-term prisoners would involve community-based criminal justice social work in activity that it is not funded to provide at present.

In a wider sense, the ADSW contends that the direction of the bill should be to replace short-term sentences rather than to enhance co-operative arrangements between the SPS and community-based social work, based on the current prison population. We would prefer to see a reduction in the prison population and an increase in work with offenders in the community.

Dr Simpson: I am not sure whether the panel heard the evidence from Henry McLeish. My point was that the Government tried successfully to do that for women offenders. From evaluation, we know that there was a reduction in reoffending among 500 women who went through the time-out programme in Glasgow and had their drug problems treated. Despite that evidence, we have seen a continuing rise in the prison population. Your hypothesis is that, if we put the money into a community resource, the prison population will drop. That is not proven by the reality of the women's prison system.

12:00

Raymund McQuillan: I do not think that that is my hypothesis. The ADSW supports the view that the prison population should fall, but I do not contend that that will be achieved simply by enhancing programme work.

Over recent years, the prison population has grown substantially; each day now, more than 8,000 people are in prison. Over the past 20 years, during which time the contribution of community-based social work interventions has increased significantly, there has also been an increase in prison populations. The sentencing council would allow us to analyse in more detail the reasons behind the continued growth in prison populations when crime rates are falling and the quality of community-based provision is increasing.

Dr Simpson: In the past five or six years, during which we have been trying community sentencing, the number of prisoners being admitted on sentences has dropped by 5,000—from 23,000 to 18,000—whereas the number being admitted on remand has gone up from 18,000 to 23,000 or slightly more. Much of the rise in the daily population is because of longer-term sentences for serious offences, but the other reason is remand. We have been moving in the right direction, but remand and breaches really need to be tackled as they are the two areas in which substantial rises have occurred. In one case the percentage is high, although the numbers are small. In the case of remand, the increase is about 28 per cent. Huge numbers of additional people are going into prison.

The Convener: I take it that that was a question and not a comment. Can someone please respond?

Anne Pinkman: SPS statistics for 2008-09 show that half of the liberations of prisoners to Fife and the Forth valley were people who were remanded only. They were remanded into custody, and at the point of sentence received either a backdated sentence that allowed them to be freed from the court, or a non-custodial disposal.

Jim Hunter: I want to follow up on Dr Simpson's point. Over the past few years, progress has been made on the interface between prisons and communities and examples of good practice exist across Scotland and can be developed. However, the huge problem that prevents significant progress is what Alex McLeish referred to as the "churn" within prisons. It is just—

The Convener: Alex McLeish is the manager of Birmingham City Football Club.

Jim Hunter: I beg your pardon—Henry McLeish referred to churn. What happens is that a wall of people comes in and out of prison day after day. That prevents the Scottish Prison Service from beginning to do anything with the very short-term prisoners.

Mr McLeish also referred to "warehousing", which is really what it is. No matter what we try to do to develop good practice, no matter what social work departments do in the community, and no matter how good is the will of prison officers, that wall of bodies prevents any progress.

The Convener: The interventions from Dr Simpson, welcome as they have been, have diverted us slightly from our track. We will move on to ask about community payback.

Cathie Craigie: The community payback order will replace a number of current community disposals. Would there be any value in retaining any of those disposals, or does the bill encompass what is needed?

Jim Hunter: Briefly, we fully support the establishment of the new community payback order, which we think will simplify matters and help people to understand. I do not think that any of the three orders that will be removed would be worth retaining in its own right.

Cathie Craigie: I note that the written submission from the community justice authorities states:

> "We do note that while the CPO is designed to replace most existing community sentences, this does not include the DTTO and RLO which remain in place. We believe there may be potential for confusion".

Can you expand on that?

Jim Hunter: Under the new community payback order, the court will have the opportunity to include an additional requirement for drug treatment. That is right and proper. However, drug treatment and testing orders will be retained under the bill. We merely make the point that, if the bill's aim is to simplify things to make them much more transparent and easy to understand, leaving both measures in place could cause a difficulty in that people might get them confused.

Cathie Craigie: If there are suggestions about how that could be improved, now is the time to make them.

Jim Hunter: We were not sure why drug treatment and testing could not have been made a requirement of the new community payback order, within the same criteria.

Cathie Craigie: Do any of the other witnesses want to comment?

The Convener: I take it that no one from the Association of Directors of Social Work wants to comment on that.

Cathie Craigie: As those who were present for our earlier evidence session will have heard, it is accepted that many offenders live chaotic lives that can make it extremely difficult for them to complete a community sentence by turning up when they are supposed to do so. Getting Henry McLeish to drag them out of bed might be a bit extreme, but many people whom I represent would certainly think that that would be reasonable. Can anyone outline to the committee the problems that, in the wealth of experience that the panel has, currently exist on the ground?

Raymund McQuillan: In terms of offenders' compliance rates with community service orders, we have considerable difficulties, although it should be noted that the vast majority of offenders comply with and complete their community service orders. Those who either choose not to comply or are unable to do so tend to present a range of difficulties and problems that are associated with background issues such as addiction, which cannot easily be overcome during the course of a community service order.

In terms of what currently happens, there is potentially a three-way dynamic involving the offender, the supervising officer and the courts. From time to time—although not in all cases—that can lead to a situation in which offenders might not turn up because they know what they might get away with. For example, with a view to ensuring that the order is completed successfully, the supervising officer might be reluctant to register a breach at a particularly early point. In the event of a breach, an offender who is taken back to court might, in any case, be returned to the community to complete the terms of the order. The three-way dynamic that can exist in some cases requires that each of the parties be clearer about their roles and responsibilities.

From a community-based social work point of view, I believe that local community-based organisations should be very clear—clearer than we currently are—with offenders about our expectations about compliance: we should be clear about what action will be taken and when. We should also ensure that that action is taken. The current guidelines suggest that an offender who does not turn up without a satisfactory excuse should be given a first warning, then a final warning, and that thereafter breach proceedings should take place. Within the community-based social work scenario, situations sometimes arise in which people are given more than those three warnings.

I suggest that each of the three parties—the offender, social work staff and the courts—needs to take due cognisance of their roles and responsibilities. From a community-based social work perspective, I think that it is imperative that we enforce the client's obligations more rigorously. In doing that, the intention would clearly not be to increase the levels of breach but to enhance the levels of compliance.

Cathie Craigie: Will the new community payback order lead to improvements?

Raymund McQuillan: I am quite convinced that the new order as outlined and the timescales that pertain to it give an opportunity to those of us in community-based social work to address our responsibilities by ensuring that orders start quickly, and by being clear with offenders about their responsibilities and what actions will be taken if they fail to comply. That must be within a framework of providing necessary support to offenders who have underlying difficulties, for example by providing addiction services.

Cathie Craigie: What opportunities will the new order give you that you do not already have?

Raymund McQuillan: It provides for a substantial tightening of timescales, which sends an important message from the courts to the public and to offenders about the commencement of new orders. We support the view that orders should be started and should finish quickly. The current arrangements provide for the work to commence within three weeks; under the new arrangements, that period would be reduced to one week. Current legislation allows one year for completion of a community service order; the new guidelines suggest that orders should be completed within three to six months. It would be in the interests of justice and of the efficiency and effectiveness of community-based social work if, alongside that, local practices took due cognisance of their responsibility to enforce compliance and to ensure that offenders who fail to comply are dealt with swiftly.

Yvonne Robson: The new order will also provide an opportunity for the imposition of electronic monitoring, if someone is taken back to court for breach. As Mr McQuillan said, if an offender is in breach currently, the court either allows the order to continue or considers sending them to prison. The imposition of electronic monitoring, with the support that the community payback order will provide, may be sufficient to help some offenders to move away from non-compliance towards compliance.

The Convener: Offenders are not complying at the moment. I return to the point that orders will be made as a direct alternative to custody. How many last chances do people get?

Raymund McQuillan: At present, compliance rates are about 75 per cent. We cannot assume that people generally do not comply with orders. The breach rate is about 25 per cent.

The Convener: I understand that it is a bit higher than that. Your figures may be more up to date than mine.

Raymund McQuillan: Yours may be more up to date than mine.

Cathie Craigie: Are the figures that you have given those for the Fife and Forth valley area?

Raymund McQuillan: No.

The Convener: We will sort the matter out.

Jim Hunter: There is some confusion about breach. Mr McQuillan is correct: the completion rate for community service is probably much higher than the breach rate, because people who breach community service orders are taken back to court, where a sheriff decides whether to terminate the order and send the offender to custody, to take other action or to continue the order. If the order is continued and the offender is given a chance to finish the sentence, the breach still counts. Often the figure that is reported as the breach rate does not reflect the number of people who successfully complete community service.

The Convener: The figures may not be inconsistent.

Angela Constance (Livingston) (SNP): What do you think of Henry McLeish's suggestion earlier this morning that people should start their community sentence on the day on which it is given?

Raymund McQuillan: People who are given custodial sentences are taken away on the day, so what has taken place is highly visible to the public. It is unfortunate that, occasionally, when someone is given a community sentence, the public perceives them as having got off, which is clearly not the case. I support the view that it is important that something visible is done on the day. Under the arrangements that are being discussed with the Scottish Government, an order will be served on the day on which the court makes its decision. A social work representative will have the opportunity to discuss the order's parameters and the obligations that it imposes, and to make arrangements for the offender to start work within five days.

Angela Constance: I was interested in Mr McLeish's suggestion that there should be more frugal or targeted use of social work resources. He gave the specific example of social inquiry reports being used less often to assist in sentencing. What do you think of that suggestion?

Raymund McQuillan: I do not have the statistics to hand, but I think that the number of social inquiry reports produced in Scotland is about 40,000. There are discretionary reports, which sheriffs may request, but in some circumstances reports are required by statute.

When reports are required by statute, there is little differentiation between cases that might lead to custodial sentences and cases that might not. As a result, the same type of report can be produced in all circumstances, regardless of whether the outcome is likely to be custody. On most occasions, there is little guidance from the bench on sentencing intentions and whether custody is being considered. That can tend to lead to reports being produced in a standardised form.

12:15

Some authorities in Scotland are participating in pilot exercises in which different formats and timescales for social inquiry reports are being considered—I think that three or five authorities are involved in the pilots. The exercises are due to be completed by the end of June and we hope that they will provide interesting lessons for us.

Stewart Maxwell: How will the bill address the public perception that community sentences are a soft option? What else needs to be done to improve understanding of, and confidence in, community disposals?

Yvonne Robson: There is much evidence that community service orders are meaningful and beneficial to individuals and communities. The ADSW has embarked on a 12-month public relations strategy, which will help the public to understand much more about social work and criminal justice. There is an on-going process in which we need to engage.

Most, if not all, areas in Scotland publicise work that is done through community service. We must go further and publicise other disposals that currently operate and will be incorporated into the new community payback order. We must explain to the public what probation orders are and what community payback orders that involve supervision, unpaid work or drug treatment are. There is evidence that when the public have some knowledge and understanding of the matter, they are much more sympathetic to, and tolerant of, the court's approach to offenders, as Mr McLeish said.

Anne Pinkman: There is much to be done to raise the profile of and levels of understanding of community-based disposals. CJAs very much welcome the proposed requirement for consultation about the undertaking of unpaid work in communities.

Yesterday, I received the results of a survey on community service that we conducted. Our area was one of three that received short-term funding for the community service visibility project, which ran for six months. The project was not costly—it cost a little more than £11,000. We surveyed residents of four local authorities in Fife and Forth valley in November and we did so again last month. It was interesting that we were able during that short period to raise awareness of community service by 50 per cent, through a combination of posters, newspaper articles, advertisements on radio and invitations to listeners of a local radio station to vote for a community service project. The approach paid dividends. It is interesting that respondents have indicated that their awareness was raised most through the newspaper articles.

I will highlight a couple of other interesting points from the residents survey, which we can make available. Just under 50 per cent of residents considered that community service is an easy option, but it was reassuring that more than 60 per cent accepted and understood that it was an alternative to custody. More than 50 per cent of the respondents considered community service to be a way for offenders to make amends to the community for the wrong that they had done. Finally, on the type of work that offenders should undertake, almost 90 per cent of those who participated in the survey felt that offenders should be involved in work that helped the community, but 57 per cent also thought that the work should allow offenders to improve their employment skills. The residents survey produced a lot of useful information that will help us to improve and continue to develop knowledge and understanding of community service, and to inform the work that we have our offenders undertake, not just in Fife and Forth valley but throughout the country.

Stewart Maxwell: That is very interesting: thank you. I think that the committee would benefit from seeing a copy of the survey. I would certainly appreciate seeing the results.

The Convener: I was about to say that that would be useful. What was the size of the sample?

Anne Pinkman: The survey sample was 3,500 residents, which was considered to be a reasonable size.

Stewart Maxwell: You said that awareness was raised. It is certainly useful and valuable to raise awareness—I would not say otherwise—but it is not the same as changing perceptions about whether community service is a soft option. Was there any impact on that?

Anne Pinkman: I would prefer to defer that question and respond later, if I may, because I received the results only late yesterday afternoon and I have had only a quick read of them. I would not want to mislead you about what the survey did or did not say.

Stewart Maxwell: That is fair enough.

Anne Pinkman: I will make the survey available.

The Convener: That is an entirely appropriate response.

Robert Brown: It has become clear that there is agreement among the panel about the importance of the community dynamic and the perception of community service. If I have picked this up right, there is also agreement about the formal requirements of community orders, such as that they must start quickly and that there must be robust enforcement if they are breached. The cast-iron test is whether these things work. Many of us have significant concerns about the effectiveness of some of the current community orders—for some individuals, at least. How good are community orders at the moment? What has to be done to make a significant difference to the reoffending rates of people who undertake community service, other than the formal matters of getting the orders to start more quickly and enforcing them more satisfactorily?

Anne Pinkman: Although reoffending rates across the piece are high and we would all like them to be lower, the reoffending rates for community service are the lowest recorded; they are lower than the rates for those who receive prison sentences and considerably lower than the rates for those who receive periods of imprisonment and also—

Robert Brown: You are dealing to some extent with a different tranche of prisoners—or, rather, people who have been convicted—are you not?

Anne Pinkman: Not necessarily, because many individuals who receive community service have served custodial sentences, and vice versa. Those who serve short-term sentences and those who receive community-based disposals are similar—they are the same group. We know that the reoffending rates for those who receive community service are lower.

Robert Brown: We are, however, talking about reoffending rates of something like 42 per cent, if I recall correctly, which is still pretty high, given the expense involved.

Can you give us any guidance about the different sorts of community orders? There are drug treatment and testing orders at one extreme, with probation orders at the other—and other things in between. Where are the big gaps in service that prevent us from producing a better effect with regard to reoffending rates and the improvements to people's lifestyles that we want?

Raymund McQuillan: The critical test of any order is the reoffending rate. We must accept that premise. When we analyse the effectiveness of sentencing and community disposals, we must consider the reoffending rates. There are a couple of caveats about how we do that, however. This goes back to statistics again, but our analysis is not yet as good as it must be. The information that we currently have about reoffending rates perhaps tells us how many people reoffend, but it does not tell us about the actual level of reoffending. We might measure the number of people who reoffend, but those who reoffend might be doing so at a reduced frequency or they might, for all we know, be committing more serious offences. We need better analysis of what we mean when we say "reduced levels of reoffending". Are we talking about people who reoffend once or more or about the level of reoffending? Do we include in our discussion analysis of the seriousness of the offences? I do not think that we do, at present. The figures are misleading, to some extent.

I support the premise that the critical test of the effectiveness of any disposal, including custody, has to be its impact on reoffending rates. Although custody is the most important measure, I would add that it is not the only measure. We would also like to consider the effectiveness of community disposals in particular in addressing the risks and needs that are presented by each individual offender, which will of course vary. We must have a view to the effectiveness of disposals in addressing addiction, employability and accommodation issues, as well as a host of other issues that individual offenders present.

Robert Brown: That is a useful analysis—although it was not quite what I asked for, which was where you think there are major gaps.

For the sake of argument, let us consider somebody who is sent out on a community sentence, cleaning off graffiti or picking up litter. If the mental health and employability problems and the other things that Mr McLeish talked about earlier are not tackled early on, and if the disposals are not properly targeted, people might end up more alienated than when they began. Is there a need to look afresh in some detail at the appropriateness of what we are doing in relation to community sentences and at how it is matched to the individual offender's needs?

Tony McNulty: The community justice authorities have been tasked with reducing reconviction rates. Obviously, someone can reoffend but not be caught, which is why we talk about reconviction rates. The aim is to reduce rates by 2 per cent across the whole range of disposals, including custody. The most recent figures that I have indicate that there is a reconviction rate of 42 or 43 per cent after two years.

Robert Brown: That is right.

Tony McNulty: I understand that the rates for prison and probation both run at about 63 per cent after two years. One of the biggest, most immediate gaps that we had in Lanarkshire, as shown by the figures, concerned short-term prisoners. They were in and out, on remand or because of short sentences. Nobody touched them. Most of them were men, and they were not prioritised in relation to child care, health or social work—they were beyond social work as they were not statutory cases. They were tried on probation and community service. The police picked them up, but they were released and caused immense problems for the communities that they returned to—drinking and committing breach of the peace. Basically, they were lawless. They were not working, they were not part of society and they were going in and out of prison. That was the case at Barlinnie, and now it is the case at Addiewell. That group of people were not just caught and reconvicted; they were caught so many times in one year that they were a nightmare. We were not touching that group with disposals at all.

Then the routes out of prison project came along—some members will have heard of it—which was a simple, straightforward project involving people who had been through the prison system or who had been involved in the justice system, and who talked the same language as the prisoners. Obviously they were put through a selection process—I think that there were about 400 applicants for five jobs. The advert in the *Sunday Mail* said that the project would employ ex-prisoners.

Those people go into prisons, but it is six weeks before they build up a relationship with the prisoner. With the Scottish Prison Service and the prison officers, they address the range of needs of the prisoner to reduce the chances of their reoffending. It might be about employability, literacy—many of the prisoners cannot read or write—signing on at the job centre or getting a general practitioner, which many of them need. It might also be about housing or getting in touch with their family and returning to a family situation.

They need to be taken by the hand—I do not mean literally, but almost—and shown round a range of agencies on their release to help them settle back into their community.

The figures show that that approach might be successful, although it is too early to say. Like Anne Pinkman, I will not say that we have had success, but the early indications are that that approach might help to reduce the 63 per cent reconviction rate. I could give the committee other examples, but I will not, because they are available in our three-year plan and our annual reports.

12:30

The key point is that not only the police, the courts and social work but the community must deal with crime. The basis for having CJAs is that communities are affected by crime. I want to involve communities, local health boards and addiction services and explain what we do. People who go into prison or are given a probation order for committing an offence are from a community, so we must generate community services for them.

There is a smashing initiative to address domestic violence in North Lanarkshire called MARAC—multi-agency risk assessment conferencing—which was lauded by Her Majesty's chief inspector of constabulary. When a policeman is called to a domestic violence incident, they immediately fill in a one-page form and pass it to their superiors, and a risk assessment is done right away. The main agencies involved, such as health and, for children, education immediately get round a table and discuss how to protect the victim. I have attended Coatbridge MARAC. If the offender gets bailed, we go to the court and get bail conditions put on them, which the police strictly supervise. Everything gravitates towards ensuring that the victim is protected.

If the offender is taken into custody, that is fine, but we want to know when they will come out. We can protect the victim by, for example, placing a tag in their house, so that if the offender comes anywhere near it, an alarm will go off and the police will know. We need such imaginative ways of working, because there is no single answer. There is a lot of hard work for us to do. I think that the bill's community payback orders will help us, but they will be only one tool.

Robert Brown: The witnesses must have many social work and CJA contacts across Scotland, and there must be examples of good practice in different local authority areas. Can you send us further information on that? I see that the witnesses will.

The direction of travel of the community payback order is okay, but it covers a multitude of sins and a series of practical disposals, some of which are more effective than others. It is therefore important to get a handle on what works.

I have a question about resources, which were referred to earlier. If the bill is passed, there will be more community disposals, in the form of community payback orders. What will be the resource implications for criminal justice social work services? Do you have concerns about that?

Jim Hunter: We provided written and oral evidence to the Finance Committee on our concerns about the bill's financial memorandum. We are concerned that the baseline for calculating the cost of community payback orders was the funding that is currently in place for probation orders, community service orders and supervised attendance orders. Those disposals are not sufficiently funded at present, therefore that fault has been carried forward in calculating costs for the new order. That is our first concern.

Our second concern is around the Government's postulation in the financial memorandum of a zero per cent, 10 per cent and 20 per cent increase in the number of orders as a result of other measures in the bill, such as the presumption against short sentences and the attractiveness of the new community payback order. The Government has perhaps underestimated the increase in the number of social inquiry reports that will be a direct consequence of the presumption against short sentences. Our view is that sheriffs might ask for social inquiry reports when they would not previously have done so—in other words, they will ask for social inquiry reports in cases in which they would have imposed a straightforward short sentence of imprisonment and would not have required a social inquiry report because the person was over 21 and had been in prison before. Because of the presumption, they will be able to ask for a social inquiry report so that they have all the information about what is available in the community, which may increase the number of requests. That was not taken into account in the financial memorandum, but it would have been reasonable to do so.

Robert Brown: Does that not pale into insignificance in comparison with the sheer cost of paying for 20 or 30 per cent more community sentences? I presume that we are talking about interventions at the more expensive end, given that you are trying to do something effective with people who would otherwise have gone to prison.

Tony McNulty: Angela Constance and Henry McLeish mentioned the number of social inquiry reports that may be required. The cost of those may not be high, but the important thing to remember is that the money for community payback orders is money for working with offenders to reduce the chance of their reoffending. Background reports for the courts are costly, as they involve six hours of a qualified social worker's time. If the issue is appealability—if the sheriff asks for a report so that the decision will be harder to appeal—that would be an inappropriate use of social work. It would not be using the process to tackle offending; it would be using it for the sake of the court.

The bill provides that

> "A court may pass a sentence of imprisonment for a term not exceeding 6 months on a person only where the court considers that no other method of dealing with the person is appropriate."

When a court imposes a custodial sentence of six months or less, it will have to state its reasons for doing so. However, the report in *The Herald* on the committee's meeting of 12 May stated:

> "Sheriffs were no more enthusiastic about the proposals, with the Sheriffs' Association being highly critical of the proposal to make the Bench offer an explanation before handing down any sentence of less than six months."

If I were a sheriff, I would be greatly tempted to ask for a background report so that I could say that community service and probation had been tried and failed, which was why I was giving the offender a six-month or three-month custodial sentence. That could result in the expenditure of scarce resources that, frankly, would not go towards reducing reoffending.

Robert Brown: I accept that point. I have, perhaps, sent you off in the wrong direction. Do you not also have to take account of the increased number of sentences and the need to fund and support them? Do you accept that the level of intervention would have to be high if it is to work?

Tony McNulty: Yes, I absolutely agree.

Robert Brown: Do you mind if I make one other, brief point, convener?

The Convener: No, please carry on.

Robert Brown: In their evidence, the ADSW witnesses talked about supporting a resource scoping exercise to ascertain accurate unit costs for community service and other community sentences. Were you asked to do that, in some way, during preparation of the bill? I presume that the Government approaches you for that sort of information.

Yvonne Robson: That goes back to what a CJA colleague said. We are given allocations under specific headings and the probation allocation is based on the cost of a standard probation order. However, 56 per cent of all probation orders have additional conditions, some of which—particularly group work programmes or community sex offender group programmes—are very intensive, and the supervision of high-risk offenders can be very intensive. We therefore support what CJAs have said—we do not have accurate costings.

Given the projected increase of 20 to 30 per cent in the number of community sentences, we need to break down the allocation into more realistic costings. At present, the total is divided by the number of new orders to give the annual cost, but that is insufficient. We must break down the cost to understand it. There are also differences between what it might cost to provide a service in an urban area with good transport services and what it might cost in rural areas where resources are much more stretched.

Robert Brown: Whatever else comes out of the bill, community payback will not involve a standard probation order in most instances, at least in terms of new people.

Yvonne Robson: That is correct.

The Convener: I remind members that the Finance Committee will report to us on the financial issues relating to the bill in due course.

Angela Constance: I had intended to ask about how drug treatment and testing orders could cause confusion with the drug treatment requirement in community payback orders, but Mrs Peattie rather effectively addressed that point earlier. I will therefore move on to another question.

The Convener: I think that you mean Mrs Craigie.

Angela Constance: I keep doing that, Cathie.

Cathie Craigie: I am used to it.

Angela Constance: I apologise.

I want to ask the CJA witnesses a question, perhaps because HMP Addiewell, in my constituency, houses a lot of Lanarkshire people. The CJAs expressed concern in their written evidence that the bill does not refer to the availability or prioritisation of programmes that offenders will be required to undertake. Will you elaborate on your concerns and say how they can be addressed?

Tony McNulty: We are almost returning to the previous point. Our concern is that people talk about programmes, but programmes are expensive. If resources are not available for programmes to be put in place, they will become a wish list; they will exist in people's minds more than in reality.

Programmes have a place and can be successful, but there is a danger that they will not produce results if we overly rely on them. Almost by definition, they quite expensively target a low number of offenders. There will always be a question about a programme's value compared with a wider blunderbuss effect on people who constantly reoffend but do not quite hit the heights of getting statutory supervision—I talked about them earlier.

The eight CJAs in Scotland are clear about their spending priorities. Obviously, our first priority is the most vulnerable, who may be subject to crime by sex offenders and violent offenders. The multi-agency public protection arrangements, which involve agencies coming together, are a terrific success in Scotland and are the first spending priority. If funding was cut, money would still be spent on them. The second priority for CJAs is statutory services, because they deal on a day-to-day basis with people coming out of prison, people who have been sentenced to four years or more, violent offenders and sex offenders. Sadly, the third-placed priority is probably reducing reoffending and dealing with the group that does not hit the heights that I have mentioned.

Programmes must be viewed in that context. Our concern is that it is easy to talk about programmes, but finances and the reality of putting programmes in place must be considered.

Stewart Maxwell: I want to return to something that we discussed earlier and to the evidence that we received from the sheriffs last week. They stated that short custodial sentences can be effective and that the current use of such sentences is appropriate. What are your views on that?

Jim Hunter: I imagine that a sheriff on the bench with a number of cases every day will not want to reduce their options. I see exactly where they are coming from, but the question why Scotland has the third-worst custodial rate in Europe remains. Is it because we are much more aggressive, abusive or antisocial than people in other European countries? Nobody has yet been able to convince me that that is the case. The use of short sentences must therefore be questioned. I am not denying that using them is justified and that in some cases there are no other options—and the opportunity to use them has been left in the bill—but the problem is simply that they are being used far too frequently.

Tony McNulty: A year ago in October, I attended an ADSW conference, which obviously was full of social workers. A sheriff in the audience—I cannot remember where he was from; it may have been Dundee—stood up and talked about short sentences. He said with a lot of feeling that, with certain offenders, he was left with no option but to give some respite to the community by handing down a short custodial sentence. The social workers applauded him, because they knew exactly where he was coming from. He did not want to hand out such sentences, but he did not think that he had any alternative. He was as frustrated as everybody else in the hall was that that was the only tool left to him. Perhaps, sadly, the issue is not short sentences but our inability to deal more smartly with offenders.

The Convener: Can we hear from the social workers?

12:45

Raymund McQuillan: There is no doubt, as Jim Hunter has pointed out, that a range of agencies and individuals in Scotland are deeply concerned about the continual growth in the use of short sentences. I do not propose to comment on or criticise individual sentencing decisions, but I think that it would be unusual if sheriffs turned up and said, "Our sentencing decisions are wrong." There is no doubt that there is a consensus that many of the growing number of short sentences that are being issued are not successful in terms of reducing reoffending or changing people's lifestyles or patterns of offending.

I support Tony McNulty's view that more work needs to be done on the alternatives that are available, which leads us back quite neatly to the question of resources. Currently, the level of service that is provided for by national standards amounts to a minimum of 17 contacts a year, which is not high, but many areas struggle to achieve that level. We have touched on the funding issues and discussed what the appropriate level of funding might be.

I agree that there is a need for community-based criminal justice social work services to scrutinise what they do. That has to be done within a consensus that accepts that we must seek to fund the level of service that is described as adequate.

The Convener: The bill seeks to amend the custody provisions in the Custodial Sentences and Weapons (Scotland) Act 2007, prior to those provisions being brought into force. The political thinking of the Government is that amending that legislation will help to create an effective regime for managing offenders. What are your views?

Anne Pinkman: The CJAs agree with your statement.

The Convener: It is not my statement; I was paraphrasing the Government.

Anne Pinkman: I beg your pardon. The CJAs agree with what you have just said. There is, however, concern about the timescales within which changes could be introduced. Clearly, there will be considerable resource implications if offenders serving sentences are to be routinely supervised on release or if they receive sentences that combine prison and community service.

We are reassured that the financial memorandum suggests that the changes would be introduced in five years' time. That should be a sufficient timescale to allow for the reduction in the prison population that will be necessary if the new provisions are to be introduced.

The Convener: In the shorter term, will the changes impact on criminal justice social work services?

Anne Pinkman: We agree that the provisions should apply to offenders who are sentenced to one year or more, but that should be the case after a phasing-in period, in which supervision initially applies to those who are sentenced to two years or more.

Yvonne Robson: We support that.

The Convener: As we have no further questions, I thank the members of our panel for their exceptionally useful contributions.

12:49

Meeting suspended.

14:11

On resuming—

The Convener: Good afternoon, ladies and gentlemen. I remind those who were not present this morning that it is important that mobile phones are switched off so that they do not interfere with the proceedings. Those who have not switched off their phone should do so now.

We enter uncharted territory this afternoon, in that we will now have an open-mike session to enable those who have not been called as formal witnesses to give their views on the issues under discussion. For all committees of the Parliament, it is important that every effort is made to engage with the public and with the people of Scotland generally on the issues that we, as politicians, are considering. The Criminal Justice and Licensing (Scotland) Bill covers many different aspects. Issues of sentencing and the sentencing measures that are potentially available—from imprisonment to a range of other options—are of interest to all communities. We are very keen indeed to hear the views of this community today.

Anyone who wants to contribute to the debate should indicate that they wish to do so by raising a hand so that our very able assistants in the hall can pass a microphone to them. If people feel more comfortable sitting, they may sit. If they want to stand up, they may stand up. Perhaps those who represent an organisation could introduce themselves and their organisation briefly before they make their point. Obviously, contributions are also welcomed from private individuals. All contributions will be recorded and will form part of the record of parliamentary proceedings.

Who will ask the first question or make the first point? At this stage, as is inevitable, there is stony silence, but I am sure that someone wants to offer a point. Councillor Kennedy, do you want to say something? I think that you felt that a couple of issues that arose this morning were not properly ventilated. This is an opportunity for you to put your point on record.

Councillor Kennedy: The point that I want to make is about the linkage between community justice authorities and community planning partnerships, which has a direct impact on how we manage or deliver certain services in the community. That has been the experience not just in the Fife and Forth Valley community justice authority area but in other CJA areas. The issue is perhaps complicated by the community planning set-up—I accept that that differs from one local authority to another—but there is also perhaps a lack of understanding among some people in the Society of Local Authority Chief Executives and Senior Managers about where the CJAs should sit. Some in SOLACE take the view that the CJA should be part of the community safety partnership. Although community safety is part of our remit or role, I feel strongly that we should be at the community planning partnership level to deal with the more strategic policy setting. We deal with not just the antisocial behaviour management side of things but health, education, employability and so on. In the opinion of Fife and Forth Valley CJA, that needs to be articulated a little bit more at the top. We need a better understanding of where we should all sit together.

14:15

The Convener: Thank you—that is now on the record.

Would anyone else like to ask a question or raise a point? Please do not feel in any way inhibited. We have allocated this time for you; we have come a long way, and it has cost a lot of money.

Elma Mitchell (Devonvale Hall Co Ltd): I am the secretary of Devonvale Hall—

The Convener: Could you perhaps give your name—[*Interruption.*]

Elma Mitchell: I am sorry. I am Elma Mitchell—is that your telephone?

The Convener: Yes, it is. [*Laughter.*] Mega-embarrassment.

Bill Butler: There will be a short custodial sentence.

Elma Mitchell: I am the secretary of Devonvale Hall. We run the hall in Tillicoultry and we have the criminal justice boys to help us. They do an exceptionally good job; we could not run the hall without them. However, they have only one vehicle, and there can be only five of them for each supervisor. That means that a lot of the boys are not out helping the community. I feel that a lot more money should be put in, so that the boys can have another supervisor, and so that they can have two more vehicles. That would be the bottom line.

The Convener: Thank you for that. You have raised a resource issue for the local authority and the CJA. Your point is well made.

Stewart Maxwell: Is there demand for people to do more work, but not enough resources even to allow them to do the work that there is at the moment?

Elma Mitchell: We use the young people regularly. They clean the hall and set it up for the next function, and they look after the grounds. They do virtually anything that we ask them to do. Only two of us run the hall during the day, but we are poor pensioners and we cannot do it all. The young people—although they are not all young—have been absolutely exemplary and a great help to us in the three and a half years during which we have run the hall.

Stewart Maxwell: Do you believe that more communities could benefit from such work?

Elma Mitchell: Yes, more communities could benefit, but more resources are definitely needed.

The Convener: As there seem to be no further points at the moment, we will move on to take evidence from our final panel. After that, we will perhaps hear more points from members of the public. We are keen to do that.

14:18

Meeting suspended.

14:19

On resuming—

The Convener: We will now hear from our final panel of witnesses, who represent the Scottish Consortium on Crime and Criminal Justice. The members of the panel are Professor Fergus McNeill, who is professor of criminology and social work at the University of Glasgow; John Scott, who is chairman of the Howard League for Penal Reform in Scotland; and Professor Alec Spencer, who is from the University of Stirling and was formerly the director of rehabilitation and care on the board of the Scottish Prison Service. I thank you all for coming, gentlemen; it will be invaluable for us to hear your evidence.

Paul Martin: Good afternoon, gentlemen. In your written evidence, you state that the purposes of sentencing, as set out in the bill,

"raise almost as many questions as they answer."

Will you elaborate on the questions that arise, and suggest what the answers might be?

Professor Fergus McNeill (Scottish Consortium on Crime and Criminal Justice): The difficulty with the way in which the bill is drafted is that it simply lists a range of purposes that sentencing might serve. The list is familiar, covering exactly what is found in similar legislation or in the relevant textbooks in various jurisdictions. It provides no coherent rationale that a sentencer might employ when thinking about which principles should apply or have priority in particular circumstances, or how to choose between different purposes of punishment or sanctioning that might conflict in certain ways.

The bill makes provision not just for attending to the issue of rehabilitation, but for punishment. Sometimes punishment may affect adversely the prospect of rehabilitation, whereas sometimes promoting rehabilitation may seem not to be doing enough in terms of punishment. The bill does not help to clarify how those competing priorities should be balanced in individual cases or even in general terms in the system.

Paul Martin: Can you make any practical suggestions that would improve the bill?

Professor McNeill: One of my suggestions is covered not in the submission from the Scottish Consortium on Crime and Criminal Justice but in the submission from the Scottish centre for crime and justice research. It would be helpful if we stated an overall purpose of the sanctioning system, under which the separate principles could be subsumed and to which they might refer. For example, some jurisdictions might have an overarching statement that the criminal justice and sanctioning system should serve to promote the existence of a just, decent and fair society. Although that sounds bland and general, it allows at least some way of looking at how specific principles are applied in particular cases and how they connect to one another.

Another specific value that I strongly urge the Parliament to consider including in the bill is a commitment to the principle of parsimony. When judges impose custodial sentences, they are exercising the greatest degree of power over individual citizens of the state that is possible in a democratic society. In one respect, they should always do that with a bad conscience, because although it is sometimes necessary, it is a bad thing to do in its own right. We should always seek to impose the least intrusive measure that is consistent with the requirements of justice. The principle is not stated in those terms in the bill—certainly not with that degree of clarity. Its inclusion would be very welcome.

Nigel Don: I detect a resistance to generate a hierarchy, but I will push you on the issue. I suggest that society would like to minimise the tendency to offend in the first place. By definition, once someone is in the justice system, that opportunity has passed. Would a reasonable priority be to minimise the incidence of reoffending? Would that find some favour as an overarching principle?

Professor McNeill: Yes and no. It is a laudable objective for the system to pursue, but if adhering to the principle allowed disproportionate sentences—perhaps even incapacitating sentences of a duration that was not merited by the gravity of the crime—to be applied, that would be contrary to the interests of justice. Although reducing reoffending is necessary and desirable, I would not have it as an overarching principle. A better approach than putting the reduction of reoffending first is to try to approximate to fairness and justice in the first instance, before thinking about the specific outcomes that we might pursue through a properly proportionate penalty.

I will give you a slightly extreme example. If I were to take the book or film "A Clockwork Orange" a bit too literally, I might say that the Ludovico method—the particularly brutal version of aversion therapy that is deployed—was an effective way of reducing reoffending, as it appears completely to disable the offender and prevent them from reoffending once they have been through it. However, the cost of the treatment is too high, because it is so brutal and inhumane. For me, there are principles that take priority over reducing reoffending.

Nigel Don: You made a fair point about the list of principles being indiscriminate—we realise that it is. Policy requires some kind of prioritisation, or it is not policy. I take your point that minimising reoffending is probably not the overwhelming priority—it occurred to me that capital punishment is the most effective way of reducing reoffending, with transportation possibly coming next. However, is there a risk that if we go for fairness we will end up with a principle that is so wishy-washy that it allows anything and is no longer a principle?

Professor McNeill: I do not agree. We can be robust in creating opportunities for people to make reparation—or pay back, in the language of the bill—without that necessarily meaning that priority is given to reducing reoffending. The example that you heard from the member of the public was not first and foremost about the extent to which community service reduces reoffending; it was about the valuable public service that people provided.

In a sense, those people paid forward. They might have been in debt to society and they might not have remedied the situation in relation to the victims of their crimes, but they paid forward by undertaking work that was of benefit and value to the community. In and of itself, that is robust and sufficient, but if community service or payback has the additional effect of reducing reoffending, which it might well do, so much the better. However, that is a secondary benefit and not the one that I would prioritise.

Professor Alec Spencer (Scottish Consortium on Crime and Criminal Justice): On whether the reduction of crime should be set out as a purpose of sentencing, it is a mistake to believe that the criminal justice system can cure the ills of society. It is the ills of society—inequalities, deprivation and so on—that are primarily responsible for levels of crime.

The criminal justice system cannot resolve the problem of the crime rate, so we must start somewhere else. The criminal justice system is a response to people who offend; it is not a method of reducing crime—and I do not think that there is much evidence that deterrence, as a concept, works.

Angela Constance: We have heard an erudite discussion about the merits of including in the bill the purposes and principles of sentencing, but what does the panel think about the practical application of those principles? In Scottish legislation in recent years the trend has been clearly to set out principles—without applying a hierarchy to them—that were intended to be used by the practitioners who would use the legislation to intervene in a way that would have an impact on other people's liberty. I am thinking about the Adults with Incapacity (Scotland) Act 2000 and the Mental Health (Care and Treatment) (Scotland) Act 2003.

The inclusion of sentencing principles in the bill is surely just about asking sentencers to consider and apply principles of best practice. It is surely more pragmatic than the erudite and intellectual discussion that we have heard suggests.

Professor McNeill: I agree. You provided good examples—we can also include section 16 of the Children (Scotland) Act 1995, which enshrines important principles that are intended to govern the judgments that are made by key decision makers in the relevant system. I am in no way against the articulation of principles in the bill. Indeed, I do not think that the bill goes far enough in articulating how the principles might best be put into operation by the relevant practitioners.

John Scott (Howard League for Penal Reform in Scotland and Scottish Consortium on Crime and Criminal Justice): If we do nothing, the current record-level prison populations will simply continue to increase. It might help if, at the beginning of the bill, there is something that gets sentencers' attention and makes them think about what they are doing—and which makes them change their mind in some cases. I was at an event last week at which sentencers were wringing their hands and saying, "Why do we have a record prison population? We don't know; we'd like to find out." Whenever sentencers gather, they usually agree that there are too many people in prison and that some of those people should not be there. However, each of those people has been sent there by a sentencer who no doubt thought that that person had to be in prison.

A statement of principles would be good, but the danger is that sentencers will simply say that they have been following the principles anyway. They need to think about their approach to sentencing more than they might have been doing and, in some cases, change it.

14:30

Angela Constance: Will they not have to provide evidence of how they have applied the principles?

John Scott: Yes, although that can sometimes be done rather too easily. Since the change in the bail laws, sheriffs have to give reasons for granting or refusing bail. In some situations—I am not saying that this is universally the case—it is clear that not much more is done than ticking boxes. In fact, a form with the boxes is provided to the sentencers. Obviously, they want to get through the business, but there is a danger that sentencing is reduced to a mechanical process or a case of the sentencer saying, "I've taken rehabilitation into account—of course I have," rather than stopping to think how it features in the sentence.

The Convener: Having dealt with the somewhat esoteric issue of purposes and principles, we will move on to a more practical level and deal with the proposed Scottish sentencing council. I note that the witnesses do not have an agreed position on the proposal, but we will pursue it with them individually.

Bill Butler: Good afternoon, gentlemen. As you know, the objectives of the proposed sentencing council are to promote consistency in sentencing, assist the development of sentencing policy and support transparency in sentencing. Do the proposed measures represent significant progress on the current position? As you do not have a collective view, we will start with Professor Spencer.

Professor Spencer: With the convener's indulgence, I will start somewhere else if I may. Why are there proposals for a sentencing council? Because the Scottish Prisons Commission talked about recommending a prison population level of 5,000, and sentencing lies somewhere behind that. The first thing that the Government and the Parliament need to decide is the appropriate prison population level. Such levels have been decided in other countries. For example, Finland decided as a matter of social policy to reduce the numbers in prison and, over a period, set about reaching its desired level through legislation, sentencing and the interventions that the state provided. It reduced its prison population by three quarters.

Therefore, politicians must start by deciding what they want the prison population to be. My personal view is that the prison population is too high. I accept the commission's proposal of 5,000, although I would have gone for a slightly greater reduction and halved the prison population to 4,000. In my experience, and according to the evidence, quite a number of people in prison do not require to be there. We have heard about remands already. A large number of people on short-term sentences go to prison. They create churn and a digression from the work of prison, which is to lock up the people who commit serious crimes and present a danger to the public. There will be others who should not be there. Removing them would give a population of 5,000.

Fergus McNeill has already talked about parsimony in sentencing. That means that prison should be the last resort, not the normal response in our society.

Bill Butler: Will the sentencing council aid that, to draw you back to the original question?

Professor Spencer: Thank you. I was going to say that, therefore, the proposal for a sentencing council is a case of using a sledgehammer to crack a nut. I am not sure that I completely favour a sentencing council, because we have to get the number of people in prison down, and judges have to fit in to that framework.

Bill Butler: How would you reduce the number? You say that the sentencing council would be a sledgehammer to crack a nut. What would be your much more sophisticated tool of preference?

Professor Spencer: I think that judges should sit down together and work out how they are going to reduce the number of people in prison. They need to say that only the most serious of crimes warrant imprisonment. I certainly agree with the proposal in the legislation that sentences of less than six months should not normally be custodial.

Bill Butler: One of my colleagues will come to that, professor, but that was an interesting comment. Can we now move on to Professor McNeill?

Professor McNeill: Are principles, and is a council, progress? In my view, yes. It is helpful to go back to the Scottish Prisons Commission's "Scotland's Choice" report and think about the context that it provides for the discussion of the measures in the bill. The report suggested that paying back in the community should be the default position and that, rather than thinking about imprisonment and alternatives to imprisonment, we should think about such community payback and alternatives to that. It is about trying to invert what is at the centre of our sanctioning system and our judicial consciousness, for want of a better expression.

Bill Butler: I am sorry to interrupt, but, in your view, does imprisonment have a place? If so, what is that place?

Professor McNeill: I was about to go on to say that it does. "Scotland's Choice" states explicitly that imprisonment should be reserved for offences that are so serious that no other sentence is appropriate, and for situations in which there is a significant risk of serious harm to the public that must be dealt with through the detention of the offender. It says—

Bill Butler: If I may interrupt again, what about a situation in which someone offends time and time again, such as a burglar—although perhaps not one who is involved in the theft of a masterpiece of fine art? Is there not an argument that a custodial sentence would, in the end, have a salutary effect?

Professor McNeill: I do not know that there is evidence for the argument that a custodial sentence would have a salutary effect.

Bill Butler: What is the evidence against it?

Professor McNeill: Well—the fact that burglars recidivate at such high rates in spite of sentences of imprisonment being handed down to them.

If you will permit me to return to your original question, "Scotland's Choice" explicitly states that a key and initial function of a sentencing council would be to establish the precise practical meaning of the two principles of seriousness and risk and how they should be applied and put into operation. The current proposals do not make it explicit that that would be an immediate function of a sentencing council, which is a serious missed opportunity.

To be fair to my colleagues in the consortium, although I am prepared to say personally—and probably with a greater degree of enthusiasm than other consortium members—that I think sentencing principles and a sentencing council are a good idea and probably long overdue, I am not so sure that the specific proposals in the bill are the best way to go about establishing guidelines or a council. You will have seen from the consortium's submission that there is a great deal of anxiety among its members about certain risks that are created by the way in which specific proposals in the bill are drafted. I will happily leave it at that, if you want to move on.

Bill Butler: I have one further question. Do you agree that a sentencing council should be advisory rather than anything else? If you do, you will be agreeing with the Lord President and Lord Cullen, who gave evidence last week.

Professor McNeill: Is that intended to encourage or discourage me?

Bill Butler: That is, of course, a matter entirely for you. I would not constrain you in that way.

Professor McNeill: No, I do not think that such a council should be merely advisory. If it were, it would be too straightforward for judges to depart from the advice that the council issued.

I would want a sentencing council to produce mandatory guidelines—I am giving a personal view, not a consortium view—but I would nonetheless hold to a position that judges should be able to depart from the guidelines and give reasons for doing so in individual cases. Where sentencing councils operate in other jurisdictions, one benefit of such a procedure is that it allows a jurisprudence of departures—in other words, the development of legal reasoning and debate about what should and should not permit a departure from the rule to be applied.

Bill Butler: Is that jurisprudence not in place at the moment? That is what the sentencers argued last week.

Professor McNeill: No. At the moment, there is a system in which, after the fact, through an appeals process, guidelines come to be issued or appeal court decisions might have some effect in moderating individual sentences and also in communicating messages to the wider community of judges. However, that leaves us vulnerable to jurisprudence developing only on matters that happen to come before the appeal court. That is not a rational way to go about establishing a sentencing policy—it is at the mercy of events as opposed to being principled and thoughtful. I would much prefer guidelines to be developed in advance to set a framework.

I will give an analogy; it will not take long to do so. It is, I admit, an imperfect analogy, but it helped me to formulate my views. As an academic, I am a judge all the time. At the moment, examination boards are looming, and I am judging a ridiculous volume of student scripts. In exercising my professional discretion and deciding which mark to award to each individual script, I continually refer to stated guidelines that determine—

Bill Butler: Do you refer to grade-related criteria, as we used to call them?

Professor McNeill: There are criteria for each grade and for each separate module that I assess. The designers of the module will have indicated what it was trying to achieve. I apply to each individual case both the general guidelines on grades and the specific guidelines on the outcomes that we are after. Moreover, I willingly and happily subject my individual professional judgment to moderation by my colleagues internally in the university and externally in the academic community. I am talking about important decisions that affect my students' career prospects and futures, but those decisions are in many respects far less important than the decisions that sentencers make every day in our courts. However, the process of moderation and the guidelines that are produced in advance of the decision making to which sentencers are subject are much weaker than the procedures that I am happy to submit myself to as a professional academic.

Bill Butler: The analogy is very good although, as you say, not perfect.

John Scott: I am on the sentencing council sceptic wing of the consortium.

Bill Butler: Is that the wing that has more members?

John Scott: It is hard to say. I think that a lot of people are in the middle and that the two sides are about even.

I think that the sentencers and judges were right last week when they said that sentencers do not start with a blank piece of paper and end up with something that bears no relation to what has happened in equivalent cases. There is a fair degree of consistency in sentencing in Scotland. However, I have problems with the meanings of the words "consistency" and "inconsistency". The word "inconsistent" is more often used to describe a sentence that is perceived as lenient. There is rarely an outcry about a sentence that is seen to be too hard, although that does happen. I am concerned that a march towards consistency is really an attempt to ensure that sentences are levelled up.

Given what is proposed in the bill, it is interesting that the appeal court has used its own powers to issue guidelines, although, I admit, it has done so on only a handful of occasions. However, that has happened in the past couple of years, and the appeal court may be prompted to use those powers by the thought of what else might come in its place. Doing things in that way is useful, because although, as Fergus McNeill says, whatever is placed in front of the appeal court will be reacted to, whenever there are particular issues that are problems, even if the issue is just a local one, they will usually end up in the appeal court. Things will take a bit longer, but I am concerned that the sentencing council would be under immediate pressure to react immediately to condemn and force the judiciary into adopting a more severe stance towards a particular offence that happened to attract the attention of the editor of a tabloid. Perhaps the sentencing council would be more susceptible to such pressure, although I think that sentencers are also susceptible to it. In recent years, sentences have gone up—there has been an inflationary drift. Someone who is convicted of an offence today will get a higher sentence than someone who was convicted of that same offence 20 years ago would have got. That is partly because of the backdrop of increased penalties in legislation, and also because of public pressure.

14:45

Bill Butler: You say that you are sceptical about the proposed sentencing council. Does that mean that you are wholly against it, or do you think instead that it should be modified and adapted in a way that makes more sense to you and meets your concerns and doubts?

John Scott: It could be modified to ensure that it plays a useful role. It could be an advisory body rather than a body that issues guidelines. The relationship between the council and the court would require to be spelled out better than it is.

One of the things that are clear but, perhaps, surprising is that our sentencers do not know why the prison population is as high as it is. Perhaps the sentencing council could have a useful role to play with regard to research. It could also get involved with explaining matters more clearly to the public. Traditionally, courts have been bad at explaining anything that they have done. In recent years, however, that has improved significantly—when a case is of significant interest to the public, the press officer at the High Court will try to prepare some material to explain the situation. However, an issue that arises is how that is reported, which means that the newspapers have to be part of that process as well. The sentencing council might also be able to conduct events with the public, which would be helpful because, the more information the public get, the more they can see that a decision that might seem to be inconsistent is actually an appropriate decision that takes into account factors of which they were not aware.

Bill Butler: Would you say that, sometimes, the public's view is coloured by the proprietors of certain newspapers, who simply want to sell more newspapers?

John Scott: Absolutely.

Bill Butler: I absolutely agree with that, too.

The Convener: As the only active practitioner present, you are not under common-law caution in respect of that answer, Mr Scott.

Stewart Maxwell: I agree that there tends to be public outcry about sentences being too lenient. However, there has also been outcry about sentences being too harsh, usually when someone who has been defending their property has injured someone, for example. Although there is not usually outcry about sentences that are seen to be too harsh, I assume that the courts' appeals process deals with the cases about which there is such an outcry. What are your views on that?

John Scott: The appeals process deals with the majority of cases. When a client is charged with a particular offence, I can tell him what the sentence is likely to be, within a band, provided that the Crown has made the information available. However, there are judges who operate beyond the upper end and below the lower end of the band. The sentences that are imposed by those sentencers, whether they are exceptionally lenient or exceptionally severe, do not necessarily always end up in the appeal court—the Crown would have to decide whether to appeal if it thought that the sentence was unduly lenient.

There is a different dynamic around what happens in the appeal court. The fact that something is seen by the public as being excessively harsh or lenient is not a guarantee that the appeal court will deal with it. Further, the appeal court often decides to leave sentences alone if the sentence is deemed to be—in the form of words that it uses—harsh but not severe. Again, at that stage, we are down to playing with words.

Stewart Maxwell: You say that, because of your experience in this area, you can use the information that the Crown has provided to tell someone what sentence they are likely to get, within a band but there will be judges who will issue sentences beyond the upper end and below the lower end of that band. Does that statement not suggest that a sentencing council that produced guidelines would be a useful tool?

John Scott: I am not sure that guidelines would be useful in that regard, as the appeal court already issues similar guidelines. Judges have a necessary degree of independence, and the sort of judges to whom I am referring will not change their behaviour based on sentencing guidelines, whether those guidelines come from the appeal court or the sentencing council, even if that results in repeated appeals.

Stewart Maxwell: Earlier, we heard that only some cases reach an appeal and result in a judgment being given, which results in an anomalous situation in which we have guidelines from the appeal court in some areas but not in others. If we had a sentencing council that issued guidelines, we could see clearly whether someone was continually sentencing too harshly or too leniently.

John Scott: You are right to point out that flaw in the current set-up. The fact that a matter requires attention does not mean that it will necessarily end up in the appeal court.

Professor McNeill: You have hit on one of the reasons why I am generally in favour of the notion of a sentencing council issuing guidelines. Through the activity of such a council, we could achieve a coherence in our approach to sanctioning that does not currently exist. That coherence would be intelligible not merely to judges but to lawyers, defence agents, accused persons and—importantly—social workers struggling with the task of writing a court report and going to a court without being sure who is going to be on the bench or what that person might consider to be a suitable range of realistic penalties. We have ample evidence that social workers are struggling to come to terms with making a judgment about what is and is not realistic. Part of the reason for that is that they do not have a common framework or an expressly articulated framework for sanctioning to which they can look for guidance that might help them. I think that we can get better coherence and communication between the relevant professionals if we have stated principles and guidelines.

To reflect properly the views of my colleagues on the consortium, I should underline the fact that there is grave anxiety that the sentencing council might be exposed to undue political pressure and that the kind of media attention that has already been referred to could have an exceptionally detrimental and damaging effect on its operation, which could lead to serious consequences for the operation of the criminal justice system. Our hesitation is about the specifics of the proposals, as drafted.

Stewart Maxwell: Professor Spencer, would you like to add anything?

Professor Spencer: I think that inconsistency is useful, if we have an independent judiciary, but, on the other hand, that usefulness depends on the inconsistency not being too inconsistent and being able to fit into a coherent system that everyone can understand and there not being mavericks.

If we have a coherent framework whose boundaries everyone understands—which is achieved through good judicial training, benchmarking, judges discussing cases and using the information technology system that enables them to compare sentences and so on—it is entirely appropriate for judges to make independent sentencing decisions based on the merits of the individual case. My concern has always been that there is an upwards drift. That needs to be addressed and, as a group, judges have to be encouraged to reverse the direction of that drift, so that we can have a manageable number of people in prison.

Stewart Maxwell: On that very point about the independence of the judiciary, do you therefore agree with the argument that a sentencing council might undermine or inhibit that independence?

Professor Spencer: Again, that depends on the format. If the council is advisory, it will provide guidelines but will not necessarily instruct. We are in Alloa, and I am pleased that, if the Government statistics are correct, the court in Alloa has the lowest level of custodial disposals. However, other courts have higher levels. So be it. That depends partly on the decisions of individual sheriffs. If sheriffs and judges were constrained and told what they had to do, that clearly might fetter their independence. They must be able to judge individual cases, taking into account the individual circumstances, the nature of the offence and the offender and putting all that together. As we have heard, the judge must also consider reports from social workers and find out about the backgrounds in trying to reach a reasonable outcome. That is what is required.

Stewart Maxwell: Is it not the case that having a set of guidelines, with the ability to depart from them, would provide a framework that would give consistency and clarity and all the other things that we have discussed but would also give the correct balance in relation to judicial independence?

Professor McNeill: That is part of the answer, but the bill raises a slightly more vexed constitutional question. How I read the bill is that it is not trying to interfere with judicial discretion in individual cases. It will leave decisions in the hands of the judges, but within a framework of guidelines that the council will produce. The question is under what authority the council will produce the guidelines. Although the Parliament in all sorts of ways sets frameworks, limits powers and establishes duties of judges already through legislation, will the sentencing council act with the authority of Parliament when it issues a guideline or will it, to an extent, act under pressure from the executive arm of government? What precisely will its relationship be to Parliament and the Executive? Further, the council's relationship with the appeal court is not entirely clear from the bill. Those issues require clarification.

There is a risk of undue political interference in the process of establishing the guidelines. I want Parliament to exercise its democratic right—I argue that it is a duty—to make clear statements about the systems of punishment and sanctioning that should exist in Scotland. I am happy for Parliament to create a body that exercises some functions on its behalf and maybe goes into a level of detail that the Parliament and the Justice Committee could never go into in their own right. However, I am slightly worried about the Cabinet Secretary for Justice having a role in the appointment of members of the council. I am not sure what the independence of those members would be once the council was operational.

I have other problems with the proposed composition of the council. For example, I am not sure why a constable is to be represented, when those involved in the administration of punishments are not. It seems obvious to me that somebody from the Scottish Prison Service and somebody from criminal justice social work ought to be involved in the council, given that they have practical day-to-day experience of making the sentences of the courts take effect. That strikes me as an exceptionally valuable form of expertise to bring to the deliberations of the sentencing council. The prosecuting arm of the justice system is already to be represented through the nomination of a procurator fiscal or a representative of the Crown Office. I am not sure what the police function is in the proposed constitution of the council.

John Scott: Given that my preference is for a council that is an advisory body, questions of independence do not really arise.

Stewart Maxwell: I have one final point, just to nail down the issue. If there were to be a sentencing council and it was not going to be advisory, what proposals would make it acceptable? Professor McNeill made some points about the make-up of the council. Should the balance be changed? For example, it has been suggested that sentencers—judges and sheriffs—should make up the majority on the council. Should it be subject to the appeal court judges, as has also been suggested? Professor McNeill questioned the proposal that the Cabinet Secretary for Justice would appoint members. Who else would appoint them?

15:00

Professor McNeill: There could—and perhaps should—be a role for Parliament in determining appointments to a sentencing council. Through that mechanism, the Executive's direct involvement would be moderated.

On the specifics of how I would constitute a council if I were in a position to do so, I do not feel that my expertise or knowledge of these councils around the world allows me to answer your question. I encourage you to put the question to Professor Neil Hutton when he gives evidence at a later date. He has an exceptional level of expertise in the operation and constitution of councils around the world.

Angela Constance: Professor McNeill has intimated who he would like to be included on the sentencing council. Does any other panel member have a view on that? Also, where should the balance of power on a sentencing council lie? Should the majority of members be judges?

Professor McNeill: I do not have a firm position on who should be in the majority. I can see why judges might think that the maintenance of judicial independence requires them to be in the majority. It is interesting to hear them talk about it. A job remains to be done in teasing out what they mean by "judges" in that context. As I see it, as the council's constitution is proposed in the bill, it will have five judges, although I am not sure that that is the view that the two senators took last week.

Given that the greatest volume of business, particularly involving short sentences, is in sheriff courts, there needs to be better representation of sheriffs and not of more senior judges. I am not sure that sheriffs are adequately represented. At the moment, there are eight lawyers as against four laypeople. I am not sure that I favour that. I am sorry to be equivocal and not to have a straight answer for you. I can say only that I remain to be convinced. I am open to argument on both sides.

John Scott: I would lean towards having a majority of judges on the sentencing council, if it were going to be more than just advisory, for the reasons of independence that Fergus McNeill mentioned.

Professor Spencer: I do not have a view. I share the view that Fergus McNeill gave.

Paul Martin: Professor McNeill spoke about independence. Section 8, "Ministers' power to request that guidelines be published or reviewed", makes a number of references to ministers' powers. For example, it says:

> "The Council must have regard to any request made by the Scottish Ministers."

Is that the kind of reference about which you are concerned?

Professor McNeill: Yes. It gives some pause for thought, although I do not want to suggest that the Cabinet Secretary for Justice or, more properly, Scottish ministers should not have input into the work of the sentencing council. That would obviously not be sensible. It all depends on how we interpret the vexed phrase "must have regard to". If that means "must consider, but can ignore", I am not too alarmed by section 8. If it means "is under some obligation to respond to"—if "must" means "must"—does that mean that the council must respond to the request but can respond in the negative? The practical effect of the section is unclear.

Section 8(3) says:

> "If the Council decides not to comply with a request made by the Scottish Ministers, it must provide the Scottish Ministers with reasons for its decision."

What reasons are acceptable and what are unacceptable? What happens if the Scottish ministers are unhappy with the reasons that the council has given? Could we end up in a ping-pong battle of referral, re-referral and refusal to consider and reconsider? I am not sure that the relationship between the Parliament, the Executive and the judiciary has been adequately thought out in relation to the constitution of the council.

Paul Martin: It is difficult to envisage the relationship. If there is going to be one, I suppose that the minister would hope that the council will have regard to any request that he makes. It is difficult to strike a balance; it will have to be one or the other. It will be difficult if, when the minister makes a particular request, the sentencing council says, "Well, we are independent," but the legislation says, "Well, sorry, you're not. You 'must have regard to' a request." We cannot have our cake and eat it, can we? We have to decide one way or the other. Do you agree?

Professor McNeill: I am sorry, you will need to clarify—decide one way or the other between which two positions?

Paul Martin: The phrase "must have regard to" is difficult. I appreciate your point that the Government must have some sort of relationship with the council, but it is difficult to envisage, because of that phrase, where the balance will be struck.

Professor McNeill: It would depend on what kind of referrals the Scottish ministers would pass to the sentencing council. If section 8 means that ministers reserve the right to refer to the council, for whatever reasons, particular practical or political concerns, then that is fine. It would be entirely appropriate for ministers to ask the council to consider such issues. However, if the section means that ministers would be able to say to the council, "You will now produce guidelines on this," I would be slightly more hesitant in saying that it was appropriate. I would like the council to be able to say, "We've considered the request for guidelines to be produced in relation to particular matters, but at the moment we have more pressing priorities." The council would then explain why those priorities were more pressing. The issue in question is the relative authority and power of the different arms of government.

Cathie Craigie: The consortium's written evidence says:

> "The case for and likely effects of a Sentencing Council are far from clear."

From the evidence that we have heard so far, I think that we could all agree with that statement. In the same paragraph, you say:

> "a sentencing council would cost £1 million a year."

You then suggest that that resource could be more effectively used elsewhere. Will you give us some examples of how the resource could be better used? Other than by the creation of a sentencing council, how might the objectives that have been set for the council be met?

Who wants to answer? Professor McNeill, you seem to be het all the time because you are in the middle.

Professor McNeill: I know—it is just not fair. I demand guidelines.

The Convener: But you must answer.

Professor McNeill: Right. I will have regard to the question, although I may not answer it.

What does £1 million buy you in the criminal justice system? Alec Spencer will correct me if I am wrong but, by my calculations, it buys you 25 prison places for a year, or fewer than 1,000 community penalties—which range in price from about £1,000 to £1,500. I think that those figures are roughly correct at the moment, although, as we have heard this morning, that is not by any means an adequate level of resourcing if we want community penalties to be as effective as I feel they could be.

I have to state clearly that what I have just said reflects a range of views within the consortium. Speaking personally, I would say that investing £1 million in producing a coherent and rational approach to sentencing would be an excellent use of taxpayers' money—as long as a coherent and rational approach was indeed the outcome. However, from the earlier discussion, the committee has already heard all the caveats about whether the proposals as they stand would achieve such an outcome.

I think that £1 million would be an entirely acceptable price to pay for greater coherence in our approach to sentencing. Whether the present proposals would deliver that coherence is a question that the consortium is debating.

Cathie Craigie: Does anybody else wish to comment?

John Scott: No, I have nothing to add to that.

Cathie Craigie: All right, I will move on to ask about consistency in sentencing. Evidence that the committee has heard, last week in particular, has suggested that more research is required to establish whether there really is inconsistency in sentencing. We heard this morning from social work representatives that there was evidence of inconsistency. That evidence came from Government statistics. Do you think that a sentencing council would produce consistency?

Professor McNeill: Would it produce consistency? Let me go back to the premise on which the question is based.

Cathie Craigie: Would it produce consistency, and do you believe that there is inconsistency at the moment?

Professor McNeill: That is where I wanted to start. Do I believe that there is inconsistency? Yes, I do. What do I base my belief on? Several things. Let me first define consistency and inconsistency, as that was troubling for the senators last week.

Technically, to demonstrate inconsistency in the sentencing of offenders one would have to be able to show that exactly the same offender appearing before different judges for exactly the same crime would be sentenced differently. That will never happen, so there is no way for any research to be conducted that would absolutely nail the question of judicial consistency or inconsistency—it is simply not possible. Judges will always be able to say that every case is unique, and they are right to make that argument. In that respect, I have no argument with what the witnesses said last week.

However, is there variance in sentencing that seems to be beyond what is defensible? I think that the answer to that question is yes. This morning, you heard evidence of the statistical patterns of sentencing in different courts. There is clear evidence from those statistics that there is significant variance between different sheriff courts in Scotland. The question is whether that variance is defensible in relation to what is going on in different sheriff court areas and the different business that comes before different courts. On that issue, I can cite three studies from the 1990s that looked at that directly or indirectly in researching various aspects of sentencing. I will give you the references later if you want them.

The studies all found evidence of a degree of consistency across sentencers but some evidence of inconsistency. One study—to which Professor Hutton can speak when he comes to the committee—looked at three sheriff court areas and found that, by and large, the sentencing by the 10 practitioners in them was within a reasonable range of variance with the exception of the sentencing of one sheriff, who was significantly out of line with his or her colleagues—I must be careful how I phrase that.

I did some research in the 1990s that looked at three sheriff court areas. To eliminate the tension around the similarities and dissimilarities between cases, I ran all the cases through a particular instrument that tries to assess the likelihood of custody. I discovered that, of the three courts that I was looking at, the one that sentenced most people to custody was the one that apparently dealt with the least serious cases. That is prima facie evidence of inconsistency.

The third study was the one that generated the instrument that I used in my study. It, too, found variance that could best be understood as the result of different judicial sentencing practices. I am convinced, therefore, that there is a degree of variance in sentencing that goes beyond what is reasonable and defensible.

A more pragmatic source of evidence that suggests variance in the system is the fact that accused persons going before the courts and the lawyers who defend them know full well that going before different sentencers requires different tactics. At intermediate diets, some people will plead guilty instantly if the judge whom they are going to appear before is deemed to be a relatively lenient sentencer. If a harsher or more punitive sentencer is on the bench, the person will not plead guilty in the hope that, when they return to court later, they will face a different judge.

Judges know that that happens. It is called judge shopping, and it goes on all the time in our system—sorry, that is an exaggeration; it goes on to a significant degree in our system. Social workers know about it because they have to cope with it in the reports that they write. My first court report was for Ayr, and my second court report was for Kilmarnock. Foolishly, I wrote them on the presumption that roughly the same thing would go on in the two courts, but my practice teacher told me that I could not possibly submit the report that I had written to Kilmarnock. It was okay for Ayr but it would not have done for Kilmarnock, as things are done differently there—at least, they were during the early 1990s.

Everybody understands that that goes on. When we say that such evidence is anecdotal, we are not doing justice to the weight of evidence that shows that there is significant variance. That is partly why I am in favour of establishing a system that aims for greater coherence.

I think that your initial question was whether a sentencing council will work and eliminate inconsistency. It will help us to make progress, and it will improve on the current position. It will expose judicial decision making to a degree of scrutiny against agreed standards—which do not currently exist in the system. That is why I am in favour of progressing in that direction, albeit with all the caveats about whether the measures that are before us provide the right way to proceed.

15:15

Cathie Craigie: We are getting deeper and deeper. Your response has not helped me to make any progress in my thinking about this. Although we might expect the Government to have to hand all the necessary research and information, anecdotal or otherwise, even the policy memorandum that accompanies the bill, in discussing public perception, says that there is no

> “empirical evidence to support the contention that inconsistency is present”.

Professor McNeill: That is actually very simple to explain.

Cathie Craigie: Well, explain it.

Professor McNeill: There are two clauses in the relevant sentence in the report by the Sentencing Commission for Scotland. The first says that there is no compelling empirical evidence that inconsistency exists. The start of my answer agreed with that—it is impossible to provide compelling empirical evidence that inconsistency exists, because no two exactly similar but separate cases are ever sentenced. I agree with that clause of the sentence.

The second clause says that there is a perception of inconsistency and that that perception is not unfounded. That is lawyerly, and the position that emerged from the Sentencing Commission was one of compromise, but both statements are entirely true. There is evidence that provides a foundation for a view that there is a degree of variance—I use that word carefully—but whether that amounts to inconsistency, in the strictest terms, is another question. I know that that is pedantic, but that is the way it is with the evidence on this question.

John Scott: One danger that I see in this part of the bill is that it proposes legislation that attempts to end a perception of something, but legislation is not terribly good at doing that. An important part of the proposed Scottish sentencing council would be its work to explain what goes on. That can sometimes be difficult even for those who are involved in the system—it is quite a challenge. If the public are presented with fuller information, they will come down from a position of wanting hanging and flogging, but trying to get the necessary information is a challenge in itself.

The Convener: Some inconsistencies might be explicable by local circumstances that determine sentencing policy. For example, Professor Spencer tells us that here in Alloa there is a very low ratio of custodial sentences. That presumably reflects on the fact that there is very little trouble in Alloa. [*Laughter.*]

Professor McNeill: You have been tried in the court of public opinion, convener.

The Convener: I got exactly the response that I was looking for.

Robert Brown: I am impressed with the personal experience that Professor McNeill has brought us, which I think reflects the experience of those of us who have been in practice in different courts—Kilmarnock has been instanced in that regard.

I have a slightly different thought on the matter. If there were a sentencing council of the sort that is proposed, would repeated departure from guidelines by a particular sheriff raise any implications about their continuance in office? Has there been any thought about those implications?

Professor McNeill: That is one implication of the bill. It is not easy to countenance a situation in which a sentencing council issues guidelines that are implemented throughout the courts with the exception of one or two judges, who are repeatedly appealed against when they refuse to comply with the guidelines and who do not provide satisfactory explanations for departure from the guidelines. Because of judicial independence, are they simply allowed to remain in office forever? There would be considerable pressure in such cases to do something about such judges—to get rid of them if they are not going to change. That is a dangerous piece of ground.

Robert Brown: Is it, or is it not? The issue is quite difficult in some ways.

John Scott: It depends. When I agree with a sentence I am not terribly troubled about it, but if something is inconsistent it attracts my attention. My fear is that judicial decisions could be the focus of adverse comment, perhaps because of a failure to comply with guidelines that had come about through intense public or political pressure or ill-judged comments about a single case. Such guidelines would potentially not be just but could not be resisted by the appeal court because of the dynamic whereby the proposed Scottish sentencing council had the upper hand.

Robert Brown: Is there a risk of what we might describe as defensive decision making by judicial persons? The fear of medical negligence processes can lead to a defensive approach taking precedence over sensible decision making.

John Scott: There is certainly a risk of that.

However sentencers justify their decisions, I want the process that they go through to be better. I want a change in judicial behaviour so that thousands fewer people go to prison, on the basis that sending people to prison is an expensive way of doing things badly. I am not convinced that the bill will help us in that regard.

Professor McNeill: I agree with John Scott. If a particularly recalcitrant judge continually refused to react to guidelines or appeals, questions would be asked about their professional competence. I would have grave anxieties if the decision to discipline that judge rested with someone other than the judiciary, but that does not mean that there ought not to be an internal discipline process in the profession, as there should be in any profession, to manage practice that is out of kilter with accepted norms.

John Scott: We are in dangerous territory, but there would be situations in which a judge's repeated behaviour would require to be considered if they were to continue in the job.

The Convener: The Judiciary and Courts (Scotland) Act 2008 provides for such situations.

We move on to consider the use of imprisonment and community payback.

Robert Brown: These issues are perhaps more central to our consideration of the bill. The Scottish Prisons Commission said in its report:

> "It is the view of the Commission that prison should be used for those whose crimes are serious and violent, and for those who present a real risk to our safety."

Does the panel agree? In practical terms, what are the implications for how we tackle these matters?

Professor McNeill: I agree whole-heartedly. We rely far too much on imprisonment, which seems to be the sanction that we countenance imposing repeatedly, irrespective of the evidence of its ineffectiveness. That might be because an offender has no choice but to comply with imprisonment, whereas all sanctions in the community require an element of co-operation if they are to work.

If short custodial sentences are related to exceptionally high rates of reconviction, if they overcrowd the prison system and inhibit the effectiveness of what can be done in prison with people who are serving longer sentences, and if they produce bigger problems for the communities to which prisoners return, I can see no logical or rational basis on which to continue the upward drift in the use of imprisonment that we have experienced in the past decade or two.

I did not quite understand the second part of your question. Were you asking about the measures in the bill?

Robert Brown: My question was about the implications of the Prisons Commission's approach to short-term sentences and what it means for the way in which the courts operate and for the facilities that need to be put in place to deal with additional community sentences.

Professor McNeill: The genuinely radical aspects of the Prisons Commission's report have come into the Criminal Justice and Licensing (Scotland) Bill in only a refracted and partial way. For example, the three-stage approach to sentencing that is articulated in "Scotland's Choice" is not in the bill. The provision for the use of progress courts that was envisaged by the commission is not included in the bill in the same way. Progress courts are an option that sentencers may consider when a community payback order is imposed, but the commission envisaged that every community payback order would involve the offender accounting for their progress in public in court. Progress courts were intended to be specialist courts, using particularly trained judges who understand the problems of people involved in persistent offending, the complexities of the process of supporting those people to change and the realities of managing issues of compliance constructively. The bill includes no provision for the creation of a specialist court.

The Prisons Commission required a huge, up-front investment in services in the community that would have allowed the creation of a system in which judges could have confidence—a system in which criminal justice social work and community justice authorities were well and truly prepared and properly resourced. No one could have anticipated what has happened in the global economy since the publication of the report, but those events have created a climate in which it is much more difficult to make the proposals work in practice. I have anxieties about the level of resourcing for the reforms that are planned. Would you like me to comment on whether I think that the reforms could work?

Robert Brown: I will come back to that after asking your colleagues about the resource issue, which is central. Is there agreement that there must be significant, short-term but up-front resource to kick-start the reforms and to make them happen? I know that Professor Spencer has views on the issue.

Professor Spencer: I support the commission's recommendation that custodial sentences be limited to those who require them—serious and violent offenders. Such sentences should be used to deal with serious offences and for the protection of the public. Community disposals should be the default position: we should talk not about alternatives to prison but about alternatives to community disposals, which should be the option for most people.

Resources are a difficult issue. I agree with the McLeish report that a large amount of resources are needed up front, but I am a realist and am not sure that that will be possible. I have suggested that there may be ways of organising things. For example, local prisons could be handed over to community justice authorities; their resources and those of the community could be merged and managed by such authorities. That would enable a better movement of staff and financial resources and allow local prisons to be used for programmes.

There are ways of starting the change. If we continue to have two separate organisations—community structures and prison structures—money will not flow from one to the other, because there is enormous pressure on the prison system, where numbers are rising.

As we know, 81 per cent of court sentences—14,686 in the last year for which we have statistics—are for six months or less. The prison system counts its numbers up to but not including six months—I do not know why we count our statistics in different ways—so it had 8,191 receptions last year of people who were serving less than six months.

Most of those sentences are very short—10,000 of the 14,686 sentences of less than six months were actually less than three months—and the average time, which the prison system's statisticians use to calculate population levels and projections, that someone who was serving a sentence of less than six months spent in prison was 23.25 days. That is a not very long time—one cannot do anything with people in that time, but it costs an enormous amount of money to process them.

15:30

I have heard the convener talk this morning and on other occasions about community respite, but a sentence of such a short period does not give that respite. I am not advocating long sentences, but that is a complete waste of money and resource. If we want to start focusing resources on the community, we have to get rid of that big churn and use the money to help with health, employability, literacy, housing and so on, and with addictions such as alcohol and drugs.

The Convener: I think Nigel Don would be grateful for a bit of clarification on that point.

Nigel Don: Can you just clarify that number—the 23 point-whatever-it-was days?

Professor Spencer: It is 23.25 days.

Nigel Don: I will not worry about taking it to significant figures any more than you would, but I would like to know whether that is the number of days that the individual actually spent in prison on remand and after sentencing, or whether it is just post sentencing.

Professor Spencer: It is post sentencing. If the remand is being rolled into that, it is counted in a different way.

Nigel Don: So that figure is for after the sentencing.

Professor Spencer: It is for after the sentencing, but, of course, one does not work with offenders until they are sentenced.

Nigel Don: I realise that. Is it possible that those who generated that statistic could also tell us what the average remand period was? It need not necessarily be this instant, but although we have established what the number means it is frequently misunderstood. We need to know what the total numbers are, or the number that you gave will not mean much.

Professor Spencer: Perhaps you can get that figure. I might find it within a few minutes; it might be in the Scottish Prison Service annual report. The statistics come from the SPS statisticians—perhaps your committee can get those details.

Nigel Don: I am sure we can—thank you.

The Convener: We must also seek the statistics on the actual sentence that was imposed, which in the case of a 23-day sentence would be about three months, bearing in mind that so many people are released after serving 25 per cent of their sentence, albeit that they might be tagged.

Professor McNeill: I am sorry to jump in ahead of John Scott, but I have some numbers on resources that might help to provide a frame of reference. The proposal to implement the Custodial Sentences and Weapons (Scotland) Act 2007 at a cut-off point of one year, at which point the new release process kicks in, is costed at about £47 million. Unless I am wrong, that figure is somewhere between a half and a third of the total current budget of criminal justice social work services.

The cost of Addiewell prison is £25 million to £30 million per annum and—with inflation and various other costs built in—possibly £1 billion over 25 years. If we consider the cost of investment in community penalties and community payback in relation to what we get for our money in prison expansion, it still seems—even in financial times as dire as those that we currently face—that that is a critically neglected area of investment in a civilised country such as Scotland.

Robert Brown: That is helpful, but I will query one further relevant aspect. As you mentioned, the convener talked about community respite, which is an important aspect—perhaps not in the prison sense but in the sense of effectiveness of disposal to stop people committing offences.

I have some concerns about the community sentences as they currently exist, and as they would presumably continue under the new regime, with regard to whether they might be made more effective within their context. It is clear that they cover a range of sins, from probation to drug treatment and testing orders and various other things in between, and some of those methods are more effective than others.

What needs to be done to make community sentences more effective, particularly in reducing offending? I think that we can take for granted more formal aspects such as starting early and dealing more effectively with breaches, but I wonder whether with their expertise panel members can give us some views on the matter.

Professor McNeill: Again, that issue is not unconnected to resource questions. The Prisons Commission report, for example, referred to an 80 per cent increase in a decade in the volume of reports that social workers are writing. That increase and the effects of the release reforms in the Custodial Sentences and Weapons (Scotland) Act 2007 mean that social workers in the community are getting busier and busier writing reports for court and managing people coming out of prison.

The only thing that can suffer in that economy is the management of people on community payback orders. I am seriously concerned that criminal justice social workers simply do not have enough time to spend on proactively addressing issues of compliance with offenders on community penalties and supporting what is for many of them a very complicated process of change. Frankly, I would love to see the skills of our criminal justice social workers unshackled by adequate resourcing and by a move to redirect their energies away from report writing and post-release supervision—important though those activities are—and towards the delivery of the new community payback order.

There have been advances in our understanding of how people change—in other words, the process of desistance. In fact, that is my principal field of research and writing. I could go on incessantly about the issue; I will not do so, but I am happy to provide documentation about it if the committee is interested. I am already involved in working with criminal justice social workers, community justice authorities and the Scottish Government on trying to ensure that the emerging evidence informs approaches to practice. That said, we need a systemic context that allows our social workers to use their skills and ensures that they are not distracted by having to deal with the front end and back end of the business, which simply leaves the core underresourced.

Robert Brown: A summary of that information would be helpful. Do other witnesses have other thoughts about the community payback orders?

John Scott: The question of the effectiveness of community penalties—and the issue of resources, which ties into it—is crucial. In fact, it is one of the issues that I am most concerned about. We should bear in mind that there is no law to prevent the proper funding of what is going on in criminal justice social work and that the range of community penalties in the different parts of Scotland is probably as wide as that in any other country.

I imagine that the courts will have raised expectations about the community payback orders, but the fact is that, when they come into play, there will be only the same—or perhaps even less—funding than there is at the moment. At the moment, a community penalty is judged as having failed when, in fact, the supervising officer might not have been able to do everything that he wanted to do. Some of the time, that comes down to resources.

As for the transformative effects of this rebranding, the fact is that much of what is in the community payback order is covered by existing orders, and the approach might founder when judges find that it gives rise to similar problems—especially in light of the suggestion that they should not use short-term custodial sentences, about which, as members will be aware, there has been a degree of resentment. As a result, they will have higher expectations about what should go in place of existing community penalties, but the penalty itself might be destined to fail.

Angela Constance: What do the witnesses think of the suggestion that was made by a sheriff at last week's meeting that short custodial sentences are effective and their current use is appropriate?

Professor Spencer: I have not read the *Official Report* of that meeting and I do not know who said that, so I will not comment on that individual's remarks. I think that the use of short-term and very short-term sentences is complete eye-wash. It has no effect at all on reducing crime. We know from research from around the world that where prison is used on its own—in general, short-term sentences involve only prison—crime increases by between 1 and 3 per cent. I can give the committee references to that research later. We know that when people are sent to prison for a short while, it is likely to be disruptive in a range of areas. A person's tenancy might be lost, their employment will certainly be lost, and their family support might diminish. If they have financial problems, those problems will be worse when they come out of prison.

Time should be taken to consider what the issues are in determining what is most effective. I think that I said earlier that the criminal justice system cannot resolve the ills of society. In general, the ills of society—inequalities and so on—generate the conditions that lead to people offending and committing crimes, which is unfortunate. Time is needed to work with people so that they learn job skills, how to relate to employers, literacy skills, life skills, how to sort out their addiction problems, how to boil an egg and so on. Such things take time and resources.

There needs to be tolerance for people serving community payback sentences. When most of us bring up children, we do not say to them when they are two or three, "Don't do that," then punish them the next time they do it; it can take years for them to learn what is and is not appropriate behaviour. The same applies to offenders. They may want to change, but perhaps they do not have the capacity to do so, therefore they need to be worked with over a period. Of course there will be lapses, but if the trend is right, that is the way that they need to go.

I think that we heard this morning that looking at reconvictions, for example, will not tell us about the nature of a person's offending, whether its frequency has reduced, whether the amount of harm has reduced or whether the person is on the right track. Only bald statistics will be seen. An holistic approach that is not easy to define needs to be taken. A generic payback sentence might allow social workers or people who counsel offenders to try to achieve that.

Angela Constance: Professor Spencer, given your background in the Scottish Prison Service, can you comment on how prison officers at the coalface view short-term sentences?

Professor Spencer: I do not think that they think that short-term sentences are very helpful. We understand why people are given long-term prison sentences—they have committed a serious offence. Staff have time to get to know such people and to try to work out what their issues are, to assess them, to work out what the risks are, and to try to sort out interventions. It is to be hoped that they will have contributed to a change in the approach of such people when they come out of prison. However, if a person is in prison for the average of 23.25 days, for example, there will not be time for such things. The prisons are overcrowded. There are two or three prisoners to a cell, and large numbers of them are processed and moved elsewhere, so staff do not have the time to get to know them individually. They certainly do not have the capacity to do individual interviews and to assess prisoners and work out which interventions would be best for them. Very short sentences are a complete waste of time. Prison staff are frustrated by them and by people going in and out of prison. The staff have to service those people by providing bedding, laundry and food and making all the other necessary provisions, therefore they cannot do the job that they want to do, which is about making society safer.

15:45

Professor McNeill: I will try to be brief, although the question is an invitation to talk about desistance.

The Convener: Feel free to adopt Professor Spencer's arguments.

Professor McNeill: I will add a very brief comment, if I may. First, the sheriff could not possibly have had in mind reducing reoffending as the measure of short custodial penalties' effectiveness. I have not read the *Official Report* of last week's meeting, but I presume that that cannot possibly be what he or she had in mind. I say that because three things help people to stop offending: getting older and becoming more mature; developing social ties that mean something to them; and changing their view of what they are about as a person. Short periods in prison do not help with any of those three things. Prison takes away responsibility and inhibits the development of maturity; it damages and often breaks already fragile social ties; and it confirms a negative narrative of a person as an offender, a prisoner and, often, a hopeless case.

From a desistance point of view, or from any evidence in relation to reconviction, we cannot argue that short sentences are effective in that sense. However, to be fair, the sheriff might have had in mind two other possibilities. One is that the approach is effective because it hurts. On a straight retributive, pain-for-pain analysis, maybe that is true the first or second time—I do not know. The Cabinet Secretary for Justice clearly disagrees, but maybe pain for pain works. The other possibility is that the sheriff was thinking about containment and respite, which I take seriously. Like everybody else, I live in a community and I have concerns about crime and antisocial behaviour. However, as a criminologist, when I think about those concerns and how I want them to be handled, I do not want people who cause trouble in my community to be sent to prison to do not very much for a short period of time except have their prospects of stopping behaving that way when they come out damaged. That just does not make sense, as it is a way of storing up trouble for the community, not a way of solving the problems for the community.

I would much rather have people working in the community—perhaps in a community hall, as we heard about earlier—making a positive contribution, building social ties and perhaps seeing themselves in a different light, as they recognise in other people's eyes that they have made a positive contribution and understand that they might be able to continue to do that in other ways. I would feel safer as an individual if fewer people went to prison, because I understand the evidence, which compels me to acknowledge that short prison sentences simply are not the best way forward.

John Scott: The evidence last week that defended the continued use of short-term sentences was pretty apocryphal. Obviously, each individual sentencer has their own experience. A sheriff might sentence the odd offender to a relatively short custodial sentence and never see them again. However, that experience is not a terribly good basis on which to justify the continuation of something that we know does not work very well at all in the vast majority of cases. Even in such individual cases, we do not know what happened when the people came out of prison.

Paul Martin: A form of payback is already in place by virtue of community service. What evidence is there that community service is more effective than short-term sentences? You have said that short-term sentences are no good, but will you clarify what percentage of them are no good? Are we saying that all those people who receive a community disposal such as community service, which is in effect the same as payback, become model citizens?

Professor McNeill: Payback is a bit different from community service, because, as set out in the bill, it involves more flexibility and a range of measures that are not currently applied to community service. However, we know that, in general, the reconviction rate with community service is significantly better than that with imprisonment, particularly short sentences, but we do not know—

Paul Martin: What is the percentage?

Professor McNeill: The two-year reconviction rate for people who are given community service is 42 per cent, as against 60-something per cent for people with prison sentences in general and an even higher rate—which escapes me—for people with short prison sentences.

The general picture is that community service performs better, although a selection effect might apply. I note the comment that was made before lunch that the two populations that receive prison sentences and community sentences are not as dissimilar as we might expect but, nonetheless, a selection effect might be at play.

Why might community service work better? An intriguing bit of research on that came from Scotland. Some time ago, Gill McIvor at the University of Stirling examined community service in operation. She discovered that, although community service has—strictly speaking—no rehabilitative intent and is meant to be a punishment whereby people pay back through work, it fares better than probation, which is meant to be the rehabilitative option to tackle offence-related needs. She also discovered that contact with beneficiaries of community service—offenders coming face to face with people who benefit from the work that they do—and a sense that the work is meaningful contribute to the reduction in reoffending.

That is only one study, but it links with desistance literature in several ways. I could point the committee to numerous such references. Payback provides a potential opportunity for people who have for a significant time seen themselves as and received the message that they are a detractor from their community—a troublemaker in their community. If they embark on payback with the support of a good social worker and they begin to make a go of it, the possibility of change occurs to them as they gradually see themselves in a different and more valued social role. That is why community service has significant rehabilitative potential.

Paul Martin: A sheriff who gave evidence last week talked about the prolific or repeat offender who appears before him regularly and who poses a problem for the community. Are we suggesting that no short sentences should be given to such an individual, who might already have participated in payback programmes or who might not want to comply with those programmes? What will we do in such instances?

Professor McNeill: There are two ways to approach that. First, are we content that the opportunity that we have provided for an offender has been sufficiently resourced and properly supported, to give it the best possible chance to work? The evidence that the committee has heard from sheriffs suggests problems with the resourcing of community service in some areas. One problem is that I am not entirely convinced that we can always attribute the failure to take the opportunity simply to the offender.

Secondly, the provisions in "Scotland's Choice" to avoid short sentences were to apply at first instance. The commission said that nobody should go straight to a short custodial sentence, but that that would remain a possibility when default on a community penalty—community payback—could not be handled in any more constructive way.

I want the courts and criminal justice social workers to work as hard as they possibly can to support compliance and to be realistic about how difficult the process of change is. As in the drugs courts, I want lapses and relapses to be handled robustly but sensitively. Nonetheless, I recognise that the public require a backstop. If somebody who has been given every opportunity and all the support, and for whom the right opportunities have been supplied at the right time, still does not avail themselves of those opportunities, a time might come when a custodial sentence is necessary. I am just not sure whether our current recourse to short custodial sentences is always necessary.

The Convener: I think that the question has been answered, so I ask Professor Spencer to be brief.

Professor Spencer: We are talking mainly about young people, of whom we lock up far too many in Scotland anyway.

The Convener: Mr Martin's question was general.

Professor Spencer: Prison sentences do not work. We lock people up, but when they come out of prison, they are still prolific offenders. If it costs us £40,000 a year to lock somebody up, we would have a much better bang for our buck and a much better chance of reducing their reoffending if we spent that £40,000 on them in the community. There are organisations that provide intensive support to and supervision of offenders and which show much higher levels of success. Of course that costs more, but nothing like the amount that it costs to keep someone in prison.

If you want impact, you get it not by sending people to prison only for them to continue to be prolific offenders when they get out, but by using the resource in the community, although it may cost more.

The Convener: Professor McNeill referred to the fact that the Criminal Justice and Licensing (Scotland) Bill will amend the Custodial Sentences and Weapons (Scotland) Act 2007 prior to its coming into force. Are your concerns purely on financial matters?

Professor McNeill: Far from it. Where do I begin? The matter is dealt with in the submission from the consortium and, at length, in the submission from the Scottish centre for crime and justice research. I will put it bluntly: the 2007 act is a dreadful piece of legislation, which will have very negative consequences for the operation of the prison service and criminal justice social work. The money that it will cost to implement it would be far better spent on making community payback work. The money must be spent up front on community payback and not on a peculiarly muddled and ill-considered set of release reforms.

I accept the argument that release arrangements needed to be reformed, but I would rather scrap the whole thing and start again. If we were to do that, it would be almost impossible to come up with a worse piece of legislation. I am sorry to be a little intemperate, but that is my view on the matter.

The Convener: It is not in the least intemperate; it is an honest view. I am aware of what you said in your submission, but my question gave you the chance to say it for the *Official Report*. Do I take it that your colleagues concur with that view?

Professor Spencer: Yes.

John Scott: Not only do I concur, but I would be even less temperate in stating my view than Fergus McNeill was. If the provisions were to be implemented, Scotland would be less safe. We do not have enough people to do risk assessments. We would need a parole board that was about 20 times its current size. Instead of dealing with the most serious crimes, it would have to deal with some of the least serious ones. The legislation is a waste of professional resources that could be better targeted towards making Scotland safer.

The Convener: Thank you.

I thank the panel for their attendance. I am sorry that the session has been fairly lengthy—there was a fair amount to go through.

I return to the earlier agenda item, under which members of the public were given the opportunity to raise any issues. We are once more in open session and have a few minutes in hand. If anyone wishes to raise a point with the committee, I invite them to do so.

Sheila Wynne: I am a volunteer from Clackmannanshire with too many volunteer positions to mention. The view of the community in Clackmannanshire of the Alloa court system is that the sheriff does not do anything. People who visit the court for various reasons—for a day out or whatever—think that the public are allowed to run riot in the court building. It seems that there is no way of saying, “Right. You must shut up or get out.”

Although I agree with community sentencing, where are the human rights of the victims? Not much has been said about that in recent times. The human rights of the accused seem to be more important—they have far more human rights than the victim has. When habitual offenders are given community sentences, the community has to deal with it. The health and wellbeing of the community should come first.

I am talking on a personal level, having had 10 years of that. I am coming out the other side only now. My views were not taken into account and I know that, in saying that, I speak for many others.

16:00

The Convener: Thank you. The individual difficulties, as you perceive them, at Alloa sheriff court are not a matter for the committee. As you will appreciate, we are here to conduct an evidence-taking session on the operation of the bill, and your views will be taken into account in that regard.

Elma Mitchell: You asked about the benefits of community service. Many of the people who have worked for us have come back to us and said, “Thank you for what you have done.” A lot of them had to be taught how to use a hoover, because they did not have a clue how to do so. We have taught them how to garden and so on. We are continually trying to educate them. There is a benefit in their doing community service.

The Convener: Thank you. Does anyone else wish to speak?

Mary Bruce: Having spent 10 years as a member of visiting committees at our two local prisons, I am pleased that the issues that we are addressing today are being addressed, and I am pleased to be part of that discussion. I believe that the committee’s visit is the first positive step towards creating an interface with the community.

The last panel concentrated on the community, which is an important matter. We in the community see how the process works and can see examples of good work, such as that which is done by Elma Mitchell. I have been involved in situations in which prisoners have been working on projects that have been of great benefit to the community and to the young people who were involved.

This morning, Councillor Kennedy asked for there to be more liaison between the groups of people who are involved in providing the support for offenders that we are talking about. One of the areas that have not been mentioned today is the way in which the statutory organisations can work together with the voluntary organisations and churches to enable the skills and knowledge of people in the community to be used properly. You brought your committee here today. If the new authorities and the other people who are involved in this area would act in a similar way and publicise what they do in order to ensure that people were more informed about the system, the benefits—to the victims of crime, as well as the perpetrators—would be immense.

The Convener: Thank you. Are there any further contributions?

Sheila Wynne: Earlier this afternoon, you talked about the community safety partnerships. In some areas, the communities have become effectively involved in the partnership teams but, in many other areas, that has not happened. Are there guidelines that could be given to the partnerships to help them involve the community? Clackmannanshire's council for voluntary services is involved in our local partnership, but it would be useful if members of community groups such as neighbourhood watch groups or the tenants and residents federation could be told how they can get voted on to the partnership and become properly involved in it as well. Would it be possible to get guidelines that the whole of Scotland can work from?

The Convener: I cannot answer your question, but Government ministers will be able to read your comments in the *Official Report*.

I thank everyone who has contributed. This has been a novel event, but I think that it has been worth while. I am pleased that some members of the public have felt able to contribute.

16:05

Meeting continued in private until 16:10.

Criminal Justice and Licensing (Scotland) Bill: Stage 1

10:06

The Convener: Agenda item 2 is further consideration of the Criminal Justice and Licensing (Scotland) Bill. As the committee has taken evidence only on part 1 of the bill so far, we have concentrated on the proposed sentencing council, minimum sentences and community payback orders. In today's session, we will concentrate on other criminal law and procedure provisions in the bill.

I welcome our first three witnesses: Chief Constable Stephen House of Strathclyde Police and Chief Constable David Strang of Lothian and Borders Police, both of whom are representing the Association of Chief Police Officers in Scotland; and Gordon Meldrum, who is the director general of the Scottish Crime and Drug Enforcement Agency. I should perhaps mention that Chief Constable Strang was a member of the Scottish Prisons Commission.

Our questioning will be opened by Nigel Don.

Nigel Don (North East Scotland) (SNP): Good morning, gentlemen, and thank you for coming along. With reference to sections 25 to 28 of the bill, can you describe to me what is wrong with the present state of the criminal law that requires the proposed provisions on serious organised crime?

The Convener: Mr Meldrum can open on that.

Gordon Meldrum (Scottish Crime and Drug Enforcement Agency): The specific offences that the bill introduces—namely, being involved in and directing serious organised crime—will be useful additions to the existing criminal law, in that they will cater for the people whom the popular press often refer to as the Mr and Mrs Bigs. Such people do not get too close to the front-end criminality, but they are most certainly involved in the background in what I might describe as orchestrating the business.

Under the existing criminal law, it is difficult to embroil those people in any particular operation or arrests that might take place, other than on charges of conspiracy. At the moment, such people may sit in the background to organise and orchestrate crimes such as drug trafficking or human trafficking, but they do not come close enough to the front-end criminality to enable us to gather evidence against them that could put them into the criminal justice system. The proposed offences will help.

Nigel Don: Can you clarify where the law of conspiracy fails us?

Gordon Meldrum: The current law does not necessarily fail us, but it can be difficult to prove that someone who appears not to be overtly involved is engaged in a criminal conspiracy. Often, we have only covert intelligence on the individual that we cannot share with the courts. The current criminal law does not completely fail us—we can use the charge of conspiracy—but it is difficult to prove that such individuals have been involved in a specific offence, whereas the provisions in the bill will create the specific offences of being involved in and directing serious organised crime.

Nigel Don: Is not the problem finding the evidence that such people are involved in serious organised crime rather than finding the offence with which they can be charged? In other words, is not the issue a matter of the evidence rather than of the offence under which they are prosecuted?

Gordon Meldrum: If I am honest, it is sometimes a case of both. On some occasions it is a matter of evidence, and on others conspiracy is so broad that what constitutes a conspiracy comes down to a subjective assessment. I return to the point that the proposal in the bill creates for the first time the specific offence of being involved with and/or directing serious organised crime.

Nigel Don: But the evidence that will enable you to prosecute somebody for being involved or directing is surely the same evidence as would found a charge of conspiracy, is it not?

Gordon Meldrum: It most certainly could be, but on occasion it would be useful to have that alternative to criminal conspiracy. From my perspective, if we in this country are serious about tackling serious organised crime, serious organised crime groups and serious organised criminals, the proposal in the bill sends out a message to them that the country is prepared to create legislation to deal specifically with them and the threat, risk and harm that they bring to communities in Scotland.

Nigel Don: I am conscious that I am speaking to senior serving police officers, but I suggest that sending messages is done by taking people to court and the consequences that come from that, rather than from the words that we use in statute.

Others will address the width of the provisions, but I notice that in your submission, Mr Meldrum, at least as I read it, that you seem to suggest that you would have preferred the offence to be even wider. Is there not a risk that we are simply creating offences that help the police to come up with some prosecution when they feel like it rather than generating a law that makes it clear that serious and organised crime is verboten?

Gordon Meldrum: Much of what I said in my submission about sections 25 and 27 to 28 was to seek some clarification as to what might constitute, for example, agreement or an act of serious violence, because some of the definitions are open to interpretation. The part of the submission where I might have pushed the bounds and raised a slightly wider issue with the bill is where I suggested bringing it in line with the Proceeds of Crime Act 2002 so that we can introduce a retrospective element. As we start to understand serious and organised crime better by virtue of work that we are doing in policing and law enforcement, is there an opportunity to apply the bill retrospectively to those individuals who we believe are involved in and/or directing serious and organised crime?

Nigel Don: If I might just take a slightly different tack, gentlemen, I wonder whether you can explain to me why we need to have a specific statutory provision that being involved in organised crime generates an aggravated offence—effectively, that aggravation can be taken into account—when it can be taken into account by the courts anyway. Am I misreading it, or is there something in the proposal that I do not understand?

Chief Constable Stephen House (Association of Chief Police Officers in Scotland): It is a valid question. In the early discussions with the people who developed the legislation, in which Mr Meldrum and I were involved, we talked about exactly the issues that Nigel Don is probing. The discussion was about how we take the intelligence that we have that somebody is involved with serious and organised crime and convert it into something that a court can consider and make a judgment on. That is the difficult area that we have to deal with.

What is in the sections under discussion is an attempt to broaden things out—Nigel Don used a similar phrase—so that we can have a better understanding of involvement in serious and organised crime, even if it is at arm’s length.

In relation to a number of activities in Scotland, it is felt that people are involved in serious and organised crime but are sufficiently removed from it that the current legislation is not getting to them. You asked whether involvement in such crime is already covered by the law. That challenge was made, and the view from the people who form the law, who have far more experience in law than I do—and probably any of us does—was that there is a need for something that goes beyond the current provision.

All I know is that there is an element of frustration, because there are people who our intelligence suggests are involved in serious and organised crime but the current legislation is not sufficiently flexible to allow us to bring them to the attention of the fiscals so that they can determine whether they should be prosecuted.

10:15

Nigel Don: I am sure that colleagues will want to explore this. Can the witnesses define "serious" and "organised" in the context of the bill? The bill does not define those terms.

Gordon Meldrum: In preparing to give evidence I used the definition of "serious organised crime" in section 25(2), which is:

> "crime involving two or more persons acting together for the principal purpose of committing or conspiring to commit a serious offence or a series of serious offences".

Nigel Don: Is that adequate?

Gordon Meldrum: That is a difficult issue. For many years, people who are involved in law enforcement have been debating what constitutes serious crime, organised crime, serious and organised crime, and so on. The definition in section 25(2) is broad, but trying to make it tighter could be problematic. I am speaking personally when I say that the definition is reasonable.

Nigel Don: Therefore, what is serious and what is organised will have to be defined by the courts. Are you happy with that?

Gordon Meldrum: Yes.

Nigel Don: The definition seems to be circular, given that it refers to "serious offences".

The Convener: The committee has a problem with the definition, which will emerge in due course.

Robert Brown (Glasgow) (LD): It has been suggested to us that the definition of "serious organised crime" in the bill

> "will cover most common law crimes and many statutory offences where a person acts with another with the intention of securing a material benefit."

In its submission, the Sheriffs Association suggested that two people who conspire or agree to steal a meat pie from a shop to give to a beggar would commit an indictable offence, which would therefore fit the category of "serious offence" in the context of section 25(2). It is clear that the bill is not trying to get at such offences. How adequate is the distinction between serious organised crime and the petty crimes that are not intended to be caught by the bill?

Chief Constable House: I am sure that no one here would categorise the stealing of a meat pie as serious and organised crime. I do not come at the issue from a legalistic point of view; I take a more practical approach, which involves considering whether we should devote resources to a case and whether the public would approve of our doing so. In the case that you described the answer would be no; we would not divert a huge amount of resource to such a crime.

If we tighten the definition too much we will miss issues and new crimes. Criminals might even exploit the definition to ensure that activity does not fall within the definition of "serious organised crime" and therefore cannot attract the powers that we are talking about. Definitions have been exploited in that way in the past.

I am sure that we are all happy to explore the definition, but tightening it would be problematic. If we apply a value to it, we might miss one end of the extreme. If we include violence, we will miss the huge amount of serious and organised crime to which violence is not attached. If we say that more than 10 people must be involved, we get back to intelligence and questions about how many people we can prove are involved. A tighter definition would make the bill much more inflexible and make it much more challenging for courts to make rulings.

Robert Brown: Does the panel agree that the areas of conspiracy and crimes that are associated to the main crime have always been difficult for the law and that, over the years, there has been criticism when the courts have taken too wide a view of such matters? I am not trying to get you to come up with a definition, but in practical terms is there a distinction between those offences that are likely to be prosecuted, as they will result in a significant jail sentence, and those that theoretically could be? Is there a cut-off point in terms of the seriousness of the case? Is that what you have in mind?

Chief Constable David Strang (Association of Chief Police Officers in Scotland): The fact that the definition is in section 25 does not mean that, from an operational and practical point of view, it will be applied in every case. It could be—that is where the exercise of judgment and discretion on the part of the procurator fiscal comes in.

The definition in section 25 allows us to tackle people who are involved in serious and organised crime, so it is useful legislation. However, it does not mean that we will automatically apply it to everything that technically falls within that definition.

Robert Brown: You would, perhaps, agree that it is not a terribly satisfactory situation if the police and prosecuting authority in a democracy have a theoretical power to prosecute people for all sorts of minor things against a background of a law that is intended to target serious organised crime. Do you agree that there is a problem with that concept?

Chief Constable Strang: I think that people understand what serious and organised crime means. I understand the difficulty that you have and your desire to clarify the definition further, but the notion of serious and organised crime has a meaning that would ensure that the provisions were not applied inappropriately or widely.

Robert Brown: It does not have a narrow meaning. The bill says:

> "'serious offence' means an indictable offence".

That means that many of the routine common-law offences are covered, which means that it is a wide definition.

Chief Constable Strang: Yes, but in terms of the standard that is applied by the police or prosecutors, it would never be the intention to apply the provision to what would be seen as a minor offence, on the scale of things, regardless of whether it fell within the technical definition as an indictable offence.

Robert Brown: On the other side of the coin, the written submission from the Scottish Crime and Drug Enforcement Agency expressed worries that the definition of violence excludes the fear of violence and the intimidatory aspect of people's behaviour that might exist in the background. Could you elaborate on that point?

Gordon Meldrum: In witness statements or through intelligence, we pick up on the fact that serious and organised crime groups operate through a culture of fear, intimidation and threats. On occasions, there might not be a physical act of violence but there will be threats, intimidation and all sorts of other non-violent abuse. That is how those groups manipulate people from all walks of life in order to get their own way.

Robert Brown: Would you like the definition of serious violence to be widened to cover that kind of situation?

Gordon Meldrum: It would be helpful if it were widened to include threats and intimidation.

Robert Brown: Section 28 deals with failure to report serious organised crime. Earlier, you referred to people being involved in such crime or directing it, but you seemed to steer clear of the failure-to-report aspect. Does that indicate a degree of unhappiness with that particular charge—which in some ways is a bit novel in the law—as it goes beyond people doing things positively and says that people are guilty of criminal offences merely by their presence or their knowledge?

Gordon Meldrum: My failure to mention the failure-to-report aspect was due entirely to my ineptitude; no other issue was attached to it.

The Convener: Refreshingly honest, if I may say so.

Robert Brown: Nevertheless, are there concerns about that offence? It seems to me that it might be a bridge too far, as it goes beyond people's actions and includes people who just happen to know about things. That is quite a novelty in the law and raises a lot of issues about establishing facts and the background.

Gordon Meldrum: Speaking on my own behalf and from the perspective of the SCDEA, I support that offence. I draw a parallel with what we call the suspicious-activity report system that operates throughout the United Kingdom. Anyone who is involved in financial transactions has a duty to report if they feel for any reason that a transaction does not add up. That system involves the sort of failure to report that you are talking about.

As far as I understand the provision—I am sure that the Crown will have a much better perspective on it—it is designed to catch the individuals whom I have often publicly described as the consultants and facilitators. They oil the wheels of organised crime but do not necessarily get close to the front-end criminality—they might be involved in the banking profession, the legal profession, the accounting profession, the haulage industry and so on. I am not saying for a second that all of those people are corrupted by organised crime, but some of them might be. Often, they have a knowledge of the business of serious organised crime, if not necessarily the daily transaction of the criminality. The fact that they fail to report that knowledge often inhibits us. Having an offence around failure to report knowledge of serious and organised crime would be helpful with regard to those people.

Robert Brown: Section 25 makes it an offence for a person to agree with another person to become involved in serious organised crime. That seems to give you the power that you might need to deal with the people about whom you are talking.

Perhaps I should declare my interest as a former practising solicitor in this context—or not in this context, I should say.

Gordon Meldrum: Although I accept that section 25 says what it says, I think that the specific provision around failure to report, as opposed to simply agreeing in general, is helpful. I know that I would say that, as I am the director general of the SCDEA, but I genuinely feel that it is useful.

Robert Brown: With regard to the people who have the connection that is defined in section 28(1)(b), could you define the difference between "involvement" and "knowledge or suspicion"?

Gordon Meldrum: I am sorry; could you state the specific question again?

Robert Brown: Could you define the difference between "involvement" in section 25 and "knowledge or suspicion" in section 28, given that section 28 states that there has to be some professional or personal relationship in order to land someone on the front line? If someone has knowledge of such crime, is not the notion of involvement adequate?

Chief Constable House: I will give you a practical example that is very much on my mind at the moment, as I am trying to buy a house in the west of Scotland. The legal company that is handling matters for us wrote us a formal letter to ask where the money is coming from because it needs to be sure about that. As Gordon Meldrum has said, we are talking about an extension of that.

On your specific question, for example, if a junior member in a legal practice facilitates the purchase of a house for £500,000 in cash and is well aware that the money is probably dodgy and comes from drugs or serious and organised crime, in my view that person is involved. The senior partner in the company may not be involved but will have knowledge of it, and section 28 would mean that they had a duty to report it.

10:30

Robert Brown: Is that not covered by the regulations on money laundering anyway?

Chief Constable House: Yes, but I am using it as an example. We could use the example of an accountant or haulier, as Gordon Meldrum did. If someone knew that something was suspicious, section 28 would lay on them a duty to report it.

Robert Brown: Can you give us examples that go beyond existing legislative and administrative requirements to demonstrate that section 28 is necessary? The example that you have given seems to me to be covered by money laundering legislation. The offence that section 28 proposes does not seem to add anything to that.

Chief Constable House: Organised crime groups require or want other services that are not connected with money laundering but facilitate their work, such as getting hold of premises. They will go to estate agents to look for premises to put into use as a cannabis factory. That is a pretty current example. Knowledge and involvement may be two separate matters in that instance.

Robert Brown: Are they? If somebody has knowledge of that position, they are manifestly involved. They have gone beyond thinking about it to taking the matter forward, have they not?

Chief Constable House: No, I do not agree. There is a difference in the definition. If someone has hands-on involvement in setting up the lease and rental of premises, they are clearly involved. However, if someone else in the company knows about it, their defence in law would be that, although they may have had some suspicion or known that it was going ahead, they were not involved. Section 28 says that, if somebody is aware of such activities and has suspicions, they are required to report them.

Robert Brown: That seems to me to be a charter for getting at the minions in firms rather than the senior directors. Is that right?

Chief Constable House: We are asking for new legislation—I said that we were widening the legislation and making it more flexible—simply because we have to get at serious and organised crime in any way that we can. The people who choose to become involved in it make a conscious choice. Therefore, they are ready for it and are getting into a defendable position. We get to those people through others who are involved in it but may be on the fringes—I would not use the word minions. In section 28, we are saying that, if such people have suspicions or knowledge, they need to step forward and, if they do not, they commit an offence.

Robert Brown: I suggest that section 28 is an astonishingly wide power that, in addition to perhaps—I use the word "perhaps" consciously—covering a number of positions beyond being involved, puts a considerable amount of power in the hands of the state and the prosecution to go after many other people who may not be involved in serious organised crime.

Chief Constable House: Yes, I understand your position. My position is that the state is not trying to go after those smaller people but, through them, is trying to get at serious and organised crime groups and gangs. I am afraid that the tentacles of such gangs reach out a long way. Many people make money from, and have business that is associated with, organised crime; that needs to be challenged with some new legislation. The legislation may be considered challenging, but we need it. We support it strongly because there is a strong public need to tackle serious and organised crime. We cannot continue to do that in the conventional way because it proves incredibly difficult to attack the Mr or Mrs Bigs, to everybody's detriment and suffering.

Robert Brown: I understand the motivation, but I remain concerned about the means of pursuing serious and organised crime under section 28. Might ACPOS and the SCDEA be able to come back to us with a bit more background detail on some practical examples? That would be extremely useful.

The Convener: Perhaps we can hear from Mr Meldrum on the general context.

Gordon Meldrum: I do not know whether this information helps, but in our operations against organised crime we continually come up against a group of people who do not go anywhere near the front-end criminality but who facilitate the business on behalf of more than one organised crime group. The organised crime groups themselves can take their criminality only so far before they have to go somewhere for assistance. There seems to be a group of people to whom serious organised crime groups tend to head back, for whatever reason. As a police officer, my view is that those people undoubtedly know that they are involved in serious and organised crime, but there is never any disclosure of that. Practically speaking, that is the group whom we are trying to identify and capture with the provisions in section 28.

Robert Brown: My final question is on ACPOS's comment on section 18 that

> "the good work achieved to date in relation to the deterrence of knife crime would be lost if knife crime is not separated from"

the legislation on short-term custodial sentences. Will you elaborate on that? There is obviously a bit of a challenge there. Does knife crime raise different issues from other sorts of violent crime or other crimes that might be caught by the legislation on short-term sentences and community sentences?

The Convener: Perhaps that is a question for you, Mr House.

Chief Constable House: It would be if I could find the part of our submission to which Robert Brown is referring, but I cannot.

Robert Brown: It is at the bottom of page 1.

Chief Constable House: I am not certain that the submission was written by the violent crime reduction unit, but I think that it is saying that knife crime is a particularly serious issue for us in Scotland and that it has to be addressed properly. However, I am not sure that I would be as keen as the submission suggests to separate out particular kinds of crime.

Knife crime is horrific in the west of Scotland. This weekend, we had three homicides and 40-odd serious assaults, and knives would have featured heavily in all of them. We have to deal with the possession and use of knives sensitively and intelligently, rather than in a dramatic, headline-grabbing way that sounds like the obvious answer. The obvious answer initially is that everybody who is convicted of knife possession as a first offence should receive a term of imprisonment. A great many people probably should receive that sentence, but creating legislation that says that everybody should receive a custodial sentence in the first instance would open up the law of exception, in that exception after exception would come forward.

I guess that the submission is saying that knife crime needs sensitive and sensible treatment and that there has to be a separate debate on it, which I think involves, quite rightly, a number of people around the table.

Robert Brown: If I understand you correctly, you are saying that whatever the original view that led to that statement in the ACPOS submission, you are not convinced that there is a need to separate out knife crime when we are considering short-term sentences, and that one can look at the arguments about punishment, deterrence and rehabilitation in a more general way. Is that an unfair summary?

Chief Constable House: It is not. I am not clear why we would have to separate out knife crime in particular. We have not yet got to the views on short-term sentencing in any case, although I am sure that we will do so in due course. I am happy to talk to my colleagues about this, but I am not sure why knife crime was separated out. It has to be dealt with sensitively and intelligently, because it is a massive issue for the country, but I am not certain what lies behind the idea that it should be separated out from the debate on short-term sentencing.

Nigel Don: I wonder whether I could wrap up the thinking on serious and organised crime by reflecting what I think you have said. These are my words, not yours. You would like sections 25 to 28 to be drawn more widely, so that they can be used sensitively, rather than more narrowly, so that they restrict you. Is that a fair comment? You are looking for prosecution discretion on wide-ranging offences. I see three nodding heads—you agree with that.

Gordon Meldrum: Yes.

Nigel Don: Would it also be fair to say that you recognise the problem that we have, as custodians of the legislative process, of creating unnecessarily wide offences? Do you recognise that we are reluctant to do that because, at the end of the day, it could be us?

Chief Constable Strang: In our view, the drafting should not be unnecessarily wide; we are arguing that it should be necessarily wide. I understand why you want to avoid drafting an unnecessarily wide piece of legislation, but we argue that wide drafting is necessary if we are to get at the heart of serious and organised crime in Scotland.

Chief Constable House: The points that you make, sir, are to the point. We initially looked for some way for us all—police, fiscals and defence—to agree that an offence was within the definition of serious and organised crime and therefore the provisions would apply, which would get us past the criticism that the legislation was incredibly wide and could be used for anything, including the theft of a meat pie. If we could overcome that and define a far narrower range of offences to which the provisions would apply, we would probably all be happier with them. The difficulty is that serious and organised crime reaches into so many different areas. We have heard recently about security companies, taxi companies, bus companies and a variety of other companies that are all within the ambit of serious and organised crime. That is why it is difficult to provide a definition with which we would all be much happier. Police officers like working within definitions; we are not particularly comfortable with broad-ranging things, either. However, providing such a definition is very challenging.

Bill Butler (Glasgow Anniesland) (Lab): I, too, like working with definitions that I accept and that are clear to me, but I am a bit troubled by what I have heard. Chief Constable House just said, in response to Robert Brown, that he does not necessarily agree with ACPOS's written submission on the need to separate out knife crime. You are speaking for ACPOS today, so which is ACPOS's position on the matter? Is it your position this morning or the position that is outlined in the written submission? We need to be clear about that. If you are unable to give us that information today, we need to get it in writing. We cannot have two positions from ACPOS.

Chief Constable House: Convener, I am happy to take your guidance on the matter. If you would like me to provide written confirmation of our position, I would be happy to do so. I do not understand the exact meaning of the submission in terms of the need to separate out knife crime. For what reason would that be done? If you would prefer it, I would be happy to write to the committee, confirming ACPOS's position.

The Convener: We need some clarification, as there appears to be a split on the issue. You have given your personal view, which is fine, but you are representing ACPOS today and we need ACPOS's position to be defined for us.

Chief Constable House: That is true, convener. Thank you. However, as the chair of ACPOS's crime business area, it would not have been right for us to turn up here and say that we did not need to answer any questions because ACPOS had given the committee a written submission. The benefit of giving oral evidence is that it challenges issues and makes us come back and be a bit clearer about what we are saying.

The Convener: Written clarification would be welcome.

Bill Butler: It is always helpful. You are right to say that it is in the interaction here, at committee, that we find out what needs to be clarified—as do you. If you could submit that clarification, we would be absolutely delighted.

The Convener: That takes us to fingerprint and DNA data.

Bill Butler: As you know, the bill will extend existing police powers on the retention of fingerprint and DNA data. However, it will not allow the police to retain such data where a case is concluded by an alleged offender accepting an alternative to prosecution, for example a fiscal fine or a fixed-penalty notice. In its written submission, ACPOS raises that as a concern. Why is ACPOS concerned?

10:45

Chief Constable House: Our concerns are to do with the fact that the legislation on fixed-penalty notices was introduced to provide alternatives to prosecution and a more flexible, speedier system, and to reduce paperwork. That is working, but it means that there is a slight reduction in the number of people whose DNA is taken. That is a fairly fine, practical point.

In certain police force areas, fixed-penalty notices for minor disorders such as drinking or urinating in the street are often issued on the street. In such cases, the requirement on—but, more important, the ability of—the police service to take DNA is zero, because we do not require our officers to take buccal swabs on the street. DNA is taken in the fixed-penalty notice disposal process only when people are taken back to the police office, which allows photographic, fingerprint and DNA evidence to be taken. Our view is that when there is a return to the police office and DNA is taken under a fixed-penalty notice for a minor offence, it sometimes indicates the sort of person from whom we would want to take DNA. The view has been expressed that the more people we take DNA from, the larger the DNA database and the higher the chance of catching people earlier in their cycle of offending. Our concern is that if we are not allowed to take DNA from anyone who receives a fixed-penalty notice, we will miss out on a section of people who it would be worth while having on the database.

Bill Butler: I hear what you are saying, chief constable, but could it be argued that that omission—if it is an omission—is deliberate, because alternatives to prosecution are extremely unlikely to be used in cases in which the offence is serious, so why the need to take and retain DNA?

Chief Constable House: That takes us to a fairly wide political, philosophical and law enforcement point, which is that the wider the DNA database, the greater the chance of catching people. If the database is narrow, we have less chance of catching people. There is a balance between that issue and the civil liberties issue. It is about proportionality.

Bill Butler: The extended powers in the bill originate from a need to keep us consistent with the European convention on human rights, specifically in relation to the case of S and Marper v the United Kingdom, in which the European Court of Human Rights criticised the blanket retention of DNA in England and praised the specific and targeted Scottish regime on DNA profiles. I hear what you are saying, but I am not convinced by it.

Chief Constable House: Let me try again. We are not in any way proposing that we move to the English model. It seems far more likely that, despite Government resistance down there, the English model will move towards a Scottish/ECHR-compliant model, which is as it should be.

This is a practical, policing point of view. Someone who drinks or urinates in public might come to the notice of a police officer, but for efficiency reasons, and to cut down on paperwork, we no longer take them into custody and put together a full file. That is why we are not getting DNA from them. That is a change in administration; it is not a change in the way that society views such crimes. In practical terms, the majority of fixed-penalty notices for such offences are issued on the street, and the police do not take DNA on the street. However, I think that such people should still come within the ambit of our ability to take DNA, and that we should be allowed to take the person to a police office, to do the work there and to take DNA.

Bill Butler: Why would you need to retain the DNA of someone who urinated in the street? Surely that is a minor offence. We are not talking about people who have been prosecuted for but not convicted of violent sexual offences. Surely those offences are not comparable.

Chief Constable House: The offences are not comparable, but the first example still involves a breach of the law.

Bill Butler: Is it not simply the case that taking the DNA would be more administratively efficient for you? The offences are not comparable in seriousness.

Chief Constable House: The issue is nothing to do with administrative efficiency; it is to do with catching people who have committed serious crimes as early as possible. I will give an example that is not from Scotland, but from down south. An individual was arrested in Brighton for what could be considered a fairly minor offence. They were taken back to the police station, where they were photographed and fingerprinted and their DNA was taken. The custody sergeant decided to refuse charge, so that person was released without further police action being taken. That person's DNA was retained—that is allowed under the English legislation at the moment—and their information was put on the DNA database. That person is now in custody for the particularly brutal rape and murder of a woman in London. That was the only way in which that person could have been caught, because the investigation was two or three years old and was, in effect, on hold, because no other lines of inquiry existed.

Exactly the same issue applies. I return to my point that a decision must be made between what some see as civil liberties issues and the effectiveness of investigation. There is no doubt that if the DNA database is extended as widely as possible, it will allow us to detect offenders who have committed serious crime more quickly in their cycle of offending. If the database is narrowed, the ability to detect will be reduced. If the DNA of somebody who comes to the notice of the police because they have committed a relatively minor offence on the street is allowed to go on the database, and they commit a more serious offence or have already committed a string of more serious offences for which they have not been caught, they will come to the notice of the police and be put in custody.

Bill Butler: Forgive me—that is a perfectly coherent and comprehensible philosophical position, but the bill does not advocate blanket retention. Because of concerns about wider provisions on the retention of DNA down south, the bill goes for more specific retention in two instances. I might be wrong, but I think that you are arguing for blanket retention. My question is specific to the bill, which says that we need a targeted extension that remains within ECHR. Do you agree with that?

Chief Constable House: You are right to correct me. Actually, I am arguing not for blanket retention but for a public debate so that the public understand what they would have if blanket retention were introduced and what they will not have if it is not introduced. We are back to the balance that must be achieved.

We have adopted a system of issuing fixed-penalty notices for some offences, to be more efficient and effective. That is good and it is working, but all that I am saying is that changing to that system should not stop us taking DNA from someone from whom we would have taken DNA if we had not introduced that system. The commission of relatively minor offences often indicates a lifestyle that might include violence and a proclivity to violence. The issue is not always what will happen in the future; the first time that a serial offender comes to the notice of the police—the first time that we catch them doing anything—might be when they are drinking in public. If we can take their DNA at that time, we can find that they are an offender. If we cannot take their DNA, we will lose the ability to sift through such people.

Chief Constable Strang: It is worth remembering where fixed-penalty notices came from. They were a part of summary justice reform to reduce delays and the number of cases that were reported. The non-taking of DNA was an unintended consequence of introducing fixed-penalty notices.

Bill Butler: Do the witnesses feel that the proposals in the bill achieve an appropriate balance between the rights of individuals and the ability of police officers to carry out their work efficiently and effectively?

Chief Constable House: In general, we do, but we are concerned about the issue that you have highlighted, Mr Butler—that of fixed-penalty notices—and we are concerned about children who go to children's hearings. Our submission makes a point that I think is common sense: if someone admits guilt and goes to a children's hearing, it should be possible to take their DNA.

Chief Constable Strang: I understand people's concerns, but I think that the balance is right. In any new legislation that introduces requirements or restrictions, you need to weigh up the benefits. Every piece of legislation restricts freedoms in some ways, so you have to judge whether the price is worth paying. In the cases that we are talking about, there would be security benefits from detecting crimes. I feel that the proposals in the bill are properly balanced.

Bill Butler: That was the general response that the committee received in written evidence. However, I raise the issue because the witnesses suggested in their submission that there was a loophole or gap. I get the clear impression from the witnesses that that gap should be bridged. Is that correct?

Chief Constable Strang: Yes, absolutely. There was perhaps an oversight in earlier times, and it needs to be resolved.

Bill Butler: I am obliged.

Paul Martin (Glasgow Springburn) (Lab): I would like to ask Chief Constable House about practical examples of DNA retention. It can be difficult to talk about specific cases, and we have to use the information that is available, but I will ask about the case of Peter Tobin. You talked about the possibility of preventing crimes. Social profile information is now available on Tobin, and it is known that he was a petty offender earlier in his life. Had DNA retention been in place as a legal remedy, could Tobin have been detected much earlier?

Chief Constable House: That is a specific example, and I have talked about a specific case down south, but there is a general issue. We should not pretend to the public that DNA retention would stop all offending, because it would not. However, if DNA were left at the scene of an offence and were properly gathered, it would allow the police to match it with information on the DNA database. That could stop somebody early in their cycle of offending, if they could be found. The evidence from areas where DNA is retained is that it allows officers to step in effectively at an early stage. In areas where that is not done, series of crimes can go on and on, with tragic results.

Paul Martin: If he had been detected for housebreaking at an early stage in his criminal career, and if DNA had been retained at that point, he could have been detected for crimes that followed that initial housebreaking.

Chief Constable House: I am not trying to avoid the point that you are making, but I want to be clear. If someone were arrested for housebreaking or for any minor offence, and if DNA were taken, it would be on the database. If the person committed a further offence and left DNA—for example, if they committed a rape—the DNA could be matched. That would not stop people offending, but it would allow us to step in earlier in cycles of offending. If everything was managed effectively and efficiently, the cycle of offending would be stopped much earlier—after the first serious offence, we would hope.

Angela Constance (Livingston) (SNP): Chief Constable House gave us an example from down south, and we have just heard about the Peter Tobin example. Has any research been done into whether people who commit minor misdemeanours on the street and receive a fixed-penalty notice, are, by and large, law abiding, or is it the case that a significant proportion of serious offenders also commit minor misdemeanours? Does research exist that gives an evidence base for the need to retain DNA from people who receive fixed-penalty notices?

11:00

Chief Constable House: I am convinced that there is a huge body of work around that. I cannot quote any of it right now, but I can tell you that what we know about criminals is that they break the law, and they tend not to break only one law. They do not think, "I am a housebreaker, therefore I will only ever do that." You see that in Hollywood films, in which people are professional criminals and they commit one type of crime, but that is not the case in reality. For example, research that was done on who illegally uses disabled bays at supermarkets—we all get furious about that—found that many of them had criminal records. Research that was done on the diaries of heroin users—drugs may be a slightly different issue—indicate that they will turn their hand to anything; they do not think to themselves, "I will just do this."

I suggest that the same applies to other criminals. People get caught for the strangest reasons and in the strangest circumstances. For example, Peter Sutcliffe was intercepted by uniformed officers on the street because of his car tax, or for driving the wrong way down a one-way street, or something like that.

People break the law. My proposal, to come back to fixed penalties and low-level crime, is that if we lived in a world with no crime, we would not have to take any DNA, but that is not the case, so we must try to prevent crime as much as possible. In my professional view, the taking and retention of DNA is a useful weapon for the police in preventing series of crimes. That must be balanced against human rights and an overbearing state. Frankly, it is for you to decide where that balance lies.

There have been proposals—I make it clear not from me—that we should take DNA from everybody in the country at birth. There would therefore be no prejudice and no need for guilt to be proven before taking someone's DNA: we would take DNA from everybody. It would be something that the state did and the DNA would be retained in a bank. If that were done, there would undoubtedly be a reduction in crime, but do we want to do that? That is a matter for the public.

If you restrict the DNA database to people who commit very serious offences, the chances are that we will catch some people but new people into the market who have precursor offences will not be caught. It is a well known fact—talk to any analyst or academic in the field—that when it comes to sexual offences it is very rare for someone to step in straight away and do a full-blown abduction and rape. They will usually go through precursor offences of indecent exposure, indecent assault and stealing underwear from washing lines. All those offences are precursors—they work up to the very serious offences. They do a little bit of exposure, then abduction and then full-blown sexual assault, often leading to murder. The earlier you get the DNA, the earlier you can interpose into that process.

The Convener: We need to move on, but Mr Meldrum wants to make a quick point.

Gordon Meldrum: I have a brief point in response to the question about serious criminals committing less serious offences. We often see that with the individuals and groups that the SCDEA examines. To be frank, we are often mesmerised by the fact that while they are involved in serious crime, on another day for another reason they will commit, for example, minor road traffic offences, shoplifting offences and common assaults. We often see evidence of serious criminals committing minor offences.

The Convener: We turn to the issue of disclosure; Stewart Maxwell will lead the questioning.

Stewart Maxwell (West of Scotland) (SNP): Good morning, gentlemen. Does the current regime for the disclosure of evidence in criminal cases cause any difficulties for the police? If so, could you explain what those are?

Chief Constable House: The issue is that the law must be seen to be transparent, fair and open. What we must not do is to present the evidence that we want to be presented, while not presenting other bodies of evidence that contradict what we are saying or suggest that a suspect is innocent. I hold up my hands and say that my experience of Scottish policing is about 19 months old, so I am not sure that I am well placed to say whether the current situation causes major difficulty. From what I have seen in Strathclyde it does not, but my colleagues who have more knowledge might be better placed to speak on that aspect.

The Convener: That is fair. Does anyone contradict that view?

Gordon Meldrum: The SCDEA has a slightly different perspective, because we work alongside the national casework division of the Crown Office in relation to our prosecutions, so a senior procurator fiscal is attached to our investigations at an early stage. However, I do not contradict or take exception to anything that Chief Constable House said.

The Convener: Do you agree, Mr Strang?

Chief Constable Strang: Absolutely. We are content with how things are. They do not cause difficulties.

The Convener: That is fine. Thank you.

Stewart Maxwell: The bill creates a statutory framework for disclosure. Does that represent an improvement on the current situation? You seem to suggest that there is no problem at present.

Chief Constable House: I am afraid that I will sound boring and repetitive. Our main worry about the bill is the resources that will be required. I have considerable experience in the area because I worked in the English and Welsh system for 27 years, and disclosure was a massive drain on police resources. It was introduced for valid reasons—which have not necessarily been demonstrated in Scotland—but it was a monster, to be frank, and one from which England and Wales have stepped back significantly.

Disclosure was the subject of massive amounts of training down south, which will also be required up here. We will have to train every police officer in disclosure because it will affect them all. We understand that it will not affect every court case because it will apply only to solemn cases—sheriff-and-jury or High Court cases—but there will be implications for all officers because we do not always know where cases will go in the end.

We are also concerned that too much is being dealt with in the bill. We would like more to be covered in the code of practice, because we believe that that is the appropriate place.

Stewart Maxwell: I notice that you make that distinction in your written evidence. Why would it be better for the matter to be dealt with in the code of practice?

Chief Constable House: It would be more appropriate for the scheduling processes if it was dealt with in the code of practice rather than being locked into the words of the bill and defined there.

Stewart Maxwell: Is it an issue of flexibility?

Chief Constable House: Yes. Putting the details in the code of practice would allow more flexibility and probably a bit more debate on the issue, which would be appropriate for the scheduling. There are also questions about the definitions of "sensitive" and "highly sensitive".

Stewart Maxwell: I will come to that in a moment. Do you agree that a case can be made that what should and should not be disclosed and the definitions thereof should be included in the bill and that codes of practice or guidance are not the appropriate place for such important details?

Chief Constable House: All I can say is that our view is that that should be contained in the code of practice, which is a better place for it. We have spoken to people down south about that, and I repeat that we believe it is more appropriate for it to be in the code of practice than in statute.

Stewart Maxwell: I am just trying to explore why you think it would cause difficulty if it was in the bill rather than in the code of practice. How often do you expect that the legislation would have to be changed? Obviously, if it was in the legislation, that would have to be changed rather than the code of practice. What specific practical difficulties would result?

Chief Constable House: If the provisions on scheduling remain in the bill, we would want a requirement for consultation if the prosecutor disagrees with the police assessment of the level of sensitivity of an item of information. I am not sure whether that point was sufficiently emphasised in our written submission. Currently, the bill provides that the prosecutor must return the schedule to the police to adjust the determination, with no scope for review or consideration. That means that the police officer can give a professional opinion, the lawyer can say no and that will be the end of it, although the police officer's opinion has not changed.

Stewart Maxwell: That is an argument about amending the bill, as opposed to removing the provisions from the bill and putting them into guidance, is it not?

Chief Constable House: I think that the whole thing would be better if the requirements on scheduling were in the code of practice.

Stewart Maxwell: What are the views of Chief Constable Strang and Mr Meldrum on this matter?

Chief Constable Strang: Chief Constable House, as the chair of our crime business area, is presenting the ACPOS view on crime, so that is the ACPOS position. However, I understand the argument that the primary legislation need not be amended and that there are advantages of flexibility in having provisions on disclosure in the code of practice.

Gordon Meldrum: I agree with what Chief Constable House said.

Stewart Maxwell: May I delve into the issue of resources? Chief Constable House said that when a similar disclosure provision hit England, a huge amount of training and other resources had to be applied to it, which created a lot of difficulty. However, do the police not undertake disclosure, anyway? Chief Constable House seemed to suggest that there would be a manifestly huge difference between what currently goes on and what would go on in the future if the bill was enacted as it stands. Can you explain that to me? I am having difficulty in understanding that point, because I imagine that the police undertake much of the bill's disclosure provisions, anyway.

Chief Constable House: Much of the provisions are undertaken currently, but the bill will place a burden on the police officer that will mean that every significant inquiry—this will impact massively on serious and organised crime—will have to put aside a number of officers to ensure that the disclosure legislation is complied with and that everything that comes into the possession of the police officers is assessed to determine whether the police will use the information as part of the prosecution, how it will be held and whether it will be presented as part of the case. All the information will have to be listed and scheduled so that it is available for examination by the defence.

To return to Mr Maxwell's original point, the question is what is wrong with the current system of disclosure that means that the bill's provisions are required. The current system depends on the police conducting an investigation and building a case, which is presented to the procurator fiscal and taken to court. There must be trust on all sides that what is presented is the meat or crux of the matter and that the police do not have files of undisclosed reports or have not suppressed a witness statement. For example, the police could interview 150 people in a murder investigation and all might say the same thing apart from the 150th, who might say that he does not think that the accused person was there at all. There is an issue around how much is disclosed and how much is held back. Currently, that is done pretty much on professional trust and integrity. The bill is trying to codify that and to say, "Never mind all that. You will provide all this information in the more serious cases."

Again, if Scotland has got to where England and Wales already are in that regard, that is one issue. We are not opposed to the proposal across the board. However, there are huge implications for resourcing the proposal because more and more police officers will have to sit down and work out what material they have, what they need to present, how they should schedule it, what pieces of paper they will send to the fiscals and so on. That will all go on in far more detail than it does at present.

Stewart Maxwell: You seem to accept the point that you undertake that process currently because you have to. I understand that the bill proposes a more formal process that will be laid down in statute, as opposed to the current arrangements. I am not sure that there is such a massive difference.

11:15

Chief Constable House: I think that there is. From my personal experience, I found huge differences in the law when I came north of the border, because the Police and Criminal Evidence Act 1984 and disclosure requirements do not apply here. The amount of time that my officers spend on paperwork—although they complain about it bitterly—is significantly less than is spent by their colleagues down south. One of the major reasons for that is the disclosure situation. The disclosure requirements would take police officers off the street because each major case would need a disclosure officer—perhaps two for a murder investigation—who would deal with nothing but the disclosure issues. The disclosure requirements would also eat into the time of officers on, frankly, every case. Because we do not know where a case will end up, officers would need to comply with the legislation. The requirements will make a significant difference to the number of officers on the street. I have no doubt about that.

Gordon Meldrum: On the issue of resourcing, let me support what Chief Constable House has said. As I said in the agency's written submission, we have scoped the issue as best as we could and as scientifically as we could. We did that by speaking to both the Metropolitan Police specialist crime directorate and the UK Serious Organised Crime Agency. Our assessment—it is a guesstimate to a certain extent—is that we will require 15 full-time disclosure/revelation officers within the agency. As members will appreciate, the number of cases that we report into the criminal justice system over the course of a year is minuscule in comparison with the rest of the Scottish police service. However, we believe that we will require that number of people simply because of the scale and complexity of our operations. Let me give a practical example without going into too much detail. One of our current operations involves somewhere in the region of 200,000 documents. An assessment would need to be made on the disclosure and scheduling of each of those documents.

Although the spirit within policing in Scotland and within law enforcement agencies such as the procurator fiscal has been to disclose information, formalising that as a requirement in the statute book will introduce an additional layer of complexity to the disclosure of material. There will need to be an assessment and ultimate signing off in deciding whether information is disclosable. That will require more people, over and above the people who are doing the day job at present.

Stewart Maxwell: The fundamental point that I am genuinely trying to understand is the difference between what happens currently and what will be required in the future. If a case involves 200,000 documents, each of those documents needs to be examined anyway. I would have thought that the police need to do much, if not all, of the work that is being formalised under the bill. I am trying to discover what the difference is between what happens currently—it seems to me that most of this stuff happens anyway—and what will be required if the bill is enacted as it stands. Given that the work needs to be done anyway, I do not understand why 15 full-time officers would need to be dedicated to disclosure as a result of the requirements being written down in a formal process.

Gordon Meldrum: As Chief Constable House said, we disclose based on professional judgment. Although we examine every document, we do not necessarily assess them for disclosure purposes, put that assessment in writing, have a conversation with the procurator fiscal, come to a determination on whether the document is disclosable and then schedule everything as either disclosable or non-disclosable. On one level, an administrative process will need to be built around the disclosure of the document over and above the professional judgment that is currently taken.

Nigel Don: Undoubtedly, this is a point of detail, but it has been said that police officers will be needed to deal with disclosure. I have nothing against police officers—they would be well trained for such a task—but is there a need for disclosure to be dealt with by a police officer, or could the job be done by someone who knows that particular part of the trade?

Gordon Meldrum: From my perspective, from having sent quite a number of my people down south, my answer as director general of the agency would be that the job need not be done by a police officer, but the individuals involved would need specific skills. I have actually scoped the requirements in our written submission. Our 15 officers would cost just short of £1 million; our 15 police staff would cost just over £0.5 million.

Nigel Don: I recall that. Are you happy that appropriately trained staff could do the job without needing to be warranted police officers?

Gordon Meldrum: In my view, yes.

The Convener: Will Mr House comment on that aspect from his experience down south? Are such matters dealt with down south by full-time professional police officers or by ancillary staff?

Chief Constable House: In the main, on the more serious murder investigations, the job is done by police officers. I think that there is no real need for that, as the job could well be done by properly trained full-time non-sworn police staff. However, I do not think that that is the point; in a large number of other cases the arresting officer and the investigating officer will still be required to do their own paperwork, because we do not have that sort of administrative backup for people. At the top end—homicide investigations—specialists take over and do the paperwork for a lesser cost as opposed to no cost. However, if uniformed police officers who are patrolling the streets arrest somebody for an offence, they still have to do the paperwork themselves; they do not get admin backup, so it still means cops being off the street.

The Convener: We turn to the subject of sexual offences.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Good morning, gentlemen. Section 33 includes provision to extend the law on indecent images of children and section 34 makes it an offence for a person to be in possession of extreme pornographic images. Can you give examples of how the existing law will be strengthened by those proposals?

Gordon Meldrum: The SCDEA's written submission comments on what constitutes an extreme image. Regarding the current definition in the bill, it says:

> "The definition of an 'extreme image' presents practical difficulties. The use of the terminology 'depicts, in an explicit and realistic way' would seem to include all images where such acts are depicted but are subsequently shown to have been staged or acted out. For example a realistic depiction of a rape or sexual murder, which is undoubtedly pornographic but where the 'victim' is shown to have suffered no harm and to have been a willing participant in actions depicted, would appear to be included in the definition."

That may not be a helpful response, because I am pointing out that we have said that work needs to be done on that definition.

Cathie Craigie: Do you have a suggestion for how it could be improved?

Gordon Meldrum: Not in front of me, but if you will bear with me, I would be happy to get back to you with thoughts and suggestions, if that would be helpful.

The Convener: That would indeed be helpful.

Cathie Craigie: The committee would welcome that.

Chief Constable House: I do not differ in any way from what Mr Meldrum said about the definition. We would also be happy to get involved in the work on that.

The Convener: Perhaps ACPOS will also give us something in writing under that heading.

Cathie Craigie: That would be useful.

On section 34, ACPOS commented that there would be challenges in monitoring the changes to the legislation and whether capacity issues would impact on Scottish police forces' ability to be proactive in the area. The general public want the police to be proactive. What are the pressures in that area and how could the bill be improved to deal with them? Are there financial or resource pressures on the ability to do the job?

Chief Constable House: There are always financial and resource pressures, because we use public money that is being spent somewhere. With the current financial outlook, I do not see more funding becoming available for an area such as this, but if it does, that would be great.

If we get a tight definition of extreme images, that would probably help us to deal with the situation. The problem is the huge flood of material that is available on the internet; in most cases, that is outside UK law enforcement and it is therefore beyond our ability to shut down the websites.

Those are the major issues that confront us, especially because different countries have different tolerance levels and the material might not be illegal in the country in which it was put on the website.

The issues are the volume of work involved, the subjectivity about what is pornography, the simple requirement to have people watching and dealing with such material to make an assessment and the need to take into account—I mean this seriously—their health, safety and welfare, given that the material is highly corrosive. I am sure that members have watched such material professionally, as I have done. The thought of having somebody watch it hour after hour for an investigation is quite troubling. Such people also need to be highly specialised and experienced. Therefore, we are talking about pretty expensive, top-end resources to deal with those things. This sounds sad, but those people deal with one case at a time, and we know that there is a flood of material out there because there seems, tragically, to be demand for it.

Cathie Craigie: The SCDEA submission says that it deals specifically with that matter. That is obviously a concern for Mr Meldrum as the man who is responsible for staffing the department. Do you want to add anything to what Chief Constable House has said?

Gordon Meldrum: I do not think so. I simply reinforce the point that we have people who are, unfortunately, involved in that work pretty much 24/7, because we have the national e-crime unit. As our written submission says, we have specific measures in place to monitor the overall health, welfare and wellbeing of those people.

I think that there will be an upward trend in e-crime in general, whether such crimes involve extreme pornographic images, fraud or other crimes that are committed with an e-crime attachment. We see that trend already. As Mr House has said, how to police the worldwide web from within the confines of Scotland is a particularly problematic issue for us. In general, we require the right people with high-end skills who can forensically interrogate the internet. However, there are not too many of those people around.

I know that none of what I have just said helps with the bill. I am sorry about that; I have simply made observations.

Chief Constable House: We are interested in another definition—the definition of the word “possession”. I have personal knowledge of the difficulties that there have been with the meaning of that word in cases involving images. Does a person possess an image if someone sends it to their website, they view it once and then delete it? Does a person possess an image if someone sends it to their website, they view it once and then leave it there? Does that constitute possession? Does the person have to get the image himself or herself? It is important to try to nail down those issues in prosecutions. Cases have been lost in which it was able to be proven that a person did not establish a link to a website and that the link was established by somebody else for them, although the person did not break that link and it stayed open. There have been debates about physically getting images and images being pushed on to the computers of people who did not go and get them. That is arrangeable through a phone call. Such issues are involved. The information technology issues become highly technical and are beyond my knowledge, but they come into play in successful prosecutions as well.

Cathie Craigie: I am sure that the committee would be pleased if you made suggestions on those areas that we could consider as we take the bill through its parliamentary stages. That would be useful.

Chief Constable House: I am sure that we and the SCDEA could work jointly on that.

Cathie Craigie: We are all aware of the difficulties that computer-generated images, cartoons and drawings that graphically depict children in a sexually abusive way can cause. How should the law deal with that issue? From what has been said today, you should be able to come back to us on that. Should any proposals to deal with that type of child pornography be extended to deal with extreme adult pornography?

Chief Constable House: In my view, the answer to that is yes, but that is a personal view. I suppose that we should follow up the issue in writing. We will do that.

The Convener: Right. You could do so, because the issue has not been considered by the wider body that you represent.

Chief Constable House: Yes.

The Convener: That is fine.

Chief Constable House: I will move on to the issue of drawings and other things, which you hinted at. We are particularly concerned about the virtual world websites, such as Second Life and others, within which depictions of violent child and adult pornography are starting to emerge. As I understand it, the images on those sites are not photographic, and therefore the law as it stands struggles to deal with them.

I am sure that that involves only a very small number of images at the moment, but that will undoubtedly increase, given the number of people who are involved in the virtual worlds way of life.

We will have to consider that issue, because those things seem to be developing into a bit of a trend. Adult and child pornographic violence is taking place in alternative realities; I know that that sounds hugely bizarre and is a bit of a stretch to consider as we sit here, but it is happening nonetheless and causing severe distress.

11:30

Cathie Craigie: I want to draw together the issues for my understanding. Sections 33 and 34 are necessary, as the law in those areas needs to be improved, but perhaps they could be improved because circumstances move quickly in that field and will have changed even since the consultation was carried out. I would welcome more information on that.

It is helpful for us to take on board the comment about resources in relation to staff, and the ability of police and agencies to deal with that issue, with regard to our budget considerations later this year.

Nigel Don: Am I right in thinking that in the situation that we are discussing, you would support the inclusion of very wide-ranging words in the bill? In other words, would you prefer to let the court restrict what is obscene and pornographic, rather than let us do so in the legislation?

Chief Constable House: I return to what I said earlier: we simply want to work in a world of certainty. I do not mind whether a judge tells us what is what, or whether the law does that—the difficulty arises if we develop a case and bring it to court, and it falls apart because the definition is not right. I am not particularly worried about whether you use the bill to give us the right guidance or reserve that guidance for a court to give.

Nigel Don: The phrase "explicit and realistic" in section 34 seems to set boundaries, but one does not have to be terribly clever to get round those boundaries.

Chief Constable House: No.

Nigel Don: I do not possess those skills myself, but it is rather obvious how one might do it. Those are presumably the kind of phrases that need to be taken away, otherwise we will just open up another world in which people can act outside the law.

In such a situation, in order to avoid setting a boundary over which people can promptly go, we surely need a law that is effectively infinite so that only the courts can drag it back.

Chief Constable House: Yes—I do not disagree with that. One can see ways to get round the "explicit and realistic" provision in five seconds flat.

Nigel Don: As Cathie Craigie said, we would appreciate any suggestions on how those words should be put together conceptually.

Chief Constable House: It would have to centre around the distress and alarm that the images cause, but one then comes up against people who will say, "I wasn't alarmed or distressed by it—it is a part of life." It is not easy.

The Convener: Perhaps Mr House has a high tolerance level for distress.

Chief Constable House: Perhaps sitting in front of the committee is adding to that.

The Convener: Stewart Maxwell would like to come in.

Stewart Maxwell: My question is on a separate area.

The Convener: I was just about to ask some closing questions.

Stewart Maxwell: It is a general question about section 17, which deals with the presumption against short custodial sentences. What is the view of ACPOS on the effectiveness or otherwise of such sentences?

Chief Constable Strang: I am happy to respond to that on behalf on ACPOS. The ACPOS evidence to the Scottish Prisons Commission—which did not come from me—acknowledged that short sentences did not in general address the underlying factors that lead to offending behaviour. A longer custodial sentence is appropriate for serious offences, but the types of offences for which people are sent to prison for a short time tend to be at the more minor end of the scale.

ACPOS supports the community payback order because it allows the sentencing court scope to include conditions that address the underlying cause, whether that is alcohol, drugs or mental health issues. It is also of more benefit to the community that has been the victim of the crime, in that requiring the offender to pay back in some way is a more satisfactory outcome than their going to prison for a short time. The academic evidence is clear that the likelihood of reoffending is less with a community sentence than with a repeat short prison sentence. ACPOS welcomes that proposal in the bill.

Stewart Maxwell: Much of the debate has been about short sentences for acts that are deemed to be serious. I know that that sounds slightly odd, but much attention has been paid to knife carrying. Will you express your views on that?

It is generally accepted that the public views non-custodial sentences as a soft option. How do we get round that?

Chief Constable Strang: For the public and sentencers to have confidence in a community sentence, it clearly needs to be not the soft option. That is why it needs to be immediate and visible, and people need to have confidence that it will be completed, that it is not simply an appointment in four weeks' time and that something will happen if the offender does not turn up. Progress courts will be important, as will follow-up of community sentences and consequences for people who do not comply. Those all need to be put in place before short sentences are removed. Offenders are sentenced to short-term imprisonment because people do not have confidence in community sentences, so I agree that a lot of work needs to be done to increase their effectiveness and public confidence in them.

Chief Constable House: Convener, may I comment on knife crime? I know that time is short.

The Convener: You have already expressed a view on that. Do you have anything to add to what you said earlier?

Chief Constable House: Our submission talks about most occasions; there are occasions when a custodial sentence may be correct. There is a public appetite for locking someone away for six months on their first conviction for carrying a knife, but the court needs to understand why the person is carrying a knife. If it is because they are going to do violence, a prison sentence may well be right. However, if it is because of peer pressure, I suggest that another approach is right—explaining and doing some meaningful, visible work on the consequences of knife carrying and violence. Sentences for second and third convictions for knife carrying should not be less than six months anyway, so they would fall outwith the provisions.

Bill Butler: In ACPOS's view, is there a place for short custodial sentences?

Chief Constable Strang: Each case must be taken on its merits. There will be occasions when the court considers that a short custodial sentence is necessary and appropriate. We want a shift in the general approach to one that recognises that putting people in prison for a short time and then allowing them out unsupervised simply does not address the crime problems that Scotland faces. In principle, there should be a presumption against short sentences. Also, if people go to prison, their sentences should contain a custodial element and a community supervision element so that they are not simply released unconditionally. However, there will be occasions when a court thinks that a short custodial sentence might be appropriate.

Bill Butler: Are you saying that there is a place for short custodial sentences?

Chief Constable Strang: I am saying that I do not think that we can entirely remove that possibility; I am not suggesting a percentage or saying in what circumstances such sentences should be given. It would be unacceptable to say to sheriffs, justices or judges that they cannot in any circumstances sentence someone to imprisonment for less than six months.

Bill Butler: That is clear. Thank you.

The Convener: We are really behind the 8-ball. Cathie Craigie will ask a final question.

Cathie Craigie: Chief Constable Strang's answer to Bill Butler cleared up the point about which I was going to ask. I was looking for clarification of what ACPOS said in its written evidence.

The Convener: I thank the witnesses for their attendance. You are aware of the matters that remain outstanding and will be dealt with in correspondence. We look forward to hearing from you in due course.

11:40

Meeting suspended.

11:44

On resuming—

The Convener: Panel 2 is made up of witnesses from Victim Support Scotland: David McKenna is chief executive, Susan Gallagher is director of development, and Jim Andrews is director of operations. Thank you for the submission that you were kind enough to send us, which we read with considerable interest. We move straight to questions.

Bill Butler: What are Victim Support Scotland's views on the proposal to establish a Scottish sentencing council?

David McKenna (Victim Support Scotland): We warmly support the proposal to bring into being a Scottish sentencing council. In the 21st century Scotland needs not just a Parliament but a sentencing council.

That is not a reflection on the judiciary; we have great judges and sheriffs, who are professional and experienced—our judiciary is probably one of the best in the world. It is about the need to build public confidence in our sentencing processes, so that there is demonstrably a greater understanding of consistency in sentencing. That is required in the 21st century. The sentencing guidelines will be an important tool for judges and other sentencers. The proposal is a win-win for communities, victims and the criminal justice system.

Bill Butler: You mentioned the need to build public confidence in sentencing and an understanding of consistency. The committee has heard different views on whether there are inconsistencies in sentencing. In your experience of working with victims of crime, have you come across examples of inconsistent sentencing or a commonly-held perception that sentencing is inconsistent? I think that your view is informed by such experience. What impact does inconsistent sentencing—or a perception of inconsistency—have on victims?

David McKenna: The area is complex. Many victims and families will never be satisfied by the sentence; for many people, no sentence is the right one. We understand that. However, all too often victims and their families say to us, “Not only did I not agree with the sentence but I have no clue how any system could have arrived at that sentence.”

It is not easy to demonstrate to people who are involved with the criminal justice system and to communities the parameters within which sentencing takes place. We say to people, “Okay, you might not be happy with the sentence, but at least you should have the right to understand how it was arrived at.” Apart from the lack of information and support for victims and witnesses in the criminal justice system, the impact of sentencing is the issue that victims raise most often with Victim Support Scotland.

There is little evidence of inconsistency, but there is even less evidence of consistency. The purpose of the new approach will be to demonstrate to the public that there is consistency and to build communities’ confidence, so that people can have confidence when they participate in the criminal justice system, not just as victims but as witnesses who want to contribute to the process.

Bill Butler: Are you saying that clarification of the parameters of sentencing will help to build confidence in the system, and that although someone might not be satisfied with a sentence, at least the rationale behind the sentence will be explained to them?

David McKenna: People have the right to understand why a particular sentence was given in a particular case. That is what sentencing guidelines can do for us.

The Convener: Can they? The perception of inconsistency in sentencing does not appear to be borne out by the evidence. Is there a reason to think that if we set up a sentencing council that clearly lays down parameters, the public will become aware of and be satisfied with those parameters? There are difficulties in that regard, are there not?

David McKenna: Absolutely. The issues will not be addressed simply through the provision of a sentencing council, which is why we welcome the proposal that, as part of its legal responsibilities, the sentencing council would build confidence by providing information on sentencing in Scotland. As I say, it is a matter not of the sentencing council simply existing, but of the processes that the council will go through to demonstrate publicly the guidelines and parameters that judges will use as a tool in sentencing. I am not saying that the sentencer or the judge will not have discretion, but we need to be able to say to victims that, given the circumstances of their particular case, the guidance indicates that the judges will work within parameters X to Y. We do not have that at the moment.

Robert Brown: You support the issuing of guidelines and the establishment of a sentencing council. Given some of the difficulties that judges, in particular, have expressed, would you be satisfied if the body turned out to be a sentencing advisory council, with the judiciary having the last word on the guidelines?

David McKenna: I am not sure whether that arrangement would be as effective in demonstrating sentencing consistency to the public as the approach that is set out in the bill. An advisory group might just disappear into the background and never be heard from again. It might do good work, but it might not make the public and communities feel secure or confident about the sentencing process. The bill’s current approach is the right way forward.

Robert Brown: I follow your argument about the status of the proposed body, but nevertheless we are talking about what would be, effectively, a quango that would be appointed by the Government and would give instructions to the judicial system and judges. Given such provisions, would you be satisfied for the final say on the matter to lie with the judiciary?

David McKenna: I have read some of the judiciary’s views on the relationship between it and the proposed council and on what you might call the separation of powers. I am not an expert on constitutional law, but I know that we have a very good judiciary who do a great job, and I do not think that a sentencing council’s statutory arrangements would affect the judiciary’s performance or the role that it carries out in our courts. I cannot see judges being told, “You will do this or that,” and thinking, “That’s not right, but I’ll do what they say anyway.” The bill contains the necessary checks and balances. The issue is about enhancing sentencing consistency by working in partnership and bringing into the process not just judges but people from communities and different areas of society. I do not see that as a challenge for the judiciary, although I understand its views on the matter.

The Convener: We move to the use of custodial and community sentences.

Paul Martin: What is the panel's view of evidence from sheriffs that short custodial sentences can be effective and that their current use is generally appropriate?

Jim Andrews (Victim Support Scotland): In general, we support the use of community payback orders but recognise that, as ACPOS made clear earlier, custodial sentences might be appropriate in certain circumstances. However, we believe that a wider use of community payback disposals presents a real opportunity for 21st century Scotland to address some reoffending issues. It is important that victims have a clear understanding of, are involved in and contribute to the process and that the outcomes are visible to communities. It is also to be hoped that the community payback process will benefit offenders to ensure that it is as much of a win for them as it is for communities and offenders.

Paul Martin: Section 17 is on "Presumption against short periods of imprisonment or detention". Do you think that such a presumption and the views that you have just expressed reflect the views of most victims? Do most victims really feel that they do not want an individual who might, for example, be involved in serious antisocial behaviour to face the possibility of incarceration?

Jim Andrews: To start with, I think that most victims would wish that they had never become a victim in the first place. Then they would wish to know why they had become a victim and whether they had been a random victim or had been targeted or whatever. Finally, they would hope that what happened to them never happened again. In that context, if community payback is seen to be effective, I think that victims would support it.

Paul Martin: But do you accept the sheriffs' view that short sentences are the only way for communities and, indeed, victims to get respite from the prolific offenders who turn up at court on many and several occasions? Does the short-sentence approach not represent victims?

Jim Andrews: As others have pointed out, on certain occasions individuals will require a custodial sentence not only to give their community some respite but to ensure the security of the victim and the community in which they live. As a result, on some occasions custodial sentences will always be appropriate. However, the presumption in favour of community disposals applies not to those individuals but to other offenders who might be better dealt with under that approach.

Paul Martin: What examples can you cite from your experience of supporting victims to back up that view? What consultation has taken place with victims on section 17?

Jim Andrews: Each year, Victim Support Scotland supports about 100,000 victims of crime, about 30,000 of whom are victims of violent crime such as serious assault or assault against the person. In communicating the feedback that we receive from service users, we try at all times to ensure that we represent all victims' views. Of course, not every victim reacts to a crime in the same way or will necessarily have the same opinion about what happened to them but, in general, victims look for justice and want a clear and transparent system that has clear outcomes that benefit them, the community and the offenders.

Paul Martin: With respect, I am looking for specific examples. In your submission, you say, significantly:

> "Victim Support Scotland supports this section when suitable alternative disposals are … available."

You must have based that view on evidence that such a disposal is of benefit to victims. On the basis of work that you have carried out, do you feel that that is the view of most victims? Where is the evidence that such disposals are of benefit in the majority of cases?

Jim Andrews: From the information that we receive through our operational services, which are in every local authority area in Scotland and provide day-to-day support for victims of crime, we believe that victims of crime would support these measures.

Paul Martin: So there is evidence that you could provide to the committee after this meeting.

Jim Andrews: We could provide background information.

Robert Brown: One imagines that people's attitudes to such matters might well change when they become a victim. Has any consistent view emerged from victims on the circumstances in which only a custodial sentence or only a community sentence might be appropriate, or are those views simply too diverse because of the different attitudes held by and the personalities of the victims themselves?

Susan Gallagher (Victim Support Scotland): In our experience, victims of serious crime always want the offender to be given a custodial sentence, as a result of not only their personal experience, but their experience in their community and their worries about their safety. Victim Support Scotland feels strongly that custodial sentences are appropriate in such cases.

12:00

Robert Brown: I do not think that anybody would argue with that for serious offences.

Susan Gallagher: Serious offences, violent offences and assaults.

We know from our experience on the youth justice side that many victims feel strongly that young offenders should not necessarily be incarcerated, but should be helped and supported. Some victims feel that an offender should be helped rather than just put in prison.

Robert Brown: From what was said earlier, I took it that the primary wish of victims is for justice to be done but that they also want to prevent the offender from repeating the offence with another victim. Is that a reasonable interpretation?

Susan Gallagher: Absolutely.

Robert Brown: Against that background, how do victims feel about the effectiveness of short-term custodial sentences?

Susan Gallagher: People think that when somebody goes into prison they will be helped and supported from the moment they arrive until the moment they are let out—that they can go on anger management courses and other courses of that nature. However, with short-term sentences, such courses will not necessarily be available, so victims often feel a bit let down.

We also know that some victims feel angry when offenders go to prison and then receive, in the victims' eyes, the benefits of participating in alcohol programmes, drug programmes or substance-abuse programmes, when the victims themselves are not eligible for such services within their community and can get them only if they pay for it. That is a disparity.

Victims often feel that, instead of being given short-term sentences, offenders could be put to better use in their community, where they could do work of value for the community as a whole and, possibly, for the victim. Putting people in prison for short-term sentences will not necessarily help the victims.

Robert Brown: In your submission, you make two very interesting suggestions. First, you suggest that the court should set an alternative sentence alongside the community payback order. Secondly, the order should be given only if the treatment or activity is immediately available. Both those suggestions would involve substantial changes to the current arrangements.

I can see the merit in your suggestion on alternative sentences, but breaches of orders can be very varied. Some people are defiant from the beginning, but others breach orders in a more modest way, or simply fail to turn up at some point. As a result, your suggestion might not be terribly helpful in making community sentences work better.

David McKenna: We have to build confidence within communities. At present, things can be long and drawn out, and the outcome may be nothing like what it might have been had a community disposal not been given in court. We have a real opportunity to transform how we deal with low-level offending, to make things better for offenders, for victims and for the community. If the community and the judiciary are not confident in the proposals, the proposals will not work.

We are keen that communities should be given information on policies and procedures in relation to community payback orders. Communities should be involved in consultations and in the delivery of services. In the sentencing process, it should, from the beginning, be made clear to the victim and to the community what the alternative would have been. Mr Brown is right to suggest that people's situations can change, but that can happen in every aspect of life. We are talking about situations in which, had the community payback order not been available, a prison sentence would have been given there and then.

We need to give victims information about that process and about the terms of any order. Indeed, victims' views ought to be taken into account when the terms of an order are set, to ensure that their safety and security, and that of the community, are protected. Regardless of the nature of the offence, we need to ensure that people on community payback orders do not go back into the community and reoffend. One way to do that is to involve the community in understanding what the individual has been asked to do.

Robert Brown: Are you suggesting that, in practical terms, there would be a presumption that a suspended sentence would be the alternative, but that there would be some wriggle room in suitable instances?

David McKenna: Yes.

Robert Brown: You say that a community sentence should be handed out only if the chosen treatment is available at the time of sentencing. There are several ways of achieving that—it can be done administratively or when orders are handed out. Do you think that the best way to tackle the obvious problems of getting disposals to start on time and making them suitable is through the judge, who may or may not have knowledge of the administrative background that is available to the social work department or whoever?

Susan Gallagher: That is an option, but we want services to be available in communities—and we want communities to see that services are available and that resources are put in to ensure that they are available—so that when a judge hands out a sentence, they know that the person concerned will be able to get the necessary support in the community. From our understanding of how community service orders work, people can sometimes wait for weeks or months for that to happen, which does not help to instil confidence in the general public. We think that making resources and services available quickly will help with confidence and transparency.

Robert Brown: The core points are the provision of information to victims, the perceived effectiveness of community sentences and the actuality: whether they are what they were supposed to be and whether people on them can get cracking from an early stage.

Susan Gallagher: Absolutely; and information should be available to people on what the sanctions will be if an order is breached.

The Convener: I have a couple of questions. There is a general perception among the public that community sentences are the soft option. I know that you have partly dealt with this, but with regard to the bill specifically, how do you think that that image could be improved—assuming that you do not think that community sentences are a soft option?

David McKenna: All three of us will have great ideas about that, but the first thing to say is that, at present, community sentences are misunderstood by communities. Communities do not see them and do not know that they are happening. In some ways, community sentences are unwanted, because of people's experience of crime and because they do not get information about what is happening. That is why the existing orders fail us.

We need to move to a position in which we understand the outcome that we want to achieve for offenders, which is that they reduce or stop their offending and we thereby reduce crime. The desired outcome for prisons is clear—we want to spend less money putting people in prison. We do not do enough talking about the outcomes for our communities that we will deliver through community payback orders. That discussion needs to start now.

We need to tell communities—I am making these outcomes up—that 1 million new trees will be planted in Scotland, that there will be a reduction of 1MW in the amount of power that is used, or that 500 miles of countryside will be opened up and made more accessible to people. We need to say to communities what CPOs will mean for them. Instead of just saying that they will be good for communities, we need to say, for example, that they will result in the development of 100 play parks or the installation of 10,000 recreational benches or seats in leisure areas across Scotland. We need to set out an agenda that shows what CPOs will mean for communities and which drives delivery of such outcomes. That is the missing part.

Jim Andrews: Community payback could be a huge success if it were linked to community planning and community safety and if community planning partnerships identified work that needed to be done in communities in their area. Through the community payback programme, such work would start to get done, which, as well as being visible, would be beneficial to the offender.

The Convener: You have dealt with the issue of speed. There seems to be general agreement that, regardless of the form that it takes, community service should have an immediacy that it does not appear to have in some jurisdictions at the moment.

Turning to visibility, there is a view that, whatever happens, offenders should be punished to an extent. How do you identify that a community service project is being carried out by those who have been sentenced by a court to do so? Do you take what some might call the extreme measure of having people wear Guantanamo bay suits? Do you have them wearing something that is recognisable? Do you advertise on the site by means of a billboard that it is a community service project? Are you prepared to do such things even if it causes some embarrassment to the offender?

David McKenna: I certainly believe that community service has to be visible; it does not have to be about wearing bright orange or fluorescent jackets with large signs on them. I hear the discussion from both sides about how community service should not be too brightly visible. We should talk to offenders about their views. I suspect that many offenders who participate in community service—if it is a constructive sentence for them—will want to take some pride in the fact that they are giving something back to the community. We can have visible community service and design that visibility into the programmes so that it does not embarrass people or take away their dignity, but helps to build their pride and dignity. We will have to wait and see what happens in that respect.

The Convener: I come back to something that you said earlier. I was interested in the statistics that Mr Andrews provided that showed that in the course of a year you deal with some 30,000 people who are the victims of violence. In some cases, the violence is minimal, but in others it is considerable. Those of us around this table speak frequently to victims of crime—perhaps the people to whom you have spoken are of a more forgiving nature—but if I were walking along the street at night and an 18-year-old with a history of previous convictions head-butted me and broke my glasses and teeth, apart from the pain and woe caused to me and the considerable expenditure that I would incur, I would expect that guy to be locked up. Would I be wrong to expect that?

David McKenna: Many people share that view, but many victims do not share it. We stand back and see that what is happening is that we are sending people to jail for two, three or four months. That is costing us a lot of money and the people are getting no help or support to change how they live when they come out of prison. Indeed, when they come out of prison they have often lost their home, family and job. So prison is expensive and it does not improve the position of the offender or the victim. Community sentencing costs a lot less, and if it could be even 1 or 2 per cent more effective, we could reduce the level of victimisation that the community might experience in the future, even though it is a challenge to get things right in the immediate period.

In the case of low-level crimes, most people do not want people to go to jail. That is the general experience about which we hear, not from the 30,000 people who suffer violent crime, but from the other 70,000 who suffer low-level property crime. People say to us, "I don't want them to go to jail; I just want to know that it won't happen again." The most common words that come out of victims' mouths are, "I don't want it to happen again." The present system practically ensures that it will happen again and that is the sad part about it.

Cathie Craigie: A majority of MSPs believe entirely in Victim Support Scotland's position on immediacy and that the punishment should fit the crime and should be swift, and that there should be some payback to the community to make amends for the crime that has been committed. However, to achieve those goals—particularly immediacy—there is a cost. We have had oral and written evidence that getting the resources required for the bill's proposals will be difficult. If the bill is passed without additional resources being allocated to it, will it be effective?

12:15

Susan Gallagher: That is the challenge for everybody. The system does not have many resources in place, so it does not necessarily advocate for the needs of communities, victims of crime or even offenders. You are right—if resources are not provided effectively, the bill might not do the best that it could do.

Resources must be available for a variety of measures. Notwithstanding that, some opportunities that are still out there might not cost as much to put in place. Our organisation works in most communities and in the 32 local authority areas. If we are given small amounts of resources, we can work with providers to assist them with victim awareness training, for example. Ways are available now in which we can assist the process in communities. However, our organisation feels strongly that resources need to be in place to enable effective implementation.

David McKenna: I will make two quick observations. The figure depends on how it is counted, but Scotland spends £2 billion on criminal justice. We are not talking about £500 million to get the provisions off the ground. Within the existing spend, there must be ways of doing things differently that will release resources to allow measures to happen.

We need a new dynamic in how we think about the issue. For example, judges and sheriffs can make compensation orders to victims. That does not happen often, sometimes because no victim is discernible. When that is the case, why cannot a compensation order be made in court for use in community payback by the community that the crime has affected? The Procurator Fiscal Service can make compensation awards to victims—in effect, they are fines that go to victims. However, victims often do not want such awards, or no victim is discernible. Why cannot that money be channelled back into the communities that suffered the crimes, to improve their safety and improve life there?

We must start to consider new ways of operating in the future and not just rely on the old ways. Plenty of resources are in the system.

Cathie Craigie: Given that resources will be tight in the next financial year, when we will want to implement the bill, if victims were given the choice between spending £1 million on a quango—the sentencing council—or on front-line services, what would be their priority?

David McKenna: How tempting—let me think. It is clear that investment must be made in front-line services. At the same time, investment must be made in the future.

Cathie Craigie: You cannot have both. What is the priority?

David McKenna: Perhaps we cannot have the Rolls-Royce option in both cases, but the challenge for us is to find something in the middle that invests in today and in the future.

Members will have seen the international statistics and those from Scotland and the UK that show the public's decreasing confidence in their criminal justice systems and their decreasing likelihood of coming forward as witnesses, of reporting crime and of co-operating with the authorities. Dealing with those issues presents challenges for society. To build confidence, we must invest in initiatives such as the sentencing council. Otherwise, what we are talking about today will not matter in 20 years' time, because nobody will co-operate with the criminal justice system or come forward as a witness and communities will look to deal with crime differently.

We must find a way to invest in the future and in front-line services, although perhaps we will not have the Rolls-Royce in both cases. I am thankful that working that out is not my job.

The Convener: That is an honest response.

You make an interesting point about money going into communities as reparation. It would be competent for a court to impose a compensation order if an agency could handle that.

David McKenna: Absolutely.

The Convener: The problem is that most offenders do not pay.

David McKenna: Of course that is correct. However, evidence from the United States and other countries shows that if compensation orders or victim fund orders are used rather than fines, they are far more likely to be paid. Offenders pay more when compensation orders rather than fines are used.

The Convener: All things are relative.

David McKenna: Yes.

The Convener: No great success has been experienced in collecting fines or compensation orders here, but that is for another day.

Nigel Don will close on disclosure.

Nigel Don: It is incumbent on me to disclose that you did not give us evidence on disclosure, so if you want to say nothing, you are entitled to do so.

Rape Crisis Scotland expressed concern that the medical records of victims of sexual offences figure more and more in court proceedings. That was in its evidence and not yours, but as you are here, what are your thoughts on that? Will the bill's proposals on disclosure help?

David McKenna: The bill is a comprehensive one and we focused on the key issues from our perspective. However, we do have something to contribute to the debate on the important matter that you mention. Susan Gallagher will pick that up.

Susan Gallagher: We have given evidence on sexual offences legislation in the past, and we concur with Rape Crisis Scotland's views on medical evidence. If it would be helpful, we are more than happy to send you a written submission on that.

Nigel Don: Given that it is a procedural matter, the more detailed the evidence we receive from those who understand these things, the better.

Susan Gallagher: Okay. That is no problem.

Nigel Don: That would be appreciated. Thank you.

The Convener: As the committee has no further questions, I thank Ms Gallagher, Mr McKenna and Mr Andrews for their attendance this morning and for their exceptionally helpful evidence.

12:21

Meeting suspended.

12:23

On resuming—

The Convener: We resume in order to take evidence from our third panel. I welcome Maire McCormack, head of policy, and Nico Juetten, parliamentary officer, both from the office of Scotland's Commissioner for Children and Young People; Tom Roberts, head of public affairs at Children 1st; and Dr Jonathan Sher, director of research, policy and programmes at Children in Scotland. Thank you for your attendance. We move straight to questions, which will be opened by Angela Constance.

Angela Constance: Good afternoon. Under the provisions in the bill, it will still be possible to deal with children aged between eight and 12 on offence grounds under the children's hearings system. What are your views on that? What further changes, if any, do you seek?

Maire McCormack (Scotland's Commissioner for Children and Young People): Thank you for inviting us. As you would expect, we approach the bill from a children's rights perspective. The function of Scotland's Commissioner for Children and Young People is to promote and safeguard children's rights and to have regard to the United Nations Convention on the Rights of the Child. That guided our approach to our submission.

The bill deems children under eight to lack capacity, as is the case under section 41 of the Criminal Procedure (Scotland) Act 1995, which is left intact, but those aged between eight and 11 are not decriminalised. The bill simply states that they cannot be prosecuted. If a child accepts an offence ground or that is established, there are serious implications under section 3 of the Rehabilitation of Offenders Act 1974. Our office has evidence that there are implications later in life for children who accept such grounds, because the information is still carried when they are looking for employment or want to go to college.

The fact that they accepted a ground as a young child can come back to haunt them.

Tom Roberts (Children 1st): As we state in our submission, the prosecution of children of eight on offence grounds does not fit with the model to which we think Scotland aspires in dealing with young people who offend. We also argue that it does not fit with our international obligations and is not in the best interests of those children, which is the starting point from our perspective.

Dr Jonathan Sher (Children in Scotland): Children in Scotland commends the Government for recommending an increase in the age, but we believe the proposal in the bill falls far short of what could and should occur. Perhaps there was a misunderstanding, because the policy document that explains the intent clearly notes the intention to increase the age of criminal responsibility to 12, but the bill does not do that. It confounds two different things: the age of criminal responsibility and the age of criminal prosecution. We believe that both should be increased. We see no point in, and do not support, splitting the two ages and maintaining a system that regards children in primary 4 as adults if they behave badly. They are not adults, but children.

We recommend that the age be increased to 16, not 12. There is no scientific basis for picking a particular age, whereas there is a scientific basis for understanding that a child's developmental age and their chronological age can be extraordinarily different. All 12-year-olds, 10-year-olds or 14-year-olds are not at the same developmental level and they do not have the same capacity or responsibility. The law ought to reflect a more sensible view.

The age of 12 is arbitrary, as any other age would be arbitrary. It was chosen simply because the UN said that it was the absolute minimum that would not be internationally appalling. I do not think that those were the UN's exact words, but that was certainly the sentiment. However, it is not good enough for Scotland to be internationally compliant. Through the children's hearings system, Scotland deservedly has a reputation for having far more than a minimalist approach to children's rights and wellbeing.

We argue that 16, not 12, should be both the age of criminal responsibility and the age of criminal prosecution. That would dovetail with other things that already exist. The children's hearings system, by and large, operates until the age of 16. Polmont young offenders institution starts to take offenders at the age of 16. Looked-after and accommodated children continue to be so until they age out at 16. Even if 16 is somewhat arbitrary, it is at least consistent with other laws relating to age and the perception of responsibility.

Angela Constance: Dr Sher anticipated my second question, but I would be interested to hear what the other three witnesses think about the age of criminal responsibility and the age of prosecution.

Maire McCormack: The bill is good in that it states that children under 12 cannot be prosecuted. Few children under 12 are prosecuted at present. I think that there have been four such prosecutions in the past four years. We are extremely pleased that the Lord Advocate's discretion in deciding whether to prosecute children under 12 is to be removed, so that no child under 12 will now be prosecuted. That is a welcome proposal.

12:30

Angela Constance: Has the bar been set too high or too low at 12?

Maire McCormack: The difficulty is that the bill has been presented as raising the age of criminal responsibility; in fact, the age of criminal responsibility will remain at eight. As Jonathan Sher pointed out, the UN Committee on the Rights of the Child refers to

"a very low level of age 7"

and to

"the commendable high level of age 14 or 16".

The committee states that setting the age lower than 12

"is considered … not to be internationally acceptable".

Two issues have been conflated. Prosecution is one thing, but capacity, which is not touched on, is also relevant to the age of criminal responsibility. The small group of children between eight and 11 will be immune from prosecution, but there has been no engagement with the issue of capacity. We need to consider whether a child is able to understand the nature and consequences of the crime that has been committed. Our submission focuses on the consequences. The UN Committee on the Rights of the Child's guidance on the subject says that we should engage with the issue of capacity, not set the bar too low, and take into account the child's emotional, mental and intellectual capacity.

Angela Constance: Are you suggesting that splitting the age of prosecution from the age of criminal responsibility is unhelpful?

Maire McCormack: It is very unhelpful, as it conflates two issues. We are dealing with a hugely complex legal construct. Last week, we met to discuss it with a number of experts; we have all found it a difficult issue to tackle. The policy memorandum says that the age of criminal responsibility is being raised, but it is not—it will stay at eight, which is deplorably low. That will have consequences when children go through the children's hearings system on an offence ground. It is good that the age of prosecution is being raised, but the two issues are distinct. We need to ask ourselves whether the bill complies with the spirit of the United Nations Convention on the Rights of the Child. We have made some suggestions that may be helpful. We would like both the age of criminal responsibility and the minimum age of prosecution to be raised.

Nico Juetten (Scotland's Commissioner for Children and Young People): Scotland is a bit awkward on the issue, as there are a number of different concepts around the age of criminal responsibility. At present, we are employing at least two of those. We have a capacity cut-off at eight that the bill does not propose to change in any way. We have what one legal academic has called an age gateway of 16—that is the cut-off after which young people are dealt with through the adult criminal justice system as a matter of standard procedure. We also have a bit of a cut-off on the prosecution of children under 12. It is not as clear cut as the others, but it is clarified in the bill. I understand that, at the moment, children under 12 can be prosecuted only with the express consent of the Lord Advocate. Although that is good to an extent, it is much better to draw an absolute line in primary legislation. Three concepts are in use here at the moment. The bill clarifies the place of one of them, but it does not do much more than that.

Angela Constance: What would you like to see?

Nico Juetten: Essentially, we would like to see the decriminalisation of children under the age of criminal responsibility. That could be achieved in different ways. We could raise the age of criminal responsibility, which would mean that no child would be dealt with in the children's hearings system on an offence ground, with the potential criminal consequences that that entails, such as a criminal record. Alternatively, the Parliament could reconsider section 3 of the Rehabilitation of Offenders Act 1974 and remove the criminal consequences of offence ground referral—I understand that it has the power to do so.

I do not think that we have concluded what is preferable, but we want children who commit offences to be dealt with by the children's hearings system and the underlying reasons for the offences—their needs and so on—to be addressed in the interests of the offender, the wider community and the victim. We do not want children to leave the children's hearings system or any other forum with a criminal record or to be unaware that they might have one.

Tom Roberts: I support much of what has been said. We would certainly prefer the age of criminal responsibility and the minimum age for prosecution to be set at 16. That would fit with international obligations and with a number of other areas of our society, as Jonathan Sher said. Setting 16 as the minimum age would also pick up on how we view the activities of young people under 16 as a shared responsibility between us as a society, the young people themselves and their parents. The fact that children have to stay in full-time education until they are 16 suggests that we as a society regard them as still growing and developing as individuals up to that age, so applying the full extent of the law to those who are below 16 feels incongruous.

Dr Sher: Another point about the congruity around the age of 16 is that section 42(1) of the Criminal Procedure (Scotland) Act 1995 states:

> "No child under the age of 16 years shall be prosecuted for any offence except on the instructions of the Lord Advocate".

The proposal regarding the age of 16 that is before the committee today is therefore not a radical new idea: it is, in fact, normal practice. We think that the law should rise to meet that standard. Fundamentally, we believe that it is not appropriate to label any child as a criminal. Criminal status should be reserved for those whom we consider to be adults.

I will give three quick reasons for that. First, there is not a shred of evidence from Scotland or from any other developed nation that indicates that labelling, punishing and conferring criminal status and a criminal record on children does the slightest bit of good for them as human beings, for society or for making communities safer. Such an approach has no positive consequences for anyone involved; in fact, it makes things worse, because conferring criminal status and labelling a child as a criminal gives that child an identity, and children have a habit of living up to or down to the labels that we assign to them. If we call them criminals, we can pretty much count on their adopting that identity and living down to it. Calling them criminals therefore does not make practical sense in relation to community safety or personal development.

Secondly, people come out again. We are talking about people who can expect to live for more than half a century after whatever happens in response to their behaviour happens. What is likely to produce the best outcome for that next half century of their being among us? There is no evidence that criminalising them will make that a better half century for them, us or our communities.

Finally, it seems to me that, amazingly enough, we can learn something from the States. As my accent betrays, that is where I come from. The American criminal justice system is absolutely not one that Scotland should emulate or want to emulate. However, even in America, where the level of incarceration is appallingly high, someone is not automatically considered for the criminal justice system until they are 18—even 16-year-olds are not automatically considered to be adults. We have to think carefully before creating a society in which a child can behave badly enough to earn adult status but in which there is no corresponding positive behaviour that will result in adult status. Criminality is an adult construction; it is not for children.

Robert Brown: I understand the labelling point and the criminal conviction aspect. However, I would like to ask a technical question about the children's hearings system. What are the implications of the age of prosecution and/or age of criminal responsibility being set at 12, 16 or some other age in between for the children's hearings system in terms of its grounds of referral and any additional powers that it might need? Obviously, children under the ages of 12, 13 and 14 can commit what we would describe objectively as crimes. Does there need to be a kind of offence-type ground, whether we make it a non-offence ground or whatever, that will allow the children's hearing to have adequate competence in these areas? Does the children's hearing require additional powers if the prosecution arrangements are done away with for children under a certain age?

The Convener: If you answer that, Ms McCormack, that will give you an opportunity to respond to the previous question as well.

Maire McCormack: In our submission we suggest that section 41 of the 1995 act should be repealed and that a new non-offence ground should be introduced to allow for children who are under 12 to be referred to the children's hearing—

Robert Brown: That involves situations in which the children have been, in effect, offending, as it were.

Maire McCormack: It would be a behavioural ground that would have no prospect of criminal consequences. We believe that it would be an abdication of our responsibility towards children who exhibit offending behaviour if their needs and behaviours were not addressed. We suggest that work should be done on rehabilitation and that people should focus on putting forward a new ground of referral. I think that that was raised during the discussions on the children's services bill, so it is not a new proposal.

The proposal would also encompass children who were under eight who did something that would be an offence ground at the hearing but who could not go to the hearing because of their age, which would be useful because those children are vulnerable and have deep-seated needs.

Robert Brown: Is there a need for the panel to have any additional powers?

Maire McCormack: Not that I am aware of.

Dr Sher: The submission from the Scottish Children's Reporters Administration offered the same idea, which Children in Scotland supports. We believe that a new, non-offence ground should be added. I want to be clear that Children in Scotland is absolutely not recommending that children who behave badly should be given a free pass or that we should look the other way when that happens.

We care about all children, and the truth is that most of the victims of child-perpetrated bad behaviour are other children. A 12-year-old child is far more likely to give a right kicking to someone who is 10 than someone who is 27. Because we care about what happens to all children, we believe that children's bad behaviour should be handled seriously by the children's hearings system. Children should not be given a free pass. They cannot behave in any way that they like, and there need to be immediate and real consequences if they behave badly. However, the point of those consequences, even if they include being sent to secure accommodation, is not simply to punish them but to find ways of unlocking the door so that those children can have better futures and become law-abiding and productive good citizens. We need to do everything in our power to ensure that that happens. The children's hearings system has a better chance than the criminal justice system does of producing that outcome.

12:45

Stewart Maxwell: I accept what you are saying about there being no free pass and children not being allowed to create mayhem and go free. The children's hearings system has a great role to play, and I am a strong supporter of it. However, surely the fact that we would be retaining section 42 of the 1995 act, which ensures that those between 12 and 15 would be prosecuted only on the direct instruction of the Lord Advocate, strikes a better balance than removing entirely the power to prosecute those under 16 does.

Tom Roberts: I think that that is a question of how we want to set out our approach to young people who become involved in what we would call offending behaviour. Part of what is important is the nature of young people's involvement in offending. The University of Edinburgh's study of youth transitions shows that a lot of young people become involved in what we would call criminal activity in adults but do not carry on that activity when they become adults. That should teach us some lessons about how we respond to young people in those situations. We have already mentioned that, if you mark someone as being criminal, they start behaving like a criminal. A number of studies have shown that we are too quick to criminalise, and that it is more effective to minimise the response and focus on diversion as much as possible.

We are not convinced by the argument that there are some crimes that are serious enough to require referral to a higher court and cannot be dealt with in the children's hearings system, with all its welfare-based provisions.

Stewart Maxwell: I do not want to get into a debate about that, but there have been some exceptionally horrible cases in which children under the age of 16 have committed heinous crimes. I am not sure that the general public would support the line of argument that you just expressed.

Tom Roberts: It is important to design our system based on our approach to the majority of young people, rather than the one or two extreme cases.

Stewart Maxwell: Sorry to interrupt, but is that not exactly what is being proposed? The norm would be for cases to be dealt with through the children's panel system but, on the instruction of the Lord Advocate, certain rare cases involving children between the age of 12 and 15 could be prosecuted. As I asked earlier, is that not the right balance?

Tom Roberts: I do not think that European countries and other countries around the world that do not have that provision are suffering from a major outbreak of youth crime. As Jonathan Sher said, we are not arguing that there should be no response; we are talking about what the starting point for that response should be. I think that the starting point for almost all young people who are involved in criminal activity must recognise that there are significant welfare needs in their background. The better we can respond to those needs, the more likely we are to prevent further reoffending and divert those children from a lifetime of crime.

Stewart Maxwell: At the start, Maire McCormack said that four cases involving children under the age of 12 had been prosecuted last year.

Maire McCormack: In the past four years.

Stewart Maxwell: That is an extremely small number. Does the fact that those cases have arisen—and have been able to be prosecuted because of decisions of the Lord Advocate—suggest that there is a case to be made for keeping the age of criminal responsibility at eight but changing the age of prosecution to 12? If the age of criminal responsibility were changed to 12 as well as the age of prosecution, the possibility of prosecuting cases involving people under 12 would in effect be removed.

I have another quick question. In those countries that have higher ages of responsibility and prosecution—Dr Sher mentioned that it is 18 in the USA—is it not the case that, when a crime has been committed by two people, one over the age of responsibility and the other under it, there can often be an attempt to manipulate the system so that the responsibility is shifted to the younger individual because the punishment element is so much less for them?

Maire McCormack: I will answer your first question first. If you are putting a high-risk offender or a higher-tariff young offender into the community, the community has to feel confident that that is appropriate. When community-based facilities are being promoted, decision-makers have to be reassured that they are appropriate and effective for those offenders. I know that the Scottish Government is doing a lot of work on that. The hearings system also has to be informed about the disposals that are available. It is a real challenge for some excellent organisations, such as Includem, to find resources to invest in such services and in service development, given the current financial climate. The hearings system should be made aware of the disposals that are out there, which can be effective and appropriate. The disposals that are available to the hearings system include secure accommodation for a very small number of young people. I know that the securing our future initiative report looks at improving the secure estate to deal with that very small number. Work is being done, but perhaps the hearings system has to be beefed up to ensure that certain disposals are facilitated.

Dr Sher: I am not persuaded by the argument that just because something has been done means that it was the right thing to do and that we should keep doing it. There have been prosecutions of children under the age of 12, albeit only a handful, but that does not mean that prosecuting them was the right decision. I have no evidence that the outcomes in those situations would encourage a repetition of that process.

Instead of stopping the thinking process at the point at which you say, "Okay, now they're a criminal," we have to take the next step and say, "Now that we've labelled them a criminal, what is the predictable consequence of that and what will happen to them?" Until we can answer that, we will not have the solution. There is no evidence from anywhere that suggests that labelling and treating children as criminals turns their lives round or makes their communities safer. It does not prevent them from reoffending; in fact, it seems to encourage them strongly to adopt that criminal identity. The fact that children under 12 have been prosecuted is not a reason to keep doing it. The evidence of what ends up happening in those cases seems to make a persuasive case for raising the age to 16.

I am now regretting mentioning the US. I did so in the context of the expression in the States that goes, "If I cannot be a good example for you, please allow me to be a horrible warning." The system there is not good and not one that we should emulate, given the effect that it has had on children and young people. My point was simply that, even in the context of a system that is far more deeply flawed than Scotland's system, 16-year-olds are not automatically considered as adults for the purpose of criminal proceedings. That is because there was an agreement between political parties in the US not to make that an issue. The underlying issue in such debates in Congress and state legislatures was that nobody wanted to be the one to raise the age for fear of being labelled soft on crime at the next election. Behind the scenes, a quiet deal was done that that would be taken off the table as an election issue and that something would be done that made sense in the light of the evidence. Although the system in the States is badly flawed, a few parts of it are worth learning from and considering in a Scottish context.

Stewart Maxwell: My point was that there have been unintended consequences when someone changes from being a juvenile to being an adult.

The Convener: Mr Maxwell was also making the point that when there are two accused, of whom one is over and one is under the age of criminal responsibility, lawyers are tempted to ensure that the one who is underage takes the rap—to use the American phrase—thereby allowing the one who is likely to receive a custodial sentence to escape. Is that the case?

Dr Sher: It is certainly the case that the system is routinely and badly manipulated in the States. There is no question about that. If we can avoid such problems in Scotland, that will be fine.

I am smiling, because I am recalling the last time that I had the honour of appearing before the committee, which was to give evidence on the Sexual Offences (Scotland) Bill. We talked about how, when someone crosses an age threshold on their birthday, they suddenly have a very different status, and we considered who would be prosecuted in the case of two people who are on different sides of the age boundary in the sexual offence arena. I will not rehash my testimony, but I remind the committee that the issue of barriers is inherently difficult.

The Convener: You will adopt your previous arguments. We move on to consider the provisions on fingerprint and DNA data, which are causing concern. The issue is fairly straightforward, so we are looking for reasonably short answers.

Bill Butler: Under section 59, the retention of fingerprint and DNA data obtained from children who are dealt with through the children's hearings system will be allowed. The witnesses think that the approach is inappropriate; will you outline your concerns?

Nico Juetten: We think that automatic retention is inappropriate and that retention through the children's hearings system is inappropriate. Those are two separate points, which I will address in turn.

Our overarching principle, which we derive from the UN Convention on the Rights of the Child, is that children who offend should be treated differently from adult offenders, because the same assumptions cannot be made for both groups. For example, is behaviour at one point when someone is growing up necessarily predictive of behaviour at another point? The age and developmental stage of the child matters and predicting future behaviour is not straightforward. That is a background point.

In some cases, it will be necessary to retain a child's DNA profile on the database—

Bill Butler: You are talking about your recommendation in paragraph 6.4 of your submission, which is that the bill be amended to ensure that there is no automaticity.

Nico Juetten: That is correct. We would not want automatic retention, for the reasons that I intimated. However, we accept that for the protection of others—in most cases, other children and young people—it might be necessary in exceptional cases to retain a DNA profile of a young person on the database. We have opinions on how that should be done—

Bill Butler: In your written submission, you suggest that the intervention of a sheriff should be required before a young person's DNA profile can be retained—never mind the extension of powers to retain DNA, which is what the bill talks about.

Nico Juetten: We need safeguards for children. There is no doubt that retention of a DNA profile is significant interference with a person's right to a private and family life, but retention can be justified in exceptional cases.

My second point is about where decisions about retention should take place. The children's hearings system is not the appropriate forum for that. We do not want the system's character to shift significantly towards being more adversarial, with more legal representation. There must be significant legal safeguards if such a level of interference in a child's right to a personal life is to be granted.

Tom Roberts: As the committee heard from witnesses earlier, the debate about the role of DNA in society and how, when and where it should be retained is continuing. I am not sure that it is appropriate to pitch children into the debate at this stage. I am concerned that we are taking action because we can, rather than because we have thought through the gain to society, particularly from a child's perspective.

I am also concerned that the bill does not make it clear what offences would allow for retention of DNA—

13:00

Bill Butler: Perhaps I can help you there, Mr Roberts. I understand that the bill provides for the retention of DNA in cases involving violent or sexual offences. It is very specific about that. We are not talking about blanket DNA retention, which is the route down which our previous panellists seemed to be going. We are bringing practice into line with the ECHR because a particular case in England showed that there was nearly blanket retention in some areas. The retention of DNA must be more specified and targeted in respect of the Scottish disposal. Does that help?

Tom Roberts: It does a little. We have had a lot of debates with people beyond Children 1st about the issue, as it is a difficult one. If there are circumstances in which retention might protect other people—

Bill Butler: Including other children.

Tom Roberts: Absolutely. We would be open to that discussion. However, we do not feel that the bill as drafted or the debate as it is at the moment has brought us to that point. There is the significant issue of a consequence of someone going to the children's hearings system being the retention of their DNA.

Bill Butler: I put it to you that you would have a point were it not for the fact that the bill is very specific about retention being for those children who are dealt with by the children's hearings system for specified violent or sexual offences. Does that help you?

Tom Roberts: There is discussion to be had about the offences that are dealt with by the children's hearings system at the moment. On reading what was in front of us at the time, we did not feel convinced that the argument had been made for the retention of DNA—

Bill Butler: At all?

Tom Roberts: No.

Bill Butler: Okay. That is very clear. What about Dr Sher?

Dr Sher: This is an area in which I can claim not the slightest expertise, so my comments will be short. At stage 1, we think that the principle that makes sense is that there should not be automatic retention of DNA from all children who behave badly at any time. We think that there is more substantive ground for retention on a more targeted, case-by-case basis. We do not have a problem with that.

Bill Butler: That is exactly what you say in your written submission. You state:

> "The policy intent … of specified time limits for the retention and destruction of samples taken from children"

is

> "heading in the right direction."

Maire McCormack: I agree with my colleague and with Tom Roberts. The bill talks about "sexual and violent offences", but that is a broad spectrum and it does not define what those offences are. I know that a working group will be set up to look into that, but we need to consider the definitions. Different agencies have different thresholds and a different understanding of what a sexual or violent offence is. We should be thinking about managing the risk and assessment of the planning, but—

Bill Butler: But you agree with your colleague that there may be certain circumstances in which DNA retention would be an appropriate way forward.

Maire McCormack: As we state in our written submission, sections 16 and 17 of the Children (Scotland) Act 1995 both state that the children's interests are paramount. The UN Convention on the Rights of the Child also talks about the child's best interests. Nevertheless, in certain cases, those must be balanced against other rights. In tightly controlled circumstances, when it is explicit, proportionate and separate from the children's hearings system—which is a welfare-based function and should not be looking at whether a child is a criminal; that is not what it is about—we are very clear that—

Bill Butler: Sure. That is very clear. I would like to move on if I may. Mr Juetten can come back in when I move on.

You have said that you have concerns about something as radical as this proposal. It is quite right for you to have those concerns. Could any of the concerns that you have about the proposal be addressed by specific changes to the provisions in the bill? The office of the Commissioner for Children and Young People has suggested certain amendments in paragraph 6.4 of its written submission.

Nico Juetten: Well, yes. We are asking for the process to be tweaked, if retention goes ahead, because the children's hearings system is not the appropriate place for such a decision to be made if, as we advocate, retention is not to be automatic. There are a few things to be said about the tentative proposal in our written submission. As with any proposal on the matter—which is a wee bit of a minefield, to be honest—there are upsides and downsides. We are aware that the fact that it would involve an additional court process after the children's hearing established an offence ground or that offence ground was accepted is an issue—it would be another big burden and another process to go through. However, at this stage, we accept the need for that process for want of a better proposal for a system that does not put a burden of double jeopardy—if we can call it that; I know that it is not quite precise—on young people. I am trying to say that we need a proper process with proper safeguards for such great decisions.

Bill Butler: Are you saying that one of those safeguards is the interposition of a sheriff in terms of establishing the ground, rather than what the bill suggests, which is simply that the extension should go to the sheriff?

Nico Juetten: I am sorry, can you repeat that, please?

Bill Butler: Well, in your submission, you suggest that the bill be amended so that DNA is retained if

> "(1) the child has been referred on an offence ground; (2) the offence is one of a list of 'trigger offences' … ; these should be serious violent and sexual offences"

and they should be specified, as Ms McCormack said, perhaps by regulation; and

> "(3) the child and their relevant adult have accepted the ground, or it has been established by a Sheriff".

It seems to me that you suggest an additional safeguard there.

Nico Juetten: The reporter will refer the child to the children's hearing on an offence ground, if there is a reason for that. If the child does not accept that ground, it can be referred for proof to a sheriff. That is the process in the children's hearings system as is. After the ground is established, the children's hearing can make a supervision requirement. In essence, the thinking behind our proposal was that, if it is deemed absolutely necessary in the exceptional case of serious violent and sexual offences that the child's DNA should be retained on the database, the police should make a separate application to the sheriff.

Bill Butler: So there should be an additional layer to be gone through and the sheriff should be part of that.

Nico Juetten: Yes.

Bill Butler: Okay, I understand that.

What are the witnesses' views on the retention of fingerprint and DNA data taken from children who are prosecuted in the criminal courts? It is a small number.

Nico Juetten: That already happens for children who go through the criminal courts system. Over the past three years, if I remember rightly, about 500 children under 16 went through criminal prosecution. That is a bit of an aside, but it is relevant. According to the most recent figures, we already have DNA profiles for about 2,500 under-16s on the database. In the same timeframe, we had just below 500 prosecutions, so there is some explaining to be done about how those profiles got on to the database in the first place.

Bill Butler: What is your view, though?

Nico Juetten: The same principles apply as I mentioned in relation to retention as an outcome of a hearing. The process argument would fall by the wayside because it would simply not be the case and there would be legal safeguards. However, we would generally advocate caution in those cases, simply because it is not necessarily appropriate to retain the DNA profiles of children in the same way as we do for adults for the reasons that I have given.

Maire McCormack: Obviously, I agree with my colleague. There is an issue. One of the key principles of the UNCRC is non-discrimination and, currently, a child of 16 who goes through the courts has their profile retained but one who goes through the hearings system does not. As Nico Juetten said, there is an issue with what is currently retained and how it is monitored, whether for minor or more serious offences. I understand that the Coroners and Justice Bill that is being considered down south will introduce a power for the Information Commissioner's office to audit without invitation, so we hope that that will deal with the issue. However, as we say in our submission, a lot of DNA is being retained for a substantial amount of time, but we do not know how long for and why.

Bill Butler: I take that point.

Tom Roberts: As stated in our final comment on the issue in our submission, we advise a strong presumption against the retention of the DNA of children. I would stick by that. Both in the children's hearings system and in the adult courts system, we recognise that a discussion is to be had about where retention of DNA might help other children or other members of the community.

However, I do not feel that we have yet had that discussion in full as a society, so that caution should remain.

Bill Butler: That is very clear, thank you.

Dr Sher: As we believe that no child under 16 should be prosecuted, there is a sense in which this should be a non-issue and we would reassert that principle in this context. As a secondary principle—on this I want to confirm the viewpoint of my colleagues—there should be no automatic retention of DNA. There should be a legislative presumption against the retention of DNA, but a legislative presumption is not a ban. We accept that there will be grounds and times and circumstances in which retention is appropriate and reasonable.

Bill Butler: That seems a wholly reasonable answer, for which I am obliged.

The Convener: Finally, we have a couple of questions on the sexual offences provisions.

Cathie Craigie: Convener, I know that we are pushed for time, so I will put both my questions at once. First, section 33 includes provisions to extend the law on indecent images of children. Are members of the panel happy with those provisions? Secondly, section 34 will apply to computer-generated images. How should the law deal with that issue?

Tom Roberts: We made a number of comments on those provisions. As a general point, we think that legislation needs to catch up with what is happening out there and with how such material is used to promote and justify the abuse of children. That is a significant issue. My only concern—although I am not a lawmaker—about the provisions in the bill is about the need to distinguish between the different purposes behind the creation of images. For example, we highlight the fact that images can be used in medical textbooks. The need to ensure that the law on the distribution of such material can be adequately enforced is an important principle.

We also need to ensure that the law keeps pace with technology. Given that computer-generated images can be used to groom children by suggesting to them that something that happens on their computer must be acceptable, the distribution of such images can cause harm or distress to children and can be just as bad as the other type of material that circulates on the internet. We need to ensure that our laws can deal with that appropriately.

The Convener: Does anyone else have a contribution under this heading?

Maire McCormack: We support the view that has been put forward by Children 1st, but I think that there is an issue with the definition of possession. What that means needs to be clarified.

Cathie Craigie: As those who were present for the earlier discussion will know, we have asked for further information on that issue from the Association of Chief Police Officers in Scotland and the Scottish Crime and Drug Enforcement Agency, which also had some concerns about the matter.

The Convener: As there are no further questions for the panel, I thank Ms McCormack and the gentlemen for their attendance, which has been very useful and is greatly appreciated.

13:13

Meeting suspended.

Criminal Justice and Licensing (Scotland) Bill: Stage 1

10:46

The Convener: Item 4 is continued consideration of the Criminal Justice and Licensing (Scotland) Bill. The evidence taken today will build on the evidence taken on parts 1 to 7 of the bill.

I welcome today's first panel, which consists of Alan McCreadie, deputy director with responsibility for law reform, and Bill McVicar, convener of the criminal law committee, who are both from the Law Society of Scotland; and Ian Duguid QC, chairman of the criminal bar association at the Faculty of Advocates. I thank you for your written submissions, and I assure you that they have all been carefully read.

We will move straight to questions, and I will ask the first one, on the Scottish sentencing council. Mr Duguid, the provisions in the bill that deal with the sentencing council have attracted criticism on the basis that they would undermine the independence of the judiciary. What are your views?

Ian Duguid QC (Faculty of Advocates): I agree substantially with that view. I read with interest the evidence that the Lord Justice General and the Lord Justice Clerk gave to the committee on a previous occasion. They were clearly concerned about the independence of the appeal court in respect of its ability to set the sentencing guidelines that currently operate for everyone who practises in the courts. They also questioned the necessity of having another body, which would be unelected, to provide guidelines. As far as I can see, there are clear difficulties with that.

Like the Lord Justice General and the Lord Justice Clerk, I do not see that there has been an inconsistency in sentencing to the point at which another body is required to set guidelines. They were also concerned with the composition of the body in its proposed form because there would not be a majority of judicial members, which would also be a concern for us. There is also a constitutional question, which it is not necessary for me to get into.

All those observations were substantially well founded. I am not sure that a difficulty currently exists. There was discussion about whether there is a perception that there is inconsistency and the idea that that is perhaps brought about by newspaper reports of sentences that members of the public find difficult to understand, but it is perhaps a matter of understanding more than anything else. One of the most obvious recent examples is the case in England when the judge who was sentencing in the baby Peter case was, by all reports, strictly adhering to guidelines, which he was obliged to follow, but the outcome was, apparently—in the view of the editors of *The Sun* and the *Daily Mail*—totally unsatisfactory.

I am not sure that the setting up of a body that fixes guidelines and causes judges to adhere to those guidelines will really address all the problems that are thrown up by individual cases. The proposed body is expensive—the suggestion is that £1 million will be spent on establishing it and operating it. I question whether that expenditure on the legal system is necessary and appropriate at this time.

The Convener: Thank you. That is very clear.

Bill McVicar (Law Society of Scotland): I agree, in principle, with what Mr Duguid has said. We are concerned to understand what is meant by consistency in sentencing. Two apparently similar cases may attract different sentences for reasons that are particular to those cases; that is the difficulty in applying strict guidelines. The question is whether we want uniform sentences or consistent sentences—and what is meant by consistent sentences. It seems to me that such matters are not properly dealt with in the bill.

The other question is whether the Government is really looking for mandatory sentences of some description—sentences that must be imposed if certain criteria are met. There is an element of concern about the undermining of judicial independence in sentencing when one moves into the field of mandatory sentences. Judges are entitled to have their own personal views of particular cases as long as they act in a judicial way. One judge may take a different view of the gravity of a particular case from the view that is taken by another judge. Are we to say that one or the other of those judges is wrong?

The Convener: You have anticipated what I was going to ask. Could there be local circumstances in which sentencing disparity was appropriate?

Bill McVicar: Absolutely. It is crucial that, in some places, judges have regard to local circumstances in passing sentence.

The Convener: Do you adopt that argument, Mr Duguid?

Ian Duguid: I understand the reasoning for it, and I can think of some examples of local circumstances calling for different courses of action, but it is a difficult matter to reconcile. Fundamentally, people do not want to be treated differently in one part of the country from how they are treated in another part of the country. If there is a fundamental basis for the sentencing, the refining of the sentence can take into account local circumstances—I do not have any difficulty with that—but the creation of differences in sentencing and perhaps even a sentencing commission providing for different local circumstances is not a course that I would endorse.

I understand the basic principle of taking account of different local circumstances. I am thinking of, for example, road traffic offences that occur on the A9. Should the sheriffs who dispose of cases along the length of that route dispose of them differently from sheriffs who deal with such cases in and around the streets of suburban Edinburgh? Of course they should—there is a recognition of the fact that many accidents occur on the A9 and something has to be done about it. I totally agree with taking local circumstances into account for that sort of example, but I do not think that it would be right to set different fundamental principles in different jurisdictions.

Nigel Don: I want to challenge Mr Duguid on the idea that dangerous driving on the A9 is different from dangerous driving on the streets of Edinburgh. It is either dangerous driving or driving without due care and attention—or any other form of words that you would care to come up with—or it is not. That offence will have its own local context in terms of how fast drivers should be going and how much traffic there is around them, but if it is the same basic offence why should it attract a higher penalty on the A9 than in the suburbs of Edinburgh?

Ian Duguid: I am giving you my answer from anecdotal evidence. There has been a recognition that speeding occurs on the A9 and that, notwithstanding the fact that speeding can constitute dangerous driving, speeding in itself should be curbed to a significant extent on that road. The question is whether the penalties that are given in the sheriff courts in Perth and Inverness should be higher than those that are given in Edinburgh. Of course I do not want to suggest that speed is speed and dangerous driving is dangerous driving, but there is anecdotal evidence that the penalties that are imposed notoriously reflect the number of fatalities on the stretch of road—and that is certainly the case in my experience.

Nigel Don: I am quite prepared to believe that that is the case and that research would demonstrate it—we do not need to do the research—but I am still not sure that I could defend it as a matter of policy or principle.

Ian Duguid: I was not trying to defend it—

Nigel Don: Forgive me for interrupting, but if we want to reduce the speed on the A9 we should do it through road engineering or any number of other mechanisms, and not by saying, "If you get caught, the penalty will be higher."

Ian Duguid: I do not think that we disagree about that. What I am saying is that local circumstances are reflected in the imposition of penalties. That is a fact. If you are asking me whether I endorse that principle, my answer is that the fundamental principle of dealing with dangerous driving is that everyone should face the same penalty, but if local sheriffs deal with local circumstances by imposing harsher penalties, that is a matter for them. They can choose to use the discretion that they have. Do the sheriffs in Edinburgh choose to exercise their discretion in the same way as sheriffs elsewhere? The anecdotal evidence is that they do not, but that does not alter the basic proposition that dangerous driving is an offence that carries the same penalty throughout the nation.

Nigel Don: Surely that brings us to the nub of the matter. If sheriffs in Perthshire, Aberdeenshire or wherever take different views—I am still not sure whether you think that that would be a good or a bad thing, but you are not on trial—surely that is wrong. Surely, in principle, the penalty for the offence should be the same throughout the country, albeit that the similarity of offences on different stretches of road might be difficult to measure. Is that not what equity and fairness are about?

Ian Duguid: The answer is yes. I think that the question that we started off with was, "Should account be taken of local circumstances in setting guidelines?" I broadly disagree with that as a principle, but I recognise that local circumstances are reflected every day in the sentences that judges impose. I am talking about sheriffs dealing with their different localities.

If you are asking me whether local circumstances should affect the decisions that are taken, the answer is that they can do that, but I do not agree that, as a matter of principle and across the board, it should be recognised that the sentence for dangerous driving will be X in one jurisdiction and Y in another. I am in favour of a universally applied penalty across the board. If individuals choose to use their discretion to reflect local circumstances and meet local difficulties, that is their business. That is what the discretion of presiding judges is all about.

Robert Brown: I am not necessarily following the line of Nigel Don's argument, but I have a question for Mr McVicar, who defended the discretion of individual sheriffs. Glasgow and Edinburgh sheriff courts have a number of different sheriffs and the different decisions that they make have an effect on whether people plead guilty at certain stages and so on, so the matter is a significant public issue. Do you have a view on how that should be tackled? Would the sentencing council approach, whether it was advisory or of the nature that the Government proposes, be a possible way forward?

Bill McVicar: I am not sure that a sentencing council and guidelines would necessarily deal with the matter. Every judge who imposes a sentence in a case has discretion. Unless we move to a system of mandatory sentences, it will always be possible for a problem to arise between different sheriffs in the same building.

I follow up on what Ian Duguid said with an example. If someone was dealing in drugs in Glasgow, an identifiable range of sentences would apply, but if they were the first person to be caught dealing in dangerous drugs in a small town or village, would the sheriff not be entitled, in the interest of deterrence, to impose a greater sentence? Is that not an example of something that would allow the judge to impose a sentence towards the higher end of the range of acceptable sentences?

The Convener: Gentlemen, you have made your views on the sentencing council clear. If, at the end of the day, it was the will of Parliament that such a council should be imposed, what changes would you suggest that might be beneficial?

11:00

Bill McVicar: With regard to the current proposals, I agree with what the Lord Justice General said about the need for a greater number of judicial members on the council, with a view to drawing on the greater experience of those who are involved in the sentencing process. As a practitioner of the imposition of sentences, that is the principal change for which I would argue.

The Convener: Do you adopt those arguments, Mr Duguid?

Ian Duguid: Yes, I agree with that view. The Law Society's submission identified the question of whether a member of the constabulary counted as a legally qualified person to sit on the council, but that is perhaps a matter of drafting. An issue of more general interest is whether a member of the constabulary should have any place on a sentencing body. Apart from those details, I broadly agree with the Law Society's submissions.

The Convener: Having dealt with the qualities of the constabulary and the issue of sheriff shopping, we turn to serious organised crime, which Paul Martin will deal with.

Paul Martin: Good morning, gentlemen. Are the new offences of involvement in and direction of serious organised crime necessary, given that people can already be prosecuted for conspiring to commit crime or inciting others to commit a crime?

Ian Duguid: No, those provisions are not really necessary; I am not sure that they will add anything to the criminal justice system. We had a brief discussion before today's meeting about the supply of controlled drugs—or drug dealing, as some people refer to it—and we were questioning whether almost every supply of drugs has involvement in serious organised crime as its end result. The supply of drugs is in a sense simply perpetuating an organisation that is both serious and organised, and it is a serious crime.

There is potential for prejudice against an accused person simply by making the allegation that they are involved in serious organised crime. For example, if a jury considers whether a person is involved in the supply of drugs, will it be influenced in any way by a couple of lines at the end of the charge that state that it will be established that that individual is guilty of involvement in serious and organised crime? Where do we draw the line between defining someone as simply a drug dealer and as a drug dealer involved in serious organised crime? It is a difficult distinction to make.

One provision in the bill suggests that the evidence of only one person is required to prove that an offence is aggravated by a connection with serious organised crime. The law as it stands provides for a number of aggravations, such as racially aggravated offences and assault that is aggravated by the seriousness of injury, which each require evidence from only one source. The bill suggests that that will be the case with involvement in organised crime. There are issues to do with whether it is proper for such an aggravation to be addressed by the involvement of one witness and whether that evidence would be an opinion, such as that of a police officer who comes along and says, "Well, as far as I'm concerned, that individual is involved in serious organised crime." Would that be admissible and acceptable evidence? Such issues raise a number of problems, which, if the bill is passed in its current form, are likely to create difficulties and raise matters for the appeal court to resolve.

The framing of the legislation and its exactness is important. Your question was, "Do you think those provisions are really necessary?" From a practitioner's point of view, we question whether something like that really is necessary.

Paul Martin: Why do you think the Government has introduced those provisions? Have you picked up on anything that clarifies its reasons? The reasons must exist: the Government would surely not want to add to the current legal remedies unless something required it to do so.

Ian Duguid: One of the most interesting features of the provisions is that involvement in serious organised crime will carry a maximum sentence of 10 years, whereas directing serious organised crime will carry a maximum sentence of 14 years. One therefore assumes that the bill's drafters were concerned that persons who are in some way remote from involvement need to be picked up by the criminal law. I whole-heartedly agree with that proposition. If the bill's aim is to get to the bigger perpetrators and to the people who direct involvement while remaining at arm's length from crime, I wholly endorse it.

If the bill is trying to pursue persons who have a remote connection with serious organised crime, that is a perfectly laudable objective. That aspect of the provisions is well founded; the issue is whether enough care has been taken in the drafting and whether the bill will create more difficulties than it is trying to solve. Who is envisaged to be

"involved in serious organised crime"?

Is it every person across the board?

Paul Martin: Do the other witnesses want to add to those comments?

Bill McVicar: I presume that the Government is attempting to draw attention to its concerns about serious organised crime. The common law would probably deal with most of the matters that are covered in sections 25 to 28.

The bill seems to provide for two separate issues. First, being involved in offences that are connected with serious organised crime should carry a heavier penalty. That is a laudable aim in its own right, and I have no difficulty with it. Secondly, the bill seems to introduce an offence of directing serious organised crime, which I suppose might be regarded as a new offence. I have not studied the matter in great detail, but the intention might be to add to the law of conspiracy and incitement to commit crime. If so, that is also a laudable aim.

In our submission we expressed concern that section 28, "Failure to report serious organised crime", might be in conflict with article 8 of the European convention on human rights. We drew attention to a German case, which it might be worth considering in due course.

Paul Martin: The witnesses may take it as a compliment when I say that between them they have decades of experience in law. How would you define "serious organised crime"?

The Convener: Is that a question of which the witnesses would have preferred prior notice?

Paul Martin: What would the witnesses say is or is not serious organised crime?

Bill McVicar: The definition in section 25 appears reasonable, in that it draws attention to the fact that certain activities that go on should be regarded as more serious for future purposes. I suppose that the definition will cover activities such as drug dealing and people smuggling—although that is covered under different legislation—and the organisation of bank robberies, for example. The definition is fairly wide.

Paul Martin: Is the definition not as focused as it should be? Will it catch individuals who should not be caught? We heard about challenges in that regard during last week's meeting. For example, the Sheriffs Association suggested that two people who agreed to steal a meat pie would commit an offence that fell within the scope of the bill. Do you agree?

Alan McCreadie (Law Society of Scotland): I certainly think that the definition of "serious offence" as an indictable offence that is

"committed with the intention of securing a material benefit for any person"

is too wide and might need to be amended appropriately. I read the *Official Report* of last week's meeting, when the meat pie example came up. It is clear that it is not the intention of the Parliament—

Paul Martin: So you recognise that, as drafted, the legislation could result in the theft of a meat pie being categorised as a serious offence.

Alan McCreadie: As it stands, section 25 could be interpreted in that way.

Paul Martin: So the wording needs to be improved.

Alan McCreadie: I think that it has to be looked at.

Paul Martin: Do you have any views on the matter, Mr Duguid?

Ian Duguid: I have to say that, after looking at the bill's definition of serious offence and its reference to "material benefit", I am not sure that they cover, for example, a recent High Court case that I was involved in that involved eight paedophiles. That case was charged as a conspiracy, and one could not say that the offence itself was neither serious nor organised. The prosecution's case was extremely well investigated, presented and prosecuted, and it secured the conviction of people whose offence one would think should fall under the definition of serious organised crime. They were, after all, a group of paedophiles who were in contact with one another. I am simply not sure whether the aggravation set out in section 25 would really meet the case in which those individuals were involved.

Would the aggravation of serious organised crime have made any difference to the case? I do not think so. As anyone who listened to the evidence will appreciate, the offence was serious and organised, but it was charged and presented as a conspiracy. The case itself has not yet been resolved with regard to penalties, but I am not sure that it would fall within the scope of the definition in section 25. It presents an unusual difficulty for the drafters of the legislation.

Of course, that is only one example. The fact is that any paedophile ring will try to gain benefit, but only for its members' own corrupted pleasure. Even though most people would view it as serious organised crime, such an offence does not fall within the bill's definition.

Paul Martin: Do you therefore acknowledge that, although politicians talk about wanting to challenge serious organised crime, the fact is that we do not actually know what we mean by the phrase? The public and political view is that it is all to do with the Mr Bigs in the criminal underworld, but our challenge is to define the offence to ensure that we deal with those individuals.

Ian Duguid: I absolutely and fully appreciate the difficulties that you face. After all, you are the lawmakers: you pass the legislation and the courts simply apply the provisions. I also realise that it is difficult for drafters to include within a definition everything that can be envisaged, but you should ask yourself whether the common law already deals adequately and properly with these situations and whether, in that case, we require a statute that in some way restricts what should fall within the definition of serious organised crime.

Paul Martin: What are your views on the concerns expressed by High Court judges and the Sheriffs Association about the potentially very wide scope of the proposed offence of failing to report serious organised crime?

Ian Duguid: I share those concerns. Anyone who reads the press will know what such an offence might cover. It might, for example, cover the relatives of those charged with the terrorist offences prosecuted in London because they withheld information about the individuals' whereabouts and the plans. However, I do not know whether, under this widely framed offence, other persons whose involvement might be more difficult to define are at risk of being prosecuted for something of that nature.

Alan McCreadie: On section 28, Mr McVicar referred earlier to the possibility of a challenge under article 8 of ECHR with regard to the individual's right to privacy. We cited the German case of Niemietz v Germany and I note a reference in section 28(1)(b) to

> "knowledge or suspicion originates from information obtained—
>
> (i) in the course of the person's trade, profession, business or employment".

For the purposes of article 8 of the ECHR, that has been seen as the person's own private business, so there may be potential for a challenge.

Perhaps section 28 is too widely drafted and has unintended consequences. It must be properly considered who the provision is intended to capture.

11:15

The Convener: I suggest that someone is committing the cardinal sin of having their mobile phone switched on. Could we all ensure that our phones are off?

We turn to questions on extreme pornography.

Cathie Craigie: Section 34 of the bill would make it an offence for a person to be in possession of extreme pornographic images. Do the witnesses have any concerns about the scope of the provisions?

Bill McVicar: Our only concern is that there may be unintended consequences for what some people might regard as works of art. We suggest that it is necessary to clarify further the extent to which the definition will operate. Beyond that, we have nothing adverse to say about the proposal.

Cathie Craigie: That point has been raised by other witnesses, so we will pursue it.

Ian Duguid: I have no concerns over and above those that have already been expressed.

Cathie Craigie: The committee is aware that there has been consultation on how the law should deal with computer-generated images, cartoons and drawings that graphically depict children in a sexually abusive way. Should any future proposals to deal with that type of child pornography be extended to extreme adult pornography?

Ian Duguid: I am not sure that there is any great concern about that. Section 52 of the Civic Government (Scotland) Act 1982 deals with images, including what are, I think, described as pseudo-images in cartoon form and constructed in the way that you describe. The law recognises that at present.

Having just experienced a case in which the images were truly dreadful, I have no difficulty with section 34 of the bill. Nor do I have any difficulty with extending the provisions to cover extreme adult pornography. It is only proper that the law deal with such images, including computer-generated images. The difficulty that I can envisage concerns policing the internet, but I have no difficulty with the full weight of the law being applied when a fruitful investigation is undertaken that reveals images of that type. If the law requires to be amended as is proposed so that it reflects the public's attitude, that is perfectly reasonable as far as I am concerned.

Bill McVicar: I agree with Mr Duguid.

The Convener: We now turn to witness anonymity orders.

Bill Butler: Section 66 of the bill will allow judges, in appropriate cases, to order the use of measures to protect the anonymity of witnesses who give evidence in court. Does the Law Society or the Faculty of Advocates have any concerns about the practicality of the proposals or their compatibility with the right to a fair trial?

Ian Duguid: If I am correct, I was initially asked about this some months ago. There was concern that an accused person is generally entitled to see his accuser and to hear the accusations that are being made against him. I offered the view that there is legislation to protect the position of vulnerable witnesses to a substantial extent. I went through the provisions in some detail: safeguards seem to be provided in section 66 against abuse of an anonymity order, which is what a lawyer's concern would be. I have to say that the drafting of the provisions is thorough, as far as I can see. The prosecution of sexual offences is a thorny issue. I fully recognise that provisions for vulnerable witnesses give some protection to persons who claim to be victims. Abuse of anonymity orders is unlikely, given the various safeguards and I accept that there must be limited circumstances in which such orders will be required for a witness to give evidence. The drafting provides sufficient safeguards and I do not have any major concerns about abuse of anonymity orders.

Bill Butler: That is very clear.

Bill McVicar: Our concern related to proposed new section 271N(4)(c) of the Criminal Procedure (Scotland) Act 1995, which says "that the witness" should not be

> "asked questions of any specified description that might lead to the identification of the witness".

One can consider cases in which difficulties might arise from the fact that a witness might have viewed an image in their house and in some cases it is difficult to know whether what the witness says is correct. It appears from proposed new section 271N(4)(c) that the defence would not be allowed to explore that avenue with a witness if it seemed appropriate. I wonder whether that subsection operates in compliance with article 6 of ECHR. If one is not able to explore properly the defence, there is at least a possibility that the right to a fair trial will be denied.

Bill Butler: Is that a continuing worry for you?

Bill McVicar: It is a concern that we mentioned in our written submission and which I mention now with particular reference to proposed new section 271N(4)(c). It might be that if we sat and thought about it more a few other bits and pieces would arise, but the concern might be met by the fact that the court would then prevent the trial from proceeding further if it were based to a fundamental extent on that witness's evidence.

Bill Butler: So there is possibly a need for amendment of that provision.

Bill McVicar: There is, but I do not know how one would go about it. We will be asked to think about amendments later on.

Bill Butler: Indeed—that is why I asked you the question in that particular fashion. There is a possible need for amendment.

Bill McVicar: Yes.

Bill Butler: That is clear. Thank you.

The Convener: We will follow that up in due course. Nigel Don will now ask about disclosure of evidence.

Nigel Don: Gentlemen, I wonder whether we can start not with disclosure of evidence as such, but with defence statements and their mandatory nature or otherwise in solemn cases. The Law Society has indicated clearly that it is against them; does Ian Duguid have any comments to make?

Ian Duguid: I am very much against defence statements.

Nigel Don: Do you feel a need to expand on that?

Ian Duguid: If I understand correctly, the committee that was chaired by Lord Coulsfield, from whom you will no doubt hear more today, did not recommend that defence statements be introduced. They are a concept that is particular to the law of England and Wales and are required there because they do not have the procedures that we have: for example, if it is planned that a special defence will be advanced in the course of a trial, it is required that that be intimated to the prosecution 14 days before the preliminary hearing. The defence statement provision relates to that very same requirement. If it is suggested that a defence such as self-defence, alibi or incrimination will be promoted, notice is required. Our procedures include a preliminary hearing at which the admissibility of evidence is addressed.

All such measures were introduced in 2004, following Lord Bonomy's High Court reforms. We have gone some way towards addressing the issues that defence statements were designed to address in England—I read in Lord Coulsfield's report that they were intended to assist in case management. We have such measures, so I am curious as to whether a defence statement will do anything over and above what we have, other than increase expenditure. If lawyers are going to commit themselves to a document that will be read to a jury and which, if it is not followed, will be the subject of comment by a trial judge, that process will—I presume—incur expense. Is any of it necessary? I was interested to hear that Lord Coulsfield thought that, on balance, it was not, perhaps for the reasons that I outlined. He can explain that more fully.

I am not sure how the measure found its way into the bill. I suspect that it is there because prosecutors think that they would be further assisted. We must ask ourselves whether the measure is necessary to address disclosure matters. I understand that the purpose of the defence statement is to ensure that, if the Crown has disclosed information and possesses further information, it will feel an obligation to disclose that.

Nigel Don: I think that that is the logic.

Ian Duguid: That situation should not arise under the present system. As I said, the system requires notification of a special defence and the holding of preliminary hearings, which do not apply in England and Wales. We can see why the idea was thought to be good for England and Wales, although Lord Coulsfield says that the statements have been found in general to be "late, unspecific and unhelpful."

I do not know how the provision would advance the procedure of disclosure. It would create a further tier that would be likely to delay trials and to cost money through the need for additional hearings and for documents to be drafted. I find nothing in the provision that persuades me that Lord Coulsfield's conclusion is unfounded. In fact, I thought, rather, that his approach and decision were well argued.

Nigel Don: Thank you for distinguishing eloquently between the two legal systems.

I will drag you on to the subject of disclosure. Disclosure is well established and is probably well understood, so I will draw you on to the provisions on non-disclosure. Are you concerned about whether the non-disclosure processes in the bill are compatible with the ECHR?

Bill McVicar: I understand that Lord Coulsfield proposed a relatively informal process of including information on schedules and inviting lawyers to consider whether they would want as a matter of right to see further information that had not been disclosed. However, the provisions in the bill are terribly complicated and they might—

unfortunately—complicate the system more than is necessary. The bill adopts more or less wholesale an English system that does not necessarily sit well with our procedures. That is not a criticism of the English system—the English do things differently from us—but that system would not fit terribly well with our procedures. I do not know whether the proposed special counsel system for hiding information from the defence—that is what it will come down to if the rules are enacted—is compatible with human rights.

11:30

Before I have no more opportunity to speak, I will return to defence statements. Among other provisions, subsection (6)(b) of proposed new section 70A of the 1995 act says that a "defence statement" means a statement that sets out

> "any matters of fact on which the accused takes issue with the prosecution and the reason for doing so".

However, 14 days before a preliminary hearing or first diet in the sheriff court, we do not always know the facts that the prosecution will seek to establish. It is difficult to know how the defence will be able to deal with a requirement to set out

> "matters of fact on which the accused takes issue with the prosecution".

Furthermore—others have said this and I agree—the danger is that, if the accused has to set things out in the detail that seems to be envisaged, their right to silence will be undermined.

Nigel Don: Does the Law Society or the Faculty of Advocates have other concerns on the law of disclosure?

Ian Duguid: No. I recognise that some provisions are necessary. Special counsel, which deals with public interest immunity, is, in a sense, an import from England. I recognise that the matter will have to be addressed in some shape or form. However, there are some questions. Are the proposals balanced? Do they take account of the need for disclosure, which—in statutory form—is appreciated and recognised? Also, are there enough safeguards for withholding of information? Clearly, there will be situations when the information will have to be withheld in the public interest. Some framework has to be provided for that situation.

Nigel Don: I am sure that we will hear a lot more about that.

I turn to witness statements and whether witnesses can refer to the written statements that they or others have made before the trial. Again, the matter appears to be contentious. Will you draw out the arguments or express an opinion on the subject?

Ian Duguid: I am totally against those provisions. Members of the constabulary are concerned about the onus that will be placed on them in taking statements. One probably has to be in practice in our courts to appreciate the frequency with which witness statements are placed in front of witnesses, either because they have forgotten that they gave one and want to see it again, or because they are giving evidence that is different from what is in the statement. Establishing whether the police officer noted correctly the statement can become a challenge.

The proposal is that, before a witness starts his evidence, he should have his statement placed in front of him. Will the accused be able to challenge a witness's credibility and reliability if the witness simply says, "I've said it before, so I'm saying it again. There you are"? The situation could become difficult to monitor accurately.

I am not suggesting that police officers routinely make up witness accounts. However, the bill makes no provision for the witnesses for the accused person—the defence witnesses. Usually, what is defined as a statement is what a police officer has recorded. A police officer does not have a recording facility; he meets the witness and writes down what he thinks that they said. In a rather obscure and odd way, the Scottish courts recognise that account as an admissible statement. However, if one sends a legally qualified solicitor to interview a witness for the defence and he does the same exercise, it is called a precognition, which is inadmissible in accordance with the practice of the courts.

The difficulty immediately arises that the prosecution is placed at an extreme advantage over the defence. The question arises whether the provision will ever be sustained as a matter of fairness to the accused. If prosecution witnesses can have a statement in front of them and read it out, and defence witnesses have no such facility, is that a recognition that defence witnesses are in a different position to prosecution witnesses? Of course it is not.

There is nothing in the bill to address that glaringly obvious difference. Of course, the difference has been brought about because of a recognition by the courts that, when a police officer takes a witness's account, it is a police statement and that, when another person takes a witness account, it is a precognition. The difference is that the court can admit a police statement but not a precognition. Until that difference is addressed, we will sometimes have to try to justify the most ridiculous descriptions. It is said, I suppose, that police officers routinely write down what a witness says. However, police officers, like everybody else, try to paraphrase that so that it does not take an age to complete.

It is a very difficult situation, which, in practice, creates a lot of difficulties for lawyers. The bill's provisions go nowhere near addressing that difficulty; rather, they will compound the difficulty and the difference between prosecution witnesses and defence witnesses. Unless some facility is introduced to deal with defence witnesses, I cannot see that the provisions will make for fairness to the accused in a trial.

Nigel Don: You have made an excellent case for the defence. Thank you.

Ian Duguid: I did not mean to.

The Convener: There is no need to go any further. You do not need to oversell a good case.

Bill McVicar: I respectfully agree with what Mr Duguid says. I also refer you to what the judges say in paragraphs 43 and 44 of their written submission:

> "The Scottish system has traditionally looked with disfavour on the practice of 'trial by prior statement'".

They subsequently address the points that Mr Duguid has made and conclude that

> "As police officers become aware of the greater reliance on evidence contained within police statements, it might affect the manner in which police officers take statements from civilian witnesses".

You might think that that is a good thing, but the judges continue that that would result

> "in a further emphasis being placed on framing the statement in clear and comprehensible terms—whatever language may have been used by the witness when the statement was taken."

The problem is that the statement will not be the words of the witness. Having asked witnesses countless times about the statements that they have given to the police and whether what is contained in those statements is right, I can say that, unless almost every witness in the universe is telling lies about it, the police tend not to write down exactly what the witness has said.

The Convener: I think that that is the practicality of it. The final question is on unfitness for trial.

Bill Butler: Although the written submission from the Law Society generally welcomes the provisions on mental disorder and unfitness for trial, it suggests some changes, including that a volitional test be added to the cognitive test. What changes would you like to be made and why?

Bill McVicar: Rather than unfitness for trial, we are talking about the defence that is presently described as insanity. We suggest that the definition in the bill is too narrow. As our written submission states:

> "To frame the defence of mental disorder solely on a cognitive test rooted in the accused's appreciation of the effects of his or her conduct at the time of the offence does not adequately reflect the variety of ways in which a person's mental disorder might impact on his or her actions … Adding the volitional test to the cognitive test would … more closely reflect the established common law of Scotland and would more appropriately define the situations in which a person should be relieved of criminal responsibility as a result of the effects of mental disorder."

That would not have the same effect with regard to a person's fitness for trial.

Our submission continues:

> "For example, a person who kills his or her children while suffering from a depressive illness may be able to appreciate what he/she is doing and understand that it is wrong in the eyes of the law, but nonetheless be driven to commit the crime by his or her illness. In such a case his or her illness overcomes his or her volition. The Society notes that the Bill does not allow a special defence in these circumstances."

Mental disorders and the law are not comfortable bedfellows in many situations, and it is difficult to find even a couple of doctors who agree about anything in the criminal courts. We are concerned that, if the bill focuses too narrowly on the understanding of the accused person, we may miss cases in which the medical doctors regard a person as being, under the present law, insane.

Angela Constance: I agree with the Law Society's suggestion and I note that the Mental Welfare Commission for Scotland makes a similar point in its written submission.

I want to ask about the thorny issue of people with a sole diagnosis of a psychopathic personality disorder. As things stand, the defence of mental disorder would not apply to those individuals. That is quite right, but I understand that other personality disorders could give rise to the defence of mental disorder. What are the general views of panel members on that? In its submission, the Mental Welfare Commission for Scotland expresses concern about and looks for further clarification on that. It states:

> "The Mental Health (Care and Treatment) (Scotland) Act 2003 … Definition provides that a 'mental disorder' means any illness, personality disorder, or learning disability however caused or manifested".

Ian Duguid: I cannot remember what the question was.

Angela Constance: In essence, I am saying that individuals with the sole diagnosis of a psychopathic personality disorder could not claim the defence of having a mental disorder, but people with other personality disorders could claim that defence. Do you, as legal practitioners, have any issues with that?

Ian Duguid: I recognise that I have no expertise in that matter. I do not think that I have any expertise in it beyond that which members of the committee have. As Mr McVicar said, experience suggests that the law and mental health are difficult to reconcile. I suppose that in the defence of serious crimes, one investigates individuals with mental illnesses, mental disorders and personality disorders. In many ways, practitioners are guided by what the experts say, and I do not think that anyone involved in the law ever tries to intrude on their expertise.

I do not think that I will add anything to the committee's deliberations by trying to answer the question. Angela Constance is right: personality disorders are sometimes difficult to define and name. You are right to express concern if a problem is being established with people with psychopathic personality disorders and other personality disorders, but psychiatrists can probably best explain the differences and how they affect the workings of an individual's mind and their responsibility for criminal acts, for instance. Obviously, the bill addresses the commission of serious criminal acts.

I suspect that I have talked around your question without answering it. It would probably be better to ask an expert such as a psychiatrist the question.

Angela Constance: Okay. Perhaps I should ask a more specific legal question.

Section 117 in part 7 of the bill proposes to insert new section 51A(2) into the Criminal Procedure (Scotland) Act 1995. That new section states:

> "But a person does not lack criminal responsibility for such conduct if the mental disorder in question consists only of a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct."

The Scottish Association for Mental Health has asked for a definition of

> "abnormally aggressive or seriously irresponsible conduct."

As legal practitioners, do you think that a further definition of a psychopathic personality disorder is needed?

Ian Duguid: Examples must be given if the definition is to be enhanced. If the examples are not exhaustive—if you ask any expert, I think you will find that they will not be—it becomes difficult to expand on that definition.

I offer the example of a case that I was involved in quite recently. A young boy ended up killing another young boy by stabbing him in the course of a fight. However, in the days before the fight, the young boy who committed the stabbing had been climbing up on the top of buildings and threatening to throw himself off, had been jumping through the glass partitions of bus shelters, and had been throwing himself at shop windows. Not surprisingly, we consulted a psychiatrist to see what sort of difficulty he had. The psychiatrist described it not even as a personality disorder but as a behavioural disorder, which is less serious. You and I would regard it as seriously odd and extreme behaviour, but it does not come within what the law would require. However, it is right that if you are talking about serious crime and about people who are not fully responsible for their acts, the test must be made comparatively high. In the case of insanity, if you are dealing with people who not only are not responsible but are suffering from a genuine mental illness, that has to be identifiable in the clearest of situations.

Ms Constance is asking me whether the definition in the bill requires expansion: I suspect that that could be done only by giving a limited number of examples. However, unless a psychiatrist could say that the list was exhaustive, I am not sure that the attempted refinement would improve the situation.

Angela Constance: Thank you. I understand.

The Convener: Have you anything to add, Mr McVicar?

Bill McVicar: Not that I could properly set out in comprehensible language.

The Convener: As there seem to be no further questions for this panel of witnesses, I thank the gentlemen very much indeed for their attendance. That was a very useful session.

11:46

Meeting suspended.

11:49

On resuming—

The Convener: Our second panel of witnesses comprises Professor Jim Fraser, who is the director of the centre for forensic science at the University of Strathclyde, and Tom Nelson, who is the director of forensic services with the Scottish Police Services Authority. I should mention by means of introduction that, at the request of the Scottish Government, Professor Fraser reviewed and reported on the operation and effectiveness of Scotland's statutory regime governing the acquisition and retention of DNA and fingerprint data. He reported in July last year.

Welcome to the committee, gentlemen. I do not think that we need detain you too long. We will move straight to questions.

Bill Butler: Good morning, gentlemen. In light of the ruling by the European Court of Human Rights in the case of S and Marper v the United Kingdom, do the proposals in the bill on the retention of fingerprint and DNA data achieve an appropriate balance between law enforcement and the rights of individuals?

Professor Jim Fraser (University of Strathclyde): Yes, I think they do. The main issue relates to the retention of samples from unconvicted people. Proportionality is a tricky issue, because there are not many data to allow detailed analysis. However, when I considered the three-year period, the available data showed that a considerable number of people reoffended during the period. That was a fairly short period, and the study related to serious offences, so the retention struck me as reasonable and balanced.

Bill Butler: Even in cases in which people were prosecuted but not convicted?

Professor Fraser: Yes. The situation seems to conform with S and Marper. The issue in England and Wales was not so much about the right to retain the data of someone who was unconvicted as about the right to retain the data indefinitely. The UK Government argued that the evidence base gave it the right to retain data indefinitely, but that argument was rejected by the European court.

Bill Butler: And any extension would have to be agreed by a sheriff, rather like what happens with a risk of sexual harm order. Is that a fair comparison?

Professor Fraser: A chief constable has the right to ask a sheriff, on the basis of evidence, for an extension of two years. That is a recurrent right; the chief constable can go back and ask for it again. The key point is that there is a legal process, so there is an expectation that evidence will be presented and independently assessed. Those things were missing in S and Marper.

Tom Nelson (Scottish Police Services Authority): I agree with Professor Fraser. The way forward that is being proposed for Scotland is supported by what is coming out of the European court. Scotland is held in very high regard because of how we manage and retain samples on the database. I do not think that we have any fears in that area.

Bill Butler: Thank you for those clear answers.

Stewart Maxwell: Good morning, gentlemen. What is your view of the difference between people who have committed an offence and been sent to jail, and whose DNA has been retained, and people who have accepted an alternative to prosecution, such as a fiscal fine, and whose DNA has not been retained?

Professor Fraser: I did not form a strong view on that; from recollection, it was not part of my terms of reference. The issue of direct disposals came up, and was referred to in my report, but I did not feel that I had the data to make any real sense of that. It strikes me that the purpose of such disposals is the speedy administration of justice. That purpose had not previously taken DNA into account, and I felt that the issue merited more research and more consideration, so I did not express a view.

Tom Nelson: Again, I agree with Jim Fraser. An opportunity may have been missed; we need to be careful, and more work is needed. If more cases take the road of alternatives to prosecution, I will be concerned about losing opportunities to get people's DNA profile and check it against the DNA database. A lot more work needs to be done in this area.

Stewart Maxwell: Do you mean that a lot more work needs to be done to prove the case for retention? Do you accept that it is illogical that DNA is retained in some cases but not in others?

Tom Nelson: I honestly believe that, if we do not have the opportunity to check against the DNA database samples from cases that are dealt with by fixed-penalty notices and fiscal fines, we will miss the opportunity to get matches on the database. We need to view that as a risk to our system.

The Convener: For the uninitiated, can you indicate the cost of taking and storing a DNA sample?

Tom Nelson: There is a cost, but I do not have the figure to hand. It includes the cost of police involvement and the purchase of the swab. At our laboratory in Dundee, there are up to 30 freezers full of samples, so storing samples in the most appropriate way is a significant issue.

The Convener: I will pursue the matter in a different direction.

Paul Martin: I want to return to the previous question and to relate it to the issue of fighting and preventing crime. Mr Nelson, did you make the point that we have an opportunity to prevent individuals who are subject to fiscal fines from committing violent crimes at a later stage?

Tom Nelson: That is the point that I hoped to make. At the end of the day, we know that people have a career in criminal activity. The more intervention we can have earlier on, the better we can assist those individuals, so that they do not become repeat or recidivist offenders. We have an opportunity to help people at an earlier stage.

Paul Martin: Politicians say that they want to get tough on crime and the causes of crime, and to prevent crime. You are suggesting that, by retaining more samples, we could prevent some crimes from taking place in the first place and save resources in the long term.

Tom Nelson: We must look at both sides. We also need to support the people concerned, to help them to leave the career path that they are on. However, if we do not have their samples on a database, we will not be able to detect their involvement in crimes and the public's fear of crime will increase.

Paul Martin: Some concerns have been expressed about the proposal to allow the retention of fingerprint and DNA data from children who are dealt with through the children's hearings system. Why should samples from children who have not been prosecuted in the criminal courts be retained?

Professor Fraser: I was asked specifically to look at that issue, which is complex. It is made especially complex by the particular status of children's hearings, which are not criminal hearings. Nonetheless, I was asked to consider whether there was potential benefit in taking samples from children.

Before I discuss the data, I will comment on the consultation responses. As far as I recall, only one individual objected in principle to taking samples from children. Almost everyone else who responded to the consultation thought that there was some merit in sampling in certain cases, as long as it was balanced in some way and was limited to serious offences. The consultation took place before the case of S and Marper v the United Kingdom was decided by the European Court of Human Rights, and proportionality was a key issue. The general tenor of the responses that I received—from a wide range of organisations—was that the taking of samples from children was legitimate, provided that a balance was struck between infringing on the children's justice system in Scotland and public protection.

12:00

The data that I obtained related more to the management of the Scottish Children's Reporter Administration, so I did not have detailed criminological data. However, it was quite plain that the vast majority of the cohort of children who were dealt with by children's panels—something like two thirds of them—were referred not for an offence but for their own protection or for some other problem. Only about a third of the children were referred for an offence of some kind. Of those, a smaller proportion were referred for serious sexual and violent offences. Those figures relate to what the children were reported for, which was not necessarily what was found by the children's panel or the sheriff. We are talking about very small numbers of children.

In summary, I found that there was general agreement that a small group of those children plainly had the potential to commit violent offences and to develop a criminal career. My aim was to try to identify that small group of children. My recommendation was that a sample should be retained if the child accepted that he had committed, or was found by a sheriff to have committed, an offence in the narrow category of serious sexual and violent offences.

Because the numbers involved are small, and because the offences are serious and involve some sort of judicial proceedings—that is, some process whereby the child is represented—I feel that the recommendation strikes a good balance between looking after the welfare of the very small number of children involved and public protection.

Tom Nelson: I support Jim Fraser's words. We cannot get away from the fact that, although only a small number of people are involved, some within that age group will commit serious offences. The statistics from the database show that those who are aged 17 and under account for just over 3 per cent of the database entries but are responsible for 15 per cent of crime scene matches. They account for a very small percentage, but they are obviously active.

Paul Martin: For clarity, let me summarise the points that have been made. The data would be retained to identify people at an earlier stage of their criminal career both to prevent that criminal behaviour from continuing and to protect the public, who could be affected by that behaviour in the longer term. Is that a fair reflection of what has been said?

Professor Fraser: Let me just add one point. Tom Nelson referred to matches, which are the measured outputs from the database. However, there are some subtleties of interpretation in deciding whether a match becomes a detection and then a conviction. It is important that the data are seen for what they are. A match will not necessarily lead to the resolution of a criminal offence or to someone being convicted in court. However, I accept that general argument as a good summary.

Robert Brown: Taking the slightly opposite end of that argument, I want to ask whether Professor Fraser believes that the stamping of children as criminals by their DNA is actually a good thing. The background to my question is that the definition in proposed new section 18B(6) of the 1995 act—which section 59 of the bill would insert—refers to

> "such relevant sexual offence or relevant violent offence as the Scottish Ministers may by order … prescribe."

That definition could cover not just the serious offences that have been mentioned but any sexual or violent offence, which—we should bear in mind—could go from, at one extreme, murder to, at the other extreme, a punch on the nose. Is that definition sufficiently proportionate in dealing with children under the bill?

Professor Fraser: My intention in the recommendations was certainly not that a punch on the nose would ever merit sampling. I very much tried to identify those children who not only had committed violent or sexual offences but might go on to commit further offences. That brings in the issue of public protection. However, I do not think that such children would be stigmatised or criminalised by the retention of their DNA. If they were criminalised, the judgment would be made either by the children's panel or by a sheriff. The DNA sample would be taken after that and would be retained only in certain cases. Again, I think that the argument comes down to the numbers involved and the proportionality of the measures.

Angela Constance: You made a number of recommendations in your report that did not require legislation. For example, you made suggestions about governance arrangements for fingerprint and DNA databases. What progress has been made in implementing those recommendations?

Professor Fraser: I can speak only generally on that issue. I only know that a committee has been formed to consider governance arrangements and how the outputs from the database can be measured. Tom Nelson might be in a better position to reply.

Tom Nelson: The committee has been set up. Its first meeting will be in June, and it will consider governance and reporting and how we can meet the standards in James Fraser's report.

Within the Scottish Police Services Authority, we already manage other databases, such as the criminal history system. We will use people within our organisation to ensure that the same standards that apply to the other databases apply to the DNA and fingerprint database.

The Convener: As there are no further questions, I thank you for your attendance, gentlemen. The session has been brief but valuable.

12:06

Meeting suspended.

12:07

On resuming—

The Convener: Our next witness is the right hon Lord Coulsfield. The issue of disclosure has caused some excitement in Scottish legal circles, Lord Coulsfield is the author of the "Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland", which has been of great assistance to us.

Welcome to the committee, Lord Coulsfield. We will proceed straight to questions.

Your written submission suggests that it would be useful to set out the prosecution's duty of disclosure at the beginning of the relevant part of the bill. How would you improve the bill to that extent?

Right Hon Lord Coulsfield: As I hope you might have gathered from my written submission, I do not criticise the general approach of the bill in most areas, but I am extremely concerned about the way in which it has been drafted, particularly with regard to the length and complication of proceedings.

You might have seen in today's *Herald* Mr Gordon Meldrum of the Scottish Crime and Drug Enforcement Agency complaining about the potential bureaucratic implications of the bill. In one sense, that is not a well-founded complaint, because the work that will have be done on disclosure already has to be done. The general requirement of disclosing information to allow a fair trial to take place is a requirement that derives from the ECHR and, indeed, our own legal history, going back to the 17th century—even if we did not have the ECHR, courts would still have to grapple with the issue of fair trial. In modern conditions, where so much depends on background investigation, intelligence, the accumulation of detail and scientific evidence, achieving a fair trial in any circumstances requires the prosecution to tell the defence what it knows, whether that helps the prosecution or not.

In that sense, any complaint about work for the police must be regarded with a little care. However, given that there is such a duty on the police, it is extremely important that the ordinary serving officer knows in a clear, direct and simple form what they are supposed to do. That can be reduced to quite simple terms because, essentially, they are required to scrutinise the evidence as they get it and ask whether it will help the prosecution, and also whether it could help the defence, in which case they must record and disclose it.

I am concerned that the drafting of the bill tends to obscure that simple duty. I know that the Association of Chief Police Officers in Scotland has taken up the issue of ensuring that ordinary front-line officers know what they are supposed to do, and is setting up extensive training arrangements, under the supervision of Detective Chief Inspector Laurie, who worked with me on the report. My concern is that the drafting of the bill does not assist the police in fulfilling the obligation.

The Convener: Suppose the bill was passed in its present form. Could you conceive of difficulties in respect of appeals to the court of criminal appeal and, possibly, to Europe on the basis that the wording did not make the obligation clear?

Lord Coulsfield: I am not sure that I can envisage appeals to Europe, but I can certainly envisage a lot of procedural wrangling at the preliminary and, perhaps, trial stages of cases in Scotland.

Contrary to what I intended, the bill introduces a statutory requirement on the police to prepare schedules, which they should give to the procurator fiscal—there are provisions about handing them back and forward and changing them—and the procurator fiscal is statutorily required to hand over schedules to the defence. I can see a lot of scope for wrangling about whether the police have performed their statutory function, before we even get to the question of disclosure by the prosecution to the defence.

The Convener: The provisions seem to be a trifle convoluted. Is there scope for making them simpler, so that they can be more readily understood and the administrative wrangles that you mention can be avoided? For example, could the terminology that is used for the various types of orders—non-disclosure, exclusion and non-notification—be improved upon, and could some of the detail in that part of the bill be dealt with elsewhere in the bill?

Lord Coulsfield: It could certainly be dealt with elsewhere; my view is that a lot of it should not be in the bill at all.

In the report, I made the point that although I recommended the set-up that involves schedules and orders, I do not like it. The criticism that the set-up is cumbersome and convoluted is sound. One ought to have as simple a way of carrying out the task as possible.

The preparation of schedules and so on is only a mechanism to enable the fundamental duty of the disclosure of material evidence to be carried out. As a mechanism, it ought not to be in the bill at all. If anything, it should be in a code of practice that can be agreed. Of course, the Procurator Fiscal Service already has a disclosure manual, which is, to a certain extent, agreed with the police. The requirements should be in a code of practice, because then they can be changed. One hopes that, with time and experience of the disclosure mechanism, the situation will become easier and less fraught.

As I said earlier, fundamentally, the obligation on the police is a simple one. You do not want to confuse that situation with any more detailed rules about what is or is not disclosable. You do not want to divert police officers from thinking about the case in front of them by getting them to look up section 27 or paragraph 35 in a book to find out whether a particular piece of information is subject to disclosure. You want them to understand that, as police officers, they have a duty to consider not only what evidence helps the Crown case but what evidence might be material to the defence case.

I mentioned Detective Chief Inspector Laurie who, as I understand it, is now in charge of preparing training programmes for the police. He has continually made the point that it is a question of good policing; we are not talking about an extra requirement. A good police officer who carries out his duty properly will always be alive to the proposition that he may come across evidence that favours the defence. It is sound policing to note such evidence and to refer to it in information that is passed on.

When it comes to orders, you will appreciate from my report that I have deep concerns about some of the procedures for withholding information from the defence. In my view, issues to do with orders, such as the procedure for making them, the terms of orders and what kind of orders can be made, should all properly be found in subordinate legislation, because one hopes that, with experience, it will be possible to simplify and improve the procedure, so it should be easy to change.

12:15

The Convener: Robert Brown has a question, although, to an extent, you have anticipated it.

Robert Brown: You have made it clear that the present provisions are extremely elaborate. That is emphasised by the fact that part 6 runs to 15 pages. You have suggested that a code of practice would be a better way of tackling disclosure. Do you envisage taking most of part 6 out of the bill and replacing it with your statement of principle and a reference to the code of practice?

Lord Coulsfield: What I suggested in my submission is not necessarily a fully considered piece of drafting, but it sets out what I regard to be the essential principle that must be included in the bill. If that principle is set out, I do not think that sections 85 to 90 are necessary. They could be replaced by one or possibly two fairly short and simple sections.

Robert Brown: There has been a bit of coming and going on defence statements, on which the Government takes a different approach. Do you retain the view that, in most cases, defence statements are not advantageous from the point of view of equity and fairness? If so, how do you anticipate the provisions on defence statements operating in practice if they remain mandatory? What difficulties do you envisage that causing?

Lord Coulsfield: I have not heard any argument that has led me to change the view that I expressed in my report, which is that defence statements are unnecessary in our procedure. Mr Duguid talked about the disadvantage of what is proposed and I think that, essentially, I agree with what he said. The defence statement provisions will add an extra stage of work and expense.

One of the problems of criminal trials is getting people to concentrate on getting on with the evidence. Given that the defence statement is supposed to state any facts that the defence challenges, an advocate depute who was presenting a case and who was not quite sure what to do next might, instead of getting on with the case, be tempted to say, “Why didn’t you say that in your defence statement? What did you really mean by your defence statement?” People might get into a sterile argument about terminology, just as happens, in some cases, with prosecution statements.

Requiring the preparation of defence statements would have a cost in time and expense, and they could cause confusion and delay and add to complexity in the conduct of trials.

Robert Brown: There would also be a loss of focus on what it is all about.

Lord Coulsfield: Yes.

Stewart Maxwell: Are you saying that the Bonomy reforms should be left as they are?

Lord Coulsfield: I have not had the occasion to think about whether the Bonomy reforms as such need to be changed. The issue goes further back than Bonomy, of course. As Mr Duguid or Mr McVicar said, from a very early date Scottish procedure has required certain defences to be stated in advance of a trial as special defences: insanity, alibi, mental disturbance, self defence and so on. England never had any such requirement, and books about English criminal procedure are always talking about the problem of ambush defences—for example, when the defence suddenly produces a witness who says, “The accused wasn’t there”, and the prosecution has had no notice of that. In so far as the defence statement procedure has any benefit in England, it is as a means of catching up with the arrangements that we have had for centuries in requiring certain defences to be specified.

The Bonomy reforms carried the approach further, because they provided a procedure that gives every opportunity for such defences, and points about the admissibility of evidence and so on, to be brought out and considered in advance of the trial. I cannot see how a general requirement to have defence statements will add anything.

Stewart Maxwell: Are the proposed procedures on non-notification orders compatible with ECHR?

Lord Coulsfield: With any luck, we will have a much clearer idea about that by the end of the month. In March, the House of Lords in England heard a case that is concerned not with criminal prosecutions but with control orders under terrorism legislation, under which there is a procedure for the use of special counsel to consider information that is thought not to be suitable for public disclosure. The bill envisages the same sort of procedure, and the same sort of problem might arise. Special counsel were employed in the case and the Court of Appeal, by divided decision—two to one—held that the use of special counsel was compatible with ECHR article 6. The decision was appealed to the Lords, and a decision is expected in the next two or three weeks—I made an effort to get a hint of what the decision might be, but I am afraid that I was not successful.

Stewart Maxwell: Perhaps we should wait, too.

Lord Coulsfield: The issue has been highly controversial and has generated a great amount of academic writing as well as discussion in court decisions. Widely differing views have been held.

If we are asking ourselves whether the proposed system would be compatible with ECHR, the response must be that the system as it has been operating in England has so far survived all the challenges that have been made to it, but one cannot say whether it will continue to do so.

Stewart Maxwell: At our meeting last week, witnesses from ACPOS put forward a strong case that the proposed disclosure regime will create an enormous additional workload and told us how many extra officers or non-uniformed staff would have to be set aside to deal with each case. You suggested that you did not agree with that view. Is there a difference between what the police currently do and what they would have to do under the new regime? Would there be an additional workload? If so, can it be quantified?

Lord Coulsfield: I do not believe that the passing of the legislation will increase the workload. I hope that, with the passage of time, the legislation and the practice under it will reduce the workload or at least make it easier for the police—as they get into the work and get the appropriate training—to perform their duties.

What creates the workload is the existing requirement to ascertain and disclose all material that might be helpful to the defence, to use a broad terminology. I hope that legislation of the kind that I recommend will make it easier for the police because it will clarify in their minds what their job is. I cannot see that there is any way in which the obligation can be fulfilled without a system of back-up and recording, which leads one back to schedules, unless somebody can think of something better.

Stewart Maxwell: Last week, we heard evidence from the police that, when such a system was introduced in England, it led to an exponential increase in the workload of police officers and forces that are involved in investigations. Why are the police arguing that the workload will increase? You said that you do not agree.

Lord Coulsfield: There was a massive increase in the English workload, but not because of the system that was introduced. The increase was due to the decisions in three European cases, which told the police that they had to ascertain, record and report the information. I do not deny that there was a massive increase in the workload in England, as there has been in Scotland. I have every sympathy with the police when they complain about the burdens on them and the difficulty of performing their duties, but those burdens arise as a result of the interpretation of the requirements of article 6 by the European Court. I will qualify that. We tend to blame the European convention on human rights for a lot of things, but as I think I said earlier, under modern conditions the courts and Parliament have to face up to the question of how to secure a fair trial, given the nature and quantity of the information that is involved in a major investigation, and it is difficult to see how that could be done without a considerable investment of time, energy and money by the police.

Stewart Maxwell: Is it fair to say that the bill just provides a framework for what is supposed to happen?

Lord Coulsfield: Yes. As I said, I do not think that the bill is particularly good at providing a clear framework and I would like it to be improved, but the idea is certainly to provide a structure. The police accept that they will have to do what is proposed. If the structure works and police officers are properly trained, that should improve the police's capacity to deal with the burdens that certainly arise as a result of the disclosure requirements.

Paul Martin: Earlier, we heard evidence from Mr Duguid about the quality of the witness statements that the police prepare and provide. Should we consider using information technology more effectively and perhaps using audio or video recording to improve the quality of witness statements?

Lord Coulsfield: I could talk for quite a long time about statements and the way in which modern practice has made them much more important than they were when I started in practice in 1960. Criminal practice has changed since I first appeared in the criminal courts, which was prior to criminal legal aid. For my first case, I got a copy of the indictment just before I got on the train to Glasgow and I saw my client when I arrived at the High Court; we then went into court and started the trial. Statements were virtually unknown then and it was certainly unknown for people to be referred to them. The assumption then was that we assembled our witnesses and went in, and what mattered was what the witnesses said at the trial. However, practice has changed materially since then.

12:30

I listened to Mr Duguid's earlier evidence. He made a particular point when he was answering, I think, Mr Martin, which I want to pick up. One of the reasons for having a provision for witnesses to see their statements is that of fairness to the witness. It has become common practice for a witness to give their evidence in chief, then to be asked questions along the lines of, "Did you say this?" or, "Have you ever said that?" or, "Did you tell a police officer the next thing?" Of course, currently, the questioner has the advantage of having the statement, but the witness has no such advantage, because they have never seen the statement. The witness can perhaps remember talking to a police officer, but they do not know what the officer recorded.

Paul Martin: But the quality of information that the police provide could be improved. We live in a video age, with YouTube and so on.

Lord Coulsfield: One of the ways of improving the quality of police information is by placing more emphasis on something that is already part of police training, which is that—I think that somebody referred to this earlier—they should, so far as possible, write down the witness's actual words. I rather doubt whether video recording would help. We must remember that quite a lot of statements are taken, for example, at eleven o'clock at night on Sauchiehall Street, with a number of people standing—

Paul Martin: Police headcams record such situations. You made a point about resources, but surely we could improve best use of resources to record properly what was said.

Lord Coulsfield: I do not know whether a video camera of some kind could be used in that way, because I have not looked at the issue. However, I know that Lothians and Borders Police is experimenting with a notebook that is essentially a personal digital assistant—perhaps you have heard about that experiment. The advantage of using the PDA, of course, is that it records what the police officer writes on it—I am told that officers' handwriting has greatly improved since they started using that sort of thing—in blocks of text that are locked in after 10 words or so and cannot be changed. If a witness says that they want to correct what they said, the officer must write "Witness corrects the statement" and so on. It seems to me that that has potential for making a big improvement in the quality of police statements.

Nigel Don: Thank you, Lord Coulsfield, for your comment about the ECHR and the upcoming House of Lords decision. Can I ask you whether a House of Lords decision is now as relevant as it undoubtedly once was, or whether, if we are looking for a view on what the ECHR really means, we need a European Court of Justice decision? Obviously, a House of Lords decision is a statement of the view of the House of Lords and is therefore binding where it is binding, but does it actually give us a definitive answer these days?

Lord Coulsfield: No. You are perfectly right that, for some questions at least, the European Court of Justice is the final court. There is still an area of coming and going between Europe and the supreme courts of the various jurisdictions, because, while the European Court essentially interprets the European convention on human rights, the interpretation of domestic law is a matter for the supreme court, which in this case is the House of Lords. There is therefore an area in which the House of Lords still may make a final decision.

Nigel Don: I am sure that that is for another day.

Lord Coulsfield: Yes. In some cases, there is a subtle and complicated relationship between what the supreme court can decide and what the European court decides.

The Convener: While you are here, will you tell us the name of the outstanding case?

Lord Coulsfield: It is the Home Secretary against AF and others—it is reported with initials—and the reference in the Court of Appeal was [2008] EWCA Civ 1148. It appears in the civil judgments because it is not a criminal proceeding but a proceeding under the Prevention of Terrorism Act 2005 for a control order.

The Convener: I thank you very much for coming this morning. It has been extremely useful.

Lord Coulsfield: Thank you very much for giving me the opportunity.

The Convener: Delighted.

There will be a brief suspension.

12:35

Meeting suspended.

12:37

On resuming—

The Convener: I warmly welcome the final witnesses today: Professor Neil Hutton and Dr Cyrus Tata of the centre for sentencing research at the University of Strathclyde; James Chalmers, senior lecturer in the school of law at the University of Edinburgh; and Dr Sarah Armstrong, senior research fellow at the University of Glasgow.

Dr Armstrong and gentlemen, if there is consensus ad idem among you on any of the questions, there may be no need for you to say anything other than that you agree with the previous response.

Bill Butler: Good afternoon, Dr Armstrong and gentlemen. The bill's provisions on a sentencing council have attracted criticism on the basis that they would undermine the independence of the judiciary. What are your views on that claim?

Dr Cyrus Tata (University of Strathclyde): I will try to be brief. In principle, a sentencing council can do the opposite and can be a way of buttressing judicial independence rather than detracting from it, but it all depends on the detail that is in the bill. I have some concerns about the fact that the council that is proposed in the bill appears to report mainly to the Scottish ministers and, to some extent, the Lord Advocate. I would want it to be more distanced from the Executive and perhaps a little bit more accountable to the Parliament. However, in principle, a council could buttress independence if it was set up in the right way. It could provide a buffer between the heat of the moment—in electoral politics or a particular case—and judicial sentencing to enable a more coherent and calm development of policy.

Bill Butler: I am all for calm.

Professor Neil Hutton (University of Strathclyde): I agree with Cyrus Tata. For me, judicial independence means that a judge makes a decision in an individual case. It is entirely appropriate for a body such as a sentencing council to develop a broader sentencing policy or to decide what sentencing should be for particular types of cases. I do not think that that interferes with judicial independence at all; I think, as Cyrus does, that it offers the opportunity for judges to engage with one another and with others in developing a sentencing policy in a more transparent way than they are currently able to do.

Dr Sarah Armstrong (University of Glasgow): I concur with my colleagues on the panel, who are the experts on sentencing councils. I approach the issue more from the perspective of considering prison populations. I cannot speak about the specific mechanics of a sentencing council, but the fact that we seem to send more of our population to prison every year than any other country in Europe does means that something is not right at the sentencing end. To the extent that a sentencing council would improve transparency and coherence—I am not sure that consistency is the only value that should be discussed—I wholly support my colleagues.

James Chalmers (University of Edinburgh): Given that the bill makes clear that the final decision on sentencing is still left to judges, I do not see how judicial independence is undermined.

Bill Butler: All right, that is very clear.

Dr Armstrong mentioned consistency of sentencing. What evidence is there of significant inconsistency in sentencing in Scotland? If there is, will the bill help to address that perceived inconsistency? Mr Chalmers can begin.

James Chalmers: I will have to defer to my colleagues on that matter.

Bill Butler: That is fair enough. Dr Armstrong?

Dr Armstrong: I know that Neil Hutton and Cyrus Tata are responsible for quite a lot of the evidence on consistency and inconsistency, so I will be brief. The judges may not feel that there is any evidence of inconsistency, but are they offering any evidence for consistency? The question suggests that there is a lack of evidence in general, and Neil and Cyrus have dealt with that issue, but if the judges are not sure about the consistency or inconsistency, there seems to be a strong argument to support some sort of mechanism that rationalises the process.

Bill Butler: That is a neat way of turning it round. I do not know what the judges would say, but I can guess.

Professor Hutton: Cyrus Tata and I carried out a study, which I will let him talk about. When proposals for a sentencing council were being drawn up in New Zealand, which has a pretty similar system to ours in that it allows for extensive judicial discretion, a national comparison was carried out. Substantial variations were found, which were unlikely to be attributable to differences in offences and offenders, and some courts were found to be systematically more severe than others. I would guess that if we carried out the same research in Scotland, we would come to similar conclusions.

Bill Butler: Are you saying that there is no research in Scotland?

Professor Hutton: Cyrus Tata will talk about the research that we conducted, which as far as I am aware is the only study of consistency in sentencing in Scotland. Judges talk about individualised sentencing, and how important it is to take account of the facts and circumstances of each case. I agree that that is important, but the other important aspect of justice and sentencing is fairness and treating like cases alike, and judges have no way to define what a like case is.

The onus is on the judiciary to tell us what they mean by consistency, and to explain that in a transparent way to the public. They do not have a language—that is a criticism not of judges but of the structure in which they work—that enables them to talk about consistency. That is why we need guidelines, and the sentencing council.

Bill Butler: That is very clear.

Dr Tata: Consistency should not be the be-all and end-all of our discussions about a sentencing council. It is more interesting to consider what a council could do, such as bolster independence. The issue has come up several times, and it has been claimed that there is not a shred of evidence of inconsistency. The response to that is that there is limited evidence of a degree of inconsistency in the courts, but also evidence of consistency, by which I mean—

Bill Butler: Why is the evidence so limited? Is there a problem in gathering evidence?

12:45

Dr Tata: There are various problems. First, to compare like cases is quite difficult. For example, I do not consider the Government statistics about different courts' rates of custody to be evidence of consistency or inconsistency because, as committee members have pointed out, those are bald statistics.

Bill Butler: So they are of as much use as league tables of school performance—in other words, useless.

Dr Tata: Exactly. They do not control for input. If you do not control for input, you are unable to control for output. The first point is a methodological one.

Secondly, as you are well aware, this is a very sensitive area, and it is natural that people will be somewhat reluctant, or careful, about co-operating with research in this area.

Bill Butler: Do you mean judges?

Dr Tata: Among others. Such reticence would be perfectly understandable, from their perspective.

Bill Butler: Is that not frustrating for you, though?

Dr Tata: It is understandable. As a researcher, one must always understand the pressures that people are under on a daily basis.

Bill Butler: I understand that, but a disinterested observer might say that the judges could be accused of blocking research. What do you think about that? I am not saying that they are guilty of that; I am just saying that they could be accused of it.

Professor Hutton: The study that Cyrus Tata and I did many years ago was at the invitation of some sheriffs. They asked us to consider the pattern of sentencing in three courts. In order to do that, we had to have some definition of consistency. We did that by asking the judges to help us to define consistency. They drew up a way of doing that—in effect, guidelines—and we demonstrated that there was a large degree of consistency but that one or two judges were out of line with the others. It is unusual for judges to participate.

Bill Butler: That is the point that I was just about to make. That is the exception rather than the rule.

Dr Tata: You raise a good question.

As well as the dedicated study that Professor Hutton mentioned, which was conducted some time ago and was a small study, a number of other pieces of research evidence come to mind. One involved the statistical risk of custody instruments that were developed for social work and so on but applied to sentencing. There is a degree of inconsistency, although I am not saying that it is wild inconsistency.

A third way in which inconsistency has been found is through simulation studies. That has been done as part of other, wider research studies, including work that we have done in which we have asked sentencing judges and sheriffs and so on to consider what kinds of sentence they would pass when, for example, they heard a mock plea mitigation about the case.

Fourthly, part of another piece of work that I did was to consider, among other things, the impact of sentence discount case law—recent case law such as Du Plooy and so on. That appears to have been interpreted in relatively different ways by different sentencers. That is not a criticism of individual sentencers; it is the way in which the structure in which one works—

Bill Butler: You would say that the thing to aim for is not uniformity but coherence.

Dr Tata: Indeed. Uniformity is not consistency. It is important that we compare like cases. We are not saying that all house break-ins must get the same sentence.

I want to mention briefly a further couple of pieces of evidence of inconsistency. The fifth is the awareness among practitioners, including sentencing judges and lawyers, of a degree of difference within the same court. All the evidence that I have mentioned goes beyond the defence of localised sentencing. We are talking about sentencing within the same busy court, for example. There is awareness among sentencing judges that if a case goes before another judge, it may well get a different sentence. The simulation studies are sometimes done in private among judges. There is an awareness of that.

Finally, the sentencing information system, which was introduced at the High Court some years ago at the judges' own request to assist them in their pursuit of consistency, showed a degree of variation but a great deal of consistency. The overall picture is rather like a bell curve, with a lot of consistency and some variation.

Bill Butler: That is very helpful. Will the bill help to tackle existing inconsistencies?

Professor Hutton: Well-crafted guidelines, the best example of which is probably the Minnesota guidelines, can help enormously. First of all, given that the range of penalty for an offence can be quite wide, there is scope for a warranted level of disparity—in other words, judges can sentence across a particular band. However, they can always depart from the guidelines. The Minnesota system builds in a 20 per cent departure rate, anticipating that judges will sentence outwith the guidelines in one case in every five and recognising, as judges keep telling us, that cases are very different and complicated and that guidelines cannot capture all of the many factors that have to be taken into account.

That said, guidelines can capture most things and, when judges depart from them, they will be able to give their reasons for doing so. Giving judges something to argue against helps to bolster judicial independence. If they decide to depart from the guidelines in a particular case, they can set out the range of penalties for the crime and then give a clear reason in public for their decision. Unlike the present situation, such a move blends consistency and individualised sentencing in a way that is transparent to the public.

Bill Butler: I am obliged to you for that very clear explanation.

Robert Brown: As you have clearly shown, this is not merely a simple matter of consistency and inconsistency; it is much more complicated than that and brings in many other issues, not least policy making on the basis of research. Are the judiciary in Scotland generally receptive to the idea of taking research on sentencing into account in their determinations and decisions? I guess that that question is for Dr Tata or Professor Hutton.

Dr Tata: I will respond briefly and then pass over to Professor Hutton. Judges are routinely sent research reports, but they are extremely busy people who day after day have to think about individual cases. That is perhaps different from thinking about policy, but there is certainly room for more knowledge transfer, knowledge exchange and so on. A sentencing council would be able to assist in that, particularly if it were genuinely independent from the executive branch of government. I have to say, though, that my concerns in that respect are not shared to the same extent by my colleagues.

Professor Hutton: I am afraid that I do not know whether judges are receptive to research because, as Dr Tata pointed out, it is hard to see how such evidence would help them to make decisions on individual cases. On the other hand, a sentencing council or that kind of body would give judges the opportunity to get together to discuss issues not only with one another but with other people, to consider evidence and to develop sentencing policy for certain kinds of case or offence. As they have no institutional means for doing that at the moment, it is a bit difficult to answer your question.

That said, when I speak privately to judges, they appear to be very interested in research on, for example, the effectiveness of sentencing, but it is very difficult to see how they can take that into account in any systematic way, other than on a case-by-case basis.

Robert Brown: Does that raise the broader question whether we are using prison resources and other resources in the most effective way to achieve certain ends? For example, I was very struck by the tables of statistics in Dr Armstrong's submission, comparing Scotland's use of imprisonment with that of other countries. I wonder whether Dr Armstrong has any view on the suggestion that one benefit of the sentencing council approach might be that, as a matter of public policy, judges and others would be able to consider some of these themes, see whether we are getting best value out of prison and find out what we could do differently.

Dr Armstrong: Yes. At the moment, there is no centralised source of information and no mechanism for co-ordinating sentencing—that is probably what we want more than to tell the judges what to do—so that the prison population is turning out to be more like that of Slovakia than that of Sweden. If judges knew that we are heading towards Transinistria rather than Ireland, they would be surprised and worried. The fact is that it takes quite a lot of digging, on an individual basis, to figure that out. A sentencing council would therefore be an important resource for judges.

I agree with Neil Hutton and Cyrus Tata that, when one speaks to judges individually, one finds that quite a few are interested in research—in fact, they have invited us to do research—yet many others seem not to be aware of the research. It is instructive that the work on sentencing and the sentencing information system that has been done by the centre for sentencing research, which is dedicated to the study of sentencing in Scotland, was not mentioned in evidence when it was claimed that there is no research on the consistency or inconsistency of sentencing in Scotland. There is a mixture of opinions.

Judges would be worried and surprised to discover not only that Scottish prison practice more closely resembles that of an eastern European country than that of a western European country, but that the Scottish prison population is composed mainly of people serving short sentences. Our prison practice is eastern European not because we put bad people away for a long time but because we put so many people away for 23 days.

Robert Brown: Some of what you say points towards the general area of decisions and sentencing guidelines, but quite a lot of it points back to the Parliament and the Executive in terms of the bills that we pass and the administrative actions that are taken in support of the general courts system. Is that right? The sentencing council could be very narrow and deal only with one bit of that rather than having a wider, more general remit of sentencing reform. Is that fair?

Dr Armstrong: Yes, I think that that is right. Whatever evidence exists on the effectiveness of sentencing councils and on the consistency or inconsistency of sentencing, there is no evidence to tell you what values the criminal justice system should ultimately have. That is for the political system of the country.

In talking about consistency, I am reminded that, in the American south, prior to the existence of the United States Sentencing Commission and guidelines, sentencing was incredibly consistent—blacks got consistently higher sentences than anybody else. Consistency in the absence of values inserted into it by the political system is meaningless. That authority and conviction must come from a separate body working in co-ordination with the law.

Robert Brown: Would you like to speak a little on the benefits that a sentencing council could bring? We have begun to get into that area a bit with one or two things that have been said. Dr Tata, do you have any thoughts on that?

Dr Tata: The bill proposes that the sentencing council will prepare guidelines. However, I think that that is the less interesting part of what a sentencing council could do. There is a great deal of consensus around what others have said about the advisory possibilities of a council.

For example, the council could examine the relationship between front-door sentencing and back-door sentencing—release arrangements that will remain and are to do with the Custodial Sentences and Weapons (Scotland) Act 2007, which are problematic. Release has been a problem for us for decades and we have not been able to deal with it properly because front-door sentencing has been left to judges in individual cases whereas back-door sentencing has been given over to the Executive. We must reconsider those types of sentencing together, as a whole, in order to get a coherent policy. That is one thing that the council might do. It might also look at other policy areas, such as the increasing imprisonment of women and the incarceration of children. There is a whole bunch of things that the council might do.

The other thing that the council might do is develop research into public attitudes. Sentencers on a daily basis, quite rightly, say that although they are not led by public opinion they take it into account in some way or other. What do we know about public opinion and public attitudes beyond what the tabloid editors suppose that the public think? How can we find out more about that? Can we also develop greater public confidence in sentencing by providing more information about what goes on? For example, previous research has shown that most people think that rapists are typically given a non-custodial sentence, but that is simply wrong. How do we go about tackling that misinformation and misunderstanding? I have described just a few of the things that a council could do, in addition or as an alternative to issuing guidelines.

13:00

Robert Brown: Your comments are very helpful.

Professor Hutton: With the greatest respect to my colleague—as we always say when we are about to call what someone has said a load of rubbish—I am firmly of the belief that issuing guidelines is a vital part of a sentencing council's role. Guidelines are important because, as I have said before, they enable us to develop a language for talking about consistency in sentencing, which is vital to persuading the public that we are trying to do justice and to be fair. I agree with Cyrus Tata that it is important for a sentencing council to be involved in public engagement, public education and research into sentencing practice. The remit for the council that is proposed in the bill is fairly broad and would allow the council to do many different things. Whether it would do them is a different story and is related to the composition of the council, to which we will return.

James Chalmers: In the absence of guidelines, whether they come from a council or from somewhere else, it is difficult to have a proper public debate about appropriate sentencing, except at the level of individual cases. It would be much more helpful if we were able to have that debate at a more general, abstract level.

Robert Brown: My final question concerns the relationship between the sentencing council and other organisations. Dr Tata suggested that some of the constitutional issues might be overcome if the council's role were advisory. Do panel members have a view on the matter and on the linked issue of the legal effect of any guidelines that might emerge from the council's deliberations?

Dr Tata: I will try to be brief. I am anxious that, under the bill as it stands, the council will not be distant enough from Scottish ministers and the Lord Advocate. We need to put more distance between the two groups. The council needs to be a genuinely independent buffer, to protect judicial independence from the heat of the moment and from future justice ministers, whoever they may be, taking forward—

Robert Brown: Does the point not apply to the Parliament as much as to the Executive? It was suggested that there would not be the same issue if there were more parliamentary control. However, the separation of powers involves three stools—it does not apply only to the Executive.

Dr Tata: Indeed. However, I have less anxiety about the Parliament, simply because the Parliament, by its nature, is a much more open body.

Robert Brown: That is a helpful point.

Professor Hutton: I am less concerned about the issue—I am reasonably comfortable with the provision that the bill makes for the council's independence. I am a little less sure about its relationship with the appeal court, which is left a bit vague in the bill. One body must have the final say. In my view, that body should be the sentencing council, if it is providing sentencing guidelines at a general level. The appeal court can make decisions in individual cases, but broad decisions should be made by the sentencing council. If the appeal court does not like a guideline, it can refer that back to the council.

Robert Brown: Can you elaborate on why you think that the sentencing council should have the final say? The judges take the opposite view and argue that guidelines should have the imprimatur of the assembled judiciary.

Professor Hutton: If there are to be sentencing guidelines, there must be one body—not two—that is responsible for issuing them.

Robert Brown: Why should it not be the appeal court, as has been suggested?

Professor Hutton: If we have a sentencing council whose task is to devise guidelines, it is appropriate that it should have final authority. That preserves judicial independence at a sufficient level, as it allows the appeal court to make decisions in individual cases. The court would be able to say to the council, "The guidelines do not work here—have another look at them." In the States, the commission that is responsible for the guidelines amends them if they are not working in practice.

Nigel Don: I return to the very beginning of part 1 of the bill, which sets out the purposes of sentencing, rather than an overarching principle. Someone—it may have been one of you, but I cannot remember—commented that perhaps we should start with an overarching principle of fairness, before worrying about consistency and coherence. If we started from the principle that the basis of the legal system, from which sentencing must derive, is fairness, would that be a fair point and would it be worth saying?

The Convener: It is appropriate for Professor Hutton to answer.

Professor Hutton: It was probably me who made the comment.

The Convener: It was—that is why I said you should answer.

Professor Hutton: We can try hard to deliver fairness, whereas it is much harder to be sure that sentencing can effectively reduce offending, so we should strive hard to deliver fairness. The first guideline that the English Sentencing Guidelines Council produced was a statement of overarching principles of fairness in sentencing. It is arguable that the Scottish sentencing council's first guideline should set an overarching framework in which to work.

The Convener: That is fair enough.

Cathie Craigie: Section 17 discourages the use of short sentences of six months or under. However, sheriffs have argued to the committee that short sentences can be useful. What are panel members' views?

The Convener: It might be appropriate for Dr Armstrong to lead the response.

Dr Armstrong: When I was at Barlinnie last Monday, I was asked what could possibly be done with all the inmates there who are serving sentences of between 20 and 30 days. That is just about enough time for officers to assess whether a person has a drug problem, will have a housing need when they are released or has family problems, before it is time for that person to go home.

Perhaps the judges might like to take a tour of the prisons, because I have not gained the impression from the people who work in them that six-month prison sentences are effective. The bill specifies six-month custodial sentences. That does not mean that six-month sentences do not work. A six-month sentence in the community that started immediately and involved a project that might relate to the person's drug offending, housing issues or work—

Cathie Craigie: I am sorry—we are talking about custodial sentences now, but we will discuss community sentences later.

Dr Armstrong: I was just making a comparison. When the press report a proposal to eliminate six-month sentences, that suggests that anyone who does something that is not very serious will experience no consequences.

The experience of those who work in prisons is that not much can be done with people who have short sentences. The Scottish Prisons Commission report found the phenomenon of life by instalments, whereby people endlessly serve short sentences of six months or under. They have a lifetime of sentences, but without the programming that is available to people who serve life sentences—they go in and come out and nothing happens, except that they become angrier about being incarcerated for short periods or they lose contact with whatever supportive social contacts they had. Some good research, which the commission's report cites, says that short prison stays are not only ineffective but criminogenic. People are more likely to engage in worse offending after they have been imprisoned than before.

Cathie Craigie: How do you respond to the sheriffs' point that in some cases—such as that of the repeat offender who has had community sentences and fines that have not worked—a short sentence can turn a person's life around?

Dr Armstrong: I have seen no anecdotal or empirical examples of that. I have heard the sheriffs say that, but I would like to see the person for whom that is true. Strathclyde Police's violence reduction unit, which has famously said that it needs more public health workers than police officers, issued a little handout of the story of David—I do not know whether the committee has seen it. The story follows the life of a young man who started by serving short sentences and who ended up as a murderer with a long-term sentence. Such stories are telling. A series of short sentences leads to bad results. If the judges can produce another story—about Mary, for example—in which a six-month sentence causes her to bottom out and turn around, I would be interested in seeing it. I have not seen any such evidence; it would go against pretty much all the international research that exists.

Cathie Craigie: Have you carried out any research on why people are imprisoned for less than six months, such as for periods of 20 or 30 days? For what crimes are such people imprisoned?

Dr Armstrong: I have not conducted any research on that. I am currently doing a project that looks at remand and the use of backdated sentences, which is an interesting phenomenon. Some people do short-term sentences simply because they are on remand. By the time that they get to court, they are sentenced to whatever time they did on remand. The interesting thing about that group of people is that they tend to be remanded not because of the crime with which they are charged, but because of their history: they already have an extensive criminal history, or they were on bail, or they have previously failed to comply with bail conditions. That fits the model of feeling like a last resort, in that the people are remanded and are then given a short sentence. However, to answer your question, I have not done any research on that issue.

Dr Tata: As we discussed previously, for a couple of reasons I am rather more agnostic than Dr Armstrong is on the presumption against sentences of six months or under. If it is so difficult to deal with people who are in prison for short periods of time, the obvious answer—one can hear people saying it—is, "Well, send them to prison for longer if that will help them more." No. The issue that needs to be grappled with is not the length of time, although the six-month limit is problematic because it is not harmonious with the new summary powers for sentences of up to 12 months. Instead, we need to look at what types of cases, broadly speaking, should be imprisonable. If the argument behind the bill is that we should not imprison non-violent, non-dangerous offenders who might simply be feckless, we should focus on those types of cases. We should specify those cases, rather than a limit of six months, because the group of prisoners on sentences of six months or under will include—this will give the tabloids a field day—people who are convicted of dangerous and violent offences. That is what we should focus on.

I will make a couple of quick points about the argument—which I entirely understand—that says, "Look, I have lost patience with this person, who keeps coming back without fulfilling the conditions that are supposed to be carried out. I am at the end of my tether. As a last resort, I have to send this person to custody, even though the initial offence is not one that would warrant a custodial sentence." I can understand that sense of frustration, but we need to ask ourselves what prison is for and whether it should be used to incarcerate people who are not a risk to public safety.

It is sometimes assumed that people who fail to comply with the conditions of a community order do so wilfully. That might sometimes be the case, but an emerging body of recent research evidence shows that quite a large proportion of those people simply do not understand the conditions. Recent research by Dr Nancy Loucks shows that a high proportion of people who are given a community penalty or custodial sentence have quite serious learning difficulties. Such issues might be picked up on even when they are mentioned in the social inquiry report.

We need to be a little bit careful with the argument that says, "We are at the end of our tether, so this person must go to custody." The issue is a little bit more complex than that. In addition, there is no objective standard as to where one might reach the end of one's tolerance and different sheriffs will have different tolerance levels. The issue is a little bit more complicated than that.

Cathie Craigie: Where should the needs of victims be taken into account? The written submission from either Dr Tata or Professor Hutton—as sod's law would have it, I cannot find the relevant paragraph—suggests that the purposes of sentencing should include the issue of fairness. How is it fair to a community not to imprison a person who, without being violent, has been noisy and has engaged persistently in antisocial behaviour, for which fines have already been imposed? If that behaviour goes on and on, where does fairness for the victim come in? Perhaps a short prison sentence might give both the community the respite that it needs and the offender the shock that is needed to change that behaviour.

13:15

Professor Hutton: The problem of persistent but arguably not serious offenders is not unique to our jurisdiction. I accept that not particularly serious behaviour can cause people a lot of distress and trouble in some communities. However, every jurisdiction has the same problems and other jurisdictions seem to find more imaginative ways of dealing with it that do not result in the use of prison.

We have to bring resources into the matter. We have limited resources to spend on criminal justice and must decide how we will get the best value for that money. We have to make difficult choices about how to spend it. Do we want to spend it on putting people in prison for 20 days to give communities a brief respite or should we spend it on work in prison to try to reduce more serious offenders' offending behaviour so that, when they are released from prison—as they inevitably will be—they are less dangerous and less of a threat to the community?

It is about balancing two kinds of damaging behaviour and two different kinds of victims and deciding where best to spend our resources. If you look at it that way, it becomes a slightly different question.

The Convener: I am anxious to get as much out of this evidence-taking session as we can and I stress the need for the answers to be as brief as possible.

Angela Constance: The bill seeks to amend the custody provisions in the Custodial Sentences and Weapons (Scotland) Act 2007 prior to their being brought into force. It is intended that that will help to create an effective regime for managing offenders. What are the witnesses' views on that?

Dr Tata: I have concerns about the 2007 act. I gave evidence to the Justice 2 Committee about the Custodial Sentences and Weapons (Scotland) Bill, which I thought was a pretty poor piece of legislation, as many witnesses said. This bill seems to offer the hope of mitigating some of the worst problems of the 2007 act, particularly the 15-day cut-off whereby the act attempted to bring combined sentences down to 15 days. That was crazy, and it was recognised that that was simply not achievable. Instead, the bill talks about a "prescribed period". The policy memorandum suggests that that will be 12 months but it is not set out in the bill, and I have concerns about that.

The bill mitigates some of the problems of the 2007 act but, in doing so, passes discretion over to the Executive, which is problematic. I return to the point—I am trying to be brief, convener—that we need to consider front-door and back-door sentencing in the round. A sentencing council could help in that. It is the only way that we will be able to deal with the problem of release, which has dogged successive Governments.

Professor Hutton: I agree with that and have nothing to add.

The Convener: You concur with your colleague.

Professor Hutton: Indeed.

The Convener: Does James Chalmers have anything to add?

James Chalmers: I do not.

Dr Armstrong: I agree with Dr Tata.

Nigel Don: That takes us on to alternatives to prison, about which the Scottish Prisons Commission had quite a lot to say. Will the witnesses give their perspective on the suggestions that have emerged for non-custodial, community sentences and whether they will be effective?

Dr Armstrong: I included a section on effectiveness in the materials that I circulated to the committee. What do we mean by effectiveness? Do we mean that community sentences will eliminate the likelihood of someone reoffending? There is some evidence that they will and that they work a little bit better than short prison sentences at doing that.

I have listed in my submission a few factors for when community sentences are at their most effective. They are most effective when they are administered immediately and are clearly packaged or labelled so that they are understandable to sentencers and those who are being sentenced. To the extent that the bill accomplishes those aims, it can be effective. There is some provision in the bill to encourage swiftness and clarity through the single community payback order, although some orders are excepted from that. The current financial climate might make it difficult to implement some of those aspirations.

Nigel Don: I want to pick up on what you said about immediacy. The timescale that is envisaged seems to be that the appropriate officer should be available and the community sentence should start within seven days, which does not seem immediate to me.

Dr Armstrong: You are right; it does not seem immediate to me, either. There is no magic number in the literature that defines "immediacy". The Scottish Prisons Commission considered community sanctions in various jurisdictions and found that in some places "immediacy" means the same day and in others it means within a week. What it does not mean is three to six months, which is the timescale in the current climate, after which there can be a further wait if the programme in which the person is at last allowed to enrol has a waiting list.

In Norway there is a reverse approach. There is a waiting list to get into prison, but community sentences start immediately. There is never a delay to get into a community programme, but when the prisons are full no one else is allowed in. Norway dealt with the resource issue by reversing the waiting list issue.

Cathie Craigie: What happens to the people who are waiting to go to prison?

Dr Armstrong: They stay at home until space opens up in prison for them.

Cathie Craigie: What if the person is a murderer?

Dr Armstrong: There are probably priority prisons, and there are secure—

Cathie Craigie: So there is not a waiting list; there are priority prisons—

Dr Armstrong: There are maximum security prisons. However, people who have been convicted of homicide might wait for a prison place. Bail is allowed for people on homicide charges.

Nigel Don: What do other members of the panel think about the immediacy issue?

Professor Hutton: If punishment is to be effective, the important issue is probably not immediacy after the decision to punish but immediacy after the commission of the offence, which is a different story altogether. How long do people have to wait before they come to court? That is a resource issue.

Nigel Don: That is an interesting perspective.

The Convener: The issue is also whether the offender pleads guilty at the earliest opportunity.

Professor Hutton: Indeed.

Nigel Don: My original question was about the effectiveness of community penalties. Do the witnesses have other views on what is proposed?

Professor Hutton: If judges are to have the capacity to attach a large number of conditions to a community penalty, I would be concerned that the more conditions are imposed, the greater the chance that they will be breached and the person will ultimately end up in prison. There needs to be proportionality of punishment in the context of community penalties. How many conditions will be imposed on a person? Will conditions relate to the seriousness of the offence, or will they be entirely about what is needed to make the offender become a better person or change their life? Such issues are not addressed in the bill.

Nigel Don: Is it fair to say that the Scottish sentencing council will be important precisely in that context? In other words, it will suggest to judges and sheriffs what is appropriate and say how many conditions might be imposed. The council could conduct research into such matters.

Professor Hutton: Indeed.

Angela Constance: Will the bill improve public understanding of community sentencing?

Professor Hutton: Probably not, on its own, but if the sentencing council works well it will be able to do much to improve public understanding.

Dr Tata: I concur with that. One issue is the implementation of the release arrangements, which are regarded as community penalties—although technically they are not. The bill does not make the position clear, which is unfortunate.

The sentencing council has the potential to improve public understanding, but the bill cannot do that and does not make things clearer.

Angela Constance: Is there more that we can do to improve public understanding?

Professor Hutton: Are you asking what the Parliament or the Government can do? I can give you an example of a sentencing council that has taken public engagement and education seriously. The Sentencing Advisory Council in Victoria, Australia, has been energetic in that regard. It runs a "you be the judge" roadshow for schools, trade unions, colleges and other places, at which judges and the community discuss sentencing.

It generates many reports about sentencing practice, it is good at disseminating that information, and it has good relationships with the media. It does not stop scare stories coming out, but it provides positive stories about sentencing, which are difficult to get into the media unless there is a relationship with them. Obviously, individual judges cannot talk to the media on a one-to-one basis, but a sentencing council can take a professional approach to communications and work with judges to communicate things more clearly. The Victoria council is a good example of a body that tries to build public engagement. Things will not change overnight. It is a matter of starting a cultural process that will take much longer.

Dr Tata: I agree. The Victoria council provides an excellent example of how to engage with the public. We also need to try to find out a little bit more about what the public think about specific issues and areas. At the policy level, there must be a two-way street between the public and the council.

The Convener: I have a couple of brief questions for clarification, the first of which is to Dr Armstrong. I thank you very much for your written submission, which is clear about incarceration levels elsewhere, and relates incarceration levels to populations. I am happy to accept the figures, but have you related incarceration levels to offending levels?

Dr Armstrong: No.

The Convener: Why not?

Dr Armstrong: Because the relationship between crime and imprisonment appears in Scotland, as in most jurisdictions, to be weak and not to explain sufficiently prison populations. Last night, Sonja Snacken, who is a professor in Belgium, gave a lecture at the University of Edinburgh in which she considered the relationship between crime and imprisonment. She surveyed research across Europe, which shows that there is less of a relationship between crime and imprisonment than there is between economic cycles and imprisonment or between political factors and imprisonment. In addition, various prison projections that were calculated using different crime versus criminal justice scenarios were included in the 2001 Halliday report on sentencing in England and Wales, and it was found that a change in crime levels has less impact on the prison population than a change in sentencing law.

The Convener: It strikes me that it is a little bit odd that nobody has related the number of people who have been jailed to the number of offences that have been committed, as the number of people who have been jailed is an obvious corollary of that.

Dr Armstrong: It is natural to think that, and that should be obvious. There should be a relationship between how much harm there is in a community and how many sanctions exist in it but, over time, we have found that there does not seem to be a very strong relationship between the two. A graphic in the Scottish Prisons Commission's report shows changes in the prison population. A line goes straight up while the crime rate in Scotland goes up, down or stays stable. The report points out that the prison population has gone up when crime rates have increased, stayed flat and declined. That is an interesting example from Scotland that shows that there does not seem to be a corollary relationship between crime and imprisonment.

James Chalmers: There are two difficulties.

The Convener: I am sorry, Mr Chalmers. I am aware that you have not really—

James Chalmers: I have less to say about sentencing than my colleagues have. It is not my specialist field.

As I was saying, there are two difficulties. One is obtaining comparable data on crime rates across jurisdictions as opposed to data on imprisonment, which can be quite reliably obtained. The second is that it is not clear where that will take us. If we found that the offending rate in Scotland was much higher than offending rates in other countries, we might conclude that more imprisonment was justified, or we might conclude that more imprisonment was not working. I do not know which answer would be correct.

The Convener: We must end the discussion; obviously, we have had to truncate it slightly. I thank the witnesses for coming to the meeting. I am sure that they would be more than happy to respond to any issues that we might ask them about in writing.

The meeting will now continue in private for a brief time.

13:29

Meeting continued in private until 13:32.

Scottish Parliament

Justice Committee

Tuesday 9 June 2009

[THE CONVENER *opened the meeting at 10:13*]

Criminal Justice and Licensing (Scotland) Bill: Stage 1

The Convener (Bill Aitken): Good morning, ladies and gentlemen. Let us get under way. I ask everyone to ensure that mobile phones are switched off. There is a full turnout of the committee and therefore no apologies.

Under item 1, we will take evidence on the Criminal Justice and Licensing (Scotland) Bill. Today's evidence will build on evidence already taken on parts 1 to 7 of the bill. I welcome our first panel who are Mike Ewart, chief executive, and Rona Sweeney, director of prisons, from the Scottish Prison Service. I apologise to Ms Sweeney in particular that this evidence-taking session had to be adjourned a couple of weeks ago because of time. Thank you very much for your forbearance. We also thank Mr Ewart for the submission that he sent in, which enables us to go straight to questions, led by Bill Butler.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, colleagues. As you know, the bill seeks to discourage the use of short custodial sentences in cases in which other appropriate sentencing options are available. What can prisons do with offenders who are sentenced to short periods of custody, and is six months a suitable dividing line between short sentences and other sentences?

Mike Ewart (Scottish Prison Service): It is fair to say that any period has an element of the arbitrary and cannot take account of the particular circumstances of every individual.

There is a strong consensus that six months is an appropriate dividing line—that has been a consistent feature of both academic literature and work in other jurisdictions. On the basis of the evidence that we can adduce from international practice and from the studies that have been done, six months appears to be appropriate.

10:15

Rona Sweeney (Scottish Prison Service): In relation to delivery in prison, there is little that can be done—it varies depending on the individual and the difficulties that they have when they come into prison, and the sentence will reflect any period spent on remand. For people who are with us for a very short time, the focus is around health care—particularly if they have an addiction, in which case we try to give them some support to deal with that. In general we try to build up their health. As I say, what can be done depends on the individual. We follow a process in trying to link people up with the community, but in many ways we are trying to undo the harm that imprisonment has caused.

Bill Butler: So anything other than health care, such as coherent rehabilitation work, is not really possible in sentences of less than six months.

Rona Sweeney: Not generally, no. During those very short sentences we focus on undoing the harm that imprisonment has caused, because we know that many of the protective factors that support someone in not reoffending are damaged by imprisonment. We try to help the individual build bridges back into the community to reduce that harm, but we are not doing anything more elaborate than that by way of offending programmes or something that is focused specifically on reducing the risk of reoffending.

Bill Butler: Does Mr Ewart agree with that?

Mike Ewart: It may be helpful to add that the six-month period that might be the overall length of a sentence is not necessarily the period that the Prison Service has to work with somebody. Often people have served a period on remand, and there may be factors that lead to their being discharged long before the six-month point is reached. Most short sentences are significantly shorter than six months.

Bill Butler: That is very clear.

The committee has received evidence from sheriffs in which they argue that short custodial sentences can be effective and that the current use of such sentences is generally appropriate. Do you have a view on that?

Mike Ewart: It is obviously delicate territory for me to comment on, because I might be taken as questioning a judicial decision, and I do not want to do that.

Bill Butler: It is just a general view that sheriffs have expressed in their evidence. Do you have a general view on their general view?

Mike Ewart: I have had many discussions with sheriffs. I have taken the opportunity to go to sheriffs' training days and discuss issues around imprisonment with them. I am sure that, in the individual decisions that they make, that generality is entirely right. They are, at the point of decision, making what they feel to be the correct decision.

I have heard sheriffs make two collective comments that I would question. The first is that a short period of imprisonment may give relief to the community from which the offender comes.

Although that is, in its own terms, obviously true, it must be balanced against the question whether a short-term sentence does more harm than good, as Rona Sweeney eloquently expressed, and might therefore contribute to further reoffending. Overall community safety might be compromised more by a short sentence, so there is a balance of arguments to be had there.

The second contention that I have heard from sheriffs is that after someone has appeared before them a number of times and has been dealt with by community disposal, which has not worked in the sense that the individual has breached or has failed to complete an element of the requirements of the disposal or has reoffended, they have no choice but to invoke imprisonment. In certain circumstances, that might happen because it is what the law requires.

One question is whether, if a community disposal was appropriate four or five times for a particular offender in particular circumstances, that disposal might still be appropriate if the only factor that has changed is the irritation of the criminal justice system with that character's reappearance.

Bill Butler: Right—that is clear.

Rona Sweeney: I agree with the chief executive. Our focus is to keep in secure custody and to care for all who the courts send us. It is not our public duty to doubt or judge that in any way. However, I am glad that we are having this discussion, because it is our public duty to alert the committee to the limitations of what we can do with very short sentences.

Robert Brown (Glasgow) (LD): I want to develop Mike Ewart's point about whether short sentences do more harm than good. Is it your view that short-term sentences across the board make people worse rather than better?

Mike Ewart: There is a strong consensus in academic and other literature that that is likely to be the case. I think that the McLeish commission used the famous phrase, which came from a Home Office report in the early 1990s, that in such circumstances, prison could be an expensive way of making bad people worse.

One can adduce a number of factors that have been teased out in many pieces of work. The first is that people lose the benefit of what Rona Sweeney called the protective factors: home, employment and family, or relationships more generally. That is a simple fact of what happens when people are sent to prison. As I think I have said previously on public platforms, that impact is rather well captured by the Dutch prison service, whose principal statutory requirement is to undo the harm that is done by imprisoning people in the first instance.

The second factor is the one that is colloquially called the university of crime. People are brought into an environment in which they may be more likely to reoffend when they are released because of the nature of the impact of the imprisonment on the protective factors, and they are exposed to people with more experience, who might coerce them into further activity or simply lead them into association with others who might do that.

Obviously, those factors cannot be traced in every individual case, but I believe that there is a strong consensus that those are the major factors and that that is the outcome.

Robert Brown: I want to challenge that a bit. A number of people who go to prison—whether on short-term sentences or longer sentences—are unemployed, have fractured family links, hang about with a difficult group of people and have a strong sense of alienation because of what has gone on before. Does prison make things worse in that respect? Can the short-shock aspect—the nastiness of going to prison—have an effect on individuals? Can things apply across the board, or do you have to distinguish between individual cases?

Mike Ewart: We very much have to distinguish between individual cases. I might put one case, but there is an alternative case that might apply. If I gave the impression that everyone has a happy domestic environment and a full-time job before they go to prison, you are right to point out that that would be entirely inaccurate. The reality is that, whatever the person's circumstances, they are made more difficult by imprisonment. Perhaps it would be better for me to leave it with that qualification.

The argument has been adduced on the issue of the short, sharp shock, which has been the subject of a practical experiment. A few decades back, that approach was formal policy in England and Wales for quite some time. However, one hears bravado from people in prison, such as: "Now I've experienced prison and I can cope with it. What more can you do to me?"

Robert Brown: In your written submission, you say:

> "Research suggests that early intervention and a care based model is more effective with young people than a justice based approach".

What do you mean by "young people"? Are such approaches also effective with older people? What is the age range of those who go to prison on short-term sentences?

Mike Ewart: That substantive point was also followed through in the Government's consultation paper and has been summarised more sharply in other places. I think that Andrew McLellan, for example, has said on several occasions that prison, which comes at the very end of the process, is the wrong instrument for correcting social ills, which should be dealt with at the beginning of life. That is the nub of the argument.

Young people represent a very significant proportion not only of the prison population but of those who have their first contact with prison. Indeed, the fastest growing group in the rising prison population is young male offenders between 16 and 21 years old.

Robert Brown: I suppose that the nub of my question is whether the mechanisms that you have advocated in your submission work as well with prisoners in their late 20s and other older prisoners as they do with young people. Having worked in the education system, you will know that the children's panel system is based on different principles. Can such principles be applied to the adult justice system and to prisoners who have, rightly or wrongly, reached that point without any early intervention?

Mike Ewart: There are different kinds of intervention. Many of the structured interventions that can be made in the prison setting are based on cognitive behavioural approaches, which could be used equally well with older people outwith the prison system. In other words, there is no specific element of the prison context that makes such interventions effective or not.

Robert Brown: I suppose that my key point is that problems such as overcrowding plague the short-term sentence approach. I appreciate that there are limits on all of this, but if you had more resource, could you be more effective with short-term prisoners—assuming of course that you had them for more than a few days? Moreover, are you able to do anything useful with those on remand, given the number of people who tend to be released after being on remand without serving any additional sentence?

Mike Ewart: I will ask Rona Sweeney to answer your points about remand and the question of people being invited to, but not required to, take part in activities.

With regard to resource, which I take to mean the staff and buildings necessary to give us capacity, I have to say that, given the current restrictions on the building envelope, I would not argue that we could do any more if we had more staff. I would like to have time to consider in an entirely theoretical way the possibility of doing different things with staff and resource. I have seen a number of different approaches that have been taken elsewhere, for example in Norway, where the prison system runs what amount to hostels to allow people to continue their education and work. Such models, which we do not have at the moment, might provide a possible way forward, but I stress that that is purely a germ of an idea in my mind, not a major policy proposal.

Overall, I would be extremely reluctant to argue for an increase in the scale of the prison estate. I want to improve the quality of the existing prison estate and to make some marginal increases to capacity, and we have plans to do that. However, my long-term contention has always been that we already lock up too many people, making ourselves, as a community, less safe as a result. If we build more capacity, that will not provide us with elastic in the system because the extra places will be filled up. That would not result in an improvement in our performance.

10:30

Rona Sweeney: I will deal with the point about remand prisoners. Some of our services are no different, whether a prisoner is on remand or has been convicted, so our remand prisoners are able to access health care services, as you would expect, social work services and addiction services. There is a difference in that, under prison rules, convicted prisoners are required to work. Our definition of work is quite broad and includes other purposeful activities, such as education or attendance at programmes. That requirement does not exist for remand prisoners. Some sites offer those services to remand prisoners when they can, and some remand prisoners accept them, but not all of them. Not every prison can offer remand prisoners such activities because of overcrowding and the fact that spaces are limited.

The Convener: Before we proceed, it might be useful if you could provide the committee with a note—at a date that is convenient to you—of the number of remand prisoners that you have, and of how many of them have been remanded in custody because of a deferred sentence and how many of them are awaiting trial on a summary matter. That would be a useful piece of information to have, if that were possible.

Paul Martin (Glasgow Springburn) (Lab): I invite Mr Ewart to elaborate on the issue of resources, particularly as it relates to prisoners who serve short sentences. How do the resources that are required for prisoners who serve short sentences compare with those that are required for prisoners who serve long-term sentences?

Mike Ewart: In principle, there is no difference between the overall resource requirements for prisoners in the two categories. It might be possible to attribute some marginal additional costs to prisoners on longer sentences who access more in the way of programmes and education, but I do not think that I could put my hand on my heart and say that we could give you a clear breakdown of the figures that you have asked for on the basis of how we allocate our budgets, because they are allocated to institutions and activities, not to categories of prisoner. If it would be helpful to the committee, we could take that question away and see what clarity we could provide.

Paul Martin: In your mind, there is no financial benefit attached to the scrapping of sentences of six months or less. Is the Government wrong to say that that will result in the saving of quite significant resources?

Mike Ewart: That is not what I am saying. I am suggesting to you that if I were to divide the operational costs of a prison or of the Prison Service collectively by the number of customers that we had on any one day, that would not distinguish effectively between prisoners in different categories of sentence.

Paul Martin: Would you like to comment, Ms Sweeney?

Rona Sweeney: I am not sure that I understand your question exactly. Our understanding of the modelling, which I know that the committee will have explored, is that if we were to reduce the number of sentences of six months or less by 50 per cent, that would have an impact on our population of between 250 and 300 people, which would mean that we would still be above the design capacity and would still have overcrowding. We would have to take a significant volume of prisoners out of the system, to the extent that we could start to close prisons, before we could release resources and hand those back to the community. I am not sure whether that was what you were asking about.

Paul Martin: In summary, there are two types of sentence: short and long term. Is one more expensive than the other? Mr Ewart has said that as far as he is aware, without going into the matter in any further detail, he does not think that there is any difference. Is that correct?

Mike Ewart: Calculated on a daily basis, prisoner costs are more or less the same, regardless of length of sentence.

Paul Martin: So if the Government were to move in this direction, the only reason for doing so would be to reduce prisoner numbers. Can you confirm that there is no financial benefit?

Mike Ewart: The purpose of the bill is to try to make better use of the resource that we have. We have advanced the argument that using short-term prison sentences puts the community at greater risk, in aggregate.

Nigel Don (North East Scotland) (SNP): If I understand you correctly, you are reflecting what I have always believed—that almost any business has few costs other than fixed costs and that, regardless of what else it does, it must still pay the bills. If a significantly smaller number of short-term prisoners came through the door, would you spend significantly less time letting them through the door and out again? Is it fair to say that, although that might not change your total fixed costs, because you would have to have the same number of personnel, it would free up a significant amount of time to allow those people to do something else?

Mike Ewart: That is a fair comment. The debate tends to be focused largely on either the average daily population or the peak daily population. At the moment, the figure is about 8,500. You are right to say that that conceals the churn of about 40,000 admissions in the course of a year.

Nigel Don: Are you able to quantify that—not in money, but in man and woman hours? Can you calculate how the reduced churn converts into man hours that are available for doing other, more productive things in prison?

Mike Ewart: I will defer to greater experience.

Rona Sweeney: We could do such a calculation. I understand that each year we have more than 8,000 receptions of prisoners with sentences of six months or less. The process varies a great deal, because we try to be as person focused as we can. It is a vulnerable time for individuals. Prison staff are alert to the fact that people are vulnerable, especially to self-harm. Care must be taken with those who are addicted to substances, until our health care teams are able to understand the complexities of their situation. The vulnerability of prisoners is such that many sites have a first-night-in-custody centre, where we can focus our attention much more acutely on those who have just come through our doors, as we may not know much about them or understand their complex needs.

We could do more modelling. The reception process varies a great deal, because it is focused on individuals. It tends to take between 20 and 50 minutes per individual, depending on their needs and how well we know them. I can explore the issue further, if the committee would like.

The Convener: That would be helpful.

Nigel Don: It would be hugely helpful.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): The bill establishes a presumption against sentences of less than six months and shifts the emphasis from criminal justice services to local authorities and community partnerships. In its written evidence, the Convention of Scottish Local Authorities states that it

> "is very clear that for the provisions of the Bill to be implemented effectively in relation to the criminal justice

> elements of the Bill there is a need for a radical shift of resources."

I take from that that COSLA envisages resources being transferred from organisations such as the Scottish Prison Service to local authorities, which will be responsible for implementing community payback orders. However, this morning you have suggested to the committee that, although there may be a reduction in the number of people coming through the door, work will continue to have to be done and there will be no scope for shifting resources. Is that a fair interpretation of your position?

Mike Ewart: That is a bald summary, but it is the nub of the issue. I discussed the issue in precisely those terms with the conveners and chief officers of the community justice authorities at a meeting earlier in the year. We all share an ambition to shift resource from strong dependence on a wholly penal solution to a much stronger system of community disposals. In addition, an even bolder statement is that we want to shift resource from the end of the process to earlier in individuals' lives.

However, the real challenge is not in persuading people that community disposals are a good idea—there is an obvious groundswell of support for that proposition—but in managing the transition to them. During the period in which effective community disposals and interventions are built up and crucial confidence in them is developed, so that we collectively feel that that is the appropriate route, we will still have to maintain the required resource for keeping more or less the current population running through the prison system. There will not be a major shift of population until that confidence is established. The transitional arrangements will be the real challenge. Henry McLeish and his colleagues on the Scottish Prisons Commission made their view clear. Certainly, Mr McLeish made it clear in his public statements that the proposition that he advanced would have a transitional cost.

The Convener: We now turn to the potential impact of the Custodial Sentences and Weapons (Scotland) Act 2007: Angela Constance will lead.

Angela Constance (Livingston) (SNP): The bill seeks to amend the custody provisions in the Custodial Sentences and Weapons (Scotland) Act 2007 prior to those provisions being brought into force in order to help create an effective regime for managing offenders. What are Mr Ewart's and Miss Sweeney's views on that?

Mike Ewart: Our principal concern about implementation of the original propositions in the custodial sentences part of the 2007 act was the inevitable impact that it would have on an already overcrowded prison system, particularly because it would introduce people who would—unlike the group whom we have just been discussing—serve substantially longer sentences and so would be in the system longer, which would keep the numbers high. We discussed that prior to the enactment of the 2007 act, and we continue to follow it through. Rona Sweeney might want to add to that more general observation.

Rona Sweeney: The challenge for us will be the risk assessments, because we are not yet clear what they will look like. Until we understand the sentence lengths, it is difficult for us to say much.

Angela Constance: Do you envisage that the amended provisions will, once they are brought into force, impact on resources—for example, those for risk assessments?

Rona Sweeney: Until we understand where the line will be drawn and what the risk assessment will look like, we do not know.

Angela Constance: Mr Ewart—do you have anything to add?

Mike Ewart: No. In this case, we are in territory that we must explore as the work is done.

The Convener: We proceed to community justice authorities.

Stewart Maxwell (West of Scotland) (SNP): The committee has heard evidence that some community justice authorities have been proactive in engaging with the Scottish Prison Service and with other relevant authorities and agencies in order to provide continuity of treatment and support to offenders once they are released. We heard about that from one particular CJA. In your experience, does that level of engagement apply throughout the country in all prisons?

10:45

Mike Ewart: From my point of view—I think it will be the same for my colleagues—contact and interaction with the community justice authorities have happened across the board and have been positive. When the community justice authorities came into being, we established a system of liaison officers to facilitate the relationship between the CJAs and the Scottish Prison Service. We have had a useful series of bilateral exchanges with individual CJAs on, for example, the development of the specification for the new prison for the north-east. More generally, in a meeting with members of the SPS board and CJA conveners and chief officers, we had an extremely helpful and open discussion about the strategic issues that we face together.

There is contact not just with the liaison officers or at board level, but between establishments and their CJAs. We hope to see that continue as we develop, through discussing with the CJA partners the community-facing prison model. I was properly upbraided for using such jargon previously. We are trying to see whether we can develop a prison that will deal with more of the community's total imprisoned population closer to home.

Rona Sweeney: The level of contact between individual sites and their CJAs reflects the extent to which a prison's population is also the CJA's population. In some sites, where the large majority of prisoners are local—such as in Greenock prison before, and even since, it took women prisoners—there is very close liaison with the CJA. I know that the governor at Greenock has a number of priorities in her planning documents that have been generated through her dialogue with the CJA.

In prison sites such as Shotts, where prisoners come from all over the country, there is less active involvement with the CJA. There is still contact, but there is less of an overlap of interests.

Stewart Maxwell: The relationship between prisons and CJAs seems to be working positively and reasonably well across the country. It is working particularly well in prisons that deal with a local population, but there are difficulties. Perhaps more work has to be done in prisons that deal with people from throughout the country.

Rona Sweeney: Yes.

Stewart Maxwell: How can things be improved?

Rona Sweeney: One of the important things that we have for prisoners is the link to individual social work departments and social workers. There is a process of integrated case management for prisoners, which is a bit like the annual appraisal process in which one might be involved in the workplace. There is an annual case conference, attended by the prisoner's supervising social worker from their home area, either in person or by videolink. We have links other than direct links through the CJA that can help to bridge the gap for individuals when they go back into the community. As the chief executive said, we are committed to developing community-facing prisons wherever we can, so that prisoners are closer to their home areas and to services there.

Stewart Maxwell: Does the system work better with longer-term prisoners than it does with shorter-term prisoners? Is there a particular difficulty with the relationship between the prison and the CJA, the support network and the treatment that offenders receive when they leave prisons where prisoners are on short sentences?

Rona Sweeney: Yes. The model that I have just described is for long-term prisoners. There is an on-going commitment to them, because they leave on a supervised basis and will have support from someone in the community.

For short-term prisoners, we do something less elaborate; we have what is called a community-integration plan. Basically, service providers are asked to make links. The housing people in the prison will therefore make links to housing people in the community. The process is less formal and less structured.

Mike Ewart: There is, in respect of people who serve short sentences, a relevant issue that is not specifically for us to address. I know from our partners in housing and social services—to which Rona Sweeney referred—that one of their challenges is that they might start the process of creating an integrated plan for a prisoner to whom they have been introduced, but not have time to provide many back-up services before that individual enters the community.

Stewart Maxwell: I want to move on to another issue. In the weeks in which we have considered the bill, we have discussed the make-up of the sentencing council. What are your views on comments that have been made about the SPS being represented on the proposed sentencing council because of its obvious experience of, and involvement with, the impact of sentences?

Mike Ewart: I will give a purely personal response—there is no policy response to give the committee on behalf of the Government. My strong preference is that the Prison Service be one of many sources of potential advice to the sentencing council on questions that it might wish to address to the Prison Service. However, there are two reasons why it would not necessarily be appropriate for the Prison Service to be formally represented on the sentencing council. First, we are required to discharge the lawful warrant that is the outcome of a sentence. Secondly, unlike some other organisations that take part in such discussions, we are part of Government and could be seen to be directed by ministers. I do not think that such a position would be helpful for us or for the sentencing council.

Stewart Maxwell: In your view, it would be helpful if the Prison Service acted through a formal method or some other method as an advisory and information service to the sentencing council.

Mike Ewart: I hope that we would be asked to provide advice.

Stewart Maxwell: Ms Sweeney, do you have a contrary view?

Rona Sweeney: No—I agree with Mike Ewart.

The Convener: I thank Mr Ewart and Ms Sweeney very much for their attendance. Their evidence has been extremely helpful.

10:52

Meeting suspended.

10:53

On resuming—

The Convener: I welcome our second panel of witnesses, which consists of Councillor Harry McGuigan, who is the Convention of Scottish Local Authorities' community wellbeing and safety spokesperson, and Mike Callaghan, who is a policy manager for COSLA. We have received COSLA's written submission, which is extremely helpful. It enables us to proceed immediately to questions, which will be led by Nigel Don.

Nigel Don: Good morning, gentlemen. Thank you for coming to the meeting.

I know that some of my colleagues want to talk to you about community payback orders and their content. I will therefore avoid that matter for the moment.

In your written submission, you suggest that it will be important for the proposed sentencing council to work alongside community justice authorities to ensure that community sentences gain credibility with both the courts and the general public. Will you please elaborate on how that relationship should develop?

Councillor Harry McGuigan (Convention of Scottish Local Authorities): I do not want to elaborate on that too much, because it is an issue of considerable contention for the judiciary and so on. However, we think that at least consistency of understanding between the sentencing council and the local authorities will be needed. Dialogue is important. We must be careful about the territory that we are moving into, however, so I would be cautious about exploring the matter in great detail this morning.

Nigel Don: I understand your caution, but I do not really want you to be cautious. I would really like to get your opinions on what the issues are. You might want to be cautious about exactly what side of the line you put your feet on, but it would be helpful if you could tell us where you think the lines are and where the areas of contention will be.

Councillor McGuigan: I will be cautious and careful because I do not think that I have the in-depth knowledge and understanding that would enable me to be more informative. However, that is not to suggest for a minute that we are badly informed about the issues around the proposal and what the impacts of a sentencing council would be on the wider judicial process.

We have an opportunity sensibly to improve what is happening in the wider judicial set-up, although I say that without going into the detail of how that could be done. There needs to be more in-depth analysis of what we may or may not be able to do and what might or might not be perceived by the judiciary as being a challenge to its independence.

Nigel Don: Others will want to explore the content of community payback orders, but I am interested in how they might operate. Section 14 talks about a "responsible officer", which you mention in your submission. I am not quite sure that I have yet heard anyone say how they think that system is going to work. Should the responsible officer who is identified by the court be the man or woman who is engaged in face-to-face supervision of the person who has been sentenced, or should it be, for example, the director of social work in the local council, who would delegate the face-to-face supervision? The position is not prescribed in the bill, so I am interested to know how you think it should work.

Councillor McGuigan: You are right to say that the issue has to be considered in greater detail. The responsible officer, as far as we are concerned, should be a qualified social worker. I do not think that you would expect to see a situation in which the court would identify personally whom the responsible officer would be. Rather, the social work department should identify who would be best equipped to undertake the role, in the context of its overall resources at that time. The responsible officer must be a qualified social worker.

Nigel Don: The bill says that the local authority must nominate the responsible officer—the court will not specify who the person should be. Should the responsible officer be the person who works face to face with the person who has been sentenced, or should it be the person who is in overall charge of the process, such as the director of social work, who would delegate the face-to-face work to others?

Councillor McGuigan: We live in the real world. We could nominate an individual to be the responsible officer, but that person might fall ill or be unavailable for another reason, which would mean that someone else would have to be identified. There are sensible mechanisms that can ensure that the responsible officer will be identified in a way that is manageable within the context of the real-world circumstances that we face.

Robert Brown: The community payback order replaces a number of existing orders. Do you think that any of those disposals should have been retained, or does the new order adequately encompass the various elements that should be available to the court?

11:00

Councillor McGuigan: Different people will give different answers about which disposals should or should not be retained, but I approach the issue with an open mind. First, we need to ensure that the new community payback order will make a real difference in rendering our communities safer and more secure and more comfortable with the processes of justice. We need to be careful not to make the mistaken assumption that was made previously—and perhaps even is being made now—that a community payback order will necessarily always work. In community sentencing, we have some pretty poor examples out there as well as some excellent examples that are working. Exemplars of good practice and proven impact should be retained, but those that are less credible and less effective should be examined to see whether they can be improved and be made more robust and more effective. Those that cannot be improved need to be replaced by those that are more effective.

The question is a good one, in that it highlights that the community payback arrangements will fall down if they are weak and if they are simply rhetoric that sounds fine without really making a difference out there. Some people have suggested that the proposals are a move away from tough justice, but I believe in effective justice. The community payback order will be a move towards effective justice if the arrangements are made properly, carefully and thoughtfully as part of a collective analysis and understanding of what we are trying to achieve.

Robert Brown: I believe in effective justice as well, but let me just pursue that point so that we are clear that we are talking about the same thing when we talk about effective justice. How do you define what is effective in this context? What is your understanding of that?

Councillor McGuigan: First of all, I define effective justice as justice that renders our communities safer, happier and better places to live in. Effective justice is about ensuring that the victims of crime are looked after. The victims need to be comfortable that the processes of justice have been effected properly and in a way that they would associate with being fair and with giving the desired reparation both to the community and to themselves.

Of course, we can use terms such as punishment, retribution and restitution, but there must also be rehabilitation. Offending behaviour happens in our communities, and offenders will go back into those communities. It is imperative that the community is also prepared to work collectively to ensure that the support arrangements are in place to enable rehabilitation and reconnection of the offender with the community. That is the broader aspiration that I have for what might be called effective justice.

Robert Brown: Let us strip that down a little. The community payback order comprises a payback element—the work that is done, which needs to be effective and meaningful—and a rehabilitative element. As the representative of local authorities throughout Scotland, what is your view on the current availability of programmes to meet those needs through the existing community disposals, never mind any that might follow?

Councillor McGuigan: That is a big issue that needs to be faced. I doubt very much whether there are sufficient programmes available for community sentences, especially if we move towards an increased demand or call on services that are to be delivered locally. The quality of such programmes is another matter, too. We need to question whether current resources are sufficient to enable quality, effectiveness and credibility in community sentences.

I firmly believe, and it is COSLA's position, that as long as community sentencing is properly resourced, proper training is given and the support services that are needed more widely are built in, it will not simply be about people doing community work and our communicating that to the public, although that is important, but will make a real difference to the individual and to the community against which that individual has offended and to which they will return.

Robert Brown: You made an interesting comment about the quality of some of the programmes and remedies that are available, which is slightly to one side of the resource issue. Questions about quality imply that some programmes could be stopped, and the resources redistributed to something a bit more effective. Have you any thoughts about the mechanisms through which that might most effectively be done? It is a key issue.

Councillor McGuigan: I do not know that it is as key an issue as you make out, but it is important. We have to ask what the deficiencies are in the programmes that are perhaps not the best type of programme. If they are not working or making a difference, we need to ask why and perhaps build in the missing features to enable them to work better.

In some situations, of course, a particular programme will just not work and will not be convincing in any way. It then has to be removed from the programme catalogue; the resource for it then becomes available, but that will not be a great amount. Resources will also be focused on trying to improve the quality and extent of the current community payback programmes and of the new ones that are introduced.

Robert Brown: Accepting that resource is limited—on which subject we will no doubt hear more later—it is important that the programmes that are in place work, are effective and achieve the best results with the money that is put in. Does COSLA have an angle on how effective those programmes are throughout the country? What improvements could be made in how they are assessed and judged and in who decides on it all?

Councillor McGuigan: COSLA works closely with the community justice authorities, which have a major role to play in assessing and commenting on the quality of the provision, and it makes interventions where it considers that it is necessary to do so. Local authorities have a responsibility to ensure that they face up to their commitments under the concordat and the single outcome agreements. Those agreements are part of the concordat and are credible; they are not a pretence. We are focusing on those main aspects.

Robert Brown: Does Mike Callaghan have any thoughts on that?

Mike Callaghan (Convention of Scottish Local Authorities): I reiterate the points that Councillor McGuigan has made. Community payback orders are essentially a spend-to-save option. Such an option involves the redistribution of current resources to the new system. You are asking about where the resources will come from. There could be opportunities for existing programmes and initiatives such as drug and alcohol strategies and modern apprenticeship initiatives, which are currently working in isolation, to converge and join up their activity and resources to implement community payback orders.

The programme as a whole is a challenge, especially given the economic downturn and the financial context of diminishing resources in the public sector. However, we have to consider where opportunities exist, and examine other areas in which a shift in resources towards the wider local government family can be implemented.

Robert Brown: My final point is on the "robust" and "visible" aspects of the Scottish Government's intentions in this regard. You have dealt with that issue to a degree, but what do you think is required to make the community orders robust and visible? I suppose that that relates, to some extent, to the victim end of the issue.

Councillor McGuigan: One of the most important aspects is resources. You asked Mike Ewart and Rona Sweeney about that earlier. The big issue is the transitional funding that will be required as we move more people out into the community. We need to be mature about how we do that, because it will not work if resources are limited.

We have made representations on the basis that we associate fully with the principles of the bill but, unless the resources are available and there is a willingness to redistribute resources between the set of agencies—not just the Scottish Prison Service, but local authorities and the national health service—it will be extremely difficult to make the significant improvements that we believe are necessary.

Robert Brown: The Government has stated that community sentences will be "robust, immediate and visible". The use of the word "immediate" is fairly obvious and has a number of implications, but what do you understand by the words "robust" and "visible" in the context? What are the implications for local authorities?

Councillor McGuigan: A robust community sentence is one that requires the offender to undertake open and committed service to the community. That can take many different forms. I could list four or five that exist in North Lanarkshire—four that are highly commendable and one that is not worth as much as the other four.

Communication is an important aspect. The community and the victims must know and understand that community sentences exist and that they enrich their community, not just in the short term through the projects that are undertaken but in the long term through the lasting, sustainable impact that they have on the community. That sustainability is crucial. We need sensible communication about what is happening so that people realise the value of the community payback programme. If the programme is managed properly—sensitively, supportively and robustly—the individual is likely to become reconnected to and reassociated with their community, and the community will benefit from that.

I am a great believer in communities playing a bigger role in the justice system. I have often said that the justice system almost captures justice issues and takes them away from the communities where the offences occur and where the victims live. There needs to be a better way of reconnecting communities to the whole system.

Paul Martin: Good morning, gentlemen. Councillor McGuigan mentioned the chaotic lifestyles of many of the offenders who will participate in the community payback programme. How realistic is it to assume that those individuals will complete their community paybacks? We know that community service involves many challenges. Why should the community payback programme be different?

Councillor McGuigan: It will be different only if it is of better quality and has a better combination of input from the various agencies. I have seen community sentencing arrangements that have input from only one agency. If we consider, for example, social work departments and the supervision that takes place there, criminal justice social work is a tiny corner of what social work does. That must change. All the community agencies must recognise that they have a role to play and they must be part and parcel of the thinking processes to identify meaningful, sensible, useful and—I use the word again—effective community sentences. In the past, we have perhaps not done that. We now have an opportunity to examine the bigger picture and involve the other agencies.

Paul Martin: We talk about the community justice authorities and the other agencies working together. We talk a good game about delivery and integration, and we can legislate for that in respect of community payback orders, but how can we be assured that individuals who have chaotic lifestyles will complete the programme? No matter which agencies supervise them, they might decide that they do not want to complete the programme. What is different about the proposed approach? In the 10 years that I have been in Parliament, I have not yet met a witness who has not said, "We need to work together as part of the programme." What is different about the new programme?

11:15

Councillor McGuigan: I have also encountered that situation and I sometimes rebuke the very people who say, "Well, we've been doing it for 10 years and it never worked so if we do it again it won't work". You have to question whether the new programme will work differently.

I disagree with you that the multi-agency approach has been as obvious as you have found it to be—I have not found it to be so obvious as that in the community sentencing and community activity arrangements that are in place. It will be a challenge. One of the key agencies will be the community justice authority, which is responsible for looking at how well and how effectively the various agencies and community planning partners are delivering on their single outcome agreements in the area. If they do not deliver on the outcome agreements, they should be held to account. You and I have a responsibility to ensure that they are held to account if they are failing.

Paul Martin: Can I take you back to consider the individual offender? You are talking about support for the offender that you hope to see in place and I am sure that we will come on to resources, but the offender has not changed; they are still the same offender who has completed community service previously and who has now been asked to complete community payback. If that offender is leading a chaotic lifestyle today, will it make any difference if we pass legislation in the Scottish Parliament? Will they become a new type of offender? What evidence is there that they will change their chaotic lifestyle?

Councillor McGuigan: I think that there will be a change. We are not talking about the offender simply going through the same old process that they went through before; there is a change in terms of the specific, person-centred support that the individual will get. I take your point that that is a necessary part of the programme. If we were simply to follow the old way where everyone went through exactly the same curriculum—for want of a better word—and the particular features of their requirements did not matter, it would fail. However, if we are ensuring that the process is offender centred as far as the rehabilitation aspect is concerned, it has to be victim centred as well because communities are the victims.

The programme will work if all the agencies are working to a plan, including local authority housing, education, employment skills and confidence building, citizenship and trying to reconnect, as you say, an alienated group of people who have been round the course a few times and do not have a great deal of confidence in the system. We have a new opportunity to make sure that those additional services are built in and we do not simply come up with a list that says, "Here's what we do and it's the same for Joe, Jimmy and Annie as it is for everyone else." The approach has to be more person centred.

Paul Martin: You have said that you want to put in place support mechanisms for chaotic individuals that you hope will have a more positive outcome. We know that the current arrangements for community service mean that a high number of people do not complete it. I cannot remember what the statistic is, but I think that Mr McLeish referred to it in his evidence. Are you willing to state on the record today that we will see a significant reduction in the number of those who do not complete payback orders? Surely if you are so confident—yours has been a confident performance today—we can get something on the record today to the effect that we will see a massive reduction in the numbers of those—

Councillor McGuigan: Of course you cannot say that and you would not expect me to. I am confident that the arrangements that will be put in place under the bill will improve on the current ones. I am also confident that community planning partnerships and the Scottish Government will have big responsibilities in the area and they have to make sure that they meet them fully. You will have a responsibility to ask questions if they are failing. However, if you want me to put my hand up and say, "Look, everything's going to be wonderful," you have the wrong man sitting in this chair.

The Convener: That was a very wise response, Councillor McGuigan.

Cathie Craigie will ask some questions on resource issues.

Cathie Craigie: As the convener has instructed, I will move on to resources. According to the financial memorandum, the majority of additional costs incurred under section 14, which relates to community payback orders, under section 17, which relates to the presumption against short periods of imprisonment, and under section 20, which relates to reports about supervised persons, will be funded under section 27A of the Social Work (Scotland) Act 1968. Given that that funding, which is provided to local authorities, is in turn channelled through the community justice authorities, COSLA is clearly right to point out in its submission that if these provisions are to work, they have to be resourced.

In your submission, you say that there has to be a "radical shift of resources". The same comment has been made in other evidence that we have received. However, as you might have heard, the Scottish Prison Service has just told us that there might not be that kind of "radical shift of resources" from the areas that I had thought might be targeted. What are the resource implications of these provisions for local authorities?

Councillor McGuigan: If you are asking me to tell you where you can find the money to deliver this—

Cathie Craigie: I do not have to find the money.

Councillor McGuigan: Okay. If you are asking me to tell you where we, collectively, can find the money, I think that the matter must be addressed in an entirely separate review. Otherwise we will be putting legislation in place and expecting the resources for it to be somehow conjured up.

I simply do not think that the bill will work if the necessary resources are not in place. Local authority budgets are not as abundant as you might believe, and we are making considerable efficiency savings—cuts, if you like—in many services. As you point out, the provisions for community payback orders, which involve reviews, putting in place responsible officers and meeting other responsibilities, will cost the local authority a fair amount, which I cannot quantify at the moment. I know that the Scottish Prison Service and others have argued that if fewer people require certain services, it might free up resources. However, as has been pointed out, prison staff, for example, will still be required, so such moves might not free up the massive amount of resources that you might think. On the other hand, some pressure might be taken off the NHS.

As a result, we need an overall review of the existing sources where resources might be found and transferred, distributed or whatever. However, if the money cannot be found from those quarters, we have to put our money where our mouth is and find the resources to ensure that the bill works in making our communities safer and reducing reoffending. It simply will not work otherwise, and I give my full backing to such moves.

Having discussed the issue with him, I know that the Cabinet Secretary for Justice is well aware of my view that the bill must be backed up with resources. Indeed, he, too, would like to see those resources being made available. The committee has to say for itself what the priorities should be; if one happens to be the safety and wellbeing of communities, the bill should be on the receiving end of resources.

Cathie Craigie: COSLA also states in its written submission:

> "interim transitional financial arrangements should be established".

Have there been reasonable returns from the cabinet secretary on that? Is it too early to discuss it?

Councillor McGuigan: It is too early, although there is continuing discussion among us about the bill's financial implications. I repeat that, if the bill's intentions are not accompanied by a big resource—I will not quantify how big—the bill will be much weaker than it should and could be.

Cathie Craigie: Do you agree that it is important that the committee ensures that financial resources follow the bill?

Councillor McGuigan: That is critical.

Cathie Craigie: Okay. I think that that is it on the resources aspect, convener. However, does the COSLA representative want to highlight anything in the bill that has not been discussed in this session?

Councillor McGuigan: No, nothing jumps to mind. I have covered most of the business.

The Convener: Yes, that is fair. Do members have any other questions?

Stewart Maxwell: Can I take the witnesses back to the proposed Scottish sentencing council? I did not ask a supplementary question on that earlier because I wanted to double-check what the COSLA written submission said on it. Nigel Don asked earlier whether you could elaborate on how the relationship between CJAs and the sentencing council would work in practice. COSLA's written evidence says:

> "COSLA welcomes the establishment of the Scottish Sentencing Council. However, it is important that this new Scottish Sentencing Council works alongside Community Justice Authorities as part of the wider Local Government Family to ensure that community sentences operate in a manner that enhances their credibility with the Courts and with the general public."

I want to ask the same question that Nigel Don asked. How do you envisage that relationship working in practice, given what your written evidence says?

Councillor McGuigan: It would work through the CJAs working very closely to their plans, which were submitted to, and approved by, the cabinet secretary. Those plans must interface with, or be woven into, the local authorities' and the community planning partnerships' single outcome agreements. If that does not happen and a CJA operates in isolation from the collective aspiration of key agencies in our communities, something is amiss. The CJAs will have to sit at the table with other agencies. I cannot be positive about this, but I think that most CJAs are, indeed, regarded as key partners in community planning partnerships. The CJAs' way of working and their plans, policies and proposals should therefore be mirrored in single outcome agreements.

Stewart Maxwell: I accept what you say about CJAs, single outcome agreements, local government and community planning partnerships, but the question was really about how CJAs and the Scottish sentencing council would work together on a day-to-day basis. How would that relationship operate in practice, given that your written submission states that it is an important feature?

Councillor McGuigan: Right. I am sorry that I went into other territory. It makes sense that the sentencing council and CJAs understand what each other is about and what is available—what the strengths and weaknesses are of, for example, community payback. If a CJA does not have programmes that are tailored to the needs of particular individuals, it needs to talk to the sentencing council about what variations or alternatives are possible. That would seem to me to be a sensible, on-going dialogue. We must be careful that CJAs do not influence, or overinfluence, what the sentencing council will do—that is similar to Mike Ewart's earlier point. I, too, do not think that CJAs should sit on the sentencing council, just as I do not think that the SPS should sit on it. It is about on-going dialogue, sharing of information and analysis of what is and is not working and how it can be reviewed to ensure that it has the intended impact.

Stewart Maxwell: That is helpful.

The Convener: We must move on. I thank Councillor McGuigan and Mr Callaghan for their evidence, which is greatly appreciated.

11:30

Meeting suspended.

11:32

On resuming—

The Convener: We will now hear from the third panel of the morning. I welcome the Lord Advocate, the Rt Hon Elish Angiolini QC; the Solicitor General for Scotland, Frank Mulholland QC; and John Logue, head of policy division at the Crown Office and Procurator Fiscal Service. Thank you for coming. We will move straight to questioning.

I open on the possibly vexed issue of the Scottish sentencing council. As you will have seen from the evidence that we have taken until now, the proposal to set up a sentencing council has attracted criticism from the judiciary, which thinks that its independence would be undermined. Do you have a view on the matter?

Elish Angiolini (Lord Advocate): Traditionally, the Lord Advocate does not play a significant role in sentencing, but she does have a role. One witness suggested that I have no locus in sentencing, but that is not the position in law. The Lord Advocate has the right to appeal what is perceived to be an unduly lenient sentence, but that is interpreted restrictively. Because the Lord Advocate and her prosecutors are the gatekeepers of what comes into the system and of the forum in which it is prosecuted, they have a significant influence on the sentencing process. We also provide information to the court, which influences sentencing. We have a significant interest and role.

In my view, a sentencing council can only be a good thing. I do not think that it would interfere with judicial independence. The Sentencing Guidelines Council in England and Wales has been a significant contributor to developing jurisprudence, on the basis that it is a resource for judges. One difficulty that our judges have faced in the past is the lack of availability of a systematic resource to which they can refer and from which they can seek advice or guidance. The sentencing council will be a huge addition to the justice system. As well as helping to achieve consistency and provide transparency and understanding of the sentencing process, it will allow judges to obtain information that will assist them in the sentencing process. At the moment, they have difficulty in pinpointing such a resource. Altogether, the sentencing council will be a real benefit to the judiciary, and I hope that that is how they will see it in years to come.

The structure that is proposed in the bill will not result in interference with judges' independence. It is quite clear that it will not be the council's role to provide prescriptive mandatory guidelines or to interfere with judges' independence in particular cases. The council will provide guidelines that the courts must "have regard to", which means that they must give them consideration. If it is considered that the application of the guidelines is not acceptable in a specific case, reasons will be given why that is the case—that is a rational approach. Equally, if the appeal court considers that the judge's determination was correct, it can refer the matter back to the sentencing council. Altogether, the bill presents a package that I think will only improve the sentencing process and assist our judiciary.

The Convener: As you say, the guidelines that the sentencing council issues will not be compulsory. It might be said that they will give a nudge in what is considered to be the appropriate direction. What would you say to the argument that, in effect, there is a sentencing council in force at the moment, which is called the appeal court?

The Lord Advocate: The appeal court has the ability to produce guideline opinions, and I am extremely enthusiastic about its doing so. It has not done that particularly frequently, although it has been asked to do so in relation to a pending case in which I have appealed sentences. When the appeal court produces guideline opinions, that is a highly effective way of looking at sentencing across the board and providing a consistency—as opposed to a uniformity—of approach.

The benefit of having a sentencing council will be that the court will be able to look at other information on aspects of sentencing that do not relate solely to the judiciary. As a public prosecutor, I prosecute in the public interest. Constitutionally, I must do so independently, but that does not mean that I exist in a hermetically sealed vacuum when I determine what the public interest is. I take account of information from a number of sources. That is extremely important. The independence of judges in community courts in the United States is not constrained by their going out and speaking to their local communities; in fact, that enhances their understanding of what the problems are and how the public view matters.

At the moment, it is difficult for judges to know, other than through the tabloid media or the editors of the tabloid media, whether their sentencing reflects public interest, and I am not sure that that is the best way to approach sentencing. The council will create an opportunity for a much more systematic approach to be adopted and will give judges a resource that will allow them to understand and research whether their sentencing approach is relevant, appropriate and effective.

The Convener: No one doubts that sentencing is sometimes a complex and difficult issue. We have received some contradictory evidence about alleged inconsistencies in sentencing. I know that you might have reservations about commenting in any great depth but, in your experience, is there a serious problem with inconsistency?

The Lord Advocate: When judges sentence, they are not sentencing widgets. Sentencing is not a process that is subject to some form of regular procedure that will result in uniformity for all sentences, and nor should it be. Every case is different. Judges must approach cases on a fact-specific basis. If they were not to do so, it would result in arbitrary outcomes. They must consider not only the nature of the crime, but the circumstances of the accused and the victim, the issue of whether there was any provocation and the context in which the crime took place.

There is no such thing as a uniform crime. The crime of murder, for example, covers a vast range of activity and the nature of the conduct can become more aggravated depending on the circumstances of the case. Therefore, it can be difficult to assess whether there is inconsistency in the sentencing process, because of the absence of data and, indeed, of a system that is open to examination. I have been a practitioner in the courts over the years and I can tell you that there is anecdotal evidence across the board that some sentences surprise practitioners and that in certain circumstances it is difficult to predict what the sentence will be. As a prosecutor, that concerns me, because if a victim of a crime in certain circumstances was to ask me what sentence they could expect the accused to receive, I would be challenged in answering, unless I had an idea of who the judge was, which might give me an indication of the range of the sentence. The situation would be similar for defence counsel. The individual judge might have a significant impact on the sentence.

Lord Macfadyen put it well in his report when he said that even if there is no information that shows beyond a doubt that there is inconsistency across the board, there is certainly a perception of that. That perception might be driven to an extent by the tabloid media, but I can say from my experience as a prosecutor that there are instances of sentences that are outwith the general realm of sentences that are imposed.

On days when a particular judge is known to be on duty, there might be a queue of enthusiastic guilty pleas, but on other days, the court can be a veritable desert as far as guilty pleas are concerned. We will always have some judges who are more lenient and others who are more draconian in the sentences that they impose. We do not produce a uniform, homogenous product in the judiciary; judges' independence, knowledge of life and experience are important in each case. However, it is important that there is a greater understanding of that; that there is consistency in the approach to sentences; and that we are not left in circumstances where there is sometimes considerable uncertainty as to the basis of the sentence, because a similar case might have resulted in a very different outcome.

The Convener: So the problem of sheriff shopping that I mentioned last week—tongue in cheek—is an issue even in the High Court.

The Lord Advocate: I am not sure that it is an issue. The structures of the courts are such that they remove the opportunity to select a judge. Someone might want to do that if they know that a particular judge is an extremely hefty sentencer—they might be inclined to try to avoid that court. That will not be ironed out by the existence of a sentencing council, because, as I said, there will always be judges who are more draconian and those who are more lenient. The important thing is that guidance will be available, which the council will have looked at. The judge will have regard to that guidance and he will explain his departure from it in the context of the sentence, which, in turn, will allow the prosecutor to determine whether the sentence is within reason and within the range established by HM Advocate v Bell.

The Convener: Have you seen any significant increases in section 76 applications dependent upon the particular judge?

The Lord Advocate: You might be relieved to hear that we do not research the sentencing of judges on that basis. There has certainly been a rise in section 76 pleas since the introduction of the Bonomy reforms and the Du Plooy judgment, which is much to be welcomed. However, we as the prosecution do not put a searchlight on where they occur.

The Solicitor General has just pointed out that you would not know who the judge would be for a section 76 plea, which would perhaps avoid the vagaries of someone attempting to ensure that a particular judge was on duty on a particular occasion.

Cathie Craigie: The convener raised the issue of the Lord Advocate's recourse to the appeal court. Can you advise the committee today—or perhaps later in writing—how many times, on average, the Crown would appeal a sentence?

The Lord Advocate: There was a recent parliamentary question on that. I think that there have been 68 appeals against unduly lenient sentences since the provision on that was introduced. The approach that I have taken—and which my predecessors have taken—is that we will not take appeals unless there is a significant issue regarding the case. We do not wish to use the mechanism constantly as a way of directing the judiciary in its sentencing procedure. It is used selectively in circumstances that have been considered judicially in the case of HM Advocate v Bell.

The Convener: We move on to the issue of voluntary intoxication. Stewart Maxwell, who has no interests to declare, will lead the questioning.

Stewart Maxwell: Thank you for clarifying that, convener.

Section 24 provides that the voluntary consumption of alcohol leading to intoxication cannot be taken into account as a mitigating factor in sentencing. Given current sentencing practice, I wondered whether you believe that that provision is required.

11:45

The Lord Advocate: Most judges would suggest that voluntary intoxication does not form the basis of mitigation and, in some circumstances, some judges would treat it as an aggravating factor. However, that does not prevent a culture in Scotland in which, if you were intoxicated, you will put that matter before the court by way of mitigation. Day in, day out, notwithstanding the understanding that it does not mitigate, solicitors continue to put it before the courts in mitigation that their client would not have carried out the crime if sober. That is particularly prevalent as an excuse or as a form of mitigation in domestic abuse cases.

Although our judges would not take into account intoxication, law is not just for judges, solicitors and those who use the courts; it is for the public. An important message would be sent out if we codified what is already known in our common law, which is that alcoholic intoxication is not a mitigating factor and that defendants who have imbibed alcohol will not have their sentences reduced because of that. It is important, in the current context in Scotland, to enshrine that message in our law.

Stewart Maxwell: I agree, particularly in relation to domestic abuse. I, too, have heard such examples. Should the provision be extended beyond alcohol to other intoxicating substances?

The Lord Advocate: Voluntary intoxication, be it through alcohol or other drugs, can result in certain offences being committed, but alcohol is still the primary feature in the cases that cross the threshold of the prosecutors, particularly in relation to aggressive and violent conduct. Certain drugs can inhibit aggressive behaviour, although they are not a neutral aspect, but drugs are often significant in so far as a person's addiction—their withdrawal symptoms and their need to secure a fix—is the reason for a crime being perpetrated in the first place.

Stewart Maxwell: Some of the evidence received by the committee has been about the issue of a drunk person who committed an offence or a breach of the peace, but who became drunk as a result of a personal tragedy, such as a family bereavement. It is suggested that such circumstances might be mitigating. What is your view?

Also, you touched on alcoholism. Many people—I hope most people nowadays—see alcoholism as an illness. What is your view of someone who commits an offence when they are trying to get over that illness but they fall off the wagon?

The Lord Advocate: Those are two separate and distinct issues. There is the issue of the underlying cause of the intoxication. In the first example that you gave, in which someone who is suffering from profound grief drinks and then commits an offence, it is the grief that is the underlying cause or mitigating circumstance to which you would attach any significance—if that were relevant to the sentence.

Likewise, if someone is an alcoholic, they have an illness—a condition—that is one of the causes of their taking alcohol; it is therefore alcoholism rather than intoxication that is the mitigating circumstance. There is a distinction here. If someone has become a chronic alcoholic, there is often organic damage to their brain. A situation in which someone has gone out and had five Bacardi Breezers, three After Shocks and ten pints of Carlsberg is different from one in which someone has developed a personality disorder or organic brain damage as a result of years and years of alcohol abuse.

The Convener: We turn to serious organised crime—a matter that I know is of particular interest to the Solicitor General. Paul Martin will lead the questioning.

Paul Martin: Lord Advocate, can you clarify the current legal position? Can people already be prosecuted for conspiring to commit a crime or inciting others to commit a crime?

The Lord Advocate: Yes.

Paul Martin: Why should that be confirmed in legislation? Why has the Government introduced the sections in the bill that refer to serious organised crime?

The Lord Advocate: The provisions add to the armoury of the police, the prosecution and the criminal justice system more generally. As we know from information that was recently published by the serious organised crime task force, and as communities already know, serious organised crime is a huge problem throughout the world. Such crime does not understand or observe borders. It attracts investors from abroad. It is important to ensure that a signal goes out to those who might have the propensity to invest in organised crime in this country that they will not be comfortable here, and that a modern, contemporary law gives that strong message. Where people will invest in illegal activities is a consideration.

On whether the bill simply duplicates what already exists, it is, to some extent, not essential to have the provisions. With creativity, we could find ways under the common law of prosecuting most of the offences that are covered. However, section 25 in particular goes further than what is currently seen as conspiracy. Currently, there is a conspiracy if two or more persons agree to commit a crime. However, section 25 goes further back than that. It states:

> "A person who agrees with at least one other person to become involved in serious organised crime commits an offence."

Things are taken a stage back. We are talking about the stage of preparation and the stage of perpetration. In many cases, we have evidence that does not quite show that the person was at the actual conspiracy stage; rather, it relates to their becoming involved in a conspiracy. The person will have set up himself or herself and their business to become involved in that, but we could not get sufficient evidence to show the commission of a specific crime, albeit that generic evidence was available that showed involvement with people connected with money laundering, drug supplying or human trafficking, for instance. The offence in question will be useful as another aspect of our prosecution armoury.

There is also a useful message about aggravation, which is a separate and distinct offence. Let us consider an 18-year-old or a 19-year-old with a conviction on indictment for assault to severe injury in their schedule of previous convictions. If such a conviction is aggravated by their involvement in serious organised crime, an entirely different message and signal will be given in later years and to those who may employ them in the future about what that assault was about and what they might have been involved in. There is therefore a question of labelling, which we have considered with racist crime and more recently with hate crime. Such an approach is useful in showing the nature of the activity as well as whether the crime was innovative or new.

Prosecutors currently have the choice of prosecuting malicious mischief or vandalism. It is not a question of legislating for the sake of legislating; rather, it is about giving clear messages to the public about what the law is and how we treat and deal with aggravated offences by reference to membership of a conspiracy. I hope that, in addition to dealing with the crime itself, the courts will clearly show and reflect the seriousness with which engagement in serious organised crime, intimidation, the exploitation of human beings for human trafficking or sexual purposes, or engagement in drug trafficking are treated in Scotland by reference to the aggravation and by having the particular offences available. I think that the provisions will be very useful.

The Solicitor General may have more to say about the matter. His discussions with the Attorney General of British Columbia brought the existence of such offences in Canada to our attention.

The Convener: It would be useful to hear from the Solicitor General at this stage.

Frank Mulholland (Solicitor General for Scotland): I visited British Columbia a couple of years ago, where I discussed serious and organised crime. British Columbia is blighted by that problem too. There was a raft of common-law or codified offences in Canada to deal with the matter, but for the reasons that the Lord Advocate articulated, the view was taken that a message had to be sent out and additional tools had to be given to law enforcement agencies and prosecutors to deal with it. There was a particular problem with Montreal biker gangs, I think, as a direct result of drug-dealing activities involving murder and that type of thing. That is why that particular legislation was introduced. I spoke to the Attorney General of British Columbia at the time—I think that there had been five successful prosecutions.

They take a slightly different approach to sentencing in this regard. If someone is convicted of a substantive offence and the aggravation, then by law the sentences must be consecutive. I do not understand that that is proposed in relation to the bill, but they thought that that was of particular use.

Paul Martin: I think that the Lord Advocate said at the outset that some elements of duplication are involved and that current legal remedies can be taken forward. Surely they can already be used as a way of sending out a public message? From a prosecutor's point of view, how helpful is it for politicians—myself included—to keep on sending out the message that we want to send out a message. There are many ways of doing that other than by duplicating legislation. The law is there to be enforced. If a legal remedy is available to us, why do we not enforce it? Why do we not use that route to send out the message? Are we not reinventing the wheel? I appreciate that there are additional elements to some parts of the bill, but there is clear duplication in other parts. How helpful is that to you as a prosecutor?

The Solicitor General for Scotland: There is duplication across the common law, for example between the common law and statute on vandalism and malicious mischief. Indeed, there is duplication across serious and organised crime—there is a raft of offences that we can deploy when indicting criminals. However, we seek to say that a person has committed a crime as part of a serious and organised crime group for the purpose of obtaining money, perhaps through drug dealing, intimidation and violence, people trafficking or labour—that type of thing. Legislation gives a framework for prosecutors and investigators in considering serious and organised crime. In my view, that is very useful, and that is the view of the Canadian authorities, too.

Paul Martin: I turn to the definition of serious and organised crime. Some have suggested that we are not focusing on what is serious and organised crime. If you have read the *Official Report* of last week's meeting, you will know that the Association of Chief Police Officers in Scotland could not confirm what its view of serious and organised crime is. Surely we have fallen away from the focus of the bill.

The Lord Advocate: I saw a suggestion that two people coming together to steal a pork pie or some other type of meat pie could amount to a serious and organised crime under the definition. Of course, if two people conspire to steal a meat pie, I can—theoretically—indict them for that. Currently, that is under the common law. However, I would not do so, because if I did, I would receive criticism—and not delicate criticism—from the judiciary and others. I would be seen as having lost all common sense. Our common law allows us to indict a whole range of crimes from breach of the peace and assault and prosecute people under summary complaint. The definition in the bill is "indictable offence". Clearly, the definition straddles a number of different types of offence.

One thing that we have learned about serious and organised crime is its capacity for innovation and change. The people who commit these crimes are innovative creatures. Fifteen or even 10 years ago, we as prosecutors could not possibly have envisaged the serious and organised crime that we see at the moment. We could not have envisaged the nature of the conduct in which these criminals are engaged. I would like to see flexibility, in so far as it is possible, so that we are not caught with a gap in the law that means that we cannot deal with something as a result of having narrowed it down to a schedule in such a way as to prescribe the nature of the offence. That would be the difficulty. For instance, let us consider those who engage in the trade of child pornography. Fifteen or 20 years ago, it would have been very difficult to envisage that type of trade taking place, but it is certainly taking place at the moment. We want to be able to take into account such new types of crime and prosecute people without being prescribed by what we currently know and recognise as organised crime.

Paul Martin: Is that specific example an area where you cannot intervene at the moment? Do you not have a legal intervention that allows you to prosecute those engaged in child pornography?

12:00

The Lord Advocate: Of course we do. As with most things, we can intervene. One of the beauties of the common law is that it allows a degree of flexibility, but with the jurisprudence of the European convention on human rights, particularly article 7, there is a drive towards greater certainty about what constitutes an offence. The exercise of our courts' power to declare what is a crime is likely to fall into desuetude.

The benefit of having a wider definition is that it gives us the capacity to indict immediately, without having to wait for legislation, when an innovative new business is created that should clearly be struck at in the context of serious organised crime, as opposed to the simple commission of fraud. Even emergency legislation can miss that opportunity. For example, we know that terrorists use credit card fraud as an effective way in which to raise money to perpetrate their activities. I could indict that activity as a fraud, but I would not do so. I would use the terrorism legislation, which duplicates the crime to some extent, but gives a clear message on purpose and intention and provides a framework.

On the point about duplication, there is a distinction to be made. The legislation gives the activity a flavour and a label, so it sends a clear message on the nature of the activity not just to the sentencer at the time but to sentencers in the future, to the public, to prospective employers, and to those who consider people for immigration. The provision would also be useful throughout Europe. If an individual who had committed an assault in the United Kingdom was thinking of settling down in Paris, it would be useful for the authorities there to know that they committed the assault for the purposes of serious organised crime.

The Solicitor General for Scotland: I have a good example of that, to supplement what the Lord Advocate said. There is evidence that some illegal dumping of toxic waste is related to serious organised crime. That is a statutory offence on its own, regardless of the context. However, if it is committed for the furtherance of serious organised crime, that will aggravate the offence, and the courts will be able to deal with the crime in the context in which it was committed.

Paul Martin: Concern has been expressed about the wide scope of the offence of failing to report serious organised crime. What are your views on that?

The Lord Advocate: The offence is modelled on the proceeds of crime legislation and the provisions on terrorist structures that are contained therein. I have no difficulty with that. There is a clear protection for legal privilege, but it should not be used as a cover by solicitors or other professionals who would facilitate crime. We would consider the facts of each case, but we need certainty about that.

In the current environment, if someone goes to a solicitor and, with no reference or background information, wants them to hire some barns in disparate and remote parts of Scotland, the solicitor will be aware of the problem that we have with cannabis cultivation and might have a basis for believing that the request is unusual. The solicitor might then acquire the information that the individual has no other business connections, and they might compile other evidence. We begin to see how professionals have a responsibility to help us to prevent the growth of organised crime.

The provision is important because a lot of organised crime can take place only with the acquiescence of certain professionals, be they estate agents, solicitors or others, who allow activity to take place through what are ostensibly legal and legitimate activities. We must ensure that we tackle that route. Organised criminals need professionals to launder their money, to transact, and to lease properties. I am not concerned that the provision is too widely drawn, but if that is seen to be the case, we can consider whether amendments might provide reassurance.

Nigel Don: I am grateful to the Lord Advocate for her comment that the European convention on human rights is and will increasingly be inconsistent with the Scottish courts' declaratory power to establish what they believe the law is now when it was not understood to be the law before. That probably explains—for the first time to me—why we increasingly come up with statute law that is wider than we might have wanted. It is because the courts cannot expand it for us.

In that context, I wonder whether the definitions of a serious offence in section 25(2)(b) are wide enough. It has been suggested to us that threats and intimidation are a part of the culture that we are trying to work against but that they might not be covered.

The Lord Advocate: They would be covered by the current definition. Threats and intimidation are indictable offences; the outcome depends on the situation in which they take place. I could indict a threat or extortion in the High Court—indeed, we have done so.

The Solicitor General for Scotland: Just issuing a threat is, in itself, an indictable crime under Scottish common law.

Nigel Don: So you are happy with the drafting of that section.

The Solicitor General for Scotland: Yes.

The Convener: The situation is fail-safe—nobody could fall through the crack in the pavement, either way.

The Lord Advocate: Who knows? If we had a crystal ball, we could look into it.

In this context, a significant feature is the ability to mutate from one type of organised crime to another. We need the flexibility in our law that will enable us to deal with that. If we prescribe things too tightly, we will end up trying to deal with the drugs barons of 10 to 15 years' time—who might have moved on to human trafficking or various activities that we as yet cannot conceive of—with an act from 2009 that, by that time, might appear all fuddy-duddy and passé.

Robert Brown: Lord Advocate, you say that you are comfortable with the provisions in section 28 that deal with people who have knowledge or suspicion of crimes. However, do you accept that that proposal moves on quite a distance from traditional concepts of law in this area? There is no question of the person's involvement in crime—if there was involvement, the person could be dealt with under one of the other sections. The offence that would be created by section 28 does not concern involvement but knowledge or suspicion, which does not even go as far as knowledge. What is the essence of that crime? What are you trying to get at that you cannot get at by using the provisions on involvement?

The Lord Advocate: You are right to say that knowledge is a step away from direct involvement in activity, but I point out that the provision is modelled on provisions in the Terrorism Act 2000 and the Proceeds of Crime Act 2002. As I said earlier, it is important that we can get to people who, through their proximity to certain activity that they know to be serious organised crime, have the ability—outwith the realms of professional privilege—to provide information that would be of use to the authorities. It is important that we have that provision. The courts would judge objectively what it was reasonable to infer from the activity and what information the individual had access to. I do not think that the provision would be applied by the courts arbitrarily or on a whim; they would have to believe that it was reasonable to have such a suspicion, based on the objective facts that were available to the individual.

Robert Brown: Is the issue not to do with the individual having some sort of involvement? In its supplementary letter to the committee, ACPOS talked about situations in which an individual received benefits, such as payments of money, which would imply involvement. I am quite comfortable with the provision dealing with people who have a degree of involvement, but I have concerns about someone being prosecuted for their knowledge and suspicions, without there being some other involvement beyond that. Most people who view these matters in a traditional fashion might take that view as well.

The Lord Advocate: If I am a solicitor in practice, I may not deal with a particular client's case but I know what is going on in the office. How would you consider that that matter should be approached?

Robert Brown: Would you elaborate on that?

The Lord Advocate: I think that, in such circumstances, the professional responsibility should be such that that knowledge is sufficient, in so far as it relates not to the privilege aspect but to the facilitation of crime. If I were a young lawyer in a firm of solicitors and I knew that in the firm something criminal was going on that involved serious and organised crime, the fact that I was not a partner or directly involved with that client should not absolve me of my professional responsibility, under the legislation, to report that.

That is why the obligations that we have placed on our financial institutions with regard to money laundering and terrorism are so important. We are dealing with a serious situation. Serious organised crime could be significantly undermining our economy and our employment laws—people involved in serious organised crime do not have to have regard to employment legislation, as they can simply intimidate or knock off those with whom they are not satisfied. They also do collateral damage to our communities in terms of the confidence of our young people and their aspirations about where they can go in their lives: if they see that those who are involved in serious organised crime are those with money and assets, that is a problem.

I understand your concern about knowledge being a step away from involvement, but I think on balance that, because of the public interest, the use of the provision is justified in the situations in which we see it being used.

Robert Brown: You seem to suggest that you would be picking off the minnows rather than going after the senior partners and others who knew more about the activities and were actually involved.

The Lord Advocate: I assure you that we would not use the provision to the exclusion of the prosecution of others—we would not let the major players off. The issue is about whether the person with knowledge of the activity would be liable to prosecution. In some cases, such people are liable to prosecution because of their own activities, and, in those cases, we use them as witnesses for the Crown. The provision would not be used arbitrarily, and discretion would be applied in those circumstances.

Robert Brown: Do you think that there are adequate protections against people being dragged into the context of the activity, even though their involvement is extremely peripheral?

The Lord Advocate: The protection is the integrity of the individual, their professional ethics and their ability to resist accommodating the activity that I described in the firm or organisation that they work in.

The difficulty is that, at the moment, there is no obligation for professionals, but if they are trained in law school about the significance of the issue, it will bring it to light. The provision will also make those who might be inclined to engage in or facilitate such criminal activity think twice about doing so, as they will be aware that the younger solicitors in the organisation and others who might have knowledge of the activity are obliged by law to report that.

Robert Brown: Can you provide us with precise examples of situations in which there has been a problem of the sort that you are talking about? I appreciate that you cannot breach people's confidence with regard to particular cases, but can you illustrate your point more precisely? You do not need to do so today; you could do so in subsequent evidence.

The Convener: Clearly, any case the Lord Advocate referenced could not be a current case; it would have to be historical.

The Lord Advocate: Yes, I cannot talk about a case that involves on-going investigations.

Anyone who is involved in the investigation of serious organised crime—in Scotland, Europe and across the world—knows that it cannot take place without the involvement of the legitimate professionals and agents who facilitate the necessary processes. We have to get to the heart of that activity and disrupt it. If we show our willingness to do so, our professionals will ensure that their ethics and practices are such that, when individuals come to them with suitcases full of cash or demand to purchase large assets without any apparent sources of money, they ask questions proactively with a view to the circumstances that might result.

Robert Brown: Are there not already arrangements in place under money-laundering legislation and so on that deal with such situations in a much more focused way?

The Solicitor General for Scotland: An example of what we are talking about would be an estate agent who factors four or five flats on someone's behalf finding that they are paying monthly electricity bills of £5,000 per flat. That would tip off anyone with any semblance of common sense that something strange is happening in the flats, and, if they applied that common sense, they would probably conclude that the flats were being used as cannabis farms. Should that person be able to say, "I had suspicions, but I decided not to do anything about it because I was getting a big fat fee for factoring the five flats"?

That sort of situation is not covered by money-laundering legislation but would be covered by the provision in the bill. The proposal would give law enforcement a great tool and send out a message to those who are willing to engage in serious organised crime that we have the tools to deal with them.

The Convener: This is an important aspect of the bill but, as there are no further questions on it, we will move on to deal with witness statements.

Bill Butler: Section 62 creates a power for the court to allow a witness to refer to his or her statement during the giving of evidence in a trial. What are your views on that proposed change to current practice?

12:15

The Solicitor General for Scotland: I think that the proposed change is a good thing. Let me explain why.

Many trials are really a memory test for witnesses. For example, in a cold case, witnesses who gave evidence in 1991 might be called to give evidence in 2009 and be questioned on the detail of their statement. If they cannot remember precisely what they said or if they say something slightly different, they will be accused of being inconsistent. It seems unfair that the only person in a prosecution who cannot see the statement before the trial is the witness who gave the statement in the first place.

Another aspect is that police officers are allowed to refer to their notebook as an aide-mémoire. Their notebook will often contain their own statement. Therefore, the proposed change has a precedent in Scots law in relation to police witnesses.

I think that the change will also reduce the length of trials. In my experience of many trials over the past five to 10 years, witnesses can be asked, "Was it at 5, or was it at 4? Was it rainy that day, or was it windy? You said that it was rainy, but you now say that it was windy." Cutting that questioning out of trials and getting down to the actual substance of the case would be a good thing.

Another aspect is that the statements must be accurate. The committee has heard evidence from various persons involved in the criminal justice system who—from the *Official Reports* that I have seen—have complained about the accuracy of police statements. I will not pretend that there are no problems, but measures are in place to deal with that, such as training, guidance and co-training with the Crown Office and Procurator Fiscal Service on the new standard statement, which tries to focus police officers. Police officers also now have electronic notebooks. In addition, Lord Coulsfield has recommended that statements in solemn cases should be signed by the witness.

In my view, the proposed change will improve the accuracy of statements. If witnesses can see their statement in advance of giving evidence, they will be able to see whether it contains any inaccuracies that should be drawn to the attention of those involved in the case. The proposal is a further measure that will save time and improve criminal justice for witnesses. After all, we rely on witnesses to prove cases so we need to treat them with respect.

Bill Butler: Are there no potential drawbacks?

The Solicitor General for Scotland: I mentioned the accuracy of statements, which we hope the proposed change will help to improve. I see no problem with the proposals. For example, when I was over in The Hague last week to see the International Criminal Tribunal for the former Yugoslavia, the prosecutors involved in those war crimes trials told me that they go through what they call a pre-trial proof, in which witnesses can go over their statements with the prosecutor. That also happens in other jurisdictions, including England, so I do not see why it should not happen here.

Bill Butler: That is very clear, thank you.

The Convener: We now turn to disclosure, which has caused some excitement. The questioning will be led by Robert Brown.

Robert Brown: As the Solicitor General will know from our evidence last week from Lord Coulsfield and others, it has been suggested—the subject of disclosure takes up about 15 pages of the bill—that the whole principle behind disclosure has been lost. Questions were asked about the workability of the provisions. Do the law officers have any technical views on whether the provisions are workable and practical? Could many of them be junked from the bill and put into a code of practice or something of that sort? What are your views on that general approach and on the comments that were made last week?

The Lord Advocate: I have had an opportunity to consider the provisions. The Solicitor General deals with disclosure and also heads our reference group, so he will answer the question, but first let me say that Lord Coulsfield did a tremendous piece of work, which was instigated by my predecessor as Lord Advocate, Lord Boyd, and by me as Solicitor General because of the great uncertainty resulting from the extent of our obligations. What has become apparent since then, from development of the common law through the appeal court and the Privy Council, is the extent to which matters are still capable of development. Although the essential concept appears to be breathtakingly simple, its practical application is extremely complex. Therefore, it has been necessary to bolt down, in a sense, that which might in the future have a consequence for a prosecution.

Much more streamlined legislation would be more attractive, but to leave open some issues might imperil future convictions because a decision that the obligations were different from those that had been understood by prosecutors would, to some extent, have retrospective effect. That has been one of the guarding principles. I certainly agree with the desire to make things as straightforward and simple as possible—there is a possibility that the schedules of evidence could be taken out of the bill and put into subordinate legislation. Again, I understand that Parliament likes to have, as far as possible, certainty about the law in the primary legislation rather than in subordinate legislation. I will let the Solicitor General give his views.

The Solicitor General for Scotland: Superficially, disclosure does not appear to be, and should not be, a complex matter, but when one gets heavily involved in the subject, it can be seen to be quite complex. For example, the COPFS disclosure manual that we have published on the Crown Office website contains 178 pages, 33 chapters and 11 annexes. That gives you a flavour of the complexity of disclosure in daily operations.

To echo what the Lord Advocate said, prosecutors need certainty. You need to know with which rules you must comply in order to comply with disclosure obligations. The problem with the common law is that it develops. We know from experience that there is a legal fiction that a change or development in the common law is retrospective—therefore you look at old convictions after a change in the law and it imperils old cases. The bill gives us a comprehensive set of rules so that the police and the prosecutor know that if they comply with those rules, they will comply with their disclosure obligations, which will ensure a fair trial in accordance with article 6 of the European convention on human rights.

As the Lord Advocate said, one or two matters could reasonably be taken out of the bill and put into subordinate legislation or a code of practice, such as schedules of evidence.

Robert Brown: We can look at the detail of that. One suggestion is that there should in the bill be a better statement of principle that provides a starting point, is ECHR-compliant and does what it can to allow an element of flexibility for development without losing the precision that you seek. Are you in favour of a clear statement of principle in the bill, as suggested by Lord Coulsfield?

The Solicitor General for Scotland: I agree that there should be a statement of principle in the bill, but there is one in section 89(3), which derives from the duties as set down in the most recent and up-to-date case from the Privy Council, which is McDonald, Blair and Dixon v HMA. It says that the subsection will apply where

> “(a) the information would materially weaken … the prosecution case,
>
> (b) the information would materially strengthen the accused’s case, or
>
> (c) the information is likely to form part of the prosecution case.”

That is a statement of principle—it is our disclosure obligation. It takes into account the most up-to-date and authoritative jurisprudence on the matter from the Privy Council, and it is enshrined in the bill.

Robert Brown: To take that further, do you agree that the more complex the arrangements for the detailed rules are, the easier it will, along the line, prove to challenge some minor aspect of them and that therefore, the complexity is a bit of a challenge in itself?

The Solicitor General for Scotland: I am a great advocate of simplicity, but as I said, disclosure is a complex matter. When you look at the number of relevant provisions and sections in comparison with our disclosure manual from which we operate, they are not overly long or detailed and they give us a comprehensive set of rules or provisions. We know that if we comply with them, we will ensure a fair trial and comply with our disclosure obligations.

The Lord Advocate: On Mr Brown’s point about whether a technical failure to comply with one aspect of the disclosure obligations might result in a conviction falling, as jurisprudence has developed on article 6 of the ECHR in Scotland, the appeal courts have acknowledged that failure to disclose would not in itself render a trial unfair and contrary to article 6. Rather than consider a technical breach that might not affect a conviction, the court would consider the fairness of the whole trial and would examine, in that context, the impact and material significance of a failure to comply with the regulations.

Robert Brown: Defence statements have been subjected to even greater criticism—on the principle, rather than their detail. Evidence has consistently suggested that such statements do not work but only make things more complex. New information from England suggests that the statements are used only in a vague way and that they make little difference at the end of the day. In short, they are complex, they waste time, and they do not help in getting at the heart of the issues. What is your view?

The Lord Advocate: That was the position when Lord Coulsfield considered defence statements in England and Wales. I subsequently met the Director of Public Prosecutions for England and Wales, and learned that statutory amendments and changes in practice mean that the experience is now quite different. From the prosecution perspective, the statements are now a different and more useful creature—

Robert Brown: When were the changes made?

The Lord Advocate: I think they were made 12 to 18 months ago. John Logue, who is the head of policy here, might be more au fait with implementation. The clear message from England and Wales is that the new version of the defence statement, as now implemented, is quite a different creature from that which existed at the time of Lord Coulsfield’s work.

I am happy for the Solicitor General for Scotland to deal with these matters, but I know that there has been debate over whether the statements should be voluntary or mandatory. The prosecutor has to understand what is relevant and material to an accused, in terms of his defence, as well as what is relevant and material to the prosecution, and decisions have to be based on all the available information.

In many cases, especially High Court cases, there may be more than 3,000 statements, thousands of productions, and information that is very broad. To understand what might be relevant or of interest to the defence, it is of considerable help—in establishing the rights of the accused to a fair trial under article 6 of the ECHR—to be able to anticipate in what the defence might be interested. It is not just about assisting the prosecution; it is also about assisting the accused. It is not about prosecution by ambush or surprise—we now disclose all our relevant information—but nor should it be about defence by ambush or surprise. Things have changed with disclosure: the environment in which we prepare cases is no longer the traditional arm's-length preparation, with defence precognition and separate Crown precognition.

If information that is relevant to the defence is esoteric or not patent, I would, as a prosecutor, want to know about that not after six weeks of trial, but before the trial commenced, because it may affect whether the prosecution should proceed at all. We should not waste the resources of the criminal justice system when a defence can clearly be made out. It is in the public interest for us to be aware of that at an early stage. Information that might assist the defence should be made known.

In Scotland, special defences are currently intimated. One is not bound by them—nor would one be by defence statements—but the special defences are restricted to particular circumstances. There are other defences for which it would, even with a crystal ball, be difficult to discern what will emerge during the trial. How can a prosecutor properly and comprehensively satisfy their obligations to the accused in the context of 3,500 statements if they have no idea what the defence will be or what might be relevant to the defence? The Solicitor General has a good example from a trial that he conducted.

The Solicitor General for Scotland: Before I give the example, I will draw on my experience at The Hague at the ICTY. I popped in to see the procedural hearing for the prosecution of Radovan Karadzic for war crimes in Serbia and Bosnia. He has been ordered by a procedural judge—Lord Bonomy: a Scottish judge who is highly regarded out there—to lodge a pre-trial brief within three weeks. As I understand it, the trial is not due to start until September or October. The pre-trial brief is a detailed case on Karadzic's behalf that answers and sets out his defence against the allegations in the pre-trial brief that the prosecutor has lodged. That is an example of how it works on the continent; there are other jurisdictions that require such measures.

12:30

To give my example, which the Lord Advocate mentioned, I prosecuted a murder trial in Glasgow a number of years ago, which concerned a young lad who was shot at close range with a sawn-off shotgun in Kenmure Street. A special defence of incrimination was lodged, but that did not give me any details.

There was a raft of disclosure in that case, but it only became clear to me towards the end of the defence case that the details of the incrimination involved the fact that the person who had committed that awful crime was wearing a balaclava. I asked, of my own volition, whether a search of the police statements could be made to see whether there was any mention of the recovery of a balaclava in any of the nearby gardens or buildings. Lo and behold, we found a statement from a police officer who said that he had recovered a balaclava. I disclosed that fact towards the end of the defence case, but I would not have known about it if I had not received that information. I am sure that the defence would have wanted to know that well in advance of the trial. With the best will in the world, I do not have a crystal ball, and I need to be advised as to the precise details of the defence that the accused is going to put forward.

Scots law has always been based on fair notice: the defence advises the Crown of the nature of its case, then the Crown advises the defence on what the prosecution's case is. The provision would supplement that and help to focus trials. Trials are paid for by the public purse, so we want them to focus on the issues, rather than on trying to second-guess the real issues with a crystal ball.

Robert Brown: It is an issue not about principle, but about the practicalities and how the process works. It strikes me from the way you described the balaclava example that that fact might well not have emerged from a defence statement anyway, certainly in the way that statements were used in England before the recent changes, which might have made a difference. Is not that a case for the lodging of defence statements to be optional rather than their being a more substantial requirement?

The Solicitor General: That goes back to the question of what is the nature of a trial. A trial is a test of the prosecution evidence and the defence case, if the defence wants to put forward a case. One would want to identify issues in advance of the trial because that, in my view, makes for a much better trial. It means that it will not be simply a case of taking a scattergun approach to the evidence: there will be focus to assist the court and the jury, and there will be no excessive delays or long trials. A defence statement is a good thing: it should be mandatory rather than discretionary in order to achieve the purposes that I have articulated.

Robert Brown: Can you give the committee further details of the changes in the English legislation, and how that legislation has improved the position there? The information that the committee has received suggests that there were significant issues with the English position before the legislation was introduced. Again, it is a matter of practicalities: whether the legislation is working; whether it has been in place long enough to make a difference; and whether it can be translated into the Scottish system. You do not have to supply the detail now. Perhaps you can write to the committee.

The Lord Advocate: John Logue might wish to deal with that.

John Logue (Crown Office and Procurator Fiscal Service): I am happy to do so. The legislative change in England and Wales is quite recent, so it might be safer if we provide the details in writing—I do not have the information with me today.

An important point of principle is that it is difficult to conceive of a reason why the defence would, at the stage of being ready to go to trial, be unable to advise anyone of what its case is. After all, as a result of the recent changes, the defence now has fair notice of the entirety of the Crown case to the extent that is required under the law, and the accused is the only person in the process who is able to say at that stage what the defence case potentially is.

There is no reason in principle why provisions that require the defence to provide a statement cannot be made to work effectively. Much of that—as I think is the case in England and Wales, on which we will provide more detail—comes down to the way in which the court manages and oversees the process. Legislation can, therefore, advance the matter only to a limited extent. The final part of the answer essentially requires—to advance the point that the Lord Advocate and the Solicitor General have made—a mature approach from all those who are involved in the criminal justice process.

The Convener: It would be helpful if someone could produce a paper for us, because that issue came—as our American baseball friends would say—from left field and has caused us some consternation.

Nigel Don: Do you expect an increased workload under the disclosure regime? I get the impression that you feel that you are doing it already and that the bill merely tells you what you need to do.

The Lord Advocate: I hope that we will to some extent reduce the workload that relates to disclosure as a result of the developments that we are currently researching. We are running pilots of pen drives, encrypted websites and so on to remove the labour intensity of the process. Disclosure was a huge additional burden when it was introduced in 2005 and it was responded to very well, given that it happened overnight. So far as the police are concerned, there should be no difference from current obligations in respect of disclosure: there is no change to the law or to the extent of our obligations. There may be alterations to working practices but—again—given the practices that have been developing, it should not be a dramatic change. It should be neutral.

Nigel Don: I will turn to the non-notification order procedures. It has been suggested that that process might not be consistent with the ECHR. Can you give us a policy steer on whether it is an acceptable way forward?

The Lord Advocate: As Lord Advocate, I will look at whatever manifestation there is of that provision at the end of the bill process and I will refer the matter to the Privy Council if I consider it to be incompatible with the ECHR. However, the issue of special procedures and non-notification has been looked at by the House of Lords in R v H and C and it has been looked at again by the House of Lords in the appeal court this week, when there was an opinion regarding special advocates. I am satisfied that, so far as is possible, the bill sets a framework that will be compatible with the ECHR as we understand it in the United Kingdom, and that much will depend on the facts of individual cases. It will ultimately be for judges to determine whether the provisions, as they operate in practice, can allow fair trials in that respect. That judicial role will be important.

Stewart Maxwell: We have received written evidence about non-invasive post mortems from the Scottish Council of Jewish Communities. In principle, do you have any objection to the introduction of non-invasive post mortems—in other words through magnetic resonance imaging scans—into the Scottish system, with the obvious caveat that the procurator fiscal would have the final say. I raise the issue not only in the light of the written evidence from the Scottish Council of Jewish Communities, but because I think that Muslim communities and other communities would probably support the introduction of such post mortems and because the Coroners and Justice Bill, which is currently going through the UK Parliament, makes provision for such a change in England and Wales, following the pilot trials in Manchester. Do you have any objection in principle to something similar coming into effect in Scotland?

The Lord Advocate: No—but it would depend on the nature of the death. Stewart Maxwell referred to deaths generally, but in the context of suspicious deaths, when we are looking at potential homicide, we would require to ensure as far as possible that we present the best possible case to the court. Where possible, if there was a significant clinical history—for example, if a person had sustained injuries and it was a very long time before they died, and there were significant clinical notes as well as computed tomography scans in life and so on—the need for a very invasive post mortem might be reduced, but might nonetheless be required thereafter to satisfy the evidential tests of corroboration, if the cause of death were to become more complex because of that very fact and causation was an issue.

I do not think that non-suspicious deaths would be within the scope of the bill, but the matter is already very much of interest to procurators fiscal. Indeed, John Logue and his staff have been looking at how we can reduce, to some extent, the terrible trauma of post-mortem examination for next of kin in any circumstance, but particularly where provision can be made for view and grant, as it is referred to. A number of pathologists in Scotland will be satisfied that by looking at the clinical notes and the X-ray material that may be available, as well as at the clinical history, by viewing the body externally and by taking samples for toxicology or for other purposes, they will be able to certify death on that basis. Where possible, that will be done. In other circumstances, such an approach might not be possible.

The specific issue of the use of CT scans by the Manchester coroner is something that we have considered. We visited the Manchester coroner with a view to establishing whether such an approach could be introduced in Scotland. That study is on-going and Mr Logue will be able to assist the committee on where that work is now.

John Logue: We are considering the matter closely because of representations that have been made to us. However, it is important to bear in mind a number of important differences.

In the context of the statutory scheme and the operation of the coroner's role, the legislation in England and Wales specifies when post mortems are required. We have a very different scheme in Scotland, so we need to consider whether MRI scan post mortems are useful, whether legislation is required for such post mortems to happen, and whether the broader role that the procurator fiscal has in relation to the investigation of deaths offers other opportunities.

There are other ways in which the procurator fiscal investigates deaths in Scotland, which mean that the use of such equipment—as it is envisaged in England and Wales—would not be necessary in Scotland. The answer, as the Lord Advocate has said, is that there is in principle no objection to its use, but the context may be very different. It may not be required as it is in England and Wales, and we are happy to consider other ways in which we can resolve the issue. At the end of the day, we must be guided by medical opinion as to when that is appropriate, in addition to our own views, to which the Lord Advocate alluded in relation to suspicious deaths. The early indication is that the use of such equipment may have limited scope, but that does not mean that we should not consider whether it would be useful.

Stewart Maxwell: I accept what the witnesses are saying—with the exception of the last point that Mr Logue made about how useful such scans would be. The evidence from the Manchester pilot is that replacing a surgical invasion with an MRI scan has reduced the number of post mortems by about 90 per cent or even more, which is more extensive than the limited application that Mr Logue is suggesting.

John Logue: The difference is between the context in which the procurator fiscal investigates deaths in Scotland and the more prescriptive and regulated scheme whereby the coroner in England and Wales investigates deaths. I understand that there are generally many more post mortems in England and Wales at the instigation of the coroner. I am trying to get across the fact that there may be more flexibility in the current system in Scotland, which means that MRI scans will not have the impact that they appear to be having in England and Wales. That is my understanding following an early visit to the coroner and the professionals who operate the scheme.

Stewart Maxwell: I have written to the Cabinet Secretary for Justice about the matter, which merits further discussion before stage 2.

The Convener: It is work in progress for the Crown Office. By that time, the situation will, we hope, be clarified.

Nigel Don has a final point to raise.

Nigel Don: Looking at the sections about extreme pornography, I am left with the impression that the offences are more widely drawn regarding images of children or images that may have come from children, than are those regarding images of adults. That may or may not be a correct perception. Given the influence of computer software and the developing nature of crime, which the Lord Advocate mentioned earlier, is section 34—which deals, essentially, with adult pornography—drawn widely enough?

The Lord Advocate: Yes. We already have the Civic Government (Scotland) Act 1982, which includes the wider definition of, or the fundamental platform of, obscenity. It provides a list, although, with the passage of time and for the reasons that I mentioned regarding serious organised crime, a list that tries to be exhaustive might always be seen to be in some sense deficient or might not cover innovation. The difficulty in respect of pornography is that we come up against the ECHR rights of freedom of expression and the article 8 rights to privacy in the context of sexual activity. It is important to derive some certainty in that area in order to show a balance—to show not only that what is being done in engaging article 8 is proportionate, but that it has a degree of certainty in that area of criminality.

The Convener: I thank the Lord Advocate, the Solicitor General and Mr Logue for their attendance. If we could have the further information that has been requested as soon as possible, we would be even more appreciative.

12:44

Meeting suspended.

Criminal Justice and Licensing (Scotland) Bill: Stage 1

10:06

The Convener: This morning's principal business is our continuing consideration of the Criminal Justice and Licensing (Scotland) Bill. The committee has taken evidence on the bill's criminal justice provisions. Some variety is perhaps called for, so today we will concentrate on the licensing provisions in parts 8 and 9.

I welcome the first panel, which comprises Alan McCreadie, the deputy director of law reform, and John Loudon, the convener of the licensing law sub-committee, from the Law Society of Scotland. We thank the Law Society for its written evidence, which we read with considerable interest.

We will go straight to questions, which I will start. Your submission highlights matters that the bill does not deal with but which you believe it should deal with, such as amendments to the appeal provisions in the Licensing (Scotland) Act 2005 and the reintroduction of a site-only application procedure. We read with particular interest what you said about appeals, but will you describe in more detail the difficulties that you expect if the 2005 act is not amended, and talk about the site-only application procedure?

John Loudon (Law Society of Scotland): We have the rare situation that almost every lawyer—if not every lawyer—whom I have met agrees that the new appeal procedures are cumbersome, expensive and not working in practice. That is what the private sector, the public sector and sheriffs have said.

The problem is that the clerk to the licensing board—somebody like the committee's adviser, Robert Millar—must produce a stated case and identify facts. In general, a licensing board is not a place where facts are identified: committee members who have been licensing board members will know that boards hear ex parte statements from people such as me, hear the objectors and take a view on the matter. At the end of the day, the applicant, the objector or I can ask for written reasons, which have historically been the basis on which a decision is made whether to appeal.

The new procedure is a long way from that. Hindsight is a wonderful thing, but it would be relatively easy to drop back to the summary procedure. Some debate might take place about the provisions for instant suspension. You might recall that, under the Licensing (Scotland) Act 1976, if a licensing board suspended a licence, somebody such as me would simply appeal, so the suspension had no effect—

The Convener: I am aware of that procedure.

John Loudon: I thought that you might be.

The Convener: I was the victim of it several times.

John Loudon: Under the 2005 act, if a board decides to suspend a premises licence holder, the suspension is instantaneous, but the person can go to the sheriff principal to ask for the decision to be reviewed. Objectively, it is difficult for a sheriff principal to do that quickly. How can a sheriff principal gainsay a licensing board when it has exercised its discretion without hearing all the evidence? For the first time that I can remember, there is, right across the board, a wish to revert to the summary procedure under the 1976 act.

I do not know whether Alan McCreadie wishes to add anything.

Alan McCreadie (Law Society of Scotland): I am not sure whether there is anything that I can usefully add. From my experience as a clerk to a district court, I know that, following the implementation of the Criminal Proceedings etc (Reform) (Scotland) Act 2007, many solicitors in local government who previously clerked district courts and licensing boards have transferred to the Scottish Court Service. There may be resource issues for councils or clerks who are simply not used to stated case procedure, but it does not seem to sit well with an appeal against a licensing board's decision for there to be a decision on which facts have been admitted and proved and thereafter for the sheriff principal to adjudicate.

John Loudon: The other matter that the convener raised was that of what I would call section 26(2) applications under the 1976 act. Some members will know that, under the old provisions, it was possible to apply for a licence in principle. Someone who wanted a public house licence went to the board and gave a brief description of the premises as they would be. If the board granted that licence, the applicant could go to affirmation and finality. The mischief under the 1976 act was that the board had no control over the detail once someone got to the affirmation stage.

We do not have that facility under the 2005 act, and there is a desperate need for it. I recently advised a pension fund about a major development—a large hotel project—that it was considering, for which it did not have an occupier. When I explained that it would be necessary to get planning permission and to produce detailed plans of the hotel, right down to fire exits and fire alarms, and an operating plan, the fund's representatives told me that it would cost them more than £200,000 to do that. As a result, the project is simply not happening. That represents the loss of a major inward investment to Scotland, which is crackers.

If, under the 2005 act, we had a procedure that was similar to the section 26(2) procedure under the 1976 act, an applicant who wanted to obtain a premises licence would outline broadly what they wanted. The real plus of such a system is that the applicant would have to get their plans approved at a later stage, and the boards would have the power to review, modify, revoke or suspend a licence if they were not happy. There is a control in the 2005 act that was missing from the 1976 act. It does not matter whether we are talking about a corner shop or a huge development—it is extremely important that people have the ability to apply without having to produce detailed plans.

Let us say that someone wants to put a small pub in a village. Before they can get off first base, they must have detailed drawings of the pub, right down to where the bar and the exits are, just to lodge the application. That situation is crackers, and it is certainly not good for business or for Scotland. I feel passionately that people need to have the flexibility to lodge section 26(2) applications, while the boards should be left with control over the details of opening hours, operating plan and layout plan.

The Convener: I turn to another issue that obviously causes you some concern—the fact that the bill provides for the attachment of mandatory and standard conditions to any type of licence that is issued by a licensing board. You say that consideration should be given to having a transitional period so that licensing authorities have time to consider and approve standard conditions for all licence types. Will you take us through some of the practical difficulties that could arise?

10:15

Alan McCreadie: We raised that point regarding section 121 of the bill and the fact that a deemed grant will not now be unconditional—the society noted that mandatory licence conditions can be applied. I do not think that there is any particular difficulty with that but, from a practical point of view, the society considered that a transitional period should be required to allow such conditions to be put in place. There will be a move from deemed grants being unconditional, as is the case now, so we were calling for a sufficient period to allow licensing authorities that deal with civic government-type licences under the Civic Government (Scotland) Act 1982 to bed in the new conditions. The society did not have a particular view on the matter other than the practical implications that section 121 would have.

The Convener: So there would be no particular issues and the proper administration of the licensing system would not be prejudiced by there not being arrangements in place in the short term.

John Loudon: I do not think that there is a problem on the civic government side. It is simply a question of identifying what the conditions would be, having some discussion about that and reaching agreement. The conditions could then be rolled in, perhaps, as licences are renewed.

The Convener: We will stay under the same general heading, with Nigel Don continuing the questioning.

Nigel Don (North East Scotland) (SNP): Let us talk about something that I do not think we have ever spoken about before, Mr Loudon, as I was never on the licensing committee: taxis. As we understand it, the bill requires local authorities to review taxi fares every 18 months at the maximum. I am referring to section 124(3)(a). In your submission, you suggest that that will be a difficult timetable to work with. Will you elaborate on that for us?

John Loudon: The concerns about that aspect of the bill primarily came from council solicitors who are involved with taxi reviews. They were concerned that it would be difficult—because of all the parties concerned and all the consultation that was required—for such reviews to be completed within 18 months. I do not know whether that is impossible, but it is difficult. Glasgow City Council is particularly concerned about that period—I do not know what the City of Edinburgh Council's current view is on the matter.

Nigel Don: Perhaps we can ask. Is the problem that we cannot find a way of having an 18-month cycle? I find that idea difficult—we could simply suggest numbers far enough in advance so that the cycle could always be made to work. Is there a need in principle to survey the number of taxis that are required? Is that a part of the plot that is not written in?

John Loudon: To a certain extent, it depends on the area of Scotland. Some parts of the country have caps on the number of taxis; others do not. It might be more of a problem in the bigger cities than elsewhere. If the reviews were in the system, and if people were given enough notice, they might be manageable even if they had to be carried out within 18 months.

Alan McCreadie: I do not think that I can usefully add much on the subject of that 18-month review period. Mr Loudon was right to state that it would depend on the local authority area. The fact that a consultation must be factored in means that the 18-month period within which the review process must be completed might prove problematic, purely from a practical point of view.

Nigel Don: It would be useful to get clarity on that. A local authority might finish up, in effect, having a continuous consultation because numbers have to be produced every 18 months. It is not obvious to me why that is impracticable, although I appreciate that it might be if other things get in the way.

John Loudon: Perhaps that would be the answer—to have a revolving review.

Nigel Don: That makes sense to me—it is not obvious to me why that is not possible. I think that is why we are asking the question.

Alan McCreadie: I am not sure. I would really have to investigate that point further.

Nigel Don: If you could give us some clarity about where such a review would cause a problem, it would be useful.

The Convener: It might be a matter for each local authority.

Nigel Don: They are all doing the same thing.

The Convener: Such arrangements would not be precluded under the bill as it stands.

Alan McCreadie: That may well be the case.

The Convener: In any event, it would be useful if you could come back to us on that point.

Alan McCreadie: We certainly will.

Nigel Don: Your submission also picked up on the issue of people whose driving licences are suspended. The legislation suggests that they have to have a licence for 12 months before they can apply or reapply for a taxi licence. Therefore, if somebody had a six-month suspension, it would be 18 months before they could drive a taxi again. I see the practicalities of that situation. Is it really a problem?

John Loudon: It might be a problem for some people, but it could be overcome simply by giving the licensing committee discretion on the matter. In other words, if the committee sitting to consider a particular application were given discretion to look at the facts and circumstances, it is likely that it would come up with the right answer, even though we do not always agree with what committees come up with. In the example given, if somebody had a six-month ban and could not reapply for a licence for a further year, it would be effectively an 18-month penalty, which does not seem fair. However, I would be comfortable if the committee considering the case were to look at the facts and circumstances and take a view.

Nigel Don: I am not so sure whether they would, but we will get a chance to ask them about it later.

Your submission also picks up the issue of advertising taxi fare scales in local newspapers. It seems a relatively trivial matter, but is that really the wrong medium in which to advertise such things these days?

John Loudon: As you know, newspaper adverts are extremely expensive. They have to be paid for by somebody—it will come out of the fees. In this day and age, most people know that almost all information should be easily available on the web. I accept that some council websites are not as good as others, but they could be improved. If you do not have web access in your house—although the majority of people do—you can certainly access it in your local library. It is not a problem. If people are aware that the first place to look for information about the council, be it about taxis, pubs or even road closures, is on the web, you will save an awful lot of money. Newspaper adverts are a one-off and expensive cost. If you happen to read the local paper, it is fine, but if you do not take it on the Tuesday night when it is published, it is of no use to you.

Nigel Don: By way of extension, do you suggest that we should do the same thing with almost all the other public notices that appear in the papers—put them on the web?

John Loudon: If you are asking me for a purely personal opinion, the answer is yes. If people accept that public information is readily available on the web and council websites are user friendly and easily accessible in libraries, I would be happy with that.

The Convener: We will now proceed to the possible unintended consequences to charities, with Robert Brown.

Robert Brown (Glasgow) (LD): I will ask a supplementary question on that last point first, if I may. Among the issues is one of time. People can get all sorts of general information from a website, but if they want to know about dates for objections or new applications, I presume that it is desirable to have a specific notice that draws their attention to the information. Do you agree that that need is not met by website information?

John Loudon: Again, purely personally, I think that councils should have a website with links to all the things that are happening so that people can see that, over the coming month, there will be X, Y and Z and all they do is click on the roads, public entertainment or licensing link, which takes them to the next information. It should be really easy for people to access information in that way. A lot of council sites are not user friendly, but they could be made so. The savings to the public and private purses of not having to run all those newspaper adverts would be considerable.

Robert Brown: Let us move on to the exemption enjoyed by charitable, youth, religious, community and other organisations to the requirement to hold a market operator's licence, which is to be changed by section 125. You made some observations about that. Will you give us more insight into what you think the consequences of that provision might be? Some of them are fairly obvious, but perhaps there are wider issues to consider.

John Loudon: The provision is similar to that for the licensing of public entertainment. In certain circumstances, it is patently obvious that someone needs a licence, but in others it is not. I offer a practical example. One of the ladies who works in my team has a severely handicapped son. Recently, she and others have been trying to organise an event to raise money for people in that situation. At present, they do not have to pay a fee for a licence. If they had to do that, the event simply would not happen.

Patently, some things need licences and others do not. It comes down to common sense. A large public event will usually need a licence. There are questions about how we define "large" but, if someone is trying to get 50 people together to raise some money for charity or whatever, it is not proportionate to impose the need for a licence and a fee.

Robert Brown: Lots of summer galas of varying sizes and scales take place in Glasgow and other areas. Some of them are week-long events with parades and roads being closed, whereas others are minor events with a few stalls on a public site. Where should the balance lie with such events, which will probably be hit the most by the bill? On the one hand, we have the bureaucracy of the licensing process. Is that necessary? What is its practical advantage? On the other hand, if an event is licensed, the authorities have some control over it.

John Loudon: I am not sure how we can strike the right balance. I suppose that I would turn the question on its head and ask where we have problems at present. If there are problems, can we identify them, find out the cause and determine the best solution? I am not aware that there are problems throughout the country with unlicensed events, but the proposal must have come from somewhere. I presume that somebody has information to explain why licensing is needed. If so, that is fine, but if there is no problem and no mischief to fix, why do we need to go down the regulatory route? If a problem has been identified, that is fine, but I am not aware of one.

Robert Brown: There have been some issues with free events—not events run by charities but concerts and various things of that sort. The bill removes the exemption that free events enjoy from the requirement to hold a public entertainment licence. Do you have a view on that?

John Loudon: Personally, I think that a large-scale public event probably needs a licence, regardless of whether it is free or charged for, because there will be health and safety and other issues that might not arise with smaller events. However, do we draw the line at 50 people or 500 people? It is difficult. All that we could do is to ask councils and police forces which events cause them difficulties and where they draw the line, and take a view based on that.

Robert Brown: Can the matter be dealt with by definitions in the bill that separate big events—those above a certain size—from small, non-challenging events?

John Loudon: There will be a problem wherever you draw the line. If the line is drawn at 500 people, people will go up to 499, or they will come and ask people such as me how they can stretch the limit. It is difficult to be prescriptive, but ultimately there must surely be a degree of common sense, the reasonable exercise of discretion, and a system that is proportionate to the risk. The public interest is paramount.

Robert Brown: I think that I am correct to say that, under the bill, it will be left to local authorities to decide whether to license events. We could argue that that is the proper approach because local authorities know the local circumstances that might arise. Is that a flexible arrangement that will allow proper consideration to be given, or is the matter so cumbersome that we need to create a general scheme rather than make decisions in individual cases?

John Loudon: The system might become too cumbersome or overprescriptive. At the end of the day, local councillors know their area. I read recently in a newspaper that Dundee City Council has decided to ban cakes from fêtes. That would be fine if there were a problem, but I am not aware that there is a problem. I keep coming back to that point: if there is a problem or a mischief that needs to be cured, we should make rules to cure it, but if not, why should we regulate something that does not cause difficulties?

10:30

Stewart Maxwell (West of Scotland) (SNP): I want to follow up the point about youth, religious or community groups having to apply for a licence. Mr Loudon seemed to indicate in answer to Robert Brown's original question that such groups must apply for a licence. However, the Law Society's written evidence states:

> "It is unclear as to the policy intent of this particular provision as charitable and community organisations in future will require to consider the cost of obtaining a market operator's licence and associated costs and that this may well prove to be prohibitive".

The bill's policy memorandum states that local authorities may choose not to license events such as gala days. Surely that indicates that local authorities will have flexibility over such licensing and that the groups about which Mr Loudon said he was concerned would probably not have to apply for a licence.

John Loudon: I sincerely hope that that would be the case, but local authorities sometimes err on the side of caution, so they may opt to include such groups in licensing.

Stewart Maxwell: If there is something to be cautious about, is it a bad thing if local authorities err on the side of caution?

John Loudon: If there is something to be cautious about or there is a mischief, I have no difficulty with a local authority erring on the side of caution. However, I have a problem if licensing is applied across the board without a bit of discretion and proportionality, because that will catch things that were never intended to be caught. I do not think that anybody here would have a problem with a large event with 500 people having to have a licence, but many of us would be concerned if, for example, a local fête for 40 or 50 people had to have a licence and go through all the required procedures, as that would not be necessary.

Stewart Maxwell: I agree with you. However, I am confused, because the bill seems to provide flexibility for local authorities to choose to license—or not—an event on the basis of local discretion and whether the event is very large or very small, as you described. I am therefore a wee bit confused about what your problem is.

Alan McCreadie: I am not exactly sure how that flexibility is put in place, given the amendment of section 40 of the Civic Government (Scotland) Act 1982 by section 125 of the bill, unless it is done by a section 9 resolution, whereby a local authority would simply resolve not to have market operators licensed at all. I suppose investing some discretion in the local authority can be brought in by regulation. I concede that I have perhaps missed something, but I am still unsure about how discretion is introduced through the amendment of section 40 of the 1982 act by section 125. However, you are right that the policy memorandum states that local authorities should be vested with discretion.

Stewart Maxwell: Does the bill as drafted not implement what the policy memorandum states? Is that the issue?

Alan McCreadie: From my reading of the bill, that appears to be an issue, unless I have missed something.

Stewart Maxwell: If you can contribute anything else after further reading, perhaps you can write to us.

Alan McCreadie: Indeed—we will.

Stewart Maxwell: We might need to take up your point with the Cabinet Secretary for Justice.

The Convener: It would be useful to have further information from Mr McCreadie. Cathie Craigie might have a couple of points on the same issue.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): The policy memorandum seems to be silent on section 125—it does not give any explanation of it. However, the explanatory notes state clearly that

"licensing authorities have discretion as to whether to charge reduced or no fees".

That seems to suggest that somebody would have to apply for a licence and that it would then be up to the local authority whether to charge a fee. Is that your understanding? Have you raised concerns about the issue because you do not see any evidence for the change?

Alan McCreadie: Our question is whether the licence is required in principle, rather than whether it should be for local authorities to determine whether a fee should be charged for a charitable or youth organisation event. The bill certainly requires further scrutiny in that regard, and I undertake to look at the area.

Robert Brown: I want to be sure that I am clear about this point. I must confess that I understood that there was a difference between the local authority having the discretion to decide whether to have a scheme for the licensing of charitable events and the like, and how that discretion was exercised, which would obviously have to be in accordance with general principles. The local authority would therefore have to develop arrangements for events, rather than consider each event independently and flexibly. Is that your understanding?

Alan McCreadie: Yes.

Robert Brown: It is not only about the fee; for small bodies, which are perhaps not very experienced in such matters, it is also about the process and the annoyance of having to go through it. Is that also your fear?

John Loudon: The process can be very daunting. It is sometimes bad enough for lawyers, but my assistant, for example, who is an experienced paralegal, would have found the process daunting. We do not want to put people off holding such events. I come back again to the fact that it is in the public interest that they happen; it is good for the community and we do not want to make it difficult for them to be held. I have no problems with licensing large events.

Robert Brown: Am I right that the provision would apply to both indoor and outdoor events? We mentioned galas. Would it also apply to church fêtes, events held in council halls and such like?

John Loudon: I thought that it would apply to all events, whether inside or outside.

Robert Brown: That is what I thought.

The Convener: That was also my interpretation.

Paul Martin (Glasgow Springburn) (Lab): Good morning, gentlemen. The bill makes provision for applications for licences under the Civic Government (Scotland) Act 1982 to be treated as renewals when they have been received within 28 days of the expiry of an old licence. Your submission refers to that provision. Can you elaborate on some of the issues with the provision that you have raised?

John Loudon: The matter is reasonably straightforward. One can see the logic and the fairness of having a bit of leeway. However, what happens if, for example, an offence occurs or someone applies for an extra taxi during the 28-day period? If the wording were adjusted to accommodate such developments, there would not be a problem. It seems fair to allow a bit of leeway, but it is necessary to address the issue of something occurring within the 28-day period.

Paul Martin: Can you suggest any particular wording, or can you respond to the committee later on the matter?

John Loudon: I cannot do so yet, but I am sure that we can have a look at it for you.

The Convener: I will cite an example—you will appreciate that, for lay people, it is always best if an example can be used for illustrative purposes. Let us assume that a taxi driver neglects or fails to apply to renew his licence. Three weeks in, it comes to the attention of the police that he has been reported for sexual assault. Does that require to be picked up by new wording? Is that an appropriate illustration?

John Loudon: Yes. That is a simple illustration.

The Convener: We now turn to alcohol licensing with Cathie Craigie.

Cathie Craigie: Your submission highlights the practical difficulties that may arise if a licensing board were able to grant a licence subject to modifications to the layout plan. Can you elaborate on those practical difficulties?

John Loudon: The issue has been a matter of much debate among members of the Law Society's licensing law sub-committee. Let us imagine that we are in a room with a licence in a listed building—I do not know whether the Parliament building is listed yet. There is a bar in one corner and, for whatever reason, the licensing board decides that it must be moved to another position. The operator may have got their building warrant and other consents based on the bar being in its current position, so the decision has an immediate knock-on effect. Many buildings in places such as Edinburgh, Glasgow and Dundee are listed. If there are changes, the operator may need listed building consent, planning consent and a building warrant, which would not necessarily be easy to get. Is it not for the operator to decide how he wants his business laid out and run? Modifications have been made to layout plans during transition. I am pretty sure that the legislation does not allow for that, but it has happened and it has worked.

For instance, if the plans show an outside area to the left of the front door, but everyone agrees that the area is to the right and adjusted plans are submitted, that has just been accepted—it has worked. However, I do not think that that is covered in the legislation. Although I am not aware of bars being moved, some boards have asked for the plans to show the location of gaming machines. That is micromanaging. It should be for the operator to decide where they want their bits of kit, having regard to the terms of the liquor and gambling legislation, which are fairly tight. A number of problems might arise if boards are able to tell operators to move a bar, a toilet or what have you—I do not think that the board is the right place for that to happen.

Cathie Craigie: The explanatory notes state that the intention is that the licensing board would grant the licence

"if the applicant agreed to the proposed modification."

Your evidence is that a board might decide to grant a licence subject to a modification, but the applicant might not be in a position to agree to the modification because of other warrants or planning consents.

John Loudon: That is part of the issue. Is it reasonable or proportionate for a board to say that someone can have their premises licence provided that they move a gaming machine from the left-hand side of the room to the right-hand side? I can envisage circumstances arising, although not often, in which boards ask for modifications that the applicant simply does not want to do. I do not think that there is a right of appeal in that regard.

Alan McCreadie: I do not think that there is. For want of a better phrase, we would end up with a catch-22 situation. Once the technical consents have been given, if the board is not happy with something, which is then fixed—if the applicant is happy to do so—the premises might then no longer meet the technical consents.

John Loudon: Some of the witnesses who will give evidence after us might want to expand on the issue.

The Convener: Surely the difficulty could be overcome fairly simply. If the licensing board wants a bar moved to another place and the applicant is of the view that that is totally inappropriate, he does not have to take up the licence—he could submit a new application that would then be a matter for determination by the board and subsequent appeal, if necessary.

John Loudon: That is possible, but a new application is an expensive process. It takes three to six months to process an application, by the time that the application with all the detailed plans is submitted, the plans are published on the board's website, the neighbour notification is carried out and the hearing takes place. It is not reasonable to require that to happen.

The Convener: Has anybody challenged a decision yet?

John Loudon: There have been a number of appeals in relation to premises licences. Those relate mainly to the definition of the term "excluded premises" and the contradiction between the 2005 act and the guidance—the act talks about residents, whereas the guidance talks about the community. Very few of those cases have gone through to decisions. There was a case in Aberdeen involving the Co-operative and the Shafiq case in the west of Scotland, but those were both to do with petrol stations. I am not aware of any other cases.

Cathie Craigie: If an applicant does not accept the amendment to the layout, can they ask the board to continue the process so that they can check with other authorities, or does the board have to reach its decision within a specified period?

John Loudon: One can always ask a board to continue. In most cases, if there was a reasonable ground for continuation, the board would grant it—generally, boards are not unreasonable. However, one might not be able to get a satisfactory answer from all the departments. For instance, obtaining listed building consent is a time-consuming process, as members will be aware.

Cathie Craigie: That is obviously an issue that we must consider more closely.

I will move on to ask about section 135. Your submission welcomes the provisions in the bill that will enable occasional licences to be granted outwith the normal timescales, when the licensing board is satisfied that the application should be dealt with quickly. You make the point that a similar fast-track procedure should be considered for applications for extended hours. What would be the advantages of that?

10:45

John Loudon: Under the 1976 act, occasional extensions, as they are known, are common. It is very rare for there to be a problem with an occasional extension: you put in your application and it is processed and granted. Some boards turn such applications round within two or three days, although others take a couple of weeks.

I will give the committee a practical example. I have recently been advising some larger contract caterers. Often, they are asked to provide facilities for weddings and functions at relatively short notice. Historically, that has not been a problem. People have been able to get an occasional licence, or an extension of hours in premises where a licence existed, quite quickly. However, I have advised the caterers that they should allow at least two months for an application for an occasional licence, and possibly the same length of time for an application for extended hours. The caterers have been absolutely horrified.

The good news is that all the competition is in the same boat. However, a lot of conference and function business is carried out at relatively short notice. Since the 1976 act came into force, the system for occasional extensions has worked very well, as far as I am aware. Relatively few issues have arisen. I therefore cannot see any good reason for not replicating that system in the 2005 act. That would be in the interests of the public, business and councils. We could be creating a time problem when none exists at present.

The Convener: When there are premises licences, an argument might be made that the applicant, or licence holder, could register as a person authorised to keep his premises open with an extension to the previously permitted hours, provided that he telephoned his local police office to say, "I intend to stay open until 2am." Thereafter, he would be invoiced by the licensing authority. That is what happens in Germany and Austria.

John Loudon: I can see that that would be great; equally, I can see that many of my clients would say to me, "Just get it for me, John, and we'll keep it just in case we ever need it." However, if the system were used properly and respected, it would be a nice, simple solution.

Nigel Don: We have already talked about site-only licences. The submission from the Scottish Beer and Pub Association says that, under section 45 of the 2005 act, there is only

> "a two-year window ... from the provisional grant of licence to confirmation".

I can see how that could cause problems and am slightly surprised that the witnesses have not raised the point.

John Loudon: It is already causing major problems. I will give the committee a practical example with which I have been involved. I was at the Edinburgh licensing board—Marjorie Thomas from the board is here today—where we sought to convert an entertainment liquor licence for a new casino in Fountainbridge to a premises licence. That was granted without issue or objection. Indeed, we even had the support of the local community council.

As soon as the licence was granted, I said to the board that I needed an extension to the two-year period because the company now had to go back to the bankers and the developers to get the project done. Demolition and rebuilding are involved, for retail units and so on, and the work will not be completed within two years. The board members smiled and said, "There shouldn't be a problem. Just come back in a year or in 15 months' time and tell us how you're getting on."

There is now a real prospect that the development will not go ahead. The company cannot take the risk: there might be an election, and different councillors might be on the board. Two years is a very short time for a big project. The Scottish Parliament building is one example; the Land Securities development at Livingston took six years; and the Scottish Widows development at Fountainbridge has taken six years. Two years is crazy.

There is no mischief in allowing a longer period. A project of any size will take longer than two years. If the project is not completed within two years and the board does not grant an extension, the developer might have spent heaven knows what and still have no licence. Developers are simply not going to do that. Bankers or financiers will not lend someone the money to do that.

Nigel Don: I think that five years is the period in which you have to get something on the ground after you get planning permission for a development. Would that be a sensible period?

John Loudon: Five years is sensible, especially for the bigger projects, such as the redevelopment of a town centre. Is there a mischief in such a period? If the licence is granted, the board can take that into account when it is looking at whether there is overprovision and so on. If the project is not taken through to completion, it will simply fall out of the system. There must be a degree of security to allow projects to go ahead. Even for a small project, such as a new pub or restaurant, two years from the date of grant is too tight a period in which to get everything in place and completed—you need the completion certificates.

Nigel Don: The Scottish Licensed Trade Association submission made some extremely interesting points about the fees for licences, which are to be based on rateable value, and the fact that supermarkets would pay relatively small fees in comparison with the fees paid by the small trader with a shop on the street corner. Given your considerable experience, will you give me some clues about the balance in all this? It is plain that licensing a supermarket with a very large turnover does not require a great deal more work by the licensing authority than licensing a corner shop, so it could be argued that it would be perfectly equitable for the supermarket and the corner shop to pay the same fee. However, the submission quite rightly states that 7.5 per cent of the fees will be paid by traders that have something like 50 per cent of the turnover. How can we balance that?

John Loudon: With the judgment of Solomon. It is very difficult to strike the balance. You will never get it right, because whatever you plump for, there will always be people who are caught fairly—or unfairly. A large supermarket, hotel or pub chain will probably present all the material to the board in a well-organised and efficient way and it will not take a lot of administration to deal with the application. However, the tiny wee restaurant or corner shop might present material to the board in a complete mess, which takes a lot of time to deal with. I know that because I have been at many board hearings where a lot of time has been spent trying to deal with the smaller applicant who has not taken professional advice, who has not gone to the expense of employing someone to help them and who takes up a disproportionate amount of time at the hearing. It is very difficult to come up with a scheme that everybody will be happy with. We have the rateable values and there are sliding scales. I appreciate what the SLTA is saying. I am glad that I am not the one who has to make the decision on the fees, because it is not easy.

Nigel Don: Thank you for clarifying that point for me.

The Convener: That was a refreshingly honest answer.

Robert Brown: The Law Society submitted a supplementary letter on some of the technical points to do with heritable securities and so on.

I want to ask about the logistical problems that you anticipate in relation to the transition date of 1 September 2009. You said in your letter that, given the logjam that is building up—I have heard this from the trade, too—consideration might be given to allowing some sort of extension or dispensation for applications that are in the system by a certain date, so that they can carry on and be okay when it comes to the transition date. How can that be done? Are there powers in existing legislation to do that? The bill will not be passed in time. Can such a dispensation be done by statutory instrument? Can you give us any guidance on the implications of that?

John Loudon: I think that such a move will be essential. A significant percentage of premises throughout Scotland will not have designated premises managers on the premises licence and will not have the premises licence and summary up by 1 September. I think that you can do pretty nearly anything that you want under section 146 of the 2005 act, which is a wide-ranging, bits-and-pieces section.

I will give you a practical example. So far, I have received one premises licence with a designated premises manager on it, although we have made many hundreds of applications across Scotland. I have had applications for personal licences in with some boards since before the turn of the year, and those personal licences have not yet been issued. There is a large misunderstanding across the industry that the training certificate is the personal licence. All the trade bodies have worked hard—I know that licensing lawyers have worked hard—to get clients to understand that it is a three-stage procedure involving training, the personal licence and the designated premises manager.

Even when the training has been done and the application for a personal licence is in, applicants have no control over how the boards process that—there is no time limit to say that a personal licence application must be dealt with in, say, a month. So, although we have put in hundreds of applications early, they are still in the system and we have no control over when the licences will be issued by the boards. Then, once a licence has been issued by the board, the licensee must nominate a designated premises manager. The board must do all that administration and processing and have the licence back with the applicant by 1 September or the applicant cannot trade alcohol. If, for whatever reason, the board does not do that by 1 December, the applicant's premises licence is revoked. It is horrendously complicated.

Let us take the Sheraton Grand hotel in Edinburgh as an example. If the application is in but the board simply has not got around to processing it by 1 September, the hotel cannot sell alcohol. If the application has not been processed and cleared by 1 December, the licence will be revoked. That is draconian. My feeling is that, if somebody has taken the trouble to get an application into the system in reasonable time—I think that we said by 31 July in the supplementary evidence—there should be a dispensation to allow them to continue to sell alcohol after 1 September until the application has been processed and dealt with; otherwise, we will have big problems.

Robert Brown: Your evidence is that the problem extends across a good part of Scotland.

John Loudon: Right across Scotland.

Robert Brown: Is that because of the bureaucratic implications for the boards and the pressure of work?

John Loudon: It is because of the sheer volume of applications. We have about 17,000 licensed premises in Scotland, each of which needs at least one DPM. That is a minimum of 17,000 DPMs. However, most licensed premises will need two or three personal licence holders, so we are talking about not 17,000 applications across Scotland, but 50,000 or 60,000 applications across Scotland. I do not care how efficient the boards are—that is a huge administrative burden on them.

Some boards are a year behind in issuing premises licences, which are supposed to be dealt with within six months. I prophesy that, with the best will in the world, come 1 September, we will have a problem. Not only is that not in the trade interest; it is not in the public interest. It is not right. Ladies and gentlemen, you have the ability to do something about it.

The Convener: We have received representations regarding the matter, which we take very seriously.

There are no further questions for this panel of witnesses. I thank Mr McCreadie and Mr Loudon for their attendance this morning and for giving their evidence in such a clear and cogent manner.

10:59

Meeting suspended.

11:00

On resuming—

The Convener: Our second panel is Assistant Chief Constable Andrew Barker, Fife Constabulary, and Inspector Gordon Hunter, Lothian and Borders Police, who represent the Association of Chief Police Officers in Scotland. We have your submissions, for which we are very grateful, so we will move straight to questions. I think that we need not detain you very long this morning.

Aileen Campbell: Good morning. I will kick off with a question on the concerns about an increase in the theft of metal due to its high value, which I think the Law Society highlighted in its submission. The bill replaces the mandatory licensing scheme for metal dealers with an optional scheme at the discretion of the local authority. Does ACPOS have a view on the impact of that change?

Assistant Chief Constable Andrew Barker (Association of Chief Police Officers in Scotland): The theft of metal has been an issue in the past. Our local experience is that it has been curtailed to a large extent, probably due to the economic downturn. I have looked into the issue in Fife fairly recently. As with other issues that you discussed with the Law Society, the question is when to impose the provision and when not to do so. It is difficult to say what the effect of local authorities being given discretion will be throughout the country. The issue may have faded somewhat as a result of the economic downturn.

Aileen Campbell: You are content with that being left to the discretion of the local authority.

Assistant Chief Constable Barker: Yes, at this point.

Aileen Campbell: That is grand.

On public entertainment licensing, you may have heard comments in the previous evidence session about problems with the licensing of free events. Respondents have suggested that the proposal may have an impact on the willingness of small, community organisations to put on free events. The Law Society suggested that it might be disproportionate to license such events. Why will the provision be useful to you? Does the policy memorandum offer local authorities enough flexibility not to penalise small events by requiring them to apply for a licence?

Assistant Chief Constable Barker: I can add very little to what the Law Society said. My difficulty is with the word "large". Where do we draw the line? Community events can draw several thousand people. Will that sort of event be licensed? I echo the previous panel's comments on the matter. We do not want to discourage community events, which are very much to the fore, particularly in areas such as the one that I police. I have lost count of the number of galas and local events that have taken place in Fife in my time there.

However, where do we draw the line? I am thinking of an event that is intended to attract 50 people but which attracts 500 or 1,000 people. It is very difficult to define a large event. Safety is the paramount issue. In that regard, I cannot put it better than a previous witness did: what is the mischief that we are trying to resolve? There is no particular issue with community events, but the question is where we draw the line.

Aileen Campbell: Where have the problems with large events arisen? What type of event has created problems? Clearly, the policy intention of the bill is to help to control such events. What is your experience of where the problems have stemmed from?

Assistant Chief Constable Barker: I am not fully cognisant with that area of the bill. In the past, the problem has been free events that have attracted thousands of people. If they are not regulated and controlled, they cause significant issues. Questions arise in relation to what my officers are going to do, what the role of the police is, how many officers are required for public safety and how we progress things. I do not have a lot of personal experience of the free events that have caused problems. Perhaps Gordon Hunter can say something on the issue.

Inspector Gordon Hunter (Association of Chief Police Officers in Scotland): The question is difficult. Several factors kick in—they depend on the event's size. For example, we start to think about traffic management and public safety in relation to equipment that is brought on to a site. Many issues are not necessarily policing matters, but public safety departments throughout the country consider a variety of issues in relation to structures that are brought on to a site.

Police consider the potential for public disorder and traffic management, which can without a shadow of a doubt become a major issue. Traffic management is not a major issue for a small event that involves 50 people, but if the event involves 500 people, it suddenly becomes a big issue. Even in smaller villages—the whole village turned out for our local fête recently—difficulties can be caused over a long period, and alcohol is being put into the mix. There is a stack of considerations.

Aileen Campbell: So, when it is sensible to require and request a licence is at the local authority's discretion on the basis of its local knowledge and that of your police colleagues.

Assistant Chief Constable Barker: A great deal of historical knowledge is also involved. We are all aware of events that have taken place for many years and which we see no need to license. Whether emerging events go down the same route is a difficult call for a local authority to make. The question is whether an event is likely to be large. One local authority's definition of what is large might differ from another local authority's definition, just because of the area's demographics. We cannot give a definitive answer on what is large.

Nigel Don: I will try to tease that out. Who talks to whom first? You talked about an emerging event. If an event does not need a licence at the moment, how does anybody know about it—other than through advertising—until it happens?

Assistant Chief Constable Barker: I agree that the question is difficult. If a local event is being developed or planned, we will probably hear about it through community officers or local groups such as community councils. Most such groups ask the police first for advice on whether any regulation applies, so I think that that is what will happen in the future.

As I said, that raises the issue of how people know a local authority's policy on what is large, when that applies and whether definitions exist of a large event for which notification is required and a small event for which notification is not required.

Nigel Don: Thank you for making it clear that the first notification of an event is probably to the police, through officers who are on foot in the community. On that basis—which I would predict—is it reasonable to say that you are the best judges in the first instance of what should be licensed? I am not worried about what the bill says at the moment. If the local chief constable were to advise the local authority that an event should be licensed, might that be a way forward?

Assistant Chief Constable Barker: On what grounds would we give that advice? Would the decision relate to an event's size, public safety or public disorder? We return to the same lack of definition as exists about what is large. Would the call about an event be based on professional judgment? A joint decision would have to be made that involved the chief constable, whom I would certainly want to influence whether an event was licensed, but what would be the criteria for the decision?

Inspector Hunter: I will add to the mix my experience that when people look for advice about events that are coming up, they do not necessarily approach only the police—they regularly approach public safety departments first for information. In reality, what matters is good communication. The police, local planning authorities and council departments now all have reasonably good links, so we have discussions—event planning-type meetings—that take many issues forward. The decision would probably sit better with that set-up than with a single person.

Nigel Don: That is what local councillors would predict. I am struggling with knowing what framework we should set down on paper. When the system works well, communities, the police and local authorities do not need to worry about what is in legislation—they just get on with it. That is how the world should be. However, we are worried about what we should prescribe in the framework and to whom we should give the power. How we should formulate that is not yet clear.

The Convener: Does Mr Barker have further views on the point?

Assistant Chief Constable Barker: It will be a joint decision. I am struggling to think what the prescribed criteria would be. However, as with most licensing issues, there will be close co-operation.

It is also important to take into account the other prescriptions that exist regarding the safety of events, such as the guidance on structures, which Gordon Hunter mentioned. That comes into play where there are to be large structures on the ground. We also have to consider whether to set a limit of 100 people, 500 people or whatever. That will vary in different parts of the country. A large event for one area will be a small one elsewhere. However, I am struggling to come up with helpful comments on exactly what the prescriptions should be.

The Convener: I have a further question on changes to the 1982 act. As you know, the bill extends the licensing system to include premises that sell food late at night. In your submission, you state that that will have resource implications for the police. Will you expand on that?

Assistant Chief Constable Barker: We make the point that the provision will have resource implications in relation to processing and reporting on such applications, but I emphasise that our submission fully supports the change.

The Convener: It is within our experience that such premises can sometimes be a source of disorder late at night. Will the licensing of such premises be a useful tool where there are difficulties?

Assistant Chief Constable Barker: The short answer is yes.

The Convener: Thank you. We move on to alcohol licensing, with Cathie Craigie.

Cathie Craigie: Good morning, gentlemen. The policy memorandum gives us an insight into the intention as regards the reporting of antisocial behaviour. The 2005 act requires chief constables to report to the licensing board on antisocial behaviour, but it has been suggested that the requirement is “unnecessarily onerous”. Will you comment on that?

Assistant Chief Constable Barker: The points that we make in our submission relate to the arrangements during transition, which worked particularly well. We asked whether an antisocial behaviour report is to be required in respect of every premises and what the relevance of that would be. We also asked how specific we can be in what is linked back to premises.

The provisions that were put in place during transition have been helpful. The amount of work that would be involved in producing an antisocial behaviour report for every premises is considerable. In our submission, we state that, where there are clusters of licensed premises in a town or city centre, it would be difficult in a general report to attribute antisocial behaviour to particular premises, but we can say that a group of premises has caused concern.

We are saying that, if we can report on instances that are particular to premises and can be attributed to them, that is helpful. Gordon Hunter has experience of that.

Inspector Hunter: All big cities have areas where there are lots of licensed premises. We have to consider how we can attribute specific instances to specific problem premises. If we take Princes Street in Edinburgh as an example, or George Street, which is perhaps a better example, can we attribute antisocial behaviour to the east end or the west end? Is it all caused by one premises or does it relate to a variety of premises? Large numbers of people travel through George Street to get to other parts of the city, so it is difficult to link antisocial behaviour with premises in that manner. Queen Street, which is the next street down, is probably one of the busiest thoroughfares in Edinburgh. There is only a small number of licensed premises there, but we see a higher level of disturbance because people visit the area as they are going home at the end of the night.

Cathie Craigie: I know from colleagues that antisocial behaviour in the centre of Edinburgh is a huge concern. Hardly a week goes by without a member raising the matter in the Parliament. Will the proposals in the bill deal with the issue?

Inspector Hunter: I think that the existing mechanisms and the proposed new mechanism deal with it more than adequately, because a board will be able to ask for a report if problems have been identified, perhaps as a result of complaints, and the chief constable will have an opportunity to submit a report if he has identified a clear pattern of disorder around premises. I think that the mechanism in the bill is more than adequate, without being a blanket provision.

11:15

Cathie Craigie: Mr Barker, you said that the mechanisms that have been used during the transitional period have been working. Could you tell us a bit more about them?

Assistant Chief Constable Barker: I think that they are the same as what is proposed in the bill—instead of an antisocial behaviour report being provided for every licence application, such a report is provided on premises only if one is requested.

Paul Martin: Do you accept that, under the current regime, some applications could slip through the net and some applications—for off-licences, for example—might not be subject to proper interrogation? I know that, in parts of my constituency, the acceptance of applications for off-licences has led to an increase in antisocial behaviour, which has not been reported to the licensing authority. Does the present method ensure that off-licence applications are carefully considered by the licensing authority?

Inspector Hunter: The situation that you describe certainly does not match my experience. We have examined all premises licence applications, which has taken up a considerable amount of time, and we do take account of complaints. I suspect that it is possible that some applications have slipped through the net, but strong legislation will mean that we will be able to identify problems and deal with them by way of review. That is a strong mechanism for weeding out problematic premises that have been missed, but I suggest that very few, if any, such premises have been missed.

Paul Martin: You say that examining all premises licence applications is onerous in terms of the resources that are required. If someone submitted an off-licence application for premises in Ruchazie in my constituency, what resources would be required if you had to provide a report to the licensing committee on that application?

Inspector Hunter: It is probably easier for me to talk about my force's area rather than your force's area. Our information technology systems do not link up quite as well as those in your force's area. I would have to assign a researcher and an officer to check all our systems, which could equate to two days' work for one premises.

Paul Martin: The other aspect is that, if a successful application results in an increase in antisocial behaviour, more resources will be required if officers have to attend the premises on, let us say, more than 100 occasions. Having to deal with that antisocial behaviour will have an impact on the local community. Do you accept that?

Inspector Hunter: I accept that. However, we have undertaken to provide antisocial behaviour reports on all applications by new premises, so we would catch such cases. Although we have said that we will not provide reports on all applications by existing premises, we would report any existing premises that were causing problems in the community to the board in any case.

Paul Martin: The 2005 act requires an antisocial behaviour report to be provided for every new premises licence application but, in the bill, the Government proposes that whether to provide such a report should be at the discretion of the chief constable. How will communities ensure that information about any antisocial behaviour that takes place—whether it occurs outside nightclubs or outside off-sales—is properly taken account of by the police authority? Under the bill, it will be for the chief constable to decide whether to report such behaviour; he will not interrogate every application.

Inspector Hunter: It is a difficult question to answer succinctly. The reality is that licences are granted in perpetuity and that, in future, we will consider only applications for new licences. However, the police monitor problematic premises on a daily basis. We examine extremely closely the complaints that local communities make to us or to the local authority through community councils.

One of the huge benefits of having licensing standards officers will be the fact that we will be able to monitor those premises and put packages of measures in place to reduce the level of antisocial behaviour. Where we identify problematic premises that do not come up to standard, the community, the police, the licensing standards officers or the local authority will ask for a review. I suggest that that is a strong power.

Paul Martin: What is proposed is an informal mechanism by which, as a result of intelligence gathering, the police could provide an antisocial behaviour report for consideration in the processing of a licensing application. The point that I am making is that the 2005 act guarantees that such a report will be submitted no matter what. Such reports might also highlight the fact that certain premises have no problems with antisocial behaviour. However, the bill proposes an informal mechanism whereby the licensing authority's consideration may be informed by such reports from the police, which raises the possibility that some people will slip through the net. That may affect the resources that will be required by police officers to deal with those premises at a later stage.

Inspector Hunter: We must concede that, yes.

Cathie Craigie: You told us that, rather than take up the challenge and answer Paul Martin's question about Springburn, you wanted to deal with your own area. That is perfectly acceptable. You said that your force would find it more difficult than Strathclyde Police, for example, because you do not have the recording mechanism—I suppose that that is the IT system. How widespread is that? I just assumed that everybody working in the police forces can now press a button and get all that information. Is that situation unique to your force?

Inspector Hunter: A number of forces have difficulties, but the majority of forces have systems that will do that relatively quickly.

Cathie Craigie: I consulted my own community on this aspect of the legislation a few years ago. They expect the police to be able to report on the activities that take place around licensed premises. The general public feel, rightly or wrongly, that a lot of the antisocial behaviour that they experience in their community is generated by licensed premises or people spilling out of licensed premises drinking alcohol out of bottles that they have purchased as off-sales. We will have a dilemma in reconciling what the community expect of their police service with what the police service considers reasonable.

Assistant Chief Constable Barker: I can pick up on a couple of those points. I recently assumed responsibility for licensing and recognise that the need for an integrated system is very much a priority. I can only echo what you say. I expect the police service to take note of which licensed premises experience difficulties with drinking, as the issue is raised by communities throughout Scotland and is something that we are bringing to the fore.

On the points that Gordon Hunter has made, there is a difference between when antisocial behaviour reports are put in place for premises and what their specification is. As I said earlier, should they relate to a group of premises? How should we detail which premises, if any, have a linkage to the antisocial behaviour that is taking place?

You make a valid point in respect of the systems that should be in place. That matter is being addressed at the moment.

Cathie Craigie: If a system were in place that made it simple to press a button and get information about the incidents that the police had been called to deal with at or around specific premises, that would address ACPOS's concerns about resources.

Assistant Chief Constable Barker: To a point. However, you have raised the issue of whether the incidents relate to the premises or to the area around the premises. When there is antisocial behaviour in a specified radius in Edinburgh or Glasgow city centre, how do we attribute that to particular premises? A licensee can take particular care to do all that they can within their premises, but there can still be an issue outwith the premises. There are specification issues there. Nevertheless, we will provide information in respect of all new applications and, for all current licensees, we will continue to monitor the behaviour of premises as they go forward.

Cathie Craigie: We have to remember that not all licences are held in city centres.

Assistant Chief Constable Barker: That is clearly the case. An awful lot, if not the majority of licensed premises, cause very few problems to either the police or the community. There are premises that cause problems but, as you rightly mention, there are also problems with people drinking alcohol in the street or elsewhere, which is not necessarily related to a particular premises.

Inspector Hunter: A related problem is that a large number of new premises opening up are in areas where there is demand and need for alcohol or a corner shop. As there is little or no disorder in those areas, any report would reflect that and would not be informative per se. I can think of a good example. The Law Society mentioned earlier the big developments that are happening. If there is a big development in the city centre, there will be a large number of incidents in the vicinity. If that development were slightly out of the city centre, there might be no incidents. It is about how you interpret such situations because you will not necessarily get what you expect.

Cathie Craigie: But you have to listen to what communities are saying and what they expect from people who serve them, whether it is MSPs or police officers.

Inspector Hunter: Absolutely.

The Convener: That was interesting evidence. If there are no final questions for ACPOS, I thank ACC Barker and Inspector Hunter for giving their evidence so clearly.

11:26

Meeting suspended.

11:33

On resuming—

The Convener: I welcome the third panel of witnesses. They are Paul Waterson, who is the chief executive of the Scottish Licensed Trade Association; Colin Wilkinson, who is the secretary of the Scottish Licensed Trade Association; Patrick Browne, who is the chief executive of the Scottish Beer and Pub Association; Paul D Smith, who is the executive director of Noctis and—to add to this morning's confusion—Paul Smith, who is the vice-chair of the Scottish Late Night Operators Association. Thank you for giving of your time to come here this morning. We will move straight to questioning.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, gentlemen. In your view, what are the main problems with the operation of the Licensing (Scotland) Act 2005? What changes would you like to be made to the bill to address your concerns?

Paul Waterson (Scottish Licensed Trade Association): The main problem that we have is trying to control local discretion. Licensing boards throughout the country interpret the 2005 act in many different ways, so we need somehow to standardise matters. It is difficult for us to give advice or opinions when licensing boards appear to be doing their own thing, as we often see. As the 2005 act gains momentum in the long term, the situation will only get worse. That is a serious criticism that we have.

Bill Butler: Will you give us examples in which there has been too much local discretion and a lack of standardisation?

Paul Waterson: In respect of operating plans and toilet provisions in Glasgow, there is no standardisation in respect of grandfather rights and what is meant by them. For example, licensees may not have room to put in new toilets, but their licence may depend on their doing so, and different boards may have different interpretations of the rights. We were told that people would have grandfather rights but, all of a sudden, parts of those rights are being taken away from licence holders. It puts licence holders in a very difficult situation if they are told that they have to put new toilets in when they do not have room for them.

Bill Butler: I will ask a High Court judge question along the lines of "Who are the Beatles?" Just for the record, what are grandfather rights?

Paul Waterson: I am sorry. Basically, they are the rights that allow licence holders to trade as they did under the 1976 act.

Bill Butler: I am grateful for that clarification.

Paul D Smith (Noctis): I will follow on from what Paul Waterson has just said. One of our central concerns is that imposition of requirements at local level is not handled reasonably. We are dealing with responsible businesses that have licences—other aspects of the economy and other business leaders are treated slightly differently. The attitude seems to be, "Well you've just got to get on with it in the licensed trade, because you operate under different rules." Our argument is that we are talking about people's livelihoods: businesses in the licensed trade are employers, and recent United Kingdom figures show that 50 pubs are closing every week.

Particular difficulties affect the licensed trade at the moment, and we would hate to see the bill exacerbate those difficulties. The present difficulties have been described numerous times in the press over recent months, so we do not need to go over them again.

Bill Butler: Just for the record, would you go over one or two of those difficulties again?

Paul D Smith (Noctis): We are in the middle of a credit crunch, and the smoking ban has inevitably raised issues—people do not go to licensed premises as much as they used to. Another issue is the cost of supermarket alcohol relative to on-trade alcohol. Numerous issues arise for the on-trade, and to exacerbate them would present lots and lots of people with considerable difficulties. We fail to see why that is necessary. The two-year rule, for instance, does not seem to make a huge amount of sense in terms of allowing major developments. The bringing into Scotland of money and jobs seems to be very important right now, so anything that prevents it does not seem to be sensible.

Paul Smith (Scottish Late Night Operators Association): One of the biggest problems that we will see with the 2005 act relates to its intention to control irresponsible promotions. Any adjustment in price will have to remain in place for 72 hours, and other promotions that currently exist will be banned. Members of our association are phoning me and asking, "If I run this promotion come 1 September, will it circumvent the act?" When I then hear the creative and imaginative promotions that are coming forward, I have to say, "Yes, that will circumvent the intent of the act, although it is not in the spirit of the act." As well-intentioned as are the controls in the 2005 act to prevent irresponsible promotions, they are weak and will fail. I fear that irresponsible promotions will continue.

For example, one of our members said that, although they must keep the same prices for 72 hours, they would introduce on a Wednesday and Thursday a brand of vodka that was 50p cheaper than the £2.80 for their main line of vodka because they want to drive business on those nights, then, come Friday and Saturday, they would simply de-list the cheap brand so that it would not be available. They would therefore not be adjusting the price, which they are not entitled to do under the controls in the 2005 act, but just de-listing a brand. I bounced that example off lawyer advisers, who said that it would be perfectly reasonable to do that.

The trade is only now—because 1 September is fast approaching—beginning to sit down and turn its attention to the issue. My fear is that once the 2005 act comes fully into force on 1 September, we will see a raft of promotions out there that will circumvent the 2005 act's intention to control irresponsible promotions, which was a central pillar of the Nicholson report. The question is how we address irresponsible practice in the on-trade and deep discounting in the off-trade, and the effect that it has on both areas and on the health of our nation's people. I am gravely worried: I think that we will see huge problems shortly after the 2005 act comes fully into force.

Patrick Browne (Scottish Beer and Pub Association): I thank the committee for the opportunity to be here today. The issues fall into two camps. First, there are issues around licensing transition. People have this morning expressed concern about designating managers of premises by the deadline of 1 September. There are real issues around that, which could have major implications for the industry.

The second category of issues concerns unintended consequences that will arise from the bill's wording and the need for greater clarity. For example, the Law Society flagged up issues around the appeals process. We were promised a fast-track process whereby, if a licence was sanctioned, suspended or revoked, we could go in front of a sheriff and have the issue resolved in weeks. The problem at the moment is that the process takes up to six months, or longer.

The second area on which it would be useful to get greater clarity—I think the Scottish Government is working on this—is what constitutes a major or minor variation under the 2005 act. At the moment, changing a pub's name is apparently viewed as a major variation that requires the licence holder to go through the process of relicensing their premises, which seems to be a bit extreme.

Bill Butler: I am grateful for that. I have a question for Paul D Smith. The Noctis written submission refers to the development of a role of night-time economy co-ordinator to run in parallel with that of licensing standards officer. What are the practical advantages of creating such a role? You refer in your submission to the example of Bournemouth.

Paul D Smith (Noctis): Historically, Bournemouth Borough Council had issues with the licensed trade and the police. A relatively short time ago—within the past couple of years, I think—the council employed as a night-time economy co-ordinator a former licensee who had run a hotel many years ago and understood the licensed trade. The co-ordinator's job is to liaise with the council, the police and local licensees, which encourages dialogue between the different groups. We undertook a major initiative last year on community engagement because we believe that it is the key to providing answers to some conundrums. Local forums can help operators, the council and the police work together effectively.

There being a night-time economy co-ordinator means that the different groups can be brought together to address particular issues. We often reach for legislative solutions when, in fact, a simple conversation would solve problems. Neither the people who run pubs and clubs nor the police and local authorities want difficulty: they want simple and practical solutions.

11:45

A night-time economy co-ordinator enables some issues to be resolved at a fairly low level without the need for any one to become involved in a lengthy legal process, the outcome of which is that no one really ends up winning. The legal case is won, but it is a pyrrhic victory: whoever wins only ends up having annoyed the other side. There is no genuine partnership for a period of time, which is not very useful. The night-time economy co-ordinator seems to provide a useful role in resolving issues before they become problems.

Bill Butler: Is that a separate position or could further advantage be taken of those co-ordinators if a slight change was made to the remit of the licensing standards officer?

Paul D Smith (Noctis): Very possibly. The understanding that partnership is the key should lie at the heart of the licensing officer's role: officers have to respect the licensees and business owners in their communities. By and large, licensees are not looking to get around anything, to make difficulties or to cause problems. The majority of people who run licensed businesses in Scotland, England and Wales or wherever view their businesses as assets to their communities. Those who do not take that view are very much in the minority. The real danger is that we could end up looking at that tiny minority and viewing their behaviour as the norm—we could end up creating a legal structure in which the presumption is that these are difficult businesses that need to be sat on. That would not help to address the broad issues around those businesses as community assets—as hubs where people gather and places where people are employed.

Bill Butler: That is fairly clear. Thank you.

Robert Brown: I want to pursue the issue of the processing of personal licences, which the Law Society of Scotland and others have raised. I seek clarity on the significance and composition of these licences. The Law Society suggested that two components are involved: the backlog of applications that licensing boards are yet to consider, and lack of knowledge about the trade—people are not applying for posts. The two issues are somewhat different one from the other. What is Mr Browne's view on that, including on the need to find a solution?

Patrick Browne: It is clear that the onus is on individual licensees to ensure that they comply with the requirements of the 2005 act. I am reasonably confident that our members have done so, wherever possible; they have submitted their applications and await their licences.

The issue is complicated by a range of factors. Licensing boards have rightly focused on processing premises licence applications instead of getting to personal licence applications, the result of which is that we now have a backlog of personal licence applications. Also, communication with the trade has been limited. The previous Scottish Government's last promotional campaign on the issue that was aimed at the industry was in December 2007, just a few months before transition. Since that time, we have had no follow-up.

A real issue is involved, the scale of which will become apparent only as we approach 1 September. Many councils go into recess for part of the summer, so during that period it will be more difficult for them to process applications at the rate at which they have so far.

Robert Brown: Have you had any communication with the Scottish Government on the perceived problems? If so, have you heard of anything in the pipeline to sort them out?

Patrick Browne: The SBPA met the Cabinet Secretary for Justice a few weeks ago. We raised the issue with him and followed up with a letter in which we highlighted the research that is now in the public domain. We made that approach, but we have so far had no positive response, other than the expectation that individual applicants should have their licences in place by 1 September.

The problem is not only the 1 September deadline because some boards are imposing deadlines that are well before then for submission and processing of personal licence applications, after which the licensee's name is added to the premises licence. For example, Orkney Islands Council has suggested that applications should be made by 30 June, and other councils are following suit with similar deadlines. The issue is starting to bite.

Paul Smith (Scottish Late Night Operators Association): An application for a personal licence must be made to the board in the area in which the person resides. That is causing a backlog, because some managers in my company live in one part of the country but work in another. We cannot apply to make them designated premises managers until they have their personal licences. Some boards will allow an application for a designated premises manager to be made first, but some will not accept such an application unless the person's personal licence is provided at the time of the application.

Such situations are causing my company deep concern. We are on the phone every day to ask how the personal licence application process is going, but we are told, "We can't tell you; you'll just have to wait and see." When we ask whether the application will be granted in time, we are told, "We don't know." To resolve that problem, I might have to remove a manager from his position and fill it with someone who has a personal licence.

Colin Wilkinson (Scottish Licensed Trade Association): We have the same problem. We encouraged our members to apply for personal licences when they applied for premises licences. Some were told, "Just forget about that the now," but they are now being chased by licensing boards for their applications.

The SLTA office gets a lot of phone calls on this. We represent about 1,200 independent licensed trade businesses and we have noticed a marked increase in the number of people who seem to think that all they need to do is sit through their training.

Robert Brown: There is a double issue, as identified by the Law Society of Scotland.

Colin Wilkinson: There definitely is.

Robert Brown: Is there a considerable backlog of applications, with relatively few being granted, as we have heard?

Colin Wilkinson: Yes.

Paul Waterson: The situation will get worse.

Robert Brown: As I understand it, the SLTA raised three points to do with fees in its written submission. First, you said that fees are higher in Scotland than they are in England. Secondly, you suggested that there is a disparity in the treatment of registered clubs. Thirdly, and perhaps most significant, you made the point that although supermarkets have the bulk of off-sales trade, their fees are relatively small beer, so to speak. Do the other witnesses share those concerns? Is there a case for making the supermarkets bear a greater proportion of the total cost of the licensing system?

Colin Wilkinson: May I add something? The system is based on rateable values, but no consideration was given to the fact that the rateable values of on-trade and off-sales premises—mainly supermarkets—are calculated in completely different ways. For the on-trade, the calculation is based on turnover—the value is roughly 8 or 9 per cent—whereas for supermarkets it is based on square footage. The people who benefit most from the sale of alcohol should pay proportionately.

Patrick Browne: We supported the principles behind the proposals on fees that were put to the

Scottish Government. We accepted the rateable value calculator—I think that we allowed for the view that the SLTA expressed.

I will be honest and say that our biggest problems have been first, the lack of transparency in boards' operating costs and fee income, and secondly, the setting of the maximum fee at twice the original level. There has been a double whammy, which has meant that some boards—I stress that I am talking about probably only four or five—are doing well and making loads of cash. I think that one board was planning for a surplus of £500,000 in the previous financial year. That money disappeared into the council coffers at the end of the financial year. It had been paid by the trade in good faith, but the trade gained no benefit from it. The combination of the two factors that I mentioned has not been helpful.

Robert Brown: It is obvious that the relationship between the on-trade and the off-trade is an underlying issue. I guess that the organisations that the two Mr Smiths represent have a slightly different mix of members than the other witnesses' organisations have. Is that right?

Paul D Smith (Noctis): We represent late-night economy businesses; the Scottish Late Night Operators Association has a similar membership. We represent clubs, bars, live venues and student venues.

One of the key issues involving the supermarkets and our membership is around preloading. The relative cost of off-trade alcohol means that lots of people—the vast majority—are preloading, to a lesser or greater extent, before they go out to our members' premises. Without doubt, that is causing a problem, and not just with our members' premises being relatively empty early in the evening. We are not hugely keen on this, but if our members run a deep-discounted promotion, their businesses will be bustling early in the evening. If they do not, people will turn up a couple of hours later having had quite a lot to drink from the supermarket. Taxi drivers used to talk about taking inebriated people home; now they talk about bringing inebriated people into the towns and cities. That change has come about over recent years.

There is a key question about our members' businesses getting into trouble. They must obviously turn away some people who have spent money on taxis to come into town. When they get to the door of the premises, those people are too inebriated to get in, and that can cause altercations on the door. It puts our members' businesses in a pretty invidious situation: potentially, they can be in quite a lot of trouble with the police and local authorities, based on incidents that occur when they turn people away. That should not be the case. Our members do not, by and large, sell alcohol to people in those circumstances—rather, they turn them away. There have been instances in England and Wales under the legislation there—the Licensing Act 2003—when that has caused problems. The businesses concerned have had pretty difficult conversations with their local councils and with the police, not based on their having caused the problems, but on their experiences of people turning up at their doors having had too much to drink before getting to their premises.

Robert Brown: Those are all important points, but I will stick to the issue of fees, which I began with. I want to clarify whether the other organisations support the approach that Mr Wilkinson has outlined on behalf of the Scottish Licensed Trade Association—that the supermarkets should bear a higher proportion of the cost of regulating the system, in terms of fees, partly for the reason that has been explained and partly for more general reasons.

Paul D Smith (Noctis): It seems fair, given that the majority of alcohol sales are moving towards the off-trade, that the off-trade should bear a reasonable percentage of the costs.

Robert Brown: Do you have a similar view, Mr Browne, or do you take a different view?

Patrick Browne: When the original fees proposal was being discussed, we stood by a principle—that our fees should reflect costs. If it costs the same amount of money to administer a licence for a supermarket as it does for a larger pub, the two businesses should pay broadly the same amount.

There might be an opportunity to examine the rateable value bands on which the calculation is based and to adjust the bands to reflect the change. There might be an opportunity to consider imposing higher bands at a higher level. That might be a way forward.

The fundamental principle is that premises should pay broadly the amount of money that it actually costs to administer the licensing process.

Nigel Don: I want to pick up on that issue. It would be useful if somebody came up with a better banding system—which seems to be accepted in principle—improved the numbers and gave us their ideas. Otherwise, we are all guessing.

Paul Waterson: The foundation for the system is a ratio, if you use the rates. You should remember that the rates for on-trade premises are far higher than for off-sale premises, therefore it is unfair to use rates to start with: you might wish to use turnover instead. I do not think that the fees that some pubs are charged—which we know some of them cannot afford, which is why they are going out of business—equate to those for supermarkets turning over millions of pounds in alcohol sales a year. The rates are fundamentally flawed to start with, because the two sides of the trade pay according to entirely different ratios. Our ratio is 9 per cent of turnover, whereas the supermarkets' ratio is nowhere near that.

Nigel Don: Presumably you could give us an estimate of a fudge factor, or multiplier, that would enable you to get on-trade and off-trade back to something like equity. Is one rate two times higher or five times higher than the other, for instance?

The Convener: You will appreciate that your evidence on that would have to be tested by some means.

12:00

Nigel Don: The point is that, if the arithmetic is not right, I would be happy for us to find a way of improving it, although it would not be perfect. It would be helpful if, having accepted the basic principle that rateable value is a way forward, you gave us some mechanism for coming up with something that is equitable. That needs to come from gentlemen such as yourselves because, frankly, we would be guessing—it is not something that we can do.

Colin Wilkinson: In its consultation document on the draft Licensing (Fees) (Scotland) Regulations 2007, the Scottish Government described its remit as

"to define a system:

- Allowing for full cost recovery
- Having the same scale of charges across Scotland as a whole"—

which we do not have—and

"Which would not be unfair to SMEs".

What we have got is certainly not fair to small and medium-sized enterprises.

Nigel Don: I ask you to work on the basis that we accept that as a statement of principle but we need you to give us the answer, please, as we have no mechanism for coming up with one. That would be helpful.

Let us move on to site-only licences. Most of you were here earlier when we spoke about them. What was helpful about site-only licences under previous legislation? How should the matter be dealt with in the future?

Paul Smith (Scottish Late Night Operators Association): I support the position that was put forward by the Law Society. My company undertakes many large-scale developments across Scotland. As the representative from the Law Society said, we need to go through certain processes, starting with securing an option on a piece of land or a building. Often, the vendor of the land or building will willingly enter into a restricted option period, but they will not want to sit on it for an indefinite length of time without knowing that a licence will be secured. Once the land or the building is secured, we have to build the concept and define how large the development will be, what it will involve and what the principal costs will be. We then have to engage with our funders, to ensure that the funding is available, and apply for a licence. We have to secure some form of licence at that stage to conclude the deal with the vendor on the piece of land or building and move to the next stage of the fine detail. That is how it has worked under the 1976 act.

In the past eight years, I have successfully built three very large developments in Scotland using the principles in the 1976 act. I doubt that I would be able to do the same under the 2005 act, as I see all sorts of hurdles—not least of which is the fact that I would not be able to secure funding if I did not have a licence. Any vendor of land or property would not tie into an option for many years until we got through to the detail and secured the licence under the 2005 act. That would severely restrict my company's ability to grow and develop. I appreciate the Law Society's concerns.

Nigel Don: Does anybody else have anything to add?

Paul Waterson: Five years seems fair.

Paul Smith (Scottish Late Night Operators Association): That accords with planning consent which, when it is granted, lasts for five years, so it is logical.

Nigel Don: Thank you very much.

The Scottish Beer and Pub Association's written submission raises concerns about the personal details of licence applicants being made available to the general public. Can you expand on that, please?

Patrick Browne: It is a point of basic fairness. Given the fact that licensees tend to be public figures in their communities, they may not always want personal information to be in the public domain. In the case of a pub company, information about directors in a different part of the country might be made public. Our view is that, in the interests of data protection and personal privacy, it is reasonable that that information be made available to licensing boards, so that they can complete the necessary statutory checks, but not to everybody.

Nigel Don: What particular information are you worried about? Can you give an example—a hypothetical one, if necessary?

Patrick Browne: Our written submission refers to people's names and addresses being made available. Making someone's address public poses particular issues in relation to personal privacy. We are concerned that the information could be misused.

Nigel Don: Does anybody else have anything to add?

Paul Waterson: We agree that it is not right that the addresses of people who run local pubs and so on are made public.

Cathie Craigie: Good afternoon, gentlemen. Section 131 will give licensing boards the power to grant licences subject to the modification of premises, if the applicant agrees to the modification. The Scottish Beer and Pub Association was the only panel member to highlight concerns about that in its submission. The committee is not helped much by the fact that the submissions from the boards of our two largest cities seem to disagree about the implications of section 131. What are the panel's views? Will the change bring any benefits for your members or the public?

Patrick Browne: We have no issue with an applicant and a board mutually agreeing that a course of action is appropriate for an application, with a consequent change to a layout plan. Our concern is that we are not convinced that that is how the process will work. The Law Society's representatives talked about a board saying that a bar should be moved from one side of a room to another. Such a situation would be fairly extreme. I have attended many board meetings in the past 18 months, for my sins. Board members might have concerns about the proximity of furniture or a door to the bar, about a serving hatch that is in the wrong place, about a pillar on the bar obstructing the view of the rest of the bar or about an amusement machine. Our concern is that if boards are given the power to make changes, they might try in some cases to do so without agreement and leave it for the applicant to seek a remedy.

In the transition, it appears to be agreed that when an applicant and a board agree a course of action, the operating plan will be changed and the layout plan will be changed as a consequence. Our concern is that including in provisions the layout plan as well as the operating plan might be a step too far.

Paul Smith (Scottish Late Night Operators Association): I agree. My concern is that when an applicant is before a licensing board that is considering the operating plan and the layout plan in detail, the board might, in effect, present the applicant with a fait accompli. If the board does not like the position of the bar or where a clutch of tables, a seating area or a dance floor is located, it can say that it will agree to the application if the applicant agrees to change the layout. That is presenting a fait accompli.

Licensing boards are not experts in design and build. Designers with many years' experience set out how licensed premises will work. I recently worked on a licensed premises of more than 40,000ft^2 that contained many trading aspects, including restaurants, a nightclub, a private members lounge, private function rooms, a bar, kids areas and amusement areas. It is critical that different trading areas work together and that crowd control measures allow movement through a building without obstruction. Achieving that takes many months of careful planning and design.

I am worried that licensing boards, which sometimes have only five or 10 minutes to decide on an application, could suggest a change that might seem right to them but which would destroy a building's layout and design. I am greatly concerned that if an applicant were presented with a fait accompli—we should remember that the decision whether to grant the licence on the day might be critical for the applicant to secure options on buildings or funding—they might be forced to accept it.

As the Law Society said, boards would be micromanaging premises. We should leave it to the experts, who have spent weeks and months on working out the layout. They know best.

Paul D Smith (Noctis): I do not know of a single licensee who aims to lay out premises in a way that causes maximum aggravation. Licensees lay out premises to minimise aggravation. Bars and other features are sited to allow reasonable movement through the premises. It makes absolutely no sense for a licensee to create plans that lead to problems or confusion. That is why, as Paul Smith from the SLNOA said, a huge amount of effort goes into plans. People do not want seemingly random decisions to be made. There are financial implications, too. It is not reasonable to expect people to have to go back into another three or six-month cycle just because of some random decision made at a board.

The Convener: We will pursue the issue with council representatives presently, but would it not be the case, Mr Browne, that in the run-up to an application being heard by a board, discussions would take place between the applicant, his legal representatives and representatives of council departments, for example people in building control? If concerns arose to do with the siting of, for example, a non-weight-bearing pillar, they would be discussed at the time. Some agreement or compromise could probably be reached.

Patrick Browne: I take that point, convener, but when issues have been raised during transition and discussions have taken place, applicants have sometimes accepted the view of the board but at other times they have not and the matter has fallen, because people have not wanted to push it.

If you gave boards the dual lever of amending the operating plan and the layout plan, the pressure could be too much. It would allow boards to comment on issues such as the siting of an amusement machine in a bar. They could say, "Why don't you move it? We think it should be here on the plan." That would add a further layer of complication.

I have no difficulty with agents acting on behalf of an applicant agreeing with a board on an outcome that is acceptable to both parties. However, if the amendment to the 2005 act were passed, I would be concerned about boards making unilateral decisions on changes.

Paul Smith (Scottish Late Night Operators Association): Convener, you are dead right: the place for discussions is between building control, building standards and the architect or designer, as the application goes through the process. I have often found that, because of their knowledge of building regulations, people suggest that an application might not comply, and changes are made. Between them, the applicant and building control arrive at the right end result. It worries me that, having reached that point, the application could be placed in front of a licensing board with no experience that might make suggestions as serious as changing the position of the bar, for example.

The Convener: Do you concur, Mr Smith with a D?

Paul D Smith (Noctis): I do, completely. Sometimes, the simplest solutions are the best. A conversation at an early point is obviously better than a late conversation with the board.

The Convener: I see that Mr Waterson accepts that point.

Stewart Maxwell: If the licensing board was pushing for changes at that stage, it would surely have to have a reasonable case for doing so. Mr Browne, you said that decisions would be taken unilaterally—you may even have said arbitrarily. You surely are not suggesting that licensing boards would make changes for no reason. There would have to be solid logic behind any decisions. Reasons would have to be explained.

Patrick Browne: I am loth to suggest that changes would be taken for no reason. However, I spent four years as a member of a licensing board, so I have been privy to discussions from the other side. I have also attended quite a few board meetings over the past 18 months, and there have been occasions on which board members have commented on the siting of an amusement machine, but board officials have had to point out that the location was chosen as a result of professional advice from officials, LSOs and others.

Paul Smith of the SLNOA made a point about people dropping in at the end of the process, rather than being involved in the discussions throughout. That is dangerous. Giving power over the operating plan and the layout plan might be taking a step too far.

Paul Waterson: You would open up things to the inconsistencies that we spoke about before: the whole of the country would be different, with an inconsistent approach. Something might seem logical to a licensing board, but that does not mean that it is right. In our experience, unfortunately, licensing boards sometimes have ideas on how things should run that are different from everybody else's.

Stewart Maxwell: But, on the other side of the coin, just because a licensee thinks that something is right does not mean that it is right.

Paul Waterson: The first thing that anybody would say to an architect is, "Remember the board." As Paul D Smith said, people do not go looking for problems. Changes are made as the process goes on. There is no need for another tier.

12:15

Paul Smith (Scottish Late Night Operators Association): The point is to leave it to the experts. The licensed trader—the person who is making the investment—who has probably put his home on the line and is prepared to suggest the design and layout of his premises is an expert, and building control people are experts. Those are the people who should be involved. With respect, licensing boards are often far from expert in such situations and a knee-jerk comment can kill a design scheme. If there is imposition on the layout or operating plan, it will not work.

Paul Martin: Gentlemen, do you want to comment on the Government's proposed new provision in section 132, on antisocial behaviour reports?

Paul D Smith (Noctis): Although we have no issues with problem premises being dealt with effectively, altercations caused by doing the right thing and turning people away can find their way into reports. Similarly, problems can be caused by an operator doing the right thing by managing people in and out of premises where there are no smoking areas—a lot of late-night premises do not have designated smoking areas. An operator might be doing their damnedest to avoid problems, but problems can occur. They can be placed in a pretty invidious situation if they are doing their best to stop people coming into their premises yet they are still falling foul of the authorities. That is not particularly fair.

Paul Martin: You make a powerful point, but if police reporting mechanisms were more effective in reporting incidents, they might at the same time report that the applicant had made reasonable efforts to deal with the problem. It is important to recognise that while the vast majority of licensees run good and effective businesses and deal with antisocial behaviour, antisocial behaviour reports provide an opportunity to highlight those who do not.

Paul D Smith (Noctis): Absolutely. The more evidence that there is to highlight problem premises the better. It would also be useful to give good premises more of a pat on the back. Of course I would say that, because I run the trade body for the late-night sector, which often operates under difficult trading conditions that are managed incredibly well by our members. However, there are operators out there who are causing problems. Most of the people on this panel would be happy for the rogue operators to be removed.

Paul Martin: The Government proposes that it would be for the licensing authority to request an antisocial behaviour report or for the police to decide to provide one. Will that create consistency issues? Some applicants might say, “Why am I being reported by the chief constable when another applicant is not being reported to the authorities, even though I am aware of antisocial behaviour on their premises?” Having a consistent approach, which was delivered under the 2005 act, would ensure that all reports were provided consistently. Under the proposed provision, a report would be made only at the request of the chief constable or the licensing authority.

Paul Waterson: The problem is in there being reports for all premises when there are clusters of pubs. I understand that not all premises are in city centres—there are pubs and off-sales in housing schemes. However, surely it is right that if there are problems in an area, the board asks for a report or the police provide one, rather than having lots of reports on all premises, most of which will probably mean nothing because, for example, in city centres there are clusters.

Paul Martin: You want the board to have discretion. You raised a point in a previous answer—

Paul Waterson: You cannot say—

Paul Martin: I am making a point about consistency and treating applicants fairly. Would the applicant not want everyone to be required to provide an antisocial behaviour report?

Paul Waterson: We are saying that the problem premises should be taken to task. They should be identified by the police or by the licensing board, if there are problems. However, when we get right down to local issues, there should be some discretion. That is the discretion that I am talking about. Who has better knowledge of the local issues than the licensing board or the local police?

Paul Martin: How do we ensure that the process is robust? We passed the Licensing (Scotland) Bill in 2005 because the police were not providing consistent information to boards. The provision whereby the police had to provide antisocial behaviour reports in every case ensured consistency. I appreciate that some boards have local intelligence, but sometimes that local intelligence is unfair. The requirement to provide antisocial behaviour reports ensures that there is a consistent approach.

Paul Smith (Scottish Late Night Operators Association): It is difficult to argue against your point. Consistency says that if we are to have a process of providing antisocial behaviour reports, it should apply to all premises. I fully take that on board. However, perhaps I am missing something. Such reports have had to be supplied for every application during transition but, given that the transition period is nearly over and licences are granted in perpetuity, antisocial behaviour reports will require to be provided only for new licence applications under the 2005 act. I do not think that that represents a burden on the police. I do not see what the difficulty is, even though I still feel that the provision in the 2005 act remains a problem, because of how distance is calculated and the fact that offences can be caught that are not related to premises.

An antisocial behaviour report will have to be prepared for every new application, when a board member requests one or when the police want to bring to the board’s attention premises that have already been granted a licence. By and large, all the work has been concluded. I take your point on board. Consistency and fairness suggest that antisocial behaviour reports should be supplied for every licence application.

I still have doubts about how the information is identified and brought together. I can give the committee a practical example relating to premises that I have in Fife. Simply by virtue of the premises’ location—adjacent to an extremely busy taxi rank, which is a hotspot for antisocial behaviour—the premises were subject to an antisocial behaviour report that was supplied by the police in relation to an application during the transition under the 2005 act. The report made the area sound like a war zone. When the report was read out, I saw some board members raise their eyebrows and focus on the premises. The first question that I asked was whether the police were prepared to comment on whether they thought that the premises were well run or were problem premises. To their credit, the police said that they were extremely well run premises. However, the report made the location of the premises sound like a war zone.

Stewart Maxwell: I have a question about consistency versus local flexibility. Do you agree that although consistency is often welcome, it serves no purpose to use up police resources, licensing boards' time and the time and effort of your members churning out antisocial behaviour reports on premises that, frankly, give concern to no one?

Paul Smith (Scottish Late Night Operators Association): I agree. On one hand, there is the consistency argument; on the other is the fact that producing an antisocial behaviour report for every licence application involves a lot of work for the police. If the premises are not problem premises, what is the need for a report? However, although I recognise both points of view, I think that, by and large, the work under the 2005 act has now been done. The police will have to produce reports on new premises licence applications, but the number of applications that are made under the 2005 act will be limited, not least because of the condition of the economy and the state of our sector. If a member of a licensing board or a local councillor asks for a review, an antisocial behaviour report will require to be produced, but that should not be too difficult to do.

Paul Waterson: Antisocial behaviour reports can be used as powerful tools against premises. They can be used to say, "We're getting reports that the premises aren't being run properly." However, if all premises are the subject of such reports, the message is that people do not have to worry too much, as 95 per cent of the reports are useless anyway because, as Paul Smith said, a premises might be next to a taxi rank or might be one of a cluster of pubs. That is the basis of our thinking.

Patrick Browne: I echo what Paul Smith from the SLNOA said towards the end of his remarks. Under the 2005 act, anybody can ask for a review of a licence at any time on the basis of any of the licensing objectives. If a board accepted an approach from a member of the public who complained about a premises on the basis of the crime and disorder objective, I would expect the board to ask the police for an antisocial behaviour report, so I suspect that we might get to that point anyway. However, there is a difference between asking for antisocial behaviour reports on 20,000 premises in advance of licensing transition and what we will have from now on, which is, perhaps, 700 reports a year plus the review applications.

The Convener: I have a final question for Mr Waterson. In your initial answer to Bill Butler, you pointed out what you regard as inconsistencies between licensing boards. I can well understand the frustrations of the SLTA in that respect and the difficulty that you have in giving advice to individual members, but do you agree that different licensing regimes, in some respects, should be applied in Glasgow and, say, Moray, where different local conditions apply?

Paul Waterson: In relation to training, a single, consistent message goes out throughout the country, which works well. However, if we think about permitted hours, while the position in the short term might be fine, as time goes on and licensing boards change and develop their ideas, we could end up with a patchwork effect. One side of a street could be open and the other side closed. As far as I know, the overprovision provisions in the 2005 act have not even commenced yet.

It would be a lot easier if the positions on overprovision and permitted opening hours were set out nationally, with some local discretion, of course. We have lost some of the more consistent parts of the 1976 act as we have tried to give boards more and more control, and they will use that—they will interpret things in ways that give them even more control. That is a dangerous situation to be in.

The Convener: Gentlemen, thank you for giving evidence today. It has been a very useful exercise.

12:27

Meeting suspended.

12:29

On resuming—

The Convener: I welcome our fourth and final panel, which comprises Councillor Marjorie Thomas, chair of the city of Edinburgh licensing board; Mairi Millar, senior solicitor and assistant clerk from the city of Glasgow licensing board; Frank Jensen, legal team leader at Fife Council; and Sylvia Murray, policy manager at the Convention of Scottish Local Authorities. Thank you for giving of your time this morning to give evidence. We will move straight to questions. Time is getting on, so if one of you has answered a question and the others agree with what has been said, do not hesitate to say so.

I draw your attention to the fact that the bill proposes to extend licensing requirements in relation to market operators and free events. You will have heard the evidence given by earlier witnesses, who expressed concern that the provision could impact negatively on charitable and community events. Are those concerns valid?

12:30

Frank Jensen (Fife Council): Yes. At the moment, local authorities are required to resolve either to license or not to license a market operator's whole activity—there is no discretion as to which bits of that activity they may or may not license. For the past 20 years or so, numerically the most common type of market has been the car-boot sale, of which there are and will continue to be many in Scotland. Conveniently, from the point of view of administration of the market operator licensing system, most of those fall within the exemption, because almost all of them are run by voluntary, charitable, sporting or recreational organisations for fundraising purposes. The removal of the exemption will bring all of them within the scope of the licensing regime.

It would be highly desirable if there were explicit provision that gave local authorities discretion to determine which categories of market in their area they wished to license, control or regulate. The committee has already heard from others about how the issue might be determined—through assessment of perceived risk, numbers and so on. Such explicit provision would allow local authorities to decide whether to license small-scale markets, or car-boot sales by church groups, and so on. That is essential, as the concerns that were expressed to the committee earlier are well founded.

The Convener: Do any of you take a contrary view?

Mairi Millar (City of Glasgow Licensing Board): No. I agree with what was said. It is important to point out that, even if such events were not licensed, they would still be subject to inspection and scrutiny by our out-of-hours health and safety team, for example. Applying for a licence has cost and practical implications—it is a cumbersome process that would put off a number of charitable organisations.

The Convener: I turn to the question of licences that have, in effect, lapsed because the application is late. As you are aware, the bill makes provision for licence applications that are made within 28 days of the expiry of the existing licence to be treated as renewals, rather than new applications. Might that have any negative consequences?

Mairi Millar: It is unclear what would happen during the 28-day period. Earlier today the point was made that we will be in a sort of limbo. It is not entirely clear whether someone who has not renewed their licence and is found driving during the period is committing an offence. Glasgow has a long-standing policy of limiting the number of taxis. If a licence application is not made at the renewal point, should we take it that the licence will not be renewed and that there is a free licence, or must we wait until the 28-day period has expired? It is unclear how we should deal with speculative applications that come in during that time.

The Convener: No one has any other comments to make on that, so we will turn to alcohol licensing.

Nigel Don: I am delighted that you probably heard the comments from the trade representatives about modifications to layout plans and operating plans. Will you give us the view from the other side of the table? Are their concerns justified?

Mairi Millar: I heard comments about frivolous matters in relation to attempts by boards to modify layout plans. I am not aware of the board in Glasgow ever having intervened because it was unhappy with the cosmetic layout of premises. Any attempts to modify the layout or operating plan have been the result of concerns raised by building control officers or licensing standards officers, so I do not buy into the remarks about frivolous matters.

I am concerned that section 23 of the 2005 act, if amended by section 131 of the bill, would provide that, if the modification were agreed by the board, the application would have to be granted. If a modification is agreed at the licensing board meeting, amended plans are prepared and developed. Only at that stage do we consult again building control and the fire authority. An issue might arise that was not in the board's or the applicant's thoughts when the modification was agreed and the bill seems to provide that

"the Board must grant the application"

with the modification, despite any concerns that might arise subsequent to the modification having been discussed.

Nigel Don: Can you suggest, either now or in writing later, how we can end up with a mechanism that will close the loop in that regard?

Mairi Millar: I do not think that there is a particular problem at the moment. In Glasgow, if there is a concern it will be discussed and the application will be continued to allow amended plans to be lodged. The amended plans would go to the various officials and, if they were fine, there would be a straightforward grant. If there were a difficulty, the application would go back to the board, where the issues would be considered without the constraint of the board being in the "must grant" situation.

Nigel Don: So the answer is to continue the application to the next board meeting.

Mairi Millar: Yes. That is what happens in practice. I think that that is the case with other boards, too. I know that John Loudon talked about it earlier.

Nigel Don: Is it fair to say that most boards meet more frequently than once a quarter?

Mairi Millar: During transition the Glasgow board has been meeting twice a week. It is difficult to anticipate how often it will meet in future, but I would imagine that meetings will be at least monthly.

Nigel Don: That is what I thought. When I was on the licensing board in Dundee, we tended to meet quarterly, but there was almost always one meeting four weeks after the cycle to catch up with the continued business. Councillor Thomas, do you have any thoughts on how councillors will feel about being told that they come up with frivolous changes?

Councillor Marjorie Thomas (City of Edinburgh Licensing Board): I agree with Mairi Millar. The word frivolous did not gel with my experience. Any decisions that boards make are taken seriously. We would never agree to anything unless the officials were happy with the changes. As far as operating plans are concerned, I think that we have once done something because of a red line—a small issue—but never anything of major significance. I concur with Mairi Millar that the board would change plans only if officials reckoned that we needed to do so.

Nigel Don: Do you concur with the idea that boards might meet often enough to ensure that variations to applications can be dealt with by continuing the application?

Councillor Thomas: Yes. In Edinburgh we meet monthly on Mondays and Tuesdays and throughout the recess, too. Sometimes the board meeting lasts from 9 until half past 6. There is plenty time.

Nigel Don: Do the other witnesses have anything to add to that?

Frank Jensen: In Fife, the board has been meeting weekly during the transitional period. Thereafter, its meetings will probably be monthly. Then again, if urgent business requires to be dealt with, it is relatively easy to convene a meeting at shorter notice.

Amendments to layout plans have been dealt with in much the same way as in Glasgow. Most amendments have been for fairly basic, innocuous matters, such as reducing the number of different display areas in off-sales from four or five to two.

Cathie Craigie: Does Mairi Millar believe that section 131, on the modification of layout plans, adds anything to the bill? If not, should it be taken out?

Mairi Millar: I do not think that the amendment of section 23 of the 2005 act is necessary. Current practice deals more than adequately with the situation.

Cathie Craigie: The written submission from the City of Edinburgh Council's licensing board says that

> "The Board welcomed this amendment which gives effect to"

what happens in practice, but you said earlier, Councillor Thomas, that you agreed with Miss Millar's points. Can the City of Edinburgh Council clarify its position in that respect?

Councillor Thomas: My point was that, to my knowledge, plans with which we have dealt have rarely had to be changed. I agree that it is not a frivolous thing, but a process that we go through. I can say only that it has not been an issue in Edinburgh. Perhaps Edinburgh and Glasgow have slightly different views on that.

Mairi Millar: It is important that licensing boards have the power to modify layout plans. My difficulty is with the "must grant" provision that would be the effect of the proposed change to section 23 of the 2005 act.

The Convener: In fairness to the previous witnesses, it should be put on record that none of them used the word "frivolous".

Paul Martin: The bill will modify the requirement to provide copies of premises licence applications, so that only a chief constable will be required to receive a copy. Copies of applications will no longer be provided in local newspapers and so on. What are your views on that?

Mairi Millar: A balance must be struck. Given the length of such documents, it would be overburdensome for boards to have to provide copies of the application form, the operating plan and the layout plan for neighbourhood notification and various other consultations. A chief constable and a fire authority should certainly receive all those documents in order that they can comment on them.

The difficulty with simply notifying—particularly people living within a 4m radius of the applicant's premises—is what they would be notified of, given that they would not get a copy of the application and that the 2005 act introduced generic premises licences. Previously, it was possible to say whether an application was for a public house, or an entertainment licence and so on, but we are now able to say only that an application has been received for a premises licence to authorise the sale of alcohol for on-sales, off-sales or both. My experience throughout the transition period for the 2005 act coming fully into force is that people who have received letters of notification have had no idea as to what was proposed, because of the lack of information that I have described. In all honesty, I think that even providing them with a copy of the application form, operating plan and layout plan would take them no further. I find it difficult to understand what is proposed in applications, because the generic operating plan has little or no information about what will happen on the premises.

Paul Martin: Communities and community councils usually get initial notification of a licence application via a newspaper. Is that not a helpful way of advising the community that a licence application has been submitted? People can then interrogate the information at a later stage, if they want to.

12:45

Mairi Millar: Boards can advertise applications either in a newspaper that circulates throughout the board's area or on a website. There is a move away from newspaper adverts. There is an Improvement Service initiative, which I think is supported by the Scottish Government, to set up a national website on which all public-notice applications will be advertised. That takes me back to the earlier point about adverts for taxi fare changes. We wonder why the bill prescribes a newspaper advert for that when there is a move away from that type of advertising. This morning, John Loudon spoke about the difficulties with newspaper adverts. They appear at a point in time, so if people miss them, that is it, whereas people know where to look for a website. It is useful to notify community councils and neighbours that an application has been received. If they wish, they can come to the licensing section office and look at the application form and the operating and layout plans. However, as I said, I am not clear how much information that would give them.

Paul Martin: Do you accept that there is a move away from providing information to communities? As I said, I embrace the IT age in which we live, but about 40 per cent of the population in the UK does not have access to broadband. Some communities do not have access to the web. I appreciate that people can go to their local library, but the opportunity to provide information to the public via a newspaper is helpful, is it not?

Councillor Thomas: I agree with Mairi Millar. We have had difficulty in Edinburgh with people perceiving that they were not able to find adverts, so we have considered the issue in great detail. We have considered putting information in libraries and elsewhere, but people are becoming much more web orientated. Given the costs, we are advised that using the web is the way forward. I do not want members of the public to think that anything is being hidden. We want to make it crystal clear that the information is open and that nobody has anything to hide. We will try to find the best way to educate people that the information is on the council or board website, using links and so on.

Paul Martin: I am sorry to labour the point, but councils send out various publications. Every month, I am sent a copy of *Glasgow* magazine, which gives information about surgeries and events. Nobody has ever told me that the council should stop sending out that magazine because people can access information on the web. We still send out paper forms of information. Libraries have countless items of literature from local councils on various issues. Why is it an onerous task to send out information on applications, given that councils are happy to send out paper on other occasions? We cannot have it both ways.

Mairi Millar: Obviously, we will still notify the community council that an application has been received for its area and we will carry out the neighbourhood notification. During the transition period, there was no requirement to provide all the documentation. I would be reluctant to send out all the documentation for the neighbourhood notification. We had one application that resulted in 200 letters of notification being sent out. Photocopying a 16-page application form and operating plan and sending that to 200 local residents would cause chaos in our office.

Paul Martin: What are the witnesses' views on antisocial behaviour reports?

Mairi Millar: One of my main concerns about the antisocial behaviour reports is that there is no tie-in with the applicant premises. That is a particular concern with premises that are not yet in operation. The suggestion is that boards might be provided with antisocial behaviour reports that detail the number of incidents of antisocial behaviour in a particular locality. My experience of appeals is that the courts want the board to establish culpability on the part of the applicant or licence holder. With board decisions that are based on test-purchase operations, the courts are looking for the board to establish that the failure is the licence holder's fault and to show a causal connection. Against that background, I would be reluctant to advise a board that it could refuse an application based on an antisocial behaviour report, because that report will display no evidence of culpability on the part of the applicant. They cannot be shown to be responsible through their actions for the antisocial behaviour.

I also adopt all the points that the previous witnesses made about location. The applicant's premises might be situated on a main thoroughfare where people are routinely passing by. Antisocial behaviour issues might also arise near premises that are located close to a particular type of hot spot, such as a football stadium. The problems might not be related to the management's operation, or future operation, of the premises.

Frank Jensen: I go along with that entirely. So far, the antisocial behaviour reports that our board has viewed have been of very limited value, essentially because of that point about culpability. The reports do not contain a great deal of information that can be used, although they might paint a picture of the area. The information in antisocial behaviour reports might be used more beneficially in larger areas such as town centres, where the details could be reported to licensing forums, which can make general recommendations to the licensing board on terminal hours and other issues. However, that option is available already.

Paul Martin: Convener, I know that we are short of time, but I want to ask just one brief question.

The Convener: Let us fully examine the issue.

Paul Martin: Concerns have been raised about the requirement to consider an antisocial behaviour report, but licensing boards must surely take into account whether antisocial behaviour has surrounded the premises to which the application relates. If antisocial behaviour clearly did not exist to the same extent previously and has increased since the premises started operating, surely the board must be in a position to be properly informed about the kind of activities that are taking place. For example, if the police are called 167 times to a particular premises, surely that should be reported to the board without requiring a police officer to decide whether to provide the information. Is the requirement for an antisocial behaviour report not a more comprehensive way of doing that? Perhaps the reporting is not an exact science at the moment, but it could be developed properly to provide proper information.

Frank Jensen: I agree with that. If information has been built up over a period—for example, if the police were called to a premises 167 times in 2008 and 427 times in 2009—the board could take that information into account.

Mairi Millar: Perhaps a distinction should be made between a new application and a review. In reviewing premises licences, some tweaking might be useful to allow boards to look at whether there has been a build-up in instances of antisocial behaviour since the premises started operating.

The Convener: Stewart Maxwell has a question on what was said earlier about notification.

Stewart Maxwell: I just want to clarify one point. Ms Millar said that, under the new proposals, neighbour notification will still be required, community councils will still be notified and people will still be able to look at applications in more detail in their local council offices. However, as Mr Martin pointed out, not everyone has broadband. In the council's view, what is the value of advertising in local newspapers? I ask for two reasons: first, not everyone buys a local newspaper; secondly, sales of local newspapers have declined quite rapidly in recent years. Does the council believe that providing access to the internet in public libraries—which are not only local but free—is a better way of notifying people than using local newspapers, whose sales are declining?

Mairi Millar: Under the 1976 act, everything was referable to the quarterly meeting of the licensing board, so people could have a reasonable expectation about when the newspaper advert would appear. For example, for the January quarterly meeting, the advert would appear just before Christmas so anyone with a particular interest would buy the paper around that time to see the notice. Because we no longer have quarterly meetings and because every time limit for an application runs from when the application was lodged, our adverts would need to appear every single day, depending on the number of applications that we receive. There could be no certainty in the public's mind about when the newspaper advert would appear.

My original point was that I do not think that we could ever condense the information into a newspaper advert in such a way as to provide meaningful information to members of the public on what was being applied for.

Cathie Craigie: The bill provides for an occasional licence to be granted outwith the normal timescales when a licensing board is satisfied that an application should be dealt with quickly. Some of the written evidence that we have received expresses concern that that function cannot be delegated to members of the licensing board's staff. Does that need to be addressed?

Mairi Millar: Having clerked the city of Glasgow licensing board for about half its meetings during the transition period, I like to think that I have earned its trust and respect, but under the proposals in the bill, I, as assistant clerk, would be unable to take that decision. That seems odd, given that many of my other responsibilities are more onerous.

Having said that, I have a concern about the decision that we would be asked to take. We mentioned that in our submission. My concern is about when it would be appropriate to exercise that discretion. Would it become routine for applicants to look to the clerk to exercise their discretion and reduce the time limit?

Cathie Craigie: You go into that in detail in your written submission. Do you want to add any comments on the matter or does your submission say it all?

Mairi Millar: The point was made earlier that one of the drivers for the reduced reporting time is the need to deal with emergency or short-notice situations such as funerals, but such cases would be more appropriately dealt with through extended hours applications. It might be useful to have a similar type of provision, although I am concerned that clerks would routinely be asked to exercise discretion and I wonder in what circumstances the reduced reporting period would be appropriate.

Cathie Craigie: It would be useful if you could write to us with your thoughts on how the bill can be improved in that respect.

Mairi Millar: We are certainly happy to do that.

The Convener: I take it that the other members of the panel concur with the views that Ms Millar expressed. They are indicating that they do, which enables us to move on to Robert Brown.

Robert Brown: If I may, convener, I will pursue the point about occasional licences. Ms Millar said that it is difficult to envisage circumstances in which they will be required, even for funeral parties, which tend to be at licensed premises and not unlicensed ones. Do the other members of the panel know any circumstances in which occasional licences would be needed?

Frank Jensen: The range of circumstances is broader than just funerals. The vast majority of applications that we get for occasional licences and extensions are for routine events such as fundraising events by voluntary organisations in village or community halls, birthday or golden wedding celebrations and so on. As often as not, even now, people apply at the last minute. We might get a non-controversial application from someone who seeks an occasional licence for a village hall from 7 pm until 11 pm and we know that there will be no difficulties with it. It would be beneficial if such applications were included in the process.

As clerks, we work closely with the board and we know its line on hours, including terminal hours for events. If the application is for an 18th birthday party, we are alerted to the kind of event that it is likely to be. If we receive any adverse comments, we invariably consult the convener of the board or a local board member.

Robert Brown: In short, then, we are discussing not emergencies but applications for routine events from people who do not know the procedure and have applied late. The applications are often not controversial and you are content with the arrangement.

Frank Jensen: Yes.

13:00

Robert Brown: Is there a need for a similar fast-track procedure for extended hours applications, or would that raise other, more complicated, issues?

Frank Jensen: I think that there is. I suspect that the licensed trade would wish to benefit from that process. The trade is contracting as a result of these changes; it will be looking to provide a full range of services, including for functions. Those who are involved in the trade will want to do that even more than they are doing at the moment. The simple answer is yes.

Robert Brown: Extended hours can be troublesome for the public in some suburban locations. Would objections be made on that ground to applications being fast-tracked without the usual provision for matters to be considered more widely?

Frank Jensen: Boards have their statement of licensing policy, which they follow, and there are also the licensing objectives. We are aware of the terminal hours issue. At present, if anyone asks for the occasional extension beyond those hours, the application is looked at closely. We are aware of the issues with regard to existing licensed premises, and we can and will impose conditions in the future. We have licensing standards officers who visit premises before an event takes place.

Robert Brown: You are saying that it might be helpful to have a fast-track procedure and that you would have no major concerns about that. Is that the position of colleagues, for example in Glasgow?

Mairi Millar: In the past week, the clerk to the board and I sat down together to look at the provisions for occasionals and extended hours applications. The process is fairly tortuous for members of the trade and those who are on the regulatory side. It would be nonsensical to have to convene and hold a board meeting to determine an extended hours application or an occasional licence—that just would not happen within the timescales.

My points on the subject in our submission are fairly narrow in scope. That said, there is cause to look again at the totality of the occasional licence and extended hours application provisions.

Robert Brown: That is helpful.

Earlier, we heard the views of the Scottish Licensed Trade Association on licensed clubs. We heard that fees in Scotland are higher than those in England, and about whether supermarkets should be put into a higher category of premises that pay more in fees towards the overall administration costs. What is your view on the association's concerns?

Mairi Millar: I have no detailed submission to make on the way in which fees are established. Obviously, I was not prepared to deal with that today.

As the committee heard, processing an application for a larger premises gives rise to no greater involvement than an application for a smaller premises. Both types of application go through exactly the same notification and advertising procedures and consultation with building control and licensing standards officers. The process is no more time consuming just because a premises is bigger.

It has always been recognised that fees would have to be reviewed once we were through transition. In making those projections, we do not yet know the level of business activity post transition—that remains to be considered. The Glasgow board has given an undertaking to review fee setting after transition. We will need to set out a detailed submission on the mechanism in the regulations for fee setting.

Robert Brown: Does Councillor Thomas have anything to say from a policy point of view on representations from the on-trade with regard to supermarkets?

Councillor Thomas: I have a lot of sympathy with them. Everybody in the business knows that young people in particular drink before they go out and obviously get their booze from the cheapest source. I do not know how the issue can be addressed, but it might be worth examining that. In Edinburgh, we have taken seriously—as I am sure all the boards have—the new rules about reducing the areas in which supermarkets can display their alcohol, which will have some effect. With the way that things are going, the matter would definitely be worth considering.

Robert Brown: Are there any other views on that or are the other witnesses happy with those observations?

Frank Jensen: My views are the same.

Aileen Campbell: The bill requires that personal licence applications be signed by the applicant. Concerns have been raised about that provision. Glasgow licensing board said that it may be contrary to the requirements of the European services directive, which may mean that such applications must be capable of being submitted electronically. The Law Society said that it could preclude signature by a legal agent or employer, which may be appropriate in some circumstances. What are the witnesses' views on those issues?

Mairi Millar: The European Union services directive will bring about fundamental changes to liquor licensing and civic government licensing. A huge number of amendments will have to be made to the Civic Government (Scotland) Act 1982 to implement the directive fully and that is to be done by 28 December this year. I have concerns about whether those legislative changes will be in place in time for licensing authorities to gear up for their implementation. It is a huge issue, which is probably beyond the scope of today's meeting. Under the services directive, we will move to allowing applications for personal licences to be submitted online. If they are submitted online, they cannot be signed.

Aileen Campbell: Does anyone else have views about a legal agent or employer not having the right to sign an application?

Frank Jensen: The 2005 act defines an applicant as

> "the person making the application".

That is not necessarily the person who will benefit from the application; it could be a lawyer or anybody else. If we apply the normal rules of grammar, the applicant is the one who makes the application and, therefore, the application could be signed by anybody. However, the services directive will point the direction. Signatures and overprovision are aspects of liquor licensing that the directive may catch, as both fall under its provisions on barriers to trade.

Mairi Millar: Since the Glasgow licensing board's submission was made, it has been clarified that, although liquor licensing is within the scope of the EU services directive, personal licensing is outwith it. However, there are still implications for other types of liquor and civic licences.

Aileen Campbell: The previous panel of witnesses said that authorities were sending inconsistent messages about whether it was fine for a premises manager not to have a personal licence. We were given the example that one company may have to second a manager who has a personal licence while another manager waits for theirs to come through. How do you respond to the problems that businesses face and the point about the inconsistency of the messages from local authorities? Perhaps the Convention of Scottish Local Authorities is best placed to give a view on the differences of approach throughout the country.

Sylvia Murray (Convention of Scottish Local Authorities): We do not have a view on that specific point, but the question of consistency throughout the country is raised often on many issues and the standard answer is that that is local democracy in action. It is a fine balance to strike all the time but it is virtually impossible. We try to promote consistency but it is not always possible because local priorities always come into play.

Frank Jensen: I suspect that the inconsistencies are relatively few and that they are magnified during the transitional period, as each board is at a different stage in the grant and issue of personal licences. I hope that the issues will resolve themselves over the next 12 months.

Robert Brown: A number of witnesses have raised the issue of personal applications being dealt with slowly. Will licences be processed by 1 September in the areas that you represent? Should we be looking to put in place a mechanism to allow derogation from the existing arrangements?

Mairi Millar: Glasgow has been processing and issuing personal licences throughout the process. We deal with applications within four to six weeks, and licences have been issued. However, personal licence applications are not yet arriving in great numbers; as of last month, we had received fewer than 1,000. That does not mean that applications have been received for premises managers for 1,000 of the 1,800 premises in Glasgow, as multiple applications are coming in for single premises. We are well short of the number of applications that would reflect the number of premises in Glasgow. It is now nearly 16 months into the transitional process, but applications are not coming in.

Robert Brown: You have not told or implied to people that they cannot lodge them yet, as was suggested earlier.

Mairi Millar: No, we have been looking for applications throughout the process. It is fair to say that everyone’s focus was on premises licences, but we have always had procedures in place to process personal licence applications. With the best will in the world, if we get a windfall of applications in July and August, they will not be issued in time for 1 September.

The Convener: You are saying that you have received four applications for some premises and none for others. That makes the situation worse.

Mairi Millar: We cannot relate personal licence applications to premises, but the numbers suggest that we have not received—

The Convener: Could you not guesstimate?

Mairi Millar: I guess that we have not received enough applications to be able to appoint a designated premises manager for each of the premises in Glasgow.

The Convener: What is the position elsewhere?

Frank Jensen: Like Glasgow, we have been accepting applications. We have issued about 800 licences for the 900 applications that we have received. We estimate that between 2,000 and 2,500 personal licence holders are needed to serve as premises managers if licensed premises are to run properly, so we are expecting a lot of applications. We told applicants earlier in the year—and have continued to repeat—that we could guarantee to issue personal licences in time if applications were received prior to 31 May. The guarantee dropped off in intensity after that date.

Councillor Thomas: I agree. At each board meeting, when we receive applications, we ask people whether they have personal licences. They say that they have, but they really mean that they have the training certificate. We are emphasising the point but, despite our best efforts, there may well be an issue towards the end of the period.

Robert Brown: That raises a subsequent issue. We have heard different accounts of who is at fault but, regardless of whether people are submitting applications late, the failure of licences to be issued in time will have a practical and economic effect. Can you guide us on how the issue might be dealt with and on the remedies that might be provided?

Mairi Millar: It needs to be dealt with through regulation, given that the mandatory conditions that apply to premises licences require there to be a designated premises manager; without one, premises cannot sell alcohol.

Robert Brown: In short, you do not have power to exercise discretion.

Mairi Millar: No, the licensing of a designated premises manager is part of the mandatory conditions.

Nigel Don: Am I right in thinking that the European services directive is directly applicable, because it is a directive, and that, even if we produce a statute that is inconsistent with it, you will have to work within its terms?

Mairi Millar: Absolutely.

13:15

Bill Butler: Several respondents have noted that not all local authorities have chosen to use the national personal licence database and that, in addition, there are no timescales for inputting information into the database. Some argue that that hampers licensing boards’ ability to check the history of applicants and therefore discharge their duties in considering applications. What are your views on the issue?

Mairi Millar: That is certainly the case at the moment. Amendments to the 2005 act that are proposed in the bill will cure many of the problems that we have identified with personal licences. There would have been no point in our checking the database during transition, because we had to grant the licence if it met certain minimum requirements. Given the changes that the bill may bring about, the personal licence database will be useful in the future, but it is certainly not useful during transition under the current provisions.

Bill Butler: That is very clear. Does anyone want to add anything or differ?

Frank Jensen: I agree with those comments.

Bill Butler: I will take it that there is agreement.

I have one other question. Some respondents have stated that the appeals procedure under the Licensing (Scotland) Act 2005 is unnecessarily complex and have called for it to be replaced with something more akin to the procedure under the Licensing (Scotland) Act 1976, which involved a summary cause appeal process. What do panel members think about the matter?

Mairi Millar: John Loudon made the point earlier that it is rare for licensing lawyers to agree unanimously on an issue, but this is one of those rare occasions when we are all in agreement—the stated case procedure does not work for licensing appeals and a straightforward return to the summary application is welcomed by all.

Bill Butler: Is it welcomed by all?

Frank Jensen: I concur.

Councillor Thomas: Yes.

Bill Butler: It seems to be welcomed by all, convener. I have no other questions.

The Convener: We have a healthy degree of unanimity. As there are no other questions for the panel, I thank the panel members very much—it has been a particularly useful session.

The committee will now move into private session.

13:17

Meeting continued in private until 13:56.

Scottish Parliament

Justice Committee

Tuesday 23 June 2009

[THE CONVENER *opened the meeting at 09:04*]

Criminal Justice and Licensing (Scotland) Bill: Stage 1

The Convener (Bill Aitken): Good morning. I remind everyone to switch off their mobile phones. We have an apology from Angela Constance, who is attending a funeral. She might join us later.

Item 1 on our agenda is continued consideration of the Criminal Justice and Licensing (Scotland) Bill. Today is the concluding evidential session on the criminal justice parts of the bill.

Given the breadth and complexity of the bill, the committee has agreed to postpone taking evidence from the Cabinet Secretary for Justice on the licensing parts of the bill until after the summer recess.

Panel 1 officials will support the cabinet secretary on sections 1 to 37, and panel 2 officials will provide support on sections 38 to 120.

I welcome Kenny MacAskill, the Cabinet Secretary for Justice, who is supported by George Burgess, from the criminal law and licensing division; Wilma Dickson, from the community justice services division; and Rachel Rayner, from the legal directorate. All of them are from the Scottish Government and none of them requires any introduction to the committee.

I invite the cabinet secretary to make a short opening statement.

The Cabinet Secretary for Justice (Kenny MacAskill): The Criminal Justice and Licensing (Scotland) Bill is a wide-ranging piece of legislation that takes forward many of the Scottish Government's priorities. In my opening statement, I will not cover everything that is contained in the bill, but I want to talk about a couple of very important elements.

The bill provides for a tough new sentence—the community payback order—as a replacement for a number of existing community penalties. The community payback order will allow offenders to repay communities for the damage that they have done by offending and will help to tackle reoffending rates with quick justice.

This year, we have already invested an additional £2 million in community service—£1 million to get orders under way and completed more quickly, and a further £1 million in recognition of underlying workload increases. That equates to a 15 per cent increase in funding for community service between 2008-09 and 2009-10, which will roll forward into next year.

Community sentences need to start on time and be enforced rigorously. However, as Robert Brown has emphasised, they also need to offer the support that offenders need. The recent audit of local authority performance revealed the distance that remains to be travelled towards the new targets that have been agreed with local authorities for the start and completion of community service orders, particularly with regard to the target for work to start within seven days of the sentence being passed.

I can announce today that we propose to make available an additional £5.5 million over the next two years to help us achieve our twin goals of having a higher number of more robust community sentences and providing better support to offenders.

Start-up funding of £1.5 million will go out this year, rising to an extra £4 million in the following year. That extra £4 million equates to an additional 15 per cent expenditure on the core community sentences—probation and community service—year on year.

Most of that money will go to local authorities, to help them clear their backlogs and achieve tighter turnaround times. We want to work with them to ensure that, if the Parliament supports the bill, they will be ready when the new community payback order comes into force. Once that transition period is complete, resources can be redirected to additional CPOs.

Subject to the views of the Parliament, we need to provide resources to deliver the new approach to sentence management that is introduced in the bill. Much of that funding will go to local authorities, but courts will also require investment to support progress hearings, and the new breach provisions will require extra electronic monitoring capacity. We need to give the courts tough options, short of prison, to deal with those who fail to comply with their orders.

The issue is not all about money. It involves the Government and local authorities working together to achieve shared goals for tighter delivery and find more efficient ways of working that will ensure that the judiciary gets the information that it needs in the most useful form, that social workers do not waste time on bureaucracy and that we make the best use of information technology to speed up case handling. However, we recognise the need to invest. Money is tight, and every penny has to be made to count. Sometimes, we have to focus investment on top priorities, which is what we are doing in this case.

Alongside the community payback order will be the introduction of a statutory presumption against the courts imposing prison sentences of six months or less. We should be clear that the courts will still be able to impose sentences of six months or less—there will be no statutory bar. However, the courts will need to explain why they think that the use of such a short sentence is justified, as opposed to the use of an alternative disposal such as the community payback order.

This is not about saving money; it is about our making communities safer by facing up to the challenge of turning round the reoffending behaviour of low-level criminals and making them pay back the community for the damage that they have done. Short custodial sentences do not allow the offending behaviour to be addressed.

I realise that this is a complex and technical piece of legislation. I am aware that the committee has received a considerable number of written submissions on the bill and has heard oral evidence from numerous organisations and individuals. Even though we have the rest of the morning, I would be surprised if we were able to answer all the queries that have been raised in evidence to the committee. I will therefore be happy for my officials to work with the clerks on any queries that remain outstanding following today's meeting.

The Convener: That is helpful, Mr MacAskill. We are unlikely to conclude our consideration of the bill today, and other questions will arise. We will put them to you in writing for answer over the summer recess—when I am sure you would otherwise only be enjoying yourself anyway.

I will open with a question on the purposes and principles of sentencing. Why was it deemed necessary to set out in the bill the purposes and principles of sentencing? Will they apply to offenders who are under 18 at the time of the offence?

Kenny MacAskill: They will not apply to people who are under 18.

We think that sections 1 and 2 are clear and easy to understand. They set out the purposes and principles of sentencing, and we think it essential to do that. Sentencing does not have just a single purpose—that of punishment—and the lack of hierarchy in section 1 is quite deliberate. In trying to get the balance right, fairness is important, and setting out purposes and principles will contribute to achieving that.

We are happy to consider any specific suggestions that the committee may have, but we felt that we should state what is being done when courts exercise the majesty of the law.

The Convener: Some people have told us that they consider section 1 incomplete.

Kenny MacAskill: If people feel that it is incomplete, we will be more than happy to take on board any recommendations from the committee. Such things will always have to be flexible, because changes will occur in society and in people's perceptions. We have set down the parameters within which the people who are charged with the function of dispensing justice should operate.

The Convener: We have to consider public perceptions, and I fully accept that they may sometimes be slightly detached from reality.

You suggest that no inference is to be drawn from the order in which the purposes and principles of sentencing are listed, but are you still confident that the public will end up with a greater understanding of the purposes of sentencing, or of the purpose of a particular sentence in an individual case?

Kenny MacAskill: We have embarked on a journey, and the legislative framework will assist us. A start has been made with the way in which sentences are announced in court; they are now made clear to everybody. Such ideas came in with the Custodial Sentences and Weapons (Scotland) Act 2007; people now realise how long an offender will spend in prison and what issues will be dealt with in other ways.

This is a work in progress. We have to tackle public misunderstanding in a range of ways. That will involve educating people about civics—or whatever terminology we want to use. However, making the role of sentencers clear, and making clear the requirements that are on them, will help to kill off the myths and to ensure that people understand what is happening in the courts. That will be important.

The Convener: Our questions also impinge on aspects relating to the Scottish sentencing council. I invite Bill Butler to pursue that line.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, cabinet secretary. As you will know, the committee has heard conflicting evidence on whether sentencing is inconsistent. Do you believe that there is significant inconsistency in sentencing? If so, to what do you attribute that?

Kenny MacAskill: The Sentencing Commission for Scotland raised the issue of inconsistency in sentencing, and we are building on its comments. Equally, the Crown has mentioned difficulties in relation to judge shopping, for example. As the convener suggested, the public perceive—although their perceptions may not reflect the reality—that sentencing is inconsistent. Justice has not only to be done, but to be seen to be done. Building on the comments of the Sentencing Commission will be the way to go.

Bill Butler: You are right to say that public perception is powerful and must be taken account of, but can you provide the committee with details of academic research that shows that there is inconsistency in sentencing?

09:15

Kenny MacAskill: The Sentencing Commission for Scotland concluded in 'The Scope to Improve Consistency in Sentencing':

> 'such research evidence as does exist, limited though it is, supports the view that there is some inconsistency in sentencing in Scotland'.

The commission went on:

> 'the experience of members of the Commission'—

who were very senior—

> 'points to the occurrence of some inconsistency in sentencing in Scotland'.

The commission noted that there was a great deal of anecdotal evidence in that regard. It would be inappropriate of me to mention individual cases, but I stand four-square behind the commission. The commission was powerful and its membership was highly esteemed.

Bill Butler: I do not doubt that. However, when we questioned Mr McLeish, the chair of the Scottish Prisons Commission, he was unable to come up with much in the way of academic evidence that proved that there is inconsistency. You said that there is such evidence, 'limited though it is'; can you forward to us the academic evidence that persuaded the commission and then you that there is inconsistency in sentencing?

Kenny MacAskill: I cannot second-guess the McLeish commission; we have founded our approach on the conclusions of the Sentencing Commission for Scotland, which was an august body that contained senior figures, including senior members of the judiciary. We are building on their comments. As we have said, factors other than inconsistency are involved. However, we think that there is disquiet among the public about inconsistency in sentencing, which must be tackled, whether it is based on anecdotal evidence or reality. The Sentencing Commission for Scotland said publicly that there is an issue. We are predicating our position on that view.

Bill Butler: The provisions on the proposed Scottish sentencing council have attracted criticism. It has been argued that they could undermine the independence of the judiciary. It was suggested that the High Court will be stripped of powers, which will be passed to a non-elected, non-judicial body, thereby giving rise to concerns about compatibility with the European convention on human rights. How do you respond to those criticisms?

Kenny MacAskill: There is no substance to such fears. It is perfectly clear that the approach is compatible with the ECHR. Not long ago, the Parliament enshrined in statute the independence of the judiciary. The Government intends neither to go against the will of the Parliament nor to interfere with the independence of the judiciary. We made it clear that the sentencing council would only set guidelines and would not give directions. The understandable concerns that might exist among the judiciary can be allayed; it is clear that the sentencing council will not interfere with judicial independence and will not be incompatible with ECHR, given its limited powers.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): It was suggested in a written submission to the committee that the creation of the Scottish sentencing council would be objectionable on constitutional grounds. How do you respond to that?

Kenny MacAskill: Given that we do not have a written constitution in this country, I find it hard to understand where the person who expressed that view is coming from. The approach is not incompatible with ECHR and the council will not interfere with the independence of the judiciary. Such fears are unfounded. We have made it as clear as we can do that we will not interfere with the ultimate responsibility of each sheriff or judge to make the decision that they think is appropriate to the specific offence of the individual offender who appears before them.

However, we believe that inconsistency in sentencing is a difficulty that must be dealt with. Equally, we believe that not only those who are given the privilege of sitting on the bench but people who represent interest groups such as victims organisations should be able to have some say, even if the ultimate decision in an individual prosecution will be made by sheriff A or judge B. There is something manifestly wrong in our society if the views of a representative of a victims organisation cannot be heard. That is why we believe that there should be a sentencing council. It will not interfere with the independence of the judiciary and it is certainly not unconstitutional.

Cathie Craigie: The make-up of any sentencing council is not the point. It has been put to the committee that it would be unconstitutional to take responsibility away from Parliament, ministers and the appeals court—that is the point that I am trying to make. I am sure that the cabinet secretary will have read the *Official Report* of the committee meeting when members of the judiciary and witnesses who came with them gave oral evidence. The constitutional issue is important, and I would like to hear a Scottish Government viewpoint on it.

Kenny MacAskill: I just cannot see the basis on which the sentencing council could be viewed as unconstitutional. It will not interfere with the independence of the judiciary and it is clearly intra vires. I do not understand the difficulties that people have with it or the question of its being unconstitutional. Ultimately, that is a matter for lawyers, whether our Government lawyers, the Lord Advocate or, indeed, the Parliament's lawyers—as we have seen in recent events. They will decide whether the bill is intra vires, but the fact that the bill was introduced with a clean certificate seems to me to indicate that nobody views it as anything other than perfectly constitutional. I therefore cannot understand where the problem arises.

Cathie Craigie: Convener, perhaps we can furnish the cabinet secretary with an extract from the *Official Report* of the evidence that we took on the issue, and ask for a response on it.

The Convener: By all means. I am sure that the cabinet secretary, having had sight of the extract, will respond appropriately.

Kenny MacAskill: By all means. All I can say is that it would be entirely inappropriate for me to seek to berate the legal advice and the sign-off that was given by the Presiding Officer, the Parliament and, indeed, other people charged under the Scotland Act 1998 with responsibility for ensuring that proposed legislation remains within the powers of the Scottish Parliament and is constitutional.

Bill Butler: As you said, one of the functions of the proposed sentencing council will be to prepare sentencing guidelines that a court must 'have regard to' when sentencing an offender. How should the phrase 'have regard to' be interpreted?

Kenny MacAskill: I will adopt the position that was taken by my learned friend the Lord Advocate when she appeared before the committee on 9 June. Requirements for the courts or other decision makers to have regard to certain matters are well precedented in statute, and the courts have been clear about what is required. The Lord Advocate explained on 9 June:

> 'The council will provide guidelines that the courts must 'have regard to', which means that they must give them consideration. If it is considered that the application of the guidelines is not acceptable in a specific case, reasons will be given why that is the case—that is a rational approach. Equally, if the appeal court considers that the judge's determination was correct—'

or incorrect—

> 'it can refer the matter back to the sentencing council.'—[*Official Report*, *Justice Committee*, 9 June 2009; c 2057.]

Bill Butler: Do you agree that sufficient discretion will be left with the court, even given the sentencing guidelines?

Kenny MacAskill: We have always sought to make it clear that, if a sheriff or judge believes that the guidelines are inappropriate in a particular case for whatever reason—whether because of something pertaining to the individual offender or because the offence is regarded as so unusual—the sentence must be left to their discretion. It is a matter for the individual presiding whether that means that the sentence will be less or more liberal than the guidelines suggest. We fully support that position, which is how it must be. It comes back to the fact that, although there will be broad guidelines, each individual offence and offender is unique.

Nigel Don (North East Scotland) (SNP): That takes me back to the purposes of sentencing, or at least the purposes of the sentencing council. It has been suggested—and I agree with the suggestion—that it might be better if the bill said that the overarching principle was fairness, which is a concept that five-year-olds understand. If we have sentencing that is coherent and appropriate, that broadly fits with fairness.

Kenny MacAskill: Fairness is clearly an appropriate factor but it is not the only one that those who impose sentences should consider. It is, presumably, about balancing in the scales of justice the interests of the community and wider public against those of the individual. However, it is also appropriate to take into account a variety of other matters in sentencing, such as the message that a sentence can send to the wider community.

Fairness is clearly a critical factor, although it is not the only one. However, we will not stand on nomenclature and, if anybody can suggest better definitions and terminology, we would be more than happy to accept them. Our general view is that fairness is important, but sentencers have to take other factors into account when sitting on the bench and presiding over the sentencing of an individual.

Bill Butler: You will be aware of the evidence that the committee took from sentencers on the proposed membership of the Scottish sentencing council. What are the reasons for not having a judicial majority on the council?

Kenny MacAskill: We must be clear that the council will be judicially led. We accept that that is important. We are open to persuasion, but our view is that it is important that the council also has representatives of broader society. That is why the council is in the bill. The ultimate decision will be made by the judiciary, who will have the power to act in their own way because of whatever reasons they consider make the treatment of a specific individual or offence different from what is suggested in the guidelines. They will be protected by that power, so it is important that we take into account others who have an interest, such as the police, the prosecution service or Victim Support Scotland. If the guidelines are not prescriptive but must be taken into account by sentencers, the fear that they will interfere with judicial discretion will be allayed. The judiciary should recognise that all our communities have a broader interest in sentencing and should be represented. The proposal gives us the best of both worlds: it will protect judicial independence, and it will ensure that the broader community has an opportunity to say how it regards offending.

Bill Butler: You say that you are open to persuasion on the council's composition. What is the purpose of a constable being a statutory member? Should the Convention of Scottish Local Authorities be represented?

Kenny MacAskill: The inclusion of a constable is simply shorthand for including the police. A decision will have to be made about whether that is a chief constable or somebody else.

I am happy to consider whether COSLA should be represented but we cannot have representation from every organisation that has legitimacy—such as the Association of Chief Police Officers in Scotland, the Scottish Police Federation, the Association of Scottish Police Superintendents and so on—because, as with any committee, there comes a time when we have to balance a broad base.

The only difficulty with including COSLA is that, the more non-judicial members we put on the council, the more judges or sheriffs we would have to put on to try to keep a reasonable balance and the less time they would have to sit on the bench and do their day jobs. Without being flippant, we need to ensure that we strike an appropriate balance between the non-judicial and judicial members of the council. However, we are open to suggestions and more than happy to consider including representation from COSLA.

Bill Butler: I am glad to hear that. In effect, you are saying that you would be open to that type of suggestion if it was manageable and was seen to retain the balance that you seek.

Kenny MacAskill: Absolutely. Such things are not static. As we have seen with other bodies, we must be flexible and pragmatic as society changes. We have not set the matter in tablets of stone. We have said that the council should be judicially led, although we do not think that a judicial majority is needed. Thereafter, the membership is about ensuring that the balance is not out of kilter so that we do not have five members from the judiciary and 25 Uncle Tom Cobbleighs and all. Equally, who those representatives should be is an important matter to discuss and we will be happy to take advice from anyone.

09:30

Robert Brown (Glasgow) (LD): I am surprised to some extent that the cabinet secretary cannot see that there is a problem with having a prosecutor and a constable on a sentencing council that will in effect give directions—albeit in general terms—to the judiciary. Might not a way round the problem be to give the judiciary the final say through the existing appeal court procedures? In effect, that would make the sentencing council an advisory council and thus keep both the independence of the different parts of the machinery of government—the separation of powers, if you like—and the input from victims and others, which we all feel is important.

Kenny MacAskill: I think that we have struck the correct balance. We have made it quite clear that, if a sheriff or judge believes that there is good reason to ignore the guidelines, they may do so—

Robert Brown: With great respect, my question is about how the sentencing council arrives at the guidelines in the first place. I appreciate that later bit.

Kenny MacAskill: I am coming on to that.

It would be ludicrous if a body dealing with the protection of our communities from offending did not include representation from the police and the prosecution. I do not believe that there will be a conflict of interest. Indeed, if the police and prosecution were not represented, good questions would be asked about how such an august body could operate without a clear input from those who are at the coalface. Clearly, as happens in a whole variety of other situations, those who are appointed will act as members of the sentencing council and will not necessarily wear the hat of their day job, but the experience that they will bring will be absolutely essential. I would think it remiss if we were to conclude that a sentencing council should not have a representative from the police or from the prosecution service. I do not see any conflict thereafter.

As I said, by laying down guidelines while allowing the sentencer to decide ultimately to say, 'The guidelines do not apply for the following reasons,' we are striking the appropriate balance. That protects the individual member of the judiciary; equally, it allows the appropriate input from our communities.

Robert Brown: With respect, no one suggests that the sentencing council should include no representatives of victims organisations. My question is whether the proper balance would be achieved if the council was an advisory council with the imprimatur, as it were, coming from the judiciary. After all, the judiciary need to interpret and make individual decisions on these matters at the end of the day.

Kenny MacAskill: I have made it quite clear that I think that the sentencing guidelines must be more than advisory. The judiciary will have the opportunity to say that the guidelines do not fit in the particular circumstances of an individual offender or individual offence. However, to give the sentencing council a status that will allow the views of the broader community to be included, the guidelines will need to be more than just a whim or fancy. Therefore, we need to ensure that the sentencing council can set broad guidelines that provide the parameters, but ultimately the judiciary will have the opportunity to state for the record that the guidelines should not apply in particular circumstances. However, in the main, the guidelines will apply.

Clearly, we have other ways in which the court provides assistance. What the High Court does in disseminating down is useful, and the sentencing council will be able to operate with that. However, as I said, we think that the current proposal strikes the appropriate balance. The bill will give our communities the right to have a say on sentencing to try to achieve better consistency of sentencing without interfering with the ultimate independence of the judiciary.

Robert Brown: I want to pursue two other aspects. First, I want to ask about the interrelation between the sentencing guidelines and the statutory purposes of sentencing that are set out in section 1. I am bothered by section 2(2), which says in effect that the sentencing guidelines need not comply with the principles and purposes of sentencing as set out in section 1, which is normally regarded as the principal section. Why is that the case? Why do the principles of sentencing not override everything, including this somewhat indeterminate body—the Scottish sentencing council—that sits in the middle?

Kenny MacAskill: To some extent, we are talking about a very general matter and then moving on to deal with more specific things. After describing the ambit of or the backdrop to what we are seeking to do—the broader background to which Nigel Don referred—the bill focuses on more specific matters. I do not think that the two provisions are inconsistent. The bill will simply allow the sentencing council, in dealing with specific matters, to be a bit tighter than it would be in dealing with a much more general philosophical position.

Robert Brown: With great respect, section 1 refers to 'the punishment of offenders', 'the reduction of crime', 'deterrence', 'reform', 'protection of the public' and 'reparation'. How can those things possibly not be taken account of in the sentencing guidelines?

Kenny MacAskill: We are talking about the backdrop and the general wide position that we are setting out. You then have to drill down and focus. That applies to a variety of other matters. I do not think that there is any inconsistency. If you have particular points to make, we will be more than happy to consider them. We are talking first about a general, philosophical view, then about rather more specific matters. It will be for those on the sentencing council to consider that.

Robert Brown: That perhaps raises the question of what purpose section 1 is intended to serve. Bearing in mind that any judge or sheriff worth his salt, any solicitor practising in the court and any prosecutor will be well aware of all the requirements of sections 1(1)(a) to 1(1)(e), what difference are you intending to make to the existing situation by stating those—dare I say it—fairly motherhood-and-apple-pie things in legislation?

Kenny MacAskill: We are doing that because we have not really done so before. We are stating for the record what we are doing. To some extent, the bill is a consolidation bill that sets out publicly what we are seeking to do and how we will do it. It comes back to some of the points that you made earlier. There is a lack of knowledge or awareness of what we are seeking to do. The bill is part of a journey of educating our people about the courts and law and giving them an opportunity to participate. We are setting down what we are seeking to achieve and the structures that will help to achieve it. We will proceed in that general direction.

Robert Brown: My final question is about section 1(5). You indicate that the sentencing purposes will not apply to people under 18. Section 1(5) states:

> 'Subsections (2) and (3) do not apply … in relation to an offender aged under 18'

but section 1(1) manifestly does. Will you explain more precisely the effect of that on offenders aged under 18?

Kenny MacAskill: Section 1(1) deals with the duty on the court; other sections deal with specific matters. Section 1(1) sets out the purposes. Sections 1(2) and 1(3) show what requires to be applied. Section 1(5) makes it clear that sections 1(2) and 1(3) do not apply with regard to under-

18s, so I think we have the appropriate checks and balances in setting out what we are trying to do, what is being done and who it does not apply to. If you read section 1(1) along with sections 1(2), 1(3) and 1(5), it is understandable.

Robert Brown: How does section 1(1) apply to offenders under 18, which it obviously does? What is the effect of it?

Kenny MacAskill: It sets out general principles to which regard has to be had. You described it as motherhood and apple pie. I think that it is an appropriate statement for a civilised society and democracy to make.

Robert Brown: Yes, but it is not something to which regard has to be had, because section 1(2) does not apply to offenders under 18. What is the purpose of it in relation to offenders under 18 if the courts are not required to have regard to it? How does it interact with anything that the courts have to do with offenders under 18? I could understand it if section 1(1) did not apply to offenders under 18—that would be a possible, if slightly peculiar, position. However, I cannot understand why section 1(1) applies when sections 1(2) and 1(3) do not apply.

Kenny MacAskill: I will leave George Burgess to explain the technical matter.

George Burgess (Scottish Government Criminal Justice Directorate): The approach that is being taken in section 1(5) in relation to under-18s and certain other groups is to disapply just the bits in sections 1(2) and 1(3) on the specific duties on the court. We have disapplied only what has to be disapplied. That is not to say that the courts might not recognise exactly the same principles of sentencing that are in section 1(3) as being, in the main, appropriate for under-18s. Section 1(1) really just defines the purposes of sentencing. We did not see any need specifically to disapply it for under-18s. The duty on the court to have regard to those purposes is disapplied, but the purposes themselves sit there. In a sense, the purposes beat the air for the under-18s. The court is not under any specific duty to have regard to them. Nevertheless, they are there and there is no reason to say that they are not the purposes of sentencing in relation to under-18s and the other groups mentioned in section 1(5).

Robert Brown: I will put the question another way. What are the purposes of sentencing and how are the courts to apply them to offenders who are under 18? What is the proposed statutory difference intended to convey? How will the courts deal with under-18s who have been prosecuted as opposed to offenders who are over 18? What differences are they supposed to take account of? Where is that to be found in the law?

George Burgess: It is not to be found in the law. Section 1 will not require the courts to have regard to any particular set of sentencing purposes when they deal with under-18s. Essentially, the duties on the courts to have regard to the purposes of sentencing apply only in relation to over-18s. The issue is perhaps more important when it comes to the principles of sentencing in section 1(3). Section 1(3) requires the court to have regard to certain factors. That is where we might recognise more of a difference in the approach that we want the courts to take when they deal with under-18s. A number of provisions in the Criminal Procedure (Scotland) Act 1995 already require special consideration to be given to younger offenders. There is perhaps more of a need to disapply section 1(3) for under-18s than there is to disapply the purposes of sentencing, but we have achieved what we think is necessary.

Robert Brown: I will leave it there.

The Convener: That might have to be looked at again.

Cathie Craigie: I have two points: one on the sentencing guidelines and one on membership of the sentencing council.

The Sheriffs Association raised concerns with the committee about the implication that the council will have to

‘take into account the cost of custodial sentences in setting an appropriate guideline.’

Section 5(5) states that ‘The Council must include’ that cost in any guidelines but, as the Sheriffs Association points out:

> ‘Cost is not actually relevant to the imposition of an appropriate sentence. It is not clear why it must be included in the guideline itself unless it is to have an effect on the creation of the guideline or, worse, to influence the court.’

Why is it necessary to include the cost of custodial sentences in the guidelines?

Kenny MacAskill: It is what we would do for a bill, and it is what we would expect to be done. We are not saying that the cost of a custodial sentence has to be weighed on the scales of justice, but an assessment of the costs and benefits of different disposals must be carried out. Disposals such as drug treatment and testing orders have cost implications for a variety of authorities. It is simply a matter of ensuring awareness of what those costs are. We are not seeking to constrain the courts. The bill does not say that they must use the cheapest option; it says that they must have some assessment of the option that they intend to use. Everyone who is involved in making use of the public purse must take cognisance of what the ultimate bill will be. You would correctly expect us to do the same for a bill. We expect people to understand the financial implications of any course of action, even if they choose to accept those financial implications.

Cathie Craigie: You are clear that the courts will not have to take that cost into account.

Kenny MacAskill: There is nothing that says that the courts will have to take the cheapest option or that they cannot choose a disposal that costs more than X thousand pounds. The bill says that the courts must understand and be able to work out the implications of particular disposals. As I said, DTTOs have tariffs, and people need to understand the cost implications for others of using them. It is a matter of ensuring that, as a country, we have an element of joined-up working, without putting any constraints on the courts.

Cathie Craigie: I return to membership of the sentencing council, on which you have already answered a number of questions. The specific issue that I want to raise is the proposal to include a constable on the sentencing council. I heard what you said in answer to Robert Brown's question but, given that every police officer who is trained in Scotland is clear that their role is not to judge but to ensure that they bring criminals before the bodies whose role it is to judge, why should we cloud that position by including a constable on the sentencing council?

09:45

Kenny MacAskill: Because they would not be judging. It has been made quite clear that the sentencing council's role will be to give guidelines, not judge. The responsibility for judging people will lie with those who have been elevated to the bench in either a shrieval or a judicial capacity. They will provide their input, and the input of the police, in the form of a constable, will be important. They will be able to reflect the views of the police, based on what they pick up on in communities. However, they will not be there to judge; they will be there to give advice.

Cathie Craigie: Any person—including a police officer—on the sentencing council will make a judgment on what is an appropriate sentence for a particular crime. That is where I see possible conflict between the role of police officers and the role of a member of the sentencing council.

Kenny MacAskill: I do not like to be tautological, but I would have thought that the definition of 'judgment' would be the choice between A or B. However, the members of the council will not be asked to choose A or B; they will be asked to set guidelines. They will say, for example, 'We view the possession of a knife as a serious offence, and we expect courts to treat it that way.' They might say something similar about sectarian singing and so on. They will state views; they will not specifically judge people—no individual will come before them, which means that they will not make judgments.

We might want to consult the dictionary for a definition of 'judgment', but it is important to state that there is a significant difference between the role of those who sit on the bench and make decisions about an offender who has committed an offence and the role of people on the sentencing council, who will state their views on general matters. The former situation involves the making of a judgment; the latter involves the setting of guidelines. The two roles are quite distinct.

Cathie Craigie: We could argue that point. I do not agree with you.

Stewart Maxwell (West of Scotland) (SNP): I would share Cathie Craigie's concerns if the sentencing council created a grid-like framework that meant that a certain crime always resulted in a certain sentence, which is what happens in some states in the United States of America. However, that is not my understanding of what the Government has in mind.

Do you see the sentencing council as being about bringing together the widest possible range of expert opinion to do with crime and its impact on our society and communities in order to provide general guidance on what society believes to be appropriate sentences, as opposed to being about the creation of a rigid grid-like framework, which, I agree, would essentially involve passing judgment on people? Do you see a distinct difference between what you are proposing and what happens in some states in America?

Kenny MacAskill: Absolutely. If we adopted the grid-like framework that you describe, we could replace judges with automatons and simply press a button once the accused had been found guilty in order to get the sentence, but that is not what we have in mind. We have ensured that judges will continue to have the right to make decisions based on individual offences and individual offenders. The sentencing council will issue broad guidelines.

The Convener: I was not entirely satisfied with the answer that you gave when Robert Brown asked about the relationship between the sentencing council and the appeal court. How would you respond to the statement that Scotland has had a sentencing council for several centuries, and it is known as the Scottish court of criminal appeal?

Kenny MacAskill: The Scottish court of criminal appeal will remain sacrosanct and untouched by us. However, the idea that it has managed to take on board, in every instance, the wishes of the broader community, that it reflects the views of those who represent victims, or that many of its decisions percolate down quickly, is not the case in practice. Significant progress is being made, however, and I welcome the steps that have been taken by the appeal court to ensure that its views and decisions are disseminated down, electronically or otherwise. The specific role of the sentencing council will be to build upon that, and to ensure that our judiciary is well advised on those views. The two are not contradictory—they run in parallel. The views of the court of criminal appeal will be extremely important in ensuring that we get that down. Its decisions are binding, but it is misguided to think that it allays the public's fears or that we should not have an opportunity to take a broader view.

The Convener: Surely the court of criminal appeal's decisions are disseminated quite quickly—you see them in the *Scots Law Times* every week. Scottish criminal cases are published regularly. I do not see that a problem exists.

Kenny MacAskill: It is accepted by the judiciary that the system is not working as well as it would like, and that decisions are not being disseminated down. Although the IT system seems to be up and running, there is considerable progress to be made. We envisage that the sentencing council will work with the appeal court to improve that; in fact, it is a matter of working not simply with the appeal court but with the Judicial Studies Committee. However, on the idea that everything is hunky dory—no, it ain't.

The Convener: Is it not the case that despite the best intentions of all concerned—and I have no doubt that those intentions are good—you will never solve the problem, in that any system in which the human element is present will always provide the occasional difficulty?

Kenny MacAskill: That is why we have an appeal court and are not changing the appellate system. That is why, if people feel that sentences are too lenient, the Crown has the right to appeal. That is why a sentence can be appealed if it is felt to be too harsh. If it is felt that there has been a miscarriage of justice, there can be an appeal. Indeed, one section of the bill will give the Crown the right of appeal—there has been something manifestly wrong in our system because the defence has had the right of appeal but the Crown has not. I look forward to the support of the committee on that.

You are correct—to err is human. We try to minimise that, but mistakes are made. That is why we have an appeal system, and it is why we are introducing the right for the Crown to appeal. It is why, if a sheriff is perceived as having given too harsh or too light a sentence, it can be appealed.

Equally, we must have a broader view of how we as a society view issues such as knife crime. We must make it clear to the judiciary that there is considerable fear and alarm in our communities and we want those communities to be represented. There has to be the right balance between having the checks that are necessary in every system, and the legitimate needs of communities and others—whether it is police, prosecution or victims—to be heard on what they view as the appropriate tariff for the offences faced by society.

The Convener: Since the start of the meeting, it has been intimated to me that Angela Constance will not be present. Aileen Campbell will be attending as her substitute. While there is no requirement in standing orders to do so, I would prefer substitutions to be for the entire meeting and to be intimated at the start. That being so, I ask Aileen Campbell to confirm that she is attending as a substitute for Angela Constance.

Aileen Campbell (South of Scotland) (SNP): I confirm that.

The Convener: Thank you. We turn to the issue of short custodial sentences.

Cathie Craigie: The committee has received and heard evidence arguing that short custodial sentences can be effective and that the current use of such sentences is generally appropriate. What are your views on that?

Kenny MacAskill: All the evidence seems to be that they are not effective. The statistics show that short sentences simply result in churn. However, we reserve the right for sheriffs—or the judiciary, although it would normally be a sheriff—to impose a short sentence if they feel that that is the only appropriate sentence.

We have preserved the correct balance. The idea that short sentences are effective is disputed by those who work with such prisoners, who say that they can do little with them—they cannot address their literacy and numeracy needs, their drug, alcohol or other dependency and their mental health problems. Such prisoners are simply contained and corralled, then released—prison staff cannot work with them. The statistics show that of those who are given a short sentence of under six months, 75 per cent reoffend within two years, whereas two thirds of those who are given a community sentence do not reoffend within two years. Community sentences appear to be much more efficacious.

That said, we acknowledge that some people are given a chance and do not take it. Imposing a short sentence might be appropriate, and we would not seek to interfere if a sheriff gave good reason, which might simply be that the individual would do nothing else and had to be punished. Alternatively, the sheriff might find some reason why a short sentence would be effective.

Cathie Craigie: You relied on the fact that the judiciary supports some of the proposed measures in part 1. However, on section 17, the submission from the judges of the High Court of Justiciary says:

> 'Our experience is that under existing arrangements courts resort to short custodial sentences only where there is no realistic alternative—for example, when all non-custodial measures have already been tried but failed or where the offender's criminal record is such that only a custodial sentence is likely to bring home to the offender the unacceptability of his or her repeated conduct. We doubt whether the proposed legislative changes will in practical terms achieve much.'

That is from people who deal with sentencing.

The Sheriffs Association made a similar comment and pointed out that

> 'short sentences have a value since a custodial sentence of up to 30 days is to be'

an

> 'option for breach of a level 1 … payback order.'

The sheriffs feel that custodial sentences are a means to deal with breaches of court orders and to remind the offender of the consequences of breaking the law.

Kenny MacAskill: Absolutely—that is why we have the 30-days option. We can take a horse to water, but we cannae make it drink. If somebody is given the opportunity to do a community payback order but they cock a snook at society—never mind those who seek to reform them—they must be punished. We will fully support any sheriff who says, 'We're sick and tired of your behaviour. If you think you can just sit at home and not go out to do some work to make up for the damage, you'll go to prison.' A fail-safe sanction must be available—the provision is in the bill because we recognise that.

I return to the idea that the system is all working out and everything is fine. I do not remember whether 14,000 or 16,000 short sentences are imposed each year. We have a revolving door. Such sentencing is not working. If it were working to stop offending, the imprisonment figures would be reducing, but they are not. People are going into and coming out of prison while their problems remain unchecked, because the prison system does not have the opportunity to address their alcohol problem, mental health issues, drug addiction or other difficulties.

Members probably know that, after I give evidence to this committee, I will give evidence to the Equal Opportunities Committee, which is extremely concerned about the number of women offenders, especially in Cornton Vale. I do not think that that committee would complain about a person who stabbed somebody or dealt in substantial quantities of drugs having to face the consequences of their action. However, I think that that committee will tell me that a serious issue is that women who have a heroin addiction or an alcohol problem enter prison with a short sentence and when they come out, their problem has not been solved.

The Government is seeking a joined-up approach. As you correctly said, there must be a fail-safe sanction, so that we can deal with a person who does not take the opportunity that we have tried to give them, but we must also take on board that sending some people to prison does not solve the problem for our communities. It is not about being tough or being liberal; it is about doing what works. The evidence is clear: tough community sentences work.

10:00

Cathie Craigie: That is all very well. I agree that there is an issue for the Scottish Prison Service to sort out when people are in prison. The public not only expect offenders to pay their debt to society, but think that we have a duty to address the issues that led to their breaking the law.

However, the judges of the High Court of Justiciary said in their submission:

> 'Our experience is that under existing arrangements courts resort to short custodial sentences only where there is no realistic alternative … We doubt whether the proposed legislative changes will in practical terms achieve much.'

The statistics that you gave do not represent people who do not deserve to be in prison.

Kenny MacAskill: We are not interfering with a sheriff's ultimate right, after considering the individual, the offence and all the options, to impose a short sentence if they think that there is no alternative. If you want me to tell the Equal Opportunities Committee that it is wasting its time, because there is no problem and everyone in Cornton Vale was sent there correctly, I can do so, but I do not think that that is what the committee has learned. I have great respect for our sheriffs and judiciary, but there is a problem that must be addressed.

Cathie Craigie: If only I had the power to instruct the cabinet secretary on what to say or do when he appears before a parliamentary committee.

What changes do you expect as a result of the measures in the bill?

Kenny MacAskill: We are looking to end the free-bed-and-board culture. Far too many people go to prison and sit there twiddling their thumbs. Their stay in prison is paid for by the taxpayer, which compounds the agonies arising from the crimes that they committed in their communities.

We want, first, such people to be punished and to pay something back, and secondly, to address people's underlying problems, whether we are talking about a young girl's heroin addiction or a young man's alcohol problem. That seems to be an appropriate approach, which would make our communities safer and address our problems. However, the ultimate decision will be made by the sheriff. The package must be taken in the round.

We are heading towards having community payback orders, so that there will be an opportunity to provide tough community punishments and to tackle the problems that underlie criminality, which in Scotland are frequently to do with drink, drug addiction or mental health issues. We acknowledge that the approach is not cost free. Robert Brown legitimately made that point, as did Harry McGuigan when he gave evidence to the committee, which is why I phoned him yesterday as a courtesy.

We are talking about a broad package in which we move away from an approach that is not working. We must acknowledge that our prisons are bursting at the seams, mainly with people who are serving very short sentences. The prison service cannot tackle the underlying problems of those people, who get free bed and board, which infuriates our communities. We want to deal with less serious offenders through community payback orders, which will free up our prisons to deal with the people who have to be there because they are a danger to our communities.

People must be given work to do and other opportunities that the committee has discussed. However, if someone cocks a snook at society when they are given such opportunities or if a sheriff thinks that a CPO is not appropriate, we will leave it open to a sheriff to impose a short sentence, so that we can strike the right balance. Something ain't working at the moment, which is why we are heading in the direction that I described. We acknowledge the legitimate concerns of committee members and COSLA; that is why we are ramping up our support and putting an extra £5.5 million into community justice.

Cathie Craigie: On the other hand, it has been suggested to the committee that courts might give longer sentences in order to circumvent the provisions in the bill. Could that be a problem?

Kenny MacAskill: No, I do not think so. Sheriff Fletcher touched on that in his evidence to you. I do not think that any sheriff would do that. They will give what they regard as the appropriate sentence. As I said, if they believe that a short sentence is appropriate, the Government will respect that. Where people seek to cock a snook, we will ensure that we give sheriffs full support.

I think that Sheriff Fletcher said it much more articulately than I could. He made it clear that that would not be the case, and that is how I see it.

Cathie Craigie: It has been pointed out to us that those who plead guilty at an early stage could have their sentences reduced by a third, which means that sentences of nine months could fall within the provision. Is that correct?

Kenny MacAskill: That is the rule under the current legislation. It applies whether the person appears on indictment in the High Court due to a serious drug offence or elsewhere. That is the rule that the Government inherited.

The Convener: It came from the Du Plooy judgment, which was a High Court decision, and it was then incorporated into legislation. Is that correct?

Kenny MacAskill: Yes.

The Convener: Mrs Craigie's point is that the top line of an individual's sentence could be 12 months, but on the basis of an early plea being tendered, it would be reduced by four months to eight months. Thereafter, because of early release, the individual could be out after a maximum of four months, which is below the six month cut-off period. That would negate what you seek to do.

Kenny MacAskill: George Burgess will give you the specific answer and I will give you a comment thereafter.

George Burgess: I do not think that the scenario that you presented would operate. The provision in section 17 operates on the sentence, which is the overall period. The fact that the person who is given the sentence would spend a shorter period than that in prison is not relevant to the calculation, which is done on the basis of the sentence. The 12-month sentence that might be reduced to eight months would not be caught by the provision.

The Convener: I accept that that will be the case under the legislation if it is approved, but the de facto position would be that the sheriff might well think that a sentence of 12 months was appropriate in a certain case, but because of the plea, a third would be taken off that, which would reduce it to eight months. Thereafter, because of early release, the individual would be out after four months. That negates Mr MacAskill's argument that individuals who find themselves in custody for short periods do not provide the Scottish Prison Service with the opportunity to rehabilitate and to combat drug or alcohol difficulties or whatever.

Kenny MacAskill: That is why, in later sections of the bill on which you might care to question me, or not, we take steps to end the arbitrary unconditional automatic early release that was commented upon by the McLeish commission and which—as we never hesitate to remind each other, convener—was introduced by a Conservative Government many years ago.

You will be glad to know that the sentence will be stated publicly, for the record, in the court so that everybody, and not just the sentencer who imposes it, knows what the sentence is. There is clearly something wrong in our society when the sentence that is given is sometimes understandable only to the sheriff who dispenses it and to those with legal qualifications, rather than to everyone in the court, including the bereaved or the victims. It seems to us that, if somebody is to be released—and people have to be released when they are given determinate sentences—it should be based on some conditions.

We are addressing the matter by building on the Custodial Sentences and Weapons (Scotland) Act 2007. Letting people out early is not necessarily a bad thing if they show remorse and have been dealt with, but there is something wrong with a system in which people get out after the same period of time whether they show no remorse for what they have done or whether they have recanted and reformed and will be an exemplary citizen. We are addressing the situation that we inherited.

The Convener: You should not bandy words with me, Mr MacAskill. I feel forced to remind you that your members in the Westminster Parliament did not exactly rush to assist when the Conservative Government sought to remedy what had gone wrong. We can discuss that later.

Paul Martin (Glasgow Springburn) (Lab): I return to six-month sentences. You used the term ‘less serious offenders’. What would be the profile of such offenders? What sort of crime would they have committed?

Kenny MacAskill: Ultimately, I will leave that to the sentencing council. You have to remember the variable nature of common-law offences in Scotland. A breach of the peace can result in someone being charged on indictment—rightly so—but it can also be a relatively minor matter. We have to have flexibility. You bandy around words in asking what constitutes an offence, Mr Martin. However, you must remember that a breach of the peace covers offences from the extremely serious to those that can be dealt with in a justice of the peace court or—at some future stage—by way of a fixed penalty or fiscal fine. If the offence is serious, it can result in a considerable jail sentence.

Paul Martin: You want to move away from six-month sentences. That is the issue. You said that you were considering that for less serious offenders, and I am asking for an example of what you mean. Should a housebreaker receive a sentence of less than six months?

Kenny MacAskill: I am giving you an example—

Paul Martin: Perhaps you will let me finish the question—

The Convener: Let him finish the question.

Paul Martin: Housebreakers can receive a sentence of six months or less. Are you saying that theirs is a less serious offence? Should housebreakers receive community sentences?

Kenny MacAskill: I am leaving the matter to the sentencing council to advise me on. I have seen a breach of the peace result in an extremely lengthy sentence. You must remember that the common law of Scotland allows for interpretation. Sentencers have the necessary flexibility to deal with offences that range from a serious assault to a fairly minor breach of the peace. The Solicitor General for Scotland has commented on that and other matters.

We can pander to scaremongering or recognise that the common law of Scotland allows flexibility in dealing with statutory offences. These things have to be taken in the round. We want to have a sentencing council that has the ability to deal with such matters. That will allow sheriffs to decide on individual cases. A breach of the peace can be extremely serious. If it means a lengthy sentence, the courts will get our full support. We seek to allow sentencers to take account of the views of the sentencing council and to do the job that we pay them to do.

Paul Martin: All that I am asking you to do today, cabinet secretary, is to assist the committee by telling us what you mean by the term ‘less serious offenders’. You are asking us to accept your policy on short custodial sentences. However, the background notes on the bill make it clear that, when you use the word ‘flexibility’, you are talking about a presumption against six-month sentences. Sheriffs will have to explain why they have given such sentences. I am asking you to give an example of what you mean by a less serious offence. Housebreakers can receive a sentence of less than six months, as can those who are involved in child pornography. Is it acceptable that people who commit such offences receive a community sentence?

Kenny MacAskill: Public safety is paramount—it always has been. That is why we have rolled back the provision of private prisons and so forth. There will always be people who have to go to prison because they are a danger to our communities. If they have committed a serious offence, and no other sanction satisfies public safety or mores, they have to go to prison. Beyond that, it is clear that there are shades of grey. That is why we recognise the right of individual sheriffs to take positions that differ from that of the sentencing council or appeal court. The convener mentioned that. Sheriffs tell us that they have differentiated in the case of offender X because of the different circumstances that apply in the case. That route is open to sheriffs.

The Convener: I will follow up the point that Mr Martin made. It is difficult to define on paper what is a serious or less serious offence. As you correctly state, cabinet secretary, breach of the peace, which is normally a minor offence, can be serious from time to time. Shoplifting of a value of £30 to £40 would hardly be a hanging matter, but how would we cope with an offender who has done that 30 or 40 times despite having gone through the full gamut of disposals from admonition to probation and community service?

10:15

Kenny MacAskill: Shoplifting might be fuelled by an addiction, which would trigger a view to be taken. Equally, people might shoplift as part of an organised gang, which is an extremely serious offence. I was a defence agent for 20 years, and I remember the problems that we had with people who had been driven out of London, Leeds and then Newcastle and who then came up here to shoplift at will as part of serious and organised crime. The specific offence of shoplifting—and the goods that they were caught with—might not necessarily have been high value, but I would fully support any sheriff who took extremely serious actions against such people.

We have to recognise the common sense of our judiciary and allow them to exercise it. That is why they already determine what matters can be dealt with by non-custodial sentences. We also have to provide other wraparound measures, which is why we are introducing quicker community punishments and additional measures. We cannot simply consider in isolation whether a sentence is custodial or non-custodial. That must be considered in the context of everything that we are doing: the additional funding that is going in, the additional resourcing that will be provided and the additional provisions that will give us the opportunity to keep offenders on a tight leash. Some people are unlikely to come to a court's attention ever again after their release but, as we well know from drug treatment and testing orders, there are instances in which people benefit from being kept on a fairly tight leash, which is why progress courts are being introduced.

The matter cannot be viewed in isolation; it has to be viewed in the round. The round is what we are offering as alternatives, what other measures besides simply punishment are available to tackle underlying problems, how we maintain those measures and how we get offenders into the punishment quickly.

Cathie Craigie: I agree that the matter cannot be viewed in isolation and strongly agree that people who are a danger or threat to communities should receive custodial sentences, but I am still concerned that section 17 will allow folk to slip through the net. I also have concerns about how we balance section 1(1)(d)—'the protection of the public' under the purposes and principles of sentencing—with what may happen if courts implement section 17. I have concerns that people who are a threat, a danger or even a nuisance to the communities will avoid custodial sentences and continue to be a nuisance to the community.

Kenny MacAskill: First, we have the fail-safe of the appeal court. If a sentence was felt to be entirely unreasonable, it could be appealed—presuming that the committee supports the bill's provisions on Crown appeals. If a disposal was breached, there would be an opportunity for the sentencing council and sheriffs to review how such offenders or offences are dealt with. Those systems are built into the proposals.

Any case in which we deal with people who have underlying problems and who are sometimes not the most rational will always require the exercise of judgment and be fraught with difficulties. That is what our sheriffs face at the moment. Unfortunately, the people they deal with, the nature of their offences and the problems that they carry will not be changed by legislation because they involve social and economic factors.

The bill allows the judiciary to give an offender a short prison sentence if they do not think that a non-custodial sentence is appropriate. It also allows for a community payback order to be appealed if it is felt to be an inappropriate sentence. If any recalibration is required, that can be achieved by the individual sheriff learning from their position, by the sentencing council and, ultimately, by the appeal court.

Stewart Maxwell: Section 23 deals with

'Offences aggravated by racial or religious prejudice'.

Does the Government intend to lodge an amendment at stage 2—or, indeed, stage 3—to take account of the passing of the Offences (Aggravation by Prejudice) (Scotland) Bill, which deals with additional aggravated offences against the lesbian, gay, bisexual and transgender and disabled communities?

George Burgess: It is more the other way round. Section 23 will bring the racial and religious aggravation provisions into line with the provisions in the Offences (Aggravation by Prejudice) (Scotland) Bill.

Stewart Maxwell: So there will be no difference between the two pieces of legislation.

George Burgess: That is right. The section ensures consistency.

Aileen Campbell: On the impact of short sentences on children, which I have previously pursued with you, cabinet secretary, Families Outside has said that children of a parent in prison are more likely to end up in prison in later life and to suffer from regressive behaviour such as bed wetting and failing at school. I acknowledge other members' comments that people who have done something bad in society must be punished with the appropriate sentence, but do you believe that the use of non-custodial sentences will also have a wider societal benefit?

I also flag up to members that Justice Albie Sachs, who has been involved with child impact assessments in South Africa, is giving a lecture tomorrow. Perhaps such issues can be tied in with the cabinet secretary's reasons for ensuring that people who receive short sentences do not necessarily need to go to prison as it can be much better for them to be dealt with outside. After all, prison impacts not just on the individual involved but on their families and on wider society.

Kenny MacAskill: That is already covered in the bill. Under section 1(4)(c), 'the offender's family circumstances' are taken into account; moreover, proposed new section 227B(2) of the Criminal Procedure (Scotland) Act 1995 as inserted by section 14 says:

> 'The court must not impose the order unless it has obtained, and taken account of, a report from an officer of a local authority containing such information relating to the offender as may be specified by Act of Adjournal.'

As I said to Cathie Craigie, after this meeting I will give evidence to the Equal Opportunities Committee's inquiry into female offenders in the criminal justice system. We recognise that female offenders have specific problems. For example, many of them have been victims of abuse; they are far more likely than male offenders to have mental health and addiction problems; and they often have to deal with child care problems. Indeed, as you point out, the danger is that offending behaviour will simply pass from generation to generation and on for eternity. We have to break that cycle, and the treatment of children is important in that respect.

Equally, as Mr Aitken will no doubt point out, we have to take into account victims' children, some of whom will have lost their mothers or witnessed their being harmed. There is a balance to be struck, but I assure you that in both the principles that lie behind sentencing and the specific opportunities afforded by community payback orders we will take women offenders' needs into account. As I said, I will soon be talking at length on that subject to another committee.

The Convener: Perhaps to a more receptive audience. [*Laughter.*]

Cathie Craigie: Judges and sheriffs have expressed concern that the provision in section 24, 'Voluntary intoxication by alcohol: effect in sentencing', is unnecessary because they already decide whether to take such matters into account. Do you have any comments on their evidence in that respect?

Kenny MacAskill: Intoxication by alcohol is not supposed to be used as a defence. However, if you go into any court in the land—as I did for 20 years until 10 years ago—you will hear defence lawyers saying, 'Yes, he did it, but he's very sorry. He's kind to dogs; he walks old ladies across roads; he wasn't there; he didn't do it; it wisnae him; he was drunk or under the effect of drugs.' There comes a time when we have to say clearly, 'It wisnae the drink that did it; it was you. If that's how you behave under the influence of alcohol, you have to accept the responsibility.'

The correct judicial interpretation is that alcohol is not meant to be used as a defence, but it is frequently so used by those who are participants in the legal process. For example, defence agents will say, 'Yes, he did it and he is very sorry, but it was the drink that did it.' We need to say, 'No, it was not.'

The bill will act as a trigger in giving that message to the public. On a previous bill, Bill Aitken argued that those who assault and attack emergency workers were already dealt with by the courts. However, as a society we sometimes need to say, 'We are not putting up with this.' We have made it clear, if a person attacks a paramedic who is doing their job, that we will not sanction that and that such crimes will be recorded for posterity. As a society, we sometimes need to say, 'It wasn't the drink that did it; it was you.' We need to make it clear that we are not putting up with flimsy excuses any more.

The Convener: I get the impression that we will not reach unanimous agreement round the table on short custodial sentences, so we will now go on to the issue of community payback. The questions will be led by Paul Martin.

Paul Martin: The policy memorandum on the bill states that community payback orders will be 'robust, immediate and visible'. First, what is meant by 'robust'?

Kenny MacAskill: We are committed to delivering robust community payback orders, which means that they must start on time and be completed quickly. We are also committed to ensuring that enforcement is robust, because the community payback must be done.

As I said, we have already invested an additional £2 million to resource local authorities to deliver improved performance. We acknowledge that the recent audit showed significant failures, but our target is that unpaid work should start within seven days. That is why, as I said at the outset, we are investing an additional £5.5 million over the next two years. That is where we are coming from in terms of 'robust'. We want to ensure that the community payback order starts early and is kept on track. If people do not comply, there are sanctions for failure.

Paul Martin: Whether a community payback order starts on time will obviously be an issue for the agencies that deliver the framework. Will the sanctions that are to be put in place also apply to the agencies if they do not deliver on time?

Kenny MacAskill: To go back to the very beginning, many of the proposals came from the McLeish commission. I remember Lesley Riddoch saying that, when she visited court, she was gobsmacked to see how someone who was given a custodial sentence, whether of three months or of three years, was taken down below to serve their sentence—in more modern courts, they might not necessarily be taken below, but they are taken away in handcuffs by police or Reliance officers—whereas someone who was given a community sentence got a wee note of paper telling them to turn up at the social work department at an unspecified date, perhaps after calling a phone number. As I said earlier, I served as a defence agent for 20 years, but I never quibbled with that—that was just what happened. Anyone who got a prison sentence went down there and then, but for anyone who got a community sentence the details were worked out in due course. Why?

When people are given a community sentence by Edinburgh sheriff court, it might not be possible for them to be taken out of the back of the court to be given a brush, shovel or whatever and then put in a van to be taken down to Portobello beach, but the idea that community sentences will just work their way through is nonsense. I am extremely grateful to Lesley Riddoch and the other members of the McLeish commission. They came in without any baggage and said, 'Frankly, that's bonkers.' The situation was bonkers. That is why we want community sentences, whenever possible, to start within seven days. The notification of what people are expected to do and the provision of information to the social workers should happen there and then, and the community payback should then start within seven days. We want to make the procedure tighter. As I said, this is a journey of travel, and we are grateful to Lesley Riddoch for that.

Paul Martin: Cabinet secretary, I could not agree more on the importance of delivering community sentences on time, but my point is that, if the offender is to be required to serve the community sentence within a seven-day period, what will happen if the relevant agency does not deliver within those seven days? Will sanctions be taken against agencies? Sometimes local authorities might let down the offender by not ensuring that effective justice is delivered quickly. The offender might not be the one who lets the system down.

Kenny MacAskill: You are right. The audit showed us that the system is not working appropriately the length and breadth of the country. Work is in progress on that with COSLA, which flagged up that it wants to deal with those matters. COSLA is united with us on the issue, but it has said that local authorities will not be able to achieve that without resourcing. That is why we are committed to more resourcing.

There will be further audits by, for example, the Social Work Inspection Agency. I do not think that we would serve our system well by pillorying a council, although a sheriff might want to bring somebody from it before them if there was a manifest failure. We can assure you that there will be auditing by SWIA and that we will deliver what we have set out to do.

10:30

Paul Martin: How robust is that? An offender might be advised that swift justice will be served on them but, if the system is let down by the local authority, where is the robust mechanism to deal with that? You have acknowledged that the current congestion in the system is because local authorities are not delivering the service that they should, so surely there should be a sanction to deal with them. I am not advocating one; I am just asking whether you have anything in place.

Kenny MacAskill: That is why we have SWIA reports. When areas of the country are flagged up as having problems, the issue is raised in the parliamentary chamber—for example, the First Minister must answer questions on it at First Minister's question time. Nobody enters public service, or public life, to do Scotland down and make it less safe and secure. When local authorities are found not to be delivering, action is taken and, for example, new lead officials are brought in to address the problem. That is the current practice, but if you are suggesting that we need some statutory intervention to address problems immediately, I am willing to consider that. We already have audits, SWIA and the view that local authorities must do their best. If they do not, they are open to criticism locally and, ultimately, here in this committee or in the parliamentary chamber.

Paul Martin: On visible community service, how will a community be able to identify that a community payback scheme is operating in their community?

Kenny MacAskill: We are already seeing that. I go to many places that have been painted or whatever through community service. Indeed, I was delighted to be advised by the minister of Portobello old parish church that the community service team will help with a fallen ceiling there. They cannot do the complicated cornice work that will have to be done, but they will do some of the hard donkey-work to ensure that the parish church is put back as it was. Do we need to have people in orange jumpsuits? No, but we need to ensure that, where appropriate, there are plaques. I have been in many a place where it was clear from plaques, whether on park benches or whatever, that community service work had been done there. I will therefore leave to the common sense of communities the decision about what work needs to be done locally.

Communities are already dealing with that question. In Buckhaven, for example, community service workers have been doing up local paths. Wherever possible, we must make it clear when community service work has been done in areas, although I do not necessarily think that Portobello old parish church would want a big plaque under the stained-glass windows in the church hall saying that it was all done by community service—I would happily support people saying that they do not want that, thank you very much. We must ensure, though, that people are out there doing what is necessary, whether picking up litter on Broughty Ferry beach, doing up paths in Fife or a variety of other work. Wherever possible and appropriate, we should say that the work was done by community service—that seems to me to get the right balance.

Paul Martin: But do you accept that the visibility issue is a challenge? Constituents have advised me of work in the local community that they understood was carried out by local contractors rather than community service. If you want community payback orders to be a visible process, do you acknowledge that that presents challenges in getting the message across to communities? I am not advocating any particular method of doing that; I am just asking whether you recognise that there is a challenge. Again, constituents have advised me that the local housing association's contractors did certain work that was, in fact, done by community service.

Kenny MacAskill: I want community service work to be done for two reasons. First, I want the kids—in many instances, it is young men—to pay back by the sweat of their brows for the harm that they have done. I make no apology for saying that. Secondly, I want people to be able to see their community getting better. In some instances, there will be a partnership between community service and others because some work, such as that for the ceiling in Portobello old parish church, requires skilled labour. That work cannot be dealt with by people who are on community service, for a variety of reasons.

It seems to me to be about getting the right balance. What matters is that offenders do some hard work to pay back for the damage that they have done and that our communities are improved, as opposed to our paying for three square meals for offenders in the free-bed-and-board culture of prison.

I saw a group of kids at Portlethen when I was travelling to Aberdeen. I am relaxed if folk who see a group of kids doing up the park at the side of the main dual carriageway to Aberdeen cannot tell from a distance whether they are council employees, kids doing community service or whatever. What matters is that they are doing the work and the community is being improved.

Paul Martin: I am sorry to labour the point, but the policy memorandum says that you want to ensure that

> 'sentences served in the community are robust … and visible'.

Therefore, I do not accept your latter point. You say that you are relaxed about the matter but, if you want sentences to be visible, the community needs to know that community payback work is being carried out.

Kenny MacAskill: Visibility comes in a variety of ways. Communities should know what work can be done. I visited a scheme in Fife, for example, in which people were asked to nominate work to be done. People could vote on the internet, as they can do for television programmes, or they could text in to say what they wanted to be done. Things were put in ascending order. In fact, there is more work in Scotland at the moment than community service kids can do.

It is about striking a sensible and legitimate balance. I want the work to be done and our communities to get better. Where appropriate, it should be said that community service people did the work. That might not be appropriate in places such as churches, but it seems to me that such an approach achieves the appropriate balance. That is what is meant by visibility. Communities should be allowed to know that such work can be done. People in Fife can say that they need the coastal path to be done up or other things to be tidied up or done. The level of skill that is required may be beyond the community service team or there could be health and safety issues. My community council at Meadowbank, for example, asked me about getting kids to get rid of their spray paint. I investigated the matter and found that some equipment for removing paint is subject to health and safety regulations, so it would be inappropriate for them to use it. However, that is not necessarily to say that they could not paint over things.

Things will develop and evolve. The community justice authorities have a role in that, and the community service teams are doing a good job in driving things home. Fife provides a clear example of what can be done so that there is community involvement as well as community visibility.

The Convener: I think that Mr Martin feels that there is a false prospectus with regard to the definition of the word 'visible'. I have some sympathy with what he has said but, as it is unlikely that there will be consensus on the matter, I suggest that we move on.

Paul Martin: On resources, the cabinet secretary told us that he had a discussion with Councillor McGuigan yesterday. When he gave oral evidence to the committee, Councillor McGuigan focused on the provision of adequate resources to COSLA to carry out the necessary work. Have you advised him that you will provide all the resources that he requires to deal with COSLA's commitments?

Kenny MacAskill: That is clearly an issue for COSLA. Harry McGuigan was correct to raise the issue, which Robert Brown and Henry McLeish have also raised. We recognise that there must be resources, which is why I said at the outset that we propose to make £5.5 million available over the next two years, as well as the additional resources to which we have already committed. I hope that we will be able to get more resources, but much depends on whether we will be given consequentials and assistance with the swine flu pandemic, for example. The Government must meet needs, but we cannot provide as much as we would like because we have not received Barnett consequentials for prisons, nor have we yet been given assistance in tackling a clear issue of national urgency. However, I hope to provide more resources if we can.

We have got the £5.5 million. The courtesy call to Harry McGuigan meant no disrespect to the committee or Parliament; I simply wanted to let him know that we would be making an announcement. He is out of the country, but I understand that he is delighted by the progress that we have made. It is clear that the money is not a king's ransom. We would like to be able to get more money, but swine flu, Barnett consequentials and other things are causing difficulties for the Cabinet Secretary for Finance and Sustainable Growth.

Robert Brown: I would like to pursue the issue of resources, if I may. I am grateful that there will be additional funding, but I want to be clear that the funding relates specifically to the existing community orders. I think you said in your introductory remarks that it is designed to increase the speed and, perhaps, the quality of the current process. Will you confirm that?

Kenny MacAskill: Wilma Dickson will comment on that.

Wilma Dickson (Scottish Government Criminal Justice Directorate): The priority, particularly for this year and next, is to get up to speed. For a number of local authorities, there is quite a transition period for retooling and dealing with backlogs. At the end of that period, it should be possible to divert resources away from catching up and into investment in additional CPOs.

Robert Brown: I follow that, but we have had figures from Glasgow and other parts of the country about the extent of the backlog—I suppose that it has not been helped by the recent strike in Glasgow, although that is another issue. It seems to me that the bulk of the money will be required to bring the existing orders up to scratch and to hold them there. If that is not done, there will be a falling away again. At the end of the period, how much of the resource—I appreciate that there is another £2 million—that will not be needed just to keep the existing orders up to scratch will you be able to reallocate?

Wilma Dickson: It might be helpful if I say that one of the other things that you should take into account is that we need to resource the additional costs of progress courts and to put some extra capacity into electronic monitoring. Most of the money will go out to local authorities. Obviously, all the £1.5 million that will go out this year will go to local authorities on the normal distribution formula as quickly as possible, because we want to start on the catch-up as quickly as possible.

Robert Brown mentioned Glasgow. In Glasgow, the strike has been resolved. There is a way forward there, which is very positive. In addition, quite a substantial slab of the money for next year will go out to local authorities. We would expect that by the end of that period, the catch-up will have happened, and that there will be scope to redirect and build up more community payback orders.

Kenny MacAskill: We cannot be too prescriptive. Some areas have specific problems. Robert Brown mentioned Glasgow, but other areas are doing remarkably well. The money has to go mainly into front-line services, and spending decisions are—given the particular needs of the criminal justice social work department—best made by local authorities, and not by me in St Andrew's house. We have given you the broad direction of travel. We are more than happy to work with local authorities on this, but ultimately it is their call.

Robert Brown: There are two or three other important issues. I think that most of us would agree about the quality of some community service orders at the moment. You mentioned the 42 per cent reoffending rates, which is one test. The rate is better than that which is achieved by short-term sentences but, arguably, not that much better, considering that you are dealing with a lesser category of offender. Are there mechanisms in place to improve the quality of community service orders by making them more focused on reducing reoffending rates and achieving more success?

Kenny MacAskill: Yes—although that has, to an extent, to be dealt with locally. It is about ensuring that we get best practice across the board. Equally, we have to recognise that there are particular problems in some areas because of their volume or geography. Community sentencing in the Highlands and Islands and in Dumfries and Galloway is particularly challenging because of the geography of those areas. It is about learning from good practice and figuring out what works in a particular area.

We must also consider what we have got with CPOs and recognise that as well as the community payback punishment aspect, we need to address the underlying problem—alcohol, drugs or whatever—in other ways.

Robert Brown: The committee is concerned about the number of breaches of community service orders—some of us have asked about that from time to time. The Government and the committee would probably agree that that has to be tackled. It is a matter not just of starting effectively but of keeping at them effectively, and dealing with breaches properly, while recognising the need for flexibility. Under the arrangements that you are putting in place, do you anticipate an increase in the number of breaches that will have to be dealt with by reference back to the courts?

Kenny MacAskill: We hope that progress courts will alleviate that. We have learned from DTTOs and from speaking to sheriffs that sometimes it is not simply about keeping people on a tight leash and berating them; sometimes it is about encouraging them, and saying how well they have done. We are giving sheriffs the flexibility to encourage people who are doing well to overcome their addictions, to become less of a nuisance in their communities and to contribute as net taxpayers who function manageably in our communities, rather than their being a drain on taxpayers.

10:45

We will provide the tools, such as the progress courts, to monitor those who might have a specific problem and who need to be kept in check. Sometimes, the aim is to encourage as well as to berate—I have picked that up from sheriffs. Electronic monitoring is also available to allow a belt-and-braces approach to be taken. Such matters must be worked out. Some of that is about embarking on a journey. We must set the parameters and have the structures of community progress courts. We have the resources—the additional money—and we must allow sheriffs and social work departments to work together. As you know, in areas that work well, much co-operation takes place between sheriffs who want to know what work is available and social workers who want to feed back information.

Robert Brown: The number of new orders will be crucial. I am bound to say that the presumption against short-term sentences implies that the intention is that in the bulk of such cases sentences will no longer be imposed and will be replaced by community orders. The financial memorandum talks about alternative scenarios of 10 and 20 per cent increases in community orders. If the new policy is to have any impact, such increases would be rather low.

I understand that about 19,000 community orders were given in 2007-08, if we add together community service orders, probation orders and supervised attendance orders. That is not a million miles away from the 14,000 to 16,000 short-term sentences that the cabinet secretary talked about. One imagines that, to make a significant impact on short-term sentences—we accept that some will continue to be imposed for all sorts of purposes—thousands of additional community service orders will have to come into the system, rather than the 10 to 20 per cent increase that the financial memorandum suggests. What was the basis for the prediction of 10 or 20 per cent? If such figures are achieved, will they make much difference in the overall scheme of things?

Kenny MacAskill: You are correct to raise the issue. We do not believe that a millennium moment will occur. In 2007-08, there were 8,191 direct sentence prison receptions for sentences of under six months, which equated to only 6,076 individuals. That shows that some people go to prison more than once for a short sentence and often more than once in the same year, through the revolving door.

Our assumption of a 10 or 20 per cent increase in the number of community orders would result in an additional 1,931 or 3,862 orders, set against the 6,076 individuals. However, we are aware that sentencers do not change their sentencing behaviour overnight, so assumptions must be realistic. There will be no millennium moment, but we are on that drive and path. The number of orders can be increased not simply through the provision of finance, but through working the system better.

Robert Brown: You suggest that we will end up with significantly higher figures and therefore increased resources in future years. In that context, would it be an advantage to phase in introduction and to adopt the Liberal Democrats' suggestion of three months rather than six months as the cut-off point? I accept that such matters are, to a degree, arbitrary. Even with the extra resource that you talked about and some reallocation later, will the facilities be available to make the policy a success? You will perhaps accept that if the policy does not work effectively, is not seen to protect communities and does not increase success at preventing reoffending, communities will be considerably disillusioned.

Kenny MacAskill: Those concerns are valid and legitimate. I have talked about the additional funding—a bit more might be obtainable, but that depends on some factors—together with improvements in practice. We take into account the fact that sentencers will not change their habits overnight; some people always take time to change. Also, some people will still receive short sentences. Such matters can be dealt with—we are on a journey in that direction of travel.

Robert Brown: What assumption have you made about the long-term increase in community sentences, once the legislation is fully in place, the lead-in period is over and confidence-building measures have been taken? Are you talking about a 50 per cent, 25 per cent or 90 per cent increase?

Wilma Dickson: It might be helpful if I return to the figures and explain some of them. There is a difficulty in that there are different ways in which we count sentences. The higher figure of 12,000-plus short sentences is a perfectly accurate figure for the number of sentences that the courts impose. However, given that some people have served time on remand or are given three or four concurrent sentences, the figure for sentence receptions is much lower and the figure for the number of people who go into prison is lower still.

If we look at the figure for direct sentence receptions, the number of individuals in a year is only 6,100. In the assumptions that we have made for increased CPOs, the 10 per cent figure is 1,900 and the 20 per cent figure is 3,800. The individuals who get short prison sentences and go into prison represent a much higher proportion than may first appear to be the case. That is because, paradoxically and counterintuitively, the number of individuals who go into prison each year is about half the number of short sentences. We are probably talking more about that targeted population. On that basis, the assumptions of 10 per cent and 20 per cent give figures of 31 per cent and 62 per cent of present receptions. The number is not as negligible as it looks. If I failed to explain that clearly enough to the Finance Committee, it is probably my fault.

Robert Brown: That is helpful.

The Convener: I see exactly where you are coming from. Many accused avail themselves of the roll-up facility, particularly when they are in custody.

Cathie Craigie: My question is on community payback orders under section 14. Proposed new section 227B(5) of the 1995 act states:

> 'The court must not make the order unless the offender has, after the court has explained those matters, confirmed that the offender (a) understands those matters, and (b) is willing to comply with each of the requirements to be imposed by the order.'

What if the offender is not willing?

Kenny MacAskill: A person who says that they will not comply with an order will not get one. The situation will be the same as with bail: a standard bail condition is that the person must not commit another offence. If the offender says, 'I'm gaunae', they will be told, 'You're no getting bail.'

Cathie Craigie: So, if the offender is not willing to comply with the order, the court has recourse to a custodial sentence.

Kenny MacAskill: The point that I made earlier was that you can take a horse to water, but you cannot make it drink. If the offender was told, 'This is what you're gaunae do', but then said, 'I'm no doing it', the sheriff would be right to say that a custodial sentence is the alternative. If a bail condition is that the person cannot go to the pub or return to the matrimonial home, but the person says that they will do that, they will be remanded.

Cathie Craigie: I am not talking about bail conditions; I am talking about community payback orders.

Kenny MacAskill: You are talking about the court laying down an order and the person refusing to accept it. If they refuse to accept it, the order will not be given. People either accept the terms and conditions or face the forfeit. In such circumstances, I have no doubt that the offender would be given a custodial sentence.

The Convener: Right. This is an appropriate time to have a suspension. I am conscious that you have an appointment elsewhere, cabinet secretary. We will have a five-minute break.

10:53

Meeting suspended.

11:01

On resuming—

The Convener: I thank everyone for being back in their seats so promptly. Robert Brown will lead the questioning on serious organised crime.

Robert Brown: Why are the new offences of involvement in, and direction of, serious organised crime needed, given that people can already be prosecuted for conspiracy to commit a crime or inciting others to commit a crime? Is the common law under that heading not entirely adequate? Does it overlap with the new proposals?

Kenny MacAskill: It can be difficult to prosecute at the top end of criminal network offences. Indeed, that has been highlighted in the media south of the border. Although conspiracy can be charged for serious organised crime, the prosecution authorities have given evidence to the committee on the difficulties of doing so and proving the offence. Serious organised crime is a significant threat and we must address it; it is unacceptable. Therefore, it is appropriate to build a statutory basis for specific offences.

Robert Brown: Section 25(1) says:

> 'A person who agrees with at least one other person to become involved in serious organised crime commits an offence.'

To all intents and purposes, that sounds like a definition of common-law conspiracy. Will you elaborate on how it is different from the common law?

Kenny MacAskill: Clearly, it would be possible to libel that crime as conspiracy. Indeed, that option may remain for the Crown in some circumstances. However, with these provisions, we are recognising that serious organised criminal gangs operate in Scotland. Those gangs are involved not only in the drugs trade but in people trafficking and smuggling, for example. They also seek to undermine legitimate areas of the economy and drive hard-working Scots off the road or undermine their businesses. We must recognise that problem. As with the Emergency Workers (Scotland) Act 2005 and the bill's provisions on intoxication, we are sending a clear message about how seriously the Government and society view serious and organised crime.

The Crown has made the point that proving conspiracy can be difficult. It is therefore appropriate that we have an additional statutory basis that allows us, while keeping the appropriate balance in the scales of justice, to ensure that it is not as difficult to convict someone of involvement in serious organised crime as it is to convict them of conspiracy, and to send a message that society will take serious organised crime extremely seriously.

Robert Brown: There is no disagreement around the table on the importance of serious organised crime, for the reasons that Mr MacAskill mentions. However, my question is this: what is the difference between the definition of involvement in serious organised crime under section 25(1) or that of directing serious organised crime under section 27(1), and the definition of conspiracy that a judge would apply under the common law?

George Burgess: I point back to the evidence that the Lord Advocate and the Solicitor General for Scotland gave to the committee a couple of weeks ago. They explained the extent to which the new offences in the bill could get into the serious crime organisation a bit earlier in the chain—before the conspiracy had formed—and why, in their view, they would be better than relying simply on common-law conspiracy. I cannot really add to what the law officers said on that occasion.

Kenny MacAskill: I think that the provisions have their genesis in the serious organised crime task force, which included not only the law officers and the police but—so that we could deal with the tentacles of organised crime—Her Majesty's Revenue and Customs, the Serious Organised Crime Agency and the Scottish Prison Service. Some ideas were also taken from Canada, where the Solicitor General had seen the benefits that had accrued from such measures. It seems to us that, if tackling serious organised crime in the way that is proposed will have benefits—as in Canada—over using the common law of conspiracy, which is not necessarily delivering as we would wish, it is appropriate that we take action. As is perhaps always the case, the common law will still exist after we bring in the statutory offence, but the provisions are about tackling the specific problem that we believe exists in Scotland. As well as ensuring that we have the legislative basis to support those in SOCA, HMRC, the Scottish Crime and Drug Enforcement Agency and the police who are involved in tackling the issue, the provisions will ensure that the balance is not tilted too much against the opportunity to protect our communities.

Robert Brown: Let me move on slightly. It was suggested in previous evidence, as the cabinet secretary perhaps heard, that two people who together organised to steal a pie could be covered by the definition of 'serious offence' in section 25(2)(a). The criticism is that the bill mixes together very serious matters with potentially trivial matters at the bottom end of the scale. I accept that the prosecution can exercise a degree of discretion, but is there not potential for narrowing the scope of those rather significant charges in the bill?

Kenny MacAskill: I know that that is not a flippant point, but it is also quite correct to point out that discretion needs to be exercised by the police, the SCDEA and the prosecution. We also need to recognise that folk will use the common sense that they are born with, so the Crown will not libel such matters on a whim or fancy. Indeed, if any such matter were so libelled, I would expect our judiciary to treat the charge with the contempt that it deserved by dismissing it fairly summarily. As I said, the provisions are intended to ensure that we have the appropriate statutory powers to protect our communities. We do not anticipate that the new offence will be used in huge volumes, but we believe that the ability to use it is necessary to protect our communities from the threat that they face.

Robert Brown: In that context, have officials given any attention to the possibility of narrowing down the scope of the provision to meet the objection—of the public, to some degree—that such charges sound, and are, very serious whereas they could be used for things that are not very serious at all? We surely do not want to water down or dilute the concentration on serious organised crime.

Kenny MacAskill: We are more than happy to reflect on that. However, as was pointed out earlier, the offence of breach of the peace can constitute anything from a minor matter, such as a ruckus out in the hallway there, to behaviour that is equivalent to stalking—I recall a defence agent once charging someone on indictment with a breach of the peace for that, and rightly so, given the person's threatening and intimidatory manner. However, the requirement for definition is clearly greater for a statutory offence than for an offence under the common law, which allows more flexibility, so I am more than happy to undertake to reflect on the points that have been made.

Equally, however, judicial interpretation will also be required if and when charges are brought in due course. As we discussed when we considered another bill recently—it might have been the Sexual Offences (Scotland) Bill or the bill dealing with the Somerville judgment—some matters will ultimately be decided by judicial interpretation. That point certainly came up in our consideration of the Somerville bill in the context of what would constitute being beyond the relevant period. We will reflect on the issues that have been raised, but the fail-safe of judicial interpretation should ensure that matters are not brought willy-nilly.

Stewart Maxwell: I have a brief follow-up question on the issue of duplication. When the Solicitor General gave evidence two weeks ago, he gave the example of malicious mischief, which is an offence under the common law but is usually prosecuted under statutes dealing with vandalism. Clearly, such duplication already happens. However, I want to move the discussion on slightly by asking whether the cabinet secretary agrees with the point that, although persons can already be charged with conspiracy, there is a great deal of usefulness in having a statute that specifies that they were involved in serious organised crime. In effect, having such an offence on the books allows it to be put on record what the conspiracy was about, given the difference between a mild conspiracy and involvement in serious organised crime. A specific statute of that sort allows it to be put on record that the individual has been involved in serious and organised crime, as opposed to just conspiracy, which, although it could be serious, might not be seen in the same light.

Kenny MacAskill: Absolutely. It is similar to the reason why we passed the Emergency Workers (Scotland) Act 2005 and a variety of other measures. Indeed, it is why the Parliament passed the hate crime bill more recently. It should be recorded—people should know that what they have carried out is viewed as significantly more serious than the milder actions that you referred to. To take the example of someone committing an assault by throwing a stone, if they are doing so at someone who, as part of their job as a paramedic, is trying to treat a person who has collapsed from a heart attack, the circumstances should be recorded. First, that is to know the number and extent of such incidents, as is the case for race hate. Also, it should be on the record what the offender was up to.

The Convener: There is a general aim that is shared round the table as to what we are trying to do here.

Kenny MacAskill: Absolutely.

The Convener: I note what you said in reply to Mr Brown—that you will consider the matter again.

Robert Brown: The focus of concern about the serious organised crime provisions lies with section 28, which is on knowledge or suspicion. I accept that there are exemptions, but you might agree that that element goes considerably beyond normal previous concepts of law, which have attempted to define what a crime and an attempt to commit a crime consist of. Section 28 moves very much into offences of omission, as it makes people guilty not for things that they have definitely and directly done themselves, but for things that they know about and have not seen fit to report to the proper authorities. Do you accept that the section has wide powers? Do you accept the concerns that have been expressed about it in some quarters? Is there any way in which those concerns might be alleviated by focusing more directly on the people you are trying to get at? Who is the target of section 28 and how can you focus on those people?

Kenny MacAskill: You are right that it is a wide target. We know that serious criminals require facilitators—professional advisers, basically—whether for property deals, for legal matters or for accountancy. The provisions are a backstop, to an extent. We hope that the situations that they cover do not arise, and we fully support the work of professional and trade organisations in relation to money-laundering legislation and the wider ethos, rules and regulations. We hope that matters are resolved from within, rather than without. However, I would not hold my breath about that, given the nature of the money and benefits involved. Although the provisions in the bill are a backstop, which we want to work, we believe that the new offence adds impetus to get our approach right.

You are correct to say that the section concerns omission, in many instances, but there is a clear difference between somebody in a garage encountering a person coming in with £40,000 in used notes in a holdall and not asking any questions, and somebody who, in whatever capacity, is sorting out property deals for people seeking to launder money in the knowledge of where that money has come from.

Some of the provisions are about allowing discretion and judgment to be used by the police, the SCDEA, HMRC and, ultimately, the Crown and the courts. There are indeed areas that concern omission, but it is not so much the person whom we might ask, ‘Where did you think the money was coming from?’ whom we are targeting; we are targeting the people whom we know to be working as the scribes or authors of inventive schemes to take money that has been bled from our community to make themselves ever richer.

Robert Brown: Are the conspiracy and involvement elements not dealt with by section 25, or by the money-laundering regulations, perhaps with some additions to them? Could you be a bit clearer about the mischief that is not being met at the moment, which would not be covered by the money-laundering arrangements, by the common law of conspiracy or by section 25?

11:15

Kenny MacAskill: Without going into anecdotal tales, which is never the best way, I suggest that those matters have to some extent been covered, in principle, by the Solicitor General and that it will be the Crown and the police who drive them forward. They have flagged up a cause for concern. You are correct that there will be areas where there is overlap between what is clearly conspiracy and a variety of other matters. We are aware that serious organised crimes are being carried out in a variety of ways and we believe that we must take steps to combat such crime. This proposal has come from the serious organised crime task force to enable us to deal with activities that we know are going on, whereby people are buying up legitimate businesses and places such as new-build flats in order to hide drugs or carry out a variety of other activities.

The job of our Government is to ensure that the appropriate legislative framework is put in place to allow the police and the prosecution service to do their job. They have told us that they do not believe that the current law of conspiracy is appropriate. We hope that we do not have to prosecute individuals who are involved in professional services that are respected in Scotland and that do a good job in our communities, but we know that, for whatever reason, some people fall from grace. We want to ensure that we protect our communities. I am more than happy to go back and ask for greater detail, but I am not the person who should provide such detail; it should be provided by those who sit on the serious organised crime task force, whether it be HMRC or the SPS. We know that serious crime is being organised not only in areas of urban deprivation of Scotland but in areas of extreme wealth, where people have managed to get themselves because of what they have done and, tragically, it is sometimes also being organised from prison, where people have correctly been sent.

Robert Brown: I repeat that nobody around the table has anything other than a desire to tackle serious organised crime, but we are still entitled to ask you whether your proposal does what it says on the tin.

The committee has heard evidence that suggests that part of the issue is evidential rather than to do with the substance of the legal provisions. Might it be beneficial to look at that element—the procedure and evidential law—rather than at the substantial definitions? In that context, we understand that the United Kingdom Government is considering and consulting on the scope of the Regulation of Investigatory Powers Act 2000. Has the Scottish Government been involved in that and is there scope for a similar review of legislation in Scotland on the evidential side to ensure that we have all the weapons, not only substantial but—perhaps at least as important—evidential, to address these particularly difficult issues?

Kenny MacAskill: We have not been involved in that, but you are correct that the issue is not only the legislative framework but how we can apply our evidence and how we act in respect of the powers for police, prosecutors and whatever else. We do not quite have an open book, but we established the serious organised crime task force to deal with these issues in a variety of ways. We are dealing with one matter that it has flagged up and we are more than happy to co-operate, adopt ideas and work with various authorities on these issues. As was made clear by the task force's recent announcement, we know that many of the criminal gangs that operate in Scotland are not based in Scotland. Many come from south of the border and some even come from beyond the shores of the UK. We work with UK authorities on the issue—for example, HMRC and SOCA sit around the table with us—and we also co-operate with Europol. There is genuine openness and we are willing to work in whatever way, with whatever authorities, in whatever jurisdictions, to tackle a global problem.

The Convener: This is an important topic. As there are no more questions on it, I will say that it is a matter to which everyone will give considerable thought before the legislation proceeds.

We now turn to the issue of retention of samples.

Stewart Maxwell: The committee has heard a variety of evidence about whether the retention of DNA samples should be extended to offenders who receive fixed-penalty notices. Some people have argued that many of those offenders go on to commit serious crimes and that the retention of their DNA would be an effective tool in detecting such crimes. Do you agree that the retention of such samples should be based not on the penalty that is received but on the offence that is committed?

The Convener: Before Mr MacAskill answers that question, I point out that the officials have changed. Denise McKay, from the legal directorate, and Rachael Weir, from the criminal procedure division, both in the Scottish Government, have seamlessly assumed their seats. Mr MacAskill may now proceed.

Kenny MacAskill: Stewart Maxwell makes a valid point. The Government has made it clear that we are open to reviewing matters—for example, Professor Fraser's review covered issues relating to children. We are getting people on board to work out what the correct balance should be. The Government is firmly opposed to any blanket retention of forensic data for an indefinite period; such data should not be retained indefinitely unless the person has been convicted in court.

However, we recognise that it is appropriate to consider the issue of retention with regard to youngsters who commit serious offences and people who commit offences that are dealt with using fixed-penalty notices, and I assure members that we are doing so.

Stewart Maxwell: I am delighted to hear that. Is it likely that the Government will either accept an amendment at stage 2 or lodge its own amendment on that point?

Kenny MacAskill: We are happy to consider our position on that, subject to provisos in the Parliament about matters being legal, appropriate and compliant with the ECHR.

Stewart Maxwell: I have written to you on that matter, as I am sure you are aware, and I look forward to receiving your response. You briefly mentioned DNA samples from children; the bill clearly provides for the retention of samples from children who have been referred to children's hearings for relevant serious and violent offences. Can you elaborate on the rationale behind those provisions and explain how the list of applicable offences will be developed?

Kenny MacAskill: We know that, tragically, there are a small number of youngsters who commit very serious sexual or violent offences, and who sadly continue in many instances to pose a threat beyond childhood. We are considering how to achieve the appropriate balance. It is important to remember that the provisions relate only to serious sexual or violent offences; we will consult with the forensic data working group on the list of offences.

Retention will be time limited, and both the child and the responsible adult will need to accept that the child has committed an offence, or a sheriff will have to find that to be the case. Children may also be victims and they have rights. Nothing will be done with the DNA that is retained unless another offence is committed. We are ensuring that appropriate people from a variety of backgrounds are involved in considering what should be on the list of trigger offences.

Stewart Maxwell: When is that likely to be forthcoming?

Kenny MacAskill: It will probably not be before the bill is passed, as it will take some time to work out. Some element of flexibility may ultimately be required, given the nature of the offences. I cannot give you a timescale, but I can certainly undertake to ask the members of the working group whether they have set a timetable. The bill will provide us with the appropriate powers, and we can then drill down to a much more specific level with the working group.

Stewart Maxwell: Just to be clear, do you expect that the working group will report before consideration of the bill is concluded?

Kenny MacAskill: We do not have a timescale. We could inquire about what stage the working group has reached, but it is still being set up and we have not set a timescale for its work. We are not expecting the group to sit and do nothing, but we have allowed it to decide on a timescale—we have only established the framework and brought the members together. I am happy to ask the group's members whether they can give us any information that we can pass on to you about the timescale for the investigation.

Stewart Maxwell: I presume that you expect that the outcome of the working group's deliberations will not impact in any way on the provisions in the bill.

Kenny MacAskill: No—there is sufficient flexibility in the framework of the bill to allow us to use the outcomes from the working group to deal with more specific matters.

The Convener: It would be useful if we could find out the timing of the working group's report. It seems to me that we are getting things slightly out of kilter. I appreciate that there may be problems, but we would want to have the information from the working group prior to legislating. That may not be possible, but can we find out what is happening?

Kenny MacAskill: We undertake to give you that information.

Robert Brown: What will the interim position be if there is a gap between the passing of the bill and the working out of the list? What will happen in the meantime?

Kenny MacAskill: The legislation will not be brought into force. I presume that it will require the trigger of subordinate legislation thereafter to bring it in. To some extent, what we are legislating for in the bill is the powers. What will have to come through thereafter will be done through a Scottish statutory instrument. If Parliament passes the bill, it will give only a consequent power, and thereafter a statutory instrument will be required to come before the committee.

Stewart Maxwell: I understand the process, but could I clarify whether the SSI will list the specific offences to be included? Given the nature of the subject matter, I assume that it will be an affirmative instrument.

George Burgess: Perhaps I can assist. We should look at section 59 of the bill and the new section 18B that it inserts into the 1995 act. Section 18B(6) provides that a relevant offence is such an offence as ministers may prescribe. What ministers can prescribe has to be selected out of what is already defined in the 1995 act as relevant sexual and relevant violent offences, so there is already a limitation on the scope of the possible set of offences that can be specified—it is not a free-for-all for ministers to choose whatever they like. It will be an order made by statutory instrument. We will need to check on the procedure to establish whether the negative or affirmative procedure will be used, but the Subordinate Legislation Committee will no doubt have considered that in recent weeks.

Stewart Maxwell: I would be grateful—as I am sure the committee would be—for confirmation of which procedure will be used. Given the nature of the subject matter, I expect it to be the affirmative procedure but, if it is not, I hope that we can have some understanding of why it is not.

Kenny MacAskill: We will check that out for you.

Paul Martin: Will the minister clarify that it is not the Government's intention to move in line with the position in England and Wales on the retention of DNA?

Kenny MacAskill: Given that the position in England and Wales has been traduced, if I can put it that way, by the European Court of Human Rights, the short answer is no. First, it would be impossible to do that, given the views of the European Court of Human Rights. Secondly, we think that, as people in other jurisdictions have said, we have the correct balance. We must recalibrate it, and that is the point made by Mr Maxwell in relation to the need to consider the issue of serious violent offences committed by young people. We are also considering whether the retention of DNA samples should apply to offenders who receive fixed-penalty notices. However, we believe that indefinite retention of such samples has been shown to be illegal by the Marper judgment and that, in any case, it was not the appropriate way to go.

Paul Martin: When we took evidence from Chief Constable House, I questioned him on whether there are opportunities to prevent crimes from taking place at a later stage by identifying offenders at a much earlier stage. Do you not recognise that the system that is in place in England and Wales is a very effective detection method at a very early stage of the criminal's career?

Kenny MacAskill: We recognise the benefits of DNA evidence in, for example, the successful prosecution of Peter Tobin in the Vicky Hamilton case, which was to the great credit of both our police and the Solicitor General. Such evidence is used for detection, but I remind Mr Martin that the Marper judgment has been issued. That is the position in which we find ourselves not only in Scotland but south of the border and that is why courts have been saying that they think that the current position in Scotland strikes the correct balance. I pay tribute to your colleague Cathy Jamieson and others who put us in this position at the outset. For the record, we do not want to go down the English route because we think that we have the appropriate balance, subject to the outcome of the matters that we are checking. Moreover, we cannot take that approach because of the European court judgment.

11:30

Paul Martin: For the record, I confirm that the position on DNA was introduced by an amendment that I lodged to the Police, Public Order and Criminal Justice (Scotland) Bill—not that I do not want to give credit to Cathy Jamieson where it is due.

The point on Peter Tobin is interesting because one of the questions that I raised with Chief Constable House was the possibility that we could have detected him at a much earlier stage of his criminal career if we had had the opportunity to retain his DNA much earlier. Do you not acknowledge, even on anecdotal evidence, that we could have prevented some of the murders that he committed if we had identified him much earlier?

Kenny MacAskill: I am a great supporter of the excellent work that forensic departments the length and breadth of Scotland do. I have seen the forensic department in Glasgow and pay great tribute to it. Indeed, it was a privilege for me as Cabinet Secretary for Justice to present an award—I have done it two years in a row—to those who have done sterling work. However, I am not quite sure what you are suggesting. I recognise the great benefits of forensic science to law enforcement.

Paul Martin: The question is clear. I posed the same question to Chief Constable House, who understood it. Could we have detected Peter Tobin earlier if we had been able to retain DNA samples decades ago?

Kenny MacAskill: I am not qualified to comment on the Peter Tobin case. You would be better asking my former school and football colleague Detective Chief Inspector Keith Anderson—now retired—who was the investigating officer, or Frank Mulholland, the Solicitor General, who prosecuted the case. I cannot comment on what could or should have been done. I am delighted at the excellent work done by Keith, Lothian and Borders Police and every other police force north and south of the border that collaborated and delighted at the sterling work that the Solicitor General did in bringing Peter Tobin to justice for the murders of Vicky Hamilton and Angelika Kluk. Beyond that, I cannot guess; I have never seen the files.

Paul Martin: Do you accept that the DNA retention opportunities that are provided to us allow us to identify criminals at much earlier stages of their careers? Yes or no.

Kenny MacAskill: Absolutely. That is why the Government is ensuring that the Scottish Police Services Authority is properly resourced and that the appropriate steps are taken to ensure that forensic science is all that it can be in Scotland. I pay great tribute to our forensic science officers in the SPSA.

The Convener: One might have considerable sympathy with what Mr Martin suggests, but there is a prohibitor in respect of the European court judgment, is there not?

Kenny MacAskill: Yes.

The Convener: That is as far as we will get today. Mr MacAskill has kindly agreed to fit in an extra meeting, at which we will deal with the licensing issues that arose last week. At that meeting, there will also be the opportunity to raise a number of other issues that we did not get time to deal with today. This morning's meeting has been exceptionally useful and exposed the cabinet secretary to fairly intensive examination on the Government's policy. I thank Mr MacAskill and his officials for attending.

11:33

Meeting suspended.

16:06

On resuming—

Criminal Justice and Licensing (Scotland) Bill: Stage 1

The Convener: Item 2 is our final oral evidence-taking session on the Criminal Justice and Licensing (Scotland) Bill. The majority of the questions will be on the licensing provisions, with which we will start. After dealing with that issue, we will return to the criminal procedure questions that we did not have time to cover when we last considered the bill.

I welcome to the committee the Cabinet Secretary for Justice, Kenny MacAskill. On this occasion, he is supported by George Burgess and Tony Rednall, of the Scottish Government criminal law and licensing division, and Craig McGuffie, principal legal officer in the Scottish Government legal directorate.

Stewart Maxwell (West of Scotland) (SNP): My first question concerns the task group that was established by the previous Executive to review the provisions in the Civic Government (Scotland) Act 1982. I believe that the report of the task group was published in 2004. According to evidence that the committee has received, only some of the task group's recommendations have been taken forward. Why did the Government take that approach?

Secondly, why is the 1982 act merely being updated rather than being replaced?

The Cabinet Secretary for Justice (Kenny MacAskill): The 1982 act has served Scotland well and, rather than replace it, we have sought to build on it and enhance it. It seems to us that we should seek to improve something that has worked reasonably well rather than making a change for the sake of it.

On your first question, all but two of the recommendations of the task group that require legislation have been taken up. One recommendation that we have not taken up is that a section be renamed "Late Hours Food and Drink Provision". The issue of nomenclature is dealt with elsewhere.

The other recommendation that we have not taken forward is

> "that a statutory obligation should be placed upon licensing authorities to ensure that any licensing requirements they have in place are adequately enforced."

We do not think that such a statutory obligation is required, as section 9(2) of the 1982 act includes a provision requiring activities to be licensed where a resolution is made. Therefore, the duty that is asked for already appears in that act.

One other recommendation requiring legislation does not appear explicitly in the bill. However, we intend to deal with that through the enabling power in section 121, which will allow Scottish ministers to prescribe by order a variety of matters.

Stewart Maxwell: Thank you for clarifying that.

Section 121 enables ministers to set mandatory conditions and licensing authorities to set standard conditions for licences granted under the 1982 act. We have heard evidence that such mandatory conditions are a radical departure from the 1982 act and will not allow licensing authorities to take local circumstances into account. A number of licensing authorities have also suggested that there should be a transitional period to allow them to draft, consider and publish standard conditions. What were the reasons for creating such mandatory conditions? Will you accept the proposal that a transitional period be introduced?

Kenny MacAskill: Several issues are involved. Obviously, the power to set mandatory conditions allows for the implementation of some of the task group's recommendations, for example on the carrying of licences, in a more flexible way. We accept that the setting of mandatory conditions has the potential to limit local flexibility. Whenever they exercise the power, ministers will need to be aware of that. We are seeking an appropriate balance between matters that require to be dealt with uniformly and those that require to be dealt with on a much more localised basis. We recognise the need for a transitional period in which local authorities can set standard conditions. We will consider that carefully as part of implementation.

Stewart Maxwell: Do the mandatory standard conditions not remove local flexibility to such an extent that local differences in circumstances will be ignored?

Kenny MacAskill: No. It is a matter of getting a balance. Clearly, there are instances when it is appropriate for matters to be dealt with uniformly across the country. Equally, there are instances when an element of more localised treatment is required.

As I said, we need to recognise that there will be instances when ministers of whatever political hue will seek to do things a bit more rigidly. Equally, there will be instances when it will be appropriate for them not to do things in that way. My take on the issue is that mandatory conditions will have to be used sparingly.

Stewart Maxwell: I will push you on that. Will you give specific examples of conditions that will be national and mandatory and conditions that will be localised and flexible?

Kenny MacAskill: I will leave the specifics to George Burgess.

George Burgess (Scottish Government Criminal Justice Directorate): It might be helpful if I explain the genesis of the mandatory conditions power. In response to your previous question, the cabinet secretary said that one recommendation was to make it mandatory that the licence holder should carry the licence, or a copy or plate of the licence. We felt that the easiest way in which to achieve that would be to create a power to set mandatory conditions. Given that the 1982 act covers a variety of licences, we felt that it would be better to create a power than to write directly into the 1982 act a different type of condition for each type of licence. That was our starting point for creating the mandatory conditions power. We do not have a long list up our sleeve of other mandatory conditions that we are looking to insert by way of the power.

The origin of the standard conditions recommendation in the task group's report was a concern that licences can be granted by default. At present, if the licensing authority does not consider the application within a sufficient timeframe, the licence is granted unconditionally. Standard conditions are created as a set of conditions that apply automatically to any licence that is granted by default. For most types of licence, most local authorities have a set of standard conditions. As the cabinet secretary said, before the provision is brought into force, plenty of time will be allowed for local authorities to determine and fix their standard conditions.

Stewart Maxwell: That is helpful.

The Convener: As there are no further questions on the task group report or mandatory and standard conditions, we move to questions on the licensing of taxis and private hires.

Nigel Don (North East Scotland) (SNP): Good afternoon. My question is on section 124, which lays down that licensing authorities will have to set taxi fares every 18 months and review charges following consultation with the appropriate people. I have no problem with the drafting, but how will that work in practice? Will we see a rolling review with fares set every 18 months or will there be consultation periods of a few weeks or months every 18 months?

16:15

Kenny MacAskill: My understanding is that 18 months will be the maximum period for carrying out such a consultation. The approach takes forward a task group recommendation and it is important to remember that it clarifies an interpretation of the current conditions as contained in the 1982 act.

Our understanding is that most authorities have been working on the basis that the review process should be completed within 18 months. We are not aware that compliance has caused undue difficulty. The 18-month period is not meant to be viewed as a rolling review period—unless an authority wants to do that. If an authority decides to review fares, the consultation period should be no more than 18 months, and the authority should seek to complete the consultation in less time than that.

Nigel Don: Are there sanctions on a licensing authority that fails to set its charges in the right period?

Kenny MacAskill: None is specified. I am not aware of sanctions being required or of any breaches. I know from my experience with the City of Edinburgh Council that the taxi trade is not shy in coming forward if it thinks that there are matters that are prejudicial to its financial wellbeing. To some extent, there is an in-built mechanism for local authority accountability, given that councillors are lobbied by the trade.

If people think that a fail-safe mechanism is necessary, I am more than happy to consider the issue. However, neither the trade nor councils think that it is necessary, and it appears that everything is dealt with within 18 months.

Nigel Don: It appears to be a classic case of, "It ain't broke, so don't fix it."

The Convener: If there are no more questions on the issue, we move on to consider the provisions on miscellaneous licences.

Bill Butler (Glasgow Anniesland) (Lab): Section 125 will remove the exemption for non-commercial organisations from the requirement for a market operator's licence, and section 126 will remove the exemption from the requirement for a public entertainment licence for free events. Witnesses have suggested that the approach will increase costs for charity, community and other such groups and might discourage such groups from holding events. How do you respond to such concerns?

Kenny MacAskill: The removal of the exemptions will not prevent local authorities from creating their own exemptions for some or indeed all of the organisations that currently benefit from exemptions. Paragraph 563 of the explanatory notes says that although the change

> "will bring charitable organisations etc within the scope of the licensing provisions, licensing authorities have discretion as to whether to charge reduced or no fees to such organisations."

Many local authorities set different charges for different bodies or types of events. The changes will give greater local flexibility and will help to prevent some of the abuses that the task group noted in its report.

Bill Butler: Is it realistic to presume that local authorities will use their discretion and not charge such organisations, given the current economic climate? If local authorities are allowed to charge, they will surely do so.

Kenny MacAskill: It is for local authorities to decide on such matters and to be held accountable to their electorate for their decisions. We must allow local authorities to make a decision. Some licensing authorities might decide that a charge is appropriate; they will have to answer for that to the council and to the electorate. Some might decide on a reduced charge, depending on the event for which the licence is sought—a car boot sale or whatever. The approach recognises that Scotland is a varied country. In a recession, we want to ensure that the voluntary sector is catered for, but the best people to make that judgment are the members of the local authority, who will take account of the needs of charities and the wants of the community.

Bill Butler: Will the approach not lead to an absurd situation, whereby a branch of an organisation in one local authority area will be charged and a branch of the same organisation in another area will be exempt? Is that not unfair?

Kenny MacAskill: That is democracy.

Bill Butler: Equating democracy with absurdity and unfairness—if that is what you are doing—is not the way to go. Surely the approach will be a hostage to fortune. We should not be withdrawing the exemptions; there is no need to do so.

Kenny MacAskill: Local authorities already decide the charges that they levy. It is about allowing local authorities to use the common sense that they are born with and to represent the area to which they are accountable.

Bill Butler: I could say common sense, that most uncommon sense, but I will refrain from quoting the poet. Does the cabinet secretary not understand that the committee's information is that the revenue of most village halls is about £3,000 a year or less and that the average fee for such licences is about £200 a year? Will such a fee not be a bit of a burden on those whose local authorities are, according to your definition, less democratic than others?

Kenny MacAskill: I trust these matters to the judgment of the elected local councillors; it is not appropriate that they should be specified from St Andrew's house or Victoria Quay. There are good reasons why, in Scotland, we allow these matters to be decided by the locally elected representatives, who are closest to the people and are able to meet those concerned and take the nature of the village hall into account; they know the organisations involved and in many cases they know the people involved personally. In some instances, different fees may be charged by different local authorities, but that already happens in relation to a variety of matters.

Bill Butler: Should we encourage it in relation to this matter?

Kenny MacAskill: It is for local councillors to use the common sense that they are born with to recognise that many parts of the voluntary sector do an excellent job with a limited budget. They know the organisations and their communities, and I want to give them the flexibility to do what they think is appropriate. They will ultimately be held to account—as you and I are—by the electorate.

Bill Butler: Once every four years, which means that, for four years, events may not be held that have been held for 50 years.

Kenny MacAskill: As we heard, the same issues arise in relation to taxi fares. There is a constituency of interest that will not be shy in coming forward. We should trust the ability of councillors, of whatever political colour, to make an appropriate decision to represent what is needed in their communities.

Bill Butler: I do not agree with you, cabinet secretary, but I hear what you are saying.

Robert Brown: I will pursue that issue with the cabinet secretary, if I may. The bill is designed to remove a current exemption; in other words, there will no longer be a general exemption. Would it not be preferable to do this the other way round and give councils the power to charge without automatically removing the exemption? I can understand that large events of one sort or another might need to be covered by the provisions, but in relation to the typical women's guild event, summer gala or a similar event at a modest level, it strikes one that a sledgehammer is being used to crack a nut. What are your thoughts on fiddling about with the formulation of the provision?

Kenny MacAskill: Would George Burgess like to comment?

George Burgess: Yes. The answer to that question lies in the transitional provisions. Perhaps it will be helpful if I set out our intention in that regard. When these provisions and the ones on scrap metal dealer licensing and so on come into force, the default position will be whatever the local authority has already decided is the scope of the licensing scheme in its area. Of course, most of those are optional licensing schemes that the local authority elects to apply or not and whose precise scope it determines. On day one, the licensing scheme will apply to precisely what it applied to before the provisions came into force. It would take an active decision by the local authority to decide to apply the provisions to those organisations or events that are currently covered by the exemption. There will not be an automatic application of the provisions to those organisations or events. That is not in the bill; it will be covered in the transitional and commencement provisions, but that is the effect that we are looking to achieve. There will not, on day one, be any requirement to license voluntary organisations or the like. It will be down to the local authority to take that step, which they currently cannot take, if they see a need to apply the provisions to that class of body.

Robert Brown: That may help, but I will pursue another issue, which is discretion—Bill Butler may have touched on the issue. We have been asked whether local authorities have discretion not only to bring the scheme in or not to bring it in, but to bring it in for certain types of organisations and to exempt certain others—to charge some people and not others. Will the local authority have full discretion on all these matters and not just on whether to have a scheme?

George Burgess: Yes.

Robert Brown: Can you point us to a provision in the bill that identifies that?

George Burgess: I think that it is in section 9 of the 1982 act rather than in the bill. I think that it is section 9 and that another section is linked to that. However, we are satisfied that local authorities have discretion in licensing and in relation to fees. If you look at the fees that are currently set by local authorities for different licensing systems, you will see that that discretion already exists and is used.

Even going back to some of the earlier questions, I think that there is provision in paragraph 15 of schedule 1 to the 1982 act on how local authorities are to set the fees. Essentially, it is looking for a cost-recovery regime, so licensing is not intended as a cash cow for local authorities. As the cabinet secretary has said, there would be quite a bit of fuss if local authorities attempted to use the licensing scheme in that way.

Robert Brown: It is fair to say that there is some concern among the committee about the direction of travel of these provisions. I appreciate that you have identified the linkage between the 1982 act and the current bill, but it might be helpful if the Scottish Government could give us an explanatory note that goes into the matter in a bit more detail. I know that you have dealt with some of it in the evidence today, but I would personally like to look at it a bit more closely and ensure that it does exactly what you say on the tin that it does and that we have chapter and verse on it. That would be helpful to the committee.

The Convener: It would indeed. As I recollect from local government days, the section 9 resolution under the 1982 act worked reasonably satisfactorily. However, you will already have got the impression from the committee that there is some anxiety over this section of the bill, cabinet secretary, so we would appreciate clarification on it.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Cabinet secretary, you will not be surprised that committee members used the explanatory notes and the policy memorandum to guide us in getting into the policy intention of particular parts of the bill. Part 8 covers sections 121 to 128. The policy memorandum covers all those sections except for section 125, so it is silent on the Government's policy intention on that issue. Do you believe that charitable organisations should be brought within the bill's scope?

Kenny MacAskill: I believe that local authorities should be given the discretion to act according to how they see matters in their area. As I said to Bill Butler, it is clearly appropriate to look after the interests of the voluntary sector, especially in a time of recession. Equally, we all know that there are areas in each constituency where voluntary organisations can sometimes be viewed as impeding legitimate trade. It may be felt that that is inappropriate and that there should perhaps be the same level of licensing. I therefore think that it is best left to those who are accountable and responsible to deal appropriately with the needs and wants in their areas. The Government and I remain fully committed to the excellent work that the voluntary sector does. However, as I said, each specific matter is best dealt with by the local authority that knows the area.

Cathie Craigie: A very important point about accountability and responsibility follows on from that. If the bill were to go through, all 128 members of the Scottish Parliament with voting powers would be accountable and responsible for the decision that they took to pass it. I repeat the question: do you believe that charitable organisations should be brought within the bill's scope?

Kenny MacAskill: As I said, I believe that local authorities should be given the powers to use their discretion and act accordingly. Indeed, local authority members should be able to use the common sense that they were born with in order to look after the interests of their communities and of charities that act appropriately. If there are instances when charities go head to head with legitimate businesses that have been in place for some time, local authorities should be able to use the flexibility to act as they see appropriate.

16:30

Cathie Craigie: What consultation has been done on the matter? What evidence led the Government to include such organisations in the remit of licensing boards? Where are the examples that suggest that the new provisions would be advantageous?

Kenny MacAskill: Our approach comes from the task group's recommendations. Anybody who represents an urban area will be aware of some relevant examples. I am a great supporter of charity shops, which do an excellent job for the organisations that they represent. However, in some areas, traders point out that although they have to pay full rates and do various other things, charitable organisations are going head to head with them. We recognise that we have to look after the interests of charities. They do an excellent job, using volunteers in the main, on a shoestring.

There are also instances when we must provide some balance. The best people to decide on such matters are those in local authorities. They know the area, and they are charged with the responsibility of listening to all parties—business and the voluntary sector.

Cathie Craigie: I remind the minister that—as far as I understand it—we are dealing with market operators here, not traders on main streets.

Kenny MacAskill: A considerable number of markets operate on a commercial basis. The point is to allow people in local authorities to use the common sense that they were born with to judge what is clearly a commercial operation and what is a charitable operation.

Cathie Craigie: I am sure that the committee will pursue the matter.

The Convener: We will revert to the issue, yes.

Stewart Maxwell: I seek further clarification on the points that Cathie Craigie has raised. Is it reasonable to suggest that the decision that a local authority might take would be based not necessarily on the type of organisation, but on the type of event or activity that the organisation is involved in? It is the activity or event that is important, rather than the nature of the organisation.

Kenny MacAskill: Absolutely. The situation must be considered in the round. A variety of factors are involved. You are right to say that it is the event that is relevant. Is it wanted, is it suitable and is the activity already being provided? There is also the question of who is doing it and why.

The Convener: There are no further questions on section 125.

I refer you to the renewal of licences and to section 128, which allows licensing authorities to consider licence renewal applications that are received up to 28 days after the expiry date of the previous licence as renewal applications, rather than as applications for a new licence. We have heard concern that that approach could cause difficulty if an offence was committed during the 28-day period. Would it be possible to give us your justification for that provision? Has any consideration been given to that issue?

Kenny MacAskill: If the licensing authority allows a late renewal application, trading will be legal, in the same way that it will be when the renewal application is made on time. If there has been no renewal application, or if the licensing authority does not recognise good cause for a late application, offences concerning trading without a licence will apply as normal.

The Convener: Therefore, there should be no particular difficulty in that regard. We need to consider the miscellaneous licences for market traders and the problems of reset, with which you will be familiar.

Kenny MacAskill: Yes.

The Convener: It is a common difficulty that arises under that occupation. If somebody is convicted of reset during the 28-day period, there should not be a difficulty regarding the forfeiture of a licence.

Kenny MacAskill: Not that I am aware of. Section 128 allows the licensing authority to recognise honest mistakes and to allow a licence holder to continue to trade, even if the renewal application is made late. It is not meant to deal with people who commit criminal offences.

The Convener: Let us turn now to alcohol licensing, starting with the modification of layout plans.

Cathie Craigie: Section 131 enables licensing boards to modify layout plans that have been submitted to them in relation to a premises licence application. We have heard from respondents who are concerned that a licensing board could require a costly or time-consuming layout or design change—perhaps a change that required planning permission. What are your views on those concerns?

Kenny MacAskill: The provision was included following a request from licensing boards, which saw it as being helpful, rather than something that would stifle businesses—it should enable applications to be progressed, rather than rejected. It came from people who sought to smooth matters, or perhaps just to iron out glitches. All such decisions rely on licensing boards using a degree of common sense in relation to the changes that they ask for. If a change is large or radical, the question is whether the premises were suitable in the first place. It is important to remember that the applicant must agree to the changes—they cannot be agreed without the applicant commenting.

In a nutshell, the provision came from licensing boards, which were trying to be helpful by suggesting that—I paraphrase—if the applicant changed this or did that, they would be happy to grant the application. If the applicant said no, the application would have to go away for consideration, but if they said yes, it could proceed.

If there is nervousness about that in the trade, I am more than happy to discuss the issue with it—I will be having meetings with the Scottish Licensed Trade Association again shortly. I take from the provision that licensing boards are seeking to act in a helpful manner in situations in which board members have some concerns. If boards can agree the modification with the applicant, rather than remit the application or bring it to a hearing, the issue can be sorted there and then. However, if there are concerns about the provision, I am happy to discuss them.

Cathie Craigie: I am grateful for that answer. There were also concerns about the short timeframe for agreeing modifications and consulting the relevant authorities so that they could look at the application more fully. Given that you are to meet the SLTA shortly, I assume that you will discuss these issues with it and that you will share information about that discussion with the committee.

Kenny MacAskill: Absolutely. I will meet the SLTA shortly. I was at a reception last night at which I met hoteliers and restaurateurs associations from Edinburgh and Glasgow. I am conscious that a variety of bodies out there represent the trade. It is not simply the SLTA; there are others. We are happy to listen, meet and engage. We recognise that there are unintended consequences—they might be covered in further questions about the Licensing (Scotland) Act 2005. We are here to try to make things work better, so that licensing boards can act accordingly and we can make our communities better.

The Convener: We now turn to antisocial behaviour reports.

Paul Martin (Glasgow Springburn) (Lab): Cabinet secretary, what difficulties do you have with the current arrangements, which were introduced by the previous Executive and agreed by the former Local Government and Transport Committee and which require an antisocial behaviour report for all applications for a premises licence?

Kenny MacAskill: We took the view that was put forward by the police, who saw a great deal of trouble and inconvenience with information of little relevance being provided. We have sought to strike the appropriate balance between the needs and wants of our communities, the requirements of our police and the amount of information that can be dealt with by the board that is charged with the ultimate responsibility of deciding whether to grant the application.

Paul Martin: Where does the community come in? I lodged the relevant amendment to the Licensing (Scotland) Bill when it was before the former Local Government and Transport Committee, because communities were concerned that when an application was being renewed, information about antisocial behaviour relating to the premises was not being properly reported to the licensing committee. Do you accept that the amendment that was agreed to required a more consistent approach to reporting on antisocial behaviour, rather than leaving it at the behest of the chief constable?

Kenny MacAskill: No. I think that we have struck the appropriate balance. We have to take into account the fact that licensing standards officers are up and running. A variety of checks and balances exist. We have to consider the scheme and the operation of the 2005 act in the round. The police have a particular role and duty. There are also the rights of individuals and the rights of the trade. Balance is provided by the licensing board, which is assisted by licensing standards officers.

Paul Martin: Given the licensing sergeant's workload, would you be confident that if there were, say, 200 calls about antisocial behaviour at an off-licence, the police would always have such information at their disposal? Would it not be better to allow the police to interrogate matters more consistently through, for example, computerised systems, which are easier to use than the systems that were used in the previous regime, and ensure that applications involving premises that are associated with antisocial behaviour are not accepted?

Kenny MacAskill: I do not seek to interfere in police operational matters with regard to licensing or, indeed, the investigation of minor or serious crimes. Whether the police use information technology systems in that respect is a matter for them.

As the representative of a constituency that is close to the Parliament, my experience is that the police very much have their ears to the ground and their eyes on where incidents are taking place. They are not shy in coming forward, and I believe that in looking after people's interests and dealing with antisocial behaviour the police and, in particular, licensing officers do an excellent job. I am more than happy to put my trust and faith in their ability to carry out the appropriate tasks with which they have been charged.

Paul Martin: Can you give a guarantee today that, if the Government's proposals are agreed to—

Kenny MacAskill: I cannot give a guarantee on any matter that is—

Paul Martin: Please let me finish the question.

The Convener: Let Mr Martin finish his question, cabinet secretary.

Paul Martin: Will the cabinet secretary guarantee today that applications that are granted will contain no element of antisocial behaviour that has been reported to the licensing committee?

Kenny MacAskill: My answer to that question is the same as that to any question that seeks a guarantee from me on matters that are not under my direction or within my control: I cannot give a guarantee on any matter that is the operational responsibility of the police. However, as the Cabinet Secretary for Justice on the very day that we have announced the rolling-out of an additional 1,044 police officers, I can say that I have the utmost faith in our police. From experience in my constituency and having met licensing police officers in Perth and, indeed, in Mr Martin's city of Glasgow, I think that they do an excellent job. Sometimes something might fall by the wayside, but they are the first to recognise that they might have erred. As I have said, they do an excellent job and we are very well served by them in licensing matters and in everything else that they do to protect, guard and serve us.

Paul Martin: I wonder whether the additional police officers that have been introduced to deal with the supposed workload will be made available to prevent antisocial behaviour. After all, we must ensure that any application that comes with reports of antisocial behaviour must not be granted. I am also grateful for the confirmation that you cannot give a guarantee that any reports of antisocial behaviour surrounding an application will not go by the wayside.

Kenny MacAskill: I am delighted to assure you that the 1,000 additional officers that this Government has provided for our communities will indeed be out there in those communities. When we agreed to fund that proposal, the Association of Chief Police Officers in Scotland assured us that those officers would not be behind desks but would be visible in our communities. It was a pleasure to accompany two police officers from Baird Street—which I believe is in your constituency, Mr Martin, although I might be wrong—as they went out and about doing an excellent job. I give you an absolute assurance that those officers will be out in our communities. I do not direct them operationally; as you well know, any such move would be constitutionally inappropriate. Indeed, it would be as inappropriate for me to do that as it would have been for my predecessors, whatever their political hue.

The Convener: Now that the cabinet secretary has satisfied the committee about his knowledge of the geography of Glasgow, we will move on to the issue of occasional licences.

Bill Butler: Perhaps we can turn back to the bill.

As you know, cabinet secretary, section 134 enables applications for occasional licences to be fast-tracked where appropriate, with the time allowed for comments from chief constables and licensing standards officers reduced from 21 days to

"not less than 24 hours".

To be fair, I point out that some respondents have welcomed that provision; however, others are concerned that the new procedure could be open to abuse by applicants. What is the Government's view on such concerns?

16:45

Kenny MacAskill: We are happy to look at concerns if they are raised, and it is clear that some people have raised concerns with you. However, I believe that we have the appropriate balance. There are good reasons why licences should be fast-tracked for a variety of local events that provide benefit. Again, it comes back to licensing boards knowing their communities and the individuals concerned. The 2005 act does not delegate to officers the granting of occasional licences, responsibility for which remains with the board members or the clerk. Occasional licences can be granted for events of significant size and also for those of a less significant size.

If there are significant concerns, either from the committee or indeed from the trade, we are happy to look at them, but my experience leads me to think that matters can be dealt with by checking with the convener of the board. We need some flexibility to let local events take place if they serve and benefit the community.

Bill Butler: I agree that we must exercise common sense, but concern has been expressed that the proposed amendment to the 2005 act to which I referred—for the consultation period to be reduced to

"not less than 24 hours"—

appears not to take into account the requirement for every application to be advertised for a period of seven days. Surely the proposal raises false expectations.

Kenny MacAskill: I ask Tony Rednall to comment on that.

Tony Rednall (Scottish Government Criminal Justice Directorate): The seven-day period is held in regulations, which we will look to change if the provisions are passed.

Bill Butler: I see. Well, that makes that clear.

I have one more question. The committee heard evidence that questioned why the power cannot be delegated to members of staff who are employed to assist the licensing board and the clerk, and it was also suggested that the provisions should be replicated for applications for extended hours under the 2005 act. What is the Government's view on those suggestions?

Kenny MacAskill: We are happy to look at them. Our initial view is that the board is ultimately accountable and there has to be some signing off by those who are ultimately to be held responsible, just as we sign things off as a Parliament. If there is a need for more flexibility, we are more than happy to look at that. If the board conveners and those who seek the power to act on authority are happy, we have no fixed views. It is a matter of ensuring that we get the right balance of ultimate accountability and responsibility. If a licence is granted at 24 hours' notice and there is trouble, for example, the local community will want to know why.

We are genuinely open to discussing the matter. If that is what boards want, we will be prepared to consider it, but I would want to take the temperature of the boards.

Bill Butler: If I may say so, that guarantee is most welcome. I am glad that that is on the record. Thank you.

The Convener: We move on to questions on the appeal procedure from Robert Brown.

Robert Brown: The cabinet secretary will be aware of the evidence that we received about the appeal procedure. I think it is fair to say, if I have not misread it all, that there is a fairly uniform view from those who have to operate the system that the stated case appeal procedure under the 2005 act does not work well. There seems to be strong support for going back to a reapplication system, which would be rather more informal and perhaps more effective in achieving what is wanted. Have you had cause to think about that? Can you give us any guarantee or undertaking on that aspect?

Kenny MacAskill: Yes. You are quite right. We now recognise the concerns that have been raised that the stated case procedure that is detailed in the 2005 act seems not to work as well as the previous summary application procedures. I did not use those in relation to liquor licensing because I was not involved in that area, but they were used in a variety of other areas. We will seek to lodge amendments at stage 2.

Robert Brown: I am grateful for that.

I take the opportunity of our discussion to return to personal licences, which do not strictly come under the bill, but about which we had an exchange before the recess. The matter has been the subject of quite a lot of publicity in the press recently. I do not want to look at the matter too widely, but given the furore about the new date, the lack of granting of applications—Cathie Craigie might know more about this, but apparently no personal licences have been granted in North Lanarkshire—and some of the issues of interpretation, can we have an update on the matter?

Tony Rednall: In relation to personal licences, regulations were put to the Parliament to enable people to nominate, during the past month, a deemed premises manager who had completed their personal licence qualification but had not yet been granted their personal licence. As far as we are aware, in the past couple of weeks, licensing boards have been telephoning licensed premises that do not have a deemed premises manager to ensure that one is put in place. We believe that only a minority of premises do not have one in place.

In the majority of licensing board areas, enforcement officers and the police have agreed that they will take a pragmatic approach in going round premises. Officers will contact the licensing board to ensure that an application has been made and then allow the premises to continue trading. Recently, a lot of attention has been given to the issue of whether premises have a premises licence when trading is carried out. We believe that quite a few licensing boards got most of their premises licences out. However, a few are behind, one of which is North Lanarkshire licensing board. It is an offence for premises to trade in those circumstances, but they have a good defence in that the licensing board has not issued the licence. We would not expect licensing standards officers to go looking for a licence if their council is behind.

Robert Brown: The committee has previously alerted the Government to the point that it is not satisfactory for legislation to have all sorts of good intentions while, in effect, the discretion of the enforcement authorities allows an illegal situation to continue. Have you had further discussions with councils or the trade—or perhaps both—with a view to regularising the situation? Is there a time limit within which the process will be finished and the issue sorted out? Will you need to lay further subordinate legislation before the Parliament? The situation is a bit of a mess, although I hasten to say that that is not necessarily the Government's fault. However, there is a practical problem to be dealt with.

Tony Rednall: Licensing boards are working extremely hard to rectify the situation in which they find themselves by getting out licences and ensuring that people have the correct paperwork. The problems have frequently been a result of a mess being made of applications. Licensing boards are working hard to ensure that provisions are in place so that premises can open. The boards are trying to ensure that those provisions are legal, by using occasional licences, for example. Many boards will hold hearings on 15 September to try to catch up and deal with premises in relation to which a mess was made in the application process, to ensure that those premises are not closed for a significant amount of time. The boards are taking action to rectify the situation as quickly as possible.

The Convener: I refer members to the correspondence that we had with the cabinet secretary when the matter was raised with the committee previously. The Government has done everything that could reasonably be expected of it. There is definitely evidence that local authorities—or licensing authorities, if I am to be strictly accurate—are now dealing with the matter. The situation is unsatisfactory but I hope that it will be remedied fairly quickly.

We will now leave the licensing provisions of the bill and return to the criminal justice aspects, to sweep up some of the questions that we did not have the opportunity to ask the cabinet secretary on 23 June. I will suspend the meeting briefly to allow the officials to change over.

16:54

Meeting suspended.

16:54

On resuming—

The Convener: I thank the officials who are leaving. The cabinet secretary has been joined by Rachael Weir from the Scottish Government's criminal procedures division and Denise McKay from its legal directorate. As ever, Mr Burgess is with us.

We will deal first with disclosure, on which I ask Robert Brown to lead the questioning.

Robert Brown: Mr Burgess obviously is omniscient on such matters.

As the cabinet secretary knows, there has been a lot of evidence from knowledgeable sources about the complexity and length of the arrangements that the bill proposes on disclosure. It has been suggested that there is a need for a simple statement of the Crown duty of disclosure at the beginning of part 6 and that a good bit of the detail could be removed to, for example, the proposed code of practice. That seems a reasonable suggestion. Is the cabinet secretary sympathetic to it?

Kenny MacAskill: It is a question of theory and practice. In theory, disclosure is relatively simple, but in practice it can involve a great deal of complexity. It is clear that we do not want to make matters as opaque as possible. As the Solicitor General said in his evidence to the committee on 9 June, a significant amount of advice requires to be given to prosecutors. We have tried to strike the appropriate balance and to ensure that the bill contains what is necessary. Unfortunately, it is not possible to reduce the relevant provisions to a one-liner. We must have some flexibility in regard to how the law develops. We have done our best to restrict the bill's provisions on disclosure, but although it would appear to be a straightforward concept, in practice, as the Solicitor General said, a great deal of guidance has to be issued. That is why we have had to be broad.

Robert Brown: Surely that is the point. Flexibility does not readily come from the inclusion of provisions in statute; it more readily comes from codes of practice and guidance. The information that we have received has come not from amateurs but from people with a close knowledge of the system. They have expressed significant concerns about how the bill deals with disclosure. Given the evidence that the committee has received, is it not worth having another look at the disclosure provisions?

Kenny MacAskill: Absolutely. We are happy to reconsider whether elements of the provisions could appropriately be dealt with in rules of court or a code of practice, but I must sound a note of caution. The duty of disclosure is a critical duty, and if too many provisions were removed, Parliament would be deprived of its important scrutiny role. We are more than happy to consider whether rules of court or a code of practice could be used, but we think that the bill should provide sufficient specification on what is an important issue.

Robert Brown: I will move on to defence statements, which have been the subject of quite a degree of controversy and comparison with the English system.

It has been suggested that the provisions on defence statements will not work and that the use of defence statements does not readily fit with the Scottish system, which already provides for the use of alibis and special defences. In the light of the evidence that the committee has received, has a sufficient case been made for requiring defence statements in solemn cases? Could we have a halfway house, whereby defence statements were voluntary? Will the issue be looked at again? It has been indicated that there would be problems with the proposal working in practice and that it would not necessarily achieve what the Government wants it to achieve because of the attitude of judges and the legal profession to the rights of the defence in Scots law.

Kenny MacAskill: As you said, defence statements will be mandatory only in solemn cases. When they gave evidence, the Lord Advocate and the Solicitor General gave examples that demonstrated the scale of the task that prosecutors face. We are conscious that it has been suggested that the existing special defences are enough. We disagree and are persuaded by the Crown that a restricted range of potential defences are covered and that being limited to intimating those defences in the context of disclosure would risk essential information not being disclosed that might very well have been disclosed if the prosecutor had appreciated its significance. I do not know whether Denise McKay wants to add anything to that.

As I said, the Lord Advocate and the Solicitor General gave the committee clear examples of instances that would not be covered simply by the defence of alibi, impeachment or whatever else. There are instances in which the Crown's obligation cannot really be triggered unless it is given some idea of what the likely defence will be.

17:00

The Convener: Does Denise McKay have anything further to add?

Denise McKay (Scottish Government Legal Directorate): No, I have nothing further to add to what the cabinet secretary has said.

Robert Brown: I suggest to the cabinet secretary that a chicken-and-egg question is involved. In the Government's mind, what is the purpose of defence statements? Are defence statements intended to enable the Crown more adequately to fulfil its disclosure duty, or are they intended to enable the Crown to have more detailed knowledge of the nature of defences going forward? As the cabinet secretary will be aware, the latter would raise other sorts of issues.

Kenny MacAskill: Clearly, they are about the Crown fulfilling its duty. To do that, the Crown needs to know what the defence is looking for in the myriad of evidence that might be available. As the member well knows, in significant solemn matters the evidence can go from the almost sublime to the ridiculous, including who was where and who put up the ticker tape. In some instances, such details can be of significant importance if it suddenly comes to light that the evidence includes people who say that the person did not come in this or that direction.

Defence statements are about ensuring that the Crown can fulfil its duty. In order that the Crown can do that, it must know what the defence is looking for. Defence statements are not about asking people to incriminate themselves—that would be precluded under the European convention on human rights. They will simply allow the Crown, when reviewing what needs to be disclosed to the defence, to have some idea of what is totally extraneous and will not be part of the defence argument. That will mean that the Crown can dispense with details about ticker tape and who drove the vehicle that carried such-and-such. However, there may be instances in which such information is relevant, so the Crown needs to know what is relevant. Defence statements are about the Crown being able to fulfil its statutory duty.

Robert Brown: Does that not make the point that voluntary defence statements, which would in principle be triggered by the defence, would be a more satisfactory and less bureaucratic way of dealing with the matter, given the fears that have been expressed both about what is said to have happened in England and about how the proposed requirement would fit into the Scottish system?

Kenny MacAskill: I recognise that problems have arisen in England and Wales, where a different system operates. The Crown Office has provided further written evidence on the changes that took place in England and Wales. Given the significance and importance of such matters, it appears to us that there should be a statutory disclosure duty on the Crown. If the Crown is to fulfil that statutory duty, the statements that it receives from the defence must provide the appropriate information that will allow the Crown to do so, therefore it is appropriate that defence statements should be mandatory. That view is also taken by the Crown.

Nigel Don: My question is on non-disclosure and special counsel, which are provided for under sections 102 to about 116. Some submissions have raised concerns about the compatibility of those provisions with the European convention on human rights. In our collective absence, on 10 June a report was published by a specially convened nine-member Appellate Committee of the United Kingdom House of Lords on the case of the Secretary of State for the Home Department v AF and others—the complete citation includes the information "[2009] UKHL 28"—that considered the issue of secret evidence in terrorism cases. It is not difficult to draw the conclusion that that judgment might be relevant to the issues that we are considering under the bill. Does the cabinet secretary think that non-disclosure will be acceptable in Scottish law? Are those provisions in the bill being looked at?

Kenny MacAskill: We think that sufficient safeguards are already built into the bill, which is why the Presiding Officer has allowed it to be introduced. We are aware of the case south of the border to which the member referred, but it does not apply to the procedures that we operate in Scotland. It is certainly correct to say that the matter could at some stage apply in Scotland, but the procedures here would be different. With the non-disclosure provisions, we have checks and balances through the ability to appoint special counsel. In our view, we would not be in the same position in which the courts in England have found themselves, because we have those checks and balances and the bill comes within the ECHR. Denise McKay can elaborate on the matter in greater detail.

Nigel Don: I would be grateful for that.

Denise McKay: You described the evidence that was dealt with in the case of the secretary of state v AF as secret evidence. In immigration cases, the judge considers the evidence and makes a decision based on it. However, it has never been the intention that under the disclosure scheme that we have brought before the Parliament evidence that the accused has not seen will be put to the judge when reaching his verdict. Any information covered by a non-disclosure order will be put to the side and will not go towards the verdict.

We can distinguish the Scottish scheme from the case of the secretary of state v AF because the Scottish scheme will never rely on evidence that the accused has been unable to see. The Scottish Government's view is that that would not be compatible with ECHR and would not represent justice for the accused. Such evidence will not be relied on and it will be put to the side. That is a critical element of the disclosure scheme that we have brought to the Parliament, and it is a critical element in ensuring compatibility with ECHR.

Nigel Don: Thank you. That is revelatory to me. That was not my understanding. I want to bounce that back and ensure that I have got it right. Non-disclosed evidence will be brought to court—and, if necessary, discussed with special counsel in order to elucidate the facts—so that it can be put to one side by the judge and not put to the jury. In that way, such evidence will be dealt with in court—albeit in camera—but will be no part of the evidence on which guilt can be found.

Denise McKay: Absolutely—perfectly put. That is exactly how the scheme will work. Special counsel will be the independent voice and the independent advocate. The judge will be the person who makes the decision, so the information will be put to the judge. Special counsel will have an opportunity to make representations, alongside the Crown. Ultimately, the judge will make the decision. There will be judicial independence in all of these matters.

Nigel Don: Thank you—I take compliments where I find them. That is helpful.

The Convener: After that exemplar of clarity, we go to unfitness for trial.

Angela Constance (Livingston) (SNP): Part 7 of the bill, on mental disorder and fitness for trial, has been broadly welcomed, not least because the new statutory defence will replace the common-law defence of insanity and because it will get rid of all the old-fashioned, outdated language. However, the committee has received evidence from organisations, including the Mental Welfare Commission for Scotland, raising concerns that the provisions are inadequate for people who, when they commit an offence, know that their actions are wrong but are nonetheless compelled to commit the offence due to their illness or mental disorder. We have been given two examples. The first is severe cases of depression in which, although the people concerned know that their actions are wrong, they are, because of their view of themselves and the world, unable to resist the impact of their illness. The second example is someone with a psychotic illness who has command hallucinations. For example, they know that it is wrong to harm another person, but because of their delusional beliefs they cannot resist the impact of their illness. What is the Government's view of that? Will the Government seek to amend the bill to include those individuals who have a diagnosed mental disorder and who know that their actions are wrong but who, due to their illness, cannot resist their urges?

Kenny MacAskill: For many a year there have been deep-running debates about personality disorders, as well as about the issue to which you refer. Unless the committee persuades us otherwise, we will not seek to amend the bill, because we are basically implementing provisions that the Scottish Law Commission considered long and hard. Things have not been done on a whim and a fancy; the Law Commission went away and discussed matters.

The issue is deeply complex. It is about where we strike the balance in respect of those who clearly have a treatable mental health issue and those, such as those to whom you refer, who have a personality disorder and complex issues to deal with. The Law Commission considered the matter in detail, and the new special defence, in proposed section 51A(1) of the Criminal Procedure (Scotland) Act 1995, provides that

> "A person is not criminally responsible for conduct constituting an offence … if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct."

I understand the issues to which you refer. The test relies on the accused not being able to understand the wrongfulness of their actions. Therefore, any accused person who suffers from a mental disorder that means that they understand that what they are doing is wrong but is unable to stop their conduct is excluded from the special defence.

As I have said, we are implementing the Scottish Law Commission's recommendations, because it is difficult to know where the line must be drawn. I am open to listening to representations, as the committee has done, but the Law Commission has already listened to recommendations and representations from the Crown and others and put forward the special defences. We based the provisions on the views of the Law Commission, which carried out intensive research, but I am open to other views.

Angela Constance: In the interests of clarity, I was certainly not making any arguments for people with a sole diagnosis of psychopathy. I know all too well the risks and dangers of getting the wrong men in the wrong system and I understand the caution.

My brain is a little bit rusty because of the recess, but I am sure that the committee heard evidence on the issue not just from organisations with a role in advocating on behalf of people with mental health problems or learning disabilities; I think that people with a legal background also reflected on the issue. I do not want to name those people, because I may be being inaccurate. I will have to go back and read the Lord Advocate's comments. I think that the Law Commission also gave subsequent oral evidence to the committee, but that will have to be checked for the sake of accuracy. As I say, I have a rusty brain.

There are real issues to do with people who have a bona fide mental disorder or psychotic illness who understand that what they are doing is wrong but who cannot resist their command hallucinations because of the severity of their diagnosed illness. I continue to be concerned about that. However, I am happy to check the evidence and write to the cabinet secretary if need be.

Kenny MacAskill: We are more than happy to consider any representations from the committee or individual members. We are standing on the views of the Law Commission, but we appreciate the complexities that are involved and we are more than happy to consider information that people provide to assist with the Law Commission's proposed changes. Criminalising the sick is the last thing that we are seeking to do. If we can avoid any manifest injustices, we will be more than delighted to do so. However, the difficulty lies in ensuring that we draw the line so that certain people to whom you have referred do not escape justice.

The Convener: To be fair to Ms Constance, her memory is not flawed. I recollect such evidence being given. Obviously, the matter could be pursued to advantage.

A letter has been received from the Scottish centre for crime and justice research that relates to section 41, on breach of undertaking. I am not totally satisfied that the objection in it is particularly well founded. Can you assure us that there was adequate consultation on that section? Does it widen the net, as has been claimed, bearing in mind the terms of the 1995 act? I do not think that it will make things particularly different, but I am interested in receiving an explanation from the cabinet secretary or one of his officials.

Kenny MacAskill: I cannot give you a categorical assurance on the matter, but I am more than happy to undertake research and to write to you about it.

George Burgess: Last September, we published a document entitled "Revitalising Justice—Proposals to Modernise And Improve The Criminal Justice System" in which we outlined our intentions. No comments on that matter were received at that stage.

The Convener: That is fine. We may pursue the matter in writing.

Members have no more questions. We will pursue in writing a number of issues that are not as important as those that we have pursued in the meeting.

I thank the cabinet secretary and his officials for their attendance. The committee will now move into private session.

17:16

Meeting continued in private until 17:42.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Letter from the Law Society of Scotland

Dear Member

I refer to the oral evidence session on Tuesday 16 June 2009 and to the Law Society of Scotland's written submission with regard to Parts 8 and 9 of the Licensing (Scotland) Act 2005.

The Law Society's Licensing Law Sub-Committee would very much like to take this opportunity to highlight a few of the practical issues arising with regard to implementation of the 2005 Act.

Firstly - with regard to Section 34 of the Act (Transfer or Application of Person other than Licence Holder). It should be noted that it is considered that the wording in the Action particular, landlords, new buyers or prospective new tenants where the premises licence holder may have absconded, banks or holders of heritable securities are not in a position to apply to the appropriate Licensing Board for the transfer of the licence given the list of prescribed persons as defined in the Licence Transfer (Prescribed Persons) (Scotland) Regulations 2007.

Secondly - A further question has arisen when an administrator is appointed by the Court following upon the insolvency of the premises licence holder.

In terms of the 1976 Act, there was no requirement for the licence to be transferred. The position now is that the administrator would be required to become the premises licence holder in his own right as opposed to as an agent of the insolvent company, (and apply within 28 days of their appointment) and may be reluctant to do so.

This is a matter which requires further clarification.

Thirdly - With regard to the provisions of Section 35, which deals with variation on transfer, the Sub-Committee notes that the transfer will fall if the variation of the licence is not granted. It is also important to have the option to withdraw the variation if the transfer did not proceed.

Fourthly - The Sub-Committee have asked for consideration to be given to the return to a Section 26(2) 1976 Act type consent with regard to new provisional premises licences.The position at present means that applicants would require to obtain all statutory consents and provide fully detailed drawings with a provisional premises licence application. Accordingly application costs may well be prohibitive with no guarantee of the application being granted. There is also the problem that the approved operating plan and layout plan are unlikely to be in a form that will suit a variety of prospective occupiers. The two year period from grant to final completion, apart from relatively small projects, is simply too short.

Lastly - The Sub-Committee would also highlight what may well be major logistical problems in advance of the fast approaching transition day of 1 September 2009. With regard to personal licence holders given that each individual premises will require to have a designated premises manager and such as person must be the holder of a personal licence.

In order to obtain a personal licence, the applicant must hold a relevant training qualification and thereafter apply for the personal licence and have that application processed and granted. It is only then that the personal licence holder can request a Board to note them on the premises licence as the designated premises manager and a personal licence holder can only be a single designated premises manager. Every single premises licence requires a separate designated premises manager. Premises without a designated premises manager by 1 September 2009 cannot sell alcohol and if there is no designated premises manager on the premises licence by 1 December 2009, the premises licence is revoked. Can consideration be given to allowing dispensation for those applications that are in the system by say 31st of July but not processed before 31st August and 1st December respectively?

Whilst the Sub-Committee is at present commenting upon the Criminal Justice and Licensing (Scotland) Bill it would consider it appropriate to bring these matters to the attention of the Justice Committee for information.

Alan McCreadie
Deputy Director, Law Reform
16 June 2009

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Supplementary written submission from the Lord President

As you may recall I was asked, when giving evidence to the Committee about the principles of the Bill, what changes, if a Scottish Sentencing Council were to be established, I would suggest to its composition or membership. I made certain suggestions for change but stated that I would leave the sheriffs and justices the same. In making that comment I had overlooked that the provision in question speaks of "two persons holding the office of sheriff principal or sheriff". As the Sheriffs' Association pointed out in their evidence later that day, that could in theory result in there being two sheriffs principal and no sheriff on the Council.

That would, in my view, be an undesirable result. As the sheriffs are, in virtually all circumstances, the sentencers in the sheriff court, it would be desirable that at least one, if not two, of the members of any Sentencing Council should hold that office.

The Sheriffs' Association has recently reminded me of my response to the Committee and asked me, if I in fact agreed with the view expressed by it, to advise the Committee accordingly. That I am happy to do.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Supplementary written submission from the Association of Chief Police Officers in Scotland

As you are aware, Chief Constable David Strang, Deputy Chief Constable Gordon Meldrum and I presented oral evidence to the Scottish Parliament Justice Committee on 26 May 2009 on behalf of ACPOS in relation to the proposed Criminal Justice and Licensing (Scotland) Bill.

During the oral session it was agreed that we would collectively provide additional information to the Justice Committee to clarify some specific points, these relating to the following:

1. Clarification of the statement in ACPOS' written submission in relation to section 18 of the Bill - "the good work achieved to date in relation to the deterrence of knife crime would be lost if knife crime is not separated from this legislation."
2. Section 28 – Failure to report serious organised crime – practical examples of pursuing serious organised crime under section 28, and
3. In conjunction with SCDEA, to suggest amendments to the definition of extreme pornography in section 34,
4. To consider how the law should deal with computer-generated images, cartoons and drawings that graphically depict children in a sexually abusive way. Should legislative provisions be extended to deal with extreme adult pornography of a similar type? (Consideration might be given to the use of the phrase "explicit and realistic" as part of the definition of what constitutes an extreme image), and
5. Section 34 – definition of the word ‘possession’

The ACPOS and SCDEA positions are now provided in respect of the above issues:

Section 18 – Amendments of Custodial Sentences and Weapons (Scotland) Act 2007

ACPOS would confirm that it was never their intention that knife crime be separated from the provisions of the Criminal Justice and Licensing (Scotland) Bill. Their original response was intended to convey the position that considerable work has been undertaken over the previous years, both in relation to policy development and also in terms of communication, to send a clear message to those who carry, possess or use knives that they are likely to face a term of imprisonment.

Changes to legislation, such as the Police, Public Order and Criminal Justice (Scotland) Act 2006, the Lord Advocate guidelines on knife-crime and general changes to sentencing for knife-crime, collectively demonstrate an attitudinal and societal change to knife crime and provide a clear message that there will be a

presumption that those found guilty of carrying a knife would face a term of imprisonment.
The Criminal Justice and Licensing (Scotland) Bill provides that there will be a presumption against sentencing individuals to short term sentences. Section 18 states that “as soon as a short-term custody and community prisoner has served one-half of the prisoner’s short-term custody and community sentence the Scottish Ministers must release the prisoner on short-term community licence”.

The original ACPOS written response was attempting to communicate that the provisions of section 18 of the Criminal Justice and Licensing (Scotland) Bill may be seen by some as contradicting earlier actions and messages sent out in relation to knife crime.

In their previous written response, ACPOS were merely attempting to highlight that there may be a conflict of messaging arising from the current sentencing position on knife crime and that proposed by the Criminal Justice and Licensing (Scotland) Bill. ACPOS were suggesting that this may be an issue requiring separate consideration so as not to undermine all the good work that has been done previously around knife crime.

ACPOS were not intending to suggest that knife crime be treated differently from other crimes or be separated from the provisions of the Bill; rather they were trying to highlight through the example of knife crime, that there may possibly be unintended consequences arising due to the generality of the provisions contained within section 18 of the Criminal Justice and Licensing (Scotland) Bill.

Section 28 – Failure to Report Serious Organised Crime

As indicated by Mr Gordon Meldrum whilst giving his evidence to the Committee, ACPOS and the SCDEA support the proposal outlined in section 28.

Those individuals who are members of a trade business, in employment or a profession - whether it is the banking, financial or legal profession or any other profession for that matter - but who through their involvement with either individuals or groups of individuals obtain a knowledge of the business of serious organised crime or form a suspicion that they may be subject of exploitation by serious organised crime groups and fail to report that knowledge or suspicion should be held to have committed an offence. This can be illustrated through the following examples.

During a recent investigation it became apparent that a number of persons were identified as having knowledge of the business of a serious organised crime group. There was however insufficient evidence to charge them with offences in connection with the primary activity of the group. Had the provisions of section 28 been available then they most certainly would have been charged under those provisions. As it was, whilst a number were charged with other offences, some of those involved could not be charged and therefore evaded prosecution.

In another example, during a particular operation, it became apparent that professionals from both the legal and finance communities had knowingly facilitated the movement and dispersal of funds of a serious organised crime group. Whilst it was possible to report offences under the Proceeds of Crime Act, 2002, again had the provisions of section 28 been available then they would have been reported under those provisions.

We are also aware of examples where members of financial institutions have been in receipt of gifts and hospitality from members of serious organised crime groups in return for arranging lending facilities which provide the group with financial stability whilst at the same time ensuring that the serious organised crime group is protected from any attempts by the financial institution to recover any unpaid debt by providing the financial institution with plausible explanations as to why credit should be extended.

A professional individual not subject to oversight by any professional body provided advice to serious organised crime groups on ‘tax avoidance’ whilst never actually taking any personal possession of criminal property.

Another professional individual, whose business was to incorporate limited companies and establish associated bank accounts on behalf of unidentified overseas individuals, many of whom were identified as having links to serious organised crime groups, utilised members of his family to act as company directors and secretaries who signed powers of attorney to allow the individuals overseas to operate bank accounts.

During one Strathclyde Police serious and organised crime operation, investigations identified that the principal target of the operation was using the services of various professionals. One was known to have been paid sums of cash (aside from his professional fees) to engage in activities to protect those involved in the crime group. Whilst he was not directly involved in the activities of the serious and organised crime group, he is known to have had knowledge that the individuals he was acting for were involved in serious and organised crime. Another provided legitimate professional services to launder money obtained through serious and organised crime. Whilst he was not directly involved in the criminal activities of the serious and organised group, he had knowledge that those he was acting for were involved in such activities. The provisions proposed in section 28 would have been of great assistance during this operation.

During another Strathclyde Police operation into serious and organised crime, the principal target is known to have used the services of many individuals within local authorities, the legal, banking and financial professions to secure land deals in a bid to launder illegally obtained money. Assessments of those who have assisted the target suggest they were aware (i.e. had knowledge) that the target was involved in serious and organised crime, but that they themselves were not directly involved. Again, the provisions proposed in section 28 would have been of great assistance during this operation.

The actions of the individuals referred to clearly demonstrate that they may have knowledge, but that they may not have direct involvement in serious organised crime. We believe the above examples clearly demonstrate the requirement for section 28 for those who have knowledge of the activities of serious organised crime groups but who are not themselves directly involved in such activities.

Section 34 – Extreme Pornography

Definition of 'extreme pornography'

Section 34 proposes amendments to section 51 of the Civic Government (Scotland) Act 1982 to include the creation of the offence of possession of extreme pornographic images. An 'extreme pornographic image' is described as an image which is *obscene, pornographic and extreme*.

As can be seen Section 34 refers to the depiction of certain acts *in an explicit and realistic way*

A ***pornographic*** image is defined as being of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal.

An ***extreme*** image as an image which depicts*, in an explicit and realistic way a*ny of the following:-

(a) An act which takes or threatens a person's life
(b) An act which results, or is likely to result, in a person severe injury
(c) Rape or other non-consensual penetrative sexual activity
(d) Sexual activity involving (directly or indirectly) a human corpse
(e) Any act which involves sexual activity between a person and an animal

ACPOS are fully supportive of the provisions set out within (a) to (e) above. However, with regard to the definition of '***extreme'***, and accepting that it is being used to refer to an image which is defined as pornographic, it may be considered that the list of depictions (a) to (e) above are restrictive and if so it is suggested that the Bill could be amended to replace the provisions currently set out within (a) to (e) to the following:

(1) an illegal act,
(2) an act which appears to be illegal and cannot readily be construed otherwise; or
(3) an act which is/would be an offence in Scotland in respect of which the court, in imposing sentence or otherwise disposing of the case, would be likely to determine that there was a significant sexual aspect to the behaviour.

This would have the effect of including all images of illegal acts committed with a sexual motivation (subject to the exclusions currently outlined within the Bill).

Whilst the words '***pornographic***' and '***extreme***' have been further defined within the legislation, the word '***obscene***' has not.

In regard to that which may be obscene, if it is considered appropriate that obscene is defined as '***abhorrent to morality or virtue; specifically designed and intended to incite lust or depravity***', it fits with the definition of pornographic and should be outlined within the legislation.

An image which is designed or intended to incite lust or depravity, is of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal and depicts, in an **explicit and realistic** way, any of the acts described, can be said to be an extreme pornographic image.

Images which are judged to be pornographic and extreme could be accepted as being obscene if they are offensive, disgusting and offend accepted standards of public decency. If an act containing a significant sexual element is considered to be illegal then depictions of that act which are produced for the purpose of sexual arousal should be encompassed within this legislation.

The use of the phrase '***in an explicit and realistic way'*** is worthy of debate when considering the definition of 'extreme' in respect of cartoon images, etc. It may be argued that cartoon (or other) images with gross distortions are not 'realistic'. However these may well portray extreme pornographic images which are clearly understood.

Potentially this offers a loop-hole in the legislation. It may be more appropriate to **address the action** rather than the realistic portrayal of the image. For example reference may be made to an image being extreme if it *'depicts in an explicit manner a representation of an event of a sexual and pornographic nature'*.

Dealing With Cartoons and Computer-Generated Images

When considering cartoons etc. of indecent images of children it may be worth remembering that pictures of actual child abuse have a crime attached and a real victim in addition to the possession etc of the image constituting an offence. It could be argued therefore that the possession of a cartoon or other computer generated image etc may be considered to be a lesser offence.

However as the management of offenders becomes ever more important we may be called upon to make assessments on offenders who have cartoons etc. depicting COPINE level 4 and 5 abuse but "real" images of a lesser COPINE level. Does this make them more or less likely to offend against a child?

From experience it is most unusual to find such material without conventional indecent images being present. At present, the images present would be counted and the COPINE levels determined and any other relevant material included in an informative paragraph within the body of the report to the Crown office and Procurator Fiscal's Service. This serves the requirement to inform the legislative and post conviction management of offenders.

As usual the crux of these deliberations revolve around what we consider to be more important, sufficient resources to detect people with unacceptable material, or managing the risk they pose and/or rescuing children whose abuse has been made internet currency.

There are however, examples of such material which may be considered obscene pornography (within the above definitions) but not extreme. Pornography depicting aliens, monsters, angels, gods, etc are examples of this.

Any meaningful attempt at including such material in legislation should include a phrase such as '***explicit and realistic depiction of a human being'*** carrying out the extreme pornographic acts as described.

Definition of 'possession'

This matter was subject of previous discussions between DI McDevitt of the SCDEA E Crime Unit, Mr. Gerry McLaughlin, (Scottish Government, Criminal Law and Licensing Division), Fiona Hooligan and Dawn Sampson (Both Crown Office and Procurator Fiscal's Service).

The general agreement was that any proposed legislation should reflect the current legislation used for the possession, manufacture and distribution of indecent images of children, namely Section 52 Civic Government (Scotland) Act, which is informed by stated cases. This view was supported by the Crown Office representatives.

If an individual goes onto the internet, whether a website, forum, newsgroup, peer to peer network, etc and downloads an indecent image of a child onto their computer that individual has committed the offence of **manufacturing** an indecent image of a child, under Section 52 (1) (a).

If that individual then sends that image, by whatever means, to another person or persons, that individual has committed the offence of **distribution** of the indecent image of a child, under Section 52 (1) (b).

It is accepted that if an individual manufactures and/or distributes such images it can be said that the individual had been in possession of them inasmuch that they (the images) were under their knowledge and control.

Possession is only ever libelled in seclusion when the provenance of images cannot be determined, for example when a suspect is found in possession of compact disks or other media. Manufacture and Distribution are seen as more serious offences and dealt with as such by the Scottish Courts.

The proposed legislation deals only with **possession** of images and fails to make any mention of manufacture or distribution. This omission is hard to understand.

With the logical progression from criminalising the possession, etc of images of actual child abuse to criminalising the possession, etc of 'generated' images, it seems equally logical that where extreme adult pornography is criminalised this should be extended to include ‘generated’ images. In each case the ‘generated’ images may be said to perpetuate demand for such images in all their forms and therefore lead to further abuse and the coercion or forced participation of actual persons in the creation of real images. This is particularly concerning given the increased involvement of Organised Crime Groups in the production of such images and the trafficking of participants.

In terms of a definition for **“possession”** the standard definition of being under a person’s knowledge and control is accepted.

There are exclusions outlined within the proposed Bill which deal with aspects of obtaining unsolicited images e.g. the receipt of an image within an e-mail with there being no knowledge of the content prior to opening the message and the appropriate action being taken within a reasonable period of time.

During the Committee’s oral session on 26 May specific issues were raised concerning the definition of possession. Having considered these further, ACPOS and the SCDEA are content that existing legislation and case law would provide sufficient definition around the term ‘possession’.

ACPOS hope the above information assists members of the Justice Committee.

Stephen House
Chief Constable

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Supplementary written submission from Victim Support Scotland

Victim Support Scotland was asked, while giving oral evidence on the 26th of May to the Justice Committee regarding the Criminal Justice and Licensing Bill, to provide additional written evidence regarding disclosure of sexual evidence. We were also asked to provide further support for our statements in relation to community payback orders.

1. Disclosure

1.1 Material information

Section 85 in the Criminal Justice and Licensing (Scotland) Bill states that "information" means "material of any kind…given to or obtained by the prosecutor in connection with the case against the accused". The section declares that this includes convictions, outstanding charges and statements of witnesses. Section 85(2)(c) proclaims that "any previous convictions and outstanding charges relating to witnesses" must be "material to the accused's case" to be seen as information that must be disclosed. Victim Support Scotland would like to see wider clarification on what should be seen as "material". The vital part in disclosing information is that it should be relevant to the case at hand. Sections 89(3) to 89(5) states that the prosecutor must disclose information to the accused that "tends to exculpate the accused"; that would "be of material assistance to the proper preparation or presentation of the accused's defence"; or that "relates to the material line of the accused's defence". As such, general information aimed to cast doubt on the credibility or reliability of a witness should not be allowed, unless it is specifically necessary and relevant to the case. This is of vital importance, as extended disclosures may adversely impact on victims' and witnesses' willingness to report a crime or step forward as a witness, due to fear that their past may be openly disclosed in court and to their family. It is of fundamental importance to ensure that the procedures for disclosure do not inhibit victim and witness participation in the criminal justice system.

1.2 Sexual history and character evidence

Victim Support Scotland shares Rape Crisis Scotland's concern that victims in sexual offence trials are continuously being questioned on their sexual history and character, despite legal reforms seeking to restrict the use of such evidence. The questioning greatly invades the privacy and dignity of the victims and in many instances, does not bring any more reliable facts to the trial. Instead, the evidence merely serves to disregard and discredit the information given by the victim. We strongly agree with the aim of the Sexual Offences (procedure and Evidence) (Scotland) Act 2002 (the 2002 Act), which according to its Policy Memorandum was to strengthen existing legal provisions restricting the extent to which evidence can be led regarding the sexual history and character of victims in sexual offence trials. The Policy Memorandum further declares that:

> “Such evidence is rarely relevant. Even where it is relevant, its probative value is frequently weak when compared with its prejudicial effect. This may include invasion of the complainer’s privacy and dignity and distortion of the course of the trial by diversion of attention from the issues which require to be determined in arriving at a verdict onto the past behaviour of the complainer.” (para 17)

Following the 2002 Act, the then Scottish Executive commissioned research into the impact of the reform. The researchers concluded that the reforms made by the 2002 Act has led to more, rather than less, use of sexual history and character evidence in court. “The legal reform has not only not had the intended effect but could be said to have moved in the opposite direction”.[1] For sexual history and character evidence to be led under the 2002 Act, the party wishing to lead such evidence must apply in writing to the court. Section 274(1) of the 2002 Act sets out the test to be applied by the court in determining whether or not to allow the evidence. This includes a requirement for the court to balance the significance of the evidence sought to be admitted against the risk of prejudice to the administration of justice if the evidence is admitted. “The “belt and braces” and “scatter-gun” strategy adopted by Defence lawyers in the drafting of applications suggests that the objective is to find anything that the court will accept”.[2] The research into the impact of the 2002 Act found that it is relatively easy to construct a claim that whatever questioning or evidence the Defence wants to put on the complainer has some relevance. “Moreover, most Judges seem to take the view that if what the Defence seeks can be claimed to have some relevance to fair trial considerations, then those considerations outweigh those in relation to the complainer, and the evidence sought is allowed”.[3]

In contrast to the view of the courts, the Crown Office and Procurator Fiscal Service claims that the probative value of the (sexual) evidence is to be weighed against its potential prejudicial effect in relation to the privacy of the complainer and the administration of justice. The legislation seeks to ensure that the accused’s right to cross-examine witnesses is weighed against the complainer’s right to privacy, as well as public interest considerations. These public interest considerations include: complainers not being deterred from reporting crimes; juries not being distracted by irrelevant material; and the prevention of acquittals arising not from the evidence but from prejudice.[4] Current practices on this matter are however evidencing developments in the opposite direction, with an increase in the use of evidence of a sexual nature.

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[1] M Burman, L Jamieson, J Nicholson & O Brooks, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study*, Scottish Government Social Research (2007), p. 9

[2] Ibid, p. 134

[3] Ibid

[4] *Review of the Investigation and Prosecution of Sexual Offences in Scotland*, Crown Office and Procurator Fiscal Service (2006), p. 11

Rape Crisis Scotland claims that “one of the reasons that women give us at rape crisis for not reporting their experience to the police is the prospect of giving evidence in court and their past history being under scrutiny”.[5]

Victim Support Scotland believes the frequency with which sexual history and character evidence is used needs to be addressed. Acknowledging that the current Criminal Justice & Licensing Bill does not look at the use of sexual evidence *per se*, we believe that the issue could be partly addressed through disclosure provisions. Victims’ previous sexual history and character should not automatically be seen as “material”, as it deals with previous events and should generally not be of more importance to determine the matter at hand than for any other crime. Therefore this type of evidence should, similar to other forms of evidence, only be allowed if it is **materially relevant** to prove whether or not the accused is guilty of the accused offence. **The criminal justice system, including the courts, should resist the view that any comment or derogative fact about the victim’s credibility or past experiences is adequate grounds for relevance and necessity in order to fulfil the “fair trial” requirement of article 6 ECHR. This includes the victims’ medical records; unauthorised disclosure of this information is a serious breach of the victims’ privacy under article 8 ECHR, exposes victims to irrelevant and speculative comments regarding highly private matters and can significantly impact the willingness of rape victims to report a crime.**

Research regarding the experiences of being a complainer in a sexual offence case found that all interviewed victims, who had given evidence in court, question whether the process had been worthwhile. They said that they would not recommend anybody to pursue a sexual complaint and if they themselves were victimised again, they would try to just “get on with it”.[6] This must be addressed; it must be ensured that the courts are accessible to all victims of crime and that victims’ rights are upheld throughout the entire justice process. Being a victim of a sexual offence is an extremely traumatic experience, and it is a difficult step to report the incident to the police, knowing that there will be intrusive questioning and examinations to come. Having taken the decision to engage in the criminal justice system, it is very important for victims to feel that their story is believed, that their suffering and status as an innocent victim is recognised, and that a proportionate response is given to the violation they have gone through. This is vital to ensure that victims feel confident to report any crimes committed against them, which is fundamental to the functioning of the entire criminal justice system.

1.3 Safeguarding disclosed information

In addition to regulate what information should be disclosed, it is also important to control what happens to information once it has been disclosed.

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[5] Written evidence given to the Scottish Parliament, Justice Committee by Rape Crisis Scotland regarding Sexual Offences (Scotland) Bill (2008)

[6] M Burman, L Jamieson, J Nicholson & O Brooks, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study*, Scottish Government Social Research (2007), p. 129

Section 97 of the Criminal Justice and Licensing (Scotland) Bill, declaring means of disclosure, states that “the prosecutor may disclose the information by any means” and “in particular, the prosecutor may disclose the information by enabling the accused to inspect it at a reasonable time and in a reasonable place”. Victim Support Scotland believes that the presumption should be that sensitive information regarding the victim, including initial statements from the victim, medical records, personal background should not be given to the offender to use at his/her disposal. It is particularly important for victims of serious crime that the offender does not have control of the victim’s information, including detailed statements of the offence. In sexual offence cases, the offender has lost the ability to represent him/herself and cross-examine the victim, due to the strain and effect this would have on the victim and to avoid secondary victimisation. We believe the same application of thought can be applied to prohibit offenders having control over medical records and disclosed statements from the victim, including personal details of a sexual nature and exhaustive descriptions of the crime, as this intrudes on the victim’s right to respect and privacy. Many victims feel forced into a passive position throughout the criminal justice process, with no control over what happens during any part of it. They may feel that in general their views and feelings are not taken account of, which may at times be almost as distressing and disempowering as the original crime, resulting in what is often referred to as the "secondary victimisation" of victims. “What can be done…is to minimise that discomfort and distress and ensure that appropriate support is available to victims both within, and from outwith, the system, to help them deal with both the consequences of the crime and any distress caused by the process leading up to the trial, the trial itself, and thereafter”.[7] **Part of doing so is to ensure that the victim’s statements, experiences and medical records are treated with respect and dignity, and should therefore not be given to the accused by the defence council to be used at his/her own disposal.** We fully agree that the statements should be shown to the accused, who should be given full access and understanding of its content. For instance, the defence should present the information to the accused in the defence council’s office or if the accused is in custody, in an allocated room. However, the information should be given back to the defence council once the accused has gained a full understand of its content, to respect the victim’s right to privacy and to ensure that the documents are not being used inappropriately.

2. Community Payback Orders

As stated in the oral evidence session, we agree with the introduction of payback orders and the overall aims set out in the bill. For many offenders, community-based punishments are proven to be more effective at reducing reoffending compared with short term prison sentences. As such, community sentences can potentially mean fewer victims and victimisation throughout our community.[8] In our view, community payback orders would however only be appropriate for less serious non-violent crimes. In a survey into public opinions regarding community sentence, it was collectively held that "community service should only be used for minor offences".[9] Section 1(1) of the Criminal Justice and Licensing Bill declares that the purpose of sentencing includes elements of punishment; deterrence; rehabilitation; public protection and reparation. We expect that any community payback order will take all these factors into account.

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[7] *Redressing the balance - Cross-Examination in Rape and Sexual Offence Trials, a Pre-Legislative Consultation Document*, Scottish Executive (2001)

[8] *Community Sentencing – Reducing reoffending, changing lives*, Ministry of Justice (2008)

Research conducted by SmartJustice and Victim Support gives a unique insight into how victims think the criminal justice system should deal with people who commit non-violent crimes. It shows that around two thirds (62%) of victims think that sending the offender to prison does not prevent re-offending and 8 out of 10 (80%) victims think that more constructive activities for young people in the community and better supervision by parents would be effective in stopping re-offending. When asked how non-violent crimes like shoplifting, car theft and vandalism can be reduced, more than half (54%) were in favour of making offenders work in the community to stop them returning to crime. "It is clear from the survey that most victims don't believe that prison produces law abiding citizens…What people seem to want is not retribution but effective ways to prevent the next victim".[10] Head of Research & Development at Victim Support, Peter Dunn, said "Victims are often assumed to be vengeful towards offenders and favour harsh punishments. This is misleading. Most victims, while feeling angry about what has happened to them, want the offender to stop offending both against them and against other people. This research confirms that a lot of victims are interested in the prospect of constructive work being done with offenders to prevent their further offending. It shows that many victims of crime want effective measures to tackle the root causes of offending, which involved more than vengeance and punishment for its own sake".

Research into public perceptions and attitudes in Scotland on community sentencing shows concerns regarding current changes in prison policies. The introduction of privileges such as television and game boys is seen by the public as rewarding prisoners for their crime and does little to deter people from reoffending. Furthermore, "those who receive a prison sentence for a minor offence may be exposed to hardened criminals, the repercussions of which may be long lasting and ultimately detrimental to the individual and society".[11] We believe any community based approach to disposals must give relevant, timely and meaningful information for victims throughout the process. One way to ensure that victims are kept fully informed of the outcome of the case and the reasoning behind it is to establish a public domain of sentencing information. This would enable the general public, including victims and their families, to search for cases to assess previous sentences along with the application of thought or reasons behind that particular sentence. Accessing such information would set reasonable expectations for victims, as well as make the entire sentencing process more transparent to the general public. This would also help to make the court process more transparent which would increase confidence in the justice system.

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[9] *Community sentencing: Public Perceptions & Attitudes, Summary Research Report*, Scottish Executive Social Research (2007)

[10] SmartJustice, "Victims say stopping re-offending is more important than prison" (2006), www.smartjustice.org *[Link no longer operates]*

[11] *Community sentencing: Public Perceptions & Attitudes, Summary Research Report*, Scottish Executive Social Research (2007)

For victims and the communities in which they live, a primary need in the aftermath of crime is safety and sense of security. Seeing the offender with no apparent restriction on their freedom critically undermines any concept of justice being served. Currently there is no real provision of information to educate the public as to the role, remit and effectiveness of community sentences.[12] In our view, it is very important that the community payback orders are visible and provide a real and tangible benefit and reparation to the community, while fulfilling the purposes of sentencing; i.e. punishment; deterrence; rehabilitation; public protection and reparation.

The fact that the offender is to be convicted of an offence punishable by imprisonment implies that it is to be considered a substantial crime and not a petty incident. From a victim perspective, it is therefore questionable to substitute imprisonment with merely a supervision requirement or drug treatment. Section 14 227A(2) states that a community payback order must impose "one or more of the following requirements:

(a) a supervision requirement,
(b) an unpaid work or other activity requirement,
(c) a programme requirement,
(d) a residence requirement,
(e) a mental health treatment requirement,
(f) a drug treatment requirement,
(g) an alcohol treatment requirement."

Victim Support Scotland acknowledges that it is very difficult to balance and compare different disposals; no punishment will compensate the intangible costs of being a victim of crime. However, looking at the requirements in section 14, 227A(2), we believe it is not proportionate to replace a custodial sentence with for instance merely unpaid work or a drug treatment requirement. We therefore believe there should be requirement to combine more than one of the mentioned requirements, in particular if one of the requirements is a treatment order. It is absolutely vital that the verdict is proportionate and reflects the severity and the circumstances of the crime. The criminal justice system must demonstrate to the victim that it recognises the victim's position and the impact of the offence. Community sentences are primarily efficient if punishment is combined with the opportunity for offenders to turn away from crime.[13]

As stated during the oral evidence session, in addition to the suggested proposals, we would like to introduce the two following requirements:

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[12] Ibid
[13] *Community Sentencing – Reducing reoffending, changing lives*, Ministry of Justice (2008)

a) an alternative (suspended) sentence should be set out by the court alongside the community payback order, which would announce what sentence would be given if the offender breaches the payback order. This would give more clarity to the victim, offender and the general community about the content of the sentence and what will happen if the order is not fulfilled.

b) a community payback order can only be given if the chosen treatments/activities are available at the time of sentencing. This will ensure that the offender will start the disposal straight away, instead of for instance waiting several months to begin a particular treatment, which gives a signal to the victim that nothing has happened. Confidence in the criminal justice system has been shown to form an important part in the recovery process for many people affected by crime; the belief that justice has been made greatly aids recovery. The effects of unclear and disproportionate sentences undermine this concept and have a damaging effect on both victims and communities. It is therefore of vital importance, both to the victim and for society as a whole, that the community payback order will provide an adequate and proportionate response to the crime and that each disposal will fulfil all the purposes of sentencing as set out in section 1(1) of the Bill.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Supplementary written submission from James Chalmers
School of Law, University of Edinburgh

In view of the fact that the Committee, in today's meeting, did not have time (in the final evidence session) to ask questions on any issues other than sentencing, I thought it might be helpful to let you have a note on two other issues in respect of which you indicated that the Committee had expressed particular interest.

You mentioned that the Committee "has questioned the scope of the [extreme pornography] provisions contained in the Bill and has also asked whether the definition would or should cover computer generated images". I am not sure exactly what aspects the Committee had in mind in relation to scope, but I would be happy to provide a response to any issues raised. As for **computer generated images**, I would comment as follows:

First, are these covered? I think it is clear that s 34 of the Bill does cover computer generated images. The only limiting factor is that an image must be "realistic" to fall within the scope of the provisions. The Bill is not limited to particular *types* of image. In this respect, it is rather wider than the offence of possessing indecent photographs of children, which is restricted to "photographs or pseudo-photographs", including photographs comprised in films. A "pseudo-photograph" is "an image, whether produced by computer-graphics or otherwise howsoever, which appears to be a photograph". (Civic Government (Scotland) Act 1982 ss52-52A.)

Professor McGlynn and Dr Rackley, in their written evidence (CLJ8, para 3.1) have argued that "[p]aintings/drawings are not covered as they are not realistic". There is no reason why, as a matter of fact, paintings and drawings cannot be regarded as "realistic", and it is common to use such language to describe works of art. McGlynn and Rackley's interpretation might imply that only photographs or pseudo-photographs are covered by s 34, but if that were the case one would expect the draftsman to adopt the language found in ss52-52A of the 1982 Act. The use of the word "image" clearly implies that materials other than photographs and pseudo-photographs are covered by s 34. *Leda and the Swan*, the painting to which McGlynn and Rackley refer, might be regarded as "unrealistic" purely on the basis of the size of the swan relative to Leda in the image, and not because it is a painting. Even if McGlynn and Rackely are right and I am wrong on this point, the potential "chilling effect" on freedom of expression which can be created by ambiguous statutory language will be obvious.

Secondly, should computer generated images be covered? This is a more difficult question to answer without understanding the rationale for the new offence: as I noted in my written evidence, this is unclear. One possible (partial) justification for the offence is the likelihood of harm having been caused to those persons depicted in extreme pornography. This has little application to depictions other than photographs, although the inclusion of pseudo-photographs might be justified on the basis that it can (I assume) be difficult to establish that an image is a genuine, rather than a pseudo, photograph. The justification for the new offence (whatever that may be) is clearly stronger in respect of photographs than other material. There would be much to be said for limiting the scope of the offence to photographs and pseudo-photographs. This would be consistent with the regime governing indecent photographs of children and would help to dispel concerns about works of art falling within the scope of the offence.

You mentioned also that views on **provisions on mental disorder and unfitness for trial** might be sought. I note that, when representatives of the Law Society and the Faculty of Advocates gave evidence earlier this morning, there was some discussion as to whether the proposed definition of mental disorder excluding criminal responsibility (under s 117, inserting s 51A into the 1995 Act) was adequate. Reference was made to the written submission of the Law Society of Scotland, which states that (CJ86a, p 13):

> "…a person who kills his or her children while suffering from a depressive illness may be able to appreciate what he/she is doing and understand that it is wrong in the eyes of the law, but nonetheless be driven to commit the crime by his or her illness. In such a case his or her illness overcomes his or her volition. The Society notes that the Bill does not allow a special defence in these circumstances."

I think, with unfeigned respect, that this concern proceeds on a misunderstanding of the Bill's provisions. The Society may have in mind the much-criticised English legal position. In English law, no defence of insanity is available to a person who knows their actions to be *legally* wrong, but – due to mental disorder – does not appreciate that they are *morally* wrong. But that is the English legal position, not the Scottish one. Scots law has previously allowed a defence of insanity in the circumstances envisaged by the Society, where mental illness renders a person incapable of appreciating the moral wrongfulness of their actions (see *HM Advocate v Sharp* 1927 JC 66, the facts of which are very similar to the Society's example). The Bill would not change this, and a defence would similarly be available under the new s 51A, which encompasses a failure to appreciate either legal or moral wrongfulness (see para 527 of the Explanatory Notes to the Bill). (The English position has, incidentally, been rejected by other common law jurisdictions.)

The possibility of what is sometimes termed a "volitional insanity" defence was fully reviewed by the Scottish Law Commission in its 2004 *Report on Insanity and Diminished Responsibility* and rejected for cogent reasons which have not been challenged. The Commission had in mind the fact that those who argued for a volitional test often had in mind cases such as that envisaged by the Society, which are in fact accommodated by the defence proposed by the Commission and included in the Bill.

It should be borne in mind that a person who kills in circumstances where mental illness has substantially diminished their capacity for self-control would be able to plead diminished responsibility under the new s 51B and so be convicted of culpable homicide rather than murder.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Further written submission from the Crown Office and Procurator Fiscal Service

Following the recent appearance of the Lord Advocate before the Justice Committee on 9 June 2009, I now attach a short note (please see the Annexe) setting out the changes in legislation in England & Wales in relation to the use of defence statements, including a requirement on the defence to actually specify within the defence statement what the actual defence is upon which they seek to rely.

The Crown Prosecution Service Policy Division has also confirmed that these legislative changes were accompanied by an increased drive by the Judiciary to ensure that the defence complied with the statutory requirement, following a clear indication both from Parliament, through the legislative changes, and the Lord Chief Justice that disclosure must be a priority for the courts. As a result, where a defence statement has not been lodged, judges are requiring the defence to complete these in court at the pre-trial hearing or alternatively they are being advised that if a defence statement is not lodged then adverse comment can be made to the jury. Together these changes have already seen a significant positive impact and work is currently ongoing to further strengthen the process.

Firstly, the Criminal Procedure Rules are being revised to include a standard form of defence statement to ensure consistency of practice. Should the provisions in relation to defence statements be implemented in Scotland, I understand that a similar approach will be adopted here. Secondly, the rules are due to be revised to include a requirement on the Crown Prosecution Service to advise the court when initial disclosure is carried out. The requirement to submit a defence statement is linked to the timing of initial disclosure, as the statement must be lodged within 14 days of initial disclosure. By advising the court of the date of initial disclosure, this will enable the court progression officer to ensure that the defence comply timeously with the requirement to submit a defence statement and to liaise with them where none has been lodged.

I hope that this information is helpful. Please let me know if there are any other issues on which the Justice Committee would like information.

John Logue
Head of Policy Division

Annexe

NOTE – LEGISLATIVE CHANGES IN RELATION TO DEFENCE STATEMENTS IN ENGLAND AND WALES

Criminal Proceedings and Investigations Act 1996

This act introduced the requirement on the defence to lodge a defence statement where the accused is charged with an indictable offence. It further provides for a system of voluntary defence statements for non-indictable offences. Such defence statements would become mandatory if the defence then seek to apply to the court for an order requiring the prosecutor to disclose information that the prosecutor has not deemed to be material.

It should be noted that the 1996 Act, when first implemented, did not include any provisions specifying what information should be contained within the defence statement nor were there any provisions in relation to updating previously lodge defence statements.

Criminal Justice Act 2003

This Act inserted a number of new provisions into the 1996 Act in relation to:

- Content of the defence statement;
- Updated defence statements;
- Notification of defence witnesses;
- Failings in disclosure by the defendant.

These provisions were implemented in April 2005.

Content of the Defence Statement

An additional section into the 1996 Act, prescribing what information should be included within the defence statement, namely:

- The nature of the defence, including any particular defences on which the defendant intends to rely;
- Indicating the matters of fact on which the defendant intends to take issue;
- Setting out, in respect of each of these, why the defendant takes issue with the prosecution;
- Indicating any point of law which s/he wishes to take and any authority upon which s/he seeks to rely.

In addition, the new section sets out details of the information that must be included in the defence statement where the defendant is seeking to rely on a defence of alibi.

Updated Defence Statements

The 2003 Act also introduced a further additional section into the 1996 Act in relation to updated defence statements, specifying that the defence must provide an updated defence statement in advance of the trial, or alternatively a written statement confirming that there has been no change in his/her defence since the lodging of the initial defence statement.

Defence Witnesses & Experts

Although not strictly in relation to defence statements, the 20033 Act inserted 2 further provisions into the Bill relating to advance disclosure of the defence position; namely provisions requiring the defence to intimate details of defence witnesses and details of any experts instructed by the defendant.

Failings in disclosure by the defendant

The 2003 Act also introduced a further new provision on defence statements which enable the judge to warn the defendant that a failure to lodge a defence statement or a failure to include the correct information can result in the possibility of comment being made or inferences drawn. The new provisions also enable a copy of the defence statement to be given to the jury either at the instigation of the judge or on application of either party.

In addition, a new provision was introduced which sets out that the court or the prosecutor can make such comments as appears appropriate if:

- A defence statement is either not lodged at all or is not lodged timeously;
- An updated defence statement is not lodged or is not lodged timeously, where an updated defence statement is required;
- The defence statement contains inconsistent defences or the defendant puts forward a different defence at trial.

Thereafter, the court of the jury can draw such inferences as appear proper in deciding the guilt or innocence of the defendant.

Criminal Justice and Immigration Act 2008

This Act made a further amendment to the 1996 Act and inserted an additional requirement on the defence in relation to the content of the defence statement, namely that the defendant must set out in the defence statement particulars of the matters of fact on which the defendant intends to rely for the purposes of his/her defence.

As a result of this amendment, there was a consequential amendment allowing comments to be made and inferences to be drawn if the accused then seeks to rely on a matter of fact not specified in his/her defence statement.

These provisions were implemented in November 2008.

Crown Office
June 2009

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Supplementary written submission from the Law Society of Scotland

I refer to your email dated 17 June 2009 enclosing a copy of the relevant sections upon which clarification was sought by the Justice Committee.

I would now like to respond as follows.

Section 124 - Licensing of Taxis and Private Hire Cars

As stated in the Society's written evidence, it was noted that the review at present is in terms of Section 17 of the Civic Government (Scotland) Act 1982, and in terms of Sub-Section (2) thereof, it shall be the duty of the Licensing Authority to fix from time to time scales for the fares and other charges …. and to review the scales at intervals not exceeding 18 months from the date on which the scales came into effect (whether proceeding upon a review under this Section or not)."

Section 124 seeks to amend this provision by inserting a new Section 17(2) into the 1982 Act whereby "the Licensing Authority must fix scales for the fares and other charges mentioned …. within 18 months beginning with the date on which the scales came into effect."

The Society noted that this new provision requires that the process be completed within an 18 month period taking into account the consultation process.

It was noted during the oral evidence session that the review period, although not exceeding 18 months, can vary from licensing authority to licensing authority. Indeed, some licensing authorities carry out a review annually. The Society was simply highlighting the practical issue of having the process completed within 18 months as opposed to the position at present whereby there is no obligation to complete the review but an obligation to review scales at intervals not exceeding 18 months.

Although it is preferable to have the process completed within 18 months, Section 17(2) at present allows licensing authorities some flexibility in the circumstances where a subsequent review is due to take place and the fares have not been fixed with regard to the preceding review.

To this end, the Society was of the view that Section 17(2) of the Civic Government (Scotland) Act 1982 does not require to be amended.

Section 125 – Licensing of Market Operators
Section 126 – Licensing of Public Entertainment

In its Memorandum of Evidence, the Society questioned the policy intent of removing the exemption from the Market Operators Licensing Provisions for non-commercial organisations at Section 40(2) of the 1982 Act.

It also questioned the need to license small scale free community based events in terms of Section 126 of the Bill.

It is noted in terms of both the explanatory notes and policy memorandum to the Bill that licensing authorities have discretion as to whether to charge reduced or no fees to charitable organisations etc. in terms of Section 125 and that authorities should have discretion whether to license events such as gala days or school fetes in terms of Section 126. It appears that the Bill does not provide for this discretion. I have considered the terms of Section 9 of the 1982 Act whereby *inter alia* the licensing of market operators and public entertainment only have effect insofar as the licensing authority has so resolved. The discretion referred to in both the policy memorandum and explanatory notes could only be exercised should a licensing authority not resolve to license these activities or, more likely, to resolve either all such classes of an activity subject to exceptions or any particular such class or classes in terms of Section 9(3)(c)(ii) and (iii). It is also noted in terms of Section 9(5)(b) that a resolution made with regard to places of public entertainment in particular shall specify the place or places, or class or classes thereof, which shall thereby fall to be licensed.

This is the only manner in which licensing authorities could decide not to license functions held by charitable, religious, youth, recreational, community, political or similar organisations in terms of Section 40 as amended by Section 125 of the Bill and decide not to license small scale free community based events in terms of Section 41 as amended by Section 126 of the Bill.

If this is the case, there is the curious situation of invoking Section 9 of the 1982 Act in order to circumvent the Section 125 and 126 Amendments to Sections 40 and 41 of the Act.

The Society would once again question whether any amendments to Sections 40 and 41 are necessary and what the reasons for these proposals actually is.

Section 128 – Applications for Licences

At the oral evidence session held on 16 June 2009, the Society's Licensing Law Sub-Committee Convener, John Loudon, in response to a question posed by Paul Martin MSP stated that a bit of leeway with regard to renewals received outwith the time limit as being fair but that practical issues such as the potential for offences being committed outwith the period would no doubt give cause for concern.

With particular reference to the Society's written evidence, concern was expressed at the new Paragraph 5A being inserted into Schedule 1 of the 1982 Act by Section 128(2)(e). The Society stated that the date of expiry of a licence is crucial both as regards to whether an offence has been committed and also, in taxi licensing terms, having regard to the power given to licensing authorities to limit the number of taxi licences for their area, where one of a limited number of taxi licences is now available. The Society further highlighted that there is no test for "on good cause being shown" nor does there require to be a hearing of such good cause.

In all the circumstances, the Society would consider it more appropriate to limit the period to e.g. seven days in order to diminish the likelihood of these issues occurring while still allowing a reasonable amount of leeway although the Society remains of the view that this particular provision does not require to be amended.

Alternatively, should the 28-day period be retained, the Society would consider it appropriate that the licensing authority convene a hearing in order to determine whether there had been cause shown for such a late renewal.

This wording could simply be attached at the end of Paragraph 5A.

Alan McCreadie
Deputy Director, Law Reform

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Supplementary written submission from the City of Glasgow Licensing Board

The provisions contained within the Licensing (Scotland) Act 2005 make the administrative process in relation to occasional licences an unduly onerous one for both applicants and Licensing Boards.

Due to the requirement to allow 21 days for consultation with the Police and Licensing Standards Officers on each occasional licence application, together with the possibility of having to hold a meeting of the Licensing Board (or alternatively allow the applicant an opportunity to respond to any comments received), applications for events in unlicensed premises require to be lodged not less than ***6 weeks*** prior to the date on which the licence is intended to take effect. In many cases, due to the nature of the event, this may not be possible.

The current provisions also remove a significant degree of discretion on the part of the Licensing Board. For example, the only matters that the Clerk or the Board can take into account in determining an application are comments by the Police, Licensing Standards Officers or an objection or representation. This precludes the Licensing Board from taking account of any issues arising from the local knowledge of the members or from allowing consultation with other council sections such as building control or environmental health, whose comments do not take the form of either an objection or representation.

In my view the answer to this difficulty is to substantially amend the provisions contained within sections 56 to 60 of the Licensing (Scotland) Act 2005 so as to essentially revert to the process contained within sections 33 and 34 of the Licensing (Scotland) Act 1976.

If the option of substantially amending sections 56 to 60 of the 2005 Act is not favoured, then I would respectfully suggest that further consideration is given to whether the proposed amendments within the Criminal Justice & Licensing Bill are appropriate. The proposed amendment to allow the consultation period to be reduced down to not less than 24 hours where the application requires to be dealt with “quickly” does0 not appear to take into account that every application requires to be advertised for a period of 7 days. Given this requirement, there would seem little point in enabling the consultation period to be reduced down to not less than 24 hours as this will create a degree of expectation that an application can be dealt with essentially in a few days.

As the licensing section is now processing applications for occasional licences, I can now say (with the benefit of experience) that applicants are finding the statutory prescribed forms both cumbersome and confusing. In turn the amount of information which the Licensing Board has to process is excessive. Licensing Boards should be able to develop their own forms, or alternatively further consultation should be carried out with Clerks to devise a more “user friendly” application.

The administration of occasional licences becomes ever more problematic in terms of the information which requires to be retained in the Licensing Register maintained by Licensing Boards. The Licensing Register (Scotland) Regulations 2007 require that copies of each application form for an occasional licence, together with a record of the decision, are to be retained for five years. The Glasgow Licensing Board processes approximately 4000 to 5000 occasional licence applications per annum. While the licensing section has a very sophisticated software system, it is anticipated that the storage of this amount of data will be significantly challenging. It is unclear what benefit is to be derived from retaining information in relation to short-life events for a period of five years.

All of the above is to be achieved for a fee of £10 per application. This does not reflect the amount of processing required.

In conclusion, and in my own personal view, the arrangements for occasional licences under the 2005 Act have no discernable positive impact on either Licensing Boards or applicants. The situation is not improved by the amendments proposed in the new Bill.

Mairi Millar
Assistant Clerk to the City of Glasgow Licensing Board
18 August 2009

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Letter to the Cabinet Secretary for Justice

Dear Cabinet Secretary

As you will know the Justice Committee is reaching the end of its oral evidence taking.

Many issues have arisen, some minor or technical, some not so minor. There is only so much the Committee will be able to cover at next week's oral evidence session with you, therefore I am writing now to advise that it is likely that there will be a number of issues which the Committee will seek to follow up by way of correspondence following that meeting.

One of the most pressing issues to emerge from the Committee's evidence relates to the licensing provisions. In advance of next week's meeting, the Committee would be grateful if you would advise what representations have been received in relation to any backlog of personal licence applications. From the evidence heard by the Committee, this appears to be an issue of significant concern, particularly given the deadline of 1 September 2009 for all such licenses to be in place. One suggestion made to the Committee was that a further transition period, for applications received by 1 June, extending the date to 1 December could be introduced. Such an adjustment could require the Government to bring forward regulations.

The Committee would be grateful if you would advise what discussions there have been on this issue, what your views are and whether any action is proposed.

I look forward to hearing from you as a matter of urgency.

Bill Aitken MSP
Convener, Justice Committee
17 June 2009

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Response from the Cabinet Secretary for Justice

Dear Convener

Thank you for your letter of 17 June 2009 concerning the state of play on personal licence applications under the Licensing (Scotland) Act 2005.

The Act is being implemented to the timetable set by the previous Scottish Executive. The transition timetable, which started on 1 February 2008, was designed to ensure the licensed trade had sufficient time to apply for premises licences and personal licences, and that licensing boards had sufficient time to process these.

Though there is a concern about the low number of applications for personal licences submitted at this stage in the transition period, it has been possible to submit an application for a personal licence since 1 February 2008. This was set out clearly in the "What all licensees need to know about changes in Scottish licensing laws" document issued to all licensees before the start of the transition. We have also taken every opportunity at various events to stress the need to get applications in as early as possible. Most recently my officials wrote on 12 January to stakeholders including the licensed trade bodies stressing the need for personal licence applications to be submitted, and the importance of Boards processing and issuing licences as speedily as possible. We are also aware that the licensed trade associations have carried out work to alert their members to the personal licence requirements.

To obtain a personal licence a qualification is needed. When it was brought to our attention that some people were completing the training but not taking the next step of applying for the actual licence, the Government contacted the main training bodies and we now understand that it is common practice to remind people of the need to apply, or even to provide application forms at the end of the training.

We are also aware that many Boards and Police forces have reminded applicants for the premises licence of the need to have a personal licence holder designated as a premises manager if they wish to serve alcohol from 1 September. Furthermore, transition regulations require Boards to write reminding each premises licence holder of the need to apply for a personal licence. I am therefore content that every reasonable effort has been made by Government, Boards, and the licensed trade to encourage the trade to submit their applications to allow them to operate under the 2005 Act.

In respect of the second concern about the speed at which Boards are dealing with applications, I have attached for the Committee's interest a table which was complied this month showing the number of applications applied for, granted and issued by each Board. I have instructed officials to continue to monitor the process and to write again reminding licensing boards of the importance of issuing the personal licences as soon as possible. While the table shows a backlog in some areas, I am sure you would agree that it demonstrates Boards are getting on with the task, but success does depend upon the trade submitting their applications in the first place.

The personal licence is a fundamental part of the new licensing regime. It ensures that there is a known, trained person responsible for the serving and sale of alcohol in every licensed premises. There has been a generous implementation period since the Bill was passed in 2005 and the Government will not be extending the 1 September deadline for the Act coming fully into force.

We will however continue to monitor the situation in respect of personal licence applications and may consider a temporary adjustment to the transitional arrangements, if that is justified, to assist the trade and licensing boards in the remaining few months of the transition period.

Parliament has chosen to license the sale of alcohol because it is a unique product and should be treated as such. Ultimately it is for those who wish to benefit from its sale to ensure they have fulfilled their responsibilities in undertaking the necessary training and applying for the relevant licences.

Kenny MacAskill MSP
Cabinet Secretary for Justice
23 July 2009

Personal Licence Applications by Licensing Board

Licensing Board	Liquor Licences at 31/12/07[1]	No of Personal Applications Received	Pending	Granted	Issued
Aberdeen City	646	535	160	375	375
Aberdeenshire	692	275	159	116	116
Angus	361	277	70	207	0
Argyll & Bute	503	446	217	229	0
Clackmannanshire	138	138	19	119	119
Dumfries & Gall	732	707	707	0	0
Dundee City	469	442	96	346	346
East Ayrshire	335	452	31	421	By July
East Dunbarton	155	204	204	0	0
East Lothian	294	285	285	0	0
East Renfrew	137	233	92	141	141
Edinburgh City of	1929	1491	200	1291	Issuing Now
Eilean Siar	103	110	25	85	85
Falkirk	387	450	450	0	0
Fife	1075	1100	1100	0	0
Glasgow City	1890	1307	274	1033	1033
Highland	1251	1222	181	1041	0
Inverclyde	191	210	29	181	181
Midlothian	183	267	267	0	0
Moray	374	390	54	336	310
North Ayrshire	416	578	319	259	259
North Lanarkshire	680	768	768	0	0
Orkney Islands	137	152	152	0	0
Perth & Kinross	685	624	274	350	350
Renfrewshire	440	469	469	0	0
Scottish Borders	474	308	63	245	0
Shetland Islands	154	166	23	143	143
South Ayrshire	443	418	59	359	359
South Lanarkshire	643	768	768	0	0
Stirling	471	Not Available			
West Dunbarton	245	293	57	236	0
West Lothian	388	350	185	165	0

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[1] This relates to licences under the 1976 Act, and is included only as an indication of the approximate number of licensed premises in each Board area.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Letter to the Cabinet Secretary for Justice

Dear Cabinet Secretary

Following the Justice Committee's meeting on 23 June, it was agreed that I would write to you for further information or clarification on a number of issues that have arisen in the context of the scrutiny of this Bill so far.

At the evidence session on 23 June, you will recall that Cathie Craigie MSP drew attention to the evidence received from sentencers in relation to the proposal for a Scottish Sentencing Council. She stated, "It has been put to the committee that it would be unconstitutional to take responsibility away from the Parliament, ministers and the appeal court…" Can I draw your attention to the official report of the meeting of 12 May 2009, particularly columns 1761 and 1762, and invite any further response you have in relation to this evidence.

On 23 June, you made mention of a forensic data working group which is developing a list of applicable offences for retention of DNA samples from children. You undertook to find out what timetable that group is working to, what stage the group has reached to date and to report back to the Committee. It was noted that a statutory instrument will be brought forward in due course. The Committee would be grateful by your confirming whether such an instrument will be subject to affirmative or negative procedure.

In relation to serious organised crime, in response to a question from Robert Brown MSP, you advised that the Scottish Government had not been involved in the consultation on the scope of the Regulation of Investigatory Powers Act 2000. What involvement, if any, has the serious organised crime task force had? Again on serious organised crime and the provisions in the Bill, the Committee would be interested to receive further information on what work was undertaken to develop section 28 of the Bill.

Finally, in relation to community sentences and treatment orders, can you advise what information is normally available to sentencers in terms of the types and availability of different community disposals and what proposals the Government has to make improvements to the information that is available to sentencers.

I look forward to hearing from you.

Bill Aitken MSP
Convener, Justice Committee
7 July 2009

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Response from the Cabinet Secretary for Justice

Dear Convener

Thank you for your letter of 6 July following up a number of issues that arose during my evidence to the Justice Committee on 23 June on the Criminal Justice and Licensing (Scotland) Bill.

Scottish Sentencing Council (sections 3-13 of the Bill)

The issue of the constitutional status of the proposed Scottish Sentencing Council was raised. I am aware that evidence put to the Justice Committee has suggested that the establishment of a Scottish Sentencing Council would take away responsibilities relating to sentencing from the Parliament, Ministers and the Appeal Court (High Court of Justiciary). Further, it is suggested that this renders the establishment of the Council in some way "unconstitutional". Aside from the fact that the establishment of an independent body to produce sentencing guidelines has been done in other jurisdictions, there has never been any intention of removing existing responsibilities in relation to sentencing from Parliament, Ministers and the Courts, and there is nothing in the Bill that does so.

Some of the evidence provided to the Committee states that the plans for a Scottish Sentencing Council will remove the powers of the High Court of Justiciary to issue guideline judgements and pass them on to a non-elected body. There is no intention on the part of the Government to remove any of the powers or functions from the High Court of Justiciary or any other sentencers, and there is nothing in the Bill that does so. The guidelines to be issued by the Sentencing Council do not prevent judges from imposing a particular sentence in a particular case. The provisions for the establishment of a Sentencing Council make it clear that the High Court will be able to continue to exercise its powers under sections 118(7) and 189(7) of the Criminal Procedure (Scotland) Act 1995 to issue guideline judgements, powers that it has to date seldom used. Section 9 of the Bill gives the High Court the power to refer sentencing guidelines to the Sentencing Council and ask that the Council review them in cases where the High Court has passed a sentence on appeal and has decided not to follow any relevant guidelines or where the High Court has concluded that a particular guideline does not deal, or deal adequately, with a significant issue raised by an appeal. The Council is required to review any guidelines referred to it by the High Court and in doing so must have regard to the High Court's reasons for its decision or conclusion.

The Sentencing Council is to be an independent body. The role of Ministers and Parliament in developing the criminal law and establishing offences and penalties in statute will remain the same. Ministers and Parliament are exercising those powers through consideration of this Bill, which is the appropriate constitutional process.

Against that background, I fail to see any substance to the argument that the proposals for a Scottish Sentencing Council are "unconstitutional".

DNA, fingerprints and other physical data (sections 58-60 of the Bill)

I agreed to provide some further information on the Forensic Data Working Group which is developing a list of applicable offences for retention of DNA samples from children.

The Working Group held its inaugural meeting on 14 July 2009, when members discussed their draft remit and terms of reference and gave initial consideration to their programme of work. The full membership of the Working Group is attached as Annex 1 to this letter.

In broad terms, the Working Group will develop detailed proposals on governance, accountability and transparency issues, taking forward the recommendations in the Fraser Review. This will include proposals for independent oversight within governance structures and for putting in the public domain information on policies, management and procedures relating to DNA and fingerprint acquisition and retention. The Working Group will also develop procedures and guidance to implement the DNA and fingerprint provisions in the Bill; and will consider the operation of existing DNA and fingerprint legislation to ensure operational consistency across Scotland.

The Working Group also agreed to establish a sub-group to consider the offences that should apply to the Children's Hearings provisions (section 59 of the Bill). This sub-group will hold its first meeting on 11 August 2009. If approved by Parliament, new section 18A(6) of the Criminal Procedure (Scotland) Act 1995 (as inserted by section 59 of the Bill) will allow the Scottish Ministers to bring forward a statutory instrument specifying the offences that will apply for retention of DNA samples from children. The work of this sub-group will inform the content of the statutory instrument and I can confirm this statutory instrument will be subject to affirmative procedure.

The Working Group aims to meet every 6-8 weeks. As it is still in the process of scoping its work, no overall timescale has been set for the completion of its work. After full consideration of the issues at hand, the Working Group will report back to me with their recommendations.

I will be pleased to update the Committee on relevant developments and to share the Working Group's recommendations when they become available.

Serious Organised Crime (sections 25-28 of the Bill)

You asked what involvement the Serious Organised Crime Taskforce has had in the consultation on the scope of the Regulation of Investigatory Powers Act 2000. As a group, the Serious Organised Crime Taskforce has had no involvement in the consultation, though individual members of the Taskforce, on behalf of their respective organisations, may well have responded to it.

You also sought information on how the new offence of failing to report serious organised crime had been developed. Early discussions of the Serious Organised Crime Taskforce focused on creating new offences aimed at those directing or involved in serious organised crime and subsequently proposals were brought before the Taskforce. Further discussions highlighted the need to capture those professionals who facilitate and benefit from such crime, to make profits for themselves as well as organised criminals and to include close associates who are knowingly living from the proceeds of such crime.

The requirement for an offence of failing to report serious organised crime has been borne out by the recently published Serious Organised Crime Mapping project which identified 241 individuals as providing specialist links to serious organised crime networks. I should stress that if there is evidence to suggest those people are actively involved in serious organised crime, then that separate offence will be triggered. The failing to report offence is to capture those people who fail in a duty to report their knowledge and suspicions of individuals involved in serious organised crime if they receive a benefit from not doing so.

Community Payback Orders (section 14 of the Bill)

In relation to communication to sentencers of information regarding statutory community disposals, this is normally undertaken by means of circulars to relevant stakeholders including sheriff clerks, who are therefore in a position to provide information, where needed, to sentencers on the statutory disposals available to the court. With regard to the local support programmes, which underpin certain orders such as probation, responsibility for informing local courts of the availability of such programmes rests with the relevant criminal justice social work teams within local authorities. In addition the information for sentencers website is designed to provide relevant information on community disposals and local programmes. The website can be found through the following link:

http://www.sentencinqinformationscotland.com *[Link no longer operates]*

You also asked what proposals the Government has to make improvements to the existing information arrangements. We have identified a need for updating the information currently available on the website and are taking steps to put in place the necessary improvements. We have also had recent exploratory discussions with members of the Judicial Studies Committee on the likely information needs of sentencers in respect of the Community Payback Order provisions within the Bill.

Disclosure (sections 85-116 of the Bill)

Though questioning did not reach the disclosure provisions in the Bill during my evidence session on 23 June, I am aware the disclosure provisions are both complex and technical in nature. In order to assist you with consideration of these provisions, the flowcharts contained in Annexes 2(a), 2(b) and 2(c) to this letter set out the steps in the disclosure process for both summary and solemn cases. These flowcharts were crafted by my officials during development of the disclosure provisions and assisted them in understanding the overall proposed disclosure "end to end" process. I hope these flowcharts are also helpful to members of the Committee in considering the disclosure provisions.

Kenny MacAskill MSP
Cabinet Secretary for Justice
23 July 2009

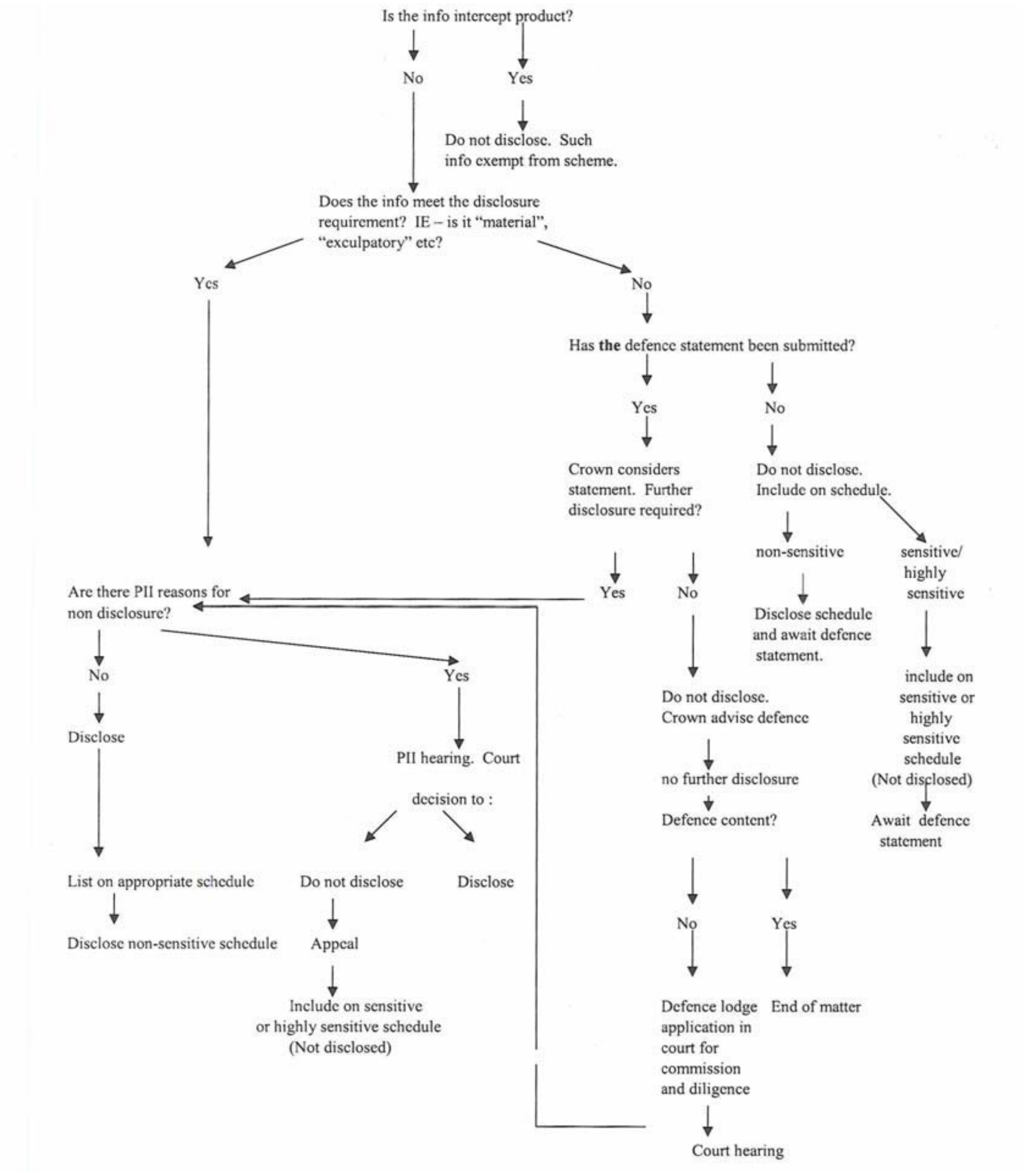
Annex 1

List of members of Forensic Data Working Group

Nominee	Organisation
Mr Kenny Lawson	Association of Chief Police Officers Scotland
Detective Chief Superintendent Malcolm Graham	Association of Chief Police Officers Scotland
David Green	Crown Office and Procurator Fiscal Service
Professor Sarah Cunningham-Burley	Human Genetics Commission
Professor Jim Fraser	Director of Forensic Science, Strathclyde University
Nico Juetten	Scotland's Commission for Children and Young People
Gillian Henderson	Scottish Children's Reporter Administration
Brian Lister	Scottish Children's Reporter Administration
David Higgins	Scottish Police Authorities Conveners' Forum
Tom Nelson	Scottish Police Services Authority
Clare Morgan	Scottish Police Services Authority
Dr Ken Macdonald	Information Commissioner's Office
Charles Welsh	Skills for Justice
Susan Ferguson	Scottish Government - DG Justice and Communities
Anna Ross	Scottish Government - DG Justice and Communities
Gordon Young	Scottish Government - DG Justice and Communities
Denise Swanson	Scottish Government – DG Education
Lyn Ross	Scottish Government – DG Education
Thomas Robertson	Scottish Government – DG Justice and Communities
Carolyn Magill	Scottish Government Legal Directorate

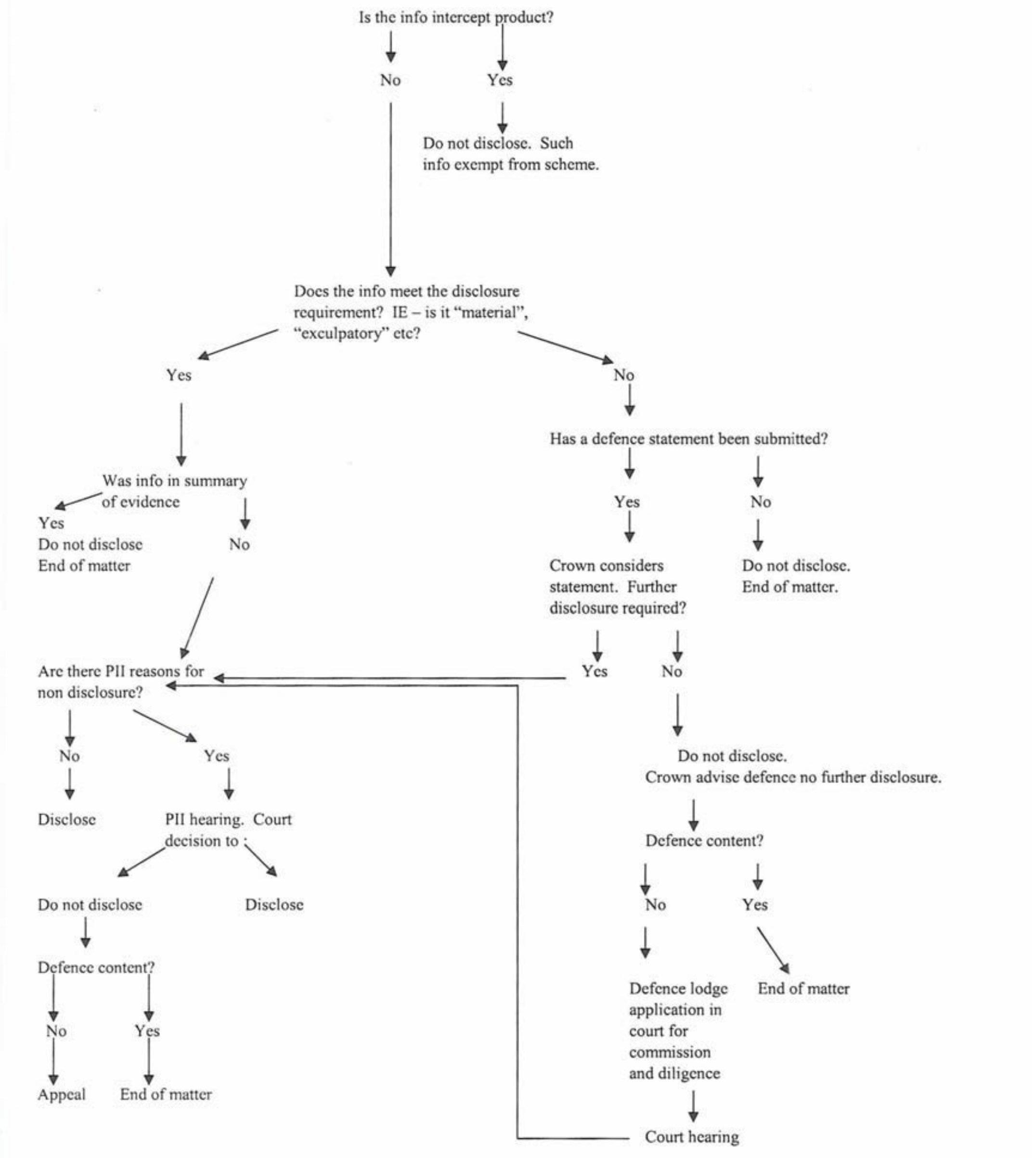
Annex 2(a)

Disclosure - flowchart showing how the scheme will operate for solemn cases


Is the info intercept product?
No
Yes
Do not disclose. Such info exempt from scheme.
Does the info meet the disclosure requirement? IE – is it "material", "exculpatory" etc?
Yes
No
Has **the** defence statement been submitted?
Yes
No
Crown considers statement. Further disclosure required?
Do not disclose. Include on schedule.
non-sensitive
sensitive/ highly sensitive
Are there PII reasons for non disclosure?
Yes
No
Disclose schedule and await defence statement.
No
Yes
Do not disclose. Crown advise defence
include on sensitive or highly sensitive schedule (Not disclosed)
Disclose
PII hearing. Court decision to :
no further disclosure
Defence content?
Await defence statement
List on appropriate schedule
Do not disclose
Disclose
No
Yes
Disclose non-sensitive schedule
Appeal
Include on sensitive or highly sensitive schedule (Not disclosed)
Defence lodge application in court for commission and diligence
End of matter
Court hearing

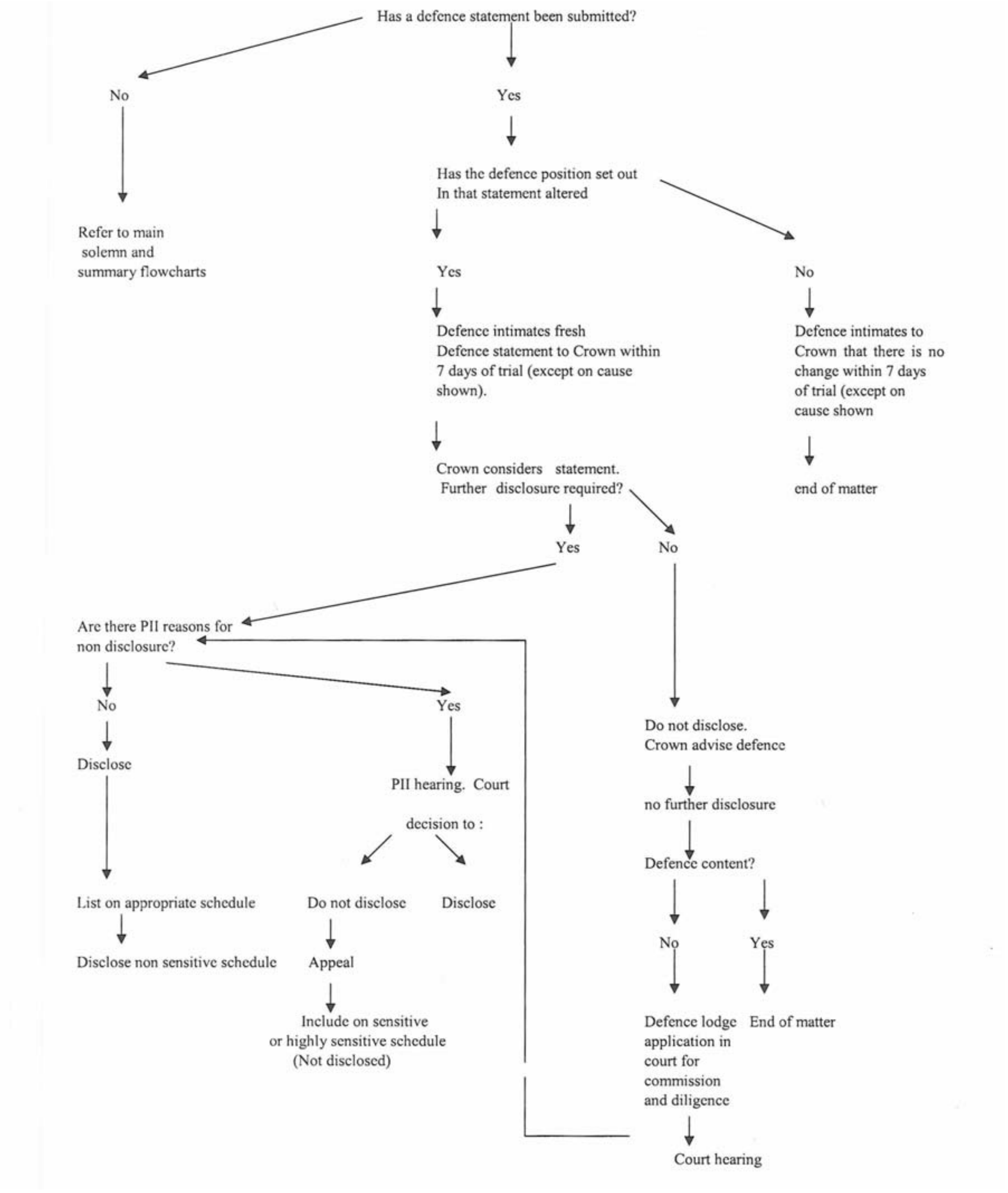
Annex 2(b)

Disclosure - flowchart showing how the scheme will operate for summary cases


Is the info intercept product?
No
Yes
Do not disclose. Such info exempt from scheme.
Does the info meet the disclosure requirement? IE – is it "material", "exculpatory" etc?
Yes
No
Has a defence statement been submitted?
Was info in summary of evidence
Yes
Do not disclose
End of matter
No
Yes
No
Crown considers statement. Further disclosure required?
Do not disclose.
End of matter.
Are there PII reasons for non disclosure?
Yes
No
No
Yes
Do not disclose.
Crown advise defence no further disclosure.
Disclose
PII hearing. Court decision to :
Defence content?
Do not disclose
Disclose
No
Yes
Defence content?
Defence lodge application in court for commission and diligence
End of matter
No
Yes
Appeal
End of matter
Court hearing

Annex 2(c)

Disclosure - flowchart showing how the scheme will operate for solemn and summary cases for second or subsequent defence statements


Has a defence statement been submitted?
No
Yes
Refer to main solemn and summary flowcharts
Has the defence position set out In that statement altered
Yes
No
Defence intimates fresh Defence statement to Crown within 7 days of trial (except on cause shown).
Defence intimates to Crown that there is no change within 7 days of trial (except on cause shown
Crown considers statement. Further disclosure required?
end of matter
Yes
No
Are there PII reasons for non disclosure?
No
Yes
Do not disclose. Crown advise defence
Disclose
PII hearing. Court decision to :
no further disclosure
Defence content?
List on appropriate schedule
Do not disclose
Disclose
No
Yes
Disclose non sensitive schedule
Appeal
Include on sensitive or highly sensitive schedule (Not disclosed)
Defence lodge application in court for commission and diligence
End of matter
Court hearing

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Letter to the Cabinet Secretary for Justice

Thank you again for your evidence yesterday afternoon. Unfortunately, there was only so much the Committee was able to cover at the session and it therefore agreed that I should write to ask a number of further questions relating to the licensing provisions in the Bill. These questions are listed below. I have also included a further question on section 41 of the Bill which supplements my final oral question yesterday. I would be grateful for a response to this letter by Tuesday 8 September if possible in order to enable the Committee to take it fully into account when we consider our draft report.

Part 8 – Licensing under the Civic Government (Scotland) Act 1982

Licensing of taxis and private hire cars

The 1982 Act current requires applicants for taxi or private hire car licences to have held a driving licence for a car under Part III of the Road Traffic Act 1988 for any continuous period of 12 months. Section 124 of the Bill requires that applicants for taxi and private hire licences must have held a driving licence for 12 months immediately prior to the application. It has been suggested that discretion should be granted to local authorities to allow them to make the appropriate decision based on the applicant's individual circumstances. What is your view on this suggestion?

The Bill amends the 1982 Act to widen the right of appeal against a licensing authority's review of taxi scales to include representatives of taxi operators. The Committee has received evidence suggesting that the right to appeal decisions should only be extended to those who responded to the original review. How do you respond to that suggestion?

Section 124 of the Bill extends from 5 to 7 days the period in which revised taxi scales can come into effect once they are published. To be deemed published, the scales must be advertised in a newspaper circulated in the relevant area. Evidence pointed to the cost of publishing notices in newspapers and also the inconsistency with the Licensing (Scotland) Act 2005 which allows publication via a website. How does the Scottish Government respond to these points?

The Committee received evidence suggesting that the 1982 Act be updated to include additional restrictions for non-UK residents who might apply for taxi and private hire car driver licences as they may not be subject to the same background and criminal checks. Is this something that could be incorporated into the Bill?

The Committee understands that, under the 1982 Act, licensing authorities have the power to limit the number of licensed taxis and require taxi drivers to undertake route tests, but cannot impose such requirements on private hire car drivers. Would the Scottish Government be prepared to consider this as a further measure to be addressed in the Bill?

Licensing of lap dancing clubs

It was suggested to the Committee that the Bill provides an opportunity to reassess the licensing of lap dancing clubs, which are currently regulated under section 41 of the 1982 Act. Should this be included in the Bill?

Licensing of late hours catering

Section 127 of the Bill substitutes the word “food” for “meals and refreshment” and gives licensing authorities the power to license any premises selling food or drink at late hours. Some evidence questioned whether the regulation and cost was proportionate to the perceived benefits. How would you respond to this?

Applications for licences

Section 128 of the Bill lengthens the objection period and increases the notice period for attending hearings. The Committee has received evidence stating that an increase in the length of the objection period is unnecessary as most applications do not attract any objections while there is already a provision allowing the authority to consider objections outwith that time. What is your view on this concern?

Section 128 of the Bill requires applicants to provide additional personal details to licensing authorities when submitting an application. There was concern that these details might be placed in the public domain, rather than only being used by applicable statutory bodies. What assurances can you give on this issue?

Section 128 also reduces the time for licensing authorities to produce a Statement of Reasons. What is the Scottish Government’s reason for this change?

Part 9 – Alcohol Licensing

Notification of licence applications

Section 130 removes the need for licensing boards, when notifying interested parties of a licence application (as required by the 2005 Act), to include a copy of the application, except in respect of the Chief Constable. There appears to be confusion about what information will be notified to interested parties. Could this provision result in interested parties being given insufficient information to properly inspect and consider the licence application?

Court-appointed administrators

The Committee received some evidence regarding transferring licences to court appointed administrators under the 2005 Act. The potential difficulty is that the administrator would be required to become the premises licence holder in his own right as opposed to an agent of the insolvent company and that he or she might be reluctant to do so. How do you respond to this?

Occasional licences

The Committee also heard evidence that the current occasional license procedure in the 2005 Act is too complicated and removes a significant degree of discretion on the part of the licensing board. The submissions go on to suggest the 2005 Act should be amended to return to the much simpler and more effective procedure contained in the Licensing (Scotland) Act 1976. What is your view on this suggestion?

Extended hours applications: variation of conditions

Section 135 of the Bill allows licensing boards to apply additional conditions to extended hours licences. The Committee received evidence asking whether the licence holder would be afforded a hearing on whether the variations proposed are necessary for the purposes of the licensing objectives. There was also a concern that licensing boards may not have the power to enforce such provisions. How do you respond to these points?

False statements in applications: offences

Section 138 of the Bill makes it an offence for a person who already holds a personal licence to apply for a second personal licence. The Committee was asked to seek assurances that the provision would cover electronic applications under the EU Services Directive and also that applicants who make honest oversights or mistakes are not sanctioned. Can the Minister give such an assurance?

National Personal Licence Database

The Committee was told that not all licensing boards use the Scottish Government's National Personal Licence Database and that there is no required timescale for inputting evidence into the database. What is the Scottish Government's view on the uptake and use of the database?

Further modifications of the 2005 Act

Section 139, which makes various amendments to schedule 4 to the 2005 Act, is intended to widen the grounds on which a chief constable can object to a premises licence. Some evidence questioned whether this change is appropriate as it could lead to the chief constable commenting on matters which are more appropriately dealt with by other agencies with more relevant, or indeed the only, expertise. How do you respond to this observation?

Level of fees

The Committee has received evidence expressing concern about the relatively small licence fees paid by supermarkets compared with smaller traders, despite the high proportion of sales that supermarkets account for. There have also been concerns about the discrepancies in the level of fees set by boards across the country, with some accused of seeing fees as “a money making exercise”. What are your views on these concerns?

Criminal Procedure

Section 41 – breach of undertaking

The Scottish Centre for Crime and Justice Research "strongly object" to the new offence of "breach of undertaking", on the following grounds:

- that it was not adequately consulted on
- that it removes the rationale for having a system of undertaking in the first place
- that it has "a dangerous and costly net-widening potential"
- that it is not supported by the evidence of what we know works
- that it undermines the Bill's overall aim of reducing the use of prison for people serving very short sentences.

What is your response to these arguments?

I look forward to hearing from you.

Bill Aitken MSP
Convener, Justice Committee
2 September 2009

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Letter from the Cabinet Secretary for Justice

Thank you for your letter of 2 September asking a number of questions that have arisen during your Stage 1 scrutiny of the Criminal Justice and Licensing (Scotland) Bill ("the Bill"). I also take the opportunity to provide some further information regarding section 125 of the Bill following discussion at the session on 1 September.

For ease of reference, each question/issue is repeated below along with our response to the issues raised.

Part 8 – Licensing under the Civic Government (Scotland) Act 1982

Licensing of market operators – section 125

During my evidence session on 1 September, there was discussion regarding the effect of section 125 of the Bill in terms of the licensing of non-commercial market operators. We agreed to provide further information as to how the system would operate if section 125 is approved by Parliament.

By way of background, the Civic Government (Scotland) Act 1982 ("the 1982 Act") provides a statutory regime for the licensing of a number of activities. Parts I and II of the 1982 Act deal with licensing by local authorities of a range of activities including taxis and private hire cars, second-hand dealers, metal dealers, street traders, market operators, public entertainment operators, indoor sports entertainment operators and window cleaners.

Licences issued under the 1982 Act fall into two basic categories, namely mandatory provision and optional provision. The distinction between the two categories refers to whether the licensing authority has any discretion as to whether it licences a particular activity.

Currently, the 1982 Act requires licensing authorities to operate licensing schemes for the activities of metal dealers and indoor sports entertainment operators. The other activities listed in Parts I and II of the 1982 Act may be subject to licensing, but this is at the discretion of the licensing authority. These optional licensing activities include taxis and private hire cars, second-hand dealers, street traders, market operators, public entertainment operators and window cleaners (it should be noted that section 123 of the Bill seeks to remove metal dealers from the list of mandatory licensing activities and add it to the list of optional licensing activities).

Section 125 of the Bill seeks to amend section 40(2) of the 1982 Act to remove the exemption from market operators' licensing for non-commercial operations (including charitable operations). If approved by Parliament, the effect of section 125 would be that licensing authorities would have discretion as to whether they licence non-commercial market operator activities. This is as a result of non-commercial operations then falling within the scope of section 9(3) of the 1982 Act (which provides for this discretion).

The provisions in section 125 take forward a specific recommendation of the Task Group report[1]. The Task Group report discussed the justification for making this recommendation as follows:

"Para 7.6 – The Task Group noted that under the existing provisions charitable, religious, youth, recreation, community, political or similar organisations are exempt from any licensing requirement. We sought views on whether this exemption should now be repealed in light of the increase in the number of such events and associated problems, including public safety concerns. We recognised however that such problems and concerns were liable to occur regardless of who is actually holding the sale. The majority of respondents agreed that the exemption should be removed. However, some concerns were expressed that the licensing fees might have an adverse impact on some of the charitable organisations running such events that are currently exempt from any licensing requirement. We took the view that, even if the exemption was removed, it would still be open to licensing authorities to provide their own exemptions for certain charitable events, or to alter their fee structure to ensure that charitable events were not unduly penalised.

Recommendation

The Task Group recommend that the exemption from the market operators' licensing provisions for non-commercial organisations at Section 40(2)(a) be removed and thereafter licensing authorities consider introducing a revised fee structure to take account of licences issued to charitable organisations."

Paragraph 15 of Schedule 1 to the 1982 Act provides for the fees regime for licensing authorities. If section 125 is approved and a licensing authority did subsequently decide to licence non-commercial market operator activities, the 1982 Act affords licensing authorities full flexibility in deciding whether to charge reduced or no fees to non-commercial organisations. For example, a licensing authority could decide to licence non-commercial market operators but charge no fees to applicants[2].

We will consider carefully the transitional provisions required for the introduction of the discretion being given to licensing authorities in terms of the licensing of non-commercial market operator activities. Following the commencement of the provisions, we intend that the transitional provisions will operate in a manner so that non-commercial operators would not require to apply for a licence unless a licensing authority made regulation to that effect. This would have the effect that from “day 1” of the new system after the section 125 provisions have come into force (and section 40(2) of the 1982 Act is therefore amended), no non-commercial market operators would require a licence to operate (even if the licensing authority had in place a general market operators’ licensing regime).

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[1] A Report by the Task Group Set Up to Review the Licensing Provisions Contained in the Civic Government (Scotland) Act 1982 - http://www.scotland.gov.uk/Publications/2004/12/20391/48542

[2] By way of example showing how local authorities have discretion over fees, attached below is a link to the current licensing fees charged by Argyll and Bute Council. As can be seen, a range of fees are charged for different activities and also for different classes within a licensed activity - http://www.argyll-bute.gov.uk/pdffilesstore/civicgovernmentfeesasat1july09
[Link no longer operates]

In seeking to implement this Task Group recommendation, we consider affording discretion to licensing authorities in this area is appropriate as it will give licensing authorities the ability to decide whether to licence non-commercial market operations in light of their own local circumstances.

Licensing of taxis and private hire cars

Justice Committee – The 1982 Act current requires applicants for taxi or private hire car licences to have held a driving licence for a car under Part III of the Road Traffic Act 1988 for any continuous period of 12 months. Section 124 of the Bill requires that applicants for taxi and private hire licences must have held a driving licence for 12 months immediately prior to the application. It has been suggested that discretion should be granted to local authorities to allow them to make the appropriate decision based on the applicant’s individual circumstances. What is your view on this suggestion?

SG response – The provisions in section 124(2) of the Bill take forward a Task Group recommendation. The purpose of the section 124(2) is to ensure that an applicant has a proven record of unblemished recent driving experience to the benefit of public safety and confidence. The provision achieves this end and will ensure a uniform approach throughout all areas which would not be achievable if we were to afford licensing authorities discretion in this area.

Justice Committee – The Bill amends the 1982 Act to widen the right of appeal against a licensing authority’s review of taxi scales to include representatives of taxi operators. The Committee has received evidence suggesting that the right to appeal decisions should only be extended to those who responded to the original review. How do you respond to that suggestion?

SG response – This takes forward a Task Group recommendation. We think it is appropriate that the right of appeal should be extended to representative persons or bodies since these groups require to be consulted by a licensing authority in any review of taxi scales and notified of the outcome.

Justice Committee – Section 124 of the Bill extends from 5 to 7 days the period in which revised taxi scales can come into effect once they are published. To be deemed published, the scales must be advertised in a newspaper circulated in the relevant area. Evidence pointed to the cost of publishing notices in newspapers and also the inconsistency with the

Licensing (Scotland) Act 2005 which allows publication via a website. How does the Scottish Government respond to these points?

SG response – We have looked to be consistent with existing practice, which we understand has worked well and we are not aware of any specific concerns in relation to cost. We do note the point about the use of websites, although making such a change would have potential implications for other parts of the 1982 Act.

Justice Committee – The Committee received evidence suggesting that the 1982 Act be updated to include additional restrictions for non-UK residents who might apply for taxi and private hire car driver licences as they may not be subject to the same background and criminal checks. Is this something that could be incorporated into the Bill?

SG response – Apart from the evidence received by the Committee, we have received no approaches from licensing authorities or indeed police bodies, to suggest that they are experiencing difficulties over assessing the suitability of foreign national applicants for taxi/private hire car licences. We are not aware this is a widespread problem therefore. We are however in touch with the relevant Council's Licensing Board on this matter.

Justice Committee – The Committee understands that, under the 1982 Act, licensing authorities have the power to limit the number of licensed taxis and require taxi drivers to undertake route tests, but cannot impose such requirements on private hire car drivers. Would the Scottish Government be prepared to consider this as a further measure to be addressed in the Bill?

SG response – We are aware from the Task Group report that there had been a lobby of support for licensing authorities to limit the number of private hire car licences which it issues. While we do not consider that this is an issue which we should look to address in the context of this Bill, we do anticipate that we may need to look more widely at the existing powers once we have a clearer understanding of where the current consultation on vehicle accessibility is proceeding.

Licensing of lap dancing clubs

Justice Committee – It was suggested to the Committee that the Bill provides an opportunity to reassess the licensing of lap dancing clubs, which are currently regulated under section 41 of the 1982 Act. Should this be included in the Bill?

SG response – We consider that the Licensing (Scotland) Act 2005 ("the 2005 Act") enables local authorities to take what action is required in this area.

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Licensing of late hours catering

Justice Committee – Section 127 of the Bill substitutes the word “food” for “meals and refreshment” and gives licensing authorities the power to license any premises selling food or drink at late hours. Some evidence questioned whether the regulation and cost was proportionate to the perceived benefits. How would you respond to this?

SG response – This takes forward a Task Group recommendation. The Task Group took the view that the principal justification for licensing such premises related to the potential for large numbers of people leaving pubs, night clubs etc. late at night to cause a disturbance, and that this potential exists regardless of whether the food or drink being sold has been cooked or pre-prepared in any way. As such, the Task Group considered that licensing authorities should have the option of licensing all such premises if they consider it necessary to do so. In view of this, we concluded that the phrase "meals and refreshments" should be replaced with "food". We agree that giving licensing authorities this discretion is appropriate as they are best placed to decide what subset of food and drink retailers need to be licensed.

Applications for licences

Justice Committee – Section 128 of the Bill lengthens the objection period and increases the notice period for attending hearings. The Committee has received evidence stating that an increase in the length of the objection period is unnecessary as most applications do not attract any objections while there is already a provision allowing the authority to consider objections outwith that time. What is your view on this concern?

SG response – This takes forward a Task Group recommendation. While we accept that the existing time period of 21 days to object to applications is usually sufficient, there can be occasions where more time is needed. For example, sometimes by the time police receive an application form from the licensing authority they have much less time than 21 days to respond. The proposal, which was supported by a majority of respondents who participated in the Task Group's consultation, to increase the length of the objection period by an additional 7 days to 28 days would ease such problems considerably.

It will still be competent for a licensing authority to consider a late objection or late representation if they are satisfied that there is sufficient reason why it was not made in the time required. However we agree with the Task Group that it is sensible to include explicit provision to lengthen the objection period from 21 days to 28 days as this will ensure all interested parties have sufficient time to respond.

Justice Committee – Section 128 of the Bill requires applicants to provide additional personal details to licensing authorities when submitting an application. There was concern that these details might be placed in the public domain, rather than only being used by applicable statutory bodies. What assurances can you give on this issue?

SG response – We would expect local authorities to use the additional information provided in the application only for the purpose of assisting relevant authorities such as the police in looking into the background of the applicant. We would not expect this additional information to be published and nothing in the 1982 Act will require this additional information to be published.

The application itself is not required to be published under the terms of the 1982 Act and this does not change. Information that is currently made publicly available by the applicant in a notice under the requirements of Schedule 1, paragraph 2(3) of the 1982 Act will continue to apply. An applicant's date of birth and place of birth is not amongst these requirements and this does not change.

It should be noted the requirement to provide further information takes forward a Task Group recommendation. In reviewing the provisions of Paragraph 1(2) of Schedule 1 of the 1982 Act (which stipulate the information which must be included on any licence application form), the Task Group considered whether the mandatory information specified should be extended to include 'date of birth' and 'place of birth'. The Task Group recognised that such information can be helpful to the police in carrying out criminal background checks. Respondents to the consultation were almost unanimously in favour of such a change and we have provided for it in section 128 of the Bill.

Justice Committee – Section 128 also reduces the time for licensing authorities to produce a Statement of Reasons. What is the Scottish Government's reason for this change?

SG response – This takes forward a Task Group recommendation. The Task Group considered the current timescales for the procedures for a licensing authority notifying an applicant of the outcome of an application, for the recipient to obtain reasons for that decision from the licensing authority and for the appeals process.

Under the current system, a licensing authority must notify the applicant (as well as the chief constable, objectors and where premises are involved the fire authority) of its decision on whether or not to grant a licence within 7 days of it being taken. The applicant then has 28 days from the date the decision was taken to request a written statement of reasons from the licensing authority which has 10 days to comply with that request.

The Task Group report followed a report produced by COSLA on the Civic Govt Act. COSLA had proposed a revised timetable in their report so that the time period for applicants to request reasons should be reduced from 28 days to 7 days and the time period within which a licensing authority must provide the written statement of reasons should be increased from 10 days to 14 days.

The Task Group considered that a reduction in the period available for requesting reasons from 28 days to 7 days was unreasonable, given that the applicant may be on holiday at the time the decision is taken. The Task Group concluded that the period for requesting reasons be reduced to 21 days without adversely affecting the applicant to help speed up the process.

Part 9 – Alcohol Licensing

Notification of licence applications

Justice Committee – Section 130 removes the need for licensing boards, when notifying interested parties of a licence application (as required by the 2005 Act), to include a copy of the application, except in respect of the Chief Constable. There appears to be confusion about what information will be notified to interested parties. Could this provision result in interested parties being given insufficient information to properly inspect and consider the licence application?

SG response – We do not consider this to be the case as notification will inform people where such information can be accessed.

The employment of Licensing Standards Officers will ensure there is an official available to advise the public on what the application actually seeks and how the public can support, oppose or comment on the application to the Licensing Board.

Court-appointed administrators

Justice Committee – The Committee received some evidence regarding transferring licences to court appointed administrators under the 2005 Act. The potential difficulty is that the administrator would be required to become the premises licence holder in his own right as opposed to an agent of the insolvent company and that he or she might be reluctant to do so. How do you respond to this?

SG response – We are unaware of the specific details of this potential difficulty and we will consider this situation further.

Occasional licences

Justice Committee – The Committee also heard evidence that the current occasional license procedure in the 2005 Act is too complicated and removes a significant degree of discretion on the part of the licensing board. The submissions go on to suggest the 2005 Act should be amended to return to the much simpler and more effective procedure contained in the Licensing (Scotland) Act 1976. What is your view on this suggestion?

SG response – The process ensures that occasional licences are given consideration by the relevant enforcement agencies but also that the local community affected by them have an opportunity to comment. It is important to remember there are no restrictions on the size or frequency of occasional licences except those decided by the Licensing Board. The previous regime did not enable the local community to comment and this regime ensures they can. We consider simplification of the procedure as suggested would remove that community involvement.

Extended hours applications: variation of conditions

Justice Committee – Section 135 of the Bill allows licensing boards to apply additional conditions to extended hours licences. The Committee received evidence asking whether the licence holder would be afforded a hearing on whether the variations proposed are necessary for the purposes of the licensing objectives. There was also a concern that licensing boards may not have the power to enforce such provisions. How do you respond to these points?

SG response – A Licensing Board may hold a hearing although that is a matter for the Licensing Board to consider.

The position on enforcement is no different from any other licence in that anyone not implementing the conditions would commit an offence and could be prosecuted and/or face a hearing from the Licensing Board where the Licensing Board could impose a sanction ranging from a warning to revocation of the licence.

False statements in applications: offences

Justice Committee – Section 138 of the Bill makes it an offence for a person who already holds a personal licence to apply for a second personal licence. The Committee was asked to seek assurances that the provision would cover electronic applications under the EU Services Directive and also that applicants who make honest oversights or mistakes are not sanctioned. Can the Minister give such an assurance?

SG response – We are in the process of ensuring all provisions of the Licensing (Scotland) Act 2005 and this Bill meet the requirements of the EU Services Directive. A defence is afforded in that the person must knowingly make a false statement before an offence is committed.

National Personal Licence Database

Justice Committee – The Committee was told that not all licensing boards use the Scottish Government's National Personal Licence Database and that there is no required timescale for inputting evidence into the database. What is the Scottish Government's view on the uptake and use of the database?

SG response – The Database is operated by the Local Government Improvement Service and we understand all Local Authorities have signed up to participate.

We understand there are some technical difficulties which are being tackled to ensure each local authority and the Police can interface with the database.

We are aware there is a large amount of data concerning Personal Licences still being processed and we therefore expect a time lag following transition before all this information is on the database.

It will be to the advantage of all licensing boards to take part and if this is not forthcoming we will consider making it mandatory.

Further modifications of the 2005 Act

Justice Committee – Section 139, which makes various amendments to schedule 4 to the 2005 Act, is intended to widen the grounds on which a chief constable can object to a premises licence. Some evidence questioned whether this change is appropriate as it could lead to the chief constable commenting on matters which are more appropriately dealt with by other agencies with more relevant, or indeed the only, expertise. How do you respond to this observation?

SG response – Section 139 of the Bill will ensure a Chief Constable has the same ability as members of the public to comment on an application. It is then for the Licensing Board to weigh the information before reaching a decision.

We think it is entirely appropriate that the Police should comment on such matters as securing public safety, preventing public nuisance or protecting children from harm. The Police frequently deal with the outcome of the chaotic lives lived by those addicted, they see first hand the outcomes of heavy drinking from domestic violence, they experience what happens to young people who put themselves at risk through overindulgence and they view the devastation that can be wrought by drunk drivers. As such, we maintain that gives the Police as much right as the rest of us to comment on all the Licensing objectives.

General issues

Justice Committee – The Committee has received evidence expressing concern about the relatively small licence fees paid by supermarkets compared with smaller traders, despite the high proportion of sales that supermarkets account for. There have also been concerns about the discrepancies in the level of fees set by boards across the country, with some accused of seeing fees as “a money making exercise”. What are your views on these concerns?

SG response – Parliament has agreed the licensing regime must be self financing. Fees are set by the local authorities within capped bands and those bands ensure a small corner shop pays less than a large supermarket. This is unlike the current arrangements where everybody pays the same. It is easy to say the costs should be loaded onto the biggest retailers but we believe the system has to be fair to everyone, including the council tax payer. The fees are charged for the cost of processing the application (a position that will be reinforced by the forthcoming EU Services Directive). Any Board which collects an excess is expected to reduce the coming year's annual fee.

We have asked the Accounts Commission to consider these all issues and will consider any recommendations they choose to make.

Criminal Procedure

Section 41 – breach of undertaking

Justice Committee – The Scottish Centre for Crime and Justice Research "strongly object" to the new offence of "breach of undertaking", on the following grounds:

- *that it was not adequately consulted on*
- *that it removes the rationale for having a system of undertaking in the first place*
- *that it has "a dangerous and costly net-widening potential"*
- *that it is not supported by the evidence of what we know works*
- *that it undermines the Bill's overall aim of reducing the use of prison for people serving very short sentences.*

What is your response to these arguments?

SG response – We should say, for the avoidance of doubt, that breach of undertaking is not a new offence. It was already an offence under section 22 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). The Criminal Proceedings (Reform) (Scotland) Act 2007 ("the 2007 Act") then amended section 22 of the 1995 Act and introduced undertaking conditions. Undertaking conditions are similar to bail conditions. The introduction of undertaking conditions helped underpin the undertaking system so that the police could be more confident in using undertakings to release an accused from police custody pending their first appearance in court.

Allowing people to breach the conditions of an undertaking without any penalty could result in the system of undertakings becoming ineffective. Therefore when conditions were introduced through the 2007 Act, the scope of the offence of breaching an undertaking was widened.

The intention behind section 41 of the Bill (which seeks to add new section 22ZA to the 1995 Act) is that where an offender breaches an undertaking by committing a further offence, the breach of undertaking will be considered as an aggravation of that further offence. We do not agree that amounts to "a dangerous and costly net-widening potential". At the moment, such a breach of undertaking is treated as a separate offence. The section 41 provisions consolidate the further offence with the breach of undertaking so that it is treated as an aggravation of this further offence. We regard this as a fairly minor change bringing consistency to the system (so that offending while on an undertaking and offending while on bail are treated the same) and helping ensure these particular types of breaches are treated in a fairer way.

It should be noted the more significant changes such as the introduction of undertaking conditions themselves and the resultant extension of potential undertaking offences were introduced in the 2007 Act and these had been consulted on. The extension of the undertaking system and the associated offences were recommendations of the Sentencing Commission who consulted on their proposals before producing their report “Report on the use of Bail and Remand” in April 2005:

http://www.scottishsentencingcommission.gov.uk/docs/scorubr.pdf

In September 2005, the then Scottish Executive announced it intended to take forward this Sentencing Commission proposal in their publication “Bail and Remand – The Scottish Executive Action Plan”:

http://www.scotland.gov.uk/Resource/Doc/69582/0017987.pdf

I hope this is helpful.

Kenny MacAskill MSP
7 September 2009

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Supplementary written submission from the Scottish Government

In response to the query regarding section 135 of the Bill, we would draw attention to paragraph 582 of the explanatory notes as this confirms what section 135 of the Bill is intended to achieve. The provisions will enable Licensing Boards to amend for the first time the conditions of operation for a licensed premises for the duration of the extended period and the period that the extension applies to. For example, if a premises was ordinarily open on a Saturday from 11am until 11pm and applied to extend its licence to 2am on Sunday morning, a Licensing Board would be able to vary conditions (such as requiring door supervisors and/or the use of plastic drinking vessels) for the period 11am to 2am, or any part of that period.

We think this is a sensible measure that provides greater flexibility to Licensing Boards in respect of considering Extended Hours licence applications. We note the comments made by Aberdeenshire Council Licensing Services and North Aberdeen Divisional Licensing Board and we will re-examine the provisions in section 135 in light of their comments to ensure the powers assigned in the provision are clear.

Philip Lamont
Criminal Justice and Licensing Bill Team Leader
14 September 2009

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Supplementary written submissions from the Scottish Government

During the briefing to the Justice Committee on section 18 of the Criminal Justice and Licensing (Scotland) Bill, it was agreed to provide further information in respect of the implementation costs of this provision in the Bill.

As stated in the Financial Memorandum accompanying the Bill (paragraphs 782-785), there are no direct cost implications of the amendments proposed to the Custodial Sentences and Weapons (Scotland) Act 2007. Those provisions of the 2007 Act are not in force, so the most relevant comparisons are between the cost of implementing the 2007 Act as originally enacted, and the cost of implementing the 2007 Act as amended by the Bill. That is what the table below paragraph 785 of the Financial Memorandum seeks to do.

The costs involved in implementing the Custodial Sentences and Weapons (Scotland) Act 2007 as originally enacted (column headed “full implementation”) and as amended (columns headed “combined sentence applied at 1 year” and “combined sentence applied at 2 years”) are based on current assumptions and prisoner projections and show the indicative impact on applying the modified measures. The figures are based on prison population projections for 2015-16. As can be seen, the costs of implementing the 2007 Act with the amendments in the Bill would be lower than implementing it as originally enacted.

The modifications to the 2007 Act are only one part of the Scottish Government’s offender management plan as recommended by the independent Scottish Prisons Commission. However, the Commission said that while these provisions will vastly improve the way that offenders are both assessed and managed in prison and in the community, they cannot be activated until we have tackled the current high numbers of those in custody.

The costs of implementing the Custodial Sentences and Weapons (Scotland) Act 2007 (as amended by section 18 of the Bill) will, however, require financial commitment at a future stage. As the costs will fall into the period of a future spending review, it would be premature to pre-empt that outcome. The costs of implementing the custodial sentence arrangements will be subject to discussion by the Scottish Government in the context of that spending review.

Philip Lamont
Criminal Justice and Licensing Bill Team Leader
29 September 2009

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Letter to the Cabinet Secretary for Justice

As you will know the Justice Committee is continuing to consider its draft Stage 1 report on the above Bill.

During the Committee’s discussion of *Part 6 – Disclosure*, a number of issues arose in respect of which the Committee agreed it would be helpful to write to you now, rather than simply highlighting them in the Committee’s report, so that your response can be considered prior to finalising the report.

To assist the Committee in judging: (a) the extent to which existing law and practice on disclosure needs to be reformed; and (b) whether or not the proposals in the Bill address existing problems in an effective way, the committee would appreciate the following:

1. A clearer explanation of the law and practice as they currently stand in relation to disclosure of evidence in Scotland, including information on the scope of the duty of disclosure, the mechanisms for ensuring that there is fair disclosure and procedures for withholding sensitive information.

2. An explanation of why the current Scottish regime for disclosure of evidence is considered to be defective and how the proposals in the Bill are intended to address any problems with the current disclosure regime.

3. The Scottish Government’s views on the concerns that have been expressed about the complexity of the proposals set out in the Bill and what scope there is to simplify the provisions in the Bill (e.g. by dealing with more aspects in guidance rather than statute).

4. In relation to A*pplications to court: orders restricting disclosure* at sections 102 to 106, the Scottish Government’s view on Lord Coulsfield’s comment that these provisions are overly complex.

5. Clarification of what (if any) role ‘special counsel’ currently play within the Scottish legal system and how they will, within the context of the Scottish Government’s proposals on disclosure, help to ensure that an accused person receives a fair trial.

It would be very helpful if you could respond by 21 October 2009.

I look forward to hearing from you.

Bill Aitken MSP
Convener, Justice Committee
8 October 2009

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Letter from the Cabinet Secretary for Justice on disclosure issues

Thank you for your letter of 8 October which seeks a response on a number of disclosure questions that arose during the Justice Committee's discussion of Part 6 of the Bill.

Q1 – A clearer explanation of the law and practice as they currently stand in relation to disclosure of evidence in Scotland, including information on the scope of the duty of disclosure, the mechanisms for ensuring that there is fair disclosure and procedures for withholding sensitive information.

Scope of duty of disclosure

Lord Coulsfield's report on the Law and Practice of Disclosure in Criminal Proceedings in Scotland very fully explores the law and practice of disclosure in Scotland, including the scope of the duty (and its historical development), the remedies and mechanisms for ensuring that the duty of disclosure is fairly carried out and procedures for withholding sensitive information. The Crown Office and Procurator Fiscal Service (COPFS) has also published extensive guidance to prosecutors on the extent of and application of their duties in practice in respect of disclosure.

Disclosure by the Crown in criminal proceedings is presently carried out on a common law basis, the legal principles of which have been established in various cases over the years (and particularly since 1998 to the present day) which have examined issues of disclosure by the prosecutor to the defence. It is to be noted that the case law in this field is still evolving, as demonstrated by the recent case of HMA v Murtagh, discussed below.

The basic principle which underpins disclosure of evidence by the prosecutor to the accused is fairness to the accused person, and in particular the ECHR Article 6 rights to a fair trial. Under that Article the accused has the right to what is known as "equality of arms" with the Crown. Under the common law, as laid down in the leading case of McLeod, the Crown have a duty to disclose to the accused not only the incriminatory information which the prosecutor intends to lead in evidence against him but also any information which would tend to exculpate the accused or which would be likely to be of material assistance in the preparation or presentation of his defence.

The legal principles of the present disclosure system have been established through various cases over the past years which have focused on disclosure issues:

- **HMA v McLeod (no2), 1998 SCCR 77** –established the principle that the Crown should provide the accused with the material evidence for or against him.

- **Sinclair v HMA 2005 SCCR 446 (Privy Council decision) –** established that the statements of all witnesses that the Crown intends to lead at trial would likely to be of material assistance to the proper preparation and presentation of the defence and would therefore always be material information that must be disclosed to the defence.

- **Holland v HMA 2005 SCCR 417 (Privy Council decision) –** established that criminal history records for witnesses that the Crown intends to lead at trial would likely to be of material assistance to the proper preparation and presentation of the defence and would therefore always be material information that must be disclosed to the defence.

Since the publication of Lord Coulsfield Review in August 2007 there have been a number of other high profile cases which have sought to further clarify the law:-

- **McDonald v HMA 2008 SLT 993 (Privy Council decision) –** confirmed the principle that the Crown need only disclose information that materially weakens the prosecution case or materially strengthens the defence case and that it was entirely appropriate for the Crown to make this assessment; established that the Crown cannot give an absolute guarantee that all material information had, or ought to have been, disclosed.

- **HMA v Murtagh [2009] U.K.P.C. 35 (Privy Council decision) –** established that the Crown is only obliged to disclose the material parts of those criminal history records that it is obliged to disclose under ***Holland v HMA***; confirmed that the appropriate formulation of the disclosure test is to disclose any information that materially weakens the prosecution case or materially strengthens the defence case.

There have been developments, too, in the way in which information is disclosed. Information can be disclosed by any means, whether by providing copies of material to the defence or allowing the defence the opportunity to view the information. The discretion to determine the method of disclosure rests with the prosecutor.

In the past, where copies of disclosable information were being provided, they would be posted to the defence solicitor. As a data controller, however, the Crown must take such technical and organisational measures as are necessary to protect information against the risk of accidental loss or damage. Accordingly, in January 2009, COFPS implemented a new process whereby defence solicitors were required to attend at a local Procurator Fiscal Office to collect disclosure material. As the solicitors also have to sign a receipt for the material, this process also ensures that the prosecutor has a clear audit trail of disclosure in order to satisfy the court that it has fulfilled its disclosure obligations.

COPFS is in the process of implementing a new process whereby information is disclosed to the defence electronically on an encrypted pen-drive which the defence agent can collect from a local PF Office. This process provides an additional level of protection and will reduce the amount of paper generated by cases. COPFS is currently developing a secure website which will allow solicitors to electronically access their disclosure evidence remotely.

Procedures for withholding sensitive information

At present there is no set process by which the Crown or UK Government can seek to withhold material information in criminal proceedings in Scotland on grounds that its disclosure would prejudice an important public interest. In some limited circumstances, the Crown or UK Government could raise this before the judge in the criminal proceedings and arguments could be presented to the Court on the appropriateness of withholding the information, as was the case in the recent appeal of *Megrahi v HMA*. However, due to the absence of any *ex parte* process in the Scottish criminal legal system, there is no established mechanism by which the Crown can seek a ruling from the court on the non-disclosure of sensitive material information, particularly where the disclosure of the existence of the information could prejudice the public interest the Crown is seeking to protect. If such a circumstance was to arise, the Crown would need to find a way in which to raise the issue with the judge outwith the presence of the accused or his legal representative.

Mechanisms for ensuring that there has been fair disclosure

If the prosecution fails to disclose material information there are well-established remedies in law, which include ordering disclosure, allowing adjournment of the case and, where there has been a miscarriage of justice, appeals against conviction, which are intended to cover such cases where there has been a failure to disclose material information. There is no change proposed in the Bill to any of the existing remedies for failure to disclose information.

Also, the defence may petition the court to seek recovery of documents where they consider that the prosecutor holds material information which has not been disclosed. There is no change proposed to this mechanism in the Bill.

Q2 – An explanation of why the current Scottish regime for disclosure of evidence is considered to be defective and how the proposals in the Bill are intended to address any problems with the current disclosure regime.

There had been a series of high profile criminal cases in which it emerged that material which should have been disclosed had not been which led to the then Scottish Government to appoint Lord Coulsfield in November 2006 to conduct a review of the law and practice of Disclosure and to make recommendations to ensure that the law and practise of Disclosure was certain and fit for 21st century justice. Lord Coulsfield's review, published in August 2007, sets out in great detail and with clarity the problems which had been encountered with the current regime for disclosure in criminal proceedings; and what legal, practical and administrative steps ought to be taken forward to remedy the position.

The provisions in the Bill are designed to implement the recommendations by Lord Coulsfield to address the problems he identified. There are 44 recommendations altogether but only some of them require legislation. Others can be taken forward through a statutory code of practice and in guidance to prosecutors and investigators. The main thrust of the recommendations is to provide clarity around what disclosure means exactly, who carries the duty of disclosure and when. In creating such a new scheme it is necessary also to consider when disclosure is not appropriate. We deal with this below.

The aim of these provisions is not to reform the law but to place the existing law on a statutory footing and provide both the prosecutor and the defence with a greater degree of certainty. Disclosure is presently carried out on a common law basis but it is clear from continuing development of the common law through the courts that allowing the law to develop in this fashion creates uncertainty. Disclosure, however, is an area where practitioners require certainty; prosecutors, in order that they can be confident that decisions taken in respect of disclosure are in compliance with the law and, equally, defence practitioners, in order to give advice to their clients. This is achieved by legislation which provides that necessary certainty, clarity and consistency.

Q3 – The Scottish Government's views on the concerns that have been expressed about the complexity of the proposals set out in the Bill and what scope there is to simplify the provisions in the Bill (e.g. by dealing with more aspects in guidance rather than statute).

The Scottish Government has listened carefully to the views expressed on complexity. Clearly, we did not set out to make this unduly complex, quite the opposite. That said, although the essential concept of the Crown's duty of disclosure is simple, its practical application can be extremely complex and the draft provisions reflect this complexity. Attempts to set it out more simply often risk missing critical elements. Given the difficulties identified by Lord Coulsfield we want to avoid that and ensure that the legislation provides certainty, clarity and consistency to ensure justice for Scotland.

That said, we are concerned at the views expressed that the provisions are too complex and we are happy to look again at the provisions to ensure that they are comprehensive and comprehensible.

We are happy to look, also, at whether elements of the provisions could appropriately be dealt with in rules of Court or in the Code of Practice, particularly those which are more informative than regulatory or which seek to establish standard processes. We will do so with some caution, though. The duty to disclose is a critical duty and if we were to remove too many provisions we would deprive Parliament of its role in scrutinising the proposals.

Q4 – In relation to *Applications to court: orders restricting disclosure at sections 102 to 106*, the Scottish Government's view on Lord Coulsfield's comment that these provisions are overly complex.

Lord Coulsfield recommended that the legislation should provide for a system of 'Public Interest Immunity' hearings. Again, this is something which seems superficially simple but which is quite complex and the provisions reflect that. Several cases, however, including cases from the European Court of Human Rights in Strasbourg have looked at the difficult issue of withholding information from the defence. Each case offers its own principles, rules and tests that have to be satisfied to ensure legislation is compatible with human rights.

The Bill provisions are designed to capture these important tests and to seek to find the correct emphasis on when are some rights more or less important than other rights. Ensuring that the provisions reflect those different principles and tests adds to the complexity. Since what the provisions do is to establish processes through which that which the accused is entitled to have can be withheld from him we think it is vital that the provisions set out fully the tests and principles which apply. That adds to the complexity.

Whilst much of the detail could have been left to a Government of the future to make Regulations or to the courts to establish their own rules covering aspects of this issue, this Government considered it correct and appropriate to give Parliament the opportunity to scrutinise these new important tests and to decide for itself that it was satisfied that the weight of ECHR compatibility was right.

That said, we are aware of the concerns that have been raised in relation to the tests applied and we will consider whether any clarification is required.

Q5 – Clarification of what (if any) role 'special counsel' currently play within the Scottish legal system and how they will, within the context of the Scottish Government's proposals on disclosure, help to ensure that an accused person receives a fair trial.

I am aware that this gave members some cause for concern and that it was explored in evidence with me before the Committee at Stage 1.

At present the use of special counsel within the Scottish criminal legal system has been extremely restricted, primarily due to the absence of a set procedure for dealing with the non-disclosure of material information and the appointment of Special Counsel. Special Counsel will help the accused to receive a fair trial because they will be present when the defence are not permitted to be, to ensure there is an adversarial element to the process, and offer counter arguments to those brought by the Prosecutor who is seeking to withhold information.

In addition the Special Counsel will be able to see the non disclosed information and make arguments to the Court about whether it is so important to the defence that, without it, he cannot receive a fair trial.

Unlike in the case of Immigration Control orders, as considered in the English House of Lords case of *Secretary of State for the Home Department v AF* and others, the information that is withheld from the defence cannot be used by the court in reaching its determination or verdict. The fundamental differences between the circumstances of the AF case and the provisions of the Bill are that, in control order cases, the non-disclosed information is the incriminatory evidence used by the court in deciding whether to grant the order whereas, in our proposed scheme, it is only the exculpatory evidence which is not disclosed (and, even then, only where rigorous tests are met) and, therefore, the court has to entirely disregard information which is the subject of a non-disclosure order in reaching its verdict. As such, Special Counsel within the scheme proposed in Scotland for non-disclosure orders in criminal proceedings do provide an additional safeguard in ensuring that the accused's rights are protected.

I hope my response is helpful to members of the Committee in considering the disclosure provisions.

Kenny MacAskill
Cabinet Secretary for Justice
October 2009

Finance Committee

Criminal Justice and Licensing (Scotland) Bill

Letter from the Cabinet Secretary

As you are aware, there has been discussion recently about the level of Parliamentary scrutiny proposed for the Government's alcohol reforms. This discussion has focussed, in particular, on the Government's proposals for minimum pricing of alcohol.

Scotland's alcohol misuse problem is estimated to cost our country at least £2.25 billion per year in extra services and lost productivity and professionals are agreed that the threat posed to our national health from current levels of consumption is very great. Alcohol-related hospital admissions and deaths have increased markedly in recent years and this Government has already set out our framework for addressing the root causes behind these statistics.

Having taken account of the representations made the Government now proposes to introduce a new health bill that deals with a range of alcohol measures, including minimum price per unit of alcohol, alcohol promotions, limiting the use of marketing material, wine glass sizes. The new bill will also include the proposals on the sale of alcohol to persons under 21 and the social responsibility levy which are currently in the Criminal Justice and Licensing Bill.

A new bill to take forward these provisions collectively will give this issue the prominence required and the Government welcomes the fact that the proposals in the Bill will be subject to full Parliamentary scrutiny.

Kenny MacAskill MSP
Cabinet Secretary for Justice
26 March 2009

WRITTEN EVIDENCE RECEIVED BY THE FINANCE COMMITTEE

SUBMISSION FROM DUMFRIES AND GALLOWAY COUNCIL

I would restrict views to Parts 8 and 9. Part 8 deals with amendments to Civic Government Licensing. The view is taken that there would be minimal costs to local authorities even in relation to the withdrawal of the exemption of community markets in respect of market operators licensing, the reference to money or money's worth within the definition of places of public entertainment and the introduction of the definition of food to late hours catering.

Local authorities have well established Civic Government Licensing systems and in respect of optional activities such as market operators, places of public entertainment and late hours catering have made resolutions. The Financial Memorandum seems to assume that with the proposed changes implemented, local authorities would then go for fresh resolutions to cover the widening of the definitions and, if appropriate, to specify what particular types of event would be exempted, such as small galas and perhaps community or charitable markets.

I had anticipated that the Council's previous resolutions would stand and thereafter the resolution could be varied under Section 9(9) of the 1982 Act.

If paragraph 978 is instead correct the local authority would require initial consultation, decision of intention to make a resolution and following newspaper notice and consideration of responses a decision to license together with newspaper notices. This would, if it were the case involve local authorities in substantial expense and use of resources. Consideration would have to be given as to the position of existing resolutions and the timeframe for new resolutions. The process would take at least 12-14 months. Even if this proves not to be the case the suggestion that fees for charitable and community markets or free music events and framework displays may be reduced or waived is not helpful as fee structures have been set, the consultation will be the same for these events and any weighing of fees will mean a substantial increase for commercial operators of markets and public entertainment.

The Social Responsibility Levy (Polluter Pays) will raise serious difficulties for local authorities including identifying relevant premises and substantiating this identification, recovery of the levy and action to be taken when the operator is unwilling or unable to pay.

Willie Taylor
Depute Clerk to the Licensing Boards

WRITTEN EVIDENCE RECEIVED BY THE FINANCE COMMITTEE

SUBMISSION FROM EAST AYRSHIRE COUNCIL

Consultation

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

East Ayrshire Council did not take part in the consultation exercise for the Bill.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

N/A

3. Did you have sufficient time to contribute to the consultation exercise?

N/A

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

As the Committee will no doubt be aware criminal justice services in this local authority are funded in terms of section27a funding via a funding distribution from the South West Community Justice Authority. We are aware that the Chief officers of the 8 CJA's in Scotland are meeting to discuss their response to any financial implications that may arise from a Criminal Justice perspective as a consequence of this Bill. This Authority is therefore not currently in a position to make specific comments in this respect. Following the removal of section 129 of the Bill, the only provision likely to have a financial impact on this Authority in relation to the licensing is in respect of the proposed notification process in the fare review process. The memorandum correctly identifies that any such additional costs incurred will be taken into account in licence fees applied by individual local authorities but does not recognise that, as such, they will indirectly be met by the general public.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

As above.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

From a criminal justice perspective the implications of the Bill (particularly in relation to the presumption against custodial sentences of less than 6 months) will potentially place significantly increased demands upon criminal justice services. Inevitably we would expect costs to rise considerably year upon year as the Act comes into force.

Our experience over the past few years is that there has been a considerable increase in the use of community sentences/requests for reports without making any significant impact upon the levels of custodial sentencing. The financial memorandum by using 10% to 20% assumptions does accurately reflect the margins of uncertainty about costs and timescales but there must be a greater uncertainty as to what impact the Bill will have upon short sentences to reduce the daily prison population and how this may require, in effect resource transfer, to facilitate a commensurate rise in community sentences/alternatives to custody. This Authority remains unclear about the financial implications surrounding the additional burden that might fall on local authorities through increased demands for alterative remand accommodation most likely in the form of secure accommodation. During the period April 2008 to March 2009 forty six juveniles appeared from custody at Kilmarnock Sheriff Court – six of whom were remanded in custody and eight placed in secure accommodation. At present there does not appear to be any mechanism to allow a juvenile to be transferred from a remand placement to secure accommodation.

Wider Issues
7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Please refer to previous comments about the impact on custodial sentencing.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

A more accurate response to this question might be forthcoming from the CJA's. At present it is not possible for this Authority to estimate or quantify additional costs arising from either subordinate legislation or more developed guidance.

Stuart McCall
Legal and Procurement Services Manager

WRITTEN EVIDENCE RECEIVED BY THE FINANCE COMMITTEE

SUBMISSION FROM NORTH LANARKSHIRE COUNCIL

North Lanarkshire Council has not taken part in a prior consultation exercise for the Bill: questions 1 to 3 of the questionnaire are, accordingly, not applicable.

In respect of question 4 -6 in respect of cost there are only elements of, in particular, the licensing issues which will impact on local authorities such as North Lanarkshire Council. There are three main areas worthy of comment as follows:

(1) Section 124 relates to licensing of taxi and private hire cars and inter alia contains a proposal to extend the way in which local authorities carry out review of taxi fares. Local authorities are empowered by the Civic Government (Scotland) Act 1982 to set reasonable fees to meet the whole costs of administration of taxi licensing. Having conducted a substantial review of fees a number of years ago, recent practice has been to adopt an inflationary increase in fees for taxis (and other activities licensable under the 1982 Act) on 1 April in each year, in line with the council's overall approach to discretionary fees and charges generally. If the proposal to notify all taxi operators of taxi fares proposals passes into legislation, there will, following the methodology set out in paragraph 980 of the Explanatory Notes, be a cost impact on this authority of circa £1100 over a three year period. If the cost cannot be absorbed from existing income streams a very modest increase in fees would be required and this would be undertaken via the appropriate committee.

(2) Section 129 relates to a proposal to allow licensing boards a discretionary power to restrict the sale of alcohol to persons aged under 21 years from certain premises. Full consideration of this proposal by the Licensing Board can only take place after any legislation is passed. The Board will require at a minimum to consult with the licensed trade, the Chief Constable, the local Licensing Forum and other appropriate local groups and organisations who are not represented on the Forum as to any new policy which might be introduced and in what manner. Depending on any policy ultimately adopted there may be an impact on the administration of the application process or, more likely, variation of existing premises licence documentation. Any associated work will require to be absorbed within the existing licensing administration operation. There will also be an impact on the delivery of our Licensing Standards Officer service in relation to the provision of guidance to licence holders and regular inspection of premises, although again the extent will not be able to be assessed until decisions are made on policy by the Board. Paragraph 769 of the Explanatory Notes states " there is likely to be a marginal additional cost on Licensing Boards …". It is impossible to assess at this stage whether that statement is true or not. The Licensing (Scotland) Act 2005 sets a mix of capped discretionary fees and mandatory fees for varying types of application. The North Lanarkshire Board has in the main adopted maximum fees where the capped maxima apply. Under present legislative powers there is very limited scope to address a trading deficit if the costs of administration of existing regulations (and any new amendments) outweigh fee income. There is of course scope to reduce maximum fees if income outweighs costs. (When decisions on fees were made by the Board in January 2008 it was noted and accepted that meaningful review of fees by the Board

could not in any event take place until the close of financial year 2009/10 at the earliest, the 2005 Act only coming into full operation on 1 September 2009).

(3) The impact of other proposals in relation to Civic Government Act activities – metal dealers, market operators, late night catering and public entertainment - is likely to be minimal in cost terms and would in any event be recovered through licence application fees.

In respect of the wider issues covered by questions 7 and 8 our position would have to be reserved until the 2005 Act is fully operational.

Paul Hughes
Head of Financial Services
North Lanarkshire Council

WRITTEN EVIDENCE RECEIVED BY THE FINANCE COMMITTEE

SUBMISSION FROM ORKNEY ISLANDS COUNCIL

Consultation

Questions 1-3 – N/A

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

No account appears to have been taken of the additional costs associated with operating in island, rural or remote environments. The same base costs would be incurred and in such localities the turnover is not there to cover the base costs that must be incurred to provide the service. This should be recognised and the appropriate funding provision addressed.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

The financial costs on the licensing side which is already affected cannot be met without further funding being made available.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Not known

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Not known

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Yes – as with all new legislation future costs regularly arise and this should be recognised. One example on the criminal justice side is that there appears to be no indication of additional funding mentioned to address the training requirements of those involved in CJSW and related bodies

Fiona MacDonald, Solicitor to the Council
Orkney Islands Council

WRITTEN EVIDENCE RECEIVED BY THE FINANCE COMMITTEE

SUBMISSION FROM PERTH AND KINROSS COUNCIL

Consultation

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

I did not take part in the consultation exercise for the Bill and was not part of the discussion process which arrived at the financial assumptions set out in the Memorandum.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Accordingly, it would not have been realistic for my views to have been taken into account prior to this point.

3. Did you have sufficient time to contribute to the consultation exercise?

As I was not part of the consultation process, the question concerning adequacy of time to contribute to it did not arise.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

The Bill has major financial consequences for my organisation, Perth and Kinross Council. Section 14 ‘Community Payback Orders’ and Section 17 ‘Protection against Short Periods of Imprisonment or Detention’ are the factors with greatest implications for us. In practice, the resource implications arise from two factors:

- The need to increase average unpaid work hours per offender per week by a factor of almost 100%
- The need to make new Community Payback Orders available for a significant number of persons currently the subject of short sentences of imprisonment.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

The national weekly average number of Community Service hours carried out per offender is of the order of 3.5 - 4 hours. Locally, we have managed to get this figure above 4 hours, but only after considerable effort, a variety of initiatives and the temporary provision of additional resources. In order to meet the Government’s requirement of a 100 hour Unpaid Work Order being completed within three months (let alone their expectation that some Orders in excess of 200 hours should be completed within six months), however, we would need to double our achievements of recent months.

Perth and Kinross covers 2,000 square miles and has a higher than average male employment rate. Consequently, not only do we suffer through the current funding formula for core Criminal Justice Social Work Services, but we also need to provide work at weekends – and pay people to supervise offenders at such times. We provide a wide variety of tasks, including both team and individual placements, but a doubling of the average hours per offender will be a **major undertaking**.

The Bill's expectation that we also absorb a very significant proportion of those persons currently sentenced to short terms of imprisonment imposes, if anything, even greater expectations on the Service. On the basis of figures provided from colleagues in the Scottish Prison Service, 170 persons from the Perth and Kinross area were imprisoned during the last year for which we have hard data. Even if only 150 of these were to end up on Community Payback Orders, this would equal the total number of persons currently sentenced to Probation here or exceed the numbers currently on Community Service Orders. In short, it amounts to a very significant increase in the numbers of persons subject to Community Supervision. Bearing in mind, that all of these persons would otherwise have received sentences of imprisonment, it seems reasonable to assume that their crimes would merit the equivalent of Probation or Community Service – both of which will now be subsumed within the new Community Payback Orders.

On the basis of the funding provided to increase Community Service hours last year, it would appear that the pro-rata allocation for Perth and Kinross from the proposed figure of £10million nationally might be of the order of £190,000. In order to oversee the additional offenders on Community Payback Orders, I would anticipate that between 2 and 3 Community Service Supervisors, 1.5 Community Service Officers and between 1 and 1.5 Social Workers will be required. These staff will need to be managed, clerically supported, accommodated and have their transport, training and supplies and services needs met. On this basis, I would anticipate that the cost to this Council of providing a robust, reliable service which meets the requirements of the Act would be closer to £250-280,000.

On the basis of the proposed additional allocation of resources, I am not content that this organisation could meet the costs associated with the Bill. Already, with a standstill Criminal Justice Social Work budget over the last four years, I am unable to keep up with existing infrastructure costs. As to how these additional costs should be met, perhaps a resource transfer from the Prisons division should be effected – reflecting the reducing number of persons entering the Prison system.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

I would not consider that the Financial Memorandum accurately reflects the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to rise – in relation to the expectations of local authorities. As and when the twin effects of introducing Community Payback Orders and restricting the use of short term custody come into effect, the impact upon Criminal Justice Social Work Services will be very significant and almost immediate.

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Unless I am mistaken, the Bill does not make specific reference to the costs involved in providing part Custody/part Community Orders in further fulfilment of the recommendations of Scotland's Choice. This may require substantial resource transfer from the Prisons Division and may need to await the closure of an entire facility to free up such resources.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

I am not in a position to comment upon the possible future costs arising from subordinate legislation or more developed guidance. I am clear, however, that the costs associated with introducing community alternatives to custody for such a large number of current prisoners are not adequately reflected within the Financial Memorandum thus far – particularly for rural areas with a dispersed population and limited offender availability for work.

John Gilruth
Lead Officer, Criminal Justice and Substance Misuse Services
Perth and Kinross Council

WRITTEN EVIDENCE RECEIVED BY THE FINANCE COMMITTEE

SUBMISSION FROM COMMUNITY JUSTICE AUTHORITIES

Consultation

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

Community Justice Authorities were consulted regarding the Bill as outlined in the Policy Memorandum, however, we were not consulted on the financial assumptions as these were only made available to us on 13 March 2009.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

See above.

3. Did you have sufficient time to contribute to the consultation exercise?

There has been insufficient time to consider the financial implications of this Bill and to consult CJA Boards and other partners.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

CJAs have responsibility for the distribution of financial resources to Local Authority Criminal Justice Social Work Services across competing demands.

We welcome the commitment that costs will be fully reimbursed for the new arrangements (paragraphs 698 and 784).

However, we have some concerns around the financial assumptions in that they may not reflect a potential increase in SERs requested from Justice of the Peace Courts or from Sheriffs imposing short term sentences who will have to explain how a community disposal could not be made.

There is an assumption that the unit costs for probation, community service and supervised attendance orders which were used as the basis of costing for the new order were sufficient in the first place. The basis of the costings may also not reflect the qualitative change required in how community sentences are delivered alongside the anticipated increase in volume.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

CJAs do not directly commission or deliver services. CJAs are required to make sure allocations are aligned against Government and local priorities and strive to ensure funds are available.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

CJAs recognise that estimates have been provided between 0% - 20% growth. There is no evidence to suggest whether this will meet margins of uncertainty

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

No, the Bill is part of wider policy initiatives; Protecting Scotland's Communities: Fair, Fast and Flexible Justice, Safer and Stronger Scotland, Reducing Reoffending, and Summary Justice Reforms and does not capture any savings from the intended reduction in short term prison sentences. It, therefore, provides an incomplete picture of the financial implications.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

There are many potential costs associated with the wider policy agendas, such as diversion schemes, addressing offending behaviour in the community and early years initiatives.

These increased demands will be met by Local Authorities, whilst any reduction in the use of imprisonment will not, at present, yield additional resources for redeployment.

The proposed requirement for sentencers to state why short term prison sentences are being imposed may lead to an increase in the demand for SERs.

Anne Pinkman
Chief Officer FFV CJA
On behalf of the Community Justice Authorities

WRITTEN EVIDENCE RECEIVED BY THE FINANCE COMMITTEE

SUBMISSION FROM THE CROWN OFFICE AND PROCURATOR FISCAL SERVICE

Referring to the questions contained in the invitation letter I can confirm that the Crown Office and Procurator Fiscal Service was involved in the consultation exercise on the Bill and had sufficient time to contribute thereto. We did make comment on the financial assumptions made. These comments are accurately reflected in the Financial Memorandum.

The Bill does have financial implications for COPFS and these have been accurately reflected in the Financial Memorandum, together with the margins of uncertainty associated with the estimates. I am confident that the Service can meet these costs.

It would not be appropriate for the COPFS to address questions arising from the policy considerations behind the Bill. These are more appropriately addressed by the Scottish Government. Similarly it is a matter for the Scottish Government to address issues of additional costs in the future, associated with subordinate legislation or more developed guidance.

Chris MacIntosh
Principal Depute

WRITTEN EVIDENCE RECEIVED BY THE FINANCE COMMITTEE

SUBMISSION FROM THE SCOTTISH COURT SERVICE

Consultation

1. *Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made*?

The Scottish Court Service (SCS) is an Executive Agency of the Scottish Government. As such we were involved in the development of many of the proposals now contained in the Bill, and it was unnecessary for us to participate in the formal consultation exercise.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

N/A

3. Did you have sufficient time to contribute to the consultation exercise?

N/A

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

The Financial Memorandum is, in general, a fair reflection of possible costs to the SCS, although the estimates are subject to variation depending on how many cases are affected by the Bill's provisions, and are inevitably based on assumptions about court time required, which is hard to estimate with complete accuracy at this stage.

There are some further areas where we could expect modest set-up costs. In particular the special measures for child and vulnerable witnesses at clause 64 of the Bill will require installation of vulnerable witness facilities in 3 further High Court court rooms, at an estimated cost of £0.06m, and the witness anonymity proposals at clause 66 of the Bill would incur a set-up cost for the SCS, for the installation of voice modulation equipment, which we provisionally estimate at

£0.007k, together with annual running costs of £0.042m, based on the assumption that there will be 200 such cases p.a.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

To the extent that the Bill reflects new costs on the SCS, we would expect these additional costs to be funded by Scottish Government.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Yes

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

We are unaware of any associated costs.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

We do not envisage any additional costs.

Marilyn Riddell
Policy and Legislation Branch
Policy and Strategy Directorate
Scottish Court Service

WRITTEN EVIDENCE RECEIVED BY THE FINANCE COMMITTEE

SUBMISSION FROM THE SCOTTISH LEGAL AID BOARD

CONSULTATION

Question 1. Did you take part in the consultation exercise for the Bill, if applicable and if so did you comment on the financial assumptions made?

Answer:
The Scottish Legal Aid Board (the Board) did not take part in the consultation on the Bill but we were asked to provide input to the Financial Memorandum in respect of *two* of the three areas relevant to the Board in relation to which assumptions have been made. This was in respect of Mandatory Defence Statements, on page 118 of the Financial Memorandum and Crown Appeals at page 140

There is one further relevant area detailed in the Financial Memorandum upon which we were not asked to comment, namely: amendments to the Custodial Sentences and Weapons Act 2007, at page 124.

Question 2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Answer:
In relation to Mandatory Defence Statements, our comments have been accurately reflected.

Question 3. Did you have sufficient time to contribute to the consultation exercise?

Answer:
Whilst the Board did not take part in the consultation on the Bill, we did have sufficient time to contribute to those aspects of the Financial Memorandum on which we were asked to comment.

COSTS

Question 4. If the Bill has any financial implications for your organization, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

Answer:
The financial implications in relation to Mandatory Defence Statements and Crown Appeals are accurately reflected in the Memorandum.

With regard to the financial implications for the remaining area relevant to the Board in the Financial Memorandum, we would observe as follows.

Although we did not provide comment on the amendments to the Custodial Sentences and Weapons Act 2007 in the current Financial Memorandum (at page 124), we did provide input to the Financial Memorandum to the Custodial Sentences and Weapons Act 2007 when it was at Bill stage. In relation to the amendments to the Custodial Sentences and Weapons Act 2007, we cannot offer comment, as the rationale for the financial assumptions contained in the Financial Memorandum have not been set out.

Having considered Crown Appeals, we would agree with the financial implications on page 140.

Question 5. Are you content that your organization can meet the financial costs associated with the Bill. If not, how do you think these costs should be met?

Answer
The Scottish Legal Aid Fund is not cash limited but initiatives, such as those contained in the Bill, may impact on Fund expenditure depending on the number and average case costs. Whilst we do not know the numbers involved, we would like to take this opportunity to highlight the following issues in relation to the Bill's new provisions as far as they may potentially affect the cost of legal aid and thus Fund expenditure.

- Clause 14 Community Payback Orders

In terms of the Advice and Assistance (ABWOR) (Scotland) Regulations 2003 (2003 Regulations) we cannot provide legal assistance for these orders because there is no provision in them to enable us to do so. These regulations will require to be amended accordingly and the Board have notified the Scottish Government of the need for this change.

Assuming the 2003 Regulations are amended, this new order will sit alongside existing orders detailed in regulation 4 of the 2003 Regulations, such as Breach of Probation and Breach of Community Service. As far as costs are concerned it would therefore be reasonable to assume that likely costs to the Legal Aid Fund can be calculated by reference to the current average cost of the existing cases contained in regulation 4 as referred to above.

This average cost, in the period 2007-2008, was £323 per case in the Sheriff Court. What is unknown is the likely number of breaches. This is because we do not know how many orders are likely to be made, nor the numbers of breaches. The financial implications therefore cannot be commented upon because the cost will be £323 times the number of breaches of the order. In addition, the Bill provides for review of such orders. In terms of the existing legislation there is currently provision for ABWOR in relation to review of probation orders and we therefore assume it is the intention to provide similar legal assistance for review of Community Payback Orders in addition to breach. It is noted that the policy intention is to replace the existing range of orders such as Probation and Community Service with the Community Payback Order and therefore the cost is expected to be neutral if this is the case.

The Bill, however, also provides that Community Payback Orders can be made in the JP as well as the Sheriff Courts. This means that breaches of such orders made in the JP Court will be an additional cost to the Fund because this is a new type of disposal that the JP Court can make.

Ordinary advice and assistance would however still be available (as it is for any matter of Scots law), but this would not allow a solicitor to take steps in proceedings including representation of the client in court. Where advice and assistance is made available for cases in the JP court there will be a corresponding additional cost to the Fund

- Clause 15 Non-Harassment Orders

Unlike the new Community Payback Orders, there is currently provision at 4(2)(g) in the 2003 Regulations relation to this type of proceedings insofar as they relate to the revocation and variation of these orders. The proposed amendment makes it less onerous for prosecutors to apply for such an order. Given the threshold has been lowered, it follows that more orders can be made and potentially, more revoked or varied.
There would therefore be an associated cost to the Fund based on (as noted for Community Payback Orders) the average cost of a case governed by regulation 4 of the 2003 Regulations (£323), times the number of revocations and variations. However, according to our figures for the past five months ABWOR has been granted twice in respect of these orders, which would seem to indicate that revocations and variations are relatively few.

- Clauses 25 and 27 Involvement in Serious Organised Crime and Directing Serious Organised Crime

It is worth indicating in relation to cases falling under these two clauses that, while they are not expected to be numerous, they may be potentially more costly in terms of added complexity of the case.

- Clause 41 Breach of Undertaking

This section does not create a new offence as such. Rather it amends section 22 of the Criminal Procedure (Scotland) Act 1995 to bring the consequences for offending while on an undertaking in line with the situation for breach of bail. It is seen as “cost neutral” to the Fund.

- Clause 46 Breach of Bail

This new section allows prosecutors to amend the principal complaint to allow additional charges of breach of bail which come up during the currency of proceedings.

In cases where summary criminal legal aid has been made available for the substantive offence the Board does not make any additional payments for any subsequent breach of bail in terms of section 27(1)(a) of the 1995 Act as this work is deemed to be subsumed into the original grant of criminal legal aid. However, for breaches of bail in terms of section 27(1)(b) of the 1995 Act, the Board will pay a half fee to solicitors.

Accordingly, this new section will potentially result in a saving against the Fund for those cases were a half fee was previously paid. The total saving will depend upon the number of ‘half fees’ we currently pay which no longer are raised as a separate complaint; for a breach of bail in terms of section 27(1)(b) of the 1995 Act we pay, as summary criminal legal aid, £257.50 in the Sheriff Court and £157.50 in the JP Court. The ABWOR fee is £257.50 and £75 respectively.

- Clauses 102-112 Disclosure

In the absence of anticipated numbers of such applications being made by the prosecutor, it is difficult for the Board to provide a reasonable estimate as to cost. For solemn procedure it would appear that there will be no associated cost to the Fund as the envisaged procedure excludes defence participation.

There is limited involvement for the defence (and accordingly associated costs against the Fund) under summary procedure, but again we do not have any indication as to the number of occasions that this is likely to happen. Summary cases are paid on a fixed fee basis and therefore the only additional cost to the Fund would arise should these hearings result in the Board being asked to treat the case as an ‘exceptional case’. If the Board considers the case merits ‘exceptional case’ status, the case is then paid for on a “time and line basis”. The current average for a case granted exceptional case status is approximately £1400; this compares to the average payment in a summary fixed fee case of £588.

With regard clause 107 (Special Counsel), we do not know how often this procedure would be used. Given the wording of this clause and the import of the Policy document accompanying the Bill, this appears to be a cost for the Scottish Court Service given that the appointment of Special Counsel is by the Court. The position would require clarification.

In the event that the Board had to meet the cost of Special Counsel, as a reasonable comparator the applicable rate could be that currently paid to counsel in Commission and Diligence proceedings. Counsel in these types of proceedings are paid with regard to the fees paid to counsel for days of trial. These rates, which vary depending on the status of counsel and category of offence, can be found at Schedule 2 of the Criminal Legal Aid (Fee Regulations)(Scotland) Regulations 2007). These fees are summarized below:

Category	**Senior**	**Junior as Leader**	**Junior Alone**	**Junior Assisting**
High Court A	900	750	650	450
High Court B	700	617.50	535	375
High Court C	560	495	430	305
Sheriff Court A	720	647.5	575	360
Sheriff Court B	560	495	430	305

Question 6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Answer

In the absence of more detailed information as regards the potential volume of applications and the assumptions on which the amendments to the 2007 Act were based, we are unable to comment further.

WIDER ISSUES

Question 7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Answer:

In the absence of information about any wider policy initiative, we are unable to comment.

Question 8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so is it possible to quantify these costs?

Answer:

For the reasons detailed above we are not currently in a position to provide an answer to this question.

Owen Mullan
Head of Criminal Legal Services

WRITTEN EVIDENCE RECEIVED BY THE FINANCE COMMITTEE

SUBMISSION FROM THE SCOTTISH PRISON SERVICE

Overall, with the possible exception of the amendments to the CSAW Act 2007, we consider there to be no significant financial impact of the Bill's provisions on the SPS, either in terms of additional costs or resources released.

A number of the specific measures in the Bill identify illustrative costs or savings to the SPS. These have been derived by applying the average long term full economic cost of a prisoner place to the Scottish Government's assumptions about the number and length of convictions resulting from the various measures.

Whilst these are valid as illustrative costings, the actual financial impact on the SPS is much harder to gauge. The SPS is funded for its design capacity, which will rise to just under 7,600 in the course of 2009/10. Despite the provision of the new 700 place prison at HMP Addiewell, a new houseblock at Edinburgh, and a further houseblock scheduled to open at Polmont in the autumn of 2009, the SPS is already operating at substantially above its design capacity (prisoner numbers were 8,066 as of the 8th of April), without consequent additional funding.

Indeed, despite the investment in the new prison, the SPS continues to operate at levels beyond the assessed operational limits at some establishments with consequent erosion of service delivery as existing resources become overstretched. HMCIP has pointed out the 'evils' of overcrowding and he is right. The Financial Memorandum records that the CSAW Act 2007, as amended, will have additional financial consequences for the SPS, albeit these are less than the 2007 Act as enacted. The Memorandum also acknowledges that implementation will not be possible until the prison population has been reduced to a point where there are resources available to support the changes. In this context, the SPS welcomes the potential longer term benefits of the package of community based measures, including the presumption against short sentences, and the proposals for tough alternatives to custody. These have the potential to reduce churn and allow resources to be focussed on achieving a workable sentence management regime for those offenders who are sent to prison.

SPS is committed to working with the Scottish Government to deliver and realise the benefits of the Offender Management Strategy. We are already actively contributing to the new programme of work in addition to strengthening our approach to offender management, continuing to work at improving joint working with CJAs, local authorities, statutory and other partners.

The SPS believes that excessive use of prison and overcrowded prisons reduce public protection rather than contributing to public safety. Prison can do good for some offenders, in particular those that present a serious risk of public harm. But prison itself can do harm; and the biggest harm is to people serving short sentences.

Imprisonment impacts on the life not only of an offender but of their family, the very act of imprisonment can reduce the positive factors which would contribute to reduce re-offending in the future. An offender is removed from employment, suffers disruption to the relationships and controls offered by family and community, and can lose access to their home. It is difficult to promote inclusion from an excluding process and use of short term imprisonment is likely to take the most deprived and make them even harder to reach in the future. Indeed the pressure of numbers created by short term churn makes effective rehabilitative work with longer term prisoners more difficult because time is spent managing the population, diluting the focus of resources on rehabilitation.

It is only right to take every opportunity to find effective disposals which stop or reduce offending and re-offending at the earliest stage, diverting minor of first offenders from the “conveyor belt” of the criminal justice system and tackling offending behaviour without the added negative impact that prison produces. Research suggests that early intervention and a care based model is more effective with young people than a justice based approach, that desistance is best supported in the community and that effective community based disposals have positive impact on public protection.

We are all committed to making Scotland a safer place this can be better achieved by breaking the cycle of re-offending at the earliest possible stage. Diverting some of these offenders into meaningful community alternatives and leaving Prisons to those whom we know can benefit from the range of interventions we have to offer, would be a very positive step in making Scotland safer and stronger.

MIKE EWART
Chief Executive
Scottish Prison Service

WRITTEN EVIDENCE RECEIVED BY THE FINANCE COMMITTEE

SUBMISSION FROM THE SCOTTISH POLICE SERVICES AUTHORITY

Consultation

1. *Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made*?

SPSA Forensic Services did not provide direct input into the consultation on the Criminal Justice and Licensing Bill, but did provide input to a separate consultation on Disclosure. The costs provided by SPSA Forensic Services were estimated for that consultation, i.e. costs associated with Disclosure, which links to part 6 of the Bill.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

The comments and assumptions made have been recorded on pages 110 and 111 of the Memorandum and are accurate as provided by the SPSA.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes, however the request for estimated costs was separate to the consultation process and was completed on a relatively short timescale. This limited the level of internal consultation / fact finding that the costing was based on.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

The costs provided by SPSA Forensic Services have been recorded on pages 110 and 111 of the Memorandum and are accurate as provided by the SPSA. (assumed to be included in the combined costs referenced in the summary table as Sections 85-116 – Disclosure)

The figures provided do not capture the cost associated with the disclosure of previous convictions for SPSA expert staff.

The estimated cost for this is around £50/60k per annum (recurring) to pay for the resources necessary to ensure this information is provided. These costs were not included as it is assumed these costs would be covered as part of the police costs for providing details of witness previous convictions.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

SPSA Forensic Services was established based on the costs incurred by Scottish Police Forces during 2006 / 2007 in the delivery of forensic services. The impact of disclosure will generate new work that will need to be addressed by an increase in resources across the service. As this is effectively new business it cannot be funded from within the current finances of the organisation.

In order to meet these additional requirements it is envisaged that these costs will be the subject of a detailed business case and bid for additional funding from the Scottish Government.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

In terms of the estimated costs, the figures supplied remain in line with SPSA's assessment of the impact of Disclosure on the organisation.

In terms of timescales, it is envisaged that some level of training will be required during this financial year to ensure SPSA is ready to respond to the requirements set out in the Bill during 2010, and to fall in line with Police / COPFS timescales for implementation. This timescale is not reflected in the Memorandum.

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

It is not clear what implications a wider policy initiative would have for SPSA Forensic Services, as such SPSA Forensic Services cannot comment at this time.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

There may be additional future costs, in particular if such legislation affects the speed of response or the volumes of responses required, but it is not possible to quantify these additional costs at this time.

Bob Simpson
SPSA Forensic Services

WRITTEN EVIDENCE RECEIVED BY THE FINANCE COMMITTEE

SUPPLEMENTARY SUBMISSION FROM ORKNEY ISLANDS COUNCIL

I have considered the minutes of the Finance Committee and note Colleagues covered the financial aspects of the Bill from a Criminal Justice perspective.

There are common costs that are borne by all Councils in making provision to meet their statutory obligations be that under licensing and or from the criminal justice side. The costs are alluded to by my colleague in his response at Q8 below. On the licensing side the establishment costs are to be met and both the Civic Government and Liquor Licensing are meant to be self funding however, the base line costs, which are more capable of being absorbed in the larger areas have an effect on the ability of smaller, rural locations to achieve that. There are minimum baseline costs that are required to support the statutory functions. For the licensing side this is reflected in fee income and the absence of the number of traders to support that. The removal of the sections referred to by the Scottish Government is noted. The reference was to alert the Committee to the fact that regardless of where you are based there are minimum costs to be met to deliver a service this applies generally to the Bill as a whole. The Bills provisions are far reaching and colleagues who appeared before Committee addressed these costs on the Criminal Justice side. The proposals regarding the Civic Government reform and liquor licensing are noted and may lead to streamlining.

Fiona MacDonald
Solicitor to the Council
Orkney Islands Council
28 April 2009

SUPPLEMENTARY SUBMISSION FROM PERTH AND KINROSS COUNCIL

You are correct in saying that I restated our position somewhat in relation to the adequacy of proposed funding for Community Payback Orders / Reduction in numbers entering Prison for periods of less than 6 months. I amplified my written observations by observing that , although the prospective sum seemed realistic in relation to the number of additional staff who may be required on the ground to deliver these enhanced services, I did not think that sufficient allowance had been made for management, accommodation, clerical support and transport costs . These costs are equally important, have not always been accounted for in the past and impact directly on our ability to deliver fast and effective services.

I was also invited by Mr Welsh to confirm the Unit costs allowed per Probation Order as I did not have these to hand when asked during yesterday’s meeting. These I have calculated by comparing the sum provided to Tayside CJA for the provision of Social Work services with the actual number of probation Orders/Community Service orders etc for the last available year, as follows:

1. Allowance per Probation Order - £1364.
2. Allowance per Supervised Attendance Order - £564
3. Allowance per Community Service order - £2389
4. Allowance per Social Enquiry Report - £226.

It is the allowance per Probation Order which gives me greatest cause for concern. These are used to supervise some of our most concerning offenders and can be up to 3 years in length. The Unit cost allowed for delivery of such services is unrealistic now and will become more so as we endeavour to supervise people in the churn of short term prison sentences who require ever higher levels of support and supervision if they are to escape the cycle of reoffending.

John Gilruth
Perth and Kinross Council

WRITTEN EVIDENCE RECEIVED BY THE FINANCE COMMITTEE

SUPPLEMENTARY SUBMISSION FROM THE SCOTTISH COURT SERVICE

Clause 89. Prosecutor's duty to disclose information The prosecutor is only required to disclose information which is material to the defence, but must notify the accused of other information held which does not meet these criteria. The accused will be able to apply to the court for an order requiring the prosecutor to disclose information which was not considered to meet the criteria for disclosure. **Clause 94. Defence statements: solemn proceedings** The prosecutor is required to review the decision taken under Clause 89 in the light of the information provided in the defence statement; The accused will similarly be able to apply to the court for an order requiring the prosecutor to disclose information following lodging of defence statement and the prosecutor's subsequent review. **Clause 100. Order enabling disclosure to third party** The accused is prohibited from using the information disclosed, for any purpose apart from preparation of the defence or an appeal. However, the accused will be able to apply to the court for permission to pass specified disclosed material to a specified person. It is anticipated that a similar procedure will apply in all three of the above types of application.		
Estimated volume of cases	50 per annum	No means of estimating the likely volume of cases but they are expected to be rare; It is assumed that they will occur predominantly in High Court or sheriff and jury cases
Estimated cost	£60 per case	Defence will require to explain why order is sought, and prosecutor will have the opportunity to advance opposing arguments; Estimated to add 6 minutes to preliminary diet/first diet; Costed *pro rata* for High Court and Sheriff Court
Total cost	£0.003m	
Clauses 89, 94 and 100. Appeals It is assumed that decisions taken in respect of applications by the accused as narrated above, will be appealable in terms of section 74 of the Criminal Procedure (Scotland) Act 1995.		
Estimated volume of cases	Less than 1 per annum	No means of estimating the likely volume of cases to which this will apply but they will be a subset of the 50 cases suggested above, and are expected to be rare
Estimated cost	£2,070 per case	Current average cost of an equivalent appeal
Total cost	£0.001m	
Clauses 99 and 101. New offences of misuse of disclosed material New offences which may be prosecuted summarily or on indictment.		
Estimated volume of cases	10 per annum	Crown Office predicts that the number of offences will be minimal[57]. We have estimated on the basis of 2 High Court (HC) prosecutions, 4 Sheriff and Jury (SJ) prosecutions and 4 summary prosecutions (S)

Estimated cost	Per case HC - £6,006 SJ - £1,474 S - £260	Current average costs
Total cost	£0.019m	*Note:- Whilst the cost per case provided in the Financial Memorandum at paragraph 761 is correct, there is an arithmetical error in the figure extended into the 'Total' column for the High Court*
Clauses 102 - 106. Applications to court: orders restricting disclosure Applications by prosecutor for non-disclosure orders, non-notification orders, and/or exclusion orders on public interest immunity grounds		
Estimated volume of cases	10 per annum	No means of estimating the likely volume of applications, but they are expected to be rare; We have estimated on the basis of 5 High Court (HC) cases, and 5 Sheriff and Jury (SJ) cases
Estimated cost	Per case HC - £1,360 SJ - £1,040	Given the extent of the matters to be considered by the court (section 106), and the need to fix 2 hearings in some cases, we have estimated that each case will, on average, require 2.5 hours; Costed *pro rata* for High Court and Sheriff Court
Total cost	£0.012m	
Clauses 107. Special Counsel Enables the court to appoint a special counsel to represent the interests of an accused when considering an application for a non-disclosure order, non-notification order, or exclusion order in the absence of the accused.		
Estimated volume of cases	0 - 10 per annum	No means of estimating the likely volume of such cases, being a subset of the 10 applications referred to immediately above.
Estimated cost	Not known	We assume that the fee for special counsel will be prescribed by Scottish Statutory Instrument. Reference to the Criminal Legal Aid Fees suggests that the fees could vary from £300 per day to over £1,000 per day, depending on the qualifications of the person appointed, and the court in which they are appearing.
Total cost	Not known	
Clauses 111 - 113. Reviews The prosecutor or the accused may apply for a review of a decision to grant a non-disclosure order if additional information subsequently becomes available; The court is required to periodically review whether the non-disclosure order continues to be appropriate, and if it is considered that it may no longer be appropriate, a review hearing is fixed.		
Estimated volume of cases	20 per annum	No means of estimating the likely volume of reviews, but we have estimated on the basis of 2 reviews for each of the 10 cases identified for clauses 102 – 106 above

Estimated cost	Per review HC - £140	We have estimated that each review will, on average, require 15 minutes
Total cost	£0.003m	
Clauses 108 - 110. Appeals against decisions relating to non-disclosure orders, non-notification orders, and/or exclusion orders The prosecutor, the accused, and the special counsel may lodge an appeal.		
Estimated volume of cases	20 per annum	No means of estimating the likely volume of appeals, but we have assumed that in these sensitive cases, the probability of an appeal will be high. This is likely to be a subset of the 20 cases identified for Clauses 111 – 113 above
Estimated cost	£2,070 per case	Current average cost of an equivalent appeal, based on 3 bench appeal hearing
Total cost	£0.041m	
Clause 114. Code of Practice We have been advised that in line with the Crown Office Disclosure Manual, we should make allowance for additional appeals by the prosecution to the High Court, by Crown Bill of Advocation, against refusal of a ‘protective order’ .		
Estimated volume of cases	2 cases per annum	It was suggested that we should estimate on the basis of 2 appeals
Estimated cost	£2,070 per case	Current average cost of an equivalent appeal, based on 3 bench appeal hearing
Total cost	£0.004m	
Clause 115. Acts of Adjournal - Security associated with restricted disclosure cases It is anticipated that the Rules of Court will make provisions to ensure safe, secure and confidential storage of case papers, and restricting access thereto. In order to provide locally available facilities, it is planned to equip 11 courts, geographically spread across the country.		
Estimated cost of secure storage	£3,000 per court	Fitting of combination lock to provide ‘secure storage’ in 11 courts, plus Securicor costs
Estimated cost of security clearance for staff	£3,500 per staff member	Developed vetting for 15 staff, based on actual cost of vetting already done in High Court for dealing with terrorist offences
Total cost	£0.086m	*Note:- There is an arithmetical error in the figures extended into the ‘Total’ column in the Financial Memorandum at paragraph 761*
IT development It is anticipated that the SCS computer system will require considerable development to accommodate the new types of applications and hearings.		

Estimated cost	£0.100m	An exact costing cannot be provided until we have had sight of the related Acts of Adjournal, and the Code of Practice. At this stage we can only provide a broad estimate. This is based on our experience of commissioning development of our software for changes of this magnitude. It is in contrast to smaller estimates made elsewhere in the Financial Memorandum for relatively minor amendments to the software. Separate estimates have been made for different provisions, as they may have to be instructed separately. This will be determined by the implementation dates fixed for the various provisions in the Bill. If common implementation dates are fixed, it may prove possible to achieve savings in the projected costs.

Marilyn Riddell
Policy and Legislation Branch
Policy and Strategy Directorate

WRITTEN EVIDENCE RECEIVED BY THE FINANCE COMMITTEE

SUPPLEMENTARY SUBMISSION FROM THE SCOTTISH GOVERNMENT

During our evidence to the Finance Committee on the Financial Memorandum for the Criminal Justice and Licensing (Scotland) Bill, we agreed to provide further information in respect of the Community Payback Order and presumption against short periods of imprisonment (sections 14 and 17 of the Bill).

Clarification has been sought on the breakdown of prisoners currently serving short term prison sentences. Direct sentenced receptions to Scottish penal establishments in 2007-08 for offenders sentenced to under 6 months[1] amounted to 8,191, comprising 6,964 adult prisoners and 1,227 young offenders. These figures, which exclude 3,610 receptions for fine default and 412 receptions for recall, are from the *Prisons Statistics Scotland 2007-08* bulletin published in August 2008.

The numbers of receptions differ from the figures for custodial sentences which appear in the *Criminal Proceedings in Scottish Courts* statistical bulletin, the most recent edition of which was published on 28 April. The latter records sentences of courts whilst those in the prisons statistical bulletin count receptions to penal establishments. Direct sentenced receptions to penal establishments (i.e. excluding fine defaulters) are counted differently from custodial disposals in the court proceedings statistics for two main reasons. Firstly, a number of offenders will have been held on remand prior to sentencing and, as a result, served the required number of days before being sentenced. These individuals would be included within the court statistics, but excluded from the sentenced prison receptions. Secondly, if a person is given custodial sentences for separate sets of charges from the same court on the same day, this is reported as multiple custodial sentences in the court statistics, but only one direct sentenced reception.

Of the 8,191 receptions for sentences of less than 6 months a certain number of individuals were received into custody on more than one occasion. In total, 6,076 individuals accounted for the 8,191 receptions in 2007-08. In essence the presumption set out in section 17 of the Bill against custodial terms of 6 months and under has the potential to impact on the 6,076 individuals received into custody in the latest year for which data is available plus the 3,610 receptions for fine default (this represents 3,246 individuals). The Committee will wish to be aware that the 3,610 receptions for fine default represented a 39% reduction from the previous year's figure of 5,963 and a further reduction is anticipated in the current year. This follows implementation in September 2007 of provisions whereby courts, which would otherwise have imposed a short custodial sentence for those defaulting on fines not exceeding £500 are required instead to impose a Supervised Attendance Order. The latter provision operated only for part year in 2007-08 and the full 12 months effect has still to be realised.

A snapshot of the crime breakdown of those received into custody for sentences of under 6 months is attached at Annex A. On 26 March 2008, this stood at 536, which represents 7% of the total prison population at that point.

One aspect of our proposals is that for the first time courts will have access to imposing an unpaid work and other activity requirement for relatively short periods starting at 20 hours. Existing Community Service Orders have a minimum period of 80 hours and whilst Supervised Attendance Orders are for periods of between 10 and 100 hours with the exceptions of two relatively small scale pilot exercises they are restricted to use with offenders who have defaulted on their fines i.e. they are not used as a sentence of first instance.

We believe that the shorter time periods could prove an attractive sentencing options for courts particularly justice of the peace courts where a level 1 unpaid work and other activity requirement could be used with an offender who lacks the financial means to pay a fine. Whilst there might be significant numbers of such orders these are likely to be offset by the number of offenders who might otherwise have been fined, subsequently defaulted on the fine and had a level 1 order imposed as a result. The net increase may not therefore be too dramatic.

As we underlined in oral evidence, it is difficult to predict with any certainty changes in sentencer behaviour, which is why we have used a range of assumptions about possible outcomes. Sentencers will rightly retain discretion to sentence as they think appropriate having regard to the specific circumstances of the case. As indicated by the Minister for Community Safety during the Parliamentary debate on offender management on 8 January this year, there is no intention to remove sentencers powers in relation to those sentenced who might otherwise have received custodial terms of 6 months or less:

"The member said that he is against removing all discretion from sheriffs, but that is not what is proposed. We are not removing discretion but creating a presumption."

Our 10% and 20% assumptions of increased numbers of Community Payback Orders in absolute numbers set out in paragraphs 695 and 697 of the Financial Memorandum represent additional capacity of 1,939 and 3,878 orders beyond the total number of existing orders imposed by courts in 2007-08 and as set out at paragraph 679 of the memorandum. This additional capacity requires to be considered in the context of the 6,076 and 3,610 receptions indicated above. Past experience suggests that sentencers are cautious in making changes to their sentencing behaviour and we therefore believe that the assumptions represent a reasonable range of increases in the context of the numbers of prison receptions for individuals for this length of sentence.

The approach we have adopted in terms of the Financial Memorandum is to attempt to identify the additional costs which are likely to be incurred as a result of the provisions in the Bill. Whether the existing baseline is sufficient to is, we believe, a separate issue and outwith the scope of the memorandum although the Committee will wish to be aware that an additional £2 million has been made available for 2009-10 to Community Justice Authorities to achieve improvements in immediacy and speed of completion of community service orders and increased workloads.

The Committee also asked whether Community Justice Authorities (CJAs) were consulted on the contents of the Financial Memorandum and had sufficient time to respond. Whilst the CJAs were not consulted on the detailed figures in the memorandum they were alerted in advance to the timing of the Bill's introduction and to the likelihood that they would be invited to give evidence to both the Finance and Justice Committees on the provisions within the Bill. Scottish Government officials offered to provide the Chief Officers of the CJAs with a detailed briefing of the figures and assumptions used in the Financial Memorandum but this offer was declined on the basis that it was not felt to be necessary.

Philip Lamont
Criminal Justice and Licensing (S) Bill Team

Annex A

Prison population serving less than 6 months by main crime/offence: snapshot at 26 March 2008

		Sentenced		Total
		Male	**Female**	
Total crimes & offences		**511**	**25**	**536**
Non-sexual crimes of violence	Serious assault etc	10	1	11
	Robbery	8	1	9
	Other violence	1	1	2
Crimes of indecency	Lewd & libidinous practice	1	-	1
Crimes of dishonesty	House breaking	24	-	24
	Theft	6	-	6
	Theft from a motor vehicle	5	-	5
	Theft of a motor vehicle	10	-	10
	Shop lifting	62	9	71
	Other theft	30	-	30
	Fraud	3	3	6
	Other	10	2	12
Fire-raising, vandalism etc	Fire raising	3	-	3
	Vandalism etc	13	-	13
Other crimes	Crimes against public justice	35	2	37
	Handling weapons	45	1	46
	Drugs	13	2	15
	Other	7	-	7
Miscellaneous offences	Petty assault	85	2	87
	Breach of the peace	67	1	68
	Breach of social work order	1	-	1
	Other	9	-	9
Motor vehicle offences	Dangerous & careless driving	6	-	6

	Drunk driving	18	-	18
	Unlawful use of vehicle	39	-	39

Source: Scottish Government Justice Analytical Services

Notes:

If a prisoner is convicted of more than one crime/offence, the main crime/offence is defined as the one attracting the longest sentence, and assumed to be the most serious.

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[1] Given that the exact length of a 6 month sentence will depend on the date of sentencing and the number of days in the month, extracting the numbers sentenced to exactly 6 months would require a separate exercise and take some time. The scale of change in this case is estimated to be about 10% at the most.

WRITTEN EVIDENCE RECEIVED BY THE FINANCE COMMITTEE

SUPPLEMENTARY SUBMISSION FROM THE SCOTTISH COURT SERVICE

During the evidence session, Alastair Merrill undertook to provide additional information to the Committee on a number of issues. He also referred to information that the SPS had submitted to the Justice Committee in Autumn 2008. I have therefore attached a copy of Mike Ewart's response to the Justice Committee scrutiny of the SPS draft budget for 2009-10[1], together with an extract of his evidence to the Justice Committee in September 2008[2]. This information provides full details of the Assessed Operation Limit of the SPS and how the reduction of short-term prison sentences is only likely to have an effect on the churn of the prison population, as opposed to having a significant reduction in cost or prisoner places in the short-term. It should be noted that the current AOL is 8920. I can also confirm that the annual average cost per prisoner place, including capital charges, for 2007-08 was £41,470 (and £32, 358 excluding capital charges).

In relation to the further analytical information on the effect on the Prison Service of the reduction in short-term custodial sentences and confirmation of the number of prisoners in custody who are serving a sentence of 6 months or less, Scottish Government colleagues have agreed to provide this information.

GREIG KNOX
Legal Policy Team Manager
Scottish Prison Service

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[1] See: http://www.scottish.parliament.uk/s3/committees/justice/inquiries/Budget20092010/BP1.ScottishPrisonService.pdf

[2] See: http://www.scottish.parliament.uk/s3/committees/justice/or-08/ju08-2202.htm#Col1137

FINANCE COMMITTEE

EXTRACT FROM THE MINUTES

9th Meeting, 2009 (Session 3)

Tuesday 21 April 2009

Present:

Jackie Baillie (Deputy Convener)
Linda Fabiani
James Kelly
Andrew Welsh (Convener)
Derek Brownlee
Kenneth Gibson (Committee Substitute)
Jeremy Purvis
David Whitton

Apologies were received from Joe FitzPatrick.

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on the Financial Memorandum of the Criminal Justice and Licensing (Scotland) Bill from—

> John Gilruth, Lead Officer, Criminal Justice and Substance Misuse Services, Perth and Kinross Council;
>
> Jim Hunter, Chief Officer, North Strathclyde Community Justice Authority;
>
> June Murray, Head of Legal Services, North Lanarkshire Council;
>
> Chris MacIntosh, Policy Division, Crown Office and Procurator Fiscal Service;
>
> Alastair Merrill, Director of Corporate Services, Scottish Prison Service;
>
> Tom Nelson, Director of Forensic Services, Scottish Police Services Authority;
>
> Alastair Sim, Director of Policy and Strategy, Scottish Court Service;
>
> George Burgess, Deputy Director, Criminal Law and Licensing Division, George Dickson, Police Division, Wilma Dickson, Deputy Director, Community Justice Services Division, Annette Sharp, Offender Management Strategy Division, and Rachael Weir, Criminal Procedure Division, Scottish Government.

Scottish Parliament

Finance Committee

Tuesday 21 April 2009

[THE CONVENER *opened the meeting at 14:06*]

Criminal Justice and Licensing (Scotland) Bill: Financial Memorandum

The Convener (Andrew Welsh): Good afternoon and welcome to the Finance Committee's ninth meeting in 2009 in the third session of the Scottish Parliament. I ask everyone—members and public alike—to turn off their mobile phones and pagers.

We have received apologies from Joe FitzPatrick. In his place I welcome Kenneth Gibson, who is attending as a Scottish National Party substitute. As this is the first time that Kenneth Gibson has attended a Finance Committee meeting in that capacity, I invite him to make a declaration of any interests relevant to the committee's remit.

Kenneth Gibson (Cunninghame North) (SNP): The vineyards in Provence and the château in Tuscany are, I think, the only things that I wish to declare at this time. Sorry, I have no declarations whatsoever to make in relation to the work of the committee.

The Convener: I am tempted to ask more, but I shall resist that temptation.

Agenda item 1 is to take oral evidence on the financial memorandum to the Criminal Justice and Licensing (Scotland) Bill. The committee has agreed to adopt level 3 scrutiny on the financial memorandum. That means that, as well as seeking written evidence, we will take oral evidence from affected organisations and from the Scottish Government bill team. The written evidence that has been received is included in members' papers as paper FI/S3/09/9/3.

Members will also recall that we wrote to the Cabinet Secretary for Justice to ask how he will ensure that certain licensing provisions, which were originally intended to be included in subordinate legislation, are subjected to appropriate scrutiny. Paper FI/S3/09/9/4 is a letter from him that outlines how he proposes to proceed with those provisions in a separate bill.

I welcome the first of our three witness panels. John Gilruth is the lead officer on criminal justice and substance misuse services at Perth and Kinross Council, Jim Hunter is the chief officer of the north Strathclyde community justice authority, and June Murray is head of legal services at North Lanarkshire Council. Do the witnesses wish to make a short opening statement?

John Gilruth (Perth and Kinross Council): I thank the committee for the opportunity to submit evidence on this important bill, which we believe will reshape the nature of criminal justice social work in Scotland. I express my support and my council's support for the key intention of developing a standard community payback order with variable component parts to reflect both the desire for public restitution and the complex nature of offenders' needs. I further support the desire to reduce the number of offenders in prison, particularly of those who are imprisoned for periods that are so short as to prohibit the undertaking of realistic rehabilitative work.

However, I urge caution on the part of the Government in requiring local authorities, in effect, to double the average number of community service hours worked per offender per week and to take on responsibility for supervising the potentially significant number of persons who are currently sentenced to periods of imprisonment.

In particular, I ask the committee to bear in mind the complex needs of those in the churn of short-term adult imprisonment, many of whom have substance abuse, mental health and chronic relationship difficulties. Many recidivate and do not normally comply with orders. Most have complex needs that require well-constructed care and supervision arrangements.

Over the past four years, Government funding for local authority core criminal justice functions—probation, community service, social inquiry reports and throughcare—has not kept pace with inflation. Those form the basis of our activity. The funding formula that informs the grant to local authorities does not necessarily take into account the greater cost of supervising court orders across dispersed rural populations. The funding formula that is employed at the level of criminal justice partnerships—now known as community justice authorities—is sometimes based on activity levels that are four, five or six years out of date and do not reflect current or immediately projected activity levels.

I ask the committee also to remember that the additional staff who will be needed to oversee the new community payback orders will need to be managed, accommodated and supported administratively. Additionally, in rural areas, they will need to travel substantial distances to supervise offenders. Funding needs to reflect the true local costs of delivering services and the complex needs of those whom Government wishes to prevent from being sentenced to periods of imprisonment.

The Convener: Do our other witnesses want to make a short opening statement?

Jim Hunter (North Strathclyde Community Justice Authority): I have no statement to make. We made a written submission on which I am happy to take questions.

June Murray (North Lanarkshire Council): I do not have a long statement to make. I am head of legal services for North Lanarkshire Council and I appear before the committee in my capacity as clerk to the licensing board. I welcome the opportunity to be here. North Lanarkshire Council will limit its evidence to the licensing provisions of the bill, from which section 129 is, of course, being removed.

The Convener: Thank you for your presence. We look forward to hearing your responses.

If you had been allowed more time to consider the financial implications of the bill, would you have recommended changes to the estimated costs? If so, what would be the extent of those changes?

Jim Hunter: We had three weeks in which to consider the financial assumptions. That did not give us a great deal of time in which to consult our board members or local authority partners.

We have a couple of concerns about the financial memorandum, the first of which is its assumption that existing core funding for probation, social inquiry reports, community service orders and supervised attendance orders is adequate. In our view, that is not the case. Community justice authorities distribute grant to local authorities in two ways: core and non-core grant funding. Each year, we are permitted to seek approval from the Government to vire money from non-core to core funding. This year, six of our eight local authorities either have asked for approval to vire money or are in the process of doing so. North Strathclyde community justice authority is seeking approval to vire about 7 per cent of non-core funding to core funding. That is evidence that existing core funding is not sufficient for purpose. We are concerned that, if we have a large increase in the number of community payback orders, we may have to vire further moneys from non-core to core funding.

14:15

Our second concern is that the financial memorandum might slightly underestimate the number of additional social inquiry reports that sheriff courts might request. When a sheriff sentences someone who is over 21 to a second or subsequent prison sentence of any length, they are not required to seek a social inquiry report and, in most cases, they merely proceed to make the sentence. Given the presumption against short sentences, we are a bit concerned that sheriffs might ask for social inquiry reports in most cases. They might do that to have the full information about the community options that are available in order to make up their minds that none of those options is suitable, which would mean moving on to a short-term prison sentence. If that were to happen, many additional social inquiry reports that have not been costed in the financial memorandum might be required. Much better men than me have tried to guess what sheriffs' reaction to legislation is likely to be and I could be completely wrong, but what I described is a realistic prospect.

The Convener: How much is the shortfall that you are concerned about? What would be the consequences if the shortfall materialised?

Jim Hunter: In 2006-07, about 18,000 prison sentences were imposed in Scottish courts. About 14,000 of them were for less than six months. I am not sure how many were first sentences or repeat sentences, but a reasonable guess is that at least half were repeat sentences. That means that 7,000 or more additional reports could be requested if the scenario that I relayed came into effect.

John Gilruth: The convener asked whether we can quantify the current situation. I can say with some accuracy that our local budget is between £70,000 and £100,000 short. We have an integrated service in which criminal justice services are delivered alongside substance misuse and youth justice services. Between us, we can achieve synergies. However, the criminal justice budget just to deliver existing services has a shortfall. That is the platform from which we seek to build.

The Convener: You mention a shortfall, but are the costings in the financial memorandum accurate?

John Gilruth: My sense is that the costings are not inaccurate, on the basis of the additional demand that might be expected. I am not sure whether they take into account the additional infrastructure costs that are involved in accommodation, management, clerical support and transport, but the costs for the additional staff who will be required are probably fairly accurate.

Jim Hunter: I agree with Mr Gilruth. The costs that are outlined in the memorandum look fair.

Jackie Baillie (Dumbarton) (Lab): I will press you on that, particularly in relation to scale. It is evident that the policy intention is that anybody who would have served a sentence of less than six months will have a community payback order. The prison population figures that I have found for 2006-07 suggest that 14,686 people are serving sentences of less than six months. Would dealing with such numbers not require a quadrupling of what you provide for people who have community service orders, for example?

John Gilruth: I can respond only by talking about the local situation, where we have checked the position. Usually, the Scottish Prison Service provides figures in the form of a snapshot, but we asked our colleagues to look into the situation further. As we have a prison on our doorstep, that was not quite as difficult as it might have been. We came up with the figure of 170 people receiving sentences of up to six months. That is slightly less than the number of people whom I have on probation and slightly more than the number whom I have on community service. That would be a significant addition, but we take it into account that we have a building and managers in place. However, additional management and accommodation costs would be incurred. On that basis, we believed that the core figure was not unrealistic for staff but that the support systems had not been fully budgeted for.

Jackie Baillie: But a local figure of 170 would be more than the envisaged take-up of between 0 and 20 per cent. Would that be a fair comment?

John Gilruth: That would be a fair comment.

Jackie Baillie: So the overall scale is in question.

John Gilruth: If the figure is purely for the first stage, it is likely to be adequate. However, the next question would concern the pace at which one might wish to develop things.

Jackie Baillie: The population is about 14,000—or, in your local case, 170. Are those people more likely to be subject to a community service order than, for example, a supervised attendance order? Obviously, one is more expensive than the other.

John Gilruth: I am sorry, can I just check what you mean? Are you asking about the situation at present or after the bill comes into force?

Jackie Baillie: After. I have made the simplistic assumption that, if a person merits a custodial sentence, it is more likely that any measure as part of a community payback order will be more robust than a simple supervised attendance order.

John Gilruth: That is our sense as well. We suspect that many people will be working in the community, and that many will be under community supervision requirements. However, we also have the sense that the total number asked to do unpaid work may rise. That seems to be an increasingly popular means of payback.

Jackie Baillie: That is interesting.

Mr Hunter mentioned the level of reoffending. How many people currently breach their community service orders, their probation orders, or their supervised attendance orders? From your experience, do you expect the number of such breaches to rise under the new proposals, because of the additional freedom that people are being given? What will the additional cost be?

Jim Hunter: It is difficult to say whether the number will rise. At the moment, the breach rate for probation orders and community service orders—the two main orders—probably ranges between 20 and 30 per cent. The breach rate is a bit higher for supervised attendance orders.

People who are subject to the new community payback order with a condition of unpaid work will be required to start on the same day and to move very quickly into their unpaid work, and they will be required to complete the work in a much reduced time. That may have the effect of reducing the breach rate, because we will be striking while the iron is hot—taking someone from the court and getting them started on their placement straight away. It has always been my experience that the longer the period between the sentence being passed and the people starting their unpaid work, the more chance there is that the people will breach their order. People can view it as a sign of softness if things are allowed to drag on. That effect may work in the order's favour and reduce the breach rate. I think that that is a reasonable assumption, although it will be interesting to see whether it is correct.

Kenneth Gibson: Mr Gilruth has touched on some issues that I wanted to ask about. Perth and Kinross Council's submission is interesting. I note your concern that, of the £10 million that will be allocated nationally, Perth and Kinross will get about £190,000 but the actual costs will be between £250,000 and £280,000. You have already said that your budget is short by about £70,000. What budget does your department have at the moment?

John Gilruth: The budget for community-based social work is around £1.3 million.

Kenneth Gibson: So the additional cost may be 10 per cent.

Situations can vary depending on the individual case and the rurality implications, but roughly how much does a report cost? I know that, in a way, I am asking, "How long is a piece of string?"

John Gilruth: No, you are not, but I would need to switch on my phone to give you the precise answer. I checked the figures a little while ago and stored the answers in my phone memory. However, if memory serves, the cost per social inquiry report is about £300 in a given year. The allocated sum is something like that. The figure for supervising a probation order is about £1,350, and more than £2,000 is allowed for a community service order. However, the biggest costs are incurred around probation and, I suggest, people who are on licence afterwards; £1,350 comes nowhere near the cost of supervising a sex offender or other high-risk offender who is subject to a probation order for three years.

Kenneth Gibson: I understand that. Rurality is also an issue. How concerned are you about rural local authorities—or mixed rural-urban local authorities such as Perth and Kinross Council—getting a fair share of the allocated resources?

John Gilruth: It is a continuing bleat from rural local authorities. However, Perth and Kinross Council covers 2,000 square miles and half our population resides outwith a radius of 5 miles from Perth or Kinross. We cannot write large tracts off as sheep, as we used to do 25 years ago, and think that we will get only a small number of people on community service, because people sometimes deliberately migrate to rural communities seeking anonymity. Throughout Perth and Kinross and other rural local authority areas, there are numbers of people who require to be supervised at high level, and the unit costs in such areas are considerably higher.

Kenneth Gibson: You pointed out that the training requirements will have to be enhanced considerably. Regardless of the costs and assuming that the financial resources could be found, would you have the staff available and how long would it take to ensure that they were properly and effectively trained to deliver an effective service in your local authority?

John Gilruth: In the current environment, I am reasonably confident that we could get the people in place. Most of them would already have the training that we are talking about because they would be social workers or would have a background as social care officers or in working with offenders and supervising in a prison context. If they were going to work in community service, I guess that we could have a staff group in place within six months.

Kenneth Gibson: Would there be a need to enhance secure accommodation in your local authority?

John Gilruth: No.

Kenneth Gibson: Mr Hunter, do you have any comments to add on that?

Jim Hunter: None just now, thank you.

Kenneth Gibson: I will ask June Murray some questions on licensing. Orkney Islands Council's submission states that the costs that relate to the bill's licensing aspects

> "cannot be met without further funding being made available"

to local authorities. However, East Ayrshire Council contradicts that and says that section 129, which will be removed, is

> "the only provision likely to have a financial impact"

on the authority. Does North Lanarkshire Council agree with East Ayrshire Council that there is unlikely to be much requirement for additional funding, or with Orkney Islands Council that additional resources may still have to be found?

June Murray: North Lanarkshire Council's greatest concern was the prospect of increased costs arising from section 129. Obviously, that might be subject to discussion elsewhere.

We are probably somewhere in the middle. We might not be quite as concerned as Orkney Islands Council, but we have concerns about section 124, which contains proposals for informing individual taxi operators of the setting of taxi fares. That is a new arrangement. The cost has been quoted as £1.08 per letter, but that estimate is limited to the postage cost. In fact, the originating of letters and the administration of dispatching letters must also be taken into account. It depends on whether one considers the administration cost to be marginal or significant.

Kenneth Gibson: What is North Lanarkshire Council's view of that?

June Murray: Our view is that, because it is a new arrangement, which will involve additional work and, therefore, an additional staffing resource, there will be a cost.

Kenneth Gibson: Are we talking about hundreds of pounds or thousands of pounds? North Lanarkshire Council is one of Scotland's largest authorities—it has a population of a third of a million or so—and its view of that might indicate the costs for other local authorities.

June Murray: We will probably require an additional clerical officer to handle the additional administration. That will require around £15,000 per annum.

Kenneth Gibson: If we extrapolate from that figure, we might be talking about expenditure throughout Scotland of £200,000 to £250,000 for all the licensing aspects of the bill. That is a ballpark figure, but is it a fair assumption?

14:30

June Murray: I think that it is a fair assessment. Perhaps we should try to mitigate the cost by dealing with the matter through the trade consultation process; there could be intimation to the trade rather than to individual operators.

Kenneth Gibson: Do Mr Hunter or Mr Gilruth want to comment on licensing or costings?

Jim Hunter: No.

John Gilruth: No.

David Whitton (Strathkelvin and Bearsden) (Lab): Mr Gilruth, you talked about the possible increased cost of supervising the new community payback orders. In your submission you said:

> "In order to oversee the additional offenders on Community Payback Orders, I would anticipate that between 2 and 3 Community Service Supervisors, 1.5 Community Service Officers and between 1 and 1.5 Social Workers will be required."

I understand that there is a national shortage of social workers and social care staff, so where will you get those people from?

John Gilruth: To date, we have succeeded in recruiting the staff that we require.

David Whitton: Are people in place in all the posts that you mentioned in your submission?

John Gilruth: I have not had difficulty in recruiting for vacancies that we experienced during the past year.

David Whitton: You represent just one local authority; every authority will have to recruit staff to implement the new legislation. Are there enough staff around?

John Gilruth: I suspect that it will be possible to find social care officers, who are usually employed to oversee fairly large numbers of people, and community service officers and supervisors. If there is a shortfall I suspect that it will relate to social workers.

The Convener: Can you quantify that?

John Gilruth: I cannot, because that has not been our experience locally.

The Convener: If the other panellists have no further comments on that, we will move on.

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): I want to ask more about the cost of community payback orders. Excuse my ignorance, but is there currently a requirement to carry out a social inquiry report before providing a disposal for probation or a community sentence?

John Gilruth: Yes. That is routine.

Jeremy Purvis: It is routine, but is it a statutory requirement?

Jim Hunter: Yes.

Jeremy Purvis: The bill will not change the law in that regard, so the assumption about the increase in the volume of community disposals is therefore the critical aspect. Mr Gilruth, you said that there is roughly an even balance between people who are on probation, people who are on a community sentence and people who are serving prison sentences of less than six months. Is it reasonable to assume that there will be a 20 per cent increase in the workload? If the bill's policy aim is met, I presume that there will be a 30 per cent increase in the use of community payback orders, because 30 per cent is broadly equivalent to the proportion of people who are serving sentences of less than six months.

Jim Hunter: We would probably be leaping into the dark if we tried to come up with an estimate. Currently, justice of the peace courts cannot sentence a person to community service. JPs to whom I have spoken over the years have been keen to get their hands on the disposal, which they regard as valuable for them. The 20 per cent figure might therefore represent an underestimation of how JPs will use the order. However, the new order will be used only as an alternative to custody, and district or JP courts do not sentence many people to custody. The danger would arise if the net were to widen and JPs used the order in cases in which in the past they would not have sentenced the person to custody. We need to keep an eye on that. A 20 per cent increase in the sheriff courts' workload is probably a reasonable starting point. As I say, it is a bit of a leap in the dark and it is difficult to come up with a figure, but 20 per cent would not be an unreasonable figure for the sheriff courts.

Jeremy Purvis: We are looking at the recurring costs. The Government has said what the initial costs will be and has set out the recurring costs based on assumptions of an increase in workload of either 10 per cent or 20 per cent. The cost estimates indicate how much the CJAs will be provided in resource if only two thirds of the intentions of the bill are implemented.

John Gilruth: In my written submission, I talk not only about the introduction of community payback orders but about the attempt to prevent people from going to prison. In some respects, I am more concerned about the figure of 14,000 prisoners that was cited earlier and the local figure of 176 prisoners. Although the situation can be addressed incrementally, there are a lot of people in that group, many of whom have complex needs. Some of them have been on probation or have been given community service a number of times before, and sentencers are saying that there is no point in using those sentences again. However, some of those people might be considered for the new community payback orders. To help those people, there will not be a standard approach; there will be a very structured approach right down to the level of the working day. As I said before I came in here, that is not dissimilar to the approach that we take at present with some high-risk offenders, and that is expensive.

Jeremy Purvis: We are also looking at the requirements that are to be attached to the community payback orders. The Government cites the example of the single community order in England, which has a menu of requirements attached to it that could well be added to the community payback order. However, the Government proposes no increase in the resource that is currently provided to ensure that those requirements are met. That does not match with what you have said about the resource that local authorities expect to receive to enable the new system to work.

John Gilruth: We are talking about a challenging new group of people with highly complex needs, and I suspect that it will test the system all round.

Jeremy Purvis: I hate to say it, but that is a politician's answer. It is a very good one. I think that we would all be very proud of that kind of answer.

John Gilruth: The national standards that apply to probation will simply not be adequate for some of those people. We cannot simply have somebody reporting in once a week or have somebody visiting them at their house once a week. The approach that will need to be taken is the approach that we currently take with some high-risk offenders. In effect, we have to enable them to put a structure round their day. We have something called accommodation support that is much more than that—it is life support. Those people need to be supported in attending appointments and we ensure that the appointments are followed up in order that they keep their employability. We need to bring in drug and alcohol services, not simply make contact with those services a condition of probation, and ensure that the people turn up. We need to construct probation as a supportive exercise—as opposed to simply a sentence—for people with multiple needs, and there will be complex multiple inputs.

Jeremy Purvis: The Government believes that there need be no change to the average number of conditions that are currently attached to a probation order, which is estimated to be 1.2 conditions per probation order. I do not want to put words into your mouth, but is it your view that that number will have to be increased if the orders are to be fully effective in meeting the bill's intentions?

John Gilruth: Yes. For some of the people, it will need to be increased.

Jim Hunter: The bill introduces a quite complex set of inter-effects. Justices of the peace will get orders that they have never had before; a supervision requirement will have to be attached to orders for 16 and 17-year-olds in addition to any other requirements; and there will be a presumption against short-term sentences. What the Government has done in the memorandum is probably the best that it could do. It has made some reasonable assumptions. However, if the bill is passed, it will be necessary to monitor closely the first year or 18 months of implementation, because I am not sure that anyone really understands yet how some of the measures will affect others. At this stage, it is difficult to predict that.

The Convener: We are hearing the voice of experience.

Linda Fabiani (Central Scotland) (SNP): Mr Hunter, I have a small question for you. You said that justices of the peace do not often deal with custodial sentencing but they might use the orders to displace non-custodial sentencing, which could increase costs. You mentioned the need for monitoring. Is the use of non-custodial sentencing already monitored through the justice system? How will we know whether that is happening? How can we prevent orders from being used inappropriately, which would obviously have a bearing on cost?

Jim Hunter: District courts publish annual statistical information, just as other courts do, so the Government knows how many prison sentences, fines and probation orders district courts impose year on year. At the moment, the number of probation orders that they impose is small—well over 90 per cent of district court sentences involve fines. In the first year or two after the bill is passed, it will become apparent whether there has been displacement from prison sentences or fines to the new community order. Orders will cost the Government much more than fines, so there will be concern if they displace fines. We will look for orders to displace prison sentences, as they are cheaper than such sentences.

David Whitton: You will have seen the written evidence that East Ayrshire Council has submitted on the financial implications of the provisions relating to remand and committal of children and young people. The council says that those provisions will place an additional burden on local authorities, through increased demand for alternative remand accommodation. Would you like to comment on that issue? I ask the question because the number of places and, consequently, the number of staff in the secure unit in my constituency are being halved. That prompts the question of where people will go if they are referred to secure accommodation.

John Gilruth: I am currently employed in criminal justice services, so I will pass on the question. Provision of secure accommodation is an issue for all local authorities and is a major problem for the larger conurbations. We make minimal use of secure accommodation. The alternative is to provide young people with a complex, structured whole day. That is demanding, but it can be done in most cases. I will not comment beyond that.

Jim Hunter: We did not cover the provisions to which you refer in our written evidence. We have not considered the issue.

David Whitton: Am I right in saying that there are not many secure units? I cannot remember the exact number—there are either six or eight. If it is thought necessary that a young offender should go to a secure unit, but they cannot do so, surely the burden of finding another way of supervising them will fall on you.

John Gilruth: Yes.

Jeremy Purvis: Linda Fabiani asked about the use of orders by JP courts. Am I right in thinking that a high proportion of short-term prison sentences continue to be imposed for fine default and that community payback orders—along with unpaid work and other requirements—will become mandatory in that area? A direct read-across is easier to get by looking at the estimates of how many orders are going to be provided in certain areas. The order will not really be a choice of disposal under the bill.

Jim Hunter: I think that you are right. District courts have been able to impose supervised attendance orders on fine defaulters for a number of years. The new community payback order will be available to the courts for that purpose. You are right that there is a straight read-across.

Jeremy Purvis: You do not think that that changes sufficiently the assumption of a 10 per cent or 20 per cent increase in workload.

John Gilruth: It would depend on the individual area and the individual court. After supervised attendance orders were introduced, certain local authorities, such as Angus Council and Perth and Kinross Council, had a massive take-up, which was not linked entirely to population or the number of known offenders in the area; it was just that some courts chose to use the orders. That has changed significantly over the past two to three years. As Jim Hunter said, the risk might be that the community payback order, which is a new sentence, appears to offer something new, proves very popular in some areas and will be much more expensive to deliver.

The Convener: I want to close this evidence session. Mr Gilruth gave us figures from memory. If he wishes to correct them, he should write to us, which would be appreciated. Do the witnesses wish to make any final remarks?

John Gilruth: I just want to thank you for the opportunity to give evidence.

The Convener: I thank you all for being here and sharing your expertise.

I will suspend the meeting for a few moments to allow our next panel to take their seats.

14:46

Meeting suspended.

14:48

On resuming—

The Convener: I welcome our second panel of witnesses: Chris MacIntosh is from the policy division of the Crown Office and Procurator Fiscal Service; Alastair Merrill is director of corporate services at the Scottish Prison Service; Tom Nelson is director of forensic services at the Scottish Police Services Authority; and Alastair Sim is director of policy and strategy at the Scottish Court Service. I believe that none of the witnesses wishes to make an opening statement.

Jeremy Purvis: I will start with a general question, which is addressed to everyone on the panel. I think that you all indicated in written evidence that you were broadly content with the assumptions about costs that were made in the financial memorandum. I ask each of you to highlight the provisions in the bill that you expect to have the most significant impact on your organisation and to say whether you will have sufficient flexibility in your on-going budgets and structures to address that.

Chris MacIntosh (Crown Office and Procurator Fiscal Service): It appears that the cost of the provisions on disclosure will be the major cost for the Crown Office and Procurator Fiscal Service. We have experience in disclosure because disclosure obligations have been with us for a number of years, and they will now be codified. We based our cost estimates on that experience and we feel that that empirical evidence makes them the best available estimates.

Alastair Merrill (Scottish Prison Service): As Mike Ewart said in his letter to the committee of 10 April, the bill's provisions will have no significant financial impact one way or another on the Scottish Prison Service. The financial memorandum contains a number of illustrative costings that are based on applying the full economic cost of a prisoner place to the Government's assumptions about prisoner numbers, which we believe are a fair reflection of the costs.

Tom Nelson (Scottish Police Services Authority): The bill's provisions on disclosure will affect the Scottish Police Services Authority's forensic services. We provided indicative costs for that in the paper that we submitted to the committee.

Alastair Sim (Scottish Court Service): There are two big issues for us. First, the move towards the increased use of community sentences and a reduction in short prison sentences will bring costs for administration and judicial salaries. Provision will need to be made for an expanded range of review hearings when people are sentenced to community payback orders. Secondly, where sheriffs still choose to give someone a sentence of six months or less, they will have to spend time in court explaining the reasons for that. That will have a marginal cost, because it will increase the amount of time taken by the court to get through its business, which will have a marginal impact on our need to pay for additional part-time shrieval resource. Such costs are reflected fairly in a range of assumptions in the financial memorandum.

The financial memorandum also reflects the fact that there will be costs for the Scottish Court Service from the new disclosure regime. In particular, there will be costs in ensuring that we build an information technology system to support that regime. Again, those costs are reflected fairly in the financial memorandum. We said in our letter to the committee that, to the extent that the bill imposes new costs on the SCS, we would expect funding to follow.

The Convener: Whenever I hear about an IT system being built, I hear alarm bells. Are you sure that that can be done at a reasonable cost?

Alastair Sim: It is the sort of thing that we do a lot. As soon as new provisions are introduced into law, we work either to adjust our existing criminal cases computer system or to build add-ons. When we looked at the bill, we thought that we were talking about a non-trivial investment of probably £50,000 to £100,000 in bolt-ons to our existing IT system. It is non-trivial, but not shuddering.

The Convener: So existing technology would cover it—nothing experimental is involved.

Alastair Sim: That is right—it will not be fancy and high-falutin'.

The Convener: That is reassuring.

Jeremy Purvis: My colleagues will ask about the issues that the panel has highlighted, but I have a second general question on the areas in which the financial memorandum estimates that there will be savings. What are your views on that? The Government has indicated, for example, that there will be savings to the SPS in relation to the early removal from the United Kingdom of short-term prisoners and savings to the SCS in relation to jury service and bail review appeals. Given that there will no doubt be cuts in your respective budgets, are you content that the savings that are estimated in the financial memorandum have been properly assessed?

Alastair Merrill: As you are aware, the Scottish Prison Service already operates significantly above the design capacity for which we are funded, so, at the margins, regardless of whether additional or fewer prisoners enter the system, there will be no impact in terms of increasing costs or releasing savings. Although we accept that the calculations to which you refer are illustrative of the savings that could be achieved, hard cash savings will not materialise until such time as the prison population has gone down to design capacity level or below.

The Convener: How do you manage to operate above the design capacity?

Alastair Merrill: We have been squeezing in additional prisoners for a number of years. The design capacity of our prisons will rise to just under 7,600 places by the end of the current financial year. That is the level for which we are funded. As of today, the prison population is a little over 8,100.

The Convener: Do you wish to follow up on that, Jeremy?

Jeremy Purvis: No. Other colleagues will follow up on that specific point. However, I would like to find out whether the Scottish Court Service agrees with the proposed savings.

Alastair Sim: What the financial memorandum says about savings is entirely fair, but I draw your attention to paragraph 895, which deals with the savings on jurors' expenses. The clear implication is that if savings are made on jurors' expenses, they will be recycled and used to improve the system for the reimbursement of jurors, which has been the subject of complaint and controversy for some time. As that is a matter of policy for the Scottish Government, the next panel might want to comment on it. The financial memorandum is saying that the relevant proposal will not produce savings for the Scottish Court Service. Any savings will be recycled to enable the jury system to work better.

The Convener: Were you involved in making those savings estimates?

Alastair Sim: Yes.

The Convener: We move on to Derek Brownlee. Oh, sorry—Linda Fabiani has a point to make.

Linda Fabiani: I would like to follow up on Jeremy Purvis's questions to Mr Merrill. I understand that the bill will not have an impact in the short term—I can see that—and that, as far as the prison infrastructure and everything else are concerned, the basics remain, because you have been operating over capacity, but surely there must be savings to be made in the medium and certainly the longer term as the bill's effects kick in.

For example, given that you are working over capacity at the moment, there must be staffing costs associated with overtime and general costs to do with the basics of ensuring that prisoners are properly and ethically looked after. I find it extremely difficult to accept that the bill will result only in negligible savings. How have those figures been arrived at? I will be open: we are talking about a Government agency and, let us face it, Government agencies and civil service departments generally like to hang on to what they have rather than give anything back. If Mike Ewart is saying on behalf of the SPS that no savings are possible in the medium to long term, there must be a bit more work to be done.

The Convener: Who wishes to rise to that?

Alastair Merrill: There are two questions on two different issues. I was answering the specific question about the savings that the financial memorandum suggests could be made from the measures on the early removal from the UK of short-term prisoners and the remand and committal of children and young people. The savings that the financial memorandum calculates could be made as a result of those measures, which are in the range of tens of thousands of pounds, relate to proportions of prisoner places that one could assume will no longer be needed once the measures have come into place.

My point in relation to those measures is that, given that the SPS is working with a budget of something over £400 million and that the population is already about 400 over the design capacity of the cells, the savings will not actually materialise. The measures will just mean that we will be slightly less overcrowded than we currently are.

15:00

Linda Fabiani has already alluded to the second issue, which concerns the longer-term benefits of the bill. We indeed see longer-term benefits coming out of the measures, particularly the presumption against custodial sentences. Those benefits will materialise in two ways. First, there is a possibility that, if the measures contained in the bill have an impact on the average prison population such that, together with other measures in the Government's offender management strategy, they reduce the average prison population to a point at which structural changes could be made, which would allow us to save significant amounts in relation to the prison estate or people, cash savings would materialise. We are not at that point yet, however—it is a long way off.

The second area where there would be benefits, and where those benefits would be much closer, lies in reducing the churn in the prison population—the number of people who go through reception and cycle through the system, which chokes up prison staff in moving people around rather than delivering proper sentence management. There would be benefits there, not in cash savings but in a better use of resources and a better sentence management regime. I am not sure whether that helps to answer the question.

Linda Fabiani: I am still not convinced—but thank you.

The Convener: You spoke about the prisons becoming "slightly less overcrowded" than at present. You are therefore saying that overcrowding will continue. What does "slightly less overcrowded" mean in actual figures?

Alastair Merrill: The assumption around the removal from the UK of short-term prisoners was that up to seven prisoners might be eligible for early removal. That would reduce the churn in the system by seven.

The Convener: Overcrowding means stress in any system.

Alastair Merrill: Yes. There is already significant overcrowding, and there is therefore significant stress in the prison system.

Jackie Baillie: I ask this question as a very simple person. In 2006-07, there were 14,686 people serving sentences of less than six months. That accounted for 81 per cent of all custodial sentences. What is the saving that you are predicting on your £400 million budget? What saving are you required to find? You are estimating that only seven prisoners will be removed early, out of 14,686. I am confused.

Alastair Merrill: I am sorry if I have confused you. The figure of seven was an illustration of the provisions in section 19, and it was the largest saving that was quoted in the financial memorandum with regard to the early removal from the UK of certain short-term prisoners. That was a Scottish Government assumption.

A lot of analytical work has been done by Scottish Government colleagues regarding the effect on the Prison Service of the reduction in short-term custodial sentences. I could recite it here, but perhaps it would be better to refer to it in writing to give the committee a fuller explanation. The net effect, as I think is mentioned in the financial memorandum, is that even a 50 per cent reduction in short-term sentences would probably result, in the longer term, in some 300 prisoner places—not prisoners—no longer being required.

Jackie Baillie: Would that have an impact on staffing? Will your paper tell us that?

Alastair Merrill: We would still be operating above the design capacity, unless other factors come into play that reduce the overall population further.

Linda Fabiani: I think that I would like to have a paper on that specific point, convener. I appreciate the offer of a paper, which I think would be very useful.

The Convener: I call Derek Brownlee. Sorry—I beg your pardon—I meant David Whitton.

David Whitton: That is all right, convener.

I assume that the Scottish Prison Service will still go ahead with building Low Moss prison, which will increase capacity. I ask as I have a constituency interest, but perhaps Alastair Merrill is not the person to answer that question.

Alastair Merrill: Yes, we are still committed to building that prison, the working title of which is, I believe, still Bishopbriggs prison. However, no final decision on that has been taken.

David Whitton: That is very unfortunate. The name should be Low Moss, but I will let that go by.

I want to ask about the costs for the Scottish sentencing council that will fall on the Scottish Court Service. First, is Mr Sim quite happy with the estimate? Secondly, is he happy that the Scottish Court Service will be able to absorb those costs?

Alastair Sim: On the first question, we think that the estimate is certainly in the right ball park.

On the second question, let me make two points. First, if the provision of support for the Scottish sentencing council was imposed on the Scottish Court Service as a new duty, we could not absorb those costs. We would need to be specifically funded for those substantial extra costs. We are already achieving major efficiency savings, which we are investing in integrating the district courts into our operations. That involves major costs and major estate refurbishments. We also have a major programme to keep Parliament house up the road fit for purpose as the home of Scotland's supreme courts. Therefore, we could not absorb those costs.

Secondly, on the policy side, the financial memorandum is quite carefully hedged in what it says about whether the duty will necessarily come to the Scottish Court Service. As members are no doubt aware, under the Judiciary and Courts (Scotland) Act 2008, the Scottish Court Service will be recreated as a new statutory body with a judicially chaired board—the Lord President will be the chair—on which there will be a judicial majority. The new body, which is likely to be in existence when the bill comes into force, will want to take a view on whether the Scottish Court Service is the right home for the Scottish sentencing council. The suggestion in the financial memorandum makes administrative sense—I can see why the Scottish Government has included that—but I think that the financial memorandum is careful not to express the issue as being an absolutely settled item of policy.

David Whitton: That kind of begs the question why the Lord President, rather than an act of Parliament, should decide where administrative support for the Scottish sentencing council should come from.

Alastair Sim: The matter can certainly be prescribed in an act of Parliament or—I do not know exactly how it will be cast—in subordinate legislation under an act of Parliament. What I am saying is that the current Scottish Court Service cannot commit the new body to taking on a function or express a view on what the new body might think about taking on that function.

James Kelly (Glasgow Rutherglen) (Lab): I have a couple of questions for the Scottish Court Service. On the disclosure provisions, paragraph 738 of the financial memorandum notes:

> "There is no indication of the numbers of cases likely to occur at each stage of the proceedings".

What estimates does the Scottish Court Service have on the additional court time that will be needed as a result of the additional requirements on disclosure?

Alastair Sim: I have the relevant paragraph in front of me in my notes, but I would like to pursue the point in more detail in writing. We made certain assumptions—to be honest, we do not anticipate a huge volume of cases—but the sums that we have done would be better expressed in writing than orally. I think that our calculations are reflected fairly in the financial memorandum. We do not anticipate huge volumes of business as a result of the bill, but it would be helpful if I could write to the committee on that.

The Convener: That would be acceptable.

James Kelly: Yes, it would be useful to have that in writing so that we can see what methodology was employed to ensure that the figures stack up.

My other question follows on from the convener's earlier point about IT costs, many of which will fall on the Scottish Court Service.

Will you think about rationalising the implementation of the changes by putting together a package that streamlines the number of changes that are required, rather than simply implementing a change programme for each issue?

Alastair Sim: We certainly want to introduce the changes as efficiently as we conceivably can. We have a relatively brand spanking new operating system for criminal cases and we will build changes into that. In general, the task should not be particularly difficult.

The Convener: Will you use existing staff or bring in expertise to make the changes?

Alastair Sim: For most of the changes, existing staff will be used. The disclosure stuff looks a wee bit newer and we will have to think about how we resource that.

James Kelly: Will the likes of community payback orders and serious organised crime offences be dealt with in the same operating system?

Alastair Sim: Yes. They will be new parts of the nice, modern operating system that we have.

The Convener: My next questions are for the Crown Office and Procurator Fiscal Service. The financial memorandum uses court figures from 2007-08 as the basis for the cost estimates for the provisions on disclosure. What are the relevant figures likely to be for 2008-09? What fluctuation might be expected? Are you content that staff resources are sufficient to meet any increased demands?

Chris MacIntosh: We have figures that go back a number of years for cases in the various courts. On the basis of those figures, we are confident that the figure in the memorandum—although it is an estimate—is reasonably accurate about what to expect in the following year.

The Convener: On the provisions on witness statements, the financial memorandum says that the costs of £216,000

> "are the upper limit of what is anticipated as COPFS will continue to consider methods of carrying out the work that will reduce the financial burden, e.g. through making effective use of IT systems".

What work are you doing and do you plan to do to reduce the financial burden of those provisions?

Chris MacIntosh: It is too early to say. We do not know the final shape of the provisions, so we do not know what sort of animal we will be dealing with. We cannot set up an IT system until we have the final shape of the provisions, although background work is being and has been done to provide the estimated figures.

The Convener: What timetable is involved? When will you know?

Chris MacIntosh: That is difficult to say. I can write to the committee with that information.

The Convener: Thank you. I call Derek Brownlee—I believe that I missed him out earlier.

Derek Brownlee (South of Scotland) (Con): I will return briefly to prisons and cost. If I picked up correctly what Mr Merrill said, the SPS is funded for about 7,600 prisoners and is dealing with about 8,100. It is obvious that the system has a significant element of fixed costs. From an internal operating perspective, I presume that the SPS considers in its forward planning a range of assumptions about the prisoner population. What ranges of prisoner population does the SPS assume that it might have to provide for?

Alastair Merrill: If I may make a minor pedantic correction, we are funded for prisoner places rather than prisoner numbers. We use a number of cost factors. The full economic cost per prisoner place is the average cost calculated on a resource accounting basis and takes account of running costs, prisoner-specific costs, overheads, depreciation, costs of capital and so on. That is the figure that is used in the financial memorandum—it is a shade over £40,000. The actual figure for 2007-08 was £41,470.

Over and above the design capacity, the actual cost is the marginal cost element. That cost varies from establishment to establishment but, in essence, it is the cost of victualling—keeping the prisoner fed and clothed—and providing person-specific add-on services. That cost is in the range of £3,000 to £3,500 on average—the figure depends on the establishment and the circumstances of the individual.

15:15

On overall numbers, last summer, we commissioned a study on what is called an assessed operational limit, which is the level beyond which each establishment cannot operate without seriously infringing health and safety or other legal obligations. That is a dynamic assessment and it is particular to each establishment. A fairly detailed explanation of that was given to the Justice Committee last autumn. Again, I would be glad to provide information on that to the Finance Committee separately. The limit is used by each establishment for internal planning purposes to manage the overcrowding, and by the service as a whole to manage population levels throughout the establishments.

Derek Brownlee: In simplistic terms, you generate a significant saving only when you get to the stage at which you can close a prison wing or an entire establishment, and you generate significant additional cost only when you are forced into creating an entirely new wing or establishment. Are those the sort of margins that we are talking about?

Alastair Merrill: In essence, yes.

Derek Brownlee: What sort of numbers would be involved in that? Obviously, a population of 8,100 must be close to your limit.

Alastair Merrill: Assuming a design capacity by the end of this year of about 7,600, we would require a reduction of 500 in average prisoner numbers before the average population was down to the level of the design capacity. We would require a significant reduction on top of that before it would be possible to close an establishment. Closing a house block in a jail would realise some savings at the margins in staffing costs, but there would still be the wider costs of running the other house blocks in the jail.

Derek Brownlee: You are almost saying that, until an establishment opens or closes, the changes in costs are the more marginal ones that you described earlier.

Alastair Merrill: Yes.

Derek Brownlee: I seem to recall in the dim and distant past in the previous session of the Parliament evidence from the SPS about the costs of a prisoner place. If I recall correctly, there was a significant disparity between the cost of a prisoner place in SPS prisons and the cost in privately operated prisons. Is that still valid, or have those figures been superseded by events?

Alastair Merrill: We have a key performance indicator in our annual plan for the average cost per prisoner place, which covers the public and private sectors. That is the annual cost, rather than the full economic cost. I think that the figure last year was £36,500, although I would need to check that in my papers. I am not aware of a significant disparity between the sectors although, depending on accounting conventions, I am sure that one could create different figures.

Kenneth Gibson: I am sorry, but I want to return to the same issue. Jackie Baillie asked about the savings if we had a 50 per cent reduction in the figure of 14,686 prisoners who serve short-term sentences. You said that the reduction would be the equivalent of about 300 prison places. If we reduced by 50 per cent the figure that Jackie Baillie gave, we would have 7,300 such prisoners. The fall in daily prisoner numbers surely assumes a sentence of less than two weeks per prisoner, so surely the reduction in prison places would be more substantial than 300.

Alastair Merrill: As I said earlier, there are two ways of looking at it. One is reductions in the average number of prisoners, that is, the number of people who are locked up each night in our establishments, where the impact would be minimal—it would be up to 300 places if we had a 50 per cent reduction. The other way is to consider the reduction in churn, or the number of people going through reception. You are right that there would be a significant reduction but, as you say, the average time that short-term prisoners spend in prison is two or three weeks, which means that one prisoner place equates to 26 people spending two weeks in prison.

Kenneth Gibson: Indeed. We are talking about people who are in prison for a short time.

Alastair Merrill: Yes.

Jeremy Purvis: You mentioned in written evidence that the snapshot figure for prisoners currently in the estate was 8,066. Do you have information on how many of those are serving a sentence of six months or less?

Alastair Merrill: Yes. I do not have it to hand, but it is somewhere in my pile of papers.

Jeremy Purvis: It would be helpful to have that figure, because it is critical. If the Government assumption is that there will be a 20 per cent increase in the number of community sentences, that needs to be squared with the current snapshot prison population. The relevant aspect is not necessarily how many people receive the disposal over the course of the year; it is the impact on capacity. I do not know whether you have found the paper.

Alastair Merrill: No. I am sorry, but I do not have the figure to hand. Rather than continuing to rummage through my papers for it, perhaps I could include it in the follow-up.

The Convener *indicated agreement*.

Jeremy Purvis: That figure is critical, so it would be helpful if you found it and gave it to the committee at the end of the meeting.

The previous panel estimated that about a third of prisoners would serve a sentence of less than six months, which is broadly equivalent to the proportion who would be on probation and the proportion who would be subject to a community service order. The previous panel expected that of those prisoners, about three quarters might receive a community payback order. That would be the impact on the current daily prison population.

Alastair Merrill: I will come back to you at the end of the meeting if I find the relevant statistic in my bunch of papers.

James Kelly: In your written submission, you refer to the financial impact on the SPS of amendments to section 18 of the Custodial Sentences and Weapons (Scotland) Act 2007. The financial memorandum states that those amendments will have no direct cost impact. Is that correct?

Alastair Merrill: The memorandum acknowledges that implementation of the bill will not be possible until the prison population has been reduced to a point at which resources are available to support it. It is also worth noting in that context that, as I understand it, the amended 2007 act will have fewer financial consequences than the unamended act.

James Kelly: Will the amended 2007 act result in any net savings or net costs for the SPS?

Alastair Merrill: That is impossible to answer at this stage. We accept that there will be additional costs, but our assumption is that the act will not be implemented until the prison population has reduced to the extent that the costs can be offset against the subsequent savings.

Linda Fabiani: We have all homed in on poor Alastair Merrill and Alastair Sim. I would like to hear a general opinion from Mr Nelson about where his organisation is coming from on these matters.

Tom Nelson: As I said at the outset, SPSA forensic services will certainly be affected by having to put in place disclosure procedures. We cannot do that work within our current budget. We will be looking for support.

The Convener: I want to bring this evidence session to a close. I offer our panellists the last word.

Chris MacIntosh: I return to a question that I could not answer, about the paragraph in the financial memorandum on what the Crown Office is doing to limit the additional costs in relation to witness statements. I am grateful to my colleague, who has more expertise in the area. The answer is that one matter that is being pursued is the centralised printing of statements, so that when somebody in the Wick office presses a button, the statements will be printed in a centralised printing unit in Glasgow and distributed from there. There will be a minimal saving.

The Convener: Thank you. I draw the session to a close. I thank the witnesses for their expertise and information, which will be of great assistance to us. We will pause while we prepare for today's final panel.

15:27

Meeting suspended.

15:30

On resuming—

The Convener: We move on to our third and final panel of witnesses. Given the wide-ranging nature of the bill, the panel is larger than normal—[*Laughter.*] I meant larger in number; I want to make that clear.

I welcome the Scottish Government bill team: George Burgess, George Dickson, Wilma Dickson, Annette Sharp and Rachael Weir. I invite Mr Burgess to make introductory remarks.

George Burgess (Scottish Government Criminal Justice Directorate): I am head of the criminal law and licensing division in the Scottish Government, which is responsible for co-ordinating the Scottish Government's effort on the bill.

As the committee knows, the Criminal Justice and Licensing (Scotland) Bill contains 148 sections and runs to more than 150 pages. It contains provisions on around 85 distinct topics, ranging from small tweaks to the criminal law to major justice and licensing reforms. Given the bill's size, we thought that it would be most helpful to draw to the front of the financial memorandum all the topics that we consider to have a significant financial impact. For that purpose, we defined "significant" as anything with an impact of more than £400,000 per year. We hope that that presentation helps the committee.

The bill team is larger than usual, as the convener said. I am fortunate to be joined by colleagues who are more expert than I am in particular aspects of the bill. Wilma Dickson will be happy to deal with sections 14 and 17, which include provisions on community payback orders and associated provisions on the presumption against short periods of imprisonment or detention. Annette Sharp will handle questions on amendments to the Custodial Sentences and Weapons (Scotland) Act 2007. George Dickson will assist with queries on serious organised crime provisions. Rachael Weir will deal with questions on sections 85 to 116, which will provide a regime for evidence disclosure in criminal trials. I have left out quite a few sections; I will do my best to answer questions on the remainder of the bill.

It might help if I confirm the recent developments on two sections, which the convener mentioned at the start of the meeting. The committee is aware that Bruce Crawford wrote to the Justice Committee and the Health and Sport Committee last month to announce that we would seek to remove sections 129 and 140 at stage 2. Those sections contain provisions on the sale of alcohol to under-21s and provisions on a social responsibility levy, which will be brought back in another bill later in the year.

David Whitton: The witnesses have been listening to the evidence that the committee has taken. Do you want to comment on the financial assumptions? No one seems to think that you have got them right.

Wilma Dickson (Scottish Government Criminal Justice Directorate): Perhaps I should respond, given that community payback orders are of considerable interest to the committee. Mr Gilruth raised two separate issues. He was correct to say that we are not adding to the assumed core costs of the orders, other than adding assumptions for the extra bits that we are adding—if you see what I mean.

I will explain that a bit more clearly. Mr Gilruth's concern is that the base unit costs for orders are not high enough. In the bill, we have assumed the core costs rolling forward, and calculated—in the first table in my section of the financial memorandum—the extra costs that are attributable to the additional features that we are adding, such as review hearings and provision for electronic monitoring for breach. The first table—the one that finishes with the additional recurring costs of £3.4 million—tells you how much we reckon it will cost to provide the same number of orders with the additional features for which the bill provides. The base unit costs of the orders are not increased. I hope that that is helpful information.

I preface my next remarks by saying something that I think everyone has said: it is genuinely difficult to predict future sentencer behaviour, especially when sentencers retain the discretion to impose a sentence of six months or less if they feel that it is required. Mr Gilruth based his costings on the assumption that all people, or virtually all people, who currently get a sentence of six months or less will flip over and get a community payback order. In the financial memorandum, we assume increases of 10 and 20 per cent in the use community payback orders, most of which will be attributable to down-tariffing from short sentences. I am therefore not sure that we are all that far apart on the unit costs. However, we make different assumptions on the speed of change.

That is all that I want to say on that point, although I am happy to come back to the committee on it.

David Whitton: How did you come up with the figure of 10 to 20 per cent?

Wilma Dickson: Behaviours do not change overnight. We believe—and I think that folk agree—that the range that we have chosen is reasonable for the likely costings projected over the next few years, as the shift occurs. I would be the first to admit that these are illustrative assumptions based on predictions of sentencer behaviour. Most folk agree that the shift will be gradual, although there might be disagreements about the speed of change. However, I take the point that people have made about the need to monitor delivery.

Shall I carry on and pick up the points that were made on community payback orders?

The Convener: Yes, of course.

Wilma Dickson: When my mouth dries up completely, I will stop.

The assumption on social inquiry reports was also queried. I accept that we will have to monitor the issue very carefully. As Mr Gilruth said, a social inquiry report is required if you are thinking of sentencing someone who has never had a custodial sentence before or someone who is under 21, however many custodial sentences they have had before. In most of the most vulnerable cases, the current law will continue and a social inquiry report will be required. Judges have the right to require social inquiry reports in other cases, and they frequently do. I therefore agree with Mr Gilruth that we have not built in costings for additional social inquiry reports, but I also agree with him that we will need to keep that under careful review.

David Whitton: I want to go back to the figure of 10 to 20 per cent. Mr Hunter said that, of the 18,000 sentences in 2006-07, 14,000 were for less than six months.

Wilma Dickson: I have had more time to rake around in my folder than Alastair Merrill had, so would it be helpful if I went through the analytical services calculations on how we arrived at the assumptions?

David Whitton: Yes.

The Convener: Please do—as long as you guarantee not to leave us behind after the first sentence.

Wilma Dickson: I will do my best. I have written it all down, because I cannot remember anything for very long.

As Alastair Merrill said, we can calculate the impact of a reduction in short sentences in two ways. First, it can be calculated based on churn, which is the number of people who come through the admissions process, are assessed and go through the core screening but are in prison for a short time only. More than 80 per cent of admissions are for sentences of six months or less, so if we cut that percentage, we will cut the churn and free up quite a lot of prison officer time.

However, we would not free up an awful lot of space in prison. The other calculation, which I got our analytical services to make, is the impact that a 10 per cent reduction in the number of sentences of six months or less would have on the prison population. Counter-instinctively, the answer is that it would free up only about 50 places, because the average amount of time that someone on a short sentence—that is, a sentence of six months or less—spends in prison is only three weeks. Bear in mind the fact that what counts is not the length of the sentence—there is 50 per cent remission on sentences of that length—but the amount of time that the offender is in a bunk.

Quite counter-instinctively, the two ways of calculating the impact differ widely. Our statisticians estimate that an offender who is sentenced to six months or less spends about three weeks in prison, because the statistics are loaded with sentences of three months or less—they are bottom heavy—and, on average, such prisoners spend three weeks in a prison cell. Given that, you can get 16 and a bit prisoners through a prison place in a year, and although reducing the number of short sentences would save quite a lot of churn, which would free up prison officer time to be more productively used on those who need to be in prison, it would not save a huge number of prison places.

David Whitton: You estimate a reduction of 10 to 20 per cent in the number of short sentences. If 14,000 people were on sentences of less than six months and there was a reduction of 50 per cent, that would mean that 7,000 folk would be thrown on to community payback orders and the local authorities would have to deal with them. Are you confident that the funding would be in place to help local authorities to deal with them?

Wilma Dickson: That is a fair point in that, if we displaced 250 prison places, we would need 4,000 additional non-custodial disposals, which is a high displacement rate the other way. I think that that is the point that you are making. We do not assume that all those people would be displaced; we assume that only 10 or 20 per cent of people on short sentences would be displaced. That would be the major factor in the number of community payback orders. With offenders no longer being sentenced to prison, the most likely outcome—but not the only possible one—would be a community payback order. It is technically possible, although quite unlikely, that offenders would be displaced to fines. It is most likely that they would get level 2 community payback orders, as the other witnesses confirmed.

We make two assumptions: that the number of community payback orders will essentially derive from a reduction in the number of short sentences, and that our best estimate of the extent of that shift in the initial years is between 10 and 20 per cent. We have costed that.

David Whitton: Yes, but you assume—correct me if I misunderstand you—that sheriffs will be reluctant or slow to take up community payback orders and will still use their powers to sentence people because they do not like being told what to do by anybody else when it comes to sentencing. However, if it goes the other way, with sheriffs deciding that they quite like the new disposal and that it is a much better way of dealing with people, many of whom should not be in prison in the first place, to what extent will there be capacity to meet unexpected demand?

Wilma Dickson: All I can say is that our costing already shows a need for substantial additional expenditure. In the financial memorandum, we have not costed a situation that we estimate to be some way down the track, and I accept that, if there was a complete flip in the next year or two, that would lead to costs that are higher than those for which the financial memorandum allows. That is a fair comment.

15:45

David Whitton: The financial memorandum states that the administrative functions of the Scottish sentencing council will

“be provided by the Scottish Court Service”.

Can you explain how you arrived at the estimate of between £1 million and £1.1 million a year that appears in the financial memorandum?

George Burgess: As Mr Sim said in the previous evidence session, the figure in the financial memorandum is based on the assumption that the administrative functions of the Scottish sentencing council will be grafted on to the new, reformed Scottish Court Service—although the bill does not provide for that explicitly—so that we do not have to bear all the costs that would be incurred by setting up an entirely new body. Paragraph 664 and subsequent paragraphs of the financial memorandum describe the different types of costs. In developing those paragraphs, we looked at the operation of the Sentencing Advisory Panel and the Sentencing Guidelines Council in England and Wales. Again, looking at examples from elsewhere, we made assumptions about the way in which the Scottish sentencing council will conduct its business. The figures that we have developed cover staff costs, displacement of judicial time and other on-costs.

David Whitton: We heard from Mr Sim about a new organisation, which the Lord President will chair, that may not be happy about the Scottish Court Service undertaking the work. If the Lord President says no, what will you do?

George Burgess: If the Lord President says no, we will have to consider whether the Scottish sentencing council should be set up as an entirely separate non-departmental public body or whether its administrative functions could sensibly be grafted on to another body. As Mr Sim said, the approach that we propose seems to make eminent administrative sense. There is a great deal of logic in the Scottish Court Service, headed by the Lord President, and the Scottish sentencing council, which will also have a judicial head, being closely associated. However, if the Lord President objects, we will have to find other ways of proceeding.

The Judiciary and Courts (Scotland) Act 2008, which Mr Sim mentioned, provides ministers with the power, after consultation with the Lord President, to confer additional support functions on the Scottish Court Service, which already provides support for a variety of smaller advisory and executive bodies. There will need to be further discussions with the Lord President as the bill progresses, to establish whether he is content for the administrative functions of the Scottish sentencing council to be assigned to the Scottish Court Service. All that we have presented is based on that assumption, but we do not say that the Scottish Court Service will definitely provide the functions concerned.

The Convener: Your response has suitably stirred the committee.

Jeremy Purvis: I have two questions for Ms Dickson about community payback orders. I listened carefully to your explanation of displacement from prison places to community payback orders. The first question—which you may say is not relevant—is one that I put to Mr Merrill. What proportion of the 8,066 people who are in prison, according to the snapshot of 8 April from the Scottish Prison Service, are serving sentences of less than six months?

Wilma Dickson: About 8 or 9 per cent of the total population.

Jeremy Purvis: So of the 8,000 who are currently—

Wilma Dickson: I did not catch where the figure of 8,000 comes from.

Jeremy Purvis: It comes from the snapshot of the current prison population that the Scottish Prison Service provided to the committee. We were told that on 8 April the prison population stood at 8,066. What proportion of those prisoners are serving sentences of less than six months?

Wilma Dickson: I do not have the exact figure to hand. It is between 8 and 9 per cent, which equates to 600 or 700 people.

The Convener: Can you provide us with the exact figure?

Wilma Dickson: Yes—that is no problem. The figure is well below 10 per cent.

Jeremy Purvis: You said that the estimate of a 10 to 20 per cent change was the best judgment at this stage with regard to sentencing practice.

Wilma Dickson: And the speed of change.

Jeremy Purvis: And the speed of change. Section 17—”Presumption against short periods of imprisonment or detention”—puts a duty on those giving a short sentence to state why there is no better option for the person being sentenced.

Wilma Dickson: Yes, that is correct.

Jeremy Purvis: Presumably, one explanation for giving a short sentence could be that there are no community services of a sufficient standard with regard to the seven potential requirements in a community payback order. The bill will therefore be skewed not by sentencing practice, given the statutory presumption against short sentences, but by the budget available in any given area. The financial memorandum states clearly that there will be no budget increases for the additional requirements in the community payback order. As far as the financial memorandum is concerned, the budget is frozen—it will be increased only on the volume of orders that are made.

Wilma Dickson: And on the elements that we are adding—for example, the electronic monitoring on breach of an order and the review hearings.

Jeremy Purvis: A sheriff might want to put three requirements on a community payback order, but the financial memorandum states clearly that the Government believes that there will continue to be an average of 1.2 requirements per order. A sheriff could therefore state that he was sentencing a person to prison because the local authority had insufficient provision for the requirements on a community payback order.

Wilma Dickson: Yes, that is a possibility. I cannot say that that was at the forefront of our minds when drafting the provision in section 17, which is like the existing presumption against jailing someone under 21. Ministers have always said that they wish to leave discretion with the judiciary, and the Cabinet Secretary for Justice acknowledged that there may be circumstances in which a judge wants the option of a short prison sentence for an individual, given an accumulation of past offences and the nature of their current offence. In such a case, the judge simply has to explain what the particular circumstances are.

I take your point, Mr Purvis, but what you describe is not what primarily underlies the way in which section 17 is drafted. It essentially gives sheriffs the discretion, which the Government has always said it would leave them, to impose a short custodial sentence if they feel that that is the only sentence that sufficiently displays the court’s condemnation of the person’s course of action.

Jeremy Purvis: Yes, I understand that, and I imagine that the Justice Committee will consider the policy aspect, but I am looking at the financial aspect—whether the financial memorandum matches the policy intention and what is in the bill.

Section 17 provides:

> "A court may pass a sentence of imprisonment for a term not exceeding 6 months on a person only where the court considers that no other method of dealing with the person is appropriate."

The financial memorandum states that that will apply to between 10 and 20 per cent of individuals; it does not state that it could be applied on a scale from 0 per cent to 100 per cent for all those who could get the disposal of a payback order.

It would be fine if a short sentence was simply a further option that was open to discretion, but it is not open to discretion. There is a statutory presumption and, when a sentence of not more than six months is passed on an individual,

> "the court must—
>
> (a) state its reasons ... that no other method of dealing with the person is appropriate, and
>
> (b) have those reasons entered in the record of the proceedings."

Why does the financial memorandum not state that that could apply to 100 per cent of all those who are currently sentenced to less than six months?

Wilma Dickson: Essentially, that is the same issue as the one that Mr Whitton raised.

Let me clarify one thing. We have costed for the additional requirements that will be imposed as the number of community payback orders increases. That perhaps does not entirely pick up your point because we have not assumed that an increased number of requirements will be imposed. An assumption about the current number of requirements imposed is built into our costings for the additional number of community penalties. I think that your point is that you are not content that the costings cover the potential range of requirements that could be imposed or the extent to which the shift could happen more rapidly.

Jeremy Purvis: There is an issue about the requirements, but it is probably right for the Justice Committee to consider that in more detail. That committee will need to consider whether the bill will satisfy the policy intentions.

My main question is about what the financial memorandum says about the use of community payback orders, given the presumption against prison sentences of less than six months. If the bill is passed, there will be a statutory presumption against prison sentences of less than six months. By law—except in the case of very short-term sentences of 15, rather than five, days, which is a separate aspect—a prison sentence of less than six months will be able to be applied only if no other method for dealing with the person is appropriate. Therefore, a fair financial memorandum should not suggest that the upper limit for the number of such orders will be one fifth of the number of people who are currently given a sentence of less than six months. The figures are certainly not clear, given the statutory presumption against using such sentences other than when no other method of dealing with the person is appropriate. My question is about the ceiling that seems to have been set.

Wilma Dickson: I take the point, but I can only reiterate that the financial memorandum gives a best-guess assumption about the speed of change in sentencer behaviour in the few years after the legislation is brought into force. Essentially, those are the years that are covered in the financial memorandum. The committee might feel that our estimate is much too low. I understand that point.

Jeremy Purvis: An element will be recurring costs, on which we are supposed to form a judgment. Given an environment in which a statutory provision requires courts to decide that a sentence of less than six months can be imposed only when no other method for dealing with the person is appropriate, community payback orders will surely be used in more than a fifth of cases. We cannot judge what the on-going recurring costs will be if the Government has arbitrarily decided that the upper limit of its estimate is that such orders will be used in only a fifth of cases.

Wilma Dickson: There is no intention to set an arbitrary limit in the financial memorandum, so I am sorry if the committee has received that impression. The intention is to provide the best possible prediction of likely change in the near future. I think that you are articulating a concern that the estimate should have been for 100 per cent.

Jeremy Purvis: I just think that the 20 per cent figure is remarkably low. I have not been able to find in the financial memorandum—forgive me if you can point this out to me—anything that suggests that that is the best estimate only for years 1 or 2. Once the statutory presumption is in place, surely the number of community payback orders will grow to more than one fifth of the number of people who currently receive a sentence of less than six months.

The Convener: An esoteric but very important point has been raised. It might be useful if the officials could think the issue through again and come back to us, as we have taken the matter as far as we can for the moment. We would all like a response on what is a very specific point, so it might be useful for the officials to consider it before replying.

16:00

Wilma Dickson: Can I clarify what the committee wants? Committee members tell me that they are not happy that we have used such a low range of assumptions in a context in which there is obviously a policy intention to achieve a more major shift away from short sentences and given the drafting of section 17.

Jeremy Purvis: Yes.

The Convener: What we want is an accurate measurement whereby the financial memorandum reflects the actual costs and problems involved. Accuracy is what we are after. Would it be sensible for you to think more about that point and respond to us in writing rather than pursue it now?

Wilma Dickson: I am very happy to respond in writing, but all I can say is that these are assumptions and predictions. I can do the very best I can, and I am happy to come back. I think that the point is about what is a fair assumption in the circumstances of the bill.

Kenneth Gibson: Let us move on to licensing.

You will have heard the questions asked to June Murray and John Gilruth on the impact on the bill following the removal of sections 129 and 140 on licensing. Some local authorities, such as Orkney Islands Council, say that the cost relating to licensing aspects of the bill cannot be met without further funding. Dumfries and Galloway Council appears to support that view, although East Ayrshire Council says that, following the removal of section 129, the only provision that is likely to have a financial impact is the one on the proposed notification process. What will be the overall impact on the bill of the removal of sections 129 and 140 on licensing? What will be the impact on the bill of the remaining licensing proposals? This question may be down to George Burgess as the guy who fills in all the gaps.

George Burgess: You will see from the financial memorandum that the social responsibility levy provisions and the age 21 provisions were among those that were flagged at the beginning as—

Kenneth Gibson: Large numbers

George Burgess: Yes, having large numbers attached to them. The licensing provisions that remain in the bill are of a much smaller order in terms of finances.

I am afraid that I am not entirely clear as to the particular provisions to which Orkney Islands Council's submission refers. I suspect that its comments may relate to section 129 and may have been submitted before the Government's announcement about the future of that section, although they may relate to other provisions. I am not clear which provisions it thought might raise an issue.

Kenneth Gibson: Might there be some confusion about when the submission was made and to what sections it relates? As a committee, should we go back to the local authorities to clarify, given the removal of sections 129 and 140, whether they still have financial concerns and the extent of those concerns?

George Burgess: Some of the issues raised by others were about specific sections—

Kenneth Gibson: Yes, Dumfries and Galloway Council.

George Burgess: On taxi licensing, for instance. That is fine, and the point is still clear, but in relation to the Orkney Islands Council's submission it may simply be a matter of timing and that the comment relates to a section that is now for another day. By all means, if Orkney Islands Council has concerns about sections that will remain in the bill, we will be happy to look at them.

Kenneth Gibson: Regardless of its view, what is your view on the impact on local government of the licensing provisions that remain?

George Burgess: In the financial memorandum we cost the provisions that will remain in the bill. We think that quite a few will lead to a more efficient licensing system and potential savings for the licensing boards and police in operating it.

Kenneth Gibson: Effectively you are saying that the system should be met from existing budgets.

George Burgess: The Cabinet Secretary for Justice made it clear that he expects the liquor licensing regime under the Licensing (Scotland) Act 2005 to be self-financing out of fees. Over the years, the current regime under the Licensing (Scotland) Act 1976 has ceased to be self-financing, so there is a significant subsidy from the council tax payer to the cost of administering it. With regard to licensing, the Civic Government (Scotland) Act 1982 contains a statutory requirement to attempt to balance the costs and income from fees, so we expect the authorities to set their fees at a level that achieves cost recovery.

The Convener: Linda Fabiani has a quick point on the issue that Jeremy Purvis raised.

Linda Fabiani: I apologise to Wilma Dickson for returning to it; George Burgess is probably involved, too. Assumptions need to be made and it is fine to obtain clarification, but we should not assume that the figure could be 100 per cent, because a great deal hangs on the word "appropriate", which is in the bill. It might be a good idea to get our clerks to look out what the Justice Committee said about appropriateness for sheriffs, because we all know that one of the great things about our judicial system is the discretion that is available to the judiciary.

I seek clarification on the figure of 14,600, which we are hearing a lot about.

Jackie Baillie: It is 14,686, to be precise.

Linda Fabiani: Jackie Baillie wrote that down. It is the number of people who received sentences of less than six months. Do we have an idea of how many of those sentences related to repeat offences or how many of the people who received them ended up with sentences that ran concurrently?

Is it the case that a social inquiry report is needed every time someone comes to court, even if they are a repeat offender? Excuse me if that information is in the paperwork and I have missed it. Is it the case that a social inquiry report stands for a certain length of time?

Wilma Dickson: A social inquiry report has a shelf life—I am trying desperately to remember whether it is three months or six months. There is a requirement to obtain a new social inquiry report after a short period of time and, if I write to the committee, I will confirm what that period is. I should remember off the top of my head; I know that it is three months or six months.

Your other point was about repeat offending.

Linda Fabiani: As it relates to the short sentences that are handed out.

Wilma Dickson: I do not have the figures with me, but we can confidently say that there is a very high level of repeat offending.

Annette Sharp (Scottish Government Criminal Justice Directorate): I do not have the figures to hand, but the Scottish Prison Commission considered the issue. It recommended that there would have to be exceptions to any presumption against prison because there are sex offenders, violent offenders and people who have a long list of previous convictions. We asked our analytical service colleagues to examine the potential impact of excluding those people, and they calculated that in almost 50 per cent of cases there would be a presumption against sending someone to prison. We can get those figures broken down if that is helpful.

Wilma Dickson: In other words, a substantial proportion of offenders would have a track record of one conviction or more. We can easily get you the exact figures.

The Convener: Derek Brownlee has been extremely patient.

Derek Brownlee: I have a relatively quick question on the assumptions about the sentencing council, which we touched on earlier. It strikes me that, for a body with a budget of just over £1 million and a staff of 11, a chief executive salary of almost £100,000 seems rather excessive in these straitened times.

George Burgess: I agree. A salary of £100,000 would be excessive, but the figure that is given in the financial memorandum is not a salary. It represents the complete cost to Government of the post, which is pitched at deputy director or division head level. I would love to receive a salary of £100,000.

Derek Brownlee: It is mentioned that the costs of the sentencing council are based on

"similar organisations in terms of size",

so would it be accurate to say that similar organisations with similar budgets and similar staffing complements have a chief executive post, the total cost of which is around £100,000?

George Burgess: Broadly, yes. The post in the Sentencing Guidelines Council and Sentencing Advisory Panel for England and Wales is graded at the same level. Another post that I can think of that is graded at an equivalent level is the chief executive of the Scottish Criminal Cases Review Commission. I am sure that the committee has seen information on chief executives' pay regimes.

Typically, such a body would have a post at the proposed level. Some bodies of such a size have chief executives or secretaries who are on a lower pay scale but, equally, other such bodies have chief executives who are on a higher rate. We think that the post is pitched reasonably. Ultimately, it will be for the sentencing council to determine the level at which it pitches its chief official and other staff, but we think that we have used a good basis for the costing.

Derek Brownlee: Similarly, the assumption that the accommodation will be in central Edinburgh is not prescriptive. If the assumption that the sentencing council will meet one day a month is correct, it is excessive to spend £165,000 annually on a conference room—a boardroom—in central Edinburgh when the support service could be based in many locations around the country that are significantly less expensive.

George Burgess: Indeed. The bulk of the staff could be located pretty much anywhere in Scotland—the research functions could be undertaken just about anywhere. As for meetings of the body, when the body is to be chaired by a top judge, I suspect that a strong preference will come from that quarter for it to be based in Edinburgh or Glasgow.

Derek Brownlee: Particularly if the budget for the council comes from the Scottish Court Service.

The Convener: Jackie Baillie is becoming impatient, which is dangerous. I want three quick questions. The first will be from James Kelly.

James Kelly: I have two quick questions. On costs that will be attributable to the Scottish Court Service, paragraph 738 of the financial memorandum says that

> "There is no indication of the numbers of cases likely to occur"

as a result of the new disclosure requirements. Given that, how was the estimate of 4,200 cases in paragraph 761 arrived at?

Rachael Weir (Scottish Government Criminal Justice Directorate): It would probably be more accurate for the financial memorandum to say that estimating the number of cases with any certainty is difficult. Broadly speaking, we can predict on the basis of figures from 2007-08 the overall number of cases that might be dealt with, but the bill will introduce new forms of hearings. Whenever we enter into such an arena, it is difficult to predict the numbers with accuracy.

That said, we thought that it would not be satisfactory for us simply to say that it was impossible to predict the figures, which is why we attempted an estimate in paragraph 761. I understand why that might be seen to be contradictory, but the intention in paragraph 761 was to put some flesh on the numbers.

James Kelly: How was the estimate of 4,200 arrived at?

Rachael Weir: The estimate of 4,200 cases at preliminary hearings or first diets was based on the figures that the Scottish Court Service provided for preliminary hearings at present.

James Kelly: I have another quick question, convener.

The Convener: Okay.

James Kelly: Paragraph 746 says that police costs will be £5.3 million, but the table below the paragraph says that the costs will be only £3.5 million. Why does the table not include the £4 million for training costs in 2009-10?

Rachael Weir: The figures in the table are deliberate. The reason for that is linked with what Mr MacIntosh from the Crown Office and Procurator Fiscal Service said about the disclosure provisions in general.

The disclosure regime is being put on a statutory footing, although it exists already. There are currently obligations incumbent on the Crown in relation to disclosure and, as a consequence, the police require to take certain actions to ensure that the Crown is fully equipped to perform its functions.

There is currently a programme of training to ensure that officers are in the best possible position to carry out their functions. That is not a direct cost of the bill as such. We have reflected the direct costs of training separately in the table; other costs are incurred to ensure that officers are in the best possible position to implement the legislation in due course.

16:15

James Kelly: So the £4 million of costs for 2009-10 do not directly relate to the bill.

Rachael Weir: They do not.

David Whitton: I have a quick question for Mr Dickson, who has been sitting quietly waiting for his chance. On the involvement in serious and organised crime, paragraph 700 of the explanatory notes says:

> "We anticipate around 2 new cases per year."

George Dickson (Scottish Government Police and Community Safety Directorate): Yes. That was based—

David Whitton: How do you get to that number?

George Dickson: That was based on information given to us by the Crown Office and Procurator Fiscal Service.

David Whitton: So there will be two new cases, but we might get a bundle of other cases that we would normally get anyway.

George Dickson: Yes—there is a likelihood of a prosecution for different offences, but the information from the Crown Office indicated that there are likely to be only two prosecutions for the new offence that we are creating.

David Whitton: I am not sure who might answer this question about the Custodial Sentences and Weapons (Scotland) Act 2007. You will have seen the responses that we have received from the Scottish Prison Service and the Scottish Legal Aid Board on the matter. Why has the likely impact of that legislation not been included in the financial memorandum for the bill?

Annette Sharp: The impact of the changes to be implemented under the bill is included in the financial memorandum, at page 123. As it shows, the Government estimates that, once the 2007 act is modified, the consequent sentence management regime would cost less than the measures contained in the act as it stands.

In the financial memorandum, we reflect the costs that would arise if we implemented the Custodial Sentences and Weapons (Scotland) Act 2007 as it stands. That means applying a custody and community sentence to those who are sentenced to 15 days or more. The evidence that was given during scrutiny of the Custodial Sentences and Weapons (Scotland) Bill suggested that it would be unworkable to apply such sentences at 15 days. Severe pressure would be put on the Prison Service and the local authority criminal justice services. In the financial memorandum, we have reflected on the impact of moving that threshold from 15 days to, say, a year, on the Prison Service, on criminal justice services and on the Legal Aid Board. The fewer people who are on custody and community sentences, the more the costs are reduced, as would be the case at the two-year stage—if the measures are applied, as recommended by the Scottish Prisons Commission, to all those who are serving two years or more. In that case, the costs reduce.

David Whitton: So you think that you have answered the points that the SPS and the Scottish Legal Aid Board have made about that.

Annette Sharp: Yes.

David Whitton: Okay. I will let them be the judge of that—I am not sure that I am qualified to make that judgment.

I asked a witness on the previous panel about the additional burden that might fall on local authorities through increased demands for alternative remand accommodation for young offenders, particularly children. Have you any comment to make about East Ayrshire Council's comments on that?

George Burgess: That is dealt with in the financial memorandum at paragraphs 841 and 842. The normal place for those youngsters to be remanded would indeed be in secure accommodation. Only in relatively rare and—judging by the figures referred to in paragraph 842—a decreasing number of instances are they placed on judicial unruly certificates and put into the prison environment. That is a policy matter, but there seems to be general agreement that putting them in the prison environment is not the right thing to do. The financial memorandum reflects the fact that there is a transfer of the responsibility from the Prison Service across to the local authority sector to provide for that.

David Whitton: Yes, but that puts the onus back on the local authority to provide some kind of secure remand facility. At the moment, there is a secure unit in my constituency that has 31 places. It is going to be cut in half and, in the future, will have only 18 places. As a consequence, the staff number will also be halved. One of the reasons for that is the fact that people are not being put forward by local authorities for one of those places. If they are not in there, they must be somewhere else; therefore, the cost surely falls on the local authority.

George Burgess: The memorandum identifies the fact that there is a cost to the local authorities of doing that. However, if the measure is passed, it will increase the demand for local authority secure accommodation and might reduce the need for the sort of reductions to which you refer. At the same time, it would produce a saving to the Scottish Prison Service.

Jackie Baillie: I was going to ask you all about community payback orders and I will not resist the temptation, despite the fact that much of the field has already been covered.

It is helpful that—if I understand correctly—you are going away to reflect on a possible increase in the number of social inquiry reports. However, I did not hear a similar commitment to an uplift in unit cost. Could I invite you to give such a commitment, given that the policy would, on the basis of the evidence that we have received from the community justice authorities, be underresourced from the start because of the significant challenges that the CJAs face?

Wilma Dickson: I can certainly undertake to go away and think about that, but I could not say any more about it now.

Jackie Baillie: That is very useful and helpful. We will also get a paper about the assumptions regarding the scale of the likely take-up of community payback orders. Somebody from the community justice authorities described the cost estimate for the policy as a leap in the dark. I accept that assumptions have to be made, but it is our duty to test their robustness. For example, the consequence of the 14,686 prisoners who are currently serving short-term sentences all getting community payback orders would be an increase in the scale of the cost, which would be £32 million rather than what is in the financial memorandum. It is, therefore, quite urgent that we get some clarity on that.

Wilma Dickson: I am happy to take away that request. I cannot respond to it immediately.

Jackie Baillie: That is fine.

This may be a question for George Burgess. To what extent is the cost estimate accounted for in the justice budget? Will the money come from another area of spend or is it new money? Also, within what timescale do you expect the eventual cost to be incurred?

Wilma Dickson: "Protecting Scotland's Communities" states that our immediate priority is to lay a foundation for the future and build a robust model of community sentences that commands public respect. In a sense, the first priority is to invest in getting the current sentences robust, with more effective ways of dealing with breach but also more supportive follow-up. That is the first stage, which is reflected in the first bit of the financial memorandum. The cabinet secretary has made it clear in recent public statements that investment in that area is a high priority for him—it is probably his top priority in the justice portfolio. To be fair, it is not all about investment; it is also about making more effective use of other resources. However, I accept that that argument will not get me very far this afternoon.

The answer is that we will have to find resources. That is a matter for the justice portfolio as a whole. George Burgess may want to add to that.

George Burgess: I do not have much to add. Overall, for simplicity rather than for any other reason, the figures in the financial memorandum have been based on the assumption that all the provisions in the bill will come into force in April 2010. Therefore, 2010-11 is the first year of costing. That is simply for illustrative purposes. At this stage, we have not set an implementation timetable for the whole bill, although individual policy areas might have timetables in mind for the implementation of particular measures. We have not set an implementation timetable for the whole bill—that might be counting our chickens.

Wilma Dickson: It is fair to say that, given the current economic climate, there are uncertainties ahead. After the budget tomorrow, we will be a bit clearer about the overall financial situation for the Government. It is clear that we can expect public expenditure to be quite constrained.

Jackie Baillie: I just want to be sure that I understand this. The first stage is to build confidence in the new system. Thereafter, the bill remains a high priority for the Cabinet Secretary for Justice. However, what I am not hearing is that the money is committed for a particular timescale and when all the costs will be met. You are introducing a bill, but some of it might not even be enacted.

Wilma Dickson: I would not say that. You have to accept that there are quite severe constraints on public expenditure at the moment, which affect prioritisation across the Government. The Government, across the piece, has to look at the position post budget and going into the new spending review period and it has to identify where it is going. It is rather hard for me to answer your question at this point.

Jackie Baillie: I suspect that the question is for ministers, rather than officials, but I always thought that legislation was an expression of the Government's priorities and that resources should follow. I am slightly disturbed by the disconnect, but that is an issue to raise with others.

I want to ask about a couple of tiny things. First, we heard from Mr Merrill earlier and from you that the saving for the Scottish Prison Service was to do with the churn, rather than the number of places. That being the case, can you give me an idea of what kind of saving would result? People talked about prison officer time; I think that Mr Merrill even talked about staffing levels. When do you anticipate that the saving would be made and what will be the scale of it?

Wilma Dickson: We have to be clear whether we are talking about a cash saving or a staff-time saving. Any reduction in overcrowding relieves pressure on staff time. It frees up staff for more productive activity with people who really have to be in prison. It is fair to say that the Government's first priority is public protection, part of which has to be about delivering prisons that are fit for purpose and providing accommodation for individuals in conditions that promote their rehabilitation. That is the other side of this argument, if you like.

It is not really for me to answer the question about cash savings—it is more for the SPS to answer that. The general view is that to make substantial staff-time and cash savings you would probably have to be able to close either a cell block or, preferably, a prison. Is that a fair statement?

Annette Sharp: Yes.

Wilma Dickson: That is the general approach. We identified in the work that we did with our analytical services folk that, because people spend such a short time in prison, you have to cut an awful lot of sentences before you make a serious impact on prison places. The figure that we were given was that if the number of short sentences was reduced by 50 per cent, that would save about 300 prison places—that is not a prison. I do not want to put statements in the mouth of the Scottish Prison Service—that would be a little unfair—but that gives you an idea of the scale of the issue.

Jackie Baillie: To be fair, given that the Scottish Government funds the Scottish Prison Service, I would have looked for the Scottish Government to have a role in identifying the likely savings, whether they are cash or time-releasing savings. I hope that that can be given further consideration.

Our understanding is that justice of the peace courts will now be able to put in place community payback orders. Was that factored into the analysis of scale that was done?

16:30

Wilma Dickson: In a sense, justice of the peace courts already have the power to give probation orders, which are the largest single community disposal. Essentially, what is being added is the power to make unpaid work-related orders, which are the next biggest disposal. I fully accept that the use of such measures is likely to grow. I suspect that an element of the increase of between 10 and 20 per cent in community payback orders will be a relatively small initial increase in their use by the justice of the peace courts, but we have very little experience of how the courts will use the new disposal.

Jeremy Purvis: The community justice authorities stated in their written evidence that they had

> "insufficient time to consider the financial implications of this Bill and to consult CJA Boards and other partners."

Why was that the case? That is probably a question for Mr Burgess.

George Burgess: Is that in relation to the—

Jeremy Purvis: To the financial memorandum.

George Burgess: Am I not right in thinking that the committee requested the CJAs to consider the financial memorandum?

Jeremy Purvis: We asked bodies whether they had sufficient time to contribute to the consultation exercise on the financial assumptions in the financial memorandum. You heard members of a previous panel say that the Government did not give them sufficient time to consider the financial implications of the bill. Why was that? Does the Government have a view on what the community justice authorities have told the committee?

The Convener: There is some puzzlement.

George Burgess: I am not quite clear that I understand who was consulted and on what, and at what stage the community justice authorities thought that there was insufficient time. The Government set out the proposals that are contained in the bill last autumn.

Jeremy Purvis: I will help. In their submission, the community justice authorities said:

> "Community Justice Authorities were consulted regarding the Bill as outlined in the Policy Memorandum, however, we were not consulted on the financial assumptions as these were only made available to us on 13 March 2009."

They said:

> "There has been insufficient time to consider the financial implications of this Bill and to consult CJA Boards and other partners."

Why was that the case?

George Burgess: I will ask Wilma Dickson to respond in a moment on the involvement of the community justice authorities in the development of the costings. However, I am not clear why the community justice authorities should only have had the figures in the financial memorandum available to them a week after that memorandum was on the Parliament's website and in the public domain, or about what they thought they were not consulted on.

Jeremy Purvis: If you do not have a clear answer to my question this afternoon, perhaps you could come back to us on it. You will be able to refer to the written evidence that the community justice authorities provided and to read the *Official Report* of the meeting, which will contain what they said to us. There does not seem to be a clear explanation about why they were provided with or had access to information only on 13 March 2009. You could come back to the committee on that.

The Convener: It would be a good idea to follow up that matter in writing, as I do not think that we will take it any further today. The committee could write to you and you could respond.

George Burgess: Yes.

The Convener: Are you finished, Mr Purvis?

Jeremy Purvis: That was my question.

The Convener: The committee has no further questions. Do the witnesses wish to make any final statements?

George Burgess: May I be permitted to ask a question? I return to Mr Whitton's first question, which was a general question about the bill and whether we had any comments to make on what might have been identified as disparities. I think that it was clear from the discussion that followed that the question was principally about community payback orders, but I want to check whether it was wider. Are there any other bits of the financial memorandum to the bill that the committee has concerns about and which have not come up in the discussion?

The Convener: There do not seem to be. That being so, I thank George Burgess, George Dickson, Wilma Dickson, Annette Sharp and Rachael Weir for their presence at the meeting and their evidence. There will be a suspension for a few moments to allow them to leave.

16:34

Meeting suspended.

EXTRACT FROM THE MINUTES OF PROCEEDINGS

Vol. 3, No. 36 Session 3

Meeting of the Parliament

Wednesday, 26 November 2009

Note: (DT) signifies a decision taken at Decision Time.

The meeting opened at 9.15 am.

Criminal Justice and Licensing (Scotland) Bill: The Cabinet Secretary for Justice (Kenny MacAskill) moved S3M-5177—That the Parliament agrees to the general principles of the Criminal Justice and Licensing (Scotland) Bill.

Criminal Justice and Licensing (Scotland) Bill: The Parliament continued debating the general principles of the Criminal Justice and Licensing (Scotland) Bill.

After debate, the motion was agreed to (DT).

Criminal Justice and Licensing (Scotland) Bill: Financial Resolution: The Minister for Community Safety (Fergus Ewing) moved S3M-4544—That the Parliament , for the purposes of any Act of the Scottish Parliament resulting from the Criminal Justice and Licensing (Scotland) Bill, agrees to any expenditure of a kind referred to in Rule 9.12.3(b)(i), (ii) or (iii) of the Parliament's Standing Orders arising in consequence of the Act.

The motion was agreed to (DT).

Criminal Justice and Licensing (Scotland) Bill: Stage 1

The Deputy Presiding Officer (Alasdair Morgan): The next item of business is a debate on motion S3M-5177, in the name of Kenny MacAskill, on the Criminal Justice and Licensing (Scotland) Bill.

10:00

The Cabinet Secretary for Justice (Kenny MacAskill): I begin by thanking members of the Justice Committee and their clerking team for their work in preparing the stage 1 report, which was published a couple of weeks ago, on the Criminal Justice and Licensing (Scotland) Bill. The bill includes provisions on more than 80 topics. In the time available this morning, I can cover only some of the key parts of the bill, although I am sure that many parts will get a mention during the debate.

Tackling the scourge of serious organised crime in our communities has been one of the Government's top priorities. That is why the serious organised crime task force was established. We are determined to tackle those who take part in serious organised crime at all levels, from the generals at the top, to their lieutenants, down to the foot soldiers and the fixers who turn a blind eye to the illegal dealings of their clients.

We welcome the committee's strong support for the intentions underlying the serious organised crime provisions in sections 25 to 28. Equally, we recognise the concerns expressed by the committee and others about the definitions contained in some of those sections. Although some consider that the definitions are too wide, by its very nature, serious organised crime is wide ranging and evolving. From trafficking and peddling drugs that bring misery to our communities, to lower-level but high-volume crime, serious organised crime comes in many forms. That is why the definitions may have to be wide ranging.

In his stage 1 evidence, Chief Constable Stephen House of Strathclyde Police said:

> "If we tighten … too much we will miss issues and new crimes. Criminals might even exploit the definition to ensure that activity does not fall within the definition of 'serious organised crime'".—[*Official Report*, *Justice Committee*, 26 May 2009; c 1906.]

We need to keep one step ahead and be able to anticipate the next form of criminality. However, the definitions need to be appropriate, and we are continuing to consider them with a view to lodging amendments at stage 2.

The scope of the "failure to report" offence in section 28 has caused some concern. Let me be clear: we are not trying to criminalise people who inadvertently discover during the course of their employment that another person may be involved in serious organised crime. Equally, however, we are clear that the offence must capture those people in professional occupations who knowingly contribute to and profit from the ends of serious organised criminals or who are used as fixers. The law should come down hard on them, and that is why section 28 is in the bill.

Following the work of Lord Coulsfield's independent review, the bill includes provisions that will establish a statutory regime for disclosure of evidence in criminal trials. That statutory regime is crucial, as it will provide certainty for all those involved in the court process about which arrangements should be followed in that important area and will help to uphold justice for all.

We are pleased that the Justice Committee is generally content with the shape and content of the disclosure provisions. However, concerns have been expressed that some provisions are too complex and that others are too detailed. Although we want provisions that provide certainty and clarity for practitioners and accused persons, it is not our intention to impose an unnecessary burden on the police and prosecutors or to create an inflexible system. Disclosure is a simple duty to understand but a complex subject for which to legislate. Attempts to set out the duty in a simple form often miss critical elements. That said, we accept the concerns that the provisions are too complex, and that is why we will seek to amend the bill at stage 2 to simplify the provisions and to ensure that they are both comprehensive and well understood.

The bill takes forward our manifesto commitment to establish a Scottish sentencing council, which will have the power to develop sentencing guidelines to help to improve consistency, transparency and public confidence in sentencing. We are pleased that the committee expressed support for our aim to improve consistency in sentencing and recognised the need to tackle the poor public perception of sentencing. People have the right to understand why a particular sentence has been given in a specific case. We believe that the sentencing guidelines that the sentencing council produces will help to improve public understanding of, and therefore public confidence in, our justice system.

In the evidence that was taken at stage 1, there was much support for the creation of a sentencing council from a number of important criminal justice organisations. We believe that it is important that representatives of broader society sit on the sentencing council and that the council takes into account the views of others who have a role in the administration of criminal justice. The stage 1 report sets out the concerns from some quarters about the impact of the sentencing council on judicial discretion. We regard the council and its guidelines as a resource for the courts, but we are giving further consideration to the committee's thoughts on how best to achieve our aims while maintaining the independence of the judiciary.

The bill provides a tough new community payback order sentence as a replacement for a number of existing community penalties. The community payback order will require offenders to repay communities for the damage that is done by offending and will help to tackle reoffending rates with quick justice. The stage 1 report supports the creation of the payback order. We welcome that conclusion, which acknowledges the facts about the effectiveness of community sentences versus short prison terms. It also reflects the public view, given that 84 per cent of people in Scotland think that community sentences are a good idea for minor crimes.

However, the committee expressed some concerns on the matter in its stage 1 report. It asked us to consider whether we have the terminology of "payback" right. The Scottish Prisons Commission was clear—as we are, and as we think the committee is—that payback to communities should be the focus of our community justice system.

Robert Brown (Glasgow) (LD): I entirely accept the cabinet secretary's point, but does he accept that the important rehabilitation element of the community payback order is not entirely captured in its name?

Kenny MacAskill: For the first time, we will be able to provide for that in up to 20 per cent of an order. That is a significant indicator that we recognise that, although one aspect of an order has to be for the person to pay back for the harm done, we must also tackle the root problem of their offending, be that literacy problems, drug or alcohol addiction, or any other matter that the sheriff regards as relevant. We believe that we have struck the right balance in ensuring that people atone and are punished for the crimes that they commit; equally, as a society, we seek to assist offenders to tackle their underlying problems.

We see the importance of ensuring that the terms that we use accurately reflect the activity that the new community sentence will involve and that they do not create confusion. We will consider that further before stage 2.

The committee's report highlights the need for additional resources to make the community payback order work. We recognise that, and we have provided significant extra funding for community service both this year and next year, to make the system tougher and tighter. The new funding will also help to provide for the transition to the new regime. As for the calls for the new sentence, when it is in place, to receive more additional funding, we have set out our budget for the next financial year and we have already provided extra resources. We absolutely share the Justice Committee's conclusion that the new sentence must be adequately resourced; that will be our priority.

James Kelly (Glasgow Rutherglen) (Lab): On funding, given that there has been no movement in the community justice service line in the budget, what lines will the cabinet secretary cut in order to fund his policy of scrapping short sentences?

Kenny MacAskill: We are not creating the problems of cutting budgets. That comes from Westminster, and we have to address the consequences. As Mr Kelly knows, we are sitting down with the Association of Directors of Social Work and the community justice authorities, which are involved in front-line services. They are saying that it will be difficult but that they are satisfied that they will manage. Perhaps he should have more faith in the staff who work in community services and local government, rather than continually disparaging them.

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): Will the cabinet secretary take an intervention?

Kenny MacAskill: Not at the moment.

Alongside the community payback order, the bill proposes the introduction of a statutory presumption against the imposition by the courts of prison sentences of six months or less. We read the stage 1 evidence and the committee's conclusions on that proposal with great care, and we found nothing that explains why some members of the committee oppose it. Many witnesses presented the committee with evidence that demonstrated the limitations of short custodial sentences. All members of the committee accept the evidence, as articulated in the stage 1 report, that

> "short prison sentences do not normally achieve much by way of rehabilitation",

that they have

> "limited effect as a deterrent",

and that any respite that they provide for victims and communities

> "is only for a limited period".

We agree with all that.

The Sheriffs Association gave evidence that short prison sentences are the only appropriate option in some circumstances, and that, in particular, custody must be an option for breach of a community sentence. We agree, and the bill acknowledges that point and contains safeguards that address it. Let me be clear that courts will still be able to impose sentences of less than six months. There will be no statutory bar to that.

However, the committee's report gives several reasons to support the presumption against short prison sentences. David McKenna, the chief executive of Victim Support Scotland, which speaks up for those who suffer from crime and whose lives are blighted by it, said just last week:

> "as an organisation we supported the introduction of robust and timeous community penalties for offenders in non-violent, non-serious cases, so we're a bit disappointed that the committee has taken the decision not to support this proposal within the bill … Certainly we hope that they can be assured that this will work for Scotland, because I think this is a golden opportunity really to take a radical and new view of how we deal with crime in our communities, making it better for communities but more importantly making it better for victims."

Richard Baker (North East Scotland) (Lab): When we talk about timeous community sentences, it is not the case that only a fraction of community sentences start within the seven-day target set by the cabinet secretary? When Victim Support Scotland gave evidence to the committee, it said that there should not be community sentences for, for example, serious offences, violent offences and assaults, yet the cabinet secretary's presumption against custodial sentences will apply to indecent assault, assault, and two thirds of convictions for knife crime.

Kenny MacAskill: There are two points there. First, Richard Baker criticises the time lag. That is the current system, which we inherited from him and his predecessors. That is why we are bringing in measures to improve the system and to address questions of timing. If he is critical of the system, that criticism should lie at my predecessor's door.

Secondly, I remind Richard Baker that we are talking about a presumption. In cases in which a sheriff believes that it is appropriate for respite care to be given, that a breach has occurred, or that no other sanction can be applied, we will fully support that sheriff in their decision. Richard Baker should perhaps think about supporting those who speak for and represent victims, who have been speaking out about what will really change things.

Members should remember that the status quo is not working. We inherited the revolving door, and communities are blighted as a result. For that reason we have established a broad coalition, from the former First Minister Henry McLeish, to the Scottish Prisons Commission and people such as David Strang, down to David McKenna. Yet some members of the Justice Committee have been unable to follow where the evidence led.

Members agreed that the priority for prison should be dealing with offenders who commit such serious acts that no other form of punishment will do. Committee members acknowledged that short prison sentences are of limited usefulness, but that specific instances may arise in which a short prison sentence may, nonetheless, be the only option. Committee members followed exactly the same path of reasoning as the Prisons Commission did, and as we have done in making the proposals that are set out in the bill. Therefore, why do some members of the committee and of the Parliament not support the presumption against short prison sentences?

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Will the cabinet secretary take an intervention?

Kenny MacAskill: I am sorry; I must make some progress.

No good reason was found to stand against the presumption, and we call on the members concerned to support that important provision.

Sections 58 to 60 make changes to the operation of the system that allows the retention of forensic data in the justice system. The forensic data working group has made good progress with developing a list of relevant sexual and violent offences committed by children that will trigger retention of forensic data under section 59. It is important that we get those provisions right, so careful consideration must be given to them. As requested by the Justice Committee, we aim to provide a draft list of the relevant offences before stage 2. GeneWatch UK submitted stage 1 evidence to the effect that DNA samples should be destroyed once DNA profiles have been obtained. The forensic data working group is considering the issue. In considering the retention and use of forensic samples, we are determined always to strike the correct balance between the rights of individual citizens and the need to keep communities safe.

This is a licensing as well as a criminal justice bill. In it, we are implementing the recommendations of the Civic Government (Scotland) Act 1982 task group and are modifying a number of provisions in the Licensing (Scotland) Act 2005 to reduce costs, shorten process times, remove unintended barriers and close loopholes.

A number of provisions in the bill give rise to a need alter reserved legislation, and we are working with United Kingdom Government departments so that a section 104 order, under the Scotland Act 1998, can be made at the appropriate time.

The Criminal Justice and Licensing (Scotland) Bill is a comprehensive bill that shows this Government's ambition to help make Scotland a safer and stronger land, and to change the status quo, which is clearly not working.

I move,

That the Parliament agrees to the general principles of the Criminal Justice and Licensing (Scotland) Bill.

The Deputy Presiding Officer: I call Bill Aitken to speak on behalf of the Justice Committee.

10:18

Bill Aitken (Glasgow) (Con): It is with pleasure, compounded with relief, that I present the Justice Committee's stage 1 report on the Criminal Justice and Licensing (Scotland) Bill. The relief is caused by the fact that a long, complex and convoluted experience is now at an end. My pleasure is formed from my belief that we have produced a fair, balanced and measured report on what is undoubtedly a complex and far-reaching piece of legislation.

It is a measure of that complexity that the committee required 24 meetings to deal with the bill, taking evidence from well over 50 witnesses. They included the Lord Justice General, the Lord Justice Clerk, the Sheriffs Association, senior police officers, voluntary groups, academics, the Law Society of Scotland, the Faculty of Advocates, the Lord Advocate and the Solicitor General. We also heard from local authorities, licensed trade representatives and, of course, the Cabinet Secretary for Justice. I put on record the committee's appreciation for those who gave of their time so willingly and for the innumerable written submissions that we received. All were carefully considered and appreciated.

Before I deal with the content of the committee's report, I also thank the members of the committee. My colleagues applied themselves with typical commitment and professionalism. I thank the clerking team, led by Andrew Mylne and Anne Peat, who kept up with the demands that the committee made of them—and with the frequently unreasonable demands of the convener.

Many of the measures in the bill are non-contentious and represent a valuable contribution to the modernisation of the law. Other aspects are controversial. Perhaps the most difficult issues to deal with were those that caused concerns across party lines, on which I hope there will be some movement before stage 2.

The controversy is largely restricted to part 1 and relates to sentencing. There might be no meetings of mind at the end of the process, but the divisions between us are perhaps less significant than some might think. The committee was lukewarm, it is fair to say, on the proposal that the bill needs to state the purposes of sentencing, as its purposes and principles are well established, nor does that proposal sit comfortably with the proposal that sentencing guidelines will be issued by the Scottish sentencing council.

It is easy to see the Government's direction of travel in relation to the sentencing council, which has perhaps been formulated in response to a public perception of inconsistency in sentencing. The committee was not convinced that clear, objective evidence exists to substantiate that perception. There is an inevitable tension between such a council and the principle of the separation of powers, and the committee could not form a consensus around how that tension could best be addressed. A majority of members took the view that sentencing guidelines developed by any sentencing council should take effect only after formal endorsement by the appeal court; an alternative suggestion was that, if there is to be such a council, its composition should have a judicial majority. I think it is significant that, when he gave evidence to the committee in Alloa, Henry McLeish downplayed the significance of a sentencing council, stating that he had "no strong views" on how it should operate.

The issue of community payback orders was not particularly controversial, and the committee broadly supports the creation of such orders, which should simplify and strengthen the current range of community sentences. The committee was firmly of the view that the orders must be adequately resourced. We found it difficult to be satisfied as to whether sufficient funds have been or will be made available for them. The level of take-up of the orders will be closely linked to the views of sentencers as to their effectiveness, and their effectiveness will be related to whether there is adequate funding.

The committee was strongly of the view that if CPOs are to gain credibility among the general public, victims of crime and, most important, offenders, there must be immediacy, with the order enforced on the day of sentence or as soon as possible thereafter. Justice delayed is justice denied—and justice that is ineffective.

The issue of short custodial sentences is of course highly controversial, but let me state, in a typically consensual vein, that, as the cabinet secretary said, the committee unanimously accepted that short-term prison sentences do not normally achieve much by way of rehabilitation. The majority view—albeit on the basis of my casting vote—was that the Government's proposals in that regard were totally unacceptable. I might have more to say about that later, but I am constrained by the role in which I am speaking. Significantly, the weight of evidence among academics was in favour of the Government's proposals, whereas members of the judiciary, who actually work in the courts, tended to take the opposite view. The issue has somewhat further to run.

In relation to the difficulty with the operation of the Custodial Sentences and Weapons (Scotland) Act 2007 regarding monitoring after early release, the proposals in the bill come under the heading of good intentions, although there will clearly be practical difficulties and resource implications. We reckon that the Government has probably got it about right.

Finally on part 1, one would have thought that the view that drink is not a mitigating factor when it comes to sentencing was unanimous. Most members of the committee found it curious that the Government felt a need to codify that principle in statute.

Having dealt with the issues that are probably the most contentious, I turn to the proposals regarding serious and organised crime, on which the committee strongly supports the Government's underlying intentions. Let no one doubt that the police, prosecutors and politicians are determined to do everything possible to hit the drug barons and their criminal associates hard. The bill is extremely well intentioned, but the committee was not certain that some of the detail was right.

There are difficulties, with which the cabinet secretary has dealt to some extent, around the definition of "involvement" and "directing", on which further dialogue is necessary. We are also concerned about other definitions, such as what is meant by "serious and organised crime". We have asked the Scottish Government to re-examine the extent to which it would be possible to tighten the definitions. The committee is keen to play its part in attempting to find a proper way forward.

Another issue of non-political, general concern relates to the age of criminal responsibility. We accept that Scotland is not in line with other jurisdictions, but, at the same time, there has to be some protection against the activities of the very small minority of youngsters who can do pretty serious things. Section 38 was the subject of long and anxious consideration. We have been unable to form a settled view on whether 12 is the appropriate age threshold for someone to be deemed capable of committing a crime or to be liable to prosecution. Before we proceed, we need to get some assurances from the cabinet secretary that there is a sufficient range of disposals in the children's hearings system for children under the age of 12. The committee would welcome further dialogue on that matter.

The retention of samples is a controversial issue. The committee agrees that it is sensible to enable fingerprint and other forensic data to be subject to the same European convention on human rights-compatible retention regime as DNA.

However, we are less certain whether it is appropriate to extend those provisions to those who are offered alternatives to prosecution. Appropriate thought does not appear to have been given to the proportionality of such a measure, bearing in mind the minor offences that are likely to be involved. That requires further examination.

The retention of DNA and other evidence, particularly from children and persons who have not been convicted of significant crimes, raises issues under article 8 of the ECHR. Once the Government has had time to absorb the committee's report, we would expect it to report to us to advise us what progress has been made with the forensic data working group, particularly on whether a draft list of offences is required. I have taken some encouragement from what the cabinet secretary said earlier.

Part 4 relates to evidence. The issue of witness statements and, in particular, the provision that will enable a civilian witness to look at their statement shortly before giving evidence troubled a number of committee members and we could not formulate a consensus on it. The legal profession and the judiciary shared our doubt, so we ask the Government to look at the issue again.

On the requirement for the spouse or civil partner of an accused to give evidence, although the Government's measures are undoubtedly well intentioned, we draw to its attention the evidence that the committee took and ask it to consider whether, in retrospect, what it proposes is the most satisfactory way forward.

There are a number of other sensible measures, such as the proposal to increase the age of jurors to 70. However, the provisions on disclosure in part 6 caused considerable anxiety. The rationale was fully understood, but there were concerns about defence statements being made available to the Crown. The committee was not persuaded that there is merit in the proposal to make defence statements compulsory in solemn cases, as that could prejudice important principles of justice, so perhaps the Government will give its justification further thought. There was a view that the disclosure provisions should be kept as simple as possible, as was highlighted in the excellent report by Lord Coulsfield, who provided valuable evidence.

The bill also deals with licensing, on which there are important provisions. It is unfortunate that the length of the criminal justice aspects of the bill preclude an exhaustive examination today of its licensing aspects, although that can take place in due course. Most of the licensing measures are common sense. However, I draw to the Parliament's attention the committee's concerns under a number of headings, such as the provision of antisocial behaviour reports to licensing boards and the committee's view that a sledgehammer was being used to crack a nut in respect of the charging of, or potential costs to, non-commercial groups for obtaining licences for charitable events.

Some events that councils require to license will require the council to expend a considerable amount of money in ensuring that everything is in order. The most obvious example is that of a rock concert, which would involve building control, environmental health and other council services. However, small events such as sales of work or flower shows—such events are familiar to many members of the Parliament—do not require the same level of council input. Perhaps the Government could look again at the matter, because, undoubtedly, there is a possibility that the good intentions of very well-intentioned people who work for charities could be frustrated if the costs that are involved become prohibitive. We cannot have charities suffer because of overtight regulation.

Other aspects of licensing are worthy of consideration, such as the definition of "fit and proper person". We are not totally relaxed that the law as it is at present is exactly the way forward, so perhaps some work could be carried out in that respect.

It would be wrong to suggest other than that the criminal justice provisions dominate the bill. Some aspects are good; some are, to my mind, capable of being improved, but the legislative thought process around them is entirely satisfactory and they would receive the approval of the majority of the Parliament; and others, such as the provisions on short periods of imprisonment, are bitterly controversial. In a conciliatory manner, I ask the cabinet secretary to look again at that issue. It may well be that Victim Support Scotland and other bodies took a differing view from half of the committee, but the committee has got it right and is speaking on behalf of the majority of the people of Scotland. As I said, I will have more to say on that later.

I hope that the Parliament will accept that a great deal of time and effort has gone into the preparation of the report, which will provide an informed basis on which the debate that will take place over the next few months can proceed.

10:33

Richard Baker (North East Scotland) (Lab): I congratulate the Justice Committee on its stage 1 report on the bill and I congratulate the convener on his self-restraint in presenting it. Given the breadth of the bill, the committee has had a lot of ground to cover. The Scottish National Party's supposed flagship bill on law and order involves many exercises in consolidation and proposals that are technical in nature. Like others, I will not have time this morning to cover all the issues in the bill.

However, the proposal to legislate for a presumption against custodial sentences of six months or less is significant, because it is unworkable, unfunded and unjust. I am fulsome in my praise for the committee's report, because it was right to reject that proposal. It has often been said that the intention is that minor offenders should not be placed in custody—indeed, the cabinet secretary referred to that this morning. However, it is clear that that presumption will not apply simply to minor offenders but to all sentences of under six months, which would include 40 per cent of those convicted of indecent assault, 85 per cent of those convicted of assault and two thirds of those convicted of knife crime. That sends out entirely the wrong message on this key area of crime. It will not do anything to make our communities safer, which should be the focus of the bill—I am afraid that it is not.

There is a false debate about whether the measure in itself will reduce reoffending. We, too, want to reduce reoffending and we believe that community sentences have an important role to play in that, but reoffending rates are higher for those who are sentenced to prison because—alas—by the time that somebody receives a prison sentence, they have normally already received several other disposals. Almost by definition, a person who is given a prison sentence is a repeat offender. Putting offenders who would otherwise be in custody back in the community will not make communities safer. We should be clear about the consequences that that might have. Scottish Women's Aid has said that the presumption could

> "have a negative impact on women, children and young people experiencing domestic abuse."

The cabinet secretary's argument that offenders will be sentenced to robust community payback programmes is fantasy. It is on his watch and not ours that community sentences are—sadly—losing public confidence. He referred to a survey in which 84 per cent of respondents said that they wanted community sentences as alternatives, but the same surveys show that people are losing confidence in such disposals.

Margo MacDonald (Lothians) (Ind): Is Richard Baker in favour of the short custodial sentences that are normally imposed on women who fail to pay a fine that is incurred for soliciting? Would he continue such measures?

Richard Baker: I certainly take on board Margo MacDonald's point. The Equal Opportunities Committee has reported on a range of issues in relation to women offenders and we will certainly consider that committee's proposals carefully.

I am afraid that the current state of community sentences cannot be ignored. One third are breached and a fraction start on time. Even those who agree with the cabinet secretary's proposal on six-month sentences say that it must be properly funded, yet in the next three years a black hole of some £66 million to provide the additional community sentences would result from the proposal.

We believe in the staff who deliver community sentences—they do a fantastic job—but the cabinet secretary is not resourcing them adequately. He says that he is increasing the available funding, but we know that the community justice budget is at best flatlining—as James Kelly said—and that the cabinet secretary has used unidentified underspend to say that he is supporting the funding in the financial memorandum. His calculations do not add up. That is a recipe for disaster that will push an overstretched community sentencing system to the point of collapse. All those who will be responsible for delivering the greatly increased number of sentences expressed concern to committees about funding. To be frank, the cabinet secretary has done no more than dismiss their concerns.

Robert Brown: I will leave aside the resource argument, which we all accept is important. Does Richard Baker accept in principle that a move away from short-term sentences, which do not work and cost huge amounts of money, is desirable? I do not see what option he is presenting.

Richard Baker: We oppose the presumption against short-term sentences in principle. We want more community sentences, but the resourcing issue cannot be escaped from—to be fair, Robert Brown does not try to do that. When the financial memorandum is scrutinised—Mr Purvis was good at doing that in committee, along with Labour members—the inescapable point is that the funding simply is not there. Everybody has said that, if the Government believes in the proposal, the investment should come first, but the investment has not been identified, even though the Scottish Government's budget is increasing—of course, the cabinet secretary failed to refer to that.

We believe in robust and effective community sentences. That is why we pioneered drug treatment and testing orders, why we now propose the use of alcohol treatment and testing orders and why we first proposed the community court in Glasgow. In England and the USA, that model provides swift and effective community justice in which we can have confidence. Despite everything that the Government and the cabinet secretary have said about community sentences, the

Scottish Government prevented the pilot community court from proceeding, although the Parliament voted for the pilot. Nothing else demonstrates so well the muddled thinking behind the bill and behind the presumption against short-term sentences.

If we are to look towards more and better community sentences, investment must come first. The cabinet secretary says that we cannot continue to spend money on prisons, but his officials told the Finance Committee that the proposals in the bill would not save a penny in the prison system. Front-loaded funding is needed, but the cabinet secretary is not providing that.

We will not support the failure to act effectively to tackle violent crime. We have proposed and will pursue a policy of mandatory minimum sentencing for knife crime. We still have some 3,500 charges of possession of an offensive weapon each year and higher violent crime rates than England has. That is why it is time to send out the clear message that if someone carries a knife, they will go to jail. Communities want tougher action to improve their safety, but the bill proposes that fewer people should go to jail for carrying a knife and that two thirds of the people who are convicted of such offences should not go to jail. The lack of action on knife crime in the bill is another unacceptable failure.

We support some measures in the bill. We do not oppose the sentencing council per se, but we have listened to the Lord President and others and believe that it should have a judicial majority, that a mechanism for it to report to the Justice Committee should exist and that it should have a narrower remit and reduced costs. The council should not have to take account of the prison population—it should have a clear and unadulterated focus on what is just in sentencing.

We will not oppose the change to the age of prosecution for children, but the Lord Advocate might need to retain the right to pursue a prosecution in exceptional serious circumstances. We will listen to views on that point and consider the detail of changes in the children's hearings system, which we still await.

We do not oppose the rebranding of community sentences, but rebranding is of course useless if the resources are not provided to make the sentences work and we are concerned about the detail of the proposed changes. For example, the Sheriffs Association's submission to the Justice Committee says that, under the proposals, no penalty would in effect be imposed for breaching supervised attendance orders. Normally, the penalty is additional hours, but as the bill sets an upper limit of 300 hours for orders, a subsequent breach would have no effect on those who have been sentenced to such an order. That requires to be addressed.

Scotland should not be left with weaker laws on DNA retention than the rest of the United Kingdom has. The report of a serious case only yesterday showed that DNA profiles can be an invaluable tool in detecting and preventing crime.

The proposals on tackling serious and organised crime are positive, but I understand from the financial memorandum that they will apply only to some two cases a year.

The reality is that—sadly—the positive proposals in the bill are far outweighed by the negative. Given the committee's rejection of the Government's proposed presumption against short custodial sentences, and to provide the opportunity for amendments to be lodged to make the bill effective in tackling violent crime, we will allow the bill to progress to stage 2. However, the reckless presumption against six-month custodial sentences and the Government's unwillingness to take action on knife crime are lines in the sand. If they are crossed in the final stages, we will not support the bill. Labour will always, always put the safety of our communities first.

10:42

John Lamont (Roxburgh and Berwickshire) (Con): The bill is complex and epic in the proportions of what it covers. The Justice Committee is to be congratulated on its efforts to scrutinise the bill. Many provisions are not contentious and will simply tidy existing procedures in the criminal justice system. We welcome most of those.

The journey to reach the stage 1 debate has been interesting. I am sure that we have all read the many consultation papers in anticipation of the Scottish Government's bill. I remember clearly the debate on the Scottish Prisons Commission's report in September last year, when we discussed in depth the recommendations to reduce the average prison population to 5,000 and to scrap sentences of six months or less in favour of community supervision sentences. As members have done today, I expressed then my concern about where that approach to custody would take us. Despite what the cabinet secretary said today, I am disappointed that the Scottish Government has not heeded those concerns and dropped the proposals from the bill.

Stewart Maxwell (West of Scotland) (SNP): Will the member take an intervention?

John Lamont: I want to make progress.

As I said, we welcome some proposals in the bill. For example, we welcome the moves to crack down on the use in prison of personal communication devices, such as mobile phones. I recently visited several prisons and I was struck by the problems that communication devices present to our Scottish Prison Service. Prisoners share the hand-held phone device but have their own SIM cards, which makes detection harder. The use of communication devices in prison enables prisoners to continue their criminal activities as before. My colleague Ted Brocklebank will consider that in detail later.

We warmly welcome the extension of the upper age limit for jurors. That will bring the law of Scotland into line with that of the rest of the United Kingdom and will create a bigger pool of jurors on which the Scottish Court Service can draw. I anticipate that David McLetchie, who has campaigned hard on the issue since 2005, will have something to say on the matter in his speech.

I will spend some time focusing on the sentencing provisions in part 1, particularly the creation of community payback orders, and the presumption against short periods of imprisonment or detention. We welcome the creation of CPOs, which will help to simplify the current range of community sentences, but the Government must ensure that CPOs are not only adequately resourced, as the Justice Committee pointed out, but properly enforced.

Last year, 35 per cent of community service orders were not completed successfully and 35 per cent resulted in a breach application. With statistics like that it is not unsurprising that the public do not have much faith in community sentences, let alone the criminal justice system. The Scottish Conservatives are not anti community sentencing. Believe it or not, we do not want to see more people locked up in prison. We want to stop offending and, more particularly, reoffending. We believe that community sentences can play an important part in our sentencing regime. However, if they are to work, they must be rigorously enforced and complied with.

We have called for the creation of a community court in Glasgow. Such a court would ensure that justice was served and was seen to be done, and it would give offenders every opportunity to make positive choices, change their lives for the better and get out of the vicious cycle of persistent offending. It is therefore disappointing that the Scottish National Party Administration has rejected the setting up of a community court in Glasgow.

It should be remembered that imprisonment serves four functions in our society: to protect the public, to deter, to punish, and to rehabilitate. I accept that a sentence of six months or less may not give an offender access to the full range of rehabilitation facilities that someone who is imprisoned for a longer period can access. However, as important as rehabilitation is—and I believe that all people need to be given an opportunity to make positive changes in their lives—it is not the only purpose of imprisonment. Prison is also to deter people from reoffending; to show them that their behaviour is unacceptable to society and that the consequence of their actions is for them to lose their liberty for a set time as a punishment; and to protect our public and give them respite from a persistent offender or someone who is deemed to be a risk.

Robert Brown: If one visits Polmont young offenders institution, one finds that 91 per cent of the young offenders have been there before. That does not say much for the deterrence argument. What is the member’s comment on that?

John Lamont: We need to understand why they are repeat offenders and why we are not using their time in prison to rehabilitate them more effectively. The argument that short-term sentences are not working is not a reason for abolishing them completely. Those sentences should be more effective as a deterrent.

Short-term sentences offer sheriffs and judges the option of dealing with persistent offenders who continuously breach community service orders by giving them a short, sharp shock to ensure that they do not reoffend. They also provide respite to communities that are blighted by the actions of the accused. Short-term custodial sentences will always be a necessary part of any summary justice system. Judges and sheriffs do not send people to jail lightly.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): It is respite care, now.

Mike Pringle (Edinburgh South) (LD): Respite care!

John Lamont: I hear members querying my reference to respite. A number of my constituents rely on short-term sentences to provide them with respite from the blight that individuals cause to their communities. Members should not underestimate the effect that short-term sentences can have on our constituents across Scotland.

The licensing parts of the bill also require further consideration, particularly their impact on charitable organisations and community groups. The Justice Committee convener mentioned that point. Recently, like other members, I received an e-mail from the Church of Scotland Guild voicing its concerns about the effect that the bill would have on its events and activities. Many local groups run small fairs, coffee mornings and other events at which they invite local businesses to display goods. They also run rallies and ask local bookshops to provide a bookstall during the event. Although the group does not make a profit on many of these occasions, the new licensing measures will require the procurement of a licence. Local authorities will have discretion over charging, but there are concerns that groups in different parts of the country may be treated differently—which could lead to inequality and unfairness—and that having to get a licence may mean that they will not put on such events in the future. That would be unfortunate for not only the groups, but the local, mostly independent shops, which may suffer a negative impact.

In addition, the Scottish Sports Association voiced concerns about the impact that the bill would have on its ability to promote sport throughout Scotland. The SSA noted that the bill would make it unviable for sport clubs that work on a not-for-profit basis to continue to promote their activities or raise funds. Many of the funds that clubs receive from the sale of goods to the public are accrued in relatively small amounts. If they are required to obtain a market operators licence for such fundraising activities, it is clear that the situation may become unviable. We should encourage and not punish clubs that are being proactive in the pursuit of additional funds. The SSA also believes that the measure will act as a deterrent to volunteering. Without the work of many thousands of volunteers, many sports clubs would not survive. Those sports clubs provide coaching, competition and youth development opportunities to local communities. We should help to facilitate such community involvement.

In September, the Scottish Government published "On your marks... Get set... Go: A games legacy for Scotland", in which it stated its ambitions for Scottish sport in the preparation for and years beyond the 2014 Commonwealth games in Glasgow. It speaks of a partnership between the Government and groups such as the SSA in delivering those sporting objectives in the community. How can the Government truly support such statements if it then places additional controls and financial burdens on clubs that are working to promote sport throughout Scotland?

We must recognise the effect that the bill could have on charities and community groups in the hope that we will not hinder their ability to continue to do good work in their local communities.

The Scottish Conservatives will vote for the Criminal Justice and Licensing (Scotland) Bill tonight at decision time, but we look forward to seeing the amendments at stage 2 that I am sure will be lodged and which we hope to support.

10:52

Robert Brown (Glasgow) (LD): I commend Bill Aitken, the Justice Committee convener, for his comments on behalf of the committee. I do not always agree with him, but on this occasion I agreed with pretty much every word that he said.

The Criminal Justice and Licensing (Scotland) Bill is long and complex, with many separate and largely unconnected strands. As we have heard, some of its proposals are highly contentious. It is a tribute to my colleagues on the Justice Committee that we were able to produce a report that was the subject of only one formal vote. I say that given the differences of emphasis or expertise in the committee membership. That consensus gives added power to the broad themes of the stage 1 report. I hope that the Government will listen and respond appropriately—indeed, the cabinet secretary indicated that he will do so.

I will indicate the Liberal Democrat position on some of the central issues. This stage 1 debate is taking place in a different financial climate from that which pertained when the Scottish Prisons Commission reported and the bill was conceived. That must influence our approach. We must ask whether particular proposals are essential or just useful.

I say immediately that the Liberal Democrats are clear in principle that those most important sections that aim to reduce short-term prison sentences and replace them with tough, speedy and effective community sentences are absolutely vital and must be properly resourced. Frankly, aiming to reduce such short-term sentences is a no-brainer. The public is funding prison places at up to about £40,000 a year per prisoner. Some prisons are housing minor criminals in grossly overcrowded conditions from which they routinely leave worse than when they went in, the underlying causes of their offending not having been addressed and the family or employment supports that are key to their rehabilitation having been fractured.

The public are equally entitled to know that the punishment that is meted out by the state is the most effective possible in stopping their local community being troubled by violent disorder, vandalism, the consequences of alcohol or drug addiction, and repeated crimes of dishonesty—all of which cause huge annoyance, worry and fear to law-abiding citizens. The Government must adequately fund community payback orders if the public are to have confidence in such measures. In fairness to the cabinet secretary, he has responded specifically to Liberal Democrat concerns on the issue by providing an initial sum of £2 million and a further £5.5 million over two years to bring existing community sentences up to scratch. Despite what members have said in the debate, I know from my visits to community justice authorities that the money is having an effect: sentences are being speeded up and sharpened up.

However, we all know that the quality of different projects is patchy and that, in moving to the new form of community orders, it is a fundamental challenge to ensure that they are started immediately, managed and supervised with both skill and authority, and allowed not just to produce visible payback to the local community, which is hugely important, but to turn around the offender. As the Justice Committee said, the presumption against short-term sentences will lead to basic costs increasing by 10 or 20 per cent, according to the Government's estimates—about which there are issues. There will also be additional costs for the Scottish Court Service and for the voluntary sector bodies that will be involved in delivering the new CPOs. The conditional requirements that will often accompany the orders may require drug or alcohol addiction treatment, mental health treatment or literacy support, all of which cost money.

James Kelly: Does Robert Brown accept the evidence of Government officials to the Finance Committee that releasing prisoners on short-term sentences will not save any money from prison budgets?

Robert Brown: I do. There will be longer-term savings, if we get CPOs right, but achieving short to medium-term savings will be a challenge. That is why bridging finance is an important issue in this area, as in so many others. Community justice authorities gave evidence that the unit cost figures that were used to calculate the costs of community orders may not be adequate. Liberal Democrats are clear that current resource levels will be inadequate and that the Government will need to find additional resources if the new CPOs and, more particularly, the presumption against short-term prison sentences are to be more than tokenistic and are to make the substantial difference to crime levels that we believe they are capable of making.

Liberal Democrats offer a partial way forward—to apply the presumption only to sentences of under three months, at least in the first instance, which would reduce the organisational and financial pressure. However, there is a difference in a broad sense between the pattern of crimes attracting sentences of less than three months, which looks more like that of those attracting community sentences at present, and the pattern of crimes attracting sentences of three to six months, which tend to look more like more serious crimes. As other members have said, why, for goodness' sake, does the SNP not rethink its lamentable and short-sighted decision to abandon the Glasgow community court project—one of a growing number of projects that have not been properly assessed but have been binned by ministers who are too often hung up on administering the smack of firm but, in this instance, inadequate Government decision making?

I will say a word about the opposition on this general issue from Labour and the Tories. With respect, I say to Richard Baker that resource is a smokescreen for Labour—as he indicated in his response to my intervention, they are against the changes in principle. They operate on the principle that no press release should go out and no new policy should be announced that does not say that they want tough penalties or tough action, which implies that the only respectable sentence for any crime is to lock up the culprit and throw away the key. That used to be the preserve of Tory conferences, which rapturously received demands for the restoration of the death penalty or bringing back the birch. Since 1997, however, new Labour has positioned itself in such a way that no one can outdo it on being tough on crime. I say to Richard Baker and the Labour Party that the difference is that they know that short-term sentences do not work but are desperate to give the impression of ceaseless activity in fighting crime, to ensure favourable headlines in the tabloids—not least those owned by Rupert Murdoch, new Labour's erstwhile but, it turns out, fair-weather friend. Richard Baker knows that demands for tough action on crime are a political spin-doctor's invention and substantially irrelevant to the real issues that we face in fighting crime.

Richard Baker: Mr Brown's accusation that we are seeking support from Rupert Murdoch is behind the times and gives the lie to the outrageous politicking of his statement, which is entirely wrong. Does he accept not only that we pioneered community sentences when we were in government with the Liberal Democrats but that we have looked for further alternatives to custody during this session, including alcohol treatment and testing orders, which we have pressed for in the context of the bill? The member's statement was extremely unfair and misrepresented our position.

Robert Brown: I pay tribute to Richard Baker for some of the policies that he mentions, but I am making a general point about positioning, right down from the Labour Government in London to Labour members in the chamber.

It is no coincidence that about 80 per cent of the young children of five or six who come before the children's panel as being in need of care and protection are back before the panel or the court at the age of 16, 17, or 18 for offending. One third of those entering prison are assessed as having an alcohol problem on admission, and 50 per cent as having a drug problem. If they do not have a drug problem when they go in, they are pretty likely to have one when they come out. Sadly, no less than 70 per cent have some form of mental health problem, with huge proportions having literacy or numeracy challenges. I mentioned the Polmont young offenders institution to John Lamont. I do not know what sort of percentage he requires to be persuaded on these matters, but 91 per cent seems pretty high to me.

I want to take a sideways glance at the issue of women in prison. Staff at Cornton Vale tell me that their main job is to try to rebuild shattered and fragile lives, to make up for the devastating fact that women are taken away from their children and homes and that their self-respect is at rock bottom, their mental health fragile and the likelihood of a suicide bid high. To all intents and purposes, those women are there mostly for their protection rather than for that of the public. It is not obvious that we are too soft on their crimes—in fact, it is totally clear that society has failed those women, that life has been extraordinarily tough for them and that there is a high chance that their children will be among the next generation of offenders.

Bill Aitken: Will the member give way?

Robert Brown: I cannot at this point—I am heading towards the end of my speech.

In my view, the £1 million annual running costs of the proposed Scottish sentencing council are not justified in the present climate. It could be a useful body; however, if the cabinet secretary goes ahead with the proposal, he should for goodness' sake pay heed to the judiciary's justified concerns and square the circle by having the council's proposals, influential as they will be, endorsed or amended by the appeal court, to ensure that there is separation of powers.

I conclude with a brief word about children. We need to sort out the age of criminal responsibility, in line with the report of the United Nations Committee on the Rights of the Child. We must also look at DNA issues, in the way that the Justice Committee recommended. The children's hearings system was not set up to deal with legal issues of that kind, and it is almost impossible to define the cut-off point between serious and not serious crimes. The number of cases would be modest, and many would go to the sheriff anyway for a finding on the referral. Such cases should be referred or should go to the sheriff.

This is an important bill, but a great deal of work remains to be done to get it right. We expect to see our concerns addressed as the bill proceeds. For many people, failure creates despondency, aggression and more failure. The high challenge for the bill is to help to break the cycle of failure, to support the work of the violence reduction unit, early intervention and diversion from crime, and to build a system in which reoffending rates are not 91 per cent in Polmont or 75 per cent in prisons generally and the current 42 per cent for community sentences is bettered by as much as possible. That is the prize. If we succeed, our country and society will be much the better for it. Alas, we cannot say that for the position advanced by Labour and the Tories in the teeth of the majority of evidence that witnesses gave to the Justice Committee. They have generations of abysmal failure of so-called tough policies on crime to explain away. Liberal Democrats members will support the bill at stage 1 tonight.

11:03

Stewart Maxwell (West of Scotland) (SNP): I add my thanks to the many witnesses who provided evidence and to the committee clerking team for all its hard work.

I start with two proposals in the bill that have received particular attention. The first is the presumption against short custodial sentences—the one issue on which the committee could not agree a position. Four members voted in favour and four against. The vote displays why that proposal will feature heavily at stage 2 and, no doubt, at stage 3.

In my view, the arguments in favour of the proposal are overwhelming, whereas the arguments against do not stack up. Beyond a shadow of a doubt, the current policy has failed. It has been tried for years and has had little or no impact on turning people away from a life of crime. In fact, many people argue—in my view, cogently—that the exact opposite is the case and that short custodial sentences are a door into, rather than out of, a life of crime.

Despite some people's attempts to cloud the issue, the bill proposes not the abolition of short custodial sentences but a presumption against them, with the judiciary retaining the freedom to impose such sentences where they are necessary and appropriate. Inevitably, it will be for the chamber to take a view on the matter at stage 3, as the 50:50 split in the committee reflects the diverse views that are held across the chamber.

I turn to the proposal for a sentencing council. I believe that we need a body to provide the courts with guidelines on sentencing and that the current arrangement is no longer the best way of dealing with the matter. As Robert Brown mentioned, there was a difference of opinion in the committee on judicial independence in the context of a sentencing council. I do not believe that we would be going far enough if we set up a sentencing council whose recommendations must then be approved by the court. That would not move us on particularly far. If there have to be changes to the bill, we should look at the make-up of the council and discuss whether there is a case for it to have a judicial majority.

James Kelly: On the £1 million funding for the sentencing council, does the member agree that, in these difficult economic times, some of that money would be better used to fund community payback orders?

Stewart Maxwell: James Kelly lays a false choice before the chamber. Of course it is important that we achieve value for money from our investment in this area—the committee made that point in its report—but it is not a straight choice between the two options as he suggests.

A judicial majority on the sentencing council might strike the right balance between maintaining judicial independence and providing us with a body that will introduce robust guidelines on sentencing.

I turn now to DNA retention and the committee's conclusions at paragraph 372 of the report. A trend in recent years has been the increasing use of non-court disposals or direct measures such as fiscal fines. However, one of the unintended consequences of that trend has been that if two people commit an identical offence, receive an identical charge and both have their fingerprints and DNA taken, they can end up with two different outcomes. The person who chooses to go to court and is found guilty of the offence has their DNA and fingerprints retained, but the person who accepts the offer of a direct measure does not have their DNA and fingerprints retained. There is no justification for the difference and, as I have indicated to the cabinet secretary and the committee, I intend to lodge an amendment to close what I believe is an anomaly in the current rules.

One of the other issues that caused debate in the committee was the age of prosecution versus the age of criminal responsibility, as other members mentioned. The bill seeks to raise the age of prosecution to 12 from the current age of eight, while retaining the age of criminal responsibility at eight. That means that children between the ages of eight and 12 could no longer be prosecuted through the criminal courts. Although the change is long overdue, I do not support the proposals from some outside the chamber to raise the age of prosecution to 13, 14, 15 or even 16, neither do I support the idea that we should change the age of criminal responsibility. There are cases of children below the age of 12 who are clearly capable of understanding the difference between right and wrong and who have committed crimes for which they must take responsibility. Therefore, I am content to support the position that is outlined in the bill.

I will mention briefly two other matters in the report. The first is serious organised crime. I realise that some people are concerned about some aspects of that area of the bill, in particular section 28, on failure to report serious organised crime. We must take a robust line on the matter as any gaps that we leave will be exploited by the very people with whom we are trying to deal. That is what happens at the moment. I recommend that members read the evidence on the matter that was provided to the committee by the Lord Advocate and the Solicitor General.

My final point relates to the proposal to allow non-invasive post mortems, to which paragraphs 645 to 651 refer. Although it is not a part of the current bill, I raised the matter with the cabinet secretary and the committee and asked questions of the Lord Advocate when she gave oral evidence. We also received written evidence about it from the Scottish Council of Jewish Communities. Therefore I ask that, if possible, we get a definitive response in the summing-up today to the questions raised about the possible use of non-invasive post mortems in Scotland and, in particular, to the question whether a change in legislation is required.

I ask all members to support the bill at decision time.

The Deputy Presiding Officer (Trish Godman): Before I call Bill Butler, I remind members that speeches should last five minutes rather than five and a half minutes.

11:09

Bill Butler (Glasgow Anniesland) (Lab): As deputy convener of the Justice Committee, I place on record my sincere thanks to the committee's clerking teams past and present, the Scottish Parliament information centre and the many witnesses who gave invaluable evidence to the committee.

There is no insurmountable difference between Labour and the Government on several measures in the bill that merit support, such as those on serious organised crime, voluntary intoxication by alcohol, people trafficking and the upper age limit for jurors. However, given the voluminous nature of the bill, I will confine my comments to some of the more controversial aspects of part 1 where no agreement has been found.

One of the most worrying aspects of this putative act is the Government's proposal to introduce a presumption against six-month sentences other than in exceptional circumstances. The production of a coherent penal policy that leads to a safer and stronger Scotland is the aim of all members across the chamber; it is certainly central to the creation of a rational system of criminal justice.

A sensible and resilient penal policy must be capable of delivering several objectives: an improvement in public safety; the delivery of condign punishment when necessary; the protection of victims' and communities' interests; and a contribution to reducing reoffending and promoting rehabilitation. Those are desirable outcomes, but determining how we achieve all or any of them is where this serious debate must focus. I say to Robert Brown that these are complex and difficult areas of policy to which no easy answers or soundbite solutions exist. One of the most difficult questions is not only how we strike a rational balance between custodial and community sentences but how we develop consensus on the symmetry between punishment and rehabilitation that is acceptable to people in our communities and recognised by them as being workable.

I remain profoundly dissuaded of the Government's policy to end six-month or shorter sentences other than in exceptional circumstances. Such a legislative change would send out entirely the wrong message to the public.

Stewart Maxwell: Will the member give way?

Bill Butler: No, thank you.

Pace the cabinet secretary, sentences of less than six months are not imposed on fine defaulters alone but cover, for example, those who push class A drugs in our most vulnerable neighbourhoods, some of which I represent. Such sentences cover housebreakers who leave behind a trail of damage and heartache and common fraudsters who prey on the old and weak in our communities. Such sentences also cover thugs who employ physical violence that can leave innocent passers-by hospitalised and, in some cases, permanently disfigured. Such a policy would be a serious misjudgement. Although it would not forbid sheriffs from imposing such sentences, it would unnecessarily restrict the scope within which the judiciary may act in cases where the safety of the public—our constituents—is paramount. I sincerely hope that the Government will think again before stage 3 about this controversial and ill-judged provision.

The other side of the equation is community disposals. If such disposals are to gain the confidence of the Scottish public, they must be visible, have immediacy and be resourced properly. I remain troubled as to whether community payback orders will be funded adequately. I have no problem with the principle of CPOs because, as my colleague Richard Baker said, they are a rebranding of the alternatives to custody that were introduced by the previous Labour-led Executive in coalition with the Liberal Democrats. Mine is a genuine worry about the £66 million black hole that is echoed by the Finance Committee, which notes that it has not

> "received any evidence to allow it to understand whether the estimated update of CPOs, of between 10 and 20 per cent, is accurate or whether this figure is likely to increase year-on-year, along with the cost implications."

I hope that the Government can provide comfort on that concern before stage 3 because it is not a cover; it is a serious concern and worry that we have on the Labour side of the chamber.

Labour will support the bill at stage 1 but, unless the Government thinks again about the matters that I mentioned, among others, we on these benches will not vote for the bill at stage 3. I hope that the Government has the wisdom to retreat and preserve the parts of the bill that are worth preserving.

11:14

Aileen Campbell (South of Scotland) (SNP): The Criminal Justice and Licensing (Scotland) Bill gives the Parliament an opportunity to take Scotland closer to being the safer, fairer country that we all want to live in. I welcome the wide-ranging consultation by the Scottish Government on the various aspects of the bill and the thorough scrutiny that was carried out by the Justice Committee. I made submissions to both the Government and the committee on aspects related to the legislation and will return to that shortly.

I endorse the general principles of the bill, as well as the wide range of specific measures that will help to tackle so much of the crime and its consequences that blight too many of our communities.

I am particularly interested in how the bill will affect the youngest members of our society. The Government is right to use the bill to reinforce the importance of ensuring that younger children who offend will continue to be dealt with in the hearings system and will be held, when that is necessary, in secure accommodation and not in adult courts or prisons. The approach is important, because it protects the rights of young people and meets their needs appropriately. It also has the effect of minimising contact with adult criminals and thereby reducing the risk of reoffending.

However, it is not just young offenders who are affected by the justice system. The children of adults who commit offences are also affected by sentencing decisions. Scotland's Commissioner for Children and Young People published the report "Not Seen. Not Heard. Not Guilty: the Rights and Status of the Children of Prisoners in Scotland" in February 2008, and in June that year the Education, Lifelong Learning and Culture Committee discussed issues that were raised in the report with the then commissioner, Kathleen

Marshall. In the report, the children of offenders were described as

"the innocent victims of their parent's offending".

That sums up the situation in which so many of those children find themselves.

In 2002, a report by the Scottish Prison Service, "Making a Difference", revealed that about 13,500 children in Scotland had a parent in prison. Families Outside, a Scottish charity that works with families who are affected by imprisonment, points out that, given the rise in the prison population since 2002, the current number is likely to be significantly higher. Kathleen Marshall said:

> "At least as many children are affected by the imprisonment of a parent as are looked-after children in Scotland".—[*Official Report*, *Education, Lifelong Learning and Culture Committee*, 25 June 2008; c 1257.]

Each case gives rise to costs of alternative care arrangements, problems for the parent when they try to get their children back after serving a custodial sentence and wider societal costs of depriving a child of a parent. Children who have a parent or primary carer in prison often exhibit regressive behaviour, such as bed wetting, or display emotional and behavioural problems. Families Outside noted that even having a parent who is remanded in custody can have a disproportionate and negative impact on a child.

The SCCYP has highlighted a ruling by the Constitutional Court in South Africa, which introduced child impact assessments, to be carried out by lower courts at the point of sentencing. Earlier this year, I was privileged to hear more about the system when I attended a moving lecture by one of the members of the court, Justice Albie Sachs. I congratulate Tam Baillie, the current children's commissioner, on organising the lecture, which made a powerful impression on everyone who attended. Justice Sachs quoted from the judgment that he had given in the case of S v M, in which a woman who would otherwise have been jailed was kept out of jail because of consideration of the rights of her three sons. He said:

> "Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinct personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them … the sins and traumas of fathers and mothers should not be visited on their children."

The Cabinet Secretary for Justice is familiar with the issue, because he kindly met me and other interested parties to discuss it. Other members will be aware of the issue, thanks to the helpful briefings that Action for Children and others provided in advance of the debate.

I make it clear that I am not advocating that convicted criminals who are also primary care givers should not be properly punished. Any person who poses a threat to the public should be incarcerated, whether or not they have children. Nor am I suggesting that it is always in a child's best interests not to lock up their parent or carer. In my submission to the Justice Committee, I argued that imprisoning low-level offenders who have children has a wider social impact as families are broken up. If we punish such offenders in the community, justice will be served and Scottish society will not have to deal with the long-term social consequences of family breakdown. I hope that the approach will also break the cycle whereby the children of prisoners are more likely to offend.

The presumption against short-term sentences will help to achieve that outcome to some extent, but there might also be a role for the Scottish sentencing council, which the bill will establish. In my submission to the Government's consultation on the sentencing council, I suggested that, when the council is established, it might review the effectiveness of social inquiry reports, which can be carried out as part of the sentencing process, and consider whether a specific family impact assessment should be carried out whenever an offender has caring responsibilities for children or other dependants. I hope that the cabinet secretary and the Government will consider my suggestion as the bill continues through the parliamentary process.

I hope that there will be support for the bill in the Parliament and I look forward to supporting it at decision time.

11:19

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Like other members, I pay tribute to the people who assisted the Justice Committee in preparing its report—I am a member of the committee, so I will take the credit that is going.

It is important that I say at the outset that although I agree with aspects of the bill, a number of areas cause me great concern. I have time to highlight only a few areas. To enshrine in law a presumption against short sentences is wrong and would send the wrong message. In the view of many of my constituents and many other people throughout Scotland, the Cabinet Secretary for Justice is not taking his position seriously. In the words of someone to whom I spoke at the weekend, he is "having a laugh" at the expense of communities throughout the country.

This is a serious matter and, if the Government will not take it seriously, the Parliament must do so. If the cabinet secretary thinks that scrapping sentences of six months or less will send the message that the SNP minority Government wants to tackle criminality and protect the public, and if the Government believes, as it seems to do, that people who are convicted of serious crimes should avoid a prison sentence, the Government is way out of touch with the Scottish public. The cabinet secretary quoted all sorts of organisations and academics in his speech, but I can quote the Mrs Smiths who live round the corner, who think that if someone has committed a serious crime, a custodial sentence is necessary.

Short custodial sentences work—there are examples of that in my constituency. If the cabinet secretary really believes that prison is a skoosh, he should bring to the Parliament measures to address the issue, rather than a stunt that will reduce prisoner numbers by leaving dangerous criminals on our streets.

Margo MacDonald: Will the member give way?

Cathie Craigie: No, I am sorry. I do not have time.

The sentence should fit the crime. If a judge or sheriff considers that a prison sentence of six months or less is appropriate, the sentence should take place and the judge's time and court time should not be further taken up by report writing to explain the decision.

The Liberal Democrats should come off the fence. If they do not think that short sentences work, why are they prepared to compromise with the Government and talk about minimum sentences of three months? They should get their act together, stop judging other members and make a decision.

Jeremy Purvis: Will the member give way?

Cathie Craigie: I am sorry, but I do not have time.

On the Scottish sentencing council, I am not convinced that the bill will change anything. There is a perception of inconsistency in sentencing. The committee was disappointed that it could gather no hard evidence on the issue, but what did come to light was the difficulty of gathering measurable evidence. Dr Cyrus Tata, from the centre for sentencing research at the University of Strathclyde, cautioned us against drawing direct inferences from bald statistics that do not take account of possible differences in the cases that come before different courts. He cited a range of studies that provide evidence of inconsistency as well as consistency and said:

> "The overall picture is rather like a bell curve, with a lot of consistency and some variation."—[*Official Report*, *Justice Committee*, 2 June 2009; c 2012.]

The bill would require the sentencing council to include in its sentencing guidelines

> "an assessment of the likely effect of the guidelines on … the number of persons detained in prisons or other institutions".

That is unbelievable. Are we saying that sentences and punishment in Glasgow, for example, should be decided not on the basis of whether they fit the crime but on the basis of whether Barlinnie prison happens to have a space? I do not have time to say more, but I ask the cabinet secretary to listen to the warning bells that Dr Tata sounded in that regard.

On licensing, the proposals in section 125 would have serious financial and administrative consequences for charitable and voluntary organisations. The policy memorandum to the bill is silent on the matter. There is not a word on why the Government thinks that change is necessary, and questioning of the cabinet secretary brought the committee no information on why section 125 is necessary. If section 125 is not amended, it will have a disastrous effect on the ability of charities and community groups to engage with and serve the public through fundraising events such as gala days. The cabinet secretary is unwilling to take responsibility for the change that he promotes but passes the buck to local authorities, leaving a real chance of differences being created all over the country. It is not acceptable to leave that hanging in the balance. We must make changes to the section and I inform the Parliament that I intend to introduce amendments to protect the status quo.

11:25

David McLetchie (Edinburgh Pentlands) (Con): As my colleague John Lamont already indicated, there is much in the bill to criticise. I will not waste the opportunity to do so later, but I will start on a more positive note by considering section 68, which deals with the upper age limit for jurors. I welcome the proposal to increase that limit from 65 to 70 years of age. It is a measure for which I have campaigned since July 2005 when the matter was first raised with me by my constituent Mrs Campbell, who wrote:

> "Dear Mr McLetchie
>
> I wonder if you might be interested in … progressing in the Scottish Parliament, a 'niggle' that arrived in the post this morning! I received a notice for potential jury service"

in Edinburgh sheriff court

> "but unfortunately as now aged 67, I am 'too long in the tooth' … but as I am now retired, I have at last the time and interest and maybe even some experience of 'life' to be able to serve if selected … why cannot jury service age be raised to at least 70?"

I took the matter up with Cathy Jamieson and then her successor, Mr MacAskill. Although it has taken more than four years, I am very pleased that the change will be enacted with, I hope, all-party support—even though, ironically, it will come too late to give Mrs Campbell an opportunity to serve. The age limit of 65 is long out of date and fails to represent the demography of Scottish society. Indeed, it is only one of many examples of age discrimination that still exist in our law.

Raising the age limit in Scotland to 70 will bring us into line with the rest of the United Kingdom and correct the long-standing and glaring anomaly in our justice system that judges can serve on the bench until they are 73 years of age, but a person who is over 65 cannot serve on a jury. Increasing the upper age limit for jurors will also increase the pool from which people are selected for jury duty by a further 200,000. That is important at a time when the court service finds it increasingly difficult to maintain a sufficient juror pool to fill our 15-member juries in Scotland.

I point out that it would be possible to have no upper age limit at all—as is the case in many jurisdictions—and move to a system in which anyone over 65 could serve but could choose not to do so. That is the system that is advocated by Help the Aged and Age Concern. Perhaps we may have an opportunity to debate the issue at stages 2 and 3.

Section 17 provides for the highly controversial presumption against short sentences. Like other members, I was sorry and angry to learn earlier this week that the number of incidents of domestic violence recorded by the police had risen by 8 per cent in the past year to 53,681. It is surely a particular concern that there was a 39 per cent increase in the number of incidents in which the victim had previously been abused. Last week, my colleague Bill Aitken discovered from a parliamentary answer that a mere 12 per cent of the 5,029 people who were convicted of domestic violence in 2007-08 received a custodial sentence, 19 per cent received a community sentence, 39 per cent were fined and 29 per cent were admonished. So much for zero tolerance; it is more like zero sentencing.

If there was ever an argument for short-term sentences, those figures surely provide it. A sentence of six months—or even three—can be long enough to give the victim of domestic violence a welcome respite and the opportunity to make a break from the past and create a new home and life for her and her family if that is her wish. Richard Baker was right to draw our attention to the comments of Scottish Women's Aid on the proposed presumption because this week's figures show that many women are trapped in a vicious cycle of abuse and are given no assistance by a criminal justice system that puts their abusers back in their homes.

Margo MacDonald: Will the member give way?

David McLetchie: I am sorry, but I must finish this point.

I am afraid that the SNP's proposed presumption against short sentences would make the situation worse not better. There are many instances in which a short spell in custody serves as a respite to a community, person and family. When judges and sheriffs sentence convicted criminals, they take into account the wider picture. They do not send offenders to prison just because they can do so; they send them to prison because it is just to do so. Justice is in the title of the bill, but I am far from convinced that it is in all the content.

11:30

Angela Constance (Livingston) (SNP): If we are passionate about reducing crime and making communities safer, we need to cast a cool eye over the evidence and dispassionately decide what will work and what measures will bring about lasting change in our communities instead of resorting to populist, primitive, Old Testament views of justice. Justice requires proportionate punishment, but punishment alone does not work. By necessity, we need to focus on the control, change and care of offenders. The bill is an attempt to strike the correct balance.

In many regards, the tide has begun to turn, with more police, recorded crime being down by 11 per cent over the past two years, cashback for communities—or, as one of my constituents describes it, cashback from crooks—and the fact that we now have a serious organised crime task force. However, if we are to secure real and lasting changes, we need to make some bold decisions.

It is time to show some leadership and courage. Often, in such debates within and outwith the Parliament, there is much talk about who is tough and who is soft in the rather macho world of politics, but I put it to members that the soft ones are those who take the easy and lazy option: those who opt for political expedience and pander to the right-wing reactionaries as opposed to taking tough decisions and showing leadership in tackling real concerns.

One of the things that the McLeish commission demonstrated is that political factors often have more influence on high imprisonment rates than crime does. I would think that that would be a good, solid reason for a sentencing council. I would also think that a sentencing council would have a valid role in, and be a sensible vehicle for, introducing some good, robust guidelines on knife crime and domestic violence.

Women offenders have already been mentioned. Why is it that, since 1997, the female prisoner population has risen by 90 per cent? Have women all of a sudden become more bad? I diplomatically suggest that it may have something more to do with how the judiciary views women and women who offend. Therefore, society needs to have some say in how sentencing is operated.

Bill Aitken: Is Angela Constance aware that the percentage of convicted women offenders who are given custodial sentences is completely out of sync with that for male offenders? Women do not get sent to prison for serious crime to the extent that men do.

Angela Constance: Mr Aitken knows that I am no fan of benevolent paternalism in that many of the issues that women offenders face are exactly the same as many of those that the poor young white men in our prisons face, whether mental health or illiteracy. I am no statistician, but I would be interested to know whether Conservative members support the Equal Opportunities Committee's work on women offenders, led by Margaret Mitchell. Perhaps the Conservative party could address that in its closing speech.

I support the Scottish Prisons Commission's view that prison should be used wisely and sparingly. We have a misplaced confidence in prison. As Stewart Maxwell said, it is counterproductive and, as Robert Brown said, it disnae act as much of a deterrent. I commend the Government and the cabinet secretary for showing leadership in the bill and not being feart to lead the way and lead the debate.

I want to raise three issues, but I suspect that I will have time to raise only one of them, which is the proposal to raise the age of prosecution instead of raising the age of criminal responsibility. In my view, that just does not go far enough and is therefore not in keeping with the bill's ambition. While unruly certificates will be gone and children will be remanded in local authority care in secure units and not prisons, I note the Commissioner for Children and Young People in Scotland's concern that the proposal may not meet our international obligations. I agree with my colleague Aileen Campbell that children are not mini-adults.

The Deputy Presiding Officer: You should finish now, Ms Constance.

Angela Constance: I will finish on that point.

The Deputy Presiding Officer: I call Rhoda Grant. You have a very tight five minutes.

11:35

Rhoda Grant (Highlands and Islands) (Lab): I will address the changes to non-harassment orders in section 15 of the bill, which I do not think anyone has dealt with yet. I very much welcome section 15, but I feel that it does not go far enough. Many victims of abuse would benefit from a non-harassment order, but we can see from the financial memorandum that that disposal is seldom used. In 2006, 24 non-harassment orders were granted; in 2007, the figure was 23; and in 2008, there was a slight rise to 29. Contrast that with the figure that David McLetchie quoted of 53,681 cases of domestic abuse reported to the police—that shows a lamentable level of intervention by our courts.

When I visited Australia and New Zealand in October, I met people and agencies that are involved in combating domestic abuse. I was impressed by the seamless support that they give. I was especially surprised to see how much it was driven by the police and the justice department. In Australia, the police have powers to put in place a 24-hour injunction without the support or agreement of the victim. The injunction is formalised in court, and justice officials support the victim through the process and ensure that the court hearing occurs prior to the injunction being spent.

There is also real recognition of the damage that is done to a child who is brought up witnessing domestic abuse. Children, too, have access to the injunctions in their own right and can seek them with the support of children's services. However, children's services can apply for an injunction on the child's behalf without their agreement. The abuser can then be removed from the home and resources can be put in place to support the children and the non-abusive parent.

The victim does not need to take any action and is not responsible for their own protection: the state is. That protects them from retribution, but it also takes into account the distinct nature of domestic abuse. It is the only crime I know of where the victim can be complicit in covering up the crime. That is because, by the time a recognised offence takes place, the victim has been undermined to the extent that they almost accept what is happening to them. The abuser ensures that the victim's confidence and self-esteem is slowly undermined; only then does the physical abuse start.

In this country, we prosecute only the physical abuse; there is no offence that covers the mental abuse. That means that, when the relationship becomes violent, the victims often blame themselves. In many circumstances, they also feel unable to exist outside the relationship, so they tend to become the best witness for the defence. That is why Women's Aid puts so much emphasis on building a victim's confidence and self-esteem. Only after that has happened are they able to take steps to protect themselves and their children. We put the onus on victims to protect themselves; that does not happen with any other crime of assault, far less with crimes against property.

The bill amends the Criminal Procedure (Scotland) Act 1995 to enable the Crown Office and Procurator Fiscal Service to apply for a non-harassment order against a person who has been convicted of crimes involving harassment. The order is not a conviction in itself, but it guards against future harassment. A breach of the order is a criminal offence, which can be punished by up to five years in prison. An order can be applied for where there is evidence of a course of conduct, involving convictions for harassment. It cannot therefore be applied for unless there has been at least one previous conviction for harassment and the current incident before the court has also led to a conviction.

My reading of section 15 is that the amendment of the 1995 act lowers the barrier from "harassment" to "misconduct towards the victim". However, it is not clear from the bill or the explanatory notes what offence would encompass "misconduct towards the victim" and whether it would be prosecuted or lead to a conviction. However, it is clear from the guidance that a previous conviction is still required, albeit for a lesser charge. The change also makes it easier for evidence of previous convictions to be presented to the court, but that does not remove the need for a previous conviction. It removes the requirement for a course of conduct amounting to harassment, but leaves the requirement for a course of conduct regarding "misconduct towards the victim", which will have to lead to a criminal conviction. It is ludicrous that, in this most difficult of crimes to prosecute, a course of conduct is required. If an offence has been committed, a non-harassment order should be granted; one offence is one too many and any future recurrence should be prevented.

I ask the Government to lodge amendments at stage 2 that would give greater protection.

The Presiding Officer (Alex Fergusson): You must close, please.

Rhoda Grant: The state needs to protect all victims of crime.

The Presiding Officer: I am grateful to members for ensuring that we finished that session on time. The debate will continue this afternoon.

Resumed debate.

Criminal Justice and Licensing (Scotland) Bill: Stage 1

The Presiding Officer: The next item of business is the continuation of this morning's debate on motion S3M-5177, in the name of Kenny MacAskill, on stage 1 of the Criminal Justice and Licensing (Scotland) Bill. We continue with speeches of no more than five minutes.

15:25

Nigel Don (North East Scotland) (SNP): Here comes the Criminal Justice and Licensing (Scotland) Bill, stage 1, part 2. I shall watch the clock and try to avoid all the areas of contention that were well covered this morning, because I want to cover one or two other areas. However, I cannot help reflecting that we had one or two interesting comments this morning. The most interesting one that I recall from before lunch was the accusation that the Liberals are sitting on the fence. First, to be fair to them, I do not think that that is true. Secondly, my observation on the Liberals' policy is that they are very good at finding the gaps in the fence and have never found any need to sit on it.

Let me look first—

Jeremy Purvis: I hope that Nigel Don was not expecting me to intervene there.

Nigel Don: No.

Let me look first at the sentencing council. The issue of consistency, or the perception of consistency, has been raised in that regard. The sentencing council is a good idea because it could lead on sentencing policy as things develop. For example, I am conscious, as other members will be, of the internet's effect on our world, and I am not entirely convinced that common law will necessarily be up to the mark on internet offences. The sentencing council may well provide a useful way of sorting out how offences that arise in that environment should reasonably be addressed, rather than waiting for the bench to find its way there. The sentencing council will also have a value in relation to knife crime. I suspect, too, that a sentencing council would have been useful in the discussion on drink driving.

I flag up an issue that Rhoda Grant introduced this morning in relation to non-harassment orders, which are in section 15. I simply note, with pleasure, that the process is being changed so that an order can be granted after what is in effect a single event, rather than a stream of events being required. That is a significant step forward.

I turn now to the issue of disclosure, because there is a major issue that will affect much of what will be put in place on disclosure. Lord Coulsfield, who provided an extensive report on disclosure, expressed concerns to us about how the bill deals with the subject. It seems to me—I think that this was the Justice Committee's general view—that, when we deal with a subject such as disclosure, we should set out the principles. If there are more than a couple of principles, there should clearly be a hierarchy so that we know what the overriding one is and what the subsidiaries are. Below that, there will necessarily be a set of rules, which I suspect will primarily lay out duties and responsibilities; it is clear that those should be in the statute. Below that, there will be a set of procedures and processes, and things that might go into a code of practice. I think that that is the way in which we are encouraging the Government to go. I take it from the cabinet secretary's comments this morning that the Government has already got its mind round that issue, but I think that that is the structure to which it should work.

I note in passing that this is a huge bill, which will require a significant amount of time at stage 2. I hope that it is being timetabled appropriately. Further, who knows how long it might take at stage 3?

I draw members' attention to the large number of areas where the Justice Committee was not sure what the answer was. There is a surprisingly long list: section 62, on witness statements; section 63, on spouse compellability; section 132, on antisocial behaviour reports; section 94, on defence statements; section 82, on compensation for miscarriages of justice; and section 38, on the prosecution of children, which was referred to this morning. I highlight those merely to make the point that, although there is a lot of good stuff in the bill and a lot of good thinking has undoubtedly been done—I do not criticise those who drew up the bill—there is a huge amount of discussion, rationalisation and reconsideration yet to come. I want to ensure that we have time and space to ensure that that happens properly.

Finally, on the bill's proposed modifications to the Custodial Sentences and Weapons (Scotland) Act 2007, I merely repeat the Justice Committee convener's remarks from this morning—

The Presiding Officer: You must close now.

Nigel Don: Again, the provisions involve an area of huge confusion, but we think that the Government has got them about right.

15:30

Duncan McNeil (Greenock and Inverclyde) (Lab): In the short time available, I intend to focus on the many concerns that we have in Inverclyde, which is a community whose experience has not always been a happy one. In recent years, the sad deaths of Damian Muir and Darren Pyper, who were killed by knives, shocked a community that had become sick of the endless cycle of violence.

We have worked as a community to try to break that cycle and to bring our experiences and influence to the Parliament. We have welcomed the changes over recent years whereby sentencing powers have been increased, although we have been disappointed that those powers have not been used to the full. Over the years, we have engaged with a wide range of groups and initiatives. We have met the violence reduction unit. We have joined with the medics against violence. We have supported the Inverclyde initiative in its aim of educating young people about the consequences of violence. We have rallied and marched with the friends and fellow pupils of tragic schoolboy Darren Pyper to create awareness of the dangers of knives. We raised a petition with John Muir, Damian's father, and presented it to the Parliament to engage with the democratic process. We held a summit in the Parliament and another in our town hall—organised by the local paper, the *Greenock Telegraph*—to give voice to the community's concerns. In the time since, John Muir has tirelessly campaigned across Scotland. His campaign has struck a chord everywhere that it has gone.

Having engaged in that parliamentary process, we saw the Criminal Justice and Licensing (Scotland) Bill as an opportunity to introduce the tougher sentences and to fund the interventionist measures that people wanted. Today, they will have heard that their calls for tougher sentences are to be ignored in the bill and that funding for preventive measures are not in place. They will have heard that these violent people will be less likely to go to jail and their communities and neighbourhoods will not be safer as a result. To hear their concerns dismissed will greatly disappoint them. To hear the cabinet secretary describe short-term prison sentences as respite care will give no confidence to my community.

Rhoda Grant and David McLetchie outlined the detrimental impact that could result from the bill's measures on domestic violence. A look at last week's report by the Scottish Children's Reporter Administration shows that nine children under the age of two—they were babies—died in recent years in incidents in which domestic violence and aggression were background factors. That is much more than just a debating point. Such an additional significant risk to the lives of our women and children must be measured against a proposal that the cabinet secretary hopes—only hopes—will reduce reoffending.

I believe that the bill is an opportunity for this Parliament of the Scottish people, which was set up to bring solutions to Scottish problems, to send a clear message to people who carry and use knives. My community does not have to look far for experiences in which knives have caused misery and heartbreak, as has happened across Scotland. Just a fortnight ago, we were told of an appalling murder whereby a young man, who was a visitor to this country, with a pregnant wife at home in India, was randomly murdered in the street. We heard of the sickening racial motive, but it is important to remember that the presence of a knife in that situation escalated that from a nasty confrontation to a vicious murder.

The people of my community—and people all over Scotland who supported John Muir's campaign—have made it clear that they think that people who carry knives should go to jail. They have made it clear that they think that violent criminals should go to jail. The strong argument for mandatory minimum sentences for those who carry and use knives is a democratic one. Instead of dismissing their arguments, ignoring their experiences and writing off their demands as populist rants, it is time that this Parliament and this Government listened to people and acted on their concerns.

Although I will support the principles of the bill at stage 1 today, I will not hesitate to vote against the bill at stage 3 if it does not address the concerns of my community.

15:35

Mike Pringle (Edinburgh South) (LD): I congratulate the Justice Committee and, in particular, the committee clerks on an excellent report.

The Liberal Democrats believe that we need to change the mindset of our criminal justice system so that the goal of reducing reoffending is a key objective in the effort to cut crime in Scotland. It is clear that, wherever and whoever we are, that must be our aim. As well as having one of the highest rates of imprisonment in the European Union, Scotland has a persistently high rate of reoffending. The extent of the revolving-door syndrome in Scotland's prisons shows that, for many people, prison does not work as a deterrent. It is clear that a radical overhaul of Scotland's sentencing system is required.

Prison is, of course, the most appropriate place for serious and violent offenders, and prison sentences must be available not only as a method of punishment for serious crimes but as a way of protecting the public from dangerous individuals. However, Liberal Democrats believe that imprisoning offenders for a very short period of time provides little or no benefit in challenging the underlying causes of offending.

Karen Gillon (Clydesdale) (Lab): Will the member take an intervention?

Mike Pringle: No, I do not have time.

We believe that short prison sentences of less than three months should be replaced with tough community sentences that require offenders to work to pay something back to the communities that they have harmed.

Many witnesses were generally supportive of the establishment of sentencing guidelines, but there was a considerable amount of disagreement on whether a Scottish sentencing council, in the form that is laid out in the bill, is needed. We think that the proposed establishment of a sentencing council misses the point. Liberal Democrats do not support a proposal for what we think would, in effect, be no more than an additional quango to have influence over the highly respected and independent judicial system. The cabinet secretary was right when he said that the sentencing council had to provide for broader representation of Scottish society, but we think that if the proposal is to go ahead, the argument by witnesses that there should be a judicial majority on it is correct.

The Liberal Democrats are broadly supportive of the new proposal for community payback orders, but I suggest that the £1.1 million that it is proposed will be spent on setting up the sentencing council would be better spent on CPOs. If CPOs are to work, they will need to be adequately resourced, and the committee was not certain that that would be the case. The cabinet secretary has given some indications in that regard, but I genuinely believe that the amount that is to be provided will not be enough.

I agree with the committee—and will quote from its report, as I could not have put it better myself—when it said that it strongly believed that

> “if CPOs are to gain credibility with the public, and with the victims of crime in particular, they must begin (and be seen to begin) very shortly after sentence is declared – either on the day of sentence or (where this is not practicable, as we accept will sometimes be the case) as soon as possible thereafter.”

I can only say that I have always been firmly of that view.

Sections 16 and 17, on short periods of detention and imprisonment, are perhaps the most contentious. Many of the witnesses who gave evidence to the committee expressed support for the proposals on the grounds that short-term prison sentences are generally regarded as being expensive and ineffective, both in protecting communities and in rehabilitating offenders and reducing crime.

We must all agree that Scotland’s prisons suffer from chronic overcrowding, which makes them hugely expensive and extremely ineffective at preventing reoffending. I am sure that we all agree that the issue must be addressed, but the question is how we do that. All members of the committee recognise that the priority is to imprison offenders who commit offences that are so serious that no other form of punishment will do or who pose a threat of causing serious harm to the public. Most of those offenders will not, I suggest, be sentenced to less than six months’ imprisonment.

James Kelly: Will the member take an intervention?

Mike Pringle: I am sorry—I will not.

The SNP proposes to end sentences of six months or less, whereas we would like to see a three-month threshold instead. However, it must be accepted that short prison sentences do not achieve very much in the way of rehabilitation, so there needs to be a method of striking a proper balance between the imposition of short custodial sentences and the use of effective community disposals. I will leave that subject for the committee to address at stage 2.

I turn to section 24, “Voluntary intoxication by alcohol: effect in sentencing”. As I might have said in previous justice debates, I was a justice of the peace in Edinburgh. Early on in my time as a JP, I well remember being faced by a defence agent who said that his client could not remember what he had done because he was drunk. I asked the defence agent who had forced his client to become drunk and suggested that he had got himself drunk without any aid from anyone. The defence agent looked somewhat perplexed at the turn of events but then readily agreed that his client had not required assistance from anyone else to get drunk. Very quickly, lawyers in my court stopped justifying their clients’ actions by suggesting that being drunk was a mitigating factor in their behaviour.

The Presiding Officer: You must close please.

Mike Pringle: I agree with the committee report when it says:

> “The evidence suggests the principle is already well understood by sentencers, and there may be a risk that a statutory provision will confuse the legal position”.

The Presiding Officer: You must close now, Mr Pringle.

Mike Pringle: This is a very important bill and I look forward to hearing the Government’s response to many of the issues raised by the committee.

15:40

Ian McKee (Lothians) (SNP): I will concentrate my contribution to this important stage 1 debate on the presumption against short periods of imprisonment that is encapsulated in sections 16 and 17. I will base my remarks in part on experience gained by working for many years as a general practitioner in a community, several members of which experienced short prison sentences, and observation of how that affected them, those immediately around them, and fellow members of the wider community.

My first point is about the reason why so many of the people whom I observed ended up in prison. In 2008, the commission on English prisons today, chaired by Cherie Booth QC, produced a report entitled "Do Better Do Less", which stated:

> "Prisons have become vast warehouses for the dumping of people with problems society has failed to deal with - those with mental health needs, with histories of neglect and abuse, with drug and alcohol addictions."

I cannot go along totally with the image of a warehouse, because many prisoners who are incarcerated for a short period of time are released, reoffend, and return again. The image is more of a revolving door, as described by the cabinet secretary in his opening speech. However, the report is spot on about the type of people who are sent to prison. Although those who are serving long-term sentences could be helped to overcome their problems, that is not the case for those who are serving sentences of less than six months. Therefore, what is the rationale behind sending people to prison for a few months?

Karen Gillon: Why are we not making sentences of less than six months in prison work rather than simply trying to get away from such sentences? People need to go to prison to give communities the rest that they need.

Ian McKee: We are not using those sentences for any form of rehabilitation because there is not time for it to take place while the person is in prison.

One argument is that society needs protecting from such folk. If they get up to antisocial behaviour when they are out of prison, a sentence inside will protect the law-abiding population for that time at least. That is undoubtedly true, as far as it goes, but the problem with the argument is that, over time, more antisocial behaviour is likely. In the recent Prince's Trust report "Breaking the Cycle of Offending", a youngster is quoted as saying:

> "Prison is a place where you learn … I've learnt more in prison about being a criminal. Prison is a university of crime."

That is borne out by the knowledge that those who serve short custodial sentences are more likely to reoffend than those who are dealt with in other ways. Although a prison sentence might protect society in the short term, it is a different story over the piece.

I can bear that out from my own work experience. People who are sent to prison for a short time often come out with a much worse and more chaotic drug habit than they had when they went in. Susceptible individuals are exposed to the influence of more hardened rogues and keep up those acquaintances on the outside. Innocence is probably the wrong word to use, but it is no exaggeration to say that any naivety is dispelled for ever by one prison sentence, no matter how short.

Short sentences have a disproportionate effect on the prison service. A recent House of Commons report about the situation in England, which is not so different from the situation in Scotland, observed that all those who are in prison on short sentences at any one time account for only 11 per cent of the prison population, but they count for a much higher percentage of admissions. The considerable amount of time and resource that is required to process each admission could be put to better use in the rehabilitation of more long-term prisoners.

Women are especially vulnerable in that context, and I share the concerns of my colleague Aileen Campbell. The Fawcett Society tells us that, in 2007, 63 per cent of women who were sent to prison had sentences of six months or less, often for such offences as non-payment of television licences or fines. In its recent report, the Equal Opportunities Committee found that, in Cornton Vale prison, most women

> "Had experienced some form of abuse; 75% declared a history of physical or sexual abuse … Had suffered psychological distress; 80% of offenders had some form of mental illness;"

and

> "Had serious problems with alcohol and drug misuse: a recent report on Cornton Vale concluded that 98% of inmates had drug addiction problems."

It seems to me, as a former doctor, that those people are crying out for help, not punishment. Putting them in prison, separating them from their children and families, is not the way forward—and I am not talking only about women.

What does that all add up to? Short sentences do not work; in fact, they do harm. Courts must think twice or three times before deciding that prison is the only method of disposal, and we must ensure that effective alternatives are available to courts.

I support the bill.

15:45

Helen Eadie (Dunfermline East) (Lab): As ever, we read the reports of the work of other committees and see a great deal of valuable evidence and advice provided by those who know and understand all the technical, professional and legal issues. It is clear to me that crimes of violence against people must be treated severely in sentencing policy in every constituency, whether they are committed by men or women.

My speech today is based on the experiences that I have heard about recently from the people whom I represent in Dunfermline East—the people of Cowdenbeath, Rosyth, Aberdour, Inverkeithing and all the other towns. I have been on the high streets, campaigning with my friends for signatures to a petition that calls for a mandatory jail sentence for anyone who carries a knife. People have queued to sign the petition everywhere I have gone. It is the petition of the Muir family and Duncan McNeil, but my people support it very strongly.

Bill Wilson (West of Scotland) (SNP): Will the member take an intervention?

Helen Eadie: No. I am sorry, but I have only just started my speech.

Those people support the petition even before I have told them why I was moved to do so. Like Duncan McNeil, I have heard people's views following the tragic stabbing earlier this year of Sean Stark. Having heard a commotion outside, he left the comfort of his flat to see what he could do to restore peace. He was fatally stabbed. The people of Dunfermline East covered that part of the High Street with floral tributes to the young man, who left behind a partner, Melanie, and two little children. Our signatures from Dunfermline East will add to those that have been gathered by the Muir family from Duncan McNeil's constituency. I hope that the petition will grow and grow until, eventually, Alex Salmond and the cabinet secretary will listen to the views of the victims just for once.

Given that two thirds of people who are convicted of knife crime receive either a fine or community service, it is hard to believe that the punishment fits the crime. That sends out completely the wrong message. I make no apology for saying again—because I believe it passionately—that Labour's policy sends out the right message: carry a knife and you go to jail. There really is a need for a mandatory sentence.

Bill Wilson *rose*—

Stewart Maxwell *rose*—

Helen Eadie: Gathering signatures on the street in connection with knife crime was a salutary experience. I ask members to listen to the views of my constituents. The people whom I represent referred to an atmosphere of fear when they walk down the street. That fear exists when a brawl happens at a pub or a club on a weekend, which is when stabbings are regularly reported. [*Interruption.*]

The Presiding Officer: Order.

Helen Eadie: It is unacceptable that such a feeling exists in any community in Scotland in 2009. We all have a responsibility to change that.

One petitioner came to me and said, "Look here, in my neck. This is where I was stabbed." The knife had just missed his jugular vein. Last Friday in Rosyth, a woman told me of her son who had been stabbed five times in his head. He lived, but operations and other procedures were required, and the distress that was caused to his family was beyond belief. I spoke with a young friend this morning who told me that she was out with her boyfriend when he said in a light-hearted, joking way to someone in a pub, "You're sitting in my seat." The guy pulled a knife on him. Labour cares very much about the victims, which is why our message is straightforward and to the point: people who carry knives will go to jail.

On a separate point, I am pleased to see that the bill addresses the issue of spousal compellability, the importance of which the cabinet secretary will concede. I have campaigned for that, asking parliamentary questions and writing to him and his predecessors over time. I am, therefore, very pleased to see the provisions included in the bill. I note that a variety of witnesses provided the Parliament with their reservations on the provisions on pages 77 to 79 of the bill. I hear, too, the views of Nigel Don with regard to the committee's uncertainty of opinion on the matter. Nevertheless, I hope that the committee, the cabinet secretary and the Parliament will, at the very least, adopt the Law Society of Scotland's proposal, which I believe is a middle way.

I shall support the representations that have been made to us by a range of organisations, but especially the Scottish Churches Parliamentary Office, on the issues for the many groups and churches that run small fairs and coffee mornings. My colleague Cathie Craigie has already highlighted that and I shall support her in her work as she lodges amendments on the issue. Unintended consequences might come about as a result of legislation that the Parliament puts through. I hope that the legislation that we pass will not impact heavily on people who give of their utmost by volunteering—we have done that before. We should not add to the administration burdens on those people by changing the licensing regime in a way that would impact hugely on them.

Like other members, I will support the bill at stage 1, but I have concerns and I will watch with interest to see what happens. I urge members to move on the spousal compellability issue.

The Presiding Officer: Members have the absolute right not to take interventions, but I have a very small amount of time in hand that I am willing to add on for members who wish to take an intervention.

15:51

Ted Brocklebank (Mid Scotland and Fife) (Con): As has become apparent from the wise and learned contributions of my colleagues Bill Aitken, John Lamont and David McLetchie this morning and, to be fair, the speeches of other members, the bill is wide ranging and complex. It seeks to implement more than 80 distinct policy proposals across a raft of criminal justice and licensing issues, but I intend to concentrate solely on the provisions that relate to the appalling incidence of hard drugs in prison and the linked problem of illegal mobile phones, which are often used to fuel prison drug trading.

As members will be well aware, the Scottish Conservatives have a zero-tolerance approach to drugs in prison. We urgently need in every jail a proactive rehabilitation programme through which agencies work with addicts, in and out of prison. Inmates who want to get off drugs should be given every help and encouragement to do so. At the same time, robust measures must be applied to anyone who supplies drugs to prisoners. Visiting privileges should be withdrawn and, in persistent cases, criminal charges should be brought. In short, we need a carrot-and-stick approach, to help those who wish to be helped and to deal responsibly with those who break the rules. Serious consideration should be given to using glass screens in prison visits to ensure that no contact occurs between prisoners and their visitors and thus to deny the opportunity for drugs to be passed over.

One of the most serious aspects of the issue is that not only drugs but mobile phones are passed over, which can allow prisoners to communicate directly with suppliers on the outside and to intimidate witnesses. Phones can allow incarcerated gang lords to continue managing their illegal businesses in communities outwith prisons. Members might have noticed that, earlier this week, David Jamieson, the chairman of Wandsworth prison's independent monitoring board, said that, as well as fuelling prison drug trading, mobile phones contribute to bullying and gang activities. We therefore fully support section 29, which deals with articles that are banned in prison, including phones, and introduces more strenuous sentencing for those who attempt to flout the law in that respect.

The Minister for Community Safety (Fergus Ewing): I agree with much of what Ted Brocklebank says about mobile phones, but I assume that he is aware that, on 11 December last year, measures were taken to render illegal the use of mobile phones in Scottish prisons. I know, because I announced them at Saughton.

Ted Brocklebank: I am grateful to the minister for reminding us of that, but I was coming to that as part of my speech.

It is estimated that, behind bars, phones can cost £400 each. According to the Wandsworth board chairman, the trade in mobile phones was worth about £9 million in 2008, when 7,000 phones were seized. However, that does not take into account the phones that are not detected and which are still in operation, which is estimated at three times the number of those that were detected and confiscated. Figures for prisons in Scotland are estimated to be at least as bad. Ever-smaller handsets are being smuggled in by visitors, and some are even thrown over prison walls. It is right that those who are found guilty of involvement in dealing with phones, whether they are prison visitors or inmates, should face the new jail sentences of up to two years, fines or both.

It is also right that we go further, particularly with so many illegal phones in prisons going undetected. We agree that technical solutions should be explored to ensure that phones do not work from prison. We require effective signal-blocking technology or mobile phone blockers in prison grounds. As Fergus Ewing has mentioned, as early as next month, under an amendment to existing legislation—I gather that it is the Prisons (Scotland) Act 1989—it should be possible specifically to prohibit personal communication devices such as mobile phones. We commend that course of action, but it does not include the mobile phone-blocking technology that I have highlighted. Of course, there are problems. For example, many prisons, including Saughton, Barlinnie, Porterfield and Perth, are situated in built-up urban areas where blocking might also affect local residents. However, we are optimistic that such difficulties can be resolved and we urge the Government to explore all possibilities.

Only when we cut the lines of communication for the so-called Mr Bigs—who, like captains on the bridges of great ocean-going vessels, lord it in their prison cells, issuing orders to underlings and meting out their own crude punishment—will yet another door slam on the drug tsars who inflict so much damage inside and outside our prisons. The benefits to society will be immense if we can match political will with developing the necessary technology to ban completely mobile messaging to and from prisons. There will be lower reoffending, less crime and a much safer prison environment, which will be good for addicts, good for families and, given how much crime in Scotland is fuelled by drugs, good for society as a whole.

15:56

Sandra White (Glasgow) (SNP): I am pleased to take part in this debate. I thank the cabinet secretary for introducing the bill, which I welcome, and the Justice Committee for taking the time to consider it and put together its stage 1 report and recommendations. I fully support the cabinet secretary's intention to take forward this wide range of criminal justice and licensing measures, which will modernise our laws in a positive way and make our communities safer and healthier.

At this point, I should say that I, too, have visited Cornton Vale, where one lady told me that she felt safer in prison, because outside it she had no recourse against violent partners and their families. I thank Ian McKee and Mike Pringle for their comments on that issue.

Other members have talked about crime and sentencing, but I want to focus on specific aspects of part 2 relating to criminal law. That part of the bill includes provisions to widen the scope of sexual offences prevention orders and to revise the statutory definition of "obscene material", measures that I believe will prove beneficial.

The bill will amend section 51 of the Civic Government (Scotland) Act 1982 to include extreme pornography within the definition of obscene material. Unlike "classified work", as defined in the Video Recordings Act 1984, such obscene material is solely for the purpose of sexual gratification, and includes images that explicitly and realistically depict extreme sexual acts that are a threat to life or would be

"likely to result … in a person's severe injury";

are forced as in, for example, rape; or feature other depraved activity. As such images frequently show abusive, disrespectful behaviour towards women, we must adopt the new framework in the bill to deal with such material and avoid the harm that it does to our culture, our society and women in general.

However, although the bill seeks to strengthen significantly laws that criminalise the pornographic exploitation of women, section 126 in part 8, which amends provisions in the 1982 act relating to public entertainment licences, falls short of recategorising the licensing of lap dancing clubs by taking them out of the alcohol licensing system. At the moment, such clubs, which represent another form of commercial exploitation that perpetuates the objectification of women as sexual objects for sexual gratification, are regulated and licensed by our local authorities under an alcohol and entertainment scheme similar to that for recorded music or live entertainment venues. That is not only misleading but leaves authorities without the necessary power to decide where—and indeed whether—lap dancing clubs belong in their community or to refuse a licence.

As adult entertainment venues, lap dancing clubs that are seeking a licence should be subject to more scrutiny than other venues. I know that many councils and communities agree, and I hope that, at stage 2, the necessary amendments are lodged to ensure that local authorities have the power to regulate and recategorise such clubs not as public entertainment venues but under some new licensing category. We need to allow each local authority to regulate lap dancing clubs effectively.

In England and Wales, the Policing and Crime Act 2009 has reclassified lap dancing clubs as sexual entertainment venues, made licences more expensive, required more frequent renewals and taken into account the views of local communities. I welcome the provisions in that act, which demonstrate the need for a progressive stance on the issue in Scotland. It is important that we in Scotland look at the issues of lap dancing clubs and the effect that they have on their local communities. In particular, I have been forceful in trying to ensure that we have better regulation of lap dancing clubs in Glasgow. I hope that, if amendments on the licensing of such venues are forthcoming from wherever at stage 2, the committee and ministers will look on them favourably.

I conclude by expressing again my support for the bill and specifically the strengthening of the law on sexual offences.

16:01

Johann Lamont (Glasgow Pollok) (Lab): My comments reflect the concerns of many of my constituents about some aspects of the bill. I regret that, this morning, the cabinet secretary seemed simply to dismiss those concerns rather than take them seriously.

Before I get to the substance of my speech, I will flag up a few issues that I trust will be revisited at stage 2. They include the issues that Sandra White flagged up in relation to trafficked women; prostitution and men who abuse women and prostitute them; and lap dancing. A further question that I hope we will revisit is how we make a connection between communities that suffer under the cosh of serious organised crime and the money that is secured as a consequence of that under the Proceeds of Crime Act 2002. There should be a direct link, with funding going back to the communities that have suffered the most.

On the broader debate, it seems that nothing is easy. It is unhelpful to try, as I think Dr McKee rather complacently did, to create the impression that somehow only those who are wilfully stupid wish to ignore the policy that the Scottish Government is taking forward. It is most unfortunate to demonise those in our communities who are demanding action and those of us who wish to highlight how victims often feel let down by the system. To do that is to deny a voice to those who, because of their day-to-day experience, feel that the justice system is unfair, irrational and out of touch with the way in which they have to live their lives.

Yes, we have to try to understand what causes people to commit offences, but we also have to stop infantilising people who choose to terrorise their partners, their families and their neighbours. We owe it to the young men who carry a knife, as much as to their potential victims, to do everything in our power to stop them doing that. I have worked with young men who, in later life, ended up either in prison on a murder charge or dead. If we take steps to address the needs of such young men as well as those of their victims, we will be doing something important.

Robert Brown: I do not think that anyone would disagree with that. The issue is what makes the difference. What is the tough sentence that turns such people around? That is the nub of the debate, which some people on my side of the chamber would say the Labour Party has not engaged with as it might.

Johann Lamont: I recognise that, but I do not think that there is recognition on the other side of the importance of deterring young people who are outside the core group that carry knives, who see that nothing happens to those people and who then carry knives themselves. We owe it to those young people to say, “This is serious,” in the same way that we punish people who drink drive to prevent others from doing that.

I am always struck by the degree to which people who come to me to ask for help because of disorder, crime and violence in their communities do so not simply because they want us to put people in jail and throw away the key but out of desperation about their circumstances. It is unjust and contemptuous to sneer at those who want tougher action on knife crime because of their direct experience of those who use violence to silence people, harm them and intimidate them to the point where they phone the police in a whisper. We owe it to those people to empower rather than disempower them and to listen to them. In that context, I urge the minister to reflect further on the action that he is taking and to test it against people’s need to have certainty that their communities will not be more dangerous and that the measures will not put them at further risk.

The scrapping of six-month sentences raises a number of issues. At First Minister’s question time, I highlighted the implication of the policy for the victims of domestic abuse and the fears of many people that it might increase risk. Following the First Minister’s response, I seek clarification on what the Scottish Government’s policy actually is. The First Minister said that serious offences should attract longer sentences. Is it the Government’s view that all domestic abuse cases that currently attract sentences of less than six months should attract longer sentences? If that is the case, how would that be enforced?

Kenny MacAskill: Will the member give way?

Johann Lamont: I am sorry, but I have only a minute left—the minister can answer the point when he sums up.

Would that policy apply to other serious offences?

There is an issue around resources. It is not enough simply to say that the resources are available. We could end up with an experiment with no safety net, the costs of which will be borne by individuals and communities. The obvious fear is not just that there could be an increase in offending behaviour, but that there could be an increased lack of confidence in the justice system’s ability to serve people’s needs.

At the heart of the matter there is a puzzle. It is illogical to say that the only way to encourage community sentences is to end short sentences now—it could be done the other way round. It is also illogical to say that people can be rehabilitated in their communities working with them only five or 10 hours a week, yet absolutely nothing can be done with them over six months when they are in prison. I have never understood the logic in assuming that the Scottish Prison Service has no responsibility towards those who are in prison serving shorter sentences. I would have more confidence in the minister if we were not hearing that Sacro, Apex Scotland and other organisations that work with prisoners who come out of prison are being told that their funding is being cut.

In those circumstances, the lack of confidence in our communities must be addressed, not dismissed.

16:06

Margaret Smith (Edinburgh West) (LD): As one of its former members, I thank the Justice Committee for its report, and I welcome this opportunity to speak in the debate. There are a number of welcome provisions in the bill, such as the new offences to tackle serious organised crime and the clarification of Scots law on trafficking.

I believe that two aspects of the bill are capable of effecting positive change: the abolition of short prison sentences and the measures on community penalties. Wide-reaching reform in those areas, backed—crucially—by the proper levels of resources, can help to address reoffending and to provide what we all want: a cut in the levels of crime on our streets and in our communities.

Prison is appropriate for some people. Serious and violent offenders cannot and should not be allowed to remain a danger to our communities. However, Scotland's prisons are chronically overcrowded. They are hugely expensive and massively inefficient at dealing with people who receive short-term sentences. Two of the purposes of sentencing are the punishment of offenders and the protection of the public, but they also include the reform and rehabilitation of offenders.

One paragraph of the committee's stage 1 report jumped off the page. Professor McNeill of the Scottish Consortium on Crime and Criminal Justice remarked:

> "three things help people to stop offending: getting older and becoming more mature; developing social ties that mean something to them; and changing their view of what they are about as a person. Short periods in prison do not help with any of those three things."—[*Official Report, Justice Committee*, 19 May 2009; c 1893.]

I add, from my experience of talking to people in the Scottish Prison Service over many years, that people who are sent to prison for short periods often lose their families, homes and jobs—the very things that might make them not reoffend in future.

We have heard much about the revolving-door system. The cycle of reoffending is a blight on our communities and our criminal justice system. People offend, they are sentenced to a short stay in prison and, on release, they go on to offend again. More than 95 per cent of people who are currently serving sentences of less than three months have already spent time in custody. On release, 74 per cent of them will go on to offend again within two years. I am disappointed that some members are not prepared to recognise that short-term sentences fail completely in helping to reduce the level of crime. For many people, prison is not working as a deterrent.

Without a fundamental change to how we approach sentencing, we risk creating—or, at this point, reinforcing—a class of Norman Stanley Fletchers, a conveyor belt of offenders who, like the "Porridge" antihero, might be happy to be told that they are someone

> "who accepts arrest as an occupational hazard and presumably accepts imprisonment in the same casual manner."

It is surely right to emphasise that prison, for many people, should be viewed as a last resort, and that, for less serious offences, a genuine alternative should be sought. We must have a better option than sending people to prison for a few weeks, during which time there is no opportunity to work with them to address the issues that sent them there in the first place. That matter has been well covered in recent years by Andrew McLellan during his time as Her Majesty's chief inspector of prisons for Scotland and by Henry McLeish and his Scottish Prisons Commission.

I welcome the focus on community sentences and the sensible move to a single community sentence, which will help to improve public understanding. However, it is fundamental that the Government ensures that the proper resources are in place to make that happen and to make it work.

The Justice Committee's point about the timing of community sentences is important. Our communities want to know that action is being taken. There is still a perception that community sentencing is a soft option, but for many people it is not as soft an option as lying on their backside in a prison bed for two or three weeks. We have to ensure that people in our communities see that community sentences mean that rapid action is taken.

Although we agree with the Government's direction of travel on short sentences, we would rather see an end to custodial sentences of three months or less, rather than six months or less. That would remove from the prison estate those whose crimes are least likely to have involved serious or violent offences. It would allow the available resources to be focused on those cases where there is the least chance of rehabilitation in the prison system and on cases where tough community sentences are more likely to bear fruit.

Those who are currently sentenced to short spells in prison are not in the system long enough for staff to obtain the relevant information about them or their needs. As a result, they do not receive the appropriate interventions, whether help for drug or alcohol issues, or further training or education, and they are not helped to tackle the issues that got them there in the first place.

Many of the very short sentences are being served for the same reasons and by the same social groups as they were a century ago—those who are blighted by poverty, those who suffer mental health problems and those with alcohol and drug misuse problems. That is not to take away from their offences; it is simply to say that we should get smarter and better at dealing with them when they are in any way brought into an interface with the criminal justice system. Those are not small problems—they are some of the biggest in Scotland—but they need to be tackled from the root. In many cases, they cannot be best tackled in our prisons.

I was shocked by some of the statistics. Compared with the general population, people in Scotland's prisons are 13 times more likely to have been unemployed and 13 times more likely to have been in care as children. Seven out of 10 have suffered from at least two mental disorders and two out of 10 males have previously attempted suicide—a figure that increases to more than 37 per cent for women. Some 65 per cent have the numeracy skills of an 11-year-old and eight out of 10 have writing skills at the same level. Those are serious issues, which have to be dealt with seriously.

Getting rid of short-term sentences needs imagination, commitment and resources. I look forward to the challenges being further addressed and debated during the passage of the bill.

16:12

Bill Wilson (West of Scotland) (SNP): The bill is excellent, but I should like to take this opportunity to suggest an addition to it, which I hope will receive the cabinet secretary's support.

The inadequacy of the present criminal justice legislation was recently highlighted by Louise Adamson of families against corporate killers, who said:

> "An annual work-related death toll in excess of 1600 is tragic testimony to the fact that the current system of fining companies for health and safety offences has not served as strict enough punishment or strong enough deterrent."

Last August, I consulted on a proposal for a member's bill to improve the situation, which, if adopted, would introduce the principle of equity fines into Scots law and allow judges to order independent financial reports on convicted companies. The latter, as an amendment, would enhance the bill.

With the creation of new procurators fiscal who specialise in health and safety offences, the cabinet secretary has shown the Government's commitment to tackling the horrific death toll that I have mentioned. The addition of independent inquiries would further strengthen the law. I hope that that would find support throughout the chamber.

The present low, and therefore non-deterrent, level of fines imposed on most convicted corporations is illustrated by the Health and Safety Executive figures for fines imposed by Scottish courts between 2001 and 2005. The median fine is the value of fine that half of all fines lie below. The other half lie above—I am sure that members worked that out. The great advantage of the median is that the results are not skewed by a limited number of very high or very low results. For cases resulting in death or injury, the median fine was only £4,000. When there was a fatality, the median fine was £12,500. In half of all cases resulting in a conviction in which a fatality occurred and for which a fine was imposed on the company, the value of the fine was £12,500 or less. That is £12,500 for being convicted of killing a human in the name of profit—and make no mistake, that is precisely what that represents.

Although hard to interpret, as the offences are not detailed, more recent figures on the HSE's website give little cause for comfort. Average penalties per conviction for cases in which the HSE or local authorities took action have declined in the past three years.

The information under the title "Fixing the sentence" on the HSE's website makes interesting reading. It says:

> "Sentencing is entirely a matter for the sheriff or judge. The prosecutor is not entitled to make representations on this matter or to remind the court of their sentencing powers. The sheriff or judge should fix a fine which, in his opinion, reflects the circumstances of the offence. In so doing he must take into account all the circumstances of the case, including the financial circumstances of the accused, whether an individual, a partnership, or a company, and whether or not this has the effect of increasing or diminishing the amount of the fine."

That is the crux of the matter.

One reason for the present low fine levels is that judges might underestimate the size of fine that a company can reasonably pay. A significant failing of the present system is the lack of a mechanism for ordering an independent report into a company's financial situation. In a paper that was prepared for the previous Scottish Executive's expert group on corporate homicide, Professor Hazel Croall recognised that situation and suggested

> "that courts should routinely receive a form of Corporate Inquiry Report and should, where necessary, have powers to appoint a relevant expert to provide a professional assessment, paid for where appropriate by the company itself."

It is instructive to compare the present law and procedures for companies with those for individuals. When an individual is brought to court for sentencing, social and other background reports are provided as a matter of course. In the case of companies, judges rely on the convicted party's honesty. That is roughly the equivalent of the judge looking the prisoner in the eye, sternly wagging his finger at the convicted felon and saying in a severe—if not downright angry—tone, "You are a very naughty fellow. Now, before I impose a sentence, could you just tell me what level of fine you can afford to pay?"

I hope that the cabinet secretary agrees that the present situation is unacceptable and that independent inquiries into a convicted company's finances would be a significant and useful addition to Scots law. I hope that the cabinet secretary will lend his support to such an amendment to the bill.

16:17

Karen Gillon (Clydesdale) (Lab): I am pleased to participate in this important debate. I support the amendment that Bill Wilson describes. In the previous parliamentary session, I proposed a member's bill with a similar purpose. I would jail individual directors of companies, because that is the only way to focus their minds on the acts of violence that they perpetrate on constituents such as mine.

I will deal with the provision in the bill to remove the exemption for charitable, religious, youth, recreational, community, political or similar organisations from holding a market operator's licence. In the past couple of weeks in my local paper, the *Carluke Gazette*, I have read about events that the Girls Brigade, the Kirkton players, the New Lanark Football Club, Biggar and district Oxfam and Castlehill Bowling Club were to hold and about the St Athanasius Christmas fayre. All those events are currently exempt from the licensing requirements. I will support Cathie Craigie's amendments to keep the exemption, because such events should remain exempted. If something is not broken, why bother fixing it? Requiring a licence would be a tax on the groups in our communities that try to raise money and support their communities. I hope that the cabinet secretary will take out this silly measure at stage 2 and that common sense will prevail.

The second issue that I want to raise is knife crime. They say that people's life experiences often determine how they react to issues. That is certainly true for me in relation to knife crime. In the early hours of 26 December 1994, there was a knock at my front door in Jedburgh. We had had an enjoyable Christmas day, and I thought that friends might want to continue the festivities. Unfortunately, the knock changed my life and the lives of my close family friends for ever.

John Frater was in the prime of his young life. He had not been in trouble; he was into rugby and was the vice-captain of Jed Thistle. He had spent Christmas day with his family and was walking his girlfriend home when he was murdered—as the result of a single stab wound—by a man who was intent on causing bother. John was simply a young man who was in the wrong place at the wrong time. He was not carrying a knife or looking for a fight, but he is now dead. His parents have lost their son and will not see him married or be able to look after his children. His death devastated them and affected me greatly. I cannot say without a doubt that tougher action on knife crime would have saved John Frater's life, but it might have given him a better chance. Our attitude to blades needs to change.

John was killed 15 years ago. In those 15 years, his family have gone through terrible pain, as have many, many other families. We have tried convincing and cajoling, we have tried campaign after campaign, and we have tried amnesty after amnesty. However, the truth—and John Muir is testament to that truth—is that despite all of that, far too many young people have died in those 15 years. They have been killed by thoughtless, mindless thugs who carried a knife, intent on its use. We have failed to change that culture.

Someone does not go out with a knife tucked down their sock, slipped into their jacket pocket or somewhere else on their person just because they think it is cool; they do it because they think they are hard. They will use the knife if they are challenged. Like Johann Lamont, I believe that it is time to stop messing about on knife crime: it is time to send out a stronger message. We have tried the fines and the community sentences—they have not worked. Far too many innocent individuals such as John Frater are now dead.

I turn to the proposed abolition of sentences of six months or less. Let there be no mistake about it: I absolutely support the use of community sentences. Such sentences work for many offenders in providing an appropriate punishment and deterrent, but for many others they do not. The cabinet secretary talks about a revolving door, but that is as true for community sentences as it is for short-term prison sentences. As a youth worker, I met many young people who got community sentence after community sentence. They saw them as a soft option. The sentences did not change their behaviour. We need more investment in community sentences, not less.

Various excuses have been made in the debate for why we should get rid of short-term prison sentences. We have heard that there is no opportunity to work with prisoners if they are in prison for only six months. Why not? We have also heard that people cannot be rehabilitated in less than six months. Why not? Why do people lie on their backside for a few weeks in a prison cell? Why have we abdicated to the Scottish Prison Service the duty of care to those who are in our prisons? We should be dealing with the issue, head on. If sheriffs believe that someone needs to be sent to prison, they do so for a reason. We should be rehabilitating prisoners while they are in prison, not abdicating responsibility. We should not be returning people to their communities where they cause havoc.

The communities that I represent want this Government to defend people properly. Like Duncan McNeil, I reserve my right to vote against the bill at stage 3. I will do that if the Government does not listen to the people of Scotland; if it does not see sense on this important issue.

16:23

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): The fact that we have held a day's debate on an issue of substance is a good advert for the Parliament.

I listened carefully to members of other parties whom I respect, such as Bill Butler and, in particular, Karen Gillon. That said, in my years in the Parliament, I have heard equally passionate speeches from Labour members in particular in favour of electronic tagging and early release into the community. Members spoke about finding alternatives to custody that are better for individuals, ensure that communities are protected and aim to reduce crime. That is as strong a territory for debate as it was in the days when the Labour Party was in office.

Cathie Craigie made a direct attack on me and my Liberal Democrat colleagues in speaking of our approach to the bill. This morning, Robert Brown made clear his position on sentencing, as he did his position on the proposed sentencing council. In debates such as this, Cathie Craigie and her Labour colleagues can so easily slip into believing that they have a monopoly on representing constituents who are affected by crime. They do not, nor do they have a monopoly on knowing what is effective in tackling the issue.

I represent Penicuik in Midlothian. Year after year, Labour has produced leaflets in which it attacks me for being soft on crime. Labour attacked me even when I was a member of the Justice 2 Sub-Committee for its inquiry into child sex offenders and yet, at the same time that I was being attacked, the Labour council in Midlothian was being castigated in official child protection reports. Indeed, the director of social work and the councillor with responsibility for the issue resigned as a result. Now we are being castigated for being soft on crime, at the same time as I have casework in the town on the Labour council's woeful approach to antisocial behaviour, which is only now being corrected. The police have had to chair the relevant body in the council, to ensure that some order is imposed.

Let us not have rhetoric without the belief that action at council, Government and legislative levels must work. Communities do not want simply more tough talk—they want action on crime. Nor do we want just rhetoric from the Scottish Government on the bill. That is why the Finance Committee unanimously asked serious questions about the assumption that only 20 per cent of sentences will involve a community payback order, rather than custody. The bill team and the Scottish Government provided no convincing reason for including in the financial memorandum options of only 10 and 20 per cent for the likely increase in the number of community sentences. When Robert Brown and the Liberal Democrats raise financial and resource issues, they do so because they want the legislation to work, rather than simply to sit on the statute book, allowing ministers of any Administration to say, "We have legislated, therefore crime is being reduced." That is not sufficient.

James Kelly: If, in the member's view, the bill is not properly resourced at stage 3, will he vote against it?

Jeremy Purvis: Absolutely. In an intervention during Richard Baker's speech, Robert Brown asked whether the resource issues were the point of principle for the member. I took careful note of Richard Baker's response. He gave the impression of making a reasonable argument that, because resources may not be in place, the bill should not proceed. However, that is a reasonable argument only if one agrees in principle that very short sentences work. They do not. That is the point that Karen Gillon asked us to address. She asked why we cannot reform short sentences so that they can work, but it is in the nature of a short sentence that it cannot work.

Karen Gillon: Will the member give way?

Jeremy Purvis: I would ordinarily, but I cannot on this occasion.

The Conservatives argued that we have short sentences because they act as a deterrent. It was extremely telling that, when Robert Brown asked how that could be, given that 91 per cent of offenders in Polmont have served sentences there before, they had no answer.

In a reply to a parliamentary question, it was confirmed that 95.6 per cent of those who are currently serving sentences of less than three months have spent previous periods in custody. Short prison sentences are not a deterrent and do not affect reoffending. That is not surprising, given that we know that more than three quarters of young people in custody have a history of regular school truancy and a third have no formal educational qualifications. Parliament has known full well for a number of years that extremely low reading and numeracy levels are the biggest obstacle to successful interventions. Those arguments were rehearsed in a report by the Parliament on youth offending in 2005.

Johann Lamont: Will the member take an intervention?

Jeremy Purvis: I do not have time—I am in the last moments of my speech.

It is not enough to talk tough to communities—the issue is now critical, because offenders are the least employable section of the population. In the current economic situation, their prospects of being employable—the biggest factor in reducing reoffending—are near to zero. It is not acceptable for us to stand aside and to leave them on the scrapheap of unproductive, uneconomic and potentially reoffending individuals when we can do something about that. The bill is one part of that action.

16:29

Bill Aitken: I agree with Jeremy Purvis that we have had a genuinely good debate today with some passionate contributions. Some excellent points were made, not all of which came from the Opposition benches, and there were some astonishing displays of naivety, most of which came from the Government and Liberal benches.

I will go through some of the contributions in which some interesting points were made. In a worthwhile speech, Stewart Maxwell was correct to raise the clear anomaly that relates to DNA retention. The rest of his speech was less worth while. He spoke about the presumption against short-term prison sentences. There is a presumption against short-term prison sentences already and I assure Stewart Maxwell and his ilk that no judge, sheriff or magistrate sends anyone to prison when there is any alternative.

Robert Brown rightly raised the cost of prison sentences. However, if we reduce substantially the prison population there will be no significant saving. I know that Robert Brown acknowledges that fact. The jails still have to pay the staff and the only saving would be on a few flat-screen televisions in Addiewell.

Robert Brown: Does the member acknowledge that if we reduce the prison population, that would free up the prison authorities and give them more resource to deal more effectively with the serious prisoners who are in prison justifiably and who are a bigger danger to the public when they come out if they have not been rehabilitated?

Bill Aitken: That is part of a wider argument that I will address.

Not for the first time, Cathie Craigie spoke common sense in an excellent speech. She raised a valid point about charities. As constituency members in areas that have their problems, she, Karen Gillon and Duncan McNeil underlined the difficulties that arise in many of Scotland's communities. They expressed the fear, which we share, that if the policy to end shorter sentences is imposed on the people of Scotland, things will get very much worse.

In a typically thoughtful speech, Nigel Don dealt with problems that might arise under the Custodial Sentences and Weapons (Scotland) Act 2007. The Government got it just about right in that respect.

Mike Pringle issued the usual mantra about tough community sentences. Whatever community sentences come, we can be assured that they will not be tough, nor will they be carried out. The other evening, I attended a lecture chaired by the cabinet secretary. The new chief inspector of prisons spoke about a conversation that he had had at Polmont, in which he had been told by one of the inmates that he did not like having to get up early to do community service. Nobody asked the prisoner how he had ended up in Polmont, if he did not like doing the community service. He had probably not done that community service, or he had reoffended as a result of it.

Bill Wilson raised a question about health and safety, which is an argument that could take place in another direction. Sandra White spoke about lap-dancing clubs, which is hardly the greatest priority given the amount of violent crime in Scotland.

Ian McKee, a man to whom I always enjoy listening, let me down a bit today. He said that prisons are a university of crime. If that is the case, some of the streets of Glasgow must be where criminals get their doctorates. He pointed out, correctly, the difficulty of drugs in prison. Surely the answer is to try to prevent drugs from getting into prison rather than bemoaning the fact—

Karen Gillon: Will the member reflect on the state hospital's success in preventing drugs from entering the hospital? Perhaps the mainstream prison estate can learn lessons from there.

Bill Aitken: That might be of interest. I acknowledge that the Government has taken certain steps in that direction, but we are not yet at the stage where that will happen.

Those who advocate the ending of short prison sentences must acknowledge that the presumption is already against such sentences. They must tell us who should not be sent to prison, because all that the policy would do would be to give the green light to the fourth-time drunk and disqualified driver and to provide a get-out-of-jail-free card for the knife carrier, the wife beater and the small-time drug pusher. It would send the message "Carry on thieving" to the shoplifter who has had 40 or more court appearances. That is the issue that confronts us all. Those are the people who would normally get a sentence of six months or less.

The bill has much to commend it, under many headings. However, part 1 is so fatally flawed that it will be difficult for any right-thinking, sensible person to support it unless it is radically amended.

16:35

James Kelly (Glasgow Rutherglen) (Lab): I welcome the opportunity to make the closing speech on behalf of the Labour Party, and I thank the Justice Committee and its clerking team for their extensive and comprehensive report on the bill.

We have had an interesting, high-quality debate. The debate started in daylight, and as darkness falls there is no doubt that gloom will descend on the SNP benches, because the debate has underlined serious flaws in the bill. Chief among those flaws is the policy of scrapping six-month sentences. It is clear to me that that would send the wrong message to Scotland's communities, as Bill Butler put it articulately. The scrapping of six-month sentences would mean that 75 per cent of people who have been found guilty of any crime, 40 per cent of people who have been found guilty of indecent assault and 71 per cent of housebreakers would be released into the community.

Members have quoted the experts and the academics, but the people in whom I put good store are the ones in my constituency: the pensioner who came to my surgery recently, who had had the door of her flat kicked in and her close vandalised; the man who had been attacked with a hammer and was afraid to return to his job on the rigs in case his family was attacked; and the constituent who was nearly beaten to death by a man who had been released from prison only that day. Those are the voices that speak strongly to me.

Mike Pringle and Ian McKee told us that prison does not work, but I do not see the logic of simply releasing people who are guilty of indecent assault, for example, back into the community. [*Interruption.*] That is not a matter about which to chuckle away, as the cabinet secretary has done during a number of serious speeches. This is an important debate.

Richard Baker made serious points about the cost of the policy. The Government's bill team has provided no evidence to explain why the financial memorandum costs the policy on the basis of a 10 or 20 per cent increase in the use of community penalties.

Jeremy Purvis: Why is the Labour Party in favour of using electronic tagging as an alternative to custody in many of the instances that we have heard about during the debate?

James Kelly: That issue is not in the bill. I am addressing the serious shortfall in resources to implement the SNP's policy of scrapping six-month sentences.

Prison statistics show that 8,200 people are serving sentences of six months or less. The figures in the financial memorandum would account for only 4,000 of those prisoners. In addition, there is nothing in the budget to support the policy. If the vast majority of the 8,200 prisoners were moved on to community sentences, the policy would cost £22 million. In a three-year period, a £66 million black hole would be created. The policy has not been costed properly. It is also important to destroy the myth that releasing prisoners from jail will save money. The Government officials made clear to the Finance Committee that it would save no money at all.

Robert Brown: I do not dissent from James Kelly's point but could we have clarity in the debate? The bill does not propose scrapping short-term sentences; it proposes a presumption against them. That is an important difference and we should talk in clear terms about it. At the end of the day, the resource follows from all that.

James Kelly: The important point to bear in mind is that, if the bill is passed, a presumption against six-month sentences would be lodged in statute. As a result, we would see the examples that Bill Butler cited earlier of convicted offenders who would currently go to prison being released into the community.

The policy is not properly costed. It is broad-brush accountancy. I just hope that, when John Swinney finalises his budget, he does not look to the Cabinet Secretary for Justice for any advice because numbers are clearly not Mr MacAskill's strong point.

I point out to Jeremy Purvis that the Labour Party supports the principle of community payback orders. In his opening remarks, Bill Aitken made the valid point that it is important for the public to see that community payback orders are immediate. There is work to be done to make them more effective.

There were important contributions on knife crime from Duncan McNeil, Helen Eadie and Karen Gillon, who spoke from experience in their constituencies about its horrendous human impact. There were 3,418 convictions for knife crime in 2007-08 but only 29 per cent of those offenders went to jail. As many Labour members have said, we need to send a strong message that knife crime is unacceptable and if somebody carries a knife they should go to jail.

Bill Wilson: Will the member give way?

James Kelly: Not at this point, sorry. I want to make my next point.

Robert Brown criticised Labour's justice policy and said that we were more interested in getting into the pages of *The Sun*. It therefore came as a surprise to me to discover a newspaper clipping from December last year that quotes him widely—in fact, it has his photograph as well.

Richard Baker: It is in *The Sun*.

James Kelly: Yes, it is. As part of the article, Robert Brown says:

> "Carrying knives is always stupid and should normally lead to a prison sentence for those caught with weapons."

Once again, we have a change of Liberal Democrat policy. I only hope that we witness a further change at stage 2.

Kenny MacAskill: Is James Kelly saying that there would be no exception to Labour's mandatory sentence for knife crime? If not, will he please define what the exceptions would be?

James Kelly: As the cabinet secretary knows, there are already exceptions in law. The Labour position is to support a mandatory minimum sentence for knife crime. That is the strong message that Scotland's communities look for.

There are serious concerns about the costs of the sentencing council—£1.1 million annual running costs and £0.45 million set-up costs. As Professor Fergus McNeill told the Justice Committee, the £1 million annual cost is equivalent to 1,000 community penalties. The costs of the proposal should be closely examined.

Richard Baker covered DNA. The UK Government has indicated that it intends to extend the policy in England and Wales of holding DNA for six years. There are currently no such proposals in Scotland, but I would certainly support the extension of the use of DNA. It is clear that the policy has been effective in ensuring that more people have been caught and more criminals put behind bars in recent years.

Cathie Craigie made an effective speech that highlighted the problems in the bill with exemptions for charity organisations and community groups. We all have experience of those problems in our constituencies. We do not want charities and community groups to be unable to hold local events because they cannot afford to pay for a licence. Further, the administration of licences would be a burden on councils.

Among other issues that were raised in the debate were antisocial behaviour reports, serious and organised crime and witness statements.

The bill's proposals are flawed. They come from a cabinet secretary who told us that prison was "a skoosh". The bill is a criminals' charter, with a £66 million black hole at the centre of its proposals. Labour will not support the bill at stage 3 unless our concerns about short-term sentences and knife crime are addressed. It is time for the cabinet secretary to venture homeward to think again.

16:46

The Minister for Community Safety (Fergus Ewing): I thank the Justice Committee for the work that it has undertaken on what is a substantial bill with, as we heard during the wide-ranging debate, a large number of measures, many of which, I think it is reasonable to say, have been welcomed by members across the chamber.

The bill's effect on charities was raised by Karen Gillon and, I think, by John Lamont and Mr Kelly. We will consider extremely carefully the arguments that were presented by members across the chamber. The point of having such debates is so that the Government can pay heed to issues, particularly when they are raised in a non-partisan, non-political way. We will reflect carefully on the arguments and report, as is appropriate, to the Justice Committee.

I will comment first on some of the bill's less controversial measures and move into the shark-infested waters towards the end of my speech. I will move towards a crescendo, as it were.

I think that we all believe that extreme pornography is particularly vile and offensive, and that we will all support the measures that Sandra White talked about. She has rightly campaigned on that subject for many years.

Mr McLetchie rightly mentioned the extreme problem of domestic violence and the continuing stain on our nation of men who batter their wives—and the serious, complex and difficult issue of how, as a society, we deal with that. Of the 5,029 convictions with a domestic abuse aggravation in 2007-08, about 80 per cent involved common assault or breach of the peace, with very few resulting in custody. I am sure that Mr McLetchie will know well that the circumstances of those cases are hugely divergent. Plainly, the courts have taken a very stiff view and imposed serious and long sentences in the relatively small number of cases where a charge of serious assault or attempted murder was brought. However, we will reflect seriously on the detailed arguments that Mr McLetchie and others made.

Bill Wilson talked about his proposals for equity fines and how we deal with crimes that are committed from behind the corporate shield. Karen Gillon has long campaigned on an extremely serious incident that led to deaths in her constituency. I recently spoke on the issue, having had the pleasure of being invited to speak to a Scottish Trades Union Congress audience. I pay tribute to the work that Karen Gillon, Bill Wilson and others do in this field. It is, as they know only too well, a reserved issue, which we would prefer not to be the case. That fact has made consideration of the issue difficult. The cabinet secretary has offered to work with Mr Wilson and other members on proposals to ensure that courts have information about a company's financial position to help determine sentencing. Bill Wilson alluded to one positive development that we should recognise and praise, which is the Crown Office's appointment of a dedicated prosecutor who now leads a group of individuals dealing with health and safety offences. That will make a huge difference in practice to how such cases are pursued.

Reference was also made to various of the slightly more technical aspects of the bill concerning disclosure. My understanding—I am by no means an expert—is that the position on disclosure requires to be clearly stated. The issue is complex, so it is not possible to make the provisions as simple as we might like. Nonetheless, on that matter and on all others on which we are trying to achieve a corpus of law that is clear, coherent and effective, the Government is happy to continue to work with the Justice Committee to achieve the best possible result. The same point applies to defence statements, which several members referred to during the debate.

Ted Brocklebank raised, quite rightly, the issue of mobile phones in prisons. It is certainly the case—I know, because I did it—that the prison rules were changed to make introducing a mobile phone into a prison contrary to the rules. As Ted Brocklebank and other members who have visited prisons will know, prison officers do excellent, painstaking and detailed work day and daily to prevent the importation of drugs into our prisons. When I saw the videos showing drugs being passed from one individual to another I did not notice what was happening in any of those instances, but the prison officers, through their professionalism, detected those incidents and prevented the importation of drugs on those occasions. The ban on the use of mobile phones, coupled with the new offences that will be introduced by the bill, will take the tough action that I believe is supported by members of all parties in the Parliament.

Ted Brocklebank: The minister has described heavier sentencing under an amendment to the prison rules to deal with the trafficking of phones in and out of prison, but I asked about the blocking of mobile telephone signals. Such technology is available, but the minister has not referred to it.

Fergus Ewing: I had not finished responding to the specific points that Ted Brocklebank raised. I was about to say—in closing the debate, I have a duty to try my best to respond, in so far as is possible, to members who made specific points or recommendations—that work on a signal blocking device is being progressed by the Scottish Government, together with the SPS, the Ministry of Justice national offender management service and the Home Office scientific development branch to try to identify a viable solution to what Ted Brocklebank conceded is a difficult and complex problem. That is so not least because we do not want to block the mobile phone signals of people who live in Saughton outside the prison walls nor of those who live near our other prisons, which happen to be mostly in residential areas. I am sure that people who live on Inverness's Culduthel Road near Porterfield prison would like to continue to enjoy chatting among themselves of an afternoon about activities in the Scottish Parliament—

Jamie Stone (Caithness, Sutherland and Easter Ross) (LD): Steady on.

Fergus Ewing:—however unlikely that may seem.

We take the matter of mobile phones in prison very seriously, in a way that I think Ted Brocklebank would approve of. We must also think about the safety and security of prison officers, who must be able to continue to use effective methods of communication. We will continue to ensure that they can do precisely that.

The more controversial aspects of the bill have certainly enlivened today's proceedings. Our priority must be to keep the public safe. We must reduce the damage that crime does to victims and communities. That requires us to respond decisively and effectively when confronted by serious, violent crime, but it also requires us to use the best available evidence to work harder and to be smarter in challenging and changing offenders and in tackling the underlying social and cultural factors that so often drive offending and reoffending. I believe that our current uses of imprisonment make that extremely difficult.

> "Scotland's prisons hold too many prisoners on short sentences where there is no real expectation of being able to punish, rehabilitate or deter."

Those words are, of course, not mine. Members will have recognised from the unusual succinctness and fluency of that passage that they are the words of Henry McLeish—they come from the foreword to the Scottish Prisons Commission report of 1 July 2008. That is the approach that we have pursued.

Johann Lamont: Will you clarify why you are taking that approach? Why do you presume that nothing can be done with people who are literally a captive audience for six months, but expect it to be possible for those issues to be addressed in the community, even though the organisations that would provide that service are suffering cuts in their funding?

The Presiding Officer: I remind members to speak through the chair and not directly to each other—in other words, do not use the word "you".

Fergus Ewing: I can give Johann Lamont the answer that she seeks and can explain exactly why we are taking that approach. We are doing so because we believe that it is the right approach. Unless we take it, we will not tackle the problem of crime and reoffending in this country.

I spell out that we are taking that approach because we learn not, as Mr Kelly said, from academics, but from people who should know—people such as Chief Constable David Strang—that it is the right approach. In his evidence to the Justice Committee, he said:

> "We want a shift in the general approach to one that recognises that putting people in prison for a short time and then allowing them out unsupervised simply does not address the crime problems that Scotland faces. In principle, there should be a presumption against short sentences."—[*Official Report*, *Justice Committee*, 26 May 2009; c 1931.]

We learn not from academics, but from people such as Professor Alec Spencer, who has been governor at Peterhead, Glenochil and Saughton prisons, occupations that are probably as unacademic in their daily duties as any that I can conceive. What did that non-academic have to say? He said:

> "I think that the use of short-term and very short-term sentences is complete eye-wash. It has no effect at all on reducing crime."

As a man who has governed three prisons, he should know, should he not?

Bill Aitken: Will the minister give way?

Fergus Ewing: I ask Bill Aitken to let me finish—there is more of that quote, as he will be pleased to hear. Professor Spencer went on to say:

> "We know from research from around the world that where prison is used on its own—in general, short-term sentences involve only prison—crime increases by between 1 and 3 per cent."—[*Official Report*, *Justice Committee*, 19 May 2009; c 1891.]

Bill Aitken: Is that the same Professor Spencer who suggested that a queueing system should be adopted at prisons to restrict prisoner numbers, which would mean that there would be a queue of offenders all the way down Smithycroft Road in Riddrie waiting to get into Barlinnie? Is that not eye-wash?

Fergus Ewing: I am reliably informed that that is a Swedish policy, and it is the Conservative party that has championed various aspects of Swedish penal policy.

While we are at it, and while we have a full chamber, I am sure that members would want to be updated on one of the Conservatives' policies that they are unusually coy about expounding in detail. They think that we need more prisons and that we should use disused hospitals throughout Scotland to house our prisoners. Members may think that the walls of hospitals are gey thin and that they were designed not to keep people securely in prison but to divide wards in hospitals and are therefore fundamentally unsuitable for conversion into prison use. How is the great disused hospital hunt going? How many such hospitals have the Conservatives found? Where are they? How much will it cost to convert the disused hospitals that Annabel Goldie says exist all over the country to house the thousands upon thousands of additional prisoners who will end up in jail, who might include me?

The Presiding Officer: You must conclude, please, minister.

Fergus Ewing: I will finish on a consensual note.

The Presiding Officer: Quite quickly, please.

Fergus Ewing: We all deplore organised crime. I do not think that Mario Puzo—the author of the novel "The Godfather" in 1969—has ever been quoted in the Parliament before. He said:

> "A lawyer with his briefcase can steal more than a thousand men with guns."

We want to ensure that there are no covert consiglieres in Scotland helping organised criminals. We will stamp that out through our measures on organised crime.

I thank members for their generous support.

Criminal Justice and Licensing (Scotland) Bill: Financial Resolution

17:00

The Presiding Officer (Alex Fergusson): The next item of business is consideration of motion S3M-4544, in the name of John Swinney, on the financial resolution for the Criminal Justice and Licensing (Scotland) Bill.

Motion moved,

That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Criminal Justice and Licensing (Scotland) Bill, agrees to any expenditure of a kind referred to in Rule 9.12.3(b)(i), (ii) or (iii) of the Parliament’s Standing Orders arising in consequence of the Act.—[*Fergus Ewing*.]

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Scottish Government response to the Stage 1 Report

Please find in Annexe A of this letter our responses to the various recommendations contained in the Justice Committee's Stage 1 report on the Criminal Justice and Licensing (Scotland) Bill.

The Committee may find it helpful to receive details of some new topics that we plan to seek to introduce into the Bill through Stage 2 amendments. Annexe B contains a summary of these new topics. I consider it is necessary to seek to add in the new topics into the Bill as there is an almost continual need for Scots criminal law to respond to developments in Scotland and at a UK and European level. Since preparation of the Bill for introduction was being completed in late 2008 and early 2009, there have been a number of developments within Scotland (eg. court judgement relating to the common law powers of sheriffs to grant warrants), at a UK level (eg. genocide offence changes) and at a European level (eg. European Union Framework Decisions) where I consider that changes to Scots law are needed to be taken forward in this Parliamentary session. I am pleased this Bill represents an opportunity for quick and efficient Scottish Government action in response to issues that need addressing through primary legislative change.

I hope this is helpful.

Kenny MacAskill MSP
Cabinet Secretary for Justice
29 January 2010

ANNEXE A – SG RESPONSE TO STAGE 1 REPORT RECOMMENDATIONS

(For ease of reference, the Committee's comments are shown in **bold** and our responses are shown in plain text)

Sections 1-2

The Committee believes that the purposes or principles of sentencing, as established by common law, are already well understood by the courts. The common law has the advantage that it can more easily evolve and develop in response to changes in social attitudes; fixing this common-law understanding in statute carries a risk of unintended consequences, and may also lose some of the nuances of case-law jurisprudence.

What is more, it is generally understood to be a principle of legislative drafting to make provision only where it is necessary to do so – and, indeed, this has often been articulated by Ministers (both of the current and previous administrations) as a reason to resist backbench amendments.

Considering section 1 in isolation, therefore, we are not convinced that a sufficiently good case has been made for its inclusion. However, we recognise the Scottish Government's view that an opening section setting out in broad terms what sentencing is for may be a useful preliminary to the creation of a Scottish Sentencing Council. Accordingly, we invite the Scottish Government both to justify the necessity for setting out the purposes and principles of sentencing in the Bill and to provide assurance that the provisions in sections 1 and 2 do not inadvertently change the law. Without adequate justification and assurance, we are liable to conclude that retaining these sections in the Bill may be problematic.

We acknowledge that all the purposes listed in subsection (1), and the "other matters" to which the courts must have regard listed in subsections (3) and (4), have a part to play in sentencing decisions. We believe it is important that, if these are to be listed in statute, they are regarded as non-exhaustive and unranked lists, with the order not implying any general priority of earlier items over later ones. We also note that, while the section title refers both to "purposes" and "principles", only purposes are actually listed. In our view, principles of fairness, justice and proportionality are at least as important as the purposes already included, and we therefore invite the Scottish Government to consider including these principles within the section (or removing reference to "principles" from the section title).

The Committee is also uncertain as to why subsections (2) and (3) of section 1 are disapplied in relation to persons under the age of 18. Our presumption would be that the matters listed in subsection (3) are still

relevant in that context, albeit in a context where the offender's age is also a significant factor.

We are also unclear what status subsection (1) is meant to have in relation to a young offender – it is not disapplied, but the court is under no obligation to have regard to it in sentencing that offender. We would invite the Scottish Government either to provide a better justification for its drafting approach here, or to bring forward amendments to clarify the application of section 1 to under-18 offenders.

The Committee has also found difficulty with the relationship between the purposes of sentencing in section 1 and the sentencing guidelines to be issued by the Scottish Sentencing Council (SSC). Specifically, the SSC does not appear to be required to reflect the purposes in preparing guidelines, but the courts are obliged to give precedence to the guidelines should they and the purposes of sentencing come into conflict (section 2(2)).

We do not see the logic of creating a statutory Sentencing Council and, at the same time, setting out the purposes of sentencing in statutory form if that Council is not itself made subject to those purposes in carrying out its work. That way, there should be no question of the council issuing guidelines that are inconsistent with the purposes of sentencing.

We recognise that the Scottish Sentencing Council is likely, in practice, to follow the purposes in any event, and there may also be reasons for not having this as a statutory obligation on the Council. Nevertheless, we believe the Scottish Government needs to do more to explain its thinking on these matters, so that the Committee can either satisfy itself that the relationship is an appropriate one, or consider how it might be amended at Stage 2.

Scottish Government response

Although it may well be the case that the courts understand the purposes and principles of sentencing, we do not consider they are well understood by the public, by those caught up in the criminal justice system as victims, witnesses or even offenders.

The judicially-led Sentencing Commission, which examined the issue of consistency in sentencing in Scotland, considered that a useful step towards the elimination of unwarranted disparity in sentencing would be to enshrine the purposes of sentencing in statute.

Public perception of justice and the sentencing process remains poor and if we are to improve confidence in the criminal justice system and promote consistency and transparency, we consider it necessary to set out clearly in statute the function and rationale of sentencing.

The provisions in the Bill require the sentencer to 'have regard to' the purposes of sentencing and the matters set out in section 1(3). We do not consider that this impacts on the ability of the sentencer to consider each case on its individual merits. The Bill provides that in the case of any conflict between the common law and the duties on the court under section 1, then the duties on the court under section 1 should prevail.

Section 1(1) has no application to young offenders as the duty on the court to have regard to the matters in section 1(1) is disapplied in respect of young offenders. The matters referred to in section 1(1) and 1(3) are still relevant to a young offender, but there are further principles that also need to be considered in relation to young offenders which we have not sought to set out in this Bill at this time.

It is likely that any Sentencing Council guidelines would be issued within the context of the purposes of sentencing and the matters referred to in section 1(3). Sentencing Council guidelines on specific offences may be more detailed than the matters referred to in section 1 of the Bill.

There is nothing in the text of the Bill to suggest that the purposes and principles are in any way ranked in order of importance. The list of purposes in section 1(1) is exhaustive whereas the matters that the court must have regard to under section 1(3) is non-exhaustive.

We plan to lodge amendments at Stage 2 to clarify that the matters that the court must have regard to under section 1(3) are to referred to as the principles of sentencing. The principles of fairness, justice and proportionality are the basis for the provisions we have made in the Bill.

Sections 3-13 and Schedule 1

The Committee recognises that some degree of inconsistency in sentencing is probably inevitable in any system that respects the independence both of the judiciary as a whole and of individual sentencers. We also accept that there is a perception, both among people working in the justice system and among the wider public as well, of at least a degree of inconsistency in the sentences given out by different judges or in different locations for similar offences. We have not been convinced that there is clear objective evidence – as opposed to anecdotal and circumstantial evidence – to substantiate this perception, no doubt partly because of the inherent difficulties involved in comparing individual sentencing decisions on a like-for-like basis.

We regard any actual – or indeed perceived – inconsistency as a problem, in that it runs counter to the principle of fairness that must be central to any justice system. We therefore support the aim of minimising inconsistency in sentencing. However, that aim cannot be an over-riding one, and must clearly be balanced against other considerations – including cost, and the potential for compromising other principles of justice.

A majority of the Committee is not yet convinced that a Scottish Sentencing Council, as proposed in the Bill, can be justified in terms of its capacity to reduce inconsistency beyond what might be achieved using existing mechanisms (such as the existing power of the Appeal Court to issue guideline judgments).

On the other hand, we are also conscious that there are other aims for the Council, including the consideration of wider sentencing issues, and the promotion of relevant research.

We accept that there may be a case for the setting of guidelines for sentencers, but recognise that there are issues as to how such guidelines are approved and promulgated. Overall, taking account of the other aims that it may serve, which we support, we recognise that there could be merit in a Sentencing Council. A Sentencing Council will inevitably have some influence on judicial discretion (indeed, there would be little point in having it if it did not), and there is a tension between that and the principle of separation of powers.

There was no consensus view in the Committee on how that tension is best addressed. A majority of members would prefer a structure in which sentencing guidelines developed by any Sentencing Council would take effect only after formal endorsement by the Appeal Court. These members argue that such endorsement would no doubt be forthcoming in the large majority of cases, but such a structure would also enable there to be a constructive dialogue in cases where the Court questioned some aspect of the guidelines proposed. These members also believe that having any guidelines issued with the authority of the Court itself is the best means of resolving the constitutional concerns about the role of the Sentencing Council that some witnesses have raised.

An alternative view within the Committee is that, to the extent that any adjustment to the provisions of the Bill is needed to address those concerns, it would be preferable to adjust the composition of the Council to provide a judicial majority. On this view, any structure that leaves the courts with the final say on sentencing guidelines would not represent a sufficient advance over the present arrangements. In that context we regard the safeguard in the Bill – that any court can decide not to follow a sentencing guideline so long as it states its reason for doing so – as essential, and the minimum necessary to preserve judicial independence. We will keep an open mind during Stage 2 as to whether further such safeguards are necessary, particularly whether the Council's composition should be adjusted to ensure there is a judicial majority.

On other aspects of the Council's composition, we can be more definite. We do not believe that a constable should be included among the "legal members" (although it will of course be important for the police to have a proper input in other ways to the Council's deliberations). We also

think there is at least a question whether a prosecutor should be included.

We do not support any of the various suggestions made to us for additional members (such as a representative of the Scottish Prisons Service, or of local authorities). We do, however, have sympathy with concerns made in evidence that the Bill would allow – at least in principle – the appointment of two sheriff principals but no sheriff, or two stipendiary magistrates but no JP – thus unbalancing the judicial composition of the Council. This may be unlikely in practice, but we suggest that some redrafting would address these concerns – perhaps by amalgamating what are currently separate requirements into a single requirement for three judicial members holding (any of) the offices of sheriff, sheriff principal, JP or stipendiary magistrate, of whom at least one must be a sheriff and at least one a JP.

We note the concerns of some witnesses as to the costs of establishing a Sentencing Council, and ask the Scottish Government to consider further whether this cost is still a priority for the use of scarce Justice Department resources at a time of financial stringency.

Scottish Government response
We are pleased that the Committee has indicated its support of our aim of improving consistency in sentencing and has recognised the need to tackle the current poor public perception of sentencing. We are also pleased to see that the Committee has recognised the merit in the creation of a Scottish Sentencing Council.

The Committee's report set out the concerns from some quarters about the impact of the Sentencing Council on judicial independence. We see the Council and its guidelines as a resource for the courts and we will be giving further consideration to the thoughts of the Committee on how best to achieve our aims while maintaining judicial independence.

We have noted the Committee's objection to the inclusion of a constable among the 'legal members' of the Sentencing Council and plan to lodge Stage 2 amendments to address this. We also plan to lodge Stage 2 amendments to address the Committee's point about the possibility of unbalancing the judicial composition of the Council. The recommendation to include representation from the prosecuting authorities was included in the Sentencing Commission report on improving consistency and we continue to believe that there is merit in their inclusion.

We do still believe that the cost of the establishment of the Sentencing Council is justified. Compared to the overall cost of sentencing decisions, the cost of the proposed Council is minimal. Of course we will take every opportunity to minimise costs where practicable and will work closely with the Scottish Court Service to do so.

Section 14

The Committee broadly supports the creation of community payback orders (CPOs) on the grounds that they should simplify and strengthen the current range of community sentences, allowing more focus on offenders' needs. However, we are also convinced that CPOs will not deliver the benefits envisaged for them unless they are adequately resourced – and we find it difficult or impossible to be sure at this stage whether sufficient funds have been or will be made available.

We are conscious that the level of take-up of CPOs will be closely linked to the views of sentencers on their effectiveness and the impact of any new statutory presumption against short-term custodial sentences, and that the Scottish Government itself cannot forecast with any confidence how many CPOs are likely to be made. What does seem clear is that there is very little prospect of any significant savings being made, in the short to medium term, in the largely fixed costs of running Scotland's prisons even if the Bill succeeds in its aim of diverting a substantial number of offenders from custodial to community disposals.

Therefore, even though community sentences are generally cheaper than imprisonment, there will be a need for additional resources to make this approach work. (We also recognise, however, that if nothing is done to address rising prison populations, it will at some point become necessary to increase prison capacity, and that this will also have significant resource implications.)

We strongly believe that, if CPOs are to gain credibility with the public, and with the victims of crime in particular, they must begin (and be seen to begin) very shortly after sentence is declared – either on the day of sentence or (where this is not practicable, as we accept will sometimes be the case) as soon as possible thereafter. This is on the same principle that judgment should be given as soon as possible after an offence is committed – namely that justice delayed is justice denied.

The Cabinet Secretary has already announced some additional resources for existing community sentences, but until we know what the level of take-up will be, it is difficult or impossible to say whether current budgets will be sufficient. It is clear that many witnesses are concerned about this issue, and equally clear that an increased take up of CPOs of 10% or 20% (as postulated by the Scottish Government in the Financial Memorandum) will require additional resources.

We welcome the additional resources already committed, but note that they require to be used both to eliminate barriers to the speedy commencement of the orders, and to address issues of quality. There may also be issues about the adequacy of the unit cost calculation used in this context. Further, it is evident that the programme, residence, mental health treatment, drug treatment or alcohol treatment requirements that may be applied to the new orders will require additional resourcing.

The Committee asks the Scottish Government to provide further assurance as to how such costs are to be met. Thereafter we need a commitment by Ministers to keep the level of take-up under review, and to bring forward additional funding as required.
In this connection, we are conscious that, while the main impact will be felt by criminal justice social work services, there will be resource implications for other areas. For example, there will be additional costs for the Scottish Court Service as a consequence of the progress reviews, and for voluntary sector bodies involved in the delivery of the new CPOs. Appropriate consideration must be given to these wider resource implications.

We do not agree with those witnesses who argued that progress courts should have been established as specialist courts, as the Prisons Commission recommended. We believe this should be a matter for individual sheriffs principal to consider in the light of local circumstances. We also believe the Bill gets it right in making progress reviews optional, so that the resources involved in them can be targeted to where they are most needed.

The Committee also recommends that the Scottish Government reconsider some of the terminology used in the Bill, specifically whether an alternative name might be considered to avoid confusion over the term "supervision requirement". We also invite the Scottish Government to consider making the rehabilitative element in community payback orders clearer.

Scottish Government response
We are pleased that the Committee has broadly supported the introduction of the Community Payback Order.

The Community Payback Order will ensure that sentences served in the community are robust, immediate and visible to the community. We have already issued revised guidance to speed up the start of community service orders. From 1 June 2009, placements should begin within 7 working days of sentence being passed rather than 21 working days as in the past. We are also looking at opportunities to trial same-day starts, as the Committee is calling for. In addition to rapid starts, the Bill will support quicker completion of orders as the court will be able to specify that the unpaid work element of sentences will be completed in 6 months rather than 12. We believe these measures will help maintain and increase public confidence in community sentences.

We share the Committee's conclusion that the new sentence must be adequately resourced. That is why along with our partners, we will be monitoring the level of take-up of the CPO closely. As for the additional funding, we have set out our budget for 2010/11: we have announced extra resources and have said it will be baselined thereafter. We have announced a total of £9.5m additional funding into community service: £3.5m for 2009/10 and £6m for 2010/11. The extra £6m for 2010/11 will come from elsewhere in the Justice budget – areas not critical to community sentences. For example the ending of the mandatory drug testing pilot will make available £1.8m a year. There will also be transfers from other parts of the justice budget, primarily from the centrally-held budget established to address reductions in reoffending. Once the new CPO provisions have been implemented we will monitor its use as a key input to future resourcing decisions.

The costs associated with the provision of the requirements under the CPO will be met from within the existing baseline for criminal justice social work. While it is difficult to predict the size of any increase in the imposition of these requirements, experience in England & Wales since the introduction of the community order is that the average number of requirements per order has remained broadly constant. In Scotland, the average number of additional conditions per probation order is estimated at 1.2 per order. However, we will of course keep the level of take up under review.

In relation to the use of the term ‘supervision requirement’, we are aware that there are proposals contained in the draft Children’s Hearings Bill (published on 26 June 2009) to change the term in that context to ‘Compulsory Supervision Order’. Subject to the parliamentary process, if the draft changes in that Bill are enacted, we believe that any potential confusion should be eliminated.

The name ‘community payback order’ was based on the definition of ‘payback’ provided by the Prisons Commission in its report ‘Scotland’s Choice’ which was clear that payback to the community should be the focus of our criminal justice system. We have deliberately adopted this broader interpretation rather than the narrower definitions assumed by some. We remain convinced that public understanding of the purpose of the new community sentence, and confidence in it, will be supported by the name ‘community payback order’. We do not therefore propose to amend it.

Section 16

There is clearly uncertainty from the evidence about whether there are, in fact, any police cells in remote parts of Scotland that are certified for use for short-term detention. The Committee invites the Scottish Government to provide clarification on this point, and also to explain more fully how the process of certification operates.

We would also suggest that further consideration be given to whether, even if no police cells are currently certified, this is a sufficient basis to repeal the provision that enables them to be so certified. We can envisage circumstances in which the facility to detain people in such cells, as an alternative to a long journey to the nearest prison, could continue to be useful.

Scottish Government response

The operation of ‘certified’ police cells is provided for within sections 206(2)-(6) of the Criminal Procedure (Scotland) Act 1995 (‘the 1995 Act’) as follows:

> SECTION 206 - MINIMUM PERIODS OF IMPRISONMENT
> (2) Where a court of summary jurisdiction has power to impose imprisonment on an offender, it may, if any suitable place provided and certified as mentioned in subsection (4) below is available for the purpose, sentence the offender to be detained therein, for such period not exceeding four days as the court thinks fit, and an extract of the finding and sentence shall be delivered with the offender to the person in charge of the place where the offender is to be detained and shall be a sufficient authority for his detention in that place in accordance with the sentence.
> (3) The expenses of the maintenance of offenders detained under this section shall be defrayed in like manner as the expenses of the maintenance of prisoners under the Prisons (Scotland) Act 1989.
> (4) The Scottish Ministers may, on the application of any police authority, certify any police cells or other similar places provided by the authority to be suitable places for the detention of persons sentenced to detention under this section, and may by statutory instrument make regulations for the inspection of places so provided, the treatment of persons detained therein and generally for carrying this section into effect.
> (5) No place certified under this section shall be used for the detention of females unless provision is made for their supervision by female officers.
> (6) In this section the expression “police authority” has the same meaning as in the Police (Scotland) Act 1967.

The operation of ‘legalised’ police cells is provided for within section 14 of the Prisons (Scotland) Act 1989 (‘the 1989 Act’) as follows:

> SECTION 14 – LEGALISED POLICE CELLS
> 1) The Scottish Ministers, on the application of a police authority, may from time to time by rules under section 39 of this Act declare that any police cells or other premises in the possession of the police authority shall be a legal prison for the detention of prisoners before, during or after trial for any period not exceeding 30 days. Any such police cells or other premises are hereinafter referred to as legalised police cells.
> (2) Any person charged with or convicted of any crime or offence committed within the area of a council who might have been lawfully confined in a prison situated therein may be lawfully confined in any legalised police cells situated in that area for such period as aforesaid.
> (3) The maintenance of prisoners confined in any legalised police cells shall be deemed to be the maintenance of prisoners under this Act:
> Provided that the police authority shall not be entitled to any payment for the use of the legalised police cells or for services rendered by any of their officers in connection with the detention or removal of the prisoners so confined.
> (4) The police authority, notwithstanding anything in this section, shall at all times have a prior claim to the uninterrupted use of any legalised police cells in their area.
> (5) For the purposes of this section the police authority of the area of a council in which there are any legalised police cells and all persons in their employment shall be subject to the provisions of this Act and any rules made thereunder.
> (6) It shall be the duty of the Scottish Ministers to make any arrangements required for the removal of any prisoners confined in legalised police cells in the areas of the councils for Orkney Islands and Shetland Islands.
> (7) In this section the expression “police authority” means a council, except that where there is an amalgamation scheme in force under the Police (Scotland) Act 1967 it means a joint police board.
> (8) For the purposes of sections 8 and 39 of this Act, legalised police cells shall be deemed to be prisons.
> (9) In this section, “council” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994.

There are currently Legalised Police Cells in 9 locations:

- Campbeltown
- Dunoon
- Hawick
- Kirkwall
- Lerwick
- Lochmaddy
- Oban
- Stornoway
- Thurso

As a result of the operation of ‘legalised’ police cells, there have been no ‘certified’ police cells used for many years and we can confirm that, not withstanding the evidence received by the Committee suggesting the contrary, Kirkwall (Orkney), Lerwick (Shetland) and Stornoway (the Western Isles) all have ‘legalised’ police cells rather than ‘certified’ police cells.

In conclusion, should any police authority wish to have available facilities to hold prisoners pending transfer to the nearest prison, then the powers under section 14 of the Prisons (Scotland) Act 1989 are sufficient and should be utilised in applying to the Scottish Ministers for police cells (or other police premises) to be designated as ‘legalised police cells’.

Section 17

The Committee agrees that there is a need to strike a proper balance between the imposition of short custodial sentences and effective community disposals. Additionally, the Committee agrees that there is a need to develop a range of community sentences in which the public can have confidence and which present the best chance of long-term rehabilitation of offenders. However, members were unable to agree on whether it was either necessary or desirable to create a statutory presumption against custodial sentences of six months or less in order to achieve that balance.

All Committee members recognise that the priority is to imprison offenders who (as the Prisons Commission said) commit offences so serious that no other form of punishment will do or who pose a threat of serious harm to the public. Committee members also recognise that those who have persistently failed to respond to non-custodial disposals may also have to be imprisoned. We acknowledge that this is, to a significant extent at least, what sentencers already aim to do, and that they do not lightly send people to prison if this is unlikely to benefit either them or those affected by their offending behaviour.

We accept that short prison sentences do not normally achieve much by way of rehabilitation, that while they provide respite for victims and communities, this is only for a limited period, and that high re-offending rates tend to demonstrate that they have limited effect as a deterrent. Finally, we all recognise that the Bill, although undoubtedly intended to shift sentencing behaviour, leaves the final decision in any individual case to the court, thus allowing a short-term prison sentence still to be

given where the court is convinced that that is the best option in the circumstances.
Where Committee members do not agree is on how far short-term custodial sentences should continue to be regarded as an appropriate disposal (other than in exceptional circumstances), and on whether they are currently being overused, or inappropriately used.

Some members point to the weight of evidence, particularly from academics, suggesting that short sentences involve only "warehousing" of offenders and provide no real opportunity to engage them in programmes to tackle their offending behaviour or address their other problems – and indeed that imprisonment itself may make those problems worse. These members also cite Scotland's high incarceration rate, and the re-offending statistics, in support of the view that current sentencing policy is not working.

However, other members question that evidence, pointing out in particular that, since the people the courts imprison are likely to be the more persistent or serious offenders, it is hardly surprising that their re-offending rates are higher than those given community disposals. These members also cite examples referred to by witnesses, where a short prison sentence has had a salutary effect in persuading an offender to change his or her behaviour, even where previous community disposals had failed to do so. They also question the assumption that short-term sentences are currently given out where better alternatives exist, and hence doubt that a statutory presumption will make any real difference.

At least one member of the Committee questions whether, in the context of a provision aimed at discouraging sentencers from imposing short custodial sentences, a six-month threshold is the right one to use. On this view, reducing this to (say) three months, at least initially, would focus the provision on those cases where there is the least chance of rehabilitation in prison and which are least likely to involve serious or violent offences.

Overall, the Committee did not agree with the proposal in the Bill to create a statutory presumption against short-term custodial sentences.

Scottish Government response
We note the Committee's detailed consideration of this issue, and its agreement on the limited effectiveness of short prison sentences as a deterrent, for rehabilitation and in providing respite to communities.

The difference in reoffending rates is very marked: 74% of those released from short custodial sentences go on to reoffend within two years of getting out. Only 42% of people sentenced to community service orders go on to reoffend in the same period. Moreover, the average time spent in prison, after conviction, on a sentence of 6 months or less is only 3 weeks. That is not enough time to address reoffending.

We note the salutary effect that a short prison sentence can have in some cases, where community disposals have not worked. We recognise this and the bill allows for it. Judges will still be able to use short custodial sentences where they think it is the only option. And if an offender breaches a community payback order, the judge will be able to impose a custodial sentence where needed in almost all cases. On the doubt that a statutory presumption will make any real difference, we note the comments by Sheriff Michael Fletcher (Honorary President of the Sheriffs' Association) who told the Committee on 12 May:

> '…all sheriffs and justices would have regard to that rule, because we are bound to do so. It would cause us to hesitate, because we would have to think about whether we can truly justify giving such a sentence.'

Most sentences of 6 months or less are given for a small group of offences of which the largest are shoplifting, breach of the peace, breaches of bail or social work orders, petty assault and handling of an offensive weapon. These are also the most common crimes in the list of offences receiving sentences of 3 months or less. In particular, 7% of sentenced receptions to prison for 6 months or less and 6% of sentenced receptions of 3 months or less are for handling offensive weapons. As the First Minister has said, people who commit serious offences should receive long jail sentences, not short sentences which the Committee has acknowledged do too little to deter and to prevent reoffending.

Section 18

The Committee has found this a particularly difficult provision to assess, because of the complex interface between the current law, the regime that would be introduced by commencing relevant provisions of the 2007 Act as it was enacted, and the version of that Act that would result from the amendments made by the Bill. We are grateful to Scottish Government officials and to SPICe for providing the Committee with additional briefing on this section at a late stage in our Stage 1 consideration.

We understand the general intention of the 2007 Act to move away from a system of automatic and unconditional early release to a system that allows appropriate conditions to be imposed. However, we also recognise the serious concerns that have been raised about the complexity and cost involved in implementing that Act unamended, given the number of prisoners who would be subject to supervision and assessment requirements.

We therefore agree that the Bill represents some improvement on the current law, as it will result in more prisoners being subject to statutory supervision on release and fewer to automatic unconditional early release, while avoiding the more onerous requirements of the 2007 Act.

We understand that the intention is to set the threshold at sentences of one or two years' duration, and we note the significant difference in the resource implications according to which of these is chosen. We also note the Subordinate Legislation Committee's concerns about the unlimited nature of the power delegated by this provision, and welcome the Scottish Government's commitment (in response to that Committee) to consider whether appropriate parameters might be specified in the Bill.

Scottish Government response
The proposed amendments to Custodial Sentences and Weapons (Scotland) Act 2007 reflect the recommendations in the Prisons Commission's report about what would be required to make the custodial sentences measures in the 2007 Act viable and, in due course, enable the Scottish Government to replace the current system of early release.

When implemented, the measures in the 2007 Act (as amended by section 18 of the Bill) will remove the current custody-only provision in the 2007 Act and provide for a two tier custody and community regime determined by the length of the sentence. This will see all offenders sentenced to imprisonment provided with statutory supports during the community part of the sentence. This will include mandatory supervision for all but those sentenced to short periods of imprisonment although, even in these cases, supervision could be imposed as a licence condition if considered appropriate in any particular case.

Concerns have been raised about the current proposal to provide an order making power that will allow the Scottish Ministers to 'set the bar' at which the lower tier custody and community arrangements give over to the more intensive arrangements. We have considered whether appropriate parameters might be specified in the Bill but remain of the view that it would not be appropriate to set it now. Although we are committed to implementing the new measures as soon as practicable, this work is incorporated within the wider Reducing Reoffending Programme. This will enable the impact that the new measures will have on the SPS and local authority criminal justice services to be properly assessed and taken into account within the implementation pathway. As the Scottish Prisons Commission noted, the size of the prisoner population will be the critical factor in determining when the new arrangements can be brought on stream.

We need to assess the evidence in 'real time' to ensure that the period set provides for a modern and flexible offender management regime for those sentenced to imprisonment. We therefore believe that the proposal to provide an order making power to allow us to 'set the bar' between the proposed two tiers of sentence management is the best way to ensure that we can deliver the new measures in the 2007 Act (as amended by section 18 of the Bill) as quickly and effectively as possible taking account of future developments around the prison service, prisoner numbers and the local authorities' resources. It may also prove, on the basis of future data (and in the light of the benefits of the investment in the prisons estate and the community payback strategy), that custody and community sentences are more effective for sentences of a certain length. Setting a limit in primary legislation beyond which the line could not be moved may impede that development.

Section 24

The Committee fully supports the principle that voluntary intoxication by alcohol should not be regarded as a mitigating factor in sentencing, but most members are less convinced of the case for codifying this principle in statute. The evidence suggests the principle is already well understood by sentencers, and there may be a risk that a statutory provision will confuse the legal position instead of clarifying it. This is partly because of uncertainty about the meaning of "voluntary" intoxication, and about the distinction between the intoxication itself and any underlying circumstances which might properly be regarded as mitigating.

It could also be inferred from the fact that the provision mentions only alcohol in the context of what is not to be regarded as a mitigating factor, that the position in respect of other forms of intoxication must be intended to be different. It would be unfortunate if one of the consequences of this well-intentioned provision was to make it easier to advance an argument for mitigation in the context of voluntary intoxication by drugs. We would therefore be grateful for further explanation from the Scottish Government about the rationale for this provision and its response to these concerns.

Scottish Government response

This provision forms part of our comprehensive framework for action to rebalance Scotland's relationship with alcohol. There is a very strong link between alcohol misuse and offending – in particular violent offending.

In spite of the understanding of the courts, there is evidence that time and time again voluntary intoxication is being put before them as a mitigating factor. In her evidence to the Committee, the Lord Advocate said:

> '…day in, day out, notwithstanding the understanding that it does not mitigate, solicitors continue to put it before the courts in mitigation that their client would not have carried out the crime if sober. That is particularly prevalent as an excuse or as a form of mitigation in domestic abuse cases.'

We do not accept that the provision in the Bill prevents the court from considering the underlying reason for an offender's intoxication as a mitigating factor (e.g. a bereavement) even though the intoxication itself cannot be a mitigating factor.

We also do not accept that the provision implies that the position in respect of other forms of intoxication must be intended to be different. The key issue here is the high level of offending associated with alcohol.

Sections 25-28

We strongly support the underlying intention of these sections of the Bill to provide additional tools for the police and the courts to tackle those involved in serious organised crime. We are less certain, however, that the Bill gets the detail right.

While there was contradictory evidence and most members are not entirely clear on what sections 25 and 27 add to the existing common law on conspiracy and incitement, and while we have some concern that the key terms of "involvement" and "direction" are insufficiently clear, on balance we support the creation of these new offences. We also support the new aggravation provided for in section 26, although we are not wholly convinced of the case for removing the normal requirement for corroborating evidence. We would therefore welcome a clearer justification for this element of the provision from Ministers.

We have considered carefully the evidence we have received about the definitions underpinning these new offences, namely the definitions of "serious organised crime" and "serious offence". The main concern is that they are too widely drawn, and in this context we note that there is some dispute about whether offences need to be widely drawn in statute to ensure that the courts can apply them as intended. The Lord Advocate advanced this view, suggesting that ECHR case-law has made it increasingly difficult for the courts to "expand" on a narrowly-drawn statutory definition in deciding what constitutes an offence.

However, the Committee's criminal justice adviser (Professor Peter Duff) has suggested that the European Court of Human Rights extends a considerable "margin of appreciation" to domestic courts, and that if the serious organised crime offences were more tightly defined, the Court "would grant the Scottish courts considerable leeway in interpreting the legislation creatively to extend to all the types of mischief it was intended to cover". Accordingly, we invite the Scottish Government to re-examine the extent to which it may be possible to tighten the definitions in the light of the evidence we have received.

Of the provisions on serious organised crime, the one that has given us most difficulty is the section 28 offence of failure to report serious organised crime. It would clearly aid the fight against serious organised crime if people who come into contact with it, even quite innocently or inadvertently, were more prepared to report their suspicions to the police – but it is much less clear that a criminal sanction for not doing so is a fair or indeed effective way of encouraging this. People may be reluctant to report suspicions to the police for quite understandable reasons.

We also think more allowance should be made for the nature of a person's role if they are to be held liable for not reporting suspicions arising from information gained in the course of their business or

employment. For example, if unusually large amounts of cash are banked by a small business and this prompts suspicion among bank staff, it is one thing to hold liable for not reporting this a senior manager or trained professional, but another to hold liable a junior cashier. Similar concerns may arise about information gained through a "close personal relationships" from which a "material benefit" is derived, as this could apply to the teenage child of a gangster who has begun to understand where the family income comes from.

While we do not agree with Sir Gerald Gordon that section 28 has "totalitarian overtones", we do agree with his view that the provision could certainly be improved. For the time being, we invite the Scottish Government either to provide a better justification for this provision, or to bring forward amendments that will address the concerns raised.

Scottish Government response

- What do these offences add to conspiracy etc.

The Scottish Government supported by the Serious Organised Crime Taskforce want to provide a range of statutory offences to help tackle serious organised crime. We recognise there is some overlap between section 25 and the offence of conspiracy but we consider it necessary to take specific action to give law enforcement more powers to deal with serious organised crime. We consider this offence will give them additional flexibility to tackle these people as well as putting on the public record that these offences have taken place in connection with serious organised crime.

- Terms of involvement and direction are insufficiently unclear

The offences are deliberately widely framed but we feel they need to be in order to catch the very wide ranging and evolving types of activity that serious organised crime involves itself in. Defining more closely would potentially restrict the effect of the offences and limit the kinds of acts we are trying to capture now and in the future. We do not want to be in a position where we have to repeatedly come back to Parliament to modify this section as and when future types of behaviour around serious organised crime become apparent to the authorities. The flexibility around these offences should allow law enforcement to stay ahead of the crime groups and to take prompt action not place them on the back foot as offending behaviour changes.

- Aggravation – removing corroborating evidence

We welcome the Committee's support for the new aggravation around serious organised crime. The Committee are concerned though about the removal of normal requirement for corroborating evidence. Although in this section evidence from a single source is sufficient to establish the aggravation, it is important to emphasise that at least 2 sources of evidence will of course still be required to establish the accused's guilt in relation to the offence charged. This does nothing to change that general principle of Scots criminal law. The aggravation does nothing to alter a finding of guilt established by corroborated evidence; it simply allows the sheriff/judge to take account of the serious organised crime context of the offence when sentencing and obliges them to record that aggravation. This is not a novel provision in statutory aggravations (sections 1(4) and 2(4) of the Offences (Aggravation by Prejudice) Act 2009 being one example). We hope this is enough to satisfy Committee but happy to engage further if necessary.

- Serious organised crime and serious offence definitions - too wide

We are continuing to work in looking at these definitions. However we remain to be convinced that significant changes are required. Both the Lord Advocate and the Chief Constable of Strathclyde Police, Stephen House, made clear in their evidence to the Committee the need for wide ranging definitions and we need to ensure we give law enforcement and the prosecution the tools they require to be as flexible as possible. We want to capture all forms of serious organised crime, to get at its heart and provide flexibility. We are continuing to look at the definitions to ensure they are sufficiently tight but at the same time ensure that the wide variety and changing conduct involved is still effectively captured.

- Failing to report criminal sanction is not fair for not reporting

Our intention is to penalise people who have benefited from not reporting serious organised crime. We do not want to capture people who have inadvertently become aware of or suspect criminality from going about their normal business. However where somebody has benefited from not reporting it, then they should be penalised. We intend to bring forward amendments at Stage 2 that we hope will satisfy Committee to ensure that a person would not unwittingly be caught by these provisions.

- Junior member

We note the comments made and do accept the points made. We intend to address the issue as we do not intend to capture with this offence those junior members of staff who carry out a task at the instruction of an employer who knows or suspects that it relates to serious organised crime. We intend to lodge amendments to require a direct link between an individual's knowledge, the service they provide and the benefit they receive from serious organised crime.

- Close personal relationships and material benefit- better justification required

We have thought more around the 'material benefit' which can be wide ranging and we intend to bring forward amendments that will more accurately reflect the forms of benefits we are aiming to capture such as being linked to certain property.

Section 34

The Committee shares the Scottish Government's aim to protect the public from extreme pornography, but has noted a range of concerns raised in evidence about the parameters of the new offence proposed. There are various points on which we would seek further clarification from the Scottish Government. The first is why the definition of "extreme image" includes a much broader reference to depictions of rape than was suggested in consultation and is provided for in the equivalent England and Wales legislation.

Secondly, we would be grateful for further explanation about why that definition refers to "realistic" depictions of sexual acts, and how that relates to cartoons or other images that have been distorted or have a fantasy element.

Thirdly, we would seek clarification on the rationale for using the term "obscene" as part of the definition of extreme pornography, when that term is itself undefined in the Bill, and whether any consideration was given to alternative definitions in terms of the cultural harm that pornography can cause.

Finally, we would be grateful for clarification of what is meant by "possession" of extreme pornography, and whether, in the absence of any definition in the Bill, what understanding of that term would be relied on by the courts (particularly where images come into someone's possession through electronic transmission).

The Committee accepts the rationale for excluding from the offence of possessing extreme pornography images that form all or part of a classified work, such as a film granted a certificate by the British Board of Film Classification. However, we are uncertain about some of the practical implications, for example whether it offers protection from prosecution to the film-maker who is in possession of a film that the BBFC has not yet been able to consider for certification.

We are satisfied with the defences that are provided in inserted section 51C. In particular, while we note the concerns raised in evidence, we agree that the Bill is right to distinguish between the possession of an image by those who participated in the sexual activity depicted and the onward transmission of that image to third parties.

Scottish Government response

- Definition of 'extreme image'

We believe that the specific inclusion of images of rape within the definition of extreme pornography sends out a clear message about the unacceptability of any pornographic depiction of rape.

We note that the majority of respondents to the Justice Committee's consultation on the draft Bill who commented on this section were supportive of the inclusion of all pornographic images of rape. Rape Crisis Scotland, for example, commented:

> 'Rape Crisis Scotland supports the inclusion in the bill of specific reference to rape and other non-consensual penetrative sexual activity within the definition of extreme pornography. Unlike similar legislation in England & Wales, the bill does not make a distinction between 'violent' rape, and rape in general, a distinction which is extremely unhelpful.'

The offence is based on that proposed by the short-life working group established by the then Scottish Executive to consider how an offence of possession of extreme pornography might be framed in Scots law. That group proposed a wider definition of 'extreme pornography' which would encompass all images of rape and non-consensual penetrative sexual activity.

- Definition refers to 'realistic' depictions of sexual acts

The definition of an extreme image is intended to be restricted to images, whether moving or still, which appear to a reasonable person to depict an act which is real. Our view is that there is a risk that such images normalise sexual violence and that the risk is greatest where such activities are depicted in a realistic manner. Where the image is realistic, the person possessing it may have no way of knowing that it does not depict a real image of a serious sexual offence. Although there is no requirement that it is actually real, the offence does not apply to cartoons or other animations which clearly do not depict real people carrying out real acts. On the other hand, a computer generated image of sufficient sophistication as to appear to a reasonable person to be depicting a real act would be caught.

- Use of the term 'obscene'

Under section 51 of the Civic Government (Scotland) Act 1982, it is an offence for any person to publish, sell, distribute, or to possess with a view to its eventual sale or distribution, any obscene material. An offence under section 51 will have been committed by someone in order for others to possess obscene material, but it can be difficult to take action to prevent its distribution as, where a person is found to be in possession of such material, the police require to find evidence of publication, sale or distribution of the material or an intention to sell or distribute it. The offence of possession of extreme pornographic material is intended to ensure that where this obscene material is extreme and pornographic, simple possession will be an offence, which will enable the police to seize the material and, if appropriate, submit a report to the procurator fiscal.

By providing that images must be obscene, in addition to being extreme and pornographic, we ensure that the possession of material which it is not currently illegal to sell or distribute is not inadvertently criminalised.

As to the absence of definition of obscene, it is not defined as we are of the view that obscenity is a relative concept which may vary according to time, circumstances and locality. The advantage of this approach is that the proper meaning of the term is left to the interpretation of the courts in the light of the prevailing moral consensus and the full facts and circumstances of each individual case. This is consistent with the approach in the 1982 Act which does not define obscene for the purposes of the section 51 offence. Therefore, obscenity is a concept with which the courts are already familiar by virtue of the 1982 Act.

- What is meant by 'possession' of extreme pornography

The term 'possession' is used in equivalent legislation concerning indecent images of children at section 52A of the Civic Government (Scotland) Act

1982. The police and the COPFS have confirmed that they are content with its use. Case law has defined possession in terms of a person having knowledge and control of the item in question. In normal circumstances, deleting images held on a computer is sufficient to divest possession of them. An exception would be where a person is shown to have intended to remain in control of the image even though he has apparently deleted it For example, where the use of software can retrieve the image.

In the context of images which come into someone's possession through electronic transmission, section 51C(2)(c) provides that it shall be a defence for a person to prove that he was sent the image concerned without any prior request having been made and did not keep it for an unreasonable time, or that he had not seen the image concerned and did not know, nor had any cause to suspect, it to be an extreme pornographic image. These defences are in line with those which apply in relation to the offence of possession of indecent images of children.

- Practical implications relating to 'classified works'

The specific exemption for BBFC-certificated films has been included within the provisions for the avoidance of doubt, so as to reassure members of the public in possession of BBFC-certificated films that they will not be prosecuted for possession of extreme pornography.

We do not consider that any BBFC-certificated film would meet the definition of extreme pornography as the BBFC are clear that they would not give a certificate to a pornographic film containing depictions of rape, serious sexual violence, bestiality or sexual activity with a corpse. As such it is appropriate that there should be no exemption for films which have not yet received BBFC certification, as any film which would fall within the offence provisions would not, in any case, receive BBFC certification. It is up to film makers to ensure that their films would not constitute extreme pornography.

- Defences

We note the Committee's comments.

Section 35

The Committee has no difficulties with this provision as far as it goes, but it would be useful to get a clearer indication of what else the Scottish Government is doing to tackle trafficking issues, particularly in view of the absence so far of convictions for sexual exploitation under the 2003 Act (notwithstanding suggestions that Glasgow has the highest number of trafficked persons outside London). We are sympathetic to the concerns expressed by ACPOS that the legislation should be sufficiently broad to cover all forms of trafficking.

We are particularly concerned that the problem may be exacerbated during the Commonwealth Games in 2014. We would therefore welcome assurances from the Cabinet Secretary that the changes made by the Bill will contribute meaningfully to addressing this problem.

Scottish Government response
We are grateful for the support of the Committee regarding these provisions.

- Other action to tackle Human Trafficking

A comprehensive range of measures designed to tackle all aspects of trafficking is set out in the UK Action Plan on Tackling Human Trafficking which is published jointly with UK Government. The Plan outlines our strategy in relation to trafficking in human beings and sets out work that is underway across the UK to address trafficking related issues.

- Coverage of Legislation

In relation to the concerns expressed by ACPOS, we would reassure the Committee that the current legislation already deals with the trafficking of human beings for labour exploitation, domestic servitude and organ harvesting and, in each case, covers trafficking into, within or outwith the UK. The provisions relating to trafficking of a human being for the purposes of forced labour etc. are contained in sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. This is additional to section 22 of the Criminal Justice (Scotland) Act 2003, which makes provision relating to trafficking of a human being for the purposes of prostitution etc. As these provisions make it clear that it is an offence to arrange or facilitate the trafficking of a human being for exploitation then the activity around the transit process is already caught.

- Commonwealth Games 2014

Our aim is to ensure that any risk of human trafficking associated with the Commonwealth Games is assessed and addressed. That is why the Commonwealth Games features as a specific issue in the UK Action Plan on Human Trafficking. The Commonwealth Games Security Planning team, a multi-agency group, has a remit to identify and address potential security measures which includes trafficking in human beings. The legislative measures currently in place and those proposed in this Bill will help in tackling the potential threat around the Commonwealth Games.

We would draw the attention of the Committee in particular to the provisions relating to closure notices and orders contained in section 72 of the Bill. If approved by Parliament, these provisions will provide the police with specific powers to close premises associated with human trafficking and other forms of exploitation. For the purposes of the closure powers a list of ‘exploitation offences’ is contained in the provisions which ensures that premises used for certain immigration offences such as falsification of documents and the trafficking in human beings for forced labour, slavery, servitude, organ transplant or for the purposes of prostitution etc. will be covered. We believe that this new power will help police address the misery caused by all forms of trafficking in human beings, including any threats identified in relation to the Commonwealth Games.

Section 38

The Committee recognises that there are various ways of addressing concerns about the fact that Scots law allows children as young as eight

to be regarded as criminally liable and prosecuted through the courts, when a minimum age of 12 is recommended by the UN Committee. However, we remain unclear why the Scottish Government has opted for raising the minimum age at which a child may be prosecuted, rather than also abolishing the rule of law on the age at which children cannot be guilty of an offence (as the Scottish Law Commission recommended).

An alternative, suggested by SCCYP, would have been to raise that age from eight to 12, and then to provide for a new "non-offence" ground to enable children below 12 to be referred to a Children's Hearing in cases where other grounds for referral do not apply. We find it difficult to assess whether the approach adopted in the Bill is the best available option without a fuller explanation of the Scottish Government's reasoning.

While we recognise that the difference between the various approaches may be mostly theoretical, it would be useful to know how far the Scottish Government's choice of approach was based on practical considerations, such as whether it would permit retention of children's forensic data, or how offences committed by children would be recorded (and what implications this might have for their future prospects).

We recognise that children under 12 can sometimes do terrible things, and if there is to be a statutory ban on criminal prosecution in all such cases, it would be useful to have an assurance from the Cabinet Secretary that there is a sufficient range of disposals available within the children's hearings system.

We note that the Bill does not change the existing situation in which the option of referring children to a Children's Hearing on the ground that they have committed an offence is unavailable for a child under the age of eight. We note that the Scottish Government intends to bring forward a Children's Hearings Bill in the near future and we trust that this issue will be properly and fully considered in that context.

On the question of whether 12 is the appropriate age threshold (either for being deemed capable of committing a crime, or for being liable to prosecution), we have no settled view. We recognise that any age is, to some extent, arbitrary, but there may be merit in having some consistency with age-limits in other relevant statutory contexts. We are conscious, in particular, that the new Sexual Offences (Scotland) Act 2009 sets an age threshold of 13 for the definition of various sexual offences against young children, and we suggest that the Scottish Government could do more to explain why the same age was not adopted in the current context.

Scottish Government response

We believe section 38 moves Scots law towards the expectations of the UN Committee on the Rights of the Child (UNCRC). The UNCRC requires State Parties to set a minimum age below which children shall be presumed not to have the capacity to infringe the penal law and that age should be at least 12. We believe that setting 12 as the age under which children cannot be prosecuted draws in line civil and criminal practice. Children under the age of 12 are not considered to be sufficiently mature to instruct a solicitor in civil proceedings and as a consequence to have the capacity to pursue and defend civil proceedings themselves. It should be noted that 12 was the age recommended by the Scottish Law Commission in their 'Report on Age of Criminal Responsibility' published in January 2002.

The Scottish Law Commission recommended abolishing any rule on the age at which children can be found guilty of an offence. This recommendation was not implemented as, if it were, it would mean that children under the age of eight could be charged with any offence as adult offenders, albeit they would be immune from prosecution. Given that it is widely appreciated that children under age 8 do not have the mental capacity (mens rea) to commit criminal acts, the approach above has not been adopted. Instead, new grounds of referral are being included in the Children's Hearings Bill to cover all situations where a child is in need of compulsory measures of supervision through the hearing, including behaviour that might be considered criminal if committed by an adult.

Children between the ages of 8 and 12 who commit serious offences will continue to have information retained on the Criminal History System and may have forensic samples (including DNA) retained (under provisions in section 59 of the Bill). These measures ensure that communities will continue to be protected despite a change in practice. In certain circumstances it is appropriate to retain conviction information in order to protect the public from harm. There is a balance to be struck between the rights of children and the rights of communities to be protected. Work is ongoing with ACPOS, the Scottish Police Services Authority and Disclosure Scotland to ensure we can strike the right balance and only retain and disclose conviction information when it is appropriate to do so.

We believe that Scotland has an internationally renowned and envied Children's Hearings system which already deals with the vast majority of offending behaviour, including very serious behaviour, committed by children under the age of 16. Children's Hearings consider both the child's behaviour and the measures that need to be put in place to change that behaviour. Improving the child's circumstances is paramount so that they can become positive contributors to society once adults. Children's Hearings have many disposals available to them, including placing children in secure care up to their 18 birthday if that is required. A Panel can also place a child on intensive support which can include an electronic tag. The Panel decides on the most appropriate intervention based on the needs of the child, the support required to change their behaviour and the measures needed to protect the public.

Sections 58-60

The Committee agrees with the Scottish Government that it is sensible to enable fingerprint data and other forensic data to be subject to the same ECHR-compatible retention regime as DNA data.

We are less certain about whether the current provisions in the Bill should be extended to cover forensic data taken from people who are then offered alternatives to prosecution. We certainly would not support any change that would result in the police being required or expected routinely to take samples in situations where, at present, fixed penalties or fiscal fines can be imposed with minimal time and bureaucracy.

However, we also recognise the logic of saying that, where a sample has already been taken from an individual in connection with an offence, the decision to offer an alternative to prosecution rather than institute criminal proceedings should not be sufficient to determine whether the forensic data can subsequently be retained. We would therefore look forward to a Stage 2 amendment that would allow for the retention of data in such circumstances. However, in considering the terms of any such amendment, particularly the duration of retention provided for, we would wish to ensure that an appropriate balance was struck between considerations of consistency and proportionality.

In relation to the retention of forensic data taken from children referred to a Children's Hearing, we are sympathetic to the broad outline of what is proposed, but uncomfortable with the fact that the Bill leaves unspecified the sexual or violent offences that would enable the retention of data in such cases. We take the view that retention of DNA and other data from children would be required only in a small proportion of cases, probably involving serious violent or sexual crimes.

We note both the evident difficulties the Scottish Government has in defining the list of relevant offences satisfactorily and concerns that the children's hearing system is not equipped to determine such questions. It would be helpful if the Scottish Government would provide us with its view of the suggestion by SCCYP that retention should only be on application to a sheriff.

The Committee is conscious that the retention of DNA and other evidence, particularly from children and from persons not convicted of significant crimes, can raise issues under Article 8 of ECHR and requires a proportional approach. We note both the suggestion by the Nuffield Council on Bioethics that there should be a presumption in favour of the removal of all records, fingerprints and DNA profiles, and the argument by GeneWatch that DNA samples should be destroyed once DNA profiles have been obtained, and would seek the comments of the Scottish Government on these matters.

We would therefore expect the Scottish Government to report in the Stage 1 debate on its position on these matters and on progress with the forensic data working group and, ideally, commit to providing us with a draft list of proposed relevant offences before Stage 2.

Scottish Government response
When we published our retention proposals for DNA and fingerprints in February 2009, we undertook to consider further the issue of retention in relation to fiscal disposals and police Fixed Penalty Notices (FPNs) issued under the Antisocial Behaviour (Scotland) Act 2004. Since then Stewart Maxwell has made public his intention to lodge a stage 2 amendment that would allow for the retention of data in relation to police FPNs. We understand that he also intends to lodge a similar amendment to ensure that DNA and fingerprints can also be retained in relation to disposals issued by Procurators Fiscal.

We note the terms of the suggestion by the Scotland's Commissioner for Children and Young People (SCCYP) that forensic data taken from children should only be retained on application to a sheriff. Whilst we are sympathetic to these concerns, we are also clear about what we hope to achieve with these provisions. We have a unique Children's Hearings system in Scotland where the needs of the child are put first. We do not want to detract from that, but we do want to ensure that those children who have committed a sexual or violent offence and who are at risk of committing further serious offences can be identified as early as possible, to enable the right interventions for the child and the right protection for the public.

While we can understand the principle behind the suggestion made by the office of the SCCYP, we have some concerns about this proposal - in particular, that we would be subjecting vulnerable and troubled children going through the Children's Hearing system to judicial process. We believe that establishing a separate procedure following the Children's Hearing to decide whether a child's DNA and fingerprints should be kept would be stigmatising for the child. It would place this aspect of their case in the court system - the very environment that the Children's Hearings system is designed to remove them from.

Section 59 of the Bill currently provides that forensic data which is taken from child upon their arrest or detention, who is subsequently referred to a children's hearing, will only be retained if (a) that child is referred on grounds of having committed a relevant sexual or violent offence, and (b) accepts that such an offence has been committed or a sheriff finds this to be the case. If a child commits no further serious offence, records will be destroyed after 3 years, unless an application is made to extend the retention period and a sheriff decides that the child poses a continuing risk to the public. We believe that what we are proposing focuses on the welfare of the child and the protection of the public. The automatic and initial 3 year retention period we are proposing strikes the right balance. It does not require the Children's Hearings system to make the decision to retain DNA and fingerprints and it does not subject the child to another process in a court setting. It is the right approach.

The list of relevant sexual and violent offences will be specified in an order subject to affirmative procedure. At present, the Bill provides that the order can only specify sexual and violent offences which are contained in section

19A(6) of the Criminal Procedure (Scotland) Act 1995. The forensic data working group, on which the SCCYP is represented, has made good progress with developing a list of relevant sexual and violent offences that will trigger retention. Although agreement has been reached on most of the offences to be included, the inclusion of a small number of offences is still under discussion. If the full draft list is not finalised prior to stage 2, we will provide details to the Committee of those offences which the group has agreed should be included.

Moving on to the argument put forward by GeneWatch that DNA samples should be destroyed once DNA profiles have been obtained – this issue will also be looked at by the Forensic Data Working Group. It is technical in nature and we must be clear that there would be no unintended consequences in doing so. We can assure the Committee, and GeneWatch, that we are determined to strike a balance between the rights of individual citizens and keeping the people who live in our communities safe, so the working group will give this proposal full consideration.

Section 62

The Committee was unable to reach consensus on the merits of this provision. On the one hand, we can understand why it seems anomalous that a witness, almost alone among those taking part in a trial, does not have access to the statement he or she made at the time the offence was investigated (which may have been months or even years previously). On the other hand, we understand the concerns expressed in evidence about the accuracy of these statements, and the risk of exacerbating a difference of treatment between prosecution and defence witness statements.

We would therefore appreciate clarification from the Scottish Government on its justification for this provision, particularly in view of the strong reservations expressed in evidence from the legal profession and the judiciary.

Scottish Government response

We note that there has been some debate over whether this provision is needed, and the strong reservations expressed in evidence by the legal profession and the judiciary.

Notwithstanding those reservations, we would draw the Committee's attention to the fact that Lord Coulsfield considered that the provision was necessary after a thorough and detailed consideration of the law as a whole. The Solicitor General also gave evidence in support of the provision.

We are of the view that proper testing of witnesses is valid and important but witness's evidence should not be reduced to a one-sided memory test, where every minor discrepancy is put under the microscope. This could have an inadvertent, detrimental effect on a witnesses ability to give evidence. The provisions in section 62 will avoid those problems, and in turn, may help to reduce the length of trials by reducing time spent on questioning witnesses on minor discrepancies and allow all concerned to focus on the issues at trial.

We recognise that this provision depends on statements accurately reflecting what witnesses have said. We accept that this is vital and a significant amount of training and guidance for police officers is in place to ensure that happens. In addition to that, by virtue of section 40 of the Bill, witnesses will have seen their own statements at an earlier stage and will have had the opportunity to correct any inaccuracies. These measures should ensure the accuracy of the witness's statement.

It is not clear to us why the provision would exacerbate a difference of treatment between prosecution and defence witness statements. It is important to remember that, as was alluded to in evidence to the Committee, there are existing measures for the use of these statements, albeit in much more restrictive circumstances than we propose. Those apply equally to defence witnesses as to witnesses for the prosecution. Section 62 will apply to all witnesses, whether prosecution or defence, provided a statement has been taken from the witness. In many cases, the defence witness will have given a statement and, if that is the case, he or she will be able to refer to it. We understand the concern that, in some cases, the defence witness may come forward at a later stage and the police may not have taken a statement at the time of the incident. In such cases, however, prosecutors, when notified by the defence of the details of their witnesses, will attempt to make arrangements for a statement to be noted from the defence witness.

As such, we cannot see that defence witnesses will be placed at any more of a disadvantage at present and that any perceived disadvantage is greatly outweighed by the benefits to witnesses and to the delivery of justice.

Section 63

The Committee understands the underlying rationale for this provision, but acknowledges the concerns raised in evidence that removing entirely the current limits on compellability, and hence making persons who refuse to give evidence against their spouses or partners liable to a charge of contempt of court, risks putting them in an invidious position in certain circumstances. We therefore invite the Scottish Government to explain further its approach in the light of the evidence received.

Scottish Government response

A spouse is already a compellable witness where the accused is charged with an offence against him or her. The Law Society of Scotland pointed out that spouses who are compellable under the present rules nevertheless seldom give evidence. It is clear, therefore, that compellability is an issue dealt with sensitively by the courts, and there is no reason to believe that widening the grounds of compellability will mean this ceases to be the case. Even if extended compellability allows evidence to be obtained only in rare circumstances, however, it will still be worthwhile. Moreover, in today's modern society, it is not clear why unmarried partners, even those who have co-habited for decades, should be compellable in circumstances where a spouse who had married the accused the day before proceedings got under way would not.

Section 66

The Committee accepts the rationale for this provision, but would invite the Scottish Government to reflect on the drafting in the light of the points raised by witnesses.

Scottish Government response

We are pleased the Committee accepts the rationale for these provisions but has asked us to reflect on the drafting of it in light of points raised by witnesses, specifically High Court Judges (HCJs) and the Scottish Crime and Drug Enforcement Agency (SCDEA).

Both the HCJs and SCDEA have expressed concern about 'willingness' in relation to the orders. The HCJs felt that condition D in section 271Q(6)(a) should be amended to read that '…the witness would not willingly testify if the proposed order were not made' since any witness validly cited was obliged to do so. The SCDEA felt that the way condition D was framed suggested that witnesses may be denied anonymity because they would be willing to testify.

While we understand the point made by the HCJs, we do not wish to add the issue of compellability in this context. The policy intention is that a witness anonymity order would be available to witnesses who would ultimately comply and testify rather than restrict anonymity to situations where a witness says he/she will not co-operate. In relation to the SCDEA's point, condition D comprises two tests – set out in subsections 271Q(6)(a) and (b) - either one of which will satisfy the condition if met. Further discussion with the SCDEA established that their concerns would be met by condition D(b), that is there would be real harm to the public interest if the witness were to testify without the proposed order being made.

We therefore plan to make no changes to this provision which remains consistent with the relevant provisions covering the rest of the UK in the Coroners and Justice Act 2009 (which itself updated the Criminal Evidence (Witness Anonymity) Act 2008). We are, however, considering what changes we might make to the explanatory and policy notes to make these issues clearer.

We have also reviewed all comments made about section 66 by witnesses, including the HCJs, the SCDEA and Scottish Women's Aid. As a result, we plan to lodge amendments at Stage 2 as follows:-

- in section 271N(5)(a)(i) (who is required to see the anonymous witness during proceedings) deleting reference to 'or other members of the court';
- deleting section 271N(5)(a)(iii) because of fears that interpreters might be intimidated or compromised;
- amending section 271P(4) (Applications) to make clear that any relevant information which is disclosed by or on behalf of the party

before determination of the application must be disclosed in such a way as to prevent the witness' identity being disclosed;
- in section 271R(2)(b) (relevant considerations), deleting reference to the notion of 'weight' in relation to the anonymous witness's evidence;
- in section 271R(2)(c), removing the words 'sole and decisive' in relation to an anonymous witness's evidence, and replacing these with the word 'material', to take account of the doctrine of corroboration; and
- in section 271(S)(2) replacing 'warning' with 'direction' to reflect modern practice.
- considering what changes we might make to the explanatory and policy notes to clarify other issues such as fears on the part of the witness about injury or serious harm to property.

We also plan to lodge a Stage 2 amendment to Paragraph 2 of Schedule 3 to the Bill (appeals against convictions) in order to remove references to 'unsafe conviction', which is not a concept in Scots law and replace it with a more appropriate reference referring simply to a miscarriage of justice having occurred.

Section 68

We endorse this provision, so far as it goes, but note that it will create an inconsistency in terms of the upper age limit for jurors in criminal and civil trials. While we recognise that this cannot be addressed through the present Bill, we recommend that the Scottish Government address this through separate legislation at the earliest practical opportunity.

Scottish Government response

We are aware of this inconsistency but, as the Committee noted, it cannot be dealt within the scope of this Bill. We will certainly consider addressing this anomaly as and when a suitable legislative opportunity arises in the future.

Section 82

The Subordinate Legislation Committee (SLC), in its report on the Bill, questioned why the *ex gratia* scheme was to be provided for in subordinate legislation, when the existing scheme was provided for directly in the 1988 Act. It also questioned the scope of the delegated power, which in its view went beyond what was required to achieve the Scottish Government's stated purpose for the provision.

Although we explained to the SLC that the order making power was necessary in order to have flexibility in relation to how it gave statutory effect to the *ex gratia* scheme, the SLC concluded that "no adequate justification had been given by the Scottish Government for the power to extend the scheme beyond that currently operating".

The Committee notes and endorses the concerns expressed by the Subordinate Legislation Committee about the scope of the delegated power proposed.

We therefore invite the Scottish Government either to justify that scope by reference to any changes of substance it might wish to make to the existing ex gratia scheme in the course of putting it on a statutory basis, or to limit the scope of the delegated power to what is required to replicate the existing scheme without substantial change.

Scottish Government response
It is not clear to us why concerns have been expressed about the scope of the delegated power proposed. We believe we provided adequate justification in our written response to the Subordinate Legislation Committee on 14 May 2009 as to why we wish to use delegated powers to provide a statutory basis for the ex gratia scheme. That is, the order-making power will allow that ex gratia scheme, which was set out in a Parliamentary written answer, to be expressed in appropriate statutory terms. This proposal will therefore introduce an element of Parliamentary control which is currently absent. We are not proposing to change the scope of the ex gratia scheme. However, the order making power would permit the expansion or narrowing of the scheme in future, if that were desired. Ministers may in future wish to recognise further circumstances in which compensation should be available, and without some flexibility in the power, the only way to do so would be through the creation of another ex gratia scheme. It is simply not necessary to make the power so narrow and intricate.

Sections 86-88
We support the general policy of clarifying the rules of disclosure, and accept that these provisions are motivated by good intentions. However, we agree with Lord Coulsfield that the way in which his recommendations have been given effect in the Bill is too complex and detailed, and risks losing sight of the underlying principle. We would prefer to see the basic duty of disclosure elevated to greater prominence. The Committee invites the Scottish Government to review, in the light of Lord Coulsfield's comments, where the line has been drawn between what is set out in the Bill (including provision about schedules of information in solemn cases) and what is to be included the proposed code of practice (or in guidance). We welcome the Crown Office's commitment to provide a copy of the draft code, and look forward to being given sight of it in advance of Stage 2.

We also note the evidence by the Sheriffs' Association questioning the need for a distinction between "sensitive" and "highly sensitive" information, particularly when the latter is not separately defined. It would be helpful if the Scottish Government could provide a fuller justification for why this distinction is considered necessary and how it is to be applied.

Scottish Government response
When framing the provisions in Part 6 of the Bill, our thoughts were to set the provisions out in a chronological order, beginning with the definition of what information is, what the early steps in disclosure are (in provision of schedules) and then the duty itself. That said we can see the sense in a different approach which would afford the duty greater prominence and we are considering how best to achieve this and will bring forward any appropriate amendments at stage 2.

On the question of complexity of the provisions, we accept the concerns made and we will seek to amend the Bill at stage 2 to simplify the provisions. While we want provisions that provided certainty and clarity for practitioners, it is not our intention to increase burden or create an inflexible system. So we have looked again at the provisions and we will lodge amendments at Stage 2 which, if approved, will not only simplify the provisions on schedules of information in solemn cases but will also remove the detail on the precise form in which the information is provided. We accept the concerns expressed that such administrative detail would be best left for the Code of Practice or in guidance for prosecutors and the police.

Having said this, as the Solicitor General explained in his evidence to the Committee, disclosure is a complex matter. While we can attempt to simplify how it is presented, the underlying complexity will remain. We are continuing to look at the remaining provisions and, if we are able to identify provisions which could be included in the Code of Practice, in secondary legislation or in guidance rather than on the face of the Bill, we will bring forward any appropriate amendments at stage 2.

We can appreciate the concerns at the absence of a definition of ‘highly sensitive’ within the Bill. The reason for making provision on sensitivity of information was that certain duties follow from the designation of information that is ‘sensitive’. No duties follow, however, from the designation of information as being ‘highly sensitive’. Designation of information into categories such as ‘sensitive’ or ‘highly sensitive’ is an administrative exercise, concerned with the handling of information by the police and prosecutors which would be better specified in the Code of Practice. Decisions regarding materiality will be governed by the information itself and not the degree of sensitivity. The degree of sensitivity however will determine the appropriate level of security clearance required by the person who will view and consider this information within the COPFS. Accordingly it is intended that the Code will include a definition of ‘highly sensitive’.

We consider, also, that defining ‘sensitive’ sets the bar, above which information must be considered ‘highly sensitive’. If the information does not meet the definition then it is ‘non-sensitive’ and results in the crystallisation of the prosecutor’s duty to disclose details of that information, provided it is material and relevant.

We consider therefore that there is no need to define ‘highly sensitive’ or ‘non-sensitive’ in primary legislation.

We have drawn to the Crown's attention the Committee's comments in respect of seeing the Code of Practice in advance of Stage 2 proceedings. The Code is a matter for the Lord Advocate but we are advised that it is under development and a copy will be shared with the Committee as soon as it is finalised.

Sections 94-95

This is another provision on which the Committee has not been able to reach an agreed and settled view. We understand the rationale presented by the Scottish Government, but we also recognise the concerns expressed by some witnesses.

However, the Committee is not currently persuaded that there is merit in the proposal to make defence statements compulsory in solemn cases, as it appears that the timing of their production may risk jeopardising important principles of justice. Some further explanation of the Scottish Government's thinking would therefore be appreciated, including on its reasons for departing from Lord Coulsfield's recommendations on this issue.

Scottish Government response

The provisions in Part 6 of the Bill as a whole are concerned with making certain that the accused has a fair trial and, to ensure that, everything which the accused is entitled to have disclosed to him, is disclosed. The provision of defence statements by the accused to the Crown helps to ensure that, a view firmly supported by the Lord Advocate when she gave evidence. The Committee will recall, also, the practical examples presented by the Solicitor General in his evidence which we believe reinforce the need for this provision.

The nature and scale of solemn cases are such that the prosecutor's task in assessing what information requires to be disclosed would be extremely difficult without knowing some information about the accused's line of defence. Not having mandatory defence statements would risk essential information not being disclosed inadvertently and through no fault of the prosecutor or the accused. A fair trial hinges on disclosure and the decision as to what should be disclosed should not depend on the prosecutor's best guess, however well informed, as to what the accused's position might be. As the Lord Advocate explained to the Committee:

> '…in many cases, especially High Court cases, there may be more than 3,000 statements, thousands of productions, and information that is very broad. To understand what might be relevant or of interest to the defence, it is of considerable help—in establishing the rights of the accused to a fair trial under article 6 of the ECHR—to be able to anticipate in what the defence might be interested. It is not just about assisting the prosecution; it is also about assisting the accused.'

Requiring defence statements in solemn cases is the best way to confidently secure disclosure to the accused of all of the information which needs to be disclosed to him and, as a result, a fair trial.

It is also a more efficient and effective way for justice to be delivered. This is not the first time a requirement has been placed on the defence. The accused must, already, provide details of any special defence they intend to rely on. They must, also, notify the prosecutor of any witnesses they intend to lead. We do not think these requirements go far enough, however as they leave significant gaps which require to be filled. The requirement to provide a defence statement in solemn proceedings will supplement existing measures and will help to focus trials on the issues, something which was highlighted by the Solicitor General in his evidence to the Committee. Moreover, revealing the accused's position to the prosecutor may result in the prosecutor taking a view as to whether proceedings should continue in the public interest. As the Lord Advocate explained to the committee:

> '…we should not waste the resources of the criminal justice system when a defence can clearly be made out. It is in the public interest for us to be aware of that at an early stage. Information that might assist the defence should be made known.'

Sections 102-106

The Committee accepts the case made by the Scottish Government, following Lord Coulsfield, for having a statutory process to allow non-disclosure of information in certain circumstances. However, we also recognise the inherent difficulties in achieving this objective while continuing to secure adequate protection for the rights of the accused. We are also concerned about the amount of detail set out in these sections of the Bill, and agree with witnesses that some of this provision would be better dealt with in subordinate legislation (subject to appropriate Parliamentary control) to allow them to be refined and developed over time.

Scottish Government response

We understand the Committee's concern at the amount of detail in the Bill in relation to the non-disclosure of information in certain circumstances provisions and can see that dealing with some of the provisions in subordinate legislation has some attraction.

It is vital, however, that the disclosure scheme sets out fully both the procedure and considerations taken into account in these decisions so that there are sufficient judicial safeguards in place to ensure that information is not withheld on the grounds of public interest unless it is strictly necessary. To leave important details to subordinate legislation means ECHR compatibility is only achieved at a later date when Rules are brought forward. We need to be able to demonstrate to Parliament that the scheme made as a whole is compatible. If a bit of the scheme was contained elsewhere this may not be achieved. That said, we are looking again at the provisions ahead of Stage 2 and, if it is possible to reconcile the desires of the Committee with the need for a compatible scheme in primary legislation, we will bring forward any appropriate amendments.

Section 107

The Committee is satisfied that the provision for special counsel in this Bill do not fall foul of the human rights objections raised by the House of Lords in relation to control orders, and are appropriate in the context of a non-disclosure regime. However, we would be grateful for clarification about how special counsel would be paid for, and in particular whether any changes to legal aid regulations will be required.

Scottish Government response

The final details on how the scheme of appointment of special counsel has still to be finalised, including the question of payments. These are administrative details and are not in the Bill. However we can advise that the intention is that the costs of special counsel will fall to the state, not the accused and will not therefore be a charge on the funds available for legal aid.

Section 115

The Committee notes the concerns of the Subordinate Legislation Committee, and invites the Scottish Government to provide a fuller justification of the scope of the proposed power, and indeed why it is considered necessary in addition to existing powers to make Acts of Adjournal.

Scottish Government response

This is the first time that disclosure has been put on a statutory footing. In looking at how the scheme should operate, it was considered that section 305 of the Criminal Procedure (Scotland) Act 1995 on Acts of Adjournal wasn't sufficient for our purposes. What was needed was flexibility to enable the High Court to do everything we think it is likely require to do and more to ensure that the scheme works efficiently. What is proposed in the Bill is limited only to those aspects required to give full effect to the Part 6 provisions on disclosure of information in criminal proceedings. We therefore disagree with the Subordinate Legislation Committee that section 115 is an entirely open power – it is not as it relates only to the disclosure provisions in the Bill.

Sections 117-120

The Committee broadly supports this provision insofar as it implements the Scottish Law Commission's recommendations. However, we are not yet confident that the proposed special defence of mental disorder has been appropriately defined, given the concerns raised in evidence and the differences of interpretation between Mr Chalmers and other witnesses about whether the special defence would be available to people who know their conduct is wrong, but are driven by their mental illness to do it anyway. We therefore invite the Scottish Government to consider carefully and respond to the points raised. We support the suggestion by James Chalmers that it should be open to the Crown as well as the accused to advance the special defence. We also invite the Scottish Government to comment on the issues raised by the Mental

Welfare Commission relating to people with learning disability or cognitive impairment.

Scottish Government response
The provisions in sections 117-120 implement the Scottish Law Commission's recommendations contained in their 2004 report on Insanity and Diminished Responsibility in Criminal Proceedings. Part 2 of the SLC's report laid out their recommendations for reform of the law relating to insanity as a defence.

The recommendations, as laid out in Part 2 of the SLC's report and contained within the Bill, are as follows:

- The common law test for insanity as a defence should be abolished;
- The defence of insanity should be retained as part of Scots criminal law;
- The defence dealing with criminal responsibility of persons with mental disorder should no longer be known as the 'insanity' defence;
- The test for the defence should require that at the time of the alleged offence the accused had a mental disorder. The term 'mental disorder' should be defined as meaning (a) mental illness; (b) personality disorder; or (c) learning disability;
- The defence should be defined in terms of a specific effect on the accused's state of mind which has been brought about by his mental disorder;
- The defence should be defined in terms of the accused's inability at the time of the offence to appreciate either the nature or the wrongfulness of his conduct;
- The definition of the defence should not contain any reference to volitional incapacities or disabilities of the accused; and
- The condition of psychopathic personality disorder should be excluded from the scope of the defence.

Section 117 of the Bill seeks to insert new section 51A into the Criminal Procedure (Scotland) Act 1995. New section 51A(1) lays out the test to be applied as follows:

New section 51A(1)
A person is not criminally responsible for conduct constituting an offence, and is to be acquitted of the offence, if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.

As can be seen, the test does not include reference to a volitional element. In other words, the test cannot be met simply by individuals claiming they were unable to control their conduct at the time of the offence. The test can only be met by individuals demonstrating they were unable to appreciate at the time of the offence either the nature or the wrongfulness of their conduct. Individuals who were able to appreciate the nature or wrongfulness of their conduct, but who were unable to control their conduct would not be able to meet the test.

The SLC took the view this was the correct approach. Paragraphs 2.54-2.55 of their report outlines their thinking:

> '…In the Discussion Paper we were inclined to adopt the position that the test for the defence should not contain a volitional element but we did not reach a concluded view on this point. We presented the issue in the form of a question whether the definition of the defence should contain any reference to volitional incapacities or disabilities. Consultees were divided on this question. However most agreed that the wider cognitive criterion of appreciation would cover any relevant volitional failing. About half of the consultees who responded on this issue accepted that there was no need for any volitional element. Two consultees gave clear support for it. It was of some significance that none of the consultees could provide any example where a person might fail the test for the defence on the appreciation criterion but satisfy it purely on a volitional one. It is also worth noting that the mental health experts whom we met were virtually unanimous in rejecting a category of mental disorder which was purely volitional in nature and which had no impact on cognitive functions.
>
> Some consultees pointed out that a volitional element exists in the current test for the defence in some legal systems (including possibly Scots law). However the existence of a volitional element in the current law can be explained chiefly by the narrowness of the cognitive criteria used in many of the definitions of the defence. We take the view that if the 'appreciation' criterion is to be understood in a wide sense, as we argue that it should, then there is no need for any volitional element. Indeed, there might be dangers in adding on a volitional part to the defence as doing so might give rise to narrow interpretations of the scope of the appreciation element.'

For the reasons outlined in Part 2 of the SLC's report, and in particular the reasons noted in paragraphs 2.54-2.55, we are content the test is appropriately defined as laid out in the Bill.

We note the comments made by James Chalmers, supported by the Committee, regarding the Crown being able to raise the new special defence. The Crown have advised that they are not persuaded of the need for a power to raise the new special defence as they do not envisage circumstances where they would make use of the power. The Crown have indicated though they will consider any further justification for providing them with this power if that can be provided.

More generally, we note the comments made by the Mental Welfare Commission for Scotland in respect of individuals appearing in court who have a learning disability or cognitive impairment but who do not meet the terms of the mental disorder test. We would expect the defence to draw to the attention of the court any issues of this sort to ensure the court has full disclosure of all relevant information relating to the accused prior to any decision regarding imposition of a suitable disposal in the case e.g. a community sentence.

In addition in the majority of cases where a court is considering either custody or a community disposal, it will ask for a Social Enquiry Report to be prepared to provide information to assist in deciding on the most appropriate way to deal with an offender. The Social Enquiry Report will include information on the circumstances of the offence and the offender's personal circumstances which may include, where appropriate, details of any medical or psychological treatment they are receiving and any underlying health conditions or issues such as an identified learning disability.

We consider therefore that appropriate procedures are already in place and are not convinced of the need to alter legislation in this area. We are however currently reviewing the National Standards for Criminal Justice Social Work and will explore where improvements can be made to the information for the courts in this context.

Section 123

The Committee notes the concerns raised by some witnesses about theft of metals and the implication that a mandatory system of licensing may have a role to play in tackling this problem. We recognise that tackling criminality is only one factor to be taken into account in deciding on an appropriate licensing regime, but we are also uncertain about the Scottish Government's rationale for proposing moving to an optional system of licensing in this area. We therefore invite the Cabinet Secretary to provide a fuller justification of this aspect of its policy intention.

Scottish Government response

Metal dealers were originally licensed due to the concern that their businesses could become involved in criminal activities. It would be fair to state that this concern tends to increase in line with the market price for metal (recently before the economic downturn there had been a significant rise in prices paid). We believe this justifies the need for a licensing system. The flexibility provided by an optional licensing regime has the advantage that as the position of the metal markets changes, it may be appropriate for Local Authorities to remove the burden of a mandatory licensing system on business if they consider it appropriate. We would only expect such action to be taken after a local authority had consulted with the relevant bodies in their area, in particular the Police.

Section 124

The Committee supports the proposal to require all applicants for taxi licences to have held a driving licence for the year immediately prior to their applications. We agree with the Cabinet Secretary that discretion for licensing authorities would not be appropriate in this context.

We also agree with the Cabinet Secretary that provision for sanctions against authorities that fail to review fares within the set period is

unnecessary, given existing mechanisms to enable authorities to be held accountable.

While we would not wish to undermine the distinction between taxis that are entitled to ply for trade and private hire cars that are not, we accept that there may be a case for allowing local authorities to limit the number of private hire cars operating in their areas, just as they can limit the number of taxis. However, we agree that this is not a matter for the current Bill, not least because of the shortage of evidence we have taken on this issue and the fact that the Task Group did not address the point in its report.

Finally, we are surprised that the Scottish Government is unaware of concerns about the ability of licensing authorities to carry out appropriate checks on non-UK residents applying for a taxi or private hire car driver's licence. Members of the Committee have, individually, heard such concerns expressed, and we would encourage the Scottish Government to adopt a more active approach to establishing whether this anecdotal impression is borne out by the evidence.

Scottish Government response
We are pleased that the Committee supports the various amendments included in section 124 of the Bill. These amendments seek to modernise the provisions within the 1982 Act and reflect recommendations of the Task Group that reviewed the licensing provisions of the 1982 Act.

We note that Committee members expressed some surprise that the Scottish Government are, save for the approach from City of Edinburgh Council, unsighted about the difficulties experienced by authorities over assessing the 'fit and proper' status of non-UK applicants for taxi and private hire car drivers' licences. We would merely confirm that It is not an issue that has been raised with us by any other licensing authorities. We can advise though that we will however keep in touch with the Chair of Edinburgh's Licensing board on this matter (and any other licensing authorities who express concerns) and we are proposing to conduct some research among licensing authorities to assess the extent of the problem.

Sections 125-126

The Committee shares concerns raised in evidence that the potential costs for non-commercial groups to obtain a market operator's or public entertainment licence might prove prohibitive. We recognise that the Bill gives local authorities discretion over whether to charge for such licenses, but we can also understand concerns that where the power to charge exists, it may in practice be used.

The Committee also recognises the public safety concerns surrounding large-scale events that are free to enter, and hence currently do not require a public entertainment licence. We believe that it is important that community and charitable groups are able to hold small-scale

events easily while also ensuring that licensing authorities have the power to control these large-scale events.

The Committee therefore invites the Scottish Government to consider the alternative of basing the requirement for a public entertainment licence on the scale of the event (recognising that this will require authorities that choose to impose a licensing regime also to exercise discretion in relation to the size of events that would then require to be licensed).

In relation to lap-dancing clubs, the Committee is strongly in favour of local authorities having sufficient powers under licensing legislation to be able to control the numbers of such venues in their area – including to the extent of setting zero as the appropriate number of such venues.

We would be grateful for an assessment by the Scottish Government of whether it considers those powers to be sufficient for this purpose. Subject to that, we are not convinced that re-categorising these venues for licensing purposes would necessarily be beneficial.

Scottish Government response
We have considered the argument put forward by the Third Sector and the Committee and, as I announced on 17 December 2009 in Ministerial Question Time[1], we are happy to continue the exemption for charities with regards to market operators' licences and will bring forward suitable amendments to section 125 of the Bill at Stage 2 in this regard.

In relation to lap dancing clubs, our position remains as it was at the start of transition to the new licensing regime of the Licensing (Scotland) Act 2005. It is possible for Licensing Boards to justify through the licensing objectives a policy of only allowing this on a limited number of licensed premises to provide adult entertainment or even to justify a ban on such entertainment on licensed premises.

Such a policy could be set out in a Board's licensing policy statement (which has to be consulted on with certain parties). Such a policy could continue to be applied as long as the justification for the policy remained. Boards can also set out what conditions such licensed premises must meet should they wish to provide such entertainment. As licensing policy statements are required to be revisited every three years, and as Licensing Boards are able to issue supplementary licensing policy statements at any time (for example at the suggestion of the local licensing forum), there are opportunities to revisit whether such policies need strengthening locally.

Section 127

The Committee considers that there is a case for broadening the definition for late night catering but supports local authorities retaining discretion in determining which types of premises require a licence.

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[1] http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor1217-02.htm#Col22314

Scottish Government response
Local Authorities will continue to be able to apply a discretion not only in determining which types of premises but in which geographical location will require a licence. This will be achieved through the section 9 resolution required under the Civic Government (Scotland) Act 1982 required to enact the licensing scheme.

Section 128

(Please note this issue was not covered in the Stage 1 report)

Following my evidence session in front of the Justice Committee on 1 September 2009, a letter was sent by the Convenor asking some further questions that were not able to be raised during the 1 September session.

One of the further questions raised was as follows:

'…Section 128 of the Bill requires applicants to provide additional personal details to licensing authorities when submitting an application. There was concern that these details might be placed in the public domain, rather than only being used by applicable statutory bodies. What assurances can you give on this issue?'.

In our response of 7 September 2009, we indicated that we would expect local authorities to use the additional information provided in the application (the applicant's date of birth and place of birth) only for the purpose of assisting relevant authorities such as the police in looking into the background of the applicant.

This response correctly summarises the policy intention as to how this additional information should be used. We went on to suggest in our response that no changes were required to the Civic Government (Scotland) Act 1982 ('the 1982 Act') in order to ensure this policy intention was met.

However, upon further consideration of the relevant provisions within the 1982 Act, it has become clear that this statement was incorrect. Amendments are required to Schedule 1 to the 1982 Act to ensure that an applicant's date of birth and place of birth are not included within the notices required for the purposes of a licence application under Part 2 of the 1982 Act.

An applicant for a licence under Part 2 of the 1982 Act is required to display a notice detailing various pieces of information about the licence application. In certain circumstances, a licensing authority must, following receipt of the licence application, publish a notice detailing various pieces of information about the licence application. We intend to lodge Stage 2 amendments to paragraphs 2(3) and 2(8) of Schedule 1 to the 1982 Act to ensure an applicant's date of birth and place of birth should not be included in either of these notices.

Section 130

The Committee believes that a balance must be struck between the cost and burdens of notification and providing appropriate information. The Committee therefore recommends that the minimum notification required should consist of a summary of what is being proposed along with information on how to view the application in full.

Scottish Government response

We are happy to include the Committee's recommendation of the minimum requirement in the statutory guidance issued under section 142 of the Licensing (Scotland) Act 2005 which all Licensing Boards are required to have regard to.

Section 131

While acknowledging the concerns raised in evidence about giving licensing boards the power to suggest modifications to layout plans, the Committee is not convinced that this would be a problem in practice. The Committee nevertheless welcomes the Cabinet Secretary's commitment to discuss the matter further with the licensed trade.

Scottish Government response

We note the comments made.

Section 132

The Committee was unable to reach consensus on the merits of this provision. Some members of the Committee considered the current measures within the 2005 Act requiring chief constables to provide an antisocial behaviour report to licensing boards for all applications still to be appropriate.

Other members felt that such reports should only be provided by chief constables if requested to do so by the licensing board or if they choose to provide one, so as to target resources more effectively. The Committee specifically notes that, now that all premises licences are subject to the requirements of the 2005 Act, antisocial behaviour reports are required only in respect of applications for new licences. We also note that the provisions in the 2005 Act allowing a premises licence to be reviewed provide an opportunity for a licensing board to consider any evidence on antisocial behaviour associated with a particular licensed premises, or indeed to request an antisocial behaviour report itself.

While we note the evidence suggesting that antisocial behaviour reports are often not specific enough to aid a licensing board's consideration of an individual application, we do not consider this to demonstrate a problem with the legislation, and is something that should be addressed by better communication between boards and the police on the information required.

Scottish Government response

We note the comments made.

Section 134

While the Committee acknowledges the need for fast-tracking of some occasional licence applications, in light of points raised by witnesses it has some concerns that the procedure might be open to abuse. The Committee therefore seeks assurances from the Scottish Government that the procedure will minimise the scope for such abuse and notes the Cabinet Secretary's willingness to look again at the provision.

The Committee also recommends that the power to approve such applications should be capable of being delegated to licensing authority officials.

Scottish Government response

In implementing a fast track procedure for occasional licences, we expect Licensing Boards will amend their licensing policy statements (required under the 2005 Act) to set out the circumstances under which they will accept such fast track applications. We will also adjust the statutory guidance (which all Licensing Boards must have regard to) setting out the importance of having such policies in place to avoid fast track procedures being abused.

We notes the Committee's recommendation that the power to approve should be delegated to licensing officials. However we believe as an ordinary occasional licence can only be delegated to the Clerk of the Board, it would seem odd to extend a power to reduce the level of authorisation for a process where less scrutiny will have taken place and are therefore not in agreement with this recommendation.

Section 135

While generally content with the provision, the Committee notes that extended hours applications might increase the potential for irresponsible drinking.

The Committee therefore seeks clarification from the Scottish Government as to how it envisages licensing boards ensuring they take health and public order concerns into account when considering such applications.

Scottish Government response

Licensing Boards are already able to grant extended hours applications and in doing we would expect them to refer to the licensing objectives set out in section 4 of the Licensing (Scotland) Act 2005 of preventing crime and disorder, securing public safety, preventing public nuisance, protecting and implementing public health, and protecting children from harm. The provisions in section 135 further enhances Licensing Boards ability to take health and public order concerns into consideration by attaching additional conditions to how a licence may operate during these extended hours.

Section 136

The Committee supports these provisions for tightening the rules on applications for personal licences. We recognise the importance of the

national database to make the provision effective, and accept the Cabinet Secretary's assurances about the practical measures being taken in this connection. We also support ACPOS's suggestion that chief constables should have wider powers to make representations to licensing boards in relation to personal licence applications, and would invite the Scottish Government to give this serious consideration.

Scottish Government response
The provisions within the Bill will enable the Police to object to a personal licence on a much wider basis than before but widens the circumstances in which they are able to call for a licensing board to hold a hearing into a personal licence holder in relation to their conduct. We can see no advantage in enabling the Police to comment on a personal licence application if it is not to object to the Licence as the Licensing Boards only course of action in relation to an application is to reject or pass an application.

Wider issues – Licensing (Scotland) Act 2005

The Committee acknowledges that concerns raised on the structure of alcohol licence fees, as defined in the 2005 Act, are outwith the scope of the current Bill. However, the Committee is of the view that there are some inequalities in the present system, including the difference in fees paid by different sized outlets, on-sales and off-sales premises and discrepancies across licensing boards.

The Committee therefore welcomes the Scottish Government's decision to ask the Accounts Commission to consider these issues and would encourage the Commission to look in particular at the cost implications for smaller outlets in rural areas. The Committee looks forward to receiving the Scottish Government's response to the Commission's recommendations in due course.
Appeals - The Committee welcomes the Cabinet Secretary's commitment to lodge amendments at Stage 2 to reinstate the summary appeals procedure.

The Committee shares the concerns raised in evidence about the procedures for obtaining a provisional premises licence under section 45 of the 2005 Act, and believes that there is a case for modifying these procedures within the current Bill. We therefore invite the Scottish Government to consider bringing forward suitable amendments at Stage 2. These amendments might re-introduce something similar to the site-only application procedure under the 1976 Act while also extending the current two-year time limit for provisional licences.

Transfer of licences - The Law Society of Scotland highlighted a potential difficulty with the 2005 Act regarding transferring licences to court-appointed administrators. The Law Society wrote — "In terms of the 1976 Act [Licensing (Scotland) Act 1976], there was no requirement for the licence to be transferred. The position now is that the administrator would be required to become the premises licence holder in his own right as opposed to as an agent of the insolvent company

(and apply within 28 days of their appointment) and may be reluctant to do so." Asked to comment on this, the Cabinet Secretary said he was unaware of the details, but was prepared to consider it further.

The Committee welcomes the Cabinet Secretary's willingness to address this potential difficulty and trusts that an appropriate solution can be found.

Scottish Government response
We note the Committee's comments on the some of the wider issues concerning the Licensing (Scotland) Act 2005. As the Committee has noted previously, the 2005 Act must operate in a way that balances the needs of the Trade and protecting the community. The 1976 Act offered seven types of licence so there was an indication for Licensing Boards, the Police and the local community of what was being proposed and the statutory restrictions that would be automatically in place. That is not the case with the 2005 Act where there is a single generic premises licence and it is the application form together with the operating plan and layout plan that enable all to know what is being proposed and decide whether they would welcome or oppose such an operation.

Once a provisional licence is granted the holder has a premises licence in all but name, it cannot be revoked unless when completed it is significantly different from what was originally proposed. We believe this is the correct approach for it would be incorrect for a licence to be removed before a premises began to trade after the investment had been made. Similarly we believe it would be wrong to simply grant a licence or a number of licences (for example to a leisure/retail complex) without knowing what was being proposed as the end result could lead to a rise in public disorder and public nuisance which could blight the local community and place additional burdens on policing. We therefore believe the present balance is the correct one.

On transfers of licences, we believe it is important that there is always somebody responsible for a premises. This ensures that both the Police and the Licensing Board are able to hold those who control the premises to account for its operation. If people are not prepared to take such responsibility or appoint others to do so, then the premises must close. The option is always available for a new licence to be applied for should the business wish to reopen. We believe that local communities deserve and require that protection and we therefore do not propose to introduce any amendments in this area.

Non invasive post mortems

The Committee acknowledges the importance of this issue to the Jewish community and potentially other faith groups in Scotland. However, we are unclear whether an amendment of the sort sought by the Scottish Council of Jewish Communities is necessary to enable MRI to be used where appropriate. It must also be doubtful whether such an amendment would be within the scope of the current Bill, given that the

issue of post-mortem examination is not directly a matter of criminal justice.

Nevertheless, since the matter has been raised with us, it would be helpful if the Scottish Government or the Crown Office could give us a more definitive view on whether it supports SCoJeC's case for a change to the system of post-mortems in Scotland, whether legislative change would be required and, if so, when that legislation might be forthcoming.

We would certainly wish to ensure that a full range of techniques for the conduct of post-mortems is available in Scotland, so that non-invasive methods can be considered in appropriate circumstances. We accept that many relatives will understandably prefer such non-invasive methods where possible, but accept that this must always be a decision for the procurator fiscal, acting in the public interest.

Scottish Government response
We note the comments made.

We would firstly advise that primary legislative change is not necessary to enable non-invasive post mortems to take place in Scotland. Such a change can be done through guidance issued from the Crown Office and the Procurator Fiscal Service (COPFS) to forensic healthcare professionals/doctors undertaking forensic work for the COFPS.

Since the representations were made to the Justice Committee in May 2009, we are aware the Lord Advocate has met with faith groups, including the Scottish Council of Jewish Communities, to discuss their concerns and to explain death investigation procedures.

It should be recognised that non-invasive procedures, such as 'View and Grant' external examination, in association with medical records, are already used extensively in Scotland, which are not available in other countries in the UK such as England. Procurators Fiscal do currently specify in instructions to pathologists the nature of the examination to be carried out. Following the discussions mentioned above, the COPFS are considering the possibility of other forms of non-invasive post mortem examination such as Magnetic Resonance Imaging scans (MRI scans).

The Scottish Council of Jewish Communities have also raised this issue at meetings with First Minister. The Crown Office and Scottish Government Health officials are actively discussing the practical issues surrounding the use of MRI scans for non-invasive post mortems and relevant officials have undertaken to revert back to the Scottish Council of Jewish Communities with the outcome of these discussions.

In conclusion, we agree with the Committee in recognising there is a balance to be struck between meeting the wishes of relatives in respect of the carrying out of non-invasive post mortems in some cases and ensuring that the

COPFS are able to properly investigate the circumstances and cause of a person’s death.

ANNEX B

SCOTTISH GOVERNMENT STAGE 2 AMENDMENTS: NEW TOPICS

DESCRIPTION OF TOPIC	BENEFITS AND ANY ADDITIONAL RELEVANT INFORMATION
EUFD on mutual recognition to judgements and probation decisions Taking an enabling power to implement the European Union Framework Decision on the application of the principle of mutual recognition to judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions.	We are responding with taking a power to ensure changes to Scots law can be made to comply with the European Union Framework Decision. This will help ensure individuals who move between member states will be required to still undertake any outstanding probation or other alternative sanctions and therefore *will not be able to defeat the ends of justice.*
Genocide offences Altering the current law in respect of offences of genocide, crimes against humanity and war crimes in Part 1 of the International Criminal Court (Scotland) Act 2001 so that offences committed since 1991 can be tried (and not 2001 as currently is the case) and clarifying how courts should decide whether an individual meets the 'residence' test within the 2001 Act.	We are responding to changes made to the International Criminal Court Act 2001 by the UK Government in section 70 of the Coroners and Justice Act 2009. This will help ensure those who have committed such atrocious crimes since 1991 can *be brought to justice.*
Knife possession offences Clarifying the law in relation to the definition of a 'public place' for the purposes of prosecution of knife possession offences (especially whether a 'common close' in a tenement is a 'public place').	We are responding to the (unreported) case of Templeton v HM Advocate (August 2008). This will help *ensure clarity of the law* in this important area.
Voyeurism offences Extend the statutory offences of voyeurism (as contained in the yet to be commenced Sexual Offences (Scotland) Act 2009) to include also the use of equipment to record or observe a person's genitals, buttocks or breasts either through or beneath a person's outer clothing, without that person's consent or any reasonable belief that the person consents, where the perpetrator acts for the purpose of obtaining sexual gratification (whether for his own or a third party's benefit) or to cause humiliation, alarm or distress to the victim. Also minor changes to correct drafting errors in the 2009 Act.	We are ensuring Sexual Offences (Scotland) Act 2009 *operates effectively*. This issue was raised too late to be included in the Sexual Offences Bill and this is the next suitable legislative vehicle.
Procedures for libelling of charges Provide that in a single charge in an indictment or complaint it is competent to libel one or more statutory offences under the Sexual Offences (Scotland) Act 2009 cumulatively with each other and with offences at common law as is possible with multiple common law offences.	We are ensuring Sexual Offences (Scotland) Act 2009 *operates effectively*. We are ensuring that, following commencement of the Sexual Offences (Scotland) Act 2009, prosecutors retain the flexibility they currently have under common law to libel two or more offences together in a single charge so that the ability to prosecute a course of conduct

	comprising multiple offences is not compromised.
Human trafficking A series of changes relating to human trafficking law: - Extending the definition of trafficking to include the exploitation of children and vulnerable adults whose involvement in their trafficking is entirely passive in nature; - Increasing the age of automatic entitlement to special measures under the Vulnerable Witnesses (Scotland) Act 2004 from under age 16 to under age 18 for cases involving human trafficking; - Section 4(2) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 makes it an offence for a person to arrange or facilitate travel within the UK of an individual, whom he believes has been trafficked into the UK for exploitation, where the person intends to exploit that individual in the UK or elsewhere, or where he believes that the individual is to be so exploited by another person. In order to make it easier to prosecute this conduct in internal trafficking cases, an amendment to section 4(2) is being made so as to remove the requirement that the person has a belief that the individual has been trafficked into the UK; - Creating a new offence to ensure that UK nationals and certain UK residents are subject to criminal sanctions where they traffic a human being into, within or out of any country other than the UK and to ensure that Scottish courts have jurisdiction to deal with these offences; and - Creating a new offence of holding another person in slavery or servitude or requiring a person to perform forced or compulsory labour.	All of these amendments are either in response to legislation taken forward by the UK Government and/or in response to an European Commission proposal for a Framework Decision on preventing and combating trafficking in human beings and protecting victims. As the Lisbon Treaty came into effect on 1 December 2009 this instrument will be re-tabled as a Directive. These amendments will help ensure we have *a comprehensive criminal law to tackle those who undertake human trafficking.*
Fraud offences Creation of two new statutory offences in relation to a) possession or control of articles intended to be used for fraudulent purposes; and b) the making/adaptation/supply or offering to supply an article which has either been designed or adapted for fraudulent purposes, or where the person intends that the article is to be used for the purposes of fraud. Where an individual is found with, say, a card skimming machine in their possession, but no proof they have attempted to undertake a fraud, no offence has been committed though it is clear the article is to be used for fraudulent purposes.	These two new offences will help close current gaps in the law. Following publication of 'Her Majesty's Inspectorate of Constabulary for Scotland: Thematic Inspection Serious Fraud' in May 2008, an ACPOS led short life working group looked at whether changes to fraud law were needed. They recommended the creation of two new offences based on similar new offences contained in sections 6 and 7 of the Fraud Act 2006 (which does not extend to Scotland). This will help ensure a *comprehensive law in relation to fraud* operates in Scotland.

Abolition of common law offence of sedition and leasing-making Abolishing common law offence of sedition which consists in wilfully, unlawfully and mischievously, and in violation of the party's allegiance, and in breach of the peace, and to the public danger, uttering language calculated to produce popular disaffection, disloyalty, resistance to lawful authority, or, in more aggravated cases, violence and insurrection. Abolishing common law offence of leasing-making which consists of maliciously making untruthful statements with the intention of damaging the Queen's reputation.	We are legislating to remove redundant provisions from statute, following similar provisions included by the UK Government in section 73 of the Coroners and Justice Act 2009. This will help *reduce the risk of error and confusion*.
Granting of common law warrants Changes to Police, Public Order and Criminal Justice (Scotland) Act 2006 to clarify the right of sheriffs and justices of the peace to grant warrants to Scottish Crime and Drug Enforcement Agency constables. An issue has arisen in a recent judgement which cast doubt on the ability of sheriffs and JPs to grant warrants under common law to SCDEA constables (consideration also being given to whether a wider issue exists with granting of warrants to non SCDEA constables which may be included in the amendments).	We are responding to doubts that have been expressed so as to clarify the law in this area to help ensure the *operation of an efficient justice system.*
Repeal of redundant provisions Repeal of redundant provisions in section 24 of the Criminal Procedure (Scotland) Act 1995 relating to remote monitoring of restrictions while on bail. Also repeal of redundant provisions contained in the Incest and Related Offences (Scotland) Act 1986.	We are tidying up the law to *reduce the risk of error and confusion.*
Minor change to Vulnerable Witnesses (Scotland) Act 2004 Amendments to section 288C, 288D and 288E of the Criminal Procedure (Scotland) Act 1995 (as inserted by the Vulnerable Witnesses Act) so that an accused person is prevented from conducting his defence in person at any relevant hearing in criminal proceedings, not just trials, preliminary hearings, and victim statement proofs.	We are correcting a small gap in legislation to *ensure the law operates effectively* in this important area.
European Union Framework Decision on previous convictions Changes to ensure compliance with the European Union Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.	We are responding with changes to ensure Scots law complies with the European Union Framework Decision. This will help ensure *courts are able to make decisions based on full information*.
Retention of forensic data Amendments to system of forensic data retention within the justice system: • Confirming a Scottish police force or anyone	We are taking forward further improvements to the system of retention of forensic data so as to ensure our criminal law is up-to-date and

acting on such a force's behalf can check any of the information listed in section 19C(1) of the Criminal Procedure (Scotland) Act 1995 which they hold lawfully against such information held by anyone else, for the purposes mentioned in section 19C(2) of the 1995 Act; • Confirming that the Scottish Police Services Authority has the power to process checking of samples from outwith Scotland; and • Section 19A of the 1995 Act enables the police to take and retain relevant physical data and samples from those who have been convicted in respect of certain relevant sexual and violent offences. Amendments to insert 'public indecency' to the list of "relevant sexual offences" in section 19A(6) of the 1995 Act and inserting offences relating to the carrying of offensive weapons to the list of "relevant violent offences" in section 19A(6) of the 1995 Act.	*provides for the dealing with retention of forensic data effectively.*
Procedures for giving of evidence in sexual offence trials Provide a basis in law for complainers in sexual offence trials to be able to give their evidence in full in circumstances in which aspects of the assault are not charged owing to a lack of corroboration. This may occur where, for example, a complainer alleges rape, but only indecent assault (or sexual assault under the Sexual Offences (Scotland) Act 2009) can be corroborated.	We are responding to the HMA vs. Geddes case (May 2008) which called into question the current common law practice in this area. This will help ensure the law operates *upholding the interests of fairness.*
Establishing the competence of witnesses Clarify that in relation to a prior statement made by a witness, the requirement in section 260(2)(c) of the Criminal Procedure (Scotland) Act 1995 to establish the competence of a witness is not a requirement to establish that a witness could understand the difference between truth and lies at the time they made their statement.	We are responding to difficulties that have been encountered in cases where the courts have interpreted the requirement in section 260(2)(c) in opposition to what the policy intent is. This will help *clarify the law* in this important area.
European Union Framework Decision on the European evidence warrant Taking an enabling power to implement the European Union Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.	We are responding with taking a power to ensure changes to Scots law can be made to comply with the European Union Framework Decision. This will help ensure the *efficient and efficient operation of the justice system* across Europe.
Sex offender notification requirements relating to homeless offenders Amendments to sections 85 and 138 of the Sexual Offences Act 2003 to tighten up the application of the sex offender notification requirements (SONR) in relation to homeless sex offenders who have no fixed	This will help *ensure a more robust system* for monitoring homeless sex offenders. This will also ensure consistency with the rest of the UK.

abode. A regulation making power will be taken to prescribe how often homeless sex offenders who are subject to SONR will require to report to the police. Under present law, it will be a year before a homeless sex offender subject to SONR is required to report to the police and the regulation making power will be used to reduce this.	
Minor changes to operation of system for Risk of Sexual Harm Orders Changes to allow evidence of previous convictions which are spent for the purposes of the Rehabilitation of Offenders Act 1974 to be led in proceedings for Risk of Sexual Harm Orders (RSHOs) in Scotland.	We are making these changes to help ensure *the court has all relevant information before it*. This will ensure consistency with the rest of the UK.
Prison healthcare Providing a statutory framework for shifting responsibility for providing prison healthcare from SPS to the Health Boards.	We are providing the necessary statutory framework for the transfer of responsibility to take place. This follows work of the Prison Healthcare Advisory Board which recommended the shift in responsibility to the NHS so as to bring about the following benefits: • *Help reduce health inequalities;* • *Provide better continuity of care;* • *Bring about long term sustainable and high quality healthcare services with appropriate clinical governance arrangements; and* • *Scotland can meet accepted international standards for the treatment of people in prison.* The Equal Opportunities Committee: Report on female offenders in the criminal justice system recommended that the Scottish Government should consider again whether the health service could take over responsibility of health care in Scottish prisons within a much shorter period than is currently envisaged.
'Vicarious responsibility' for licensing offences Introduce the concept of 'vicarious responsibility' to certain offences under the Licensing (Scotland) Act 2005.	This will ensure premises licence holders can be held liable for the actions of frontline staff. This is included at the request of ACPOS and will *help ensure robust operation of licencing law.*
Licensing appeals Reforms to some of the appeal processes in the Licensing (Scotland) Act 2005.	A number of changes *improving the operation of the 2005 Act*.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Informal briefing from the Cabinet Secretary for Justice

Note by the Clerk

The Cabinet Secretary for Justice and officials attended an informal meeting on 9 February with Justice Committee members to discuss the Scottish Government's response to the Committee's Stage 1 Report. At the beginning of the meeting, the Cabinet Secretary made some opening remarks, and later in the meeting, Committee members asked whether those could be provided in writing. The notes for the Cabinet Secretary's remarks have now been provided by the Scottish Government, and are set out below.

Opening remarks from the Cabinet Secretary for Justice

Thank you for inviting us here today.

Early last week, we sent our response to your Stage 1 report on the Bill. We responded to your comments on provisions within the Bill and also took the opportunity to include details of a number of new topics we plan to seek to introduce into the Bill at Stage 2.

Before we take questions, it may help if we take a little time to highlight some key aspects of our approach to Stage 2.

On the matter of the Sentencing Council, we are pleased to see that the Committee clearly indicated its support with our aim of improving consistency in sentencing and recognised the need to tackle the current poor public perception of sentencing.

People have the right to understand why a sentence was given in a specific case; they have a right to know what the judge took into account.

We believe that sentencing guidelines will help to improve public understanding and therefore public confidence in our justice system.

The Committee recognised the merit in the creation of a Scottish Sentencing Council and this reflects the evidence in support of the provisions in the Bill from organisations such as Victim Support Scotland, the Scottish Police Federation, Community Justice Authorities, the Scottish Prisons Commission and the Crown Office.

Your Stage 1 report did set out the concerns from some quarters about the impact of the Sentencing Council on judicial discretion. The Committee concluded that the tension between the separation of powers and the impact of sentencing guidelines should be addressed.

A majority of you supported the idea of a structure in which sentencing guidelines would take effect only after endorsement from the Appeal Court. We have taken this recommendation and entered into discussions with representatives of the judiciary, with a view to taking it forward in a way that answers the concerns about judicial discretion.

Those discussions are still ongoing but we are hopeful of obtaining judicial support before taking forward amendments at Stage 2.

Turning to our plans to introduce the new Community Payback Order, we appreciate and value the Committee's general endorsement of these proposals.

This new order offers a real opportunity to make positive changes to the effectiveness of community penalties and to increase the understanding and confidence of both the judiciary and the community as a whole, of the value of community based sanctions.

At Stage 2, we propose to introduce a number of changes to make the Community Payback Order more robust.

We intend to add to the existing requirements which a court may attach to a Community Payback order – a new General Requirement.

This will allow the court to make a requirement tailored to the needs of the individual case before them where they consider that necessary to promote good behaviour or prevent further offending.

For example, they might wish to prohibit contact with a particular person or persons, or bar an individual from going to a specified locality.

A key factor in ensuring the effectiveness of this new order will of course be robust enforcement. We will therefore seek to amend the Bill to ensure that in all cases of a proven breach of the new order the court will have available to it, as an ultimate sanction, the ability to impose a custodial sentence.

This will include cases where the original offence would not have attracted a prison sentence.

To strengthen this provision we also propose to increase the maximum penalties for breach of the new order for fine defaulters.

We will also be making a substantial number of technical amendments to the Community Payback Order provisions, many of which seek to place the procedural detail more clearly on the face of the Bill.

As regards the presumption against custodial sentences of six months or less, we are clearly aware of the range of positions represented on the Committee.

However we remain convinced that the presumption – as it appears in the Bill – is the right way to proceed. We are not fettering the judges' discretion – they will still be able to impose a sentence of six months or less where required.

You yourselves have accepted in your Stage 1 report that short prison sentences do not normally achieve much by way of rehabilitation, and that there is little evidence of their deterrent effect. So we will be resisting the proposal that this provision should be deleted from the Bill.

On Disclosure we have considered the comments made during Stage 1 scrutiny that the provisions are too complex.

We have looked again at the parts of the Bill that have been the subject of comment:

- Section 85 which concerns the meaning of the expression "information" where it is used in the Bill,
- Provisions on disclosure schedules in solemn cases,
- Section 89 which concerns the new statutory test for disclosure and the provisions relating to non-disclosure of information.

We intend to bring forward Stage 2 amendments to meet some of the criticisms on the complexity of the provisions and to delete some of the finer detail in the provisions which, as the Committee noted, might be better placed within subordinate legislation, rules of court or in the statutory code of practice.

There will also be amendments covering some technical changes to add detail and clarification to some of the disclosure provisions following Stage 1 evidence.

We also will seek to make some changes to the Public Interest non-disclosure provisions, associated court hearings and appeals from such hearings. It should be stressed that some complexity here is unavoidable, though.

We also intend to bring Stage 2 amendments which will make provision in relation to the Crown's disclosure in appeals and post conviction.

Disclosure in criminal proceedings is a complex matter; and we need to ensure that the overall schemes for disclosure and for non-disclosure of evidence as presented in the Bill are both:

- compatible with ECHR;
- and that Parliament is given its proper opportunity to scrutinise the provisions.

Since preparation of the Bill for introduction was being completed in late 2008, there have been a number of developments within Scotland, at a UK level, and at a European level which we consider gives rise to a need to make changes to Scots law.

Turning to the specifics of new Stage 2 topics, we are seeking to make changes to a number of existing offences and also to introduce some new offences.

We are taking the opportunity to clarify the law in relation to the definition of a ‘public place’ in respect of knife and offensive weapon offences.

We are seeking to address an anomaly in the definition of ‘public place’ in the Criminal Law (Consolidation) (Scotland) Act 1995 that allows people carrying knives or offensive weapons on stairs or common landings such as those found in tenement blocks or high rise flats to escape prosecution. Clarity of the law is crucial in this important area and we are taking forward the necessary action in that regard.

Dealing with human trafficking is a priority. Your Stage 1 report sought reassurance from us that we are committed to tackling trafficking issues. Of course, the law is but one part of the picture but our package of Stage 2 measures will help ensure we have a comprehensive criminal law to tackle those who undertake human trafficking.

We propose two new statutory fraud offences to complement the existing common law of fraud. These offences will criminalise the possession of and the making, adaption or supplying of articles which have been designed or adapted for fraudulent purposes.

What this means is that in future, if the police catch someone with, say, a credit card skimming machine in their possession but with no evidence a fraud has yet been committed but a fraud was planned, the police can now charge the person under these new offences.

ACPOS asked us to take forward legislation in this area and we are happy to use this Bill to lodge suitable Stage 2 amendments to ensure we have a robust fraud law.

There are a number of Stage 2 amendments we intend to lodge in relation to three European Framework Decisions – the framework decision on previous convictions, the framework decision on the European evidence warrant and the framework decision on the mutual recognition of judgements and probation decisions.

These amendments will allow the necessary changes to Scots law to be made, either directly in this Bill or through taking enabling powers in this Bill which we can then use in the future to ensure Scots law complies with the terms of the framework decisions.

We need to ensure our justice system operates effectively. Responding to a recent court judgement where doubts were raised, we will clarify the law so as to ensure Scottish Crime and Drug Enforcement Agency constables are able to be granted warrants. We also plan to lodge some other amendments to improve criminal procedure.

We all want a robust system for managing sex offenders. We will lodge Stage 2 amendments that seek to tighten the regime for homeless offenders subject to sex offender notification requirements.

At present, sex offenders, who are subject to the notification requirements, are required to attend a police station on an annual basis to verify the information which they have provided to the police.

We intend to take a regulation making power that will enable Ministers to specify that homeless sex offenders should be required to report to the police at more frequent intervals for the purpose of verifying the information which they have notified. This reflects the greater difficulties encountered by the police in keeping track of homeless sex offenders than those with a permanent address.

As recommended by the Equal Opportunities Committee in their recent report on female offenders in the criminal justice system, we intend to lodge Stage 2 amendments that will provide the statutory framework for the transfer of responsibility for providing prison healthcare from the Scottish Prison Service to the Health Boards. The Prison Healthcare Advisory Board considered this issue very carefully and recommended the shift in responsibility so as to help reduce health inequalities, provide better continuity of care and bring about long term sustainable and high quality healthcare services for prisoners.

This is a Criminal Justice and Licensing Bill. Along with a number of improvements to existing licensing provisions within the Bill, we intend to lodge Stage 2 amendments that will introduce the concept of 'vicarious responsibility' to certain offences under the Licensing (Scotland) Act 2005. This will ensure premises licence holders can be held liable for the actions of frontline staff. We are including this at the request of ACPOS and will help ensure robust operation of licensing law.

We are pleased that this Bill represents an opportunity to take quick and effective action in response to issues that need addressing through primary legislative change.

We are happy to take any questions you have.

Kenny MacAskill MSP
Cabinet Secretary for Justice
9 February 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Letter from the Cabinet Secretary for Justice

Ahead of the start of Stage 2 of the Criminal Justice and Licensing Bill and further to our informal briefing session on 9 February, we are writing in relation to a number of Stage 2 matters.

Section 28 of the Bill - Failure to Report Serious Organised Crime

During Stage 1, the Justice Committee raised a number of concerns about the failing to report offence in section 28 of the Bill. In particular the Committee sought to ensure that there should be no criminal sanction for not reporting information which people have come across inadvertently and that more allowance should be made to safeguard the position of junior staff who are simply carrying out their job.

In my response to your Stage 1 report of 29 January, we said that we would be taking steps to make it clear that there must be a clear and direct link to such knowledge and the provision of goods and services and that a material benefit has been obtained. On reflection we have concluded that these changes are not necessary.

Section 28 of the Bill makes it an offence to fail to report knowledge or suspicion that a serious organised crime offence has been committed under sections 25 – 27 of the Bill in 2 situations:

i. Where the individual has a close personal relationship with the person committing the offence, in which case the bill already provides that individual has to have obtained a material benefit from the knowledge or suspicion; and
ii. Where the person has obtained the knowledge or suspicion during their employment.

The section is intended to address 2 policy objectives which were identified by members of the serious organised crime taskforce, firstly that partners and other relatives of serious organised criminals are living off the proceeds of the crime and secondly that professionals are colluding with serious organised crime by failing to report their suspicions or knowledge. In both those circumstances we consider it right that individuals should be liable for prosecution if they do not report their suspicions. The Bill also provides (in section 25) a new offence of being involved in serious organised crime which is intended to cover the situation where friends and professionals are actively involved in supporting organised crime rather than simply being wilfully blind to it.

We can assure you we are not seeking to criminalise teenage children of serious organised criminals. Equally we do not intend to capture innocent junior officials who unwittingly stumble across information during the course of their work, although we need to be aware that in some cases it could be the junior member of staff who has a suspicion or knowledge about serious organised crime and we would not therefore want to provide a blanket exemption for this group.

Having reviewed this section in consultation with the Solicitor General we have concluded that as drafted it already provides sufficient safeguards to meet the Committee's concerns and that no amendments are necessary.

In the case of close personal relationships the Bill already provides that a person is only under an obligation to report their suspicions where they have obtained material benefit. We are proposing an amendment to section 25 to clarify the definition of material benefit. The Committee raised a specific question about liability for a teenage child. As you will be aware the law already provides (section 42 of the Criminal Procedure (Scotland) Act 1995) that any prosecution of under 16s can only take place at the instruction of the Lord Advocate which is a significant safeguard.

In the case of a suspicion or knowledge arising out of employment the section provides that the knowledge or suspicion would have to come about from information obtained in the course of employment (therefore not including information people come across in other contexts) and that they knew or suspected that a serious organised crime offence has been committed. The section also provides a defence for a person charged with this offence to prove that they had a reasonable excuse for not doing so. This may cover a junior member of staff who wasn't aware of the significance of a particular piece of information or action. It would not, however excuse them where they did have knowledge that a crime had been committed and we think that is right.

Although we are not proposing to amend this section we do recognise the Committee's concerns about the need to ensure this offence is use proportionately and in a targeted way. As a result the Solicitor General has indicated that the Law Officers will issue prosecutorial guidance which will clearly target the proportionate use of the offence against those in a position of authority in relation to the supply of goods and services and those who have benefitted from their connection with serious organised crime. In addition this will guide prosecutors when the treatment of a person as a witness would be more appropriate than prosecution. Also the Solicitor General is minded to direct that no prosecution will proceed under this section without the consent of Crown Counsel.

We hope this provides you with sufficient reassurance to support this section which will be a valuable tool in our efforts to tackle serious organised crime in Scotland.

Serious organised crime offences – common law of conspiracy

At the informal session, we agreed to provide some further information in this area. There is a difficulty in tackling and prosecuting serious organised crime by using the law of conspiracy. Therefore we need to pursue options to provide further flexibility to the law to assist the procurators fiscal when tackling the important players in the chain of serious organised crime.

There are a number of common law crimes and statutory offences which are relevant to this area of criminality. These in themselves capture particular aspects of wrongdoing but do not provide a sufficiently comprehensive description of the various types of conduct which are to be captured by the involvement or indeed the other serious organised crime offences.

The new offence of involvement will better describe the conduct which we seek to criminalise. It is more narrowly focused on the particular activities of serious organised criminals and so provides a more targeted approach to this particular mischief than the very wide-ranging common law offence of conspiracy. In addition, a conviction of this offence will put on the record that the offender's conduct was in connected to serious organised crime rather than just badged as a conspiracy.

So while we recognise that there are similarities and indeed an overlap with the common law of conspiracy we do think it necessary and legitimate to take specific action to give law enforcement specific powers to deal with serious organised crime and place such offences on the public record.

That view was reflected in the evidence provided at Stage 1 by the Law Officers who support the introduction of this offence and the other serious organised crime offences and consider that it provides a useful framework for prosecutors. The Lord Advocate provided a useful scenario explaining how the prosecution would benefit from the involvement offence rather than conspiracy:

> *"we have evidence that does not quite show that the person was at the actual conspiracy stage, rather it relates to their becoming involved in a conspiracy. The person will have set up himself or herself and their business to become involved in that, but we could not get sufficient evidence to show the commission of a specific crime, albeit the generic evidence was available that showed involvement with people connected with money laundering, drug supplying or human trafficking, for instance"*

That is one example of a case where the common law crime of conspiracy would have proved inadequate to deal with serious organised criminals, but where the new offence of involvement, with its more bespoke approach, may have filled the gap in the law.

It is also worth bearing in mind that it is not novel for Parliament to make laws to deal with particular social problems even though these problems are already addressed to some extent by existing common law rules. For example, the Emergency Workers (Scotland) Act 2005 addresses conduct which might have been dealt with using the common law on assault. But in that case, as with this proposed offence, we consider having a specific statutory offence places on the public record that the offence took place in a particular context which merits special treatment.

Threatening, alarming or distressing behaviour

We have decided to introduce an amendment at Stage 2 to create a new statutory offence of engaging in threatening, alarming or distressing behaviour. The need for this has arisen in the light of the Appeal Court's Opinion in *Harris v HMA* which concluded that some public element is essential for the offence of breach of the peace to be committed. While the Appeal Court's decision does not affect the majority of breach of the peace cases, which take place in a public place, there is concern that it would make it difficult for the criminal law to intervene in domestic disputes and in other circumstances where the offence of breach of the peace has in the past been used to prosecute conduct where there is not necessarily a public element such as, for example, stalking.

The amendment will provide for an offence criminalising conduct which, either recklessly or by intention, is likely to cause a reasonable person alarm or distress or fear for their personal safety or the personal safety of another person. There would be no requirement for a public element and the conduct could take place with only the perpetrator and the victim being present (or, in fact, without either having been together at the same time in the case of written threats, phone calls, texts, emails etc.) The offence will ensure that the criminal law remains able to intervene in domestic disputes where the behaviour is such as to cause a reasonable person fear, alarm or distress. It will also enable the prosecution of 'stalking' behaviour where the perpetrator follows, pursues, spies upon on watches someone, and the circumstances are such that their behaviour would cause a reasonable person fear, alarm or distress.

Increase in penalties for the existing offences of brothel keeping and living on the earnings of prostitution

To the best of our knowledge human trafficking for sexual exploitation in Scotland is exclusively for indoor prostitution. We therefore welcome the Inquiry by the Equality and Human Rights Commission into the trafficking of human beings which will focus on sexual exploitation, and the also the Inquiry by the Parliament's Equal Opportunities Committee into the impact of migration and trafficking. The findings from both these Inquiries will contribute to the overall picture and help inform the development of a strategy in relation to addressing the issue. Also, the findings will assist in ensuring that any measures required to be put in place are necessary, practicable and sustainable.

Proposing substantial changes to the current law relating to the issue of prostitution could be seen to prejudge the outcome of both Inquiries. To complement the provisions already in the Bill on human trafficking and the closure of premises associated with human exploitation, we have nevertheless decided to bring forward relatively straightforward amendments which will be of practical assistance to the police.

The penalties for the existing offences of 'Brothel Keeping' and 'Living on the earnings of prostitution' in the Criminal Law (Consolidation) (Scotland) Act 1995 have become outdated and the maximum financial penalty for a conviction for these offences does not represent an effective disincentive to criminality. We therefore propose to increase the maximum penalty for these offences to 7 years (in line with the equivalent English offences) and an unlimited fine. An increase in these penalties is supported by ACPOS.

Section 134 of the Bill – Occasional licences

Further to the matter being raised at the informal session on 9 February, we are grateful for Nigel Don in raising the issue of approvals under our section 134 provisions in relation to occasional licences. We are giving this further consideration including having discussions with Licensing Board officials to the question raised with regards to who approves occasional licences and whether additional flexibility is needed. If following these discussions, there is a need to amend legislation we would intend to use this Bill (either at Stage 2 or 3) in making the necessary changes.

I hope this is helpful.

Kenny MacAskill MSP
Cabinet Secretary for Justice
19 February 2010

Criminal Justice and Licensing (Scotland) Bill

1st Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 3	Schedule 1
Sections 4 to 18	Schedule 2
Sections 19 to 66	Schedule 3
Sections 67 to 139	Schedule 4
Sections 140 to 145	Schedule 5
Sections 146 to 148	Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Robert Brown

26 In section 1, page 1, line 10, after <The> insert <primary purposes of sentencing are—

(a) fairness, and

(b) justice.

( ) The other>

Robert Brown

27 In section 1, page 1, line 10, leave out <are> and insert <include>

Robert Brown

28 In section 1, page 1, line 15, at end insert—

<( ) The primary principle of sentencing is proportionality, that is to say, imposing the least oppressive sentence that is consistent with securing the purposes mentioned in subsection (1)(b) and (d).>

Robert Brown

29 In section 1, page 1, line 20, after <seriousness> insert <, nature and character>

Robert Brown

30 In section 1, page 1, line 25, at end insert—

<( ) whether the offender pled guilty to the offence and, if so, at what stage of proceedings the plea was entered or guilt otherwise acknowledged,>

Robert Brown

31 In section 1, page 1, line 25, at end insert—

<( ) whether the offender was aged under 21 at the time of the offence,>

Aileen Campbell

32 In section 1, page 2, line 8, after <circumstances> insert <(including any responsibilities the offender has for the care of children or dependent adults)>

Robert Brown

33 In section 1, page 2, leave out line 12

Robert Brown

34 In section 1, page 2, leave out lines 13 and 14

Kenny MacAskill

35 In section 1, page 2, line 15, at end insert—

<( ) an interim compulsion order under section 53 of the 1995 Act,

( ) a supervision and treatment order under section 57(2)(d) of, and Schedule 4 to, that Act,>

Kenny MacAskill

36 In section 1, page 2, line 16, leave out <the 1995> and insert <that>

Kenny MacAskill

37 In section 1, page 2, line 20, at end insert—

<( ) The matters to which a court must have regard under subsection (3) in sentencing an offender in respect of an offence are referred to in this Part as the "principles of sentencing".>

Robert Brown
Supported by: Bill Aitken

38 Leave out section 1

Section 2

Robert Brown

39 In section 2, page 2, line 30, leave out subsection (2)

Robert Brown
Supported by: Bill Aitken

40 Leave out section 2

Schedule 1

Kenny MacAskill

41 In schedule 1, page 140, leave out line 11 and insert—

<( ) one person holding the office of sheriff (other than a sheriff principal),>

Bill Butler

12 In schedule 1, page 140, line 12, leave out <one person> and insert <two persons>

Bill Aitken

42 In schedule 1, page 140, line 12, leave out <or> and insert <, and

( ) one person holding the office of>

Kenny MacAskill

43 In schedule 1, page 140, line 12, at end insert <, and

( ) one other person holding—

(i) any of the offices mentioned in paragraphs (a) to (c), or

(ii) the office of sheriff principal.>

Bill Aitken

44 In schedule 1, page 140, leave out line 14

Bill Butler
Supported by: Kenny MacAskill

13 In schedule 1, page 140, leave out line 15

Bill Aitken

45 In schedule 1, page 140, line 16, after <prosecutor> insert <within the meaning of section 307 of the 1995 Act>

Bill Aitken

46 In schedule 1, page 140, line 18, after <is> insert <such>

Kenny MacAskill

47 In schedule 1, page 140, line 19, at end insert—

<( ) one constable,>

Robert Brown

48 In schedule 1, page 140, line 21, after <crime,> insert—

<( ) one member of a community justice authority,

( ) one person nominated by the Scottish Prison Service to represent its views and interests,>

Bill Butler
Supported by: Bill Aitken

14 In schedule 1, page 140, line 22, leave out <two other persons neither of whom is> and insert <one other person who is not>

Bill Butler

15 In schedule 1, page 140, line 23, at end insert—

<( ) Of the judicial members appointed under paragraph 1(3)(b) and (c) above, at least one must be a sheriff and at least one must be a justice of the peace.>

Bill Aitken

49 In schedule 1, page 140, line 27, leave out <after consulting> and insert <with the approval of>

Kenny MacAskill

50 In schedule 1, page 141, line 19, at end insert—

<( ) In this paragraph, “a member” means a member appointed by the Lord Justice General or the Scottish Ministers.>

Kenny MacAskill

51 In schedule 1, page 142, line 24, leave out <preparing and publishing sentencing guidelines> and insert <submitting sentencing guidelines to the High Court of Justiciary for approval>

Section 4

Robert Brown

52 In section 4, page 3, line 10, at end insert—

( ) promote the effectiveness and optimum use of—

(i) sentences of imprisonment or detention, and

(ii) non-custodial sentences,

by reference to the purposes and principles of sentencing>

Section 5

Kenny MacAskill

53 In section 5, page 3, line 12, leave out subsection (1) and insert—

<( ) The Council is from time to time to prepare, for the approval of the High Court of Justiciary, guidelines relating to the sentencing of offenders.>

Bill Butler

16 In section 5, page 3, line 12, leave out <and publish> and insert <for the approval of the Lord Justice General>

Robert Brown

54 In section 5, page 3, line 14, at end insert—

<( ) Sentencing guidelines must be consistent with the purposes and principles of sentencing.>

Angela Constance

394 In section 5, page 3, line 14, at end insert—

<( ) Sentencing guidelines must in particular relate to the sentencing of offenders aged under 18 at the time of the offence, including the circumstances in which it would be appropriate to refer such offenders to a children's hearing.>

Kenny MacAskill

55 In section 5, page 3, line 23, leave out <include in any sentencing guidelines> and insert <, on preparing any sentencing guidelines, also prepare>

Bill Butler

17 In section 5, page 3, leave out lines 27 and 28

Robert Brown
Supported by: Kenny MacAskill

56 In section 5, page 3, line 30, leave out subsections (6) and (7)

Bill Butler

18 In section 5, page 3, line 32, at end insert—

<(7A) The Lord Justice General, on receipt of guidelines prepared under subsection (1), must—

(a) refer the guidelines to such other Lords Commissioner of Justiciary as the Lord Justice General considers appropriate, inviting their comments,

(b) having taken account of any comments made by virtue of paragraph (a), either—

(i) approve the guidelines, or

(ii) refer the guidelines back to the Council for further consideration, giving reasons for so doing.

(7B) Where the Lord Justice General approves guidelines under subsection (7A)(b)(i), the Council must publish them.

(7C) Where guidelines are referred back to the Council under subsection (7A)(b)(ii), the Council must review the guidelines and, taking account of the reasons given for the reference, prepare revised guidelines for the approval of the Lord Justice General; and subsection (7A) applies to revised guidelines prepared under this subsection as it applies to guidelines prepared under subsection (1).>

Robert Brown

18A As an amendment to amendment 18, line 7, after <guidelines> insert <with or without amendments>

Robert Brown

18B As an amendment to amendment 18, line 11, leave out <Council must publish them> and insert <Clerk of Justiciary must publish them, as approved, under the authority of the High Court>

Robert Brown

57 In section 5, page 3, line 34, leave out <by it> and insert <under the authority of the High Court>

Kenny MacAskill

58 In section 5, page 3, line 35, leave out <publish revised guidelines> and insert <prepare, for the approval of the High Court of Justiciary, revised guidelines>

Bill Butler

19 In section 5, page 3, line 35, leave out <publish> and insert <prepare for the approval of the Lord Justice General>

Kenny MacAskill

59 In section 5, page 3, line 36, leave out subsection (9) and insert—

<( ) In this section and sections 6 to 13, references to sentencing guidelines include references to revised sentencing guidelines.>

Robert Brown

60 In section 5, page 3, line 36, at end insert—

<( ) This section is without prejudice to the power of the High Court to pronounce an opinion on the sentence that is appropriate in certain types of case under section 118(7) or 189(7) of the 1995 Act.>

Section 6

Bill Butler

20 In section 6, page 4, line 2, leave out <before publishing> and insert <in preparing for the approval of the Lord Justice General>

Kenny MacAskill

61 In section 6, page 4, line 2, leave out from <publishing> to <guidelines> in line 3 and insert <submitting any sentencing guidelines to the High Court of Justiciary for approval>

Kenny MacAskill

62 In section 6, page 4, line 4, after <guidelines> insert <together with a draft of the assessments referred to in section 5(5)>

Kenny MacAskill

63 In section 6, page 4, line 5, leave out <draft> and insert <drafts>

Robert Brown

64 In section 6, page 4, line 5, at end insert—

> <( ) the Lord Justice General (who may, in turn, consult other Lords Commissioner of Justiciary),>

Bill Butler

21 In section 6, page 4, line 7, at end insert—

> <( ) any committee of the Scottish Parliament for the time being established under the Parliament's standing orders with a remit that includes the criminal justice system,>

Angela Constance

395 In section 6, page 4, line 7, at end insert—

> <( ) persons aged under 18 who have been victims of offences relevant to the proposed guidelines, and bodies providing support to such persons,>

Angela Constance

396 In section 6, page 4, line 8, after <persons> insert <and bodies>

Kenny MacAskill

65 In section 6, page 4, line 9, leave out subsection (2)

Kenny MacAskill

66 In section 6, page 4, line 10, leave out <sentencing guidelines or revised sentencing guidelines> and insert <guidelines and assessments for submission to the High Court of Justiciary>

Bill Butler

22 In section 6, page 4, line 11, after <guidelines> insert <for approval by the Lord Justice General>

Kenny MacAskill

67 In section 6, page 4, line 11, leave out <draft> and insert <drafts>

After section 6

Kenny MacAskill

68 After section 6, insert—

<**Approval of sentencing guidelines by High Court**

(1) Sentencing guidelines have no effect unless approved by the High Court of Justiciary.

(2) On submitting sentencing guidelines to the High Court for approval, the Council must also provide the High Court with the assessments referred to in section 5(5).

(3) Where the Council submits sentencing guidelines to the High Court for approval, the Court may—

(a) approve the proposed guidelines—

(i) in whole or in part,

(ii) with or without modifications, or

(b) reject the proposed guidelines, in whole or in part.

(4) Where the High Court—

(a) rejects any of the proposed guidelines, or

(b) modifies any of them,

the Court must state its reasons for doing so.

(5) Sentencing guidelines approved by the High Court take effect on such date as the Court may determine.

(6) Different dates may be determined in relation to—

(a) different provisions of the guidelines, or

(b) different purposes.

(7) As soon as possible after the approval of sentencing guidelines by the High Court, the Council must publish—

(a) the guidelines as approved (including the date on which they take effect), and

(b) the assessments referred to in section 5(5) (revised as necessary to take account of any modifications of the guidelines prior to their approval).

(8) The guidelines and assessments are to be published in such manner as the Council considers appropriate.>

Section 7

Kenny MacAskill

69 In section 7, page 4, line 19, after <guidelines,> insert <or to depart from them in accordance with provision contained in them under section 5(3)(d),>

Section 8

Angela Constance

397 In section 8, page 5, line 10, after <may> insert <, after consulting such persons and bodies as they consider appropriate,>

Kenny MacAskill

70 In section 8, page 5, line 10, leave out from <publishing> to end of line 11 and insert—

<( ) preparing, for the approval of the High Court of Justiciary, sentencing guidelines on any matter, or

( ) reviewing any sentencing guidelines published by the Council.>

Bill Butler

23 In section 8, page 5, line 10, leave out <publishing> and insert <preparing for the approval of the Lord Justice General>

Section 9

Kenny MacAskill

71 Leave out section 9 and insert—

<**High Court's power to require preparation or review of sentencing guidelines**

(1) Where the High Court of Justiciary pronounces an opinion under section 118(7) or 189(7) of the 1995 Act, the Court may require the Council to—

(a) prepare, for the Court's approval, sentencing guidelines on any matter, or

(b) review any sentencing guidelines published by the Council on any matter.

(2) On making a requirement under subsection (1), the High Court must state its reasons for doing so.

(3) The Council must comply with a requirement made under subsection (1) and, in doing so, must have regard to the High Court's reasons for making the requirement.>

After section 9

Kenny MacAskill

72 After section 9, insert—

<**Publication of High Court guideline judgments**

(1) The Council must publish the opinions of the High Court of Justiciary pronounced under section 118(7) or 189(7) of the 1995 Act.

(2) As soon as possible after the High Court pronounces such an opinion, the Scottish Court Service must provide the Council with a copy of the opinion.

(3) The copy opinion is to be provided in such form and by such means as the Council may require.

(4) The opinions are to be published in such manner, and at such times, as the Council considers appropriate.

(5) This section does not affect any power or responsibility of the Scottish Court Service in relation to the publication of opinions of the High Court.>

Section 11

Robert Brown

73 In section 11, page 6, line 17, leave out subsections (2) and (3)

Section 12

Robert Brown

74 In section 12, page 7, line 5, at end insert—

<( ) the Lord Justice General (who may, in turn, consult other Lords Commissioner of Justiciary),>

Section 13

Kenny MacAskill

75 In section 13, page 7, line 26, at end insert—

<( ) any sentencing guidelines submitted during the year to the High Court of Justiciary for approval and of the Court's response to them,>

Kenny MacAskill

76 In section 13, page 7, line 30, leave out <references made by the High Court of Justiciary under section 9> and insert <requirements made by the High Court of Justiciary under section (*High Court's power to require preparation or review of sentencing guidelines*)>

Section 14

Kenny MacAskill

199 In section 14, page 8, line 8, leave out <in respect of> and insert <on>

Robert Brown

77 In section 14, page 8, line 8, at end insert—

<( ) The purpose of a community payback order is to punish an offender in a way that—

(a) helps to pay back to the community adversely affected by the conduct of the offender, and

(b) supports the offender in addressing the behaviour or circumstances that have contributed to that conduct.>

Robert Brown

78 In section 14, page 8, line 11, leave out <a> and insert <an offender>

Kenny MacAskill

200 In section 14, page 8, line 11, at end insert—

<( ) a compensation requirement,>

Kenny MacAskill

201 In section 14, page 8, line 17, at end insert—

<( ) a conduct requirement.>

Kenny MacAskill

202 In section 14, page 8, line 23, leave out <in respect of> and insert <on>

Kenny MacAskill

203 In section 14, page 8, line 24, at end insert—

<( ) a supervision requirement,>

Kenny MacAskill

204 In section 14, page 8, line 25, leave out from second <or> to end of line 26 and insert—

<( ) a conduct requirement.>

Robert Brown

79 In section 14, page 8, line 26, leave out second <a> and insert <an offender>

Kenny MacAskill

205 In section 14, page 8, line 27, leave out from <impose> to <imposes> in line 28 and insert <only impose a community payback order imposing>

Robert Brown

80 In section 14, page 8, line 29, leave out <a> and insert <an offender>

Kenny MacAskill

206 In section 14, page 8, line 29, at end insert—

<( ) a compensation requirement,>

Kenny MacAskill

207 In section 14, page 8, line 31, at end insert—

<( ) a conduct requirement.>

Kenny MacAskill

208 In section 14, page 8, line 33, leave out <making> and insert <imposing>

Kenny MacAskill

209 In section 14, page 8, line 37, leave out <in> and insert <by>

Kenny MacAskill

210 In section 14, page 9, line 4, after <section> insert <and sections 227B to 227ZI, except where the context requires otherwise>

Kenny MacAskill

211 In section 14, page 9, leave out lines 7 and 8

Kenny MacAskill

212 In section 14, page 9, line 11, leave out <in respect of> and insert <on>

Kenny MacAskill

213 In section 14, page 9, line 13, leave out from <such> to end of line 14 and insert <information about the offender and the offender's circumstances.

( ) An Act of Adjournal may prescribe—

(a) the form of a report under subsection (2), and

(b) the particular information to be contained in it.>

Kenny MacAskill

214 In section 14, page 9, line 14, at end insert—

<( ) Subsection (2) does not apply where the court is considering imposing a community payback order—

(a) imposing only a level 1 unpaid work or other activity requirement, or

(b) under section 227M(2).>

Kenny MacAskill

215 In section 14, page 9, line 28, leave out <make> and insert <impose>

Kenny MacAskill

216 In section 14, page 9, line 33, leave out <is subject to section 227M(7)> and insert <does not apply where the court is considering imposing a community payback order under section 227M(2)>

Kenny MacAskill

217 In section 14, page 9, line 35, leave out <in respect of> and insert <on>

Kenny MacAskill

218 In section 14, page 10, line 2, leave out <five> and insert <two>

Kenny MacAskill

219 In section 14, page 10, line 7, leave out from <and> to end of line 10 and insert—

<( ) require the offender to report to the responsible officer in accordance with instructions given by that officer,

( ) require the offender to notify the responsible officer without delay of—

(i) any change of the offender's address, and

(ii) the times, if any, at which the offender usually works (or carries out voluntary work) or attends school or any other educational establishment, and

( ) where the order imposes an unpaid work or other activity requirement, require the offender to undertake for the number of hours specified in the requirement such work or activity as the responsible officer may instruct, and at such times as may be so instructed.>

Kenny MacAskill

220 In section 14, page 10, line 16, leave out <or discharge any of them> and insert <, revoke or discharge the order>

Kenny MacAskill

221 In section 14, page 10, line 18, leave out <in respect of> and insert <on>

Kenny MacAskill

222 In section 14, page 10, line 20, leave out <five> and insert <two>

Kenny MacAskill

223 In section 14, page 10, line 21, leave out <Saturdays and Sundays> and insert <a Saturday or Sunday or any day which is a local or public holiday>

Kenny MacAskill

224 In section 14, page 10, leave out lines 22 to 39

Kenny MacAskill

225 In section 14, page 11, line 2, leave out <in respect of> and insert <on>

Kenny MacAskill

226 In section 14, page 11, line 6, leave out <in respect of> and insert <on>

Kenny MacAskill

227 In section 14, page 11, line 7, leave out from <from> to end of line 10 and insert <imposing a fine or any other sentence (other than imprisonment), or making any other order, that it would be entitled to impose or make in respect of the offence.>

Kenny MacAskill

228 In section 14, page 11, line 11, leave out <in respect of> and insert <on>

Kenny MacAskill

229 In section 14, page 11, line 13, leave out <imposing the community payback order>

Kenny MacAskill

230 In section 14, page 11, line 20, leave out <imposing the community payback order>

Kenny MacAskill

231 In section 14, page 11, line 28, leave out <An order imposing a> and insert <A>

Kenny MacAskill

232 In section 14, page 11, line 31, leave out <in respect of> and insert <on>

Kenny MacAskill

233 In section 14, page 11, line 39, at end insert—

<**227FA Payment of offenders' travelling and other expenses**

(1) The Scottish Ministers may by order made by statutory instrument provide for the payment to offenders of travelling or other expenses in connection with their compliance with requirements imposed on them by community payback orders.

(2) An order under subsection (1) may—

(a) specify expenses or provide for them to be determined under the order,

(b) provide for the payments to be made by or on behalf of local authorities,

(c) make different provision for different purposes.

(3) An order under subsection (1) is subject to annulment in pursuance of a resolution of the Scottish Parliament.>

Robert Brown

81 In section 14, page 12, line 3, leave out <a "supervision> and insert <an "offender supervision>

Robert Brown

82 In section 14, page 12, line 8, leave out second <a> and insert <an offender>

Kenny MacAskill

234 In section 14, page 12, line 10, leave out from <and> to end of line 12 and insert <at the time the order is imposed,>

Kenny MacAskill

235 In section 14, page 12, line 13, at end insert—

<(zi) a compensation requirement,>

Kenny MacAskill

236 In section 14, page 12, leave out lines 19 and 20 and insert—

<( ) a conduct requirement.>

Robert Brown

83 In section 14, page 12, line 19, leave out <a> and insert <an offender>

Kenny MacAskill

237 In section 14, page 12, line 21, at end insert—

<(3A) Subsection (3) is subject to subsection (3B) and section 227ZB(7B).

(3B) In the case of a supervision requirement imposed on a person aged 16 or 17 along with only a level 1 unpaid work or other activity requirement, the specified period must be no more than whichever is the greater of—

(a) the specified period under section 227L in relation to the level 1 unpaid work or other activity requirement, and

(b) 3 months.>

Kenny MacAskill

238 In section 14, page 12, line 22, leave out from <the> to end of line 23 and insert <"specified", in relation to a supervision requirement, means specified in the requirement.>

Robert Brown

84 In section 14, page 12, line 22, leave out <a> and insert <an offender>

Kenny MacAskill

239 In section 14, page 12, leave out lines 24 to 41 and insert—

<*Compensation requirement*

227H Compensation requirement

(1) In this Act, a "compensation requirement" is, in relation to an offender, a requirement that the offender must pay compensation for any relevant matter in favour of a relevant person.

(2) In subsection (1)—

"relevant matter" means any personal injury, loss, damage or other matter in respect of which a compensation order could be made against the offender under section 249 of this Act, and

"relevant person" means a person in whose favour the compensation could be awarded by such a compensation order.

(3) A compensation requirement may require the compensation to be paid in a lump sum or in instalments.

(4) The offender must complete payment of the compensation before the earlier of the following—

(a) the end of the period of 18 months beginning with the day on which the compensation requirement is imposed,

(b) the beginning of the period of 2 months ending with the day on which the supervision requirement imposed under section 227G(2) ends.

(5) The following provisions of this Act apply in relation to a compensation requirement as they apply in relation to a compensation order, and as if the references in them to a compensation order included a compensation requirement—

(a) section 249(3), (4), (5) and (8) to (10),

(b) section 250(2),

(c) section 251(1), (1A) and (2)(b), and

(d) section 253.>

Robert Brown

85 In section 14, page 12, line 26, leave out <a> and insert <an offender>

Robert Brown

86* In section 14, page 12, line 38, after second <the> insert <offender>

Robert Brown

87 In section 14, page 12, line 40, after second <the> insert <offender>

Kenny MacAskill

240 In section 14, page 13, line 6, leave out from <and> to end of line 7 and insert <or—

( ) unpaid work and other activity.

( ) Whether the offender must undertake other activity as well as unpaid work is for the responsible officer to determine.>

Kenny MacAskill

241 In section 14, page 13, line 8, after <and> insert <any>

Angela Constance

398 In section 14, page 13, line 9, after <officer> insert <but must be such as the responsible officer considers provides significant benefits in the area in which the work or activity is undertaken>

Kenny MacAskill

242 In section 14, page 13, line 22, at end insert—

<( ) An order under subsection (6) may only substitute for the number of hours for the time being specified in a provision mentioned in the first column of the following table a number of hours falling within the range set out in the corresponding entry in the second column.

Provision	*Range*	
	No fewer than	*No more than*
Subsection (3)(a)	10 hours	40 hours
Subsection (3)(b)	250 hours	350 hours
Subsections (4) and (5)	70 hours	150 hours>

Kenny MacAskill

243 In section 14, page 13, line 33, at end insert—

<( ) Subsection (2) does not apply where the court is considering imposing a community payback order—

(a) imposing only a level 1 unpaid work or other activity requirement, or

(b) under section 227M(2).>

Kenny MacAskill

244 In section 14, page 14, line 6, leave out <total>

Kenny MacAskill

245 In section 14, page 14, leave out line 9 and insert—

<( ) any other activity to be undertaken.>

Kenny MacAskill

246 In section 14, page 14, line 12, leave out <total>

Kenny MacAskill

247 In section 14, page 14, line 14, leave out from <amend> to <a> in line 16 and insert—

<(a) substitute another percentage for the percentage for the time being specified in subsection (2)(a),

(b) substitute another number of hours for the number of hours for the time being specified in subsection (2)(b).

( ) An order is not to be made under subsection (3) unless a draft of the statutory instrument containing the order has been laid before and approved by>

Kenny MacAskill

248 In section 14, page 14, line 19, leave out <total>

Kenny MacAskill

249 In section 14, page 14, line 19, after <and> insert <any>

Kenny MacAskill

250 In section 14, page 14, line 22, at end insert <beginning with the imposition of the requirement.>

Kenny MacAskill

251 In section 14, page 14, line 23, leave out from <such> to end of line 29 and insert—

<(a) in relation to a level 1 unpaid work or other activity requirement, 3 months or such longer period as the court may specify in the requirement,

(b) in relation to a level 2 unpaid work or other activity requirement, 6 months or such longer period as the court may specify in the requirement.>

Kenny MacAskill

252 In section 14, page 14, line 36, leave out <sentence> and insert <period>

Kenny MacAskill

253 In section 14, page 15, line 1, leave out <sentence> and insert <period>

Kenny MacAskill

254 In section 14, page 15, line 3, at end insert—

<( ) The court, in imposing a community payback order under subsection (2) on a person aged 16 or 17, must also impose a supervision requirement.>

Kenny MacAskill

255 In section 14, page 15, line 5, leave out <total>

Kenny MacAskill

256 In section 14, page 15, line 7, after <and> insert <any>

Kenny MacAskill

257 In section 14, page 15, line 11, leave out <in respect of> and insert <on>

Kenny MacAskill

258 In section 14, page 15, leave out lines 14 to 17

Kenny MacAskill

259 In section 14, page 15, leave out lines 21 and 22

Kenny MacAskill

260 In section 14, page 15, line 29, leave out <in respect of> and insert <on>

Kenny MacAskill

261 In section 14, page 15, line 32, leave out <such requirements in respect of> and insert <community payback orders imposing such a requirement on>

Kenny MacAskill

262 In section 14, page 15, line 36, leave out <so directs> and insert <makes a direction under subsection (2)>

Kenny MacAskill

263 In section 14, page 15, line 39, leave out <so direct> and insert <make a direction under subsection (2)>

Kenny MacAskill

264 In section 14, page 15, line 41, leave out from <300> to end of line 42 and insert <the number of hours specified in section 227I(3)(b) less the aggregate of the number of hours of unpaid work or activity still to be completed under each existing requirement at the time the new requirement is imposed.

( ) In calculating that aggregate, if any existing requirement is concurrent with another (by virtue of a direction under subsection (2)), hours that count for the purposes of compliance with both (or, as the case may be, all) are to be counted only once.>

Kenny MacAskill

265 In section 14, page 16, leave out lines 12 and 13

Kenny MacAskill

266 In section 14, page 16, line 14, after <and> insert <any>

Kenny MacAskill

267 In section 14, page 16, line 14, at end insert—

<( ) Rules under subsection (1) may—

(a) confer functions on responsible officers,

(b) contain rules about the way responsible officers are to exercise functions under this Act.>

Robert Brown

88 In section 14, page 16, line 33, after first <the> insert <offender>

Robert Brown

89 In section 14, page 17, line 10, after third <the> insert <offender>

Kenny MacAskill

268 In section 14, page 17, line 20, leave out <chartered> and insert <registered>

Kenny MacAskill

269 In section 14, page 17, line 33, leave out <chartered> and insert <registered>

Kenny MacAskill

270 In section 14, page 17, line 39, leave out <chartered> and insert <registered>

Robert Brown

90 In section 14, page 18, line 12, after third <the> insert <offender>

Kenny MacAskill

271 In section 14, page 18, line 19, after <practitioner> insert <(within the meaning of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13))>

Kenny MacAskill

272 In section 14, page 19, line 1, leave out <chartered> and insert <registered>

Kenny MacAskill

273 In section 14, page 19, line 24, leave out <chartered> and insert <registered>

Robert Brown

91 In section 14, page 20, line 7, after third <the> insert <offender>

Kenny MacAskill

274 In section 14, page 20, line 17, after <been> insert <, or can be,>

Robert Brown

92 In section 14, page 21, line 1, after third <the> insert <offender>

Kenny MacAskill

275 In section 14, page 21, line 13, at end insert—

<Conduct requirement

227VA Conduct requirement

(1) In this Act, a "conduct requirement" is, in relation to an offender, a requirement that the offender must, during the specified period, do or refrain from doing specified things.

(2) A court may impose a conduct requirement on an offender only if the court is satisfied that the requirement is necessary with a view to—

(a) securing or promoting good behaviour by the offender, or

(b) preventing further offending by the offender.

(3) The specified period must be not more than 3 years.

(4) The specified things must not include anything that—

(a) could be required by imposing one of the other requirements listed in section 227A(2), or

(b) would be inconsistent with the provisions of this Act relating to such other requirements.

(5) In this section, "specified", in relation to a conduct requirement, means specified in the requirement.>

Robert Brown

276* In section 14, page 21, line 13 at end, insert—

<Community payback orders: commencement and standards

227VB Commencement of community payback orders

(1) Each community payback order must specify—

(a) if the order imposes a supervision requirement, the date by which the specified period (within the meaning of section 227G) must have begun,

(b) if the order imposes an unpaid work or other activity requirement, the date by which the offender must have begun to undertake the unpaid work or other activity.

(2) At least one of the dates specified by virtue of subsection (1) must, wherever possible, be either the day on which the community payback order is imposed, or the weekday immediately following that day.

(3) Both the dates specified by virtue of subsection (1) must be as soon after the day on which the community payback order is imposed as is practicable.

227VC Standards with which community payback orders must comply

(1) The Scottish Ministers may, by regulations made by statutory instrument, specify standards with which community payback orders must comply.

(2) Standards specified under subsection (1) must aim to ensure that community payback orders (and any requirements imposed by them) are—

(a) capable of being delivered promptly,

(b) effective,

(c) proportionate to the nature of the offence and the circumstances of the offender, and

(d) consistent with the purposes and principles of sentencing.

(3) Regulations under subsection (1) are subject to annulment in pursuance of a resolution of the Scottish Parliament.>

Kenny MacAskill

277 In section 14, page 21, line 16, leave out <in respect of> and insert <on>

Kenny MacAskill

278 In section 14, page 21, line 22, leave out <by the appropriate court> and insert <(if different) the appropriate court, and, where those courts are different, the court must specify in the order which of those courts is to carry out the reviews>

Kenny MacAskill

279 In section 14, page 21, line 33, at end insert—

<(8A) Subsections (8B) and (8C) apply where, in the course of carrying out a progress review in respect of a community payback order, it appears to the court that the offender has failed to comply with a requirement imposed by the order.

(8B) The court must—

(a) provide the offender with written details of the alleged failure,

(b) inform the offender that the offender is entitled to be legally represented, and

(c) inform the offender that no answer need be given to the allegation before the offender—

(i) has been given an opportunity to take legal advice, or

(ii) has indicated that the offender does not wish to take legal advice.

(8C) The court must then—

(a) if it is the appropriate court, appoint another hearing for consideration of the alleged failure in accordance with section 227ZB, or

(b) if it is not the appropriate court, refer the alleged failure to that court for consideration in accordance with that section.>

Kenny MacAskill

280 In section 14, page 22, line 2, leave out <in respect of> and insert <on>

Kenny MacAskill

281 In section 14, page 22, line 5, leave out <proposes to vary, revoke or discharge> and insert <is considering varying, revoking or discharging>

Kenny MacAskill

282 In section 14, page 22, line 6, leave out <under section 227W(9) or 227X(1)> and insert <imposed on an offender>

Kenny MacAskill

283 In section 14, page 22, line 9, at end insert—

<( ) Subsection (2) does not apply where the court is considering varying the order under section 227ZB(5)(c).>

Kenny MacAskill

284 In section 14, page 22, line 13, at end insert—

<( ) include provision for progress reviews under section 227W,

( ) where the order already includes such provision, vary that provision.>

Kenny MacAskill

285 In section 14, page 22, line 18, leave out <total>

Robert Brown

93 In section 14, page 22, line 19, leave out first <a> and insert <an offender>

Kenny MacAskill

286 In section 14, page 22, line 19, leave out from <supervision> to <227H> in line 20 and insert <compensation requirement>

Kenny MacAskill

287 In section 14, page 22, leave out lines 22 to 24

Kenny MacAskill

288 In section 14, page 22, line 25, leave out <total>

Kenny MacAskill

289 In section 14, page 22, line 26, leave out from <maximum> to end of line 27 and insert <appropriate maximum.

( ) The appropriate maximum is the number of hours specified in section 227I(3)(b) at the time the unpaid work or other activity requirement being varied was imposed less the aggregate of the number of hours of unpaid work or other activity still to be completed under each other unpaid work or other activity requirement (if any) in effect in respect of the offender at the time of the variation (a "current requirement").

( ) In calculating that aggregate, if any current requirement is concurrent with another (by virtue of a direction under section 227N(2)), hours that count for the purposes of compliance with both (or, as the case may be, all) are to be counted only once.>

Kenny MacAskill

290 In section 14, page 22, line 27, at end insert—

<( ) The court may not, under subsection (4)(c), increase the amount of compensation beyond the maximum that could have been awarded at the time the requirement was imposed.>

Kenny MacAskill

291 In section 14, page 22, line 28, leave out <in> and insert <by>

Kenny MacAskill

292 In section 14, page 22, line 35, at end insert—

<( ) Subsection (8) applies in relation to a community payback order imposed under section 227M(2) as if the reference to the offence in relation to which the order was imposed were a reference to the failure to pay in respect of which the order was imposed.>

Kenny MacAskill

293 In section 14, page 22, line 36, leave out <proposes to vary, revoke or discharge> and insert <is considering varying, revoking or discharging>

Kenny MacAskill

294 In section 14, page 22, line 39, after <227W(6)> insert <or 227ZB(2)(b)>

Kenny MacAskill

295 In section 14, page 23, line 5, leave out <in respect of> and insert <imposed on>

Kenny MacAskill

296 In section 14, page 23, line 7, leave out from <such> to end of line 8 and insert <information about the offender and the offender's circumstances.

( ) An Act of Adjournal may prescribe—

(a) the form of a report under subsection (2), and

(b) the particular information to be contained in it.>

Kenny MacAskill

297 In section 14, page 23, line 8, at end insert—

<( ) Subsection (2) does not apply where the court is considering varying a community payback order—

(a) which imposes only a level 1 unpaid work or other activity requirement, or

(b) imposed under section 227M(2).>

Kenny MacAskill

298 In section 14, page 23, line 21, leave out <under section 227W for it to be reviewed> and insert <for a progress review under section 227W>

Kenny MacAskill

299 In section 14, page 23, line 31, leave out <in> and insert <by>

Kenny MacAskill

300 In section 14, page 23, line 32, leave out <made> and insert <imposed>

Kenny MacAskill

301 In section 14, page 23, line 36, leave out <in> and insert <by>

Kenny MacAskill

302 In section 14, page 23, line 36, leave out <made> and insert <imposed>

Kenny MacAskill

303 In section 14, page 23, line 36, at end insert—

<( ) Subsection (6)(a) does not prevent the imposition of a restricted movement requirement under section 227ZB(5)(c).

( ) In determining for the purpose of subsection (6)(a) whether an unpaid work or other activity requirement is a requirement that could have been imposed by the order when the order was imposed, the effect of section 227N(6) is to be ignored.>

Kenny MacAskill

304 In section 14, page 23, line 39, leave out second <in> and insert <by>

Kenny MacAskill

305 In section 14, page 23, line 40, leave out <made> and insert <imposed>

Kenny MacAskill

306 In section 14, page 23, line 40, at end insert—

<( ) Subsections (4) and (5) of section 227E apply, with the necessary modifications, where a community payback order is varied as they apply where such an order is imposed.>

Kenny MacAskill

307 In section 14, page 24, line 3, leave out <in respect of> and insert <on>

Kenny MacAskill

308 In section 14, page 24, line 3, leave out <is in force> and insert <has been imposed>

Kenny MacAskill

309 In section 14, page 24, line 7, leave out from <an> to <varied> in line 8 and insert <the court is considering varying the order>

Kenny MacAskill

310 In section 14, page 24, line 10, leave out <as proposed in the application>

Kenny MacAskill

311 In section 14, page 24, line 14, leave out <as proposed in the application>

Kenny MacAskill

312 In section 14, page 24, line 21, leave out <in respect of> and insert <on>

Kenny MacAskill

313 In section 14, page 24, line 22, leave out <in> and insert <by>

Kenny MacAskill

314 In section 14, page 24, line 30, at end insert—

<(4A) The court must, before considering the alleged failure—

(a) provide the offender with written details of the alleged failure,

(b) inform the offender that the offender is entitled to be legally represented, and

(c) inform the offender that no answer need be given to the allegation before the offender—

(i) has been given an opportunity to take legal advice, or

(ii) has indicated that the offender does not wish to take legal advice.

(4B) Subsection (4A) does not apply if the offender has previously been provided with those details and informed about those matters under section 227W(8B) of this Act.>

Kenny MacAskill

315 In section 14, page 24, line 34, at beginning insert <where the order was imposed under section 227A(1),>

Kenny MacAskill

316 In section 14, page 24, line 36, at end insert—

<(ba) where the order was imposed under section 227A(4), revoke the order and impose on the offender a sentence of imprisonment for a term not exceeding—

(i) where the court is a justice of the peace court, 60 days,

(ii) in any other case, 3 months,

(bb) where the order was imposed under section 227M(2), revoke the order and impose on the offender a period of imprisonment for a term not exceeding—

(i) where the court is a justice of the peace court, 60 days,

(ii) in any other case, 3 months,>

Kenny MacAskill

317 In section 14, page 24, line 38, after <or> insert <revoke or>

Kenny MacAskill

318 In section 14, page 24, line 38, at end insert <, or

( ) both impose a fine under paragraph (a) and vary the order under paragraph (c).>

Kenny MacAskill

319 In section 14, page 24, line 38, at end insert—

<(5A) Where the court revokes a community payback order under subsection (5)(b) or (ba) and the offender is, in respect of the same offence, also subject to—

(a) a drug treatment and testing order, by virtue of section 234J, or

(b) a restriction of liberty order, by virtue of section 245D(3),

the court must, before dealing with the offender under subsection (5)(b) or (ba), revoke the drug treatment and testing order or, as the case may be, restriction of liberty order.>

Kenny MacAskill

320 In section 14, page 24, line 38, at end insert—

<( ) If the court is satisfied that the offender has failed to comply with a requirement imposed by the order but had a reasonable excuse for the failure, the court may, subject to section 227Y(2), vary the order so as to impose a new requirement, vary any requirement imposed by the order or revoke or discharge any requirement imposed by the order.>

Kenny MacAskill

321 In section 14, page 25, line 1, leave out <imposes> and insert <varies the order so as to impose>

Robert Brown

94 In section 14, page 25, line 2, leave out first <a> and insert <an offender>

Robert Brown

95 In section 14, page 25, line 2, leave out second <a> and insert <an offender>

Kenny MacAskill

322 In section 14, page 25, line 3, at end insert—

<(7A) The court must ensure that the specified period under section 227G in relation to the supervision requirement is at least as long as the period for which the restricted movement requirement has effect and, where the community payback order already imposes a supervision requirement, must vary it accordingly, if necessary.

(7B) The minimum period of 6 months in section 227G(3) does not apply in relation to a supervision requirement imposed under subsection (7).>

Kenny MacAskill

323 In section 14, page 25, leave out lines 8 to 11

Robert Brown

96 In section 14, page 25, line 10, after second <the> insert <offender>

Kenny MacAskill

324 In section 14, page 25, leave out lines 19 to 24

Kenny MacAskill

325 In section 14, page 25, line 24, at end insert—

<( ) Subsections (5)(b) and (ba) and (5A) are subject to section 42(9) of the Criminal Justice (Scotland) Act 2003 (asp 7) (powers of drugs courts to deal with breach of community payback orders).>

Kenny MacAskill

326 In section 14, page 25, leave out lines 26 to 32

Robert Brown

97 In section 14, page 25, line 36, leave out second <a> and insert <an offender>

Kenny MacAskill

327 In section 14, page 25, line 37, leave out from <supervision> to end of line 38 and insert <compensation requirement.>

Kenny MacAskill

328 In section 14, page 26, line 14, leave out from <A> to <offender> and insert <In imposing a restricted movement requirement containing provision under subsection (2)(a), the court must ensure that the offender is not required, either by the requirement alone or the requirement taken together with any other relevant requirement or order,>

Kenny MacAskill

329 In section 14, page 26, line 15, at end insert—

<( ) In subsection (3), "other relevant requirement or order" means—

(a) any other restricted movement requirement in effect in respect of the offender at the time the court is imposing the requirement referred to in subsection (3), and

(b) any restriction of liberty order under section 245A in effect in respect of the offender at that time.>

Kenny MacAskill

330 In section 14, page 26, line 18, leave out <of not more than 12 months>

Kenny MacAskill

331 In section 14, page 26, line 18, at end insert—

<(4A) The period specified under subsection (4)(b) must be—

(a) not less than 14 days, and

(b) subject to subsections (4B) and (4C), not more than 12 months.

(4B) Subsection (4C) applies in the case of a restricted movement requirement imposed for failure to comply with a requirement of a community payback order—

(a) where the offender was under 18 years of age at the time the order was imposed, or

(b) where the only requirement imposed by the order is a level 1 unpaid work or other activity requirement.

(4C) The period specified under subsection (4)(b) must be not more than—

(a) where the order was imposed by a justice of the peace court, 60 days, or

(b) in any other case, 3 months.>

Kenny MacAskill

332 In section 14, page 26, line 28, leave out <(4)(b)> and insert <(4A)(b)>

Kenny MacAskill

333 In section 14, page 27, line 11, leave from <an> to <varied> in line 12 and insert <the court is considering varying the requirement>

Kenny MacAskill

334 In section 14, page 27, line 14, leave out <proposed in the application>

Kenny MacAskill

335 In section 14, page 27, line 20, leave out <proposed in the application>

Kenny MacAskill

336 In section 14, page 27, line 34, leave out <in respect of> and insert <on>

Kenny MacAskill

337 In section 14, page 28, line 19, after <person> insert <and to the responsible officer>

Kenny MacAskill

338 In section 14, page 28, line 24, leave out <in respect of> and insert <on>

Robert Brown

98 In section 14, page 29, line 3, after <consult> insert—

<(a) persons or organisations representing victims of crime,
(b) community councils established in their area, and
(c)>

Kenny MacAskill

339 In section 14, page 29, line 5, leave out <in respect of> and insert <on>

Robert Brown

99 In section 14, page 29, line 11, at end insert—

<*Annual reports on community payback orders*

227ZJA Annual reports on community payback orders

(1) Each local authority must, as soon as practicable after the end of each reporting year, publish a report on the operation of community payback orders within their area during that reporting year.

(2) A report under subsection (1) must specify—

(a) in relation to unpaid work or other activity under section 227I—

(i) the number of offenders undertaking the unpaid work or other activity,

(ii) the total number of hours of unpaid work or other activity undertaken,

(iii) the nature of the unpaid work or other activity undertaken,

(iv) the cost of organising and managing the unpaid work or other activity, and the estimated value of that work and activity,

(b) in relation to programmes under section 227P—

(i) the number of offenders participating in the programmes,

(ii) the number and nature of those programmes,

(iii) the cost of providing those programmes.

(3) The Scottish Ministers must, as soon as practicable after the end of each reporting year, lay before the Scottish Parliament and publish a report on the operation of community payback orders during that reporting year.

(4) A report under subsection (3) must—

(a) collate and summarise the data included in the various reports under subsection (1),

(b) provide an assessment of the overall costs and effectiveness of community payback orders.

(5) In this section, "reporting year" means—

(a) the period of 12 months beginning on the day this section comes into force, or

(b) any subsequent period of 12 months beginning on an anniversary of that day.>

Kenny MacAskill

340 In section 14, page 29, line 23, leave out <(1)(b)> and insert <(1)>

Kenny MacAskill

341 In section 14, page 29, line 24, leave out <the order imposing>

Kenny MacAskill

342 In section 14, page 29, line 25, at end insert—

<(2) Schedule (*Community payback orders: consequential modifications*) modifies enactments in consequence of this section.>

After schedule 1

Kenny MacAskill

343 After schedule 1, insert—

<SCHEDULE
(*introduced by section 14(2)*)

COMMUNITY PAYBACK ORDERS: CONSEQUENTIAL MODIFICATIONS

PART 1

THE 1995 ACT

The 1995 Act

1 The 1995 Act is amended as follows.

2 In section 52H(3) (early termination of assessment order), the following are repealed—

(a) the word "or" immediately following paragraph (e), and

(b) paragraph (f).

3 In section 52R(3) (termination of treatment order), the following are repealed—

(a) the word "or" immediately following paragraph (e), and

(b) paragraph (f).

4 In section 53(12)(a) (interim compulsion orders), for sub-paragraphs (vi) and (vii) substitute—

"(vi) impose a community payback order;

(vii) make a drug treatment and testing order; or

(viii) make a restriction of liberty order,".

5 In section 57A(15)(a) (compulsion order), for sub-paragraphs (vi) and (vii) substitute—

"(vi) impose a community payback order;

(vii) make a drug treatment and testing order; or

(viii) make a restriction of liberty order,".

6 In section 58(8) (order for hospital admission or guardianship), for "make a probation order or a community service order" substitute "impose a community payback order or make a drug treatment and testing order".

7 In section 106(1) (right of appeal), for paragraph (d) substitute—

"(d) against any drug treatment and testing order;".

8 In section 108 (Lord Advocate's right of appeal against disposal)—

(a) in subsection (1), paragraphs (d) and (e) are repealed, and

(b) in subsection (2)(b)(iii), for "(d) to (e)" substitute "(dd)".

9 In section 121A(4) (suspension of certain sentences pending determination of appeal), for paragraphs (a) to (c) substitute—

"(aa) a community payback order;".

10 In section 175 (right of appeal)—

(a) in subsection (2)(c), for "probation order, drug treatment and testing order or any community service order" substitute "drug treatment and testing order",

(b) in subsection (4), paragraphs (d) and (e) are repealed, and

(c) in subsection (4A)(b)(iii), for "(d) to (e)" substitute "(dd)".

11 In section 193A(4) (suspension of certain sentences pending determination of appeal)—

(a) for paragraphs (a) to (c) substitute—

“(aa) a community payback order;”, and

(b) paragraph (e) is repealed.

12 Sections 228 to 234 (probation) are repealed.

13 In section 234H (disposal on revocation of drug treatment and testing order)—

(a) in subsection (1), for “drugs” substitute “drug”, and

(b) in subsection (3), for the words from “subject to” where they first occur to the end substitute “, in respect of the same offence, also subject to a community payback order, by virtue of section 234J, or a restriction of liberty order, by virtue of section 245D, the court shall, before disposing of the offender under subsection (1) above, revoke the community payback order or restriction of liberty order (as the case may be).”.

14 (1) Section 234J (concurrent drug treatment and testing and probation orders) is amended as follows.

(2) In subsection (1)—

(a) for “sections 228(1) and” substitute “section”, and

(b) for “probation order” substitute “community payback order”.

(3) In subsection (3)—

(a) for “probation order” substitute “community payback order”, and

(b) for paragraphs (b) and (c) substitute—

“(ba) the local authority within whose area the offender will reside for the duration of each order.”.

(4) In subsection (4)—

(a) in paragraph (a), for “probation order and is dealt with under section 232(2)(c)” substitute “community payback order and is dealt with under section 227ZB(5)(c)”, and

(b) in paragraph (b), for “232(2)(c) of this Act in relation to the probation order” substitute “227ZB(5)(c) of this Act in relation to the community payback order”.

(5) In subsection (5)—

(a) for “probation order” substitute “community payback order”, and

(b) for “232(2)” substitute “227ZB(5)”.

15 Sections 235 to 245 (supervised attendance orders and community service orders) are repealed.

16 (1) Section 245A (restriction of liberty orders) is amended as follows.

(2) In subsection (2), the words from “but” to the end are repealed.

(3) After subsection (2) insert—

“(2A) In making a restriction of liberty order containing provision under subsection (2)(a), the court must ensure that the offender is not required, either by the order alone or the order taken together with any other relevant order or requirement, to be in any place or places for a period or periods totalling more than 12 hours in any one day.

(2B) In subsection (2A), “other relevant order or requirement” means—

(a) any other restriction of liberty order in effect in respect of the offender at the time the court is making the order referred to in subsection (2A), and

(b) any restricted movement requirement under section 227ZD in effect in respect of the offender at that time.”.

(4) In subsection (12)(a), for “subsection (2)” substitute “subsection (2A)”.

17 (1) Section 245D (combination of restriction of liberty orders with other orders) is amended as follows.

(2) In subsection (1)(b)—

(a) in sub-paragraph (i), for “probation order made under section 228(1)” substitute “community payback order imposed under section 227A(1)”, and

(b) in sub-paragraph (ii)—

(i) for “probation order made under section 228(1) of this Act,” substitute “community payback order imposed under section 227A(1) of this Act or”, and

(ii) the words “or both such orders” are repealed.

(3) In subsection (2), for “probation order” substitute “community payback order”.

(4) In subsection (3)—

(a) the word “228(1),” is repealed,

(b) in paragraph (a), for “probation order” substitute “community payback order”, and

(c) in paragraph (b), for “either or both of a probation order and” substitute “either a community payback order or”.

(5) In subsection (4)—

(a) for “probation order” substitute “community payback order”, and

(b) for paragraph (b) substitute—

“(b) the local authority within whose area the offender will reside for the duration of each order.”.

(6) Subsection (6) is repealed.

(7) In subsection (7)—

(a) in paragraph (a)—

(i) for “contained in a probation order and is dealt with under section 232(2)(c)” substitute “imposed by a community payback order and is dealt with under section 227ZB(5)(c)”, and

(ii) the words from “234G(2)(b)” to “section” where it third occurs are repealed,

(b) in paragraph (b), the words from “232(2)(c)” to “section” where it third occurs are repealed, and

(c) in paragraph (c), for “232(2)(c) of this Act in relation to a probation order” substitute “227ZB(5)(c) of this Act in relation to a community payback order”.

(8) In subsection (8), for “232(2)” substitute “227ZB”.

(9) In subsection (9)—

(a) in paragraph (a), for “probation order” substitute “community payback order”, and

(b) paragraph (c) is repealed.

18 (1) Section 245G (disposal on revocation of restriction of liberty order) is amended as follows.

(2) In subsection (2), for the words from “by virtue” to the end substitute “in respect of the same offence, also subject to a community payback order or a drug treatment and testing order, by virtue of section 245D(3), it shall before disposing of the offender under subsection (1) above, revoke the community payback order or drug treatment and testing order.”.

(3) In subsection (3), for “probation order discharged” substitute “community payback order”.

(4) Subsection (4) is repealed.

19 In section 245J (breach of certain orders: adjourning hearing and remanding in custody etc.)—

(a) in subsection (1)—

(i) for “a probationer or” substitute “an”,

(ii) for “probation order” substitute “community payback order”, and

(iii) the words “supervised attendance order, community service order” are repealed,

(b) in subsection (2), the words “probationer or” are repealed, and

(c) in subsection (4), for “A probationer or” substitute “An”.

20 Sections 245K to 245Q (community reparation orders) are repealed.

21 In section 246 (admonition and absolute discharge), in each of subsections (2) and (3), the words “and that a probation order is not appropriate” are repealed.

22 In section 249(2) (compensation order against convicted person), for paragraph (b) substitute—

“(ab) where, under section 227A of this Act, it imposes a community payback order;”.

23 In section 307 (interpretation)—

(a) in subsection (1)—

(i) insert at the appropriate places—

““alcohol treatment requirement” has the meaning given in section 227V(1);”

““community payback order” means a community payback order (within the meaning of section 227A(2)) imposed under section 227A(1) or (4) or 227M(2);”

““compensation requirement” has the meaning given in section 227H(1);”

““conduct requirement” has the meaning given in section 227VA(1);”

““drug treatment requirement” has the meaning given in section 227U(1);”

““mental health treatment requirement” has the meaning given in section 227R(1);”

““programme requirement” has the meaning given in section 227P(1);”

““residence requirement” has the meaning given in section 227Q(1);”

““responsible officer”, in relation to a community payback order, is to be construed in accordance with section 227C;”

““restricted movement requirement” has the meaning given in section 227ZD(1);”

““supervision requirement” has the meaning given in section 227G(1);”

““unpaid work or other activity requirement” has the meaning given in section 227I(1), and “level 1 unpaid work or other activity requirement” and “level 2 unpaid work or other activity requirement” are to be construed in accordance with section 227I(4) and (5) respectively;”, and

(ii) the definitions of the following terms are repealed—

“appropriate court”

“community service order”

“probationer”

“probation order”

“probation period”, and

(b) subsection (3) is repealed.

24 Schedules 6 and 7 are repealed.

PART 2

OTHER ENACTMENTS

The Social Work (Scotland) Act 1968 (c.49)

25 (1) The Social Work (Scotland) Act 1968 is amended as follows.

(2) In section 27 (supervision and care of persons put on probation or released from prisons etc.), in subsection (1)(b)—

(a) in paragraph (iii), for the words from “community service order” to the end substitute “community payback order imposed under section 277A or 227M of the Criminal Procedure (Scotland) Act 1995 imposing an unpaid work or other activity requirement”, and

(b) sub-paragraphs (iv) and (va) are repealed.

(3) In section 86(3) (adjustments between authority providing accommodation etc. and authority of area of residence), after "supervision order" insert ", community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995,".

The Rehabilitation of Offenders Act 1974 (c.53)

26 (1) The Rehabilitation of Offenders Act 1974 is amended as follows.

(2) In section 5(4A) (rehabilitation periods for particular sentences), the words "a probation order or" are repealed.

(3) In section 6(3) (the rehabilitation period applicable to a conviction), the following are repealed—

(a) the words "or a probation order was made",

(b) the words "or a breach of the order", and

(c) the words "or probation order".

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55)

27 In Schedule 1 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, in Part 2 (ineligibility for and disqualification and excusal from jury service), in paragraph (bb)—

(a) for sub-paragraph (i) substitute—

"(i) a community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46);", and

(b) sub-paragraph (iii) is repealed.

The Local Government and Planning (Scotland) Act 1982 (c.43)

28 In section 24 of the Local Government and Planning (Scotland) Act 1982 (councils' functions in relation to the provision of gardening assistance for the disabled and the elderly), in subsection (3), for the words from "instruction" to "that Act" substitute "determination that may be made or instruction that may be given, for the purposes of an unpaid work or other activity requirement imposed in a community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46), by the responsible officer in relation to the order,".

The Foster Children (Scotland) Act 1984 (c.56)

29 In section 2 of the Foster Children (Scotland) Act 1984 (exceptions to section 1), in subsection (3), for "probation order" substitute "community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46)".

The Road Traffic Offenders Act 1988 (c.53)

30 In section 46(3)(b) of the Road Traffic Offenders Act 1988 (combination of disqualification and endorsement with probation orders and orders for discharge), the words "section 228 (probation) or" are repealed.

The Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40)

31 In Schedule 3 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (transitional provisions, transitory modifications and savings), in Part 2, paragraph 13 is repealed.

The Proceeds of Crime (Scotland) Act 1995 (c.43)

32 (1) The Proceeds of Crime (Scotland) Act 1995 is amended as follows.

(2) In section 25(9) (recall or variation of suspended forfeiture order), the words "probation order or" are repealed.

(3) In section 26(9) (property wrongly forfeited: return or compensation), the words "probation order or" are repealed.

The Crime and Punishment (Scotland) Act 1997 (c.48)

33 In the Crime and Punishment (Scotland) Act 1997, the following provisions are repealed—

(a) section 26 (evidence concerning certain orders), and

(b) in Schedule 1 (minor and consequential amendments), in paragraph 21, sub-paragraphs (27) to (29).

The Crime and Disorder Act 1998 (c.37)

34 In the Crime and Disorder Act 1998, in Schedule 6 (drug treatment and testing orders: amendment of the 1995 Act), in Part 1, paragraphs 1 and 2 are repealed.

The Powers of Criminal Courts (Sentencing) Act 2000 (c.6)

35 In Schedule 9 to the Powers of Criminal Courts (Sentencing) Act 2000 (consequential amendments), paragraphs 176 to 178 are repealed.

The Criminal Justice and Court Services Act 2000 (c.43)

36 (1) Schedule 7 to the Criminal Justice and Court Services Act 2000 (minor and consequential amendments) is amended as follows.

(2) In paragraph 4(2), in the entry relating to the Criminal Procedure (Scotland) Act 1995, for "sections 209(3)(a) and 234(1)(a)" substitute "section 209(3)(a)".

(3) Paragraphs 122 to 125 are repealed.

The Social Security Fraud Act 2001 (c.11)

37 In section 7(9)(b) of the Social Security Fraud Act 2001 (loss of benefit for commission of benefit offences), the words "or a court in Scotland makes a probation order" are repealed.

The Justice (Northern Ireland) Act 2002 (c.26)

38 In Schedule 4 to the Justice (Northern Ireland) Act 2002 (functions of justices of the peace), paragraph 37 is repealed.

The Criminal Justice (Scotland) Act 2003 (asp 7)

39 (1) The Criminal Justice (Scotland) Act 2003 is amended as follows.

(2) In section 42 (drugs courts)—

(a) in subsection (4)—

(i) for "probationer with the requirements of a probation order" substitute "community payback order",

(ii) in paragraph (b), for the words from "make" to "work" substitute "in the case of a failure to comply with the requirements of a drug treatment and testing order, make a community payback order imposing a level 1 unpaid work or other activity requirement, so however that the total hours of unpaid work or other activity", and

(iii) for "probation order" where those words second occur substitute "community payback order",

(b) in subsection (6), for paragraph (b) substitute—

"(b) alleged at—

(i) a progress review carried out by such a court in relation to a community payback order; or

(ii) a diet of such a court to which an offender has been cited under section 227ZB(2) of that Act (breach of community payback order),

that the offender has failed to comply with a requirement imposed by a community payback order,",

(c) in subsection (7)—

(i) the words "or probationer" are repealed, and

(ii) for "232" substitute "227ZB",

(d) for subsection (9) substitute—

"(9) If a community payback order is revoked under section 227ZB(5)(b) of the 1995 Act, the court (whether or not a drugs court) must, in dealing with the offender by virtue of that section, take into account any sentence which has been imposed under paragraph (a) of subsection (4) of this section in relation to a failure to comply with the community payback order.",

(e) in subsection (10)—

(i) insert at the appropriate places—

""community payback order" means an order imposed under section 227A of the 1995 Act;"

""level 1 unpaid work or other activity requirement" has the meaning given in section 227I(4) of the 1995 Act;", and

(ii) the definition of "probation order" is repealed, and

(f) in subsection (11), paragraphs (a) and (b) are repealed.

(3) Section 46 (requirement for remote monitoring in probation order) is repealed.

(4) In section 50 (amendments in relation to certain non-custodial sentences), subsections (1), (2) and (4) are repealed.

(5) In section 60 (unified citation provisions)—

(a) in subsection (1), paragraphs (a), (b), (e) and (f) are repealed, and

(b) subsections (3) and (4) are repealed.

The Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)

40 In the Mental Health (Care and Treatment) (Scotland) Act 2003, the following provisions are repealed—

(a) section 135 (amendment of 1995 Act: probation for treatment of mental disorder), and

(b) in schedule 4 (minor and consequential amendments), in paragraph 8, sub-paragraph (15).

The Criminal Justice Act 2003 (c.44)

41 In Schedule 32 to the Criminal Justice Act 2003 (amendments relating to sentencing), paragraphs 69 to 72 are repealed.

The Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8)

42 In the Antisocial Behaviour etc. (Scotland) Act 2004, the following provisions are repealed—

(a) section 120 (community reparation orders), and

(b) in schedule 4 (minor and consequential amendments), in paragraph 5, sub-paragraphs (3), (5), (6) and (11).

The Management of Offenders etc. (Scotland) Act 2005 (asp 14)

43 (1) The Management of Offenders etc. (Scotland) Act 2005 is amended as follows.

(2) In section 10 (arrangements for assessing and managing risks posed by certain offenders), in subsection (1)(b), for sub-paragraph (i) substitute—

"(i) is subject to a community payback order imposed under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46), or".

(3) Section 12 (probation progress review) is repealed.

The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6)

44 In the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, the following provisions are repealed—

(a) in section 49 (compensation orders), subsection (4),

(b) section 57 (probation and community service orders), and

(c) in paragraph 26 of the schedule (modification of enactments), sub-paragraphs (l) and (n).

The Criminal Justice and Immigration Act 2008 (c.4)

45 In Part 1 of Schedule 4 to the Criminal Justice and Immigration Act 2008 (youth rehabilitation orders: consequential amendments), paragraphs 43 to 46 are repealed.>

Section 15

Rhoda Grant

399 In section 15, page 29, line 29, after <subsection (1)> insert—

<( ) at the beginning insert “Subject to subsection (1A),”, and

( )>

Rhoda Grant

400 In section 15, page 29, line 29, at end insert—

<( ) after subsection (1) insert—

“(1A) The prosecutor must, where a person (“A”) is convicted of the offence of stalking a person (“B”), apply to the court to make a non-harassment order against A requiring A to refrain from such conduct in relation to—

(a) B, or

(b) any other person in relation to whom the course of conduct engaged in by A, and which constituted the offence, related,

as may be specified in the order for such period (which includes an indeterminate period) as may be so specified, in addition to any other disposal which may be made in relation to the offence.”,>

Rhoda Grant

401 In section 15, page 29, line 30, after <subsection (2)> insert—

<( ) after “subsection (1)” insert “or (1A)”, and

( )>

Rhoda Grant

5 In section 15, page 29, line 30, leave out <“harassment (or further harassment)”> and insert <“misconduct (or further misconduct)”>

Rhoda Grant

6 In section 15, page 30, line 18, leave out <“harassment” and “conduct” are> and insert <“conduct” is>

Rhoda Grant

7 In section 15, page 30, line 20, at end insert <whether on one or more than one occasion>

Section 17

Robert Brown

100 In section 17, page 30, line 32, leave out <6> and insert <3>

Robert Brown

101 In section 17, page 31, line 2, leave out <6> and insert <3>

Robert Brown

388 In section 17, page 31, line 7, at end insert—

<(4) The Scottish Ministers may not bring subsection (1), (2) or (3) into force until they have—

(a) prepared a report setting out—

(i) the reduction in the number of sentences of imprisonment or detention imposed annually that is expected as a result of bringing those subsections into force,

(ii) the increase in the number of community payback orders imposed annually that is expected as a result of bringing those subsections into force (by comparison with the number of such orders imposed annually that would be expected if those subsections were not brought into force),

(iii) the estimated annual cost implications of the changes referred to in sub-paragraphs (i) and (ii),

(iv) the additional funding, if any, that Ministers will provide to community justice authorities or local authorities to ensure that they have the capacity to support the requirements expected to be imposed by any additional community payback orders identified under sub-paragraph (ii).

(b) laid that report before the Scottish Parliament; and

(c) taken into account any views expressed on it by any committee of the Parliament the remit of which includes the criminal justice system.>

Richard Baker
Supported by: Bill Aitken

1 Leave out section 17

After section 17

Robert Brown

102 After section 17, insert—

<**Report on operation of sections 14 and 17**

(1) The Scottish Ministers must, no later than 5 years after sections 14 and 17 come fully into force, lay before the Scottish Parliament and publish a report on the operation of those sections.

(2) The report under subsection (1) must, in particular, include an assessment of whether and to what extent those sections, individually or collectively, have—

(a) reduced offending,

(b) increased public safety.>

After section 20

Bill Wilson

103 After section 20, insert—

<**Pre-sentencing reports about organisations**

After section 203 of the 1995 Act (reports), insert—

“**203A Reports about organisations**

(1) This section applies where an organisation is convicted of an offence.

(2) Before dealing with the organisation in respect of the offence, the court may obtain a report into the organisation’s financial affairs and structural arrangements.

(3) The report is to be prepared by a person appointed by the court.

(4) The person appointed to prepare the report is referred to in this section as the “reporter”.

(5) The court may issue directions to the reporter about—

(a) the information to be contained in the report,

(b) the particular matters to be covered by the report,

(c) the time by which the report is to be submitted to the court.

(6) The court may order the organisation to give the reporter and any person acting on the reporter’s behalf—

(a) access at all reasonable times to the organisation’s books, documents and other records,

(b) such information or explanation as the reporter thinks necessary.

(7) The reporter’s costs in preparing the report are to be paid by the clerk of court, but the court may order the organisation to reimburse to the clerk all or a part of those costs.

(8) An order under subsection (7) may be enforced by civil diligence as if it were a fine.

(9) On submission of the report to the court, the clerk of court must provide a copy of the report to—

(a) the organisation,

(b) the organisation’s solicitor (if any), and

(c) the prosecutor.

(10) The court must have regard to the report in deciding how to deal with the organisation in respect of the offence.

(11) If the court decides to impose a fine, the court must, in determining the amount of the fine, have regard to—

(a) the report, and

(b) if the court makes an order under subsection (7), the amount of costs that the organisation is required to reimburse under the order.

(12) Where the court—

(a) makes an order under subsection (7), and

(b) imposes a fine on the organisation,

any payment by the organisation is first to be applied in satisfaction of the order under subsection (7).

(13) Where the court also makes a compensation order in respect of the offence, any payment by the organisation is first to be applied in satisfaction of the compensation order before being applied in accordance with subsection (12).”.>

Section 24

Robert Brown
Supported by: Bill Aitken

104 Leave out section 24

After section 24

Kenny MacAskill

105 After section 24, insert—

<**Mutual recognition of judgments and probation decisions**

(1) The Scottish Ministers may by order make provision for the purposes of and in connection with implementing any obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).

(2) The provision may, in particular, confer functions—

(a) on the Scottish Ministers,

(b) on other persons.

(3) An order under subsection (1) may modify any enactment.

(4) In this section, the “Framework Decision” means Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.>

Richard Baker

10 After section 24, insert—

<**Minimum sentence for having in a public place an article with a blade or point**

(1) In section 49 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (offence of having in a public place an article with a blade or point), after subsection (5) insert—

"(5A) Subsection (5B) applies where—

(a) a person is convicted of an offence under subsection (1),

(b) the offence was committed after the commencement of this subsection, and

(c) when the offence was committed, the person was aged 16 or over.

(5B) Where this subsection applies, the court must impose a sentence of imprisonment of at least 6 months (with or without a fine) unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify not doing so.".

(2) In section 207(3A) of the 1995 Act (detention of young offenders: minimum sentences), after paragraph (a) insert—

"(aa) section 49(5B) of the Criminal Law (Consolidation) (Scotland) Act 1995 (minimum sentence for having in a public place an article with a blade or point);".>

Bill Aitken

10A As an amendment to amendment 10, line 11, leave out from <6> to end of line 13 and insert <2 years (with or without a fine) unless the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction and thinks fit to order the offender to be imprisoned for a shorter period or not to order the offender to be imprisoned>

Section 25

Kenny MacAskill

344 In section 25, page 38, line 34, at end insert—

<( ) Without limiting the generality of subsection (1), a person agrees to become involved in serious organised crime if the person—

(a) agrees to do something (whether or not the doing of that thing would itself constitute an offence), and

(b) knows or suspects, or ought reasonably to have known or suspected, that the doing of that thing will enable or further the commission of serious organised crime.>

Robert Brown

345 In section 25, page 38, line 36, leave out <involving> and insert—

(a) that would reasonably be regarded as being both serious and organised, and

(b) that involves>

Kenny MacAskill

346 In section 25, page 39, line 2, leave out <securing> and insert <obtaining>

Kenny MacAskill

347 In section 25, page 39, line 4, leave out <serious>

Robert Brown

348 In section 25, page 39, line 4, leave out <serious violence> and insert <violence or intimidation>

Kenny MacAskill

349 In section 25, page 39, line 4, after <committed> insert <or a threat made>

Kenny MacAskill

350 In section 25, page 39, line 4, leave out <securing> and insert <obtaining>

Kenny MacAskill

351 In section 25, page 39, line 5, at end insert <, and

“material benefit” means a right or interest of any description in any property, whether heritable or moveable and whether corporeal or incorporeal.>

Section 26

Robert Brown

352 In section 26, page 39, line 21, leave out subsection (4)

Section 27

Robert Brown

353 In section 27, page 39, line 35, leave out <a serious offence> and insert <an offence under section 25(1)>

Kenny MacAskill

354 In section 27, page 40, line 9, leave out subsection (4)

Robert Brown

355 In section 27, page 40, line 14, leave out <a serious offence> and insert <an offence under section 25(1)>

Kenny MacAskill

356 In section 27, page 40, line 17, leave out subsection (6)

Section 28

Robert Brown

357 In section 28, page 40, line 28, after <suspects> insert <with good reason>

Bill Aitken
Supported by: Robert Brown

106 In section 28, page 40, line 36, at end insert—

<( ) In the case of knowledge or suspicion originating from information obtained by the person in the course of the person's trade, profession, business or employment, this section applies only where the person's experience or seniority in that trade, profession, business or employment makes it reasonable to assume that the person should be aware of any offence of the sort mentioned in subsection (1) that the other person has or may have committed.>

Kenny MacAskill

358 In section 28, page 40, line 39, leave out <derived> and insert <obtained>

Robert Brown

359 In section 28, page 41, line 1, after <constable> insert <or other specified public official>

Robert Brown

360 In section 28, page 41, line 20, at end insert—

<( ) In subsection (3), "specified public official" means a person holding a public office specified in an order made by the Scottish Ministers.>

After section 28

Kenny MacAskill

107 After section 28, insert—

<*Genocide, crimes against humanity and war crimes*

Genocide, crimes against humanity and war crimes: UK residents

(1) The International Criminal Court (Scotland) Act 2001 (asp 13) is amended as follows.

(2) After section 8, insert—

"**8A Meaning of "United Kingdom national" and "United Kingdom resident"**

(1) In this Part—

"United Kingdom national" means—

(a) a British citizen, a British Overseas Territories citizen, a British National (Overseas) or a British Overseas citizen,

(b) a person who under the British Nationality Act 1981 (c.61) is a British subject, or

(c) a British protected person within the meaning of that Act,

"United Kingdom resident" means a person who is resident in the United Kingdom.

(2) To the extent that it would not otherwise be the case, the following individuals are to be treated for the purposes of this Part as being resident in the United Kingdom—

(a) an individual who has indefinite leave to remain in the United Kingdom,

(b) any other individual who has made an application for such leave (whether or not it has been determined) and who is in the United Kingdom,

(c) an individual who has leave to enter or remain in the United Kingdom for the purposes of work or study and who is in the United Kingdom,

(d) an individual who has made an asylum claim, or a human rights claim, which has been granted,

(e) any other individual who has made an asylum claim or a human rights claim (whether or not the claim has been determined) and who is in the United Kingdom,

(f) an individual named in an application for indefinite leave to remain, an asylum claim or a human rights claim as a dependant of the individual making the application or claim if—

(i) the application or claim has been granted, or

(ii) the named individual is in the United Kingdom (whether or not the application or claim has been determined),

(g) an individual who would be liable to removal or deportation from the United Kingdom but cannot be removed or deported because of section 6 of the Human Rights Act 1998 (c.42) or for practical reasons,

(h) an individual—

(i) against whom a decision to make a deportation order under section 5(1) of the Immigration Act 1971 (c.77) by virtue of section 3(5)(a) of that Act (deportation conducive to the public good) has been made,

(ii) who has appealed against the decision to make the order (whether or not the appeal has been determined), and

(iii) who is in the United Kingdom,

(i) an individual who is an illegal entrant within the meaning of section 33(1) of the Immigration Act 1971 or who is liable to removal under section 10 of the Immigration and Asylum Act 1999 (c.33),

(j) an individual who is detained in lawful custody in the United Kingdom.

(3) When determining for the purposes of this Part whether any other individual is resident in the United Kingdom regard is to be had to all relevant considerations including—

(a) the periods during which the individual is, has been or intends to be in the United Kingdom,

(b) the purposes for which the individual is, has been or intends to be in the United Kingdom,

(c) whether the individual has family or other connections to the United Kingdom and the nature of those connections, and

(d) whether the individual has an interest in residential property located in the United Kingdom.

(4) In this section—

"asylum claim" means—

(a) a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention for the claimant to be removed from, or required to leave, the United Kingdom,

(b) a claim that the claimant would face a real risk of serious harm if removed from the United Kingdom,

"Convention rights" means the rights identified as Convention rights by section 1 of the Human Rights Act 1998,

"detained in lawful custody" means—

(a) detained in pursuance of a sentence of imprisonment or detention, a sentence of custody for life or a detention and training order,

(b) remanded in or committed to custody by an order of a court,

(c) detained pursuant to an order under section 2 of the Colonial Prisoners Removal Act 1884 (c.31) or a warrant under section 1 or 4A of the Repatriation of Prisoners Act 1984 (c.47),

(d) detained under Part 3 of the Mental Health Act 1983 (c.20) or by virtue of an order under section 5 of the Criminal Procedure (Insanity) Act 1964 (c.84) or section 6 or 14 of the Criminal Appeal Act 1968 (c.19) (hospital orders etc.),

(e) detained by virtue of an order under Part 6 of the Criminal Procedure (Scotland) Act 1995 (c.46) (other than an order under section 60C) or a hospital direction under section 59A of that Act, and includes detention by virtue of the special restrictions set out in Part 10 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) to which a person is subject by virtue of an order under section 59 of the Criminal Procedure (Scotland) Act 1995,

(f) detained under Part 3 of the Mental Health (Northern Ireland) Order 1986 (SI 1986/595) or by virtue of an order under section 11 or 13(5A) of the Criminal Appeal (Northern Ireland) Act 1980 (c. 47), "human rights claim" means a claim that to remove the claimant from, or to require the claimant to leave, the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Convention) as being incompatible with the person's Convention rights,

"the Refugee Convention" means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol to the Convention,

"serious harm" has the meaning given by article 15 of Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

(5) In this section, a reference to having leave to enter or remain in the United Kingdom is to be construed in accordance with the Immigration Act 1971.

(6) This section applies in relation to any offence under this Part (whether committed before or after the coming into force of this section).".

(3) In section 28(1) (interpretation), the definitions of "United Kingdom national" and "United Kingdom resident" are repealed.>

Kenny MacAskill

108 After section 28, insert—

<Genocide, crimes against humanity and war crimes: retrospective application

After section 9 of the International Criminal Court (Scotland) Act 2001 (asp 13) insert—

"**9A Retrospective application of certain offences**

(1) Section 1 of this Act applies to acts committed on or after 1 January 1991.

(2) But that section does not apply to an act committed before 17 December 2001 which constitutes a crime against humanity or a war crime within article 8.2(b) or (e) unless, at the time the act was committed, it amounted in the circumstances to a criminal offence under international law.

(3) Section 2 of this Act applies to conduct engaged in on or after 1 January 1991.

(4) The references in subsections (1), (3) and (5) of that section to an offence include an act or conduct that would not constitute an offence but for this section.

(5) Any enactment or rule of law relating to an offence ancillary to a relevant offence applies—

(a) to conduct engaged in on or after 1 January 1991, and

(b) even if the act or conduct constituting the relevant offence would not constitute such an offence but for this section.

(6) But section 2 of this Act, and any enactment or rule of law relating to an offence ancillary to a relevant offence, do not apply to—

(a) conduct engaged in before 17 December 2001, or

(b) conduct engaged in on or after that date which was ancillary to an act or conduct that—

(i) was committed or engaged in before that date, and

(ii) would not constitute a relevant offence but for this section,

unless, at the time the conduct was engaged in, it amounted in the circumstances to a criminal offence under international law.

(7) Section 5 of this Act, so far as it has effect in relation to relevant offences, applies—

(a) to failures to exercise control of the kind mentioned in subsection (2) or (3) of that section which occurred on or after 1 January 1991, and

(b) even if the act or conduct constituting the relevant offence would not constitute an offence but for this section.

(8) But section 5 of this Act, so far as it has effect in relation to relevant offences, does not apply to a failure to exercise control of the kind mentioned in subsection (2) or (3) of that section which occurred before 17 December 2001 unless, at the time it occurred, it amounted in the circumstances to a criminal offence under international law.

(9) In this section, "relevant offence" means an offence under section 1 or 2 of this Act or an offence ancillary to such an offence.

9B Provision supplemental to section 9A: modification of penalties

(1) This section applies in relation to—

(a) an offence under section 1 of this Act on account of an act committed before 17 December 2001 constituting genocide, if at the time the act was committed it also amounted to an offence under section 1 of the Genocide Act 1969,

(b) an offence under section 1 of this Act on account of an act committed before 1 September 2001 constituting a war crime, if at the time the act was committed it also amounted to an offence under section 1 of the Geneva Conventions Act 1957 (c.52) (grave breaches of the Conventions),

(c) an offence ancillary to an offence within paragraph (a) or (b) above.

(2) Section 3(5) of this Act has effect in relation to such an offence as if for "30 years" there were substituted "14 years".".>

After section 31

Kenny MacAskill

109 After section 31, insert—

<Offensive weapons etc.

Offensive weapons etc.

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.

(2) In section 47 (prohibition of the carrying of offensive weapons)—

(a) in subsection (1), the words from "without" to "him," are repealed,

(b) after subsection (1), insert—

"(1A) It is a defence for a person charged with an offence under subsection (1) to show that the person had a reasonable excuse or lawful authority for having the weapon with the person in the public place.", and

(c) for subsection (4), substitute—

"(4) In this section—

"offensive weapon" means any article—

(a) made or adapted for use for causing injury to a person, or

(b) intended, by the person having the article, for use for causing injury to a person by—

(i) the person having it, or

(ii) some other person,

"public place" means any place other than—

(a) domestic premises,

(b) school premises (within the meaning of section 49A(6)),

(c) a prison (within the meaning of section 49C(7)),

"domestic premises" means premises occupied as a private dwelling (including any stair, passage, garden, yard, garage, outhouse or other appurtenance of such premises which is not used in common by the occupants of more than one such dwelling).".

(3) In section 49 (offence of having in public place article with blade or point)—

(a) in subsection (4), for the words "prove that he had good reason" substitute "show that the person had a reasonable excuse",

(b) in subsection (5), for "prove" substitute "show", and

(c) for subsection (7), substitute—

"(7) In this section, "public place" has the same meaning as in section 47(4).".

(4) In section 49A (offence of having article with blade or point (or offensive weapon) on school premises)—

(a) in subsection (3), for the words "prove that he had good reason" substitute "show that the person had a reasonable excuse", and

(b) in subsection (4), for "prove" substitute "show".

(5) In section 49C(2) (offence of having offensive weapon etc. in prison), for the words "prove that he had good reason" substitute "show that the person had a reasonable excuse".

(6) In section 50(4) (extension of constable's power to stop, search and arrest without warrant), for "3" substitute "4".>

Johann Lamont

11* After section 31, insert—

<**Offence of having article with blade or point (or offensive weapon) on workplace premises**

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.

(2) After section 49A, insert—

"**49AA Offence of having article with blade or point (or offensive weapon) on workplace premises**

(1) Any person who has an article to which section 49 of this Act applies with him on workplace premises is guilty of an offence.

(2) Any person who has an offensive weapon within the meaning of section 47 of this Act with him on workplace premises is guilty of an offence.

(3) It is a defence for a person charged with an offence under subsection (1) or (2) above to prove that he had good reason or lawful authority for having the article or weapon with him on the premises in question.

(4) Without prejudice to the generality of subsection (3) above, it is a defence for a person charged with an offence under subsection (1) or (2) above to prove that he had the article or weapon in question with him—

(a) for use at work (whether on the premises in question or otherwise),

(b) for religious reasons, or

(c) as part of any national costume.

(5) A person guilty of an offence—

(a) under subsection (1) above is liable—

(i) on summary conviction to imprisonment for a term not exceeding twelve months, or a fine not exceeding the statutory maximum, or both;

(ii) on conviction on indictment, to imprisonment for a term not exceeding four years, or a fine, or both;

(b) under subsection (2) above is liable—

(i) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both;

(ii) on conviction on indictment, to imprisonment for a term not exceeding four years, or a fine, or both.

(6) In this section and section 49B of this Act, "workplace premises" means any premises (other than school premises) used for the purposes of an undertaking carried on by an employer and made available to any employee of the employer as a place of work; and includes—

(a) any part of those premises to which such an employee has access while at work;

(b) any premises (other than a public road or other public place within the meaning of section 49 of this Act)—

(i) which are a means of access to or egress from the place of work; or

(ii) where facilities are provided for use in connection with the place of work.”.

(3) In section 49B(1)—

(a) after “school premises” insert “or workplace premises”;

(b) after “49A” insert “or 49AA”.

(4) In section 50(3), for “or section 49A(1) or (2)” substitute “, 49A(1) or (2) or 49AA(1) or (2)”.>

Rhoda Grant

402 After section 31, insert—

<Stalking

Offence of stalking

(1) A person (“A”) commits an offence, to be known as the offence of stalking, where A stalks another person (“B”).

(2) For the purposes of subsection (1), A stalks B where—

(a) A engages in a course of conduct,

(b) subsection (3) or (4) applies, and

(c) A’s course of conduct causes B to suffer—

(i) physical or psychological harm, or

(ii) apprehension or fear for B’s own safety or for the safety of any other person.

(3) This subsection applies where A engages in the course of conduct with the intention of causing such harm to B or of arousing such apprehension or fear in B.

(4) This subsection applies where A knows, or ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause such harm or arouse such apprehension or fear.

(5) It is a defence for a person charged with an offence under this section to show that the course of action—

(a) was authorised by virtue of any enactment or rule of law,

(b) was engaged in for the purpose of preventing or detecting crime, or

(c) was, in the particular circumstances, reasonable.

(6) In this section—

“conduct” includes (but is not limited to)—

(a) following B or any other person,

(b) contacting B or any other person by post, telephone, email, text message or any other method,

(c) publishing any statement or other material—

(i) relating or purporting to relate to B or to any other person,

(ii) purporting to originate from B or from any other person,

(d) tracing the use by B or by any other person of the internet, email or any other form of electronic communication,

(e) entering or loitering in the vicinity of—

(i) the place of residence of B or of any other person,

(ii) the place of work or business of B or of any other person,

(iii) any place frequented by B or of any other person,

(f) interfering with any property in the possession of B or of any other person,

(g) giving offensive material to B or to any other person or leaving such material where it may be found by, given to or brought to the attention of B or any other person,

(h) keeping B or any other person under surveillance,

(i) acting in any other way that a reasonable person would expect would arouse apprehension or fear in B for B's own safety or for the safety of any other person, and

"course of conduct" involves conduct on at least two occasions.

(7) A person convicted of the offence of stalking is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or to both.>

Section 34

Kenny MacAskill

361 In section 34, page 49, line 4, leave out <(and any sounds accompanying it)>

Kenny MacAskill

362 In section 34, page 49, line 5, leave out <(and any sounds accompanying them)>

Kenny MacAskill

363 In section 34, page 49, line 7, at end insert—

<and reference may also be had to any sounds accompanying the image or the series of images.>

Kenny MacAskill

364 In section 34, page 49, line 31, after <images> insert—

<(i) any sounds accompanying the series of images,

(ii)>

Robert Brown

365 In section 34, page 50, line 4, leave out from <“excluded> to <work> and insert <image is an “excluded image” if it is all or part of a classified work, and is so excluded from the time that an application for a classification certificate is received by the designated authority>

Kenny MacAskill

366 In section 34, page 50, line 18, after <images> insert—

<(i) any sounds accompanying the series of images,

(ii)>

Kenny MacAskill

367 In section 34, page 50, line 19, leave out <and section 51C>

Kenny MacAskill

368 In section 34, page 50, line 27, leave out <and “extreme pornographic image” are> and insert <is>

Kenny MacAskill

369 In section 34, page 51, line 23, at end insert—

<( ) In this section “image” and “extreme pornographic image” are to be construed in accordance with section 51A.”.>

After section 34

Kenny MacAskill

110 After section 34, insert—

<**Voyeurism: additional forms of conduct**

(1) The Sexual Offences (Scotland) Act 2009 (asp 9) is amended as follows.

(2) In section 9 (voyeurism)—

(a) after subsection (4), insert—

“(4A) The fourth thing is that A—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,

operates equipment beneath B’s clothing with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B’s genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B’s genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents, records an image beneath B's clothing of B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at the image.",

(b) in subsection (5)—

(i) for "fourth" substitute "sixth", and

(ii) for paragraph (b), substitute—

"(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).", and

(c) in subsection (7), for "and (4)" substitute ", (4), (4A) and (4B)".

(3) In section 10(2) (interpretation of section 9), after "section 9(3)" insert "and (4A)".

(4) In section 26 (voyeurism towards a young child)—

(a) after subsection (4), insert—

"(4A) The fourth thing is that A operates equipment beneath B's clothing with the intention of enabling A or another person ("C"), for a purpose mentioned in subsection (7), to observe—

(a) B's genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A records an image beneath B's clothing of—

(a) B's genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at the image.",

(b) in subsection (5)—

(i) for "fourth" substitute "sixth", and

(ii) for paragraph (b), substitute—

"(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).",

(c) in subsection (7), for "and (4)" substitute ", (4), (4A) and (4B)", and

(d) in subsection (8)—

(i) after "section 9(3)" insert ", (4A)", and

(ii) after "subsections (3)" insert ", (4A)".

(5) In section 36 (voyeurism towards an older child)—

(a) after subsection (4), insert—

“(4A) The fourth thing is that A operates equipment beneath B’s clothing with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe—

(a) B’s genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B’s genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A records an image beneath B’s clothing of—

(a) B’s genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B’s genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at the image.”,

(b) in subsection (5)—

(i) for “fourth” substitute “sixth”, and

(ii) for paragraph (b), substitute—

“(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).”,

(c) in subsection (7), for “and (4)” substitute “, (4), (4A) and (4B)”, and

(d) in subsection (8)—

(i) after “section 9(3)” insert “, (4A)”, and

(ii) after “subsections (3)” insert “, (4A)”.>

Kenny MacAskill

111 After section 34, insert—

<**Sexual offences: defences in relation to offences against older children**

In section 39 of the Sexual Offences (Scotland) Act 2009 (asp 9) (defences in relation to offences against older children), in subsection (4)(c), after “section 30(2)(d)” insert “or (e)”.>

Kenny MacAskill

370 After section 34, insert—

<**Penalties for offences of brothel-keeping and living on the earnings of prostitution**

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.

(2) In section 11 (trading in prostitution and brothel-keeping)—

(a) in subsection (1), for the words from “liable” to the end substitute “guilty of an offence and liable to the penalties set out in subsection (1A)”,

(b) after that subsection insert—

“(1A) A person—

(a) guilty of the offence set out in subsection (1)(a) is liable—

(i) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(ii) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both,

(b) guilty of the offence set out in subsection (1)(b) is liable—

(i) on conviction on indictment, to imprisonment for a term not exceeding two years,

(ii) on summary conviction, to imprisonment for a term not exceeding 12 months.”,

(c) in subsection (4), for “subsection (1)” substitute “subsection (1A)(a)”, and

(d) for subsection (6) substitute—

“(6) A person guilty of an offence under subsection (5) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both.”.

(3) In section 13(9) (living on earnings of another from male prostitution), for paragraphs (a) and (b) substitute—

“(a) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both.”.>

Trish Godman

8* After section 34, insert—

<Offences of engaging in, advertising and facilitating paid-for sexual activities

(1) The Sexual Offences (Scotland) Act 2009 (asp 9) is amended as follows.

(2) After section 11 insert—

“Engaging in, advertising and facilitating paid-for sexual activities

11A Engaging in a paid-for sexual activity

(1) A person (“A”) commits an offence, to be known as the offence of engaging in a paid-for sexual activity, if A knowingly engages in a paid-for sexual activity with another person (“B”).

(2) A sexual activity is paid for where B engages in that activity in exchange for payment.

(3) For the purposes of subsection (2), it is immaterial whether the payment is made—

(a) by A or by another person, or

(b) to B or to another person on B's behalf.

11B Advertising paid-for sexual activities

A person commits an offence, to be known as the offence of advertising paid-for sexual activities, if that person knowingly advertises, by any means, the availability of sexual activities that can be engaged in for payment.

11C Facilitating engagement in a paid-for sexual activity

(1) A person ("A") commits an offence, to be known as the offence of facilitating engagement in a paid-for sexual activity, if A knowingly facilitates the engagement of another person ("B") in a paid-for sexual activity with another person ("C").

(2) A sexual activity is paid for where C engages in that activity in exchange for payment.

(3) For the purposes of subsection (2), it is immaterial whether the payment is made—

(a) by A, by B or by another person, or

(b) to C or to another person on C's behalf.

(4) For the purposes of subsection (1), facilitating the engagement by B in a paid-for sexual activity includes (but is not limited to)—

(a) arranging B's engagement in the activity,

(b) making payment to C or to another person on C's behalf,

(c) making available premises in which the activity takes place, or

(d) transporting B, or arranging transport for B, to where the activity takes place.

11D Arrest for offences under sections 11A to 11C

(1) Where a constable reasonably believes that a person is committing or has committed an offence under section 11A, 11B or 11C, the constable may arrest the person without warrant.

(2) Subsection (1) is without prejudice to any power of arrest conferred by law apart from that subsection.".

(3) In the table in schedule 2 insert at the appropriate place—

“Engaging in a paid-for sexual activity	Section 11A	A fine not exceeding level 3 on the standard scale	
Advertising paid-for sexual activities	Section 11B	A fine not exceeding level 3 on the standard scale	
Facilitating engagement in a paid-for sexual activity	Section 11C	A fine not exceeding level 3 on the standard scale”.>	

Margo MacDonald

8A As an amendment to amendment 8, line 15, at end insert—

<**11AA Causing alarm etc. by engaging in a paid-for sexual activity**

In the circumstances described in section 11A(1), A and B commit an offence, to be known as the offence of causing alarm etc. by engaging in a paid-for sexual activity, if their engaging in the activity that constitutes the offence under that section causes alarm to another person (“C”), endangers C or creates a nuisance for C.>

Margo MacDonald

8B As an amendment to amendment 8, line 15, at end insert—

<**11AB Profiting from coerced paid-for sexual activities**

A person commits an offence, to be known as the offence of profiting from coerced paid-for sexual activities, if that person knowingly secures a direct benefit (whether financial or otherwise) from a paid-for sexual activity involving a person whose engagement in that activity has been secured as a result of coercion.>

Margo MacDonald

8C As an amendment to amendment 8, line 40, after <11A,> insert <11AA, 11AB>

Margo MacDonald

8D As an amendment to amendment 8, line 48, at end insert—

<“Causing alarm etc. by engaging in a paid-for sexual activity	Section 11AA	A fine not exceeding level 3 on the standard scale	
Profiting from coerced paid-for sexual activities	Section 11AB	A fine not exceeding level 3 on the standard scale>	

Section 35

Kenny MacAskill

371 In section 35, page 51, line 30, at end insert—

<( ) after subsection (1) insert—

“(1A) A person to whom subsection (6) applies commits an offence if the person arranges or facilitates—

(a) the arrival in or the entry into a country (other than the United Kingdom), or travel there (whether or not following such arrival or entry) by, an individual and—

(i) intends to exercise control over prostitution by the individual or to involve the individual in the making or production of obscene or indecent material; or

(ii) believes that another person is likely to exercise such control or so to involve the individual,

there or elsewhere; or

(b) the departure from a country (other than the United Kingdom) of an individual and—

(i) intends to exercise such control or so to involve the individual; or

(ii) believes that another person is likely to exercise such control or so to involve the individual,

outwith the country.”,>

Kenny MacAskill

372 In section 35, page 51, line 30, at end insert—

<( ) in subsection (2), for “subsection (1)” substitute “subsections (1) and (1A)”,>

Kenny MacAskill

373 In section 35, page 51, line 32, leave out <Subsection (1) applies> and insert <Subsections (1) and (1A) apply>

Kenny MacAskill

374 In section 35, page 51, line 34, leave out <proceeded against, indicted> and insert <prosecuted>

Kenny MacAskill

375 In section 35, page 51, line 40, after <on> insert <the>

Kenny MacAskill

376 In section 35, page 52, leave out line 1 and insert—

<( ) in subsection (6)—

(i) the word "and" immediately following paragraph (e) is repealed, and

(ii) after paragraph (f) insert—

"(g) a person who at the time of the offence was habitually resident in Scotland, and

(h) a body incorporated under the law of a part of the United Kingdom.".>

Kenny MacAskill

377 In section 35, page 52, line 2, leave out subsection (2) and insert—

<( ) In section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation)—

(a) in subsection (1), after "arrival in" insert "or the entry into",

(b) in subsection (2), the words from "in" where it first occurs to "committed" are repealed,

(c) after subsection (3) insert—

"(3A) A person to whom section 5(2) applies commits an offence if—

(a) in relation to an individual (the "passenger"), he arranges or facilitates—

(i) the arrival in or the entry into a country other than the United Kingdom of the passenger,

(ii) travel by the passenger within a country other than the United Kingdom,

(iii) the departure of the passenger from a country other than the United Kingdom, and

(b) he—

(i) intends to exploit the passenger, or

(ii) believes that another person is likely to exploit the passenger,

(wherever the exploitation is to occur).",

(d) in subsection (4)—

(i) in paragraph (b), the words from "as a result" to "Act 2004," become sub-paragraph (i),

(ii) immediately following that sub-paragraph insert "or—

(ii) which, were it done in Scotland, would constitute an offence mentioned in sub-paragraph (i),",

(iii) after paragraph (b) insert—

"(ba) he is encouraged, required or expected to do anything in connection with the removal of any part of a human body—

(i) as a result of which he or another person would commit an offence under the law of Scotland (other than an offence mentioned in paragraph (b)(i)), or

(ii) which, were it done in Scotland, would constitute such an offence,", and

(iv) for paragraph (d) substitute—

"(d) another person uses or attempts to use him for any purpose within sub-paragraph (i), (ii) or (iii) of paragraph (c), having chosen him for that purpose on the grounds that—

(i) he is mentally or physically ill or disabled, he is young, or he has a family relationship with a person, and

(ii) a person without the illness, disability, youth or family relationship would be likely to refuse to be used for that purpose.".

( ) In section 5 of that Act—

(a) in subsection (1), for the words from "(3)" to the end substitute "(3A) of section 4 apply to anything done in or outwith the United Kingdom.",

(b) in subsection (2)—

(i) the word "and" immediately following paragraph (e) is repealed, and

(ii) after paragraph (f) insert—

"(g) a person who at the time of the offence was habitually resident in Scotland, and

(h) a body incorporated under the law of a part of the United Kingdom.",

(c) after subsection (2) insert—

"(2A) A person may be prosecuted, tried and punished for any offence to which section 4 applies—

(a) in any sheriff court district in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).

(2B) In subsection (2A), "sheriff court district" is to be construed in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995 (c.46) (interpretation).".>

After section 35

Kenny MacAskill

112 After section 35, insert—

<*Slavery, servitude and forced or compulsory labour*

Slavery, servitude and forced or compulsory labour

(1) A person (“A”) commits an offence if—

(a) A holds another person in slavery or servitude and the circumstances are such that A knows or ought to know that the person is so held, or

(b) A requires another person to perform forced or compulsory labour and the circumstances are such that A knows or ought to know that the person is being required to perform such labour.

(2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention (which prohibits a person from being held in slavery or servitude or being required to perform forced or compulsory labour).

(3) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 14 years, or to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

(4) In this section “Human Rights Convention” means the Convention for the Protection of Human Rights and Fundamental Freedoms agreed by the Council of Europe at Rome on 4 November 1950.>

After section 36

Kenny MacAskill

113 After section 36, insert—

<**Articles for use in fraud**

(1) A person (“A”) commits an offence if A has in A’s possession or under A’s control an article for use in, or in connection with, the commission of fraud.

(2) A person guilty of an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine, or to both.

(3) A person commits an offence if the person makes, adapts, supplies or offers to supply an article—

(a) knowing that the article is designed or adapted for use in, or in connection with, the commission of fraud, or

(b) intending the article to be used in, or in connection with, the commission of fraud.

(4) A person guilty of an offence under subsection (3) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine, or to both.

(5) In this section, "article" includes a program or data held in electronic form.>

After section 37

Kenny MacAskill

114 After section 37, insert—

<*Abolition of offences of sedition and leasing-making*

Abolition of offences of sedition and leasing-making

The following offences under the common law of Scotland are abolished—

(a) the offence of sedition,

(b) the offence of leasing-making.>

Kenny MacAskill

378 After section 37, insert—

<*Threatening, alarming or distressing behaviour*

Threatening, alarming or distressing behaviour

(1) A person ("A") commits an offence if—

(a) A behaves in such a manner that a reasonable person would be likely to—

(i) fear for the safety of any person on account of the behaviour, or

(ii) be alarmed or distressed by the behaviour, and

(b) the condition in subsection (2) is satisfied.

(2) That condition is that A—

(a) intends by the behaviour to cause fear, alarm or distress, or

(b) is reckless as to whether the behaviour would cause fear, alarm or distress.

(3) It does not matter—

(a) whether A's behaviour is directed at anyone in particular,

(b) if it is directed at a particular person, whether that person is aware of the behaviour, or

(c) whether A's behaviour—

(i) actually causes anyone fear, alarm or distress, or

(ii) takes place in public or private.

(4) Subsection (1) applies to—

(a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done,

(b) behaviour consisting of—

  (i) a single act, or

  (ii) a course of conduct.

(5) The reference in subsection (1)(a)(i) to fear for a person's safety is to fear that the person's life could be endangered or that the person's physical or psychological well-being could be harmed.

(6) A person guilty of an offence under subsection (1) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.>

Bill Aitken

115 After section 37, insert—

<**PART**

DOUBLE JEOPARDY

Rule against double jeopardy

(1) It is not competent to charge a person who, whether on indictment or complaint (the "original" indictment or complaint), has been convicted or acquitted of an offence—

(a) with an offence of which it would have been competent to convict the person on the original indictment or complaint, or

(b) with an offence which—

  (i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and

  (ii) is an aggravated way of committing the offence of which the person was convicted or acquitted.

(2) Whether the conviction or acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) Subsection (1) is subject to sections *(Tainted acquittals)*, *(Admission subsequent to acquittal)* and *(New evidence)* and is without prejudice to sections 118(1)(c) (disposal of appeals), 119 (provision where High Court authorises new prosecution), 183(1)(d) (stated case: disposal of appeal) and 185 (authorisation of new prosecution) of the 1995 Act.

(4) In this Part, reference to a person being convicted of an offence is—

(a) to the person being found guilty of the offence, or

(b) to the prosecutor accepting the person's plea of guilty to the offence,

in either case whether or not sentence is passed.>

Bill Aitken

116 After section 37, insert—

<Plea in bar of trial

(1) A person charged with an offence—

(a) whether on indictment or complaint, but

(b) other than by virtue of a section mentioned in section *(Rule against double jeopardy)*(3),

may aver, as a plea in bar of trial, that the offence arises out of the same, or largely the same, acts or omissions as have already given rise to the person being tried for, and convicted or acquitted of, an offence (the "original offence").

(2) Whether the conviction or acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) If the court is satisfied, on a balance of probabilities, as to the truth of the person's averment, the plea is to be sustained unless the prosecutor persuades the court that there is some special reason why the case should proceed to trial (as for example, but without prejudice to the generality of this subsection, where trials were separated on the application of, or with the consent of, the person).

(4) Subsections (1) to (3) apply irrespective of where the person was tried; but this subsection is subject to subsection (5).

(5) Where the person was tried outwith the United Kingdom the court may disregard a conviction or acquittal if—

(a) it determines that it is in the interests of justice to do so, and

(b) to permit the case to proceed to trial would not be inconsistent with the obligations of the United Kingdom under Article 54 of the Schengen Convention (that is to say, of the Convention of 19th June 1990 implementing the Schengen Agreement of 14th June 1985).

(6) In making a determination in pursuance of subsection (5)(a), the court is in particular to have regard to—

(a) whether the purpose of bringing the person to trial in the foreign country appears to have been to assist the person to evade justice,

(b) whether the proceedings in the foreign country appear to have been conducted—

(i) independently and impartially, and

(ii) in a manner consistent with dealing justly with the person,

(c) whether such sentence (or other disposal) as might be imposed in the foreign country for an offence of the kind for which the person has been acquitted or convicted is commensurate with any that might be imposed for an offence of that kind in Scotland, and

(d) the extent to which the acts or omissions can be considered to have occurred in, respectively—

(i) Scotland,

(ii) the foreign country.>

Bill Aitken

117 After section 37, insert—

<Eventual death of injured person

(1) This section applies where—

(a) a person ("A") sustains physical injuries,

(b) another person ("B") is, whether on indictment or complaint, acquitted or convicted of an offence ("offence Y") which comprises the infliction of the injuries, and

(c) after the acquittal or conviction A dies, ostensibly from the injuries.

(2) Whether the conviction or acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) If B was acquitted of offence Y (and was not then convicted of a different offence, "offence Z", which comprised the infliction of the injuries) it is not competent to charge B with—

(a) the murder of A,

(b) culpable homicide as respects A, or

(c) any other offence comprising causing A's death.

(4) If B was convicted of offence Y (or of offence Z), then—

(a) for the purposes of sections *(Rule against double jeopardy)* and *(Plea in bar of trial)* the offences mentioned in paragraphs (a) to (c) of subsection (3) are not to be treated as offences arising out of the same, or largely the same, acts or omissions as the offence of which B was convicted, but

(b) on B being acquitted or convicted of any of the offences mentioned in those paragraphs, the court may, on the motion of B and after hearing the parties on that motion, quash B's conviction of offence Y (or offence Z) where satisfied that it is appropriate to do so.

(5) A party may appeal to the High Court against the granting or refusing of a motion under subsection (4)(b).>

Bill Aitken

118 After section 37, insert—

<Tainted acquittals

(1) A person who, whether on indictment or complaint (the "original" indictment or complaint), has been acquitted of an offence (the "original offence") may, provided that the conditions mentioned in subsection (3) are satisfied, be charged with, and prosecuted anew for—

(a) the original offence, or

(b) an offence arising out of the same, or largely the same, acts or omissions as gave rise to the original offence.

(2) Whether the acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) The conditions are—

(a) either—

(i) that the acquitted person or some other person has (or the acquitted person and some other person have) been convicted of an offence against the course of justice, being an offence in connection with proceedings on the original indictment or complaint, or

(ii) that on the application of the Lord Advocate the High Court has concluded on a balance of probabilities that the acquitted person or some other person has (or the acquitted person and some other person have) committed such an offence against the course of justice, and

(b) that on the application of the Lord Advocate the High Court has—

(i) set aside the acquittal, and

(ii) granted authority to bring, by virtue of this section, a new prosecution.

(4) On making an application under subsection (3), the Lord Advocate is to send a copy of that application to the acquitted person.

(5) The acquitted person is entitled to appear or to be represented at any hearing of the application.

(6) For the purpose of—

(a) hearing and coming to a conclusion on any application under subsection (3)(a)(ii), or

(b) hearing and determining any application under subsection (3)(b),

three of the Lords Commissioners of Justiciary are a quorum of the Court (the application being determined by majority vote of those sitting).

(7) The decision of the Court on the application is final.

(8) Subsection (7) is without prejudice to any power of those sitting to remit the application to a differently constituted sitting of the Court (as for example to the whole Court sitting together).

(9) The Court may appoint counsel to act as *amicus curiae* at the hearing in question.

(10) Subsections (11) and (12) apply in a case where (or as the case may be where the Court, in coming to a conclusion under subsection (3)(a)(ii), is satisfied on a balance of probabilities that) the offence against the course of justice consisted of or included interference with a juror or with the trial judge.

(11) An acquittal is to be set aside under subsection (3)(b)(i) if the Court is unable to conclude that the interference had no effect on the outcome of the proceedings on the original indictment or complaint.

(12) But it is not to be so set aside if in the course of the trial, the interference (being interference with a juror and not with the trial judge) became known to the trial judge, who then allowed the trial to proceed to its conclusion.

(13) Subsection (14) applies in a case other than is mentioned in subsection (10).

(14) An acquittal is not to be set aside under subsection (3)(b)(i) unless the Court is satisfied on a balance of probabilities—

(a) that the offence led—

(i) to the withholding of evidence which, had it been given, would have been, or

(ii) to the giving of false evidence which was,

evidence capable of being regarded as credible and reliable by a reasonable jury, and

(b) that the witholding, or as the case may be the giving, of the evidence was likely to have had a material effect on the outcome of the proceedings on the original indictment or complaint.

(15) And an acquittal is not to be set aside under subsection (3)(b)(i), whether by virtue of subsections (10) to (12) or by virtue of subsections (13) and (14), if the court considers that setting it aside would be contrary to the interests of justice.

(16) In this section, the expression "offence against the course of justice"—

(a) means an offence of perverting, or of attempting to pervert, the course of justice (by whatever means and however the offence is described), and

(b) without prejudice to the generality of paragraph (a), includes—

(i) an offence under section 45(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (aiding, abetting, counselling, procuring or suborning the commission of an offence under section 44 of that Act),

(ii) the crime of subornation of perjury, and

(iii) the crime of bribery.

(17) But the expression does not include—

(a) the crime of perjury, or

(b) an offence under section 44(1) of that Act (statement on oath which is false or which the person making it does not believe to be true).>

Bill Aitken

119 After section 37, insert—

<Further provision as regards prosecution by virtue of section *(Tainted acquittals)*

(1) A prosecution may be brought by virtue of section *(Tainted acquittals)* notwithstanding that any time limit for the commencement of such proceedings has elapsed.

(2) In proceedings in a prosecution brought by virtue of section *(Tainted acquittals)* it is competent for either party to lead evidence which it was competent for that party to lead in the earlier proceedings.

(3) But the indictment or complaint in the prosecution is to identify any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (2) (being matters as respects which it would not have been competent to lead evidence but for that subsection).

(4) On granting authority under section *(Tainted acquittals)*(3)(b)(ii) to bring a new prosecution, the High Court may, after giving the parties an opportunity of being heard, order the detention of the accused person in custody or admit that person to bail.

(5) In—

(a) solemn proceedings, section 65(4)(aa) and (b) and (4A) to (9), and

(b) summary proceedings, section 147,

of the 1995 Act (prevention of delay in trials) applies to an accused person who is detained under subsection (4) as it applies to an accused person detained by virtue of being committed until liberated in due course of law.>

Bill Aitken

120 After section 37, insert—

<Admission subsequent to acquittal

(1) A person who, whether on indictment or complaint (the “original” indictment or complaint), has been acquitted of an offence but subsequently admits to committing it may, provided that the condition mentioned in subsection (3) is satisfied, be charged with, and prosecuted anew for, the offence.

(2) Whether the acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) The condition is that on the application of the Lord Advocate the High Court has—

(a) set aside the acquittal, and

(b) granted authority to bring, by virtue of this section, a new prosecution.

(4) On making an application under subsection (3), the Lord Advocate is to send a copy of that application to the acquitted person.

(5) The acquitted person is entitled to appear or to be represented at any hearing of the application.

(6) For the purpose of hearing and determining the application, three of the Lords Commissioners of Justiciary are a quorum of the Court (the application being determined by majority vote of those sitting).

(7) An acquittal is not to be set aside under subsection (3)(a) unless the Court is satisfied—

(a) on a balance of probabilities, that subsequent to the acquittal the person credibly admitted having committed the offence, and

(b) that evidence is available sufficient to corroborate the admission.

(8) Even if the Court is satisfied as is mentioned in subsection (7), it is not to set aside the acquittal if it considers that to do so would be contrary to the interests of justice.>

Robert Brown

120A As an amendment to amendment 120, line 15, at end insert—

<( ) Before hearing an application under subsection (3), the Court is to order that no publicity be given to the application, or to any document prepared in connection with the application, until—

(a) the application is refused,

(b) a final decision has been made not to bring, or to discontinue, a new prosecution, or

(c) the new trial is concluded.>

Bill Aitken

121 After section 37, insert—

<Further provision as regards prosecution by virtue of section (*Admission subsequent to acquittal)*

(1) No sentence may be passed on conviction in a new prosecution brought by virtue of section (*Admission subsequent to acquittal)* which could not have been passed under the proceedings on the original indictment or complaint ("the earlier proceedings").

(2) A new prosecution may be brought by virtue of section (*Admission subsequent to acquittal)* notwithstanding that any time limit, other than the time limit mentioned in subsection (3), for the commencement of such proceedings has elapsed.

(3) Proceedings in a new prosecution brought by virtue of section (*Admission subsequent to acquittal)* are to be commenced within 2 months after the date on which authority to bring the prosecution was granted.

(4) In proceedings in a new prosecution brought by virtue of section (*Admission subsequent to acquittal)* it is competent for either party to lead evidence which it was competent for that party to lead in the earlier proceedings.

(5) But the indictment or complaint in the new prosecution is to identify any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (4) (being matters as respects which it would not have been competent to lead evidence but for that subsection).

(6) For the purposes of subsection (3), proceedings are deemed commenced—

(a) in a case where a warrant to apprehend the accused is granted—

(i) on the date on which the warrant is executed, or

(ii) if it is executed without unreasonable delay, on the date on which it is granted, and

(b) in any other case, on the date on which the accused is cited.

(7) Where the 2 months mentioned in subsection (3) elapse and no new prosecution has been brought under this section, the order under section (*Admission subsequent to acquittal)*(3)(a) setting aside the acquittal has the effect, for all purposes, of an acquittal.

(8) On granting authority under section (*Admission subsequent to acquittal)*(3)(b) to bring a new prosecution, the High Court may, after giving the parties an opportunity of being heard, order the detention of the accused person in custody or admit that person to bail.

(9) In—

(a) solemn proceedings, section 65(4)(aa) and (b) and (4A) to (9), and

(b) summary proceedings, section 147,

of the 1995 Act (prevention of delay in trials) applies to an accused person who is detained under subsection (8) as it applies to an accused person detained by virtue of being committed until liberated in due course of law.

(10) It is immaterial, for the purposes of this section, whether the acquittal was before or after the coming into force of the section.>

Bill Aitken

122 After section 37, insert—

<New evidence

(1) A person who has been acquitted, after the coming into force of this section (or on the day on which it comes into force), of an offence may—

(a) if there is new evidence that the person committed the offence, and

(b) the conditions mentioned in subsection (2) are satisfied,

be charged with, and prosecuted for, the offence anew.

(2) The conditions are—

(a) that the person's acquittal was of an offence mentioned in subsection (9), and

(b) that on the application of the Lord Advocate the High Court has—

(i) set aside the acquittal, and

(ii) granted authority to bring, by virtue of this section, a new prosecution.

(3) The setting aside of the acquittal and the granting of such authority may, under subsection (2)(b), be applied for on one occasion only.

(4) On making an application under that subsection, the Lord Advocate is to send a copy of the application to the acquitted person.

(5) The acquitted person is entitled to appear or to be represented at any hearing of the application.

(6) For the purpose of hearing and determining the application under subsection (2)(b), three of the Lords Commissioners of Justiciary are a quorum of the Court (the application being determined by majority vote of those sitting).

(7) An acquittal is not to be set aside under subsection (2)(b)(i) unless the Court is satisfied that—

(a) the case against the accused is strengthened substantially by the new evidence,

(b) the new evidence is evidence which was not available, and could not with the exercise of reasonable diligence have been made available, at the trial in respect of the original offence, and

(c) on the new evidence and the evidence which was led at that trial it is highly likely that a reasonable jury properly instructed would have convicted the person of the offence.

(8) Even if the Court is satisfied as is mentioned in subsection (7), it is not to set aside the acquittal if it considers that to do so would be contrary to the interests of justice.

(9) The offences are—

(a) murder,

(b) at common law, rape, and

(c) an offence under either section 1 (rape) or section 18 (rape of a young child) of the Sexual Offences (Scotland) Act 2009 (asp 9).

(10) The Scottish Ministers may by order amend subsection (9) so as to add further offences to those for the time being mentioned in that subsection.

(11) But subsection (1) does not apply as respects a person's acquittal of an offence so added if the date of acquittal is earlier than that on which the addition is effected.>

Bill Aitken

123 After section 37, insert—

<Further provision as regards prosecution by virtue of section *(New evidence)*

(1) No sentence may be passed on conviction in a new prosecution brought by virtue of section *(New evidence)* which could not have been passed under the indictment on the trial of which the person was acquitted of the offence in question.

(2) A new prosecution may be brought by virtue of section *(New evidence)* notwithstanding that any time limit for the commencement of such proceedings, other than the time limit mentioned in subsection (3), has elapsed.

(3) Proceedings in a new prosecution brought by virtue of section *(New evidence)* are to be commenced within 2 months after the date on which authority to bring the prosecution was granted.

(4) In proceedings in a new prosecution brought by virtue of section *(New evidence)* it is competent for either party to lead evidence which it was competent for that party to lead in the earlier proceedings.

(5) But the indictment in the new prosecution is to identify any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (4) (being matters as respects which it would not have been competent to lead evidence but for that subsection).

(6) For the purposes of subsection (3), proceedings are deemed commenced—

(a) in a case where a warrant to apprehend the accused is granted—

(i) on the date on which the warrant is executed, or

(ii) if it is executed without unreasonable delay, on the date on which it is granted, and

(b) in any other case, on the date on which the accused is cited.

(7) Where the 2 months mentioned in subsection (3) elapse and no new prosecution has been brought under this section, the order under section *(New evidence)*(2)(b)(i) setting aside the acquittal has the effect, for all purposes, of an acquittal.

(8) On granting authority under section *(New evidence)*(2)(b)(ii) to bring a new prosecution, the High Court is, after giving the parties an opportunity of being heard, to order the detention of the accused person in custody or to admit that person to bail.

(9) Subsections (4)(aa) and (b) and (4A) to (9) of section 65 of the 1995 Act (prevention of delay in trials) apply to an accused person who is detained under subsection (8) as they apply to an accused person detained by virtue of being committed until liberated in due course of law.>

Bill Aitken

124 After section 37, insert—

<Nullity of proceedings on previous indictment or complaint

(1) Subsection (3) applies where—

(a) a person has, whether on indictment or complaint—

(i) been charged with, and

(ii) acquitted or convicted of, an offence, and

(b) the conditions mentioned in subsection (4) are satisfied.

(2) Whether the conviction or acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) The person may be charged with, and prosecuted anew for, the offence.

(4) The conditions are that, on the application of the prosecutor and after hearing the parties, the High Court is satisfied—

(a) that the proceedings on the indictment or complaint were a nullity, and

(b) that it would not be contrary to the interests of justice to proceed as mentioned in subsection (3).>

Bill Aitken

125 After section 37, insert—

<Amendment of Schedule 1 to the Contempt of Court Act 1981

(1) Schedule 1 to the Contempt of Court Act 1981 (c.49) (times when proceedings are active for the purposes of section 2 of that Act) is amended as follows.

(2) After paragraph 1 (the expressions “criminal proceedings” and “appellate proceedings”), there is inserted—

“1A Proceedings under sections *(Plea in bar of trial)* to *(Nullity of proceedings on previous indictment or complaint)* of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00) are criminal proceedings (and are not appellate proceedings) for the purposes of this Schedule.”.

(3) In paragraph 4 (initial steps of criminal proceedings), at the end there is added—

“(f) the making of an application under section *(Tainted acquittals)*(3)(a)(ii) or (b) (tainted acquittals), *(Admission subsequent to acquittal)*(3) (admission subsequent to acquittal) or *(New evidence)*(2)(b) (new evidence) of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00).”.

(4) In paragraph 5 (conclusion of criminal proceedings), at the end there is added—

“(d) where the initial steps of the proceedings are as mentioned in paragraph 4(f)—

(i) by refusal of the application,

(ii) if the application is granted and within 2 months thereafter a new prosecution is brought, by acquittal, or as the case may be by sentence, in the new prosecution.”.

(5) In paragraph 7 (discontinuance of proceedings), at the end there is added—

“(d) where the initial steps of the proceedings are as mentioned in paragraph 4(f) and the application is granted, if no new prosecution is brought within 2 months thereafter.”.>

Section 38

Robert Brown

379 In section 38, page 53, line 15, leave out subsection (2) and insert—

<(2) In section 41 (age of criminal responsibility), for “eight” substitute “12”.>

Bill Aitken

126 In section 38, page 53, line 17, after <not> insert <normally>

Bill Aitken

127 In section 38, page 53, line 18, after <not> insert <normally>

Richard Baker

389 In section 38, page 53, line 26, at end insert—

<(5) The Scottish Ministers must, as soon as possible after the end of each of the reporting years, lay before the Scottish Parliament and publish a report on the disposal of cases (“relevant cases”) involving children who, but for section 41A of the 1995 Act (as inserted by subsection (2)), could have been prosecuted.

(6) For the purposes of subsection (5), the “reporting years” are—

(a) the period of 12 months beginning with the day on which this section comes into force, and

(b) the periods of 12 months beginning with the first and second anniversaries of that day.

(7) A report under subsection (5) must, in particular—

(a) specify the number of relevant cases disposed of during the reporting year,

(b) set out how those cases were disposed of, the costs and other resources involved in those disposals, and what (if any) alternative disposals were considered, and

(c) state what (if any) consideration the Scottish Ministers have given during the year covered by the report to the merits of altering the range of disposals available in such cases.>

Robert Brown

390 In section 38, page 53, line 26, at end insert—

<( ) The Scottish Ministers may not bring subsections (1) to (4) into force until the Children’s Hearings (Scotland) Act 2010 (asp 00) is fully in force.>

Section 39

Kenny MacAskill

128 In section 39, page 53, line 32, after <offence> insert <committed by the partnership>

Kenny MacAskill

129 In section 39, page 54, line 9, at end insert—

<( ) In subsection (1), the references to a partner of a partnership include references to a person purporting to act as a partner of the partnership.>

Section 40

Kenny MacAskill

130 In section 40, page 54, line 23, leave out <all reasonable hours> and insert <a reasonable time and in a reasonable place>

Bill Aitken
Supported by: Robert Brown

131 Leave out section 40

After section 40

Margaret Curran

403 After section 40, insert—

<Parole: victims' representation

Victims' representation at Parole Board hearings

(1) Section 17 of the Criminal Justice (Scotland) Act 2003 (asp 7) is amended as follows.

(2) After subsection (1), insert—

"(1A) Representations under subsection (1) may include a request by the victim to be heard (either in person or through a representative) at the relevant hearing of the Parole Board for Scotland.

(1B) In this section, the "relevant hearing" of the Board is the hearing at which the Board is to consider the convicted person's case in order to decide whether to recommend, or direct, that person's release on licence.".

(3) In subsection (3), for "Parole Board for Scotland" substitute "Board".

(4) After subsection (5), insert—

"(5A) Where representations are made under subsection (1) which include a request to be heard at the relevant hearing, the Board must—

(a) give the victim reasonable notice in writing of when and where the hearing is to take place and invite the victim to—

(i) attend the hearing, with or without an accompanying person, in order to be heard in person; or

(ii) send a representative to the hearing to be heard on the victim's behalf;

(b) in so doing, give the victim appropriate information about the hearing and how it is likely to be conducted including, in particular—

(i) information about any parts of the hearing from which the victim and any accompanying person are, or the victim's representative is, to be excluded, and

(ii) any limits on their participation during the other parts of the hearing;

(c) at the hearing, afford the victim (or the victim's representative) a reasonable opportunity to be heard.

(5B) A victim's representative may only be a member of the victim's immediate family or a friend of the victim.

(5C) In reaching its decision at or after the hearing, the Board must take account of—

(a) any written representations made under subsection (1); and

(b) anything said by the victim (or the victim's representative) at the hearing.".>

After section 43

Kenny MacAskill

132 After section 43, insert—

<**Bail conditions: remote monitoring requirements**

Sections 24A to 24E of the 1995 Act (bail conditions: remote monitoring) are repealed.>

Section 58

James Kelly

404 In section 58, page 71, line 4, leave out from <18(7A)> to <Act),> in line 5 and insert <18 (prints, samples etc. in criminal investigations)—

( ) in subsection (3), the words "or on the conclusion of such proceedings otherwise than with a conviction or an order under section 246(3) of this Act" are repealed, and

( ) in subsection (7A),>

James Kelly

405 In section 58, page 71, leave out line 6, and insert—

<( ) The title of section 18A becomes "Retention of samples, etc.: persons prosecuted but not convicted etc.", and in that section>

James Kelly

406 In section 58, page 71, line 11, after <(2)> insert—

<( ) the words "in respect of a relevant sexual offence or a relevant violent offence" are repealed, and

( )>

James Kelly

407 In section 58, page 71, line 13, at end insert—

<( ) in subsection (4)(a), for "3" substitute "6",>

James Kelly

408 In section 58, page 71, line 18, at end insert <, and

( ) the definition of "relevant sexual offence" and "relevant violent offence" is repealed.>

Section 59

James Kelly

409 In section 59, page 72, line 19, leave out from <such> to second <offence> and insert—

<( ) an offence of assault, categorised by the Principal Reporter as grave, or

( ) such—

(i) other relevant violent offence, or

(ii) relevant sexual offence,>

James Kelly

410 In section 59, page 72, leave out lines 21 to 36

Robert Brown

380 In section 59, page 72, leave out lines 21 and 22, and insert—

<(7) Where this section applies, the sheriff may, on summary application by the relevant chief constable, make an order that, subject to section 18C(6) and (7), the relevant physical data, sample or the information must be destroyed no later than the destruction date.

(7A) The sheriff may only make the order referred to in subsection (7) if satisfied that the child continues to pose a risk to public safety and that retention of the relevant physical data, sample or information until the destruction date is justified by that risk.>

Robert Brown

381 In section 59, page 72, line 40, at end insert—

<"relevant chief constable" has the same meaning as in section 18A(11), with the modification that references to the person referred to in subsection (2) of that section are references to the child referred to in subsection (1);>

James Kelly

411 In section 59, page 73, leave out lines 4 to 40

Robert Brown

382 In section 59, page 73, line 37, leave out from <18A(11)> to end of line 40 and insert <18B(10)>

James Kelly

412 In section 59, page 74, line 2, leave out from <after> to end of line and insert <at beginning insert “Except where section 18B applies and”>

Section 61

Kenny MacAskill

133 In section 61, page 76, line 6, after <reasons> insert <for making the reference>

Kenny MacAskill

134 In section 61, page 76, line 9, leave out from <additional> to end of line 10 and insert <the appellant to found the appeal on additional grounds>

Kenny MacAskill

135 In section 61, page 76, line 19, leave out <additional grounds to be raised> and insert <the appeal to be founded on additional grounds>

Section 62

Robert Brown

383 In section 62, page 77, line 1, after <may> insert <, if satisfied that there is good reason to do so,>

After section 64

Kenny MacAskill

384 After section 64, insert—

<Child witnesses in proceedings for people trafficking offences

In section 271 of the 1995 Act (vulnerable witnesses: main definitions)—

(a) in subsection (1)(a), for “age of 16” substitute “relevant age”, and

(b) after subsection (1), insert—

“(1A) In subsection (1)(a), “the relevant age” means—

(a) in the case of a person who is giving or is to give evidence in proceedings for an offence under section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (trafficking in prostitution etc.) or section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation), the age of 18, and

(b) in any other case, the age of 16.”.>

Section 70

Kenny MacAskill

136 In section 70, page 89, line 34, leave out <and Wales>

Kenny MacAskill

137 In section 70, page 90, line 21, leave out from <body> to end of line 23 and insert <health and social care body mentioned in paragraphs (a) to (e) of section 1(5) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 (c.1).>

Section 72

Kenny MacAskill

138 In section 72, page 94, line 29, leave out <Law> and insert <Justice>

Trish Godman

9 In section 72, page 94, line 39, at end insert <, other than an offence under section 11A (engaging in a paid-for sexual activity) or 11B (advertising paid-for sexual activities)>

Margo MacDonald

9A As an amendment to amendment 9, line 2, after <activity)> insert <, 11AA (causing alarm etc. by engaging in a paid-for sexual activity)>

Kenny MacAskill

139 In section 72, page 94, line 41, leave out <27> and insert <37>

Kenny MacAskill

140 In section 72, page 94, line 42, leave out <penetrative>

Kenny MacAskill

141 In section 72, page 95, line 1, leave out <31> and insert <42>

Kenny MacAskill

142 In section 72, page 95, line 2, leave out <35> and insert <46>

Kenny MacAskill

143 In section 72, page 95, line 3, at end insert—

<( ) an offence under section (*Slavery, servitude and forced or compulsory labour*) (slavery, servitude and forced or compulsory labour) of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00).>

Kenny MacAskill

144 In section 72, page 95, line 14, leave out <42> and insert <54>

After section 74

Kenny MacAskill

145 After section 74, insert—

<Sex offender notification requirements

Sex offender notification requirements

(1) The Sexual Offences Act 2003 (c.42) is amended as follows.

(2) In section 85 (notification requirements: periodic notification)—

(a) in subsection (1), for "period of one year" substitute "applicable period",

(b) in subsection (3), for "period referred to in subsection (1)" substitute "applicable period", and

(c) after subsection (4) insert—

"(5) In this section, the "applicable period" means—

(a) in any case where subsection (6) applies to the relevant offender, such period not exceeding one year as the Scottish Ministers may prescribe in regulations, and

(b) in any other case, the period of one year.

(6) This subsection applies to the relevant offender if the last home address notified by the offender under section 83(1) or 84(1) or subsection (1) was the address or location of such a place as is mentioned in section 83(7)(b).".

(3) In section 86 (notification requirements: travel outside the United Kingdom), subsection (4) is repealed.

(4) In section 87 (method of notification and related matters), subsection (6) is repealed.

(5) In section 96 (information about release or transfer), subsection (4) is repealed.

(6) In section 138 (orders and regulations)—

(a) in subsection (2), after "84," insert "85,", and

(b) after subsection (3) insert—

"(4) Orders or regulations made by the Scottish Ministers under this Act may—

(a) make different provision for different purposes,

(b) include supplementary, incidental, consequential, transitional, transitory or saving provisions.".>

After section 75

Kenny MacAskill

146 After section 75, insert—

<Risk of sexual harm orders: spent convictions

In section 7 of the Rehabilitation of Offenders Act 1974 (c.53) (limitations on rehabilitation under the Act), in subsection (2), after paragraph (bb) insert—

> “(bc) in any proceedings on an application under section 2, 4 or 5 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) or in any appeal under section 6 of that Act;”.>

Section 80

Angela Constance

413 In section 80, page 100, line 29, after <victims> insert <(including children and young people)>

Section 89

Bill Aitken

147 In section 89, page 106, line 37, leave out <review all the> and insert <disclose to the accused all>

Bill Aitken

148 In section 89, page 106, line 38, leave out from <and> to end of line 14 on page 107

Bill Aitken

149 In section 89, page 107, line 15, leave out <(5)> and insert <(2)>

Section 90

Bill Aitken

150 In section 90, page 107, line 19, leave out <(5) or (6)> and insert <(2)>

Bill Aitken

151 In section 90, page 107, leave out lines 24 to 26 and insert <and

> (b) disclose to the accused any such information not already disclosed under section 89(2).>

Bill Aitken

152 In section 90, page 107, line 28, leave out <(5) or (6)> and insert <(2)>

Section 91

Bill Aitken

153 In section 91, page 108, line 5, leave out <89(5) or 90(2)> and insert <89(2) or 90(2)(b)>

Section 92

Bill Aitken

154 In section 92, page 108, line 10, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 93

Bill Aitken

155 In section 93, page 108, line 20, leave out <(5)> and insert <(2)>

Section 94

Bill Aitken
Supported by: Robert Brown

156 Leave out section 94

Section 95

Bill Aitken
Supported by: Robert Brown

157 Leave out section 95

Section 96

Bill Aitken

158 In section 96, page 110, line 28, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 97

Bill Aitken

159 In section 97, page 110, line 36, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 98

Bill Aitken

160 In section 98, page 111, line 5, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 100

Bill Aitken

161 In section 100, page 111, line 36, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 102

Bill Aitken

162 In section 102, page 112, line 26, leave out from <89(5)> to <information> in line 28 and insert <89(2) or 90(2)(b) the prosecutor is required to disclose an item of information to an accused>

Bill Aitken

163 In section 102, page 113, line 5, leave out from <89(5)> to end of line 6 and insert <89(2) or, as the case may be, 90(2)(b)>

Section 106

Bill Aitken

164 In section 106, page 115, line 14, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 111

Bill Aitken

165 In section 111, page 117, line 6, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 116

Bill Aitken

166 In section 116, page 119, line 24, leave out from <89(5)> to end of line 27 and insert <89(2),

(b) section 90(1) and (2),

(c) section 93(2) (where it first occurs),>

Section 117

Angela Constance

24 In section 117, page 120, line 10, at end insert <, or

(b) to determine or control that conduct despite being able to appreciate the nature or wrongfulness of it.>

Kenny MacAskill

167 In section 117, page 120, line 31, leave out <it> and insert <such abnormality>

Section 121

Kenny MacAskill

168 In section 121, page 123, leave out lines 2 and 3 and insert—

<(3A) No order may be made under subsection (1) unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.>

Section 122

Kenny MacAskill

169 In section 122, page 125, line 1, leave out from <5,> to <29> in line 2 and insert <5 and 11>

Section 123

Robert Brown

385 Leave out section 123

After section 124

Kenny MacAskill

170 After section 124, insert—

<**Licensing of street trading: food hygiene certificates**

(1) Section 39 of the 1982 Act (street traders' licences) is amended as follows.

(2) In subsection (4), for the words from "the requirements" to the end substitute "such requirements as the Scottish Ministers may by order made by statutory instrument specify".

(3) After subsection (4), insert—

"(5) An order under subsection (4) may specify requirements by reference to provision contained in another enactment.

(6) A statutory instrument containing an order made under subsection (4) is subject to annulment in pursuance of a resolution of the Scottish Parliament.".>

Section 125

Kenny MacAskill

171 In section 125, page 128, line 24, at beginning insert <In>

Kenny MacAskill

172 In section 125, page 128, line 24, leave out from <is> to <In> in line 26 and insert <, in>

Cathie Craigie

2 In section 125, page 128, line 25, leave out subsection (2)

Cathie Craigie

3 In section 125, page 128, line 26, leave out subsection (3)

Cathie Craigie
Supported by: Robert Brown

4 Leave out section 125

Section 128

Kenny MacAskill

173 In section 128, page 129, line 25, at end insert—

<( ) in paragraph 2(3)(b), after "application" insert "(other than the date and place of birth of any person)",

( ) in paragraph 2(8)(a), after "application" insert "(other than the date and place of birth of any person)",>

Section 129

Kenny MacAskill

174 Leave out section 129

After section 131

Kenny MacAskill

175 After section 131, insert—

<**Reviews of premises licences: notification of determinations**

(1) The 2005 Act is amended as follows.

(2) After section 39 (Licensing Board's powers on review), insert—

"**39A Notification of determinations**

(1) Where a Licensing Board, at a review hearing—

(a) decides to take one of the steps mentioned in section 39(2), or

(b) decides not to take one of those steps,

the Board must give notice of the decision to each of the persons mentioned in subsection (2).

(2) The persons referred to in subsection (1) are—

(a) the holder of the premises licence, and

(b) where the decision is taken in connection with a premises licence review application, the applicant.

(3) Where subsection (1)(a) applies, the holder of the premises licence may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(4) Where—

(a) subsection (1)(a) or (b) applies, and

(b) the decision is taken in connection with a premises licence review application,

the applicant may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(5) Where the clerk of a Board receives a notice under subsection (3) or (4), the Board must issue a statement of the reasons for the decision to—

(a) the person giving the notice, and

(b) any other person to whom the Board gave notice under subsection (2).

(6) A statement of reasons under subsection (5) must be issued—

(a) by such time, and

(b) in such form and manner,

as may be prescribed.”.>

After section 132

Kenny MacAskill

176 After section 132, insert—

<**Premises licence applications: food hygiene certificates**

(1) Section 50 of the 2005 Act (certificates as to planning, building standards and food hygiene) is amended as follows.

(2) In subsection (7), for the words from “the requirements” to the end substitute “such requirements as the Scottish Ministers may, by order, specify.”.

(3) After subsection (7), insert—

“(7A) An order under subsection (7) may specify requirements by reference to provision contained in another enactment.”.

(4) In subsection (8)(c), for “the 1990 Act” substitute “section 5 of the Food Safety Act 1990 (c.16)”.>

Section 136

Kenny MacAskill

177 In section 136, page 135, line 3, at end insert—

<“(ba) the notice does not include a recommendation under section 73(4),>

Kenny MacAskill

178 In section 136, page 135, leave out lines 22 to 27 and insert—

<(a) hold a hearing for the purposes of considering and determining the application, and

(b) after having regard to the circumstances in which the personal licence previously held expired or, as the case may be, was surrendered—

(i) refuse the application, or

(ii) grant the application.”.>

After section 137

Kenny MacAskill

179 After section 137, insert—

<**Appeals**

In section 131(2) of the 2005 Act (appeals), the words “by way of stated case, at the instance of the appellant,” are repealed.>

Schedule 4

Kenny MacAskill

180 In schedule 4, page 149, line 11, leave out <22(2) or>

Kenny MacAskill

181 In schedule 4, page 150, leave out lines 18 to 21

Section 140

Kenny MacAskill

182 Leave out section 140

Section 142

Kenny MacAskill

183 Leave out section 142

Section 143

Robert Brown

391 In section 143, page 138, line 30, after <148(1)> insert <other than one bringing into force section 17(1), (2) or (3)>

Kenny MacAskill

184 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*Mutual recognition of judgments and probation decisions*)(1),>

Bill Aitken

185 In section 143, page 138, line 32, at end insert—

<( ) an order under section *(New evidence)*(10),>

Kenny MacAskill

186 In section 143, page 138, leave out line 33

Kenny MacAskill

187 In section 143, page 138, line 33, at end insert—

<( ) an order under section 146(1) containing provisions which modify any enactment (including this Act), or>

Kenny MacAskill

188 In section 143, page 138, line 34, leave out <146(1) or>

Robert Brown

392 In section 143, page 138, line 35, at end insert <or

( ) an order under section 148(1) bringing into force section 17(1), (2) or (3),>

Schedule 5

Kenny MacAskill

189 In schedule 5, page 151, line 35, at end insert—

<*The Libel Act 1792 (c.60)*

The Libel Act 1792 is repealed.

The Criminal Libel Act 1819 (c.8)

The Criminal Libel Act 1819 is repealed.

The Defamation Act 1952 (c.66)

In the Defamation Act 1952, section 17(2) is repealed.>

Kenny MacAskill

190 In schedule 5, page 152, line 24, at end insert—

<*The Incest and Related Offences (Scotland) Act 1986 (c.36)*

The Incest and Related Offences (Scotland) Act 1986 is repealed.>

Kenny MacAskill

191 In schedule 5, page 153, line 3, after <89> insert <, 111>

Kenny MacAskill

192 In schedule 5, page 153, line 3, at end insert—

<*The Trade Union and Labour Relations (Consolidation) Act 1992 (c.52)*

In section 243(4)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 (restriction of offence of conspiracy: Scotland), the words "or sedition" are repealed.>

Kenny MacAskill

193 In schedule 5, page 153, line 12, at end insert—

<*The Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40)*

In Schedule 4 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (minor and consequential amendments), in paragraph 44, sub-paragraph (2) is repealed.>

Kenny MacAskill

386 In schedule 5, page 153, line 35, at end insert—

<In section 11 (certain offences committed outside Scotland)—

(a) in subsection (3), for "proceeded against, indicted" substitute "prosecuted",

(b) in subsection (4), for "dealt with, indicted" substitute "prosecuted".>

Kenny MacAskill

194 In schedule 5, page 157, line 8, at end insert—

<*The Defamation Act 1996 (c.31)*

In the Defamation Act 1996, section 20(2) is repealed.>

Kenny MacAskill

195 In schedule 5, page 157, line 10, leave out paragraph 44 and insert—

<(1) The Crime and Punishment (Scotland) Act 1997 is amended as follows.

(2) In section 9 (power to specify hospital unit), in subsection (1)(a), for "insane" substitute "found not criminally responsible or unfit for trial".

(3) In section 13 (increase in sentences available to sheriff and district courts), subsection (2) is repealed.

(4) In section 56 (powers of the court on remand or committal of children and young persons), subsection (3) is repealed.>

Kenny MacAskill

196 In schedule 5, page 157, line 28, at end insert—

<*The Legal Deposit Libraries Act 2003 (c.28)*

Section 10 of the Legal Deposit Libraries Act 2003 (exemption from liability: activities in relation to publications) is amended as follows—

(a) in subsection (1), the words ", or subject to any criminal liability," are repealed,

(b) in subsection (2)(a), the words "in the case of liability in damages" are repealed,

(c) in subsection (3), the words ", or subject to any criminal liability," are repealed,

(d) in subsection (4)(a), the words "in the case of liability in damages" are repealed,

(e) in subsection (6)(a), the words ", or subject to any criminal liability," are repealed, and

(f) in subsection (8), the words "and criminal liability" are repealed.>

Kenny MacAskill

197 In schedule 5, page 158, line 36, at end insert <and

(ii) sub-paragraph (b) is repealed.>

Kenny MacAskill

387 In schedule 5, page 159, line 12, at end insert—

<*The Sexual Offences (Scotland) Act 2009 (asp 9)*

In section 55(7) of the Sexual Offences (Scotland) Act 2009 (offences committed outside the United Kingdom), for "proceeded against, indicted" substitute "prosecuted".>

Kenny MacAskill

198 In schedule 5, page 159, line 14, leave out <134> and insert <156>

Section 148

Robert Brown

393 In section 148, page 139, line 19, after <sections> insert <17(4) and>

Criminal Justice and Licensing (Scotland) Bill

1st Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated on the first day of Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

Purposes and principles of sentencing
26, 27, 28, 29, 30, 31, 32, 37, 38

Circumstances in which courts not to have regard to purposes and principles
33, 34, 35, 36

Relationship between section 1 and other law
39, 40, 54

Scottish Sentencing Council – composition (general)
41, 42, 43, 44, 45, 46, 47, 48, 15

Scottish Sentencing Council – case for judicial majority
12, 13, 14

Scottish Sentencing Council – members (appointment, term of office)
49, 50

Sentencing guidelines – role of judiciary in approval and publication
51, 53, 16, 18, 18A, 18B, 57, 58, 19, 59, 20, 61, 66, 22, 68, 70, 23, 75

Notes on amendments in this group
Amendment 53 pre-empts amendment 16
Amendment 58 pre-empts amendment 19
Amendment 70 pre-empts amendment 23

Scottish Sentencing Council – objectives
52

Sentencing guidelines – application to young people
394

Assessments to accompany sentencing guidelines
55, 17, 62, 63, 65, 67

Dates on which sentencing guidelines to take effect
56

Relationship with existing power of High Court to issue sentencing guidelines
60, 71, 72, 76

Consultation on draft sentencing guidelines
64, 21, 395, 396

Effect of sentencing guidelines
69

Ministers' power to request Council to prepare or review guidelines
397

Scottish Sentencing Council – power to provide information, advice etc.
73

Consultation on Scottish Sentencing Council's business plan
74

Community payback orders (and requirements under CPOs) to be imposed on offenders
199, 202, 205, 208, 209, 212, 215, 217, 221, 225, 226, 228, 229, 230, 231, 232, 257, 260, 277, 280, 291, 295, 299, 300, 301, 302, 304, 305, 307, 308, 312, 313, 336, 338, 339, 340, 341

Purpose of community payback orders
77

Title of "supervision requirement"
78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97

Notes on amendments in this group
Amendment 79 is pre-empted by amendment 204 in the group "Conduct requirements"
Amendment 83 is pre-empted by amendment 236, also in that group
Amendments 85, 86 and 87 are pre-empted by amendment 239 in the group "Compensation requirements"

Compensation requirements
200, 206, 235, 239, 286, 290, 327

Notes on amendments in this group
Amendment 239 pre-empts amendments 85, 86 and 87 in the previous group

Conduct requirements
201, 204, 207, 236, 275

> *Notes on amendments in this group*
> Amendments 204 and 236 pre-empt, respectively, amendments 79 and 83 in group "Title of "supervision requirement""

Supervision requirements
203, 234, 237, 238

Community payback orders – definitions
210, 211

Community payback orders – local authority (responsible officer and reports on offenders)
213, 214, 218, 219, 220, 222, 223, 224, 267, 296, 337

Community payback orders – special provision for level 1 unpaid work or other activity requirements
216, 243, 254, 259, 297

Community payback orders – alternative disposals available to court
227

Community payback orders – payment of offenders' expenses
233, 265

Community payback orders – unpaid work or other activity requirement
240, 241, 398, 242, 244, 245, 246, 247, 248, 249, 250, 251, 255, 256, 261, 262, 263, 264, 266, 285, 288, 289

Community payback orders – fine defaulters
252, 253, 258, 292

Community payback orders – mental health treatment requirements (chartered psychologists)
268, 269, 270, 271, 272, 273

Community payback orders – drug treatment requirement
274

Community payback orders – commencement and standards
276

Community payback orders – progress reviews
278, 279

Community payback orders – revocation, variation and discharge, including where CPO breached
281, 282, 283, 284, 287, 293, 294, 298, 303, 306, 309, 310, 311, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326

Notes on amendments in this group
Amendment 323 pre-empts amendment 96 in the group "Title of "supervision requirement""

Community payback orders – restricted movement requirement
328, 329, 330, 331, 332, 333, 334, 335

Unpaid work and other activity requirement – consultation
98

Annual reports on community payback orders
99

Community payback orders – consequential modifications
342, 343

Offence of stalking, offence of threatening, alarming or distressing behaviour
399, 400, 401, 402, 378

Non-harassment orders – course of conduct
5, 6, 7

Presumption against short periods of imprisonment or detention
100, 101, 388, 1, 391, 392, 393

Report on operation of sections 14 and 17
102

Pre-sentencing reports about organisations
103

Voluntary intoxication by alcohol – effect in sentencing
104

Mutual recognition of judgments and probation decisions
105, 184

Minimum sentence for having in a public place an article with a blade or point
10, 10A

Involvement in serious organised crime
344, 345, 346, 347, 348, 349, 350, 351, 358

Notes on amendments in this group
Amendment 347 pre-empts amendment 348

Offences aggravated by connection with serious organised crime (corroboration)
352

Directing serious organised crime
353, 354, 355, 356

Failure to report serious organised crime
357, 106, 359, 360

Genocide, crimes against humanity and war crimes
107, 108

Clarification of existing offence prohibiting the carrying of offensive weapons
109

Offence of having article with blade or point (or offensive weapon) on workplace premises
11

Extreme pornography – sounds accompanying images
361, 362, 363, 364, 366

Extreme pornography – excluded images
365, 367, 368, 369

Voyeurism – additional forms of conduct
110

Sexual offences – defences in relation to offences against older children
111

Penalties for offences of brothel-keeping and living on the earnings of prostitution
370

Engaging in, advertising and facilitating paid-for sexual activities
8, 8A, 8B, 8C, 8D, 9, 9A

People trafficking (and consequential provision)
371, 372, 373, 374, 375, 376, 377, 386, 387

Slavery, servitude and forced or compulsory labour
112, 143

Articles for use in fraud
113

Abolition of offences of sedition and leasing-making
114, 189, 192, 194, 196

Double jeopardy (Scottish Law Commission report)
115, 116, 117, 118, 119, 120, 120A, 121, 122, 123, 124, 125, 185

Children – age of criminal responsibility and minimum age of prosecution
379, 126, 127, 389, 390

Offences – liability of partners
128, 129

Witness statements
130, 131

Victims' representation at Parole Board hearings
403

Bail conditions – remote monitoring requirements
132, 197

Retention of samples etc. – adults
404, 405, 406, 407, 408

Retention of samples etc. – children referred to children's hearings (application to sheriff)
409, 410, 380, 381, 411, 382, 412

Notes on amendments in this group
Amendment 410 pre-empts amendment 380
Amendment 411 pre-empts amendment 382

Scottish Criminal Cases Review Commission – grounds for appeal
133, 134, 135

Witness statements – use during trial
383

Child witnesses in proceedings for people trafficking offences
384

Data matching for detection of fraud etc.
136, 137

Closure of premises associated with human exploitation etc. (minor corrections etc.)
138, 139, 140, 141, 142, 144, 198

Sex offender notification requirements
145

Risk of sexual harm orders – spent convictions
146

Assistance for victim support
413

Prosecutor's duty to disclose information
147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166

Mental disorder and unfitness for trial
24, 167, 195

Conditions to which licences under the 1982 Act are to be subject
168

Licensing – powers of entry etc. (definition of "authorised civilian employee")
169

Licensing of metal dealers
385

Licensing of street trading – food hygiene certificates
170

Licensing of market operators
171, 172, 2, 3, 4

Notes on amendments in this group
Amendment 172 pre-empts amendments 2 and 3

Applications for licences
173

Provisions to be considered as part of the Alcohol (Scotland) Bill
174, 182, 186

Reviews of premises licences – notification of determinations
175

Premises licence applications
176, 180, 181

Personal licence applications
177, 178

Appeals against decisions of licensing board
179

Corruption in public bodies
183

Orders and regulations – circumstances in which affirmative procedure required
187, 188

Incest and related offences
190

Criminal law – revision
191, 193

JUSTICE COMMITTEE

EXTRACT FROM THE MINUTES

8th Meeting, 2010 (Session 3)

Tuesday 2 March 2010

Present:

Bill Aitken (Convener)	Robert Brown
Bill Butler (Deputy Convener)	Angela Constance
Cathie Craigie	Nigel Don
James Kelly	Stewart Maxwell

Also present: Richard Baker, Aileen Campbell, Rhoda Grant, Trish Godman and John Scott.

Criminal Justice and Licensing (Scotland) Bill: The Committee considered whether to take evidence on Stage 2 amendments raising significant issues not considered during Stage 1. The Committee agreed to seek oral and written evidence on amendments 10 and 10A (minimum sentence for having in a public place an article with a blade or point); amendments 399-402 (new offence of stalking) and 378 (new offence of threatening, alarming or distressing behaviour); and amendments 370 (penalties for offences of brothel-keeping and living on the earnings of prostitution) and 8, 8A-8D, 9 and 9A (offences of engaging in, advertising and facilitating paid-for sexual activities).

Criminal Justice and Licensing (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 1).

The following amendments were agreed to (without division): 33, 35, 36, 37, 41, 43, 13, 47, 50 and 51.

The following amendments were agreed to (by division)—

38 (For 5, Against 3, Abstentions 0)
40 (For 5, Against 3, Abstentions 0)
12 (For 5, Against 3, Abstentions 0)
14 (For 4, Against 4, Abstentions 0; amendment agreed to on casting vote)
49 (For 5, Against 3, Abstentions 0)
53 (For 4, Against 1, Abstentions 3)

The following amendments were disagreed to (by division)—

26 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
27 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
28 (For 1, Against 7, Abstentions 0)
29 (For 1, Against 7, Abstentions 0)
32 (For 3, Against 5, Abstentions 0)
39 (For 1, Against 7, Abstentions 0)

52 (For 1, Against 4, Abstentions 3)

Amendment 394 was moved and, with the agreement of the Committee, withdrawn.

Amendment 16 was pre-empted.

The following amendments were not moved: 30, 31, 34, 42, 44, 45, 46, 48, 15 and 54.

Sections 3 and 4 were agreed to without amendment.

Schedule 1 was agreed to as amended.

The Committee ended consideration of the Bill for the day, amendment 394 having been disposed of.

Scottish Parliament

Justice Committee

Tuesday 2 March 2010

[The Convener *opened the meeting at 10:13*]

Criminal Justice and Licensing (Scotland) Bill

The Convener (Bill Aitken): Good morning, ladies and gentlemen. Welcome to the meeting. I remind everyone to ensure that mobile phones are switched off in order to avoid disrupting proceedings. All members of the committee are in attendance, so there are no apologies. I welcome Aileen Campbell MSP and Richard Baker MSP. I also welcome Rhoda Grant, who had escaped my vision. All of them are here in connection with amendments to the Criminal Justice and Licensing (Scotland) Bill.

Item 1 is consideration of a paper by the clerk—paper J/S3/10/8/1—on the options that are available to the committee if it wishes to take evidence on amendments to the Criminal Justice and Licensing (Scotland) Bill at stage 2. The key questions for the committee are summarised in paragraphs 18 and 19 of the paper.

10:15

An unfortunate, but perhaps inevitable, part of dealing with such complex legislation is that late in the day we receive amendments, some of which are far reaching. No one is to blame for that; all the amendments from the Government and from members that have been lodged late in the day are, of course, worthy of consideration and will be considered. However, the amendments concern several issues on which the committee has not taken evidence. We should have the benefit of evidence on those issues before making determinations on the relevant amendments.

I refer members to paragraph 6 on page 2 of paper J/S3/10/8/1, which highlights several issues. The double-jeopardy issue has largely gone away, because of a comment by the Cabinet Secretary for Justice in the chamber the other day and because of private discussions that I have had with him. I am reconciled to the situation for the moment—although we will see what develops—so we need not take evidence on that.

However, we must consider taking evidence on the new offence of stalking, which Rhoda Grant proposes in amendment 402, and on the new offence of threatening, alarming or distressing behaviour, which is in Scottish Government amendment 378. We should also take evidence—possibly restricted—on the minimum sentence for having in a public place an article with a blade or point, which is in Richard Baker's amendment 10 and my amendment 10A, which would apply after section 24. Other issues are penalties for the offences of brothel keeping and living on the earnings of prostitution, which are in Government amendment 370, and the offences of engaging in, advertising and facilitating paid-for sexual activities, to which Trish Godman's amendment 8 refers.

My view is that we should arrange to take evidence on those matters. I ask for members' comments.

James Kelly (Glasgow Rutherglen) (Lab): There is no doubt that the bill is complex. Many stage 2 amendments have been lodged, several of which deal with matters that were not discussed at stage 1 and on which the committee did not have the opportunity to take evidence. Given that, the clerk's note sets out several matters on which our considering whether to take further evidence is valid.

In relation to Rhoda Grant's amendments, the Government's counter-amendments and the amendments on prostitution, it is clear from representations made to committee members that many strong feelings have been aroused on both sides of the arguments about both subjects. It makes sense for the committee to take further evidence and to take stock before considering how to proceed with those amendments.

I take on board the convener's points about knife crime. It has been the subject of much analysis and discussion in public, so we are more informed about it, although I would not be against taking limited evidence.

Stewart Maxwell (West of Scotland) (SNP): I agree with the convener. Apart from the fact that several amendments have been lodged slightly late in the day, the issue is that a number of amendments concern new issues on which the bill contains nothing. We took no written or oral evidence on many of those matters at stage 1.

I slightly disagree with James Kelly about knives. We took no evidence whatever on knives at stage 1. People have views on the appropriate sentences for knife crime, but it would be reasonable—to say the least—to take proper evidence on that. I am slightly concerned about James Kelly's use of the word "limited". Of course, all the evidence that we take will be limited, but evidence on knife crime should be no more limited than that on other subjects.

Although I have a great deal of sympathy with Trish Godman's amendment, I am concerned about the fact that we have had a lot of late submissions on the issue with which it deals—we have received new material only this morning—so further evidence requires to be submitted to, and considered by, the committee on that amendment, and on the other ones that have been mentioned, before we move forward.

Robert Brown (Glasgow) (LD): I agree with a good deal of what has been said, not least the convener's summation. I agree that there are three areas on which we should divide our attention, but it is worth making a few additional comments.

Stalking—which Rhoda Grant's amendment deals with—and the Government's proposed new breach-of-the-peace-type statutory offence represent new areas as far as the bill is concerned, but they are relatively discrete areas, on which it would be possible for us to take substantial evidence without departing from the general issues in the bill. In a sense, that makes them easier to deal with.

The proposed prostitution-type offences are pretty wide ranging. The concern is that over the years, all sorts of views have been expressed about the best way of tackling the issue. Everyone is anxious for progress to be made and for the harm that is caused by prostitution to be diminished, but it is a big issue. To be frank, it is the sort of issue that would benefit from the setting up of a body such as a Government commission to examine the ins and outs of where we are and whether legislative changes would be worth while. Such matters are difficult to deal with by way of a by-blow in the context of a bill that is primarily about other issues.

On knife crime, it is true that there is a lot of information and heated opinion in the public domain, but there is much less clear research evidence—the committee has certainly not seen any—on what effects, deterrent or otherwise, particular sentences might have, were the legislation to be changed in that regard. I am talking about the cost implications and the effect on the number of people in prison, for example. As Stewart Maxwell rightly said, we require to take not limited but quite substantial evidence on all that. It is not just a matter of repeating the views on either side; it is a question of seeing what lies beneath those views and testing the evidence in the way that the committee would normally do and has done at stage 1 on other issues. We need to adopt a wider approach to the amendments on knife crime.

The Convener: I think that we should take limited oral evidence on that, but I am more than happy to ensure that relevant academic studies and statistical information be made available. I am sure that the clerks will involve Stewart Maxwell and Robert Brown in that.

Robert Brown: What format will the evidence seeking take? At stage 1, we would normally advertise in the usual way. At the very least, we should do something of that sort this time round, although I appreciate that the timescales are difficult and that, as the paper points out, there may be a need to defer our conclusion of stage 2, which would obviously affect the progress of the bill.

The Convener: As Robert Brown says, there is a time inhibition, but clearly our proposal would be to take any oral evidence before we had to deal with the relevant amendments. We are okay for this week and for next week—there is enough for us to get on with. We can certainly advertise in the usual manner and see what results that brings in, but I propose that we have a brief and limited oral evidence session on this topic involving two witnesses two weeks hence. We can, of course, return to it during consideration of the amendments.

Stewart Maxwell: I do not object to that course of action; I just suggest that the Scottish Parliament information centre may be of great assistance in directing requests for factual and research evidence. That would be preferable to issuing a general call.

The Convener: That is a helpful suggestion, which we will certainly take up.

James Kelly: The suggestion that the convener has outlined is sensible. It will allow us to take some oral evidence that captures the issues and gives us a sense of the differing views on them. As other members have said, our inviting written submissions will allow us to explore matters in more detail and come to a more considered opinion before we deal with the amendments.

The Convener: I would like to bring our discussion to a conclusion. We have agreed to take evidence under the headings that have been stated. Is it agreed that we should take what is the easiest administrative route and carry on considering amendments this week and next week, that we attempt to complete the evidence two weeks from today, and that we deal with the question of written evidence along the lines that have been suggested, in particular by involving SPICe?

Members *indicated agreement.*

Stewart Maxwell: For clarity, are you suggesting that we take written and oral evidence on the issues of knives and prostitution and written evidence on Rhoda Grant's amendments on stalking, as per Robert Brown's comments, or are you suggesting that we do the same for all three issues?

The Convener: We will have to take oral evidence on stalking, as well.

Stewart Maxwell: That is fine. I just wanted clarification.

The Convener: I am sorry if I did not make that clear.

Stewart Maxwell: I know that we are under time pressure, but I would prefer to treat the areas with the respect that they deserve, and to give them the time that they deserve. If that means going back and asking for a slight extension, it would be appropriate to do that.

The Convener: I think that the Minister for Parliamentary Business has been made aware of the difficulties under which we are operating. I have indicated to him that we will do our best but that a time extension might well be necessary.

The other decision that we have to make is whether to invite written submissions and, if so, by what deadline. At this stage, I welcome Trish Godman and John Scott, who have joined us for the current agenda item. I understand that Mr Scott wishes to say something.

John Scott (Ayr) (Con): I thank the committee for considering taking evidence on stalking. In particular, I am here to support my constituent Anne Moulds, who has—

The Convener: You have heard what we are going to do about the issue.

John Scott: I put on the record my thanks.

The Convener: That is appreciated. Ms Godman—do you have anything to add at this juncture?

Trish Godman (West Renfrewshire) (Lab): Yes. I agree with Stewart Maxwell that the issues are serious and that the more evidence the committee has, both written and oral, the better informed you will be in making decisions. I certainly support that position. Thank you.

The Convener: As has been made fairly clear, you are pushing at an open door.

Which persons or organisations do we wish to speak to? On knives, John Muir and the chief constable of Lothian and Borders Police, David Strang, who has had things to say about the issue, are the obvious choices.

Nigel Don (North East Scotland) (SNP): I echo a thought that I heard from across the table. I have great respect for John Muir. We have heard from him many times, and those of us who are on the Public Petitions Committee have heard from him more. If I may say so, what we need is not opinion, however well informed it is, but the benefit of research and a wider view of what works and what does not. I say that with the greatest respect to the views of John Muir and David Strang. I therefore suggest that we wait to see what kind of written responses we get, what research is available and where the experts are before we decide from whom we should hear.

The Convener: Those two aspects are not mutually exclusive. I believe that we need to take oral evidence, but that is enough for us to be going on with. We do not require to make final decisions today as to who will be involved.

Robert Brown: As what I said before perhaps suggested, I support what Nigel Don said. I agree that we should not exclude other people's evidence, but we need people such as the Scottish Consortium on Crime and Criminal Justice not just to give written evidence but to give oral evidence so that we can test people about exactly what they are saying. I wonder whether we will need two evidence-taking sessions, either in one go or in successive weeks. I know that it would be difficult to find the time for that and that you are anxious to cut the evidence down, but the matter is important.

The Convener: It is important. Clearly, I would prefer to take more time to get a satisfactory result rather than to move forward too expeditiously, but time is finite, as I said.

Richard Baker (North East Scotland) (Lab): Absolutely, convener. I do not disagree that the committee should take further evidence on knife crime, because it has not been considered during stage 1, but it is important to reflect on the fact that we have had a parliamentary process through the petition by John Muir, which was also the subject of a summit in the chamber. We received a huge amount of research and evidence as part of that process, which the committee should take on board. In addition, victims of knife crime, particularly Mr Muir, have informed and strong opinions on the issue. It is important that the committee give those their due credence and respect.

The Convener: We do not need to finalise the decision today, but there has been a reasonable exchange of views and we know our direction of travel. The Cabinet Secretary for Justice, who is present, will appreciate our difficulties. As ever, we will do everything possible to proceed with the matter expeditiously.

10:33

On resuming—

Criminal Justice and Licensing (Scotland) Bill: Stage 2

The Convener: Item 3 is the first day of stage 2 proceedings on the Criminal Justice and Licensing (Scotland) Bill. The committee will consider amendments to parts 1 and 2 of the bill and will not proceed beyond that. I welcome the Cabinet Secretary for Justice, Kenny MacAskill, who is accompanied by senior officials from his department. In the event of our reaching amendment 103, in the name of Bill Wilson, Angela Constance will speak to it. Members should have copies of the bill and of the marshalled list and groupings of amendments for today's consideration.

Section 1—Purposes and principles of sentencing

The Convener: Amendment 26, in the name of Robert Brown, is grouped with amendments 27 to 32, 37 and 38.

Robert Brown: I am glad to welcome several familiar faces to the table along with the cabinet secretary this morning. My comments on the group will be reasonably lengthy, but they will deal with some of the issues that we will come to later.

The Convener: That is perfectly understandable.

Robert Brown: The first three groups of amendments relate to the Government's desire to state the purposes and principles of sentencing in statutory form. Broadly, I am against that, as it gives unnecessary rigidity to the law and leads to unintended consequences. There is little doubt in my mind as to the purposes and principles of sentencing. They are applied every day in the courts, and they are understood by the public. They involve, in various ways, the protection of the public, punishment, deterrence, reform, vindication of public repugnance against particular crimes, and compensation for victims, either by allowing them to see justice done or by including some sort of reparation to them.

It is the job of sentencers to apply those principles to various degrees in various situations, and that is where the professional skill of the sentencer comes in. Their job changes over time, in accordance with changing social norms. Prison reform, and the introduction of a wide range of community sentences, has meant that the sentence is intended not just to protect the public but, if possible, to reform the offender. There was not much evidence of that sort of thing in the days when people were hanged for stealing a sheep.

As soon as those principles are analysed and set down, inadequacies become apparent. What about mitigatory factors? What about the youth or poor upbringing of the offender—which is more important? What about the interests of the victim? If someone can be reformed by on-going supervision that lasts for five years, is that proportionate to an offence of breach of the peace? Is that an economic use of public funds?

My primary proposition is contained in amendment 38, and also in amendment 40, in group 3, which between them would delete sections 1 and 2. However, the first group of amendments seeks to improve the statement of the purposes and principles of sentencing, if we are to have it at all. That should be the first exercise.

Amendment 26 proposes that, although there cannot be a hierarchy of purposes of sentencing, it is all subject to the overriding purposes of fairness and justice, and the committee will recall our significant evidence on that from representatives of research bodies including the Scottish Consortium on Crime and Criminal Justice. Fairness and justice are wide concepts. They embrace justice to the offender, to the victim and to society, and they are the correct, overriding purposes of sentencing. Fairness and justice must take priority because, as has been said in evidence, the system has limited capacity to deliver other objectives such as deterrence and reform.

Amendment 27 makes the other purposes of sentencing in section 1 non-inclusive, and it allows flexibility for existing jurisprudence. It is a guard against unintended consequences or omissions. For example, the purposes of sentencing as drafted do not quite include the element of the indication of public distaste for particular crimes. There is a broad social desire to indicate the unacceptability of domestic violence, for example, but that is not quite covered by the other purposes that are in the bill.

Government amendment 37 successfully meets the committee's view that there should be a clearer division between the purposes and principles of sentencing.

Amendment 28 arises from the evidence of the Scottish Consortium on Crime and Criminal Justice, whose representatives spoke about the principle of parsimony. The general point is that the state is entitled to interfere with the liberty of the citizen only to the extent that is necessary to achieve its purpose. The state intentionally draws out punishment and the reduction of crime as its key interests. Amendment 28 introduces the important principle of proportionality: that the sentence should fit the crime but should not be overly harsh and excessive—nor should it be inadequate.

Amendment 29 inserts further words into section 1(3)(a). The court needs to have regard to the nature and character of the crime, not just to its seriousness. It could be argued, for example, that a sex crime was less serious than a murder, on the basis that no life has been lost, but there are some such crimes that, by their nature, character and detail, are even more deserving of punishment than a particular murder offence.

Amendment 30 adds to the principles the early acceptance of guilt, which has traditionally been accepted as mitigatory, while the absence of such acceptance has been regarded as aggravatory. That is for all sorts of good reasons, not least of which is saving the victim and other close witnesses the ordeal of giving evidence. Omitting that aspect is another example of the possible unintended consequences of trying to state such principles in a statutory form.

Amendment 31 is intended to deal with the oddity that was noted by the committee in section 1(5), which is that the purposes and principles of sentencing only sort of apply, and only partially, to offenders under 18. That is linked to amendment 33, in group 2. The treatment of offenders under the age of 21 has always differed in kind from that of offenders over the age of 21, whether in terms of a greater latitude for youth, incarceration in a different sort of establishment or other ways.

There are, of course, other cut-offs—at 12, 13, 16 and 18—but they can be accommodated within the high-level principle of drawing attention to the fact that the offenders' age is under 21. Again, the issue is missing from the bill. However, it is a vital and necessary principle that regard be had to the youth and, perhaps, immaturity of the offender.

Amendment 32, in the name of Aileen Campbell, is intended to place emphasis on the well-known fact that imprisoning a parent, especially a woman—I refer members to the evidence that we heard recently heard about Cornton Vale—has evil effects on his or her children, which, in turn, are likely to rebound on society. I would like to hear the debate on this amendment, with which I have some sympathy in principle. What would Aileen Campbell's position mean in practice? Could it or should it mean that an offender with dependent children could escape prison in circumstances in which a childless offender would not? It is possible that that happens under the existing law. If it does not, however, what are the implications of the amendment?

Section 1 is an important section, and I have, in my amendments, attempted to improve areas in which the bill is not quite right and could be damaging. However, I remain concerned that there are certain things on which we have not heard evidence or about which we have not thought, but which could distort existing or future practice, not because we intend that to happen or because the motivations are not good, but because we have accidentally omitted something or overstated or understressed something else.

The committee was prepared to consider some leeway on the issue because stating what sentencing is for is viewed as a preliminary to the creation of the proposed sentencing council. However, after reflection, I have come to the view that that is not a valid proposition, and that the sentencing council can stand on its own without sections 1 and 2, if it is desired to proceed with it when we come to the consideration of the substantive matters on that area.

I move amendment 26.

Aileen Campbell (South of Scotland) (SNP): In February 2008, Scotland's Commissioner for Children and Young People published a report called "Not seen. Not heard. Not guilty. The rights and status of the children of prisoners in Scotland". The report argues, in relation to sentencing, that the children of prisoners are the invisible victims of crime and of our penal system. As well as the emotional loss of contact with a parent or significant carer, children might suffer from a financial disadvantage, a need to move house, bullying, shame, stigma, stress, regressive behaviour and the loss of a care-free childhood. The report also found that, in many social inquiry reports, information on children was included only if they were at risk from the offender, and further research suggests inconsistencies in relation to those reports.

As you know, convener, I have taken an interest in this issue since it was first raised by the children's commissioner, and I wrote to the committee on the subject while it was taking evidence on the bill at stage 1. I have also raised the issue with the cabinet secretary, and I have been grateful for the support of a range of children's organisations in developing a way forward. Action for Children and Children in Scotland have provided important perspectives on the rights of children in these situations. Families Outside, which supports people with family members in prison, has also done important work in this area, and estimates that there are currently 16,000 children in Scotland who are affected by the imprisonment of a parent or guardian.

It is also worth noting, as Robert Brown did, that the recent Equal Opportunities Committee report on female offenders cited Home Office figures showing that about half of the children of female prisoners will end up in prison. In light of that, it is essential that the best interests of the children of offenders are taken into account as part of the sentencing process.

I recognise that some members of the committee might have concerns about the rights of victims of crime and the desirability of consistency in sentencing on the basis of the crime that has been committed. I am not suggesting that parenthood should be a get-out-of-jail-free card. There will always be circumstances in which nothing but a prison sentence will be appropriate. Indeed, on some occasions, a custodial sentence will be in the best interests of the child. However, I think that information about a person's caring responsibilities should be one of the factors that a court must consider when deciding on a sentence, while accepting that the independence of the judiciary is a cornerstone of the Scottish criminal justice system.

10:45

The Cabinet Secretary for Justice (Kenny MacAskill): Robert Brown's amendments to section 1 are no doubt partly inspired by the Justice Committee's stage 1 report.

Amendment 26 seeks to add fairness and justice as the primary purposes of sentencing. I recognise the committee's view that

> "principles of fairness, justice and proportionality are at least as important as the purposes already included".

I set aside for now the fact that amendment 26 would erect those as purposes, rather than principles as the committee had suggested. That may not have been helped by the lack of a proper label for the part of section 1 that constitutes the principles of sentencing, which we are now putting right in amendment 37.

Who could disagree with the importance of fairness and justice? I note, however, that if our proposals have been criticised as teaching granny to suck eggs, the proposals in these amendments are even more liable to criticism. References to fairness and justice are simply too high level to be of any use. We have instead in section 1 an expression of what is needed to deliver justice and ensure fairness.

Amendment 27 seeks to make the list of purposes in section 1(1) inclusive rather than exclusive. I recognise that the committee, in paragraph 36 of its report, took the view that the lists in subsections (1), (3) and (4) should be non-exhaustive and unranked. I agree with that, except in relation to the purposes that are set out in subsection (1).

Subsection (1) should be a complete expression of the purposes of sentencing, and that is what we believe we have created. Allowing the courts or others to establish their own purposes that do not fall within the list in subsection (1) would undermine the justice and fairness that the committee seeks. As we have said in the explanatory memorandum, the list is not intended to prevent the courts from considering other matters—including the non-exhaustive set of principles in subsection (3)—when sentencing offenders.

Amendment 28 would establish proportionality as the primary principle of sentencing. By proportionality, the amendment means the least oppressive sentence that is consistent with securing the reduction of crime and the protection of the public. That is in line with the suggestion by the Scottish Consortium on Crime and Criminal Justice to the committee that we include a principle of sentencing parsimony, but that suggestion was apparently not picked up by the committee in its conclusions.

I admit that the suggestion has some attractions. Sentences should certainly be no more oppressive than necessary, and by setting out the five purposes of sentencing in subsection (1), we avoid any suggestion that sentencing is all about punishment. However, I wonder whether it is right to single out the two purposes of securing the reduction of crime and the protection of the public in the way that amendment 28 does. Why are punishment, reform and rehabilitation and reparation excluded? Why should a court not require an offender to make reparation to his victim, just because that would not be necessary to reduce crime or protect the public? Amendment 28 is flawed, so I cannot accept it.

Amendment 29 would require the court to have regard to the nature and character of an offence as well as to its seriousness, as the Sheriffs Association suggested. I have difficulty in seeing what, if anything, that would add. In my view, the seriousness of an offence is a product of its nature and character; they are not really distinct elements. If we were to include all three words in the provision, we would be likely to tie the court in knots as it tried to work out what Parliament meant. I believe that the single word “seriousness” does what we want it to.

Amendment 30 would require the court to have regard to pleas of guilty and the stage at which they are tendered, as suggested by the Royal Society of Edinburgh. However, such provision is not necessary, as section 196 of the Criminal Procedure (Scotland) Act 1995 already requires the court to take into account the stage in proceedings at which an intention to plead guilty is indicated, and the circumstances in which that indication is given. The court is then required to state whether the sentence that is imposed is different from what it would otherwise have been.

The committee will be aware of other provisions that require particular factors to be taken into account in sentencing, including those in the Offences (Aggravation by Prejudice) (Scotland) Act 2009. Those requirements are already in place, and there is no need to place the courts under a double duty to take those factors into account. Section 2(1) of the bill is also intended to ensure that other enactments, such as those that I have mentioned, take precedence over the purposes and principles of sentencing to the extent that they are inconsistent.

Amendment 31 would add a further sentencing principle, which would require the court to have regard to whether the offender was aged under 21 at the time of the offence. We certainly agree that the age of the offender is relevant to sentencing, but we believe that it is already covered by section 1(3)(e), which requires the court to have regard to the information that is before it about the circumstances of the offender.

There are, of course, other limitations in the Criminal Procedure (Scotland) Act 1995 on the sentencing of young offenders, including the requirement for a social inquiry report. There is some risk that, even though the list of matters in section 1(3) of the bill is inclusive, the reference to a specific age in amendment 31 may limit the ability of the court to take account of age more generally.

Accordingly, I invite the committee to reject Robert Brown’s amendments.

I am grateful to Aileen Campbell for lodging amendment 32. The purposes and principles that are set out in section 1 provide that courts must have regard to a number of elements, including the information that is before them about an offender’s family circumstances. Amendment 32 highlights the need for courts to be aware of the wider implications of their sentences, particularly their impacts on the children of offenders. It strikes an appropriate balance between justice for victims and sentencing in the best interests of the children of offenders. Therefore, we support it.

At stage 1, it was queried what exactly was meant by the term “principles of sentencing” in section 1. Amendment 37 is intended to bring clarity to section 1 and to identify clearly the principles of sentencing to which the courts must have regard.

Amendment 38 seeks to leave out section 1 in its entirety. I recognise that the committee was not convinced that, taking section 1 in isolation, a sufficiently good case had been made for its inclusion, but it recognised our view that an opening section that sets out in broad terms what sentencing is for may be a useful preliminary to the creation of a Scottish sentencing council.

The committee invited us to justify the necessity for setting out the purposes and principles of sentencing in the bill and to provide assurance that the provisions in sections 1 and 2 would not inadvertently change the law. The very fact that other amendments to section 1 have been lodged and debated demonstrates the value of section 1. If the purposes and principles of sentencing were widely agreed on and consistently understood, as some of those who gave evidence to the committee suggested, there would be no need for debate—we would all have drunk them in with our mother's milk and would understand them implicitly. If we want our justice system to work effectively, we need a common understanding of what sentencing is for, and it is the Parliament's role to provide that. We believe that setting out the purposes and principles of sentencing is important, not just as a preamble to the Scottish sentencing council provisions, but for its own sake.

James Kelly: I support amendments 26 and 27 and oppose amendments 28 to 32. I would like to make brief comments on two of the amendments in particular.

On amendment 28, in the name of Robert Brown, I think that we all agree that a prime principle in sentencing should be getting its proportionality and fairness correct. However, I am not comfortable with the words

"imposing the least oppressive sentence",

which are inconsistent with the principle of proportionality.

I am not minded to support amendment 32, in the name of Aileen Campbell. I think that we all agree that it is important to take into account the children of offenders and the impact that any sentence may have on them, but it is also important to strike a balance. When a crime, particularly a violent crime, has been committed, we must balance the rights of the children against the rights of victims. If we went down the proposed route, there could be inconsistency in sentencing—Aileen Campbell alluded to that—and people who had committed the same crime could be given different sentences, depending on whether they had children. That is not an appropriate way to proceed. Obviously, courts are able to consider background reports. That allows the sheriff in sentencing to consider issues relating to the offender's family, and that is the appropriate way to take such matters into account. If the amendment were agreed to, it could raise issues to do with inconsistency of treatment. I therefore oppose amendment 32.

Richard Baker: I have anxieties about setting down the principles and purposes of sentencing in legislation, and I share some of the concerns that Robert Brown has expressed. There can be unintended consequences in setting down the principles and purposes of sentencing in legislation. It has been clearly understood that matters that have previously been set down would inform the exercise of justice by the judiciary and the courts. As in many other instances in legislation, it can be dangerous to define such matters in law, particularly because of unforeseen omissions and because the application and evolution of justice policy changes over time, as Robert Brown rightly said. I appreciate that he seeks to improve the principles of sentencing if section 1 is passed and, in that spirit, I support amendments 26 and 27, but not 28, 29, 30 and 31, not least because aspects of those amendments are already taken into account by our justice system.

I appreciate the intention behind amendment 32 and agree that the welfare of those children whose parents are in the criminal justice system is extremely important. The matter was raised during the recent debate on female offending, although the amendment is not gender specific. When the matter was first raised by the children's commissioner, it was highlighted that the courts take such matters into consideration already. Although I appreciate the intention, I am not persuaded of the need for the amendment or for the matter to be included in the bill.

I am sure that we all agree that the most important factor in determining a sentence must be the severity of the crime, but it is also right that the welfare of children involved must be a consideration and that a balance must be struck. If the amendments are accepted, the need for the court to take into account the offender's family circumstances will be retained. We also need to consider that, unfortunately, in some circumstances it will be better for the child to have their parent removed. I acknowledge that Aileen Campbell made that point in her speech. I appreciate the concern raised by the children's commissioner in his briefing on the matter that in many cases at present, information about an offender's children does not come before the court and is not included in social inquiry reports. I do not think that anyone would argue that that should remain the case, although amendment 32 does not create such a specific requirement. In seeking to strike the right balance on such an important matter, I appreciate the intention behind the amendment, but I am not persuaded that we should put it in the bill.

I know that colleagues will listen to the rest of the debate before reaching a conclusion on amendment 38. However, having observed the difficulty of improving section 1, I think that there are strong reasons not to include it and I agree with Robert Brown that it is not necessary to retain the section as a preamble to the sentencing council.

Stewart Maxwell: I am content with the cabinet secretary's comments about amendments 26 to 31. His arguments are reasoned and make perfect sense to me. I have concerns about amendment 32 and share some of the views expressed by Richard Baker and James Kelly, not about the principle involved but about whether what it seeks to achieve should be in the bill and whether it is necessary. As I understand it, the courts already take into account the offender's family circumstances and section 1(4)(c) says that the matters to be taken account of include "the offender's family circumstances". I am not sure what including the words

"responsibilities the offender has for the care of children or dependent adults"

would add to what is in the bill. I have not yet firmly made up my mind about it, but it seems odd to add those words. I am slightly concerned that highlighting that consideration as something that a court must take into account—as opposed to any other family circumstances—would run the risk of skewing the court's decision and it might be better to leave the wording as "family circumstances".

11:00

The Convener: As there are no other contributions, I will make one of my own. Amendment 38 would delete section 1. It is important to clear up any misunderstanding following the cabinet secretary's comments that Robert Brown was constrained in what he could do. We are required to look at the individual sections to see how they might be improved prior to determining whether to accept or reject them. Robert Brown has operated—very professionally, if I may say so—on that basis, although I do not agree with some of his arguments.

Section 1 is not vital. Members have heard me say that legislation should be specific and should not be open ended and, in that respect, section 1 fails. The purposes and principles of sentencing have been well established over the centuries and there is little or no need to put them in statute. A basic principle of legislation is that it should be simple and readily understandable. Section 1 will leave us very much open to uncertainties, because it is inevitable that something will be omitted or open to dual interpretation, despite the best intentions of everyone concerned. I am minded to support amendments 37 and 38.

I will not go through the other amendments in the group seriatim. Some are unnecessary and go against the grain of natural justice. The case for amendment 32 is arguable and has been advanced very eloquently by Aileen Campbell, but I think that the amendment is unnecessary. In proceeding to sentence, a court will require a social inquiry report if the offender is under 21 or has not previously been in custody. Any social inquiry report is bound to reflect the offender's family circumstances, and if the social worker who prepared the report failed to draw the court's attention to the family circumstances, I have no doubt that the defence solicitor would bring the matter firmly before the court. Although amendment 32 is well intentioned and constructive, I am unable to support it.

Robert Brown: I thank the convener for his kind words. The debate has been useful and interesting and has demonstrated and illustrated my central point, which is that the inclusion of a statement of the purposes and principles of sentencing, which has no obvious utility, is fraught with difficulties. I stand by amendment 38, which would leave out section 1. That approach has been borne out by the debate.

On the details, the convener is right to say that section 1 is perhaps not the most important section in the bill. Nevertheless, if we are to agree to include a statement of the purposes and principles of sentencing, we must get the balance right. I am grateful for members' support for amendments 26 and 27. The cabinet secretary said that a reference to fairness and justice would be too high level to be of use. I do not agree that those are high-level issues in this regard. As a number of witnesses to the committee made clear, the concepts of fairness and justice underlie the whole basis of our approach to the criminal justice system and give guidance in practical circumstances—even if they are in with the bricks in terms of how judges and sheriffs view such matters.

On amendment 27, the cabinet secretary stuck by the approach in section 1(1), which he suggested provides the final word on the matter. However, that is not the final word, as was illustrated by the emergence of certain issues in the debate. Restorative justice is not mentioned in that context, as witnesses pointed out.

I will move amendment 28, which raises an important issue about the approach that we take, but I accept that there is a debate about whether the provision should be restricted to paragraphs (b) and (d) of section 1(1) or should be wider in context. The issue could be dealt with at stage 3, if appropriate.

On amendment 29, I am not persuaded by the cabinet secretary's suggestion that the nature and character of an offence are implied by the word "seriousness". Amendment 29 would add depth and meaning and—at least as far as I can see—would not have unintended consequences.

On amendment 30, I accept the cabinet secretary's point. I add only that, if we are to lay out the purposes and principles of sentencing in one place, it would not be inappropriate to repeat a reference to the mitigatory effect of an early plea of guilty. It makes sense to do that and it adds transparency to the procedure.

You could argue about the wording of amendment 31—I am prepared to discuss that—but I think that it brings out the age issue in a slightly different way from how Aileen Campbell brought out the issue of children. That is important if we are dealing with high-level purposes and principles. I was not persuaded by the cabinet secretary's point in that regard.

On amendment 32, the evidence that we got from the children's commissioner about what is put into social inquiry reports and what is not is not unimportant. I must confess that I was surprised to hear that, according to the survey that was carried out, there were a significant number of instances in which information about children was not present in the report. That needs to be dealt with and I hope that the cabinet secretary will take on board the observations that have been made in that regard to see whether there are other ways of tackling the issue. I share the view that other members have expressed that the phraseology of amendment 32 either does not add anything to what is in section 1(3)(e) or has a slightly distorting effect, which is not terribly helpful. I think that Stewart Maxwell expressed similar views and concerns about that.

At the end of the day, one has to make a judgment as to whether section 1 is necessary. I stand by the view that, even with the amendments, it is not necessary and that, if anything, it will have unintended and perhaps damaging consequences for the way in which the courts operate—there is no apparent public utility in doing things in that way.

I will press amendment 26.

The Convener: The question is, that amendment 26 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Aitken, Bill (Glasgow) (Con)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0. I use my casting vote against the amendment.

Amendment 26 disagreed to.

Amendment 27 moved—[Robert Brown].

The Convener: The question is, that amendment 27 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Aitken, Bill (Glasgow) (Con)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0. I use my casting vote against the amendment.

Amendment 27 disagreed to.

Amendment 28 moved—[Robert Brown].

The Convener: The question is, that amendment 28 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)

Against

Aitken, Bill (Glasgow) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 7, Abstentions 0.

Amendment 28 disagreed to.

Amendment 29 moved—[Robert Brown].

The Convener: The question is, that amendment 29 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)

Against

Aitken, Bill (Glasgow) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 7, Abstentions 0.

Amendment 29 disagreed to.

Amendment 30 not moved.

The Convener: I call amendment 31, in the name of Robert Brown.

Robert Brown: I will not move amendment 31, because I might come back to its phraseology at a later point.

The Convener: You are reserving your position and not moving amendment 31.

Amendment 31 not moved.

Amendment 32 moved—[Aileen Campbell].

The Convener: The question is, that amendment 32 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

Against

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 32 disagreed to.

The Convener: The second group of amendments comes under the heading "Circumstances in which courts not to have regard to purposes and principles". Amendment 33, in the name of Robert Brown, is grouped with amendments 34 to 36.

Robert Brown: Amendments 33 and 34 are designed to get rid of, respectively, section 1(5)(a) and section 1(5)(b).

On section 1(5)(a), as I mentioned previously and as was pointed out in the committee's stage 1 report, it is odd and unnecessary to disapply the purposes and principles of sentencing to offenders under the age of 18. I appreciate that there should be differences in how we deal with young offenders, but those should be additions to the normal purposes rather than exceptions. It really cannot be said that punishment, deterrence, reform, protection of the public and the reduction of crime apply with less force to young offenders than to others, although the balance may vary.

Section 1(5)(b) is unnecessary. Where a specific sentence is set by law, nothing in the bill would override that express direction. Even with fixed sentences, such as the minimum recommended term for murder, there are issues on which the purposes and principles of sentencing would be brought to bear. An interesting point is whether the presumed sentences, which we will consider later in various forms, are fixed by law and therefore come within section 1(5)(b), which is possibly the case. In any event, the matter is already covered by sections 2(1) and 2(3).

I have no particular comments on amendments 35 and 36, on which I await the cabinet secretary's comments with interest.

I move amendment 33.

Kenny MacAskill: Amendment 33 would leave out section 1(5)(a), with the effect that the requirement to have regard to the purposes and principles of sentencing would apply when the court is dealing with offenders aged under 18. The committee's stage 1 report queried the application of section 1(1) to young offenders. Section 1(1) has no application to young offenders, as the duty on the court to have regard to the matters in section 1(1) is disapplied in respect of young offenders.

As the committee recognised, the matters referred to in sections 1(1) and 1(3) are still relevant to young offenders, but further principles need to be considered in relation to young offenders, although we have not sought to set them out in the bill at this time. However, if the committee takes the view that the purposes and principles in the bill, and the associated duties on the courts, should apply to offenders under the age of 18, we will be content for amendment 33 to be agreed to.

Amendment 34 would leave out section 1(5)(b), with the effect that the requirement to have regard to the purposes and principles of sentencing would apply even when dealing with an offence for which the sentence is fixed by law. In our view, that would be pointless. Where Parliament has fixed the sentence for an offence, such as a life sentence for murder, there is no point in requiring the court to have regard to the purposes and principles of sentencing only to arrive back at the answer that Parliament has already dictated. It is important to remember that the exclusion operates only “so far as the sentence … is fixed by law”,

so the purposes and principles will still be relevant in setting the punishment part of a mandatory life sentence or in other cases in which a mandatory sentence can be mitigated in exceptional circumstances.

Grouped with those amendments are our amendments 35 and 36. Amendment 35 will make a minor technical amendment to section 1(5)(c), which sets out a list of mental health disposals that are available to courts. Courts are not required to have regard to the principles of sentencing as set out in sections 1(2) and 1(3) in circumstances in which those disposals are to be used. The purpose of amendment 35 is to complete the list of mental health disposals that are available to courts. Amendment 36 is consequential on amendment 35.

Stewart Maxwell: I speak in favour of amendment 33, in the name of Robert Brown. When the issue came up during stage 1, it made little sense to the committee that the purposes and principles of sentencing that are outlined in section 1(1) should not apply to offenders under the age of 18, therefore Robert Brown is quite correct to move amendment 33 to delete section 1(5)(a). That is perfectly sensible.

However, I do not support amendment 34. As the cabinet secretary has argued, disapplying the purposes and principles to the imposition of sentences where the penalty is “fixed by law”, as section 1(5)(b) says, makes perfect sense, therefore I will not support amendment 34, which would delete section 1(5)(b).

The Convener: Amendments 35 and 36 are perfectly straightforward and require no comment.

As amendment 33 seeks to ensure a degree of consistency, I am minded to support it. However, I see little merit in amendment 34 for reasons similar to those that Stewart Maxwell has advanced.

11:15

Robert Brown: With regard to amendment 34, it was valid to raise the issue. I am not entirely satisfied with the cabinet secretary’s response but, given that this is a technical issue, I am prepared to go with the Government’s view. As a result, I will not move amendment 34.

Amendment 33 agreed to.

Amendment 34 not moved.

Amendments 35 to 37 moved—[Kenny MacAskill]—and agreed to.

Amendment 38 moved—[Robert Brown].

The Convener: The question is, that amendment 38 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 38 agreed to.

Section 2—Relationship between section 1 and other law

The Convener: Amendment 39, in the name of Robert Brown, is grouped with amendments 40 and 54.

Robert Brown: This group of amendments centres on the relationship between the sentencing principles—which are no longer in the bill, but I think that we still have to consider a way forward—and the proposed sentencing council. I have to say that I regarded it as not just wrong but a constitutional outrage that a quango should be established that not only could give direction on sentencing to the courts but would itself be excluded from having to follow the very purposes and principles of sentencing. We will debate the sentencing council later, but I very much welcome the likely change in its status and relationships.

Obviously, in light of agreeing to amendment 38, we will have to consider further how everything works together, but for the present purposes I will be moving and pressing the amendments in this group. Amendment 39 seeks to get rid of section 2(2), thereby subordinating the sentencing council to the law and taking away any power that it might have to go off on its own tangent outwith the sentencing purposes and principles. That is as it should be.

Amendment 40 seeks to continue the process of preventing the statutory enactment of these measures, which is only reasonable and follows what has already been agreed. Amendment 54 seeks to complete that process by expressly requiring sentencing guidelines to comply

“with the purposes and principles of sentencing”

laid down in section 1. I am well aware that that stipulation has in a sense become obsolete, but the principle behind it should be agreed to. We can consider how to put it into legislative form when we tidy up the effects of these amendments at stage 3. It means that we will have to make some tricky decisions, but stage 3 will allow us to sort things out in a practical way.

My point is that the sentencing council has to be subordinate to the general principles of sentencing, although I accept that we might have to look at the phraseology later on. As I say, I will move amendment 54 at the appropriate point.

I move amendment 39.

Kenny MacAskill: As I have already said, the committee invited us both to justify the necessity for setting out the purposes and principles of sentencing in the bill and to provide assurances that the provisions in sections 1 and 2 would not inadvertently change the law. Amendment 39 seeks to leave out section 2(2), which effectively provides that sentencing guidelines take precedence over the purposes and principles of sentencing, and amendment 40 seeks to leave out section 2 altogether.

I recognise that the committee found difficulty with the relationship between the purposes of sentencing in section 1 and the sentencing guidelines to be issued by the Scottish sentencing council. Specifically, the committee commented that the sentencing council does not appear to be required to reflect the purposes in preparing guidelines but the courts are obliged by section 2(2) to give precedence to the guidelines, should they and the purposes of sentencing come into conflict.

We are imposing new duties on the courts and it is essential that the courts are clear how those duties fit together. That is what section 2 does, and I consider that it is an essential part of the structure. Amendment 54 requires that sentencing guidelines are consistent with the purposes and principles of sentencing. Section 2(2) clarifies the relationship between the purposes and principles and the sentencing guidelines. It provides that, if a sentencing guideline is not consistent with the purposes and principles, the court need not comply with the purposes and principles to that extent. It is likely that sentencing council guidelines will be issued within the context of the purposes and principles of sentencing, as noted by the committee.

However, we cannot know what issues will be dealt with by sentencing guidelines in the future, and we feel that it is necessary to provide the scope and leeway for guidelines to tackle specific and detailed issues that cannot be predicted. A guideline on a particular type of offence might well give greater prominence to one of the purposes of sentencing or a particular principle. We would not want the council to be troubled with arguments about whether that is “consistent” with the purposes and principles.

We believe that it is right that specific guidelines about specific offences should have precedence over the more general requirements of section 1. If the committee agrees to the amendments in a later group, which will provide for the High Court itself to set sentencing guidelines, the argument for that will be even stronger.

We resist amendments 39, 40 and 54.

The Convener: The arguments have been fairly well canvassed already, but I return to Robert Brown to wind up and to press or withdraw amendment 39.

Robert Brown: My only observation is that, obviously, the Government will have to deal with the passage of amendment 38, which deleted section 1. The cabinet secretary’s comments have not come to grips with all of the implications of that. I have reread amendment 54 in particular, and I think that it stands by itself, despite the departure of section 1, although obviously

“the purposes and principles of sentencing”

now relate primarily to common-law purposes and principles of sentencing. We may need to examine that phrase in the future, but it is a useful constraint, notwithstanding the departure of section 1 and, I hope, section 2. I press amendment 39.

The Convener: The question is, that amendment 39 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)

Against

Aitken, Bill (Glasgow) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 7, Abstentions 0.

Amendment 39 disagreed to.

Amendment 40 moved—[Robert Brown].

The Convener: The question is, that amendment 40 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Absentions 0.

Amendment 40 agreed to.

The Convener: I suspend the meeting for five minutes.

11:23

Meeting suspended.

11:29

On resuming—

Section 3 agreed to.

Schedule 1—The Scottish Sentencing Council

The Convener: Amendment 41, in the name of the cabinet secretary, is grouped with amendments 42 to 48 and 15.

Kenny MacAskill: In paragraph 112 of its stage 1 report, the committee expressed concern that the existing wording of the schedule could result in a membership of two sheriffs principal and no sheriff. Amendment 41 addresses those concerns by providing that, in addition to the Lord Justice Clerk and one other High Court judge, one of the judicial members must be a sheriff. One member must also be a justice of the peace or a stipendiary magistrate.

Government amendment 43 provides that the final judicial member may be a High Court judge, a sheriff, a sheriff principal, a justice of the peace or a stipendiary magistrate. That provides the Lord Justice General with more flexibility in appointing the judicial members, meaning that, in line with the committee's recommendations, a balanced judicial membership can be created. Furthermore, Government amendments have been lodged to recast the council as an advisory body and provide the High Court with the power to approve sentencing guidelines. In light of those points, I do not support amendments 42 or 15.

Amendment 44 and consequential amendments 45 and 46 seek to remove the prosecutor from the membership of the council. Input from the prosecution service is key to ensuring that the sentencing council creates balanced and well-thought-out guidelines. Although the bill requires consultation with the Lord Advocate, among others, on draft guidelines, that is no substitute for having prosecutorial experience at the council table.

Government amendment 47—and amendment 13, in the name of Bill Butler—will have the effect, when considered together, of responding to comments by the committee in its stage 1 report about listing the constable as a legal member of the council. It is essential to have police representation on the council. The police play a critical role in the front line of the criminal justice system and have a particular insight into the impact of offences on members of the public and on communities, as well as an understanding of long-term crime prevention. Government amendment 47 moves the constable from the list of legal members of the sentencing council to the list of lay members. I will, therefore, support amendment 13, in the name of Bill Butler, as it works together with Government amendment 47.

Amendment 48 adds two further members to the sentencing council, drawn from community justice authorities and the Scottish Prison Service. I am aware that, when we consulted on the creation of the sentencing council and subsequently during stage 1, there were calls for those two areas to be represented on the council, given their experience in offender management. The committee did not support those calls. The current membership of the council provides for two lay members; there is no reason why they should not be drawn from those who work with offenders in prisons and the community, if that were thought to give the council the best mix of experience and skills.

I move amendment 41.

The Convener: I now face the onerous task of calling myself to speak to amendment 42 and other amendments in the group.

Amendment 42 would enable representatives of the lower courts to be on the sentencing council. It stipulates that one member must be a justice and another must be a stipendiary magistrate. The stipendiary magistrate system is unique to Glasgow but has played a valuable role in the Scottish justice system for many years. By virtue of their office, the stipendiaries have become exceptionally experienced and are probably better placed even than sheriffs to express views on summary justice issues. In due course, the stipendiary system—albeit under a different name—may be extended to other jurisdictions. The Gill report recommends the appointment of district judges, who would resemble stipendiary magistrates and have limited civil jurisdiction. On that basis, it is highly desirable that a stipendiary magistrate be appointed to any sentencing council, to ensure that there is the appropriate input on summary matters.

Generally, this group of amendments has considerable merit. I am particularly attracted to some of Bill Butler's amendments, which will have the effect of achieving a greater degree of balance on the proposed council.

I listened carefully to what the cabinet secretary said about the prosecutor's membership of the council. Committee members will be aware that amendment 44, in my name, seeks to delete that provision. The long-established principle of the Scottish courts is that the Crown has no locus in so far as sentencing matters are concerned. That said, having listened to the cabinet secretary, I am persuaded that, on this occasion, there should perhaps be some input from the Crown. I intend therefore not to move amendment 44.

Robert Brown: I support Government amendment 47 for "one constable" to become a non-legal member of the council. Initially, I preferred Bill Butler's formulation under his amendment 15, on the sheriffs and magistrates issue, but my interest is in the end result. I do not support the convener's amendment 45 with its dilution of the prosecutor role. I think that he has conceded the argument; we need to retain the role. The prosecutor has a vital input to make to the sentencing council, but only if the council is constituted as an advisory body, as the Government concedes.

On my amendment 48, views were expressed on the Scottish Prison Service in submissions and evidence to the committee. Again, it is important to recognise the changes that I hope we will pass later today on the role of the sentencing council. If the intention had been for the council to be the top dog, so to speak, in giving orders to the courts, I would have been strongly against the prosecutor—or, in this instance, the Scottish Prison Service and others—being involved in its membership. However, having the sentencing council as an advisory body is a different ball game, and it would benefit from the input of the Scottish Prison Service and a community justice authority. In their various ways, the SPS and CJAs know about the effects of sentences on offenders. They also know about resources and the inputs that are required, and many other relevant issues. Despite the view that the committee expressed, albeit in a different context, I hope that members will, on reflection, regard my proposed additions as sensible additions that will add to the breadth and effectiveness of the sentencing council.

Bill Butler (Glasgow Anniesland) (Lab): I support the cabinet secretary's amendment 47 on the inclusion of "one constable". It is an eminently sensible suggestion, particularly when it is taken with my eminently sensible suggestion in amendment 13, which picks up on a concern that the committee raised at paragraph 112 of its stage 1 report. As the committee said, we do not want to unbalance the council's judicial composition. I lodged amendment 15 to try to get a balanced composition. That said, I accept that the cabinet secretary's and convener's amendments take us towards the eminently sensible position of a balanced composition on the putative council.

I do not accept that the SPS should be on the council. That view ties in exactly with the concerns that the committee raised in paragraph 112. I acknowledge Robert Brown's point, but the principle of better caution means that I will not support it at this stage.

Stewart Maxwell: I speak in support of amendments 41 and 43, in the name of the cabinet secretary. If I am not mistaken, Bill Butler has accepted that the amendments deal with the issue that he is trying to deal with in his amendment 15. I am sure that the cabinet secretary's amendments have dealt with it.

I also support the cabinet secretary's amendment 47 and Bill Butler's amendment 13. It is clear that amendment 13 deals with the issue that the committee raised in its stage 1 report and in the stage 1 debate. The cabinet secretary's proposal under amendment 47 that "one constable" should become a lay member is entirely sensible and acceptable.

I disagree with Robert Brown's amendment 48. The sentencing council was never intended to be "top dog", to use his words. That is not how it has been laid out and the context has not changed much, if at all, such that we should now support including a CJA member and an SPS representative as he suggests. We should stick with what we agreed in our stage 1 report and not support amendment 48.

James Kelly: As the convener and Bill Butler have said, it is important to get right the balance and the expertise on the sentencing council. Several of the amendments are complementary in seeking to achieve that aim.

I oppose amendment 48, in Robert Brown's name, because I am uncomfortable with the Scottish Prison Service being represented on the council. The SPS comes under the umbrella of the Government, so having an SPS representative could undermine the sentencing council's independence.

Angela Constance (Livingston) (SNP): I will comment on Robert Brown's amendment 48. I have long-standing sympathy with the idea of the SPS being represented on the sentencing council, and I was somewhat surprised that, when the SPS gave evidence to the committee, it did not appear to have the appetite for that, if my recollection serves me right. Given that, I will not support

Robert Brown's amendment, with a bit of a heavy heart.

The Convener: I can see that.

Amendment 41 agreed to.

The Convener: Amendment 12, in the name of Bill Butler, is grouped with amendments 13 and 14.

Bill Butler: The policy intention behind the amendments is to secure the minimum balance that achieves a judicial majority of one on the council. The balance of judicial to non-judicial members is currently five to seven. The amendments would remove the reference to a constable, to which the cabinet secretary and other members have referred. I am grateful that the Scottish Government has shown, by lodging amendment 47 and supporting amendment 13, that it is willing to delete the constable. My amendments would make two other changes in favour of the judicial membership.

That is basically it. As I say, the amendment to leave out the constable would achieve the balance that we all want, so I hope that members will see fit to support amendments 12 to 14.

I move amendment 12.

The Convener: We are all of a mind about what we are trying to achieve. Once the amendments in the group are agreed to, they will achieve our aim.

Kenny MacAskill: The Government amendments in group 7, which we will deal with later, will recast the sentencing council as an advisory body that drafts sentencing guidelines for formal endorsement by the High Court. Those amendments will mean that guidelines will be issued with the High Court's full authority. That is in line with the committee's recommendations.

Amendments 12 to 14 relate to the sentencing council's membership. Amendment 12 would ensure that sheriffs and justices of the peace were guaranteed representation on the council. I am conscious that concern was expressed at stage 1 that the provisions did not ensure that they would be represented.

Amendment 13 removes the constable from the council's membership. However, it is essential that the police are represented, as has been said, because the police have a critical role. Government amendment 47, which we have dealt with, makes a constable a lay member of the council. We would have sought to lodge an amendment in identical terms to amendment 13; in order for the amendment to be accepted, we require the council to have police representation, as amendment 47 makes clear.

11:45

Amendment 14 would reduce to one the number of lay members on the council. It is essential that the council has a balance of opinions from legal and lay sources. The lay members may be drawn from the general public, from those with prison service or criminal justice social work experience, or from academia. It is essential to have balanced representation on the council if it is to improve public confidence in our system. For that reason, we cannot support amendments that seek to create a judicial majority on the council, particularly given our amendments that make the council an advisory body. That approach reflects the committee's argument that a council with a judicial majority and a structure that left the final say on guidelines to the court would not represent a sufficient advance on the current arrangements.

I ask Bill Butler to withdraw amendment 12 and to not move amendment 14. I fully support amendment 13.

Bill Butler: I hear clearly what the cabinet secretary is saying. We just have a disagreement on the matter. I will not waste time by saying anything other than that I urge members to support amendments 12 and 14.

The Convener: The question is, that amendment 12 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 12 agreed to.

Amendment 42 not moved.

Amendment 43 moved—[Kenny MacAskill]—and agreed to.

Amendment 44 not moved.

Amendment 13 moved—[Bill Butler]—and agreed to.

Amendments 45 and 46 not moved.

Amendment 47 moved—[Kenny MacAskill]—and agreed to.

Amendment 48 not moved.

Amendment 14 moved—[Bill Butler].

The Convener: The question is, that amendment 14 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0. The casting vote is for the amendment, on the basis of what I said earlier.

Amendment 14 agreed to.

Amendment 15 not moved.

The Convener: The next group is on the appointment and term of office of members of the Scottish sentencing council. Amendment 49, in my name, is grouped with amendment 50.

Amendment 49 simply makes a requirement that any appointments are made with the approval of the Lord Justice General. In doing so, it changes the emphasis of the bill. The advantage is to take away some powers from Scottish ministers and ensure that the appropriate degree of detachment is taken in respect of appointments. I stress that I am in no way suggesting that the Government—or indeed any other Government of which I have had experience in this august assembly—is likely to bring about any undue influence in that respect. However, democracy is a tender plant that requires to be nurtured carefully, and the appropriate detachment is required in such circumstances. That is the justification for the amendment.

I move amendment 49.

Kenny MacAskill: Amendment 49 would require the approval of the Lord Justice General before the Scottish ministers could appoint the lay members of the Scottish sentencing council. Paragraph 2 of schedule 1 currently requires the Scottish ministers to consult the Lord Justice General before appointing the lay members of the council and also requires the Lord Justice General to consult the Scottish ministers before appointing the remaining members of the council. I see no merit in creating an imbalance between the procedures for appointing the lay and other members of the council, nor for creating what would, in effect, be a joint appointment procedure for lay members alone. The procedure is not about picking teams to be pitted against one another in the council. I expect the council to operate by consensus.

Government amendment 50 will clarify that the rule preventing any member from sitting on the council for more than five years does not apply to the Lord Justice Clerk as chairing member.

The Convener: In winding up the debate, I simply adhere to my earlier comments. A degree of detachment is required. I cast absolutely no aspersions on any previous Government or the present one, but that detachment is necessary.

The question is, that amendment 49 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 49 agreed to.

Amendment 50 moved—[Kenny MacAskill]—and agreed to.

The Convener: We turn to the role of the judiciary in the approval and publication of sentencing guidelines. Amendment 51, in the name of the cabinet secretary, is grouped with amendments 53, 16, 18, 18A, 18B, 57, 58, 19, 59, 20, 61, 66, 22, 68, 70, 23 and 75. I draw members' attention to the pre-emption information that is shown on the groupings list. In addition, amendment 20 pre-empts amendment 61, but that was inadvertently omitted from the list.

Kenny MacAskill: During stage 1 it became clear that there were substantial concerns about the influence of sentencing guidelines on judicial discretion and how the Scottish sentencing council would function alongside the High Court. In light of that, and in line with the committee's recommendations, we have re-examined the status of the sentencing council and lodged amendments that will recast it as an advisory body that will prepare sentencing guidelines for endorsement by the High Court. We believe, as the committee does, that that will address the tension between the principle of the separation of powers and the influence of sentencing guidelines on judicial discretion.

Amendment 53 is the key amendment. It amends section 5(1) to require the sentencing council to prepare guidelines on the sentencing of offenders for the approval of the High Court. That means that guidelines must have the endorsement of the High Court before they can come into force. Government amendments 51, 58, 59, 61, 66, 70 and 75 are consequential. They amend the provisions to reflect the altered role of the sentencing council and the High Court in preparing and endorsing new and revised guidelines. In due course, I will support Robert Brown's amendment 56, which is in group 11, as it provides that it is no longer for the sentencing council to decide when a guideline comes into effect. Under our new model, that will instead be for the High Court to decide.

Amendment 68 will insert a new section that sets out the process of approval or rejection of the guidelines that the council prepares for the High Court.

Bill Butler's and Robert Brown's amendments would amend the provisions on the Scottish sentencing council. Those amendments, which no doubt reflect elements of the committee's report as well as evidence that the committee received during stage 1, would change the approval process for sentencing guidelines and require them to be approved by the Lord Justice General, which in effect would make the sentencing council an advisory body. The Government amendments have a similar effect, by recasting the sentencing council as an advisory body that drafts sentencing guidelines for formal endorsement by the High Court sitting as the court of appeal. The Government amendments mean that guidelines would be issued with the full authority of the High Court, which is in line with the committee's recommendations.

Robert Brown's amendments 18A and 18B would further amend the guideline approval process that is set out in Bill Butler's amendment 18. Amendment 18A would allow the Lord Justice General to approve sentencing guidelines with or without amendments, but does not require him to state his reasons for any amendments. Government amendment 68 provides for the High Court to approve guidelines with modifications, but requires it to state its reasons.

Amendment 18B provides that the clerk of justiciary must publish approved sentencing guidelines, whereas Government amendment 68 provides that the sentencing council must publish such guidelines. When we come to group 12, we will deal with Government amendment 72, which provides for the sentencing council to publish guideline judgments that are pronounced by the High Court. The intention is to ensure that all sentencing guidelines and guideline judgments are available in one place and are accessible to the public. That does not affect the role of the Scottish Court Service in relation to the publication of High Court opinions. In light of that, I cannot support Bill Butler's or Robert Brown's amendments in this group.

I move amendment 51.

Bill Butler: In my view, the principal amendment in the group is amendment 18, which would make it clear that the Lord Justice General, rather than the sentencing council, would have the final say, should any difference of view arise about a proposed sentencing guideline. The Lord Justice General could refer it back to the council, and the council would have to revise it to address the concerns that had been raised.

The reference in proposed new subsection (7A)(a) of section 5 to "Lords Commissioner of Justiciary" is how I understand judges are referred to formally in a criminal context. The phrase covers all the same judges who, in a civil context, sit in a Court of Session, inner house and outer house. The proposed drafting would allow the Lord Justice General to decide how many and which judges to involve in consideration of the proposed guidelines. The choice could be different each time. In practice, he would presumably select a small number of judges who had particular experience in criminal cases, depending on their availability. There is nothing to preclude the judges who are consulted in that context from including judges who are already members of the council.

The approach that I have suggested mostly involves amending section 5. In particular, it involves seeking to qualify the existing reference to the council publishing guidelines to make it clear that it could do so only after having had them approved by the Lord Justice General.

My amendments 19, 20 and 23 are consequential on amendment 16. Amendment 22 is necessary to reflect the fact that, by virtue of amendment 16, the council will, under section 6, finalise only proposed guidelines rather than guidelines.

Robert Brown: I will not move amendments 18A, 18B and 57, which the cabinet secretary commented on.

We are discussing an important group of amendments. The committee as a whole is grateful to the Government for responding to the evidence and the views of the committee on where the sentencing council should stand vis-à-vis the court and the Government. I have thought from the beginning that all our constitutional principles on the independence of the judiciary and the rule of law require the High Court to give the final imprimatur on sentencing guidelines, and my view was reinforced by the evidence of the Lord Justice General, the Lord Justice Clerk and other significant witnesses.

I think that the Government's amendments ensure that that will be the case. I must confess that I have got slightly lost on the interrelation between them and Bill Butler's amendments, but I am happy to support whatever is necessary to achieve the purpose.

Stewart Maxwell: I am happy to support Kenny MacAskill's amendments 51 and onwards. As all members of the committee understand, the issue here is the delicate balance between the independence of the judiciary and the right of the public to expect clarity that enables them to understand sentencing. In that regard, the Government's amendments respond to the stage 1 report.

I am disappointed that, as a result of the previous set of amendments, the judiciary will not only appoint members of the sentencing council but will have a majority on it and will get to approve the guidelines that it produces. I am not quite sure how much further forward that takes us; I think that the balance has been rather skewed the other way. However, I am happy that the Government has lodged amendments to deal with part of our stage 1 report, and I will support them.

Richard Baker: I do not share Stewart Maxwell's anxiety about the position that we have reached. The important thing is what will work, and I think that the changes that we proposed will make the system work better. In addition, I put on record my welcome for the change in policy that the cabinet secretary has proposed.

We have been guided by what we think will work. We want a more transparent system of sentencing that people can be confident is consistent, but clearly it is also important to respect the separation of powers and the role of the judiciary, and to have the judiciary's co-operation in developing a proposal to make the system work. That has been the motivation behind all Bill Butler's amendments, both in this group and on membership of the council. It will still be possible for lay members, including victim representatives, to be on the council.

I am sure that the key issue of making the proposition work is what lies behind the cabinet secretary's amendments 53 and 68, which are a welcome response to the points that the committee raised in its report. I strongly believe that nothing will be lost in relation to what it is hoped that the sentencing council will achieve. The amendments will bring practical benefits in ensuring that the council works well and that guidelines will be used effectively by the courts.

12:00

The Convener: If no other member wishes to make a contribution, I will speak.

I freely and frankly acknowledge that the Government has made every possible effort to achieve a satisfactory outcome on the issue. I appreciate that, as with many of the other issues with which we are dealing, the prolixity of amendments has made life a bit difficult for us all. Perhaps we can all learn a lesson and consider it at an earlier stage in future, so that we do not have to go through a fairly convoluted process to arrive—largely—at the situation that we seek to reach.

Amendment 51 agreed to.

Schedule 1, as amended, agreed to.

Section 4—The Council's objectives

The Convener: Amendment 52, in the name of Robert Brown, is in a group on its own.

Robert Brown: Amendment 52 is designed to give some shape and definition to the objectives of the sentencing council by bringing to the fore the effectiveness of the use that is made of prisons and of community sentences. Every professional who is involved in the criminal justice system knows that prison is the most expensive and the poorest and least successful way of meeting most criminal justice objectives—beyond, of course, the central objective of protecting the public. Equally, community sentences are often patchy and are far less successful in reducing crime or reforming offenders than we sometimes like to think.

Consideration of those issues should be at the heart of what the sentencing council will do. Consistency is no doubt a virtue, public awareness is invaluable and the research role will be vital, but what will tick the boxes and make the sentencing council worth the considerable expenditure that is proposed will be its impact on helping us to get the most effective use out of the considerable resources that are swallowed up by the criminal justice system. I hope that the committee will support that addition.

I move amendment 52.

The Convener: Are there any other contributions?

Stewart Maxwell: I have more of a question for Robert Brown than a contribution. The last line of amendment 52 states:

> "by reference to the purposes and principles of sentencing".

Given that we have removed all that from the bill, does Robert Brown believe that amendment 52 is still valid? Should the amendment be agreed to? If it is agreed to, would that line have to be deleted at stage 3?

The Convener: That is a contribution to the debate rather than a specific question, but I have no doubt that Robert Brown will answer that point in summing up.

My brief contribution is to say that I would have asked the same question as Stewart Maxwell, and I underline the necessity for an answer at the summing-up stage.

Kenny MacAskill: The convener and Stewart Maxwell have both alluded to the last line of amendment 52. The definition of "optimum" is a more difficult matter; I suspect that members around the table would have different views about what might be "optimum" depending on the emphasis that is given to particular purposes of sentencing. I doubt that the sentencing council would find that an easy requirement to put into practice and, accordingly, I cannot support amendment 52.

Robert Brown: I accept the point about the last line—the context has obviously changed as a result of earlier decisions—but that can be readily dealt with by deletion at stage 3, or now, if that is possible, although it is probably not worth getting into such complications. Nevertheless, it is important that the principle of the amendment is given effect, leaving any subsidiary matters to be sorted out later on.

I do not accept the cabinet secretary's objections to amendment 52. Any word that is used in statute can give rise to issues of definition, but we should bear it in mind that we are giving a steer on what the sentencing council will do. It is, in a sense, up to the council to define the words and to operate in that general direction of travel. The provision would not affect in an immediate sense how people would be sentenced—it affects the work of the sentencing council. Against that background, I confess that I am not really too bothered about the precise meaning of words in the same way as the cabinet secretary. I press amendment 52.

The Convener: The question is, that amendment 52 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)

Against

Aitken, Bill (Glasgow) (Con)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

Abstentions

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 1, Against 4, Abstentions 3.

Amendment 52 disagreed to.

Section 4 agreed to

Section 5—Sentencing guidelines

The Convener: Amendment 53, in the name of the minister, has already been debated with amendment 51. I point out that if amendment 53 is agreed to, amendment 16 will be pre-empted.

Amendment 53 moved—[Kenny MacAskill].

The Convener: The question is, that amendment 53 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

Against

Aitken, Bill (Glasgow) (Con)

Abstentions

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 4, Against 1, Abstentions 3.

Amendment 53 agreed to.

Amendment 54 not moved.

The Convener: Amendment 394, in the name of Angela Constance, is in a group on its own.

Angela Constance: I should say in the interests of clarity and transparency that I lodged amendment 394 after representations were made to me by Action for Children Scotland. Amendment 394 would require the Scottish sentencing council to publish guidelines on the sentencing of young offenders, including when it would be appropriate for the young offender to be referred to the children's hearings system.

I am aware that section 5(3)(c) of the bill already states that guidelines may relate to "the particular types of sentence that are appropriate for particular types of offence or offender".

That might cover young offenders, but amendment 394 would require that the Scottish sentencing council's guidelines did that; it is about the difference between "can" and "must". As mentioned in earlier debates, the motivation for the amendment is consistency in sentencing and good practice. We are all aware that the criminogenic and rehabilitation needs of young offenders are different to those of adults. The opportunities and challenges of working with young offenders are also very different.

Reflecting on the earlier debates about the composition of the Scottish sentencing council, which now has a judicial majority and therefore less room for other experts, I propose that it is now more appropriate for the application of sentencing guidelines to young people to be particularly specific.

I move amendment 394.

Robert Brown: I support the principle of what Angela Constance is trying to do with amendment 394, but I do not think that she has got it quite right.

"Sentencing guidelines must in particular relate to the sentencing of offenders".

Does that mean every sentencing guideline? I rather think that it does. I accept that it could be a priority of the sentencing council to focus on the position of offenders under the age of 18. That is valid and I would support that.

The amendment seems to go beyond sentencing, which I am not sure is correct either, and deals with when young offenders are sent to the children's panel. Although I appreciate that such a decision can be part of the sentencing process, more normally it is made before the case arrives at court so it is obviously more a matter for the Parliament than the sentencing council. It might be worth while looking again at amendment 394, but I cannot support it in its present form.

Stewart Maxwell: I echo some of Robert Brown's comments. Although I understand the principle behind Angela Constance's amendment, the use of the word "must" gives me some concern. I can think of examples of sentences for offences that have nothing to do with under 18s. There are issues about the inflexibility that the amendment would bring to the process. On reflection, I would find it difficult to support the amendment as drafted.

The Convener: Before the minister responds, I say that I find amendment 394 unobjectionable and understand Angela Constance's direction of travel. However, I point out that it is highly likely, as she will know from her criminal justice social work experience, that in the circumstances that she is considering, even though the offender is over 16, a court might well seek the advice of the children's panel prior to final disposal of the case. In the circumstances, unless the member can persuade me in her summing up, I am not minded to support the amendment.

Kenny MacAskill: As was mentioned by other committee members and the convener, sentencing guidelines already cover the matters raised in amendment 394. Section 5(3)(c) of the bill says that sentencing guidelines will relate to

"the particular types of sentence that are appropriate for particular types of offence or offender"

and so covers the sentencing of under 18s. It would not be helpful to require each and every sentencing guideline to deal with under 18s and references to children's hearings. Where appropriate, we can rely on the sentencing council to ensure that that is covered in its work. I accept the spirit in which Angela Constance lodged amendment 394 and subsequent ones, but we view it as unnecessary.

Angela Constance: Given the comments and contributions from my learned colleagues, I seek leave to withdraw amendment 394.

Amendment 394, by agreement, withdrawn.

The Convener: Bearing in mind the time and that this is a sensible point to adjourn, the committee will finish its consideration of the bill today and move into private session.

12:13

Meeting continued in private until 13:15.

Criminal Justice and Licensing (Scotland) Bill

2nd Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 3	Schedule 1
Sections 4 to 18	Schedule 2
Sections 19 to 66	Schedule 3
Sections 67 to 139	Schedule 4
Sections 140 to 145	Schedule 5
Sections 146 to 148	Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 5

Kenny MacAskill

55 In section 5, page 3, line 23, leave out <include in any sentencing guidelines> and insert <, on preparing any sentencing guidelines, also prepare>

Bill Butler

17 In section 5, page 3, leave out lines 27 and 28

Robert Brown
Supported by: Kenny MacAskill

56 In section 5, page 3, line 30, leave out subsections (6) and (7)

Bill Butler

18 In section 5, page 3, line 32, at end insert—

<(7A) The Lord Justice General, on receipt of guidelines prepared under subsection (1), must—

  (a) refer the guidelines to such other Lords Commissioner of Justiciary as the Lord Justice General considers appropriate, inviting their comments,

  (b) having taken account of any comments made by virtue of paragraph (a), either—

    (i) approve the guidelines, or

    (ii) refer the guidelines back to the Council for further consideration, giving reasons for so doing.

(7B) Where the Lord Justice General approves guidelines under subsection (7A)(b)(i), the Council must publish them.

(7C) Where guidelines are referred back to the Council under subsection (7A)(b)(ii), the Council must review the guidelines and, taking account of the reasons given for the reference, prepare revised guidelines for the approval of the Lord Justice General; and subsection (7A) applies to revised guidelines prepared under this subsection as it applies to guidelines prepared under subsection (1).>

Robert Brown

18A As an amendment to amendment 18, line 7, after <guidelines> insert <with or without amendments>

Robert Brown

18B As an amendment to amendment 18, line 11, leave out <Council must publish them> and insert <Clerk of Justiciary must publish them, as approved, under the authority of the High Court>

Robert Brown

57 In section 5, page 3, line 34, leave out <by it> and insert <under the authority of the High Court>

Kenny MacAskill

58 In section 5, page 3, line 35, leave out <publish revised guidelines> and insert <prepare, for the approval of the High Court of Justiciary, revised guidelines>

Bill Butler

19 In section 5, page 3, line 35, leave out <publish> and insert <prepare for the approval of the Lord Justice General>

Kenny MacAskill

59 In section 5, page 3, line 36, leave out subsection (9) and insert—

<( ) In this section and sections 6 to 13, references to sentencing guidelines include references to revised sentencing guidelines.>

Robert Brown

60 In section 5, page 3, line 36, at end insert—

<( ) This section is without prejudice to the power of the High Court to pronounce an opinion on the sentence that is appropriate in certain types of case under section 118(7) or 189(7) of the 1995 Act.>

Section 6

Bill Butler

20 In section 6, page 4, line 2, leave out <before publishing> and insert <in preparing for the approval of the Lord Justice General>

Kenny MacAskill

61 In section 6, page 4, line 2, leave out from <publishing> to <guidelines> in line 3 and insert <submitting any sentencing guidelines to the High Court of Justiciary for approval>

Kenny MacAskill

62 In section 6, page 4, line 4, after <guidelines> insert <together with a draft of the assessments referred to in section 5(5)>

Kenny MacAskill

63 In section 6, page 4, line 5, leave out <draft> and insert <drafts>

Robert Brown

64 In section 6, page 4, line 5, at end insert—

<( ) the Lord Justice General (who may, in turn, consult other Lords Commissioner of Justiciary),>

Bill Butler

21 In section 6, page 4, line 7, at end insert—

<( ) any committee of the Scottish Parliament for the time being established under the Parliament's standing orders with a remit that includes the criminal justice system,>

Angela Constance

395 In section 6, page 4, line 7, at end insert—

<( ) persons aged under 18 who have been victims of offences relevant to the proposed guidelines, and bodies providing support to such persons.>

Angela Constance

396 In section 6, page 4, line 8, after <persons> insert <and bodies>

Kenny MacAskill

65 In section 6, page 4, line 9, leave out subsection (2)

Kenny MacAskill

66 In section 6, page 4, line 10, leave out <sentencing guidelines or revised sentencing guidelines> and insert <guidelines and assessments for submission to the High Court of Justiciary>

Bill Butler

22 In section 6, page 4, line 11, after <guidelines> insert <for approval by the Lord Justice General>

Kenny MacAskill

67 In section 6, page 4, line 11, leave out <draft> and insert <drafts>

After section 6

Kenny MacAskill

68 After section 6, insert—

<**Approval of sentencing guidelines by High Court**

(1) Sentencing guidelines have no effect unless approved by the High Court of Justiciary.

(2) On submitting sentencing guidelines to the High Court for approval, the Council must also provide the High Court with the assessments referred to in section 5(5).

(3) Where the Council submits sentencing guidelines to the High Court for approval, the Court may—

(a) approve the proposed guidelines—

(i) in whole or in part,

(ii) with or without modifications, or

(b) reject the proposed guidelines, in whole or in part.

(4) Where the High Court—

(a) rejects any of the proposed guidelines, or

(b) modifies any of them,

the Court must state its reasons for doing so.

(5) Sentencing guidelines approved by the High Court take effect on such date as the Court may determine.

(6) Different dates may be determined in relation to—

(a) different provisions of the guidelines, or

(b) different purposes.

(7) As soon as possible after the approval of sentencing guidelines by the High Court, the Council must publish—

(a) the guidelines as approved (including the date on which they take effect), and

(b) the assessments referred to in section 5(5) (revised as necessary to take account of any modifications of the guidelines prior to their approval).

(8) The guidelines and assessments are to be published in such manner as the Council considers appropriate.>

Section 7

Kenny MacAskill

69 In section 7, page 4, line 19, after <guidelines,> insert <or to depart from them in accordance with provision contained in them under section 5(3)(d),>

Section 8

Angela Constance

397 In section 8, page 5, line 10, after <may> insert <, after consulting such persons and bodies as they consider appropriate,>

Kenny MacAskill

70 In section 8, page 5, line 10, leave out from <publishing> to end of line 11 and insert—

<( ) preparing, for the approval of the High Court of Justiciary, sentencing guidelines on any matter, or

( ) reviewing any sentencing guidelines published by the Council.>

Bill Butler

23 In section 8, page 5, line 10, leave out <publishing> and insert <preparing for the approval of the Lord Justice General>

Section 9

Kenny MacAskill

71 Leave out section 9 and insert—

<**High Court's power to require preparation or review of sentencing guidelines**

(1) Where the High Court of Justiciary pronounces an opinion under section 118(7) or 189(7) of the 1995 Act, the Court may require the Council to—

(a) prepare, for the Court's approval, sentencing guidelines on any matter, or

(b) review any sentencing guidelines published by the Council on any matter.

(2) On making a requirement under subsection (1), the High Court must state its reasons for doing so.

(3) The Council must comply with a requirement made under subsection (1) and, in doing so, must have regard to the High Court's reasons for making the requirement.>

After section 9

Kenny MacAskill

72 After section 9, insert—

<**Publication of High Court guideline judgments**

(1) The Council must publish the opinions of the High Court of Justiciary pronounced under section 118(7) or 189(7) of the 1995 Act.

(2) As soon as possible after the High Court pronounces such an opinion, the Scottish Court Service must provide the Council with a copy of the opinion.

(3) The copy opinion is to be provided in such form and by such means as the Council may require.

(4) The opinions are to be published in such manner, and at such times, as the Council considers appropriate.

(5) This section does not affect any power or responsibility of the Scottish Court Service in relation to the publication of opinions of the High Court.>

Section 11

Robert Brown

73 In section 11, page 6, line 17, leave out subsections (2) and (3)

Section 12

Robert Brown

74 In section 12, page 7, line 5, at end insert—

<( ) the Lord Justice General (who may, in turn, consult other Lords Commissioner of Justiciary),>

Section 13

Kenny MacAskill

75 In section 13, page 7, line 26, at end insert—

<( ) any sentencing guidelines submitted during the year to the High Court of Justiciary for approval and of the Court's response to them,>

Kenny MacAskill

76 In section 13, page 7, line 30, leave out <references made by the High Court of Justiciary under section 9> and insert <requirements made by the High Court of Justiciary under section (*High Court's power to require preparation or review of sentencing guidelines*)>

Section 14

Kenny MacAskill

199 In section 14, page 8, line 8, leave out <in respect of> and insert <on>

Robert Brown

77 In section 14, page 8, line 8, at end insert—

<( ) The purpose of a community payback order is to punish an offender in a way that—

(a) helps to pay back to the community adversely affected by the conduct of the offender, and

(b) supports the offender in addressing the behaviour or circumstances that have contributed to that conduct.>

Robert Brown

78 In section 14, page 8, line 11, leave out <a> and insert <an offender>

Kenny MacAskill

200 In section 14, page 8, line 11, at end insert—

<( ) a compensation requirement,>

Kenny MacAskill

201 In section 14, page 8, line 17, at end insert—

<( ) a conduct requirement.>

Kenny MacAskill

202 In section 14, page 8, line 23, leave out <in respect of> and insert <on>

Kenny MacAskill

203 In section 14, page 8, line 24, at end insert—

<( ) a supervision requirement,>

Kenny MacAskill

204 In section 14, page 8, line 25, leave out from second <or> to end of line 26 and insert—

<( ) a conduct requirement.>

Robert Brown

79 In section 14, page 8, line 26, leave out second <a> and insert <an offender>

Kenny MacAskill

205 In section 14, page 8, line 27, leave out from <impose> to <imposes> in line 28 and insert <only impose a community payback order imposing>

Robert Brown

80 In section 14, page 8, line 29, leave out <a> and insert <an offender>

Kenny MacAskill

206 In section 14, page 8, line 29, at end insert—

<( ) a compensation requirement,>

Kenny MacAskill

207 In section 14, page 8, line 31, at end insert—

<( ) a conduct requirement.>

Kenny MacAskill

208 In section 14, page 8, line 33, leave out <making> and insert <imposing>

Kenny MacAskill

209 In section 14, page 8, line 37, leave out <in> and insert <by>

Kenny MacAskill

210 In section 14, page 9, line 4, after <section> insert <and sections 227B to 227ZI, except where the context requires otherwise>

Kenny MacAskill

211 In section 14, page 9, leave out lines 7 and 8

Kenny MacAskill

212 In section 14, page 9, line 11, leave out <in respect of> and insert <on>

Kenny MacAskill

213 In section 14, page 9, line 13, leave out from <such> to end of line 14 and insert <information about the offender and the offender's circumstances.

( ) An Act of Adjournal may prescribe—

(a) the form of a report under subsection (2), and

(b) the particular information to be contained in it.>

Kenny MacAskill

214 In section 14, page 9, line 14, at end insert—

<( ) Subsection (2) does not apply where the court is considering imposing a community payback order—

(a) imposing only a level 1 unpaid work or other activity requirement, or

(b) under section 227M(2).>

Kenny MacAskill

215 In section 14, page 9, line 28, leave out <make> and insert <impose>

Kenny MacAskill

216 In section 14, page 9, line 33, leave out <is subject to section 227M(7)> and insert <does not apply where the court is considering imposing a community payback order under section 227M(2)>

Kenny MacAskill

217 In section 14, page 9, line 35, leave out <in respect of> and insert <on>

Kenny MacAskill

218 In section 14, page 10, line 2, leave out <five> and insert <two>

Kenny MacAskill

219 In section 14, page 10, line 7, leave out from <and> to end of line 10 and insert—

<( ) require the offender to report to the responsible officer in accordance with instructions given by that officer,

( ) require the offender to notify the responsible officer without delay of—

(i) any change of the offender's address, and

(ii) the times, if any, at which the offender usually works (or carries out voluntary work) or attends school or any other educational establishment, and

( ) where the order imposes an unpaid work or other activity requirement, require the offender to undertake for the number of hours specified in the requirement such work or activity as the responsible officer may instruct, and at such times as may be so instructed.>

Kenny MacAskill

220 In section 14, page 10, line 16, leave out <or discharge any of them> and insert <, revoke or discharge the order>

Kenny MacAskill

221 In section 14, page 10, line 18, leave out <in respect of> and insert <on>

Kenny MacAskill

222 In section 14, page 10, line 20, leave out <five> and insert <two>

Kenny MacAskill

223 In section 14, page 10, line 21, leave out <Saturdays and Sundays> and insert <a Saturday or Sunday or any day which is a local or public holiday>

Kenny MacAskill

224 In section 14, page 10, leave out lines 22 to 39

Kenny MacAskill

225 In section 14, page 11, line 2, leave out <in respect of> and insert <on>

Kenny MacAskill

226 In section 14, page 11, line 6, leave out <in respect of> and insert <on>

Kenny MacAskill

227 In section 14, page 11, line 7, leave out from <from> to end of line 10 and insert <imposing a fine or any other sentence (other than imprisonment), or making any other order, that it would be entitled to impose or make in respect of the offence.>

Kenny MacAskill

228 In section 14, page 11, line 11, leave out <in respect of> and insert <on>

Kenny MacAskill

229 In section 14, page 11, line 13, leave out <imposing the community payback order>

Kenny MacAskill

230 In section 14, page 11, line 20, leave out <imposing the community payback order>

Kenny MacAskill

231 In section 14, page 11, line 28, leave out <An order imposing a> and insert <A>

Kenny MacAskill

232 In section 14, page 11, line 31, leave out <in respect of> and insert <on>

Kenny MacAskill

233 In section 14, page 11, line 39, at end insert—

<**Payment of offenders' travelling and other expenses**

(1) The Scottish Ministers may by order made by statutory instrument provide for the payment to offenders of travelling or other expenses in connection with their compliance with requirements imposed on them by community payback orders.

(2) An order under subsection (1) may—

- (a) specify expenses or provide for them to be determined under the order,
- (b) provide for the payments to be made by or on behalf of local authorities,
- (c) make different provision for different purposes.

(3) An order under subsection (1) is subject to annulment in pursuance of a resolution of the Scottish Parliament.>

Robert Brown

81 In section 14, page 12, line 3, leave out <a "supervision> and insert <an "offender supervision>

Robert Brown

82 In section 14, page 12, line 8, leave out second <a> and insert <an offender>

Kenny MacAskill

234 In section 14, page 12, line 10, leave out from <and> to end of line 12 and insert <at the time the order is imposed,>

Kenny MacAskill

235 In section 14, page 12, line 13, at end insert—

<(zi) a compensation requirement,>

Kenny MacAskill

236 In section 14, page 12, leave out lines 19 and 20 and insert—

<( ) a conduct requirement.>

Robert Brown

83 In section 14, page 12, line 19, leave out <a> and insert <an offender>

Kenny MacAskill

237 In section 14, page 12, line 21, at end insert—

<(3A) Subsection (3) is subject to subsection (3B) and section 227ZB(7B).

(3B) In the case of a supervision requirement imposed on a person aged 16 or 17 along with only a level 1 unpaid work or other activity requirement, the specified period must be no more than whichever is the greater of—

(a) the specified period under section 227L in relation to the level 1 unpaid work or other activity requirement, and

(b) 3 months.>

Kenny MacAskill

238 In section 14, page 12, line 22, leave out from <the> to end of line 23 and insert <"specified", in relation to a supervision requirement, means specified in the requirement.>

Robert Brown

84 In section 14, page 12, line 22, leave out <a> and insert <an offender>

Kenny MacAskill

239 In section 14, page 12, leave out lines 24 to 41 and insert—

<*Compensation requirement*

227H Compensation requirement

(1) In this Act, a "compensation requirement" is, in relation to an offender, a requirement that the offender must pay compensation for any relevant matter in favour of a relevant person.

(2) In subsection (1)—

“relevant matter” means any personal injury, loss, damage or other matter in respect of which a compensation order could be made against the offender under section 249 of this Act, and

“relevant person” means a person in whose favour the compensation could be awarded by such a compensation order.

(3) A compensation requirement may require the compensation to be paid in a lump sum or in instalments.

(4) The offender must complete payment of the compensation before the earlier of the following—

(a) the end of the period of 18 months beginning with the day on which the compensation requirement is imposed,

(b) the beginning of the period of 2 months ending with the day on which the supervision requirement imposed under section 227G(2) ends.

(5) The following provisions of this Act apply in relation to a compensation requirement as they apply in relation to a compensation order, and as if the references in them to a compensation order included a compensation requirement—

(a) section 249(3), (4), (5) and (8) to (10),

(b) section 250(2),

(c) section 251(1), (1A) and (2)(b), and

(d) section 253.>

Robert Brown

85 In section 14, page 12, line 26, leave out <a> and insert <an offender>

Robert Brown

86 In section 14, page 12, line 38, after second <the> insert <offender>

Robert Brown

87 In section 14, page 12, line 40, after second <the> insert <offender>

Kenny MacAskill

240 In section 14, page 13, line 6, leave out from <and> to end of line 7 and insert <or—

( ) unpaid work and other activity.

( ) Whether the offender must undertake other activity as well as unpaid work is for the responsible officer to determine.>

Kenny MacAskill

241 In section 14, page 13, line 8, after <and> insert <any>

Angela Constance

398 In section 14, page 13, line 9, after <officer> insert <but must be such as the responsible officer considers provides significant benefits in the area in which the work or activity is undertaken>

Kenny MacAskill

242 In section 14, page 13, line 22, at end insert—

<( ) An order under subsection (6) may only substitute for the number of hours for the time being specified in a provision mentioned in the first column of the following table a number of hours falling within the range set out in the corresponding entry in the second column.

Provision	*Range*	
	No fewer than	*No more than*
Subsection (3)(a)	10 hours	40 hours
Subsection (3)(b)	250 hours	350 hours
Subsections (4) and (5)	70 hours	150 hours>

Kenny MacAskill

243 In section 14, page 13, line 33, at end insert—

<( ) Subsection (2) does not apply where the court is considering imposing a community payback order—

(a) imposing only a level 1 unpaid work or other activity requirement, or

(b) under section 227M(2).>

Kenny MacAskill

244 In section 14, page 14, line 6, leave out <total>

Kenny MacAskill

245 In section 14, page 14, leave out line 9 and insert—

<( ) any other activity to be undertaken.>

Kenny MacAskill

246 In section 14, page 14, line 12, leave out <total>

Kenny MacAskill

247 In section 14, page 14, line 14, leave out from <amend> to <a> in line 16 and insert—

<(a) substitute another percentage for the percentage for the time being specified in subsection (2)(a),

(b) substitute another number of hours for the number of hours for the time being specified in subsection (2)(b).

( ) An order is not to be made under subsection (3) unless a draft of the statutory instrument containing the order has been laid before and approved by>

Kenny MacAskill

248 In section 14, page 14, line 19, leave out <total>

Kenny MacAskill

249 In section 14, page 14, line 19, after <and> insert <any>

Kenny MacAskill

250 In section 14, page 14, line 22, at end insert <beginning with the imposition of the requirement.>

Kenny MacAskill

251 In section 14, page 14, line 23, leave out from <such> to end of line 29 and insert—

<(a) in relation to a level 1 unpaid work or other activity requirement, 3 months or such longer period as the court may specify in the requirement,

(b) in relation to a level 2 unpaid work or other activity requirement, 6 months or such longer period as the court may specify in the requirement.>

Kenny MacAskill

252 In section 14, page 14, line 36, leave out <sentence> and insert <period>

Kenny MacAskill

253 In section 14, page 15, line 1, leave out <sentence> and insert <period>

Kenny MacAskill

254 In section 14, page 15, line 3, at end insert—

<( ) The court, in imposing a community payback order under subsection (2) on a person aged 16 or 17, must also impose a supervision requirement.>

Kenny MacAskill

255 In section 14, page 15, line 5, leave out <total>

Kenny MacAskill

256 In section 14, page 15, line 7, after <and> insert <any>

Kenny MacAskill

257 In section 14, page 15, line 11, leave out <in respect of> and insert <on>

Kenny MacAskill

258 In section 14, page 15, leave out lines 14 to 17

Kenny MacAskill

259 In section 14, page 15, leave out lines 21 and 22

Kenny MacAskill

260 In section 14, page 15, line 29, leave out <in respect of> and insert <on>

Kenny MacAskill

261 In section 14, page 15, line 32, leave out <such requirements in respect of> and insert <community payback orders imposing such a requirement on>

Kenny MacAskill

262 In section 14, page 15, line 36, leave out <so directs> and insert <makes a direction under subsection (2)>

Kenny MacAskill

263 In section 14, page 15, line 39, leave out <so direct> and insert <make a direction under subsection (2)>

Kenny MacAskill

264 In section 14, page 15, line 41, leave out from <300> to end of line 42 and insert <the number of hours specified in section 227I(3)(b) less the aggregate of the number of hours of unpaid work or activity still to be completed under each existing requirement at the time the new requirement is imposed.

( ) In calculating that aggregate, if any existing requirement is concurrent with another (by virtue of a direction under subsection (2)), hours that count for the purposes of compliance with both (or, as the case may be, all) are to be counted only once.>

Kenny MacAskill

265 In section 14, page 16, leave out lines 12 and 13

Kenny MacAskill

266 In section 14, page 16, line 14, after <and> insert <any>

Kenny MacAskill

267 In section 14, page 16, line 14, at end insert—

<( ) Rules under subsection (1) may—

(a) confer functions on responsible officers,

(b) contain rules about the way responsible officers are to exercise functions under this Act.>

Robert Brown

88 In section 14, page 16, line 33, after first <the> insert <offender>

Robert Brown

89 In section 14, page 17, line 10, after third <the> insert <offender>

Kenny MacAskill

268 In section 14, page 17, line 20, leave out <chartered> and insert <registered>

Kenny MacAskill

269 In section 14, page 17, line 33, leave out <chartered> and insert <registered>

Kenny MacAskill

270 In section 14, page 17, line 39, leave out <chartered> and insert <registered>

Robert Brown

90 In section 14, page 18, line 12, after third <the> insert <offender>

Kenny MacAskill

271 In section 14, page 18, line 19, after <practitioner> insert <(within the meaning of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13))>

Kenny MacAskill

272 In section 14, page 19, line 1, leave out <chartered> and insert <registered>

Kenny MacAskill

273 In section 14, page 19, line 24, leave out <chartered> and insert <registered>

Robert Brown

91 In section 14, page 20, line 7, after third <the> insert <offender>

Kenny MacAskill

274 In section 14, page 20, line 17, after <been> insert <, or can be,>

Robert Brown

92 In section 14, page 21, line 1, after third <the> insert <offender>

Kenny MacAskill

275 In section 14, page 21, line 13, at end insert—

<*Conduct requirement*

227VA Conduct requirement

(1) In this Act, a "conduct requirement" is, in relation to an offender, a requirement that the offender must, during the specified period, do or refrain from doing specified things.

(2) A court may impose a conduct requirement on an offender only if the court is satisfied that the requirement is necessary with a view to—

(a) securing or promoting good behaviour by the offender, or

(b) preventing further offending by the offender.

(3) The specified period must be not more than 3 years.

(4) The specified things must not include anything that—

(a) could be required by imposing one of the other requirements listed in section 227A(2), or

(b) would be inconsistent with the provisions of this Act relating to such other requirements.

(5) In this section, "specified", in relation to a conduct requirement, means specified in the requirement.>

Robert Brown

276 In section 14, page 21, line 13 at end, insert—

<*Community payback orders: commencement and standards*

227VB Commencement of community payback orders

(1) Each community payback order must specify—

(a) if the order imposes a supervision requirement, the date by which the specified period (within the meaning of section 227G) must have begun,

(b) if the order imposes an unpaid work or other activity requirement, the date by which the offender must have begun to undertake the unpaid work or other activity.

(2) At least one of the dates specified by virtue of subsection (1) must, wherever possible, be either the day on which the community payback order is imposed, or the weekday immediately following that day.

(3) Both the dates specified by virtue of subsection (1) must be as soon after the day on which the community payback order is imposed as is practicable.

227VC Standards with which community payback orders must comply

(1) The Scottish Ministers may, by regulations made by statutory instrument, specify standards with which community payback orders must comply.

(2) Standards specified under subsection (1) must aim to ensure that community payback orders (and any requirements imposed by them) are—

(a) capable of being delivered promptly,

(b) effective,

(c) proportionate to the nature of the offence and the circumstances of the offender, and

(d) consistent with the purposes and principles of sentencing.

(3) Regulations under subsection (1) are subject to annulment in pursuance of a resolution of the Scottish Parliament.>

Kenny MacAskill

277 In section 14, page 21, line 16, leave out <in respect of> and insert <on>

Kenny MacAskill

278 In section 14, page 21, line 22, leave out <by the appropriate court> and insert <(if different) the appropriate court, and, where those courts are different, the court must specify in the order which of those courts is to carry out the reviews>

Kenny MacAskill

279 In section 14, page 21, line 33, at end insert—

<(8A) Subsections (8B) and (8C) apply where, in the course of carrying out a progress review in respect of a community payback order, it appears to the court that the offender has failed to comply with a requirement imposed by the order.

(8B) The court must—

(a) provide the offender with written details of the alleged failure,

(b) inform the offender that the offender is entitled to be legally represented, and

(c) inform the offender that no answer need be given to the allegation before the offender—

(i) has been given an opportunity to take legal advice, or

(ii) has indicated that the offender does not wish to take legal advice.

(8C) The court must then—

(a) if it is the appropriate court, appoint another hearing for consideration of the alleged failure in accordance with section 227ZB, or

(b) if it is not the appropriate court, refer the alleged failure to that court for consideration in accordance with that section.>

Kenny MacAskill

280 In section 14, page 22, line 2, leave out <in respect of> and insert <on>

Kenny MacAskill

281 In section 14, page 22, line 5, leave out <proposes to vary, revoke or discharge> and insert <is considering varying, revoking or discharging>

Kenny MacAskill

282 In section 14, page 22, line 6, leave out <under section 227W(9) or 227X(1)> and insert <imposed on an offender>

Kenny MacAskill

283 In section 14, page 22, line 9, at end insert—

<( ) Subsection (2) does not apply where the court is considering varying the order under section 227ZB(5)(c).>

Kenny MacAskill

284 In section 14, page 22, line 13, at end insert—

<( ) include provision for progress reviews under section 227W,

( ) where the order already includes such provision, vary that provision.>

Kenny MacAskill

285 In section 14, page 22, line 18, leave out <total>

Robert Brown

93 In section 14, page 22, line 19, leave out first <a> and insert <an offender>

Kenny MacAskill

286 In section 14, page 22, line 19, leave out from <supervision> to <227H> in line 20 and insert <compensation requirement>

Kenny MacAskill

287 In section 14, page 22, leave out lines 22 to 24

Kenny MacAskill

288 In section 14, page 22, line 25, leave out <total>

Kenny MacAskill

289 In section 14, page 22, line 26, leave out from <maximum> to end of line 27 and insert <appropriate maximum.

( ) The appropriate maximum is the number of hours specified in section 227I(3)(b) at the time the unpaid work or other activity requirement being varied was imposed less the aggregate of the number of hours of unpaid work or other activity still to be completed under each other unpaid work or other activity requirement (if any) in effect in respect of the offender at the time of the variation (a "current requirement").

( ) In calculating that aggregate, if any current requirement is concurrent with another (by virtue of a direction under section 227N(2)), hours that count for the purposes of compliance with both (or, as the case may be, all) are to be counted only once.>

Kenny MacAskill

290 In section 14, page 22, line 27, at end insert—

<( ) The court may not, under subsection (4)(c), increase the amount of compensation beyond the maximum that could have been awarded at the time the requirement was imposed.>

Kenny MacAskill

291 In section 14, page 22, line 28, leave out <in> and insert <by>

Kenny MacAskill

292 In section 14, page 22, line 35, at end insert—

<( ) Subsection (8) applies in relation to a community payback order imposed under section 227M(2) as if the reference to the offence in relation to which the order was imposed were a reference to the failure to pay in respect of which the order was imposed.>

Kenny MacAskill

293 In section 14, page 22, line 36, leave out <proposes to vary, revoke or discharge> and insert <is considering varying, revoking or discharging>

Kenny MacAskill

294 In section 14, page 22, line 39, after <227W(6)> insert <or 227ZB(2)(b)>

Kenny MacAskill

295 In section 14, page 23, line 5, leave out <in respect of> and insert <imposed on>

Kenny MacAskill

296 In section 14, page 23, line 7, leave out from <such> to end of line 8 and insert <information about the offender and the offender's circumstances.

( ) An Act of Adjournal may prescribe—

(a) the form of a report under subsection (2), and

(b) the particular information to be contained in it.>

Kenny MacAskill

297 In section 14, page 23, line 8, at end insert—

<( ) Subsection (2) does not apply where the court is considering varying a community payback order—

(a) which imposes only a level 1 unpaid work or other activity requirement, or

(b) imposed under section 227M(2).>

Kenny MacAskill

298 In section 14, page 23, line 21, leave out <under section 227W for it to be reviewed> and insert <for a progress review under section 227W>

Kenny MacAskill

299 In section 14, page 23, line 31, leave out <in> and insert <by>

Kenny MacAskill

300 In section 14, page 23, line 32, leave out <made> and insert <imposed>

Kenny MacAskill

301 In section 14, page 23, line 36, leave out <in> and insert <by>

Kenny MacAskill

302 In section 14, page 23, line 36, leave out <made> and insert <imposed>

Kenny MacAskill

303 In section 14, page 23, line 36, at end insert—

<( ) Subsection (6)(a) does not prevent the imposition of a restricted movement requirement under section 227ZB(5)(c).

( ) In determining for the purpose of subsection (6)(a) whether an unpaid work or other activity requirement is a requirement that could have been imposed by the order when the order was imposed, the effect of section 227N(6) is to be ignored.>

Kenny MacAskill

304 In section 14, page 23, line 39, leave out second <in> and insert <by>

Kenny MacAskill

305 In section 14, page 23, line 40, leave out <made> and insert <imposed>

Kenny MacAskill

306 In section 14, page 23, line 40, at end insert—

<( ) Subsections (4) and (5) of section 227E apply, with the necessary modifications, where a community payback order is varied as they apply where such an order is imposed.>

Kenny MacAskill

307 In section 14, page 24, line 3, leave out <in respect of> and insert <on>

Kenny MacAskill

308 In section 14, page 24, line 3, leave out <is in force> and insert <has been imposed>

Kenny MacAskill

309 In section 14, page 24, line 7, leave out from <an> to <varied> in line 8 and insert <the court is considering varying the order>

Kenny MacAskill

310 In section 14, page 24, line 10, leave out <as proposed in the application>

Kenny MacAskill

311 In section 14, page 24, line 14, leave out <as proposed in the application>

Kenny MacAskill

312 In section 14, page 24, line 21, leave out <in respect of> and insert <on>

Kenny MacAskill

313 In section 14, page 24, line 22, leave out <in> and insert <by>

Kenny MacAskill

314 In section 14, page 24, line 30, at end insert—

<(4A) The court must, before considering the alleged failure—

- (a) provide the offender with written details of the alleged failure,
- (b) inform the offender that the offender is entitled to be legally represented, and
- (c) inform the offender that no answer need be given to the allegation before the offender—
  - (i) has been given an opportunity to take legal advice, or
  - (ii) has indicated that the offender does not wish to take legal advice.

(4B) Subsection (4A) does not apply if the offender has previously been provided with those details and informed about those matters under section 227W(8B) of this Act.>

Kenny MacAskill

315 In section 14, page 24, line 34, at beginning insert <where the order was imposed under section 227A(1),>

Kenny MacAskill

316 In section 14, page 24, line 36, at end insert—

<(ba) where the order was imposed under section 227A(4), revoke the order and impose on the offender a sentence of imprisonment for a term not exceeding—

(i) where the court is a justice of the peace court, 60 days,

(ii) in any other case, 3 months,

(bb) where the order was imposed under section 227M(2), revoke the order and impose on the offender a period of imprisonment for a term not exceeding—

(i) where the court is a justice of the peace court, 60 days,

(ii) in any other case, 3 months,>

Kenny MacAskill

317 In section 14, page 24, line 38, after <or> insert <revoke or>

Kenny MacAskill

318 In section 14, page 24, line 38, at end insert <, or

( ) both impose a fine under paragraph (a) and vary the order under paragraph (c).>

Kenny MacAskill

319 In section 14, page 24, line 38, at end insert—

<(5A) Where the court revokes a community payback order under subsection (5)(b) or (ba) and the offender is, in respect of the same offence, also subject to—

(a) a drug treatment and testing order, by virtue of section 234J, or

(b) a restriction of liberty order, by virtue of section 245D(3),

the court must, before dealing with the offender under subsection (5)(b) or (ba), revoke the drug treatment and testing order or, as the case may be, restriction of liberty order.>

Kenny MacAskill

320 In section 14, page 24, line 38, at end insert—

<( ) If the court is satisfied that the offender has failed to comply with a requirement imposed by the order but had a reasonable excuse for the failure, the court may, subject to section 227Y(2), vary the order so as to impose a new requirement, vary any requirement imposed by the order or revoke or discharge any requirement imposed by the order.>

Kenny MacAskill

321 In section 14, page 25, line 1, leave out <imposes> and insert <varies the order so as to impose>

Robert Brown

94 In section 14, page 25, line 2, leave out first <a> and insert <an offender>

Robert Brown

95 In section 14, page 25, line 2, leave out second <a> and insert <an offender>

Kenny MacAskill

322 In section 14, page 25, line 3, at end insert—

<(7A) The court must ensure that the specified period under section 227G in relation to the supervision requirement is at least as long as the period for which the restricted movement requirement has effect and, where the community payback order already imposes a supervision requirement, must vary it accordingly, if necessary.

(7B) The minimum period of 6 months in section 227G(3) does not apply in relation to a supervision requirement imposed under subsection (7).>

Kenny MacAskill

323 In section 14, page 25, leave out lines 8 to 11

Robert Brown

96 In section 14, page 25, line 10, after second <the> insert <offender>

Kenny MacAskill

324 In section 14, page 25, leave out lines 19 to 24

Kenny MacAskill

325 In section 14, page 25, line 24, at end insert—

<( ) Subsections (5)(b) and (ba) and (5A) are subject to section 42(9) of the Criminal Justice (Scotland) Act 2003 (asp 7) (powers of drugs courts to deal with breach of community payback orders).>

Kenny MacAskill

326 In section 14, page 25, leave out lines 26 to 32

Robert Brown

97 In section 14, page 25, line 36, leave out second <a> and insert <an offender>

Kenny MacAskill

327 In section 14, page 25, line 37, leave out from <supervision> to end of line 38 and insert <compensation requirement.>

Kenny MacAskill

328 In section 14, page 26, line 14, leave out from <A> to <offender> and insert <In imposing a restricted movement requirement containing provision under subsection (2)(a), the court must ensure that the offender is not required, either by the requirement alone or the requirement taken together with any other relevant requirement or order,>

Kenny MacAskill

329 In section 14, page 26, line 15, at end insert—

<( ) In subsection (3), "other relevant requirement or order" means—

(a) any other restricted movement requirement in effect in respect of the offender at the time the court is imposing the requirement referred to in subsection (3), and

(b) any restriction of liberty order under section 245A in effect in respect of the offender at that time.>

Kenny MacAskill

330 In section 14, page 26, line 18, leave out <of not more than 12 months>

Kenny MacAskill

331 In section 14, page 26, line 18, at end insert—

<(4A) The period specified under subsection (4)(b) must be—

(a) not less than 14 days, and

(b) subject to subsections (4B) and (4C), not more than 12 months.

(4B) Subsection (4C) applies in the case of a restricted movement requirement imposed for failure to comply with a requirement of a community payback order—

(a) where the offender was under 18 years of age at the time the order was imposed, or

(b) where the only requirement imposed by the order is a level 1 unpaid work or other activity requirement.

(4C) The period specified under subsection (4)(b) must be not more than—

(a) where the order was imposed by a justice of the peace court, 60 days, or

(b) in any other case, 3 months.>

Kenny MacAskill

332 In section 14, page 26, line 28, leave out <(4)(b)> and insert <(4A)(b)>

Kenny MacAskill

333 In section 14, page 27, line 11, leave from <an> to <varied> in line 12 and insert <the court is considering varying the requirement>

Kenny MacAskill

334 In section 14, page 27, line 14, leave out <proposed in the application>

Kenny MacAskill

335 In section 14, page 27, line 20, leave out <proposed in the application>

Kenny MacAskill

336 In section 14, page 27, line 34, leave out <in respect of> and insert <on>

Kenny MacAskill

337 In section 14, page 28, line 19, after <person> insert <and to the responsible officer>

Kenny MacAskill

338 In section 14, page 28, line 24, leave out <in respect of> and insert <on>

Robert Brown

98 In section 14, page 29, line 3, after <consult> insert—

<(a) persons or organisations representing victims of crime,

(b) community councils established in their area, and

(c)>

Kenny MacAskill

339 In section 14, page 29, line 5, leave out <in respect of> and insert <on>

Robert Brown

99 In section 14, page 29, line 11, at end insert—

<Annual reports on community payback orders

227ZJA Annual reports on community payback orders

(1) Each local authority must, as soon as practicable after the end of each reporting year, publish a report on the operation of community payback orders within their area during that reporting year.

(2) A report under subsection (1) must specify—

(a) in relation to unpaid work or other activity under section 227I—

(i) the number of offenders undertaking the unpaid work or other activity,

(ii) the total number of hours of unpaid work or other activity undertaken,

(iii) the nature of the unpaid work or other activity undertaken,

(iv) the cost of organising and managing the unpaid work or other activity, and the estimated value of that work and activity,

(b) in relation to programmes under section 227P—

(i) the number of offenders participating in the programmes,

(ii) the number and nature of those programmes,

(iii) the cost of providing those programmes.

(3) The Scottish Ministers must, as soon as practicable after the end of each reporting year, lay before the Scottish Parliament and publish a report on the operation of community payback orders during that reporting year.

(4) A report under subsection (3) must—

(a) collate and summarise the data included in the various reports under subsection (1),

(b) provide an assessment of the overall costs and effectiveness of community payback orders.

(5) In this section, "reporting year" means—

(a) the period of 12 months beginning on the day this section comes into force, or

(b) any subsequent period of 12 months beginning on an anniversary of that day.>

Kenny MacAskill

340 In section 14, page 29, line 23, leave out <(1)(b)> and insert <(1)>

Kenny MacAskill

341 In section 14, page 29, line 24, leave out <the order imposing>

Kenny MacAskill

342 In section 14, page 29, line 25, at end insert—

<(2) Schedule (*Community payback orders: consequential modifications*) modifies enactments in consequence of this section.>

After schedule 1

Kenny MacAskill

343 After schedule 1, insert—

<SCHEDULE
(*introduced by section 14(2)*)

COMMUNITY PAYBACK ORDERS: CONSEQUENTIAL MODIFICATIONS

PART 1

THE 1995 ACT

The 1995 Act

1 The 1995 Act is amended as follows.

2 In section 52H(3) (early termination of assessment order), the following are repealed—

(a) the word "or" immediately following paragraph (e), and

(b) paragraph (f).

3 In section 52R(3) (termination of treatment order), the following are repealed—

(a) the word "or" immediately following paragraph (e), and

(b) paragraph (f).

4 In section 53(12)(a) (interim compulsion orders), for sub-paragraphs (vi) and (vii) substitute—

> "(vi) impose a community payback order;
>
> (vii) make a drug treatment and testing order; or
>
> (viii) make a restriction of liberty order,".

5 In section 57A(15)(a) (compulsion order), for sub-paragraphs (vi) and (vii) substitute—

> "(vi) impose a community payback order;
>
> (vii) make a drug treatment and testing order; or
>
> (viii) make a restriction of liberty order,".

6 In section 58(8) (order for hospital admission or guardianship), for "make a probation order or a community service order" substitute "impose a community payback order or make a drug treatment and testing order".

7 In section 106(1) (right of appeal), for paragraph (d) substitute—

> "(d) against any drug treatment and testing order;".

8 In section 108 (Lord Advocate's right of appeal against disposal)—

(a) in subsection (1), paragraphs (d) and (e) are repealed, and

(b) in subsection (2)(b)(iii), for "(d) to (e)" substitute "(dd)".

9 In section 121A(4) (suspension of certain sentences pending determination of appeal), for paragraphs (a) to (c) substitute—

> "(aa) a community payback order;".

10 In section 175 (right of appeal)—

(a) in subsection (2)(c), for "probation order, drug treatment and testing order or any community service order" substitute "drug treatment and testing order",

(b) in subsection (4), paragraphs (d) and (e) are repealed, and

(c) in subsection (4A)(b)(iii), for "(d) to (e)" substitute "(dd)".

11 In section 193A(4) (suspension of certain sentences pending determination of appeal)—

(a) for paragraphs (a) to (c) substitute—

> "(aa) a community payback order;", and

(b) paragraph (e) is repealed.

12 Sections 228 to 234 (probation) are repealed.

13 In section 234H (disposal on revocation of drug treatment and testing order)—

(a) in subsection (1), for "drugs" substitute "drug", and

(b) in subsection (3), for the words from "subject to" where they first occur to the end substitute ", in respect of the same offence, also subject to a community payback order, by virtue of section 234J, or a restriction of liberty order, by virtue of section 245D, the court shall, before disposing of the offender under subsection (1) above, revoke the community payback order or restriction of liberty order (as the case may be).".

14 (1) Section 234J (concurrent drug treatment and testing and probation orders) is amended as follows.

(2) In subsection (1)—

(a) for "sections 228(1) and" substitute "section", and

(b) for "probation order" substitute "community payback order".

(3) In subsection (3)—

(a) for "probation order" substitute "community payback order", and

(b) for paragraphs (b) and (c) substitute—

"(ba) the local authority within whose area the offender will reside for the duration of each order.".

(4) In subsection (4)—

(a) in paragraph (a), for "probation order and is dealt with under section 232(2)(c)" substitute "community payback order and is dealt with under section 227ZB(5)(c)", and

(b) in paragraph (b), for "232(2)(c) of this Act in relation to the probation order" substitute "227ZB(5)(c) of this Act in relation to the community payback order".

(5) In subsection (5)—

(a) for "probation order" substitute "community payback order", and

(b) for "232(2)" substitute "227ZB(5)".

15 Sections 235 to 245 (supervised attendance orders and community service orders) are repealed.

16 (1) Section 245A (restriction of liberty orders) is amended as follows.

(2) In subsection (2), the words from "but" to the end are repealed.

(3) After subsection (2) insert—

"(2A) In making a restriction of liberty order containing provision under subsection (2)(a), the court must ensure that the offender is not required, either by the order alone or the order taken together with any other relevant order or requirement, to be in any place or places for a period or periods totalling more than 12 hours in any one day.

(2B) In subsection (2A), "other relevant order or requirement" means—

(a) any other restriction of liberty order in effect in respect of the offender at the time the court is making the order referred to in subsection (2A), and

(b) any restricted movement requirement under section 227ZD in effect in respect of the offender at that time.".

(4) In subsection (12)(a), for "subsection (2)" substitute "subsection (2A)".

17 (1) Section 245D (combination of restriction of liberty orders with other orders) is amended as follows.

(2) In subsection (1)(b)—

  (a) in sub-paragraph (i), for "probation order made under section 228(1)" substitute "community payback order imposed under section 227A(1)", and

  (b) in sub-paragraph (ii)—

    (i) for "probation order made under section 228(1) of this Act," substitute "community payback order imposed under section 227A(1) of this Act or", and

    (ii) the words "or both such orders" are repealed.

(3) In subsection (2), for "probation order" substitute "community payback order".

(4) In subsection (3)—

  (a) the word "228(1)," is repealed,

  (b) in paragraph (a), for "probation order" substitute "community payback order", and

  (c) in paragraph (b), for "either or both of a probation order and" substitute "either a community payback order or".

(5) In subsection (4)—

  (a) for "probation order" substitute "community payback order", and

  (b) for paragraph (b) substitute—

    "(b) the local authority within whose area the offender will reside for the duration of each order.".

(6) Subsection (6) is repealed.

(7) In subsection (7)—

  (a) in paragraph (a)—

    (i) for "contained in a probation order and is dealt with under section 232(2)(c)" substitute "imposed by a community payback order and is dealt with under section 227ZB(5)(c)", and

    (ii) the words from "234G(2)(b)" to "section" where it third occurs are repealed,

  (b) in paragraph (b), the words from "232(2)(c)" to "section" where it third occurs are repealed, and

  (c) in paragraph (c), for "232(2)(c) of this Act in relation to a probation order" substitute "227ZB(5)(c) of this Act in relation to a community payback order".

(8) In subsection (8), for "232(2)" substitute "227ZB".

(9) In subsection (9)—

  (a) in paragraph (a), for "probation order" substitute "community payback order", and

  (b) paragraph (c) is repealed.

18 (1) Section 245G (disposal on revocation of restriction of liberty order) is amended as follows.

(2) In subsection (2), for the words from “by virtue” to the end substitute “in respect of the same offence, also subject to a community payback order or a drug treatment and testing order, by virtue of section 245D(3), it shall before disposing of the offender under subsection (1) above, revoke the community payback order or drug treatment and testing order.”.

(3) In subsection (3), for “probation order discharged” substitute “community payback order”.

(4) Subsection (4) is repealed.

19 In section 245J (breach of certain orders: adjourning hearing and remanding in custody etc.)—

(a) in subsection (1)—

(i) for “a probationer or” substitute “an”,

(ii) for “probation order” substitute “community payback order”, and

(iii) the words “supervised attendance order, community service order” are repealed,

(b) in subsection (2), the words “probationer or” are repealed, and

(c) in subsection (4), for “A probationer or” substitute “An”.

20 Sections 245K to 245Q (community reparation orders) are repealed.

21 In section 246 (admonition and absolute discharge), in each of subsections (2) and (3), the words “and that a probation order is not appropriate” are repealed.

22 In section 249(2) (compensation order against convicted person), for paragraph (b) substitute—

“(ab) where, under section 227A of this Act, it imposes a community payback order;”.

23 In section 307 (interpretation)—

(a) in subsection (1)—

(i) insert at the appropriate places—

““alcohol treatment requirement” has the meaning given in section 227V(1);”

““community payback order” means a community payback order (within the meaning of section 227A(2)) imposed under section 227A(1) or (4) or 227M(2);”

““compensation requirement” has the meaning given in section 227H(1);”

““conduct requirement” has the meaning given in section 227VA(1);”

““drug treatment requirement” has the meaning given in section 227U(1);”

““mental health treatment requirement” has the meaning given in section 227R(1);”

““programme requirement” has the meaning given in section 227P(1);”

““residence requirement” has the meaning given in section 227Q(1);”

““responsible officer”, in relation to a community payback order, is to be construed in accordance with section 227C;”

““restricted movement requirement” has the meaning given in section 227ZD(1);”

““supervision requirement” has the meaning given in section 227G(1);”

““unpaid work or other activity requirement” has the meaning given in section 227I(1), and “level 1 unpaid work or other activity requirement” and “level 2 unpaid work or other activity requirement” are to be construed in accordance with section 227I(4) and (5) respectively;”, and

(ii) the definitions of the following terms are repealed—

“appropriate court”

“community service order”

“probationer”

“probation order”

“probation period”, and

(b) subsection (3) is repealed.

24 Schedules 6 and 7 are repealed.

PART 2

OTHER ENACTMENTS

The Social Work (Scotland) Act 1968 (c.49)

25 (1) The Social Work (Scotland) Act 1968 is amended as follows.

(2) In section 27 (supervision and care of persons put on probation or released from prisons etc.), in subsection (1)(b)—

(a) in paragraph (iii), for the words from “community service order” to the end substitute “community payback order imposed under section 277A or 227M of the Criminal Procedure (Scotland) Act 1995 imposing an unpaid work or other activity requirement”, and

(b) sub-paragraphs (iv) and (va) are repealed.

(3) In section 86(3) (adjustments between authority providing accommodation etc. and authority of area of residence), after “supervision order” insert “, community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995,”.

The Rehabilitation of Offenders Act 1974 (c.53)

26 (1) The Rehabilitation of Offenders Act 1974 is amended as follows.

(2) In section 5(4A) (rehabilitation periods for particular sentences), the words “a probation order or” are repealed.

(3) In section 6(3) (the rehabilitation period applicable to a conviction), the following are repealed—

(a) the words “or a probation order was made”,

(b) the words “or a breach of the order”, and

(c) the words “or probation order”.

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55)

27 In Schedule 1 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, in Part 2 (ineligibility for and disqualification and excusal from jury service), in paragraph (bb)—

(a) for sub-paragraph (i) substitute—

“(i) a community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46);”, and

(b) sub-paragraph (iii) is repealed.

The Local Government and Planning (Scotland) Act 1982 (c.43)

28 In section 24 of the Local Government and Planning (Scotland) Act 1982 (councils’ functions in relation to the provision of gardening assistance for the disabled and the elderly), in subsection (3), for the words from “instruction” to “that Act” substitute “determination that may be made or instruction that may be given, for the purposes of an unpaid work or other activity requirement imposed in a community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46), by the responsible officer in relation to the order,”.

The Foster Children (Scotland) Act 1984 (c.56)

29 In section 2 of the Foster Children (Scotland) Act 1984 (exceptions to section 1), in subsection (3), for “probation order” substitute “community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46)”.

The Road Traffic Offenders Act 1988 (c.53)

30 In section 46(3)(b) of the Road Traffic Offenders Act 1988 (combination of disqualification and endorsement with probation orders and orders for discharge), the words “section 228 (probation) or” are repealed.

The Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40)

31 In Schedule 3 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (transitional provisions, transitory modifications and savings), in Part 2, paragraph 13 is repealed.

The Proceeds of Crime (Scotland) Act 1995 (c.43)

32 (1) The Proceeds of Crime (Scotland) Act 1995 is amended as follows.

(2) In section 25(9) (recall or variation of suspended forfeiture order), the words “probation order or” are repealed.

(3) In section 26(9) (property wrongly forfeited: return or compensation), the words “probation order or” are repealed.

The Crime and Punishment (Scotland) Act 1997 (c.48)

33 In the Crime and Punishment (Scotland) Act 1997, the following provisions are repealed—

(a) section 26 (evidence concerning certain orders), and

(b) in Schedule 1 (minor and consequential amendments), in paragraph 21, sub-paragraphs (27) to (29).

The Crime and Disorder Act 1998 (c.37)

34 In the Crime and Disorder Act 1998, in Schedule 6 (drug treatment and testing orders: amendment of the 1995 Act), in Part 1, paragraphs 1 and 2 are repealed.

The Powers of Criminal Courts (Sentencing) Act 2000 (c.6)

35 In Schedule 9 to the Powers of Criminal Courts (Sentencing) Act 2000 (consequential amendments), paragraphs 176 to 178 are repealed.

The Criminal Justice and Court Services Act 2000 (c.43)

36 (1) Schedule 7 to the Criminal Justice and Court Services Act 2000 (minor and consequential amendments) is amended as follows.

(2) In paragraph 4(2), in the entry relating to the Criminal Procedure (Scotland) Act 1995, for “sections 209(3)(a) and 234(1)(a)” substitute “section 209(3)(a)”.

(3) Paragraphs 122 to 125 are repealed.

The Social Security Fraud Act 2001 (c.11)

37 In section 7(9)(b) of the Social Security Fraud Act 2001 (loss of benefit for commission of benefit offences), the words “or a court in Scotland makes a probation order” are repealed.

The Justice (Northern Ireland) Act 2002 (c.26)

38 In Schedule 4 to the Justice (Northern Ireland) Act 2002 (functions of justices of the peace), paragraph 37 is repealed.

The Criminal Justice (Scotland) Act 2003 (asp 7)

39 (1) The Criminal Justice (Scotland) Act 2003 is amended as follows.

(2) In section 42 (drugs courts)—

(a) in subsection (4)—

(i) for “probationer with the requirements of a probation order” substitute “community payback order”,

(ii) in paragraph (b), for the words from "make" to "work" substitute "in the case of a failure to comply with the requirements of a drug treatment and testing order, make a community payback order imposing a level 1 unpaid work or other activity requirement, so however that the total hours of unpaid work or other activity", and

(iii) for "probation order" where those words second occur substitute "community payback order",

(b) in subsection (6), for paragraph (b) substitute—

"(b) alleged at—

(i) a progress review carried out by such a court in relation to a community payback order; or

(ii) a diet of such a court to which an offender has been cited under section 227ZB(2) of that Act (breach of community payback order),

that the offender has failed to comply with a requirement imposed by a community payback order,",

(c) in subsection (7)—

(i) the words "or probationer" are repealed, and

(ii) for "232" substitute "227ZB",

(d) for subsection (9) substitute—

"(9) If a community payback order is revoked under section 227ZB(5)(b) of the 1995 Act, the court (whether or not a drugs court) must, in dealing with the offender by virtue of that section, take into account any sentence which has been imposed under paragraph (a) of subsection (4) of this section in relation to a failure to comply with the community payback order.",

(e) in subsection (10)—

(i) insert at the appropriate places—

""community payback order" means an order imposed under section 227A of the 1995 Act;"

""level 1 unpaid work or other activity requirement" has the meaning given in section 227I(4) of the 1995 Act;", and

(ii) the definition of "probation order" is repealed, and

(f) in subsection (11), paragraphs (a) and (b) are repealed.

(3) Section 46 (requirement for remote monitoring in probation order) is repealed.

(4) In section 50 (amendments in relation to certain non-custodial sentences), subsections (1), (2) and (4) are repealed.

(5) In section 60 (unified citation provisions)—

(a) in subsection (1), paragraphs (a), (b), (e) and (f) are repealed, and

(b) subsections (3) and (4) are repealed.

The Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)

40 In the Mental Health (Care and Treatment) (Scotland) Act 2003, the following provisions are repealed—

(a) section 135 (amendment of 1995 Act: probation for treatment of mental disorder), and

(b) in schedule 4 (minor and consequential amendments), in paragraph 8, sub-paragraph (15).

The Criminal Justice Act 2003 (c.44)

41 In Schedule 32 to the Criminal Justice Act 2003 (amendments relating to sentencing), paragraphs 69 to 72 are repealed.

The Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8)

42 In the Antisocial Behaviour etc. (Scotland) Act 2004, the following provisions are repealed—

(a) section 120 (community reparation orders), and

(b) in schedule 4 (minor and consequential amendments), in paragraph 5, sub-paragraphs (3), (5), (6) and (11).

The Management of Offenders etc. (Scotland) Act 2005 (asp 14)

43 (1) The Management of Offenders etc. (Scotland) Act 2005 is amended as follows.

(2) In section 10 (arrangements for assessing and managing risks posed by certain offenders), in subsection (1)(b), for sub-paragraph (i) substitute—

> "(i) is subject to a community payback order imposed under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46), or".

(3) Section 12 (probation progress review) is repealed.

The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6)

44 In the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, the following provisions are repealed—

(a) in section 49 (compensation orders), subsection (4),

(b) section 57 (probation and community service orders), and

(c) in paragraph 26 of the schedule (modification of enactments), sub-paragraphs (l) and (n).

The Criminal Justice and Immigration Act 2008 (c.4)

45 In Part 1 of Schedule 4 to the Criminal Justice and Immigration Act 2008 (youth rehabilitation orders: consequential amendments), paragraphs 43 to 46 are repealed.>

Section 15

Rhoda Grant

399 In section 15, page 29, line 29, after <subsection (1)> insert—

<( ) at the beginning insert "Subject to subsection (1A),", and

( )>

Rhoda Grant

400 In section 15, page 29, line 29, at end insert—

<( ) after subsection (1) insert—

"(1A) The prosecutor must, where a person ("A") is convicted of the offence of stalking a person ("B"), apply to the court to make a non-harassment order against A requiring A to refrain from such conduct in relation to—

(a) B, or

(b) any other person in relation to whom the course of conduct engaged in by A, and which constituted the offence, related,

as may be specified in the order for such period (which includes an indeterminate period) as may be so specified, in addition to any other disposal which may be made in relation to the offence.",>

Rhoda Grant

401 In section 15, page 29, line 30, after <subsection (2)> insert—

<( ) after "subsection (1)" insert "or (1A)", and

( )>

Rhoda Grant

5 In section 15, page 29, line 30, leave out <"harassment (or further harassment)"> and insert <"misconduct (or further misconduct)">

Rhoda Grant

6 In section 15, page 30, line 18, leave out <"harassment" and "conduct" are> and insert <"conduct" is>

Rhoda Grant

7 In section 15, page 30, line 20, at end insert <whether on one or more than one occasion>

Section 17

Robert Brown

100 In section 17, page 30, line 32, leave out <6> and insert <3>

Robert Brown

101 In section 17, page 31, line 2, leave out <6> and insert <3>

Robert Brown

388 In section 17, page 31, line 7, at end insert—

<(4) The Scottish Ministers may not bring subsection (1), (2) or (3) into force until they have—

(a) prepared a report setting out—

(i) the reduction in the number of sentences of imprisonment or detention imposed annually that is expected as a result of bringing those subsections into force,

(ii) the increase in the number of community payback orders imposed annually that is expected as a result of bringing those subsections into force (by comparison with the number of such orders imposed annually that would be expected if those subsections were not brought into force),

(iii) the estimated annual cost implications of the changes referred to in sub-paragraphs (i) and (ii),

(iv) the additional funding, if any, that Ministers will provide to community justice authorities or local authorities to ensure that they have the capacity to support the requirements expected to be imposed by any additional community payback orders identified under sub-paragraph (ii).

(b) laid that report before the Scottish Parliament; and

(c) taken into account any views expressed on it by any committee of the Parliament the remit of which includes the criminal justice system.>

Richard Baker
Supported by: Bill Aitken

1 Leave out section 17

After section 17

Robert Brown

102 After section 17, insert—

<**Report on operation of sections 14 and 17**

(1) The Scottish Ministers must, no later than 5 years after sections 14 and 17 come fully into force, lay before the Scottish Parliament and publish a report on the operation of those sections.

(2) The report under subsection (1) must, in particular, include an assessment of whether and to what extent those sections, individually or collectively, have—

(a) reduced offending,

(b) increased public safety.>

After section 20

Bill Wilson

103 After section 20, insert—

<**Pre-sentencing reports about organisations**

After section 203 of the 1995 Act (reports), insert—

“**203A Reports about organisations**

(1) This section applies where an organisation is convicted of an offence.

(2) Before dealing with the organisation in respect of the offence, the court may obtain a report into the organisation’s financial affairs and structural arrangements.

(3) The report is to be prepared by a person appointed by the court.

(4) The person appointed to prepare the report is referred to in this section as the “reporter”.

(5) The court may issue directions to the reporter about—

(a) the information to be contained in the report,

(b) the particular matters to be covered by the report,

(c) the time by which the report is to be submitted to the court.

(6) The court may order the organisation to give the reporter and any person acting on the reporter’s behalf—

(a) access at all reasonable times to the organisation’s books, documents and other records,

(b) such information or explanation as the reporter thinks necessary.

(7) The reporter’s costs in preparing the report are to be paid by the clerk of court, but the court may order the organisation to reimburse to the clerk all or a part of those costs.

(8) An order under subsection (7) may be enforced by civil diligence as if it were a fine.

(9) On submission of the report to the court, the clerk of court must provide a copy of the report to—

(a) the organisation,

(b) the organisation’s solicitor (if any), and

(c) the prosecutor.

(10) The court must have regard to the report in deciding how to deal with the organisation in respect of the offence.

(11) If the court decides to impose a fine, the court must, in determining the amount of the fine, have regard to—

(a) the report, and

(b) if the court makes an order under subsection (7), the amount of costs that the organisation is required to reimburse under the order.

(12) Where the court—

(a) makes an order under subsection (7), and

(b) imposes a fine on the organisation,

any payment by the organisation is first to be applied in satisfaction of the order under subsection (7).

(13) Where the court also makes a compensation order in respect of the offence, any payment by the organisation is first to be applied in satisfaction of the compensation order before being applied in accordance with subsection (12).”.>

Section 24

Robert Brown
Supported by: Bill Aitken

104 Leave out section 24

After section 24

Kenny MacAskill

105 After section 24, insert—

<**Mutual recognition of judgments and probation decisions**

(1) The Scottish Ministers may by order make provision for the purposes of and in connection with implementing any obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).

(2) The provision may, in particular, confer functions—

(a) on the Scottish Ministers,

(b) on other persons.

(3) An order under subsection (1) may modify any enactment.

(4) In this section, the “Framework Decision” means Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.>

Richard Baker

10 After section 24, insert—

<**Minimum sentence for having in a public place an article with a blade or point**

(1) In section 49 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (offence of having in a public place an article with a blade or point), after subsection (5) insert—

“(5A) Subsection (5B) applies where—

(a) a person is convicted of an offence under subsection (1),

(b) the offence was committed after the commencement of this subsection, and

(c) when the offence was committed, the person was aged 16 or over.

(5B) Where this subsection applies, the court must impose a sentence of imprisonment of at least 6 months (with or without a fine) unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify not doing so.”.

(2) In section 207(3A) of the 1995 Act (detention of young offenders: minimum sentences), after paragraph (a) insert—

“(aa) section 49(5B) of the Criminal Law (Consolidation) (Scotland) Act 1995 (minimum sentence for having in a public place an article with a blade or point);”.>

Bill Aitken

10A As an amendment to amendment 10, line 11, leave out from <6> to end of line 13 and insert <2 years (with or without a fine) unless the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction and thinks fit to order the offender to be imprisoned for a shorter period or not to order the offender to be imprisoned>

Section 25

Kenny MacAskill

344 In section 25, page 38, line 34, at end insert—

<( ) Without limiting the generality of subsection (1), a person agrees to become involved in serious organised crime if the person—

(a) agrees to do something (whether or not the doing of that thing would itself constitute an offence), and

(b) knows or suspects, or ought reasonably to have known or suspected, that the doing of that thing will enable or further the commission of serious organised crime.>

Robert Brown

345 In section 25, page 38, line 36, leave out <involving> and insert—

(a) that would reasonably be regarded as being both serious and organised, and

(b) that involves>

Kenny MacAskill

346 In section 25, page 39, line 2, leave out <securing> and insert <obtaining>

Kenny MacAskill

347 In section 25, page 39, line 4, leave out <serious>

Robert Brown

348 In section 25, page 39, line 4, leave out <serious violence> and insert <violence or intimidation>

Kenny MacAskill

349 In section 25, page 39, line 4, after <committed> insert <or a threat made>

Kenny MacAskill

350 In section 25, page 39, line 4, leave out <securing> and insert <obtaining>

Kenny MacAskill

351 In section 25, page 39, line 5, at end insert <, and

> "material benefit" means a right or interest of any description in any property, whether heritable or moveable and whether corporeal or incorporeal.>

Section 26

Robert Brown

352 In section 26, page 39, line 21, leave out subsection (4)

Section 27

Robert Brown

353 In section 27, page 39, line 35, leave out <a serious offence> and insert <an offence under section 25(1)>

Kenny MacAskill

354 In section 27, page 40, line 9, leave out subsection (4)

Robert Brown

355 In section 27, page 40, line 14, leave out <a serious offence> and insert <an offence under section 25(1)>

Kenny MacAskill

356 In section 27, page 40, line 17, leave out subsection (6)

Section 28

Robert Brown

357 In section 28, page 40, line 28, after <suspects> insert <with good reason>

Bill Aitken
Supported by: Robert Brown

106 In section 28, page 40, line 36, at end insert—

<( ) In the case of knowledge or suspicion originating from information obtained by the person in the course of the person's trade, profession, business or employment, this section applies only where the person's experience or seniority in that trade, profession, business or employment makes it reasonable to assume that the person should be aware of any offence of the sort mentioned in subsection (1) that the other person has or may have committed.>

Kenny MacAskill

358 In section 28, page 40, line 39, leave out <derived> and insert <obtained>

Robert Brown

359 In section 28, page 41, line 1, after <constable> insert <or other specified public official>

Robert Brown

360 In section 28, page 41, line 20, at end insert—

<( ) In subsection (3), "specified public official" means a person holding a public office specified in an order made by the Scottish Ministers.>

After section 28

Kenny MacAskill

107 After section 28, insert—

<*Genocide, crimes against humanity and war crimes*

Genocide, crimes against humanity and war crimes: UK residents

(1) The International Criminal Court (Scotland) Act 2001 (asp 13) is amended as follows.

(2) After section 8, insert—

"**8A Meaning of "United Kingdom national" and "United Kingdom resident"**

(1) In this Part—

"United Kingdom national" means—

(a) a British citizen, a British Overseas Territories citizen, a British National (Overseas) or a British Overseas citizen,

(b) a person who under the British Nationality Act 1981 (c.61) is a British subject, or

(c) a British protected person within the meaning of that Act,

"United Kingdom resident" means a person who is resident in the United Kingdom.

(2) To the extent that it would not otherwise be the case, the following individuals are to be treated for the purposes of this Part as being resident in the United Kingdom—

(a) an individual who has indefinite leave to remain in the United Kingdom,

(b) any other individual who has made an application for such leave (whether or not it has been determined) and who is in the United Kingdom,

(c) an individual who has leave to enter or remain in the United Kingdom for the purposes of work or study and who is in the United Kingdom,

(d) an individual who has made an asylum claim, or a human rights claim, which has been granted,

(e) any other individual who has made an asylum claim or a human rights claim (whether or not the claim has been determined) and who is in the United Kingdom,

(f) an individual named in an application for indefinite leave to remain, an asylum claim or a human rights claim as a dependant of the individual making the application or claim if—

(i) the application or claim has been granted, or

(ii) the named individual is in the United Kingdom (whether or not the application or claim has been determined),

(g) an individual who would be liable to removal or deportation from the United Kingdom but cannot be removed or deported because of section 6 of the Human Rights Act 1998 (c.42) or for practical reasons,

(h) an individual—

(i) against whom a decision to make a deportation order under section 5(1) of the Immigration Act 1971 (c.77) by virtue of section 3(5)(a) of that Act (deportation conducive to the public good) has been made,

(ii) who has appealed against the decision to make the order (whether or not the appeal has been determined), and

(iii) who is in the United Kingdom,

(i) an individual who is an illegal entrant within the meaning of section 33(1) of the Immigration Act 1971 or who is liable to removal under section 10 of the Immigration and Asylum Act 1999 (c.33),

(j) an individual who is detained in lawful custody in the United Kingdom.

(3) When determining for the purposes of this Part whether any other individual is resident in the United Kingdom regard is to be had to all relevant considerations including—

(a) the periods during which the individual is, has been or intends to be in the United Kingdom,

(b) the purposes for which the individual is, has been or intends to be in the United Kingdom,

(c) whether the individual has family or other connections to the United Kingdom and the nature of those connections, and

(d) whether the individual has an interest in residential property located in the United Kingdom.

(4) In this section—

“asylum claim” means—

(a) a claim that it would be contrary to the United Kingdom’s obligations under the Refugee Convention for the claimant to be removed from, or required to leave, the United Kingdom,

(b) a claim that the claimant would face a real risk of serious harm if removed from the United Kingdom,

“Convention rights” means the rights identified as Convention rights by section 1 of the Human Rights Act 1998,

“detained in lawful custody” means—

(a) detained in pursuance of a sentence of imprisonment or detention, a sentence of custody for life or a detention and training order,

(b) remanded in or committed to custody by an order of a court,

(c) detained pursuant to an order under section 2 of the Colonial Prisoners Removal Act 1884 (c.31) or a warrant under section 1 or 4A of the Repatriation of Prisoners Act 1984 (c.47),

(d) detained under Part 3 of the Mental Health Act 1983 (c.20) or by virtue of an order under section 5 of the Criminal Procedure (Insanity) Act 1964 (c.84) or section 6 or 14 of the Criminal Appeal Act 1968 (c.19) (hospital orders etc.),

(e) detained by virtue of an order under Part 6 of the Criminal Procedure (Scotland) Act 1995 (c.46) (other than an order under section 60C) or a hospital direction under section 59A of that Act, and includes detention by virtue of the special restrictions set out in Part 10 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) to which a person is subject by virtue of an order under section 59 of the Criminal Procedure (Scotland) Act 1995,

(f) detained under Part 3 of the Mental Health (Northern Ireland) Order 1986 (SI 1986/595) or by virtue of an order under section 11 or 13(5A) of the Criminal Appeal (Northern Ireland) Act 1980 (c. 47),

“human rights claim” means a claim that to remove the claimant from, or to require the claimant to leave, the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Convention) as being incompatible with the person’s Convention rights,

“the Refugee Convention” means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol to the Convention,

“serious harm” has the meaning given by article 15 of Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

(5) In this section, a reference to having leave to enter or remain in the United Kingdom is to be construed in accordance with the Immigration Act 1971.

(6) This section applies in relation to any offence under this Part (whether committed before or after the coming into force of this section).”.

(3) In section 28(1) (interpretation), the definitions of “United Kingdom national” and “United Kingdom resident” are repealed.>

Kenny MacAskill

108 After section 28, insert—

<Genocide, crimes against humanity and war crimes: retrospective application

After section 9 of the International Criminal Court (Scotland) Act 2001 (asp 13) insert—

“9A Retrospective application of certain offences

(1) Section 1 of this Act applies to acts committed on or after 1 January 1991.

(2) But that section does not apply to an act committed before 17 December 2001 which constitutes a crime against humanity or a war crime within article 8.2(b) or (e) unless, at the time the act was committed, it amounted in the circumstances to a criminal offence under international law.

(3) Section 2 of this Act applies to conduct engaged in on or after 1 January 1991.

(4) The references in subsections (1), (3) and (5) of that section to an offence include an act or conduct that would not constitute an offence but for this section.

(5) Any enactment or rule of law relating to an offence ancillary to a relevant offence applies—

(a) to conduct engaged in on or after 1 January 1991, and

(b) even if the act or conduct constituting the relevant offence would not constitute such an offence but for this section.

(6) But section 2 of this Act, and any enactment or rule of law relating to an offence ancillary to a relevant offence, do not apply to—

(a) conduct engaged in before 17 December 2001, or

(b) conduct engaged in on or after that date which was ancillary to an act or conduct that—

(i) was committed or engaged in before that date, and

(ii) would not constitute a relevant offence but for this section,

unless, at the time the conduct was engaged in, it amounted in the circumstances to a criminal offence under international law.

(7) Section 5 of this Act, so far as it has effect in relation to relevant offences, applies—

(a) to failures to exercise control of the kind mentioned in subsection (2) or (3) of that section which occurred on or after 1 January 1991, and

(b) even if the act or conduct constituting the relevant offence would not constitute an offence but for this section.

(8) But section 5 of this Act, so far as it has effect in relation to relevant offences, does not apply to a failure to exercise control of the kind mentioned in subsection (2) or (3) of that section which occurred before 17 December 2001 unless, at the time it occurred, it amounted in the circumstances to a criminal offence under international law.

(9) In this section, "relevant offence" means an offence under section 1 or 2 of this Act or an offence ancillary to such an offence.

9B Provision supplemental to section 9A: modification of penalties

(1) This section applies in relation to—

(a) an offence under section 1 of this Act on account of an act committed before 17 December 2001 constituting genocide, if at the time the act was committed it also amounted to an offence under section 1 of the Genocide Act 1969,

(b) an offence under section 1 of this Act on account of an act committed before 1 September 2001 constituting a war crime, if at the time the act was committed it also amounted to an offence under section 1 of the Geneva Conventions Act 1957 (c.52) (grave breaches of the Conventions),

(c) an offence ancillary to an offence within paragraph (a) or (b) above.

(2) Section 3(5) of this Act has effect in relation to such an offence as if for "30 years" there were substituted "14 years".".>

After section 31

Kenny MacAskill

109 After section 31, insert—

<Offensive weapons etc.

Offensive weapons etc.

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.

(2) In section 47 (prohibition of the carrying of offensive weapons)—

(a) in subsection (1), the words from "without" to "him," are repealed,

(b) after subsection (1), insert—

"(1A) It is a defence for a person charged with an offence under subsection (1) to show that the person had a reasonable excuse or lawful authority for having the weapon with the person in the public place.", and

(c) for subsection (4), substitute—

"(4) In this section—

"offensive weapon" means any article—

(a) made or adapted for use for causing injury to a person, or

(b) intended, by the person having the article, for use for causing injury to a person by—

(i) the person having it, or

(ii) some other person,

"public place" means any place other than—

(a) domestic premises,

(b) school premises (within the meaning of section 49A(6)),

(c) a prison (within the meaning of section 49C(7)),

"domestic premises" means premises occupied as a private dwelling (including any stair, passage, garden, yard, garage, outhouse or other appurtenance of such premises which is not used in common by the occupants of more than one such dwelling).".

(3) In section 49 (offence of having in public place article with blade or point)—

(a) in subsection (4), for the words "prove that he had good reason" substitute "show that the person had a reasonable excuse",

(b) in subsection (5), for "prove" substitute "show", and

(c) for subsection (7), substitute—

"(7) In this section, "public place" has the same meaning as in section 47(4).".

(4) In section 49A (offence of having article with blade or point (or offensive weapon) on school premises)—

(a) in subsection (3), for the words "prove that he had good reason" substitute "show that the person had a reasonable excuse", and

(b) in subsection (4), for "prove" substitute "show".

(5) In section 49C(2) (offence of having offensive weapon etc. in prison), for the words "prove that he had good reason" substitute "show that the person had a reasonable excuse".

(6) In section 50(4) (extension of constable's power to stop, search and arrest without warrant), for "3" substitute "4".>

Johann Lamont

11 After section 31, insert—

<**Offence of having article with blade or point (or offensive weapon) on workplace premises**

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.

(2) After section 49A, insert—

"**49AA Offence of having article with blade or point (or offensive weapon) on workplace premises**

(1) Any person who has an article to which section 49 of this Act applies with him on workplace premises is guilty of an offence.

(2) Any person who has an offensive weapon within the meaning of section 47 of this Act with him on workplace premises is guilty of an offence.

(3) It is a defence for a person charged with an offence under subsection (1) or (2) above to prove that he had good reason or lawful authority for having the article or weapon with him on the premises in question.

(4) Without prejudice to the generality of subsection (3) above, it is a defence for a person charged with an offence under subsection (1) or (2) above to prove that he had the article or weapon in question with him—

(a) for use at work (whether on the premises in question or otherwise),

(b) for religious reasons, or

(c) as part of any national costume.

(5) A person guilty of an offence—

(a) under subsection (1) above is liable—

(i) on summary conviction to imprisonment for a term not exceeding twelve months, or a fine not exceeding the statutory maximum, or both;

(ii) on conviction on indictment, to imprisonment for a term not exceeding four years, or a fine, or both;

(b) under subsection (2) above is liable—

(i) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both;

(ii) on conviction on indictment, to imprisonment for a term not exceeding four years, or a fine, or both.

(6) In this section and section 49B of this Act, "workplace premises" means any premises (other than school premises) used for the purposes of an undertaking carried on by an employer and made available to any employee of the employer as a place of work; and includes—

(a) any part of those premises to which such an employee has access while at work;

(b) any premises (other than a public road or other public place within the meaning of section 49 of this Act)—

(i) which are a means of access to or egress from the place of work; or

(ii) where facilities are provided for use in connection with the place of work.".

(3) In section 49B(1)—

(a) after "school premises" insert "or workplace premises";

(b) after "49A" insert "or 49AA".

(4) In section 50(3), for "or section 49A(1) or (2)" substitute ", 49A(1) or (2) or 49AA(1) or (2)".>

Rhoda Grant

402 After section 31, insert—

<Stalking

Offence of stalking

(1) A person ("A") commits an offence, to be known as the offence of stalking, where A stalks another person ("B").

(2) For the purposes of subsection (1), A stalks B where—

(a) A engages in a course of conduct,

(b) subsection (3) or (4) applies, and

(c) A's course of conduct causes B to suffer—

(i) physical or psychological harm, or

(ii) apprehension or fear for B's own safety or for the safety of any other person.

(3) This subsection applies where A engages in the course of conduct with the intention of causing such harm to B or of arousing such apprehension or fear in B.

(4) This subsection applies where A knows, or ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause such harm or arouse such apprehension or fear.

(5) It is a defence for a person charged with an offence under this section to show that the course of action—

(a) was authorised by virtue of any enactment or rule of law,

(b) was engaged in for the purpose of preventing or detecting crime, or

(c) was, in the particular circumstances, reasonable.

(6) In this section—

"conduct" includes (but is not limited to)—

(a) following B or any other person,

(b) contacting B or any other person by post, telephone, email, text message or any other method,

(c) publishing any statement or other material—

(i) relating or purporting to relate to B or to any other person,

(ii) purporting to originate from B or from any other person,

(d) tracing the use by B or by any other person of the internet, email or any other form of electronic communication,

(e) entering or loitering in the vicinity of—

(i) the place of residence of B or of any other person,

(ii) the place of work or business of B or of any other person,

(iii) any place frequented by B or of any other person,

(f) interfering with any property in the possession of B or of any other person,

(g) giving offensive material to B or to any other person or leaving such material where it may be found by, given to or brought to the attention of B or any other person,

(h) keeping B or any other person under surveillance,

(i) acting in any other way that a reasonable person would expect would arouse apprehension or fear in B for B's own safety or for the safety of any other person, and

"course of conduct" involves conduct on at least two occasions.

(7) A person convicted of the offence of stalking is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or to both.>

Section 34

Kenny MacAskill

361 In section 34, page 49, line 4, leave out <(and any sounds accompanying it)>

Kenny MacAskill

362 In section 34, page 49, line 5, leave out <(and any sounds accompanying them)>

Kenny MacAskill

363 In section 34, page 49, line 7, at end insert—

<and reference may also be had to any sounds accompanying the image or the series of images.>

Kenny MacAskill

364 In section 34, page 49, line 31, after <images> insert—

<(i) any sounds accompanying the series of images,

(ii)>

Robert Brown

365 In section 34, page 50, line 4, leave out from <"excluded> to <work> and insert <image is an "excluded image" if it is all or part of a classified work, and is so excluded from the time that an application for a classification certificate is received by the designated authority>

Kenny MacAskill

366 In section 34, page 50, line 18, after <images> insert—

<(i) any sounds accompanying the series of images,

(ii)>

Kenny MacAskill

367 In section 34, page 50, line 19, leave out <and section 51C>

Kenny MacAskill

368 In section 34, page 50, line 27, leave out <and “extreme pornographic image” are> and insert <is>

Kenny MacAskill

369 In section 34, page 51, line 23, at end insert—

<( ) In this section “image” and “extreme pornographic image” are to be construed in accordance with section 51A.”.>

After section 34

Kenny MacAskill

110 After section 34, insert—

<**Voyeurism: additional forms of conduct**

(1) The Sexual Offences (Scotland) Act 2009 (asp 9) is amended as follows.

(2) In section 9 (voyeurism)—

(a) after subsection (4), insert—

“(4A) The fourth thing is that A—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,

operates equipment beneath B’s clothing with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B’s genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B’s genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,

records an image beneath B’s clothing of B’s genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B’s genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at the image.”,

(b) in subsection (5)—

(i) for “fourth” substitute “sixth”, and

(ii) for paragraph (b), substitute—

“(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).”, and

(c) in subsection (7), for “and (4)” substitute “, (4), (4A) and (4B)”.

(3) In section 10(2) (interpretation of section 9), after “section 9(3)” insert “and (4A)”.

(4) In section 26 (voyeurism towards a young child)—

(a) after subsection (4), insert—

"(4A) The fourth thing is that A operates equipment beneath B's clothing with the intention of enabling A or another person ("C"), for a purpose mentioned in subsection (7), to observe—

(a) B's genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A records an image beneath B's clothing of—

(a) B's genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at the image.",

(b) in subsection (5)—

(i) for "fourth" substitute "sixth", and

(ii) for paragraph (b), substitute—

"(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).",

(c) in subsection (7), for "and (4)" substitute ", (4), (4A) and (4B)", and

(d) in subsection (8)—

(i) after "section 9(3)" insert ", (4A)", and

(ii) after "subsections (3)" insert ", (4A)".

(5) In section 36 (voyeurism towards an older child)—

(a) after subsection (4), insert—

"(4A) The fourth thing is that A operates equipment beneath B's clothing with the intention of enabling A or another person ("C"), for a purpose mentioned in subsection (7), to observe—

(a) B's genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A records an image beneath B's clothing of—

(a) B's genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at the image.",

(b) in subsection (5)—

(i) for "fourth" substitute "sixth", and

(ii) for paragraph (b), substitute—

"(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).",

(c) in subsection (7), for "and (4)" substitute ", (4), (4A) and (4B)", and

(d) in subsection (8)—

(i) after "section 9(3)" insert ", (4A)", and

(ii) after "subsections (3)" insert ", (4A)".>

Kenny MacAskill

111 After section 34, insert—

<**Sexual offences: defences in relation to offences against older children**

In section 39 of the Sexual Offences (Scotland) Act 2009 (asp 9) (defences in relation to offences against older children), in subsection (4)(c), after "section 30(2)(d)" insert "or (e)".>

Kenny MacAskill

370 After section 34, insert—

<**Penalties for offences of brothel-keeping and living on the earnings of prostitution**

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.

(2) In section 11 (trading in prostitution and brothel-keeping)—

(a) in subsection (1), for the words from "liable" to the end substitute "guilty of an offence and liable to the penalties set out in subsection (1A)",

(b) after that subsection insert—

"(1A) A person—

(a) guilty of the offence set out in subsection (1)(a) is liable—

(i) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(ii) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both,

(b) guilty of the offence set out in subsection (1)(b) is liable—

(i) on conviction on indictment, to imprisonment for a term not exceeding two years,

(ii) on summary conviction, to imprisonment for a term not exceeding 12 months.”,

(c) in subsection (4), for “subsection (1)” substitute “subsection (1A)(a)”, and

(d) for subsection (6) substitute—

“(6) A person guilty of an offence under subsection (5) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both.”.

(3) In section 13(9) (living on earnings of another from male prostitution), for paragraphs (a) and (b) substitute—

“(a) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both.”.>

Trish Godman

8 After section 34, insert—

<Offences of engaging in, advertising and facilitating paid-for sexual activities

(1) The Sexual Offences (Scotland) Act 2009 (asp 9) is amended as follows.

(2) After section 11 insert—

“Engaging in, advertising and facilitating paid-for sexual activities

11A Engaging in a paid-for sexual activity

(1) A person (“A”) commits an offence, to be known as the offence of engaging in a paid-for sexual activity, if A knowingly engages in a paid-for sexual activity with another person (“B”).

(2) A sexual activity is paid for where B engages in that activity in exchange for payment.

(3) For the purposes of subsection (2), it is immaterial whether the payment is made—

(a) by A or by another person, or

(b) to B or to another person on B’s behalf.

11B Advertising paid-for sexual activities

A person commits an offence, to be known as the offence of advertising paid-for sexual activities, if that person knowingly advertises, by any means, the availability of sexual activities that can be engaged in for payment.

11C Facilitating engagement in a paid-for sexual activity

(1) A person (“A”) commits an offence, to be known as the offence of facilitating engagement in a paid-for sexual activity, if A knowingly facilitates the engagement of another person (“B”) in a paid-for sexual activity with another person (“C”).

(2) A sexual activity is paid for where C engages in that activity in exchange for payment.

(3) For the purposes of subsection (2), it is immaterial whether the payment is made—

(a) by A, by B or by another person, or

(b) to C or to another person on C's behalf.

(4) For the purposes of subsection (1), facilitating the engagement by B in a paid-for sexual activity includes (but is not limited to)—

(a) arranging B's engagement in the activity,

(b) making payment to C or to another person on C's behalf,

(c) making available premises in which the activity takes place, or

(d) transporting B, or arranging transport for B, to where the activity takes place.

11D Arrest for offences under sections 11A to 11C

(1) Where a constable reasonably believes that a person is committing or has committed an offence under section 11A, 11B or 11C, the constable may arrest the person without warrant.

(2) Subsection (1) is without prejudice to any power of arrest conferred by law apart from that subsection.".

(3) In the table in schedule 2 insert at the appropriate place—

"Engaging in a paid-for sexual activity	Section 11A	A fine not exceeding level 3 on the standard scale	
Advertising paid-for sexual activities	Section 11B	A fine not exceeding level 3 on the standard scale	
Facilitating engagement in a paid-for sexual activity	Section 11C	A fine not exceeding level 3 on the standard scale".>	

Margo MacDonald

8A As an amendment to amendment 8, line 15, at end insert—

<11AA Causing alarm etc. by engaging in a paid-for sexual activity

In the circumstances described in section 11A(1), A and B commit an offence, to be known as the offence of causing alarm etc. by engaging in a paid-for sexual activity, if their engaging in the activity that constitutes the offence under that section causes alarm to another person ("C"), endangers C or creates a nuisance for C.>

Margo MacDonald

8B As an amendment to amendment 8, line 15, at end insert—

<**11AB Profiting from coerced paid-for sexual activities**

A person commits an offence, to be known as the offence of profiting from coerced paid-for sexual activities, if that person knowingly secures a direct benefit (whether financial or otherwise) from a paid-for sexual activity involving a person whose engagement in that activity has been secured as a result of coercion.>

Margo MacDonald

8C As an amendment to amendment 8, line 40, after <11A,> insert <11AA, 11AB>

Margo MacDonald

8D As an amendment to amendment 8, line 48, at end insert—

<"Causing alarm etc. by engaging in a paid-for sexual activity	Section 11AA	A fine not exceeding level 3 on the standard scale	
Profiting from coerced paid-for sexual activities	Section 11AB	A fine not exceeding level 3 on the standard scale>	

Nigel Don

461 After section 34, insert—

<**Offence of paying for sexual services of a prostitute subjected to force etc.**

(1) The Sexual Offences (Scotland) Act 2009 (asp 9) is amended as follows.

(2) After section 11 insert—

"*Paying for sexual services of a prostitute subjected to force etc.*

11E Paying for sexual services of a prostitute subjected to force etc.

(1) A person ("A") commits an offence, to be known as the offence of paying for sexual services of a coerced prostitute, if—

(a) A makes or promises payment for the sexual services of a prostitute ("B"),

(b) a third person ("C") has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and

(c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).

(2) The following are irrelevant—

(a) where in the world the sexual services are to be provided and whether those services are provided,

(b) whether A is, or ought to be, aware that C has engaged in exploitative conduct.

(3) C engages in exploitative conduct if—

(a) C uses force, threats (whether or not relating to violence) or any other form of coercion, or

(b) C practises any form of deception.”.

(3) In the table in schedule 2 insert at the appropriate place—

“Paying for sexual services of a coerced prostitute	Section 11E	A fine not exceeding level 3 on the standard scale”.>	

Section 35

Kenny MacAskill

371 In section 35, page 51, line 30, at end insert—

<( ) after subsection (1) insert—

“(1A) A person to whom subsection (6) applies commits an offence if the person arranges or facilitates—

(a) the arrival in or the entry into a country (other than the United Kingdom), or travel there (whether or not following such arrival or entry) by, an individual and—

(i) intends to exercise control over prostitution by the individual or to involve the individual in the making or production of obscene or indecent material; or

(ii) believes that another person is likely to exercise such control or so to involve the individual,

there or elsewhere; or

(b) the departure from a country (other than the United Kingdom) of an individual and—

(i) intends to exercise such control or so to involve the individual; or

(ii) believes that another person is likely to exercise such control or so to involve the individual,

outwith the country.”,>

Kenny MacAskill

372 In section 35, page 51, line 30, at end insert—

<( ) in subsection (2), for “subsection (1)” substitute “subsections (1) and (1A)”,>

Kenny MacAskill

373 In section 35, page 51, line 32, leave out <Subsection (1) applies> and insert <Subsections (1) and (1A) apply>

Kenny MacAskill

374 In section 35, page 51, line 34, leave out <proceeded against, indicted> and insert <prosecuted>

Kenny MacAskill

375 In section 35, page 51, line 40, after <on> insert <the>

Kenny MacAskill

376 In section 35, page 52, leave out line 1 and insert—

<( ) in subsection (6)—

(i) the word "and" immediately following paragraph (e) is repealed, and

(ii) after paragraph (f) insert—

"(g) a person who at the time of the offence was habitually resident in Scotland, and

(h) a body incorporated under the law of a part of the United Kingdom.".>

Kenny MacAskill

377 In section 35, page 52, line 2, leave out subsection (2) and insert—

<( ) In section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation)—

(a) in subsection (1), after "arrival in" insert "or the entry into",

(b) in subsection (2), the words from "in" where it first occurs to "committed" are repealed,

(c) after subsection (3) insert—

"(3A) A person to whom section 5(2) applies commits an offence if—

(a) in relation to an individual (the "passenger"), he arranges or facilitates—

(i) the arrival in or the entry into a country other than the United Kingdom of the passenger,

(ii) travel by the passenger within a country other than the United Kingdom,

(iii) the departure of the passenger from a country other than the United Kingdom, and

(b) he—

(i) intends to exploit the passenger, or

(ii) believes that another person is likely to exploit the passenger,

(wherever the exploitation is to occur).",

(d) in subsection (4)—

(i) in paragraph (b), the words from "as a result" to "Act 2004," become sub-paragraph (i),

(ii) immediately following that sub-paragraph insert "or—

(ii) which, were it done in Scotland, would constitute an offence mentioned in sub-paragraph (i),",

(iii) after paragraph (b) insert—

"(ba) he is encouraged, required or expected to do anything in connection with the removal of any part of a human body—

(i) as a result of which he or another person would commit an offence under the law of Scotland (other than an offence mentioned in paragraph (b)(i)), or

(ii) which, were it done in Scotland, would constitute such an offence,", and

(iv) for paragraph (d) substitute—

"(d) another person uses or attempts to use him for any purpose within sub-paragraph (i), (ii) or (iii) of paragraph (c), having chosen him for that purpose on the grounds that—

(i) he is mentally or physically ill or disabled, he is young, or he has a family relationship with a person, and

(ii) a person without the illness, disability, youth or family relationship would be likely to refuse to be used for that purpose.".

( ) In section 5 of that Act—

(a) in subsection (1), for the words from "(3)" to the end substitute "(3A) of section 4 apply to anything done in or outwith the United Kingdom.",

(b) in subsection (2)—

(i) the word "and" immediately following paragraph (e) is repealed, and

(ii) after paragraph (f) insert—

"(g) a person who at the time of the offence was habitually resident in Scotland, and

(h) a body incorporated under the law of a part of the United Kingdom.",

(c) after subsection (2) insert—

"(2A) A person may be prosecuted, tried and punished for any offence to which section 4 applies—

(a) in any sheriff court district in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).

(2B) In subsection (2A), "sheriff court district" is to be construed in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995 (c.46) (interpretation).".>

After section 35

Kenny MacAskill

112 After section 35, insert—

<*Slavery, servitude and forced or compulsory labour*

Slavery, servitude and forced or compulsory labour

(1) A person ("A") commits an offence if—

(a) A holds another person in slavery or servitude and the circumstances are such that A knows or ought to know that the person is so held, or

(b) A requires another person to perform forced or compulsory labour and the circumstances are such that A knows or ought to know that the person is being required to perform such labour.

(2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention (which prohibits a person from being held in slavery or servitude or being required to perform forced or compulsory labour).

(3) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 14 years, or to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

(4) In this section "Human Rights Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms agreed by the Council of Europe at Rome on 4 November 1950.>

After section 36

Kenny MacAskill

113 After section 36, insert—

<**Articles for use in fraud**

(1) A person ("A") commits an offence if A has in A's possession or under A's control an article for use in, or in connection with, the commission of fraud.

(2) A person guilty of an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine, or to both.

(3) A person commits an offence if the person makes, adapts, supplies or offers to supply an article—

(a) knowing that the article is designed or adapted for use in, or in connection with, the commission of fraud, or

(b) intending the article to be used in, or in connection with, the commission of fraud.

(4) A person guilty of an offence under subsection (3) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine, or to both.

(5) In this section, "article" includes a program or data held in electronic form.>

After section 37

Kenny MacAskill

114 After section 37, insert—

<Abolition of offences of sedition and leasing-making

Abolition of offences of sedition and leasing-making

The following offences under the common law of Scotland are abolished—

(a) the offence of sedition,

(b) the offence of leasing-making.>

Kenny MacAskill

378 After section 37, insert—

<Threatening, alarming or distressing behaviour

Threatening, alarming or distressing behaviour

(1) A person ("A") commits an offence if—

(a) A behaves in such a manner that a reasonable person would be likely to—

(i) fear for the safety of any person on account of the behaviour, or

(ii) be alarmed or distressed by the behaviour, and

(b) the condition in subsection (2) is satisfied.

(2) That condition is that A—

(a) intends by the behaviour to cause fear, alarm or distress, or

(b) is reckless as to whether the behaviour would cause fear, alarm or distress.

(3) It does not matter—

(a) whether A's behaviour is directed at anyone in particular,

(b) if it is directed at a particular person, whether that person is aware of the behaviour, or

(c) whether A's behaviour—

(i) actually causes anyone fear, alarm or distress, or

(ii) takes place in public or private.

(4) Subsection (1) applies to—

(a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done,

(b) behaviour consisting of—

(i) a single act, or

(ii) a course of conduct.

(5) The reference in subsection (1)(a)(i) to fear for a person's safety is to fear that the person's life could be endangered or that the person's physical or psychological well-being could be harmed.

(6) A person guilty of an offence under subsection (1) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.>

Bill Aitken

115 After section 37, insert—

<PART

DOUBLE JEOPARDY

Rule against double jeopardy

(1) It is not competent to charge a person who, whether on indictment or complaint (the "original" indictment or complaint), has been convicted or acquitted of an offence—

(a) with an offence of which it would have been competent to convict the person on the original indictment or complaint, or

(b) with an offence which—

(i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and

(ii) is an aggravated way of committing the offence of which the person was convicted or acquitted.

(2) Whether the conviction or acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) Subsection (1) is subject to sections *(Tainted acquittals)*, *(Admission subsequent to acquittal)* and *(New evidence)* and is without prejudice to sections 118(1)(c) (disposal of appeals), 119 (provision where High Court authorises new prosecution), 183(1)(d) (stated case: disposal of appeal) and 185 (authorisation of new prosecution) of the 1995 Act.

(4) In this Part, reference to a person being convicted of an offence is—

(a) to the person being found guilty of the offence, or

(b) to the prosecutor accepting the person's plea of guilty to the offence,

in either case whether or not sentence is passed.>

Bill Aitken

116 After section 37, insert—

<Plea in bar of trial

(1) A person charged with an offence—

(a) whether on indictment or complaint, but

(b) other than by virtue of a section mentioned in section *(Rule against double jeopardy)*(3),

may aver, as a plea in bar of trial, that the offence arises out of the same, or largely the same, acts or omissions as have already given rise to the person being tried for, and convicted or acquitted of, an offence (the "original offence").

(2) Whether the conviction or acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) If the court is satisfied, on a balance of probabilities, as to the truth of the person's averment, the plea is to be sustained unless the prosecutor persuades the court that there is some special reason why the case should proceed to trial (as for example, but without prejudice to the generality of this subsection, where trials were separated on the application of, or with the consent of, the person).

(4) Subsections (1) to (3) apply irrespective of where the person was tried; but this subsection is subject to subsection (5).

(5) Where the person was tried outwith the United Kingdom the court may disregard a conviction or acquittal if—

(a) it determines that it is in the interests of justice to do so, and

(b) to permit the case to proceed to trial would not be inconsistent with the obligations of the United Kingdom under Article 54 of the Schengen Convention (that is to say, of the Convention of 19th June 1990 implementing the Schengen Agreement of 14th June 1985).

(6) In making a determination in pursuance of subsection (5)(a), the court is in particular to have regard to—

(a) whether the purpose of bringing the person to trial in the foreign country appears to have been to assist the person to evade justice,

(b) whether the proceedings in the foreign country appear to have been conducted—

(i) independently and impartially, and

(ii) in a manner consistent with dealing justly with the person,

(c) whether such sentence (or other disposal) as might be imposed in the foreign country for an offence of the kind for which the person has been acquitted or convicted is commensurate with any that might be imposed for an offence of that kind in Scotland, and

(d) the extent to which the acts or omissions can be considered to have occurred in, respectively—

(i) Scotland,

(ii) the foreign country.>

Bill Aitken

117 After section 37, insert—

<Eventual death of injured person

(1) This section applies where—

(a) a person ("A") sustains physical injuries,

(b) another person ("B") is, whether on indictment or complaint, acquitted or convicted of an offence ("offence Y") which comprises the infliction of the injuries, and

(c) after the acquittal or conviction A dies, ostensibly from the injuries.

(2) Whether the conviction or acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) If B was acquitted of offence Y (and was not then convicted of a different offence, "offence Z", which comprised the infliction of the injuries) it is not competent to charge B with—

(a) the murder of A,

(b) culpable homicide as respects A, or

(c) any other offence comprising causing A's death.

(4) If B was convicted of offence Y (or of offence Z), then—

(a) for the purposes of sections *(Rule against double jeopardy)* and *(Plea in bar of trial)* the offences mentioned in paragraphs (a) to (c) of subsection (3) are not to be treated as offences arising out of the same, or largely the same, acts or omissions as the offence of which B was convicted, but

(b) on B being acquitted or convicted of any of the offences mentioned in those paragraphs, the court may, on the motion of B and after hearing the parties on that motion, quash B's conviction of offence Y (or offence Z) where satisfied that it is appropriate to do so.

(5) A party may appeal to the High Court against the granting or refusing of a motion under subsection (4)(b).>

Bill Aitken

118 After section 37, insert—

<Tainted acquittals

(1) A person who, whether on indictment or complaint (the "original" indictment or complaint), has been acquitted of an offence (the "original offence") may, provided that the conditions mentioned in subsection (3) are satisfied, be charged with, and prosecuted anew for—

(a) the original offence, or

(b) an offence arising out of the same, or largely the same, acts or omissions as gave rise to the original offence.

(2) Whether the acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) The conditions are—

(a) either—

(i) that the acquitted person or some other person has (or the acquitted person and some other person have) been convicted of an offence against the course of justice, being an offence in connection with proceedings on the original indictment or complaint, or

(ii) that on the application of the Lord Advocate the High Court has concluded on a balance of probabilities that the acquitted person or some other person has (or the acquitted person and some other person have) committed such an offence against the course of justice, and

(b) that on the application of the Lord Advocate the High Court has—

(i) set aside the acquittal, and

(ii) granted authority to bring, by virtue of this section, a new prosecution.

(4) On making an application under subsection (3), the Lord Advocate is to send a copy of that application to the acquitted person.

(5) The acquitted person is entitled to appear or to be represented at any hearing of the application.

(6) For the purpose of—

(a) hearing and coming to a conclusion on any application under subsection (3)(a)(ii), or

(b) hearing and determining any application under subsection (3)(b),

three of the Lords Commissioners of Justiciary are a quorum of the Court (the application being determined by majority vote of those sitting).

(7) The decision of the Court on the application is final.

(8) Subsection (7) is without prejudice to any power of those sitting to remit the application to a differently constituted sitting of the Court (as for example to the whole Court sitting together).

(9) The Court may appoint counsel to act as *amicus curiae* at the hearing in question.

(10) Subsections (11) and (12) apply in a case where (or as the case may be where the Court, in coming to a conclusion under subsection (3)(a)(ii), is satisfied on a balance of probabilities that) the offence against the course of justice consisted of or included interference with a juror or with the trial judge.

(11) An acquittal is to be set aside under subsection (3)(b)(i) if the Court is unable to conclude that the interference had no effect on the outcome of the proceedings on the original indictment or complaint.

(12) But it is not to be so set aside if in the course of the trial, the interference (being interference with a juror and not with the trial judge) became known to the trial judge, who then allowed the trial to proceed to its conclusion.

(13) Subsection (14) applies in a case other than is mentioned in subsection (10).

(14) An acquittal is not to be set aside under subsection (3)(b)(i) unless the Court is satisfied on a balance of probabilities—

(a) that the offence led—

(i) to the withholding of evidence which, had it been given, would have been, or

(ii) to the giving of false evidence which was,

evidence capable of being regarded as credible and reliable by a reasonable jury, and

(b) that the witholding, or as the case may be the giving, of the evidence was likely to have had a material effect on the outcome of the proceedings on the original indictment or complaint.

(15) And an acquittal is not to be set aside under subsection (3)(b)(i), whether by virtue of subsections (10) to (12) or by virtue of subsections (13) and (14), if the court considers that setting it aside would be contrary to the interests of justice.

(16) In this section, the expression "offence against the course of justice"—

(a) means an offence of perverting, or of attempting to pervert, the course of justice (by whatever means and however the offence is described), and

(b) without prejudice to the generality of paragraph (a), includes—

(i) an offence under section 45(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (aiding, abetting, counselling, procuring or suborning the commission of an offence under section 44 of that Act),

(ii) the crime of subornation of perjury, and

(iii) the crime of bribery.

(17) But the expression does not include—

(a) the crime of perjury, or

(b) an offence under section 44(1) of that Act (statement on oath which is false or which the person making it does not believe to be true).>

Bill Aitken

119 After section 37, insert—

<Further provision as regards prosecution by virtue of section *(Tainted acquittals)*

(1) A prosecution may be brought by virtue of section *(Tainted acquittals)* notwithstanding that any time limit for the commencement of such proceedings has elapsed.

(2) In proceedings in a prosecution brought by virtue of section *(Tainted acquittals)* it is competent for either party to lead evidence which it was competent for that party to lead in the earlier proceedings.

(3) But the indictment or complaint in the prosecution is to identify any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (2) (being matters as respects which it would not have been competent to lead evidence but for that subsection).

(4) On granting authority under section *(Tainted acquittals)*(3)(b)(ii) to bring a new prosecution, the High Court may, after giving the parties an opportunity of being heard, order the detention of the accused person in custody or admit that person to bail.

(5) In—

(a) solemn proceedings, section 65(4)(aa) and (b) and (4A) to (9), and

(b) summary proceedings, section 147,

of the 1995 Act (prevention of delay in trials) applies to an accused person who is detained under subsection (4) as it applies to an accused person detained by virtue of being committed until liberated in due course of law.>

Bill Aitken

120 After section 37, insert—

<Admission subsequent to acquittal

(1) A person who, whether on indictment or complaint (the “original” indictment or complaint), has been acquitted of an offence but subsequently admits to committing it may, provided that the condition mentioned in subsection (3) is satisfied, be charged with, and prosecuted anew for, the offence.

(2) Whether the acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) The condition is that on the application of the Lord Advocate the High Court has—

(a) set aside the acquittal, and

(b) granted authority to bring, by virtue of this section, a new prosecution.

(4) On making an application under subsection (3), the Lord Advocate is to send a copy of that application to the acquitted person.

(5) The acquitted person is entitled to appear or to be represented at any hearing of the application.

(6) For the purpose of hearing and determining the application, three of the Lords Commissioners of Justiciary are a quorum of the Court (the application being determined by majority vote of those sitting).

(7) An acquittal is not to be set aside under subsection (3)(a) unless the Court is satisfied—

(a) on a balance of probabilities, that subsequent to the acquittal the person credibly admitted having committed the offence, and

(b) that evidence is available sufficient to corroborate the admission.

(8) Even if the Court is satisfied as is mentioned in subsection (7), it is not to set aside the acquittal if it considers that to do so would be contrary to the interests of justice.>

Robert Brown

120A As an amendment to amendment 120, line 15, at end insert—

<( ) Before hearing an application under subsection (3), the Court is to order that no publicity be given to the application, or to any document prepared in connection with the application, until—

(a) the application is refused,

(b) a final decision has been made not to bring, or to discontinue, a new prosecution, or

(c) the new trial is concluded.>

Bill Aitken

121 After section 37, insert—

<**Further provision as regards prosecution by virtue of section (*Admission subsequent to acquittal)***

(1) No sentence may be passed on conviction in a new prosecution brought by virtue of section (*Admission subsequent to acquittal)* which could not have been passed under the proceedings on the original indictment or complaint ("the earlier proceedings").

(2) A new prosecution may be brought by virtue of section (*Admission subsequent to acquittal)* notwithstanding that any time limit, other than the time limit mentioned in subsection (3), for the commencement of such proceedings has elapsed.

(3) Proceedings in a new prosecution brought by virtue of section (*Admission subsequent to acquittal)* are to be commenced within 2 months after the date on which authority to bring the prosecution was granted.

(4) In proceedings in a new prosecution brought by virtue of section (*Admission subsequent to acquittal)* it is competent for either party to lead evidence which it was competent for that party to lead in the earlier proceedings.

(5) But the indictment or complaint in the new prosecution is to identify any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (4) (being matters as respects which it would not have been competent to lead evidence but for that subsection).

(6) For the purposes of subsection (3), proceedings are deemed commenced—

  (a) in a case where a warrant to apprehend the accused is granted—

    (i) on the date on which the warrant is executed, or

    (ii) if it is executed without unreasonable delay, on the date on which it is granted, and

  (b) in any other case, on the date on which the accused is cited.

(7) Where the 2 months mentioned in subsection (3) elapse and no new prosecution has been brought under this section, the order under section (*Admission subsequent to acquittal)*(3)(a) setting aside the acquittal has the effect, for all purposes, of an acquittal.

(8) On granting authority under section (*Admission subsequent to acquittal)*(3)(b) to bring a new prosecution, the High Court may, after giving the parties an opportunity of being heard, order the detention of the accused person in custody or admit that person to bail.

(9) In—

  (a) solemn proceedings, section 65(4)(aa) and (b) and (4A) to (9), and

  (b) summary proceedings, section 147,

of the 1995 Act (prevention of delay in trials) applies to an accused person who is detained under subsection (8) as it applies to an accused person detained by virtue of being committed until liberated in due course of law.

(10) It is immaterial, for the purposes of this section, whether the acquittal was before or after the coming into force of the section.>

Bill Aitken

122 After section 37, insert—

<New evidence

(1) A person who has been acquitted, after the coming into force of this section (or on the day on which it comes into force), of an offence may—

(a) if there is new evidence that the person committed the offence, and

(b) the conditions mentioned in subsection (2) are satisfied,

be charged with, and prosecuted for, the offence anew.

(2) The conditions are—

(a) that the person's acquittal was of an offence mentioned in subsection (9), and

(b) that on the application of the Lord Advocate the High Court has—

(i) set aside the acquittal, and

(ii) granted authority to bring, by virtue of this section, a new prosecution.

(3) The setting aside of the acquittal and the granting of such authority may, under subsection (2)(b), be applied for on one occasion only.

(4) On making an application under that subsection, the Lord Advocate is to send a copy of the application to the acquitted person.

(5) The acquitted person is entitled to appear or to be represented at any hearing of the application.

(6) For the purpose of hearing and determining the application under subsection (2)(b), three of the Lords Commissioners of Justiciary are a quorum of the Court (the application being determined by majority vote of those sitting).

(7) An acquittal is not to be set aside under subsection (2)(b)(i) unless the Court is satisfied that—

(a) the case against the accused is strengthened substantially by the new evidence,

(b) the new evidence is evidence which was not available, and could not with the exercise of reasonable diligence have been made available, at the trial in respect of the original offence, and

(c) on the new evidence and the evidence which was led at that trial it is highly likely that a reasonable jury properly instructed would have convicted the person of the offence.

(8) Even if the Court is satisfied as is mentioned in subsection (7), it is not to set aside the acquittal if it considers that to do so would be contrary to the interests of justice.

(9) The offences are—

(a) murder,

(b) at common law, rape, and

(c) an offence under either section 1 (rape) or section 18 (rape of a young child) of the Sexual Offences (Scotland) Act 2009 (asp 9).

(10) The Scottish Ministers may by order amend subsection (9) so as to add further offences to those for the time being mentioned in that subsection.

(11) But subsection (1) does not apply as respects a person's acquittal of an offence so added if the date of acquittal is earlier than that on which the addition is effected.>

Bill Aitken

123 After section 37, insert—

<Further provision as regards prosecution by virtue of section *(New evidence)*

(1) No sentence may be passed on conviction in a new prosecution brought by virtue of section *(New evidence)* which could not have been passed under the indictment on the trial of which the person was acquitted of the offence in question.

(2) A new prosecution may be brought by virtue of section *(New evidence)* notwithstanding that any time limit for the commencement of such proceedings, other than the time limit mentioned in subsection (3), has elapsed.

(3) Proceedings in a new prosecution brought by virtue of section *(New evidence)* are to be commenced within 2 months after the date on which authority to bring the prosecution was granted.

(4) In proceedings in a new prosecution brought by virtue of section *(New evidence)* it is competent for either party to lead evidence which it was competent for that party to lead in the earlier proceedings.

(5) But the indictment in the new prosecution is to identify any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (4) (being matters as respects which it would not have been competent to lead evidence but for that subsection).

(6) For the purposes of subsection (3), proceedings are deemed commenced—

(a) in a case where a warrant to apprehend the accused is granted—

(i) on the date on which the warrant is executed, or

(ii) if it is executed without unreasonable delay, on the date on which it is granted, and

(b) in any other case, on the date on which the accused is cited.

(7) Where the 2 months mentioned in subsection (3) elapse and no new prosecution has been brought under this section, the order under section *(New evidence)*(2)(b)(i) setting aside the acquittal has the effect, for all purposes, of an acquittal.

(8) On granting authority under section *(New evidence)*(2)(b)(ii) to bring a new prosecution, the High Court is, after giving the parties an opportunity of being heard, to order the detention of the accused person in custody or to admit that person to bail.

(9) Subsections (4)(aa) and (b) and (4A) to (9) of section 65 of the 1995 Act (prevention of delay in trials) apply to an accused person who is detained under subsection (8) as they apply to an accused person detained by virtue of being committed until liberated in due course of law.>

Bill Aitken

124 After section 37, insert—

<Nullity of proceedings on previous indictment or complaint

(1) Subsection (3) applies where—

(a) a person has, whether on indictment or complaint—

(i) been charged with, and

(ii) acquitted or convicted of, an offence, and

(b) the conditions mentioned in subsection (4) are satisfied.

(2) Whether the conviction or acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) The person may be charged with, and prosecuted anew for, the offence.

(4) The conditions are that, on the application of the prosecutor and after hearing the parties, the High Court is satisfied—

(a) that the proceedings on the indictment or complaint were a nullity, and

(b) that it would not be contrary to the interests of justice to proceed as mentioned in subsection (3).>

Bill Aitken

125 After section 37, insert—

<Amendment of Schedule 1 to the Contempt of Court Act 1981

(1) Schedule 1 to the Contempt of Court Act 1981 (c.49) (times when proceedings are active for the purposes of section 2 of that Act) is amended as follows.

(2) After paragraph 1 (the expressions "criminal proceedings" and "appellate proceedings"), there is inserted—

"1A Proceedings under sections *(Plea in bar of trial)* to *(Nullity of proceedings on previous indictment or complaint)* of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00) are criminal proceedings (and are not appellate proceedings) for the purposes of this Schedule.".

(3) In paragraph 4 (initial steps of criminal proceedings), at the end there is added—

"(f) the making of an application under section *(Tainted acquittals)*(3)(a)(ii) or (b) (tainted acquittals), *(Admission subsequent to acquittal)*(3) (admission subsequent to acquittal) or *(New evidence)*(2)(b) (new evidence) of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00).".

(4) In paragraph 5 (conclusion of criminal proceedings), at the end there is added—

"(d) where the initial steps of the proceedings are as mentioned in paragraph 4(f)—

(i) by refusal of the application,

(ii) if the application is granted and within 2 months thereafter a new prosecution is brought, by acquittal, or as the case may be by sentence, in the new prosecution.".

(5) In paragraph 7 (discontinuance of proceedings), at the end there is added—

"(d) where the initial steps of the proceedings are as mentioned in paragraph 4(f) and the application is granted, if no new prosecution is brought within 2 months thereafter.".>

Section 38

Robert Brown

379 In section 38, page 53, line 15, leave out subsection (2) and insert—

<(2) In section 41 (age of criminal responsibility), for "eight" substitute "12".>

Bill Aitken

126 In section 38, page 53, line 17, after <not> insert <normally>

Bill Aitken

127 In section 38, page 53, line 18, after <not> insert <normally>

Richard Baker

389 In section 38, page 53, line 26, at end insert—

<(5) The Scottish Ministers must, as soon as possible after the end of each of the reporting years, lay before the Scottish Parliament and publish a report on the disposal of cases ("relevant cases") involving children who, but for section 41A of the 1995 Act (as inserted by subsection (2)), could have been prosecuted.

(6) For the purposes of subsection (5), the "reporting years" are—

(a) the period of 12 months beginning with the day on which this section comes into force, and

(b) the periods of 12 months beginning with the first and second anniversaries of that day.

(7) A report under subsection (5) must, in particular—

(a) specify the number of relevant cases disposed of during the reporting year,

(b) set out how those cases were disposed of, the costs and other resources involved in those disposals, and what (if any) alternative disposals were considered, and

(c) state what (if any) consideration the Scottish Ministers have given during the year covered by the report to the merits of altering the range of disposals available in such cases.>

Robert Brown

390 In section 38, page 53, line 26, at end insert—

<( ) The Scottish Ministers may not bring subsections (1) to (4) into force until the Children's Hearings (Scotland) Act 2010 (asp 00) is fully in force.>

Section 39

Kenny MacAskill

128 In section 39, page 53, line 32, after <offence> insert <committed by the partnership>

Kenny MacAskill

129 In section 39, page 54, line 9, at end insert—

<( ) In subsection (1), the references to a partner of a partnership include references to a person purporting to act as a partner of the partnership.>

Section 40

Kenny MacAskill

130 In section 40, page 54, line 23, leave out <all reasonable hours> and insert <a reasonable time and in a reasonable place>

Bill Aitken
Supported by: Robert Brown

131 Leave out section 40

After section 40

Margaret Curran

403 After section 40, insert—

<Parole: victims' representation

Victims' representation at Parole Board hearings

(1) Section 17 of the Criminal Justice (Scotland) Act 2003 (asp 7) is amended as follows.

(2) After subsection (1), insert—

"(1A) Representations under subsection (1) may include a request by the victim to be heard (either in person or through a representative) at the relevant hearing of the Parole Board for Scotland.

(1B) In this section, the "relevant hearing" of the Board is the hearing at which the Board is to consider the convicted person's case in order to decide whether to recommend, or direct, that person's release on licence.".

(3) In subsection (3), for "Parole Board for Scotland" substitute "Board".

(4) After subsection (5), insert—

"(5A) Where representations are made under subsection (1) which include a request to be heard at the relevant hearing, the Board must—

(a) give the victim reasonable notice in writing of when and where the hearing is to take place and invite the victim to—

(i) attend the hearing, with or without an accompanying person, in order to be heard in person; or

(ii) send a representative to the hearing to be heard on the victim's behalf;

(b) in so doing, give the victim appropriate information about the hearing and how it is likely to be conducted including, in particular—

(i) information about any parts of the hearing from which the victim and any accompanying person are, or the victim's representative is, to be excluded, and

(ii) any limits on their participation during the other parts of the hearing;

(c) at the hearing, afford the victim (or the victim's representative) a reasonable opportunity to be heard.

(5B) A victim's representative may only be a member of the victim's immediate family or a friend of the victim.

(5C) In reaching its decision at or after the hearing, the Board must take account of—

(a) any written representations made under subsection (1); and

(b) anything said by the victim (or the victim's representative) at the hearing.".>

After section 41

Kenny MacAskill

420 After section 41, insert—

<*Grant of warrants*

Grant of warrants for execution by constables and police members of SCDEA

(1) A sheriff or justice of the peace does not lack power or jurisdiction to grant a warrant for execution by a person mentioned in subsection (2) solely because the person is not a constable of a police force for a police area lying wholly or partly in the sheriff's or justice's sheriffdom.

(2) The persons referred to in subsection (1) are—

(a) a constable,

(b) a police member of the Scottish Crime and Drug Enforcement Agency.>

After section 43

Kenny MacAskill

132 After section 43, insert—

<**Bail conditions: remote monitoring requirements**

Sections 24A to 24E of the 1995 Act (bail conditions: remote monitoring) are repealed.>

Section 44

Kenny MacAskill

421 In section 44, page 58, line 5, at end insert—

<( ) The title of section 287 becomes "Demission from office of Lord Advocate and Solicitor General for Scotland".>

Kenny MacAskill

422 In section 44, page 58, line 6, leave out from <subsection> to <Advocate)> and insert <that section>

Kenny MacAskill

423 In section 44, page 58, line 11, at end insert <and

( ) after "successor" insert "or the Solicitor General",>

Kenny MacAskill

424 In section 44, page 58, leave out line 13 and insert—

<( ) for "in name of" substitute "at the instance of Her Majesty's Advocate or", and>

Kenny MacAskill

425 In section 44, page 58, line 17, at end insert—

<(2AA) All indictments which have been raised at the instance of the Solicitor General shall remain effective notwithstanding the holder of the office of Solicitor General subsequently having died or demitted office and may be taken up and proceeded with by his successor or the Lord Advocate.>

Kenny MacAskill

426 In section 44, page 58, line 19, leave out from <as> to end of line 20

Kenny MacAskill

427 In section 44, page 58, line 24, at end insert—

<( ) in paragraph (a), after "subsection (1)" insert "or (2AA)",>

After section 46

Kenny MacAskill

428 After section 46, insert—

<*Dockets and charges in sex cases*

Dockets and charges in sex cases

After section 288B of the 1995 Act insert—

"*Dockets and charges in sex cases*

288BA Dockets for charges of sexual offences

(1) An indictment or a complaint may include a docket which specifies any act or omission that is connected with a sexual offence charged in the indictment or complaint.

(2) Here, an act or omission is connected with such an offence charged if it—

(a) is specifiable by way of reference to a sexual offence, and

(b) relates to—

(i) the same event as the offence charged, or

(ii) a series of events of which that offence is also part.

(3) The docket is to be in the form of a note apart from the offence charged.

(4) It does not matter whether the act or omission, if it were instead charged as an offence, could not competently be dealt with by the court (including as particularly constituted) in which the indictment or complaint is proceeding.

(5) Where under subsection (1) a docket is included in an indictment or a complaint, it is to be presumed that—

(a) the accused person has been given fair notice of the prosecutor's intention to lead evidence of the act or omission specified in the docket, and

(b) evidence of the act or omission is admissible as relevant.

(6) The references in this section to a sexual offence are to—

(a) an offence under the Sexual Offences (Scotland) Act 2009,

(b) any other offence involving a significant sexual element.

288BB Mixed charges for sexual offences

(1) An indictment or a complaint may include a charge that is framed as mentioned in subsection (2) or (3) (or both).

(2) That is, framed so as to comprise (in a combined form) the specification of more than one sexual offence.

(3) That is, framed so as to—

(a) specify, in addition to a sexual offence, any other act or omission, and

(b) do so in any manner except by way of reference to a statutory offence.

(4) Where a charge in an indictment or a complaint is framed as mentioned in subsection (2) or (3) (or both), the charge is to be regarded as being a single yet cumulative charge.

(5) The references in this section to a sexual offence are to an offence under the Sexual Offences (Scotland) Act 2009.".>

After section 51

Kenny MacAskill

429 After section 51, insert—

<Personal conduct of case by accused

Prohibition of personal conduct of case by accused in certain proceedings

(1) The 1995 Act is amended as follows.

(2) In section 288C (prohibition of personal conduct of defence in cases of certain sexual offences)—

(a) for subsection (1) substitute—

"(1) An accused charged with a sexual offence to which this section applies is prohibited from conducting his case in person at, or for the purposes of, any relevant hearing in the course of proceedings (other than proceedings in a JP court) in respect of the offence.

(1A) In subsection (1), "relevant hearing" means a hearing at, or for the purposes of, which a witness is to give evidence.", and

(b) subsection (8) is repealed.

(3) In section 288D (appointment of solicitor by court in cases to which section 288C applies)—

(a) in subsection (1), after "proceedings" insert "(other than proceedings in a JP court)",

(b) in subsection (2)(a), for sub-paragraphs (i) and (ii) substitute—

"(i) the conduct of his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the proceedings; or", and

(c) in subsection (6), for the words from "of the accused's defence" to the end substitute "referred to in subsection (2)(a) above.".

(4) In section 288E (prohibition of personal conduct of defence in certain cases involving child witness under the age of 12)—

(a) subsection (1) is repealed,

(b) in subsection (2)(b), for "the trial" substitute "any hearing in the course of the proceedings",

(c) after subsection (2) insert—

"(2A) The accused is prohibited from conducting his case in person at, or for the purposes of, any hearing at, or for the purposes of, which the child witness is to give evidence.",

(d) in subsection (4), at the end insert "and as if references to a relevant hearing were references to a hearing referred to in subsection (2A) above",

(e) in subsection (6)—

(i) for paragraphs (za) and (a) substitute—

"(a) that his case at, or for the purposes of, any hearing in the course of the proceedings at, or for the purposes of, which the child witness is to give evidence may be conducted only by a lawyer,", and

(ii) in paragraph (c), for the words from "preliminary" to "trial" substitute "hearing", and

(f) subsection (8) is repealed.

(5) In section 288F (power to prohibit personal conduct of defence in other cases involving vulnerable witnesses)—

(a) in subsection (1), for "the trial" substitute "any hearing in the course of the proceedings",

(b) in subsection (2), for the words from "defence" to the end substitute "case in person at any hearing at, or for the purposes of, which the vulnerable witness is to give evidence.",

(c) in subsection (3)(a), for "trial" substitute "hearing",

(d) in subsection (4), for the words from "after" to the end substitute "in relation to a hearing after, as well as before, the hearing has commenced.",

(e) subsection (4A) is repealed,

(f) in subsection (5), at the end insert "and as if references to a relevant hearing were references to any hearing in respect of which an order is made under this section", and

(g) subsection (6) is repealed.>

Section 58

James Kelly

404 In section 58, page 71, line 4, leave out from <18(7A)> to <Act),> in line 5 and insert <18 (prints, samples etc. in criminal investigations)—

( ) in subsection (3), the words "or on the conclusion of such proceedings otherwise than with a conviction or an order under section 246(3) of this Act" are repealed, and

( ) in subsection (7A),>

James Kelly

405 In section 58, page 71, leave out line 6, and insert—

<( ) The title of section 18A becomes "Retention of samples, etc.: persons prosecuted but not convicted etc.", and in that section>

James Kelly

406 In section 58, page 71, line 11, after <(2)> insert—

<( ) the words "in respect of a relevant sexual offence or a relevant violent offence" are repealed, and

( )>

James Kelly

407 In section 58, page 71, line 13, at end insert—

<( ) in subsection (4)(a), for "3" substitute "6",>

James Kelly

408 In section 58, page 71, line 18, at end insert <, and

( ) the definition of "relevant sexual offence" and "relevant violent offence" is repealed.>

After section 58

Stewart Maxwell

418 After section 58, insert—

<**Retention of samples etc. where offer under sections 302 to 303ZA of 1995 Act accepted**

After section 18A of the 1995 Act insert—

“18AA Retention of samples etc. where offer under sections 302 to 303ZA accepted

(1) This section applies to—

(a) relevant physical data taken from or provided by a person under section 18(2), and

(b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A),

where the conditions in subsection (2) are satisfied.

(2) The conditions are—

(a) the relevant physical data or sample was taken from or provided by the person while the person was under arrest or being detained in connection with the offence or offences in relation to which a relevant offer is issued to the person, and

(b) the person—

(i) accepts a relevant offer, or

(ii) in the case of a relevant offer other than one of the type mentioned in paragraph (d) of subsection (3), is deemed to accept a relevant offer.

(3) In this section “relevant offer” means—

(a) a conditional offer under section 302,

(b) a compensation offer under section 302A,

(c) a combined offer under section 302B, or

(d) a work offer under section 303ZA.

(4) Subject to subsections (6) and (7) and section 18AB(9) and (10), the relevant physical data, sample or information must be destroyed no later than the destruction date.

(5) In subsection (4), “destruction date” means—

(a) in relation to a relevant offer that relates only to—

(i) a relevant sexual offence,

(ii) a relevant violent offence, or

(iii) both a relevant sexual offence and a relevant violent offence,

the date of expiry of the period of 3 years beginning with the date on which the relevant offer is issued or such later date as an order under section 18AB(2) or (6) may specify,

(b) in relation to a relevant offer that relates to—

  (i) an offence or offences falling within paragraph (a), and

  (ii) any other offence,

the date of expiry of the period of 3 years beginning with the date on which the relevant offer is issued or such later date as an order under section 18AB(2) or (6) may specify,

(c) in relation to a relevant offer that does not relate to an offence falling within paragraph (a), the date of expiry of the period of 2 years beginning with the date on which the relevant offer is issued.

(6) If the relevant offer is recalled by virtue of section 302C(5) or a decision to uphold it is quashed under section 302C(7)(a), all record of the relevant physical data, sample and information derived from the sample must be destroyed as soon as possible after the recall or, as the case may be, quashing of the decision.

(7) If the relevant offer is set aside by virtue of section 303ZB, all record of the relevant physical data, sample and information derived from the sample must be destroyed as soon as possible after the setting aside.

(8) In this section, “relevant sexual offence” and “relevant violent offence” have, subject to the modification in subsection (9), the same meanings as in section 19A(6) and include any attempt, conspiracy or incitement to commit such an offence.

(9) The modification is that the definition of “relevant sexual offence” in section 19A(6) is to be read as if for paragraph (g) there were substituted—

“(g) public indecency if it is apparent from the relevant offer (as defined in section 18AA(3)) relating to the offence that there was a sexual aspect to the behaviour of the person to whom the relevant offer is issued;”.

18AB Section 18AA: extension of retention period where relevant offer relates to certain sexual or violent offences

(1) This section applies where the destruction date for relevant physical data, a sample or information derived from a sample falls within section 18AA(5)(a) or (b).

(2) On a summary application made by the relevant chief constable within the period of 3 months before the destruction date, the sheriff may, if satisfied that there are reasonable grounds for doing so, make an order amending, or further amending, the destruction date.

(3) An application under subsection (2) may be made to any sheriff—

(a) in whose sheriffdom the appropriate person resides,

(b) in whose sheriffdom that person is believed by the applicant to be, or

(c) to whose sheriffdom the person is believed by the applicant to be intending to come.

(4) An order under subsection (2) must not specify a destruction date more than 2 years later than the previous destruction date.

(5) The decision of the sheriff on an application under subsection (2) may be appealed to the sheriff principal within 21 days of the decision.

(6) If the sheriff principal allows an appeal against the refusal of an application under subsection (2), the sheriff principal may make an order amending, or further amending, the destruction date.

(7) An order under subsection (6) must not specify a destruction date more than 2 years later than the previous destruction date.

(8) The sheriff principal's decision on an appeal under subsection (5) is final.

(9) Section 18AA(4) does not apply where—

(a) an application under subsection (2) has been made but has not been determined,

(b) the period within which an appeal may be brought under subsection (5) against a decision to refuse an application has not elapsed, or

(c) such an appeal has been brought but has not been withdrawn or finally determined.

(10) Where—

(a) the period within which an appeal referred to in subsection (9)(b) may be brought has elapsed without such an appeal being brought,

(b) such an appeal is brought and is withdrawn or finally determined against the appellant, or

(c) an appeal brought under subsection (5) against a decision to grant an application is determined in favour of the appellant,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the period has elapsed, or, as the case may be, the appeal is withdrawn or determined.

(11) In this section—

"appropriate person" means the person from whom the relevant physical data was taken or by whom it was provided or from whom the sample was taken,

"destruction date" has the meaning given by section 18AA(5),

"the relevant chief constable" has the same meaning as in subsection (11) of section 18A, with the modification that references to the person referred to in subsection (2) of that section are references to the appropriate person.".>

Stewart Maxwell

419 After section 58, insert—

<**Retention of samples etc. taken or provided in connection with certain fixed penalty offences**

After section 18A of the 1995 Act insert—

"18AC Retention of samples etc. taken or provided in connection with certain fixed penalty offences

(1) This section applies to—

(a) relevant physical data taken from or provided by a person under section 18(2), and

(b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A),

where the conditions in subsection (2) are satisfied.

(2) The conditions are—

(a) the person was arrested or detained in connection with a fixed penalty offence,

(b) the relevant physical data or sample was taken from or provided by the person while the person was under arrest or being detained in connection with that offence,

(c) after the relevant physical data or sample was taken from or provided by the person, a constable gave the person under section 129(1) of the 2004 Act—

(i) a fixed penalty notice in respect of that offence (the "main FPN"), or

(ii) the main FPN and one or more other fixed penalty notices in respect of fixed penalty offences arising out of the same circumstances as the offence to which the main FPN relates, and

(d) the person, in relation to the main FPN and any other fixed penalty notice of the type mentioned in paragraph (c)(ii)—

(i) pays the fixed penalty, or

(ii) pays any sum that the person is liable to pay by virtue of section 131(5) of the 2004 Act.

(3) Subject to subsections (4) and (5), the relevant physical data, sample or information derived from a sample must be destroyed before the end of the period of 2 years beginning with—

(a) where subsection (2)(c)(i) applies, the day on which the main FPN is given to the person,

(b) where subsection (2)(c)(ii) applies and—

(i) the main FPN and any other fixed penalty notice are given to the person on the same day, that day,

(ii) the main FPN and any other fixed penalty notice are given to the person on different days, the later day.

(4) Where—

(a) subsection (2)(c)(i) applies, and

(b) the main FPN is revoked under section 133(1) of the 2004 Act,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the revocation.

(5) Where—

(a) subsection (2)(c)(ii) applies, and

(b) the main FPN and any other fixed penalty notices are revoked under section 133(1) of the 2004 Act,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the revocations.

(6) In this section—

"the 2004 Act" means the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8),

"fixed penalty notice" has the meaning given by section 129(2) of the 2004 Act,

"fixed penalty offence" has the meaning given by section 128(1) of the 2004 Act.".>

Section 59

James Kelly

409 In section 59, page 72, line 19, leave out from <such> to second <offence> and insert—

<( ) an offence of assault, categorised by the Principal Reporter as grave, or

( ) such—

(i) other relevant violent offence, or

(ii) relevant sexual offence,>

James Kelly

410 In section 59, page 72, leave out lines 21 to 36

Robert Brown

380 In section 59, page 72, leave out lines 21 and 22, and insert—

<(7) Where this section applies, the sheriff may, on summary application by the relevant chief constable, make an order that, subject to section 18C(6) and (7), the relevant physical data, sample or the information must be destroyed no later than the destruction date.

(7A) The sheriff may only make the order referred to in subsection (7) if satisfied that the child continues to pose a risk to public safety and that retention of the relevant physical data, sample or information until the destruction date is justified by that risk.>

Robert Brown

381 In section 59, page 72, line 40, at end insert—

<"relevant chief constable" has the same meaning as in section 18A(11), with the modification that references to the person referred to in subsection (2) of that section are references to the child referred to in subsection (1);>

James Kelly

411 In section 59, page 73, leave out lines 4 to 40

Robert Brown

382 In section 59, page 73, line 37, leave out from <18A(11)> to end of line 40 and insert <18B(10)>

James Kelly

412 In section 59, page 74, line 2, leave out from <after> to end of line and insert <at beginning insert "Except where section 18B applies and">

Section 61

Kenny MacAskill

133 In section 61, page 76, line 6, after <reasons> insert <for making the reference>

Kenny MacAskill

134 In section 61, page 76, line 9, leave out from <additional> to end of line 10 and insert <the appellant to found the appeal on additional grounds>

Kenny MacAskill

135 In section 61, page 76, line 19, leave out <additional grounds to be raised> and insert <the appeal to be founded on additional grounds>

Before section 62

Kenny MacAskill

430 Before section 62, insert—

<**Admissibility of prior statements of witnesses: abolition of competence test**

(1) This section applies in relation to a prior statement made by a witness before the commencement of section 24 of the Vulnerable Witnesses (Scotland) Act 2004 (asp 3) ("the 2004 Act") (which abolishes the competence test for witnesses in criminal and civil proceedings).

(2) For the purpose of the application of subsection (2)(c) of section 260 of the 1995 Act (admissibility of prior statement depends on competence of the witness at the time of the statement) in relation to the statement, section 24 of the 2004 Act is taken to have been in force at the time the statement was made.

(3) In this section, "prior statement" has the meaning it has in section 260 of the 1995 Act.>

Section 62

Robert Brown

383 In section 62, page 77, line 1, after <may> insert <, if satisfied that there is good reason to do so,>

After section 64

Kenny MacAskill

384 After section 64, insert—

<Child witnesses in proceedings for people trafficking offences

In section 271 of the 1995 Act (vulnerable witnesses: main definitions)—

(a) in subsection (1)(a), for "age of 16" substitute "relevant age", and

(b) after subsection (1), insert—

"(1A) In subsection (1)(a), "the relevant age" means—

(a) in the case of a person who is giving or is to give evidence in proceedings for an offence under section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (trafficking in prostitution etc.) or section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation), the age of 18, and

(b) in any other case, the age of 16.".>

Section 66

Kenny MacAskill

431 In section 66, page 80, line 13, leave out from <other> to end of line 16 and insert <the jury>

Kenny MacAskill

432 In section 66, page 80, line 18, leave out <any persons within paragraph (a)(i) to (iii)> and insert <the judge or the jury>

Kenny MacAskill

433 In section 66, page 81, line 6, leave out <material> and insert <information>

Kenny MacAskill

434 In section 66, page 81, line 8, leave out <may> and insert <must>

Kenny MacAskill

435 In section 66, page 81, line 12, leave out <material"> and insert <information">

Kenny MacAskill

436 In section 66, page 82, line 16, leave out <the weight of>

Kenny MacAskill

437 In section 66, page 82, line 18, leave out <the sole or decisive evidence> and insert <material in>

Kenny MacAskill

438 In section 66, page 82, line 36, leave out <warning> and insert <direction>

Kenny MacAskill

439 In section 66, page 83, leave out lines 33 to 36

Schedule 3

Kenny MacAskill

440 In schedule 3, page 148, line 28, leave out <treat the conviction as unsafe> and insert <quash the conviction>

Kenny MacAskill

441 In schedule 3, page 148, line 31, leave out <treat the conviction as unsafe> and insert <quash the conviction>

After section 67

Kenny MacAskill

442 After section 67, insert—

<**European evidence warrants**

(1) The Scottish Ministers may by order make provision for the purposes of and in connection with implementing any obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).

(2) The provision may, in particular, confer functions—

(a) on the Scottish Ministers,

(b) on the Lord Advocate,

(c) on other persons.

(3) An order under subsection (1) may modify any enactment.

(4) An order under subsection (1) may contain provision creating offences and a person who commits such an offence is liable to such penalties, not exceeding those mentioned in subsection (5), as are provided for in the order.

(5) Those penalties are—

(a) on conviction on indictment, imprisonment for a period not exceeding 2 years, or a fine, or both,

(b) on summary conviction, imprisonment for a period not exceeding 12 months, or a fine not exceeding the statutory maximum, or both.

(6) In this section, the "Framework Decision" means Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.>

Before section 68

Kenny MacAskill

443 Before section 68, insert—

<**Lists of jurors**

(1) The 1995 Act is amended as follows.

(2) In section 84 (juries: returns of jurors and preparation of lists)—

(a) in subsection (3), for "list" substitute "lists",

(b) for subsection (4) substitute—

"(4) For the purpose of a trial in the sheriff court, the sheriff principal must furnish the clerk of court with a list of names, containing the number of persons required, from lists of potential jurors of—

(a) the sheriff court district in which the trial is to be held (the "local district"), and

(b) if the sheriff principal considers it appropriate, any other sheriff court district or districts in the sheriffdom in which the trial is to be held ("other districts").

(4A) Where the sheriff principal furnishes a list containing names of potential jurors of other districts, the sheriff principal may determine the proportion as between the local district and the other districts in which jurors are to be summoned.",

(c) in subsection (5), for "list", in both places where it occurs, substitute "lists", and

(d) subsection (7) is repealed.

(3) In section 85(4) (juries: citation and attendance of jurors)—

(a) for the words from the beginning to "shall", in the first place where it occurs, substitute "The sheriff clerk of—

(a) the sheriffdom in which the High Court is to sit, or

(b) the sheriff court district in which a trial in the sheriff court is to be held,

shall", and

(b) the word "such", in the first place where it occurs, is repealed.>

Section 68

David McLetchie

415 In section 68, page 86, line 14, leave out from <for> to <relevant"> and insert <at beginning insert "subject to subsection (1A),">

David McLetchie

416 In section 68, page 86, leave out lines 17 to 19 and insert—

<"(1A) In relation to criminal proceedings, a person is qualified and liable to serve as a juror despite being over 65 years of age.">

Section 69

David McLetchie

417 In section 69, page 86, line 30, at end insert <and

( ) persons who have attained the age of 71;>

Section 70

Kenny MacAskill

136 In section 70, page 89, line 34, leave out <and Wales>

Kenny MacAskill

137 In section 70, page 90, line 21, leave out from <body> to end of line 23 and insert <health and social care body mentioned in paragraphs (a) to (e) of section 1(5) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 (c.1).>

Section 72

Kenny MacAskill

138 In section 72, page 94, line 29, leave out <Law> and insert <Justice>

Trish Godman

9 In section 72, page 94, line 39, at end insert <, other than an offence under section 11A (engaging in a paid-for sexual activity) or 11B (advertising paid-for sexual activities)>

Margo MacDonald

9A As an amendment to amendment 9, line 2, after <activity)> insert <, 11AA (causing alarm etc. by engaging in a paid-for sexual activity)>

Kenny MacAskill

139 In section 72, page 94, line 41, leave out <27> and insert <37>

Kenny MacAskill

140 In section 72, page 94, line 42, leave out <penetrative>

Kenny MacAskill

141 In section 72, page 95, line 1, leave out <31> and insert <42>

Kenny MacAskill

142 In section 72, page 95, line 2, leave out <35> and insert <46>

Kenny MacAskill

143 In section 72, page 95, line 3, at end insert—

<( ) an offence under section (*Slavery, servitude and forced or compulsory labour*) (slavery, servitude and forced or compulsory labour) of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00).>

Kenny MacAskill

144 In section 72, page 95, line 14, leave out <42> and insert <54>

Section 74

Kenny MacAskill

444 In section 74, page 96, line 23, after <station> insert <in Scotland>

Kenny MacAskill

445 In section 74, page 97, line 5, leave out from <a> to end of line and insert—

<(a) a requirement under section 117A(2) (surrender of passports: England and Wales and Northern Ireland), or

(b) a requirement under section 117B(2) (surrender of passports: Scotland).".>

Kenny MacAskill

446 In section 74, page 97, line 5, at end insert—

<(1C) A person may be prosecuted, tried and punished for any offence under subsection (1B)—

(a) in any sheriff court district in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).".>

After section 74

Kenny MacAskill

145 After section 74, insert—

<*Sex offender notification requirements*

Sex offender notification requirements

(1) The Sexual Offences Act 2003 (c.42) is amended as follows.

(2) In section 85 (notification requirements: periodic notification)—

(a) in subsection (1), for "period of one year" substitute "applicable period",

(b) in subsection (3), for "period referred to in subsection (1)" substitute "applicable period", and

(c) after subsection (4) insert—

"(5) In this section, the "applicable period" means—

(a) in any case where subsection (6) applies to the relevant offender, such period not exceeding one year as the Scottish Ministers may prescribe in regulations, and

(b) in any other case, the period of one year.

(6) This subsection applies to the relevant offender if the last home address notified by the offender under section 83(1) or 84(1) or subsection (1) was the address or location of such a place as is mentioned in section 83(7)(b).".

(3) In section 86 (notification requirements: travel outside the United Kingdom), subsection (4) is repealed.

(4) In section 87 (method of notification and related matters), subsection (6) is repealed.

(5) In section 96 (information about release or transfer), subsection (4) is repealed.

(6) In section 138 (orders and regulations)—

(a) in subsection (2), after "84," insert "85,", and

(b) after subsection (3) insert—

"(4) Orders or regulations made by the Scottish Ministers under this Act may—

(a) make different provision for different purposes,

(b) include supplementary, incidental, consequential, transitional, transitory or saving provisions.".>

After section 75

Kenny MacAskill

146 After section 75, insert—

<**Risk of sexual harm orders: spent convictions**

In section 7 of the Rehabilitation of Offenders Act 1974 (c.53) (limitations on rehabilitation under the Act), in subsection (2), after paragraph (bb) insert—

"(bc) in any proceedings on an application under section 2, 4 or 5 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) or in any appeal under section 6 of that Act;".>

After section 79

Kenny MacAskill

447 After section 79, insert—

<*Rehabilitation of offenders*

Spent alternatives to prosecution: Rehabilitation of Offenders Act 1974

(1) The Rehabilitation of Offenders Act 1974 (c.53) is amended as follows.

(2) After section 8A (protection afforded to spent cautions), insert—

“8B Protection afforded to spent alternatives to prosecution: Scotland

(1) For the purposes of this Act, a person has been given an alternative to prosecution in respect of an offence if the person (whether before or after the commencement of this section)—

(a) has been given a warning in respect of the offence by—

(i) a constable in Scotland, or

(ii) a procurator fiscal,

(b) has accepted, or is deemed to have accepted—

(i) a conditional offer issued in respect of the offence under section 302 of the Criminal Procedure (Scotland) Act 1995 (c.46), or

(ii) a compensation offer issued in respect of the offence under section 302A of that Act,

(c) has had a work order made against the person in respect of the offence under section 303ZA of that Act,

(d) has been given a fixed penalty notice in respect of the offence under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8),

(e) has accepted an offer made by a procurator fiscal in respect of the offence to undertake an activity or treatment or to receive services or do any other thing as an alternative to prosecution, or

(f) in respect of an offence under the law of a country or territory outside Scotland, has been given, or has accepted or is deemed to have accepted, anything corresponding to a warning, offer, order or notice falling within paragraphs (a) to (e) under the law of that country or territory.

(2) In this Act, references to an “alternative to prosecution” are to be read in accordance with subsection (1).

(3) Schedule 3 to this Act (protection for spent alternatives to prosecution: Scotland) has effect.”.

(3) After section 9A (unauthorised disclosure of spent cautions), insert—

“9B Unauthorised disclosure of spent alternatives to prosecution: Scotland

(1) In this section—

(a) “official record” means a record that—

(i) contains information about persons given an alternative to prosecution in respect of an offence, and

(ii) is kept for the purposes of its functions by a court, police force, Government department, part of the Scottish Administration or other local or public authority in Scotland,

(b) “relevant information” means information imputing that a named or otherwise identifiable living person has committed, been charged with, prosecuted for or given an alternative to prosecution in respect of an offence which is the subject of an alternative to prosecution which has become spent,

(c) "subject of the information", in relation to relevant information, means the named or otherwise identifiable living person to whom the information relates.

(2) Subsection (3) applies to a person who, in the course of the person's official duties (anywhere in the United Kingdom), has or has had custody of or access to an official record or the information contained in an official record.

(3) The person commits an offence if the person—

(a) obtains relevant information in the course of the person's official duties,

(b) knows or has reasonable cause to suspect that the information is relevant information, and

(c) discloses the information to another person otherwise than in the course of the person's official duties.

(4) Subsection (3) is subject to the terms of an order under subsection (6).

(5) In proceedings for an offence under subsection (3), it is a defence for the accused to show that the disclosure was made—

(a) to the subject of the information or to a person whom the accused reasonably believed to be the subject of the information, or

(b) to another person at the express request of the subject of the information or of a person whom the accused reasonably believed to be the subject of the information.

(6) The Scottish Ministers may by order provide for the disclosure of relevant information derived from an official record to be excepted from the provisions of subsection (3) in cases or classes of cases specified in the order.

(7) A person guilty of an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(8) A person commits an offence if the person obtains relevant information from an official record by means of fraud, dishonesty or bribery.

(9) A person guilty of an offence under subsection (8) is liable on summary conviction to a fine not exceeding level 5 on the standard scale, or to imprisonment for a term not exceeding 6 months, or to both.".

(4) After Schedule 2 (protection for spent convictions) insert—

"SCHEDULE 3

PROTECTION FOR SPENT ALTERNATIVES TO PROSECUTION: SCOTLAND

Preliminary

1 (1) For the purposes of this Act, an alternative to prosecution given to any person (whether before or after the commencement of this Schedule) becomes spent—

(a) in the case of—

(i) a warning referred to in paragraph (a) of subsection (1) of section 8B, or

(ii) a fixed penalty notice referred to in paragraph (d) of that subsection,

at the time the warning or notice is given,

(b) in any other case, at the end of the relevant period.

(2) The relevant period in relation to an alternative to prosecution is the period of 3 months beginning on the day on which the alternative to prosecution is given.

(3) Sub-paragraph (1)(a) is subject to sub-paragraph (5).

(4) Sub-paragraph (2) is subject to sub-paragraph (6).

(5) If a person who is given a fixed penalty notice referred to in section 8B(1)(d) in respect of an offence is subsequently prosecuted and convicted of the offence, the notice—

(a) becomes spent at the end of the rehabilitation period for the offence, and

(b) is to be treated as not having become spent in relation to any period before the end of that rehabilitation period.

(6) If a person who is given an alternative to prosecution (other than one to which sub-paragraph (1)(a) applies) in respect of an offence is subsequently prosecuted and convicted of the offence—

(a) the relevant period in relation to the alternative to prosecution ends at the same time as the rehabilitation period for the offence ends, and

(b) if the conviction occurs after the end of the period referred to sub-paragraph (2), the alternative to prosecution is to be treated as not having become spent in relation to any period before the end of the rehabilitation period for the offence.

2 (1) In this Schedule, "ancillary circumstances", in relation to an alternative to prosecution, means any circumstances of the following—

(a) the offence in respect of which the alternative to prosecution is given or the conduct constituting the offence,

(b) any process preliminary to the alternative to prosecution being given (including consideration by any person of how to deal with the offence and the procedure for giving the alternative to prosecution),

(c) any proceedings for the offence which took place before the alternative to prosecution was given (including anything that happens after that time for the purpose of bringing the proceedings to an end),

(d) any judicial review proceedings relating to the alternative to prosecution,

(e) in the case of an offer referred to in paragraph (e) of subsection (1) of section 8B, anything done or undergone in pursuance of the terms of the offer.

(2) Where an alternative to prosecution is given in respect of two or more offences, references in sub-paragraph (1) to the offence in respect of which the alternative to prosecution is given includes a reference to each of the offences.

(3) In this Schedule, "proceedings before a judicial authority" has the same meaning as in section 4.

Protection for spent alternatives to prosecution and ancillary circumstances

3 (1) A person who is given an alternative to prosecution in respect of an offence is, from the time the alternative to prosecution becomes spent, to be treated for all purposes in law as a person who has not committed, been charged with or prosecuted for, or been given an alternative to prosecution in respect of, the offence.

(2) Despite any enactment or rule of law to the contrary—

(a) where an alternative to prosecution given to a person in respect of an offence has become spent, evidence is not admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Scotland to prove that the person has committed, been charged with or prosecuted for, or been given an alternative to prosecution in respect of, the offence,

(b) a person must not, in any such proceedings, be asked any question relating to the person's past which cannot be answered without acknowledging or referring to an alternative to prosecution that has become spent or any ancillary circumstances, and

(c) if a person is asked such a question in any such proceedings, the person is not required to answer it.

(3) Sub-paragraphs (1) and (2) do not apply in relation to any proceedings—

(a) for the offence in respect of which the alternative to prosecution was given, and

(b) which are not part of the ancillary circumstances.

4 (1) This paragraph applies where a person ("A") is asked a question, otherwise than in proceedings before a judicial authority, seeking information about—

(a) A's or another person's previous conduct or circumstances,

(b) offences previously committed by A or the other person, or

(c) alternatives to prosecution previously given to A or the other person.

(2) The question is to be treated as not relating to alternatives to prosecution that have become spent or to any ancillary circumstances and may be answered accordingly.

(3) A is not to be subjected to any liability or otherwise prejudiced in law because of a failure to acknowledge or disclose an alternative to prosecution that has become spent or any ancillary circumstances in answering the question.

5 (1) An obligation imposed on a person ("A") by a rule of law or by the provisions of an agreement or arrangement to disclose any matter to another person does not extend to requiring A to disclose an alternative to prosecution (whether one given to A or another person) that has become spent or any ancillary circumstances.

(2) An alternative to prosecution that has become spent or any ancillary circumstances, or any failure to disclose an alternative to prosecution that has become spent or any ancillary circumstances, is not a ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing the person in any way in any occupation or employment.

6 The Scottish Ministers may by order—

(a) exclude or modify the application of any of paragraphs (a) to (c) of paragraph 3(2) in relation to questions put in such circumstances as may be specified in the order,

(b) provide for exceptions from any of the provisions of paragraphs 4 and 5 in such cases or classes of case, or in relation to alternatives to prosecution of such descriptions, as may be specified in the order.

7 Paragraphs 3 to 5 do not affect—

(a) the operation of an alternative to prosecution, or

(b) the operation of an enactment by virtue of which, because of an alternative to prosecution, a person is subject to a disqualification, disability, prohibition or other restriction or effect for a period extending beyond the time at which the alternative to prosecution becomes spent.

8 (1) Section 7(2), (3) and (4) apply for the purpose of this Schedule as follows.

(2) Subsection (2), apart from paragraphs (b) and (d), applies to the determination of any issue, and the admission or requirement of evidence, relating to alternatives to prosecution previously given to a person and to ancillary circumstances as it applies to matters relating to a person’s previous convictions and circumstances ancillary thereto.

(3) Subsection (3) applies to evidence of alternatives to prosecution previously given to a person and ancillary circumstances as it applies to evidence of a person’s previous convictions and the circumstances ancillary thereto.

(4) For that purpose, subsection (3) has effect as if—

(a) a reference to subsection (2) or (4) of section 7 were a reference to that subsection as applied by this paragraph, and

(b) the words “or proceedings to which section 8 below applies” were omitted.

(5) Subsection (4) applies for the purpose of excluding the application of paragraph 3.

(6) For that purpose, subsection (4) has effect as if the words “(other than proceedings to which section 8 below applies)” were omitted.

(7) References in the provisions applied by this paragraph to section 4(1) are to be read as references to paragraph 3.”>

Kenny MacAskill

448 After section 79, insert—

<*Medical services in prisons*

Medical services in prisons

(1) For section 3A of the Prisons (Scotland) Act 1989 (c.45) (medical services in prisons) substitute—

“3A Medical officers for prisons

(1) The Scottish Ministers must designate one or more medical officers for each prison.

(2) A person may be designated as a medical officer for a prison only if the person is a registered medical practitioner performing primary medical services for prisoners at the prison under the National Health Service (Scotland) Act 1978 (c.29).

(3) A medical officer has the functions that are conferred on a medical officer for a prison by or under this Act or any other enactment.

(4) A medical officer is not an officer of the prison for the purposes of this Act.

(5) Rules under section 39 of this Act may provide for the governor of a prison to authorise the carrying out by officers of the prison of a search of any person who is in, or is seeking to enter, the prison for the purpose of providing medical services for any prisoner at the prison.

(6) Nothing in rules made by virtue of subsection (5) allows the governor to authorise an officer of a prison to require a person to remove any of the person's clothing other than an outer coat, jacket, headgear, gloves and footwear.".

(2) In section 41D of that Act (unlawful disclosure of information by medical officers), for subsection (1) substitute—

"(1) This section applies to—

(a) a medical officer for a prison, and

(b) any person acting under the supervision of such a medical officer.".

(3) In section 107 of the Criminal Justice and Public Order Act 1994 (c.33) (officers of contracted out prisons), for subsections (6) to (8) substitute—

"(6) The director must designate one or more medical officers for the prison.

(7) A person may be designated as a medical officer for the prison only if the person is a registered medical practitioner performing primary medical services for prisoners at the prison under the National Health Service (Scotland) Act 1978 (c.29).".

(4) In section 110 of that Act (consequential modifications of the 1989 Act etc.)—

(a) in each of subsections (3) and (4), for "3A(6)" substitute "3A(5) and (6)",

(b) subsection (4A) is repealed, and

(c) in subsection (6), for "3A(1) to (5) (medical services)" substitute "3A(1) and (2) (medical officers)".

(5) In section 111(3) of that Act (intervention by the Scottish Ministers), in paragraph (c), after "prison" insert "and the medical officer or officers for the prison".>

Section 80

Angela Constance

413 In section 80, page 100, line 29, after <victims> insert <(including children and young people)>

Section 89

Bill Aitken

147 In section 89, page 106, line 37, leave out <review all the> and insert <disclose to the accused all>

Bill Aitken

148 In section 89, page 106, line 38, leave out from <and> to end of line 14 on page 107

Bill Aitken

149 In section 89, page 107, line 15, leave out <(5)> and insert <(2)>

Section 90

Bill Aitken

150 In section 90, page 107, line 19, leave out <(5) or (6)> and insert <(2)>

Bill Aitken

151 In section 90, page 107, leave out lines 24 to 26 and insert <and

(b) disclose to the accused any such information not already disclosed under section 89(2).>

Bill Aitken

152 In section 90, page 107, line 28, leave out <(5) or (6)> and insert <(2)>

Section 91

Bill Aitken

153 In section 91, page 108, line 5, leave out <89(5) or 90(2)> and insert <89(2) or 90(2)(b)>

Section 92

Bill Aitken

154 In section 92, page 108, line 10, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 93

Bill Aitken

155 In section 93, page 108, line 20, leave out <(5)> and insert <(2)>

Section 94

Bill Aitken
Supported by: Robert Brown

156 Leave out section 94

Section 95

Bill Aitken
Supported by: Robert Brown

157 Leave out section 95

Section 96

Bill Aitken

158 In section 96, page 110, line 28, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 97

Bill Aitken

159 In section 97, page 110, line 36, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 98

Bill Aitken

160 In section 98, page 111, line 5, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 100

Bill Aitken

161 In section 100, page 111, line 36, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 102

Bill Aitken

162 In section 102, page 112, line 26, leave out from <89(5)> to <information> in line 28 and insert <89(2) or 90(2)(b) the prosecutor is required to disclose an item of information to an accused>

Bill Aitken

163 In section 102, page 113, line 5, leave out from <89(5)> to end of line 6 and insert <89(2) or, as the case may be, 90(2)(b)>

Section 106

Bill Aitken

164 In section 106, page 115, line 14, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 111

Bill Aitken

165 In section 111, page 117, line 6, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 116

Bill Aitken

166 In section 116, page 119, line 24, leave out from <89(5)> to end of line 27 and insert <89(2),

(b) section 90(1) and (2),

(c) section 93(2) (where it first occurs),>

Section 117

Angela Constance

24 In section 117, page 120, line 10, at end insert <, or

(b) to determine or control that conduct despite being able to appreciate the nature or wrongfulness of it.>

Kenny MacAskill

167 In section 117, page 120, line 31, leave out <it> and insert <such abnormality>

Section 121

Kenny MacAskill

168 In section 121, page 123, leave out lines 2 and 3 and insert—

<(3A) No order may be made under subsection (1) unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.>

Section 122

Kenny MacAskill

169 In section 122, page 125, line 1, leave out from <5,> to <29> in line 2 and insert <5 and 11>

Section 123

Robert Brown

385 Leave out section 123

After section 124

Kenny MacAskill

170 After section 124, insert—

<**Licensing of street trading: food hygiene certificates**

(1) Section 39 of the 1982 Act (street traders' licences) is amended as follows.

(2) In subsection (4), for the words from "the requirements" to the end substitute "such requirements as the Scottish Ministers may by order made by statutory instrument specify".

(3) After subsection (4), insert—

"(5) An order under subsection (4) may specify requirements by reference to provision contained in another enactment.

(6) A statutory instrument containing an order made under subsection (4) is subject to annulment in pursuance of a resolution of the Scottish Parliament.".>

Section 125

Kenny MacAskill

171 In section 125, page 128, line 24, at beginning insert <In>

Kenny MacAskill

172 In section 125, page 128, line 24, leave out from <is> to <In> in line 26 and insert <, in>

Cathie Craigie

2 In section 125, page 128, line 25, leave out subsection (2)

Cathie Craigie

3 In section 125, page 128, line 26, leave out subsection (3)

Cathie Craigie
Supported by: Robert Brown

4 Leave out section 125

Section 128

Kenny MacAskill

173 In section 128, page 129, line 25, at end insert—

<( ) in paragraph 2(3)(b), after "application" insert "(other than the date and place of birth of any person)",

( ) in paragraph 2(8)(a), after "application" insert "(other than the date and place of birth of any person)",>

Section 129

Kenny MacAskill

174 Leave out section 129

After section 130

Bill Aitken

460 After section 130, insert—

<**Premises licence applications: crime prevention objective**

In section 23(5) of the 2005 Act (grounds for refusal of premises licence application), after paragraph (b), insert—

"(ba) that the appropriate chief constable has made a recommendation under section 21(5) that the application be refused,".>

After section 131

Kenny MacAskill

175* After section 131, insert—

<**Reviews of premises licences: notification of determinations**

(1) The 2005 Act is amended as follows.

(2) After section 39 (Licensing Board's powers on review), insert—

"**39A Notification of determinations**

(1) Where a Licensing Board, at a review hearing—

(a) decides to take one of the steps mentioned in section 39(2), or

(b) decides not to take one of those steps,

the Board must give notice of the decision to each of the persons mentioned in subsection (2).

(2) The persons referred to in subsection (1) are—

(a) the holder of the premises licence, and

(b) where the decision is taken in connection with a premises licence review application, the applicant.

(3) Where subsection (1)(a) applies, the holder of the premises licence may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(4) Where—

(a) subsection (1)(a) or (b) applies, and

(b) the decision is taken in connection with a premises licence review application,

the applicant may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(5) Where the clerk of a Board receives a notice under subsection (3) or (4), the Board must issue a statement of the reasons for the decision to—

(a) the person giving the notice, and

(b) any other person to whom the Board gave notice under subsection (1).

(6) A statement of reasons under subsection (5) must be issued—

(a) by such time, and

(b) in such form and manner,

as may be prescribed.”.>

After section 132

Kenny MacAskill

176 After section 132, insert—

<**Premises licence applications: food hygiene certificates**

(1) Section 50 of the 2005 Act (certificates as to planning, building standards and food hygiene) is amended as follows.

(2) In subsection (7), for the words from “the requirements” to the end substitute “such requirements as the Scottish Ministers may, by order, specify.”.

(3) After subsection (7), insert—

“(7A) An order under subsection (7) may specify requirements by reference to provision contained in another enactment.”.

(4) In subsection (8)(c), for “the 1990 Act” substitute “section 5 of the Food Safety Act 1990 (c.16)”.>

After section 134

Kenny MacAskill

449 After section 134, insert—

<**Extended hours applications: notification period**

(1) Section 69 of the 2005 Act (notification of extended hours application) is amended as follows.

(2) After subsection (3), add—

“(4) Subsections (5) and (6) apply where the Licensing Board is satisfied that the application requires to be dealt with quickly.

(5) Subsections (2) and (3) have effect in relation to the application as if the references to the period of 10 days were references to such shorter period of not less than 24 hours as the Board may determine.

(6) Subsection (3) has effect in relation to the application as if for the word “must” there were substituted “may”.”.>

Section 136

Kenny MacAskill

177 In section 136, page 135, line 3, at end insert—

<“(ba) the notice does not include a recommendation under section 73(4),>

Kenny MacAskill

178 In section 136, page 135, leave out lines 22 to 27 and insert—

<(a) hold a hearing for the purposes of considering and determining the application, and

(b) after having regard to the circumstances in which the personal licence previously held expired or, as the case may be, was surrendered—

(i) refuse the application, or

(ii) grant the application.”.>

After section 137

Kenny MacAskill

179 After section 137, insert—

<**Appeals**

In section 131(2) of the 2005 Act (appeals), the words “by way of stated case, at the instance of the appellant,” are repealed.>

Schedule 4

Kenny MacAskill

180 In schedule 4, page 149, line 11, leave out <22(2) or>

Kenny MacAskill

181 In schedule 4, page 150, leave out lines 18 to 21

Section 140

Kenny MacAskill

182 Leave out section 140

Section 142

Kenny MacAskill

183 Leave out section 142

Section 143

Robert Brown

391 In section 143, page 138, line 30, after <148(1)> insert <other than one bringing into force section 17(1), (2) or (3)>

Kenny MacAskill

184 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*Mutual recognition of judgments and probation decisions*)(1),>

Kenny MacAskill

450 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*European evidence warrants*)(1),>

Bill Aitken

185 In section 143, page 138, line 32, at end insert—

<( ) an order under section *(New evidence)*(10),>

Kenny MacAskill

186 In section 143, page 138, leave out line 33

Kenny MacAskill

187 In section 143, page 138, line 33, at end insert—

<( ) an order under section 146(1) containing provisions which modify any enactment (including this Act), or>

Kenny MacAskill

188 In section 143, page 138, line 34, leave out <146(1) or>

Robert Brown

392 In section 143, page 138, line 35, at end insert <or

( ) an order under section 148(1) bringing into force section 17(1), (2) or (3),>

Schedule 5

Kenny MacAskill

189 In schedule 5, page 151, line 35, at end insert—

<*The Libel Act 1792 (c.60)*

The Libel Act 1792 is repealed.

The Criminal Libel Act 1819 (c.8)

The Criminal Libel Act 1819 is repealed.

The Defamation Act 1952 (c.66)

In the Defamation Act 1952, section 17(2) is repealed.>

Kenny MacAskill

451 In schedule 5, page 152, line 10, at end insert—

<*The Law Officers Act 1944 (c.25)*

In section 2(3) of the Law Officers Act 1944 (Lord Advocate and Solicitor General for Scotland), for the words from "three" to the end substitute "287 of the Criminal Procedure (Scotland) Act 1995 (c.46)".>

Kenny MacAskill

452 In schedule 5, page 152, line 12, leave out from <In> to <1974> and insert—

<( ) The Rehabilitation of Offenders Act 1974 is amended as follows.

( ) In section 1>

Kenny MacAskill

453 In schedule 5, page 152, line 15, at end insert—

<( ) In section 6(6)(bb) (convictions in service disciplinary proceedings), for "the Schedule" substitute "Schedule 1".

( ) The Schedule (service disciplinary proceedings) is renumbered as Schedule 1.>

Kenny MacAskill

190 In schedule 5, page 152, line 24, at end insert—

<*The Incest and Related Offences (Scotland) Act 1986 (c.36)*

The Incest and Related Offences (Scotland) Act 1986 is repealed.>

Kenny MacAskill

191 In schedule 5, page 153, line 3, after <89> insert <, 111>

Kenny MacAskill

192 In schedule 5, page 153, line 3, at end insert—

<*The Trade Union and Labour Relations (Consolidation) Act 1992 (c.52)*

In section 243(4)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 (restriction of offence of conspiracy: Scotland), the words "or sedition" are repealed.>

Kenny MacAskill

193 In schedule 5, page 153, line 12, at end insert—

<*The Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40)*

In Schedule 4 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (minor and consequential amendments), in paragraph 44, sub-paragraph (2) is repealed.>

Kenny MacAskill

386 In schedule 5, page 153, line 35, at end insert—

<In section 11 (certain offences committed outside Scotland)—

(a) in subsection (3), for "proceeded against, indicted" substitute "prosecuted",

(b) in subsection (4), for "dealt with, indicted" substitute "prosecuted".>

Kenny MacAskill

454 In schedule 5, page 153, line 35, at end insert—

<In section 17A (right of person accused of sexual offence to be told about restriction on conduct of defence: arrest), in subsection (1)—

(a) for paragraphs (za) and (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words from "preliminary" to "trial" substitute "hearing".>

Kenny MacAskill

455 In schedule 5, page 154, line 5, at end insert—

<In section 35 (judicial examination), in subsection (4A)—

(a) for paragraphs (za) and (a) substitute—

“(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,”, and

(b) in paragraph (c), for the words from “preliminary” to “trial” substitute “hearing”.>

Kenny MacAskill

456 In schedule 5, page 154, line 42, at end insert—

<In section 66 (service and lodging of indictment etc.), in subsection (6A)(a)—

(a) for sub-paragraphs (zi) and (i) substitute—

“(i) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings (including at any commissioner proceedings) may be conducted only by a lawyer,”, and

(b) in sub-paragraph (iii), for the words from “preliminary” to “trial” substitute “hearing”.

In section 71 (first diet)—

(a) in subsection (A1), for the words “his defence at the trial” substitute “the conduct of his case at any relevant hearing in the course of the proceedings”,

(b) in subsection (B1)(c), for the words “before the trial diet” substitute “in relation to any hearing in the course of the proceedings”,

(c) in subsection (1A)(a), for “the trial” substitute “any hearing in the course of the proceedings”,

(d) in subsection (1B)(a), for “the trial” substitute “any hearing in the course of the proceedings”,

(e) in subsection (5A)(b), for the words “his defence at the trial” substitute “the conduct of his case at any relevant hearing in the course of the proceedings”, and

(f) after subsection (7), insert—

“(7A) In subsections (A1) and (5A)(b), “relevant hearing” means—

(a) in relation to proceedings mentioned in paragraph (a) of subsection (B1), any hearing at, or for the purposes of, which a witness is to give evidence,

(b) in relation to proceedings mentioned in paragraph (b) of that subsection, a hearing referred to in section 288E(2A),

(c) in relation to proceedings mentioned in paragraph (c) of that subsection, a hearing in respect of which an order is made under section 288F.”.>

Kenny MacAskill

457 In schedule 5, page 155, line 3, at end insert—

<In section 79 (preliminary pleas and preliminary issues), in subsection (2)(b)(ii), after “under section” insert “22ZB(3)(b),”.>

Kenny MacAskill

458 In schedule 5, page 155, line 23, at end insert—

<In section 140 (citation), in subsection (2A)—

(a) for paragraph (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings (including at any commissioner proceedings) may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words "his defence at the trial" substitute "the conduct of his case at, or for the purposes of, the hearing".

In section 144 (procedure at first diet), in subsection (3A)—

(a) for paragraph (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words "his defence at the trial" substitute "the conduct of his case at, or for the purposes of, the hearing".

In section 146 (plea of not guilty), in subsection (3A)—

(a) for paragraph (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words "his defence at the trial" substitute "the conduct of his case at, or for the purposes of, the hearing".>

Kenny MacAskill

414 In schedule 5, page 155, line 31, leave out paragraphs 35 to 39

Kenny MacAskill

194 In schedule 5, page 157, line 8, at end insert—

<*The Defamation Act 1996 (c.31)*

In the Defamation Act 1996, section 20(2) is repealed.>

Kenny MacAskill

195 In schedule 5, page 157, line 10, leave out paragraph 44 and insert—

<(1) The Crime and Punishment (Scotland) Act 1997 is amended as follows.

(2) In section 9 (power to specify hospital unit), in subsection (1)(a), for "insane" substitute "found not criminally responsible or unfit for trial".

(3) In section 13 (increase in sentences available to sheriff and district courts), subsection (2) is repealed.

(4) In section 56 (powers of the court on remand or committal of children and young persons), subsection (3) is repealed.>

Kenny MacAskill

196 In schedule 5, page 157, line 28, at end insert—

<*The Legal Deposit Libraries Act 2003 (c.28)*

Section 10 of the Legal Deposit Libraries Act 2003 (exemption from liability: activities in relation to publications) is amended as follows—

(a) in subsection (1), the words ", or subject to any criminal liability," are repealed,

(b) in subsection (2)(a), the words "in the case of liability in damages" are repealed,

(c) in subsection (3), the words ", or subject to any criminal liability," are repealed,

(d) in subsection (4)(a), the words "in the case of liability in damages" are repealed,

(e) in subsection (6)(a), the words ", or subject to any criminal liability," are repealed, and

(f) in subsection (8), the words "and criminal liability" are repealed.>

Kenny MacAskill

459 In schedule 5, page 157, line 36, at end insert—

<*The Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5)*

In the Criminal Procedure (Amendment) (Scotland) Act 2004 the following provisions are repealed—

(a) in section 4 (prohibition on accused conducting case in person in certain cases), subsection (4),

(b) section 17 (bail conditions: remote monitoring of restrictions on movements), and

(c) in the schedule (further modifications of the 1995 Act), paragraph 55.>

Kenny MacAskill

197 In schedule 5, page 158, line 36, at end insert <and

(ii) sub-paragraph (b) is repealed.>

Kenny MacAskill

387 In schedule 5, page 159, line 12, at end insert—

<*The Sexual Offences (Scotland) Act 2009 (asp 9)*

In section 55(7) of the Sexual Offences (Scotland) Act 2009 (offences committed outside the United Kingdom), for "proceeded against, indicted" substitute "prosecuted".>

Kenny MacAskill

198 In schedule 5, page 159, line 14, leave out <134> and insert <156>

Section 148

Robert Brown

393 In section 148, page 139, line 19, after <sections> insert <17(4) and>

Criminal Justice and Licensing (Scotland) Bill

2nd Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- a list of any amendments already debated;
- the text of amendments to be debated on the second day of Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

Assessments to accompany sentencing guidelines
55, 17, 62, 63, 65, 67

Dates on which sentencing guidelines to take effect
56

Relationship with existing power of High Court to issue sentencing guidelines
60, 71, 72, 76

Consultation on draft sentencing guidelines
64, 21, 395, 396

Effect of sentencing guidelines
69

Ministers' power to request Council to prepare or review guidelines
397

Scottish Sentencing Council – power to provide information, advice etc.
73

Consultation on Scottish Sentencing Council's business plan
74

Community payback orders (and requirements under CPOs) to be imposed on offenders
199, 202, 205, 208, 209, 212, 215, 217, 221, 225, 226, 228, 229, 230, 231, 232, 257, 260, 277, 280, 291, 295, 299, 300, 301, 302, 304, 305, 307, 308, 312, 313, 336, 338, 339, 340, 341

Purpose of community payback orders
77

Title of “supervision requirement”
78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97

> *Notes on amendments in this group*
> Amendment 79 is pre-empted by amendment 204 in the group “Conduct requirements”
> Amendment 83 is pre-empted by amendment 236, also in that group
> Amendment 84 is pre-empted by amendment 238 in the group “Supervision requirements”
> Amendments 85, 86 and 87 are pre-empted by amendment 239 in the group “Compensation requirements”
> Amendment 96 is pre-empted by amendment 323 in the group “Community payback orders – revocation, variation and discharge, including where CPO breached”

Compensation requirements
200, 206, 235, 239, 286, 290, 327

> *Notes on amendments in this group*
> Amendment 239 pre-empts amendments 85, 86 and 87 in the previous group

Conduct requirements
201, 204, 207, 236, 275

> *Notes on amendments in this group*
> Amendments 204 and 236 pre-empt, respectively, amendments 79 and 83 in group “Title of “supervision requirement””

Supervision requirements
203, 234, 237, 238

> *Notes on amendments in this group*
> Amendment 238 pre-empts amendment 84 in the group “Title of “supervision requirement””

Community payback orders – definitions
210, 211

Community payback orders – local authority (responsible officer and reports on offenders)
213, 214, 218, 219, 220, 222, 223, 224, 267, 296, 337

Community payback orders – special provision for level 1 unpaid work or other activity requirements
216, 243, 254, 259, 297

Community payback orders – alternative disposals available to court
227

Community payback orders – payment of offenders’ expenses
233, 265

Community payback orders – unpaid work or other activity requirement
240, 241, 398, 242, 244, 245, 246, 247, 248, 249, 250, 251, 255, 256, 261, 262, 263, 264, 266, 285, 288, 289

Community payback orders – fine defaulters
252, 253, 258, 292

Community payback orders – mental health treatment requirements (chartered psychologists)
268, 269, 270, 271, 272, 273

Community payback orders – drug treatment requirement
274

Community payback orders – commencement and standards
276

Community payback orders – progress reviews
278, 279

Community payback orders – revocation, variation and discharge, including where CPO breached
281, 282, 283, 284, 287, 293, 294, 298, 303, 306, 309, 310, 311, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326

> *Notes on amendments in this group*
> Amendment 323 pre-empts amendment 96 in the group "Title of "supervision requirement""

Community payback orders – restricted movement requirement
328, 329, 330, 331, 332, 333, 334, 335

Unpaid work and other activity requirement – consultation
98

Annual reports on community payback orders
99

Community payback orders – consequential modifications
342, 343, 414

Offence of stalking, offence of threatening, alarming or distressing behaviour
399, 400, 401, 402, 378

Non-harassment orders – course of conduct
5, 6, 7

Presumption against short periods of imprisonment or detention
100, 101, 388, 1, 391, 392, 393

Report on operation of sections 14 and 17
102

Pre-sentencing reports about organisations
103

Voluntary intoxication by alcohol – effect in sentencing
104

Mutual recognition of judgments and probation decisions
105, 184

Minimum sentence for having in a public place an article with a blade or point
10, 10A

Involvement in serious organised crime
344, 345, 346, 347, 348, 349, 350, 351, 358

> *Notes on amendments in this group*
> Amendment 347 pre-empts amendment 348

Offences aggravated by connection with serious organised crime (corroboration)
352

Directing serious organised crime
353, 354, 355, 356

Failure to report serious organised crime
357, 106, 359, 360

Genocide, crimes against humanity and war crimes
107, 108

Clarification of existing offence prohibiting the carrying of offensive weapons
109

Offence of having article with blade or point (or offensive weapon) on workplace premises
11

Extreme pornography – sounds accompanying images
361, 362, 363, 364, 366

Extreme pornography – excluded images
365, 367, 368, 369

Voyeurism – additional forms of conduct
110

Sexual offences – defences in relation to offences against older children
111

Penalties for offences of brothel-keeping and living on the earnings of prostitution
370

Engaging in, advertising and facilitating paid-for sexual activities
8, 8A, 8B, 8C, 8D, 461, 9, 9A

People trafficking (and consequential provision)
371, 372, 373, 374, 375, 376, 377, 386, 387

Slavery, servitude and forced or compulsory labour
112, 143

Articles for use in fraud
113

Abolition of offences of sedition and leasing-making
114, 189, 192, 194, 196

Double jeopardy (Scottish Law Commission report)
115, 116, 117, 118, 119, 120, 120A, 121, 122, 123, 124, 125, 185

Children – age of criminal responsibility and minimum age of prosecution
379, 126, 127, 389, 390

Notes on amendments in this group
Amendment 379 pre-empts amendments 126 and 127

Offences – liability of partners
128, 129

Witness statements
130, 131

Victims' representation at Parole Board hearings
403

Power of sheriff or JP to grant warrants to police based outside sheriffdom
420

Bail conditions – remote monitoring requirements
132, 197

Prosecution on indictment – Scottish Law Officers
421, 422, 423, 424, 425, 426, 427, 451

Dockets and charges in sex cases
428

Prohibition of personal conduct of case by accused
429, 454, 455, 456, 458, 459

Retention of samples etc. – adults
404, 405, 406, 407, 408

Retention of samples etc. – alternatives to prosecution
418, 419

Retention of samples etc. – children referred to children's hearings (application to sheriff)
409, 410, 380, 381, 411, 382, 412

Notes on amendments in this group
Amendment 410 pre-empts amendment 380
Amendment 411 pre-empts amendment 382

Scottish Criminal Cases Review Commission – grounds for appeal
133, 134, 135

Prior statements by witnesses – abolition of competence test
430

Witness statements – use during trial
383

Child witnesses in proceedings for people trafficking offences
384

Witness anonymity orders
431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441

European evidence warrants
442, 450

Jurors in criminal trials
443, 415, 416, 417

Data matching for detection of fraud etc.
136, 137

Closure of premises associated with human exploitation etc. (minor corrections etc.)
138, 139, 140, 141, 142, 144, 198

Foreign travel orders – surrender of passports
444, 445, 446

Sex offender notification requirements
145

Risk of sexual harm orders – spent convictions
146

Rehabilitation of offenders – spent alternatives to prosecution
447, 452, 453

Medical services in prisons
448

Assistance for victim support
413

Prosecutor’s duty to disclose information
147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166

Mental disorder and unfitness for trial
24, 167, 195

Conditions to which licences under the 1982 Act are to be subject
168

Licensing – powers of entry etc. (definition of “authorised civilian employee”)
169

Licensing of metal dealers
385

Licensing of street trading – food hygiene certificates
170

Licensing of market operators
171, 172, 2, 3, 4

Notes on amendments in this group
Amendment 172 pre-empts amendments 2 and 3

Applications for licences
173

Provisions to be considered as part of the Alcohol (Scotland) Bill
174, 182, 186

Premises licence applications
460, 176, 180

Reviews of premises licences – notification of determinations
175

Extended hours applications – notification period
449

Personal licence applications
177, 178, 181

Appeals against decisions of licensing board
179

Corruption in public bodies
183

Orders and regulations – circumstances in which affirmative procedure required
187, 188

Incest and related offences
190

Criminal law – revision
191, 193

Breach of undertakings – consequential modification
457

Amendments already debated

Sentencing guidelines – role of judiciary in approval and publication
With 51 – 18, 18A, 18B, 57, 58, 19, 59, 20, 61, 66, 22, 68, 70, 23, 75

Notes on amendments in this group
Amendment 58 pre-empts amendment 19
Amendment 20 pre-empts amendment 61
Amendment 70 pre-empts amendment 23

JUSTICE COMMITTEE

EXTRACT FROM THE MINUTES

10th Meeting, 2010 (Session 3)

Tuesday 16 March 2010

Present:

Bill Aitken (Convener)	Robert Brown
Bill Butler (Deputy Convener)	Angela Constance
Cathie Craigie	Nigel Don
James Kelly	Stewart Maxwell

Criminal Justice and Licensing (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 2).

The following amendments were agreed to (without division): 55, 56, 58, 59, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 72, 75, 76, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 88, 268, 269, 270, 271, 272, 273, 274, 275, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342 and 343.

The following amendments were agreed to (by division):

17 (For 4, Against 4, Abstentions 0; amendment agreed to on casting vote)
73 (For 5, Against 3, Abstentions 0)
78 (For 5, Against 3, Abstentions 0)
80 (For 5, Against 3, Abstentions 0)
233 (For 5, Against 0, Abstentions 3)
81 (For 5, Against 3, Abstentions 0)
82 (For 5, Against 3, Abstentions 0)
89 (For 5, Against 3, Abstentions 0)
90 (For 5, Against 3, Abstentions 0)
91 (For 5, Against 3, Abstentions 0)
92 (For 5, Against 3, Abstentions 0)
93 (For 5, Against 3, Abstentions 0)
94 (For 5, Against 3, Abstentions 0)
95 (For 5, Against 3, Abstentions 0)
97 (For 5, Against 3, Abstentions 0)

The following amendments were disagreed to (by division):

64 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
21 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
77 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)

Amendments 60, 397, 276, 98 and 99 were moved and, with the agreement of the Committee, withdrawn.

Amendments 19, 23, 79, 83, 84, 85, 86, 87 and 96 were pre-empted.

The following amendments were not moved: 18 (and as a consequence 18A and 18B), 57, 20, 395, 396, 22, 74 and 398.

Sections 10 and 12 were agreed to without amendment.

Sections 5, 6, 7, 8, 9, 11, 13 and 14 were agreed to as amended.

The Committee ended consideration of the Bill for the day, amendment 343 having been disposed of.

10:13

On resuming—

Criminal Justice and Licensing (Scotland) Bill (Stage 2)

The Convener: This is the second day of stage 2 proceedings on the Criminal Justice and Licensing (Scotland) Bill. The committee will consider amendments to part 1 of the bill. However, it will not proceed beyond section 15 and line 29 on page 29 of the bill, because at its meeting next week it will take evidence on amendments that relate to subsequent provisions. I welcome again the Cabinet Secretary for Justice, who is accompanied by officials various. Members should have a copy of the bill, the marshalled list of amendments and the list of groupings for today's consideration.

Section 5—Sentencing guidelines

The Convener: Amendment 55, in the name of the minister, is grouped with amendments 17, 62, 63, 65 and 67.

Kenny MacAskill: Amendments 55 and 17 relate to the costs and benefits assessment of guidelines that section 5(5) requires the Scottish sentencing council to produce. When giving evidence to the committee on 12 May 2009, the Sheriffs Association expressed concern that the assessment of costs and benefits would be part of the guidelines, reflecting that it would be inappropriate for sentencers to take such matters into account. In light of that, Government amendment 55 provides that the assessment is not part of a guideline but should be prepared alongside it and published during the consultation process. That makes it clear that the courts are not expected to have regard to the costs and benefits impact of a guideline when applying it.

We do not support the removal of the requirement for the assessment to contain information on the likely effect of the guidelines on the number of persons detained and the number of persons serving community sentences. We consider that it is essential to know the impact of a guideline on the number of people detained and the number of people undertaking community service during consultation, so that consultees are fully informed, but we agree that those matters should not be part of the consideration of an individual sentence and our amendments address that.

Government amendments 62, 63, 65 and 67 are consequential. They amend the provisions to reflect the altered roles of both the sentencing council and the High Court in preparing and endorsing new and revised guidelines.

I move amendment 55.

10:15

Bill Butler (Glasgow Anniesland) (Lab): I hope that members agree that amendment 17 is straightforward. It would remove the obligation on the sentencing council to consider the likely effect of sentencing guidelines on

> "the number of persons detained in prisons or other institutions"

and

> "the number of persons serving sentences in the community".

It would be inappropriate for such an obligation to be placed on the council. The amendment rightly retains the obligation to consider

> "the likely effect of the guidelines on ... the criminal justice system generally",

so I hope that members will be able to support this reasonable and logical amendment.

Robert Brown: I oppose Bill Butler's amendment 17. It is reasonable and sensible to include in the provisions on the sentencing council the obligation that the amendment would delete, particularly as that provision is elaborated by amendment 55, which the minister moved. If the sentencing council is to have benefit, it must consider the overall position in relation to prisons, community sentences and the like—not, as the minister rightly says, at the individual level but at the corporate level—so that politicians, the public and policy makers have an idea of the implications of sentencing guidelines. After all, prison overcrowding and the evil effects to which it has given rise in the system are one of the big issues that the committee has dealt with over the months. We need information about such issues when considering the likely effects of sentencing policy.

Stewart Maxwell (West of Scotland) (SNP): I support amendments 55, 62, 63, 65 and 67 but oppose amendment 17.

Amendment 55 in particular deals with the committee's concern at stage 1 about the wording of section 5(5). The amendment changes the wording from

> "The Council must include in any sentencing guidelines"

to

> "The Council must, on preparing any sentencing guidelines, also prepare".

The amendment therefore separates out the guidelines and the assessment of their likely effect, as Robert Brown indicated, but leaves the fact that the matters mentioned in section 5(5) are important to any guidelines and that the likely effect of any guidelines on those matters must be taken into account, although not as part of the guidelines themselves.

Amendment 55 deals with the issue that concerned some members at stage 1. The information would still be available but would not, as originally intended, be included in the sentencing guidelines. That deals with the problem.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I support Bill Butler's amendment 17. My recollection of the evidence that was received during stage 1, including from the Scottish Police Federation, was that the sentencing council should not be required to include in any guidelines an assessment of their likely effects on prison numbers. The courts and the sentencing council should not have that responsibility.

The Convener: The issue is whether it is appropriate for guidelines to indicate that the problems of prison capacity should affect judicial determinations. In my view, it would not be appropriate for them so to do, which is why I am attracted by the merits of Bill Butler's amendment.

Amendment 55 agreed to.

Amendment 17 moved—[Bill Butler].

The Convener: The question is, that amendment 17 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0. I use my casting vote in favour of the amendment on the basis of what I have already said.

Amendment 17 agreed to.

The Convener: The next group of amendments is on the dates on which sentencing guidelines are to take effect. Amendment 56, in the name of Robert Brown, is the only amendment in the group.

Robert Brown: Amendment 56 is simple. It removes the requirement that the sentencing council must specify the date on which guidelines are to take effect, because the guidelines are ultimately for the court under the arrangements that have now been decided. It is a consequence of other amendments that we have agreed to.

I move amendment 56.

Kenny MacAskill: I fully support Robert Brown on this amendment.

The Convener: Does Robert Brown feel the need to wind up?

Robert Brown: No.

The Convener: I think that that is a question of quitting while one is winning.

Amendment 56 agreed to.

Amendment 18 not moved.

The Convener: Amendment 18A, in the name of Robert Brown, has already been debated with amendment 51. Mr Brown, would you like to move or not move the amendment?

Robert Brown: Sorry, I have to confess that I have lost track of this one. Not moved, I think.

Bill Butler: If I may comment, convener, I remember that Robert Brown indicated two weeks ago that he would not move 18A or 18B.

Robert Brown: That is what I thought.

Amendments 18A, 18B and 57 not moved.

The Convener: Amendment 58, in the name of the minister, has already been debated with amendment 51. If amendment 58 is agreed to, I will not be able to call amendment 19, on the ground of pre-emption.

Amendments 58 and 59 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group of amendments is on the relationship with the existing power of the High Court to issue sentencing guidelines. Amendment 60, in the name of Robert Brown, is grouped with amendments 71, 72 and 76.

Robert Brown: Amendment 60 makes it clear that the High Court is still entitled to exercise its jurisdiction to issue guideline judgments. I also support Government amendments 71, 72 and 76, which provide for the court to require the sentencing council to prepare guidelines following a guideline judgment, and for the publication of guideline judgments. That seems sensible. I suppose that it could be argued that amendment 60 is not necessary, but it would be useful to clarify matters in the bill.

I move amendment 60.

Kenny MacAskill: Amendment 60 provides that section 5 is without prejudice to the power of the High Court to pronounce guideline judgments. Such a provision is not necessary as section 5 does not prejudice the existing power of the High Court in any way. The bill is framed in such a way that the system for the High Court to pronounce guideline judgments and the new role for the sentencing council to prepare sentencing guidelines can coexist harmoniously. We therefore resist amendment 60.

Government amendment 72 seeks to strengthen the guideline judgments system by providing a clearer mechanism for their promulgation. It provides for the sentencing council to publish guideline judgments pronounced by the High Court under existing powers, as well as sentencing guidelines.

The intention behind the amendment is to ensure that all sentencing guidelines and guideline judgments are available in one place and are easily accessible to the public. That does not affect the role of the Scottish Court Service in relation to the publication of High Court opinions.

Amendment 71 is consequential on amendment 53 and reflects the revised roles of the sentencing council and the High Court. Amendment 76 is also consequential on amendment 53, and amends section 13, which provides for the sentencing council to produce an annual report. Those amendments reflect the revised function of the council as an advisory body.

The Convener: I see that there are no other contributions; I do not think that there is any great division on the matter. I ask Robert Brown to wind up.

Robert Brown: The minister has put on record the position with regard to the existing powers of the High Court, so I withdraw amendment 60.

Amendment 60, by agreement, withdrawn.

Section 5, as amended, agreed to.

Section 6—Procedure for publication and review of sentencing guidelines

The Convener: Amendment 20, in the name of Bill Butler, has already been debated with amendment 51. I point out that if amendment 20 is agreed to, I will not be able to call amendment 61, on the ground of pre-emption.

Amendment 20 not moved.

Amendments 61 to 63 moved—[Kenny MacAskill]—and agreed to.

The Convener: We turn to consultation on draft sentencing guidelines. Amendment 64, in the name of Robert Brown, is grouped with amendments 21, 395 and 396.

Robert Brown: Amendment 64 would require the Lord Justice General, on behalf of the High Court, to be one of the persons whom the council consults about draft guidelines. Although we have agreed that the High Court ought to approve the eventual guidelines, it is more efficient and sensible to have its views at an earlier stage. That will get it thinking about the issue and involve its views in the procedure, which I hope will sort out any issues along the line, as we would not want any dispute about those matters.

I support Bill Butler's amendment 21, to add the Justice Committee to the list of consultees. I am interested to hear Angela Constance's argument for consulting young people who are under 18 and the bodies that support them. I am not sure that it is necessary to single out groups in that way, but it might be better to specify more clearly how the draft is published and made known to such groups—there might be another way of tackling the issue. I suspect that amendment 396 might not be necessary, as I assume that the definition of the term "persons" includes bodies, but no doubt the minister will enlighten us on that matter.

I move amendment 64.

Bill Butler: I support Robert Brown's amendment 64, as it seems pertinent and sensible.

Amendment 21, in my name, is both easier and more complex than it might at first appear. It is easier, in so far as the bill already provides a procedure for the sentencing council to publish proposed guidelines in draft, consult certain persons and have regard to their comments prior to finalisation. However, the difficulty is that it is not appropriate—so I am informed—to refer to the committee as such in statute, as it is not a body that is required by statute. The Scotland Act 1998 allows for the Parliament to establish committees, but there is no requirement for it to do so, and certainly no requirement—even under standing orders—to have a justice committee.

In addition, there are times, such as during dissolution and for a few weeks after an election, when, in practice, there are no committees in existence. That makes it necessary for amendment 21 to refer to

"any committee ... with a remit that includes the criminal justice system".

The obligation to consult simply would not apply if there were no such committee at the time. That is my information. I hope that that is reasonably clear. That, in essence, is the purpose of amendment 21. I believe that it is a modest but logical addition and I ask members to support it.

10:30

Angela Constance (Livingston) (SNP): I lodged amendments 395 and 396 after discussions with Action for Children Scotland. Amendment 395 would require consultation of young people who have been victims of crime and organisations that work with young people and which support young people who have been victims of crime. Amendment 396 would require the sentencing council to consult relevant agencies and organisations before publishing guidelines.

My motivation in lodging the amendments is that I really want the perspective and experience of young people, who are far more likely to be victims than perpetrators of crime, to be captured. Of course, we know that only a small minority of young people offend. The group most at risk of becoming victims are young men between the ages of 16 and 24. Sometimes, the same people can be both victims and perpetrators, and there are clear links between victimisation and offending.

On amendment 396, it is important that before guidelines are published

the Scottish sentencing council consults key stakeholders who have experience in working with young people both as victims and as offenders. That will promote consistency and relevance in any guidelines that are published.

Section 6(1)(b)(iii) refers to

"such other persons as the Council considers appropriate."

Does that include bodies? I am not sure what the technical definition of "persons" is.

The Convener: I am sure that the minister will address that issue when he gets the opportunity.

Stewart Maxwell: I will speak first to Angela Constance's amendments. I have some sympathy with the arguments that she makes about the impact of much of this on young people, but I share other members' concerns that picking out one particular group can sometimes have unintended consequences. I am not sure that the amendments are a good way to achieve what she is trying to achieve. It may well be that other methods could be brought into play that would achieve the aims that underlie the amendments without putting those provisions in the bill, because I am not sure that that is the best place for them.

I am concerned about Bill Butler's amendment 21, given that, as he said, there are a number of occasions on which no such committee of the Parliament exists, although I know that the amendment tries to deal with that. However, I have a larger concern. Often in this committee we say that we are concerned about possible or perceived political interference with the judicial system. By making the Justice Committee a formal consultee on the guidelines we might be slightly overstepping the mark. I ask him to consider that point. There is an issue about politicians, whether on this committee or on any other committee, being formal consultees in relation to sentencing guidelines. I am not sure that I can support amendment 21 on that basis.

I think that Robert Brown's amendment 64 is unnecessary. As I said last week, I think that we are getting to the point of overkill in relation to the legal profession's input into the guidelines. The issue is already covered and I do not think that the amendment is necessary.

James Kelly (Glasgow Rutherglen) (Lab): I oppose Angela Constance's amendment 395. I have no doubt that it is well intentioned, but the bill already gives the option for

"such other persons as the Council considers appropriate"

to be consulted, and that covers it. I agree with Stewart Maxwell's point that if we opened it up and inserted a line on one specific group, we would need to consider the relevance of including others.

The Convener: We have heard some interesting arguments from the three members who lodged the amendments. All the arguments have a degree of validity and they were expressed in fairly cogent and logical terms. I think that we all accept the intent of Robert Brown's amendment 64, but I am not persuaded that the matter is not already picked up in the bill.

Bill Butler's amendment 21 seeks to extend the consultation by widening the input process. I will listen to the minister's comments on that. I am not certain that it would be appropriate for a parliamentary committee to have input, bearing in mind that such committees are made up of politicians, as Stewart Maxwell correctly said. I have doubts about amendment 21, but I will listen to further arguments before making a determination.

Angela Constance makes the obvious point that young people are frequently the victims of crime as well as the perpetrators. Her case is arguable, but I am just a little bit dubious about the advisability of selecting one particular group out of the wider range of persons who might be consulted. She raises an interesting point, but I am not persuaded by it.

Kenny MacAskill: Amendment 64 adds the Lord Justice General to the list of those who must be consulted on sentencing guidelines. There is nothing in the bill to prevent the Lord Justice General from being consulted on sentencing guidelines, and given that draft guidelines will be presented to the High Court for approval I see no need for the proposed provision.

Amendment 21 adds the Justice Committee to the required list of consultees on sentencing guidelines. As drafted, the bill allows the council to consult any committee of the Parliament if it considers it appropriate to do so.

Amendment 395 would require the sentencing council to consult young people who have been the victims of crime and bodies that work with them. Section 6 already requires consultation with the Scottish ministers, the Lord Advocate and

"such other persons as the Council considers appropriate"

on draft guidelines. We can rely on the council's good sense in deciding who it is appropriate to consult. For some types of offence, consultation with young victims will be essential, but for others a statutory requirement to consult them would be of no value. The bill already requires one of the lay members of the council to be a person who appears to the Scottish ministers to have knowledge of the issues that are faced by the victims of crime, so the interests of victims of crime in general will not be forgotten.

Amendment 396 would amend section 6(1)(b)(iii) to require the sentencing council to consult such "persons and bodies" as it considers appropriate on draft guidelines. The amendment is unnecessary. The general rules for the interpretation of acts of the Scottish Parliament already provide that a reference to a person includes a body of persons, whether corporate or unincorporated, so the requirement on the sentencing council to consult "persons" already includes bodies.

Robert Brown: As the convener said, we have had an interesting debate. The issues are perhaps not world shattering, but they are nevertheless interesting and relevant to the operation of the sentencing council.

I am not persuaded by the opposition to amendment 64. It seems to me that I am suggesting a slightly different thing. I appreciate that the High Court gets involved at the stage of the draft guidelines. My point is that there is some advantage in its being more in with the bricks at an earlier stage. Against that background, I will press amendment 64.

On amendment 21, mention has been made of possible political interference from the Justice Committee. One takes the point, but if that is the case I cannot see why the Scottish ministers should be mentioned. Surely the Scottish ministers stand in a similar position to that of the committee. If there is objection to consulting the Justice Committee, the same objection should apply to the Scottish ministers. Bill Butler's suggestion in amendment 21 is reasonable. I am minded to suggest that the committee supports it.

I have a lot of sympathy for Angela Constance's amendment 395. However, as I have said, it is the wrong way in which to do things. After the meeting, the cabinet secretary might give some thought to the ways in which the viewpoint of young people can be more adequately taken on board. I am interested in what he said about there being someone on the sentencing council to represent the views of victims in general, but that is not quite the same as Angela Constance's proposal. He may want to look again to see whether the perspective of young people can be brought to bear on the workings of the sentencing council either through its procedures or in the way in which things are done.

I press amendment 64.

The Convener: The question is, that amendment 64 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Aitken, Bill (Glasgow) (Con)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

I exercise my casting vote against amendment 64. The matter is adequately dealt with in the bill.

Amendment 64 disagreed to.

Amendment 21 moved—[Bill Butler].

The Convener: The question is, that amendment 21 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Aitken, Bill (Glasgow) (Con)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

I exercise my casting vote against amendment 21. As I stated earlier, the amendment would introduce political involvement into the process, which we do not wish to have.

Amendment 21 disagreed to.

The Convener: I call amendment 395, in the name of Angela Constance.

Angela Constance: I highlighted young people in my amendment 395 because of the disproportionate focus on them for right and wrong reasons, but given committee members' comments I will not move it. Similarly, given the cabinet secretary's comments, I will not move amendment 396.

Amendments 395 and 396 not moved.

Amendments 65 and 66 moved—[Kenny MacAskill]—and agreed to.

Amendment 22 not moved.

Amendment 67 moved—[Kenny MacAskill]—and agreed to.

Section 6, as amended, agreed to.

After section 6

Amendment 68 moved—[Kenny MacAskill]—and agreed to.

Section 7—Effect of sentencing guidelines

10:45

The Convener: Amendment 69, in the name of the minister, is in a group on its own.

Kenny MacAskill: Amendment 69 clarifies that when the court departs from a guideline it must state why, even if its reasons are based on another guideline.

I move amendment 69.

Amendment 69 agreed to.

Section 7, as amended, agreed to.

Section 8—Ministers' power to request that guidelines be published or reviewed

The Convener: Amendment 397, in the name of Angela Constance, is the only amendment in the group.

Angela Constance: The purpose of amendment 397 is to require the Scottish ministers to consult relevant persons and bodies before a request goes to the Scottish sentencing council to publish or review guidelines. I am interested to know whether the Scottish Government anticipates that it will, in practice, consult relevant key stakeholders on the need to publish or review specific sentencing guidelines. I imagine that there will be dialogue between the

Government and civil servants and various interest groups about what representations need to be made for particular requests to the Scottish sentencing council. I hope that that dialogue will be a two-way process.

I move amendment 397.

Kenny MacAskill: Amendment 397 would require the Scottish ministers to consult such relevant persons and bodies as they consider appropriate before requesting the sentencing council to consider or review sentencing guidelines. Given that the guidelines themselves will have to be consulted on, adding on a further mandatory consultation at the beginning of the process does not seem justified. There may be cases where stakeholders make a case to the Scottish ministers about the need for a guideline, and that might be part of the reason for ministers inviting the council to do a particular bit of work. Section 12 also requires the council to consult widely in preparing its business plan. That provides another opportunity for stakeholders to suggest areas that the council should examine, not just in relation to sentencing guidelines but in relation to how it uses its other powers in section 11 to conduct research, disseminate information or provide advice and guidance about sentencing. We resist amendment 397.

The Convener: I ask Angela Constance whether she wishes to press or withdraw amendment 397.

Angela Constance: I will withdraw amendment 397.

Amendment 397, by agreement, withdrawn.

The Convener: Amendment 70, in the name of the minister, was debated with amendment 51. I point out that if amendment 70 is agreed to, amendment 23 will be pre-empted.

Amendment 70 moved—[Kenny MacAskill]—and agreed to.

Section 8, as amended, agreed to.

Section 9—High Court's power to request review of guidelines

Amendment 71 moved—[Kenny MacAskill]—and agreed to.

Section 9, as amended, agreed to.

After section 9

Amendment 72 moved—[Kenny MacAskill]—and agreed to.

Section 10 agreed to.

Section 11—The Council's power to provide information, advice etc

The Convener: Amendment 73, in the name of Robert Brown, is in a group on its own.

Robert Brown: Amendment 73 deals with an important issue. It seems to me entirely appropriate for the sentencing council to be asked by Government to look at particular issues as part of its remit, but it is something else altogether for the council to be required or to be requested to give advice to the Scottish Government, far less an MSP, on sentencing matters as opposed to preparing draft sentencing guidelines for the High Court. The Government has an array of lawyers—some are in the room today—and civil servants to advise it. The Government is not responsible for sentencing; that is a matter for the courts. It is certainly true that there are issues to do with the availability, resourcing or effectiveness of community sentences and prison sentences, for example, and no doubt the council might publish material on them, but it is not obvious to me that the council has a role as a Government or parliamentary adviser. That is a confusion of its role and, indeed, its independence.

I move amendment 73.

Nigel Don (North East Scotland) (SNP): I think that sections 11(2) and 11(3) are in the bill to establish that it is lawful for the sentencing council to provide advice. They simply mean that if somebody chooses to ask for advice, the council is not required to say that it does not have the statutory power to provide it. On that basis, those provisions seem perfectly reasonable. I am interested to hear what the minister has to say.

Kenny MacAskill: Section 11 gives the sentencing council the power to provide advice or submit proposals on sentencing matters to the Scottish ministers or any member of the Scottish Parliament. I see no reason to remove that power from the sentencing council and therefore cannot support amendment 73. The council's role is more than to frame sentencing guidelines: it should become a valuable source of knowledge and expertise—the natural place where ministers and parliamentarians turn for advice.

Robert Brown: I do not accept the minister's view of the matter. Section 5, which concerns sentencing guidelines, clearly states:

> "The function of the Council is to prepare and publish guidelines relating to the sentencing of offenders."

That is its function, not to provide advice to ministers or MSPs. The minister's reply left a little bit to be desired on the reasoning for sections 11(2) and 11(3). It is an important constitutional point, so I press amendment 73.

The Convener: The question is, that amendment 73 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 73 agreed to.

Section 11, as amended, agreed to.

Section 12—Business plan

The Convener: The next group concerns consultation on the Scottish sentencing council's business plan. Amendment 74, in the name of Robert Brown, is the only amendment in the group.

Robert Brown: In light of the earlier decision on the Lord Justice General's involvement in matters, I will not pursue the amendment.

Amendment 74 not moved.

Section 12 agreed to.

Section 13—Annual report

Amendments 75 and 76 moved—[Kenny MacAskill]—and agreed to.

Section 13, as amended, agreed to.

Section 14—Community payback orders

The Convener: The next group is on community payback orders—and requirements under CPOs—to be imposed on offenders. Amendment 199, in the name of the minister, is grouped with amendments 202, 205, 208, 209, 212, 215, 217, 221, 225, 226, 228 to 232, 257, 260, 277, 280, 291, 295, 299 to 302, 304, 305, 307, 308, 312, 313, 336 and 338 to 341.

Kenny MacAskill: Amendments 199, 202, 212, 217, 221, 225, 226, 228, 232, 257, 260, 277, 280, 295, 307, 312, 336, 338 and 339 are minor technical and drafting amendments to ensure consistent use of language. References to the court imposing a community payback order "in respect of" an offender are changed to the court imposing a community payback order "on" the offender. The amendments are designed to remove inconsistencies in the language and terminology in the bill.

Amendment 205 is a minor technical amendment and seeks to make clear that a justice of the peace court may impose only certain of the requirements in a community payback order and not the entire range of options that are available to the sheriff courts.

Amendments 229 to 231 are minor drafting amendments that seek to remove unnecessary words from the bill.

Amendments 208, 209, 215, 291, 299, 300 to 302, 304, 305, 308, 313 and 341 are minor and technical amendments concerning the consistent use of language. References to "made", "making" or "make" in relation to a community payback order are changed to "imposed", "imposing" or "impose." Reference to "in" a community payback order is changed to "by" a community payback order. Amendment 308 deletes "is in force" at section 14, page 24, line 3 and substitutes "has been imposed". Amendment 341 deletes "the order imposing", which is superfluous. The amendments are designed to remove inconsistencies in language and terminology.

Amendment 340 is a minor and technical amendment that relates to the definition of "locality". It will ensure that when a community payback order is imposed in the sheriff or justice of the peace court, the appropriate court is determined by reference to the locality in which the offender resides.

I move amendment 199.

The Convener: The matter seems remarkably simple.

Amendment 199 agreed to.

The Convener: The next group is on the purpose of community payback orders. Amendment 77, in the name of Robert Brown, is the only amendment in the group.

Robert Brown: The intention behind amendment 77 is to state reasonably clearly what a community payback order is for. As members know, I am concerned about whether the order's name really describes its rehabilitative aspects. For transparency and public understanding, it is important that the names of criminal sanctions resonate with people.

I was not convinced about saying that an offender pays back to the community by sorting his drugs problem or whatever—that is not a straightforward use of the English language—but I could not think of a better name for the order. I therefore thought that describing the order's purpose would be useful, and the phraseology that the clerks have used at my request succeeds in that. I hope that the amendment will appeal to the committee as a sensible and helpful definition of community payback order.

I move amendment 77.

Kenny MacAskill: Amendment 77 seeks to define the purpose of community payback orders. It identifies their dual purpose as providing payback to the community and support to the offender in addressing the underlying causes of his or her offending.

We understand and support the intention behind the amendment, but we have two reservations about its drafting. The first reservation is technical: the amendment does not make it clear that the court must have regard to the stated purpose when imposing a community payback order.

The second reservation is more substantial. In our response to the committee's stage 1 report, we underlined to the committee the fact that the name "community payback order" is based on the wider definition of payback that is assumed in the Scottish Prisons Commission's report. That underlines that offenders paying back to those whom they harmed should be at the heart of the justice system and that a range of ways of paying back exists, including paying back by working at change.

Separating payback from rehabilitation, as the amendment would do, might blur the fact that ceasing to offend is an important aspect of payback and that addressing the causes of offending is in itself an important contribution to payback.

We therefore resist amendment 77 and invite the member to withdraw it.

Robert Brown: I thank the minister for his comments and I understand what he says. I am not sure whether the objection that the amendment does not expressly require the court to have regard to the purpose has as much substance as it appears to have at first glance. If the amendment were agreed to, it would be part of the law. I did not intend to affect in a detailed way how the court deals with such issues, but it cannot be said that the provision would have no meaning—that is a different matter.

I take the point about the community payback order's line of descent, as it were, from the Scottish Prisons Commission, but we are still left with a lack of transparency about what the order is. Against that background, I am minded to press amendment 77, although I am not averse to re-examining the situation if technical improvements can be made.

The Convener: The question is, that amendment 77 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Aitken, Bill (Glasgow) (Con)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

The casting vote goes against the amendment. I will give the reasons for that. Robert Brown has throughout the process consistently expressed his concerns about the purpose of community payback orders and he was of course entitled to move amendment 77. However, I am not persuaded by it. The technical arguments against the amendment are sound. It might not be Mr Brown's last word on the subject. For the moment, I adhere to the original intent of the bill.

Amendment 77 disagreed to.

The Convener: The next group is on title of "supervision requirement". Amendment 78, in the name of Robert Brown, is grouped with amendments 79 to 97. I draw members' attention to the pre-emption information on the groupings list.

11:00

Robert Brown: Amendment 78 and the other amendments in the group—quite a lot of them are needed to produce the desired effect—are designed to replace the phrase "supervision requirement" with the phrase "offender supervision requirement".

There are two reasons for that. The first, and most obvious, is that the phrase "supervision requirement" is associated more with the children's hearings system and therefore causes a degree of confusion that could be avoided. The second reason, which I believe has some validity, is that a supervision requirement does not really sound as if it is an order of the court, of a penal nature, on a person who has committed a crime. On a point of transparency, it is desirable that the phrase has some meaning to the public.

I therefore suggest that the phrase "offender supervision requirement" is an improvement. I do not pretend that it provides finality, but it makes clearer what the order is all about, and that there lies behind it a penal requirement in an order that has been imposed by a court.

I move amendment 78.

Stewart Maxwell: We have before us a choice between two options. Robert Brown's amendments and the Government's proposals in the Children's Hearings (Scotland) Bill both seek to address the issue, which we queried at stage 1, of the nature of that particular phrase. On the face of it, I am happy with the Government's proposals, although I entirely understand Robert Brown's intention.

The Convener: I do not think that there is any great divide on the matter, although Robert Brown's amendments have—at this stage, at least—a slight edge in terms of clarity on the Government's proposals. Perhaps the minister can persuade me otherwise.

Kenny MacAskill: Amendments 78 to 97 are technical amendments that seek to change the term "supervision requirement" to "offender supervision requirement". As Stewart Maxwell said, the issue was recorded in the Justice Committee's stage 1 report, following the Scottish Children's Reporter Administration's written evidence to the committee.

That evidence sought to highlight what the SCRA saw as the potential for confusion arising as a result of the existing supervision requirement, which can be imposed under section 70 of the Children (Scotland) Act 1995, given the possibility that both types of supervision might apply to a child or young person.

The Scottish Government's response to the committee's stage 1 report explained the proposals that were contained in the draft Children's Hearings (Scotland) Bill, published on 26 June 2009, to change the term "supervision requirement" in that context to "compulsory supervision order". In the Children's Hearings (Scotland) Bill, which was introduced to Parliament on 23 February 2010, the terminology remains as "compulsory supervision order". If that bill is enacted without change in that regard, any potential confusion with regard to the terminology should be eliminated. We will not therefore support amendments 78 to 97.

Robert Brown: I accept that it is not the most major of issues, but the term "supervision requirement" has been so much—and for so long—associated with the children's hearings system that proposals to change the terminology for that system will not do the trick.

As the convener rightly said, the issue is relatively marginal, but my amendment 78 provides clarity. Notwithstanding the minister's comments, I hope that the committee will support it. I press the amendment.

The Convener: The question is, that amendment 78 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 78 agreed to.

The Convener: The next group is on compensation requirements. Amendment 200, in the name of the minister, is grouped with amendments 206, 235, 239, 286, 290 and 327. I draw members' attention to the pre-emption information on the groupings list.

Kenny MacAskill: In imposing a community payback order, the court may impose a supervision requirement. A supervision requirement can include a requirement to pay compensation. Amendments 200, 206, 235 and 239 seek to amend the bill to create a separate compensation requirement, although it should be noted that if a compensation requirement is imposed in a community payback order, the court must also impose a supervision requirement.

The offender must complete payment of the compensation within 18 months of the imposition of the compensation requirement or two months before the end of the relevant supervision requirement, whichever is the earlier.

Amendment 239 provides that some of the provisions in the Criminal Procedure (Scotland) Act 1995 that relate to compensation orders also apply to compensation requirements. That will mean that, for example, the types of loss for which compensation may be ordered and the arrangements for payment of compensation will apply to compensation requirements in the same way as they apply to a compensation order.

Amendments 286 and 327 are consequential on the amendments that provide for a separate compensation requirement. Amendment 290 provides that a variation to a CPO cannot increase the amount of compensation that could have been awarded at the time the requirement was imposed.

I move amendment 200.

Robert Brown: Broadly speaking, I support the minister's amendments, but will he comment on the implications of the decision on amendment 78 and how he wants to take matters forward in light of it? There are some pre-emption issues. I am happy to agree to the amendments on the understanding that we will tidy up the bill at stage 3 in light of the consequences of amendment 78.

The Convener: The amendments will of course be dealt with in due course.

Robert Brown: Yes. I just wanted some guidance on how we might juggle all the technical matters.

Kenny MacAskill: We do not anticipate any difficulties. We are talking about minor technical matters.

The Convener: The issue is straightforward. Is there any need to wind up, Mr MacAskill?

Kenny MacAskill: No.

Amendment 200 agreed to.

The Convener: The next group is on conduct requirements. Amendment 201, in the name of the minister, is grouped with amendments 204, 207, 236 and 275. Again, members should note the pre-emption information in the groupings document.

Kenny MacAskill: Amendments 201, 204, 207, 236 and 275 provide for a court at any level that is imposing a community payback order to include within that order a conduct requirement. In a conduct requirement, the court may require that the offender must do or refrain from doing specified things in a way that is conducive to achieving the outcome of promoting good behaviour or preventing further offending. The provision is similar to the power of the court in relation to probation orders in section 229 of the Criminal Procedure (Scotland) Act 1995.

The changes will give the courts more flexibility than is provided under the community payback order provisions. At present, the law allows the court to impose similar requirements as part of a probation order. More than 1,000 instances of such general conditions were imposed by courts in 2007-08. They included such restrictions as requiring an offender not to go into the centre of town and not to live in a house with anyone under the age of 17.

The amendments provide that the conduct requirement must be accompanied by the imposition of a supervision requirement. Further, they provide that what is required under a conduct requirement must not include or be inconsistent with anything that could be required under one of the other community payback order requirements.

I move amendment 201.

The Convener: There is merit in the amendments. Indeed, had the Government not come up with them, I would have been tempted to do so myself, as they plug a loophole. The courts have historically applied probation orders with conditions, and it is an obvious and useful corollary to do so with community payback orders.

Amendment 201 agreed to.

Amendment 202 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group is on supervision requirements. Amendment 203, in the name of the minister, is grouped with amendments 234, 237 and 238. Again, I draw members' attention to the pre-emption information.

Kenny MacAskill: Amendment 203 adds a supervision requirement to the list of requirements that the court may impose when it imposes a CPO on an offender who is convicted of a non-imprisonable offence. The amendment provides that the supervision requirement may be imposed on its own or with other requirements.

When a court imposes a CPO under proposed new section 227G(2)(a) on an offender who is under 18 years of age, it must also impose a supervision requirement if the court is satisfied as to the services that the local authority will provide for the offender's support and rehabilitation. Amendment 234 amends that to provide that, when the offender is under 18 at the time the court order is imposed, a supervision requirement must be imposed. As a supervision requirement will be obligatory, local authorities will have to ensure that suitable provision for supervision of young offenders who are sentenced to a CPO exists in their locality.

Amendment 237 limits the length of time for which the supervision requirement must be imposed on offenders aged 16 and 17 whose order includes only a supervision requirement and a level 1 unpaid work or other activity requirement. Amendment 238 clarifies the meaning of the word "specified" in relation to a supervision requirement.

I move amendment 203.

Amendment 203 agreed to.

The Convener: If amendment 204 is agreed to, I will be unable to call amendment 79 due to pre-emption.

Amendments 204 and 205 moved—[Kenny MacAskill]—and agreed to.

Amendment 80 moved—[Robert Brown].

The Convener: The question is, that amendment 80 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the amendment is: For 5, Against 3, Abstentions 0.

Amendment 80 agreed to.

Amendments 206 to 209 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group is on community payback orders—definitions. Amendment 210, in the name of the minister, is grouped with amendment 211.

Kenny MacAskill: Amendments 210 and 211 are minor technical amendments to proposed new section 227A of the 1995 act. Amendment 210 clarifies that the meanings of "court" and "imprisonment" are the same throughout section 14. Amendment 211 deletes an unnecessary reference to the definition of a level 1 unpaid work or other activity requirement from proposed new section 227A of the 1995 act as the definition will be inserted elsewhere in that act as a consequence of amendment 343.

I move amendment 210.

Amendment 210 agreed to.

Amendments 211 and 212 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group is on community payback orders—local authority responsible officer and reports on offenders. Amendment 213, in the name of the minister, is grouped with amendments 214, 218 to 220, 222 to 224, 267, 296 and 337.

Kenny MacAskill: Amendment 213 relates to the requirement on the court to take account of a report from an officer of the local authority on the offender's circumstances and makes it clear that the form and content of such a report may be specified by an act of adjournal but that that need not be so.

Amendment 214 disapplies the requirement on the court to obtain and take account of a report by an officer of a local authority where the court is considering imposing a community payback order that imposes only a level 1 unpaid work or other activity requirement or which is imposed in respect of fine default. The amendment aims to reduce the burden on social work departments by limiting the types of cases in which reports must be provided. It does that by providing that, in those circumstances, the court is not required to take account of a report.

Amendment 219 merges the provisions that relate to "offender's duties" in proposed new section 227D of the 1995 act with those on the "responsible officer" in proposed new section 227C of that act so that all the duties must be imposed by the court when it imposes the community payback order.

11:15

Amendment 220 provides that, in addition to taking steps to vary or discharge an order, the responsible officer is responsible for taking steps to revoke an order. Amendment 224 deletes the provisions of proposed new section 227D, which amendment 219 includes in proposed new section 227C.

To support the goal that community payback orders should start as soon as possible, we seek to amend from five to two days the time within which the local authority must nominate one of its officers to be the responsible officer for the order. The two-day period starts when the local authority receives a copy of the order; the responsible officer oversees the order and deals with its compliance. That change is achieved by amendments 218 and 222. Amendment 223 makes it clear that Saturdays, Sundays and other public or local holidays do not count towards the period of two days.

Amendment 296 relates to the requirement on the court to take account of a report from an officer of the local authority about the offender's circumstances and makes it clear that the form and content of such a report may be, but need not be, specified by an act of adjournal.

Amendment 267 allows rules made under proposed new section 227O to cover the issues that it refers to. Amendment 337 requires the court to forward to the responsible officer a copy of any restricted movement requirement varied under proposed new section 227ZF.

I move amendment 213.

Amendment 213 agreed to.

Amendments 214 and 215 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group is on community payback orders—special provision for level 1 unpaid work or other activity requirements. Amendment 216, in the name of the minister, is grouped with amendments 243, 254, 259 and 297.

Kenny MacAskill: Amendment 216 clarifies that the offender's willingness to comply with an order is not needed when the court is imposing a community payback order that is imposed in relation to fine default. In line with current legislation, it will be mandatory for the court to impose a community payback order in relation to fine default.

Amendment 243 identifies instances in which a court need not take account of a report from an officer of the local authority before deciding to impose a community payback order. The instances are when the order consists of only a level 1 unpaid work or other activity requirement and when the court has no option but to impose the order because the offender has defaulted on a fine.

Amendment 254 provides that, when the court imposes a community payback order on a person aged 16 or 17 for fine default, it must also impose a supervision requirement. Amendment 259 is a minor technical amendment to take account of amendments to proposed new section 227B(6).

Amendment 297 provides that there is no requirement on the court to obtain and take account of a report by an officer of a local authority when it is considering whether to vary a community payback order when the order imposed only a level 1 unpaid work or other activity requirement or was imposed in respect of fine default.

I move amendment 216.

Amendment 216 agreed to.

The Convener: Does any member object to a single question being put on amendments 217 to 226 inclusive?

Members: No.

The Convener: Why does that not surprise me?

Amendments 217 to 226 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group is on community payback orders—alternative disposals available to court. Amendment 227, in the name of the minister, is the only amendment in the group.

Kenny MacAskill: Amendment 227 widens proposed new section 227E(3) to provide that the imposition of a community payback order does not prevent the court from imposing any other additional penalties, other than imprisonment, that may be available to it.

I move amendment 227.

Amendment 227 agreed to.

Amendments 228 to 232 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group is on community payback orders—payment of offenders' expenses. Amendment 233, in the name of the minister, is grouped with amendment 265.

Kenny MacAskill: Amendments 233 and 265 are technical amendments. Proposed new section 227O(2)(c) that section 14 will insert into the 1995 act provides that rules under proposed new section 227O(1) of the 1995 act may make provision for the payment of travelling and other expenses in connection with the undertaking of unpaid work or other activity. Amendment 265 removes that provision and amendment 233 enables provision to be made in an order made by the Scottish ministers for the payment to offenders of travelling or other expenses in connection with the undertaking of any of the requirements of a community payback order.

The current position is that offenders receive travelling expenses that are incurred in complying with probation orders and community service orders. Amendment 233 will ensure that similar arrangements may be made for the requirements of a CPO. Such rules will be subject to negative resolution.

I move amendment 233.

James Kelly: I have some general concerns about the financial back-up on the bill. As I stated during the stage 1 debate, the figures in the financial memorandum on the numbers of people who would go on to community payback orders are not robust enough. The finance that is required to back up the policy has been estimated at between £6 million and £11 million, but I believe that it is closer to the £20 million mark.

There are genuine concerns about the financing of the bill. I note what amendment 233 seeks to achieve but there is a financial commitment associated with it, so I have some concerns and will therefore abstain.

Angela Constance: My understanding is that amendment 233 takes the opportunity of the bill to put into legislation what already happens in practice whereby, if a supervising officer is working with an offender who is on a very limited income, they provide the offender's bus fares or other travel expenses via the criminal justice social work service to get the offender to their community service. Although that might be anathema to some people, it is what happens in practice already. From recollection of my former experience, supervising officers did not provide such expenses routinely; it was done on a case-by-case basis and the merits of the situation were taken into account.

Some vulnerable individuals—albeit that they are offenders—are on very limited incomes and we need to do what we can to enable such people to comply with their orders. My recollection, albeit that I am talking about some years ago, is that expenses were not provided routinely; it was done on a case-by-case basis. Therefore, with respect, I think that Mr Kelly is overstating his case.

The Convener: I certainly would not think it appropriate for an offender who was ordered to attend a drugs detoxification centre some distance from his home, which might involve considerable expense in getting to and from the centre, to be denied the opportunity of getting the appropriate finance. At the same time, I would be a little bit concerned if expenses of a fairly nominal nature were paid for someone to attend a community project to which he had been ordered to go to carry out community service.

As ever, I value Angela Constance's input on the basis of her previous career, which indicates that, as we stand, decisions in this respect are taken on a case-by-case basis. At this stage, that persuades me that there is some merit in amendment 233. However, I await total reassurance from the cabinet secretary in that respect.

Kenny MacAskill: We seek to regulate and formalise a procedure that already happens and which was introduced as long ago as the 1995 act. As Angela Constance says, it does not happen in every instance but is a matter of supervision. That is where we are coming from. James Kelly and I have disagreed on the matters that he raises throughout the progress of the bill and, doubtless, we will continue to do so. I press amendment 233.

The Convener: The question is, that amendment 233 be agreed to. Are we agreed?

Members: No.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

Abstentions

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 5, Against 0, Abstentions 3.

Amendment 233 agreed to.

The Convener: I suspend the meeting for five minutes.

11:25

Meeting suspended.

11:31

On resuming—

Amendment 81 moved—[Robert Brown].

The Convener: The question is, that amendment 81 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 81 agreed to.

Amendment 82 moved—[Robert Brown].

The Convener: The question is, that amendment 82 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 82 agreed to.

Amendments 234 and 235 moved—[Kenny MacAskill]—and agreed to.

The Convener: If amendment 236 is agreed to, amendment 83 will be pre-empted.

Amendments 236 and 237 moved—[Kenny MacAskill]—and agreed to.

The Convener: If amendment 238 is agreed to, amendment 84 will be pre-empted.

Amendment 238 moved—[Kenny MacAskill]—and agreed to.

The Convener: If amendment 239 is agreed to, amendments 85 to 87 will be pre-empted.

Amendment 239 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group is on community payback orders and the unpaid work or other activity requirement. Amendment 240, in the name of the minister, is grouped with amendments 241, 398, 242, 244 to 251, 255, 256, 261 to 264, 266, 285, 288 and 289.

Kenny MacAskill: The purpose of amendments 240, 241, 245, 249, 256 and 266 is to make it clear that, under

"an unpaid work or other activity requirement,"

unpaid work—which is the clearest form of payback by the offender to the community—must be undertaken, but that the "other activity" is at the discretion of the responsible officer.

The responsible officer has some flexibility to decide on activities that may be important for the offender to undertake, such as work on literacy or employability. That does not mean that the court itself cannot impose such activities on the offender, through one of the other requirements that are available under the community payback order. However, it provides a flexibility in the order, which can often be valuable in light of information about the offender and his or her circumstances that becomes available to the responsible officer after the court has imposed its sentence.

Amendments 242 and 247 respond to observations by the Subordinate Legislation Committee and limit the Scottish ministers in terms of the powers that are set out in the proposed new sections 227I(6) and 227K(3) to make regulations that vary the maximum and minimum hours for which unpaid work or other activities can be required.

Amendments 244, 246, 248 and 255 are minor technical amendments that remove the word "total" from references to an unpaid work or other activity requirement. That is to avoid implying, incorrectly, that the figure is the result of adding different components.

Amendments 250 and 251 make it clear that three months is the normal period for completion of a level 1 unpaid work or other activity requirement, that six months is the normal period for completion of a level 2 requirement and that any extension of those periods must be the decision of the court.

Amendments 261 and 264 amend the proposed new section 227N of the 1995 act, which applies where an offender is subject to more than one unpaid work or other activity requirement. The purpose of amendment 261 is to clarify that there may be only one unpaid work and other activity requirement included in a community payback order.

Amendment 264 provides that when considering the number of hours that might be specified in an unpaid work or other activity requirement where another such requirement is still in place, the court should take account of only the net hours that are still to be undertaken by the offender in respect of the earlier orders, not the total hours that were originally imposed.

Where the hours that are specified under any existing unpaid work or other activity requirement are concurrent with another such requirement, hours that count towards both requirements are only counted once in determining the net balance of hours that are still to be undertaken.

Amendments 262 and 263 are minor technical amendments to the proposed new sections 227N(3) and (4) that clarify phrasing on the directions of the court in relation to section 227N(2).

Amendments 285 and 288 are minor drafting amendments that resolve inconsistencies in the language and terminology that is used. Amendment 289 provides that where a CPO is varied, the hours that are specified in an unpaid work or other activity requirement cannot be increased beyond the "appropriate maximum".

Proposed new section 227I provides that the nature of the unpaid work or other activity that is to be undertaken by the offender is for the responsible officer to determine. Amendment 398 lays on the responsible officer the duty of ensuring that any unpaid work and any other activity that is undertaken by an offender will bring significant benefits to the area in which it is undertaken. It will be no surprise to the committee that we agree that unpaid work can bring huge benefits to communities. However, we have made it clear in our response to the committee's stage 1 report and elsewhere that our definition of "payback" to communities is wider than unpaid work. It would include, for example, tackling a long-standing alcohol problem that fuelled offending behaviour. We therefore have no difficulty with the principle that unpaid work and other activities should benefit both the offender and the wider community However, there are some technical problems with the way in which the amendment is drafted. The test that it sets refers to

"significant benefits in the area in which the work or activity is undertaken".

A responsible officer might conclude, for example, that an offender should undergo a course of alcohol counselling or engage with a local provider of literacy services. That would not necessarily bring immediate benefit to the area in which the drug counselling or literacy project is located, even if in the longer term it would benefit the community more widely if the offender beat their addiction or acquired new literacy skills that enabled them to enter the labour market. In many cases it would be difficult to demonstrate immediate local benefit to the geographic area in which the activity was carried out. We have therefore concluded that amendment 398 as drafted would place unnecessary restrictions on the responsible officer, and we are unable to support it.

I move amendment 240.

Angela Constance: Amendment 398 is designed to provide that the responsible officer, in determining the nature of unpaid work or other activity to be undertaken, ensures that it brings considerable benefits to the area or community.

Community payback orders provide the opportunity for offenders not just to address their own issues but to bring significant benefits to the community. The work that an offender undertakes while on a community payback order should be meaningful and not just work for the sake of it, and there should be a direct benefit to the community. I accept that unpaid work is not the only way in which an offender can pay back and that their addressing the underlying causes of their offending in the longer term will also be a meaningful payback to the community.

The debate about the amendment has a lot of parallels with that on Robert Brown's amendment 77. That amendment ultimately failed, and I suspect that amendment 398 may go the same way.

The Convener: The principal issue in this group is amendment 398; the amendments proposed by Mr MacAskill are fairly cogent.

There is considerable merit in amendment 398. It would be greatly beneficial, both to offenders and to our hard-pressed communities, if there were visible and tangible signs of community payback within a community. However, the amendment fails on its practicality. There might not be work available in a number of areas and, as such, it could not be done.

That said, as I am sure that the minister would do, I would encourage supervising officers to see whether it is possible for work to be done in the area where the offence is perpetrated. One of the great successes of the community court system in New York, of which members will have heard me speak in the past, is the fact that there is that visibility, which works as an effective deterrent and encourages the people in the community to recognise that the law is on their side.

On the basis of the practicalities, I would have to vote against Miss Constance's well-thought-out and well-argued amendment 398.

Kenny MacAskill: We accept the spirit and ethos of what Angela Constance seeks to achieve, but I agree with you, convener, that it is the practicality that causes difficulty.

Amendment 240 agreed to.

Amendment 241 moved—[Kenny MacAskill]—and agreed to.

Amendment 398 not moved.

Amendments 242 to 251 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group is on community payback orders and fine defaulters. Amendment 252, in the name of the minister, is grouped with amendments 253, 258 and 292.

Kenny MacAskill: Amendments 252 and 253 are minor technical amendments to proposed new sections 227M(1) and (2) of the 1995 act to replace the phrase "sentence of imprisonment" with "period of imprisonment" as fine defaulters receive only a period of imprisonment and not a sentence of imprisonment.

Amendment 258 will remove the option of the offender paying part of the outstanding fine in order that the court vary a CPO that was imposed for fine default. The amendment is considered necessary to avoid both potential significant practical administrative problems and the likely difficulty in determining how such an order should be varied. However, an offender can still pay the outstanding fine or the instalment of the fine that resulted in the CPO in full in one payment, the effect of which will be to discharge both the fine and the CPO.

Amendment 292 has the effect that the court, when revoking an order imposed for fine default, may deal with the offender in any way that it could have done in respect of the fine default for which the CPO was imposed.

I move amendment 252.

11:45

The Convener: I will resist the temptation to speak on the issue of unpaid fines.

Amendment 252 agreed to.

Amendments 253 to 267 moved—[Kenny MacAskill]—and agreed to.

Amendment 88 moved—[Robert Brown].

Nigel Don: I think that we have passed the stage at which there is any point in opposing

Robert Brown's amendments on this matter. For consistency, we should just accept them.

The Convener: We will record that as agreement. No doubt you can pursue the matter in another place.

Amendment 88 agreed to.

Amendment 89 moved—[Robert Brown].

The Convener: The question is, that amendment 89 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 89 agreed to.

The Convener: The next group is on community payback orders, mental health treatment requirements and chartered psychologists. Amendment 268, in the name of the minister, is grouped with amendments 269 to 273.

Kenny MacAskill: These are minor technical amendments. Paragraph 3 of part 1 of schedule 5 to the Health Care and Associated Professions (Miscellaneous Amendments and Practitioner Psychologists) Order 2009 (SI 2009/1182) amends section 230 of the Criminal Procedure (Scotland) Act 1995, which makes similar provision in relation to probation orders, to replace references to "chartered psychologists" with "registered psychologists". Amendments 268 to 270, 272 and 273 bring proposed new sections 227R and 227T of the 1995 act into line with the amendments that the 2009 order made to section 230 of the 1995 act.

Amendment 271 updates a cross-reference that relates to the definition of "approved medical practitioner". Proposed new section 227S of the 1995 act uses the term "approved medical practitioner". That term is defined in the Mental Health (Care and Treatment) (Scotland) Act 2003 rather than in the Criminal Procedure (Scotland) Act 1995. Where the term is used in proposed new section 227R(4)(a) of the 1995 act, reference is made to its having the meaning that is given in the 2003 act. Amendment 271 inserts a similar reference into proposed new section 227S of the 1995 act.

I move amendment 268.

The Convener: That was a perfectly straightforward, if somewhat convoluted, explanation.

Amendment 268 agreed to.

Amendments 269 and 270 moved—[Kenny MacAskill]—and agreed to.

Amendment 90 moved—[Robert Brown].

The Convener: The question is, that amendment 90 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 90 agreed to.

Amendments 271 to 273 moved—[Kenny MacAskill]—and agreed to.

Amendment 91 moved—[Robert Brown].

The Convener: The question is, that amendment 91 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 91 agreed to.

The Convener: The next group is on community payback orders and drug treatment requirements. Amendment 274, in the name of the minister, is the only amendment in the group.

Kenny MacAskill: Proposed new section 227U of the 1995 act provides that a court may impose a community payback order with a drug treatment requirement provided that it is satisfied that arrangements have been made for the proposed treatment. Amendment 274 will clarify that the court may also impose a community payback order where it is satisfied that the proposed treatment can be made available.

I move amendment 274.

Amendment 274 agreed to.

Amendment 92 moved—[Robert Brown].

The Convener: The question is, that amendment 92 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 92 agreed to.

Amendment 275 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group is on the commencement and standards of community payback orders. Amendment 276, in the name of Robert Brown, is the only amendment in the group.

Robert Brown: We are aware that community payback orders, in their own context and in the wider context of later changes in the bill, are pretty important. My amendment 276 is intended to firm up the speedy and effective start of community payback orders that the committee agrees is vital. I pay tribute to the Scottish Government's investment in improving the existing community orders and getting them to start more quickly, but I think that I am right in saying that those arrangements are not statutory. There is a strong case for making them so. Statutory direction is one of the most effective drivers of public policy. Courts, criminal justice authorities and social workers, among others, know that the order is to commence immediately, especially if it says so in statute. My amendment 276 proposes to insert new section 227VB into the 1995 act. In it, I have retained enough flexibility by providing that the order must start on the day on which it is imposed or the next weekday, but have qualified that with the phrase, "wherever possible". As one can imagine, there may be circumstances in which there are issues, but the norm should be very clear.

My amendment also proposes to insert new section 227VC into the 1995 act. That new section would give ministers specific powers to lay down standards for community payback orders to ensure that they are prompt, effective and proportional, and that they make a difference. It is vital to have national standards in that area. While the Government has in the past indicated its views on those matters to community justice authorities and others, it would be useful if ministers had a specific power to develop standards in that regard.

I move amendment 276.

The Convener: This is an important issue, and I look forward to hearing what Mr MacAskill has to say about it.

Kenny MacAskill: The first part of amendment 276 proposes a new section 227VB, which would require that a court imposing a community payback order with a supervision or an unpaid work requirement must specify commencement dates in respect of those requirements. In addition, the dates to be specified for commencement should be either the day on which the community payback order is imposed or as soon after that date as is practicable. Obviously, there has been no opportunity to consult local authorities on the potentially significant practical and resource impacts of such statutory provision. We agree that a speedy start to a CPO is critical, but we should also recognise our commitment to working in partnership with local authorities. We have taken the approach of joint agreement to new timescales, which are included in guidance that took effect in June 2009 and are already making a difference to delivery. We do not think that such provision in the bill would be helpful. That part of amendment 276 should be resisted.

The second part of amendment 276 would insert new section 227VC into the 1995 act, to provide that the Scottish ministers may specify standards of compliance for community payback orders by means of statutory instrument. There are already powers in the bill to make rules in connection with the undertaking of unpaid work, and we are amending the bill to make it clear that the rules may confer functions on responsible officers and specify how they are to exercise their functions under the bill. The provision that amendment 276 seeks to make would be much broader and we have difficulty in seeing how it would work. For example, it is not clear how one would set out standard provisions that would support an "effective" community payback order—"effective" is not defined.

Some of the provisions in proposed new section 227VC mirror provision that is already in the bill. The bill makes it clear in section 227A(3) that a community payback order can be imposed only if the offence or offences committed were sufficiently serious. That part of amendment 276 should also be resisted and I invite Robert Brown to withdraw the amendment.

Robert Brown: I listened with interest to what the cabinet secretary said. The issue is important, as he said. I have worries—if I can put it that way—about how everything will fit together, and I depend on Government guidance in that regard. However, I am keen that the bill should provide the stronger statutory drive that I talked about. There was general agreement in the committee that it would be good if community payback activity started pretty much in the way that prison sentences do.

Although I understand and appreciate what the Government has done to try to move things forward, I wonder whether the cabinet secretary will give further consideration to the issue, to ascertain whether the approach can be tightened up. I do not want to impose on the Government a formulation that overlaps with other provisions in the bill, as the cabinet secretary pointed out. I would appreciate further discussion or ministerial consideration of the matter prior to stage 3. If such consideration is forthcoming I will seek leave to withdraw amendment 276.

The Convener: I will allow the cabinet secretary to respond to Robert Brown, because we are talking about an important issue.

Kenny MacAskill: Draft standards and guidelines will be published, but I will be more than happy to discuss the matter with Robert Brown or any other member of the committee, if that would help. We must ensure that we work together. We accept the ethos behind what Mr Brown and the committee seek to achieve; we simply seek to work with partners and statutory agencies who are charged with delivery, so that we move together and ensure that there is no replication.

The Convener: It is important that there should be immediacy. However, on the basis of the cabinet secretary's undertaking, I ask Robert Brown what his attitude is to amendment 276.

Robert Brown: In the circumstances, I will seek leave to withdraw amendment 276.

Amendment 276, by agreement, withdrawn.

Amendment 277 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group is on progress reviews in relation to community payback orders. Amendment 278, in the name of the cabinet secretary, is grouped with amendment 279.

Kenny MacAskill: Amendment 278 will provide that where the court that imposes a community payback order is not the appropriate court to carry out the progress review, it must specify in the order the appropriate court.

In the course of a progress review, if it is alleged that the offender has failed to comply with a requirement that was imposed by the order, amendment 279 will provide that the court must

"(a) provide the offender with written details of the alleged failure,

(b) inform the offender that the offender is entitled to be legally represented,

and

(c) inform the offender that no answer need be given to the allegation before the offender—

(i) has been given an opportunity to take legal advice, or

(ii) has indicated that the offender does not wish to take legal advice."

Amendment 279 will also provide that the court must appoint another hearing, at which it can consider the matter in accordance with the breach provisions in proposed new section 227ZB of the 1995 act. If the court is not the appropriate court, it must refer the matter to the appropriate court.

The provisions make it clear that a separate breach hearing must be held whenever, in the course of a progress review, it appears to the court that a breach of the order has been committed. They spell out more clearly an offender's rights when it appears that there has been a breach of a community payback order.

I move amendment 278.

Amendment 278 agreed to.

Amendments 279 and 280 moved—[Kenny MacAskill]—and agreed to.

12:00

The Convener: We turn to community payback orders—revocation and so on. Amendment 281, in the name of the minister, is grouped with amendments 282 to 284, 287, 293, 294, 298, 303, 306, 309 to 311 and 314 to 326. I draw members' attention to the pre-emption information that is shown on the groupings list.

Kenny MacAskill: Amendments 281 to 284, 293, 294, 298, 303 and 306 relate to the court's powers when varying, revoking or discharging a CPO. Amendments 281, 282, and 293 are minor drafting amendments to resolve inconsistencies in the language and terminology. Amendment 284 will insert two further options that will be available to the court when varying an order: making provision for progress reviews, or varying such provision when it is already included in the order.

Amendment 287 will remove proposed new section 227Y(5) of the Criminal Procedure (Scotland) Act 1995, as it is unnecessary because the same effect will be provided by proposed new section 227Z(7) of that act. Amendment 294 will remove the requirement for the court to issue a citation that requires the offender to appear in cases in which the offender is already required to appear in respect of breach of a CPO. There is separate provision for the court to issue a citation in breach cases. Amendment 298 will clarify the wording in relation to the duty on the court to explain the requirements for a progress review that is included in a CPO following its variation.

Amendment 303 will insert into proposed new section 227Z of the 1995 act two new provisions that relate to the imposition of new requirements following variation. As the bill is drafted, only the requirements that were available to the court when the order was originally imposed can be imposed following a variation of the order. Amendment 303 will provide that that does not apply when a restricted movement requirement is being imposed as a result of a breach of a CPO. Amendment 303 will also provide that the limitation on the maximum number of unpaid work or other activity hours that could have been imposed when the order was first imposed is disregarded when varying an order. However, there will still be limits on the number of hours that can be specified in an unpaid work or other activity requirement, on variation of a CPO.

Amendment 306 will ensure that, when a court has varied a CPO, a copy of the varied order is provided to the relevant local authority as well as to the offender.

Amendment 283 will insert a new subsection into proposed new section 227Y of the 1995 act in respect of the court's powers to vary an order. The amendment will provide that the requirement that the court may vary, discharge or revoke a CPO only if it is in the interests of justice to do so, does not apply when the court is considering varying the order as a consequence of breach of the CPO. The test for varying a CPO on breach is set out in proposed new section 227ZB(5) of the 1995 act.

Amendments 309 to 311 will remove the requirement for an application for a variation to a community payback order to be made before the court can consider varying the order to specify a new local authority, following a change of address by the offender. That will provide the court with more flexibility when varying a community payback order.

Amendment 314 will ensure that the court provides the offender with a copy of any alleged breach and notifies him or her of their rights to legal representation.

Amendments 315, 316 and 326 will amend the provisions relating to the power of the court to impose custody when revoking a CPO as a consequence of a breach. In cases in which a CPO is imposed for an offence that is not punishable by imprisonment, or for one that is imposed for fine default, the court may impose custody for up to 60 days in the case of the justice of the peace court and three months in any other court.

Amendment 317 will allow the court, when dealing with breach, to revoke any single requirement that has been imposed by the order. Amendment 318 will provide the court with the additional option, as well as that of varying the order, of imposing a fine. Amendment 320 will enable the court to vary the order if it is satisfied that the offender has failed to comply with the CPO, but has reasonable excuse for that failure.

Amendment 319 applies to a breach of a CPO that was originally imposed concurrently with a drug treatment and testing order or restriction of liberty order, and in respect of the same offence. In such cases, if the CPO is revoked as a result of breach, the court will also have to revoke any drug treatment and testing order or restriction of liberty order that was imposed for the same offence.

Amendment 322 relates to the requirement that any CPO that contains a restricted movement requirement must also contain a supervision requirement. The amendment specifies that the court must ensure that the supervision period is at least as long as the period of the restricted movement requirement. When the restricted movement requirement is less than six months in duration, the period of supervision may also be less than six months.

Amendments 323 and 324 will remove the provisions about the period of the restricted movement, as those will be dealt with by amendment 331. Amendment 325 provides that, when the court that deals with an alleged breach of a CPO is a drug court, the additional powers of a drug court also apply.

I move amendment 281.

The Convener: The amendments are reasonably straightforward, but Robert Brown has a comment.

Robert Brown: Proposed new section 227ZB of the 1995 act describes what happens

> "If the court is satisfied that the offender has failed without reasonable excuse to comply with a requirement".

The CPO can be varied, and so forth. It strikes me that there will be situations in which there is a reasonable excuse. Nevertheless, problems with the operation of the orders have been experienced and it might be advantageous to both the offender and the public to vary an order. Is there a power to vary the order in such circumstances? If not, would such a power be worth considering?

Kenny MacAskill: That is a fair point. Amendment 320 is meant to do what Robert Brown suggests—it will enable the court to vary a CPO if it is satisfied that the offender has failed to comply with the order but has reasonable excuse for that failure. There is a general discretionary power for the sheriff.

Robert Brown: Thank you. I had not followed the explanation as well as I should have done.

The Convener: It is as well that such matters are highlighted. I will assume that Mr MacAskill's response was his summing up.

Kenny MacAskill: Yes.

Amendment 281 agreed to.

Amendments 282 to 285 moved—[Kenny MacAskill]—and agreed to.

Amendment 93 moved—[Robert Brown].

The Convener: The question is, that amendment 93 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 93 agreed to.

Amendments 286 to 321 moved—[Kenny MacAskill]—and agreed to.

Amendment 94 moved—[Robert Brown].

The Convener: The question is, that amendment 94 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 94 agreed to.

Amendment 95 moved—[Robert Brown].

The Convener: The question is, that amendment 95 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 95 agreed to.

Amendment 322 moved—[Kenny MacAskill]—and agreed to.

The Convener: I call amendment 323. If the amendment is agreed to, I cannot call amendment 96, due to pre-emption.

Amendments 323 to 326 moved—[Kenny MacAskill]—and agreed to.

Amendment 97 moved—[Robert Brown].

The Convener: The question is, that amendment 97 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 97 agreed to.

Amendment 327 moved—[Kenny MacAskill]—and agreed to.

The Convener: We come to amendments on community payback orders—restricted movement requirement. Amendment 328, in the name of the minister, is grouped with amendments 329 to 335.

Kenny MacAskill: Amendments 328 to 335 relate to the provisions about restricted movement requirements, a requirement which may be imposed in a CPO following breach. Amendments 328 and 329 will require the court, when imposing a restricted movement requirement, to take account of any other restricted movement requirements or restriction of liberty orders the offender is subject to, and to ensure that the cumulative effect of those requirements does not require the offender to remain at the specified address for more than 12 hours in any one day.

Amendment 331 will insert new subsections into proposed new section 227ZD of the 1995 act to provide for the minimum and maximum durations of a restricted movement requirement. The minimum duration for such a requirement will be 14 days; the maximum duration will depend on which court imposed the original order, the age of the offender at the time the order was imposed and what requirements were included in the original order. Where the offender was under 18 at the time the order was imposed or where the order only included a level 1 unpaid work requirement, the maximum duration of a restricted movement requirement will be 60 days if the order has been imposed in the JP court, and three months if imposed in any other court. Those maximums are in line with the maximum custody periods that are available in other circumstances for breach of a CPO. In all other cases the maximum duration is 12 months. Amendments 330 and 332 are consequential on amendment 331.

Amendment 333 will allow the court to vary the address that is specified in the restricted movement requirement without the requirement for an application. That might be needed if the court decides to vary the requirement following a breach. Amendments 334 and 335 are consequential on amendment 333.

Amendment 337 will require the court to forward to the responsible officer a copy of any restricted movement requirement that is varied under proposed new section 227ZF of the 1995 act.

I move amendment 328.

Amendment 328 agreed to.

Amendments 329 to 338 moved—[Kenny MacAskill]—and agreed to.

The Convener: We come to the group on unpaid work and other activity requirement—consultation. Amendment 98, in the name of Robert Brown, is the only amendment in the group.

Robert Brown: Amendment 98 is designed to ensure that there is a proper relationship between victims of crime and communities on the one hand, and the arrangements that are made for community work on the other. In fairness, there is growing good practice and experience in this area, but it is vital that both victims and local communities have confidence in the arrangements, know what work is being done to repay them and have an input into that. The importance of that requires specific mention over and above the "prescribed persons" who are specified in the existing section 14. That would be appropriate in the case of community councils and adds a little to their functions in a helpful way. I hope that the committee will be sympathetic to the amendment.

I move amendment 98.

Kenny MacAskill: As Robert Brown says, proposed new section 227ZJ of the 1995 act sets out the duties of local authorities in relation to consulting "prescribed persons" about the nature of unpaid work and other activities to be undertaken by offenders in the local authority area where the community payback order is imposed. Amendment 98 seeks to include in proposed new section 227ZJ two particular classes of persons whom the local authority should consult, namely

> "persons or organisations representing victims of crime"

and community councils established in their area.

Rather than amend the section, as proposed, it would be better to allow Parliament to look at the list of prescribed persons in the round when the necessary regulations are laid. According to current plans, that will be in autumn 2010.

Amendment 98 should be resisted. However, both the categories that it mentions would be obvious consultees, so I am happy to give Mr Brown a commitment that we will include individuals or organisations representing victims of crime and representatives of community councils as prescribed persons in the draft regulations, so I invite him to withdraw amendment 98.

12:15

The Convener: No doubt Robert Brown will address that in his winding up.

Robert Brown: Yes. I do not have a totally strong view on the matter. There is some merit in making mention of victims in the bill, but the end result is the important thing. I am in the hands of the committee on this one—I am not sure whether members are anxious to pursue the matter. We have had a satisfactory assurance from the cabinet secretary that I am minded to accept at this stage. We can return to the issue at stage 3 if there are further qualms on the matter. I seek leave to withdraw amendment 98.

Amendment 98, by agreement, withdrawn.

The Convener: That is the sensible solution. There is merit in the amendment, but I think that all of us are encouraged by what the cabinet secretary said.

Amendment 339 moved—[Kenny MacAskill]—and agreed to.

The Convener: We turn to annual reports and community payback orders. Amendment 99, in the name of Robert Brown, is the only amendment in the group.

Robert Brown: Amendment 99 is the natural corollary to the previous amendment. At the time of the Christmas bad weather, some fuss made was rightly made about whether people on community sentences were being employed in gritting the roads. Most of us have no idea of the work that offenders do, how many people are involved and how much it all costs. It is important that elected Government and the public should know that information, both locally and nationally and in a structured way. The importance of the issue goes beyond that; information will be an important contributor to the success of the new orders and their public acceptability. Amendment 99 proposes an important provision, which matches the Government's general desire for consultation on the nature of the work that is being done, public knowledge of the details and transparency.

I move amendment 99.

James Kelly: I support amendment 99, which is both important and helpful in the general context of the bill. From our discussions this morning and previously, it is clear that there is cross-party support for the principle of community payback orders—we want to see them working. The amendment will allow us to demonstrate what is being done. Proper evaluation of the scheme would also be undertaken. I will not repeat my previous concerns about finances. The proposed annual report would give additional information on finances, which would be helpful to the Government and local authorities in predicting their future budgeting requirements.

Kenny MacAskill: Amendment 99 would impose reporting requirements on local authorities individually and the Scottish Government in relation to the impact of community payback orders, particularly in relation to the extent, cost and nature of unpaid work and the extent, cost and nature of the programmes that are undertaken. It would also impose additional statutory reporting burdens on local authorities without due opportunity for advance consultation with the Convention of Scottish Local Authorities.

At this stage, our view is that amendment 99 should be resisted. That said, we fully accept the principle of making available adequate information on the delivery, uptake and impact of the community payback order. I would be very happy to write to the committee to set out in detail the work that we are doing to improve information collection. In particular, we are working in partnership with stakeholders to review the scope and collection of criminal justice social work statistics. Instead of imposing any new burden on local authorities, we are taking forward this work within our existing arrangements. We are working in collaboration with stakeholders who deal with front-line services as well as collating the information that the public and Parliament require.

I invite Robert Brown to seek leave to withdraw amendment 99.

Robert Brown: I am grateful for the minister's response. I am not sure that what is proposed would place a great burden on local authorities, but I am prepared to consider the matter further between now and stage 3. I will discuss it with the minister and wait to see his letter. If committee colleagues continue to have an interest in the matter, we could return to it at stage 3.

It is important that there is a degree of statutory pressure on the operation of community payback orders, as it is central to their success that the public have confidence in them. The information that would be provided under my proposal, both on individual local authority areas and at a national level, would inform debate. It is information that we ought to have, although I am open to discussions about the detail.

Against that background, I seek the committee's leave to withdraw amendment 99.

The Convener: I take it that you seek leave to withdraw amendment 99 on the understanding that the issue might be revisited at stage 3, because there are merits in your arguments.

Robert Brown: Yes.

Amendment 99, by agreement, withdrawn.

Amendments 340 and 341 moved—[Kenny MacAskill]—and agreed to.

The Convener: We turn to the group on community payback orders—consequential modifications. Amendment 342, in the name of the minister, is grouped with amendments 343 and 414.

Kenny MacAskill: Amendment 342 will insert a schedule into the Criminal Procedure (Scotland) Act 1995 that lists amendments that are consequential on the introduction of community payback orders. Amendment 414 seeks to remove the amendments in schedule 5 to the bill that relate to the introduction of community payback orders, as they will be dealt with in the schedule that is proposed in amendment 342.

Amendment 343 contains the schedule that details the amendments that are consequential on the introduction of CPOs, the majority of which relate to the repealing of references to “probation order”, “community service order” and “supervised attendance order”—the orders that are being replaced by CPOs—and their replacement with references to “community payback order”, where appropriate.

There are a few amendments that are more substantial, such as those that relate to the combination of CPOs, drug treatment and testing orders and restriction of liberty orders, which a court may impose for the same offence, and to the action that a court requires to take when it revokes such an order.

I move amendment 342.

Amendment 342 agreed to.

Section 14, as amended, agreed to.

After Schedule 1

Amendment 343 moved—[Kenny MacAskill]—and agreed to.

The Convener: Before I conclude this item, I point out that the committee has gone through some 36 pages of amendments. That would not have been possible had everyone not come to the meeting so well prepared and organised. I offer my congratulations to all at the table, including the cabinet secretary, on the way in which business has been conducted this morning.

I remind members that the main item on next week’s agenda will be oral evidence on stage 2 amendments to the Criminal Justice and Licensing (Scotland) Bill. Formal stage 2 consideration will resume after the Easter recess, on 13 April. A target for the furthest point in the bill that the committee will reach on that day—day 3 of stage 2—will be announced shortly. I remind members that they will be expected to lodge all remaining amendments up to that point by the lodging deadline of 12 noon on 25 March.

I thank members for their attendance.

Meeting closed at 12:24.

JUSTICE COMMITTEE

EXTRACT FROM THE MINUTES

11th Meeting, 2010 (Session 3)

Tuesday 23 March 2010

Present:

Bill Aitken (Convener)	Robert Brown
Bill Butler (Deputy Convener)	Angela Constance
Cathie Craigie	Nigel Don
James Kelly	Stewart Maxwell

Also present: Richard Baker, Trish Godman, Rhoda Grant and Margo MacDonald.

Criminal Justice and Licensing (Scotland) Bill — witness expenses: The Committee agreed to delegate to the Convener responsibility for arranging for the SPCB to pay, under Rule 12.4.3, any expenses of witnesses invited to give evidence on Stage 2 amendments to the Bill.

Criminal Justice and Licensing (Scotland) Bill: The Committee took evidence on Stage 2 amendments relating to prostitution offences from-—

George Lewis, Co-chair, Scot-PEP;

Ann Hamilton, Head of Equalities and Women's Services, Glasgow Community and Safety Services;

Assistant Chief Constable Iain Livingstone, Lothian and Borders Police, Association of Chief Police Officers in Scotland;

on Stage 2 amendments relating to stalking etc. from—

Ann Moulds, Campaign Founder, Action Scotland Against Stalking;

Frida Petersson, Senior Research and Policy Officer, Victim Support Scotland;

Assistant Chief Constable Iain Livingstone, Lothian and Borders Police, and Detective Chief Inspector Peter McPike, Strathclyde Police, Association of Chief Police Officers in Scotland;

on Stage 2 amendments relating to sentencing on knife crime from—

John Muir, "Damian's Law" Campaigner;

Chief Constable David Strang, Executive Vice President, Association of Chief Police Officers in Scotland.

Criminal Justice and Licensing (Scotland) Bill — written evidence (in private): The Committee considered requests to accept certain written submissions on Stage 2 amendments on the basis that they would be seen in full by the Committee but not published. The Committee did not agree to these requests, but agreed that it could accept these submissions on the basis that they would be published with all references that would enable individuals to be identified redacted.

Criminal Justice and Licensing (Scotland) Bill

10:08

The Convener: Item 3 is on the Criminal Justice and Licensing (Scotland) Bill. The committee is invited to delegate to me the responsibility for arranging for the Scottish Parliamentary Corporate Body to pay, under rule 12.4.3 of standing orders, any expenses of witnesses who are invited to give evidence on stage 2 amendments to the bill. Are members content with that delegation?

Members *indicated agreement.*

The Convener: That leads us to item 4, which is the main item on the agenda today and under which the committee will take evidence on stage 2 amendments to the Criminal Justice and Licensing (Scotland) Bill. I particularly welcome Trish Godman MSP and Margo MacDonald MSP, who have a specific interest in the first item to be discussed. It is probable that other members will join us later.

The first evidence session relates to prostitution offences and, specifically, to the offence of engaging in paid-for sexual activity and related new offences. Amendment 8, which has been lodged by Trish Godman, proposes changes to the Sexual Offences (Scotland) Act 2009 to create three new offences: engaging in a paid-for sexual activity; advertising paid-for sexual activities; and facilitating engagement in a paid-for sexual activity. Amendments 8A to 8D, which have been lodged by Margo MacDonald, propose the addition of two further offences: causing alarm etc by engaging in a paid-for sexual activity; and profiting from coerced paid-for sexual activities. Finally, amendment 461, which was recently lodged by Nigel Don, would create the offence of paying for the sexual services of a prostitute subjected to force etc.

I welcome the first panel of witnesses: George Lewis is co-chair of SCOT-PEP, the Scottish prostitutes education project; Ann Hamilton is the head of equalities and women's services at Glasgow Community and Safety Services; and Assistant Chief Constable Iain Livingstone is from the Association of Chief Police Officers in Scotland. I thank you very much for agreeing to come to the meeting. We move straight to questioning, which will be opened by Nigel Don.

Nigel Don (North East Scotland) (SNP): Good morning, and welcome to the cauldron. There is a great deal of public interest in what will be said here this morning, so I am sure that we will be careful in what we do.

My first question might best be addressed to Assistant Chief Constable Livingstone. To what extent is indoor prostitution, provided that it does not involve coercion or children, or cause a public nuisance, currently tolerated by the police?

Assistant Chief Constable Iain Livingstone (Association of Chief Police Officers in Scotland): Our main concern with regard to indoor prostitution is the organised crime that lies behind it. To be frank, our toleration is not overt, and it is not the case that we turn a blind eye.

In recent years, and certainly in the past five years, there has been, from my experience of working in the Leith area of Edinburgh, a move away from the traditional profile of street-based prostitution towards off-street prostitution and—probably uniquely in Edinburgh, through the approach of the City of Edinburgh Council and others—towards the use of off-street licensed premises.

We do not tolerate off-street prostitution as such, because there are significant issues in relation to knowledge gaps in our information and intelligence. Our general assessment is that there is likely to be organised crime behind off-street prostitution, and that a lot of the women who work in off-street premises may well be there under some form of duress. We seek to identify those premises and to find out more about what is going on, but toleration is not a national police policy.

Nigel Don: I was going to ask you about the national context. I am conscious that the issue probably affects big cities more than it does other places; can you comment in any detail on the situation in the other big cities in Scotland?

Assistant Chief Constable Livingstone: The links between prostitution and vulnerable individuals, organised crime, community concern and antisocial behaviour are probably more complex than they are in relation to any other issue.

As we understand the problem—there are gaps in our understanding—the profile of prostitution is different throughout Scotland. In Edinburgh, there are a number of licensed premises, whereas in Aberdeen it appears that there is more of an issue with organised street prostitution. In the west of Scotland—I am speaking in general terms—the profile appears to involve more organised off-street prostitution.

Those different areas of prostitution all have a different profile and demand different levels of response. Our view is that no single approach will be effective: each area needs a tailored approach, and enforcement and support need to be undertaken on an interagency and multi-agency basis.

I have referred to three significant city areas, but our view—again with the caveat that there are gaps in our understanding—is that prostitution permeates beyond the main city areas into some of the other urban areas in Scotland.

Nigel Don: Would Mr Lewis like to comment on the extent to which indoor prostitution is tolerated in Scotland?

10:15

George Lewis (SCOT-PEP): We can really speak only about the Edinburgh experience. Our understanding is that a pragmatic approach exists in Edinburgh, which is supported in part by the police, the local council and service providers such as ourselves, although I take on board what Iain Livingstone said about overall police policy.

In our view, the pragmatic approach works well on a number of levels, particularly with regard to sexual health, HIV and hepatitis C transmission, and the public nuisance issue. Saunas conform to their responsibilities in order to keep their licenses: there have, for example, been cases over the years in which saunas have stepped out of line by employing underage girls and they have, quite rightly, been jumped on from a great height. The majority of saunas toe the line, as it were, which has benefits in a lot of different areas.

It is a small point, but a sauna will pay its rates and taxes just to keep on the right side of the law. We believe that the pragmatic approach has worked well in Edinburgh, but I cannot comment about the situation in the rest of Scotland.

Nigel Don: Perhaps Ms Hamilton can comment on another part of Scotland.

Ann Hamilton (Glasgow Community and Safety Services): We have seen a change in policing by Strathclyde Police, which has stepped up its action on residential and sauna and massage-parlour brothels. We have been involved in supporting victims from a number of operations during the past few months. I think that there is now a recognition of the harm that is done to women who are involved in indoor prostitution, whether they are trafficked or not.

I have brought along some quotations from the work that we have done with women who are involved in indoor and street prostitution, from which we can see that the women suffer isolation, stigma, shame and mental health problems—[*Interruption*.]

The Convener: I am sorry about the noise. We will suspend until we get it sorted out.

10:17

Meeting suspended.

10:18

On resuming—

The Convener: Order appears to have been restored, so we will continue. I am sorry about the interruption, Ms Hamilton.

Ann Hamilton: I trust that it was not anything I said.

Nigel Don: Feel free to go back to the beginning of your sentence so that your thoughts are in the right order.

Ann Hamilton: I was saying that I think that the proactive and strategic interagency approach that we have taken in Glasgow is now paying off. We have examined the nature of both indoor and street prostitution, and we feel that indoor prostitution has not received the type of attention and research that it requires.

Our researchers recently interviewed a number of women who are involved in indoor and street prostitution, and it is evident that in both the harm—in terms of the stigma and shame that women feel, and the isolation and mental health problems that occur—is the same. We also know that there are, as my colleague Assistant Chief Constable Livingstone said, links with organised crime and trafficking.

We know from women's accounts that they are moved around Scotland and to Ireland and England on a regular basis. Indoor prostitution is part of an organised network rather than involving individual women who are prostituting from premises.

I think that we have become much more aware of the various issues, such as the links with organised crime and the harm that has been done to women. In fact, I have brought the committee a little gift—today's *Scottish Daily Sport*—that illustrates the amount of advertising of Scottish and especially foreign women all over Scotland, and which shows that these women are using the same mobile phones and are being moved around. I thought that it might interest the committee.

The Convener: Perhaps you could leave that with us.

Nigel Don: Other members will explore the question whether the law should be changed, but do any of you feel that certain areas of the law are not being used? I appreciate that Mr Livingstone might not want to comment on that, but do the other witnesses feel that a blind eye is being turned to certain legal measures or that certain measures are not being used or are felt to be impracticable?

Assistant Chief Constable Livingstone: I would like to respond to that question. The Law Society of Scotland and others who have submitted evidence to the committee have suggested that there have been no convictions under the Prostitution in Public Places (Scotland) Act 2007. I was curious about that, because I know for a fact that more than 200 people in the Lothian and Borders area have been charged under the so-called kerb-crawling legislation. When I looked into the matter, I found that, although not all the cases had been prosecuted, a number of them had been disposed of by fiscals under the various summary justice reforms, such as fixed-penalty fines, that MSPs have sponsored. I have not been able to clarify the validity of the claim that has been made by various interested parties that there have been no convictions under the 2007 act—and, indeed, would not dispute the point—but I can say that the police have robustly enforced the legislation, even though the Crown has elected to dispose of such matters by fiscal fine.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, colleagues. Do the police need more powers to deal effectively with prostitution?

Assistant Chief Constable Livingstone: We probably do not. Instead, we need more information, intelligence and awareness of where prostitution takes place, the nature of that prostitution, who is involved in it, whether the women are vulnerable and so on. Ann Hamilton is right to say that there must be robust enforcement against organised and unlicensed off-street premises, although I add that enforcement can take place only against things that we know about. We are concerned about the possibility of driving prostitution further off-street into areas where it is harder to identify vulnerable women and enforcement opportunities. As ever, we need to strike the optimum balance, but I am not sitting before the committee this morning seeking additional powers.

Bill Butler: You are clearly saying that the present powers are sufficient.

Assistant Chief Constable Livingstone: I think that there are sufficient common-law and statutory powers, although I have qualified support for a number of the proposals in some of the amendments because they would allow us to get a clearer picture of what prostitution is. However, when we think about what should be done about prostitution, we should bear in mind its profile: it is not a single entity and does not manifest itself in any single way. It can be very complex and multilayered with regard to whether it occurs on-street or off-street and in the different approaches that are taken across the country. From a policing perspective, I find it quite difficult to speak on a national basis because there is certainly a lot of robust debate in the police service about how the issue should be taken forward.

Bill Butler: I hear you loud and clear. Other colleagues will explore with you your interesting statement that you “have qualified support for” some “of the proposals” that are before the Parliament.

However, I will stick with my general question and ask Ms Hamilton to comment on whether more powers are needed to deal effectively with prostitution.

Ann Hamilton: We feel that there is a need for additional powers, specifically to address aspects such as advertising and facilitation, and we very much welcome the power in the bill to close premises. We are also seeking a sea change in the general acceptance of prostitution. At the moment, it does not matter what the police find when they go into a licensed or unlicensed brothel; the fact is that the men who buy sex are not subjected to any police action and are often not used as witnesses. We definitely need to step up the powers that are required to control and reduce the level of prostitution in Scotland.

Bill Butler: That was very clear. Do you wish to comment, Mr Lewis?

George Lewis: Yes. We believe that police already have the powers to combat what we see as the important issues: trafficking, actual assault and breaches of the peace.

I echo Mr Livingstone’s point that increased legislation will simply drive much of the industry underground, to the fringes or whatever phrase you might wish to use. With the introduction of the kerb-crawling legislation and the loss of the tolerance zone in Edinburgh, we as service providers have found it more difficult to access and provide health and support services to women. Such moves certainly alienate women. I am not saying that this has actually happened—we simply do not know—but those women might, as a result, be driven to the fringes and into the organised crime to which Mr Livingstone referred and begin to see everyone, including service providers such as our organisation, as the establishment and therefore as people to be avoided.

Bill Butler: So, in your view the present police powers are sufficient.

George Lewis: Yes. They are sufficient to deal with what we see as the important issues.

Bill Butler: That is very clear.

The Convener: At this point, I ask Robert Brown to raise the issue of trafficking.

Robert Brown (Glasgow) (LD): Can I first ask a supplementary on another point?

The Convener: Yes.

Robert Brown: On the effects of the kerb-crawling legislation, SCOT-PEP's written evidence refers to an increase in the number of attacks that were reported to the police from 2006 to 2008, after which the organisation has been unable to take statistics. Do the other witnesses wish to make any comment on that? After all, sometimes it is the unintended consequences that have to be dealt with in these matters. I wonder whether Mr Livingstone knows anything about the effects of the legislation with regard to reports to the police.

Assistant Chief Constable Livingstone: I do, but I should qualify my comments by saying that my comments will be a mix of evidence from specific cases and anecdotal observations that I made in preparation for my attendance this morning. Speaking, perhaps, with my Lothian and Borders Police hat on, I point out that, when we had the tolerance zone in the Leith area, the women who worked there knew and would engage with the individuals who would pass through. The police were also present in cars.

Anecdotally, from two or three pretty serious cases—although I would never draw a general conclusion from them—instead of a woman carrying out a risk assessment by thinking, "Who is this individual and have I met him before?" the initial contact is minimal because the individual in the car and the woman are anxious about enforcement of the legislation. So, anecdotally—it is no more than that—from two or three horrendous assaults on women who were picked up in the Leith area, it seems that women are jumping in the car quicker because of the legislation, whereas previously there might have been more engagement and a risk assessment might have been carried out.

10:30

Robert Brown: At a statistical level, can the police confirm or deny—either today or in follow-up evidence if necessary—the general suggestion that there has been an increase in attacks on women since the anti-kerb-crawling legislation came in?

Assistant Chief Constable Livingstone: I cannot give a definitive view now. I could go and find out the statistics, but I would always come back to the point—on which I think we all agree—that we have never known the true nature of attacks on prostitutes. We do not know enough about prostitution. We do not know enough about who is involved and what happens to the women. That is a critical issue that all of us in society need to deal with. I support Ann Hamilton's point that we need to make it a priority. I could find the figures, but I would not have great faith that they represent the reality.

The Convener: I accept that the information comes with a health warning and a caveat, but it would be useful if you could let us have the statistics in writing reasonably quickly.

Assistant Chief Constable Livingstone: I can certainly do that and perhaps give some context, if that would help.

The Convener: We would be obliged.

Robert Brown: Ann Hamilton was going to say something on the issue.

Ann Hamilton: We are not aware of a rise in the number of attacks. However, we know that prostitution is a dangerous business. In Ipswich, a number of women went with a known punter—somebody whom they trusted—and he murdered them. The idea of a risk assessment can be difficult when we are talking about something that is intrinsically dangerous.

Last week, 80 women who are involved in street prostitution came into our service. In Glasgow and Edinburgh, women have been moving out of some of the traditional areas and it is undoubtedly a challenge for services to engage with those women. We are beginning to do much more outreach work to make contact with women. It is a responsibility of services to change the way in which they provide the service, depending on the nature of prostitution at the time.

Robert Brown: The main issue that I want to raise is trafficking. I am sorry that I diverted us slightly, but that other issue is important. As far as I am aware, there have still been no prosecutions in Scotland for trafficking, despite the suggestion that, in Glasgow, the extent of the problem is proportionately similar to, if not greater than, that in London. From contact that I have had with TARA—the trafficking awareness-raising alliance—I know that Ann Hamilton's service has dealt with quite a number of people who have been trafficked. You mentioned trafficking within the United Kingdom as well as into the UK. What is your knowledge of the extent of trafficking, either within the UK or into the UK, based on your experience of providing support services?

Ann Hamilton: This is one of those issues on which it is difficult to give numbers. However, we had 50 referrals in 2009 and staff are currently working with 31 women. Many of those women came through the national referral mechanism that the UK Government has established as part of the obligations under the European convention on trafficking. We certainly support women who have been trafficked.

We also run a service twice a week for women who are involved in indoor prostitution. We currently have about 180 women registered for that and about 50 per cent of them are foreign women. I cannot say that all the foreign women have been trafficked, just as I cannot say that the Glasgow or Scottish women have not been trafficked. However, we know that women are being moved around and sexually exploited, so all the indications of trafficking are there. The police have stepped up their activity in relation to premises and we hope that charges will be placed, although they might not be charges of trafficking, which seem particularly difficult to pursue. Charges have been brought of running brothels, living off immoral earnings and similar offences.

Robert Brown: Is it a fair observation that trafficking is much more difficult to track down as it involves indoor premises stuff that is perhaps a bit more individual or isolated?

Ann Hamilton: It is undoubtedly difficult to track down, because it is part of a criminal organisation. Just as drug dealing, money laundering and so on are challenges for the police, so are prostitution and trafficking. Punters need to find the women. They do not ask specifically for trafficked women; they ask for Thai, black or eastern European women. There is a market in bringing in women to provide fresh faces. There is a great market in moving women from Glasgow to Edinburgh and from Edinburgh to Aberdeen. That is the nature of the industry.

Robert Brown: I ask for a comment from the police perspective. Ann Hamilton is from the service or support side, but the prosecution aspect is obviously proving much more difficult. What is the police assessment of the extent of the trafficking problem within the UK and into the UK?

Assistant Chief Constable Livingstone: The problem is growing, but I make no apology for saying again that there is a great dearth of knowledge and intelligence on the issue. We welcome the helpful work that Baroness Kennedy has kicked off on trafficking. Ann Hamilton is entirely right about the issues to do with organised crime. People move around the UK. Traditionally, Aberdeen has had close links with the west midlands; there are links between Edinburgh and Glasgow; and Glasgow has had links with the north-west. That is where some of the crime groups have had associations.

Trafficking is undoubtedly an issue, but the majority of women whom we see involved in prostitution are, if you like, indigenous Scottish women who are vulnerable and have multiple drug use problems as well as significant social and other factors that influence their lives. Trafficking is an issue, because it is linked to the involvement of organised crime, but the vast majority of vulnerable women whom we see involved in prostitution are local women who often have an array of needs and problems that need assistance.

Robert Brown: Would the criminalisation of paying for sex help or hinder the ability to get stuck into the trafficking problems?

Assistant Chief Constable Livingstone: That is a very good question that goes to the essence of some of the proposed amendments to the bill. We have fears about the potential to prosecute. Ann Hamilton talked about some of the complexities of the trafficking legislation. There are issues to do with getting corroborative evidence of some of the key elements, such as that sex took place, that payment took place and how the payment was made. There are also issues to do with whether the women are unwilling witnesses and whether we would revictimise them by enforcing the proposed legislation. That is our fundamental reservation, although it is a reservation rather than an objection, if that is not too woolly.

We are not sure how the proposed measures would work in practice, or how they would be enforced. Would they cause further harm, and would it be too difficult for us to report the matter to the Crown? Would the Crown be in a position to take the case? If not, would we end up with a piece of legislation on the statute book that was not enforced or utilised, which would undermine our whole approach?

There is consensus and clarity that, although the problem is not an easy one to tackle, we need to commit to doing that, as a lot of vulnerable people are involved and a lot of organised, serious villains are behind it. How do we go about tackling it collectively? We have reservations about whether criminalising the purchase of sex does that, and about how the measures would play out in practice.

Robert Brown: I am conscious of the time, but I would be interested to hear the views of other panel members.

George Lewis: SCOT-PEP was instrumental in setting up protocols in Edinburgh, with an early-warning reporting system for trafficked people—not just women. We worked closely with the police in doing that. Therefore, we are partly seen as the establishment, and we do not necessarily know the extent of the trafficking problem.

We have had some experience of dealing with suspected trafficking. We have good relations with some sauna owners in that regard. Cases have been minimal—at worst, they have involved passport violations and people being sent home.

As Mr Livingstone has pointed out, the complexities of the problem are such that it needs more than just three people sitting here talking for a limited time in order to deal with it.

Trafficking is already illegal. I cannot see that putting another layer of legislation on top will do anything to help trafficked people. It will certainly not help anyone here to identify those people. It might make the situation worse. A trafficker is a trafficker. They are already breaking the law. They will think, “Another law will not make any difference to what I do.”

Robert Brown: Ms Hamilton, you are a proponent of the changes to the law that are being suggested, yet you must accept that there is a gap between the number of people you identify and the number of people that the police can prosecute. What are your thoughts on that?

Ann Hamilton: First, we want something that challenges the acceptability of prostitution. At the moment, buying sex is viewed as something that men do, to which there is an entitlement, and which causes no harm. It is an individual transaction. We want there to be a clear message that that is not the case, and that buying sex has an impact: it supports organised crime and brings harm to women and their families. The proposed change sends out a clear message about the kind of Scotland that we want.

Secondly, our biggest problem with identifying trafficking victims is the fact that prostitution is normal. When the police go into premises, women will immediately say—as they have been warned to do—that they want to do it, that they are there freely and that they send money home.

One woman whom we are supporting said that, when she approached us, she felt able to tell her story and talk through the harm that she had experienced in being trafficked all round the world. She said that she never knew that what she had been going through was illegal and that somebody might help her, so she never said anything. The men who bought sex could see when they came in that she did not want to do it, yet they queued up, paid their money and left. There were policemen in and out of the premises who never asked her anything or said anything to her.

Although the situation is changing in Scotland and the police have been great partners in talking to the trafficked women they find in brothels about their experience, we are still not at a point where most women will tell their story when police go in to raid or visit premises. It takes quite a bit of time for women to talk through what they have experienced and to seek help. The more we disrupt the sex industry, the better it is for the women who are harmed.

10:45

Robert Brown: As trafficking is already illegal, will the proposed new legislation make any difference?

Ann Hamilton: The buying of sex is not illegal, and there are some licensed premises where the buying of sex appears to be legal and regulated. That is not the case in Glasgow, but it is in some parts of the country. The fact that it is in Edinburgh has an impact on women in Glasgow. Women in Glasgow tell staff for whom I am responsible that they do not like going through to Edinburgh, because there are more rules and regulations there, and more harmful practices. That is anecdotal, but it is what women are telling those who work in the relevant services.

The Convener: I am anxious to move on. Stewart Maxwell has a point to raise.

Stewart Maxwell (West of Scotland) (SNP): We have spoken about trafficking and the involvement of organised crime in prostitution. That is not denied by anybody. As a number of people have said, prostitution is a complex, multifaceted, multilayered issue. I presume that you are not suggesting that all women or men who are working in the sex industry are the victims of organised crime or trafficking. There might well be individuals who work on their own, and not in licensed premises, brothels or saunas. My question refers back to Nigel Don’s earlier question. What difficulties do individuals working in those circumstances cause the police? Do other panel members feel that it is right, or even enforceable, to criminalise such activity between consenting adults behind closed doors in cases where the women or men involved are working on their own?

Assistant Chief Constable Livingstone: There are indeed licensed saunas in Edinburgh, which is to do with the City of Edinburgh Council’s partnership approach. There is a history of such an approach in the east, including an emphasis on harm reduction. Rightly or wrongly, it is an historical fact. We recently visited all licensed premises—and there are a number of gay saunas in Edinburgh—with a view to engaging with people working in those establishments. They were not enforcement visits, but welfare visits.

We spoke to a number of people, and we were told by the majority—bearing in mind Ann Hamilton’s point about what they say to us and what might actually be going on—that they were economic migrants. If they were not United Kingdom nationals, they said that they were over in the UK, Scotland and Edinburgh because they needed to make money. They did not wish any assistance or referrals from us, and they felt that they were entirely in charge of their own destiny.

That covers the policing element. However, it is our perception or feeling that there will be some element of coercion for anybody working in that environment, even if it is economic coercion.

Stewart Maxwell: I accept that. However, I was specifically asking about people who are not working in such premises, but who are working on their own. We have received written evidence from a number of individuals who say that they work by themselves, using a receptionist or maid, to use the usual expression. They feel that the proposed new section headed “Facilitating engagement in paid-for sexual activity” would result in the individual receptionist or maid, who is part of the protection, being criminalised, which would make the work more dangerous for those individuals, and so they object most strongly. What would the impact of the proposed legislation be on individuals in that situation?

Assistant Chief Constable Livingstone: We rarely come upon such individuals, unless a specific complaint is made. I return to my earlier observation that we are discussing an issue where there are as many gaps in our knowledge as areas of awareness. There is a lot of anecdotal experience, and we have had a lot of personal experience in various ways and in different roles, but the points that you have made about the impact on the sole traders that you describe underline some of the reservations that have been expressed about criminalising the purchase of sex. Establishing it would be difficult and might revictimise others but, in policing terms, we rarely come upon the sole traders that you describe.

Ann Hamilton: Similarly, we do not tend to come into contact with individual women who have made a choice to be involved in prostitution. The women whom we engage with and the men with whom the open road project engages in Glasgow tend to work in flats where there are two or three people—it could be only one but, in that case, it is being facilitated by somebody.

Obviously, there has been a lot of chat on punternet, which is one of the websites that provide an opportunity for men to review women and talk about their experience in prostitution. You might be interested to hear that they have been encouraging as many individual women as possible to write in and respond to the committee on the matters that are being considered. We do not tend to come into contact with individual women who say that they have made a choice. I doubt very much, given police resources, that that would be a priority.

Stewart Maxwell: Absolutely but, as I understand it, the amendments would also criminalise that behaviour.

Ann Hamilton: Yes. Rightly, I think, because we are talking about the buying and selling of people and attitudes generally—

Stewart Maxwell: They are working by themselves. That is the crucial difference.

Ann Hamilton: Yes, that is right, but the issue is also to do with gender inequality and why women end up selling sex because of economic necessity or for other reasons. We do not know enough about those women, but there must be a general strategic approach to the issue, which involves tackling demand and tackling the general attitude that prostitution is inevitable and acceptable.

George Lewis: Unlike my two colleagues on the panel, we come into contact with many of those women and men. As you rightly say, there are a lot of submissions to the committee from women who work on their own. Some of them are extremely articulate and others are less so, but there is an underlying theme that they do what they do out of choice and with consent. There is anger and frustration that the proposed amendments take away that choice and that consent. You will have read the submissions yourselves. You have had 90-odd submissions from all shades of opinion but, for me, those from the women who are working in the industry are perhaps the most valid when it comes to how the proposals will affect lives.

The Convener: I now ask James Kelly to ask a question on the amendments, which might provide the opportunity, if they so wish, for Margo MacDonald and Trish Godman to ask any questions that they feel are relevant.

James Kelly (Glasgow Rutherglen) (Lab): This has been a wide-ranging discussion, some of which has focused on current experiences and the way in which the law operates now. I am interested, first, in Mr Livingstone’s views on what the four amendments that are before us would mean for the policing of prostitution, particularly indoor prostitution.

Assistant Chief Constable Livingstone: I expressed my reservation about the enforceability of the proposed legislation on paid-for sexual activity. I do not disagree with what Ann Hamilton says about sending a clear message nationally about the dangers of prostitution. Our reservation is about whether proposed new section 11A would assist with that or take away from it. Establishing that the main parts of sexual activity had taken place and evidencing payment would give investigative challenges. If required, those challenges would be met, but the Crown would have a view on the sufficiency of evidence required to establish that. Our main reservation is about how the proposal would play out in practice, regardless of the debate about its utility or the potential human rights conflicts that rest behind it.

Do you want me to take the proposals in the amendments one by one?

James Kelly: Yes, that would be helpful.

Assistant Chief Constable Livingstone: In principle, we support proposed new section 11B, which deals with advertising. We take Ann Hamilton's point about its impact. We think that the proposals in amendment 8 are quite narrowly worded—that is just an observation. We know from colleagues in the Republic of Ireland who have introduced such an offence that it has had an impact. We would again qualify our support by saying that there is always the danger that the more enforcement and overt legislation you have, the further you drive the issue away. I still have anxiety about legislating on a social problem and a social phenomenon when we do not have a clear understanding of prostitution and the scale and extent of the problem—as the lead on behalf of the police service in Scotland, I certainly do not feel confident that we do. However, I think that we would support the principle behind new section 11B, which Ann Hamilton has graphically evidenced with the papers that she has provided this morning.

Our reservations about proposed new section 11C, on facilitation, are similar to those that we have about section 11A in respect of establishing that sexual activity took place, that payment was made and that it was knowingly facilitated. We again feel that prostitution is, in itself, already an offence in a public place and that sufficient legislation is in place.

In respect of amendment 8B, on coercion, we again feel that any level of sexual coercion is criminalised. Under section 4 of the Sexual Offences (Scotland) Act 2009, which will, hopefully, be given force at the end of the year, any level of sexual coercion—whether for payment or otherwise—is criminal. We feel that that is sufficient to deal with that mischief and that amendment 8B, by narrowing the issue down to payment, puts another burden on the prosecution whereas, if coercion can be established, whether it is for payment or otherwise, it is criminal. The payment may or may not aggravate or mitigate the offence, depending on the circumstances of the crime, but sexual coercion is already legislated for under the 2009 act.

James Kelly: Thanks for your comprehensive comments. Does Ms Hamilton or Mr Lewis have comments on the amendments?

Ann Hamilton: I suppose that we see this as presenting challenges to the police, but no more so than lots of other areas of criminal activity. When it comes to domestic abuse, for example, the police have to consider how to get corroboration and how to evidence that something that happened in a domestic or private setting is a crime.

When a brothel-keeper is charged, it appears that it is currently possible to prove that money passed over into other hands, that sex was being paid for and that sexual activity took place. Those are all matters for which evidence is provided in court now; the only addition would be that the person who was paying and passed over the money would also be liable.

In respect of advertising for paid sex, it is clear that, if people were not able to advertise in the newspaper, they would not stop but would move on to the internet, which is currently used very extensively, but there are means of addressing that. We do so in relation to child pornography and a number of other crimes. Because something might be difficult is not a reason for not doing it. It is an area in which the police would be able to develop more investigative tools, over a period.

The amendment on facilitating would make another offence. At the moment, someone can be charged with living off immoral earnings and brothel-keeping; the new offence would be similar and we think that it would assist in the disruption of the industry.

The amendment on coercion is probably the most difficult to evidence because women quite often say that they were not coerced, and it might be difficult to prove that they were. Coercion can be very subtle.

11:00

George Lewis: My colleagues here have referred to the sheer complexity of the subject, and there is an underlying perception in the submissions, certainly from the academic and legal point of view, that the amendments have been tacked on to something that is much bigger. Although we are certainly not accusing anyone of trying to force things through without wider debate, the complexity is such that all the amendments should be rejected in full in favour of much wider consultation and debate. In the previous session of Parliament, we had the expert working group on prostitution, which I think took nine months just to debate the outdoor industry. The indoor industry is much more complex, and the consultation period has been short. We have had a month and, although the three of us sitting here have various opinions, we are certainly not representative of the diversity of opinion. The subject needs a lot more consultation than it has had so far.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Mr Livingstone, I think you said that you have reservations about the enforceability of the amendments. I am confident that our law enforcement officers in Scotland will enforce any laws the Parliament passes. The submission from Glasgow Community and Safety Services says:

> "Although the very nature of the sex industry makes it covert, prostitution can never truly exist underground as if the punters are able to find the women selling sex, then so can the Police".

Do you accept that statement?

Assistant Chief Constable Livingstone: I have no doubts or reservations about our ability to enforce the law. My reservations are about the ability to have sufficient evidence to allow a conviction to take place. If the law is there, we will seek to enforce it as best we can. If Parliament has legislated, that law will be enforced. My reservations and those of my colleagues are about the difficulty of evidencing brothel keeping. There are the wider circumstances of financial gain by an individual but there are difficulties with individual transactions—the instance that Mr Maxwell put to us. We might end up taking criminal sanctions against individuals who really did not want the authorities, such as the police, to come near them.

The police will enforce the legislation that Parliament passes; our comment was a practical one—that establishing sufficient evidence to get a conviction would be challenging. The comment about punters finding prostitutes is a fair point. That is what we do—we utilise the advertisements and we increasingly utilise the online threat. As we know from our experiences relating to child abuse offences, the traditional grooming mechanisms and means of contact by the paedophile have changed. Likewise, in the online world, the traditional contact mechanisms have changed, which provides added complexity. I have no difficulty saying that if the law is there the police will take steps to enforce it; I am just saying that we have some reservations, before the law is passed, about how it might play out in practice.

Cathie Craigie: You mentioned that the proposed legislation could drive the problem further underground. Will you say a bit more about that?

Assistant Chief Constable Livingstone: One thing that there has been a consensus on is that we do not know the full extent of off-street prostitution. The adverts may point us in its direction to some extent. There are women working with George Lewis and Ann Hamilton who we have come upon, prosecuted and referred to support means. We deal with what we see but, as we said about trafficking, when it comes to what is happening in the far corners, people are not going to go near any officialdom. Therefore, the more enforcement legislation we have, the more potential there is for a problem that is already proportionately hidden to become more hidden. That is all. It is just a concern that people who we should be looking to assist, give advice to, rescue and provide health care and diversion opportunities to, might be harder to reach because of the enforcement mechanism. Make no mistake: if the law is passed, the police will enforce the law.

The Convener: I invite Trish Godman, who is one of the proposers of the amendments, to ask any appropriate question.

Trish Godman (West Renfrewshire) (Lab): I want to make two quick comments and ask Iain Livingstone a question. George Lewis, you said that you are anxious about whether there is sufficient evidence for the amendments. That smacks of the domestic violence issue—Ann Hamilton mentioned it too; there is a bit of déjà vu here. I take your point, but we would perhaps not be discussing anything at all if we had not lodged the amendments—and the number of people who have responded to the amendments shows that someone wants to do something about the issue.

Iain Livingstone, you said that there is nothing here on trafficking and arrests, as there is in England. I spent a couple of days with the Metropolitan Police exploring that very issue. Is it only because we need corroboration here? What other difficulty would you have—if there is another one—doing the same kind of things as are being done in England?

Assistant Chief Constable Livingstone: People trafficking is linked to prostitution, but it stands alone—as we know, people are trafficked for reasons other than prostitution. Trafficking is more prevalent in the south-east of England because of the points of entry, the extent of London and the international links there. Our understanding—which is still partial—is that people are more likely to be trafficked into the south-east first and then moved north. However, as Ann Hamilton suggested, although one may define a person as being a trafficked individual, they may define themselves as an economic migrant. It is hard to establish where the distinction falls.

I accept that trafficking is an area on which we need to do more work. Gordon Meldrum, Johnny Gwynne, other colleagues and I, who lead in the crime arena in Scotland, know that it is an area in which our information and intelligence is lacking and in which we need to be more coherent. We need to consider what is happening south of the border and whether it is applicable where we are. We are addressing the issue. The Scottish Crime and Drug Enforcement Agency has the lead for it because we have determined that it is primarily a manifestation of organised crime. It does not matter to organised criminals whether the commodity is drugs, cigarettes or people. That is why we are using the organised crime mechanism to address it.

I agree about the extent to which we have progressed with domestic abuse. We will discuss stalking and harassment, which are linked to it. The distinction that I would draw between prostitution and domestic abuse is that there is not the same consensus on the two issues. There is clarity about the social harm that domestic abuse does, its nasty, malicious nature and its impact on children and society. We have already heard that prostitution is far more complex. Our view is that vulnerable people are involved in prostitution and that they are victims. There are analogies with domestic abuse, but I do not think that we can say that the progress that we have made in services and in society on domestic abuse is identical to what we can do on prostitution—there is not a straight lift from one to the other.

Trish Godman: I was not suggesting that the two issues are the same; I was just saying that there is a bit of déjà vu about this. The thing that worries me is the corroboration issue. Perhaps this is a dumb question, but I am an MSP, so there are no surprises there. We need to have corroboration here, but you do not need to have it in England. Will that stop you?

Assistant Chief Constable Livingstone: My personal opinion is that corroboration is not the difficulty. Corroboration is a fundamental part of Scots law and it is why, although we have had significant cases, we have not had great miscarriages of justice. Corroboration can be sought from a number of sources. We are more sophisticated at getting corroboration—it is no longer about getting two individuals who are saying the same thing. I do not think that the need for corroboration is a threat to any police enforcement activity; it is a necessary discipline and a fundamental part of Scots law that we should protect.

Margo MacDonald (Lothians) (Ind): The evidence that we have heard underlines what George Lewis said: this is not something that should have been tacked on to a bill that has an entirely different objective to the specific objectives that everyone who is interested in prostitution would want to achieve. For that reason, I say on the record that if anybody wants to reconvene the second part of the committee that was set up under Jack McConnell's Government to look at indoor sex, I would be willing to serve again, because the issue just fell through the cracks and the police were left with absolutely unsatisfactory legislation.

However, let us start. Do the witnesses think that it is possible for the amendments to cover the individual who is working herself to pay off the big Christmas bill, lap dancers and potentially trafficked people or economic migrants? Is it possible to take a catch-all approach to that? Ann Hamilton said that we need to take a general, strategic approach, but I do not think that the amendments represent that. Perhaps you disagree.

George Lewis: The short answer is no, because the three situations that you mentioned are so different. The experience in each city in Scotland is different, too. The catch-all approach looks like a blunt instrument and it will not address the real issues of trafficking and violence. I honestly cannot see that it will deal with the real nasties, particularly given the experience of the loss of tolerance zones and the kerb-crawling legislation.

Margo MacDonald: I think that Iain Livingstone suggested that.

Forty-four police forces took part in operation pentameter, which tried to determine the scope of people being trafficked for prostitution. How many of the Scottish forces took part?

Assistant Chief Constable Livingstone: All the forces and the agency were involved. The operation led to no convictions in Scotland.

11:15

Margo MacDonald: Do you agree that it is a bit previous to say that we know that there is trafficking and that women are being coerced and moved about, given that the operation did not result in one conviction?

Assistant Chief Constable Livingstone: That is a fair challenge. I rely on items of intelligence, the experience of voluntary groups such as Barnardo's and the work that Ann Hamilton has been doing. Our professional opinion is that trafficking is a growing potential threat. A dedicated resource within the SCDEA is looking specifically at trafficking. A number of individuals are now working on that in the new SCDEA premises at Livingston, which is linked to the United Kingdom human trafficking centre at Sheffield. Observations were made about our linking into the UK. Scotland is seeking to do that, but the bottom line is that we have yet to convict anybody of that offence.

Margo MacDonald: Do you agree that it would be safer just now for your strategic approach to be preventive, rather than curative, because there is no proof?

Assistant Chief Constable Livingstone: Our approach should always be preventive. It is a cliché, but prevention is better than cure. However, one does not preclude the other. There has to be robust enforcement but, at the same time, there has to be wider work around interventions. A lot of the interventions might have nothing to do with legislation on prostitution—they might be to do with getting access to assistance for drug abuse or child care. It is about addressing all the other social factors that underpin the problem.

We would certainly welcome having a longer look at this issue, as an imperative. As Ann Hamilton said, the issue now has public profile. It was difficult to get a coherent police approach nationally—it is difficult for me to sit here and talk on behalf of all the forces and the agency. There is value in our committing to having a longer look at the problem, its various layers and complexities and interdependencies and deciding what we need to do. Once we have done that, we have to consider whether we need legislation to allow us to do the things that we agree we need to take forward.

Margo MacDonald: I am absolutely delighted to hear you say that, because it seems much more logical.

Can I ask Ann Hamilton about the number of complaints the police have had from people saying that a brothel is operating up their close?

The Convener: Would she be in a position to answer?

Margo MacDonald: I should hope so; she is the officer for that in the council.

Ann Hamilton: I am not working for the police.

We have had a number of complaints about specific premises. We are taking a much more co-ordinated approach to gathering complaints. For a long time people who had a brothel next door to them felt that there was no point complaining about it because very seldom did anything happen. One of the things we are challenging is the acceptability of a brothel either in the close next door or in the street. A number of police operations are now happening on specific premises.

Margo MacDonald: Are the numbers up or down compared with two years ago?

Ann Hamilton: I cannot tell you that because we do not collect that information—the police would do that.

Margo MacDonald: How, then, would you know whether there are more or fewer prostitutes working in Glasgow or whether they are foreign women or home-grown women? How would you know if you do not collect figures?

Ann Hamilton: We provide a service for any woman who is involved in indoor prostitution. About 180 women are registered with that service at the moment. About 50 per cent of them are foreign women. I cannot tell you whether that is a tenth or a quarter of the women involved in prostitution. A significant number of women are involved in prostitution throughout Glasgow and Scotland; some are home-grown and some are foreign. It is very difficult to tell how many women are involved, but the problem certainly appears to be increasing because there is more advertising, whether on the internet, in magazines or in newspapers.

Iain Livingstone referred to the need for a preventive approach. We have had a preventive approach in Glasgow—we have arranged child care and looked at providing drug packages—but we know that unless we tackle the demand for prostitution there will always be new women coming in, who will be harmed. Simply carrying on providing harm-reduction and early-intervention services—which we are committed to providing—will never tackle the problem; we need to make a fundamental change in the way that we view the nature of prostitution.

It is estimated that about one in 10 men buys sex. The Women's Support Project study on prostitution in the central belt of Scotland that was published about a year and a half ago showed that 25 per cent of those men had serious regrets about buying sex. Part of the reason they bought sex was peer pressure, which relates to acceptability. That is what we want to address to reduce the number of men who buy sex from women in prostitution.

The Convener: I think that Margo MacDonald now has her answer.

Margo MacDonald: With all due respect, convener, that is not the purpose of the amendments. If the aim is to bring about a cultural change, why seek to do it by criminalising those who may be the victims of the cultural attitude and habit that is to be changed?

The Convener: I point out that this is not a debate but an evidence session.

Margo MacDonald: I was asking a question.

The Convener: Would the witness care to comment briefly on that question?

Ann Hamilton: The first proposed offence is about buying sex, which is about tackling the demand for sex. That is saying that prostitution is not a harmless activity, but has an impact. Such activity may be tied into organised crime, whereby people profit from the misery of the men and women who are involved in prostitution. That is not to deny that some—a tiny number, I believe—women and men may not be harmed by their involvement in prostitution. However, we need to look at attitudinal change.

The Convener: Thank you for that.

The next question will be from Angela Constance. As is inevitable in such evidence sessions, the further we go, the greater the danger of repetition. I ask that, when witnesses have already answered part of the question, they simply refer to their earlier answer.

Angela Constance (Livingston) (SNP): At various points this morning, all members of the panel have acknowledged that prostitution is complex, hidden and, of course, dangerous. Therefore, first and foremost, I am interested in finding out what specific impact the offences that are proposed in the various amendments that we are considering this morning would have on women who work as prostitutes. Would the proposed offences help or hinder work to keep such women safe, whether by preventing offences from being committed against them or by promoting good health? Would the amendments do anything to drive the level of prostitution up or down?

The Convener: Perhaps Ann Hamilton can open on that question.

Ann Hamilton: We think that the proposals would disrupt the lives of the women and of the men who buy sex, but we do not think that that should be the central consideration.

After the murders that took place in Ipswich, efforts were made to drive kerb-crawlers off the streets. That meant that women could not make any income from prostitution. Support services then supported those women out of prostitution. Ipswich now does not have kerb-crawling or street prostitution. That is not to say that there has not been some displacement, but those actions have had a very positive impact on reducing the number of men buying sex and the number of women involved in prostitution as well as the public harm that is caused by street prostitution—

Angela Constance: My question was specifically about the impact on women who work as prostitutes. Would the proposals help them, or not?

Ann Hamilton: I think that the same thing would happen here. When police operations in Glasgow have disrupted brothels, women have come to the support services to ask for support to exit prostitution. Although the proposals might be disruptive and make things difficult for women, we see them as a way of engaging better with women and supporting them to exit prostitution. I do not know whether that answers your question. The women will not say, “Well, that is fine. I will go and do something else.” They will need support. We feel that support can be provided.

Another thing that has not been said today is that the Scottish Government has a policy on prostitution, which is that it sees prostitution as violence against women and as intrinsically harmful. That is really the framework within which we think the amendments could start to address the issue to take forward that policy position.

The Convener: Does Mr Lewis want to respond as well?

George Lewis: I was not aware that the Scottish Government’s position is that prostitution is violence against women—

Margo MacDonald: It cannot be such, because that would be gender specific.

George Lewis: We tend not to get involved in the ideological debate, but I felt that I should pick up on that point.

The question was whether the proposals would help or hinder women who are involved in prostitution. I think that I have already mentioned the loss of access to services. Therefore, taking up the convener’s point, I refer you to my previous answer.

It is certainly the case that we have not seen any reduction since the introduction of the kerb-crawling legislation and the loss of the tolerance zone, but we have seen a reduction in the sense of co-operation that previously existed, particularly between street women and the police. I would point the committee in the direction of the Liverpool experience, where a much more cohesive sense of co-operation between street women and the police has led to more attacks being reported and convictions being achieved. In particular, the figures relating to rape there are something like six times the national average. For me, the reduction in the sense of co-operation has been the biggest effect of the legislation that has been brought in over the past few years. We believe that further legislation would just lead to that emerging pattern continuing. In our view, the proposed offences would be a hindrance.

The Convener: Bearing in mind that the issue is slightly political, I leave it entirely up to Mr Livingstone whether he will answer the question.

Angela Constance: My question was certainly not political.

Assistant Chief Constable Livingstone: I think that the question gets to the hub of the debate. My answer is that we do not know. The proposed legislation might cause more harm or it might cause less harm. Until we have had an assessment of what its likely implications are, there might be dangers in going forward with it. The police’s position is that we are not sure what the impact would be. That is a straightforward answer, although it might not be a clear one.

The Convener: I think that Mr Livingstone would make a superb politician.

Assistant Chief Constable Livingstone: No offence taken.

Angela Constance: It still was not a political question.

The Convener: I think that we have advanced fairly far. Do committee members have any other questions that they wish to ask at this point?

Cathie Craigie: I would like to seek clarification from George Lewis on the level of violence and harassment. He tells us in his submission that, from his organisation's discussions with the women involved, violence seems to be taken as normal. He states in page 3 of his submission:

> "From discussions with women, we are aware that levels of violence and harassment continue to grow, but that women are still not reporting to police as they see the violence as 'normal' and do not see the benefit of reporting crimes."

Is violence taken as normal?

11:30

George Lewis: I think that that is a result of the growing alienation there has been over the past few years, with the loss of the tolerance zone and the kerb-crawling legislation. Women are feeling alienated from the establishment and there has been even more of a loss of self-respect and self-esteem. It is almost a case of, "Why should we bother; the establishment has given up on us, so what's the point in reporting things? Nothing will get done." The continuing pattern of alienation has probably led to that feeling. There is certainly not that feeling right across the industry—many women will still take time to report violence and appear in court, if need be—but the increased regulation has caused a pattern of isolation and alienation. Does that answer your question?

Cathie Craigie: Are you referring solely to women who work on the streets?

George Lewis: Yes, because that is where regulation has kicked in over the past few years. Obviously, the kerb-crawling legislation and the loss of the tolerance zone have particularly affected the street women.

Cathie Craigie: Earlier, you said that we should consider the evidence from people who work in the sex industry. I have considered that evidence. We have statements from people who have worked in the sex industry, and they have been scathing. They have talked about people who make money from them simply not entertaining the truth. If the truth is that there is abuse and that people still have to suffer violence and take it as part of the job, I find it difficult to reconcile that with your evidence in the second section of your submission, in which you say that we should see the licensing of indoor establishments as having a

> "consequent positive effect on public health. Additionally, it has brought income to local councils in terms of Rates, and the Treasury in terms of V.A.T. and direct taxes."

Surely local authorities and the Government should not sit back and accept that while women are saying that they accept that violence is a normal part of their job.

George Lewis: You are highlighting a complex experience. What I have said about violence is about violence that has been experienced by the street women. Such violence is not so prevalent in the sauna sector of the industry and it is certainly not so prevalent in the escort part of the industry. There are three, diverse, kinds of experience that highlight what I have already said about the complexity of the issue. For that reason, the violence aspect should not be considered in isolation as being representative of what happens in the whole industry, if that is what you are doing.

Cathie Craigie: I am not doing that; I am saying that we should not say, "Don't touch that," and leave people who work in the industry having to accept violence as a normal part of their life. From the figures that you have quoted, violence seems to be increasing.

George Lewis: I am not saying that that should happen.

Cathie Craigie: No—I am sorry—I know you did not say that, but we politicians should not sit back and accept it.

George Lewis: I am saying that the figures show that increased regulation has led to an increase in violence and the sense of isolation in the sector.

Ann Hamilton: That is not our experience. There has certainly been some dispersal, and services have experienced challenges maintaining good contact with women, but the street liaison team, which is part of the police, continues to work on engaging with women and men who are involved in prostitution. Women still report violence, but I am not aware of an increase in violence and attacks. It is certainly not the case that women who are involved in saunas and indoor activities do not experience violence and rapes. They do; sadly, that is part of the nature of the activity.

George Lewis: Do not the different experiences at each end of the M8 underline the complexity of the matter? Ann Hamilton's experience is completely different from ours. It is obvious that we will not agree ideologically, but our completely different experiences underline what I have said right from the beginning: the complexity of the matter is such that much wider debate and information gathering are needed.

The Convener: We are entering into the realms of debate. I would like members to confine themselves to asking questions.

Stewart Maxwell: I will be as quick as I can. I want to ask about definitions. First, how does the panel define "sexual activity"? Sexual activity can range from something that we would all clearly recognise—I will not go into detail—but does the use of telephone sex lines represent sexual activity? Does lap-dancing that does not involve physical contact between two individuals represent sexual activity? When we considered a previous bill, we heard about sexual activity that involves submission, domination and all sorts of other things but no actual sex, if I can put it that way.

Margo MacDonald: Arousal.

The Convener: Let Stewart Maxwell finish, please.

Stewart Maxwell: There are complications. What is meant by "sexual activity"?

Secondly, I want to ask about the definitions of "paid for" and "payment". What do they mean? Does a payment mean a cash payment or a payment in some other form? Has there been a payment if a person has paid an electricity or council tax bill, or if goods or services have been provided, or if jewellery has been bought?

Assistant Chief Constable Livingstone: Your question articulates our concern about the lack of definitions. What does the term "paid for" mean? Does it refer to payments in kind or cash-only payments? What does the term "sexual activity" mean? How would that be established on a bilateral basis? Would medical evidence be required if a woman was unwilling to give evidence, albeit that the circumstances pointed to a man having purchased sexual activity? Questions about what such activity is, how it is proven and what is meant by the word "payment" underline our concerns about the lack of definitions relating to the amendments.

Ann Hamilton: Sexual activities are those that are associated with brothels. They include masturbation, intercourse and other things that people currently pay for in brothels.

Stewart Maxwell: So anything that is paid for in a brothel would be defined as a sexual activity?

Ann Hamilton: Well, no. Sexual activities are activities that are normally provided by brothels and saunas and on the street, and they include masturbation, sexual intercourse and anal intercourse. People are fairly clear about the kinds of activities that we are talking about. Some brothels will give a list of what the activities are and prices beside them. We are not looking at kissing and lap-dancing, but the kinds of activities that are now paid for in brothels nearby.

It is obvious that most activities that happen in traditional brothels and saunas are paid for by cash or credit card. We have some women and men who trade sex for drugs, rent, heating and clothing. That would be much more difficult to pursue, but it may be worth covering that in the bill as it is still about exploitation and harm being caused to people.

George Lewis: The fact that you had to ask the question highlights the confusion that the police and the justice system would face when trying to enforce the legislation. It also highlights the fact that the law is already a bit of a mishmash and that there might be more confusion. I cannot answer the question, "What constitutes sexual activity?"—it is all things to all people.

Robert Brown: I was struck by what Assistant Chief Constable Livingstone said about his uncertainty about the effects of the proposed legislation. Against the background of the non-convening of the second stage of the task force inquiry into indoor sex, does the panel think that, given the complexities, the proposed legislation would benefit from an in-depth, properly studied inquiry into all its implications?

Assistant Chief Constable Livingstone: Yes, that would be a prudent and helpful approach.

Robert Brown: Do we know why the expert group was not reconvened? Does anybody have any knowledge of that?

Margo MacDonald: Yes.

Robert Brown: Mr Lewis?

George Lewis: Do you have a better handle on it Margo?

Margo MacDonald: I was on the group. An urgent investigation into outdoor work was planned because of the ending of the policy set-up in Edinburgh. It was to be followed by further investigation of indoor work. The intelligence gathering had just started. Everybody knew that it was going to be difficult and complex, but it was allowed to fall through the cracks because, regrettably, our colleagues did not think that it was worth putting that much effort into it.

Robert Brown: Ms Hamilton, do you accept the suggestion that in-depth consideration by a reconvened task force or something similar would add a considerable degree of light and allow us to settle the significant, almost theological, difference of view that has emerged between panel members this morning and in evidence? More specifically, would that allow us to get a handle on the implications of the amendments for harm reduction or otherwise?

Ann Hamilton: Many of us have been looking at the issue over a number of years. The expert group's report was not accepted by the Government and many of its recommendations were not acted on. The Prostitution (Public Places) (Scotland) Act 2007 took a very different approach from that which was recommended by the expert group and sought to criminalise the buying of sex in public places. We always felt that it was a flaw to consider street prostitution in isolation from commercial sexual exploitation in general, which would include both indoor and outdoor prostitution and trafficking. We have not had a group looking into the issue at a Scotland level, but we have lots of evidence of the nature of it, the harm that is caused by it and what has worked in other jurisdictions.

Robert Brown: With respect, from the point of view of laypeople and legislators such as us, there does not appear to be any consensus on this stuff. I would like to have a good deal more information about what people throughout Scotland in different situations think about all of it before we legislate on it. Do you not think that there would be some advantage in having a further study? Is there not even more need for that given what you have said about the lack of a link between the exploitative aspects and the outdoor sex trade?

Ann Hamilton: I would not oppose further consideration.

The Convener: I will allow Margo MacDonald back in. Briefly.

Margo MacDonald: I have said all that I wanted to say. If it is possible, I would like the committee to advise the Government to look at the whole problem in a different way. I have lodged amendments to the bill, but only to show that there are alternatives to the amendments that have been lodged by Trish Godman. I do not think that the bill gets anywhere near tackling the issue.

The Convener: You will appreciate the difficulty that we have in that the amendments before us must be disposed of in one way or the other.

11:45

Trish Godman: As the former convener of the Local Government Committee, which took evidence on tolerance zones, I point out that the violence does not take place in the tolerance zones. The business with the punter is done outside the tolerance zones, as members will know. We did what we did because of the kind of things that Ann Hamilton has spoken about. The police knew where the women were and there was contact with them in the tolerance zones—you are absolutely right about that. However, if the services adapt to the changes, the women can be helped. We have evidence of that in Glasgow and in other places. The violence does not take place inside tolerance zones; if it takes place, it takes place outside the tolerance zones. The committee was charged with looking into that and how services could pick up the women and work with them.

The Convener: Do you want to respond to that, Mr Lewis?

George Lewis: The beauty of the tolerance zone was the spirit of co-operation that existed there. Women were more likely to work in the tolerance zone and, if there were incidences of violence, they were more likely to report it to the police because of that spirit of co-operation. I do not have any figures with me, but there was probably more direct reporting of attacks to the police by the street women at the time because of that spirit. I do not disagree with the assertion that the violence took place away from the tolerance zone, but the fact that the zone existed made it much more likely that attacks would be reported.

The Convener: Ms Hamilton, gentlemen, I thank you very much for your attendance this morning. It has been an exceptionally useful evidence session. I will suspend the meeting briefly to enable a change of witnesses.

11:47

Meeting suspended.

11:52

On resuming—

The Convener: The committee will now deal with the issue of stalking. Amendment 402, which was lodged by Rhoda Grant, whom I welcome to the committee, provides for a new offence of stalking. Amendment 378, which was lodged by the Scottish Government, provides for a new offence involving threatening, alarming or distressing behaviour. The two amendments are grouped with amendments 399, 400 and 401, also lodged by Rhoda Grant. I welcome our second panel of witnesses: Ann Moulds, the campaign founder of Action Scotland Against Stalking; Frida Petersson, senior research and policy officer at Victim Support Scotland; and Assistant Chief Constable Iain Livingstone of Lothian and Borders Police and Detective Chief Inspector Peter McPike of Strathclyde Police, both of whom are representing the Association of Chief Police Officers in Scotland. I thank Ms Moulds, in particular, for her attendance this morning. She will be relieved to know that the evidence session will not be nearly as long as the previous one. We have around four questions to ask, after which I will ask whether you have anything further to say. Thank you very much for coming here this morning—it is greatly appreciated.

Cathie Craigie: Good morning. Let us get straight to the main point. Do we need a specific offence of stalking, so that such behaviour is clearly labelled, or is it best to have a more general offence, to avoid potential difficulties in prosecuting cases in which behaviour was clearly threatening?

The Convener: I ask the police to give us their response first.

Assistant Chief Constable Livingstone: We think that we need a specific offence. People understand what it says, and it criminalises insidious, threatening behaviour. We strongly support the proposal for a specific offence of stalking. You also asked about the requirement for a more general offence of threatening behaviour. A statutory breach of the peace would be valuable in giving wider coverage, as some recent case law has narrowed the common-law definition.

Therefore, the ACPOS position is that we strongly support having both a specific stalking offence and a statutory breach of the peace, with reference to the other amendment.

Ann Moulds (Action Scotland Against Stalking): Part of the reason why I launched the campaign was as a victim of a long, horrendous stalking crime that was not recognised as such. Breach of the peace is an open, catch-all offence. It does not identify the crime or tell anybody what law has been broken, and it did not define a course of conduct, although the Government has included that aspect in its amendment. Nevertheless, stalking is a hidden crime between the perpetrator and the victim. With a catch-all offence, it will remain a hidden crime, despite it being a serious crime. A significant number of people are affected by stalking. Making the crime a statutory offence would give a clear definition of what offence was being committed. As Iain Livingstone said, making the crime a statutory offence would ensure that it was not open to interpretation or ambiguity.

Frida Petersson (Victim Support Scotland): Victim Support Scotland takes the same view: we support there being a more defined crime of stalking. The general public is well aware of the term. Research from 2002 stated that more than 95 per cent of respondents to a survey understood the concept of stalking. We think that it is important that stalking is clearly defined. In particular, we like the non-exhaustive list of suggested conducts that the offence would cover, which would give more clarity both to the general public and the victim as well as to potential offenders.

Cathie Craigie: Do you see any practical difficulties with using either of the proposed offences to deal with instances of stalking?

Assistant Chief Constable Livingstone: DCI McPike has led a lot of work on exactly that type of case in the domestic violence task force in Glasgow and Strathclyde. He might be able to offer something.

The Convener: Before DCI McPike answers, I remind people that all mobile phones should be switched off to prevent proceedings from being interrupted.

Detective Chief Inspector Peter McPike (Association of Chief Police Officers in Scotland): We take the view that amendments 402 and 378 deal with different types of behaviour. We support the first amendment, which seeks to make stalking an offence, because it is clear. It would focus the attention of law enforcement agencies and make clear the practicalities of investigating stalking-type offences. It is difficult for us to do that at the moment because there is no crime of stalking, so we do not record stalking crimes as such and it is difficult to gauge the extent of the problem. Often, individual types of behaviour might not be criminal. For example, the mere presence of someone in a street at a given time of the day might not appear to be criminal, so the proposed stalking offence would help.

Amendment 378 proposes a statutory breach of the peace, as Mr Livingstone referred to it. Certainly, I know from investigating domestic abuse-related crimes that it is possible, for example, to have two people living in a dwelling-house where there is no chance of any other person overhearing the conduct or behaviour that goes on in the dwelling-house or between the two people and one individual is being subjected to pretty appalling verbal abuse, but that set of circumstances is not a crime in Scots law because, as the recent High Court decision in the Harris v Her Majesty's Advocate case reinforced, there is a need for a public element to the crime of breach of the peace—it was not a new decision, but it reinforced the point. The proposed amendment would make the example that I gave a crime. In a practical sense, the amendment would give us the ability to investigate that type of behaviour, whereas my understanding is that now, although we could investigate that set of circumstances, the Crown might not be able to prosecute without there being a public element to the crime.

12:00

The Convener: The law on breach of the peace is varied. The original case, way back, was Logan v Jessop, from which the High Court retreated to some extent. However, on the basis of the Harris judgment, there has to be a public element, which would seem to be a justification for doing something to tighten up the law, would it not?

Detective Chief Inspector McPike: That is true. That would be of significant help to us in our investigations, particularly of domestic abuse-related incidents, which is where most of the circumstances that I referred to would arise.

Nigel Don: If a conversation got that heated, would that constitute assault? I know that that is a technical question, but I am interested in whether there is a hole in the law there.

Assistant Chief Constable Livingstone: Assault is a crime of common law. It constitutes a physical attack on the person by another. It does not need to be a contact, but verbal abuse alone would not constitute an assault.

Nigel Don: So there really is a hole in the law with regard to a situation in which two people are at home, shouting at each other, and one of them genuinely gets alarmed.

Assistant Chief Constable Livingstone: Absolutely. As Peter McPike said, in the case of someone in an isolated, remote farm cottage, there is no public element, as the nearest neighbours are miles away. Clearly, there is a need for some form of intervention because of the level of abuse or harassment, but at the moment that course of conduct is not open to us. The two amendments identify gaps in the law of Scotland as it stands.

The Convener: Verbal comments would not constitute a sufficiency for action at the moment. Is that the case?

Assistant Chief Constable Livingstone: That is correct.

Robert Brown: I want to talk about some of the proposed defences to an offence of stalking, which are fairly limited, in particular about a protest situation or picket line, of which we have seen some evidence in recent days. Such activities might be covered by proposed subsection (5)(c), under which it is a defence for a person to show that a course of action

“was, in the particular circumstances, reasonable.”

However, if there is to be a general offence of stalking, does that part of the bill need to be strengthened to cover legitimate public protest activities?

Assistant Chief Constable Livingstone: I would have concerns about doing that. I appreciate that the test in proposed subsection (5)(c) is subjective, but given that the impact of the course of action and its cause are both essential elements of the proposed new offence, I think that the wording is sufficient in stating that the person who is charged must demonstrate that their course of conduct was reasonable. I do not think that it has to be more specific.

Robert Brown: Is there a risk that people’s right of public protest will be weakened? That is not an unimportant issue. Public protest is obviously different from what most people would describe as a stalking offence, but is there a need to state specifically that while such situations might constitute a breach of the peace or whatever, they are not the same as stalking?

Assistant Chief Constable Livingstone: In the protest scenario, are you thinking of a constituent or a complainer who felt that their complaint had not been addressed and was constantly engaged in a certain course of conduct against an individual?

Robert Brown: Proposed subsection (6)(e) says that “conduct” includes

“entering or loitering in the vicinity of ... the place of work or business of ... any other person”

or

“any place frequented by ... any other person”.

That seems to me to cover a picketing situation or, I suppose, a situation in which someone demonstrates in a particular place about a particular thing—I know that that might touch on some contentious issues but I think that you follow the point that I am trying to make. There is a generality about the proposed provisions that is a bit tricky, as they seem to include conduct that is undertaken with non-stalking purposes in mind, if I can put it in that way.

Assistant Chief Constable Livingstone: Proposed subsection (3) in amendment 402 requires that the person engages in the course of conduct

“with the intention of causing ... harm ... or ... arousing ... apprehension”

and proposed subsection (4) requires that they know

“that engaging in the course of conduct would be likely to cause such harm”.

My take on the matter is that if the other elements are satisfied and harm has been caused by someone who had the guilty intent to cause that harm, the conduct may legitimately be considered an offence. In my interpretation, amendment 402 already provides a sufficient defence in cases in which the conduct was reasonable because the person was making a protest.

Robert Brown: Do the other witnesses have a view on that? You can see the point that I am trying to get at. An area of behaviour that is not really stalking could be caught by the legislation if it is too vaguely drawn.

Ann Moulds: It is important to note that proposed subsection (3) in amendment 402, on the intention behind the course of conduct, would have to apply as well. With stalking, there is a mode, a motive and a perspective. Somebody might harass another person because they are not happy with them or whatever, but that is slightly different from the intimate relationship that a stalker has with his victim. There is an emotional relationship between two people, and it is an unequal relationship. One of the written submissions gives an excellent comment on that. It states:

> "Badcock (2005) notes that the term 'continues to be apt in its image of a hunter pursuing prey in a sustained but unequal relationship'".

That is slightly different from just harassment.

Robert Brown: So we need to capture that effectively in the legislation.

Ann Moulds: Yes.

Robert Brown: We heard that the Government lodged amendment 378, on threatening behaviour, primarily to deal with a perceived gap in the law following a recent court decision. However, it appears to contain a restated breach of the peace charge in statutory form. I ask Mr Livingstone in particular—I apologise to him for the fact that he is getting all the difficult questions today—whether he has any concerns about the breadth of the provision. It is one thing to fill a relatively narrow gap in the definition of breach of the peace because of a court decision, but it is another to create a new offence that is wider than breach of the peace but encompasses the sort of things that would usually be charged under breach of the peace at present.

Assistant Chief Constable Livingstone: Again, I do not disagree with your analysis. That is how I read it. My understanding is that the provision was deliberately drafted with such breadth because it was felt that that was appropriate to capture some of the difficult scenarios that we discussed earlier. You will know better than I do the difficulty with prosecuting such cases. Breach of the peace has always been a broad offence in common law. The appeal court judgment legitimately narrowed it, which provided clear guidance for members of the public, police and prosecutors, but in our view that left some victims vulnerable because of the requirement for a public element.

I accept your analysis that the proposed new offence is broadly drawn, but we argue that it is appropriate because it will enable us to support victims who are currently unsupported by the law.

Robert Brown: I suppose what I was getting at is whether it would have been possible to deal with the gap in the law by tweaking the breach of the peace offence. As you rightly say, it has been a useful offence, but its breadth has made it subject to criticism. Conceptually, there is not a huge gap in the law, although there are some people who need to be brought within the definition. Would an amendment to the definition of breach of the peace not do the trick? Do we simply need to tweak the definition to reflect the appeal court judgment?

Assistant Chief Constable Livingstone: Potentially. This is the first time that I have ever seen breach of the peace codified, and it is a codification of my understanding of breach of the peace, subject to the restatement of the public place element in the Harris judgment. I believe that amendment 378 restates the breadth of the offence in statute and is properly drafted—or its intention is right. I defer to the people who draft legislation on whether it is properly drafted. However, our opinion is that the amendment addresses the gap in the law that allows some offenders to go free and some victims' issues not to be addressed.

The Convener: Can you not provide some reassurance to Mr Brown on his earlier points about a demonstration? There might be similarities in the mens rea under the amendments and under the standing common law on breach of the peace, but the practicalities are surely that in the circumstances that Mr Brown envisages, the offence would be charged as a common-law breach of the peace.

Assistant Chief Constable Livingstone: Yes. In practice, that is exactly what would happen. On the mischief of the offence that we would look for, stalking does exactly what it says on the tin. That is why we would welcome a specific offence of stalking—people would know what it means and what the law is there to do.

James Kelly: I want to ask Ms Moulds and Ms Petersson specifically about amendment 402, which is quite a wide-ranging amendment. Do you feel that it addresses your concerns about stalking or does the specific amendment in the name of Rhoda Grant need to progress really to address your issues?

Frida Petersson: Victim Support Scotland is happy with Rhoda Grant's proposal, which specifies types of conduct that could be covered but leaves it open to add new types of conduct, as new technology develops and so on. In our written response, we have made a few comments on specific additions, such as publishing statements, to ensure that things like Facebook and Bebo are included. In general, we are quite pleased with Rhoda Grant's proposal, which also looks at the reaction of the victim, which is vital to ensure that we cover what we talked about before. Many of the actions that will constitute the offence of stalking will not necessarily be criminal in themselves. It is important to balance that with the reaction of the victim. We are happy that all those elements seem to be part of the amendment.

James Kelly: What about amendment 402? What are your views on that?

Frida Petersson: Is that not Rhoda Grant's amendment?

James Kelly: No, that is the amendment in the name of Kenny MacAskill—the more wide-ranging amendment.

The Convener: That is amendment 378.

James Kelly: I apologise.

The Convener: When there are 600 amendments to a bill, Mr Kelly's confusion can be understood.

Frida Petersson: That is not a problem.

As we have said before, we have looked at this wide-ranging offence. We have had discussions back and forth about it. It involves reckless behaviour as well as intentional behaviour. Having discussed with colleagues in other organisations the practicalities of the Harris judgment, we are content with the phrasing, which will ensure that it targets specifically breach of the peace situations that currently do not have a public element.

James Kelly: Would you say that there is a case for progressing both amendments?

Frida Petersson: Yes. We would support both of them next to each other. We see that they would cover different offences.

James Kelly: Ms Moulds?

Ann Moulds: Yes, I think that they are both excellent amendments. There is a different focus in each one. Rhoda Grant's amendment focuses specifically on stalking. It deals with the crime—it names the crime, as we said before. It is focused, but it has a wide scope and a broad application, so the list is non-exhaustive. The advantage to going for a more listed method or having more categories of behaviour is that it helps those on the front line recognise what types of behaviour might constitute the course of conduct.

Normally, stalking is a constellation of acts. Stalkers employ all different types of things, and if there are five things that a stalker should not do, he or she will find a sixth thing. Amendment 402 allows for that—it is flexible and open enough without being so open that something could fall through the net. Everything should be captured quite well within the framework. The Government's amendment 378 is excellent. It differentiates between what is a breach of the peace and what is a specific stalking crime. Both amendments have their place in the bill.

12:15

The Convener: I ask Rhoda Grant whether she has any questions, as we are discussing her amendment.

Rhoda Grant (Highlands and Islands) (Lab): I have just one question, as most aspects of the amendment have been covered. I ask Ann Moulds what difference it would have made to her had there been a statutory crime of stalking when she was being stalked.

Ann Moulds: I have tested my case under both amendments and without a doubt it would have fallen through the net under the Government's amendment, as it would not have been recognised. The course of conduct was not recognised. It was not just the police who did not recognise it at the time; even in the early stages, the prosecution service did not recognise it. You could argue that that is a training issue, and I would agree with that; however, the fact is that the course of conduct was not recognised. There was no legal definition that was not too broad and loose—it was like a wild card sitting in there because of the type of stalking that I experienced. However, it would fit well under amendment 402, which is more prescriptive. Amendment 402 proposes a good framework into which the behaviours could have been placed quite well, and I could see it being translated down to front-line response a lot more easily.

Stewart Maxwell: Proposed subsection (6) of amendment 402 is prefaced by the phrase

"'conduct' includes (but is not limited to)".

Are you happy with the non-exhaustive list that follows, or is there a risk, as with all legislation, that including a list—even a non-exhaustive one—in the bill could lead to people trying to find a way around it and does not address the fact that things change and that behaviour might arise that was not anticipated? There appears to be no easy way of amending the list through subordinate legislation. Might an additional amendment that allowed the list to be amended by subordinate legislation in the future be of some value? I am not asking Rhoda Grant; I am asking the panel. Lists can create difficulties if there is no possibility of changing them.

Assistant Chief Constable Livingstone: I recognise that legitimate concern. The fact that stalking is not defined in exclusive terms—the amendment states that

"'conduct' includes (but is not limited to)"—

suggests that the listed behaviours are merely examples from 2010. However, there may be a potential danger. If the fact that the definition is not limited to the listed behaviours were expressed more overtly in the bill, that might deal with your concern. You are absolutely right that every time that there is a new means of committing an offence or of getting round it, human behaviour is guaranteed to find it. It is important that we do not define too narrowly the conduct that we mean. I hope that the qualification that the offence is not limited to that list of behaviours addresses that.

Stewart Maxwell: Ms Moulds, do you have a view on that?

Ann Moulds: The matter was thought about and well discussed in looking at the different forms of legislation. When anti-stalking legislation began to be introduced in America, the problem was that the definition was too open and broad. That was the start of a learning curve. The definition had to be narrowed a bit and made more focused.

I take on board your point about whether it is better to have a list of behaviours or whether stalking is better defined as a course of conduct without the list. The list must not be exhaustive; it should be possible to add to it. Proposed subsection (6)(i) covers someone

> "acting in any other way that a reasonable person would expect would arouse apprehension or fear",

which is an open statement that should cover other behaviours. It is slightly more open to interpretation, but some flexibility is needed in the provisions.

Stewart Maxwell: So you think that there is enough flexibility in the amendment as it stands to cover any changes.

Ann Moulds: Yes. It is more important that the police are better at responding, as the provisions must be put into practice.

Detective Chief Inspector McPike: I agree with Ann Moulds that proposed subsection (6)(i), which refers to

> "acting in any other way that a reasonable person would expect would arouse apprehension or fear in"

another, is a good catch-all provision.

The Convener: At the beginning of the session, I told Ann Moulds that if she wanted to make any concluding remarks, we would be interested in hearing them. We received full initial written correspondence from her, which all of us have read carefully, as she can see. She can also see that members have a degree of sympathy for the proposal.

Ann Moulds: I am comfortable with what has been discussed and with the questions that have been asked.

The Convener: I thank all of the witnesses for their attendance this morning.

12:21

Meeting suspended.

12:23

On resuming—

The Convener: Today's final panel relates to sentencing for knife crime. The session will deal with amendments that would create mandatory sentences for knife crime. Amendment 10, in the name of Richard Baker, whom I welcome to the committee, proposes a change to sentencing law to require a court to impose a custodial sentence of at least six months for the carrying of a knife in a public place, other than in exceptional cases. Amendment 10A, in my name, proposes a minimum custodial sentence of two years and a different test for where that might apply.

I welcome the final panel of witnesses: John Muir, Damian's law campaigner, and Chief Constable David Strang, executive vice-president of the Association of Chief Police Officers in Scotland. I am sorry that you were held up this morning—we had some fairly complex matters to deal with—but the session should not take terribly long. We move straight to questions.

Angela Constance: Good afternoon. Government statistics for 2008-09 indicate that 30 per cent of people who were convicted of handling an offensive weapon, including knives, received a custodial sentence and that the average length of such sentences was 263 days. The figure has more than doubled in the past decade. In your view, what are the implications of those facts?

Chief Constable David Strang (Association of Chief Police Officers in Scotland): It is clear from the facts that you have stated that 30 per cent of those who are convicted of knife offences are sentenced to imprisonment. Knife crime is a serious crime; as we know, the consequences can be fatal, especially when an offender's behaviour is fuelled by alcohol and associated with severe violence. I do not want anything that I say to be seen as suggesting that we should be soft on violence or crime. However, the statistics that you cited show that, if the amendments are agreed to, there will be a huge increase in the rate of imprisonment of people who are convicted of carrying knives and offensive weapons. In the year to which the statistics refer, the sheriff or judge in 70 per cent of cases determined that an alternative to imprisonment was appropriate. In ACPOS's view, discretion ought to remain with the bench, so that it can impose an appropriate sentence that takes into account the facts of the case and the circumstances of the offender.

Angela Constance: You intimated that you have concerns about the proposal that everyone who has been convicted of handling an offensive weapon should go to prison. The figures indicate that 3,529 individuals were convicted of that offence in 2008-09. Does ACPOS have concerns about the vast majority of those offenders going to prison?

Chief Constable Strang: Our position is that we need to tackle knife crime and that it is much better to invest in preventive measures such as robust policing, searching people, education and using metal detectors at night clubs. At the point of sentencing—six months after the offence—it is too late to have a real impact. All the evidence shows that the deterrent effect of mandatory imprisonment is marginal. Early police involvement and a prevention strategy that includes pre-emptive searches and tackling knife and gang culture have much greater deterrent impact.

12:30

John Muir: You can make anything that you want from the statistics that have been cited. Everyone in government knows that you can make what comes up sound different by altering it to suit you. We have heard that 30 per cent of people in the knife crime business have been drinking; they are part of a booze and knife culture. Does the fact that the other 70 per cent were not drinking mean that it is okay? You can fix the figures to make things look how you want them to look.

I am pleased to say that, in our region of Inverclyde, we have pioneered many initiatives over the past two years. Last Saturday, all the effort that has been put in produced results: for the first time in nine years, we have a lower level of knife crime. That is an accolade for our local constabulary and for the petitions that we have run with the *Greenock Telegraph*, which has backed us to the hilt and run a sticker campaign on cars, vans and elsewhere.

We have a superintendent and a chief inspector who are really switched on. We work in conjunction with Inverclyde Council and with the police and go to these places. All those things are factors.

Of course, statistics mean a lot. I look at the national figures and we hear about all the big things that are jumping up and down. I can bring out figures that have been reported, in various newspapers, on the league of knife shame, as they call it. There is fury because, from 1999 to 2008-09, knife crime has increased by 67 per cent. Somebody has these figures and is able to put them into the newspaper. I am not a politician and I do not know where all these figures come from, but I have to accept that, if they are written up, there must be some substance in what has been said.

I can tell you honestly about what we have achieved through direct involvement in Inverclyde, because I have been involved in it. As Chief Constable Strang said, object policing, targeting certain things, is good and it is working in our area, but we are looking for sentencing to be more severe and to ensure that someone who has committed a knife crime is dealt with appropriately. Risk management is okay if it works, but risk management did not work for my son. The person who murdered my son had a record as long as your arm but, because of the local authority, the court, the police and the welfare people, my son died. He was stabbed eight times. That was very frustrating for us. Risk management had gone straight out the window, because the man who murdered my son in July 2007 had disfigured a man with a knife in December 2006 and disfigured a man with a bottle in March 2007. In between, there were incidents when he was caught for carrying knives, for threatening behaviour and for other things, yet he was let out. That was risk management gone mad. How many figures can we come up with on that? That is another set of figures that we should be looking at—cases in which it has not been properly adjusted.

We as a family feel very sore about the issue. We lost a son who we consider to be very good. Everybody tells us that he is one of life’s good guys, but we are suffering for it. No one ever comes back and says to us, “What would you like to see happen in prison?” I would like prison to be reinvented as a place of punishment, because all we hear coming from parliamentary debates and papers is that they are going back in there for rehabilitation. Damn the rehabilitation—what about the punishment part of a sentence? Everyone just sits and nods, but who is going to do it? I cannot do it; I can bring it to your attention and hope that you will do it. I am sorry if I deviated from the issue of statistics, but that is where we are coming from and that is why we are pushing quite hard in the hope that the judiciary, the police, the public—I have missed out somebody.

The Convener: We are considering the bill, so I think that we perhaps have a wee bit of a role to play.

John Muir: Yes. I would like to take any questions as we go along on how it affects the family, how it affects your life and how it affects what you try to do. I am in favour of direct intervention on a week-to-week basis to try to get things done. We have proved in Inverclyde that it is a going thing. To have the lowest figures in nine years after less than two years of petitioning and going round is a credit to the police force down there—they have got so many things going. I support the long-term action, but this is where we fall out with the police and others: what about the here and now? It is good to say that, in five or 10 years' time, we will have less knife crime in Scotland, but there have been, on average, 55 knife murders a year over the past decade. It is quite incredible that it was the choice of weapon in 55 murders. People say that they carry a knife for protection. That is rubbish—we have proved that. In every 100 knife cases, whether a stabbing, a slashing or a fatality is involved, 90 of the people who are injured are not carrying a weapon. That is quite a dramatic figure. Ten people in every 100 such cases carry a knife for their protection.

The simple reason why we want mandatory custodial sentences for knife crimes is that, if a person is prepared to put a knife in their pocket on the way out of the door before they go for a drink, or even if they are not going for a drink, they are a knife user. There is intent, so they must be sorted out.

I am sorry to take up so much time.

The Convener: You may have anticipated some questions that would have been forthcoming. Is Angela Constance satisfied with her answer?

Angela Constance: Yes, just for now.

Bill Butler: Good afternoon, gentlemen. I would like to direct some questions at Mr Strang first; I will then turn to Mr Muir. As you know, Mr Strang, amendment 10 seeks to establish a custodial sentence of at least six months as the norm for any adult who has been convicted of carrying a knife in a public place. Amendment 10A seeks to establish a custodial sentence of at least two years as the norm. Do you think that such changes to the law would have a positive deterrent effect?

Chief Constable Strang: I think that the effect of increased sentences on deterrence is marginal.

Bill Butler: What is your evidence for that? I know that you said that in an answer to Angela Constance.

Chief Constable Strang: I have with me an article on mandatory sentencing by Declan Roche of the Australian Institute of Criminology.

Bill Butler: Is that your only piece of evidence?

Chief Constable Strang: No. From what I have read by criminologists, there is not a strong correlation between mandatory sentences and reductions in crime.

Bill Butler: What is the criminologists' evidence for their assertion? I am worried. If there is evidence, that is fine: let us have it. However, do you agree that mere assertion is not enough?

Chief Constable Strang: There are much higher levels of mandatory sentencing and higher levels of imprisonment in the United States of America. We have mandatory sentences for murder in this country, but that has clearly not reduced the number of murders to zero. We know that people will still commit offences. The prospect of detection is much more of a deterrent than the length of sentences that people are given in court.

Bill Butler: Is the number of homicides not decreasing? You referred to murders.

Chief Constable Strang: I am saying that mandatory life imprisonment for murder does not stop people committing murder.

Bill Butler: The members who have lodged the amendments can speak for themselves, but I do not think that any of them would say that the amendments are cure-alls or panaceas. Is it not at least arguable that, if Parliament agreed to such changes and they were implemented, they would go some way to deterring illegitimate knife carrying?

Chief Constable Strang: I accept that that is a possibility, but the costs and the impact on individuals' lives of an automatic sentence of imprisonment must be considered. I would argue that sentences of imprisonment also do harm in the long run. That was also the conclusion of the Scottish Prisons Commission.

Bill Butler: What about the harm to victims? What are the costs to them?

Chief Constable Strang: Of course our primary concern is the victims. We want to make Scotland a safer place by reducing crime. As I argued earlier, we make the greatest impact on reducing crime by taking a broad approach that includes prevention, early intervention, police searches using metal detectors and an attempt to change the culture among young people so that they do not go out carrying a knife, which is hugely important.

My only point is that the introduction of a mandatory two-year term of imprisonment would not have the impact that we want. The discretion ought to remain with the judge.

Bill Butler: If I remember correctly, the amendments provide that the discretion would still ultimately remain with the judge. No one would disagree that we should not take a one-club approach; there is no doubt that any approach should include preventive measures.

However, do you think that people who listen to this evidence session might be at least a bit disappointed that you seem to think that the two amendments that have been lodged on mandatory minimum sentences would have only a marginal impact? What do you say to the 30,000 Scots who have signed a petition that calls for the implementation of mandatory minimum sentences?

Chief Constable Strang: We hear real concern about people carrying and using knives, and we are determined to tackle the issue. In Scotland, the number of knife crime offences has fallen over the past two or three years, which is evidence of the effectiveness of what we are doing without the notion of a mandatory sentence.

As you will know, the options that are available to the court were increased four years ago, so it is possible for courts to impose a sentence of four years for carrying a knife. That sends out a message about how seriously we take the issue, but it is quite different from removing the discretion and making it mandatory that people should be sentenced to imprisonment.

Bill Butler: Thank you, Mr Strang—although I emphasise again that, from my recollection, neither of the two amendments that will come before the committee and, ultimately, the Parliament, removes the discretion.

Mr Muir, you responded to my colleague Angela Constance's question by giving the very personal reasons why you support the amendments that the committee will discuss in the weeks to come, and we have listened carefully to those. I will ask you a slightly different—although obviously related—question.

What reaction have you had from members of the public when you were gathering support for the knife crime petition? Were they content with the law as it stands, as detailed by the chief constable, or did they want something more to be done? What was your impression in that regard?

John Muir: We clearly stated at the top of our petition sheets, and on our website when it was running, that we were seeking mandatory custodial sentences along the line, so people were signing for that.

If you meet the public face to face and ask them, "Are you happy with the way things are being handled on the street?" they will turn round and tell you that they are not happy. I have tried many times to say that to Parliament. That is the public's view now and, unless the issue is addressed properly, there is no doubt that it will become an election issue.

People are now thinking about the current rules and regulations, especially given the comments that are made by those who should know better—for example, that prison is a "skoosh"—which stick in people's minds. People do not want to know about statistics; they just want to know that things will happen to make things better.

My position is along the lines of the statement that I made to the knife crime summit in January 2009. I said then:

> "Today must be the pivotal point in the fight against violent crime and, in particular, against knife and weapons crime. Any and all honest men would recognise that there has been very nearly criminal institutional failure and neglect on the part of the authorities in which the protection of the Scottish nation is vested. That failure is borne out by the frequency of incidences of knife crime and by the disgraceful statistics that shame Scotland. I remind this learned assembly that those statistics relate to real people and are not an academic board game.
>
> Each and every one of the statistics represents ... a person whose life has been taken or shattered along with the lives of their family and friends."

Knife crime does not need to involve murder for it to have an effect on people throughout the rest of their lives, even if they did not die. Younger people who have been slashed cannot get a job because they have a face like a hot cross bun. That does not give them any solace when they are trying to get work. No, what is in place just now is not up to the job. Changes need to be made.

12:45

Bill Butler: That is very clear, Mr Muir. Thank you, gentlemen.

Stewart Maxwell: I want to follow up on a couple of points that Bill Butler raised with Chief Constable Strang. Bill Butler asked what evidence exists to prove what he called an assertion that Chief Constable Strang had made. Are there any studies or evidence from around the world that show that mandatory sentences reduce crime? I am not aware of any such evidence.

Chief Constable Strang: No, I am not aware of any studies that show that mandatory sentences reduce crime.

Stewart Maxwell: Are you aware of any evidence or studies that show that mandatory sentences have little or no impact on reducing crime?

Chief Constable Strang: The piece of evidence to which I referred earlier states that mandatory sentences have very little impact on reducing crime.

Stewart Maxwell: On the practical implications of such a policy, is it your understanding that, in the United States, where mandatory sentences have been in vogue for some years, many parts of the penal establishment and others—including, even, many on the right—are now backing away from that policy because of its failure?

Chief Constable Strang: I do not know whether people are backing away from it, but the United States certainly has much higher rates of imprisonment—more than four times higher than the rate in Scotland—and higher levels of crime. There does not seem to be a correlation between imprisoning more people for longer and reducing crime.

Stewart Maxwell: Mr Butler also asked about the impact on victims. From the tenor of Mr Butler's questions, I presume that he believes that all victims throughout Scotland would support the amendments. If that is the case, can you explain why Victim Support Scotland does not support the introduction of mandatory sentences for knife crime?

Chief Constable Strang: That question would need to be put to Victim Support Scotland. However, I think that there is almost a sense that it is misleading potential victims to try to persuade people that introducing mandatory sentences or increasing sentence tariffs will somehow have a big impact. Sadly, we know that there will be victims of crime. The court needs to take into account the facts of the case and the circumstances of the individual in sentencing in an appropriate way. I know that Victim Support Scotland is thoughtful in its approach and would not welcome a blanket mandatory sentence.

James Kelly: My first couple of questions are directed to Mr Strang. He will be very aware of the experience in Lothian and Borders, where the number of people who have been caught and convicted for being in possession of a knife has increased by 21 per cent. Homicides involving an attack by a knife or sharp object comprise 71 per cent of all such incidents in Lothian and Borders. However, as Mr Muir said, the issue is not about just statistics but about the human side of the story. For example, there was a serious knife attack in Edinburgh on Sunday night, when a man opened his door and was attacked.

In the face of those statistics and of incidents such as the one on Sunday night, do you accept the logic that, if people going out on a Friday or Saturday night know that being caught in possession of a knife will likely mean jail, fewer people will carry knives as a result, so there will be fewer knife incidents and a resultant decline in the number of murders, thereby saving lives?

Chief Constable Strang: I said that the incidence of knife crime in Lothian and Borders has reduced in the past two or three years. That partly reflects police activity such as more proactive searches. As for the murder rate, half the homicides in which a knife is used do not involve someone taking a knife outside but take place in a domestic situation, in which a knife is the most readily available weapon.

If someone goes out with a knife and has the malicious intent to use it, they face a severe prison sentence at the moment. It is self-evident that that does not stop people carrying knives. People's motivations are different—some carry a knife through fear, for protection or because of group pressure. People who carry and use knives already receive custodial sentences, so I do not accept your premise that making a mandatory prison sentence would stop people carrying knives, because it does not do so at the moment.

James Kelly: Do you not think that your attitude is complacent, particularly given the human situations that have, unfortunately, occurred throughout Scotland, where 58 per cent of murders result from knife attacks?

Chief Constable Strang: No. I have said clearly that we are absolutely not complacent. We want effective measures that reduce the number of people who carry and use knives. We want our criminal justice system to reduce offending effectively in the long term.

We know that sending people to prison is the punishment with the least positive outcomes—people who are sentenced to prison lose their jobs and are more likely to reoffend on release. I am much more in favour of targeted sentencing that is appropriate for an individual and a case. We are far from complacent—we want to make Scotland safer and to arrest those who commit offences. We will do that and we will continue to reassure the public.

James Kelly: You have mentioned costs. *The Sunday Times* reported recently that the cost to the national health service of treating 1,170 victims of knife attacks was £500 million. Do you accept the logic that a tougher sentencing policy will reduce the number of knife attack victims whom the NHS must treat, which will therefore reduce those costs and save the service money?

Chief Constable Strang: I agree that we want to reduce those wasted costs. Much more important is the cost and impact of the damage and harm that are done to individuals and families. However, as I said, I do not accept your link between mandatory sentences and a reduced cost to the NHS. We need much more effective and earlier intervention rather than compulsory imprisonment at the end of a court case.

James Kelly: Mr Muir, what is your view of people such as Mr Strang, who support the status quo in sentencing policy? Does that address the concerns of campaigners such as you?

John Muir: We are trying to redress the whole situation in one swoop, to get something done. In Inverclyde, the local newspaper—the *Greenock Telegraph*—has backed our campaign for the past two years. It has stood up and said, "We want things done." As a result of that, Sheriff John Herald said that anyone who was found to be in possession of a knife and who came to his court would be held over in jail until trial. That has applied for the past 15 months and is obviously having an effect. After the lowest reported knife crime stats, we can turn round and say that it is nine years since the position has been as good as it is. We must look at that and say, "Yes—we're doing the right thing." We are not considering the opposite.

No one seems to be taking up the point that prison has to be disinvented or reinvented—whatever way you want to look at it. It is a place of punishment, not somewhere to put somebody conveniently out of the road. There must be terms before offenders go to prison. If the prison service gives them a course to follow and they muck about or jump about and do not do it, instead of having time taken off their sentences, time should be added on, otherwise they are not being challenged for the crimes that they commit.

That must happen. It is another stage to which we must move forward; it is all progression. We will eventually take the right decision on mandatory sentences. It is all right saying that the prisons are overcrowded but they are overcrowded for only a little while, because the sentence can soon be adjusted to get the offenders out—they are given tags. I read in the paper last week that a chap who was convicted of culpable homicide had received an eight-year sentence, had done two years in the mainstream prison and was being considered for open prison. What message and assurance does that give the public?

I meet the rank and file of the police who—contrary to what Chief Constable Strang says—tell me, "Keep it going, John. We've got to keep these rascals and thugs off the street. We find it hard. We get them in and before we can even get our squad car back to the garage, they are waving to us in taxis." That is where the weaknesses are coming in. It is not being applied and nailed to the floor. If people commit crimes and break the law, they should be punished, not told before they go to prison that they will be rehabilitated. There should be a punishment part of the sentence before they get anything easier.

Angela Constance: I ask both gentlemen whether we can address knife crime in isolation from Scotland's battle with the booze.

Chief Constable Strang: Absolutely not.

I will correct one implication of Mr Kelly's last question. He said that I supported the status quo on sentencing but, as you know, I do not. ACPOS argues strongly for effective community sentencing and fully supports the proposals in the bill to make alternatives to prison much more effective.

Alcohol and drug abuse are undoubtedly underlying factors in many of the offences with which we deal, whether carrying knives, assaults or crimes of dishonesty. It is not the case that dealing with one aspect alone will transform someone's life. We often find that alcohol and substance misuse play a part in assaults and knife carrying. I accept entirely that we need to tackle the broader, underlying factors as well as the single offence.

John Muir: We can differentiate between the booze and the knife culture. Generally, we find that someone who has been out earlier in the night having drink might pick up a knife and have it in their possession or that knife crime is committed by a guy who goes out reasonably cold headed and has the knife for a purpose. We have always said that if somebody carries a knife, he is a user. There is no doubt about that, because we have proved time and again that there is no need to carry one.

This has been spoken about for a long time—years and years. In case anyone missed it, I will read you something that I put in my submission:

> "It is depressing nowadays to take up one's paper and read the daily catalogue of assaults and murders with knives, razors and other lethal weapons. Indeed slashings and stabbings are becoming so common that they appear to be accepted as part of our modern youth's recreation."

That came from the *Evening Times* letters page on 14 March 1930. Do you not think that we should be changing things? That quotation tells us enough about Scotland: we have had the problem for 80 years and we are not moving fast enough.

13:00

Angela Constance: Are there any other aspects of the criminal justice system where we might be able to do better than consider only mandatory sentences? For example, when Mr Muir spoke of what happened to him and his son, he mentioned that it had come about because a violent recidivist had been released on bail, and perhaps we should focus on such matters.

I also listened with interest to Mr Muir's comments about improvements in the Inverclyde area, and I wonder whether we can do more to ensure that people throughout Scotland follow that kind of good practice.

John Muir: I can speak only about what happens in Inverclyde and what happened to our family. There is no doubt about it; what happened to us was a tragedy that we feel greatly. However, my son did not die in a ghetto or a bad area; as the police said, he was in the wrong place at the wrong time and got picked on. Unfortunately, the guy who did it was also in the wrong place at the wrong time—he should have been in jail.

Risk management is part of the judiciary's role, and it decides whether a particular guy can be released as long as he wears an electronic tag. I am quite sure that there are statistics for the number of burglaries, incidents of knife crime and other offences that have been committed by people with electronic tags, but I want to focus on knife crime. Booze and knife crime go together. Greenock had a terrible reputation for such crime; at one stage, you were three and a half times more likely to be stabbed in Greenock than anywhere else in Scotland. However, the effort over 18 months to reduce this kind of crime has resulted in the best figures for nine years, and I believe that the same approach can work with many people.

Inverclyde Council and Strathclyde Police have been absolutely immense in all of this. These particular exercises, which are carried out every three or four months, are not cheap; it costs £11,000 a night to put the police in position and everything else. In case people do not know what happens on those nights, I should say that the police take their police vans into areas where there has been violence, drunkenness or whatever, pick up the people involved and bring them down, say, to James Watt College, among other places. Those who have been picked up because they are part of a drinking culture are processed; as for those who have committed a crime—for example, those carrying drugs or knives or underage drinkers—before they can go home their parents are called and they have to see three different people. A senior police officer explains to the family what might have happened, especially to girls, if they had been left lying in the street and makes it clear that boys in the wrong company can end up being knifed or stabbed. Someone from the council then explains to the younger ones about antisocial behaviour orders, how hard they can affect families and the fact that for someone who gets an ASBO at a certain address their right of tenancy after six months goes out the window. They do not know these things, and they come as a shock to the parents. Then I tell the people how a family feels to lose someone and ask them whether they want to be in the same position. That approach is working.

However, the big thing is that we have had as many as 30 organisations offering options including badminton, tennis, football, tae kwon do, boxing and music. People always say that nothing can be done; the fact is that plenty can be done, and we are showing them what we have been able to do. As I say, the approach is working and I think that communities and councils can do a lot in conjunction with the police force.

Chief Constable Strang: I commend those comments about the proactive work with the community in Greenock. Indeed, such an approach is being taken throughout Scotland. For example, operation floorwalk in West Lothian was similarly aimed at engaging with young people who were at risk of offending, particularly as a result of alcohol. Instead of trying to do something after people have offended, we need to take a preventive approach in the first place and put more effort into those kinds of early intervention and upstream measures.

Angela Constance: The letter that Mr Muir read out from the *Glasgow Evening Times* mentioned "lethal weapons". Richard Baker's amendment 10 talks about

"having in a public place an article with a blade or point".

I wonder whether there is a risk of displacement and whether, instead of carrying knives or things with a blade or point, people might go on to carry other types of offensive weapon that could have the same catastrophic consequences.

Chief Constable Strang: The blade or the pointed article reflects the Criminal Law (Consolidation) (Scotland) Act 1995 in which the amendment seeks to make a replacement. I do not think that people will be as calculating as that. If someone puts a knife in their back pocket, I do not think that they think about the sentence that they might get if they are caught and have to appear in court in six months.

Angela Constance: What would deter you or me will not always deter a feckless, irresponsible individual.

Cathie Craigie: This question is specifically for you, Mr Strang. You said today that you support prevention efforts and you mentioned something that happened in the Lothian police force area. Mr Muir spoke about the good work that has gone on in Greenock and how it has reduced the level of offences there in the past year. If work is going on in the Lothian area, why are we seeing a rise in the level of knife crime there?

Chief Constable Strang: I will say two things. One is that right across all eight forces in Scotland we are tackling violence. The violence reduction unit headed by Chief Superintendent John Carnochan provides support to campaigns throughout Scotland in all our cities and rural areas. The other is that the number of recorded knife crime incidents has fallen in the Lothian and Borders police area over the past three years; it has not increased.

Cathie Craigie: But not in the past year according to the information in front of me.

Chief Constable Strang: I think that you might be talking about conviction rates in court, which are different from recorded offences. I have here the figures for the past three years in Lothian and Borders: in 2006-07, there were 984 incidents with offensive weapons; in 2007-08, it was 797; and in 2008-09, it was 784.

The Convener: Due to the lateness of the hour, I propose that we do not go into any great depth about what is happening in Lothian and Borders, but perhaps it would be helpful if the chief constable could write to us with the figures.

Chief Constable Strang: Certainly.

Cathie Craigie: Then we can confirm the numbers, because I stand by the figures that I have.

According to Mr Muir's evidence, the focus of the work being carried out in the Greenock area is on young people, which I applaud because a lot of behaviours can be learned from older people. The statistical bulletin published in March 2010 on the criminal proceedings in Scottish courts in 2008-09 tells us that 67 per cent of people who were convicted for using an offensive weapon were over 21. Therefore, it is clear that there is a group of people that some of those preventive measures will not touch. Earlier today, Mr Strang, you said in your evidence that people who carry a knife at present can expect to go to jail, but in fact that is not the case, according to figures that we have from the published statistical bulletin. Would the deterrent of the possibility of going to jail help to reduce that percentage?

Chief Constable Strang: The 67 per cent of people who were over 21 were people who were convicted in court. They were people in relation to whom we had taken preventive action, by arresting them because they were carrying a weapon.

It is clear that people are sent to prison for carrying knives. My point was that someone who goes out with a knife in their pocket is not thinking that they will be caught. They are not thinking, "I have only a 30 per cent chance of going to prison. If the case comes before the sheriff there is a 70 per cent chance that I will get only a community sentence, probation or a fine." That is not how people who carry knives think. They assume that they will not get caught. I do not accept the premise that to make the final court disposal a mandatory prison sentence will stop people taking a knife with them when they leave the house on a Friday evening.

Cathie Craigie: Would it not make a difference if someone who gets ready to go out on a Friday night by gelling their hair and putting a knife in their pocket knew that if they were caught the court would send them to jail?

Chief Constable Strang: No. I think that such people think that they will not get caught, just as people who drink and drive think that they will not get caught and get a particular sentence. That is the deciding factor.

Cathie Craigie: Why then do we not see lots of people going about with guns in their pockets? The approach proposed in the amendment is similar to the law on possession of a gun. If knife-carriers think that they will not get caught, why do they not stick other offensive weapons in their pockets?

Chief Constable Strang: The culture around—and availability of—guns is very different from the culture around knives. The purpose of imprisonment is primarily punishment for the offence and protection of the public. There is some deterrent effect, but the evidence is that that is weak. There are all sorts of reasons to do with the availability of firearms, and other social reasons, why people do not carry guns.

Robert Brown: I thank Mr Muir for hosting my visit to Inverclyde to learn about the initiative. As I understand it, the essence of the initiative is early intervention. There is a restorative element, whereby people are brought face to face with people like you, who have experienced tragic knife crime in their families. Young people are given positive alternatives through various opportunities, and their parents are brought into the picture. All that, which has nothing to do with mandatory sentences, has had a significant effect on knife crime rates in Inverclyde. I do not know whether we have the statistics, but there is anecdotal evidence that knife crime has gone down by about a third—is that correct?

John Muir: Yes.

Robert Brown: Does that not establish that whatever we think about other matters, early intervention techniques have an effect on that catchment of people? I pay tribute to John Muir for his impressive work in that regard.

13:15

John Muir: There is no self-accountability among people who want to carry a knife and be violent. That is not part of their religion. If they have not got something, they will take it, so they put a knife in their pocket. The old-fashioned way when guys went out at night was to take bonnet, belt, fags and matches; now they take a mobile phone and a knife. That is the modern style.

Something that has been greatly overlooked is that the murder conviction rates show that murders are being committed not by feral 15-year-old and 14-year-old youths but by older people—people who are 21, 23 or 30. Down in Greenock, we have had people who were 43 and 51 and carrying a knife. It is not about the feral youths that everyone keeps talking about.

At the summit in January last year, John Carnochan said:

> "People kill people, not knives".

Although that is a fair point, at the time I said that equally people not carrying knives are less likely to kill people. For us as victims, what he said was a total snub. Who did he think he was talking to? Some wee boy from the side of the street? I am an elderly gentleman—an elderly man—who is trying to put a point across to Parliament and someone was talking down to me. I did not like it; I resented it.

While I am here I should say to Robert Brown that I brought to the summit Kelly McGee, whose brother was stabbed to death in Lochwinnoch. I have a list in my diary of the people I introduced her to on the day. Reading from the top down, they included Bill Aitken and Miss Goldie. Nigel Don also saw the girl that day. Robert, you were waiting to be interviewed; you did not make time to be introduced to her. That was a snub to the family. I can assure you that the girl went home in tears; she was really upset. How can I come to a meeting such as this knowing that some of the people who take the decisions do not support us? Kelly McGee was not just an ordinary voter; she was a victim. Her brother had been stabbed to death. He had received the Queen's commendation for bravery medal for his bravery in Iraq and he died on his own doorstep.

We are talking about self-accountability. These people do not care; they just do it. There is only one place for them and that is behind bars. If I am driving past Barlinnie, I do not for one minute think to myself that the people inside there are paying a debt to society. Damn that. I am pleased that they are in there. While they are locked up in there, they cannot do any harm to my family.

The Convener: In defence of Robert Brown. I am certain that he would not have done that through any lack of courtesy. He is one of the most courteous of members.

Robert Brown: Thank you, convener. That is useful on that one.

I refer you to the paper that you helpfully gave us, Mr Muir, in which you analyse your reasons for looking at issues such as punishment across the criminal justice system. I am clear about your view on punishment, which you have articulated this morning. I also understand your view on paying a debt to society. If someone goes to prison, they have to come out at some point—after three months, six months or two years. The central question is: do they come out of prison more or less likely to carry knives and commit crimes? When I visited Polmont young offenders institution, I was told that 91 per cent of the young offenders had been there before. Polmont is a facility for those under 21, but going there appears not to be an obvious deterrent. I think that there are similar statistics for those given prison sentences. Prison seems not to have a deterrent effect. Do we not have to deal with the underlying causes of why people commit crimes?

John Muir: Where do those differentials get us? Let us take general conditions for prisoners—

Robert Brown: Some of them are inside for a long time.

John Muir: That is fine. Get them in for a long time if they have done a big crime.

Prisoners have Sky television, warm cells, showers and three meals a day. If they do not like the meals they get, they have them brought in from the outside. There is no deterrent in that. They go back into prison readily; it is like a club. They say, "I'm going back in to see my mates who're in for a wee bit longer than me. They'll give me an update on what's going on."

At times, I feel that I am letting myself down when I come along and complain about things. I have said this many times: go to the sharp end of the boat. Go to the areas where life is difficult and where things are poor and bad. People in those areas do not live the life that you or I live. I live in an area where I am not faced by violent crime every hour of the day, but people near to where I live face that.

Again, this goes back to self-accountability and the lack of proper prison sentences. The big thing that jumps up when people go into prison is that they then have these wonderful civil liberties—civil rights to claim for sundries so as not to upset their cosy lifestyles. I have to ask the question time and again: what about my son? He was 34 years of age when he died, and he will be 34 years of age when I die. That is what you have to look at. He had nothing out of life up to that age. He was a fine boy.

The victims are us—the family, carrying on in the aftermath. We see people coming out of prison, giving us the finger, snubbing us just because of who and what we are, and saying, "We beat the system again." The present system does not have enough guts.

The Convener: Right, I think that we have now reached the point of repetition. On the strict understanding that their questions be without significant preamble, we will have final brief questions first from Trish Godman and then from Richard Baker.

Trish Godman: I represent part of Inverclyde—Paul McGee was a constituent of mine. I want clarification from you, Mr Strang. You opened by saying that cost and prison space would be a problem, and then you said that mandatory sentencing would be a problem, too. Which do you think is the bigger problem in terms of your objections to the amendments?

You have also said, “We need to do” lots of times—I have written it down. You have good examples in Inverclyde and Lothian, so why are you not doing it? If you are not doing it just now, do you have the intention to move the good practice that Angela Constance spoke about across the city? However, I am more concerned about your opening statement that says that it will cost a lot, there is not the prison space and you do not believe in mandatory sentencing. Which of those things is the reason why you do not support the amendments?

The Convener: Short, crisp answer, Mr Strang.

Chief Constable Strang: On mandatory sentencing, I think that the discretion should be with the sheriff or judge who is sentencing. They know the facts of the case and can take into account the individual’s circumstance and sentence accordingly. However much it cost or however many prison spaces we had, I would still say that a mandatory prison sentence is not the right way forward.

The Convener: I ask Richard Baker to follow the excellent example set by Trish Godman.

Richard Baker (North East Scotland) (Lab): I am not sure whether I can match that, but I have two brief questions.

Mr Strang, my amendment is based on the current laws for mandatory sentences for firearms offences. I presume that you are not suggesting that the current laws on firearms are faulty, so can you understand why some of us are perplexed that we have that sentencing regime in place for firearms, offences of which are falling, but not for knives? Last year, 57 people were stabbed to death, while only two people were killed with firearms. Can you see why your logic escapes us?

Chief Constable Strang: No, because I do not think that there is a logic that says that if we introduced mandatory sentences for knife crime, they would have the impact that you hope for.

Richard Baker: Even though, with that sentencing regime in place, firearms offences are falling.

Chief Constable Strang: I do not have the figures for firearms offences with me but, as I said earlier, the culture and circumstances of people carrying firearms are very different. The availability of firearms is in stark contrast to the availability of knives: every kitchen has a string of knives in it.

Richard Baker: I understand that we are short of time and that we will have an opportunity to return to the subject, so this is my final question.

The figures that we have show that there was an increase—admittedly a small one—between 2007-08 and 2008-09 in offences of handling an offensive weapon in Lothian and Borders. The interventions in your police force area that you have mentioned and those in Greenock that John Muir has referred to are to be commended, but why should they preclude a change in the sentencing regime? We could have a new sentencing regime that would have the effect that we want, send out a clear message—“Carry a knife, go to jail”—and, at the same time, have those interventions, too. Surely they can work side by side.

Chief Constable Strang: From a logical and technical point of view, they could. However, I am arguing against a mandatory sentence that is applicable to absolutely everyone, whether they are a 16-year-old who is fearful or a 30-year-old who has gone out with criminal intent and carrying a knife. I think that there needs to be a distinction.

I stressed preventive and proactive policing—working with communities, youth clubs and schools—because that is the way to make a real difference, rather than sending people to prison, which we know has negative outcomes for them. I accept entirely that it protects the public while those people are in prison because they are not committing offences on the street, but we must remember the long-term impact. The point of “Scotland’s Choice”, the report of the Scottish Prisons Commission, was that we have a choice to make: either we continue to lock up people, with the negative outcomes that that has, or we have a fresh approach to community sentences.

The Convener: Thank you very much—

John Muir: I just want to make one small point. One reason why we have had a lot of success in Inverclyde is the Scottish Parliament. That should not be forgotten. We have received proceeds of crime money, which has been a big bonus, and I want the MSPs here to know that we appreciate that very much.

The Convener: Thank you for those generous words, and thank you for your evidence this morning. That concludes our evidence session.

13:25

Meeting continued in private until 13:36.

Criminal Justice and Licensing (Scotland) Bill

3rd Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 3	Schedule 1
Sections 4 to 18	Schedule 2
Sections 19 to 66	Schedule 3
Sections 67 to 139	Schedule 4
Sections 140 to 145	Schedule 5
Sections 146 to 148	Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 15

Rhoda Grant

399 In section 15, page 29, line 29, after <subsection (1)> insert—

<( ) at the beginning insert "Subject to subsection (1A),", and

( )>

Rhoda Grant

400 In section 15, page 29, line 29, at end insert—

<( ) after subsection (1) insert—

"(1A) The prosecutor must, where a person ("A") is convicted of the offence of stalking a person ("B"), apply to the court to make a non-harassment order against A requiring A to refrain from such conduct in relation to—

(a) B, or

(b) any other person in relation to whom the course of conduct engaged in by A, and which constituted the offence, related,

as may be specified in the order for such period (which includes an indeterminate period) as may be so specified, in addition to any other disposal which may be made in relation to the offence.",>

Rhoda Grant

401 In section 15, page 29, line 30, after <subsection (2)> insert—

<( ) after "subsection (1)" insert "or (1A)", and

( )>

Rhoda Grant

5 In section 15, page 29, line 30, leave out <"harassment (or further harassment)"> and insert <"misconduct (or further misconduct)">

Rhoda Grant

6 In section 15, page 30, line 18, leave out <"harassment" and "conduct" are> and insert <"conduct" is>

Rhoda Grant

7 In section 15, page 30, line 20, at end insert <whether on one or more than one occasion>

Section 17

Robert Brown

100 In section 17, page 30, line 32, leave out <6> and insert <3>

Robert Brown

101 In section 17, page 31, line 2, leave out <6> and insert <3>

Robert Brown

388 In section 17, page 31, line 7, at end insert—

<(4) The Scottish Ministers may not bring subsection (1), (2) or (3) into force until they have—

(a) prepared a report setting out—

(i) the reduction in the number of sentences of imprisonment or detention imposed annually that is expected as a result of bringing those subsections into force,

(ii) the increase in the number of community payback orders imposed annually that is expected as a result of bringing those subsections into force (by comparison with the number of such orders imposed annually that would be expected if those subsections were not brought into force),

(iii) the estimated annual cost implications of the changes referred to in sub-paragraphs (i) and (ii),

(iv) the additional funding, if any, that Ministers will provide to community justice authorities or local authorities to ensure that they have the capacity to support the requirements expected to be imposed by any additional community payback orders identified under sub-paragraph (ii).

(b) laid that report before the Scottish Parliament; and

(c) taken into account any views expressed on it by any committee of the Parliament the remit of which includes the criminal justice system.>

Richard Baker
Supported by: Bill Aitken

1 Leave out section 17

After section 17

Robert Brown

102 After section 17, insert—

<**Report on operation of sections 14 and 17**

(1) The Scottish Ministers must, no later than 5 years after sections 14 and 17 come fully into force, lay before the Scottish Parliament and publish a report on the operation of those sections.

(2) The report under subsection (1) must, in particular, include an assessment of whether and to what extent those sections, individually or collectively, have—

(a) reduced offending,

(b) increased public safety.>

After section 20

Bill Wilson

103 After section 20, insert—

<**Pre-sentencing reports about organisations**

After section 203 of the 1995 Act (reports), insert—

"**203A Reports about organisations**

(1) This section applies where an organisation is convicted of an offence.

(2) Before dealing with the organisation in respect of the offence, the court may obtain a report into the organisation's financial affairs and structural arrangements.

(3) The report is to be prepared by a person appointed by the court.

(4) The person appointed to prepare the report is referred to in this section as the "reporter".

(5) The court may issue directions to the reporter about—

(a) the information to be contained in the report,

(b) the particular matters to be covered by the report,

(c) the time by which the report is to be submitted to the court.

(6) The court may order the organisation to give the reporter and any person acting on the reporter's behalf—

(a) access at all reasonable times to the organisation's books, documents and other records,

(b) such information or explanation as the reporter thinks necessary.

(7) The reporter's costs in preparing the report are to be paid by the clerk of court, but the court may order the organisation to reimburse to the clerk all or a part of those costs.

(8) An order under subsection (7) may be enforced by civil diligence as if it were a fine.

(9) On submission of the report to the court, the clerk of court must provide a copy of the report to—

- (a) the organisation,
- (b) the organisation's solicitor (if any), and
- (c) the prosecutor.

(10) The court must have regard to the report in deciding how to deal with the organisation in respect of the offence.

(11) If the court decides to impose a fine, the court must, in determining the amount of the fine, have regard to—

- (a) the report, and
- (b) if the court makes an order under subsection (7), the amount of costs that the organisation is required to reimburse under the order.

(12) Where the court—

- (a) makes an order under subsection (7), and
- (b) imposes a fine on the organisation,

any payment by the organisation is first to be applied in satisfaction of the order under subsection (7).

(13) Where the court also makes a compensation order in respect of the offence, any payment by the organisation is first to be applied in satisfaction of the compensation order before being applied in accordance with subsection (12).".>

Section 24

Robert Brown
Supported by: Bill Aitken

104 Leave out section 24

After section 24

Kenny MacAskill

105 After section 24, insert—

<**Mutual recognition of judgments and probation decisions**

(1) The Scottish Ministers may by order make provision for the purposes of and in connection with implementing any obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).

(2) The provision may, in particular, confer functions—

(a) on the Scottish Ministers,

(b) on other persons.

(3) An order under subsection (1) may modify any enactment.

(4) In this section, the "Framework Decision" means Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.>

Richard Baker

10 After section 24, insert—

<**Minimum sentence for having in a public place an article with a blade or point**

(1) In section 49 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (offence of having in a public place an article with a blade or point), after subsection (5) insert—

"(5A) Subsection (5B) applies where—

(a) a person is convicted of an offence under subsection (1),

(b) the offence was committed after the commencement of this subsection, and

(c) when the offence was committed, the person was aged 16 or over.

(5B) Where this subsection applies, the court must impose a sentence of imprisonment of at least 6 months (with or without a fine) unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify not doing so.".

(2) In section 207(3A) of the 1995 Act (detention of young offenders: minimum sentences), after paragraph (a) insert—

"(aa) section 49(5B) of the Criminal Law (Consolidation) (Scotland) Act 1995 (minimum sentence for having in a public place an article with a blade or point);".>

Bill Aitken

10A As an amendment to amendment 10, line 11, leave out from <6> to end of line 13 and insert <2 years (with or without a fine) unless the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction and thinks fit to order the offender to be imprisoned for a shorter period or not to order the offender to be imprisoned>

Section 25

Kenny MacAskill

344 In section 25, page 38, line 34, at end insert—

<( ) Without limiting the generality of subsection (1), a person agrees to become involved in serious organised crime if the person—

(a) agrees to do something (whether or not the doing of that thing would itself constitute an offence), and

(b) knows or suspects, or ought reasonably to have known or suspected, that the doing of that thing will enable or further the commission of serious organised crime.>

Robert Brown

345 In section 25, page 38, line 36, leave out <involving> and insert—

(a) that would reasonably be regarded as being both serious and organised, and

(b) that involves>

Kenny MacAskill

346 In section 25, page 39, line 2, leave out <securing> and insert <obtaining>

Kenny MacAskill

347 In section 25, page 39, line 4, leave out <serious>

Robert Brown

348 In section 25, page 39, line 4, leave out <serious violence> and insert <violence or intimidation>

Kenny MacAskill

349 In section 25, page 39, line 4, after <committed> insert <or a threat made>

Kenny MacAskill

350 In section 25, page 39, line 4, leave out <securing> and insert <obtaining>

Kenny MacAskill

351 In section 25, page 39, line 5, at end insert <, and

“material benefit” means a right or interest of any description in any property, whether heritable or moveable and whether corporeal or incorporeal.>

Section 26

Robert Brown

352 In section 26, page 39, line 21, leave out subsection (4)

Section 27

Robert Brown

353 In section 27, page 39, line 35, leave out <a serious offence> and insert <an offence under section 25(1)>

Kenny MacAskill

354 In section 27, page 40, line 9, leave out subsection (4)

Robert Brown

355 In section 27, page 40, line 14, leave out <a serious offence> and insert <an offence under section 25(1)>

Kenny MacAskill

356 In section 27, page 40, line 17, leave out subsection (6)

Section 28

Robert Brown

357 In section 28, page 40, line 28, after <suspects> insert <with good reason>

Bill Aitken
Supported by: Robert Brown

106 In section 28, page 40, line 36, at end insert—

<( ) In the case of knowledge or suspicion originating from information obtained by the person in the course of the person's trade, profession, business or employment, this section applies only where the person's experience or seniority in that trade, profession, business or employment makes it reasonable to assume that the person should be aware of any offence of the sort mentioned in subsection (1) that the other person has or may have committed.>

Kenny MacAskill

358 In section 28, page 40, line 39, leave out <derived> and insert <obtained>

Robert Brown

359 In section 28, page 41, line 1, after <constable> insert <or other specified public official>

Robert Brown

360 In section 28, page 41, line 20, at end insert—

<( ) In subsection (3), "specified public official" means a person holding a public office specified in an order made by the Scottish Ministers.>

After section 28

Kenny MacAskill

107 After section 28, insert—

<Genocide, crimes against humanity and war crimes

Genocide, crimes against humanity and war crimes: UK residents

(1) The International Criminal Court (Scotland) Act 2001 (asp 13) is amended as follows.

(2) After section 8, insert—

“8A Meaning of “United Kingdom national” and “United Kingdom resident”

(1) In this Part—

“United Kingdom national” means—

(a) a British citizen, a British Overseas Territories citizen, a British National (Overseas) or a British Overseas citizen,

(b) a person who under the British Nationality Act 1981 (c.61) is a British subject, or

(c) a British protected person within the meaning of that Act,

“United Kingdom resident” means a person who is resident in the United Kingdom.

(2) To the extent that it would not otherwise be the case, the following individuals are to be treated for the purposes of this Part as being resident in the United Kingdom—

(a) an individual who has indefinite leave to remain in the United Kingdom,

(b) any other individual who has made an application for such leave (whether or not it has been determined) and who is in the United Kingdom,

(c) an individual who has leave to enter or remain in the United Kingdom for the purposes of work or study and who is in the United Kingdom,

(d) an individual who has made an asylum claim, or a human rights claim, which has been granted,

(e) any other individual who has made an asylum claim or a human rights claim (whether or not the claim has been determined) and who is in the United Kingdom,

(f) an individual named in an application for indefinite leave to remain, an asylum claim or a human rights claim as a dependant of the individual making the application or claim if—

(i) the application or claim has been granted, or

(ii) the named individual is in the United Kingdom (whether or not the application or claim has been determined),

(g) an individual who would be liable to removal or deportation from the United Kingdom but cannot be removed or deported because of section 6 of the Human Rights Act 1998 (c.42) or for practical reasons,

(h) an individual—

(i) against whom a decision to make a deportation order under section 5(1) of the Immigration Act 1971 (c.77) by virtue of section 3(5)(a) of that Act (deportation conducive to the public good) has been made,

(ii) who has appealed against the decision to make the order (whether or not the appeal has been determined), and

(iii) who is in the United Kingdom,

(i) an individual who is an illegal entrant within the meaning of section 33(1) of the Immigration Act 1971 or who is liable to removal under section 10 of the Immigration and Asylum Act 1999 (c.33),

(j) an individual who is detained in lawful custody in the United Kingdom.

(3) When determining for the purposes of this Part whether any other individual is resident in the United Kingdom regard is to be had to all relevant considerations including—

(a) the periods during which the individual is, has been or intends to be in the United Kingdom,

(b) the purposes for which the individual is, has been or intends to be in the United Kingdom,

(c) whether the individual has family or other connections to the United Kingdom and the nature of those connections, and

(d) whether the individual has an interest in residential property located in the United Kingdom.

(4) In this section—

"asylum claim" means—

(a) a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention for the claimant to be removed from, or required to leave, the United Kingdom,

(b) a claim that the claimant would face a real risk of serious harm if removed from the United Kingdom,

"Convention rights" means the rights identified as Convention rights by section 1 of the Human Rights Act 1998,

"detained in lawful custody" means—

(a) detained in pursuance of a sentence of imprisonment or detention, a sentence of custody for life or a detention and training order,

(b) remanded in or committed to custody by an order of a court,

(c) detained pursuant to an order under section 2 of the Colonial Prisoners Removal Act 1884 (c.31) or a warrant under section 1 or 4A of the Repatriation of Prisoners Act 1984 (c.47),

(d) detained under Part 3 of the Mental Health Act 1983 (c.20) or by virtue of an order under section 5 of the Criminal Procedure (Insanity) Act 1964 (c.84) or section 6 or 14 of the Criminal Appeal Act 1968 (c.19) (hospital orders etc.),

(e) detained by virtue of an order under Part 6 of the Criminal Procedure (Scotland) Act 1995 (c.46) (other than an order under section 60C) or a hospital direction under section 59A of that Act, and includes detention by virtue of the special restrictions set out in Part 10 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) to which a person is subject by virtue of an order under section 59 of the Criminal Procedure (Scotland) Act 1995,

(f) detained under Part 3 of the Mental Health (Northern Ireland) Order 1986 (SI 1986/595) or by virtue of an order under section 11 or 13(5A) of the Criminal Appeal (Northern Ireland) Act 1980 (c. 47),

"human rights claim" means a claim that to remove the claimant from, or to require the claimant to leave, the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Convention) as being incompatible with the person's Convention rights,

"the Refugee Convention" means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol to the Convention,

"serious harm" has the meaning given by article 15 of Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

(5) In this section, a reference to having leave to enter or remain in the United Kingdom is to be construed in accordance with the Immigration Act 1971.

(6) This section applies in relation to any offence under this Part (whether committed before or after the coming into force of this section).".

(3) In section 28(1) (interpretation), the definitions of "United Kingdom national" and "United Kingdom resident" are repealed.>

Kenny MacAskill

108 After section 28, insert—

<Genocide, crimes against humanity and war crimes: retrospective application

After section 9 of the International Criminal Court (Scotland) Act 2001 (asp 13) insert—

"9A Retrospective application of certain offences

(1) Section 1 of this Act applies to acts committed on or after 1 January 1991.

(2) But that section does not apply to an act committed before 17 December 2001 which constitutes a crime against humanity or a war crime within article 8.2(b) or (e) unless, at the time the act was committed, it amounted in the circumstances to a criminal offence under international law.

(3) Section 2 of this Act applies to conduct engaged in on or after 1 January 1991.

(4) The references in subsections (1), (3) and (5) of that section to an offence include an act or conduct that would not constitute an offence but for this section.

(5) Any enactment or rule of law relating to an offence ancillary to a relevant offence applies—

(a) to conduct engaged in on or after 1 January 1991, and

(b) even if the act or conduct constituting the relevant offence would not constitute such an offence but for this section.

(6) But section 2 of this Act, and any enactment or rule of law relating to an offence ancillary to a relevant offence, do not apply to—

(a) conduct engaged in before 17 December 2001, or

(b) conduct engaged in on or after that date which was ancillary to an act or conduct that—

(i) was committed or engaged in before that date, and

(ii) would not constitute a relevant offence but for this section,

unless, at the time the conduct was engaged in, it amounted in the circumstances to a criminal offence under international law.

(7) Section 5 of this Act, so far as it has effect in relation to relevant offences, applies—

(a) to failures to exercise control of the kind mentioned in subsection (2) or (3) of that section which occurred on or after 1 January 1991, and

(b) even if the act or conduct constituting the relevant offence would not constitute an offence but for this section.

(8) But section 5 of this Act, so far as it has effect in relation to relevant offences, does not apply to a failure to exercise control of the kind mentioned in subsection (2) or (3) of that section which occurred before 17 December 2001 unless, at the time it occurred, it amounted in the circumstances to a criminal offence under international law.

(9) In this section, “relevant offence” means an offence under section 1 or 2 of this Act or an offence ancillary to such an offence.

9B Provision supplemental to section 9A: modification of penalties

(1) This section applies in relation to—

(a) an offence under section 1 of this Act on account of an act committed before 17 December 2001 constituting genocide, if at the time the act was committed it also amounted to an offence under section 1 of the Genocide Act 1969,

(b) an offence under section 1 of this Act on account of an act committed before 1 September 2001 constituting a war crime, if at the time the act was committed it also amounted to an offence under section 1 of the Geneva Conventions Act 1957 (c.52) (grave breaches of the Conventions),

(c) an offence ancillary to an offence within paragraph (a) or (b) above.

(2) Section 3(5) of this Act has effect in relation to such an offence as if for “30 years” there were substituted “14 years”.”.>

After section 31

Kenny MacAskill

109 After section 31, insert—

<*Offensive weapons etc.*

Offensive weapons etc.

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.

(2) In section 47 (prohibition of the carrying of offensive weapons)—

(a) in subsection (1), the words from “without” to “him,” are repealed,

(b) after subsection (1), insert—

“(1A) It is a defence for a person charged with an offence under subsection (1) to show that the person had a reasonable excuse or lawful authority for having the weapon with the person in the public place.”, and

(c) for subsection (4), substitute—

“(4) In this section—

“offensive weapon” means any article—

(a) made or adapted for use for causing injury to a person, or

(b) intended, by the person having the article, for use for causing injury to a person by—

(i) the person having it, or

(ii) some other person,

“public place” means any place other than—

(a) domestic premises,

(b) school premises (within the meaning of section 49A(6)),

(c) a prison (within the meaning of section 49C(7)),

“domestic premises” means premises occupied as a private dwelling (including any stair, passage, garden, yard, garage, outhouse or other appurtenance of such premises which is not used in common by the occupants of more than one such dwelling).”.

(3) In section 49 (offence of having in public place article with blade or point)—

(a) in subsection (4), for the words “prove that he had good reason” substitute “show that the person had a reasonable excuse”,

(b) in subsection (5), for “prove” substitute “show”, and

(c) for subsection (7), substitute—

“(7) In this section, “public place” has the same meaning as in section 47(4).”.

(4) In section 49A (offence of having article with blade or point (or offensive weapon) on school premises)—

(a) in subsection (3), for the words “prove that he had good reason” substitute “show that the person had a reasonable excuse”, and

(b) in subsection (4), for “prove” substitute “show”.

(5) In section 49C(2) (offence of having offensive weapon etc. in prison), for the words “prove that he had good reason” substitute “show that the person had a reasonable excuse”.

(6) In section 50(4) (extension of constable’s power to stop, search and arrest without warrant), for “3” substitute “4”.>

Johann Lamont

11 After section 31, insert—

<**Offence of having article with blade or point (or offensive weapon) on workplace premises**

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.

(2) After section 49A, insert—

“**49AA Offence of having article with blade or point (or offensive weapon) on workplace premises**

(1) Any person who has an article to which section 49 of this Act applies with him on workplace premises is guilty of an offence.

(2) Any person who has an offensive weapon within the meaning of section 47 of this Act with him on workplace premises is guilty of an offence.

(3) It is a defence for a person charged with an offence under subsection (1) or (2) above to prove that he had good reason or lawful authority for having the article or weapon with him on the premises in question.

(4) Without prejudice to the generality of subsection (3) above, it is a defence for a person charged with an offence under subsection (1) or (2) above to prove that he had the article or weapon in question with him—

(a) for use at work (whether on the premises in question or otherwise),

(b) for religious reasons, or

(c) as part of any national costume.

(5) A person guilty of an offence—

(a) under subsection (1) above is liable—

(i) on summary conviction to imprisonment for a term not exceeding twelve months, or a fine not exceeding the statutory maximum, or both;

(ii) on conviction on indictment, to imprisonment for a term not exceeding four years, or a fine, or both;

(b) under subsection (2) above is liable—

(i) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both;

(ii) on conviction on indictment, to imprisonment for a term not exceeding four years, or a fine, or both.

(6) In this section and section 49B of this Act, “workplace premises” means any premises (other than school premises) used for the purposes of an undertaking carried on by an employer and made available to any employee of the employer as a place of work; and includes—

(a) any part of those premises to which such an employee has access while at work;

(b) any premises (other than a public road or other public place within the meaning of section 49 of this Act)—

(i) which are a means of access to or egress from the place of work; or

(ii) where facilities are provided for use in connection with the place of work.”.

(3) In section 49B(1)—

(a) after “school premises” insert “or workplace premises”;

(b) after “49A” insert “or 49AA”.

(4) In section 50(3), for “or section 49A(1) or (2)” substitute “, 49A(1) or (2) or 49AA(1) or (2)”.>

Rhoda Grant

402 After section 31, insert—

<Stalking

Offence of stalking

(1) A person (“A”) commits an offence, to be known as the offence of stalking, where A stalks another person (“B”).

(2) For the purposes of subsection (1), A stalks B where—

(a) A engages in a course of conduct,

(b) subsection (3) or (4) applies, and

(c) A’s course of conduct causes B to suffer—

(i) physical or psychological harm, or

(ii) apprehension or fear for B’s own safety or for the safety of any other person.

(3) This subsection applies where A engages in the course of conduct with the intention of causing such harm to B or of arousing such apprehension or fear in B.

(4) This subsection applies where A knows, or ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause such harm or arouse such apprehension or fear.

(5) It is a defence for a person charged with an offence under this section to show that the course of action—

(a) was authorised by virtue of any enactment or rule of law,

(b) was engaged in for the purpose of preventing or detecting crime, or

(c) was, in the particular circumstances, reasonable.

(6) In this section—

“conduct” includes (but is not limited to)—

(a) following B or any other person,

(b) contacting B or any other person by post, telephone, email, text message or any other method,

(c) publishing any statement or other material—

(i) relating or purporting to relate to B or to any other person,

(ii) purporting to originate from B or from any other person,

(d) tracing the use by B or by any other person of the internet, email or any other form of electronic communication,

(e) entering or loitering in the vicinity of—

(i) the place of residence of B or of any other person,

(ii) the place of work or business of B or of any other person,

(iii) any place frequented by B or of any other person,

(f) interfering with any property in the possession of B or of any other person,

(g) giving offensive material to B or to any other person or leaving such material where it may be found by, given to or brought to the attention of B or any other person,

(h) keeping B or any other person under surveillance,

(i) acting in any other way that a reasonable person would expect would arouse apprehension or fear in B for B’s own safety or for the safety of any other person, and

“course of conduct” involves conduct on at least two occasions.

(7) A person convicted of the offence of stalking is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or to both.>

Robert Brown

402A As an amendment to amendment 402, line 21, after <crime,> insert—

<( ) was engaged in as part of lawful and reasonable public protest or industrial action,>

Section 34

Kenny MacAskill

361 In section 34, page 49, line 4, leave out <(and any sounds accompanying it)>

Kenny MacAskill

362 In section 34, page 49, line 5, leave out <(and any sounds accompanying them)>

Kenny MacAskill

363 In section 34, page 49, line 7, at end insert—

<and reference may also be had to any sounds accompanying the image or the series of images.>

Kenny MacAskill

364 In section 34, page 49, line 31, after <images> insert—

<(i) any sounds accompanying the series of images,

(ii)>

Robert Brown

365 In section 34, page 50, line 4, leave out from <“excluded> to <work> and insert <image is an “excluded image” if it is all or part of a classified work, and is so excluded from the time that an application for a classification certificate is received by the designated authority>

Kenny MacAskill

366 In section 34, page 50, line 18, after <images> insert—

<(i) any sounds accompanying the series of images,

(ii)>

Kenny MacAskill

367 In section 34, page 50, line 19, leave out <and section 51C>

Kenny MacAskill

368 In section 34, page 50, line 27, leave out <and “extreme pornographic image” are> and insert <is>

Kenny MacAskill

369 In section 34, page 51, line 23, at end insert—

<( ) In this section “image” and “extreme pornographic image” are to be construed in accordance with section 51A.”.>

Kenny MacAskill

517 In section 34, page 51, line 23, at end insert—

<( ) In Schedule 3 to the Sexual Offences Act 2003 (c.42) (sexual offences for the purposes of Part 2 of that Act), after paragraph 44 insert—

“44A An offence under section 51A of the Civic Government (Scotland) Act 1982 (c.45) (possession of extreme pornography) if—

(a) the offender—

(i) was 18 or over, and

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of more than 12 months, and

(b) in imposing sentence, the court determines that it is appropriate that Part 2 of this Act should apply in relation to the offender.”.>

After section 34

Kenny MacAskill

110 After section 34, insert—

<Voyeurism: additional forms of conduct

(1) The Sexual Offences (Scotland) Act 2009 (asp 9) is amended as follows.

(2) In section 9 (voyeurism)—

(a) after subsection (4), insert—

“(4A) The fourth thing is that A—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,

operates equipment beneath B’s clothing with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B’s genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B’s genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,

records an image beneath B’s clothing of B’s genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B’s genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at the image.”,

(b) in subsection (5)—

(i) for “fourth” substitute “sixth”, and

(ii) for paragraph (b), substitute—

“(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).”, and

(c) in subsection (7), for “and (4)” substitute “, (4), (4A) and (4B)”.

(3) In section 10(2) (interpretation of section 9), after “section 9(3)” insert “and (4A)”.

(4) In section 26 (voyeurism towards a young child)—

(a) after subsection (4), insert—

“(4A) The fourth thing is that A operates equipment beneath B’s clothing with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe—

(a) B’s genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B’s genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A records an image beneath B’s clothing of—

(a) B’s genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B’s genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at the image.”,

(b) in subsection (5)—

(i) for “fourth” substitute “sixth”, and

(ii) for paragraph (b), substitute—

“(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).”,

(c) in subsection (7), for “and (4)” substitute “, (4), (4A) and (4B)”, and

(d) in subsection (8)—

(i) after “section 9(3)” insert “, (4A)”, and

(ii) after “subsections (3)” insert “, (4A)”.

(5) In section 36 (voyeurism towards an older child)—

(a) after subsection (4), insert—

“(4A) The fourth thing is that A operates equipment beneath B’s clothing with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe—

(a) B’s genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B’s genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A records an image beneath B’s clothing of—

(a) B’s genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B’s genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at the image.",

(b) in subsection (5)—

(i) for "fourth" substitute "sixth", and

(ii) for paragraph (b), substitute—

"(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).",

(c) in subsection (7), for "and (4)" substitute ", (4), (4A) and (4B)", and

(d) in subsection (8)—

(i) after "section 9(3)" insert ", (4A)", and

(ii) after "subsections (3)" insert ", (4A)".>

Kenny MacAskill

111 After section 34, insert—

<**Sexual offences: defences in relation to offences against older children**

In section 39 of the Sexual Offences (Scotland) Act 2009 (asp 9) (defences in relation to offences against older children), in subsection (4)(c), after "section 30(2)(d)" insert "or (e)".>

Kenny MacAskill

370 After section 34, insert—

<**Penalties for offences of brothel-keeping and living on the earnings of prostitution**

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.

(2) In section 11 (trading in prostitution and brothel-keeping)—

(a) in subsection (1), for the words from "liable" to the end substitute "guilty of an offence and liable to the penalties set out in subsection (1A)",

(b) after that subsection insert—

"(1A) A person—

(a) guilty of the offence set out in subsection (1)(a) is liable—

(i) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(ii) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both,

(b) guilty of the offence set out in subsection (1)(b) is liable—

(i) on conviction on indictment, to imprisonment for a term not exceeding two years,

(ii) on summary conviction, to imprisonment for a term not exceeding 12 months.”,

(c) in subsection (4), for “subsection (1)” substitute “subsection (1A)(a)”, and

(d) for subsection (6) substitute—

“(6) A person guilty of an offence under subsection (5) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both.”.

(3) In section 13(9) (living on earnings of another from male prostitution), for paragraphs (a) and (b) substitute—

“(a) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both.”.>

Trish Godman

8 After section 34, insert—

<Offences of engaging in, advertising and facilitating paid-for sexual activities

(1) The Sexual Offences (Scotland) Act 2009 (asp 9) is amended as follows.

(2) After section 11 insert—

“Engaging in, advertising and facilitating paid-for sexual activities

11A Engaging in a paid-for sexual activity

(1) A person (“A”) commits an offence, to be known as the offence of engaging in a paid-for sexual activity, if A knowingly engages in a paid-for sexual activity with another person (“B”).

(2) A sexual activity is paid for where B engages in that activity in exchange for payment.

(3) For the purposes of subsection (2), it is immaterial whether the payment is made—

(a) by A or by another person, or

(b) to B or to another person on B’s behalf.

11B Advertising paid-for sexual activities

A person commits an offence, to be known as the offence of advertising paid-for sexual activities, if that person knowingly advertises, by any means, the availability of sexual activities that can be engaged in for payment.

11C Facilitating engagement in a paid-for sexual activity

(1) A person (“A”) commits an offence, to be known as the offence of facilitating engagement in a paid-for sexual activity, if A knowingly facilitates the engagement of another person (“B”) in a paid-for sexual activity with another person (“C”).

(2) A sexual activity is paid for where C engages in that activity in exchange for payment.

(3) For the purposes of subsection (2), it is immaterial whether the payment is made—

(a) by A, by B or by another person, or

(b) to C or to another person on C's behalf.

(4) For the purposes of subsection (1), facilitating the engagement by B in a paid-for sexual activity includes (but is not limited to)—

(a) arranging B's engagement in the activity,

(b) making payment to C or to another person on C's behalf,

(c) making available premises in which the activity takes place, or

(d) transporting B, or arranging transport for B, to where the activity takes place.

11D Arrest for offences under sections 11A to 11C

(1) Where a constable reasonably believes that a person is committing or has committed an offence under section 11A, 11B or 11C, the constable may arrest the person without warrant.

(2) Subsection (1) is without prejudice to any power of arrest conferred by law apart from that subsection.".

(3) In the table in schedule 2 insert at the appropriate place—

"Engaging in a paid-for sexual activity	Section 11A	A fine not exceeding level 3 on the standard scale	
Advertising paid-for sexual activities	Section 11B	A fine not exceeding level 3 on the standard scale	
Facilitating engagement in a paid-for sexual activity	Section 11C	A fine not exceeding level 3 on the standard scale".>	

Margo MacDonald

8A As an amendment to amendment 8, line 15, at end insert—

<11AA Causing alarm etc. by engaging in a paid-for sexual activity

In the circumstances described in section 11A(1), A and B commit an offence, to be known as the offence of causing alarm etc. by engaging in a paid-for sexual activity, if their engaging in the activity that constitutes the offence under that section causes alarm to another person ("C"), endangers C or creates a nuisance for C.>

Margo MacDonald

8B As an amendment to amendment 8, line 15, at end insert—

<**11AB Profiting from coerced paid-for sexual activities**

A person commits an offence, to be known as the offence of profiting from coerced paid-for sexual activities, if that person knowingly secures a direct benefit (whether financial or otherwise) from a paid-for sexual activity involving a person whose engagement in that activity has been secured as a result of coercion.>

Margo MacDonald

8C As an amendment to amendment 8, line 40, after <11A,> insert <11AA, 11AB>

Margo MacDonald

8D As an amendment to amendment 8, line 48, at end insert—

<"Causing alarm etc. by engaging in a paid-for sexual activity	Section 11AA	A fine not exceeding level 3 on the standard scale	
Profiting from coerced paid-for sexual activities	Section 11AB	A fine not exceeding level 3 on the standard scale>	

Nigel Don

461 After section 34, insert—

<**Offence of paying for sexual services of a prostitute subjected to force etc.**

(1) The Sexual Offences (Scotland) Act 2009 (asp 9) is amended as follows.

(2) After section 11 insert—

"Paying for sexual services of a prostitute subjected to force etc.

11E Paying for sexual services of a prostitute subjected to force etc.

(1) A person ("A") commits an offence, to be known as the offence of paying for sexual services of a coerced prostitute, if—

(a) A makes or promises payment for the sexual services of a prostitute ("B"),

(b) a third person ("C") has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and

(c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).

(2) The following are irrelevant—

(a) where in the world the sexual services are to be provided and whether those services are provided,

(b) whether A is, or ought to be, aware that C has engaged in exploitative conduct.

(3) C engages in exploitative conduct if—

(a) C uses force, threats (whether or not relating to violence) or any other form of coercion, or

(b) C practises any form of deception.”.

(3) In the table in schedule 2 insert at the appropriate place—

“Paying for sexual services of a coerced prostitute	Section 11E	A fine not exceeding level 3 on the standard scale”.>	

Section 35

Kenny MacAskill

371 In section 35, page 51, line 30, at end insert—

<( ) after subsection (1) insert—

“(1A) A person to whom subsection (6) applies commits an offence if the person arranges or facilitates—

(a) the arrival in or the entry into a country (other than the United Kingdom), or travel there (whether or not following such arrival or entry) by, an individual and—

(i) intends to exercise control over prostitution by the individual or to involve the individual in the making or production of obscene or indecent material; or

(ii) believes that another person is likely to exercise such control or so to involve the individual,

there or elsewhere; or

(b) the departure from a country (other than the United Kingdom) of an individual and—

(i) intends to exercise such control or so to involve the individual; or

(ii) believes that another person is likely to exercise such control or so to involve the individual,

outwith the country.”,>

Kenny MacAskill

372 In section 35, page 51, line 30, at end insert—

<( ) in subsection (2), for “subsection (1)” substitute “subsections (1) and (1A)”,>

Kenny MacAskill

373 In section 35, page 51, line 32, leave out <Subsection (1) applies> and insert <Subsections (1) and (1A) apply>

Kenny MacAskill

374 In section 35, page 51, line 34, leave out <proceeded against, indicted> and insert <prosecuted>

Kenny MacAskill

375 In section 35, page 51, line 40, after <on> insert <the>

Kenny MacAskill

376 In section 35, page 52, leave out line 1 and insert—

<( ) in subsection (6)—

(i) the word "and" immediately following paragraph (e) is repealed, and

(ii) after paragraph (f) insert—

"(g) a person who at the time of the offence was habitually resident in Scotland, and

(h) a body incorporated under the law of a part of the United Kingdom.".>

Kenny MacAskill

377 In section 35, page 52, line 2, leave out subsection (2) and insert—

<( ) In section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation)—

(a) in subsection (1), after "arrival in" insert "or the entry into",

(b) in subsection (2), the words from "in" where it first occurs to "committed" are repealed,

(c) after subsection (3) insert—

"(3A) A person to whom section 5(2) applies commits an offence if—

(a) in relation to an individual (the "passenger"), he arranges or facilitates—

(i) the arrival in or the entry into a country other than the United Kingdom of the passenger,

(ii) travel by the passenger within a country other than the United Kingdom,

(iii) the departure of the passenger from a country other than the United Kingdom, and

(b) he—

(i) intends to exploit the passenger, or

(ii) believes that another person is likely to exploit the passenger,

(wherever the exploitation is to occur).",

(d) in subsection (4)—

(i) in paragraph (b), the words from “as a result” to “Act 2004,” become sub-paragraph (i),

(ii) immediately following that sub-paragraph insert “or—

(ii) which, were it done in Scotland, would constitute an offence mentioned in sub-paragraph (i),”,

(iii) after paragraph (b) insert—

“(ba) he is encouraged, required or expected to do anything in connection with the removal of any part of a human body—

(i) as a result of which he or another person would commit an offence under the law of Scotland (other than an offence mentioned in paragraph (b)(i)), or

(ii) which, were it done in Scotland, would constitute such an offence,”, and

(iv) for paragraph (d) substitute—

“(d) another person uses or attempts to use him for any purpose within sub-paragraph (i), (ii) or (iii) of paragraph (c), having chosen him for that purpose on the grounds that—

(i) he is mentally or physically ill or disabled, he is young, or he has a family relationship with a person, and

(ii) a person without the illness, disability, youth or family relationship would be likely to refuse to be used for that purpose.”.

( ) In section 5 of that Act—

(a) in subsection (1), for the words from “(3)” to the end substitute “(3A) of section 4 apply to anything done in or outwith the United Kingdom.”,

(b) in subsection (2)—

(i) the word “and” immediately following paragraph (e) is repealed, and

(ii) after paragraph (f) insert—

“(g) a person who at the time of the offence was habitually resident in Scotland, and

(h) a body incorporated under the law of a part of the United Kingdom.”,

(c) after subsection (2) insert—

“(2A) A person may be prosecuted, tried and punished for any offence to which section 4 applies—

(a) in any sheriff court district in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).

(2B) In subsection (2A), “sheriff court district” is to be construed in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995 (c.46) (interpretation).”.>

After section 35

Kenny MacAskill

112 After section 35, insert—

<*Slavery, servitude and forced or compulsory labour*

Slavery, servitude and forced or compulsory labour

(1) A person (“A”) commits an offence if—

(a) A holds another person in slavery or servitude and the circumstances are such that A knows or ought to know that the person is so held, or

(b) A requires another person to perform forced or compulsory labour and the circumstances are such that A knows or ought to know that the person is being required to perform such labour.

(2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention (which prohibits a person from being held in slavery or servitude or being required to perform forced or compulsory labour).

(3) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 14 years, or to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

(4) In this section “Human Rights Convention” means the Convention for the Protection of Human Rights and Fundamental Freedoms agreed by the Council of Europe at Rome on 4 November 1950.>

After section 36

Kenny MacAskill

113 After section 36, insert—

<**Articles for use in fraud**

(1) A person (“A”) commits an offence if A has in A’s possession or under A’s control an article for use in, or in connection with, the commission of fraud.

(2) A person guilty of an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine, or to both.

(3) A person commits an offence if the person makes, adapts, supplies or offers to supply an article—

(a) knowing that the article is designed or adapted for use in, or in connection with, the commission of fraud, or

(b) intending the article to be used in, or in connection with, the commission of fraud.

(4) A person guilty of an offence under subsection (3) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine, or to both.

(5) In this section, "article" includes a program or data held in electronic form.>

After section 37

Kenny MacAskill

114 After section 37, insert—

<Abolition of offences of sedition and leasing-making

Abolition of offences of sedition and leasing-making

The following offences under the common law of Scotland are abolished—

(a) the offence of sedition,

(b) the offence of leasing-making.>

Kenny MacAskill

378 After section 37, insert—

<Threatening, alarming or distressing behaviour

Threatening, alarming or distressing behaviour

(1) A person ("A") commits an offence if—

(a) A behaves in such a manner that a reasonable person would be likely to—

(i) fear for the safety of any person on account of the behaviour, or

(ii) be alarmed or distressed by the behaviour, and

(b) the condition in subsection (2) is satisfied.

(2) That condition is that A—

(a) intends by the behaviour to cause fear, alarm or distress, or

(b) is reckless as to whether the behaviour would cause fear, alarm or distress.

(3) It does not matter—

(a) whether A's behaviour is directed at anyone in particular,

(b) if it is directed at a particular person, whether that person is aware of the behaviour, or

(c) whether A's behaviour—

(i) actually causes anyone fear, alarm or distress, or

(ii) takes place in public or private.

(4) Subsection (1) applies to—

(a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done,

(b) behaviour consisting of—

(i) a single act, or

(ii) a course of conduct.

(5) The reference in subsection (1)(a)(i) to fear for a person's safety is to fear that the person's life could be endangered or that the person's physical or psychological well-being could be harmed.

(6) A person guilty of an offence under subsection (1) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.>

Bill Aitken

115 After section 37, insert—

<**PART**

DOUBLE JEOPARDY

Rule against double jeopardy

(1) It is not competent to charge a person who, whether on indictment or complaint (the "original" indictment or complaint), has been convicted or acquitted of an offence—

(a) with an offence of which it would have been competent to convict the person on the original indictment or complaint, or

(b) with an offence which—

(i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and

(ii) is an aggravated way of committing the offence of which the person was convicted or acquitted.

(2) Whether the conviction or acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) Subsection (1) is subject to sections *(Tainted acquittals)*, *(Admission subsequent to acquittal)* and *(New evidence)* and is without prejudice to sections 118(1)(c) (disposal of appeals), 119 (provision where High Court authorises new prosecution), 183(1)(d) (stated case: disposal of appeal) and 185 (authorisation of new prosecution) of the 1995 Act.

(4) In this Part, reference to a person being convicted of an offence is—

(a) to the person being found guilty of the offence, or

(b) to the prosecutor accepting the person's plea of guilty to the offence,

in either case whether or not sentence is passed.>

Bill Aitken

116 After section 37, insert—

<Plea in bar of trial

(1) A person charged with an offence—

(a) whether on indictment or complaint, but

(b) other than by virtue of a section mentioned in section *(Rule against double jeopardy)*(3),

may aver, as a plea in bar of trial, that the offence arises out of the same, or largely the same, acts or omissions as have already given rise to the person being tried for, and convicted or acquitted of, an offence (the "original offence").

(2) Whether the conviction or acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) If the court is satisfied, on a balance of probabilities, as to the truth of the person's averment, the plea is to be sustained unless the prosecutor persuades the court that there is some special reason why the case should proceed to trial (as for example, but without prejudice to the generality of this subsection, where trials were separated on the application of, or with the consent of, the person).

(4) Subsections (1) to (3) apply irrespective of where the person was tried; but this subsection is subject to subsection (5).

(5) Where the person was tried outwith the United Kingdom the court may disregard a conviction or acquittal if—

(a) it determines that it is in the interests of justice to do so, and

(b) to permit the case to proceed to trial would not be inconsistent with the obligations of the United Kingdom under Article 54 of the Schengen Convention (that is to say, of the Convention of 19th June 1990 implementing the Schengen Agreement of 14th June 1985).

(6) In making a determination in pursuance of subsection (5)(a), the court is in particular to have regard to—

(a) whether the purpose of bringing the person to trial in the foreign country appears to have been to assist the person to evade justice,

(b) whether the proceedings in the foreign country appear to have been conducted—

(i) independently and impartially, and

(ii) in a manner consistent with dealing justly with the person,

(c) whether such sentence (or other disposal) as might be imposed in the foreign country for an offence of the kind for which the person has been acquitted or convicted is commensurate with any that might be imposed for an offence of that kind in Scotland, and

(d) the extent to which the acts or omissions can be considered to have occurred in, respectively—

(i) Scotland,

(ii) the foreign country.>

Bill Aitken

117 After section 37, insert—

<Eventual death of injured person

(1) This section applies where—

(a) a person ("A") sustains physical injuries,

(b) another person ("B") is, whether on indictment or complaint, acquitted or convicted of an offence ("offence Y") which comprises the infliction of the injuries, and

(c) after the acquittal or conviction A dies, ostensibly from the injuries.

(2) Whether the conviction or acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) If B was acquitted of offence Y (and was not then convicted of a different offence, "offence Z", which comprised the infliction of the injuries) it is not competent to charge B with—

(a) the murder of A,

(b) culpable homicide as respects A, or

(c) any other offence comprising causing A's death.

(4) If B was convicted of offence Y (or of offence Z), then—

(a) for the purposes of sections *(Rule against double jeopardy)* and *(Plea in bar of trial)* the offences mentioned in paragraphs (a) to (c) of subsection (3) are not to be treated as offences arising out of the same, or largely the same, acts or omissions as the offence of which B was convicted, but

(b) on B being acquitted or convicted of any of the offences mentioned in those paragraphs, the court may, on the motion of B and after hearing the parties on that motion, quash B's conviction of offence Y (or offence Z) where satisfied that it is appropriate to do so.

(5) A party may appeal to the High Court against the granting or refusing of a motion under subsection (4)(b).>

Bill Aitken

118 After section 37, insert—

<Tainted acquittals

(1) A person who, whether on indictment or complaint (the "original" indictment or complaint), has been acquitted of an offence (the "original offence") may, provided that the conditions mentioned in subsection (3) are satisfied, be charged with, and prosecuted anew for—

(a) the original offence, or

(b) an offence arising out of the same, or largely the same, acts or omissions as gave rise to the original offence.

(2) Whether the acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) The conditions are—

(a) either—

(i) that the acquitted person or some other person has (or the acquitted person and some other person have) been convicted of an offence against the course of justice, being an offence in connection with proceedings on the original indictment or complaint, or

(ii) that on the application of the Lord Advocate the High Court has concluded on a balance of probabilities that the acquitted person or some other person has (or the acquitted person and some other person have) committed such an offence against the course of justice, and

(b) that on the application of the Lord Advocate the High Court has—

(i) set aside the acquittal, and

(ii) granted authority to bring, by virtue of this section, a new prosecution.

(4) On making an application under subsection (3), the Lord Advocate is to send a copy of that application to the acquitted person.

(5) The acquitted person is entitled to appear or to be represented at any hearing of the application.

(6) For the purpose of—

(a) hearing and coming to a conclusion on any application under subsection (3)(a)(ii), or

(b) hearing and determining any application under subsection (3)(b),

three of the Lords Commissioners of Justiciary are a quorum of the Court (the application being determined by majority vote of those sitting).

(7) The decision of the Court on the application is final.

(8) Subsection (7) is without prejudice to any power of those sitting to remit the application to a differently constituted sitting of the Court (as for example to the whole Court sitting together).

(9) The Court may appoint counsel to act as *amicus curiae* at the hearing in question.

(10) Subsections (11) and (12) apply in a case where (or as the case may be where the Court, in coming to a conclusion under subsection (3)(a)(ii), is satisfied on a balance of probabilities that) the offence against the course of justice consisted of or included interference with a juror or with the trial judge.

(11) An acquittal is to be set aside under subsection (3)(b)(i) if the Court is unable to conclude that the interference had no effect on the outcome of the proceedings on the original indictment or complaint.

(12) But it is not to be so set aside if in the course of the trial, the interference (being interference with a juror and not with the trial judge) became known to the trial judge, who then allowed the trial to proceed to its conclusion.

(13) Subsection (14) applies in a case other than is mentioned in subsection (10).

(14) An acquittal is not to be set aside under subsection (3)(b)(i) unless the Court is satisfied on a balance of probabilities—

(a) that the offence led—

(i) to the withholding of evidence which, had it been given, would have been, or

(ii) to the giving of false evidence which was,

evidence capable of being regarded as credible and reliable by a reasonable jury, and

(b) that the withholding, or as the case may be the giving, of the evidence was likely to have had a material effect on the outcome of the proceedings on the original indictment or complaint.

(15) And an acquittal is not to be set aside under subsection (3)(b)(i), whether by virtue of subsections (10) to (12) or by virtue of subsections (13) and (14), if the court considers that setting it aside would be contrary to the interests of justice.

(16) In this section, the expression “offence against the course of justice”—

(a) means an offence of perverting, or of attempting to pervert, the course of justice (by whatever means and however the offence is described), and

(b) without prejudice to the generality of paragraph (a), includes—

(i) an offence under section 45(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (aiding, abetting, counselling, procuring or suborning the commission of an offence under section 44 of that Act),

(ii) the crime of subornation of perjury, and

(iii) the crime of bribery.

(17) But the expression does not include—

(a) the crime of perjury, or

(b) an offence under section 44(1) of that Act (statement on oath which is false or which the person making it does not believe to be true).>

Bill Aitken

119 After section 37, insert—

<Further provision as regards prosecution by virtue of section *(Tainted acquittals)*

(1) A prosecution may be brought by virtue of section *(Tainted acquittals)* notwithstanding that any time limit for the commencement of such proceedings has elapsed.

(2) In proceedings in a prosecution brought by virtue of section *(Tainted acquittals)* it is competent for either party to lead evidence which it was competent for that party to lead in the earlier proceedings.

(3) But the indictment or complaint in the prosecution is to identify any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (2) (being matters as respects which it would not have been competent to lead evidence but for that subsection).

(4) On granting authority under section *(Tainted acquittals)*(3)(b)(ii) to bring a new prosecution, the High Court may, after giving the parties an opportunity of being heard, order the detention of the accused person in custody or admit that person to bail.

(5) In—

(a) solemn proceedings, section 65(4)(aa) and (b) and (4A) to (9), and

(b) summary proceedings, section 147,

of the 1995 Act (prevention of delay in trials) applies to an accused person who is detained under subsection (4) as it applies to an accused person detained by virtue of being committed until liberated in due course of law.>

Bill Aitken

120 After section 37, insert—

<Admission subsequent to acquittal

(1) A person who, whether on indictment or complaint (the "original" indictment or complaint), has been acquitted of an offence but subsequently admits to committing it may, provided that the condition mentioned in subsection (3) is satisfied, be charged with, and prosecuted anew for, the offence.

(2) Whether the acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) The condition is that on the application of the Lord Advocate the High Court has—

(a) set aside the acquittal, and

(b) granted authority to bring, by virtue of this section, a new prosecution.

(4) On making an application under subsection (3), the Lord Advocate is to send a copy of that application to the acquitted person.

(5) The acquitted person is entitled to appear or to be represented at any hearing of the application.

(6) For the purpose of hearing and determining the application, three of the Lords Commissioners of Justiciary are a quorum of the Court (the application being determined by majority vote of those sitting).

(7) An acquittal is not to be set aside under subsection (3)(a) unless the Court is satisfied—

(a) on a balance of probabilities, that subsequent to the acquittal the person credibly admitted having committed the offence, and

(b) that evidence is available sufficient to corroborate the admission.

(8) Even if the Court is satisfied as is mentioned in subsection (7), it is not to set aside the acquittal if it considers that to do so would be contrary to the interests of justice.>

Robert Brown

120A As an amendment to amendment 120, line 15, at end insert—

<( ) Before hearing an application under subsection (3), the Court is to order that no publicity be given to the application, or to any document prepared in connection with the application, until—

(a) the application is refused,

(b) a final decision has been made not to bring, or to discontinue, a new prosecution, or

(c) the new trial is concluded.>

Bill Aitken

121 After section 37, insert—

<Further provision as regards prosecution by virtue of section (*Admission subsequent to acquittal)*

(1) No sentence may be passed on conviction in a new prosecution brought by virtue of section (*Admission subsequent to acquittal)* which could not have been passed under the proceedings on the original indictment or complaint ("the earlier proceedings").

(2) A new prosecution may be brought by virtue of section (*Admission subsequent to acquittal)* notwithstanding that any time limit, other than the time limit mentioned in subsection (3), for the commencement of such proceedings has elapsed.

(3) Proceedings in a new prosecution brought by virtue of section (*Admission subsequent to acquittal)* are to be commenced within 2 months after the date on which authority to bring the prosecution was granted.

(4) In proceedings in a new prosecution brought by virtue of section (*Admission subsequent to acquittal)* it is competent for either party to lead evidence which it was competent for that party to lead in the earlier proceedings.

(5) But the indictment or complaint in the new prosecution is to identify any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (4) (being matters as respects which it would not have been competent to lead evidence but for that subsection).

(6) For the purposes of subsection (3), proceedings are deemed commenced—

- (a) in a case where a warrant to apprehend the accused is granted—
  - (i) on the date on which the warrant is executed, or
  - (ii) if it is executed without unreasonable delay, on the date on which it is granted, and
- (b) in any other case, on the date on which the accused is cited.

(7) Where the 2 months mentioned in subsection (3) elapse and no new prosecution has been brought under this section, the order under section (*Admission subsequent to acquittal)*(3)(a) setting aside the acquittal has the effect, for all purposes, of an acquittal.

(8) On granting authority under section (*Admission subsequent to acquittal)*(3)(b) to bring a new prosecution, the High Court may, after giving the parties an opportunity of being heard, order the detention of the accused person in custody or admit that person to bail.

(9) In—

- (a) solemn proceedings, section 65(4)(aa) and (b) and (4A) to (9), and
- (b) summary proceedings, section 147,

of the 1995 Act (prevention of delay in trials) applies to an accused person who is detained under subsection (8) as it applies to an accused person detained by virtue of being committed until liberated in due course of law.

(10) It is immaterial, for the purposes of this section, whether the acquittal was before or after the coming into force of the section.>

Bill Aitken

122 After section 37, insert—

<New evidence

(1) A person who has been acquitted, after the coming into force of this section (or on the day on which it comes into force), of an offence may—

(a) if there is new evidence that the person committed the offence, and

(b) the conditions mentioned in subsection (2) are satisfied,

be charged with, and prosecuted for, the offence anew.

(2) The conditions are—

(a) that the person's acquittal was of an offence mentioned in subsection (9), and

(b) that on the application of the Lord Advocate the High Court has—

(i) set aside the acquittal, and

(ii) granted authority to bring, by virtue of this section, a new prosecution.

(3) The setting aside of the acquittal and the granting of such authority may, under subsection (2)(b), be applied for on one occasion only.

(4) On making an application under that subsection, the Lord Advocate is to send a copy of the application to the acquitted person.

(5) The acquitted person is entitled to appear or to be represented at any hearing of the application.

(6) For the purpose of hearing and determining the application under subsection (2)(b), three of the Lords Commissioners of Justiciary are a quorum of the Court (the application being determined by majority vote of those sitting).

(7) An acquittal is not to be set aside under subsection (2)(b)(i) unless the Court is satisfied that—

(a) the case against the accused is strengthened substantially by the new evidence,

(b) the new evidence is evidence which was not available, and could not with the exercise of reasonable diligence have been made available, at the trial in respect of the original offence, and

(c) on the new evidence and the evidence which was led at that trial it is highly likely that a reasonable jury properly instructed would have convicted the person of the offence.

(8) Even if the Court is satisfied as is mentioned in subsection (7), it is not to set aside the acquittal if it considers that to do so would be contrary to the interests of justice.

(9) The offences are—

(a) murder,

(b) at common law, rape, and

(c) an offence under either section 1 (rape) or section 18 (rape of a young child) of the Sexual Offences (Scotland) Act 2009 (asp 9).

(10) The Scottish Ministers may by order amend subsection (9) so as to add further offences to those for the time being mentioned in that subsection.

(11) But subsection (1) does not apply as respects a person's acquittal of an offence so added if the date of acquittal is earlier than that on which the addition is effected.>

Bill Aitken

123 After section 37, insert—

<Further provision as regards prosecution by virtue of section *(New evidence)*

(1) No sentence may be passed on conviction in a new prosecution brought by virtue of section *(New evidence)* which could not have been passed under the indictment on the trial of which the person was acquitted of the offence in question.

(2) A new prosecution may be brought by virtue of section *(New evidence)* notwithstanding that any time limit for the commencement of such proceedings, other than the time limit mentioned in subsection (3), has elapsed.

(3) Proceedings in a new prosecution brought by virtue of section *(New evidence)* are to be commenced within 2 months after the date on which authority to bring the prosecution was granted.

(4) In proceedings in a new prosecution brought by virtue of section *(New evidence)* it is competent for either party to lead evidence which it was competent for that party to lead in the earlier proceedings.

(5) But the indictment in the new prosecution is to identify any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (4) (being matters as respects which it would not have been competent to lead evidence but for that subsection).

(6) For the purposes of subsection (3), proceedings are deemed commenced—

(a) in a case where a warrant to apprehend the accused is granted—

(i) on the date on which the warrant is executed, or

(ii) if it is executed without unreasonable delay, on the date on which it is granted, and

(b) in any other case, on the date on which the accused is cited.

(7) Where the 2 months mentioned in subsection (3) elapse and no new prosecution has been brought under this section, the order under section *(New evidence)*(2)(b)(i) setting aside the acquittal has the effect, for all purposes, of an acquittal.

(8) On granting authority under section *(New evidence)*(2)(b)(ii) to bring a new prosecution, the High Court is, after giving the parties an opportunity of being heard, to order the detention of the accused person in custody or to admit that person to bail.

(9) Subsections (4)(aa) and (b) and (4A) to (9) of section 65 of the 1995 Act (prevention of delay in trials) apply to an accused person who is detained under subsection (8) as they apply to an accused person detained by virtue of being committed until liberated in due course of law.>

Bill Aitken

124 After section 37, insert—

<Nullity of proceedings on previous indictment or complaint

(1) Subsection (3) applies where—

(a) a person has, whether on indictment or complaint—

(i) been charged with, and

(ii) acquitted or convicted of, an offence, and

(b) the conditions mentioned in subsection (4) are satisfied.

(2) Whether the conviction or acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) The person may be charged with, and prosecuted anew for, the offence.

(4) The conditions are that, on the application of the prosecutor and after hearing the parties, the High Court is satisfied—

(a) that the proceedings on the indictment or complaint were a nullity, and

(b) that it would not be contrary to the interests of justice to proceed as mentioned in subsection (3).>

Bill Aitken

125 After section 37, insert—

<Amendment of Schedule 1 to the Contempt of Court Act 1981

(1) Schedule 1 to the Contempt of Court Act 1981 (c.49) (times when proceedings are active for the purposes of section 2 of that Act) is amended as follows.

(2) After paragraph 1 (the expressions “criminal proceedings” and “appellate proceedings”), there is inserted—

“1A Proceedings under sections *(Plea in bar of trial)* to *(Nullity of proceedings on previous indictment or complaint)* of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00) are criminal proceedings (and are not appellate proceedings) for the purposes of this Schedule.”.

(3) In paragraph 4 (initial steps of criminal proceedings), at the end there is added—

“(f) the making of an application under section *(Tainted acquittals)*(3)(a)(ii) or (b) (tainted acquittals), *(Admission subsequent to acquittal)*(3) (admission subsequent to acquittal) or *(New evidence)*(2)(b) (new evidence) of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00).”.

(4) In paragraph 5 (conclusion of criminal proceedings), at the end there is added—

“(d) where the initial steps of the proceedings are as mentioned in paragraph 4(f)—

(i) by refusal of the application,

(ii) if the application is granted and within 2 months thereafter a new prosecution is brought, by acquittal, or as the case may be by sentence, in the new prosecution.”.

(5) In paragraph 7 (discontinuance of proceedings), at the end there is added—

“(d) where the initial steps of the proceedings are as mentioned in paragraph 4(f) and the application is granted, if no new prosecution is brought within 2 months thereafter.”.>

Robert Brown

544 After section 37, insert—

<*Breach of the peace*

Breach of the peace: modification of common law offence

A person's behaviour may constitute a breach of the peace—

(a) whether or not it is directed at anyone in particular, and

(b) whether it takes place in public or private,

and to the extent that any rule of law is to the contrary, it ceases to have effect.>

Section 38

Robert Brown

379 In section 38, page 53, line 15, leave out subsection (2) and insert—

<(2) In section 41 (age of criminal responsibility), for "eight" substitute "12".>

Bill Aitken

126 In section 38, page 53, line 17, after <not> insert <normally>

Bill Aitken

127 In section 38, page 53, line 18, after <not> insert <normally>

Richard Baker

389 In section 38, page 53, line 26, at end insert—

<(5) The Scottish Ministers must, as soon as possible after the end of each of the reporting years, lay before the Scottish Parliament and publish a report on the disposal of cases ("relevant cases") involving children who, but for section 41A of the 1995 Act (as inserted by subsection (2)), could have been prosecuted.

(6) For the purposes of subsection (5), the "reporting years" are—

(a) the period of 12 months beginning with the day on which this section comes into force, and

(b) the periods of 12 months beginning with the first and second anniversaries of that day.

(7) A report under subsection (5) must, in particular—

(a) specify the number of relevant cases disposed of during the reporting year,

(b) set out how those cases were disposed of, the costs and other resources involved in those disposals, and what (if any) alternative disposals were considered, and

(c) state what (if any) consideration the Scottish Ministers have given during the year covered by the report to the merits of altering the range of disposals available in such cases.>

Section 39

Kenny MacAskill

128 In section 39, page 53, line 32, after <offence> insert <committed by the partnership>

Kenny MacAskill

129 In section 39, page 54, line 9, at end insert—

<( ) In subsection (1), the references to a partner of a partnership include references to a person purporting to act as a partner of the partnership.>

Section 40

Kenny MacAskill

130 In section 40, page 54, line 23, leave out <all reasonable hours> and insert <a reasonable time and in a reasonable place>

Bill Aitken
Supported by: Robert Brown

131 Leave out section 40

After section 40

Margaret Curran

403 After section 40, insert—

<Parole: victims' representation

Victims' representation at Parole Board hearings

(1) Section 17 of the Criminal Justice (Scotland) Act 2003 (asp 7) is amended as follows.

(2) After subsection (1), insert—

"(1A) Representations under subsection (1) may include a request by the victim to be heard (either in person or through a representative) at the relevant hearing of the Parole Board for Scotland.

(1B) In this section, the "relevant hearing" of the Board is the hearing at which the Board is to consider the convicted person's case in order to decide whether to recommend, or direct, that person's release on licence.".

(3) In subsection (3), for "Parole Board for Scotland" substitute "Board".

(4) After subsection (5), insert—

"(5A) Where representations are made under subsection (1) which include a request to be heard at the relevant hearing, the Board must—

(a) give the victim reasonable notice in writing of when and where the hearing is to take place and invite the victim to—

(i) attend the hearing, with or without an accompanying person, in order to be heard in person; or

(ii) send a representative to the hearing to be heard on the victim's behalf;

(b) in so doing, give the victim appropriate information about the hearing and how it is likely to be conducted including, in particular—

(i) information about any parts of the hearing from which the victim and any accompanying person are, or the victim's representative is, to be excluded, and

(ii) any limits on their participation during the other parts of the hearing;

(c) at the hearing, afford the victim (or the victim's representative) a reasonable opportunity to be heard.

(5B) A victim's representative may only be a member of the victim's immediate family or a friend of the victim.

(5C) In reaching its decision at or after the hearing, the Board must take account of—

(a) any written representations made under subsection (1); and

(b) anything said by the victim (or the victim's representative) at the hearing.".>

Section 41

Kenny MacAskill

518 In section 41, page 55, line 22, at end insert—

<(4A) The reference in subsection (4)(c) to any previous conviction of an offence under subsection (1)(b) includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to an offence under subsection (1)(b).

(4B) The references in subsection (4)(d) to subsection (4) are to be read, in relation to a previous conviction by a court referred to in subsection (4A), as references to any provision that is equivalent to subsection (4).

(4C) Any issue of equivalence arising in pursuance of subsection (4A) or (4B) is for the court to determine.>

After section 41

Kenny MacAskill

420 After section 41, insert—

<*Grant of warrants*

Grant of warrants for execution by constables and police members of SCDEA

(1) A sheriff or justice of the peace does not lack power or jurisdiction to grant a warrant for execution by a person mentioned in subsection (2) solely because the person is not a constable of a police force for a police area lying wholly or partly in the sheriff's or justice's sheriffdom.

(2) The persons referred to in subsection (1) are—

(a) a constable,

(b) a police member of the Scottish Crime and Drug Enforcement Agency.>

After section 43

Kenny MacAskill

132 After section 43, insert—

<**Bail conditions: remote monitoring requirements**

Sections 24A to 24E of the 1995 Act (bail conditions: remote monitoring) are repealed.>

Section 44

Kenny MacAskill

421 In section 44, page 58, line 5, at end insert—

<( ) The title of section 287 becomes "Demission from office of Lord Advocate and Solicitor General for Scotland".>

Kenny MacAskill

422 In section 44, page 58, line 6, leave out from <subsection> to <Advocate)> and insert <that section>

Kenny MacAskill

423 In section 44, page 58, line 11, at end insert <and

( ) after "successor" insert "or the Solicitor General",>

Kenny MacAskill

424 In section 44, page 58, leave out line 13 and insert—

<( ) for "in name of" substitute "at the instance of Her Majesty's Advocate or", and>

Kenny MacAskill

425 In section 44, page 58, line 17, at end insert—

<(2AA) All indictments which have been raised at the instance of the Solicitor General shall remain effective notwithstanding the holder of the office of Solicitor General subsequently having died or demitted office and may be taken up and proceeded with by his successor or the Lord Advocate.>

Kenny MacAskill

426 In section 44, page 58, line 19, leave out from <as> to end of line 20

Kenny MacAskill

427 In section 44, page 58, line 24, at end insert—

<( ) in paragraph (a), after "subsection (1)" insert "or (2AA)",>

After section 46

Kenny MacAskill

428 After section 46, insert—

<Dockets and charges in sex cases

Dockets and charges in sex cases

After section 288B of the 1995 Act insert—

"*Dockets and charges in sex cases*

288BA Dockets for charges of sexual offences

(1) An indictment or a complaint may include a docket which specifies any act or omission that is connected with a sexual offence charged in the indictment or complaint.

(2) Here, an act or omission is connected with such an offence charged if it—

(a) is specifiable by way of reference to a sexual offence, and

(b) relates to—

(i) the same event as the offence charged, or

(ii) a series of events of which that offence is also part.

(3) The docket is to be in the form of a note apart from the offence charged.

(4) It does not matter whether the act or omission, if it were instead charged as an offence, could not competently be dealt with by the court (including as particularly constituted) in which the indictment or complaint is proceeding.

(5) Where under subsection (1) a docket is included in an indictment or a complaint, it is to be presumed that—

(a) the accused person has been given fair notice of the prosecutor's intention to lead evidence of the act or omission specified in the docket, and

(b) evidence of the act or omission is admissible as relevant.

(6) The references in this section to a sexual offence are to—

(a) an offence under the Sexual Offences (Scotland) Act 2009,

(b) any other offence involving a significant sexual element.

288BB Mixed charges for sexual offences

(1) An indictment or a complaint may include a charge that is framed as mentioned in subsection (2) or (3) (or both).

(2) That is, framed so as to comprise (in a combined form) the specification of more than one sexual offence.

(3) That is, framed so as to—

(a) specify, in addition to a sexual offence, any other act or omission, and

(b) do so in any manner except by way of reference to a statutory offence.

(4) Where a charge in an indictment or a complaint is framed as mentioned in subsection (2) or (3) (or both), the charge is to be regarded as being a single yet cumulative charge.

(5) The references in this section to a sexual offence are to an offence under the Sexual Offences (Scotland) Act 2009.”.>

Section 47

Robert Brown

541 In section 47, page 61, line 2, at end insert—

<(A1) Section 44 of the 1995 Act (detention of children) is amended in accordance with subsections (B1) and (C1).

(B1) In subsection (1), after “child” insert “aged 16 years or over”.

(C1) In subsection (2), the words from “(other than” to “this Act)” are repealed.>

After section 51

Kenny MacAskill

429 After section 51, insert—

<Personal conduct of case by accused

Prohibition of personal conduct of case by accused in certain proceedings

(1) The 1995 Act is amended as follows.

(2) In section 288C (prohibition of personal conduct of defence in cases of certain sexual offences)—

(a) for subsection (1) substitute—

“(1) An accused charged with a sexual offence to which this section applies is prohibited from conducting his case in person at, or for the purposes of, any relevant hearing in the course of proceedings (other than proceedings in a JP court) in respect of the offence.

(1A) In subsection (1), "relevant hearing" means a hearing at, or for the purposes of, which a witness is to give evidence.", and

(b) subsection (8) is repealed.

(3) In section 288D (appointment of solicitor by court in cases to which section 288C applies)—

(a) in subsection (1), after "proceedings" insert "(other than proceedings in a JP court)",

(b) in subsection (2)(a), for sub-paragraphs (i) and (ii) substitute—

"(i) the conduct of his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the proceedings; or", and

(c) in subsection (6), for the words from "of the accused's defence" to the end substitute "referred to in subsection (2)(a) above.".

(4) In section 288E (prohibition of personal conduct of defence in certain cases involving child witness under the age of 12)—

(a) subsection (1) is repealed,

(b) in subsection (2)(b), for "the trial" substitute "any hearing in the course of the proceedings",

(c) after subsection (2) insert—

"(2A) The accused is prohibited from conducting his case in person at, or for the purposes of, any hearing at, or for the purposes of, which the child witness is to give evidence.",

(d) in subsection (4), at the end insert "and as if references to a relevant hearing were references to a hearing referred to in subsection (2A) above",

(e) in subsection (6)—

(i) for paragraphs (za) and (a) substitute—

"(a) that his case at, or for the purposes of, any hearing in the course of the proceedings at, or for the purposes of, which the child witness is to give evidence may be conducted only by a lawyer,", and

(ii) in paragraph (c), for the words from "preliminary" to "trial" substitute "hearing", and

(f) subsection (8) is repealed.

(5) In section 288F (power to prohibit personal conduct of defence in other cases involving vulnerable witnesses)—

(a) in subsection (1), for "the trial" substitute "any hearing in the course of the proceedings",

(b) in subsection (2), for the words from "defence" to the end substitute "case in person at any hearing at, or for the purposes of, which the vulnerable witness is to give evidence.",

(c) in subsection (3)(a), for "trial" substitute "hearing",

(d) in subsection (4), for the words from "after" to the end substitute "in relation to a hearing after, as well as before, the hearing has commenced.",

(e) subsection (4A) is repealed,

(f) in subsection (5), at the end insert “and as if references to a relevant hearing were references to any hearing in respect of which an order is made under this section”, and

(g) subsection (6) is repealed.>

Section 52

Kenny MacAskill

519 In section 52, page 64, line 11, at end insert—

<( ) A reference in this section to a conviction which occurred on or after the date of offence O is a reference to such a conviction by a court in any part of the United Kingdom or in any other member State of the European Union.”.>

Kenny MacAskill

520 In section 52, page 64, line 36, at end insert—

<( ) A reference in this section to a conviction which occurred on or after the date of offence O is a reference to such a conviction by a court in any part of the United Kingdom or in any other member State of the European Union.”.>

After section 52

Kenny MacAskill

521 After section 52, insert—

<**Convictions by courts in other EU member States**

(1) Schedule (*Convictions by courts in other EU member States*) makes modifications of the 1995 Act and other enactments for the purposes of and in connection with implementing obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).

(2) The Scottish Ministers may by order make further provision for the purposes of and in connection with implementing those obligations.

(3) The provision may, in particular, confer functions—

(a) on the Scottish Ministers,

(b) on other persons.

(4) An order under subsection (2) may modify any enactment.

(5) In this section, the “Framework Decision” means Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.>

After schedule 2

Kenny MacAskill

522 After schedule 2, insert—

<SCHEDULE

(introduced by section (Convictions by courts in other EU member States)(1))

CONVICTIONS BY COURTS IN OTHER EU MEMBER STATES: MODIFICATIONS OF ENACTMENTS

PART 1

THE 1995 ACT

The 1995 Act

1 The 1995 Act is amended as follows.

2 In section 23C(2)(d)(i) (previous convictions to be taken into consideration in determining bail), for "outwith Scotland" substitute "by courts outside the European Union".

3 In section 27 (breach of bail conditions: offences), after subsection (3) insert—

"(3A) The reference in subsection (3)(b) to any previous conviction of an offence under subsection (1)(b) includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to an offence under subsection (1)(b).

(3B) The references in subsection (3)(c) to subsection (3) are to be read, in relation to a previous conviction by a court referred to in subsection (3A), as references to any provision that is equivalent to subsection (3).

(3C) Any issue of equivalence arising in pursuance of subsection (3A) or (3B) is for the court to determine.".

4 In section 202(2) (deferred sentence), for "Great Britain" substitute "the United Kingdom or in another member State of the European Union".

5 In section 204 (restrictions on passing sentence of imprisonment or detention)—

(a) in each of subsections (1) and (2), after "United Kingdom" insert "or in another member State of the European Union",

(b) after subsection (4) insert—

"(4A) The court shall, for the purpose of determining whether a person has been previously sentenced to imprisonment or detention by a court in a member State of the European Union other than the United Kingdom—

(a) disregard any previous sentence of imprisonment which, being the equivalent of a suspended sentence, has not taken effect;

(b) construe detention as meaning an equivalent sentence to any of those mentioned in subsection (4)(b).

(4B) Any issue of equivalence arising in pursuance of subsection (4A) is for the court to determine.".

6 In section 205B (minimum sentence for third conviction of certain offences relating to drug trafficking)—

(a) in subsection (1)(b), for "been convicted in any part of the United Kingdom of two other class A drug trafficking offences" substitute "two previous convictions for relevant offences",

(b) after subsection (1) insert—

"(1A) In subsection (1), "relevant offence" means—

(a) in relation to a conviction by a court in any part of the United Kingdom, a class A drug trafficking offence;

(b) in relation to a conviction by a court in a member State of the European Union other than the United Kingdom, an offence that is equivalent to a class A drug trafficking offence.

(1B) Any issue of equivalence arising in pursuance of subsection (1A)(b) is for the court to determine.".

7 In section 275A (disclosure of accused's previous convictions where court allows questioning or evidence under section 275)—

(a) in subsection (10)—

(i) the word "or" immediately following paragraph (a) is repealed,

(ii) after paragraph (a) insert—

"(aa) a conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to one to which section 288C of this Act applies by virtue of subsection (2) thereof; or",

(b) after subsection (10) insert—

"(10A) Any issue of equivalence arising in pursuance of subsection (10)(aa) is for the court to determine.".

8 In section 307 (interpretation)—

(a) in subsection (1), insert the following definition at the appropriate place—

""conviction", in relation to a previous conviction by a court outside Scotland, means a final decision of a criminal court establishing guilt of a criminal offence;", and

(b) for subsection (5) substitute—

"(5) Except where the context requires otherwise—

(a) any reference in this Act to a previous conviction is to be construed as a reference to a previous conviction by a court in any part of the United Kingdom or in any other member State of the European Union;

(b) any reference in this Act to a previous sentence is to be construed as a reference to a previous sentence passed by any such court;

(c) any reference to a previous conviction of a particular offence is to be construed, in relation to a previous conviction by a court outside Scotland, as a reference to a previous conviction of an equivalent offence; and

(d) any reference to a previous sentence of a particular kind is to be construed, in relation to a previous sentence passed by a court outside Scotland, as a reference to a previous sentence of an equivalent kind.".

PART 2

OTHER ENACTMENTS

The Civic Government (Scotland) Act 1982 (c.45)

9 In section 58 of the Civic Government (Scotland) Act 1982, after subsection (4) insert—

> “(4A) In subsection (4), the reference to a conviction for theft includes a reference to a conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to theft.
>
> (4B) Any issue of equivalence arising in pursuance of subsection (4A) is for the court to determine.”.

The Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9)

10 In section 27(1) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (interpretation of Part 1), insert at the appropriate place—

> ““previous conviction” means a previous conviction by a court in any part of the United Kingdom or in any other member State of the European Union;”.

The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)

11 (1) Section 9 of the Criminal Law (Consolidation) (Scotland) Act 1995 (permitting girl to use premises for intercourse) is amended as follows.

(2) In subsection (2A)—

(a) the word “or” immediately following paragraph (a) is repealed, and

(b) after paragraph (a) insert—

> “(aa) that person has a previous conviction for a relevant foreign offence committed against a person under the age of 16; or”.

(3) In subsection (3)—

(a) the word “and” immediately following paragraph (a) is repealed, and

(b) after paragraph (a) insert—

> “(aa) “a previous conviction for a relevant foreign offence” has the same meaning as in section 39(5)(aa) of that Act; and”.

The Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17)

12 In section 4(1) of the Custodial Sentences and Weapons (Scotland) Act 2007 (basic definitions for purposes of Part 2), insert at the appropriate place—

> ““previous conviction” means a previous conviction by a court in any part of the United Kingdom or in any other member State of the European Union,”.

The Sexual Offences (Scotland) Act 2009 (asp 9)

13 (1) Section 39 of the Sexual Offences (Scotland) Act 2009 (defences in relation to offences against older children) is amended as follows.

(2) In subsection (2)—

(a) in paragraph (a)—

(i) the word "or" immediately following sub-paragraph (i) is repealed, and

(ii) after sub-paragraph (i) insert—

"(ia) if A has a previous conviction for a relevant foreign offence committed against a person under the age of 16, or",

(b) in paragraph (b)—

(i) the word "or" immediately following sub-paragraph (i) is repealed, and

(ii) after sub-paragraph (i) insert—

"(ia) if B has a previous conviction for a relevant foreign offence committed against a person under the age of 16, or".

(3) In subsection (5), after paragraph (a) insert—

"(aa) "a previous conviction for a relevant foreign offence" means a previous conviction by a court in a member State of the European Union other than the United Kingdom for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1,"

(4) After subsection (5) insert—

"(5A) Any issue of equivalence arising in pursuance of subsection (5)(aa) is for the court to determine.

(5B) For that purpose, an offence may be equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1 even though, under the law of the member State (or part of the member State) in question, it is an offence—

(a) regardless of the age of the victim, or

(b) only if committed against a person under an age other than 16 years.".>

Section 54

Kenny MacAskill

462 In section 54, page 65, line 30, leave out <the close of the whole of the evidence> and insert <one or other (but not both) of the appropriate events>

Kenny MacAskill

463 In section 54, page 65, leave out lines 39 and 40 and insert—

<( ) For the purposes of subsection (1), "the appropriate events" are—

(a) the close of the whole of the evidence,

(b) the conclusion of the prosecutor's address to the jury on the evidence.>

Kenny MacAskill

464 In section 54, page 66, line 15, leave out <the prosecutor to amend the indictment> and insert <that the indictment be amended>

Kenny MacAskill

465 In section 54, page 66, line 22, after first <of> insert <the judge or>

Kenny MacAskill

466 In section 54, page 66, line 29, leave out <the prosecutor to amend the indictment> and insert <that the indictment be amended>

Kenny MacAskill

467 In section 54, page 66, line 37, after first <of> insert <the judge or>

Kenny MacAskill

468 In section 54, page 66, line 37, at end insert—

<**97D No acquittal on "no reasonable jury" grounds**

(1) A judge has no power to direct the jury to return a not guilty verdict on any charge on the ground that no reasonable jury, properly directed on the evidence, could convict on the charge.

(2) Accordingly, no submission based on that ground or any ground of like effect is to be allowed.>

Section 55

Kenny MacAskill

469 In section 55, page 67, line 4, at end insert—

<(1A) If, immediately after an acquittal under section 97 or 97B(2)(a), the prosecutor moves for the trial diet to be adjourned for no more than 2 days in order to consider whether to appeal against the acquittal under subsection (1), the court of first instance must grant the motion unless the court considers that there are no arguable grounds of appeal.

(1B) If, immediately after the giving of a direction under section 97B(2)(b) or 97C(2), the prosecutor moves for the trial diet to be adjourned for no more than 2 days in order to consider whether to appeal against the direction under subsection (1), the court of first instance must grant the motion unless the court considers that it would not be in the interests of justice to do so.

(1C) In considering whether it would be in the interests of justice to grant a motion for adjournment under subsection (1B), the court must have regard, amongst other things, to—

(a) whether, if an appeal were to be made and to be successful, continuing with the diet would have any impact on any subsequent or continued prosecution,

(b) whether there are any arguable grounds of appeal.

(1D) An appeal may not be brought under subsection (1) unless the prosecutor intimates intention to appeal—

(a) immediately after the acquittal or, as the case may be, the giving of the direction,

(b) if a motion to adjourn the trial diet under subsection (1A) or (1B) is granted, immediately upon resumption of the diet, or

(c) if such a motion is refused, immediately after the refusal.

(1E) Subsection (2) applies if—

(a) the prosecutor intimates an intention to appeal under subsection (1)(a), or

(b) the trial diet is adjourned under subsection (1A).>

Kenny MacAskill

470 In section 55, page 67, line 5, leave out from beginning to <Court> and insert <Where this subsection applies, the court of first instance must suspend the effect of the acquittal and>

Kenny MacAskill

471 In section 55, page 67, line 10, leave out <exceptionally and>

Kenny MacAskill

472 In section 55, page 67, line 11, at end insert—

<( ) The court may, under subsection (2)(b), order the detention of the person in custody only if the court considers that there are arguable grounds of appeal.>

Kenny MacAskill

473 In section 55, page 67, leave out lines 25 to 33

Kenny MacAskill

474 In section 55, page 68, line 5, leave out <an appeal is brought> and insert <the prosecutor intimates intention to appeal>

Kenny MacAskill

475 In section 55, page 68, line 28, leave out <or 107B>

Kenny MacAskill

476 In section 55, page 69, line 13, at end insert—

<( ) However, if the prosecutor moves for the diet to be deserted *pro loco et tempore* in relation to such other offence, the court must grant the motion.>

Section 57

Kenny MacAskill

477 In section 57, page 69, line 26, leave out <within 7 days after an appeal is brought under section 107A(1)> and insert <where the prosecutor intimates intention to appeal under section 107A(1), within 7 days after the acquittal or direction appealed against>

Section 58

Kenny MacAskill

478 In section 58, page 71, line 4, leave out from <18(7A)> to end of line 5 and insert <18 (prints, samples etc. in criminal investigations)—

( ) in subsection (3), for "section 18A" substitute "sections 18A to 18C",

( ) in subsection (7A), for "sections 19 to 20" substitute ", subject to the modification in subsection (7AA), sections 18A to 19C", and

( ) after subsection (7A) insert—

"(7AA) The modification is that for the purposes of section 19C as it applies in relation to relevant physical data taken from or provided by a person outwith Scotland, subsection (7A) is to be read as if in paragraph (d) the words from "created" to the end were omitted.".>

James Kelly

404 In section 58, page 71, line 4, leave out from <18(7A)> to <Act),> in line 5 and insert <18 (prints, samples etc. in criminal investigations)—

( ) in subsection (3), the words "or on the conclusion of such proceedings otherwise than with a conviction or an order under section 246(3) of this Act" are repealed, and

( ) in subsection (7A),>

James Kelly

405 In section 58, page 71, leave out line 6 and insert—

<( ) The title of section 18A becomes "Retention of samples, etc.: persons prosecuted but not convicted etc.", and in that section>

Kenny MacAskill

479 In section 58, page 71, leave out lines 7 to 10 and insert—

<( ) for subsection (1) substitute—

"(1) This section applies to—

(a) relevant physical data taken or provided under section 18(2), and

(b) any sample, or any information derived from a sample, taken under section 18(6) or (6A),

where the condition in subsection (2) is satisfied.",>

James Kelly

406 In section 58, page 71, line 11, after <(2)> insert—

<( ) the words "in respect of a relevant sexual offence or a relevant violent offence" are repealed, and

( )>

Kenny MacAskill

480 In section 58, page 71, line 13, leave out from <after> to <data,"> and insert <for "sample or information" substitute "relevant physical data, sample or information derived from a sample",>

James Kelly

407 In section 58, page 71, line 13, at end insert—

<( ) in subsection (4)(a), for "3" substitute "6",>

Kenny MacAskill

481 In section 58, page 71, line 14, leave out from beginning to <data,"> in line 15 and insert—

<( ) after subsection (8) insert—

"(8A) If the sheriff principal allows an appeal against the refusal of an application under subsection (5), the sheriff principal may make an order amending, or further amending, the destruction date.

(8B) An order under subsection (8A) must not specify a destruction date more than 2 years later than the previous destruction date.",

( ) in subsection (10), for "sample or information" substitute "relevant physical data, sample or information derived from a sample">

Kenny MacAskill

482 In section 58, page 71, line 18, at end insert <and

( ) in the definition of "relevant sexual offence" and "relevant violent offence", after "have" insert ", subject to the modification in subsection (12),", and

( ) after subsection (11) insert—

"(12) The modification is that the definition of "relevant sexual offence" in section 19A(6) is to be read as if for paragraph (g) there were substituted—

"(g) public indecency if it is apparent from the offence as charged in the indictment or complaint that there was a sexual aspect to the behaviour of the person charged;".".>

James Kelly

408 In section 58, page 71, line 18, at end insert <, and

( ) the definition of "relevant sexual offence" and "relevant violent offence" is repealed.>

After section 58

Stewart Maxwell

418* After section 58, insert—

<**Retention of samples etc. where offer under sections 302 to 303ZA accepted**

After section 18A of the 1995 Act insert—

"18AA Retention of samples etc. where offer under sections 302 to 303ZA accepted

(1) This section applies to—

(a) relevant physical data taken from or provided by a person under section 18(2), and

(b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A),

where the conditions in subsection (2) are satisfied.

(2) The conditions are—

(a) the relevant physical data or sample was taken from or provided by the person while the person was under arrest or being detained in connection with the offence or offences in relation to which a relevant offer is issued to the person, and

(b) the person—

(i) accepts a relevant offer, or

(ii) in the case of a relevant offer other than one of the type mentioned in paragraph (d) of subsection (3), is deemed to accept a relevant offer.

(3) In this section "relevant offer" means—

(a) a conditional offer under section 302,

(b) a compensation offer under section 302A,

(c) a combined offer under section 302B, or

(d) a work offer under section 303ZA.

(4) Subject to subsections (6) and (7) and section 18AB(9) and (10), the relevant physical data, sample or information derived from a sample must be destroyed no later than the destruction date.

(5) In subsection (4), "destruction date" means—

(a) in relation to a relevant offer that relates only to—

(i) a relevant sexual offence,

(ii) a relevant violent offence, or

(iii) both a relevant sexual offence and a relevant violent offence,

the date of expiry of the period of 3 years beginning with the date on which the relevant offer is issued or such later date as an order under section 18AB(2) or (6) may specify,

(b) in relation to a relevant offer that relates to—

(i) an offence or offences falling within paragraph (a), and

(ii) any other offence,

the date of expiry of the period of 3 years beginning with the date on which the relevant offer is issued or such later date as an order under section 18AB(2) or (6) may specify,

(c) in relation to a relevant offer that does not relate to an offence falling within paragraph (a), the date of expiry of the period of 2 years beginning with the date on which the relevant offer is issued.

(6) If a relevant offer is recalled by virtue of section 302C(5) or a decision to uphold it is quashed under section 302C(7)(a), all record of the relevant physical data, sample and information derived from a sample must be destroyed as soon as possible after—

(a) the prosecutor decides not to issue a further relevant offer to the person,

(b) the prosecutor decides not to institute criminal proceedings against the person, or

(c) the prosecutor institutes criminal proceedings against the person and those proceedings conclude otherwise than with a conviction or an order under section 246(3).

(7) If a relevant offer is set aside by virtue of section 303ZB, all record of the relevant physical data, sample and information derived from a sample must be destroyed as soon as possible after the setting aside.

(8) In this section, “relevant sexual offence” and “relevant violent offence” have, subject to the modification in subsection (9), the same meanings as in section 19A(6) and include any attempt, conspiracy or incitement to commit such an offence.

(9) The modification is that the definition of “relevant sexual offence” in section 19A(6) is to be read as if for paragraph (g) there were substituted—

“(g) public indecency if it is apparent from the relevant offer (as defined in section 18AA(3)) relating to the offence that there was a sexual aspect to the behaviour of the person to whom the relevant offer is issued;”.

18AB Section 18AA: extension of retention period where relevant offer relates to certain sexual or violent offences

(1) This section applies where the destruction date for relevant physical data, a sample or information derived from a sample falls within section 18AA(5)(a) or (b).

(2) On a summary application made by the relevant chief constable within the period of 3 months before the destruction date, the sheriff may, if satisfied that there are reasonable grounds for doing so, make an order amending, or further amending, the destruction date.

(3) An application under subsection (2) may be made to any sheriff—

(a) in whose sheriffdom the appropriate person resides,

(b) in whose sheriffdom that person is believed by the applicant to be, or

(c) to whose sheriffdom the person is believed by the applicant to be intending to come.

(4) An order under subsection (2) must not specify a destruction date more than 2 years later than the previous destruction date.

(5) The decision of the sheriff on an application under subsection (2) may be appealed to the sheriff principal within 21 days of the decision.

(6) If the sheriff principal allows an appeal against the refusal of an application under subsection (2), the sheriff principal may make an order amending, or further amending, the destruction date.

(7) An order under subsection (6) must not specify a destruction date more than 2 years later than the previous destruction date.

(8) The sheriff principal's decision on an appeal under subsection (5) is final.

(9) Section 18AA(4) does not apply where—

(a) an application under subsection (2) has been made but has not been determined,

(b) the period within which an appeal may be brought under subsection (5) against a decision to refuse an application has not elapsed, or

(c) such an appeal has been brought but has not been withdrawn or finally determined.

(10) Where—

(a) the period within which an appeal referred to in subsection (9)(b) may be brought has elapsed without such an appeal being brought,

(b) such an appeal is brought and is withdrawn or finally determined against the appellant, or

(c) an appeal brought under subsection (5) against a decision to grant an application is determined in favour of the appellant,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the period has elapsed, or, as the case may be, the appeal is withdrawn or determined.

(11) In this section—

"appropriate person" means the person from whom the relevant physical data was taken or by whom it was provided or from whom the sample was taken,

"destruction date" has the meaning given by section 18AA(5),

"the relevant chief constable" has the same meaning as in subsection (11) of section 18A, with the modification that references to the person referred to in subsection (2) of that section are references to the appropriate person.".>

Stewart Maxwell

419 After section 58, insert—

<Retention of samples etc. taken or provided in connection with certain fixed penalty offences

After section 18A of the 1995 Act insert—

“18AC Retention of samples etc. taken or provided in connection with certain fixed penalty offences

(1) This section applies to—

(a) relevant physical data taken from or provided by a person under section 18(2), and

(b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A),

where the conditions in subsection (2) are satisfied.

(2) The conditions are—

(a) the person was arrested or detained in connection with a fixed penalty offence,

(b) the relevant physical data or sample was taken from or provided by the person while the person was under arrest or being detained in connection with that offence,

(c) after the relevant physical data or sample was taken from or provided by the person, a constable gave the person under section 129(1) of the 2004 Act—

(i) a fixed penalty notice in respect of that offence (the “main FPN”), or

(ii) the main FPN and one or more other fixed penalty notices in respect of fixed penalty offences arising out of the same circumstances as the offence to which the main FPN relates, and

(d) the person, in relation to the main FPN and any other fixed penalty notice of the type mentioned in paragraph (c)(ii)—

(i) pays the fixed penalty, or

(ii) pays any sum that the person is liable to pay by virtue of section 131(5) of the 2004 Act.

(3) Subject to subsections (4) and (5), the relevant physical data, sample or information derived from a sample must be destroyed before the end of the period of 2 years beginning with—

(a) where subsection (2)(c)(i) applies, the day on which the main FPN is given to the person,

(b) where subsection (2)(c)(ii) applies and—

(i) the main FPN and any other fixed penalty notice are given to the person on the same day, that day,

(ii) the main FPN and any other fixed penalty notice are given to the person on different days, the later day.

(4) Where—

(a) subsection (2)(c)(i) applies, and

(b) the main FPN is revoked under section 133(1) of the 2004 Act,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the revocation.

(5) Where—

(a) subsection (2)(c)(ii) applies, and

(b) the main FPN and any other fixed penalty notices are revoked under section 133(1) of the 2004 Act,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the revocations.

(6) In this section—

"the 2004 Act" means the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8),

"fixed penalty notice" has the meaning given by section 129(2) of the 2004 Act,

"fixed penalty offence" has the meaning given by section 128(1) of the 2004 Act.".>

Section 59

James Kelly

409 In section 59, page 72, line 19, leave out from <such> to second <offence> and insert—

<( ) an offence of assault, categorised by the Principal Reporter as grave, or

( ) such—

(i) other relevant violent offence, or

(ii) relevant sexual offence,>

James Kelly

410 In section 59, page 72, leave out lines 21 to 36

Robert Brown

380 In section 59, page 72, leave out lines 21 and 22, and insert—

<(7) Where this section applies, the sheriff may, on summary application by the relevant chief constable, make an order that, subject to section 18C(6) and (7), the relevant physical data, sample or the information must be destroyed no later than the destruction date.

(7A) The sheriff may only make the order referred to in subsection (7) if satisfied that the child continues to pose a risk to public safety and that retention of the relevant physical data, sample or information until the destruction date is justified by that risk.>

Kenny MacAskill

483 In section 59, page 72, line 21, leave out <18C(5) and (6)> and insert <18C(6) and (7)>

Kenny MacAskill

484 In section 59, page 72, line 21, leave out <the information> and insert <information derived from a sample>

Robert Brown

545 In section 59, page 72, leave out lines 25 to 36 and insert <the date on which the relevant offence mentioned in subsection (3), (4) or, as the case may be, (5) was committed; or

(b) such later date as an order under section 18C(1) may specify.

( ) For the purposes of subsection (8)(a)—

(a) if two or more relevant offences were committed on different dates, it is the most recent of those offences that is to be taken as the offence constituting the ground of referral; and

(b) if a relevant offence was committed on more than one date, the date on which the offence was committed is to be taken as the most recent of those dates.>

Robert Brown

381 In section 59, page 72, line 40, at end insert—

<"relevant chief constable" has the same meaning as in section 18A(11), with the modification that references to the person referred to in subsection (2) of that section are references to the child referred to in subsection (1);>

Kenny MacAskill

485 In section 59, page 73, line 1, after <have> insert <, subject to the modification in subsection (11),>

Kenny MacAskill

486 In section 59, page 73, line 3, at end insert—

<(11) The modification is that the definition of "relevant sexual offence" in section 19A(6) is to be read as if for paragraph (g) there were substituted—

"(g) public indecency if it is apparent from the ground of referral relating to the offence that there was a sexual aspect to the behaviour of the child;".>

James Kelly

411 In section 59, page 73, leave out lines 4 to 40

Robert Brown

546 In section 59, page 73, line 7, leave out from <there> to end of line 8 and insert <at least one ground for doing so, specified by virtue of subsection (1A), is established, make an order amending (or further amending) the destruction date.

(1A) The Scottish Ministers must, by regulations made by statutory instrument, specify the grounds on which an order under subsection (1) may be made.

(1B) Before making regulations under subsection (1A), the Scottish Ministers must consult such persons as they consider appropriate.

(1C) A statutory instrument containing regulations under subsection (1A) is subject to annulment in pursuance of a resolution of the Scottish Parliament.>

Kenny MacAskill

487 In section 59, page 73, line 17, at end insert—

<(4A) If the sheriff principal allows an appeal against the refusal of an application under subsection (1), the sheriff principal may make an order amending, or further amending, the destruction date.

(4B) An order under subsection (4A) must not specify a destruction date more than 2 years later than the previous destruction date.>

Kenny MacAskill

488 In section 59, page 73, line 23, leave out <expired> and insert <elapsed>

Kenny MacAskill

489 In section 59, page 73, line 28, leave out <expired> and insert <elapsed>

Kenny MacAskill

490 In section 59, page 73, line 33, after <information> insert <derived from a sample>

Kenny MacAskill

491 In section 59, page 73, line 34, leave out from <practicable> to end of line and insert <possible after the period has elapsed or, as the case may be, the appeal is withdrawn or determined.>

Kenny MacAskill

492 In section 59, page 73, line 37, leave out <section 18A(11)> and insert <subsection (11) of section 18A>

Robert Brown

382 In section 59, page 73, line 37, leave out from <18A(11)> to end of line 40 and insert <18B(10)>

Kenny MacAskill

493 In section 59, page 74, line 1, leave out subsection (2)

James Kelly

412 In section 59, page 74, line 2, leave out from <after> to end of line and insert <at beginning insert "Except where section 18B applies and">

After section 59

Kenny MacAskill

494 After section 59, insert—

<**Extension of section 19A of 1995 Act**

In section 19A(6) of the 1995 Act (definitions of certain expressions for purposes of section 19A)—

(a) in the definition of "relevant sexual offence", for paragraph (g) substitute—

"(g) public indecency if the court, in imposing sentence or otherwise disposing of the case, determined for the purposes of paragraph 60 of Schedule 3 to the Sexual Offences Act 2003 (c.42) that there was a significant sexual aspect to the offender's behaviour in committing the offence;", and

(b) in paragraph (h) of the definition of "relevant violent offence", after sub-paragraph (iv), insert—

"(v) section 47(1) (possession of offensive weapon in public place), 49(1) (possession of article with blade or point in public place), 49A(1) or (2) (possession of article with blade or point or offensive weapon on school premises) or 49C(1) (possession of offensive weapon or article with blade or point in prison) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39);".>

Section 60

Kenny MacAskill

495 In section 60, page 74, line 6, leave out <This section> and insert <Subsection (2)>

Kenny MacAskill

496 In section 60, page 74, line 7, leave out <, or any information derived from relevant physical data,>

Kenny MacAskill

497 In section 60, page 74, line 12, leave out <, a sample or an impression> and insert <or a sample>

Kenny MacAskill

498 In section 60, page 74, line 17, leave out <relevant physical data or a sample or impression> and insert <a sample>

Kenny MacAskill

499 In section 60, page 74, line 18, at end insert <and

( ) relevant physical data, a sample or information derived from a sample taken from, or provided by, a person outwith Scotland which is given by any person to—

(i) a police force,

(ii) the Scottish Police Services Authority, or

(iii) a person acting on behalf of a police force.>

Kenny MacAskill

500 In section 60, page 74, line 19, leave out <, impression or information> and insert <or information derived from a sample>

Kenny MacAskill

501 In section 60, page 74, line 23, leave out <, sample or impression> and insert <or sample>

Kenny MacAskill

502 In section 60, page 74, line 23, at end insert—

<(2A) Subsections (2B) and (2C) apply to relevant physical data, a sample or information derived from a sample falling within any of paragraphs (a) to (d) of subsection (1) ("relevant material").

(2B) If the relevant material is held by a police force, the Scottish Police Services Authority or a person acting on behalf of a police force, the police force or, as the case may be, the Authority or person may give the relevant material to another person for use by that person in accordance with subsection (2).

(2C) A police force, the Scottish Police Services Authority or a person acting on behalf of a police force may, in using the relevant material in accordance with subsection (2), check it against other relevant physical data, samples and information derived from samples received from another person.>

Kenny MacAskill

503 In section 60, page 74, line 33, leave out <the United Kingdom> and insert <Scotland>

Kenny MacAskill

504 In section 60, page 74, line 35, leave out <the United Kingdom> and insert <Scotland>

Kenny MacAskill

505 In section 60, page 74, line 38, leave out from <, impressions> to end of line 39 and insert <or information derived from a sample>

Kenny MacAskill

506 In section 60, page 75, leave out line 2

Kenny MacAskill

507 In section 60, page 75, leave out line 5

Kenny MacAskill

508 In section 60, page 75, line 7, leave out <, impression or relevant physical data>

Kenny MacAskill

509 In section 60, page 75, line 12, leave out <, impression>

Kenny MacAskill

510 In section 60, page 75, line 14, leave out from beginning to <impression"> in line 25 and insert <, after "information" insert "derived from a sample",

( ) in subsection (5)(b), the words "with all information derived from them" are repealed,

( ) in subsection (6)(a), for "it or them" substitute "the sample",

( ) in subsection (7)(a), the words "or relevant physical data", in the second place where they occur, are repealed,>

Section 61

Kenny MacAskill

133 In section 61, page 76, line 6, after <reasons> insert <for making the reference>

Kenny MacAskill

134 In section 61, page 76, line 9, leave out from <additional> to end of line 10 and insert <the appellant to found the appeal on additional grounds>

Kenny MacAskill

135 In section 61, page 76, line 19, leave out <additional grounds to be raised> and insert <the appeal to be founded on additional grounds>

Before section 62

Kenny MacAskill

430 Before section 62, insert—

<**Admissibility of prior statements of witnesses: abolition of competence test**

(1) This section applies in relation to a prior statement made by a witness before the commencement of section 24 of the Vulnerable Witnesses (Scotland) Act 2004 (asp 3) ("the 2004 Act") (which abolishes the competence test for witnesses in criminal and civil proceedings).

(2) For the purpose of the application of subsection (2)(c) of section 260 of the 1995 Act (admissibility of prior statement depends on competence of the witness at the time of the statement) in relation to the statement, section 24 of the 2004 Act is taken to have been in force at the time the statement was made.

(3) In this section, "prior statement" has the meaning it has in section 260 of the 1995 Act.>

Section 62

Robert Brown

383 In section 62, page 77, line 1, after <may> insert <, if satisfied that there is good reason to do so,>

After section 64

Kenny MacAskill

384 After section 64, insert—

<Child witnesses in proceedings for people trafficking offences

In section 271 of the 1995 Act (vulnerable witnesses: main definitions)—

(a) in subsection (1)(a), for "age of 16" substitute "relevant age", and

(b) after subsection (1), insert—

"(1A) In subsection (1)(a), "the relevant age" means—

(a) in the case of a person who is giving or is to give evidence in proceedings for an offence under section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (trafficking in prostitution etc.) or section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation), the age of 18, and

(b) in any other case, the age of 16.".>

Section 66

Kenny MacAskill

431 In section 66, page 80, line 13, leave out from <other> to end of line 16 and insert <the jury>

Kenny MacAskill

432 In section 66, page 80, line 18, leave out <any persons within paragraph (a)(i) to (iii)> and insert <the judge or the jury>

Kenny MacAskill

433 In section 66, page 81, line 6, leave out <material> and insert <information>

Kenny MacAskill

434 In section 66, page 81, line 8, leave out <may> and insert <must>

Kenny MacAskill

435 In section 66, page 81, line 12, leave out <material"> and insert <information">

Kenny MacAskill

436 In section 66, page 82, line 16, leave out <the weight of>

Kenny MacAskill

437 In section 66, page 82, line 18, leave out <the sole or decisive evidence> and insert <material in>

Kenny MacAskill

438 In section 66, page 82, line 36, leave out <warning> and insert <direction>

Kenny MacAskill

439 In section 66, page 83, leave out lines 33 to 36

Schedule 3

Kenny MacAskill

440 In schedule 3, page 148, line 28, leave out <treat the conviction as unsafe> and insert <quash the conviction>

Kenny MacAskill

441 In schedule 3, page 148, line 31, leave out <treat the conviction as unsafe> and insert <quash the conviction>

After section 67

Kenny MacAskill

442 After section 67, insert—

<**European evidence warrants**

(1) The Scottish Ministers may by order make provision for the purposes of and in connection with implementing any obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).

(2) The provision may, in particular, confer functions—

- (a) on the Scottish Ministers,
- (b) on the Lord Advocate,
- (c) on other persons.

(3) An order under subsection (1) may modify any enactment.

(4) An order under subsection (1) may contain provision creating offences and a person who commits such an offence is liable to such penalties, not exceeding those mentioned in subsection (5), as are provided for in the order.

(5) Those penalties are—

- (a) on conviction on indictment, imprisonment for a period not exceeding 2 years, or a fine, or both,
- (b) on summary conviction, imprisonment for a period not exceeding 12 months, or a fine not exceeding the statutory maximum, or both.

(6) In this section, the "Framework Decision" means Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.>

Before section 68

Kenny MacAskill

443 Before section 68, insert—

<**Lists of jurors**

(1) The 1995 Act is amended as follows.

(2) In section 84 (juries: returns of jurors and preparation of lists)—

(a) in subsection (3), for "list" substitute "lists",

(b) for subsection (4) substitute—

"(4) For the purpose of a trial in the sheriff court, the sheriff principal must furnish the clerk of court with a list of names, containing the number of persons required, from lists of potential jurors of—

(a) the sheriff court district in which the trial is to be held (the "local district"), and

(b) if the sheriff principal considers it appropriate, any other sheriff court district or districts in the sheriffdom in which the trial is to be held ("other districts").

(4A) Where the sheriff principal furnishes a list containing names of potential jurors of other districts, the sheriff principal may determine the proportion as between the local district and the other districts in which jurors are to be summoned.",

(c) in subsection (5), for "list", in both places where it occurs, substitute "lists", and

(d) subsection (7) is repealed.

(3) In section 85(4) (juries: citation and attendance of jurors)—

(a) for the words from the beginning to "shall", in the first place where it occurs, substitute "The sheriff clerk of—

(a) the sheriffdom in which the High Court is to sit, or

(b) the sheriff court district in which a trial in the sheriff court is to be held,

shall", and

(b) the word "such", in the first place where it occurs, is repealed.>

Section 68

David McLetchie

415 In section 68, page 86, line 14, leave out from <for> to <relevant"> and insert <at beginning insert "subject to subsection (1A),">

David McLetchie

416 In section 68, page 86, leave out lines 17 to 19 and insert—

<“(1A) In relation to criminal proceedings, a person is qualified and liable to serve as a juror despite being over 65 years of age.”>

After section 68

Kenny MacAskill

511 After section 68, insert—

<**Excusal from jury service**

(1) The Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 is amended as follows.

(2) In section 1 (qualification of jurors)—

(a) in subsection (1), after “below” insert “and to section 1A”,

(b) in subsection (2), after “service” in the second place where it occurs insert “in relation to civil proceedings”,

(c) in subsection (3), after “service” in the first place where it occurs insert “in relation to civil proceedings”,

(d) in subsection (5), after “above” insert “or under section 1A”, and

(e) in subsection (6), after paragraph (a) insert—

“(aa) section 1A;”.

(3) After section 1 insert—

“**1A Excusal of jurors in relation to criminal proceedings**

(1) A person who is qualified under section 1(1) but is among the persons listed in Part III of Schedule 1 to this Act (being persons excusable as of right from jury service) is to be excused from jury service in relation to criminal proceedings on any occasion where the person—

(a) has been required to provide information under section 3(2) of the Jurors (Scotland) Act 1825 (c.22); and

(b) gives written notice to the sheriff principal that the person wishes to be excused, before the end of the period of 7 days beginning with the day on which the person receives the requirement.

(2) A person who is qualified under section 1(1) but is among the persons listed in Group C of Part III of Schedule 1 to this Act is to be excused from jury service in relation to criminal proceedings on any occasion where—

(a) the person has been required to provide information under section 3(2) of the Jurors (Scotland) Act 1825; and

(b) the person’s commanding officer certifies to the sheriff principal that it would be prejudicial to the efficiency of the force of which the person is a member were the person required to be absent from duty.”.

(4) In section 3(1)(a) (offences in connection with jury service), after “been” insert “required to provide information under section 3(2) of the Jurors (Scotland) Act 1825 or”.>

Section 69

David McLetchie

417 In section 69, page 86, line 30, at end insert <and

( ) persons who have attained the age of 71;>

Section 70

Kenny MacAskill

136 In section 70, page 89, line 34, leave out <and Wales>

Kenny MacAskill

137 In section 70, page 90, line 21, leave out from <body> to end of line 23 and insert <health and social care body mentioned in paragraphs (a) to (e) of section 1(5) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 (c.1).>

Section 72

Kenny MacAskill

138 In section 72, page 94, line 29, leave out <Law> and insert <Justice>

Trish Godman

9 In section 72, page 94, line 39, at end insert <, other than an offence under section 11A (engaging in a paid-for sexual activity) or 11B (advertising paid-for sexual activities)>

Margo MacDonald

9A As an amendment to amendment 9, line 2, after <activity)> insert <, 11AA (causing alarm etc. by engaging in a paid-for sexual activity)>

Kenny MacAskill

139 In section 72, page 94, line 41, leave out <27> and insert <37>

Kenny MacAskill

140 In section 72, page 94, line 42, leave out <penetrative>

Kenny MacAskill

141 In section 72, page 95, line 1, leave out <31> and insert <42>

Kenny MacAskill

142 In section 72, page 95, line 2, leave out <35> and insert <46>

Kenny MacAskill

143 In section 72, page 95, line 3, at end insert—

<( ) an offence under section (*Slavery, servitude and forced or compulsory labour*) (slavery, servitude and forced or compulsory labour) of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00).>

Kenny MacAskill

144 In section 72, page 95, line 14, leave out <42> and insert <54>

Section 74

Kenny MacAskill

444 In section 74, page 96, line 23, after <station> insert <in Scotland>

Kenny MacAskill

445 In section 74, page 97, line 5, leave out from <a> to end of line and insert—

<(a) a requirement under section 117A(2) (surrender of passports: England and Wales and Northern Ireland), or

(b) a requirement under section 117B(2) (surrender of passports: Scotland).”.>

Kenny MacAskill

446 In section 74, page 97, line 5, at end insert—

<(1C) A person may be prosecuted, tried and punished for any offence under subsection (1B)—

(a) in any sheriff court district in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).”.>

After section 74

Kenny MacAskill

145 After section 74, insert—

<*Sex offender notification requirements*

Sex offender notification requirements

(1) The Sexual Offences Act 2003 (c.42) is amended as follows.

(2) In section 85 (notification requirements: periodic notification)—

(a) in subsection (1), for "period of one year" substitute "applicable period",

(b) in subsection (3), for "period referred to in subsection (1)" substitute "applicable period", and

(c) after subsection (4) insert—

"(5) In this section, the "applicable period" means—

(a) in any case where subsection (6) applies to the relevant offender, such period not exceeding one year as the Scottish Ministers may prescribe in regulations, and

(b) in any other case, the period of one year.

(6) This subsection applies to the relevant offender if the last home address notified by the offender under section 83(1) or 84(1) or subsection (1) was the address or location of such a place as is mentioned in section 83(7)(b).".

(3) In section 86 (notification requirements: travel outside the United Kingdom), subsection (4) is repealed.

(4) In section 87 (method of notification and related matters), subsection (6) is repealed.

(5) In section 96 (information about release or transfer), subsection (4) is repealed.

(6) In section 138 (orders and regulations)—

(a) in subsection (2), after "84," insert "85,", and

(b) after subsection (3) insert—

"(4) Orders or regulations made by the Scottish Ministers under this Act may—

(a) make different provision for different purposes,

(b) include supplementary, incidental, consequential, transitional, transitory or saving provisions.".>

After section 75

Kenny MacAskill

146 After section 75, insert—

<**Risk of sexual harm orders: spent convictions**

In section 7 of the Rehabilitation of Offenders Act 1974 (c.53) (limitations on rehabilitation under the Act), in subsection (2), after paragraph (bb) insert—

"(bc) in any proceedings on an application under section 2, 4 or 5 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) or in any appeal under section 6 of that Act;".>

Section 77

Kenny MacAskill

523 In section 77, page 98, leave out lines 5 to 10

Kenny MacAskill

524 In section 77, page 98, line 14, leave out from <(including> to <operation)> in line 15

Kenny MacAskill

525 In section 77, page 98, line 22, at end insert—

<( ) After that section insert—

“**10A Authorisation of surveillance: joint surveillance operations**

In the case of a joint surveillance operation, where authorisation is sought for the carrying out of any form of conduct to which this Act applies, authorisation may be granted by any one of the persons having power to grant authorisation for the carrying out of that conduct.”.>

Kenny MacAskill

526 In section 77, page 98, line 27, at end insert—

<( ) In section 14 (approval required for authorisations to take effect)—

(a) in subsection (5)(b), after “General” insert “or the Deputy Director General”, and

(b) subsection (7) is repealed.>

Kenny MacAskill

527 In section 77, page 98, line 27, at end insert—

<( ) In section 16 (appeals against decisions by Surveillance Commissioners), in subsection (1), after “General” insert “or the Deputy Director General”.>

Kenny MacAskill

528 In section 77, page 98, line 30, leave out from <, where> to <surveillance,> in line 31

Section 78

Kenny MacAskill

529 In section 78, page 98, line 39, leave out <(3)> and insert <(3A)>

Kenny MacAskill

530 In section 78, page 99, line 1, leave out <(3A)> and insert <(3AA)>

Kenny MacAskill

531 In section 78, page 99, line 8, leave out <or>

Kenny MacAskill

532 In section 78, page 99, line 18, leave out <(3A)> and insert <(3AA)>

Kenny MacAskill

533 In section 78, page 99, line 23, at end insert—

<( ) in paragraph (cc) of subsection (6), after "General" insert ", or Deputy Director General,".>

Kenny MacAskill

534 In section 78, page 99, line 26, leave out <(5)(a)> and insert <(5)>

Kenny MacAskill

535 In section 78, page 99, line 26, leave out <"where> and insert <"Where>

Kenny MacAskill

536 In section 78, page 99, line 29, after <operation,> insert <the person referred to in subsection (2)(h) is>

Section 79

Kenny MacAskill

537 In section 79, page 99, line 39, at end insert—

<( ) In section 113B (enhanced criminal record certificates), in subsection (3), for the words from ", or" immediately following paragraph (a) to the end of paragraph (b), substitute "(or states that there is no such matter or information), and

(b) if the applicant is subject to notification requirements under Part 2 of the Sexual Offences Act 2003 (c.42), states that fact.".>

Kenny MacAskill

538 In section 79, page 100, line 1, leave out <section 113B> and insert <that section>

After section 79

Kenny MacAskill

447 After section 79, insert—

<*Rehabilitation of offenders*

Spent alternatives to prosecution: Rehabilitation of Offenders Act 1974

(1) The Rehabilitation of Offenders Act 1974 (c.53) is amended as follows.

(2) After section 8A (protection afforded to spent cautions), insert—

"8B Protection afforded to spent alternatives to prosecution: Scotland

(1) For the purposes of this Act, a person has been given an alternative to prosecution in respect of an offence if the person (whether before or after the commencement of this section)—

(a) has been given a warning in respect of the offence by—

(i) a constable in Scotland, or

(ii) a procurator fiscal,

(b) has accepted, or is deemed to have accepted—

(i) a conditional offer issued in respect of the offence under section 302 of the Criminal Procedure (Scotland) Act 1995 (c.46), or

(ii) a compensation offer issued in respect of the offence under section 302A of that Act,

(c) has had a work order made against the person in respect of the offence under section 303ZA of that Act,

(d) has been given a fixed penalty notice in respect of the offence under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8),

(e) has accepted an offer made by a procurator fiscal in respect of the offence to undertake an activity or treatment or to receive services or do any other thing as an alternative to prosecution, or

(f) in respect of an offence under the law of a country or territory outside Scotland, has been given, or has accepted or is deemed to have accepted, anything corresponding to a warning, offer, order or notice falling within paragraphs (a) to (e) under the law of that country or territory.

(2) In this Act, references to an "alternative to prosecution" are to be read in accordance with subsection (1).

(3) Schedule 3 to this Act (protection for spent alternatives to prosecution: Scotland) has effect.".

(3) After section 9A (unauthorised disclosure of spent cautions), insert—

"9B Unauthorised disclosure of spent alternatives to prosecution: Scotland

(1) In this section—

(a) "official record" means a record that—

(i) contains information about persons given an alternative to prosecution in respect of an offence, and

(ii) is kept for the purposes of its functions by a court, police force, Government department, part of the Scottish Administration or other local or public authority in Scotland,

(b) "relevant information" means information imputing that a named or otherwise identifiable living person has committed, been charged with, prosecuted for or given an alternative to prosecution in respect of an offence which is the subject of an alternative to prosecution which has become spent,

(c) "subject of the information", in relation to relevant information, means the named or otherwise identifiable living person to whom the information relates.

(2) Subsection (3) applies to a person who, in the course of the person's official duties (anywhere in the United Kingdom), has or has had custody of or access to an official record or the information contained in an official record.

(3) The person commits an offence if the person—

(a) obtains relevant information in the course of the person's official duties,

(b) knows or has reasonable cause to suspect that the information is relevant information, and

(c) discloses the information to another person otherwise than in the course of the person's official duties.

(4) Subsection (3) is subject to the terms of an order under subsection (6).

(5) In proceedings for an offence under subsection (3), it is a defence for the accused to show that the disclosure was made—

(a) to the subject of the information or to a person whom the accused reasonably believed to be the subject of the information, or

(b) to another person at the express request of the subject of the information or of a person whom the accused reasonably believed to be the subject of the information.

(6) The Scottish Ministers may by order provide for the disclosure of relevant information derived from an official record to be excepted from the provisions of subsection (3) in cases or classes of cases specified in the order.

(7) A person guilty of an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(8) A person commits an offence if the person obtains relevant information from an official record by means of fraud, dishonesty or bribery.

(9) A person guilty of an offence under subsection (8) is liable on summary conviction to a fine not exceeding level 5 on the standard scale, or to imprisonment for a term not exceeding 6 months, or to both.".

(4) After Schedule 2 (protection for spent convictions) insert—

"SCHEDULE 3

PROTECTION FOR SPENT ALTERNATIVES TO PROSECUTION: SCOTLAND

Preliminary

1 (1) For the purposes of this Act, an alternative to prosecution given to any person (whether before or after the commencement of this Schedule) becomes spent—

(a) in the case of—

(i) a warning referred to in paragraph (a) of subsection (1) of section 8B, or

(ii) a fixed penalty notice referred to in paragraph (d) of that subsection,

at the time the warning or notice is given,

(b) in any other case, at the end of the relevant period.

(2) The relevant period in relation to an alternative to prosecution is the period of 3 months beginning on the day on which the alternative to prosecution is given.

(3) Sub-paragraph (1)(a) is subject to sub-paragraph (5).

(4) Sub-paragraph (2) is subject to sub-paragraph (6).

(5) If a person who is given a fixed penalty notice referred to in section 8B(1)(d) in respect of an offence is subsequently prosecuted and convicted of the offence, the notice—

(a) becomes spent at the end of the rehabilitation period for the offence, and

(b) is to be treated as not having become spent in relation to any period before the end of that rehabilitation period.

(6) If a person who is given an alternative to prosecution (other than one to which sub-paragraph (1)(a) applies) in respect of an offence is subsequently prosecuted and convicted of the offence—

(a) the relevant period in relation to the alternative to prosecution ends at the same time as the rehabilitation period for the offence ends, and

(b) if the conviction occurs after the end of the period referred to sub-paragraph (2), the alternative to prosecution is to be treated as not having become spent in relation to any period before the end of the rehabilitation period for the offence.

2 (1) In this Schedule, "ancillary circumstances", in relation to an alternative to prosecution, means any circumstances of the following—

(a) the offence in respect of which the alternative to prosecution is given or the conduct constituting the offence,

(b) any process preliminary to the alternative to prosecution being given (including consideration by any person of how to deal with the offence and the procedure for giving the alternative to prosecution),

(c) any proceedings for the offence which took place before the alternative to prosecution was given (including anything that happens after that time for the purpose of bringing the proceedings to an end),

(d) any judicial review proceedings relating to the alternative to prosecution,

(e) in the case of an offer referred to in paragraph (e) of subsection (1) of section 8B, anything done or undergone in pursuance of the terms of the offer.

(2) Where an alternative to prosecution is given in respect of two or more offences, references in sub-paragraph (1) to the offence in respect of which the alternative to prosecution is given includes a reference to each of the offences.

(3) In this Schedule, "proceedings before a judicial authority" has the same meaning as in section 4.

Protection for spent alternatives to prosecution and ancillary circumstances

3 (1) A person who is given an alternative to prosecution in respect of an offence is, from the time the alternative to prosecution becomes spent, to be treated for all purposes in law as a person who has not committed, been charged with or prosecuted for, or been given an alternative to prosecution in respect of, the offence.

(2) Despite any enactment or rule of law to the contrary—

(a) where an alternative to prosecution given to a person in respect of an offence has become spent, evidence is not admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Scotland to prove that the person has committed, been charged with or prosecuted for, or been given an alternative to prosecution in respect of, the offence,

(b) a person must not, in any such proceedings, be asked any question relating to the person's past which cannot be answered without acknowledging or referring to an alternative to prosecution that has become spent or any ancillary circumstances, and

(c) if a person is asked such a question in any such proceedings, the person is not required to answer it.

(3) Sub-paragraphs (1) and (2) do not apply in relation to any proceedings—

(a) for the offence in respect of which the alternative to prosecution was given, and

(b) which are not part of the ancillary circumstances.

4 (1) This paragraph applies where a person ("A") is asked a question, otherwise than in proceedings before a judicial authority, seeking information about—

(a) A's or another person's previous conduct or circumstances,

(b) offences previously committed by A or the other person, or

(c) alternatives to prosecution previously given to A or the other person.

(2) The question is to be treated as not relating to alternatives to prosecution that have become spent or to any ancillary circumstances and may be answered accordingly.

(3) A is not to be subjected to any liability or otherwise prejudiced in law because of a failure to acknowledge or disclose an alternative to prosecution that has become spent or any ancillary circumstances in answering the question.

5 (1) An obligation imposed on a person ("A") by a rule of law or by the provisions of an agreement or arrangement to disclose any matter to another person does not extend to requiring A to disclose an alternative to prosecution (whether one given to A or another person) that has become spent or any ancillary circumstances.

(2) An alternative to prosecution that has become spent or any ancillary circumstances, or any failure to disclose an alternative to prosecution that has become spent or any ancillary circumstances, is not a ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing the person in any way in any occupation or employment.

6 The Scottish Ministers may by order—

(a) exclude or modify the application of any of paragraphs (a) to (c) of paragraph 3(2) in relation to questions put in such circumstances as may be specified in the order,

(b) provide for exceptions from any of the provisions of paragraphs 4 and 5 in such cases or classes of case, or in relation to alternatives to prosecution of such descriptions, as may be specified in the order.

7 Paragraphs 3 to 5 do not affect—

(a) the operation of an alternative to prosecution, or

(b) the operation of an enactment by virtue of which, because of an alternative to prosecution, a person is subject to a disqualification, disability, prohibition or other restriction or effect for a period extending beyond the time at which the alternative to prosecution becomes spent.

8 (1) Section 7(2), (3) and (4) apply for the purpose of this Schedule as follows.

(2) Subsection (2), apart from paragraphs (b) and (d), applies to the determination of any issue, and the admission or requirement of evidence, relating to alternatives to prosecution previously given to a person and to ancillary circumstances as it applies to matters relating to a person's previous convictions and circumstances ancillary thereto.

(3) Subsection (3) applies to evidence of alternatives to prosecution previously given to a person and ancillary circumstances as it applies to evidence of a person's previous convictions and the circumstances ancillary thereto.

(4) For that purpose, subsection (3) has effect as if—

(a) a reference to subsection (2) or (4) of section 7 were a reference to that subsection as applied by this paragraph, and

(b) the words "or proceedings to which section 8 below applies" were omitted.

(5) Subsection (4) applies for the purpose of excluding the application of paragraph 3.

(6) For that purpose, subsection (4) has effect as if the words "(other than proceedings to which section 8 below applies)" were omitted.

(7) References in the provisions applied by this paragraph to section 4(1) are to be read as references to paragraph 3.">

Kenny MacAskill

448 After section 79, insert—

<*Medical services in prisons*

Medical services in prisons

(1) For section 3A of the Prisons (Scotland) Act 1989 (c.45) (medical services in prisons) substitute—

"3A Medical officers for prisons

(1) The Scottish Ministers must designate one or more medical officers for each prison.

(2) A person may be designated as a medical officer for a prison only if the person is a registered medical practitioner performing primary medical services for prisoners at the prison under the National Health Service (Scotland) Act 1978 (c.29).

(3) A medical officer has the functions that are conferred on a medical officer for a prison by or under this Act or any other enactment.

(4) A medical officer is not an officer of the prison for the purposes of this Act.

(5) Rules under section 39 of this Act may provide for the governor of a prison to authorise the carrying out by officers of the prison of a search of any person who is in, or is seeking to enter, the prison for the purpose of providing medical services for any prisoner at the prison.

(6) Nothing in rules made by virtue of subsection (5) allows the governor to authorise an officer of a prison to require a person to remove any of the person's clothing other than an outer coat, jacket, headgear, gloves and footwear.".

(2) In section 41D of that Act (unlawful disclosure of information by medical officers), for subsection (1) substitute—

"(1) This section applies to—

(a) a medical officer for a prison, and

(b) any person acting under the supervision of such a medical officer.".

(3) In section 107 of the Criminal Justice and Public Order Act 1994 (c.33) (officers of contracted out prisons), for subsections (6) to (8) substitute—

"(6) The director must designate one or more medical officers for the prison.

(7) A person may be designated as a medical officer for the prison only if the person is a registered medical practitioner performing primary medical services for prisoners at the prison under the National Health Service (Scotland) Act 1978 (c.29).".

(4) In section 110 of that Act (consequential modifications of the 1989 Act etc.)—

(a) in each of subsections (3) and (4), for "3A(6)" substitute "3A(5) and (6)",

(b) subsection (4A) is repealed, and

(c) in subsection (6), for "3A(1) to (5) (medical services)" substitute "3A(1) and (2) (medical officers)".

(5) In section 111(3) of that Act (intervention by the Scottish Ministers), in paragraph (c), after "prison" insert "and the medical officer or officers for the prison".>

Section 80

Angela Constance

413 In section 80, page 100, line 29, after <victims> insert <(including children and young people)>

Section 89

Bill Aitken

147 In section 89, page 106, line 37, leave out <review all the> and insert <disclose to the accused all>

Bill Aitken

148 In section 89, page 106, line 38, leave out from <and> to end of line 14 on page 107

Bill Aitken

149 In section 89, page 107, line 15, leave out <(5)> and insert <(2)>

Section 90

Bill Aitken

150 In section 90, page 107, line 19, leave out <(5) or (6)> and insert <(2)>

Bill Aitken

151 In section 90, page 107, leave out lines 24 to 26 and insert <and

(b) disclose to the accused any such information not already disclosed under section 89(2).>

Bill Aitken

152 In section 90, page 107, line 28, leave out <(5) or (6)> and insert <(2)>

Section 91

Bill Aitken

153 In section 91, page 108, line 5, leave out <89(5) or 90(2)> and insert <89(2) or 90(2)(b)>

Section 92

Bill Aitken

154 In section 92, page 108, line 10, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 93

Bill Aitken

155 In section 93, page 108, line 20, leave out <(5)> and insert <(2)>

Section 94

Bill Aitken
Supported by: Robert Brown

156 Leave out section 94

Section 95

Bill Aitken
Supported by: Robert Brown

157 Leave out section 95

Section 96

Bill Aitken

158 In section 96, page 110, line 28, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 97

Bill Aitken

159 In section 97, page 110, line 36, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 98

Bill Aitken

160 In section 98, page 111, line 5, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 100

Bill Aitken

161 In section 100, page 111, line 36, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 102

Bill Aitken

162 In section 102, page 112, line 26, leave out from <89(5)> to <information> in line 28 and insert <89(2) or 90(2)(b) the prosecutor is required to disclose an item of information to an accused>

Bill Aitken

163 In section 102, page 113, line 5, leave out from <89(5)> to end of line 6 and insert <89(2) or, as the case may be, 90(2)(b)>

Section 106

Bill Aitken

164 In section 106, page 115, line 14, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 111

Bill Aitken

165 In section 111, page 117, line 6, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 116

Bill Aitken

166 In section 116, page 119, line 24, leave out from <89(5)> to end of line 27 and insert <89(2),

(b) section 90(1) and (2),

(c) section 93(2) (where it first occurs),>

Section 117

Angela Constance

24 In section 117, page 120, line 10, at end insert <, or

(b) to determine or control that conduct despite being able to appreciate the nature or wrongfulness of it.>

Kenny MacAskill

167 In section 117, page 120, line 31, leave out <it> and insert <such abnormality>

Section 121

Kenny MacAskill

168 In section 121, page 123, leave out lines 2 and 3 and insert—

<(3A) No order may be made under subsection (1) unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.>

Section 122

Kenny MacAskill

169 In section 122, page 125, line 1, leave out from <5,> to <29> in line 2 and insert <5 and 11>

Section 123

Robert Brown

385 Leave out section 123

After section 124

Kenny MacAskill

170 After section 124, insert—

<**Licensing of street trading: food hygiene certificates**

(1) Section 39 of the 1982 Act (street traders' licences) is amended as follows.

(2) In subsection (4), for the words from "the requirements" to the end substitute "such requirements as the Scottish Ministers may by order made by statutory instrument specify".

(3) After subsection (4), insert—

"(5) An order under subsection (4) may specify requirements by reference to provision contained in another enactment.

(6) A statutory instrument containing an order made under subsection (4) is subject to annulment in pursuance of a resolution of the Scottish Parliament.".>

Section 125

Kenny MacAskill

171 In section 125, page 128, line 24, at beginning insert <In>

Kenny MacAskill

172 In section 125, page 128, line 24, leave out from <is> to <In> in line 26 and insert <, in>

Cathie Craigie

2 In section 125, page 128, line 25, leave out subsection (2)

Cathie Craigie

3 In section 125, page 128, line 26, leave out subsection (3)

Cathie Craigie
Supported by: Robert Brown

4 Leave out section 125

After section 127

Sandra White

516 After section 127, insert—

<**Control of lap dancing and other adult entertainment venues**

(1) The 1982 Act is amended as follows.

(2) In section 41(2) (definition of place of public entertainment), after paragraph (aa) insert—

"(ab) adult entertainment venues (as defined in section 45A) in relation to which Schedule 2 (as modified for the purposes of that section) have effect, while being used as such;"

(3) The title of Part 3 becomes "Control of sex shops and adult entertainment venues".

(4) After section 45 insert—

"**45A Control of lap dancing and other adult entertainment venues**

(1) A local authority may resolve that Schedule 2, as modified for the purposes of this section, is to have effect in their area in relation to adult entertainment venues; and, if they do so resolve, that Schedule (as so modified) has effect from the day specified in the resolution.

(2) The day referred to in subsection (1) must not be before the expiry of the period of one month beginning with the day on which the resolution is passed.

(3) A local authority must, not later than 28 days before the day referred to in subsection (1), publish notice that they have passed a resolution under this section in a newspaper circulating in their area.

(4) The notice is to state the general effect of Schedule 2, as modified for the purposes of this section.

(5) For the purposes of this section, Schedule 2 is modified as follows—

(a) in paragraph 1, sub-paragraphs (b)(ii) (and the word "or" immediately preceding it) and (c) are omitted;

(b) for paragraph 2 substitute—

"2 In this Schedule, "adult entertainment venue" has the same meaning as in section 45A.";

(c) in paragraph 9—

(i) after sub-paragraph (5)(c) insert—

"(ca) where it is intended to sell alcohol in the adult entertainment venue, an application for the grant, renewal or transfer of a premises licence under Part 3 of the Licensing (Scotland) Act 2005 (asp 16) relating to that venue has been refused;"; and

(ii) after sub-paragraph (6) insert—

"(6A) A local authority may refuse an application for the grant or renewal of a licence despite the fact that a premises licence under Part 3 of the Licensing (Scotland) Act 2005 (asp 16) is in effect in relation to the adult entertainment venue.";

(d) in paragraph 25, for "section 45" in each place where those words occur, substitute "section 45A"; and

(e) for "sex shop", in each place where those words occur, substitute "adult entertainment venue".

(6) In this section, "adult entertainment venue" means any premises, vehicle, vessel or stall used for a business which consists to a significant degree of providing relevant entertainment before a live audience; and, for the purposes of that definition—

"audience" includes an audience of one;

"display of nudity" means—

(a) in the case of a woman, exposure of her breasts, nipples, pubic area, genitals or anus;

(b) in the case of a man, exposure of his pubic area, genitals or anus;

"relevant entertainment" means—

(a) any live performance; or

(b) any live display of nudity,

which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means).".>

Section 128

Kenny MacAskill

173 In section 128, page 129, line 25, at end insert—

<( ) in paragraph 2(3)(b), after "application" insert "(other than the date and place of birth of any person)",

( ) in paragraph 2(8)(a), after "application" insert "(other than the date and place of birth of any person)",>

Section 129

Kenny MacAskill

174 Leave out section 129

After section 130

Bill Aitken

460 After section 130, insert—

<**Premises licence applications: crime prevention objective**

In section 23(5) of the 2005 Act (grounds for refusal of premises licence application), after paragraph (b), insert—

“(ba) that the appropriate chief constable has made a recommendation under section 21(5) that the application be refused,”.>

After section 131

Kenny MacAskill

175 After section 131, insert—

<**Reviews of premises licences: notification of determinations**

(1) The 2005 Act is amended as follows.

(2) After section 39 (Licensing Board’s powers on review), insert—

“**39A Notification of determinations**

(1) Where a Licensing Board, at a review hearing—

(a) decides to take one of the steps mentioned in section 39(2), or

(b) decides not to take one of those steps,

the Board must give notice of the decision to each of the persons mentioned in subsection (2).

(2) The persons referred to in subsection (1) are—

(a) the holder of the premises licence, and

(b) where the decision is taken in connection with a premises licence review application, the applicant.

(3) Where subsection (1)(a) applies, the holder of the premises licence may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(4) Where—

(a) subsection (1)(a) or (b) applies, and

(b) the decision is taken in connection with a premises licence review application,

the applicant may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(5) Where the clerk of a Board receives a notice under subsection (3) or (4), the Board must issue a statement of the reasons for the decision to—

(a) the person giving the notice, and

(b) any other person to whom the Board gave notice under subsection (1).

(6) A statement of reasons under subsection (5) must be issued—

(a) by such time, and

(b) in such form and manner,

as may be prescribed.”.>

After section 132

Kenny MacAskill

176 After section 132, insert—

<**Premises licence applications: food hygiene certificates**

(1) Section 50 of the 2005 Act (certificates as to planning, building standards and food hygiene) is amended as follows.

(2) In subsection (7), for the words from "the requirements" to the end substitute "such requirements as the Scottish Ministers may, by order, specify.".

(3) After subsection (7), insert—

"(7A) An order under subsection (7) may specify requirements by reference to provision contained in another enactment.".

(4) In subsection (8)(c), for "the 1990 Act" substitute "section 5 of the Food Safety Act 1990 (c.16)".>

George Foulkes

542 After section 132, insert—

<**Premises licence applications: disability compliance statements**

In section 20 of the 2005 Act (application for premises licence), after subsection (4)(f), insert—

"(fa) a statement of compliance with Part 3 of the Disability Discrimination Act 1995, including information as to where reasonable adjustments have been or will be made to remove barriers to access for disabled people,".>

Robert Brown

543 After section 132, insert—

<**Provisional premises licences**

(1) Section 45 (provisional premises licence) of the 2005 Act is amended as follows.

(2) In subsection (6), for "2 years" substitute "5 years".

(3) In subsection (8), paragraph (b) and the word "and" immediately preceding it are repealed.

(4) In subsection (10), for paragraphs (a) and (b) substitute—

"(a) for subsection (2) there were substituted—

"(2) An application under subsection (1) must be accompanied by—

(a) a plan sufficient to identify the site of the subject premises and give a general indication of their size,

(b) a document giving a general indication of—

(i) the anticipated capacity of the premises,

(ii) the hours during which it is proposed to serve alcohol on the premises,

(iii) the extent to which it is proposed to allow children or young persons entry to the premises, and

(c) the certificate required by section 50(2).", and

(b) subsections (4) and (5) were omitted.".

(5) After subsection (10) insert—

"(10A) Sections 21 to 32 have effect in relation to any provisional premises licence application and to any provisional premises licence as if references to—

(a) the operating plan were read as references to the document required under section 20(2)(b) (as substituted by subsection (10)(a)), and

(b) the layout plan were read as references to the plan required under section 20(2)(a) (as so substituted).".>

Section 134

Kenny MacAskill

539 In section 134, page 134, line 17, leave out from <after> to end of line 22 and insert <in sub-paragraph (4), after "Board" in the second place where it appears insert "or to a member of staff provided under paragraph 8(1)(b)".>

After section 134

Kenny MacAskill

449 After section 134, insert—

<**Extended hours applications: notification period**

(1) Section 69 of the 2005 Act (notification of extended hours application) is amended as follows.

(2) After subsection (3), add—

"(4) Subsections (5) and (6) apply where the Licensing Board is satisfied that the application requires to be dealt with quickly.

(5) Subsections (2) and (3) have effect in relation to the application as if the references to the period of 10 days were references to such shorter period of not less than 24 hours as the Board may determine.

(6) Subsection (3) has effect in relation to the application as if for the word "must" there were substituted "may".".>

Section 136

Kenny MacAskill

177 In section 136, page 135, line 3, at end insert—

<"(ba) the notice does not include a recommendation under section 73(4),>

Kenny MacAskill

178 In section 136, page 135, leave out lines 22 to 27 and insert—

<(a) hold a hearing for the purposes of considering and determining the application, and

(b) after having regard to the circumstances in which the personal licence previously held expired or, as the case may be, was surrendered—

(i) refuse the application, or

(ii) grant the application.”.>

After section 137

Kenny MacAskill

179 After section 137, insert—

<**Appeals**

In section 131(2) of the 2005 Act (appeals), the words “by way of stated case, at the instance of the appellant,” are repealed.>

Schedule 4

Kenny MacAskill

180 In schedule 4, page 149, line 11, leave out <22(2) or>

Kenny MacAskill

181 In schedule 4, page 150, leave out lines 18 to 21

Section 140

Kenny MacAskill

182 Leave out section 140

Section 142

Kenny MacAskill

183 Leave out section 142

Section 143

Kenny MacAskill

184 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*Mutual recognition of judgments and probation decisions*)(1),>

Kenny MacAskill

540 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*Convictions by courts in other EU member States*)(2),>

Kenny MacAskill

450 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*European evidence warrants*)(1),>

Bill Aitken

185 In section 143, page 138, line 32, at end insert—

<( ) an order under section *(New evidence)*(10),>

Kenny MacAskill

186 In section 143, page 138, leave out line 33

Kenny MacAskill

187 In section 143, page 138, line 33, at end insert—

<( ) an order under section 146(1) containing provisions which modify any enactment (including this Act), or>

Kenny MacAskill

188 In section 143, page 138, line 34, leave out <146(1) or>

Robert Brown

392 In section 143, page 138, line 35, at end insert <or

( ) an order under section 148(1) bringing into force section 17(1), (2) or (3),>

Robert Brown

549 In section 143, page 138, line 35, at end insert <or

( ) an order under section 148(1) bringing into force section 38(1), (2), (3) or (4),>

Schedule 5

Kenny MacAskill

189 In schedule 5, page 151, line 35, at end insert—

<*The Libel Act 1792 (c.60)*

The Libel Act 1792 is repealed.

The Criminal Libel Act 1819 (c.8)

The Criminal Libel Act 1819 is repealed.

The Defamation Act 1952 (c.66)

In the Defamation Act 1952, section 17(2) is repealed.>

Kenny MacAskill

451 In schedule 5, page 152, line 10, at end insert—

<*The Law Officers Act 1944 (c.25)*

In section 2(3) of the Law Officers Act 1944 (Lord Advocate and Solicitor General for Scotland), for the words from "three" to the end substitute "287 of the Criminal Procedure (Scotland) Act 1995 (c.46)".>

Kenny MacAskill

452 In schedule 5, page 152, line 12, leave out from <In> to <1974> and insert—

<( ) The Rehabilitation of Offenders Act 1974 is amended as follows.

( ) In section 1>

Kenny MacAskill

453 In schedule 5, page 152, line 15, at end insert—

<( ) In section 6(6)(bb) (convictions in service disciplinary proceedings), for "the Schedule" substitute "Schedule 1".

( ) The Schedule (service disciplinary proceedings) is renumbered as Schedule 1.>

Kenny MacAskill

190 In schedule 5, page 152, line 24, at end insert—

<*The Incest and Related Offences (Scotland) Act 1986 (c.36)*

The Incest and Related Offences (Scotland) Act 1986 is repealed.>

Kenny MacAskill

191 In schedule 5, page 153, line 3, after <89> insert <, 111>

Kenny MacAskill

192 In schedule 5, page 153, line 3, at end insert—

<*The Trade Union and Labour Relations (Consolidation) Act 1992 (c.52)*

In section 243(4)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 (restriction of offence of conspiracy: Scotland), the words "or sedition" are repealed.>

Kenny MacAskill

193 In schedule 5, page 153, line 12, at end insert—

<*The Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40)*

In Schedule 4 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (minor and consequential amendments), in paragraph 44, sub-paragraph (2) is repealed.>

Kenny MacAskill

386 In schedule 5, page 153, line 35, at end insert—

<In section 11 (certain offences committed outside Scotland)—

(a) in subsection (3), for "proceeded against, indicted" substitute "prosecuted",

(b) in subsection (4), for "dealt with, indicted" substitute "prosecuted".>

Kenny MacAskill

454 In schedule 5, page 153, line 35, at end insert—

<In section 17A (right of person accused of sexual offence to be told about restriction on conduct of defence: arrest), in subsection (1)—

(a) for paragraphs (za) and (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words from "preliminary" to "trial" substitute "hearing".>

Kenny MacAskill

512 In schedule 5, page 153, line 35, at end insert—

<In section 18(8)(c) (power to take prints etc. under authority of a warrant unaffected by section), for "prints, impressions" substitute "relevant physical data".

In section 19(1)(b) (samples etc. taken from person convicted of offence), the words "impression or", in both places where they occur, are repealed.>

Kenny MacAskill

513 In schedule 5, page 154, line 4, at end insert—

<Section 20 (use of prints, samples etc.) is repealed.>

Kenny MacAskill

455 In schedule 5, page 154, line 5, at end insert—

<In section 35 (judicial examination), in subsection (4A)—

(a) for paragraphs (za) and (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words from "preliminary" to "trial" substitute "hearing".>

Kenny MacAskill

514 In schedule 5, page 154, line 5, at end insert—

<In section 23A (bail and liberation where person already in custody)—

(a) in each of subsections (1) and (4), for "23 or 65(8C)" substitute "23, 65(8C) or 107A(2)(b)", and

(b) in subsection (3), for "22A(3) or 23(7)" substitute "22A(3), 23(7) or 107A(2)(b)".>

Kenny MacAskill

456 In schedule 5, page 154, line 42, at end insert—

<In section 66 (service and lodging of indictment etc.), in subsection (6A)(a)—

(a) for sub-paragraphs (zi) and (i) substitute—

"(i) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings (including at any commissioner proceedings) may be conducted only by a lawyer,", and

(b) in sub-paragraph (iii), for the words from "preliminary" to "trial" substitute "hearing".

In section 71 (first diet)—

(a) in subsection (A1), for the words "his defence at the trial" substitute "the conduct of his case at any relevant hearing in the course of the proceedings",

(b) in subsection (B1)(c), for the words "before the trial diet" substitute "in relation to any hearing in the course of the proceedings",

(c) in subsection (1A)(a), for "the trial" substitute "any hearing in the course of the proceedings",

(d) in subsection (1B)(a), for "the trial" substitute "any hearing in the course of the proceedings",

(e) in subsection (5A)(b), for the words "his defence at the trial" substitute "the conduct of his case at any relevant hearing in the course of the proceedings", and

(f) after subsection (7), insert—

"(7A) In subsections (A1) and (5A)(b), "relevant hearing" means—

(a) in relation to proceedings mentioned in paragraph (a) of subsection (B1), any hearing at, or for the purposes of, which a witness is to give evidence,

(b) in relation to proceedings mentioned in paragraph (b) of that subsection, a hearing referred to in section 288E(2A),

(c) in relation to proceedings mentioned in paragraph (c) of that subsection, a hearing in respect of which an order is made under section 288F.".>

Kenny MacAskill

457 In schedule 5, page 155, line 3, at end insert—

<In section 79 (preliminary pleas and preliminary issues), in subsection (2)(b)(ii), after "under section" insert "22ZB(3)(b),".>

Kenny MacAskill

458 In schedule 5, page 155, line 23, at end insert—

<In section 140 (citation), in subsection (2A)—

(a) for paragraph (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings (including at any commissioner proceedings) may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words "his defence at the trial" substitute "the conduct of his case at, or for the purposes of, the hearing".

In section 144 (procedure at first diet), in subsection (3A)—

(a) for paragraph (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words "his defence at the trial" substitute "the conduct of his case at, or for the purposes of, the hearing".

In section 146 (plea of not guilty), in subsection (3A)—

(a) for paragraph (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words "his defence at the trial" substitute "the conduct of his case at, or for the purposes of, the hearing".>

Kenny MacAskill

414 In schedule 5, page 155, line 31, leave out paragraphs 35 to 39

Kenny MacAskill

515 In schedule 5, page 157, line 8, at end insert—

<*The Offensive Weapons Act 1996 (c.26)*

In the Offensive Weapons Act 1996, section 5 is repealed.>

Kenny MacAskill

194 In schedule 5, page 157, line 8, at end insert—

<*The Defamation Act 1996 (c.31)*

In the Defamation Act 1996, section 20(2) is repealed.>

Kenny MacAskill

195 In schedule 5, page 157, line 10, leave out paragraph 44 and insert—

<(1) The Crime and Punishment (Scotland) Act 1997 is amended as follows.

(2) In section 9 (power to specify hospital unit), in subsection (1)(a), for "insane" substitute "found not criminally responsible or unfit for trial".

(3) In section 13 (increase in sentences available to sheriff and district courts), subsection (2) is repealed.

(4) In section 56 (powers of the court on remand or committal of children and young persons), subsection (3) is repealed.>

Kenny MacAskill

196 In schedule 5, page 157, line 28, at end insert—

<*The Legal Deposit Libraries Act 2003 (c.28)*

Section 10 of the Legal Deposit Libraries Act 2003 (exemption from liability: activities in relation to publications) is amended as follows—

(a) in subsection (1), the words ", or subject to any criminal liability," are repealed,

(b) in subsection (2)(a), the words "in the case of liability in damages" are repealed,

(c) in subsection (3), the words ", or subject to any criminal liability," are repealed,

(d) in subsection (4)(a), the words "in the case of liability in damages" are repealed,

(e) in subsection (6)(a), the words ", or subject to any criminal liability," are repealed, and

(f) in subsection (8), the words "and criminal liability" are repealed.>

Kenny MacAskill

459 In schedule 5, page 157, line 36, at end insert—

<*The Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5)*

In the Criminal Procedure (Amendment) (Scotland) Act 2004 the following provisions are repealed—

(a) in section 4 (prohibition on accused conducting case in person in certain cases), subsection (4),

(b) section 17 (bail conditions: remote monitoring of restrictions on movements), and

(c) in the schedule (further modifications of the 1995 Act), paragraph 55.>

Kenny MacAskill

197 In schedule 5, page 158, line 36, at end insert <and

(ii) sub-paragraph (b) is repealed.>

Kenny MacAskill

387 In schedule 5, page 159, line 12, at end insert—

<*The Sexual Offences (Scotland) Act 2009 (asp 9)*

In section 55(7) of the Sexual Offences (Scotland) Act 2009 (offences committed outside the United Kingdom), for “proceeded against, indicted” substitute “prosecuted”.>

Kenny MacAskill

198 In schedule 5, page 159, line 14, leave out <134> and insert <156>

Section 148

Robert Brown

393 In section 148, page 139, line 19, after <sections> insert <17(4) and>

Criminal Justice and Licensing (Scotland) Bill

3rd Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- a list of any amendments already debated;
- the text of amendments to be debated on the third day of Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

Offence of stalking, offence of threatening, alarming or distressing behaviour
399, 400, 401, 402, 402A, 378, 544

Non-harassment orders – course of conduct
5, 6, 7

Presumption against short periods of imprisonment or detention
100, 101, 388, 1, 392, 393

Report on operation of sections 14 and 17
102

Pre-sentencing reports about organisations
103

Voluntary intoxication by alcohol – effect in sentencing
104

Mutual recognition of judgments and probation decisions
105, 184

Minimum sentence for having in a public place an article with a blade or point
10, 10A

Involvement in serious organised crime
344, 345, 346, 347, 348, 349, 350, 351, 358

Notes on amendments in this group
Amendment 347 pre-empts amendment 348

Offences aggravated by connection with serious organised crime (corroboration)
352

Directing serious organised crime
353, 354, 355, 356

Failure to report serious organised crime
357, 106, 359, 360

Genocide, crimes against humanity and war crimes
107, 108

Clarification of existing offence prohibiting the carrying of offensive weapons
109, 11, 515

Extreme pornography – sounds accompanying images
361, 362, 363, 364, 366

Extreme pornography – excluded images
365, 367, 368, 369

Extreme pornography – sex offender notification
517

Voyeurism – additional forms of conduct
110

Sexual offences – defences in relation to offences against older children
111

Penalties for offences of brothel-keeping and living on the earnings of prostitution
370

Engaging in, advertising and facilitating paid-for sexual activities
8, 8A, 8B, 8C, 8D, 461, 9, 9A

People trafficking (and consequential provision)
371, 372, 373, 374, 375, 376, 377, 386, 387

Slavery, servitude and forced or compulsory labour
112, 143

Articles for use in fraud
113

Abolition of offences of sedition and leasing-making
114, 189, 192, 194, 196

Double jeopardy (Scottish Law Commission report)
115, 116, 117, 118, 119, 120, 120A, 121, 122, 123, 124, 125, 185

Children – age of criminal responsibility and minimum age of prosecution
379, 126, 127, 389, 549

> *Notes on amendments in this group*
> Amendment 379 pre-empts amendments 126 and 127

Offences – liability of partners
128, 129

Witness statements
130, 131

Victims' representation at Parole Board hearings
403

Convictions in other UK or EU jurisdictions
518, 519, 520, 521, 522, 540

Power of sheriff or JP to grant warrants to police based outside sheriffdom
420

Bail conditions – remote monitoring requirements
132, 197

Prosecution on indictment – Scottish Law Officers
421, 422, 423, 424, 425, 426, 427, 451

Dockets and charges in sex cases
428

Remand and committal of children and young persons
541

Prohibition of personal conduct of case by accused
429, 454, 455, 456, 458, 459

Crown appeals
462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 514

Retention of samples etc. – adults
478, 404, 405, 479, 406, 480, 407, 481, 482, 408, 494, 499, 502, 503, 504, 512, 513

> *Notes on amendments in this group*
> Amendment 478 pre-empts amendment 404

Retention of samples etc. – alternatives to prosecution
418, 419

Retention of samples etc. – children referred to children's hearings
409, 410, 380, 483, 484, 545, 381, 485, 486, 411, 546, 487, 488, 489, 490, 491, 492, 382, 493, 412

Notes on amendments in this group
Amendment 410 pre-empts amendments 380, 483, 484 and 545
Amendment 380 pre-empts amendments 483 and 484
Amendment 411 pre-empts amendments 546, 487, 488, 489, 490, 491, 492 and 382
Amendment 492 pre-empts amendment 382
Amendment 493 pre-empts amendment 412

Use of samples etc.
495, 496, 497, 498, 500, 501, 505, 506, 507, 508, 509, 510

Scottish Criminal Cases Review Commission – grounds for appeal
133, 134, 135

Prior statements by witnesses – abolition of competence test
430

Witness statements – use during trial
383

Child witnesses in proceedings for people trafficking offences
384

Witness anonymity orders
431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441

European evidence warrants
442, 450

Jurors in criminal trials
443, 415, 416, 511, 417

Data matching for detection of fraud etc.
136, 137

Closure of premises associated with human exploitation etc. (minor corrections etc.)
138, 139, 140, 141, 142, 144, 198

Foreign travel orders – surrender of passports
444, 445, 446

Sex offender notification requirements
145

Risk of sexual harm orders – spent convictions
146

Police and SCDEA – authorisation of surveillance
523, 524, 525, 526, 527, 528

Police and SCDEA – authorisation of interference with property
529, 530, 531, 532, 533, 534, 535, 536

Enhanced criminal record certificates: disclosure of sex offender notification requirements
537, 538

Rehabilitation of offenders – spent alternatives to prosecution
447, 452, 453

Medical services in prisons
448

Assistance for victim support
413

Prosecutor's duty to disclose information
147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166

Mental disorder and unfitness for trial
24, 167, 195

Conditions to which licences under the 1982 Act are to be subject
168

Licensing – powers of entry etc. (definition of "authorised civilian employee")
169

Licensing of metal dealers
385

Licensing of street trading – food hygiene certificates
170

Licensing of market operators
171, 172, 2, 3, 4

Notes on amendments in this group
Amendment 172 pre-empts amendments 2 and 3

Control of lap dancing and other adult entertainment venues
516

Applications for licences
173

Provisions to be considered as part of the Alcohol (Scotland) Bill
174, 182, 186

Premises licence applications
460, 176, 542, 180

Reviews of premises licences – notification of determinations
175

Provisional premises licences
543

Occasional licences
539

Extended hours applications – notification period
449

Personal licence applications
177, 178, 181

Appeals against decisions of licensing board
179

Corruption in public bodies
183

Orders and regulations – circumstances in which affirmative procedure required
187, 188

Incest and related offences
190

Criminal law – revision
191, 193

Breach of undertakings – consequential modification
457

Amendments already debated

Community payback orders – consequential modifications
With 342 – 414

JUSTICE COMMITTEE

EXTRACT FROM THE MINUTES

12th Meeting, 2010 (Session 3)

Tuesday 13 April 2010

Present:

Bill Aitken (Convener)	Robert Brown
Bill Butler (Deputy Convener)	Angela Constance
Cathie Craigie	Nigel Don
James Kelly	Stewart Maxwell

Also present: Richard Baker, Trish Godman, Rhoda Grant, Johann Lamont and Bill Wilson.

Criminal Justice and Licensing (Scotland) Bill: The Committee considered whether to take evidence at Stage 2 on amendment 516 lodged by Sandra White. It agreed to issue a call for written evidence, but not to take oral evidence on the amendment.

Criminal Justice and Licensing (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 3).

The following amendments were agreed to (without division): 103, 105, 344, 346, 347, 349, 350 and 351.

The following amendments were agreed to (by division):

1 (For 4, Against 4, Abstentions 0; amendment agreed to on casting vote)
104 (For 5, Against 3, Abstentions 0)
10 (For 4, Against 4, Abstentions 0; amendment agreed to on casting vote).

The following amendments were disagreed to (by division):

100 (For 1, Against 7, Abstentions 0)
388 (For 1, Against 7, Abstentions 0)
102 (For 2, Against 3, Abstentions 3)
10A (For 1, Against 4, Abstentions 3)
352 (For 2, Against 6, Abstentions 0).

The following amendments were moved and, with the agreement of the Committee, withdrawn: 399 and 5.

Amendment 348 was pre-empted.

The following amendments were not moved: 400, 401, 6, 7, 101 and 345.

Sections 15, 16, and 18, schedule 2, sections 19, 20, 21, 22, 23, and 26 were agreed to without amendment.

Section 25 was agreed to as amended.

The Committee ended consideration of the Bill for the day, section 26 having been agreed to.

Scottish Parliament

Justice Committee

Tuesday 13 April 2010

[The Convener *opened the meeting at 10:05*]

Criminal Justice and Licensing (Scotland) Bill

The Convener (Bill Aitken): Good morning, ladies and gentlemen. Let us get the meeting under way. The entire committee is present—there are no apologies. I remind everyone to switch off mobile phones to avoid any interruption to proceedings.

This morning, our principal business is stage 2 consideration of the Criminal Justice and Licensing (Scotland) Bill. However, we have to deal with the preliminary matter whether to take evidence on amendment 516, in the name of Sandra White, on the licensing of lap dancing clubs and other adult entertainment venues. Paper J/S3/10/2/1, prepared by the clerk, explains the available options.

I am in the committee's hands.

Stewart Maxwell (West of Scotland) (SNP): I think that this issue is slightly different from the other stage 2 amendment issues on which we decided to take oral evidence. Up until that point, we had taken zero evidence on those matters. As the *Official Report* and our stage 1 report show, we examined the area in question to some extent at stage 1; I am quite happy to receive further written evidence, but I do not think that we should delay stage 2 even further to take oral evidence.

The Convener: That is my own preferred option. Do members agree?

Members *indicated agreement.*

The Convener: In that case, we will seek written evidence, which will be provided within an appropriate timescale. The clerk will organise things.

Criminal Justice and Licensing (Scotland) Bill: Stage 2

10:07

The Convener: Item 2 is day 3 of stage 2 proceedings on the Criminal Justice and Licensing (Scotland) Bill. The committee will not proceed beyond the end of part 3 today; indeed, it is highly likely that we will get only as far as the end of part 2, which—perhaps unfortunately—contains a concentration of complex and controversial items.

I welcome to the meeting the Cabinet Secretary for Justice, Kenny MacAskill, who will be joined by officials various. Indeed, I understand that his team will change over the course of the morning as we come to deal with different matters. I also welcome to the table non-committee members Bill Wilson, Rhoda Grant and Richard Baker. It is highly probable that other members will join us when items of particular interest come up. Members should have their copy of the bill, the third marshalled list and the third grouping of amendments for consideration.

Section 15—Non-harassment orders

The Convener: Amendment 399, in the name of Rhoda Grant, is grouped with amendments 400 to 402, 402A, 378 and 544.

Rhoda Grant (Highlands and Islands) (Lab): First, I pay tribute to Ann Moulds, her group Action Scotland Against Stalking and their vigorous campaign to highlight the problem of stalking in Scotland, which convinced me that I should lodge amendments 399 to 402.

The term "stalking" is used generally to describe repeated and unwelcome conduct that a person finds alarming or threatening. Due to the wide range of such behaviour, it is difficult to define stalking. Some of the behaviour may be perfectly innocent, such as making a telephone call or standing in the street, but becomes threatening and alarming due to the context of the relationship between the stalker and the victim. Therefore, stalking is a context-dependent crime the unacceptability of which depends on the context in which it occurs. Previously, such crimes were prosecuted as breaches of the peace. However, following the ruling in the case of Harris v HM Advocate in 2009, that approach may no longer be possible. That ruling said that there must be some public element to the behaviour if it is to constitute a breach of the peace. Amendments have been lodged by the Government and by Robert Brown that seek to close that loophole. Those important amendments deal with abusive crimes, and I urge the committee to give them due consideration; nevertheless, they do not address stalking, which was not adequately covered by breach of the peace.

Amendment 402 is required if we are to make stalking a crime, as the amendment names a new offence of stalking. Action Scotland Against Stalking has made it clear that the approach that was taken in the Protection from Harassment Act 1997 in England and Wales, which does not name the crime of stalking, has kept stalking hidden in the same way as breach of the peace has done in Scotland. There are many misunderstandings around stalking concerning what it is, its prevalence and the devastating consequences that it can have. That is partly because the actions involved in stalking cases are not, in themselves, criminal offences; it is the combination of those actions that causes fear and distress. By calling that behaviour stalking, we recognise it and mark it as unacceptable. In proposed subsection (6) of the new section that amendment 402 would insert, we define the kinds of behaviour that would constitute such conduct, although the list is not exhaustive. It is important that the list is not restrictive, as stalking behaviour can be extremely subtle and not easily recognised as stalking. However, listing examples of stalking behaviour makes it easier for people to recognise the actions that will be considered to constitute stalking.

Amendments 399 to 401 follow on from the introduction of a new offence of stalking and relate to section 234A of the Criminal Procedure (Scotland) Act 1995. Because many stalkers repeatedly harass their victims, sometimes over a period of years, it would be appropriate for a non-harassment order to be applied for in all cases following a conviction. My amendments would require a procurator fiscal to do that. That would remove the discretion of the prosecutor but it would not remove the discretion of the court, which would still be able to decline an application if it were not convinced that an order would be appropriate.

I do not think that Robert Brown's amendment 402A is required. However, as it takes nothing away from amendment 402 I would not oppose it.

I move amendment 399.

The Cabinet Secretary for Justice (Kenny MacAskill): Amendment 402 is intended to create a statutory offence of stalking. It would make it an offence for a person to engage in a course of conduct with the intention of causing physical or psychological harm to another person or of causing that person to fear for their own safety or for the safety of any other person. An offence would also be committed if the accused engaged in a course of conduct and knew, or ought in all the circumstances to have known, that the conduct would be likely to cause such harm or arouse such apprehension or fear, regardless of whether that was the accused's purpose.

We are aware that, in the light of the outcome of recent court cases, there has been concern that the common-law offence of breach of the peace, which—as Rhoda Grant correctly said—has previously been used to prosecute behaviour constituting stalking, may not be sufficient. In the case of Harris v HM Advocate, the appeal court concluded that some public element is essential for a breach of the peace to be committed and that the public element will not always be present in stalking cases. To address that, the Government has lodged amendment 378, which creates a new statutory offence of engaging in threatening, alarming or distressing behaviour. The offence will criminalise conduct that, either recklessly or by intention, is likely to cause a reasonable person alarm, distress or fear for their personal safety or for the personal safety of another person. That would include the sort of behaviour that is covered by amendment 402.

The need to create such an offence has arisen as a result of the appeal court's opinion in Harris v HM Advocate, which concluded that some public element is essential for the offence of breach of the peace to be committed. The court's decision does not affect the majority of cases of breach of the peace, in which the offence takes place in a public place—for example, in a street or in a pub. However, there is real concern that the decision has been making it more difficult to prosecute criminal behaviour arising from domestic disputes and other circumstances, such as stalking cases, in which there is not necessarily a public element. In the past, such behaviour could have been successfully prosecuted as breach of the peace, but that may no longer be the case.

10:15

Amendment 378 creates a new offence that criminalises conduct that, either recklessly or by intention, is likely to cause a reasonable person alarm or distress or create fear for their personal safety or that of another person. There is no requirement for a public element so the problem that arose in the Harris case should not arise again. The conduct could take place in the presence of the perpetrator and the victim only, or indeed without their being together, in the case of written threats, phone calls and so on. That is particularly relevant where threats are sent by text or e-mail—a relatively recent problem about which we have all heard.

Stalking can include a range of alarming, distressing and frightening behaviours, such as repeatedly following or spying on a victim or otherwise watching them; the repeated sending of unwanted threatening correspondence; and the making of repeated nuisance phone calls or the sending of repeated nuisance texts or e-mails. When a person engages in such activity and the circumstances are such that their behaviour would cause a reasonable person alarm or distress or create fear for the safety of any person, that will constitute the offence of engaging in threatening, alarming or distressing behaviour.

Although we support what amendment 402 seeks to achieve, we do not believe that it goes far enough. The offence in amendment 402 requires "a course of conduct", whereas we suggest that it is important that, in appropriate cases, it is possible to prosecute an individual who engages in such unacceptable behaviour once. It does not address the problem that arises from the Harris case, which means that it might no longer be possible to prosecute unacceptable behaviour that is committed in a domestic setting and which would have been prosecuted as a breach of the peace if it had been committed in public. It would also be necessary to prove that the behaviour caused harm to, or created fear for the safety of, the victim or someone else. We suggest that such behaviour is unacceptable and that it should therefore be treated as criminal regardless of whether the victim actually suffers harm or fear. It should be enough that that was the intention. Those issues are addressed in the Government's amendment 378, which also covers the behaviour that is caught by amendment 402. I therefore hope that the committee will support the Government's amendment 378 in preference to amendment 402.

We understand that some of those who have given evidence expressed support for both amendment 378 and amendment 402. However, as we have explained, amendment 402, on stalking, covers a narrower range of conduct than is covered by amendment 378. The Crown Office has expressed concern that there would be a disadvantage in having a narrowly defined offence alongside an offence with a wider definition. Because of the many circumstances that present themselves in criminal conduct, the prosecutor would, in the event of a choice, often be bound to prefer the offence with a wider definition to ensure that all the conduct was captured in the charge. We understand the desire of many committee members to see both amendments go through and we are happy to seek to consider whether we can incorporate the particular matters that Rhoda Grant's amendment 402 seeks to cover into an expanded Government amendment in due course.

We understand that amendment 402A seeks to ensure that Rhoda Grant's amendment 402 does not inadvertently criminalise legitimate public protest or industrial action. However, the Government's view is that, even if amendment 402 was accepted, amendment 402A would be unnecessary. For an offence of stalking to be committed, it is required that the accused acted with the intention of causing physical or psychological harm or knew, or ought to have known, that their conduct was likely to cause such harm or arouse fear or apprehension. Legitimate public protest and industrial action should not cause people physical or psychological harm and should not cause people to fear for their personal safety.

In addition, amendment 402 provides a defence to a charge of stalking where the conduct is, in the particular circumstances, reasonable. It would be for the courts to decide, but it could certainly be argued that, depending on the circumstances, legitimate public protest or industrial action would be covered by the defence that it amounted to reasonable conduct. As such, amendment 402A is unnecessary and I invite Robert Brown to not move it.

The purpose of Robert Brown's amendment 544 is to modify the common-law offence of breach of the peace to ensure that it covers behaviour that takes place in private. As I noted, the need for action on breach of the peace arose as a result of the appeal court's opinion in Harris v HMA, which concluded that some public element is essential for the offence of breach of the peace to have been committed. We appreciate that there is concern that the appeal court judgment makes it difficult for the criminal law to intervene in domestic disputes and other circumstances in which breach of the peace has traditionally been used to prosecute, such as stalking cases, when there is not necessarily a public element. That is why we lodged amendment 378, which creates a new offence that criminalises conduct that, either recklessly or by intention, is likely to cause a reasonable person alarm or distress or cause them to fear for their personal safety or that of another person. There would be no requirement for a public element. The conduct could take place in the presence of the perpetrator and the victim only, or without them having to be together at the same time, in the case of written threats, texts, phone calls and so on, which I mentioned.

The appeal court judgment, which concluded that a public element was necessary in cases of breach of the peace, overturned a 1959 judgment in the case of Young v Heatly, in which the appeal court recognised that although a public element was usually required in cases of breach of the peace, there was a class of special cases in which the offence constituted a breach of the peace, even though it occurred in private. It may have been Robert Brown's intention to restore the outcome of the 1959 judgment, but amendment 544 goes a great deal further in providing that any behaviour that constitutes a breach of the peace in public may also do so in private.

The advantage of Government amendment 378 over Robert Brown's amendment 544 is that it recognises that behaviour in public and behaviour in private may be judged differently. For example, a member of the public who was shouting and swearing in the street would normally be judged differently from a member of the public who was shouting and swearing at a television. Government amendment 378 provides for incidents such as domestic abuse or stalking to be tackled, but it does not seek potentially to criminalise behaviour in private simply because the same behaviour in public might well constitute a breach of the peace. Therefore, we are unable to support amendment 544.

I understand that amendments 399 to 401 are intended to amend the provisions in section 234A of the Criminal Procedure (Scotland) Act 1995 on non-harassment orders to require the prosecutor to apply to the court for a non-harassment order to be granted in respect of a person who has been convicted of stalking. I agree that in many cases it would be appropriate to make a non-harassment order in respect of a person who has been convicted of behaviour that constituted stalking, and the provisions in the bill that amend section 234A of the 1995 act will make it easier for the prosecutor to apply to the courts for an order.

However, the Government does not believe that there should be an automatic requirement for the prosecutor to apply for a non-harassment order in respect of any person who has been convicted of stalking. Non-harassment orders are intended to deal with people who are considered to pose a risk of future offending. Many people who are convicted of stalking behaviour may pose a risk of future offending against their victim, but others may not. The offender may have moved away from where the victim lives or may have been sentenced to a long term of imprisonment, in which case an NHO may not be necessary. Clearly, whether an NHO is necessary will depend on the facts and circumstances of each individual case. It should be for prosecutors to decide on a case-by-case basis whether it is appropriate to apply to the court for a non-harassment order to be granted.

We support amendment 378 and resist all other amendments in the group, on the understanding that we take on board the committee's desire to see some correlation between the two offences that we are discussing.

Robert Brown (Glasgow) (LD): In this group, amendments 402A and 544 are in my name. As Rhoda Grant and the cabinet secretary have indicated, the group raises a number of overlapping issues.

I agree with the cabinet secretary's comments on amendment 400—I think it might be a case of overkill. Under the criminal law in Scotland, the Crown has traditionally acted in the public interest as master of the instance. In other words, it is up to the prosecutor when to bring charges and on what basis, when to continue with or abandon a prosecution and when to ask for specific orders. It may well be that a non-harassment order is appropriate in many cases in which there is a stalking conviction, but circumstances vary and the discretion should remain with the Crown.

Amendment 402 seeks to introduce the specific offence of stalking. There has been quite a bit of debate about that, but the case for the new offence has been well put. Stalking is a crime that, in essence, is different from breach of the peace because it involves the repeated, deliberate targeting of a particular victim and is often made up of a series of actions that, in normal circumstances, may themselves be unexceptional.

However, it is vital that the definition is got right because an offence that is too widely or imprecisely stated will produce injustice. I hope that the cabinet secretary's officials—who I accept are not in favour of amendment 402—have pored over it carefully to ensure that it does what it says on the tin. I continue to hold the view that the definition must be looked at extremely closely, as it may be too wide. More particularly, the defences in subsection (5) of the proposed new section that amendment 402 seeks to insert are likely to produce considerable trouble.

I am not sure that I am altogether persuaded by the cabinet secretary's point about a single action as opposed to a course of conduct. By its nature, stalking seems to be a course of conduct. I readily accept that, in any event, significant instances of a one-off nature would continue to be dealt with under breach of the peace, so I do not think that that is a problem. I am keen to hear the cabinet secretary's views on the matter, as it is important to get it right.

I do not think that the reasons behind amendment 402 arise out of the Harris case per se, although that adds another dimension.

The defences that are set out in the proposed new subsection (5) that amendment 402 would introduce are modelled on the phraseology of the Protection from Harassment Act 1997. However, the 1997 act is not quite the same as the legislation that we are discussing today, as it basically establishes a procedure for providing orders, rather than establishing a criminal action and the immediate offset—a crime is committed under the 1997 act only on breach of a non-harassment order. For example, proposed subsection (5)(a) suggests that a course of action would be legal if it were

"authorised by ... any rule of law".

If my memory serves me correctly, various enactments make it legal to walk upon the public highway. Is it possible that walking up and down outside someone's house, even with malicious intent, could be authorised in that sense, thereby providing a loophole to a stalker? I remind members that the rule of construction is that penal statutes are, rightly, construed strictly against the Crown.

Further, the catch-all defence in proposed subsection (5)(c) suggests that a course of action would be legal if it

> "was, in the particular circumstances, reasonable".

I should say that that is phrased differently from the way in which the cabinet secretary's amendment 378 is phrased. The difference between the use of the word "reasonable" in the two amendments does not amount to a difference of approach. However, some questions remain around the issue of reasonableness. To whom should the course of action seem reasonable—the accused or the man on the number 18 bus, for example? Reasonable by what criteria?

I continue to have a concern about the effect of the proposals on legitimate public protest and lawful industrial action. Students of trade union history will know that early restrictions on what we would now regard as legitimate trade union protest arose from judicial extension of contract and property law into the criminal sphere. Subsection (6)(e) of the proposed section that amendment 402 would introduce defines "conduct" as including

> "entering or loitering in the vicinity of ... the place of work or business ... or of any other person",

which very much touches on the area of industrial action. Are we entirely sure that such legitimate conduct is authorised by existing trade union law, as opposed to simply not being forbidden by it? I suggest that there is a subtle difference there. I do not pretend to be an expert on trade union law, but I hope that the issues that I have raised will be closely considered by the cabinet secretary's officials.

Further to the issue of public protest, what about football fans who are distressed at their club's performance and want to demonstrate at the football ground? We have seen examples of that in the recent past.

"Conduct" also includes the sending of letters, e-mails and texts. What about whistleblowers or people who go a bit over the top in castigating their MSPs or—perhaps more likely—their MPs for their sins? Would that behaviour be criminalised? Some of us might think that that would be a good idea, but I am not sure that most of us would.

People have various and heated views about Orange order parades, Irish republican parades, demonstrations about middle east issues and so on. Some such marches can arouse apprehension and fear in the minds of onlookers—some are intended to do exactly that through a demonstration of strength. However, that does not necessarily make them illegal. The right to freedom of expression gives people a certain latitude, providing that they keep within the law. Are we not at risk of narrowing that latitude too much and unreasonably getting involved in people's motives and intentions when they engage in legitimate public protest?

It is against that background that I lodged amendment 402A to ensure that the law of unintended consequences does not throw its arm over lawful and reasonable public protest or industrial action. I think that we are dealing with a significant point. Others have expressed the view that the proposals do not change the existing defence but I think that they do.

The Government's amendment 378 is designed to deal with a perceived anomaly in the definition of breach of the peace, following the recent decision of the appeal court in Harris v HMA. Effectively, the amendment provides a statutory basis for breach of the peace, which I think is the wrong direction to go in. Breach of the peace is an ancient and useful measure. Its flexibility will be damaged if it is put on a statutory basis. I also note that there has been little consultation on the proposal. It would be preferable to deal with the consequences of the appeal court's decision by amending the law in a much more minor way so that it reverts to what the situation was thought to be before. Kenny MacAskill mentioned the Young v Heatly case, which I recall from my student days and which set the right tone. If I recall correctly, it was something to do with a headmaster making inappropriate suggestions to a pupil and the pupil not being upset but the public possibly being outraged.

My amendment 544 attempts to do what I have suggested by saying that

> "A person's behaviour may constitute a breach of the peace".

The amendment is intended to restore flexibility to the courts. I readily accept that I may not have got the phraseology right, but the amendment is a reasonable stab at it, and it echoes the Government's amendment. The distinctions that the cabinet secretary made do not stand up. If we get things slightly wrong, it is easier to correct them at stage 3 than to fiddle about with a significant and complicated amendment such as amendment 378, which tries to start from scratch and put the whole issue on a statutory basis. The committee has been concerned about doing that in other areas and about any unintended consequences. Against that background, I stand by my position on the amendments.

10:30

Stewart Maxwell: I entirely agree with Robert Brown's comments on amendment 400 and the role of the Crown Office, so I will not repeat his arguments.

In relation to amendment 402, on the offence of stalking, the cabinet secretary and others are correct that there was a great deal of sympathy for the position that was laid out by witnesses, especially Ann Moulds. The issue is not whether we agree with the intention but whether the amendments, or some combination of them, achieve what they set out to achieve. There is some doubt about that. I do not know whether Rhoda Grant would agree, but the best course of action might be for her not to move amendment 402, and for us to have further discussions on amendment 402 and the other amendments, with a view to re-engaging at stage 3. There is an opportunity between stages 2 and 3 for us to try to incorporate Rhoda Grant's specific points—with which I have a great deal of sympathy—into the wider amendment 378. At the moment, there is some confusion and doubt about how the amendments would operate, whether together or independently. My preference at this stage would be for Rhoda Grant not to move amendment 402 and for the committee to revisit the issue at stage 3, perhaps after further discussions with the cabinet secretary and officials. Although a valid point is being made here, at this stage I am not entirely convinced about which route would provide the correct detail that should be inserted into the bill in order to deal with the problem that the amendments seek to address.

Robert Brown's amendment 402A is unnecessary. I do not agree with his comments on subsection 6(e) of the new section that amendment 402 would introduce, in relation to place of work or business. I am not sure that I follow his logic about why that would be a threat to legitimate trade union activity.

In relation to amendment 544, I have some sympathy with Robert Brown's argument about the flexibility that breach of the peace gives, as opposed to laying everything out in statute. We are perhaps at a difficult point. If we leave things as they are there is clearly a problem. I am not sure that amendment 544 will achieve what it sets out to achieve, which is to return to a position of flexibility. There is some doubt about that, which is why I am minded to support the statutory route. While I agree in principle with what Robert Brown is saying, I do not think that he will achieve his aims with amendment 544.

James Kelly (Glasgow Rutherglen) (Lab): I support Rhoda Grant's amendments. She has put her case well and I pay tribute to her for the amount of work that she has done to get the amendments to this stage. It is clear from evidence to the committee that stalking causes a lot of distress throughout Scotland, and she is correct to try to bring a specific offence of stalking into statute. The effect would be to protect a greater number of people in communities throughout Scotland. From that point of view, amendment 402 is positive.

In relation to Robert Brown's amendment 402A, I am not totally convinced by the points that he made about the rights of trade unionists. I am not convinced that the amendment would add anything to Rhoda Grant's amendment 402.

I note the intent of amendment 378, which is more wide ranging than Rhoda Grant's amendment 402 and which would address many concerns about threatening and aggressive behaviour. Amendment 378 is well intentioned and would deal with specific crimes such as domestic abuse. However, members have had representations from several organisations raising concerns about the way in which the amendment has been drafted and its wide-ranging nature. It would be wise to reflect on those submissions and consider whether the amendment could be redrafted for stage 3.

Stage 3 would also be an appropriate time at which to take on board Robert Brown's comments about his amendment 544. Two different avenues are available to us in trying to achieve the same thing. Further discussion might produce a more tightly worded amendment that has broader support.

Nigel Don (North East Scotland) (SNP): I will briefly address amendment 378. As James Kelly noted, we have received several submissions on the issue. I do not buy them lock, stock and barrel, but there are important points in them. First, nowhere does the proposed new section describe the mischief that it seeks to address. That makes it wide ranging, so the court would be looking for any behaviour that happened to fit within the words. I wonder whether that is appropriate. Perhaps the provision should be drafted to address stalking specifically, if that is the intention, and any other issues that it is intended to address specifically. Obviously, that cannot be done now—it would be a stage 3 addition. I am slightly concerned that amendment 378 is too wide ranging and that the court and the Crown would get no inkling as to where the limits were intended to be.

Secondly, and perhaps more importantly, amendment 378 might make it difficult to say uncomfortable things in public. We as MSPs will appreciate this point. I go back to my days as a councillor, when I once had to address a public meeting on a local housing issue. The folk in the area did not particularly want to hear what I had to say to them, but I could make the points perfectly reasonably and the perfectly reasonable people in the room could hear them reasonably—they did not like what they heard, but they did not take offence. However, if a perfectly reasonable person in that meeting had been sitting next to somebody who was plainly agitated and had already made it clear that they were not happy with what was going to be said, it would perhaps have been reckless of me to say something, because that would have put the perfectly reasonable person in fear that the unreasonable person sitting next to them would react in a way that would be violent, aggressive or a breach of the peace.

By my reading, and that of others, that situation seems to be caught by the amendment. We would therefore find ourselves drifting in a situation in which the aggressive complainer could hold a public event to ransom. The fact that somebody might get cross about something could prevent people from saying things that were perfectly reasonable for anybody else to hear. I am deliberately pushing the situation to the limit to make the point that amendment 378 might be a little too wide ranging and might have unintended consequences. Am I happy that the Crown, the police and the courts can sort out such matters? Yes, but I am conscious that we are considering creating law whose boundaries would not be defined in the bill, and I think that the police, the Crown and the courts could do with a little more guidance on what we are trying to achieve.

The Convener: The series of amendments that Rhoda Grant, the Government and Robert Brown have lodged seeks to build on the protection that is given—largely to women—under the 1995 act. The case for all the amendments is arguable and they have merit.

As members know, my preference for all law is simplicity. To my mind, the catch-all offence of breach of the peace covers such offences. However, like other members, I have been persuaded by the evidence that we have heard that a change in the law is needed.

If we work from the premise that we should do something, it is clear that we must consider what is the best approach. First, we have amendments from Rhoda Grant on non-harassment orders, which would strengthen section 234A of the 1995 act. Amendments 400, 401 and 399 have considerable merit, but I am not persuaded that they are needed, given what the cabinet secretary said. In many cases, it will be entirely appropriate to apply for and make a non-harassment order, but I see dangers in having a blanket requirement to do so.

I turn to the offence of stalking. Having agreed that we should do something, we need to examine Rhoda Grant's amendment as opposed to the Government's amendment, although I acknowledge that the amendments are not mutually exclusive. I revert again to my wish for simplicity. There are dangers, so we should keep matters as simple as possible—I have a track record on that.

Amendment 378, which the Government lodged, presents possible dangers about which I have serious concerns and on which I will require reassurance at some stage. Subsection (1) of the new section defines the crime by how a reasonable person would interpret the behaviour that is complained of. I have no difficulty with that concept, which is much used in Scottish civil and criminal law. However, subsection (2) is a little less firm than I would prefer. It should require the conditions in both paragraphs (a) and (b), as opposed to either the condition in paragraph (a) or the one in paragraph (b), to be met. That would be a reasonable requirement.

My principal concerns are with subsection (3), which renders an accused person guilty of an offence when no alarm is caused and when nobody is even aware of the accused person's conduct. I appreciate the difficulties that the present law causes, but what is proposed is not the way forward. I have not been persuaded that the wording in subsection (3) is apposite. I have every confidence in our police and prosecutors, but to legislate in respect of acts in private that do not cause fear, alarm or distress is a little idiosyncratic. I know that amendment 378 is well intended, but I am a little concerned that its terms could cause difficulty.

It is ironic that Rhoda Grant's amendment 402 falls into the trap of seeking to define the conduct. In normal circumstances, that is a little bit dangerous. By their nature, such definitions cannot be exhaustive and we could leave ourselves open to challenge. I would be particularly grateful if, in summing up, Rhoda Grant gave the source of that wording. I am minded to support the amendment, but I seek that reassurance.

Robert Brown's amendment 402A is well thought out and was extremely well argued. A thin balance is involved and he has properly identified potential dangers. However, on balance, I am not persuaded, although I recognise the validity of the argument.

The matter is complex and important and the debate has been good.

10:45

Rhoda Grant: I have listened carefully to what committee members and the cabinet secretary have said. On reflection, given the concerns about amendments 399, 400 and 401, I seek leave to withdraw amendment 399 and will not move amendments 400 and 401. I will reflect further on those issues and will perhaps bring back the amendments at stage 3, but I understand that there are genuine concerns around them.

Several concerns were raised about substantive amendment 402. Robert Brown mentioned the proposed defences, which I think are quite robust; it would be for the court to decide whether a behaviour is reasonable. Stalking is by its nature made up of behaviours that are not in themselves illegal and indeed can be quite innocent. A defence of reasonableness would need to be left in for the courts to consider.

The cabinet secretary made clear his view that my amendment and his amendment are the same, but I am equally clear that they are not. They are quite different. It will be difficult for the cabinet secretary to rectify the problems that arise from the Harris v HMA case if he does not deal precisely with stalking. The nature of stalking means that we need a very clear law that makes it an offence.

Bill Aitken mentioned the definition of stalking. Amendment 402 makes clear that the list of behaviours is not exhaustive. If we included an exhaustive list, a stalker would immediately find a way round it. In their evidence to the committee, the police discussed the benefits of having a list of behaviours. Such a list would enable them to identify more easily the type of behaviour that makes up stalking, to begin a prosecution and to help witnesses much earlier.

It is therefore right to have a definition, as is the case in Australia and America. We have heard examples of how the law works better in those places than it does in England and Wales. The list is not exhaustive but merely gives examples of that type of behaviour.

Given that the amendments are so different, I intend to press amendment 402, because it is important. If the Government has concerns about any aspect, it could make small amendments at stage 3, but we need a crime of stalking. The committee needs to send out a clear signal that such behaviour is totally unacceptable, and I ask it to support amendment 402.

The Convener: I should have given the cabinet secretary another bite at the cherry. Do you have anything to say?

Kenny MacAskill: I have listened to the committee's comments, and I think that Stewart Maxwell's suggestion is appropriate. We understand the committee's desire to address the situation, and it appears that there are two matters to be dealt with. The Harris v HMA case requires to be addressed; I say to Robert Brown that, in the view of the Crown and of many legal practitioners, the offence of breach of the peace will remain and the common law will still be in place. Indeed, there may be further High Court matters that relate to the issue.

Rhoda Grant and the various campaigners are right to raise the issue of stalking. The Crown has offered good views on why one law is preferable to two, and we have to work out the concerns that the convener and others have raised. I am happy not to move amendment 378, to discuss those matters with Rhoda Grant and to come back at stage 3 with an amendment to address them. For clarity's sake, so that the law is understandable to all, it should be possible to corral the two issues together in one or two subsections.

I am happy to work with the Crown, which is not represented at today's meeting but which has a vested interest, and with Rhoda Grant, to find out whether we can reach a compromise. The general will of the committee is that we address the loophole created by the Harris v HMA case and that the bill should specifically mention stalking. The Government believes that less law is better, so it would probably be better to have one amendment rather than two.

The Convener: That is a constructive contribution.

Amendment 399, by agreement, withdrawn.

Amendments 400 and 401 not moved.

The Convener: Amendment 5, in the name of Rhoda Grant, is grouped with amendments 6 and 7.

Rhoda Grant: A non-harassment order is an order that gives a victim protection from further abuse. The order comes with powers of arrest, and breach of the order is a criminal offence. The purpose of amendments 5 to 7 is to place it beyond doubt that evidence of a course of conduct is not required before a criminal court can grant a non-harassment order. For a course of conduct to be shown, there must be a conviction, which requires there to have been conduct on at least two occasions that has caused harassment. Currently, a procurator fiscal can apply for a non-harassment order where the accused has been convicted of an offence or offences involving a course of conduct of harassment. However, normally the prosecution focuses on one incident of criminal behaviour, which means that it is unlikely that the conviction will amount to a course of conduct.

In the case of domestic violence, getting evidence of one incident is difficult, because the behaviour tends to occur away from witnesses and is difficult to corroborate. Victims may also try to hide their abuse, as they feel shame and a degree of responsibility for what has happened to them. For that reason, victims seldom make complaints. However, when a victim provides the authorities with proof of their abuse, it is important that protection from future abuse is provided.

The bill seeks to address the issue by proposing that previous convictions may be taken into account to prove the course of conduct that is needed to secure a non-harassment order. The policy memorandum states that the Government's aim is that evidence of a course of a conduct should not be required. However, I fear that that is not made clear in the bill and that a victim may still have to wait until their abuser has been successfully convicted of more than one offence before the prosecutor can seek a protection order on their behalf.

As the purpose of a non-harassment order is to protect a victim against future abuse, one incident should be sufficient for us to consider whether there is a risk of future harm. A victim should not be abused twice before the state steps in to protect them. My amendments make it clear that a non-harassment order should be granted after one conviction for a single offence.

I move amendment 5.

Kenny MacAskill: We fully understand Rhoda Grant's sentiments. However, section 15 already provides that a non-harassment order may be made after a conviction for a single offence. Ms Grant's amendments do not alter the overall effect of the section in any way, so we ask her to withdraw or not move them on the basis that they are not necessary.

The Convener: Amendment 5 is entirely meritorious, but I question its necessity, given the other provisions in the bill.

Rhoda Grant: I seek leave to withdraw amendment 5, as the cabinet secretary has given the reassurance that I sought. He has indicated that evidence of a course of conduct is not required before a non-harassment order may be granted. It is important to have that on the record and to remove any doubt, as the bill is not totally clear on the matter. I am grateful to the cabinet secretary for the reassurance that he has given.

Amendment 5, by agreement, withdrawn.

Amendments 6 and 7 not moved.

Section 15 agreed to.

Section 16 agreed to.

Section 17—Presumption against short period of imprisonment or detention

The Convener: Amendment 100, in the name of Robert Brown, is grouped with amendments 101, 388, 1, 392 and 393.

Robert Brown: Section 17 is one of the most important sections in the bill. I will deal with it at two levels: the principle and the practicalities. In principle, the policy intention of section 17 is not just right, founded solidly on professional evidence and recommended by the McLeish commission and by many other practitioners in the field, but vital if Scotland is to protect victims of crime in the most appropriate way—by reducing the risk of the crime happening in the first place and the risk of recurrence.

It is right that there should be not a bar on, but rather a presumption against, short-term sentences. Despite popular mythology, short-term sentences do not work. In the vast majority of instances, they do not deter criminals. If they do, why are an incredible 91 per cent of inmates at HM YOI Polmont there for a second or subsequent time?

Short-term sentences do not protect the public, except by offering a short period of relief from criminality. I do not underrate the value of that, but, nevertheless, it is limited. The sentences are short and the vast bulk of those who serve them come out more hardened and more likely to reoffend than they were when they went in.

Short-term sentences do not begin to tackle the causes of offending, which are often rooted in bad parenting, neglect, lack of bonding, illiteracy, lack of skills, unemployability, drug or alcohol addiction and, too often, mental health problems. How could such things be tackled in a short period in prison? Instead, short-term sentences put a lot of bad boys—it is mostly boys—together. They separate them from their families, which I admit is not always a bad thing, and render their chances of current or future employment negligible.

Short-term sentences do not provide reparation to the victim in the way that a compensation order or a community payback order can. In short, it is doubtful whether, for most offenders, short-term sentences fulfil any of the classic functions of sentencing. I wonder whether the committee recalls the evidence of Dr Sarah Armstrong of the University of Glasgow that

> "short prison stays are not only ineffective but criminogenic."—[*Official Report, Justice Committee*, 2 June 2009; c 2018.]

I had not heard the word "criminogenic" before, but I think that we understand what Dr Armstrong was getting at.

I turn to the practicalities of the Government's proposals. It is an absolute requirement that the reduction in short-term sentences has public confidence. That means that an increased number of timely and effective community sentences must be available, along with the add-on of action on unemployability, addiction and various other problems, which the bill rightly emphasises and which we have supported in previous sections.

My amendment 100 and its consequential amendment 101 would reduce the period in the presumption against short-term sentences from six months to three months. That is for two reasons. The first is that although any period is arbitrary, the spread of crimes that receive sentences of under three months looks pretty much like the spread of crimes that receive other, non-custodial disposals and the spread of crimes that receive three-to-six-month sentences tend to look rather more like the spread of crimes that receive longer sentences. There has been a certain amount of comment about the sort of people who would be affected by the arrangements.

The second reason is that the reduction to three months would make the whole system more manageable and affordable by reducing the number of cases involved. Given the financial pressures and the need to bed in the new arrangements successfully, such a change would be helpful.

Amendment 388 is intended to make central the numbers affected and the linked funding. Public confidence in the system is vital. The Government must demonstrate publicly and specifically, before bringing section 17 into effect, that it has a clear handle on the numbers, that the additional cases requiring community service orders will be funded and that community justice authorities have the capacity to deliver the goods.

I am grateful to the Government for the additional funding that it has provided to improve existing community orders. That funding is manifestly having an effect, but we know that the quality of orders is patchy across the country. We know, too, that reoffending rates will be lower with the most effective interventions and that the additional orders consequential on section 17 will need yet more funding in what we know are stringent financial times. The Government should be clear that the improvement funding cannot be double counted to pay for the increased number of community sentences, too.

Amendments 392 and 393 are consequential on amendment 388.

It follows that I urge the committee to reject Richard Baker's amendment 1, both for the obvious reason that I think that it is wrong in principle and flies in the face of common sense, and because it is clear that it is likely that there will be a parliamentary majority for some form of amended section 17. Among other things it is the committee's job to reflect that reality to ensure that section 17 passes into law in the most effective fashion and after the most detailed of scrutiny.

I move amendment 100.

11:00

Richard Baker (North East Scotland) (Lab): The proposal for a legislative presumption against custodial sentences of six months and under has been a focus for debate. My amendment 1 seeks to give effect to the conclusion in the committee's report that the proposal should not proceed. I am grateful for the convener's support for my amendment; he has previously highlighted some of the key concerns about this ill-judged proposal.

I am confident that our judiciary already seeks to use imprisonment as a last resort and only in cases in which the offence has been serious. For more minor offences, such as fine defaulting, we have already seen great reductions in the number of offenders receiving custodial sentences. The presumption will create an unnecessary bureaucracy by having courts provide reasons for imposing sentences of six months or under, which will delay court processes, but it is not just about that. The policy drive that was first outlined in the Scottish National Party's 2007 manifesto was clear that in all but the most exceptional circumstances such custodial sentences would no longer apply.

Ministers have made it clear that the proposal is an arbitrary measure to reduce the prison population and to make savings on that basis, but the cabinet secretary's officials made it clear to the Finance Committee that the proposal would not produce savings in the prison estate because the infrastructure would need to be maintained. The crucial issue is that the interests of justice must be paramount; therefore, sentences should be based on what is just and appropriate, not simply on prison capacity. To do otherwise is not to serve the victims of crime.

The presumption applies not only to minor but to serious offences. It would apply to 40 per cent of those convicted of indecent assault, to 88 per cent of those convicted of crimes of dishonesty and, particularly seriously in our view, to two thirds of those convicted of knife carrying. In its evidence, Scottish Women's Aid highlighted that the presumption could

> "have a negative impact on women, children and young people experiencing domestic abuse."

When I quizzed the First Minister on the matter, he said that serious crimes should receive longer sentences, but that is to seriously misrepresent the presumption. There is no proposal that such offenders should receive longer sentences; there is a proposal only that there should be a presumption against their serving any custodial sentence. That is what the Government's plans arbitrarily to reduce the prison population are all about.

The argument is made that those who go to jail are more likely to reoffend—Robert Brown made that argument again today—but the unfortunate reality is that by the time that an offender receives a custodial sentence they will normally have received numerous different disposals for other offences. They are, by definition, a repeat offender by the time that they go into prison. Even those who agree with the presumption point out that it must be accompanied by increased investment in more effective community sentences. Instead we have seen cuts in funding to those organisations with expertise in addressing reoffending, the Scottish Government has vetoed the establishment of the community court in Glasgow, and we believe that there is a funding gap of tens of millions of pounds in the Government's plans, which will demand thousands of additional community sentences.

Despite Robert Brown's support for the Scottish Government's general approach, his amendment 388 and related amendments, and his amendment 102 in the next group, highlight the awareness that the extra investment in robust community sentences that is needed to give any logic to the proposal is simply not there. Indeed, it is from information revealed to Robert Brown that we know that only a fraction of community sentences start within the target period of seven days. We also know that, under the current Government, a third of community sentences are being breached. I simply do not recognise the improvement to which Robert Brown referred. The paucity of robust alternatives to custodial sentences under the current Government means that the proposal is not only nonsensical, but detrimental to community safety and certainly to the justice system. The same principles apply to Robert Brown's proposal to change the presumption to one against custodial sentences of three months and under. For example, it would cover 28 per cent of those convicted of indecent assault, over half of those convicted of crimes of dishonesty, and a third of those convicted of knife carrying. We will oppose amendments 100 and 101 and, on the basis that we seek to remove section 17, we will oppose Robert Brown's amendment 102 in the next group.

Angela Constance (Livingston) (SNP): I cannot support the detail of Robert Brown's amendments 100 and 101, but I support in principle his logic in eloquently arguing against short-term sentences. I say with respect that amendments 100 and 101 are somewhat too cautious, although they are preferable to the status quo.

The presumption against short periods of imprisonment or detention is bold and radical, and the matter has provoked considerable debate, but we need to grasp the nettle. Of course, the Government and members of the committee are clear that those who have committed crimes against people should be imprisoned, arguably for much longer than six months, but politicians have a responsibility to show leadership in the debate, which must be progressed in a rational and calm manner, rather than by blatant tabloid politicking. We will make our communities safer only when we have the courage and conviction to implement what actually works.

Members are entitled to focus on finances, but my experience of individuals and organisations working in the field to implement community sentencing is that they say that there has been much improvement in delivery times. I do not think that, on the cabinet secretary's watch, people have waited nine months to have community sentences implemented. Finances are important, and the cabinet secretary will no doubt have something to say about them, but organisations that represent the social work profession seem to be up for the change. I have not heard any substantial organisation that works in the field arguing against the presumption against six-month sentences on the basis that we cannot aspire to deliver something better in terms of community sentencing.

I stress the importance of leadership and having courage. If we want to make communities safer, we must focus first and foremost on what actually works to deliver that.

James Kelly: I support amendment 1 and oppose amendments 100, 101 and 388.

One of the arguments that is used by those who argue for a presumption against short-term sentences relates to the level of reoffending by people who have left prison. I acknowledge that that is an issue that needs to be addressed and that we cannot run away from it, but I do not accept the argument that someone who has reoffended should not be sent to jail, but should be given a community sentence instead. I still think that prison is an adequate punishment in appropriate circumstances. There is a public safety issue. Individuals who have committed indecent assault or domestic abuse crimes or have carried a knife are a threat to the public, and there is a strong case for sending them to prison as opposed to giving them community sentences.

The challenge for the Government and for all political parties is to consider how we can make prison work better. We need to consider organisations such as the Wise Group, which has done much effective work through life coaches to try to ensure that people who leave prison go into more stable situations and do not reoffend.

There are serious questions to do with the funding of community payback orders. I support the principle of community sentences, which have an appropriate role to play, but the policy of a presumption against short-term sentences will result in an increase in community sentences and the financial memorandum is a little unclear about the extent to which that will happen. I asked officials about that when they gave evidence to the Finance Committee, but they did not seem to have a grasp of the details. Discussions that have taken place since then have not convinced me that officials have an appropriate handle on the issue. The increase in community sentences that would result from the bill could result in increased costs of up to £20 million per year over a three-year period. There is potentially a £60 million black hole.

In all, there is an issue about the policy of a presumption against short-term sentences, and community sentences are not funded appropriately. I support amendment 1 and oppose the other amendments in the group.

Kenny MacAskill: The presumption against custodial sentences of six months or less has been the subject of some debate and attacks by parts of the Opposition. We do not doubt that members' motivation, like that of the Scottish Government, is to make our communities safer, but members have not been clear about why they oppose our proposals and what they would do instead.

Our approach is plain. We will make Scotland safer by making low-level criminals face up to the challenge of turning round their behaviour and repaying their communities for the damage that they have done. That is better than the alternative of a short custodial sentence, for reasons that the Justice Committee set out clearly in its stage 1 report. Custodial sentences of six months or less do not work and do not stop offending behaviour. The figures show that three quarters of people who are released from short sentences go on to reoffend within two years of getting out, whereas, in contrast, three out of five people who are sentenced to community punishment do not go on to reoffend over the same period.

There will be some cases in which a court decides that a short custodial sentence is the only appropriate option. If we were proposing to prevent courts from imposing such sentences in those cases, the Opposition's criticism might be right, but we are not making such a proposal. Courts will still be able to use their discretion, and there will be no statutory bar. The sentence will remain a matter for the presiding sheriff.

Our policy is exactly in line with the unanimous view of the Justice Committee. Short sentences will not make Scotland safer, but in some cases they cannot be avoided. The bill reflects that unanimous view by presuming against use of short sentences but allowing for their use when that is needed. That is why our proposal is the right proposal and the right way to make Scotland safer.

Amendments 100 and 101, in the name of Robert Brown, support the principle of a presumption against short custodial sentences. Indeed, the "Pocket Guide to Scottish Liberal Democrat Policies", which was published last month, acknowledges:

> "there is clear evidence that very short prison sentences simply reinforce offending behaviour."

The document goes on to say that the Liberal Democrats in Scotland will

> "end the 'revolving door' prison system by replacing very short sentences, which are ineffective and expensive, with tough community penalties where offenders can pay back the communities they have harmed."

The main area on which we appear to differ is the period to be specified in that presumption—although we would not know that from the Scottish Liberal Democrats' policy guide, in which no cut-off point is specified. Robert Brown's amendments would set the cut-off point at three months, but we remain unconvinced of the wisdom of such an approach. The offences for which prisoners receive a sentence of three months or less are not significantly different from the offences that receive sentences of six months or less. Most sentences of six months or less are given for a small group of offences, of which the most common are shoplifting, breach of the peace, breaches of bail or social work orders, common assault and handling of an offensive weapon. Those are also the most common crimes in the list of offences that receive a sentence of three months or less.

11:15

We believe that we can achieve more if we have the courage of our convictions now to create a presumption against sentences of six months or less. The backstop will be the same, irrespective of which option we choose, because judicial discretion will remain intact. Sentencers will still be able to impose a custodial sentence, in either scenario, if they consider that the circumstances of the case leave them no alternative.

If we are to make a difference, we must seize the opportunity before us. We will make Scotland safer by making low-level criminals face up to what they have done, change their offending behaviour and pay back to their communities for the harm that they have inflicted. That makes far more sense than the alternative of a short custodial sentence, for reasons that the committee set out clearly in its stage 1 report. Custodial sentences of six months or less do not work and do not stop offending behaviour. The evidence does not suggest that changing to a presumption against sentences of three months or less would make the provision any more effective or have any better impact on reoffending.

We do not accept that there is anything to be achieved by delaying the commencement of section 17, as proposed by amendment 388. That amendment seeks to provide that the presumption may not be brought into effect until the Scottish ministers lay before the Parliament a report setting out the expected impact of the presumption in terms of the reduction in the number of prison sentences, the increase in the number of community payback orders, the increase in the costs for local authorities and the additional funding that will be provided to meet the expected pressures on local authorities.

The financial memorandum already sets out in some detail our costings for a range of increases in the number of community payback orders. We have repeatedly made it clear that we expect most of the increase to come from a change in judges' sentencing patterns, with reduced use of short prison sentences offset by an increased use of the community payback order.

We have already said that, in 2010-11, £6 million more will be provided to support improved service delivery of community penalties and to resource the initial increase in community payback orders. We have said that that will be baselined, which will ensure that at least current funding levels for community penalties will be the top priority when decisions are taken for 2011-12. We have said that we will monitor increases in uptake very closely and work with local authorities to assess the need for additional funding. In the absence of clarity about the likely total Scottish budget from 2011-12 onwards, it would be difficult to do more. I urge members to resist amendment 388.

Amendments 392 and 393 would ensure that the Scottish ministers could not commence section 17 using the normal procedure but would need to lay an affirmative order on which the Parliament would be required to vote. If the Parliament agrees to section 17, what would be the point of requiring another vote at the point of commencement? We urge the committee to resist amendments 392 and 393.

I ask the member to withdraw amendment 100.

The Convener: I call Robert Brown to wind up the debate and to press or withdraw amendment 100.

Robert Brown: I am bound to say that there has not exactly been a meeting of minds in the debate. I am somewhat disappointed by the cabinet secretary's response to what were intended to be helpful amendments, around which I think that the Parliament could to some degree coalesce. The debate has perhaps had some of the overtones of debates once seen on abortion, in which there were no doubt good views on either side that never seemed to meet in the middle.

This is an important debate—no one around the table disputes that—and it is important that we get it right, given the need for public confidence in the system that I emphasised earlier. Against that background, it is particularly disappointing that, although the cabinet secretary talked about baselining existing funding to improve the current system, he did not deal with the resourcing of the increased number of community sentence orders, on which the whole of section 17 is postulated. That is a central point on which the SNP Government needs to engage more than it has done so far.

I found it interesting that the cabinet secretary endeavoured to cast doubt on the Liberal Democrat position on the issue, but there has never been any doubt about our position. We support a reduction in the use of short-term sentences, and we have always said that three months is the appropriate period. One good reason why that is a good idea in the context of this debate is that such a policy would, broadly speaking, halve the number of additional community sentences that would be required. Whether or not three months was a lead-in to a longer period or an end position in its own right, the same argument prevails.

On the other side of the argument, Labour members have made very little attempt to engage with the key debate. What works? Does prison work or does it not? If prison works, in what way does it work? No speaker today has demonstrated that prison does the trick other than in the limited terms that I conceded at the outset: removing malefactors from the community for a few weeks, a couple of months or whatever gives people an element of relief.

There is also a degree of contradiction in the argument. On the one hand, there are many platitudes about how community service orders are a good thing that we all support. On the other hand, there is no commitment to say, "Okay, if that is the case, what are the mechanisms that would bring about a greater use of community service orders in an effective fashion without risk to the public, about which people are concerned?" My amendments in the group were designed to deal with that. Angela Constance made the good point that social workers are up for change in this respect, as are many other professionals.

I concede one point, which is Richard Baker's point on prison numbers. It is clear from all the evidence that the proposed changes to section 17 will not lead to any significant savings in the prison budget. Given the level of overcrowding, that is certainly the case in the short to medium term. Of course, overcrowding is a major reason behind the McLeish commission's recommendation to do something about short-term sentences. Overcrowding impacts not only on those on short-term sentences, but on our ability to resource and deal properly with those on longer sentences who represent a much more serious threat to the public.

I readily accept that this is not entirely a black-and-white issue. That said, as a committee, we ought to proceed—as we have done in the past—on the basis of what the research and other professional evidence has shown to work. The reality is: short-term sentences do not work. We should proceed on the principle that the right approach is to do something better—in this case, community sentences—and then to look at the detail of what takes place. I warn the Government that, if the matter is to be taken forward effectively, it must engage with those who are broadly on its side of the argument. It will have to do that if the proposition that it puts to the Parliament is to command the consent of the chamber. I will press amendment 100.

The Convener: The question is, that amendment 100 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)

Against

Aitken, Bill (Glasgow) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 7, Abstentions 0.

Amendment 100 disagreed to.

Amendment 101 not moved.

Amendment 388 moved—[Robert Brown].

The Convener: The question is, that amendment 388 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)

Against

Aitken, Bill (Glasgow) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 7, Abstentions 0.

Amendment 388 disagreed to.

Amendment 1 moved—[Richard Baker].

The Convener: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

I use my casting vote in favour of the amendment.

Amendment 1 agreed to.

The Convener: Given the controversial nature of the matter, I will give my reasons for using my casting vote for the amendment. I agree with Robert Brown that the debate is important. Although there was no meeting of minds, the debate was carried out in an appropriate and measured manner.

I support Richard Baker's amendment 1 and oppose the Government stance on amendment 1 for two reasons. First, the Government does not seem to appreciate the existing presumption against such sentences. Richard Baker referred to that. No judge in Scotland, at whatever level, will impose a prison sentence if there is any possible alternative. Depriving someone of their liberty is a terrible thing to do; it is never done readily or easily. Secondly, as we know, the vast majority of summary cases are disposed of by monetary penalty.

The cases that are likely to be dealt with through custody are fairly serious, for example the drunk driver with four or five convictions who drives while disqualified; the person who has been found guilty of domestic violence, with previous convictions; the person who has been convicted of minor crimes of dishonesty 30 or 40 times; and the small-time drug dealer. To my mind, all those cases deserve appropriate custodial sentences. Although I accept the cabinet secretary's argument that the provisions as they stand would not preclude that, they seek to inhibit it.

If the community payback orders are to work as we all hope that they will—and we will do everything possible to support them—there will require to be a custodial alternative to persuade the offender that, if he does not mend his ways, custody is likely. The bill's proposals, prior to amendment 1 being agreed to, removed that deterrent.

After section 17

The Convener: Amendment 102, in the name of Robert Brown, is in a group on its own.

Robert Brown: I will not dwell on the amendment in detail. It provides a useful requirement on the Government to produce a report on how well sections 14 and 17, on community payback orders and—when the provisions are agreed to—short-term sentences, are working.

Five years is a reasonable time over which to gauge how those important changes are working, where they might be deficient and whether they could go further. The public might regard that as useful further reassurance that we have got these reforms right, and such a requirement is a further exercise in accountability.

Cathie Craigie might recall that we did something similar with the changes to the right to buy when we were on the Social Justice Committee, and those measures provided a useful lever for reconsidering the policy and effects at a later stage, after things had developed.

I move amendment 102.

The Convener: I have often felt that the Parliament, under Governments of either persuasion, has been sadly remiss in not revisiting the effects of our legislation. There are merits to Robert Brown's arguments.

Kenny MacAskill: As Robert Brown said, amendment 102 seeks to introduce a further reporting requirement that, within five years of sections 14 and 17 coming into force,

> "The Scottish Ministers must ... lay before the Scottish Parliament and publish a report on the operation of those sections."

Such a report must

> "include an assessment of whether and to what extent those sections, individually or collectively, have—
>
> (a) reduced offending,
>
> (b) increased public safety."

Five years is a long time hence. We think that we should instead focus on getting good-quality performance information on the impact of the community payback order in the short term. In responding to amendment 99, on the community payback order, we offered to write to the committee, setting out our programme of work in that regard. We are happy to undertake to continue to keep the committee abreast of developments. We invite the member to withdraw amendment 102.

Robert Brown: The assurances that the cabinet secretary has given are useful, but they do not offset the need and desire for a report. Therefore, I press the amendment.

The Convener: The question is, that amendment 102 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

Abstentions

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 2, Against 3, Abstentions 3.

Amendment 102 disagreed to.

The Convener: The amendment falls, despite my best efforts.

Section 18 agreed to.

Schedule 2 agreed to.

Sections 19 and 20 agreed to.

After section 20

The Convener: Amendment 103, in the name of Bill Wilson, is in a group on its own. I welcome Bill Wilson to the committee.

Bill Wilson (West of Scotland) (SNP): Amendment 103 allows judges to order independent inquiries into an organisation's finances, following that organisation's conviction. It also provides a sequence of priority for the payment of money to the court. That sequence is: a compensation order—that is, victims' compensation; the repayment of the cost of the report, as it is my intention that the convicted company could be charged for the cost of the report; and the payment of any fine.

11:30

I will clarify one thing before I say anything else. At the start of this parliamentary session I lodged a proposal for a member's bill, which contained one part on equity fines and one part on background reports. I am aware that there is slight confusion about my proposal, which I have split. This amendment is separate from my proposal on equity fines, which is going ahead as part of my member's bill. When I ran the consultation on my original member's bill, which included the two parts, I consulted on both what is now the member's bill and this proposal on background reports. I consulted a wide range of organisations and received responses from academic experts, trade unions, campaigning organisations and the Confederation of British Industry. All the responses that I received either did not mention background reports or expressed unequivocal support for background reports. No organisation expressed any opposition to the idea of background reports.

Moreover, company background inquiry reports were recommended by the Scottish Executive's expert group on corporate homicide in 2005 and by the English Sentencing Advisory Panel in its consultation paper on corporate manslaughter and corporate homicide. There is also a body of academic work that supports the principle of background reports—for example, "Sentencing the corporate offender: Legal and social Issues" by Croall and Ross, 2002, and "Sentencing and Society: International Perspectives" by N Hutton and C Tata, 2002. There is a solid body of evidence in favour of company background reports.

It strikes me as ridiculous that we rely on convicted companies to provide the reports that will influence the level of fine. That is the equivalent of a judge sternly wagging his finger at a convicted housebreaker and saying in a severe, if not downright angry, tone, "You are a terribly naughty fellow. Now, please tell me how big a fine you can afford to pay."

I move amendment 103.

The Convener: Thank you for that amusing presentation. Do any other members want to say anything?

Bill Butler (Glasgow Anniesland) (Lab): Just that I think that the amendment makes good common sense and is worthy of support. It would prevent the ludicrous, albeit exaggerated, situation that Dr Wilson cited in support of this most necessary and timely reform.

Kenny MacAskill: We are grateful to Dr Bill Wilson for lodging amendment 103 and agree with Bill Butler's comments. We are aware that there is a public perception that convicted organisations currently have only minimal fines imposed on them, which are not sufficient to act as an effective deterrent. That perception has, understandably, resulted in calls for further legislative changes to be made to ensure that courts are able to impose appropriate sentences.

The difficulty in practice is that, as Bill Wilson pointed out, courts often do not have sufficiently up-to-date information about the state of an organisation's financial health prior to sentencing. That issue was highlighted by the High Court in 2009, when the Crown appealed the level of a fine in a case that involved the death of a member of the public due to breaches of the Health and Safety at Work Act etc 1974. In its opinion, the High Court made it clear that the information that was provided to the sentencing judge at the original trial and, subsequently, to itself was less than might have been hoped for for sentencing purposes. The expert group on corporate homicide also illustrated the difficulties that courts face in relation to the issue in its 2005 report.

Not only is there a public perception that fines for convicted organisations are not sufficient; the courts and other experts have highlighted the fact that there is an issue that needs to be resolved. We are also pleased that amendment 103 will be, as far as possible, cost neutral to the criminal justice system. We therefore support the amendment.

Amendment 103 agreed to.

Sections 21 to 23 agreed to.

The Convener: As we are approximately halfway through this morning's proceedings, I propose that we take a short break.

11:34

Meeting suspended.

11:43

On resuming—

The Convener: I welcome to the meeting Trish Godman MSP, who has joined us for a discussion on amendments that we will get to later—I hope.

Section 24—Voluntary intoxication by alcohol: effect in sentencing

The Convener: Amendment 104, in the name of Robert Brown, is in a group on its own.

Robert Brown: Amendment 104 simply proposes that section 24 be deleted. In my view, the Government is trying to fiddle about with something that does not need fiddling about with. This provision is highly likely to have unintended consequences or will, at the very least, give enormous scope for legal wrangling over a matter that is already well understood by judges.

I have heard people say that defence lawyers are always claiming that their clients are very sorry but they did what they did under the influence of too much bevvy. In my time, I have been a prosecutor and a defence solicitor and I am pretty clear that, if the aim is to achieve a lesser sentence, such pleas, which are made not least by solicitors struggling to say anything useful about their clients, just will not wash with the magistrate or sheriff. Of course, even though it is not a mitigating factor—the mitigatory element is, I must say, one of the oddities in this whole matter—the fact that something needs to be done about an alcohol problem might well be relevant to the sentence. Certainly such information is vital for community orders or, for that matter, the prison concerned.

As we discussed at stage 1, section 24 might also cause problems with regard, for example, to genuine cases of people getting drunk in the face of bereavement or in other sympathetic circumstances and there is a risk that we might be entangling ourselves in an issue that I really do not think gives courts that much of a problem.

I move amendment 104.

Stewart Maxwell: I oppose amendment 104 on a number of grounds. First, Robert Brown is simply wrong to claim that the defence is not used by solicitors to get their clients off—it is. The amendment sends out entirely the wrong message about the use of alcohol and offences that are committed while under its influence. It is right and proper that we make it crystal clear that such behaviour is unacceptable.

Robert Brown's second point concerned mitigation when someone is bereaved, has taken alcohol and has subsequently been charged with an offence. The mitigation in such cases relates not to alcohol but to the fact that, due to bereavement, the person is suffering severe stress and upset. The member is wrong in fact when he claims that such circumstances could no longer be used as mitigation. The bill in no way prevents defence lawyers from offering them as mitigation or courts from taking them into account. For that reason, I oppose amendment 104.

11:45

Bill Butler: I support amendment 104. Robert Brown has made a good case. The provision that he seeks to remove is unnecessary and superfluous. We do not need it, as everything that is necessary is already in the mix.

The Convener: I have already indicated support for Robert Brown's amendment 104. Stewart Maxwell is correct to say that the fact that the conduct that has been complained about has been committed while under the influence of drink is brought to the court's attention in a number of cases, but it is never seen as a relevant plea in mitigation. As Robert Brown suggested, frequently the issue is brought to the court's attention to guide it—hopefully, from the accused's point of view—down the road of a probation order, with appropriate conditions relating to alcohol treatment. I cannot conceive of a court accepting as a mitigation the fact that an offence was committed under the influence of drink; in most instances, it would be regarded as an aggravation. That addresses the point that the Government makes. In my view, section 24 is unnecessary.

Kenny MacAskill: I agree entirely with Stewart Maxwell. Amendment 104 seeks to leave out section 24. The provision forms part of our comprehensive framework for action to rebalance Scotland's relationship with alcohol. We know that alcohol fuels much criminal offending. There is a strong link between alcohol misuse and offending, especially violent offending. In spite of the courts' understanding, there is evidence that time and time again voluntary intoxication is put before them as a mitigating factor. That happened throughout the 20 years during which I practised law; it has continued to happen during the 11 years since I left the practice of law.

In her evidence to the committee, the Lord Advocate said:

> "Day in, day out, notwithstanding the understanding that it does not mitigate, solicitors continue to put it before the courts in mitigation that their client would not have carried out the crime if sober. That is particularly prevalent as an excuse or as a form of mitigation in domestic abuse cases."—[*Official Report*, *Justice Committee*, 9 June 2009; c 2060.]

We do not accept that the provision in the bill would prevent the court from considering the underlying reason for an offender's intoxication as a mitigating factor—Stewart Maxwell referred to bereavement—although the intoxication itself cannot be a mitigating factor. We also do not accept that the provision implies that the position in respect of other forms of intoxication must be intended to be different. The key issue is the high level of offending that is associated with alcohol.

We invite the member to withdraw amendment 104 and to support the Lord Advocate and those in our courts who, as she said, day in, day out have put before them the excuse that it was the drink that done it. The time has come to rebalance our relationship with alcohol, in the courts as well as outwith them.

Robert Brown: The cabinet secretary has entirely missed the point. As I indicated, solicitors may well present such information to the court, in mitigation or otherwise. The practice is particularly noticeable among more junior solicitors, when they first appear in court on such matters. That is entirely different from saying that the court takes notice of alcohol as a mitigatory factor. I would be extraordinarily surprised if any sheriff or magistrate in Scotland did that.

As the convener and I have indicated, the fact that someone has an alcohol problem or that there is some background of that sort is relevant and needs to be taken into account when consideration is given to what sentence should be imposed, as it might well be important information in that context. I just do not accept the suggestion that section 24 is part of the Government's broader strategy on alcohol, for which I would imagine that there is unanimous support among committee members.

Apart from any other considerations, it is an odd proposal to make. The provision in section 24 focuses on drink. Most of us know that drug taking is often put forward as a mitigatory factor, but section 24 does not deal with drugs. Why is drink singled out? One could make the case that drink is just one form of drug. It is an odd provision that does nothing to enhance the professional practice of the courts. It might make a difference to what solicitors put forward in court, but that is not the issue. The issue is what the courts do with such information when it is put forward. Section 24 is misconceived, so I will press amendment 104, which seeks to remove it from the bill.

The Convener: The question is, that amendment 104 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 104 agreed to.

After section 24

The Convener: Amendment 105, in the name of the minister, is grouped with amendment 184.

Kenny MacAskill: Amendment 105 provides that the Scottish ministers may, by affirmative order, make provision for the implementation of the European Union framework decision on the mutual recognition of judgments and probation decisions, including the modification of existing legislation, if required.

The framework decision provides for a person who has been sentenced to a community sentence or a suspended custodial sentence, or who has been released from custody on licence, in another EU member state to request a return to his or her home country and for the conditions that are attached to his or her sentence to be supervised in that country. The aims of the decision are improved rehabilitation and public protection. By taking the proposed enabling power, we will be able to make the necessary changes to Scots law to ensure that we can comply with the framework decision by the deadline of 2011.

Amendment 184 provides that any order that is made on the implementation of the EU framework decision must be made by affirmative order.

I move amendment 105.

Amendment 105 agreed to.

The Convener: Amendment 10, in the name of Richard Baker, is grouped with amendment 10A.

Richard Baker: Along with our concern about the proposal for a presumption against custodial sentences of six months or less, our other key concern has been about the absence from the bill of provision for the action that is required to tackle violent crime, in particular knife crime. We seek to remedy that through amendment 10, which would give effect to the proposal for a system of mandatory minimum sentences for knife carrying.

Scotland still suffers from rates of violent crime that are higher than those anywhere else in the United Kingdom, and knife crime remains at persistently high levels. Research by the Institute for Public Policy Research highlighted that violent crime accounted for 30 per cent of crime in Scotland but only 20 per cent of crime in England and Wales. In 2007-08, 8,989 offences of handling an offensive weapon were recorded by police. In 2008-09, there were only nine fewer such offences. Only 29 per cent of those who were convicted of such offences received a custodial sentence. Of course, if a presumption against custodial sentences of six months or less, or three months or less, continues to be pursued, even fewer of those offenders will receive a custodial sentence. The cabinet secretary referred to the number of such sentences for knife offences when we discussed section 17.

We do not believe that the situation is appropriate. Given the persistently high levels of knife crime, we believe that the sentencing regime for knife carrying must change. That is why I propose a mandatory minimum custodial sentence of six months for knife carrying, except in exceptional circumstances. That would put knife offences on the same footing as firearms offences, which already carry a mandatory minimum sentence of five years' custody. Far more people in Scotland are killed with knives than with firearms. Last year, knives were responsible for 58 per cent of homicides in Scotland, which is the highest percentage ever recorded.

There has been debate about the cost of our proposal due to its impact on prison places. Robert Brown has said that it would cost £23 million. However, that presumes that the policy would have no deterrent effect, which we do not accept, and it needs to be balanced with other factors including the recent estimate that, last year, injuries resulting from knife crimes cost the national health service in Scotland £500 million. Furthermore, we do not accept the counsel of despair on the impact of prison. The argument is made that rehabilitation cannot take place in custody over that period, but we believe that that notion should be challenged and that greater efforts should be made to engage in rehabilitation in prison. Why should we accept the status quo, if that is what it is?

The other key fallacy in the debate has been the argument that those who carry knives legitimately—for example, for their work—would be targeted by amendment 10. They would not, because the 1995 act already makes exemptions for those who have knives for use at work, for religious reasons or as part of a national costume. We do not seek to change the law in that area.

The committee has received a range of evidence on the proposal. Some were concerned about those who carry knives legitimately—I have addressed that point. Others argued that mandatory services do not work, but the empirical evidence that was put forward to support that view was pretty insubstantial. We have mandatory sentences for homicides and firearms offences and we have seen reductions in those. The violence reduction unit has emphasised that other methods of reducing knife crime should be employed, particularly the education of young people. I point out that the vast majority of knife crimes are committed by adult offenders, but it is also important to say that we do not regard the proposed change to the sentencing regime as an isolated measure to tackle knife crime. We believe that it is complementary to the other work, which is often very good, that is continuing in communities to reduce knife crime and divert those who are at risk of becoming involved in it.

I turn to the convener's amendment 10A, with which we have sympathy. Others have accused us of being in a bidding war on the level of sentences, but that is not the case. Our proposal has been for a minimum sentence of six months, and that remains our position today. The convener has made it clear that he does not regard that as adequate and he proposes a minimum of two years. I highlight the fact that our proposal is for a minimum sentence and it would still be open to the court to impose a sentence of up to four years. We believe that the crucial thing is to introduce the principle of a minimum custodial sentence so that those who are convicted of carrying knives can expect to go to jail. I appreciate that the convener has made a different legislative proposal based on a different precedent in the law, and we would be happy to reflect on that before stage 3. We will therefore abstain in any vote on amendment 10A.

We believe that there is a clear difference on the committee between members who have listened to the victims of knife crime and their families who have fought so hard for the proposed change in the law and members who have not. It is crucial that we move to stage 3 with an intact proposal for a mandatory minimum sentence so that, at the very least, the matter can be debated further. To those who question the practicality and cost of the proposal, I simply point to the powerful evidence that the committee heard from John Muir, who eloquently and persistently stated his case and that of other victims. The real question is what the costs will be of not pursuing the change in the law, which is why I move the amendment in my name.

I move amendment 10.

The Convener: I will speak to and move amendment 10A before I open the debate. The matter is divisive, but there will be unanimous agreement that the effects of knife crime are felt by every community in Scotland. It is a matter for profound regret that too many young men, in particular, who go out for a night put a blade in their pocket as readily as they spray on aftershave and deodorant. We all find that deeply depressing.

There is simply no excuse for carrying a knife, and where knives are carried there has to be an assumption that there is an intention and indeed a willingness to use them. Even in what we would have hoped was a more enlightened and civilised age, we can see the effects of knife crime as we walk through the streets of some of our cities, where young men's faces show the signs of being slashed with a knife or similar weapon. Many, of course, are not seen because they have been stabbed to death, with all the heartbreak and loss of expectations that families feel.

12:00

The wording of the existing law makes it clear that no one can be picked up for carrying a weapon if the weapon can have a conventional and law-abiding use. Richard Baker was correct to underline that fact. In seeking to incorporate my proposed approach into the bill, I have unashamedly plagiarised the Road Traffic Offenders Act 1988, which permits a sentencer to find special reasons for not disqualifying a person from driving or endorsing a licence. I have adapted the approach in amendment 10A, which would enable a sheriff or judge to find special reasons for not imposing the two-year jail sentence.

We are not in a bidding war on the matter, but I respectfully suggest to Richard Baker that a sentence of six months, as is proposed in amendment 10, is not likely to be a sufficient deterrent to people who are prepared to carry knives. The fact is that, as the law currently operates, a person who is sentenced to less than six months will spend a maximum of three months in a prison or young offenders institution. I do not think that people regard such a sentence as a sufficient deterrent.

I acknowledge that the approaches that are proposed in amendments 10 and 10A would carry a cost. Nevertheless, we must take on board the cost in human lives and human misery that has been inflicted by people who carry and frequently use knives. I am convinced that a sentence of two years would act as a sufficient deterrent and would lead to a dramatic reduction in knife carrying and consequently to a dramatic reduction in homicides and assaults to severe injury. That is what we should be seeking to achieve.

I move amendment 10A.

Robert Brown: Nobody doubts that knife crime has been and continues to be a curse on Scotland, and has far too often led to tragedy. That is particularly the case in the west of Scotland; in a conversation with police officers in the east I was struck to discover that they do not regard knife crime as anything like the same problem as it is for their colleagues in the west.

There is no single, totemic answer to the problem. However, the way forward is clear. It lies in the work of the violence reduction unit in breaking down territorialism between gangs. It lies in the increasingly effective targeted stop-and-search mission of the police, who are conducting more searches and finding fewer weapons. It lies in the Cardiff model of using information from accident and emergency departments on violent injuries, which are often unreported to the police—the issue is the subject of an amendment in my name, which we will consider. It lies in the work that is done by operation reclaim and the Inverclyde initiative, in which Mr John Muir is so successfully involved, and in the work of organisations such as Includem.

I think that colleagues in Glasgow received the March performance update from Strathclyde Police's Glasgow central and west division, which covers the city centre. The update indicates that not only has there been a substantial drop in violent crime in the division but the number of cases involving offensive weapons has dropped by 28.4 per cent and the number of incidents involving knives has fallen by 20.2 per cent. Those are significant reductions, which have been achieved by effective policing.

It is through effective policing that the deterrent effect is brought to bear, rather than through sentences and what I regard as highly populist amendments, which seem to have more to do with garnering votes for the Labour and Conservative parties than with a serious attempt to tackle the problem. The proposal for a so-called mandatory prison sentence for carrying a knife is a distraction from the real issue.

It is often the case that a person who is found in possession of a knife will face a prison sentence. People who carry knives should know that they face the real potential of such a sentence. However, we know that many offenders are men of full age, and a man of 25 or 30 who might have previous convictions for violence and undoubtedly knows the score is in a manifestly different position from an immature youth of 16—amendment 10 would apply to offenders aged 16 and over—who is caught up on the margins of a gang and thinks that carrying a knife makes him a hard man. Sheriffs know the difference and sentence accordingly.

Research carried out by the Liberal Democrats has demonstrated that if amendments 10 and 10A were agreed to, 1,345 extra offenders would require to be sent to prison—I accept that the figure might be too precise. It would be necessary to build at least one new Barlinnie prison to house those prisoners, with running costs to the Scottish Prison Service of between £21 million and £84 million, depending on whether both amendments were agreed to—that is to say nothing of the capital costs per annum.

It is fair to say that you cannot entirely predict the effects of any particular measure against a moving background of various other things. However, the issue is not the cost of not passing the amendments, as Richard Baker suggested, but the mechanisms for dealing more effectively with knife crime. I make it clear that if a policy of increased sentences or mandatory sentences stopped people carrying knives, I would be happy to look at it, but the reality is that it does not—prison does not deter most people. Effective policing, early intervention and targeted youth justice work reduce criminality.

In their evidence to the committee, Professor Neil Hutton and Professor Fergus McNeill pointed out that there was no evidence to support the view that criminal sentences have a deterrent effect generally and that there was much experience, from America in particular, to demonstrate the lack of any significant impact on criminal behaviour of changes in sanctions. It is interesting that both the Scottish Police Federation and the violence reduction unit oppose mandatory sentences because they are unworkable and ineffective. The Scottish Justices Association and Chief Constable Stephen House of Strathclyde Police have expressed similar views. I suggest to the committee that it is just possible that those guys know something about the issue.

Ninety-four per cent of those who are currently in prison for carrying offensive weapons have been in prison before. That is hardly an endorsement of the deterrent effect of prison. Indeed, 60 per cent of them have been sent there for the same blooming offence.

There are other objections to the amendments. Mandatory sentences lead to perverse results. If Richard Baker's amendment were agreed to, a person convicted of carrying but not brandishing a knife would have to get six months, in the absence of mitigating circumstances. Ten minutes later in the same court, somebody else who had threatened to batter people with a lump of iron or wood that was not bladed or pointed might well get a lesser sentence for what is clearly a more serious crime.

Mandatory sentences move power from the sentencing judge to the prosecutor, who can decide whether and in what form to bring charges. The prosecution decision effectively becomes the sentencing decision, too. Prosecution decisions are inevitably less open and less challengeable than judicial decisions. A study carried out by the United States Sentencing Commission found that the prosecutor circumvented mandatory minima by bringing different charges, to avoid potentially unjust or unworkable consequences. In its experience, charges were filed under the mandatory provisions in only about a quarter of eligible cases. I readily accept that the legal background in the United States is different. Ironically, for the reasons found in that study, the USA is retreating from mandatory sentences.

If amendment 10A were agreed to, all cases would have to be tried by a jury, which would involve considerable expense and delay. I wonder whether that is really a sensible way forward.

We have recently agreed to set up an advisory sentencing council. It would be a reasonable way forward to have the sentencing council look at the background material on this issue and make sensible, professional and research-based proposals on how to deal with knife crime. I leave the committee with that thought on this highly contentious issue. I urge the committee to reject Richard Baker's amendment 10 and the convener's amendment 10A.

Stewart Maxwell: I agree 100 per cent with Robert Brown's comments on the amendments. I, too, completely oppose amendments 10 and 10A.

I will begin where Robert Brown left off, on deterrence. There is no evidence whatever to support the idea that a mandatory sentence for knife crime, or indeed for any other crime, would act as a deterrent. If it did, we would not have any murders. Look at other jurisdictions—the USA has been mentioned. If mandatory sentences were effective deterrents, the USA would be crime free. The USA has had mandatory sentences for a number of crimes for years, but they have made not one iota of difference.

The committee often prides itself on ensuring that it looks at the evidence that is submitted to it before it comes to a logical and reasoned conclusion. In this case, not one single professional working in the field agrees with either the Labour amendment or the Conservative amendment, because there is no evidence to support their positions.

I will quote what Bill Butler said at stage 1 when he was questioning—cross-questioning might be a better description—Henry McLeish. On evidence, he said:

> "Will you outline those sources and back up your assertion that there is sufficient evidence?"—[*Official Report*, *Justice Committee*, 19 May 2009; c 1817.]

I ask the same question of the Labour and Conservative members around the table—and Richard Baker in particular, who has moved amendment 10. Will you back up your assertion that there is evidence to support your amendment? Frankly, there is none, and you have so far failed to provide any.

Chief Constable David Strang told this committee that the fear of a prison sentence, irrespective of its length, does not in any way enter into the equation when criminals carry knives, use knives or take part in any other kind of criminal activity. What makes the difference, he said, was the fear of getting caught. That goes back to the point that Robert Brown made about effective policing and early intervention.

Effective policing, early intervention and the fear of getting caught stop people carrying out the offences that we all condemn; the fear of receiving one prison sentence as opposed to another prison sentence has no effect whatsoever, as it is not in the minds of any of the people, young or old, who walk out of their house carrying a knife. The amendments will do nothing apart from cause money to be spent that could better be spent on ensuring that the justice system tackles the problem properly.

James Kelly: I support amendment 10. As you said, convener, the effects of knife crime are felt throughout communities in Scotland. It is with that in mind that amendments 10 and 10A have been lodged.

In examining the validity of an amendment, we need to consider the policy effect of its implementation. We heard a lot of evidence that suggests that far too many young men carry knives when they go out on a Friday or Saturday night. Some do it because it is simply seen as something that people do, although evidence suggests that, somewhere down the line, those people will use those knives to detrimental effect.

I submit that it is absolutely logical that if such young men are aware that they will face a jail sentence for carrying a knife, they will be less inclined to carry such instruments, and there will be a reduction in knife incidents throughout Scotland.

I refute Robert Brown's points about cost. I accept that, initially, there would be an increase in prisoner numbers. However, as the policy took effect it would act as a deterrent, and in the longer term reduce prisoner numbers. Richard Baker made a valid point about costs to the NHS. Last year, the NHS treated 1,170 knife victims, at a cost of £500 million. If the proposals result in even 5 per cent fewer people being treated—which would be just under 60 people—that could save the NHS £50 million, which is far in excess of the figure of £23 million that Robert Brown mentioned.

We must also consider the human effect of knife crime, which we have seen in some of the written submissions and the powerful oral evidence that we received from John Muir.

The convener's amendment 10A takes a different position from Labour's amendment 10. I reject Robert Brown's assertion that the amendments are inspired by some sort of chase for votes. Both the individuals and the parties behind the amendments are making a serious contribution to the attempts to counter the effects of knife crime throughout Scotland.

I reiterate my support for amendment 10. In the long term, it would reduce the impact of knife crime, save lives and contribute significantly to making Scottish communities safer.

12:15

Angela Constance: Richard Baker and Bill Aitken almost took the words out of my mouth when they used the phrase "a bidding war". I am somewhat surprised by our convener, who normally has a great focus on good law and good justice. My concern is that mandatory sentences can lead to injustice. Irrespective of our emotional desires, singling out one offence involves a false logic. Many hideous offences afflict victims the length and breadth of Scotland.

Notwithstanding that, while the human cost of knife crime is of course severe, we cannot separate discussions about blades from discussions about booze. We will tackle knife crime seriously only when we consider seriously Scotland's relationship with alcohol.

The length of sentences for knife crime has increased in the past decade, so that blows out of the water any arguments about deterrence. I listened with interest to the evidence session that we held before the recess and I was somewhat struck by the evidence from the police—who are not known for their extreme liberal tendencies—that they take a pragmatic approach. In Mr John Muir's evidence, I was struck by his level of knowledge about the good preventive work that is taking place in Inverclyde. We would do better by our communities if we strove to roll out the good practice that is being followed there.

I have a former colleague—a friend—who is a social worker at Barlinnie. She always jokes about the perception that Barlinnie has elastic walls. To the best of my knowledge, the reality is that neither Barlinnie nor any other penal establishment has elastic walls. Robert Brown raised a legitimate point about the consequences of increasing the number of young men who are incarcerated, as a result of the proposed policy. To his credit, Mr Kelly has a somewhat anorak fixation on financial memorandums, so I am somewhat surprised that he has not applied that rigour about financial consequences to the proposed policy. The reality is that mandatory sentences would not deter knife crime and that the cost and burden on our penal establishments would increase.

Nigel Don: As usual, I have no wish to repeat what has been said, but I will follow up one point that Robert Brown made towards the end of his comments. Regardless of the offence or the subject that we are talking about, it is entirely clear that, if we remove discretion from the bench, we push it further down the prosecution and investigation chain. It will be obvious to the Crown that some people who carry knives should not carry knives, but that sending them to prison is not the right answer. The Crown will find ways of using whatever discretion it has not to bring those people to court on such charges.

Equally, policemen will recognise a range of offences and will—for good human reasons—find it convenient not to pick up on the carrying of a knife, because doing so would finish up propagating the wrong solution. I say with respect that that is what those who use their professional discretion will do.

Apart from any other questions, we need to address the question whether we want discretion to rest with the police and the Crown—and possibly even those who report the incident—or with the bench. In principle, we want it to be with the bench and we want everything to be properly investigated. We need to leave the discretion with those who give the sentence, so any mandatory sentence should probably be resisted.

Bill Butler: On emotive issues such as this, good sense sometimes goes out the window. As best we can, we need to be rational in our approach, but that is not to say that we will not have different approaches. I do not impugn anyone's integrity for taking a different view.

I agree that there is a place for preventive work. As Angela Constance said, John Muir himself illustrated that point. Such preventive work and diversionary approaches were rightly initiated by the previous Executive and supported by all parties.

As I recall, an amendment to a previous bill to increase the maximum sentence for carrying a knife from two years to four years was, I think, moved by Stewart Maxwell. That was also right because, where circumstances dictate and in appropriate cases, such condign sentences are obviously correct.

We need to try to strike a balance here. Time and again, it has been said that there is no evidence that mandatory sentences deter. However, we have not as yet tried what is being proposed, so perhaps that is why little evidence is available. It may be that such an approach works only if it is included in a range of approaches that can be applied to different individuals.

I finish by pointing out that, although Nigel Don does not often nod off—though even Homer nods, as we know from the poet—he inadvertently said something that is becoming common coinage, but which is nevertheless incorrect. New subsection 5B that amendment 10, in the name of Richard Baker, would insert into the 1995 act states:

> "Where this subsection applies, the court must impose a sentence of imprisonment of at least 6 months (with or without a fine) unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify not doing so."

If I may say so, that does not provide a mandatory sentence. It would still leave discretion, quite rightly, in the hands of the sentencer—

Stewart Maxwell: Is it not mandatory, then?

Bill Butler: I am just reading what amendment 10 says. Given Stewart Maxwell's point that we should look at the evidence as it is, we should also look at amendments as they are written. It is reasonable to do that. I am simply stating what the amendment says.

I think that amendment 10 provides a presumption of a mandatory minimum, but it would not tie the sentencer's hands absolutely. It would leave discretion.

This is a difficult and controversial issue on which there are no easy answers. Amendment 10 at least attempts to provide another approach where circumstances dictate that such an approach might have a positive effect. For that reason, I will support amendment 10.

Kenny MacAskill: I say, following Bill Butler's remarks, that if Labour's position is now that it is not moving for a mandatory sentence, I am very open to discussing matters with Mr Butler, Mr Baker or whomever. However, Mr Baker may wish to clarify that point.

Clearly, amendments 10 and 10A reflect on-going public concerns about the booze and blades culture on our streets and, in particular, about the number of young people who choose to carry knives. However, the Government is doing more than ever to tackle knife crime, with tougher sentences and tough police action to take weapons off our streets. That goes hand in hand with ground-breaking initiatives to educate young people about the dangers of knives.

The results of that work are demonstrated in the statistics, which show that recorded crime last year was at its lowest level in nearly 30 years, with violent crime at its lowest level since 1986. Our courts are handing down tougher sentences for carrying knives: the average custodial sentence for knife carriers has increased from 116 days in 2003-04 to 217 days in 2007-08.

Mandatory minimum custodial sentences for knife carriers—a one-size-fits-all approach—are not the solution, and we are not the only ones who make that point: the chief constable of Strathclyde Police, Stephen House, has stated that mandatory minimum sentences are not the answer. The head of the national violence reduction unit, John Carnochan, gave to the committee evidence in which he stated:

> "Jail doesn't work, we need early intervention, restricting access to alcohol and knives."

We should listen to those who are at the front line in the fight against knife crime.

John Muir and Chief Constable David Strang provided evidence to the committee on 23 March. In spite of their divergent views, a clear message about the importance of education and prevention emerged from that session. We need to pursue a twin approach of education and enforcement, give our courts the discretion to consider the circumstances of each case that comes before them, and give our judges sufficient discretion to sentence individuals, not offences. We believe—Robert Brown referred to this—that it would be more appropriate for the proposed Scottish sentencing council to consider the appropriate disposals for persons who have been found carrying knives or other offensive weapons in public and to produce guidelines on that.

The Government does not support amendments 10 and 10A.

Richard Baker: I agree with the convener's comments on the aim of the proposal in principle being that those who carry knives as a matter of routine should think again. We want them to think again and to leave their knives at home. Too often, that still does not happen in Scotland.

We do not believe that the cabinet secretary is taking sufficient action. His proposal is that two thirds fewer knife criminals will go to jail, but we think that that sends out the wrong message entirely, which is why we propose mandatory minimum sentences, except in exceptional circumstances, as Bill Butler made clear. Such a framework for firearms offences has existed for some time, but we think it remarkable that we have that framework for firearms offences when fewer people are killed by firearms than by knives in this country.

Mr Butler made it clear that not all judicial discretion would be removed. However, we want to change the situation significantly through our proposal for mandatory minimum sentences. That is clear from amendment 10, as members will appreciate if they have read the amendment properly.

I agree with Robert Brown that no single measure will solve the problems of knife crime; rather, a range of measures will be required, as he and Bill Butler have said. However, we believe that what we have proposed will be a powerful tool. We and the Conservative party have not made the proposal simply as a matter of politics, but because victims of knife crime and their families, whom we have listened to, have put it forward.

It should be pointed out that the figures show that the incidence of knife crime in the east of Scotland is far from insubstantial.

Angela Constance referred to costs and James Kelly made a point about the impact on NHS costs of injuries that result from knife crime.

On the evidence on the impact of mandatory minimum sentences on crime, such sentences are in place for homicide and firearms offences in this country, and we have seen reductions in those offences. Lord Carmont was given credit for helping to reduce knife crime in Glasgow 50 years ago through imposing longer sentences on knife criminals.

It is clear that we are not making enough progress through use of the current measures, however successful some of them have been. We certainly do not wish to detract from those measures or to say that they should not continue, because they should. However, it is also important that we do not dismiss the evidence from John Muir and others. I do not see why the committee should give their evidence lower status than is given to evidence from others. They have carefully considered the issue and have been gravely affected by it, so the committee should listen carefully to what they say.

I take on board the convener's view on six-month sentences, but I believe that agreement to amendment 10 and the bringing in of a mandatory minimum custodial sentence will move us forward and have an impact on people who might carry knives. I would be happy to debate the detail of the proposal further at stage 3 or in advance of that, although I hope that we adopt the fundamental principle of mandatory minimum sentences today, and that that will be the context of future debates.

12:30

The Convener: A number of points with which I agree in some measure have been made in opposition to amendments 10 and 10A. There must be a comprehensive package to combat knife crime—Robert Brown, Angela Constance and Nigel Don raised that issue. There is merit in the arguments and I accept them. However, I part company with the members on a number of issues. Robert Brown described a situation in which someone could be charged with brandishing a piece of wood or a similar object that might present a more immediate threat than would possession of a knife. I do not accept that, because the statistics demonstrate the fatal consequences of carrying knives—consequences than can be much more severe than in cases of makeshift would-be weapons.

The firearms legislation, which has been in force for a number of years and has been accepted without demur, makes an automatic five-year sentence apposite and applicable in cases in which an individual is in possession of a firearm. That is a much more draconian approach than that which is being recommended by me and Richard Baker. There does not appear to have been any reaction against that. We must also bear in mind that even these days, when there is an unacceptable level of use of firearms, the number of incidents of the use of firearms in homicides pales into insignificance compared with the number of cases involving knives.

The aspect of my amendment 10A that I would especially like to stress is the provision for special reasons, which would enable the sentencer to take into consideration the special circumstances that are apposite to the offence and to the accused person. The offence is self-evident. There can frequently be perfectly appropriate defences for carrying a knife, the obvious ones being for tradesmen and butchers. Such a defence is a reasonable excuse, and such a case should not be prosecuted. Were it prosecuted, it is a defence that would almost invariably succeed. However, what cannot be allowed to continue is the carrying of knives on social occasions, or people hanging about with their chums, as kids do, carrying knives. That frequently results in tragedy. It is on that basis that I press amendment 10A.

The question is that amendment 10A be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)

Against

Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

Abstentions

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 1, Against 4, Abstentions 3.

Amendment 10A disagreed to.

The Convener: The question is that amendment 10 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

For the reasons that I have outlined—the deterrent effect of a custodial sentence and the fact that levels of knife crime are unacceptably high—I use my casting vote in favour of the amendment.

Amendment 10 agreed to.

Section 25—Involvement in serious organised crime

The Convener: Amendment 344, in the name of the minister, is grouped with amendments 345 to 351 and 358. I draw the attention of members to the pre-emption information on the groupings list.

Kenny MacAskill: Amendments 344, 346, 347, 349 to 351 and 358 will introduce changes to the detail of the provisions on serious organised crime in part 2 of the bill. Although we understand the reason behind amendments 345 and 348, we do not think that they are appropriate or necessary.

Amendment 344 sets out in more detail the circumstances in which somebody agrees to be involved in serious organised crime. The amendment is needed to help to target those who facilitate or enable serious organised crime groups, without themselves committing indictable offences. The amendment therefore makes it clear that a person agrees to become involved in serious organised crime when he agrees to do anything—criminal or otherwise—while knowing or suspecting that doing that thing will enable or further the commission of serious organised crime.

The offence, therefore, will remain broadly drawn but will, through amendment 344, be more clearly defined. That approach is necessary because we need to capture all forms of serious organised crime in order to get at its heart, and to do so requires flexibility. The activity around serious organised crime is wide ranging and we need a wide-ranging offence to tackle those who are involved in serious organised crime. That includes both those who commit the criminal act and those who supply and support the criminals. For example, someone may allow the use of their property while knowing or suspecting that the accommodation is being used to house people who are being trafficked for sexual exploitation, or they may allow their vehicle to be used for the transportation of drugs. Those activities may not, in themselves, be criminal acts, but the main purpose of the activity is to further the criminal purpose of a serious offence as defined in section

25, and thereby to support serious organised crime. We realise that the offence is already widely drawn; however, it needs to be if we are to tackle the scourge of organised crime. The amendment is required if we are to capture all forms of activity that enable or further serious organised crime.

Robert Brown's amendment 345 suggests additional criteria that will need to be satisfied to establish that crime amounts to serious organised crime. In particular, the amendment would provide that serious organised crime means crime involving two or more people committing or conspiring to commit serious offences

"that would reasonably be regarded as being both serious and organised".

However, it is not entirely clear what that is intended to achieve. We already have a definition of "serious offence" in the bill: it is an indictable offence that is

"committed with the intention of securing a material benefit",

or an indictable threat or act of violence that is intended to obtain

"such a benefit in the future".

I presume that Robert Brown intends that only serious offences within that technical meaning, which are also objectively serious and sufficiently organised, should constitute serious organised crime. Nevertheless, there is obviously a question as to what a court would make of such broad terminology. What do "serious" and "organised" mean in that context?

The more compelling argument against amendment 345 is that it would stifle the practical benefits of the provision. We know that serious organised crime is flexible and that it covers all levels of criminality and activity. Activities that are apparently minor or trivial in themselves often form part of a more insidious picture. The amendment would potentially miss significant elements of activity that contribute to the business interests of a serious crime network. If, for example, a group of people undertook shoplifting excursions with the purpose of generating profits to fund drug deals, would their shoplifting

"reasonably be regarded as being both serious and organised"?

It may perhaps satisfy the latter test, but it is doubtful that it would be considered to be "serious", particularly without further legislative guidance.

Although they will make the definition broad, the Government's amendments make it sufficiently clear to capture the range of activity that constitutes involvement in serious organised crime. We accept that there is a valid concern that the provisions should not be used to punish offending that is genuinely minor and which is not, relatively speaking, organised. However, the best way in which to deal with that concern while retaining the flexibility that is required to tackle the diversity and innovation that are inherent in serious organised crime is to rely on the discretion of the police and the prosecution authorities to report and prosecute such offending appropriately.

Amendments 346, 350 and 358 are simple technical amendments that have the sole purpose of making the terminology in relation to obtaining "a material benefit" more consistent throughout the provisions on serious organised crime.

Amendments 347 and 349 will change the definition of "serious offence", which forms an integral part of the definition of serious organised crime. Threats and violence are part of the armoury that is used by serious organised crime groups to protect their interests. They believe that they are in total control and thrive on the fact that people may not report their actions because of fear of retribution. Clearly, that is unacceptable. In recognition of that aspect of serious organised criminal activity, amendment 347 will modify the definition of serious offence to include indictable offences that are constituted by any act of violence, when the intention behind the commission of the act is to obtain a material benefit either directly or at some point in the future. That removes the prior qualification that only a "serious" act of violence could be a "serious offence" for these purposes.

We agree with the principle behind amendment 348. The technical definition of a "serious offence" that is committed to secure a future benefit should not be restricted to "serious" violence. The Scottish Government's amendment 347 already seeks to cover that point, and the use of the term "threat" will cover instances of intimidation, which are themselves indictable offences. We think that the use of the term "threat" rather than the term "intimidation", which is drawn from the common-law crime of threats, will be more easily understood by the courts.

Amendment 349 is also an adjustment of the definition of serious offence. It is required to ensure that a threat may be sufficient to establish the commission of serious organised crime when it is carried out by two or more people with the intention of securing a material benefit. It is important to note that, in that context, a threat will be a "serious offence" only if the threat is itself an indictable offence and the underlying intention is to secure a material benefit. We consider that it is necessary to deal specifically with threats because a threat of violence might, for example, engender fear that would prevent people from reporting a serious organised criminal or might prevent witnesses from giving evidence at a trial. Equally, threats and intimidation are commonly used by serious organised criminals to secure territorial advantages or to enhance their ability to conduct their criminal business.

Amendment 351 provides a definition of the term "material benefit" where it appears in sections 25 to 28. We are aware that the committee has a concern that the definition of "material benefit" as set out in the introduction could be extended to capture trivial forms of benefit. The amendment that we have made is designed to ensure that only an intended benefit in the form of heritable or moveable property will allow a court or jury to find that a person has agreed to become involved in serious organised crime or has directed somebody else to commit a serious offence.

Similarly, only a benefit in the form of property received in consequence of the commission of serious organised crime will suffice to trigger the duty to report serious organised crime in the context of close personal relationships. Although that definition is still technically wide enough to cover many forms of small-scale proprietary benefit, it makes it clear to courts and juries that we are not targeting those who seek or obtain intangible benefits other than in the form of incorporeal property. We would expect the Crown to exercise its discretion appropriately in deciding how to charge those who are accused of working together to achieve minor or trivial benefits.

I move amendment 344.

Robert Brown: There is broad agreement in committee on the need for weapons to tackle the Mr Bigs of serious organised crime, but there is also genuine anxiety about the scope of some of the offences that will be introduced by sections 25 to 28. I am bound to say that I have found the area difficult and complex—I am sure that other committee members have, too. My amendments in this group and the succeeding groups are designed to try to deal with some of those difficulties.

Amendment 345 relates to section 25. The committee will recall the evidence that a person could be prosecuted under the section if he got involved with someone else to steal a meat pie. Although I appreciate that the prosecutor would probably not use the section in that extreme way, we have to get the "serious and organised" bit into the definition of the crime for which, after all, one could go to jail for 10 years.

My proposed wording would contribute something without losing the targeted intention of the section. At the top of page 39 of the bill, a serious offence is defined as, among other things, an "indictable offence" of certain kinds. In principle, an indictable offence is a theft, a robbery, an assault, a sexual assault and even a breach of the peace, unless I am mistaken. The term covers a lot of offences that range from the very serious at one end, right down to the meat-pie theft at the other, which does not obviously have anything to do with Mr Big. We must have some form of words that narrows down that definition, which goes too far in terms of the areas that it is designed to pick up. Law has to mean something and people need at least an idea of what they are prevented from doing by the country's criminal legislation. I am not sure that the bill quite gets that right at the moment.

Amendment 348 goes the other way. It is clear from evidence that the committee received that serious and organised crime could manifest itself as relatively minor violence and threats. Providing that an offence is part of serious and organised crime, as I hope a previous amendment of mine will redefine, it should be caught by section 25. However, I concede that the Government has dealt with the point in its amendments 347 and 349, so I will not press amendment 348.

Stewart Maxwell: Although I understand the reasons why Robert Brown has lodged his amendments and the concern about the breadth of the proposed offences that he expressed during discussions of the stage 1 report, I remind the committee of the evidence that both the Lord Advocate and the Solicitor General gave us about the reasons why it is so necessary to have a broad definition of such offences; namely, the ability of the Mr Bigs—to use Robert Brown's expression—to get round the law if the definition is too constrained. I will not go over all the evidence that we all heard and used in our stage 1 report when we considered this part of the bill, but I thought that it was both compelling and detailed about why it is necessary to keep in the bill the offences as currently drafted. Therefore, I do not support Robert Brown's amendments to section 25, although I understand why he lodged them and the concerns that he has expressed. We must allow the law to be as flexible as possible so that it can deal with the fast-moving and ever-changing world of serious organised crime.

12:45

The Convener: If there are no other comments, I will make some of my own. All the amendments to section 25 are predicated on concerns about definitions. The general view has been that, as it stands, the bill has the capacity to catch with its provisions people whose involvement in serious organised crime is peripheral and which, in certain situations, could be accidental. It is clear that members and the Government have understood that and have sought to apply the appropriate remedies. It worth putting on the record, yet again, that the Parliament has a unanimous and firm commitment to combating such crime, but any legislation in that respect must be workable and proportionate. Robert Brown and the Government genuinely recognise that—it is the thinking that lies behind their amendments.

Mr MacAskill's amendment 344 seeks to change one of the definitions, as does Robert Brown's amendment 345. Although Mr Brown's amendment is well thought out, makes a case that is entirely arguable and has merit, I think that the Government amendment is probably tidier and I will support it. Mr MacAskill's amendment 346 seeks to deal with the committee's concern about the material benefit provision. I think that it fits the bill and I will support it.

I ask Robert Brown to—I am sorry; it has been a long morning. It is for the minister to wind up.

Kenny MacAskill: In view of the time, I am happy just to press amendment 344.

The Convener: That is fine—I am obliged to you.

Amendment 344 agreed to.

The Convener: I invite Robert Brown to move or not to move amendment 345.

Robert Brown: I wonder whether I would be entitled not to move amendment 345 but, while not moving it, to make to the minister the point that some further examination, particularly of the "serious offence" definition, might be helpful. I would like to engage with him on that, if he would be prepared to do it.

The Convener: I take it that, having driven a horse and cart through standing orders—albeit that you were making a relevant point—you will not move amendment 345.

Robert Brown: Indeed.

Amendment 345 not moved.

Amendment 346 moved—[Kenny MacAskill]—and agreed to.

The Convener: I point out that if amendment 347 is agreed to, I will not be able to call amendment 348 on the ground of pre-emption.

Amendment 347 moved—[Kenny MacAskill]—and agreed to.

Amendments 349 to 351 moved—[Kenny MacAskill]—and agreed to.

Section 25, as amended, agreed to.

Section 26—Offences aggravated by connection with serious organised crime

The Convener: We move on to section 26, which is as far as we will get at today's meeting.

Incidentally, I should earlier have welcomed Johann Lamont MSP, who has joined us. I doubt whether she will get any of the action, but she is welcome nonetheless.

Amendment 352, in the name of Robert Brown, is in a group on its own.

Robert Brown: Amendment 352 relates to the new aggravation issue in section 26 and is intended to restore the requirement for corroboration in the class of cases that is covered—those in which an ordinary offence of perhaps theft, assault, stalking or breach of the peace is said to be aggravated by a connection with serious organised crime. That situation is different from an aggravation for a racial or sectarian motive, when the nature of the crime has not really changed but an aspect requires a particular extra sanction.

Under section 26, the aggravation wholly alters the nature of the crime. For example, when a motor car is stolen to facilitate the operation of a major drugs or people-trafficking operation, that puts the crime into a new category with a new level of sentence. It appears that the aggravation could even apply to a motoring offence such as driving without insurance. We must take that into account. In such circumstances, surely the aggravation—which will dwarf the principal crime in many instances—should be corroborated, as it would have to be under section 25 as it has been amended today.

The point is important and is not just technical. The issue is not just about facilitating prosecution of serious criminals—the provision must be got right. If we are to land people with serious prison sentences as a consequence of the provision, the major element of the offence with which they are charged should be the subject of proper proof in the normal way.

I move amendment 352.

The Convener: The argument is interesting. I accept what Robert Brown says about the precedent from the various aggravations for sectarian, racial or homophobic motives, but I am instinctively drawn to a requirement for corroboration. I will listen with interest to the cabinet secretary.

Kenny MacAskill: I will try to clarify matters. We understand the reason behind amendment 352, but it is not appropriate or necessary. Notwithstanding our recent letter to the Justice Committee, we still think that there is some confusion about section 26(4). We are not removing the normal rules of corroboration—they will still apply in proving the underlying offence that incurs a statutory aggravation.

Only the essential elements of an offence—as opposed to, for example, an aggravation—must be proved by corroborated evidence in Scotland. Subsection (4) makes it clear that the approach of requiring only a single source of evidence to establish the aggravation, which has common law and statutory precedent, applies here.

If amendment 352 were agreed to, the position on proving the aggravation might be unclear. Courts might nonetheless resort to the common-law approach, which does not require corroboration of aggravating circumstances. In such an event, the amendment would be meaningless. On the other hand, the lack of any provision at all might produce uncertainty. I invite Robert Brown to withdraw amendment 352 and I hope that I have clarified the underlying aspects.

Robert Brown: I am bound to say that I am not sure whether the cabinet secretary listened to what I said. Neither I nor any other committee member is confused about what the provision is intended to do. I did not suggest any difficulty about the need to corroborate the principal offence; I said that the principal offence could easily be dwarfed by the aggravation. A person might be fined or whatever for the principal offence, but they could go to jail for a long time for the aggravation. That does not at all parallel the normal position of other aggravations, which we have heard about before.

There would be no doubt about the court's position. It would be pretty obvious from the debate and from the *Official Report*, which can be taken into account in interpretation, why section 26(4) had been removed; it would be easy for judicial interpretation to make that conclusion.

I am not totally fixed on the issue—I raise it seriously, for the reasons that I have given. To be frank, I have heard no reason from the cabinet secretary for why I should not press amendment 352 to a vote. Given the circumstances, I will do so, but against the background of being happy to continue discussion, if the cabinet secretary can come back with anything more substantial.

The Convener: The question is, that amendment 352 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)

Against

Butler, Bill (Glasgow Anniesland) (Lab)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 2, Against 6, Abstentions 0.

Amendment 352 disagreed to.

Section 26 agreed to.

The Convener: That takes us to section 27, which is not politically controversial but could take a little time. In the circumstances, we will end proceedings now. I thank members, the cabinet secretary and his officials for their attendance.

I remind committee members that we have a couple of administrative items to deal with.

12:55

Meeting continued in private until 13:01.

Criminal Justice and Licensing (Scotland) Bill

4th Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 3	Schedule 1
Sections 4 to 18	Schedule 2
Sections 19 to 66	Schedule 3
Sections 67 to 139	Schedule 4
Sections 140 to 145	Schedule 5
Sections 146 to 148	Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 27

Robert Brown

353 In section 27, page 39, line 35, leave out <a serious offence> and insert <an offence under section 25(1)>

Kenny MacAskill

354 In section 27, page 40, line 9, leave out subsection (4)

Robert Brown

355 In section 27, page 40, line 14, leave out <a serious offence> and insert <an offence under section 25(1)>

Kenny MacAskill

356 In section 27, page 40, line 17, leave out subsection (6)

Section 28

Robert Brown

357 In section 28, page 40, line 28, after <suspects> insert <with good reason>

Bill Aitken
Supported by: Robert Brown

106 In section 28, page 40, line 36, at end insert—

<( ) In the case of knowledge or suspicion originating from information obtained by the person in the course of the person's trade, profession, business or employment, this section applies only where the person's experience or seniority in that trade, profession, business or employment makes it reasonable to assume that the person should be aware of any offence of the sort mentioned in subsection (1) that the other person has or may have committed.>

Kenny MacAskill

358 In section 28, page 40, line 39, leave out <derived> and insert <obtained>

Robert Brown

359 In section 28, page 41, line 1, after <constable> insert <or other specified public official>

Robert Brown

360 In section 28, page 41, line 20, at end insert—

<( ) In subsection (3), "specified public official" means a person holding a public office specified in an order made by the Scottish Ministers.>

After section 28

Kenny MacAskill

107 After section 28, insert—

<Genocide, crimes against humanity and war crimes

Genocide, crimes against humanity and war crimes: UK residents

(1) The International Criminal Court (Scotland) Act 2001 (asp 13) is amended as follows.

(2) After section 8, insert—

"**8A Meaning of "United Kingdom national" and "United Kingdom resident"**

(1) In this Part—

"United Kingdom national" means—

(a) a British citizen, a British Overseas Territories citizen, a British National (Overseas) or a British Overseas citizen,

(b) a person who under the British Nationality Act 1981 (c.61) is a British subject, or

(c) a British protected person within the meaning of that Act,

"United Kingdom resident" means a person who is resident in the United Kingdom.

(2) To the extent that it would not otherwise be the case, the following individuals are to be treated for the purposes of this Part as being resident in the United Kingdom—

(a) an individual who has indefinite leave to remain in the United Kingdom,

(b) any other individual who has made an application for such leave (whether or not it has been determined) and who is in the United Kingdom,

(c) an individual who has leave to enter or remain in the United Kingdom for the purposes of work or study and who is in the United Kingdom,

(d) an individual who has made an asylum claim, or a human rights claim, which has been granted,

(e) any other individual who has made an asylum claim or a human rights claim (whether or not the claim has been determined) and who is in the United Kingdom,

(f) an individual named in an application for indefinite leave to remain, an asylum claim or a human rights claim as a dependant of the individual making the application or claim if—

(i) the application or claim has been granted, or

(ii) the named individual is in the United Kingdom (whether or not the application or claim has been determined),

(g) an individual who would be liable to removal or deportation from the United Kingdom but cannot be removed or deported because of section 6 of the Human Rights Act 1998 (c.42) or for practical reasons,

(h) an individual—

(i) against whom a decision to make a deportation order under section 5(1) of the Immigration Act 1971 (c.77) by virtue of section 3(5)(a) of that Act (deportation conducive to the public good) has been made,

(ii) who has appealed against the decision to make the order (whether or not the appeal has been determined), and

(iii) who is in the United Kingdom,

(i) an individual who is an illegal entrant within the meaning of section 33(1) of the Immigration Act 1971 or who is liable to removal under section 10 of the Immigration and Asylum Act 1999 (c.33),

(j) an individual who is detained in lawful custody in the United Kingdom.

(3) When determining for the purposes of this Part whether any other individual is resident in the United Kingdom regard is to be had to all relevant considerations including—

(a) the periods during which the individual is, has been or intends to be in the United Kingdom,

(b) the purposes for which the individual is, has been or intends to be in the United Kingdom,

(c) whether the individual has family or other connections to the United Kingdom and the nature of those connections, and

(d) whether the individual has an interest in residential property located in the United Kingdom.

(4) In this section—

"asylum claim" means—

(a) a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention for the claimant to be removed from, or required to leave, the United Kingdom,

(b) a claim that the claimant would face a real risk of serious harm if removed from the United Kingdom,

"Convention rights" means the rights identified as Convention rights by section 1 of the Human Rights Act 1998,

"detained in lawful custody" means—

(a) detained in pursuance of a sentence of imprisonment or detention, a sentence of custody for life or a detention and training order,

(b) remanded in or committed to custody by an order of a court,

(c) detained pursuant to an order under section 2 of the Colonial Prisoners Removal Act 1884 (c.31) or a warrant under section 1 or 4A of the Repatriation of Prisoners Act 1984 (c.47),

(d) detained under Part 3 of the Mental Health Act 1983 (c.20) or by virtue of an order under section 5 of the Criminal Procedure (Insanity) Act 1964 (c.84) or section 6 or 14 of the Criminal Appeal Act 1968 (c.19) (hospital orders etc.),

(e) detained by virtue of an order under Part 6 of the Criminal Procedure (Scotland) Act 1995 (c.46) (other than an order under section 60C) or a hospital direction under section 59A of that Act, and includes detention by virtue of the special restrictions set out in Part 10 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) to which a person is subject by virtue of an order under section 59 of the Criminal Procedure (Scotland) Act 1995,

(f) detained under Part 3 of the Mental Health (Northern Ireland) Order 1986 (SI 1986/595) or by virtue of an order under section 11 or 13(5A) of the Criminal Appeal (Northern Ireland) Act 1980 (c. 47),

"human rights claim" means a claim that to remove the claimant from, or to require the claimant to leave, the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Convention) as being incompatible with the person's Convention rights,

"the Refugee Convention" means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol to the Convention,

"serious harm" has the meaning given by article 15 of Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

(5) In this section, a reference to having leave to enter or remain in the United Kingdom is to be construed in accordance with the Immigration Act 1971.

(6) This section applies in relation to any offence under this Part (whether committed before or after the coming into force of this section).”.

(3) In section 28(1) (interpretation), the definitions of “United Kingdom national” and “United Kingdom resident” are repealed.>

Kenny MacAskill

108 After section 28, insert—

<Genocide, crimes against humanity and war crimes: retrospective application

After section 9 of the International Criminal Court (Scotland) Act 2001 (asp 13) insert—

“**9A Retrospective application of certain offences**

(1) Section 1 of this Act applies to acts committed on or after 1 January 1991.

(2) But that section does not apply to an act committed before 17 December 2001 which constitutes a crime against humanity or a war crime within article 8.2(b) or (e) unless, at the time the act was committed, it amounted in the circumstances to a criminal offence under international law.

(3) Section 2 of this Act applies to conduct engaged in on or after 1 January 1991.

(4) The references in subsections (1), (3) and (5) of that section to an offence include an act or conduct that would not constitute an offence but for this section.

(5) Any enactment or rule of law relating to an offence ancillary to a relevant offence applies—

(a) to conduct engaged in on or after 1 January 1991, and

(b) even if the act or conduct constituting the relevant offence would not constitute such an offence but for this section.

(6) But section 2 of this Act, and any enactment or rule of law relating to an offence ancillary to a relevant offence, do not apply to—

(a) conduct engaged in before 17 December 2001, or

(b) conduct engaged in on or after that date which was ancillary to an act or conduct that—

(i) was committed or engaged in before that date, and

(ii) would not constitute a relevant offence but for this section,

unless, at the time the conduct was engaged in, it amounted in the circumstances to a criminal offence under international law.

(7) Section 5 of this Act, so far as it has effect in relation to relevant offences, applies—

(a) to failures to exercise control of the kind mentioned in subsection (2) or (3) of that section which occurred on or after 1 January 1991, and

(b) even if the act or conduct constituting the relevant offence would not constitute an offence but for this section.

(8) But section 5 of this Act, so far as it has effect in relation to relevant offences, does not apply to a failure to exercise control of the kind mentioned in subsection (2) or (3) of that section which occurred before 17 December 2001 unless, at the time it occurred, it amounted in the circumstances to a criminal offence under international law.

(9) In this section, “relevant offence” means an offence under section 1 or 2 of this Act or an offence ancillary to such an offence.

9B Provision supplemental to section 9A: modification of penalties

(1) This section applies in relation to—

(a) an offence under section 1 of this Act on account of an act committed before 17 December 2001 constituting genocide, if at the time the act was committed it also amounted to an offence under section 1 of the Genocide Act 1969,

(b) an offence under section 1 of this Act on account of an act committed before 1 September 2001 constituting a war crime, if at the time the act was committed it also amounted to an offence under section 1 of the Geneva Conventions Act 1957 (c.52) (grave breaches of the Conventions),

(c) an offence ancillary to an offence within paragraph (a) or (b) above.

(2) Section 3(5) of this Act has effect in relation to such an offence as if for “30 years” there were substituted “14 years”.”.>

After section 31

Kenny MacAskill

109 After section 31, insert—

<Offensive weapons etc.

Offensive weapons etc.

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.

(2) In section 47 (prohibition of the carrying of offensive weapons)—

(a) in subsection (1), the words from “without” to “him,” are repealed,

(b) after subsection (1), insert—

“(1A) It is a defence for a person charged with an offence under subsection (1) to show that the person had a reasonable excuse or lawful authority for having the weapon with the person in the public place.”, and

(c) for subsection (4), substitute—

“(4) In this section—

“offensive weapon” means any article—

(a) made or adapted for use for causing injury to a person, or

(b) intended, by the person having the article, for use for causing injury to a person by—

(i) the person having it, or

(ii) some other person,

“public place” means any place other than—

(a) domestic premises,

(b) school premises (within the meaning of section 49A(6)),

(c) a prison (within the meaning of section 49C(7)),

“domestic premises” means premises occupied as a private dwelling (including any stair, passage, garden, yard, garage, outhouse or other appurtenance of such premises which is not used in common by the occupants of more than one such dwelling).”.

(3) In section 49 (offence of having in public place article with blade or point)—

(a) in subsection (4), for the words “prove that he had good reason” substitute “show that the person had a reasonable excuse”,

(b) in subsection (5), for “prove” substitute “show”, and

(c) for subsection (7), substitute—

“(7) In this section, “public place” has the same meaning as in section 47(4).”.

(4) In section 49A (offence of having article with blade or point (or offensive weapon) on school premises)—

(a) in subsection (3), for the words “prove that he had good reason” substitute “show that the person had a reasonable excuse”, and

(b) in subsection (4), for “prove” substitute “show”.

(5) In section 49C(2) (offence of having offensive weapon etc. in prison), for the words “prove that he had good reason” substitute “show that the person had a reasonable excuse”.

(6) In section 50(4) (extension of constable’s power to stop, search and arrest without warrant), for “3” substitute “4”.>

Johann Lamont

11 After section 31, insert—

<**Offence of having article with blade or point (or offensive weapon) on workplace premises**

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.

(2) After section 49A, insert—

“**49AA Offence of having article with blade or point (or offensive weapon) on workplace premises**

(1) Any person who has an article to which section 49 of this Act applies with him on workplace premises is guilty of an offence.

(2) Any person who has an offensive weapon within the meaning of section 47 of this Act with him on workplace premises is guilty of an offence.

(3) It is a defence for a person charged with an offence under subsection (1) or (2) above to prove that he had good reason or lawful authority for having the article or weapon with him on the premises in question.

(4) Without prejudice to the generality of subsection (3) above, it is a defence for a person charged with an offence under subsection (1) or (2) above to prove that he had the article or weapon in question with him—

(a) for use at work (whether on the premises in question or otherwise),

(b) for religious reasons, or

(c) as part of any national costume.

(5) A person guilty of an offence—

(a) under subsection (1) above is liable—

(i) on summary conviction to imprisonment for a term not exceeding twelve months, or a fine not exceeding the statutory maximum, or both;

(ii) on conviction on indictment, to imprisonment for a term not exceeding four years, or a fine, or both;

(b) under subsection (2) above is liable—

(i) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both;

(ii) on conviction on indictment, to imprisonment for a term not exceeding four years, or a fine, or both.

(6) In this section and section 49B of this Act, "workplace premises" means any premises (other than school premises) used for the purposes of an undertaking carried on by an employer and made available to any employee of the employer as a place of work; and includes—

(a) any part of those premises to which such an employee has access while at work;

(b) any premises (other than a public road or other public place within the meaning of section 49 of this Act)—

(i) which are a means of access to or egress from the place of work; or

(ii) where facilities are provided for use in connection with the place of work.".

(3) In section 49B(1)—

(a) after "school premises" insert "or workplace premises";

(b) after "49A" insert "or 49AA".

(4) In section 50(3), for "or section 49A(1) or (2)" substitute ", 49A(1) or (2) or 49AA(1) or (2)".>

Rhoda Grant

402 After section 31, insert—

<Stalking

Offence of stalking

(1) A person (“A”) commits an offence, to be known as the offence of stalking, where A stalks another person (“B”).

(2) For the purposes of subsection (1), A stalks B where—

- (a) A engages in a course of conduct,
- (b) subsection (3) or (4) applies, and
- (c) A’s course of conduct causes B to suffer—
  - (i) physical or psychological harm, or
  - (ii) apprehension or fear for B’s own safety or for the safety of any other person.

(3) This subsection applies where A engages in the course of conduct with the intention of causing such harm to B or of arousing such apprehension or fear in B.

(4) This subsection applies where A knows, or ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause such harm or arouse such apprehension or fear.

(5) It is a defence for a person charged with an offence under this section to show that the course of action—

- (a) was authorised by virtue of any enactment or rule of law,
- (b) was engaged in for the purpose of preventing or detecting crime, or
- (c) was, in the particular circumstances, reasonable.

(6) In this section—

“conduct” includes (but is not limited to)—

- (a) following B or any other person,
- (b) contacting B or any other person by post, telephone, email, text message or any other method,
- (c) publishing any statement or other material—
  - (i) relating or purporting to relate to B or to any other person,
  - (ii) purporting to originate from B or from any other person,
- (d) tracing the use by B or by any other person of the internet, email or any other form of electronic communication,
- (e) entering or loitering in the vicinity of—
  - (i) the place of residence of B or of any other person,
  - (ii) the place of work or business of B or of any other person,
  - (iii) any place frequented by B or of any other person,
- (f) interfering with any property in the possession of B or of any other person,
- (g) giving offensive material to B or to any other person or leaving such material where it may be found by, given to or brought to the attention of B or any other person,

(h) keeping B or any other person under surveillance,

(i) acting in any other way that a reasonable person would expect would arouse apprehension or fear in B for B's own safety or for the safety of any other person, and

"course of conduct" involves conduct on at least two occasions.

(7) A person convicted of the offence of stalking is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or to both.>

Robert Brown

402A As an amendment to amendment 402, line 21, after <crime,> insert—

<( ) was engaged in as part of lawful and reasonable public protest or industrial action,>

Section 34

Kenny MacAskill

361 In section 34, page 49, line 4, leave out <(and any sounds accompanying it)>

Kenny MacAskill

362 In section 34, page 49, line 5, leave out <(and any sounds accompanying them)>

Kenny MacAskill

363 In section 34, page 49, line 7, at end insert—

<and reference may also be had to any sounds accompanying the image or the series of images.>

Kenny MacAskill

364 In section 34, page 49, line 31, after <images> insert—

<(i) any sounds accompanying the series of images,

(ii)>

Robert Brown

365 In section 34, page 50, line 4, leave out from <"excluded> to <work> and insert <image is an "excluded image" if it is all or part of a classified work, and is so excluded from the time that an application for a classification certificate is received by the designated authority>

Kenny MacAskill

366 In section 34, page 50, line 18, after <images> insert—

<(i) any sounds accompanying the series of images,

(ii)>

Kenny MacAskill

367 In section 34, page 50, line 19, leave out <and section 51C>

Kenny MacAskill

368 In section 34, page 50, line 27, leave out <and "extreme pornographic image" are> and insert <is>

Kenny MacAskill

369 In section 34, page 51, line 23, at end insert—

<( ) In this section "image" and "extreme pornographic image" are to be construed in accordance with section 51A.".>

Kenny MacAskill

517 In section 34, page 51, line 23, at end insert—

<( ) In Schedule 3 to the Sexual Offences Act 2003 (c.42) (sexual offences for the purposes of Part 2 of that Act), after paragraph 44 insert—

"44A An offence under section 51A of the Civic Government (Scotland) Act 1982 (c.45) (possession of extreme pornography) if—

(a) the offender—

(i) was 18 or over, and

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of more than 12 months, and

(b) in imposing sentence, the court determines that it is appropriate that Part 2 of this Act should apply in relation to the offender.".>

After section 34

Kenny MacAskill

110 After section 34, insert—

<**Voyeurism: additional forms of conduct**

(1) The Sexual Offences (Scotland) Act 2009 (asp 9) is amended as follows.

(2) In section 9 (voyeurism)—

(a) after subsection (4), insert—

"(4A) The fourth thing is that A—

(a) without another person ("B") consenting, and

(b) without any reasonable belief that B consents, operates equipment beneath B’s clothing with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B’s genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B’s genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,

records an image beneath B’s clothing of B’s genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B’s genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at the image.”,

(b) in subsection (5)—

(i) for “fourth” substitute “sixth”, and

(ii) for paragraph (b), substitute—

“(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).”, and

(c) in subsection (7), for “and (4)” substitute “, (4), (4A) and (4B)”.

(3) In section 10(2) (interpretation of section 9), after “section 9(3)” insert “and (4A)”.

(4) In section 26 (voyeurism towards a young child)—

(a) after subsection (4), insert—

“(4A) The fourth thing is that A operates equipment beneath B’s clothing with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe—

(a) B’s genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B’s genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A records an image beneath B’s clothing of—

(a) B’s genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B’s genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at the image.”,

(b) in subsection (5)—

(i) for “fourth” substitute “sixth”, and

(ii) for paragraph (b), substitute—

“(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).”,

(c) in subsection (7), for “and (4)” substitute “, (4), (4A) and (4B)”, and

(d) in subsection (8)—

(i) after “section 9(3)” insert “, (4A)”, and

(ii) after “subsections (3)” insert “, (4A)”.

(5) In section 36 (voyeurism towards an older child)—

(a) after subsection (4), insert—

“(4A) The fourth thing is that A operates equipment beneath B’s clothing with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe—

(a) B’s genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B’s genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A records an image beneath B’s clothing of—

(a) B’s genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B’s genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at the image.”,

(b) in subsection (5)—

(i) for “fourth” substitute “sixth”, and

(ii) for paragraph (b), substitute—

“(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).”,

(c) in subsection (7), for “and (4)” substitute “, (4), (4A) and (4B)”, and

(d) in subsection (8)—

(i) after “section 9(3)” insert “, (4A)”, and

(ii) after “subsections (3)” insert “, (4A)”.>

Kenny MacAskill

111 After section 34, insert—

<**Sexual offences: defences in relation to offences against older children**

In section 39 of the Sexual Offences (Scotland) Act 2009 (asp 9) (defences in relation to offences against older children), in subsection (4)(c), after "section 30(2)(d)" insert "or (e)".>

Kenny MacAskill

370 After section 34, insert—

<**Penalties for offences of brothel-keeping and living on the earnings of prostitution**

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.

(2) In section 11 (trading in prostitution and brothel-keeping)—

(a) in subsection (1), for the words from "liable" to the end substitute "guilty of an offence and liable to the penalties set out in subsection (1A)",

(b) after that subsection insert—

"(1A) A person—

(a) guilty of the offence set out in subsection (1)(a) is liable—

(i) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(ii) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both,

(b) guilty of the offence set out in subsection (1)(b) is liable—

(i) on conviction on indictment, to imprisonment for a term not exceeding two years,

(ii) on summary conviction, to imprisonment for a term not exceeding 12 months.",

(c) in subsection (4), for "subsection (1)" substitute "subsection (1A)(a)", and

(d) for subsection (6) substitute—

"(6) A person guilty of an offence under subsection (5) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both.".

(3) In section 13(9) (living on earnings of another from male prostitution), for paragraphs (a) and (b) substitute—

"(a) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both.".>

Trish Godman

8 After section 34, insert—

<Offences of engaging in, advertising and facilitating paid-for sexual activities

(1) The Sexual Offences (Scotland) Act 2009 (asp 9) is amended as follows.

(2) After section 11 insert—

“Engaging in, advertising and facilitating paid-for sexual activities

11A Engaging in a paid-for sexual activity

(1) A person (“A”) commits an offence, to be known as the offence of engaging in a paid-for sexual activity, if A knowingly engages in a paid-for sexual activity with another person (“B”).

(2) A sexual activity is paid for where B engages in that activity in exchange for payment.

(3) For the purposes of subsection (2), it is immaterial whether the payment is made—

(a) by A or by another person, or

(b) to B or to another person on B’s behalf.

11B Advertising paid-for sexual activities

A person commits an offence, to be known as the offence of advertising paid-for sexual activities, if that person knowingly advertises, by any means, the availability of sexual activities that can be engaged in for payment.

11C Facilitating engagement in a paid-for sexual activity

(1) A person (“A”) commits an offence, to be known as the offence of facilitating engagement in a paid-for sexual activity, if A knowingly facilitates the engagement of another person (“B”) in a paid-for sexual activity with another person (“C”).

(2) A sexual activity is paid for where C engages in that activity in exchange for payment.

(3) For the purposes of subsection (2), it is immaterial whether the payment is made—

(a) by A, by B or by another person, or

(b) to C or to another person on C’s behalf.

(4) For the purposes of subsection (1), facilitating the engagement by B in a paid-for sexual activity includes (but is not limited to)—

(a) arranging B’s engagement in the activity,

(b) making payment to C or to another person on C’s behalf,

(c) making available premises in which the activity takes place, or

(d) transporting B, or arranging transport for B, to where the activity takes place.

11D Arrest for offences under sections 11A to 11C

(1) Where a constable reasonably believes that a person is committing or has committed an offence under section 11A, 11B or 11C, the constable may arrest the person without warrant.

(2) Subsection (1) is without prejudice to any power of arrest conferred by law apart from that subsection.”.

(3) In the table in schedule 2 insert at the appropriate place—

“Engaging in a paid-for sexual activity	Section 11A	A fine not exceeding level 3 on the standard scale	
Advertising paid-for sexual activities	Section 11B	A fine not exceeding level 3 on the standard scale	
Facilitating engagement in a paid-for sexual activity	Section 11C	A fine not exceeding level 3 on the standard scale”.>	

Margo MacDonald

8A As an amendment to amendment 8, line 15, at end insert—

<11AA Causing alarm etc. by engaging in a paid-for sexual activity

In the circumstances described in section 11A(1), A and B commit an offence, to be known as the offence of causing alarm etc. by engaging in a paid-for sexual activity, if their engaging in the activity that constitutes the offence under that section causes alarm to another person (“C”), endangers C or creates a nuisance for C.>

Margo MacDonald

8B As an amendment to amendment 8, line 15, at end insert—

<11AB Profiting from coerced paid-for sexual activities

A person commits an offence, to be known as the offence of profiting from coerced paid-for sexual activities, if that person knowingly secures a direct benefit (whether financial or otherwise) from a paid-for sexual activity involving a person whose engagement in that activity has been secured as a result of coercion.>

Margo MacDonald

8C As an amendment to amendment 8, line 40, after <11A,> insert <11AA, 11AB>

Margo MacDonald

8D As an amendment to amendment 8, line 48, at end insert—

<"Causing alarm etc. by engaging in a paid-for sexual activity	Section 11AA	A fine not exceeding level 3 on the standard scale	
Profiting from coerced paid-for sexual activities	Section 11AB	A fine not exceeding level 3 on the standard scale>	

Nigel Don

461 After section 34, insert—

<**Offence of paying for sexual services of a prostitute subjected to force etc.**

(1) The Sexual Offences (Scotland) Act 2009 (asp 9) is amended as follows.

(2) After section 11 insert—

"Paying for sexual services of a prostitute subjected to force etc.

11E Paying for sexual services of a prostitute subjected to force etc.

(1) A person ("A") commits an offence, to be known as the offence of paying for sexual services of a coerced prostitute, if—

(a) A makes or promises payment for the sexual services of a prostitute ("B"),

(b) a third person ("C") has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and

(c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).

(2) The following are irrelevant—

(a) where in the world the sexual services are to be provided and whether those services are provided,

(b) whether A is, or ought to be, aware that C has engaged in exploitative conduct.

(3) C engages in exploitative conduct if—

(a) C uses force, threats (whether or not relating to violence) or any other form of coercion, or

(b) C practises any form of deception.".

(3) In the table in schedule 2 insert at the appropriate place—

"Paying for sexual services of a coerced prostitute	Section 11E	A fine not exceeding level 3 on the standard scale".>	

Section 35

Kenny MacAskill

371 In section 35, page 51, line 30, at end insert—

<( ) after subsection (1) insert—

"(1A) A person to whom subsection (6) applies commits an offence if the person arranges or facilitates—

(a) the arrival in or the entry into a country (other than the United Kingdom), or travel there (whether or not following such arrival or entry) by, an individual and—

(i) intends to exercise control over prostitution by the individual or to involve the individual in the making or production of obscene or indecent material; or

(ii) believes that another person is likely to exercise such control or so to involve the individual,

there or elsewhere; or

(b) the departure from a country (other than the United Kingdom) of an individual and—

(i) intends to exercise such control or so to involve the individual; or

(ii) believes that another person is likely to exercise such control or so to involve the individual,

outwith the country.",>

Kenny MacAskill

372 In section 35, page 51, line 30, at end insert—

<( ) in subsection (2), for "subsection (1)" substitute "subsections (1) and (1A)",>

Kenny MacAskill

373 In section 35, page 51, line 32, leave out <Subsection (1) applies> and insert <Subsections (1) and (1A) apply>

Kenny MacAskill

374 In section 35, page 51, line 34, leave out <proceeded against, indicted> and insert <prosecuted>

Kenny MacAskill

375 In section 35, page 51, line 40, after <on> insert <the>

Kenny MacAskill

376 In section 35, page 52, leave out line 1 and insert—

<( ) in subsection (6)—

(i) the word "and" immediately following paragraph (e) is repealed, and

(ii) after paragraph (f) insert—

“(g) a person who at the time of the offence was habitually resident in Scotland, and

(h) a body incorporated under the law of a part of the United Kingdom.”.>

Kenny MacAskill

377 In section 35, page 52, line 2, leave out subsection (2) and insert—

<( ) In section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation)—

(a) in subsection (1), after “arrival in” insert “or the entry into”,

(b) in subsection (2), the words from “in” where it first occurs to “committed” are repealed,

(c) after subsection (3) insert—

“(3A) A person to whom section 5(2) applies commits an offence if—

(a) in relation to an individual (the “passenger”), he arranges or facilitates—

(i) the arrival in or the entry into a country other than the United Kingdom of the passenger,

(ii) travel by the passenger within a country other than the United Kingdom,

(iii) the departure of the passenger from a country other than the United Kingdom, and

(b) he—

(i) intends to exploit the passenger, or

(ii) believes that another person is likely to exploit the passenger,

(wherever the exploitation is to occur).”,

(d) in subsection (4)—

(i) in paragraph (b), the words from “as a result” to “Act 2004,” become sub-paragraph (i),

(ii) immediately following that sub-paragraph insert “or—

(ii) which, were it done in Scotland, would constitute an offence mentioned in sub-paragraph (i),”,

(iii) after paragraph (b) insert—

“(ba) he is encouraged, required or expected to do anything in connection with the removal of any part of a human body—

(i) as a result of which he or another person would commit an offence under the law of Scotland (other than an offence mentioned in paragraph (b)(i)), or

(ii) which, were it done in Scotland, would constitute such an offence,”, and

(iv) for paragraph (d) substitute—

“(d) another person uses or attempts to use him for any purpose within sub-paragraph (i), (ii) or (iii) of paragraph (c), having chosen him for that purpose on the grounds that—

(i) he is mentally or physically ill or disabled, he is young, or he has a family relationship with a person, and

(ii) a person without the illness, disability, youth or family relationship would be likely to refuse to be used for that purpose.”.

( ) In section 5 of that Act—

(a) in subsection (1), for the words from “(3)” to the end substitute “(3A) of section 4 apply to anything done in or outwith the United Kingdom.”,

(b) in subsection (2)—

(i) the word “and” immediately following paragraph (e) is repealed, and

(ii) after paragraph (f) insert—

“(g) a person who at the time of the offence was habitually resident in Scotland, and

(h) a body incorporated under the law of a part of the United Kingdom.”,

(c) after subsection (2) insert—

“(2A) A person may be prosecuted, tried and punished for any offence to which section 4 applies—

(a) in any sheriff court district in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).

(2B) In subsection (2A), “sheriff court district” is to be construed in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995 (c.46) (interpretation).”.>

After section 35

Kenny MacAskill

112 After section 35, insert—

<Slavery, servitude and forced or compulsory labour

Slavery, servitude and forced or compulsory labour

(1) A person (“A”) commits an offence if—

(a) A holds another person in slavery or servitude and the circumstances are such that A knows or ought to know that the person is so held, or

(b) A requires another person to perform forced or compulsory labour and the circumstances are such that A knows or ought to know that the person is being required to perform such labour.

(2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention (which prohibits a person from being held in slavery or servitude or being required to perform forced or compulsory labour).

(3) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 14 years, or to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

(4) In this section "Human Rights Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms agreed by the Council of Europe at Rome on 4 November 1950.>

After section 36

Kenny MacAskill

113 After section 36, insert—

<**Articles for use in fraud**

(1) A person ("A") commits an offence if A has in A's possession or under A's control an article for use in, or in connection with, the commission of fraud.

(2) A person guilty of an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine, or to both.

(3) A person commits an offence if the person makes, adapts, supplies or offers to supply an article—

(a) knowing that the article is designed or adapted for use in, or in connection with, the commission of fraud, or

(b) intending the article to be used in, or in connection with, the commission of fraud.

(4) A person guilty of an offence under subsection (3) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine, or to both.

(5) In this section, "article" includes a program or data held in electronic form.>

After section 37

Kenny MacAskill

114 After section 37, insert—

<*Abolition of offences of sedition and leasing-making*

Abolition of offences of sedition and leasing-making

The following offences under the common law of Scotland are abolished—

(a) the offence of sedition,

(b) the offence of leasing-making.>

Kenny MacAskill

378 After section 37, insert—

<*Threatening, alarming or distressing behaviour*

Threatening, alarming or distressing behaviour

(1) A person ("A") commits an offence if—

(a) A behaves in such a manner that a reasonable person would be likely to—

(i) fear for the safety of any person on account of the behaviour, or

(ii) be alarmed or distressed by the behaviour, and

(b) the condition in subsection (2) is satisfied.

(2) That condition is that A—

(a) intends by the behaviour to cause fear, alarm or distress, or

(b) is reckless as to whether the behaviour would cause fear, alarm or distress.

(3) It does not matter—

(a) whether A's behaviour is directed at anyone in particular,

(b) if it is directed at a particular person, whether that person is aware of the behaviour, or

(c) whether A's behaviour—

(i) actually causes anyone fear, alarm or distress, or

(ii) takes place in public or private.

(4) Subsection (1) applies to—

(a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done,

(b) behaviour consisting of—

(i) a single act, or

(ii) a course of conduct.

(5) The reference in subsection (1)(a)(i) to fear for a person's safety is to fear that the person's life could be endangered or that the person's physical or psychological well-being could be harmed.

(6) A person guilty of an offence under subsection (1) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.>

Bill Aitken

115 After section 37, insert—

<PART

DOUBLE JEOPARDY

Rule against double jeopardy

(1) It is not competent to charge a person who, whether on indictment or complaint (the "original" indictment or complaint), has been convicted or acquitted of an offence—

(a) with an offence of which it would have been competent to convict the person on the original indictment or complaint, or

(b) with an offence which—

(i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and

(ii) is an aggravated way of committing the offence of which the person was convicted or acquitted.

(2) Whether the conviction or acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) Subsection (1) is subject to sections *(Tainted acquittals)*, *(Admission subsequent to acquittal)* and *(New evidence)* and is without prejudice to sections 118(1)(c) (disposal of appeals), 119 (provision where High Court authorises new prosecution), 183(1)(d) (stated case: disposal of appeal) and 185 (authorisation of new prosecution) of the 1995 Act.

(4) In this Part, reference to a person being convicted of an offence is—

(a) to the person being found guilty of the offence, or

(b) to the prosecutor accepting the person's plea of guilty to the offence,

in either case whether or not sentence is passed.>

Bill Aitken

116 After section 37, insert—

<Plea in bar of trial

(1) A person charged with an offence—

(a) whether on indictment or complaint, but

(b) other than by virtue of a section mentioned in section *(Rule against double jeopardy)*(3),

may aver, as a plea in bar of trial, that the offence arises out of the same, or largely the same, acts or omissions as have already given rise to the person being tried for, and convicted or acquitted of, an offence (the "original offence").

(2) Whether the conviction or acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) If the court is satisfied, on a balance of probabilities, as to the truth of the person's averment, the plea is to be sustained unless the prosecutor persuades the court that there is some special reason why the case should proceed to trial (as for example, but without prejudice to the generality of this subsection, where trials were separated on the application of, or with the consent of, the person).

(4) Subsections (1) to (3) apply irrespective of where the person was tried; but this subsection is subject to subsection (5).

(5) Where the person was tried outwith the United Kingdom the court may disregard a conviction or acquittal if—

(a) it determines that it is in the interests of justice to do so, and

(b) to permit the case to proceed to trial would not be inconsistent with the obligations of the United Kingdom under Article 54 of the Schengen Convention (that is to say, of the Convention of 19th June 1990 implementing the Schengen Agreement of 14th June 1985).

(6) In making a determination in pursuance of subsection (5)(a), the court is in particular to have regard to—

(a) whether the purpose of bringing the person to trial in the foreign country appears to have been to assist the person to evade justice,

(b) whether the proceedings in the foreign country appear to have been conducted—

(i) independently and impartially, and

(ii) in a manner consistent with dealing justly with the person,

(c) whether such sentence (or other disposal) as might be imposed in the foreign country for an offence of the kind for which the person has been acquitted or convicted is commensurate with any that might be imposed for an offence of that kind in Scotland, and

(d) the extent to which the acts or omissions can be considered to have occurred in, respectively—

(i) Scotland,

(ii) the foreign country.>

Bill Aitken

117 After section 37, insert—

<Eventual death of injured person

(1) This section applies where—

(a) a person ("A") sustains physical injuries,

(b) another person ("B") is, whether on indictment or complaint, acquitted or convicted of an offence ("offence Y") which comprises the infliction of the injuries, and

(c) after the acquittal or conviction A dies, ostensibly from the injuries.

(2) Whether the conviction or acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) If B was acquitted of offence Y (and was not then convicted of a different offence, "offence Z", which comprised the infliction of the injuries) it is not competent to charge B with—

(a) the murder of A,

(b) culpable homicide as respects A, or

(c) any other offence comprising causing A's death.

(4) If B was convicted of offence Y (or of offence Z), then—

(a) for the purposes of sections *(Rule against double jeopardy)* and *(Plea in bar of trial)* the offences mentioned in paragraphs (a) to (c) of subsection (3) are not to be treated as offences arising out of the same, or largely the same, acts or omissions as the offence of which B was convicted, but

(b) on B being acquitted or convicted of any of the offences mentioned in those paragraphs, the court may, on the motion of B and after hearing the parties on that motion, quash B's conviction of offence Y (or offence Z) where satisfied that it is appropriate to do so.

(5) A party may appeal to the High Court against the granting or refusing of a motion under subsection (4)(b).>

Bill Aitken

118 After section 37, insert—

<Tainted acquittals

(1) A person who, whether on indictment or complaint (the "original" indictment or complaint), has been acquitted of an offence (the "original offence") may, provided that the conditions mentioned in subsection (3) are satisfied, be charged with, and prosecuted anew for—

(a) the original offence, or

(b) an offence arising out of the same, or largely the same, acts or omissions as gave rise to the original offence.

(2) Whether the acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) The conditions are—

(a) either—

(i) that the acquitted person or some other person has (or the acquitted person and some other person have) been convicted of an offence against the course of justice, being an offence in connection with proceedings on the original indictment or complaint, or

(ii) that on the application of the Lord Advocate the High Court has concluded on a balance of probabilities that the acquitted person or some other person has (or the acquitted person and some other person have) committed such an offence against the course of justice, and

(b) that on the application of the Lord Advocate the High Court has—

(i) set aside the acquittal, and

(ii) granted authority to bring, by virtue of this section, a new prosecution.

(4) On making an application under subsection (3), the Lord Advocate is to send a copy of that application to the acquitted person.

(5) The acquitted person is entitled to appear or to be represented at any hearing of the application.

(6) For the purpose of—

(a) hearing and coming to a conclusion on any application under subsection (3)(a)(ii), or

(b) hearing and determining any application under subsection (3)(b),

three of the Lords Commissioners of Justiciary are a quorum of the Court (the application being determined by majority vote of those sitting).

(7) The decision of the Court on the application is final.

(8) Subsection (7) is without prejudice to any power of those sitting to remit the application to a differently constituted sitting of the Court (as for example to the whole Court sitting together).

(9) The Court may appoint counsel to act as *amicus curiae* at the hearing in question.

(10) Subsections (11) and (12) apply in a case where (or as the case may be where the Court, in coming to a conclusion under subsection (3)(a)(ii), is satisfied on a balance of probabilities that) the offence against the course of justice consisted of or included interference with a juror or with the trial judge.

(11) An acquittal is to be set aside under subsection (3)(b)(i) if the Court is unable to conclude that the interference had no effect on the outcome of the proceedings on the original indictment or complaint.

(12) But it is not to be so set aside if in the course of the trial, the interference (being interference with a juror and not with the trial judge) became known to the trial judge, who then allowed the trial to proceed to its conclusion.

(13) Subsection (14) applies in a case other than is mentioned in subsection (10).

(14) An acquittal is not to be set aside under subsection (3)(b)(i) unless the Court is satisfied on a balance of probabilities—

(a) that the offence led—

(i) to the withholding of evidence which, had it been given, would have been, or

(ii) to the giving of false evidence which was,

evidence capable of being regarded as credible and reliable by a reasonable jury, and

(b) that the witholding, or as the case may be the giving, of the evidence was likely to have had a material effect on the outcome of the proceedings on the original indictment or complaint.

(15) And an acquittal is not to be set aside under subsection (3)(b)(i), whether by virtue of subsections (10) to (12) or by virtue of subsections (13) and (14), if the court considers that setting it aside would be contrary to the interests of justice.

(16) In this section, the expression "offence against the course of justice"—

(a) means an offence of perverting, or of attempting to pervert, the course of justice (by whatever means and however the offence is described), and

(b) without prejudice to the generality of paragraph (a), includes—

   (i) an offence under section 45(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (aiding, abetting, counselling, procuring or suborning the commission of an offence under section 44 of that Act),

   (ii) the crime of subornation of perjury, and

   (iii) the crime of bribery.

(17) But the expression does not include—

(a) the crime of perjury, or

(b) an offence under section 44(1) of that Act (statement on oath which is false or which the person making it does not believe to be true).>

Bill Aitken

119 After section 37, insert—

<Further provision as regards prosecution by virtue of section *(Tainted acquittals)*

(1) A prosecution may be brought by virtue of section *(Tainted acquittals)* notwithstanding that any time limit for the commencement of such proceedings has elapsed.

(2) In proceedings in a prosecution brought by virtue of section *(Tainted acquittals)* it is competent for either party to lead evidence which it was competent for that party to lead in the earlier proceedings.

(3) But the indictment or complaint in the prosecution is to identify any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (2) (being matters as respects which it would not have been competent to lead evidence but for that subsection).

(4) On granting authority under section *(Tainted acquittals)*(3)(b)(ii) to bring a new prosecution, the High Court may, after giving the parties an opportunity of being heard, order the detention of the accused person in custody or admit that person to bail.

(5) In—

(a) solemn proceedings, section 65(4)(aa) and (b) and (4A) to (9), and

(b) summary proceedings, section 147,

of the 1995 Act (prevention of delay in trials) applies to an accused person who is detained under subsection (4) as it applies to an accused person detained by virtue of being committed until liberated in due course of law.>

Bill Aitken

120 After section 37, insert—

<Admission subsequent to acquittal

(1) A person who, whether on indictment or complaint (the “original” indictment or complaint), has been acquitted of an offence but subsequently admits to committing it may, provided that the condition mentioned in subsection (3) is satisfied, be charged with, and prosecuted anew for, the offence.

(2) Whether the acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) The condition is that on the application of the Lord Advocate the High Court has—

(a) set aside the acquittal, and

(b) granted authority to bring, by virtue of this section, a new prosecution.

(4) On making an application under subsection (3), the Lord Advocate is to send a copy of that application to the acquitted person.

(5) The acquitted person is entitled to appear or to be represented at any hearing of the application.

(6) For the purpose of hearing and determining the application, three of the Lords Commissioners of Justiciary are a quorum of the Court (the application being determined by majority vote of those sitting).

(7) An acquittal is not to be set aside under subsection (3)(a) unless the Court is satisfied—

(a) on a balance of probabilities, that subsequent to the acquittal the person credibly admitted having committed the offence, and

(b) that evidence is available sufficient to corroborate the admission.

(8) Even if the Court is satisfied as is mentioned in subsection (7), it is not to set aside the acquittal if it considers that to do so would be contrary to the interests of justice.>

Robert Brown

120A As an amendment to amendment 120, line 15, at end insert—

<( ) Before hearing an application under subsection (3), the Court is to order that no publicity be given to the application, or to any document prepared in connection with the application, until—

(a) the application is refused,

(b) a final decision has been made not to bring, or to discontinue, a new prosecution, or

(c) the new trial is concluded.>

Bill Aitken

121 After section 37, insert—

<Further provision as regards prosecution by virtue of section (*Admission subsequent to acquittal)*

(1) No sentence may be passed on conviction in a new prosecution brought by virtue of section (*Admission subsequent to acquittal)* which could not have been passed under the proceedings on the original indictment or complaint (“the earlier proceedings”).

(2) A new prosecution may be brought by virtue of section (*Admission subsequent to acquittal)* notwithstanding that any time limit, other than the time limit mentioned in subsection (3), for the commencement of such proceedings has elapsed.

(3) Proceedings in a new prosecution brought by virtue of section (*Admission subsequent to acquittal)* are to be commenced within 2 months after the date on which authority to bring the prosecution was granted.

(4) In proceedings in a new prosecution brought by virtue of section (*Admission subsequent to acquittal)* it is competent for either party to lead evidence which it was competent for that party to lead in the earlier proceedings.

(5) But the indictment or complaint in the new prosecution is to identify any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (4) (being matters as respects which it would not have been competent to lead evidence but for that subsection).

(6) For the purposes of subsection (3), proceedings are deemed commenced—

(a) in a case where a warrant to apprehend the accused is granted—

(i) on the date on which the warrant is executed, or

(ii) if it is executed without unreasonable delay, on the date on which it is granted, and

(b) in any other case, on the date on which the accused is cited.

(7) Where the 2 months mentioned in subsection (3) elapse and no new prosecution has been brought under this section, the order under section (*Admission subsequent to acquittal)*(3)(a) setting aside the acquittal has the effect, for all purposes, of an acquittal.

(8) On granting authority under section (*Admission subsequent to acquittal)*(3)(b) to bring a new prosecution, the High Court may, after giving the parties an opportunity of being heard, order the detention of the accused person in custody or admit that person to bail.

(9) In—

(a) solemn proceedings, section 65(4)(aa) and (b) and (4A) to (9), and

(b) summary proceedings, section 147,

of the 1995 Act (prevention of delay in trials) applies to an accused person who is detained under subsection (8) as it applies to an accused person detained by virtue of being committed until liberated in due course of law.

(10) It is immaterial, for the purposes of this section, whether the acquittal was before or after the coming into force of the section.>

Bill Aitken

122 After section 37, insert—

<New evidence

(1) A person who has been acquitted, after the coming into force of this section (or on the day on which it comes into force), of an offence may—

(a) if there is new evidence that the person committed the offence, and

(b) the conditions mentioned in subsection (2) are satisfied,

be charged with, and prosecuted for, the offence anew.

(2) The conditions are—

(a) that the person's acquittal was of an offence mentioned in subsection (9), and

(b) that on the application of the Lord Advocate the High Court has—

(i) set aside the acquittal, and

(ii) granted authority to bring, by virtue of this section, a new prosecution.

(3) The setting aside of the acquittal and the granting of such authority may, under subsection (2)(b), be applied for on one occasion only.

(4) On making an application under that subsection, the Lord Advocate is to send a copy of the application to the acquitted person.

(5) The acquitted person is entitled to appear or to be represented at any hearing of the application.

(6) For the purpose of hearing and determining the application under subsection (2)(b), three of the Lords Commissioners of Justiciary are a quorum of the Court (the application being determined by majority vote of those sitting).

(7) An acquittal is not to be set aside under subsection (2)(b)(i) unless the Court is satisfied that—

(a) the case against the accused is strengthened substantially by the new evidence,

(b) the new evidence is evidence which was not available, and could not with the exercise of reasonable diligence have been made available, at the trial in respect of the original offence, and

(c) on the new evidence and the evidence which was led at that trial it is highly likely that a reasonable jury properly instructed would have convicted the person of the offence.

(8) Even if the Court is satisfied as is mentioned in subsection (7), it is not to set aside the acquittal if it considers that to do so would be contrary to the interests of justice.

(9) The offences are—

(a) murder,

(b) at common law, rape, and

(c) an offence under either section 1 (rape) or section 18 (rape of a young child) of the Sexual Offences (Scotland) Act 2009 (asp 9).

(10) The Scottish Ministers may by order amend subsection (9) so as to add further offences to those for the time being mentioned in that subsection.

(11) But subsection (1) does not apply as respects a person's acquittal of an offence so added if the date of acquittal is earlier than that on which the addition is effected.>

Bill Aitken

123 After section 37, insert—

<Further provision as regards prosecution by virtue of section *(New evidence)*

(1) No sentence may be passed on conviction in a new prosecution brought by virtue of section *(New evidence)* which could not have been passed under the indictment on the trial of which the person was acquitted of the offence in question.

(2) A new prosecution may be brought by virtue of section *(New evidence)* notwithstanding that any time limit for the commencement of such proceedings, other than the time limit mentioned in subsection (3), has elapsed.

(3) Proceedings in a new prosecution brought by virtue of section *(New evidence)* are to be commenced within 2 months after the date on which authority to bring the prosecution was granted.

(4) In proceedings in a new prosecution brought by virtue of section *(New evidence)* it is competent for either party to lead evidence which it was competent for that party to lead in the earlier proceedings.

(5) But the indictment in the new prosecution is to identify any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (4) (being matters as respects which it would not have been competent to lead evidence but for that subsection).

(6) For the purposes of subsection (3), proceedings are deemed commenced—

(a) in a case where a warrant to apprehend the accused is granted—

(i) on the date on which the warrant is executed, or

(ii) if it is executed without unreasonable delay, on the date on which it is granted, and

(b) in any other case, on the date on which the accused is cited.

(7) Where the 2 months mentioned in subsection (3) elapse and no new prosecution has been brought under this section, the order under section *(New evidence)*(2)(b)(i) setting aside the acquittal has the effect, for all purposes, of an acquittal.

(8) On granting authority under section *(New evidence)*(2)(b)(ii) to bring a new prosecution, the High Court is, after giving the parties an opportunity of being heard, to order the detention of the accused person in custody or to admit that person to bail.

(9) Subsections (4)(aa) and (b) and (4A) to (9) of section 65 of the 1995 Act (prevention of delay in trials) apply to an accused person who is detained under subsection (8) as they apply to an accused person detained by virtue of being committed until liberated in due course of law.>

Bill Aitken

124 After section 37, insert—

<Nullity of proceedings on previous indictment or complaint

(1) Subsection (3) applies where—

(a) a person has, whether on indictment or complaint—

(i) been charged with, and

(ii) acquitted or convicted of, an offence, and

(b) the conditions mentioned in subsection (4) are satisfied.

(2) Whether the conviction or acquittal was before or after the coming into force of this section is, for the purposes of the section, immaterial.

(3) The person may be charged with, and prosecuted anew for, the offence.

(4) The conditions are that, on the application of the prosecutor and after hearing the parties, the High Court is satisfied—

(a) that the proceedings on the indictment or complaint were a nullity, and

(b) that it would not be contrary to the interests of justice to proceed as mentioned in subsection (3).>

Bill Aitken

125 After section 37, insert—

<Amendment of Schedule 1 to the Contempt of Court Act 1981

(1) Schedule 1 to the Contempt of Court Act 1981 (c.49) (times when proceedings are active for the purposes of section 2 of that Act) is amended as follows.

(2) After paragraph 1 (the expressions "criminal proceedings" and "appellate proceedings"), there is inserted—

"1A Proceedings under sections *(Plea in bar of trial)* to *(Nullity of proceedings on previous indictment or complaint)* of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00) are criminal proceedings (and are not appellate proceedings) for the purposes of this Schedule.".

(3) In paragraph 4 (initial steps of criminal proceedings), at the end there is added—

"(f) the making of an application under section *(Tainted acquittals)*(3)(a)(ii) or (b) (tainted acquittals), *(Admission subsequent to acquittal)*(3) (admission subsequent to acquittal) or *(New evidence)*(2)(b) (new evidence) of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00).".

(4) In paragraph 5 (conclusion of criminal proceedings), at the end there is added—

"(d) where the initial steps of the proceedings are as mentioned in paragraph 4(f)—

  (i) by refusal of the application,

  (ii) if the application is granted and within 2 months thereafter a new prosecution is brought, by acquittal, or as the case may be by sentence, in the new prosecution.".

(5) In paragraph 7 (discontinuance of proceedings), at the end there is added—

"(d) where the initial steps of the proceedings are as mentioned in paragraph 4(f) and the application is granted, if no new prosecution is brought within 2 months thereafter.".>

Robert Brown

544 After section 37, insert—

<Breach of the peace

Breach of the peace: modification of common law offence

A person's behaviour may constitute a breach of the peace—

(a) whether or not it is directed at anyone in particular, and

(b) whether it takes place in public or private,

and to the extent that any rule of law is to the contrary, it ceases to have effect.>

Section 38

Robert Brown

379 In section 38, page 53, line 15, leave out subsection (2) and insert—

<(2) In section 41 (age of criminal responsibility), for "eight" substitute "12".>

Bill Aitken

126 In section 38, page 53, line 17, after <not> insert <normally>

Bill Aitken

127 In section 38, page 53, line 18, after <not> insert <normally>

Richard Baker

389* In section 38, page 53, line 26, at end insert—

<(5) The Scottish Ministers must, as soon as possible after the end of each of the reporting years, lay before the Scottish Parliament and publish a report on the disposal of cases ("relevant cases") involving children who, but for section 41A of the 1995 Act (as inserted by subsection (2)), would have been prosecuted.

(6) For the purposes of subsection (5), the "reporting years" are—

(a) the period of 12 months beginning with the day on which this section comes into force, and

(b) the periods of 12 months beginning with the first and second anniversaries of that day.

(7) A report under subsection (5) must, in particular—

(a) specify the number of relevant cases disposed of during the reporting year,

(b) set out how those cases were disposed of and the costs and other resources involved in those disposals, and

(c) state what (if any) consideration the Scottish Ministers have given during the year covered by the report to the merits of altering the range of disposals available in such cases.>

Section 39

Kenny MacAskill

128 In section 39, page 53, line 32, after <offence> insert <committed by the partnership>

Kenny MacAskill

129 In section 39, page 54, line 9, at end insert—

<( ) In subsection (1), the references to a partner of a partnership include references to a person purporting to act as a partner of the partnership.>

Section 40

Kenny MacAskill

130 In section 40, page 54, line 23, leave out <all reasonable hours> and insert <a reasonable time and in a reasonable place>

Bill Aitken
Supported by: Robert Brown

131 Leave out section 40

After section 40

Margaret Curran

403 After section 40, insert—

<Parole: victims' representation

Victims' representation at Parole Board hearings

(1) Section 17 of the Criminal Justice (Scotland) Act 2003 (asp 7) is amended as follows.

(2) After subsection (1), insert—

"(1A) Representations under subsection (1) may include a request by the victim to be heard (either in person or through a representative) at the relevant hearing of the Parole Board for Scotland.

(1B) In this section, the "relevant hearing" of the Board is the hearing at which the Board is to consider the convicted person's case in order to decide whether to recommend, or direct, that person's release on licence.".

(3) In subsection (3), for "Parole Board for Scotland" substitute "Board".

(4) After subsection (5), insert—

"(5A) Where representations are made under subsection (1) which include a request to be heard at the relevant hearing, the Board must—

(a) give the victim reasonable notice in writing of when and where the hearing is to take place and invite the victim to—

(i) attend the hearing, with or without an accompanying person, in order to be heard in person; or

(ii) send a representative to the hearing to be heard on the victim's behalf;

(b) in so doing, give the victim appropriate information about the hearing and how it is likely to be conducted including, in particular—

(i) information about any parts of the hearing from which the victim and any accompanying person are, or the victim's representative is, to be excluded, and

(ii) any limits on their participation during the other parts of the hearing;

(c) at the hearing, afford the victim (or the victim's representative) a reasonable opportunity to be heard.

(5B) A victim's representative may only be a member of the victim's immediate family or a friend of the victim.

(5C) In reaching its decision at or after the hearing, the Board must take account of—

(a) any written representations made under subsection (1); and

(b) anything said by the victim (or the victim's representative) at the hearing.".>

Section 41

Kenny MacAskill

518 In section 41, page 55, line 22, at end insert—

<(4A) The reference in subsection (4)(c) to any previous conviction of an offence under subsection (1)(b) includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to an offence under subsection (1)(b).

(4B) The references in subsection (4)(d) to subsection (4) are to be read, in relation to a previous conviction by a court referred to in subsection (4A), as references to any provision that is equivalent to subsection (4).

(4C) Any issue of equivalence arising in pursuance of subsection (4A) or (4B) is for the court to determine.>

After section 41

Kenny MacAskill

420 After section 41, insert—

<*Grant of warrants*

Grant of warrants for execution by constables and police members of SCDEA

(1) A sheriff or justice of the peace does not lack power or jurisdiction to grant a warrant for execution by a person mentioned in subsection (2) solely because the person is not a constable of a police force for a police area lying wholly or partly in the sheriff's or justice's sheriffdom.

(2) The persons referred to in subsection (1) are—

(a) a constable,

(b) a police member of the Scottish Crime and Drug Enforcement Agency.>

After section 43

Kenny MacAskill

132 After section 43, insert—

<**Bail conditions: remote monitoring requirements**

Sections 24A to 24E of the 1995 Act (bail conditions: remote monitoring) are repealed.>

Section 44

Kenny MacAskill

421 In section 44, page 58, line 5, at end insert—

<( ) The title of section 287 becomes "Demission from office of Lord Advocate and Solicitor General for Scotland".>

Kenny MacAskill

422 In section 44, page 58, line 6, leave out from <subsection> to <Advocate)> and insert <that section>

Kenny MacAskill

423 In section 44, page 58, line 11, at end insert <and

( ) after "successor" insert "or the Solicitor General",>

Kenny MacAskill

424 In section 44, page 58, leave out line 13 and insert—

<( ) for "in name of" substitute "at the instance of Her Majesty's Advocate or", and>

Kenny MacAskill

425 In section 44, page 58, line 17, at end insert—

<(2AA) All indictments which have been raised at the instance of the Solicitor General shall remain effective notwithstanding the holder of the office of Solicitor General subsequently having died or demitted office and may be taken up and proceeded with by his successor or the Lord Advocate.>

Kenny MacAskill

426 In section 44, page 58, line 19, leave out from <as> to end of line 20

Kenny MacAskill

427 In section 44, page 58, line 24, at end insert—

<( ) in paragraph (a), after "subsection (1)" insert "or (2AA)",>

After section 46

Kenny MacAskill

428 After section 46, insert—

<Dockets and charges in sex cases

Dockets and charges in sex cases

After section 288B of the 1995 Act insert—

"Dockets and charges in sex cases

288BA Dockets for charges of sexual offences

(1) An indictment or a complaint may include a docket which specifies any act or omission that is connected with a sexual offence charged in the indictment or complaint.

(2) Here, an act or omission is connected with such an offence charged if it—

(a) is specifiable by way of reference to a sexual offence, and

(b) relates to—

(i) the same event as the offence charged, or

(ii) a series of events of which that offence is also part.

(3) The docket is to be in the form of a note apart from the offence charged.

(4) It does not matter whether the act or omission, if it were instead charged as an offence, could not competently be dealt with by the court (including as particularly constituted) in which the indictment or complaint is proceeding.

(5) Where under subsection (1) a docket is included in an indictment or a complaint, it is to be presumed that—

(a) the accused person has been given fair notice of the prosecutor's intention to lead evidence of the act or omission specified in the docket, and

(b) evidence of the act or omission is admissible as relevant.

(6) The references in this section to a sexual offence are to—

(a) an offence under the Sexual Offences (Scotland) Act 2009,

(b) any other offence involving a significant sexual element.

288BB Mixed charges for sexual offences

(1) An indictment or a complaint may include a charge that is framed as mentioned in subsection (2) or (3) (or both).

(2) That is, framed so as to comprise (in a combined form) the specification of more than one sexual offence.

(3) That is, framed so as to—

(a) specify, in addition to a sexual offence, any other act or omission, and

(b) do so in any manner except by way of reference to a statutory offence.

(4) Where a charge in an indictment or a complaint is framed as mentioned in subsection (2) or (3) (or both), the charge is to be regarded as being a single yet cumulative charge.

(5) The references in this section to a sexual offence are to an offence under the Sexual Offences (Scotland) Act 2009.".>

Section 47

Robert Brown

541 In section 47, page 61, line 2, at end insert—

<(A1) Section 44 of the 1995 Act (detention of children) is amended in accordance with subsections (B1) and (C1).

(B1) In subsection (1), after “child” insert “aged 16 years or over”.

(C1) In subsection (2), the words from “(other than” to “this Act)” are repealed.>

After section 51

Kenny MacAskill

429 After section 51, insert—

<*Personal conduct of case by accused*

Prohibition of personal conduct of case by accused in certain proceedings

(1) The 1995 Act is amended as follows.

(2) In section 288C (prohibition of personal conduct of defence in cases of certain sexual offences)—

(a) for subsection (1) substitute—

“(1) An accused charged with a sexual offence to which this section applies is prohibited from conducting his case in person at, or for the purposes of, any relevant hearing in the course of proceedings (other than proceedings in a JP court) in respect of the offence.

(1A) In subsection (1), “relevant hearing” means a hearing at, or for the purposes of, which a witness is to give evidence.”, and

(b) subsection (8) is repealed.

(3) In section 288D (appointment of solicitor by court in cases to which section 288C applies)—

(a) in subsection (1), after “proceedings” insert “(other than proceedings in a JP court)”,

(b) in subsection (2)(a), for sub-paragraphs (i) and (ii) substitute—

“(i) the conduct of his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the proceedings; or”, and

(c) in subsection (6), for the words from “of the accused’s defence” to the end substitute “referred to in subsection (2)(a) above.”.

(4) In section 288E (prohibition of personal conduct of defence in certain cases involving child witness under the age of 12)—

(a) subsection (1) is repealed,

(b) in subsection (2)(b), for “the trial” substitute “any hearing in the course of the proceedings”,

(c) after subsection (2) insert—

“(2A) The accused is prohibited from conducting his case in person at, or for the purposes of, any hearing at, or for the purposes of, which the child witness is to give evidence.”,

(d) in subsection (4), at the end insert “and as if references to a relevant hearing were references to a hearing referred to in subsection (2A) above”,

(e) in subsection (6)—

(i) for paragraphs (za) and (a) substitute—

“(a) that his case at, or for the purposes of, any hearing in the course of the proceedings at, or for the purposes of, which the child witness is to give evidence may be conducted only by a lawyer,”, and

(ii) in paragraph (c), for the words from “preliminary” to “trial” substitute “hearing”, and

(f) subsection (8) is repealed.

(5) In section 288F (power to prohibit personal conduct of defence in other cases involving vulnerable witnesses)—

(a) in subsection (1), for “the trial” substitute “any hearing in the course of the proceedings”,

(b) in subsection (2), for the words from “defence” to the end substitute “case in person at any hearing at, or for the purposes of, which the vulnerable witness is to give evidence.”,

(c) in subsection (3)(a), for “trial” substitute “hearing”,

(d) in subsection (4), for the words from “after” to the end substitute “in relation to a hearing after, as well as before, the hearing has commenced.”,

(e) subsection (4A) is repealed,

(f) in subsection (5), at the end insert “and as if references to a relevant hearing were references to any hearing in respect of which an order is made under this section”, and

(g) subsection (6) is repealed.>

Section 52

Kenny MacAskill

519 In section 52, page 64, line 11, at end insert—

<( ) A reference in this section to a conviction which occurred on or after the date of offence O is a reference to such a conviction by a court in any part of the United Kingdom or in any other member State of the European Union.”.>

Kenny MacAskill

520 In section 52, page 64, line 36, at end insert—

<( ) A reference in this section to a conviction which occurred on or after the date of offence O is a reference to such a conviction by a court in any part of the United Kingdom or in any other member State of the European Union.”.>

After section 52

Kenny MacAskill

521 After section 52, insert—

<**Convictions by courts in other EU member States**

(1) Schedule (*Convictions by courts in other EU member States*) makes modifications of the 1995 Act and other enactments for the purposes of and in connection with implementing obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).

(2) The Scottish Ministers may by order make further provision for the purposes of and in connection with implementing those obligations.

(3) The provision may, in particular, confer functions—

(a) on the Scottish Ministers,

(b) on other persons.

(4) An order under subsection (2) may modify any enactment.

(5) In this section, the “Framework Decision” means Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.>

After schedule 2

Kenny MacAskill

522 After schedule 2, insert—

<SCHEDULE

(*introduced by section (Convictions by courts in other EU member States)(1)*)

CONVICTIONS BY COURTS IN OTHER EU MEMBER STATES: MODIFICATIONS OF ENACTMENTS

PART 1

THE 1995 ACT

The 1995 Act

1 The 1995 Act is amended as follows.

2 In section 23C(2)(d)(i) (previous convictions to be taken into consideration in determining bail), for “outwith Scotland” substitute “by courts outside the European Union”.

3 In section 27 (breach of bail conditions: offences), after subsection (3) insert—

“(3A) The reference in subsection (3)(b) to any previous conviction of an offence under subsection (1)(b) includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to an offence under subsection (1)(b).

(3B) The references in subsection (3)(c) to subsection (3) are to be read, in relation to a previous conviction by a court referred to in subsection (3A), as references to any provision that is equivalent to subsection (3).

(3C) Any issue of equivalence arising in pursuance of subsection (3A) or (3B) is for the court to determine.”.

4 In section 202(2) (deferred sentence), for “Great Britain” substitute “the United Kingdom or in another member State of the European Union”.

5 In section 204 (restrictions on passing sentence of imprisonment or detention)—

(a) in each of subsections (1) and (2), after “United Kingdom” insert “or in another member State of the European Union”,

(b) after subsection (4) insert—

“(4A) The court shall, for the purpose of determining whether a person has been previously sentenced to imprisonment or detention by a court in a member State of the European Union other than the United Kingdom—

(a) disregard any previous sentence of imprisonment which, being the equivalent of a suspended sentence, has not taken effect;

(b) construe detention as meaning an equivalent sentence to any of those mentioned in subsection (4)(b).

(4B) Any issue of equivalence arising in pursuance of subsection (4A) is for the court to determine.”.

6 In section 205B (minimum sentence for third conviction of certain offences relating to drug trafficking)—

(a) in subsection (1)(b), for “been convicted in any part of the United Kingdom of two other class A drug trafficking offences” substitute “two previous convictions for relevant offences”,

(b) after subsection (1) insert—

“(1A) In subsection (1), “relevant offence” means—

(a) in relation to a conviction by a court in any part of the United Kingdom, a class A drug trafficking offence;

(b) in relation to a conviction by a court in a member State of the European Union other than the United Kingdom, an offence that is equivalent to a class A drug trafficking offence.

(1B) Any issue of equivalence arising in pursuance of subsection (1A)(b) is for the court to determine.”.

7 In section 275A (disclosure of accused’s previous convictions where court allows questioning or evidence under section 275)—

(a) in subsection (10)—

(i) the word “or” immediately following paragraph (a) is repealed,

(ii) after paragraph (a) insert—

"(aa) a conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to one to which section 288C of this Act applies by virtue of subsection (2) thereof; or",

(b) after subsection (10) insert—

"(10A) Any issue of equivalence arising in pursuance of subsection (10)(aa) is for the court to determine.".

8 In section 307 (interpretation)—

(a) in subsection (1), insert the following definition at the appropriate place—

""conviction", in relation to a previous conviction by a court outside Scotland, means a final decision of a criminal court establishing guilt of a criminal offence;", and

(b) for subsection (5) substitute—

"(5) Except where the context requires otherwise—

(a) any reference in this Act to a previous conviction is to be construed as a reference to a previous conviction by a court in any part of the United Kingdom or in any other member State of the European Union;

(b) any reference in this Act to a previous sentence is to be construed as a reference to a previous sentence passed by any such court;

(c) any reference to a previous conviction of a particular offence is to be construed, in relation to a previous conviction by a court outside Scotland, as a reference to a previous conviction of an equivalent offence; and

(d) any reference to a previous sentence of a particular kind is to be construed, in relation to a previous sentence passed by a court outside Scotland, as a reference to a previous sentence of an equivalent kind.".

PART 2

OTHER ENACTMENTS

The Civic Government (Scotland) Act 1982 (c.45)

9 In section 58 of the Civic Government (Scotland) Act 1982, after subsection (4) insert—

"(4A) In subsection (4), the reference to a conviction for theft includes a reference to a conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to theft.

(4B) Any issue of equivalence arising in pursuance of subsection (4A) is for the court to determine.".

The Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9)

10 In section 27(1) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (interpretation of Part 1), insert at the appropriate place—

““previous conviction” means a previous conviction by a court in any part of the United Kingdom or in any other member State of the European Union;”.

The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)

11 (1) Section 9 of the Criminal Law (Consolidation) (Scotland) Act 1995 (permitting girl to use premises for intercourse) is amended as follows.

(2) In subsection (2A)—

(a) the word “or” immediately following paragraph (a) is repealed, and

(b) after paragraph (a) insert—

“(aa) that person has a previous conviction for a relevant foreign offence committed against a person under the age of 16; or”.

(3) In subsection (3)—

(a) the word “and” immediately following paragraph (a) is repealed, and

(b) after paragraph (a) insert—

“(aa) “a previous conviction for a relevant foreign offence” has the same meaning as in section 39(5)(aa) of that Act; and”.

The Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17)

12 In section 4(1) of the Custodial Sentences and Weapons (Scotland) Act 2007 (basic definitions for purposes of Part 2), insert at the appropriate place—

““previous conviction” means a previous conviction by a court in any part of the United Kingdom or in any other member State of the European Union,”.

The Sexual Offences (Scotland) Act 2009 (asp 9)

13 (1) Section 39 of the Sexual Offences (Scotland) Act 2009 (defences in relation to offences against older children) is amended as follows.

(2) In subsection (2)—

(a) in paragraph (a)—

(i) the word “or” immediately following sub-paragraph (i) is repealed, and

(ii) after sub-paragraph (i) insert—

“(ia) if A has a previous conviction for a relevant foreign offence committed against a person under the age of 16, or”,

(b) in paragraph (b)—

(i) the word “or” immediately following sub-paragraph (i) is repealed, and

(ii) after sub-paragraph (i) insert—

“(ia) if B has a previous conviction for a relevant foreign offence committed against a person under the age of 16, or”.

(3) In subsection (5), after paragraph (a) insert—

“(aa) “a previous conviction for a relevant foreign offence” means a previous conviction by a court in a member State of the European Union other than the United Kingdom for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1,”

(4) After subsection (5) insert—

“(5A) Any issue of equivalence arising in pursuance of subsection (5)(aa) is for the court to determine.

(5B) For that purpose, an offence may be equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1 even though, under the law of the member State (or part of the member State) in question, it is an offence—

(a) regardless of the age of the victim, or

(b) only if committed against a person under an age other than 16 years.”.>

Section 54

Kenny MacAskill

462 In section 54, page 65, line 30, leave out <the close of the whole of the evidence> and insert <one or other (but not both) of the appropriate events>

Kenny MacAskill

463 In section 54, page 65, leave out lines 39 and 40 and insert—

<( ) For the purposes of subsection (1), “the appropriate events” are—

(a) the close of the whole of the evidence,

(b) the conclusion of the prosecutor’s address to the jury on the evidence.>

Kenny MacAskill

464 In section 54, page 66, line 15, leave out <the prosecutor to amend the indictment> and insert <that the indictment be amended>

Kenny MacAskill

465 In section 54, page 66, line 22, after first <of> insert <the judge or>

Kenny MacAskill

466 In section 54, page 66, line 29, leave out <the prosecutor to amend the indictment> and insert <that the indictment be amended>

Kenny MacAskill

467 In section 54, page 66, line 37, after first <of> insert <the judge or>

Kenny MacAskill

468 In section 54, page 66, line 37, at end insert—

<**97D No acquittal on "no reasonable jury" grounds**

(1) A judge has no power to direct the jury to return a not guilty verdict on any charge on the ground that no reasonable jury, properly directed on the evidence, could convict on the charge.

(2) Accordingly, no submission based on that ground or any ground of like effect is to be allowed.>

Section 55

Kenny MacAskill

469 In section 55, page 67, line 4, at end insert—

<(1A) If, immediately after an acquittal under section 97 or 97B(2)(a), the prosecutor moves for the trial diet to be adjourned for no more than 2 days in order to consider whether to appeal against the acquittal under subsection (1), the court of first instance must grant the motion unless the court considers that there are no arguable grounds of appeal.

(1B) If, immediately after the giving of a direction under section 97B(2)(b) or 97C(2), the prosecutor moves for the trial diet to be adjourned for no more than 2 days in order to consider whether to appeal against the direction under subsection (1), the court of first instance must grant the motion unless the court considers that it would not be in the interests of justice to do so.

(1C) In considering whether it would be in the interests of justice to grant a motion for adjournment under subsection (1B), the court must have regard, amongst other things, to—

(a) whether, if an appeal were to be made and to be successful, continuing with the diet would have any impact on any subsequent or continued prosecution,

(b) whether there are any arguable grounds of appeal.

(1D) An appeal may not be brought under subsection (1) unless the prosecutor intimates intention to appeal—

(a) immediately after the acquittal or, as the case may be, the giving of the direction,

(b) if a motion to adjourn the trial diet under subsection (1A) or (1B) is granted, immediately upon resumption of the diet, or

(c) if such a motion is refused, immediately after the refusal.

(1E) Subsection (2) applies if—

(a) the prosecutor intimates an intention to appeal under subsection (1)(a), or

(b) the trial diet is adjourned under subsection (1A).>

Kenny MacAskill

470 In section 55, page 67, line 5, leave out from beginning to <Court> and insert <Where this subsection applies, the court of first instance must suspend the effect of the acquittal and>

Kenny MacAskill

471 In section 55, page 67, line 10, leave out <exceptionally and>

Kenny MacAskill

472 In section 55, page 67, line 11, at end insert—

<( ) The court may, under subsection (2)(b), order the detention of the person in custody only if the court considers that there are arguable grounds of appeal.>

Kenny MacAskill

473 In section 55, page 67, leave out lines 25 to 33

Kenny MacAskill

474 In section 55, page 68, line 5, leave out <an appeal is brought> and insert <the prosecutor intimates intention to appeal>

Kenny MacAskill

475 In section 55, page 68, line 28, leave out <or 107B>

Kenny MacAskill

476 In section 55, page 69, line 13, at end insert—

<( ) However, if the prosecutor moves for the diet to be deserted *pro loco et tempore* in relation to such other offence, the court must grant the motion.>

Section 57

Kenny MacAskill

477 In section 57, page 69, line 26, leave out <within 7 days after an appeal is brought under section 107A(1)> and insert <where the prosecutor intimates intention to appeal under section 107A(1), within 7 days after the acquittal or direction appealed against>

Section 58

Kenny MacAskill

478 In section 58, page 71, line 4, leave out from <18(7A)> to end of line 5 and insert <18 (prints, samples etc. in criminal investigations)—

( ) in subsection (3), for "section 18A" substitute "sections 18A to 18C",

( ) in subsection (7A), for "sections 19 to 20" substitute ", subject to the modification in subsection (7AA), sections 18A to 19C", and

( ) after subsection (7A) insert—

"(7AA)The modification is that for the purposes of section 19C as it applies in relation to relevant physical data taken from or provided by a person outwith Scotland, subsection (7A) is to be read as if in paragraph (d) the words from "created" to the end were omitted.".>

James Kelly

404 In section 58, page 71, line 4, leave out from <18(7A)> to <Act),> in line 5 and insert <18 (prints, samples etc. in criminal investigations)—

( ) in subsection (3), the words "or on the conclusion of such proceedings otherwise than with a conviction or an order under section 246(3) of this Act" are repealed, and

( ) in subsection (7A),>

James Kelly

405 In section 58, page 71, leave out line 6 and insert—

<( ) The title of section 18A becomes "Retention of samples, etc.: persons prosecuted but not convicted etc.", and in that section>

Kenny MacAskill

479 In section 58, page 71, leave out lines 7 to 10 and insert—

<( ) for subsection (1) substitute—

"(1) This section applies to—

(a) relevant physical data taken or provided under section 18(2), and

(b) any sample, or any information derived from a sample, taken under section 18(6) or (6A),

where the condition in subsection (2) is satisfied.",>

James Kelly

406 In section 58, page 71, line 11, after <(2)> insert—

<( ) the words "in respect of a relevant sexual offence or a relevant violent offence" are repealed, and

( )>

Kenny MacAskill

480 In section 58, page 71, line 13, leave out from <after> to <data,"> and insert <for "sample or information" substitute "relevant physical data, sample or information derived from a sample",>

James Kelly

407 In section 58, page 71, line 13, at end insert—

<( ) in subsection (4)(a), for "3" substitute "6",>

Kenny MacAskill

481 In section 58, page 71, line 14, leave out from beginning to <data,"> in line 15 and insert—

<( ) after subsection (8) insert—

"(8A) If the sheriff principal allows an appeal against the refusal of an application under subsection (5), the sheriff principal may make an order amending, or further amending, the destruction date.

(8B) An order under subsection (8A) must not specify a destruction date more than 2 years later than the previous destruction date.",

( ) in subsection (10), for "sample or information" substitute "relevant physical data, sample or information derived from a sample">

Kenny MacAskill

482 In section 58, page 71, line 18, at end insert <and

( ) in the definition of "relevant sexual offence" and "relevant violent offence", after "have" insert ", subject to the modification in subsection (12),", and

( ) after subsection (11) insert—

"(12) The modification is that the definition of "relevant sexual offence" in section 19A(6) is to be read as if for paragraph (g) there were substituted—

"(g) public indecency if it is apparent from the offence as charged in the indictment or complaint that there was a sexual aspect to the behaviour of the person charged;".".>

James Kelly

408 In section 58, page 71, line 18, at end insert <, and

( ) the definition of "relevant sexual offence" and "relevant violent offence" is repealed.>

After section 58

Stewart Maxwell

418 After section 58, insert—

<**Retention of samples etc. where offer under sections 302 to 303ZA accepted**

After section 18A of the 1995 Act insert—

"18AA Retention of samples etc. where offer under sections 302 to 303ZA accepted

(1) This section applies to—

(a) relevant physical data taken from or provided by a person under section 18(2), and

(b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A),

where the conditions in subsection (2) are satisfied.

(2) The conditions are—

(a) the relevant physical data or sample was taken from or provided by the person while the person was under arrest or being detained in connection with the offence or offences in relation to which a relevant offer is issued to the person, and

(b) the person—

(i) accepts a relevant offer, or

(ii) in the case of a relevant offer other than one of the type mentioned in paragraph (d) of subsection (3), is deemed to accept a relevant offer.

(3) In this section "relevant offer" means—

(a) a conditional offer under section 302,

(b) a compensation offer under section 302A,

(c) a combined offer under section 302B, or

(d) a work offer under section 303ZA.

(4) Subject to subsections (6) and (7) and section 18AB(9) and (10), the relevant physical data, sample or information derived from a sample must be destroyed no later than the destruction date.

(5) In subsection (4), "destruction date" means—

(a) in relation to a relevant offer that relates only to—

(i) a relevant sexual offence,

(ii) a relevant violent offence, or

(iii) both a relevant sexual offence and a relevant violent offence,

the date of expiry of the period of 3 years beginning with the date on which the relevant offer is issued or such later date as an order under section 18AB(2) or (6) may specify,

(b) in relation to a relevant offer that relates to—

(i) an offence or offences falling within paragraph (a), and

(ii) any other offence,

the date of expiry of the period of 3 years beginning with the date on which the relevant offer is issued or such later date as an order under section 18AB(2) or (6) may specify,

(c) in relation to a relevant offer that does not relate to an offence falling within paragraph (a), the date of expiry of the period of 2 years beginning with the date on which the relevant offer is issued.

(6) If a relevant offer is recalled by virtue of section 302C(5) or a decision to uphold it is quashed under section 302C(7)(a), all record of the relevant physical data, sample and information derived from a sample must be destroyed as soon as possible after—

(a) the prosecutor decides not to issue a further relevant offer to the person,

(b) the prosecutor decides not to institute criminal proceedings against the person, or

(c) the prosecutor institutes criminal proceedings against the person and those proceedings conclude otherwise than with a conviction or an order under section 246(3).

(7) If a relevant offer is set aside by virtue of section 303ZB, all record of the relevant physical data, sample and information derived from a sample must be destroyed as soon as possible after the setting aside.

(8) In this section, "relevant sexual offence" and "relevant violent offence" have, subject to the modification in subsection (9), the same meanings as in section 19A(6) and include any attempt, conspiracy or incitement to commit such an offence.

(9) The modification is that the definition of "relevant sexual offence" in section 19A(6) is to be read as if for paragraph (g) there were substituted—

"(g) public indecency if it is apparent from the relevant offer (as defined in section 18AA(3)) relating to the offence that there was a sexual aspect to the behaviour of the person to whom the relevant offer is issued;".

18AB Section 18AA: extension of retention period where relevant offer relates to certain sexual or violent offences

(1) This section applies where the destruction date for relevant physical data, a sample or information derived from a sample falls within section 18AA(5)(a) or (b).

(2) On a summary application made by the relevant chief constable within the period of 3 months before the destruction date, the sheriff may, if satisfied that there are reasonable grounds for doing so, make an order amending, or further amending, the destruction date.

(3) An application under subsection (2) may be made to any sheriff—

(a) in whose sheriffdom the appropriate person resides,

(b) in whose sheriffdom that person is believed by the applicant to be, or

(c) to whose sheriffdom the person is believed by the applicant to be intending to come.

(4) An order under subsection (2) must not specify a destruction date more than 2 years later than the previous destruction date.

(5) The decision of the sheriff on an application under subsection (2) may be appealed to the sheriff principal within 21 days of the decision.

(6) If the sheriff principal allows an appeal against the refusal of an application under subsection (2), the sheriff principal may make an order amending, or further amending, the destruction date.

(7) An order under subsection (6) must not specify a destruction date more than 2 years later than the previous destruction date.

(8) The sheriff principal's decision on an appeal under subsection (5) is final.

(9) Section 18AA(4) does not apply where—

(a) an application under subsection (2) has been made but has not been determined,

(b) the period within which an appeal may be brought under subsection (5) against a decision to refuse an application has not elapsed, or

(c) such an appeal has been brought but has not been withdrawn or finally determined.

(10) Where—

(a) the period within which an appeal referred to in subsection (9)(b) may be brought has elapsed without such an appeal being brought,

(b) such an appeal is brought and is withdrawn or finally determined against the appellant, or

(c) an appeal brought under subsection (5) against a decision to grant an application is determined in favour of the appellant,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the period has elapsed, or, as the case may be, the appeal is withdrawn or determined.

(11) In this section—

"appropriate person" means the person from whom the relevant physical data was taken or by whom it was provided or from whom the sample was taken,

"destruction date" has the meaning given by section 18AA(5),

"the relevant chief constable" has the same meaning as in subsection (11) of section 18A, with the modification that references to the person referred to in subsection (2) of that section are references to the appropriate person.".>

Stewart Maxwell

419 After section 58, insert—

<**Retention of samples etc. taken or provided in connection with certain fixed penalty offences**

After section 18A of the 1995 Act insert—

"18AC Retention of samples etc. taken or provided in connection with certain fixed penalty offences

(1) This section applies to—

(a) relevant physical data taken from or provided by a person under section 18(2), and

(b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A),

where the conditions in subsection (2) are satisfied.

(2) The conditions are—

(a) the person was arrested or detained in connection with a fixed penalty offence,

(b) the relevant physical data or sample was taken from or provided by the person while the person was under arrest or being detained in connection with that offence,

(c) after the relevant physical data or sample was taken from or provided by the person, a constable gave the person under section 129(1) of the 2004 Act—

  (i) a fixed penalty notice in respect of that offence (the “main FPN”), or

  (ii) the main FPN and one or more other fixed penalty notices in respect of fixed penalty offences arising out of the same circumstances as the offence to which the main FPN relates, and

(d) the person, in relation to the main FPN and any other fixed penalty notice of the type mentioned in paragraph (c)(ii)—

  (i) pays the fixed penalty, or

  (ii) pays any sum that the person is liable to pay by virtue of section 131(5) of the 2004 Act.

(3) Subject to subsections (4) and (5), the relevant physical data, sample or information derived from a sample must be destroyed before the end of the period of 2 years beginning with—

(a) where subsection (2)(c)(i) applies, the day on which the main FPN is given to the person,

(b) where subsection (2)(c)(ii) applies and—

  (i) the main FPN and any other fixed penalty notice are given to the person on the same day, that day,

  (ii) the main FPN and any other fixed penalty notice are given to the person on different days, the later day.

(4) Where—

(a) subsection (2)(c)(i) applies, and

(b) the main FPN is revoked under section 133(1) of the 2004 Act,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the revocation.

(5) Where—

(a) subsection (2)(c)(ii) applies, and

(b) the main FPN and any other fixed penalty notices are revoked under section 133(1) of the 2004 Act,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the revocations.

(6) In this section—

“the 2004 Act” means the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8),

“fixed penalty notice” has the meaning given by section 129(2) of the 2004 Act, “fixed penalty offence” has the meaning given by section 128(1) of the 2004 Act.”.>

Section 59

James Kelly

409 In section 59, page 72, line 19, leave out from <such> to second <offence> and insert—

<( ) an offence of assault, categorised by the Principal Reporter as grave, or

( ) such—

(i) other relevant violent offence, or

(ii) relevant sexual offence,>

James Kelly

410 In section 59, page 72, leave out lines 21 to 36

Robert Brown

380 In section 59, page 72, leave out lines 21 and 22, and insert—

<(7) Where this section applies, the sheriff may, on summary application by the relevant chief constable, make an order that, subject to section 18C(6) and (7), the relevant physical data, sample or the information must be destroyed no later than the destruction date.

(7A) The sheriff may only make the order referred to in subsection (7) if satisfied that the child continues to pose a risk to public safety and that retention of the relevant physical data, sample or information until the destruction date is justified by that risk.>

Kenny MacAskill

483 In section 59, page 72, line 21, leave out <18C(5) and (6)> and insert <18C(6) and (7)>

Kenny MacAskill

484 In section 59, page 72, line 21, leave out <the information> and insert <information derived from a sample>

Robert Brown

545 In section 59, page 72, leave out lines 25 to 36 and insert <the date on which the relevant offence mentioned in subsection (3), (4) or, as the case may be, (5) was committed; or

(b) such later date as an order under section 18C(1) may specify.

( ) For the purposes of subsection (8)(a)—

(a) if two or more relevant offences were committed on different dates, it is the most recent of those offences that is to be taken as the offence constituting the ground of referral; and

(b) if a relevant offence was committed on more than one date, the date on which the offence was committed is to be taken as the most recent of those dates.>

Robert Brown

381 In section 59, page 72, line 40, at end insert—

<"relevant chief constable" has the same meaning as in section 18A(11), with the modification that references to the person referred to in subsection (2) of that section are references to the child referred to in subsection (1);>

Kenny MacAskill

485 In section 59, page 73, line 1, after <have> insert <, subject to the modification in subsection (11),>

Kenny MacAskill

486 In section 59, page 73, line 3, at end insert—

<(11) The modification is that the definition of "relevant sexual offence" in section 19A(6) is to be read as if for paragraph (g) there were substituted—

"(g) public indecency if it is apparent from the ground of referral relating to the offence that there was a sexual aspect to the behaviour of the child;".>

James Kelly

411 In section 59, page 73, leave out lines 4 to 40

Robert Brown

546 In section 59, page 73, line 7, leave out from <there> to end of line 8 and insert <at least one ground for doing so, specified by virtue of subsection (1A), is established, make an order amending (or further amending) the destruction date.

<(1A) The Scottish Ministers must, by regulations made by statutory instrument, specify the grounds on which an order under subsection (1) may be made.

(1B) Before making regulations under subsection (1A), the Scottish Ministers must consult such persons as they consider appropriate.

(1C) A statutory instrument containing regulations under subsection (1A) is subject to annulment in pursuance of a resolution of the Scottish Parliament.>

Kenny MacAskill

487 In section 59, page 73, line 17, at end insert—

<(4A) If the sheriff principal allows an appeal against the refusal of an application under subsection (1), the sheriff principal may make an order amending, or further amending, the destruction date.

(4B) An order under subsection (4A) must not specify a destruction date more than 2 years later than the previous destruction date.>

Kenny MacAskill

488 In section 59, page 73, line 23, leave out <expired> and insert <elapsed>

Kenny MacAskill

489 In section 59, page 73, line 28, leave out <expired> and insert <elapsed>

Kenny MacAskill

490 In section 59, page 73, line 33, after <information> insert <derived from a sample>

Kenny MacAskill

491 In section 59, page 73, line 34, leave out from <practicable> to end of line and insert <possible after the period has elapsed or, as the case may be, the appeal is withdrawn or determined.>

Kenny MacAskill

492 In section 59, page 73, line 37, leave out <section 18A(11)> and insert <subsection (11) of section 18A>

Robert Brown

382 In section 59, page 73, line 37, leave out from <18A(11)> to end of line 40 and insert <18B(10)>

Kenny MacAskill

493 In section 59, page 74, line 1, leave out subsection (2)

James Kelly

412 In section 59, page 74, line 2, leave out from <after> to end of line and insert <at beginning insert "Except where section 18B applies and">

After section 59

Kenny MacAskill

494 After section 59, insert—

<**Extension of section 19A of 1995 Act**

In section 19A(6) of the 1995 Act (definitions of certain expressions for purposes of section 19A)—

(a) in the definition of "relevant sexual offence", for paragraph (g) substitute—

"(g) public indecency if the court, in imposing sentence or otherwise disposing of the case, determined for the purposes of paragraph 60 of Schedule 3 to the Sexual Offences Act 2003 (c.42) that there was a significant sexual aspect to the offender's behaviour in committing the offence;", and

(b) in paragraph (h) of the definition of "relevant violent offence", after sub-paragraph (iv), insert—

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“(v) section 47(1) (possession of offensive weapon in public place), 49(1) (possession of article with blade or point in public place), 49A(1) or (2) (possession of article with blade or point or offensive weapon on school premises) or 49C(1) (possession of offensive weapon or article with blade or point in prison) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39);”.>

Section 60

Kenny MacAskill

495 In section 60, page 74, line 6, leave out <This section> and insert <Subsection (2)>

Kenny MacAskill

496 In section 60, page 74, line 7, leave out <, or any information derived from relevant physical data,>

Kenny MacAskill

497 In section 60, page 74, line 12, leave out <, a sample or an impression> and insert <or a sample>

Kenny MacAskill

498 In section 60, page 74, line 17, leave out <relevant physical data or a sample or impression> and insert <a sample>

Kenny MacAskill

499 In section 60, page 74, line 18, at end insert <and

( ) relevant physical data, a sample or information derived from a sample taken from, or provided by, a person outwith Scotland which is given by any person to—

(i) a police force,

(ii) the Scottish Police Services Authority, or

(iii) a person acting on behalf of a police force.>

Kenny MacAskill

500 In section 60, page 74, line 19, leave out <, impression or information> and insert <or information derived from a sample>

Kenny MacAskill

501 In section 60, page 74, line 23, leave out <, sample or impression> and insert <or sample>

Kenny MacAskill

502 In section 60, page 74, line 23, at end insert—

<(2A) Subsections (2B) and (2C) apply to relevant physical data, a sample or information derived from a sample falling within any of paragraphs (a) to (d) of subsection (1) ("relevant material").

(2B) If the relevant material is held by a police force, the Scottish Police Services Authority or a person acting on behalf of a police force, the police force or, as the case may be, the Authority or person may give the relevant material to another person for use by that person in accordance with subsection (2).

(2C) A police force, the Scottish Police Services Authority or a person acting on behalf of a police force may, in using the relevant material in accordance with subsection (2), check it against other relevant physical data, samples and information derived from samples received from another person.>

Kenny MacAskill

503 In section 60, page 74, line 33, leave out <the United Kingdom> and insert <Scotland>

Kenny MacAskill

504 In section 60, page 74, line 35, leave out <the United Kingdom> and insert <Scotland>

Kenny MacAskill

505 In section 60, page 74, line 38, leave out from <, impressions> to end of line 39 and insert <or information derived from a sample>

Kenny MacAskill

506 In section 60, page 75, leave out line 2

Kenny MacAskill

507 In section 60, page 75, leave out line 5

Kenny MacAskill

508 In section 60, page 75, line 7, leave out <, impression or relevant physical data>

Kenny MacAskill

509 In section 60, page 75, line 12, leave out <, impression>

Kenny MacAskill

510 In section 60, page 75, line 14, leave out from beginning to <impression"> in line 25 and insert <, after "information" insert "derived from a sample",

( ) in subsection (5)(b), the words "with all information derived from them" are repealed,

( ) in subsection (6)(a), for "it or them" substitute "the sample",

( ) in subsection (7)(a), the words "or relevant physical data", in the second place where they occur, are repealed,>

Section 61

Kenny MacAskill

133 In section 61, page 76, line 6, after <reasons> insert <for making the reference>

Kenny MacAskill

134 In section 61, page 76, line 9, leave out from <additional> to end of line 10 and insert <the appellant to found the appeal on additional grounds>

Kenny MacAskill

135 In section 61, page 76, line 19, leave out <additional grounds to be raised> and insert <the appeal to be founded on additional grounds>

Before section 62

Kenny MacAskill

430 Before section 62, insert—

<**Admissibility of prior statements of witnesses: abolition of competence test**

(1) This section applies in relation to a prior statement made by a witness before the commencement of section 24 of the Vulnerable Witnesses (Scotland) Act 2004 (asp 3) (“the 2004 Act”) (which abolishes the competence test for witnesses in criminal and civil proceedings).

(2) For the purpose of the application of subsection (2)(c) of section 260 of the 1995 Act (admissibility of prior statement depends on competence of the witness at the time of the statement) in relation to the statement, section 24 of the 2004 Act is taken to have been in force at the time the statement was made.

(3) In this section, “prior statement” has the meaning it has in section 260 of the 1995 Act.>

Section 62

Robert Brown

383 In section 62, page 77, line 1, after <may> insert <, if satisfied that there is good reason to do so,>

After section 64

Kenny MacAskill

384 After section 64, insert—

<**Child witnesses in proceedings for people trafficking offences**

In section 271 of the 1995 Act (vulnerable witnesses: main definitions)—

(a) in subsection (1)(a), for “age of 16” substitute “relevant age”, and

(b) after subsection (1), insert—

“(1A) In subsection (1)(a), “the relevant age” means—

(a) in the case of a person who is giving or is to give evidence in proceedings for an offence under section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (trafficking in prostitution etc.) or section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation), the age of 18, and

(b) in any other case, the age of 16.”.>

Section 66

Kenny MacAskill

431 In section 66, page 80, line 13, leave out from <other> to end of line 16 and insert <the jury>

Kenny MacAskill

432 In section 66, page 80, line 18, leave out <any persons within paragraph (a)(i) to (iii)> and insert <the judge or the jury>

Kenny MacAskill

433 In section 66, page 81, line 6, leave out <material> and insert <information>

Kenny MacAskill

434 In section 66, page 81, line 8, leave out <may> and insert <must>

Kenny MacAskill

435 In section 66, page 81, line 12, leave out <material”> and insert <information”>

Kenny MacAskill

436 In section 66, page 82, line 16, leave out <the weight of>

Kenny MacAskill

437 In section 66, page 82, line 18, leave out <the sole or decisive evidence> and insert <material in>

Kenny MacAskill

438 In section 66, page 82, line 36, leave out <warning> and insert <direction>

Kenny MacAskill

439 In section 66, page 83, leave out lines 33 to 36

Schedule 3

Kenny MacAskill

440 In schedule 3, page 148, line 28, leave out <treat the conviction as unsafe> and insert <quash the conviction>

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Kenny MacAskill

441 In schedule 3, page 148, line 31, leave out <treat the conviction as unsafe> and insert <quash the conviction>

After section 67

Kenny MacAskill

442 After section 67, insert—

<**European evidence warrants**

(1) The Scottish Ministers may by order make provision for the purposes of and in connection with implementing any obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).

(2) The provision may, in particular, confer functions—

(a) on the Scottish Ministers,

(b) on the Lord Advocate,

(c) on other persons.

(3) An order under subsection (1) may modify any enactment.

(4) An order under subsection (1) may contain provision creating offences and a person who commits such an offence is liable to such penalties, not exceeding those mentioned in subsection (5), as are provided for in the order.

(5) Those penalties are—

(a) on conviction on indictment, imprisonment for a period not exceeding 2 years, or a fine, or both,

(b) on summary conviction, imprisonment for a period not exceeding 12 months, or a fine not exceeding the statutory maximum, or both.

(6) In this section, the "Framework Decision" means Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.>

Before section 68

Kenny MacAskill

443 Before section 68, insert—

<**Lists of jurors**

(1) The 1995 Act is amended as follows.

(2) In section 84 (juries: returns of jurors and preparation of lists)—

(a) in subsection (3), for "list" substitute "lists",

(b) for subsection (4) substitute—

“(4) For the purpose of a trial in the sheriff court, the sheriff principal must furnish the clerk of court with a list of names, containing the number of persons required, from lists of potential jurors of—

(a) the sheriff court district in which the trial is to be held (the “local district”), and

(b) if the sheriff principal considers it appropriate, any other sheriff court district or districts in the sheriffdom in which the trial is to be held (“other districts”).

(4A) Where the sheriff principal furnishes a list containing names of potential jurors of other districts, the sheriff principal may determine the proportion as between the local district and the other districts in which jurors are to be summoned.”,

(c) in subsection (5), for “list”, in both places where it occurs, substitute “lists”, and

(d) subsection (7) is repealed.

(3) In section 85(4) (juries: citation and attendance of jurors)—

(a) for the words from the beginning to “shall”, in the first place where it occurs, substitute “The sheriff clerk of—

(a) the sheriffdom in which the High Court is to sit, or

(b) the sheriff court district in which a trial in the sheriff court is to be held,

shall”, and

(b) the word “such”, in the first place where it occurs, is repealed.>

Section 68

David McLetchie

415 In section 68, page 86, line 14, leave out from <for> to <relevant”> and insert <at beginning insert “subject to subsection (1A),”>

David McLetchie

416 In section 68, page 86, leave out lines 17 to 19 and insert—

<“(1A) In relation to criminal proceedings, a person is qualified and liable to serve as a juror despite being over 65 years of age.”>

After section 68

Kenny MacAskill

511 After section 68, insert—

<**Excusal from jury service**

(1) The Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 is amended as follows.

(2) In section 1 (qualification of jurors)—

(a) in subsection (1), after “below” insert “and to section 1A”,

(b) in subsection (2), after "service" in the second place where it occurs insert "in relation to civil proceedings",

(c) in subsection (3), after "service" in the first place where it occurs insert "in relation to civil proceedings",

(d) in subsection (5), after "above" insert "or under section 1A", and

(e) in subsection (6), after paragraph (a) insert—

"(aa) section 1A;".

(3) After section 1 insert—

"**1A Excusal of jurors in relation to criminal proceedings**

(1) A person who is qualified under section 1(1) but is among the persons listed in Part III of Schedule 1 to this Act (being persons excusable as of right from jury service) is to be excused from jury service in relation to criminal proceedings on any occasion where the person—

(a) has been required to provide information under section 3(2) of the Jurors (Scotland) Act 1825 (c.22); and

(b) gives written notice to the sheriff principal that the person wishes to be excused, before the end of the period of 7 days beginning with the day on which the person receives the requirement.

(2) A person who is qualified under section 1(1) but is among the persons listed in Group C of Part III of Schedule 1 to this Act is to be excused from jury service in relation to criminal proceedings on any occasion where—

(a) the person has been required to provide information under section 3(2) of the Jurors (Scotland) Act 1825; and

(b) the person's commanding officer certifies to the sheriff principal that it would be prejudicial to the efficiency of the force of which the person is a member were the person required to be absent from duty.".

(4) In section 3(1)(a) (offences in connection with jury service), after "been" insert "required to provide information under section 3(2) of the Jurors (Scotland) Act 1825 or".>

Section 69

David McLetchie

417 In section 69, page 86, line 30, at end insert <and

( ) persons who have attained the age of 71;>

Section 70

Kenny MacAskill

136 In section 70, page 89, line 34, leave out <and Wales>

Kenny MacAskill

137 In section 70, page 90, line 21, leave out from <body> to end of line 23 and insert <health and social care body mentioned in paragraphs (a) to (e) of section 1(5) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 (c.1).>

Section 72

Kenny MacAskill

138 In section 72, page 94, line 29, leave out <Law> and insert <Justice>

Trish Godman

9 In section 72, page 94, line 39, at end insert <, other than an offence under section 11A (engaging in a paid-for sexual activity) or 11B (advertising paid-for sexual activities)>

Margo MacDonald

9A As an amendment to amendment 9, line 2, after <activity)> insert <, 11AA (causing alarm etc. by engaging in a paid-for sexual activity)>

Kenny MacAskill

139 In section 72, page 94, line 41, leave out <27> and insert <37>

Kenny MacAskill

140 In section 72, page 94, line 42, leave out <penetrative>

Kenny MacAskill

141 In section 72, page 95, line 1, leave out <31> and insert <42>

Kenny MacAskill

142 In section 72, page 95, line 2, leave out <35> and insert <46>

Kenny MacAskill

143 In section 72, page 95, line 3, at end insert—

<( ) an offence under section (*Slavery, servitude and forced or compulsory labour*) (slavery, servitude and forced or compulsory labour) of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00).>

Kenny MacAskill

144 In section 72, page 95, line 14, leave out <42> and insert <54>

Section 74

Kenny MacAskill

444 In section 74, page 96, line 23, after <station> insert <in Scotland>

Kenny MacAskill

445 In section 74, page 97, line 5, leave out from <a> to end of line and insert—

<(a) a requirement under section 117A(2) (surrender of passports: England and Wales and Northern Ireland), or

(b) a requirement under section 117B(2) (surrender of passports: Scotland).”.>

Kenny MacAskill

446 In section 74, page 97, line 5, at end insert—

<(1C) A person may be prosecuted, tried and punished for any offence under subsection (1B)—

(a) in any sheriff court district in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).”.>

After section 74

Kenny MacAskill

145 After section 74, insert—

<Sex offender notification requirements

Sex offender notification requirements

(1) The Sexual Offences Act 2003 (c.42) is amended as follows.

(2) In section 85 (notification requirements: periodic notification)—

(a) in subsection (1), for “period of one year” substitute “applicable period”,

(b) in subsection (3), for “period referred to in subsection (1)” substitute “applicable period”, and

(c) after subsection (4) insert—

“(5) In this section, the “applicable period” means—

(a) in any case where subsection (6) applies to the relevant offender, such period not exceeding one year as the Scottish Ministers may prescribe in regulations, and

(b) in any other case, the period of one year.

(6) This subsection applies to the relevant offender if the last home address notified by the offender under section 83(1) or 84(1) or subsection (1) was the address or location of such a place as is mentioned in section 83(7)(b).”.

(3) In section 86 (notification requirements: travel outside the United Kingdom), subsection (4) is repealed.

(4) In section 87 (method of notification and related matters), subsection (6) is repealed.

(5) In section 96 (information about release or transfer), subsection (4) is repealed.

(6) In section 138 (orders and regulations)—

(a) in subsection (2), after “84,” insert “85,”, and

(b) after subsection (3) insert—

“(4) Orders or regulations made by the Scottish Ministers under this Act may—

(a) make different provision for different purposes,

(b) include supplementary, incidental, consequential, transitional, transitory or saving provisions.”.>

After section 75

Kenny MacAskill

146 After section 75, insert—

<**Risk of sexual harm orders: spent convictions**

In section 7 of the Rehabilitation of Offenders Act 1974 (c.53) (limitations on rehabilitation under the Act), in subsection (2), after paragraph (bb) insert—

“(bc) in any proceedings on an application under section 2, 4 or 5 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) or in any appeal under section 6 of that Act;”.>

Section 77

Kenny MacAskill

523 In section 77, page 98, leave out lines 5 to 10

Kenny MacAskill

524 In section 77, page 98, line 14, leave out from <(including> to <operation)> in line 15

Kenny MacAskill

525 In section 77, page 98, line 22, at end insert—

<( ) After that section insert—

“10A **Authorisation of surveillance: joint surveillance operations**

In the case of a joint surveillance operation, where authorisation is sought for the carrying out of any form of conduct to which this Act applies, authorisation may be granted by any one of the persons having power to grant authorisation for the carrying out of that conduct.”.>

Kenny MacAskill

526 In section 77, page 98, line 27, at end insert—

<( ) In section 14 (approval required for authorisations to take effect)—

(a) in subsection (5)(b), after “General” insert “or the Deputy Director General”, and

(b) subsection (7) is repealed.>

Kenny MacAskill

527 In section 77, page 98, line 27, at end insert—

<( ) In section 16 (appeals against decisions by Surveillance Commissioners), in subsection (1), after “General” insert “or the Deputy Director General”.>

Kenny MacAskill

528 In section 77, page 98, line 30, leave out from <, where> to <surveillance,> in line 31

Section 78

Kenny MacAskill

529 In section 78, page 98, line 39, leave out <(3)> and insert <(3A)>

Kenny MacAskill

530 In section 78, page 99, line 1, leave out <(3A)> and insert <(3AA)>

Kenny MacAskill

531 In section 78, page 99, line 8, leave out <or>

Kenny MacAskill

532 In section 78, page 99, line 18, leave out <(3A)> and insert <(3AA)>

Kenny MacAskill

533 In section 78, page 99, line 23, at end insert—

<( ) in paragraph (cc) of subsection (6), after “General” insert “, or Deputy Director General,”.>

Kenny MacAskill

534 In section 78, page 99, line 26, leave out <(5)(a)> and insert <(5)>

Kenny MacAskill

535 In section 78, page 99, line 26, leave out <“where> and insert <“Where>

Kenny MacAskill

536 In section 78, page 99, line 29, after <operation,> insert <the person referred to in subsection (2)(h) is>

Section 79

Kenny MacAskill

537 In section 79, page 99, line 39, at end insert—

<( ) In section 113B (enhanced criminal record certificates), in subsection (3), for the words from “, or” immediately following paragraph (a) to the end of paragraph (b), substitute “(or states that there is no such matter or information), and

(b) if the applicant is subject to notification requirements under Part 2 of the Sexual Offences Act 2003 (c.42), states that fact.”.>

Kenny MacAskill

538 In section 79, page 100, line 1, leave out <section 113B> and insert <that section>

After section 79

Kenny MacAskill

447 After section 79, insert—

<*Rehabilitation of offenders*

Spent alternatives to prosecution: Rehabilitation of Offenders Act 1974

(1) The Rehabilitation of Offenders Act 1974 (c.53) is amended as follows.

(2) After section 8A (protection afforded to spent cautions), insert—

“**8B Protection afforded to spent alternatives to prosecution: Scotland**

(1) For the purposes of this Act, a person has been given an alternative to prosecution in respect of an offence if the person (whether before or after the commencement of this section)—

(a) has been given a warning in respect of the offence by—

(i) a constable in Scotland, or

(ii) a procurator fiscal,

(b) has accepted, or is deemed to have accepted—

(i) a conditional offer issued in respect of the offence under section 302 of the Criminal Procedure (Scotland) Act 1995 (c.46), or

(ii) a compensation offer issued in respect of the offence under section 302A of that Act,

(c) has had a work order made against the person in respect of the offence under section 303ZA of that Act,

(d) has been given a fixed penalty notice in respect of the offence under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8),

(e) has accepted an offer made by a procurator fiscal in respect of the offence to undertake an activity or treatment or to receive services or do any other thing as an alternative to prosecution, or

(f) in respect of an offence under the law of a country or territory outside Scotland, has been given, or has accepted or is deemed to have accepted, anything corresponding to a warning, offer, order or notice falling within paragraphs (a) to (e) under the law of that country or territory.

(2) In this Act, references to an "alternative to prosecution" are to be read in accordance with subsection (1).

(3) Schedule 3 to this Act (protection for spent alternatives to prosecution: Scotland) has effect.".

(3) After section 9A (unauthorised disclosure of spent cautions), insert—

"9B Unauthorised disclosure of spent alternatives to prosecution: Scotland

(1) In this section—

(a) "official record" means a record that—

(i) contains information about persons given an alternative to prosecution in respect of an offence, and

(ii) is kept for the purposes of its functions by a court, police force, Government department, part of the Scottish Administration or other local or public authority in Scotland,

(b) "relevant information" means information imputing that a named or otherwise identifiable living person has committed, been charged with, prosecuted for or given an alternative to prosecution in respect of an offence which is the subject of an alternative to prosecution which has become spent,

(c) "subject of the information", in relation to relevant information, means the named or otherwise identifiable living person to whom the information relates.

(2) Subsection (3) applies to a person who, in the course of the person's official duties (anywhere in the United Kingdom), has or has had custody of or access to an official record or the information contained in an official record.

(3) The person commits an offence if the person—

(a) obtains relevant information in the course of the person's official duties,

(b) knows or has reasonable cause to suspect that the information is relevant information, and

(c) discloses the information to another person otherwise than in the course of the person's official duties.

(4) Subsection (3) is subject to the terms of an order under subsection (6).

(5) In proceedings for an offence under subsection (3), it is a defence for the accused to show that the disclosure was made—

(a) to the subject of the information or to a person whom the accused reasonably believed to be the subject of the information, or

(b) to another person at the express request of the subject of the information or of a person whom the accused reasonably believed to be the subject of the information.

(6) The Scottish Ministers may by order provide for the disclosure of relevant information derived from an official record to be excepted from the provisions of subsection (3) in cases or classes of cases specified in the order.

(7) A person guilty of an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(8) A person commits an offence if the person obtains relevant information from an official record by means of fraud, dishonesty or bribery.

(9) A person guilty of an offence under subsection (8) is liable on summary conviction to a fine not exceeding level 5 on the standard scale, or to imprisonment for a term not exceeding 6 months, or to both.”.

(4) After Schedule 2 (protection for spent convictions) insert—

“SCHEDULE 3

PROTECTION FOR SPENT ALTERNATIVES TO PROSECUTION: SCOTLAND

Preliminary

1 (1) For the purposes of this Act, an alternative to prosecution given to any person (whether before or after the commencement of this Schedule) becomes spent—

(a) in the case of—

(i) a warning referred to in paragraph (a) of subsection (1) of section 8B, or

(ii) a fixed penalty notice referred to in paragraph (d) of that subsection,

at the time the warning or notice is given,

(b) in any other case, at the end of the relevant period.

(2) The relevant period in relation to an alternative to prosecution is the period of 3 months beginning on the day on which the alternative to prosecution is given.

(3) Sub-paragraph (1)(a) is subject to sub-paragraph (5).

(4) Sub-paragraph (2) is subject to sub-paragraph (6).

(5) If a person who is given a fixed penalty notice referred to in section 8B(1)(d) in respect of an offence is subsequently prosecuted and convicted of the offence, the notice—

(a) becomes spent at the end of the rehabilitation period for the offence, and

(b) is to be treated as not having become spent in relation to any period before the end of that rehabilitation period.

(6) If a person who is given an alternative to prosecution (other than one to which sub-paragraph (1)(a) applies) in respect of an offence is subsequently prosecuted and convicted of the offence—

(a) the relevant period in relation to the alternative to prosecution ends at the same time as the rehabilitation period for the offence ends, and

(b) if the conviction occurs after the end of the period referred to sub-paragraph (2), the alternative to prosecution is to be treated as not having become spent in relation to any period before the end of the rehabilitation period for the offence.

2 (1) In this Schedule, "ancillary circumstances", in relation to an alternative to prosecution, means any circumstances of the following—

(a) the offence in respect of which the alternative to prosecution is given or the conduct constituting the offence,

(b) any process preliminary to the alternative to prosecution being given (including consideration by any person of how to deal with the offence and the procedure for giving the alternative to prosecution),

(c) any proceedings for the offence which took place before the alternative to prosecution was given (including anything that happens after that time for the purpose of bringing the proceedings to an end),

(d) any judicial review proceedings relating to the alternative to prosecution,

(e) in the case of an offer referred to in paragraph (e) of subsection (1) of section 8B, anything done or undergone in pursuance of the terms of the offer.

(2) Where an alternative to prosecution is given in respect of two or more offences, references in sub-paragraph (1) to the offence in respect of which the alternative to prosecution is given includes a reference to each of the offences.

(3) In this Schedule, "proceedings before a judicial authority" has the same meaning as in section 4.

Protection for spent alternatives to prosecution and ancillary circumstances

3 (1) A person who is given an alternative to prosecution in respect of an offence is, from the time the alternative to prosecution becomes spent, to be treated for all purposes in law as a person who has not committed, been charged with or prosecuted for, or been given an alternative to prosecution in respect of, the offence.

(2) Despite any enactment or rule of law to the contrary—

(a) where an alternative to prosecution given to a person in respect of an offence has become spent, evidence is not admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Scotland to prove that the person has committed, been charged with or prosecuted for, or been given an alternative to prosecution in respect of, the offence,

(b) a person must not, in any such proceedings, be asked any question relating to the person's past which cannot be answered without acknowledging or referring to an alternative to prosecution that has become spent or any ancillary circumstances, and

(c) if a person is asked such a question in any such proceedings, the person is not required to answer it.

(3) Sub-paragraphs (1) and (2) do not apply in relation to any proceedings—

(a) for the offence in respect of which the alternative to prosecution was given, and

(b) which are not part of the ancillary circumstances.

4 (1) This paragraph applies where a person ("A") is asked a question, otherwise than in proceedings before a judicial authority, seeking information about—

(a) A's or another person's previous conduct or circumstances,

(b) offences previously committed by A or the other person, or

(c) alternatives to prosecution previously given to A or the other person.

(2) The question is to be treated as not relating to alternatives to prosecution that have become spent or to any ancillary circumstances and may be answered accordingly.

(3) A is not to be subjected to any liability or otherwise prejudiced in law because of a failure to acknowledge or disclose an alternative to prosecution that has become spent or any ancillary circumstances in answering the question.

5 (1) An obligation imposed on a person ("A") by a rule of law or by the provisions of an agreement or arrangement to disclose any matter to another person does not extend to requiring A to disclose an alternative to prosecution (whether one given to A or another person) that has become spent or any ancillary circumstances.

(2) An alternative to prosecution that has become spent or any ancillary circumstances, or any failure to disclose an alternative to prosecution that has become spent or any ancillary circumstances, is not a ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing the person in any way in any occupation or employment.

6 The Scottish Ministers may by order—

(a) exclude or modify the application of any of paragraphs (a) to (c) of paragraph 3(2) in relation to questions put in such circumstances as may be specified in the order,

(b) provide for exceptions from any of the provisions of paragraphs 4 and 5 in such cases or classes of case, or in relation to alternatives to prosecution of such descriptions, as may be specified in the order.

7 Paragraphs 3 to 5 do not affect—

(a) the operation of an alternative to prosecution, or

(b) the operation of an enactment by virtue of which, because of an alternative to prosecution, a person is subject to a disqualification, disability, prohibition or other restriction or effect for a period extending beyond the time at which the alternative to prosecution becomes spent.

8 (1) Section 7(2), (3) and (4) apply for the purpose of this Schedule as follows.

(2) Subsection (2), apart from paragraphs (b) and (d), applies to the determination of any issue, and the admission or requirement of evidence, relating to alternatives to prosecution previously given to a person and to ancillary circumstances as it applies to matters relating to a person's previous convictions and circumstances ancillary thereto.

(3) Subsection (3) applies to evidence of alternatives to prosecution previously given to a person and ancillary circumstances as it applies to evidence of a person's previous convictions and the circumstances ancillary thereto.

(4) For that purpose, subsection (3) has effect as if—

(a) a reference to subsection (2) or (4) of section 7 were a reference to that subsection as applied by this paragraph, and

(b) the words "or proceedings to which section 8 below applies" were omitted.

(5) Subsection (4) applies for the purpose of excluding the application of paragraph 3.

(6) For that purpose, subsection (4) has effect as if the words "(other than proceedings to which section 8 below applies)" were omitted.

(7) References in the provisions applied by this paragraph to section 4(1) are to be read as references to paragraph 3.">

Kenny MacAskill

448 After section 79, insert—

<*Medical services in prisons*

Medical services in prisons

(1) For section 3A of the Prisons (Scotland) Act 1989 (c.45) (medical services in prisons) substitute—

"**3A Medical officers for prisons**

(1) The Scottish Ministers must designate one or more medical officers for each prison.

(2) A person may be designated as a medical officer for a prison only if the person is a registered medical practitioner performing primary medical services for prisoners at the prison under the National Health Service (Scotland) Act 1978 (c.29).

(3) A medical officer has the functions that are conferred on a medical officer for a prison by or under this Act or any other enactment.

(4) A medical officer is not an officer of the prison for the purposes of this Act.

(5) Rules under section 39 of this Act may provide for the governor of a prison to authorise the carrying out by officers of the prison of a search of any person who is in, or is seeking to enter, the prison for the purpose of providing medical services for any prisoner at the prison.

(6) Nothing in rules made by virtue of subsection (5) allows the governor to authorise an officer of a prison to require a person to remove any of the person's clothing other than an outer coat, jacket, headgear, gloves and footwear.".

(2) In section 41D of that Act (unlawful disclosure of information by medical officers), for subsection (1) substitute—

“(1) This section applies to—

(a) a medical officer for a prison, and

(b) any person acting under the supervision of such a medical officer.”.

(3) In section 107 of the Criminal Justice and Public Order Act 1994 (c.33) (officers of contracted out prisons), for subsections (6) to (8) substitute—

“(6) The director must designate one or more medical officers for the prison.

(7) A person may be designated as a medical officer for the prison only if the person is a registered medical practitioner performing primary medical services for prisoners at the prison under the National Health Service (Scotland) Act 1978 (c.29).”.

(4) In section 110 of that Act (consequential modifications of the 1989 Act etc.)—

(a) in each of subsections (3) and (4), for “3A(6)” substitute “3A(5) and (6)”,

(b) subsection (4A) is repealed, and

(c) in subsection (6), for “3A(1) to (5) (medical services)” substitute “3A(1) and (2) (medical officers)”.

(5) In section 111(3) of that Act (intervention by the Scottish Ministers), in paragraph (c), after “prison” insert “and the medical officer or officers for the prison”.>

Section 80

Angela Constance

413 In section 80, page 100, line 29, after <victims> insert <(including children and young people)>

Section 89

Bill Aitken

147 In section 89, page 106, line 37, leave out <review all the> and insert <disclose to the accused all>

Bill Aitken

148 In section 89, page 106, line 38, leave out from <and> to end of line 14 on page 107

Bill Aitken

149 In section 89, page 107, line 15, leave out <(5)> and insert <(2)>

Section 90

Bill Aitken

150 In section 90, page 107, line 19, leave out <(5) or (6)> and insert <(2)>

Bill Aitken

151 In section 90, page 107, leave out lines 24 to 26 and insert <and

(b) disclose to the accused any such information not already disclosed under section 89(2).>

Bill Aitken

152 In section 90, page 107, line 28, leave out <(5) or (6)> and insert <(2)>

Section 91

Bill Aitken

153 In section 91, page 108, line 5, leave out <89(5) or 90(2)> and insert <89(2) or 90(2)(b)>

Section 92

Bill Aitken

154 In section 92, page 108, line 10, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 93

Bill Aitken

155 In section 93, page 108, line 20, leave out <(5)> and insert <(2)>

Section 94

Bill Aitken
Supported by: Robert Brown

156 Leave out section 94

Section 95

Bill Aitken
Supported by: Robert Brown

157 Leave out section 95

Section 96

Bill Aitken

158 In section 96, page 110, line 28, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 97

Bill Aitken

159 In section 97, page 110, line 36, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 98

Bill Aitken

160 In section 98, page 111, line 5, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 100

Bill Aitken

161 In section 100, page 111, line 36, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 102

Bill Aitken

162 In section 102, page 112, line 26, leave out from <89(5)> to <information> in line 28 and insert <89(2) or 90(2)(b) the prosecutor is required to disclose an item of information to an accused>

Bill Aitken

163 In section 102, page 113, line 5, leave out from <89(5)> to end of line 6 and insert <89(2) or, as the case may be, 90(2)(b)>

Section 106

Bill Aitken

164 In section 106, page 115, line 14, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 111

Bill Aitken

165 In section 111, page 117, line 6, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Section 116

Bill Aitken

166 In section 116, page 119, line 24, leave out from <89(5)> to end of line 27 and insert <89(2),

(b) section 90(1) and (2),

(c) section 93(2) (where it first occurs),>

Section 117

Angela Constance

24 In section 117, page 120, line 10, at end insert <, or

(b) to determine or control that conduct despite being able to appreciate the nature or wrongfulness of it.>

Kenny MacAskill

167 In section 117, page 120, line 31, leave out <it> and insert <such abnormality>

Section 121

Kenny MacAskill

168 In section 121, page 123, leave out lines 2 and 3 and insert—

<(3A) No order may be made under subsection (1) unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.>

Section 122

Kenny MacAskill

169 In section 122, page 125, line 1, leave out from <5,> to <29> in line 2 and insert <5 and 11>

Section 123

Robert Brown

385 Leave out section 123

After section 124

Kenny MacAskill

170 After section 124, insert—

<Licensing of street trading: food hygiene certificates

(1) Section 39 of the 1982 Act (street traders' licences) is amended as follows.

(2) In subsection (4), for the words from "the requirements" to the end substitute "such requirements as the Scottish Ministers may by order made by statutory instrument specify".

(3) After subsection (4), insert—

"(5) An order under subsection (4) may specify requirements by reference to provision contained in another enactment.

(6) A statutory instrument containing an order made under subsection (4) is subject to annulment in pursuance of a resolution of the Scottish Parliament.".>

Section 125

Kenny MacAskill

171 In section 125, page 128, line 24, at beginning insert <In>

Kenny MacAskill

172 In section 125, page 128, line 24, leave out from <is> to <In> in line 26 and insert <, in>

Cathie Craigie

2 In section 125, page 128, line 25, leave out subsection (2)

Cathie Craigie

3 In section 125, page 128, line 26, leave out subsection (3)

Cathie Craigie
Supported by: Robert Brown

4 Leave out section 125

After section 127

Sandra White

516 After section 127, insert—

<**Control of lap dancing and other adult entertainment venues**

(1) The 1982 Act is amended as follows.

(2) In section 41(2) (definition of place of public entertainment), after paragraph (aa) insert—

"(ab) adult entertainment venues (as defined in section 45A) in relation to which Schedule 2 (as modified for the purposes of that section) have effect, while being used as such;".

(3) The title of Part 3 becomes "Control of sex shops and adult entertainment venues".

(4) After section 45 insert—

“45A Control of lap dancing and other adult entertainment venues

(1) A local authority may resolve that Schedule 2, as modified for the purposes of this section, is to have effect in their area in relation to adult entertainment venues; and, if they do so resolve, that Schedule (as so modified) has effect from the day specified in the resolution.

(2) The day referred to in subsection (1) must not be before the expiry of the period of one month beginning with the day on which the resolution is passed.

(3) A local authority must, not later than 28 days before the day referred to in subsection (1), publish notice that they have passed a resolution under this section in a newspaper circulating in their area.

(4) The notice is to state the general effect of Schedule 2, as modified for the purposes of this section.

(5) For the purposes of this section, Schedule 2 is modified as follows—

(a) in paragraph 1, sub-paragraphs (b)(ii) (and the word “or” immediately preceding it) and (c) are omitted;

(b) for paragraph 2 substitute—

“2 In this Schedule, “adult entertainment venue” has the same meaning as in section 45A.”;

(c) in paragraph 9—

(i) after sub-paragraph (5)(c) insert—

“(ca) where it is intended to sell alcohol in the adult entertainment venue, an application for the grant, renewal or transfer of a premises licence under Part 3 of the Licensing (Scotland) Act 2005 (asp 16) relating to that venue has been refused;”; and

(ii) after sub-paragraph (6) insert—

“(6A) A local authority may refuse an application for the grant or renewal of a licence despite the fact that a premises licence under Part 3 of the Licensing (Scotland) Act 2005 (asp 16) is in effect in relation to the adult entertainment venue.”;

(d) in paragraph 25, for “section 45” in each place where those words occur, substitute “section 45A”; and

(e) for “sex shop”, in each place where those words occur, substitute “adult entertainment venue”.

(6) In this section, “adult entertainment venue” means any premises, vehicle, vessel or stall used for a business which consists to a significant degree of providing relevant entertainment before a live audience; and, for the purposes of that definition—

“audience” includes an audience of one;

“display of nudity” means—

(a) in the case of a woman, exposure of her breasts, nipples, pubic area, genitals or anus;

(b) in the case of a man, exposure of his pubic area, genitals or anus;

“relevant entertainment” means—

(a) any live performance; or

(b) any live display of nudity,

which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means).”.>

Section 128

Kenny MacAskill

173 In section 128, page 129, line 25, at end insert—

<( ) in paragraph 2(3)(b), after “application” insert “(other than the date and place of birth of any person)”,

( ) in paragraph 2(8)(a), after “application” insert “(other than the date and place of birth of any person)”,>

Section 129

Kenny MacAskill

174 Leave out section 129

After section 130

Bill Aitken

460 After section 130, insert—

<**Premises licence applications: crime prevention objective**

In section 23(5) of the 2005 Act (grounds for refusal of premises licence application), after paragraph (b), insert—

“(ba) that the appropriate chief constable has made a recommendation under section 21(5) that the application be refused,”.>

After section 131

Kenny MacAskill

175 After section 131, insert—

<**Reviews of premises licences: notification of determinations**

(1) The 2005 Act is amended as follows.

(2) After section 39 (Licensing Board’s powers on review), insert—

“**39A Notification of determinations**

(1) Where a Licensing Board, at a review hearing—

(a) decides to take one of the steps mentioned in section 39(2), or

(b) decides not to take one of those steps,

the Board must give notice of the decision to each of the persons mentioned in subsection (2).

(2) The persons referred to in subsection (1) are—

(a) the holder of the premises licence, and

(b) where the decision is taken in connection with a premises licence review application, the applicant.

(3) Where subsection (1)(a) applies, the holder of the premises licence may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(4) Where—

(a) subsection (1)(a) or (b) applies, and

(b) the decision is taken in connection with a premises licence review application,

the applicant may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(5) Where the clerk of a Board receives a notice under subsection (3) or (4), the Board must issue a statement of the reasons for the decision to—

(a) the person giving the notice, and

(b) any other person to whom the Board gave notice under subsection (1).

(6) A statement of reasons under subsection (5) must be issued—

(a) by such time, and

(b) in such form and manner,

as may be prescribed.”.>

After section 132

Kenny MacAskill

176 After section 132, insert—

<**Premises licence applications: food hygiene certificates**

(1) Section 50 of the 2005 Act (certificates as to planning, building standards and food hygiene) is amended as follows.

(2) In subsection (7), for the words from “the requirements” to the end substitute “such requirements as the Scottish Ministers may, by order, specify.”.

(3) After subsection (7), insert—

“(7A) An order under subsection (7) may specify requirements by reference to provision contained in another enactment.”.

(4) In subsection (8)(c), for “the 1990 Act” substitute “section 5 of the Food Safety Act 1990 (c.16)”.>

George Foulkes

542 After section 132, insert—

<**Premises licence applications: disability compliance statements**

In section 20 of the 2005 Act (application for premises licence), after subsection (4)(f), insert—

“(fa) a statement of compliance with Part 3 of the Disability Discrimination Act 1995, including information as to where reasonable adjustments have been or will be made to remove barriers to access for disabled people,”.>

Robert Brown

543 After section 132, insert—

<**Provisional premises licences**

(1) Section 45 (provisional premises licence) of the 2005 Act is amended as follows.

(2) In subsection (6), for “2 years” substitute “5 years”.

(3) In subsection (8), paragraph (b) and the word “and” immediately preceding it are repealed.

(4) In subsection (10), for paragraphs (a) and (b) substitute—

“(a) for subsection (2) there were substituted—

“(2) An application under subsection (1) must be accompanied by—

(a) a plan sufficient to identify the site of the subject premises and give a general indication of their size,

(b) a document giving a general indication of—

(i) the anticipated capacity of the premises,

(ii) the hours during which it is proposed to serve alcohol on the premises,

(iii) the extent to which it is proposed to allow children or young persons entry to the premises, and

(c) the certificate required by section 50(2).”, and

(b) subsections (4) and (5) were omitted.”.

(5) After subsection (10) insert—

“(10A) Sections 21 to 32 have effect in relation to any provisional premises licence application and to any provisional premises licence as if references to—

(a) the operating plan were read as references to the document required under section 20(2)(b) (as substituted by subsection (10)(a)), and

(b) the layout plan were read as references to the plan required under section 20(2)(a) (as so substituted).”.>

Bill Aitken

547 After section 132, insert—

<**Premises licence: minor variations**

(1) Section 29(6) of the 2005 Act (definition of minor variations to premises licence) is amended as follows.

(2) In paragraph (a), insert at the end "or if the variation relates only to parts of the premises to which the public does not have access".

(3) After paragraph (c) insert—

"(ca) any reduction in the capacity of the premises,

(cb) any change in the name by which the business carried on in the premises is to be known or under which it trades,

(cc) any variation of the layout plan or operating plan required by virtue of any enactment relating to planning, building control, food safety or fire safety,".>

Robert Brown

550 After section 132, insert—

<**Premises licence: transfer on application of person other than licence holder**

(1) Section 34 (transfer on application of person other than licence holder) of the 2005 Act is amended as follows.

(2) In subsection (3)—

(a) the word "and" immediately preceding paragraph (d) is repealed, and

(b) after that paragraph insert ", and

"(e) for any other reason, the business that was (prior to the event in question) carried on in the licensed premises to which the licence relates ceases to be carried on in those premises.".

(3) In subsection (4), insert at the beginning "Subject to subsection (4A),".

(4) After that subsection insert—

"(4A) In the case of an application made following the event specified in subsection (3)(e)—

(a) subsection (8) of section 33 applies as if, after the words "the Board must" there were inserted ", if satisfied in all the circumstances that it is reasonable to do so,", and

(b) subsection (10)(b) of that section applies as if, after the words "if not so satisfied," there were inserted "but otherwise satisfied that in all the circumstances it is reasonable to do so.".>

After section 133

Bill Aitken

548 After section 133, insert—

<**Consumption of alcohol on licensed premises outwith licensed hours**

In section 63(2) of the 2005 Act (exceptions to offence of allowing sale, consumption etc. of alcohol outwith licensed hours), after paragraph (f) insert—

“(g) allow alcohol to be consumed on licensed premises at any time within 45 minutes of the end of any period of licensed hours by—

(i) the premises licence holder,

(ii) the premises manager, or

(iii) any person aged 18 or over who, at the end of that period of licensed hours, was working on the premises.”.>

Section 134

Kenny MacAskill

539 In section 134, page 134, line 17, leave out from <after> to end of line 22 and insert <in sub-paragraph (4), after “Board” in the second place where it appears insert “or to a member of staff provided under paragraph 8(1)(b)”.>

After section 134

Kenny MacAskill

449 After section 134, insert—

<**Extended hours applications: notification period**

(1) Section 69 of the 2005 Act (notification of extended hours application) is amended as follows.

(2) After subsection (3), add—

“(4) Subsections (5) and (6) apply where the Licensing Board is satisfied that the application requires to be dealt with quickly.

(5) Subsections (2) and (3) have effect in relation to the application as if the references to the period of 10 days were references to such shorter period of not less than 24 hours as the Board may determine.

(6) Subsection (3) has effect in relation to the application as if for the word “must” there were substituted “may”.”.>

Section 136

Kenny MacAskill

177 In section 136, page 135, line 3, at end insert—

<“(ba) the notice does not include a recommendation under section 73(4),>

Kenny MacAskill

178 In section 136, page 135, leave out lines 22 to 27 and insert—

<(a) hold a hearing for the purposes of considering and determining the application, and

(b) after having regard to the circumstances in which the personal licence previously held expired or, as the case may be, was surrendered—

(i) refuse the application, or

(ii) grant the application.”.>

After section 137

Kenny MacAskill

179 After section 137, insert—

<**Appeals**

In section 131(2) of the 2005 Act (appeals), the words “by way of stated case, at the instance of the appellant,” are repealed.>

Schedule 4

Kenny MacAskill

180 In schedule 4, page 149, line 11, leave out <22(2) or>

Kenny MacAskill

181 In schedule 4, page 150, leave out lines 18 to 21

Section 140

Kenny MacAskill

182 Leave out section 140

Section 142

Kenny MacAskill

183 Leave out section 142

Section 143

Kenny MacAskill

184 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*Mutual recognition of judgments and probation decisions*)(1),>

Bill Aitken

185 In section 143, page 138, line 32, at end insert—

<( ) an order under section *(New evidence)*(10),>

Kenny MacAskill

540 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*Convictions by courts in other EU member States*)(2),>

Kenny MacAskill

450 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*European evidence warrants*)(1),>

Kenny MacAskill

186 In section 143, page 138, leave out line 33

Kenny MacAskill

187 In section 143, page 138, line 33, at end insert—

<( ) an order under section 146(1) containing provisions which modify any enactment (including this Act), or>

Kenny MacAskill

188 In section 143, page 138, line 34, leave out <146(1) or>

Robert Brown

392 In section 143, page 138, line 35, at end insert <or

( ) an order under section 148(1) bringing into force section 17(1), (2) or (3),>

Robert Brown

549 In section 143, page 138, line 35, at end insert <or

( ) an order under section 148(1) bringing into force section 38(1), (2), (3) or (4),>

Schedule 5

Kenny MacAskill

189 In schedule 5, page 151, line 35, at end insert—

<*The Libel Act 1792 (c.60)*

The Libel Act 1792 is repealed.

The Criminal Libel Act 1819 (c.8)

The Criminal Libel Act 1819 is repealed.

The Defamation Act 1952 (c.66)

In the Defamation Act 1952, section 17(2) is repealed.>

Kenny MacAskill

451 In schedule 5, page 152, line 10, at end insert—

<The Law Officers Act 1944 (c.25)

In section 2(3) of the Law Officers Act 1944 (Lord Advocate and Solicitor General for Scotland), for the words from "three" to the end substitute "287 of the Criminal Procedure (Scotland) Act 1995 (c.46)".>

Kenny MacAskill

452 In schedule 5, page 152, line 12, leave out from <In> to <1974> and insert—

<( ) The Rehabilitation of Offenders Act 1974 is amended as follows.

( ) In section 1>

Kenny MacAskill

453 In schedule 5, page 152, line 15, at end insert—

<( ) In section 6(6)(bb) (convictions in service disciplinary proceedings), for "the Schedule" substitute "Schedule 1".

( ) The Schedule (service disciplinary proceedings) is renumbered as Schedule 1.>

Kenny MacAskill

190 In schedule 5, page 152, line 24, at end insert—

<The Incest and Related Offences (Scotland) Act 1986 (c.36)

The Incest and Related Offences (Scotland) Act 1986 is repealed.>

Kenny MacAskill

191 In schedule 5, page 153, line 3, after <89> insert <, 111>

Kenny MacAskill

192 In schedule 5, page 153, line 3, at end insert—

<The Trade Union and Labour Relations (Consolidation) Act 1992 (c.52)

In section 243(4)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 (restriction of offence of conspiracy: Scotland), the words "or sedition" are repealed.>

Kenny MacAskill

193 In schedule 5, page 153, line 12, at end insert—

<The Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40)

In Schedule 4 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (minor and consequential amendments), in paragraph 44, sub-paragraph (2) is repealed.>

Kenny MacAskill

386 In schedule 5, page 153, line 35, at end insert—

<In section 11 (certain offences committed outside Scotland)—

(a) in subsection (3), for “proceeded against, indicted” substitute “prosecuted”,

(b) in subsection (4), for “dealt with, indicted” substitute “prosecuted”.>

Kenny MacAskill

454 In schedule 5, page 153, line 35, at end insert—

<In section 17A (right of person accused of sexual offence to be told about restriction on conduct of defence: arrest), in subsection (1)—

(a) for paragraphs (za) and (a) substitute—

“(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,”, and

(b) in paragraph (c), for the words from “preliminary” to “trial” substitute “hearing”.>

Kenny MacAskill

512 In schedule 5, page 153, line 35, at end insert—

<In section 18(8)(c) (power to take prints etc. under authority of a warrant unaffected by section), for “prints, impressions” substitute “relevant physical data”.

In section 19(1)(b) (samples etc. taken from person convicted of offence), the words “impression or”, in both places where they occur, are repealed.>

Kenny MacAskill

513 In schedule 5, page 154, line 4, at end insert—

<Section 20 (use of prints, samples etc.) is repealed.>

Kenny MacAskill

514 In schedule 5, page 154, line 5, at end insert—

<In section 23A (bail and liberation where person already in custody)—

(a) in each of subsections (1) and (4), for “23 or 65(8C)” substitute “23, 65(8C) or 107A(2)(b)”, and

(b) in subsection (3), for “22A(3) or 23(7)” substitute “22A(3), 23(7) or 107A(2)(b)”.>

Kenny MacAskill

455 In schedule 5, page 154, line 5, at end insert—

<In section 35 (judicial examination), in subsection (4A)—

(a) for paragraphs (za) and (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words from "preliminary" to "trial" substitute "hearing".>

Kenny MacAskill

456 In schedule 5, page 154, line 42, at end insert—

<In section 66 (service and lodging of indictment etc.), in subsection (6A)(a)—

(a) for sub-paragraphs (zi) and (i) substitute—

"(i) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings (including at any commissioner proceedings) may be conducted only by a lawyer,", and

(b) in sub-paragraph (iii), for the words from "preliminary" to "trial" substitute "hearing".

In section 71 (first diet)—

(a) in subsection (A1), for the words "his defence at the trial" substitute "the conduct of his case at any relevant hearing in the course of the proceedings",

(b) in subsection (B1)(c), for the words "before the trial diet" substitute "in relation to any hearing in the course of the proceedings",

(c) in subsection (1A)(a), for "the trial" substitute "any hearing in the course of the proceedings",

(d) in subsection (1B)(a), for "the trial" substitute "any hearing in the course of the proceedings",

(e) in subsection (5A)(b), for the words "his defence at the trial" substitute "the conduct of his case at any relevant hearing in the course of the proceedings", and

(f) after subsection (7), insert—

"(7A) In subsections (A1) and (5A)(b), "relevant hearing" means—

(a) in relation to proceedings mentioned in paragraph (a) of subsection (B1), any hearing at, or for the purposes of, which a witness is to give evidence,

(b) in relation to proceedings mentioned in paragraph (b) of that subsection, a hearing referred to in section 288E(2A),

(c) in relation to proceedings mentioned in paragraph (c) of that subsection, a hearing in respect of which an order is made under section 288F.".>

Kenny MacAskill

457 In schedule 5, page 155, line 3, at end insert—

<In section 79 (preliminary pleas and preliminary issues), in subsection (2)(b)(ii), after "under section" insert "22ZB(3)(b),".>

Kenny MacAskill

458 In schedule 5, page 155, line 23, at end insert—

<In section 140 (citation), in subsection (2A)—

(a) for paragraph (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings (including at any commissioner proceedings) may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words "his defence at the trial" substitute "the conduct of his case at, or for the purposes of, the hearing".

In section 144 (procedure at first diet), in subsection (3A)—

(a) for paragraph (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words "his defence at the trial" substitute "the conduct of his case at, or for the purposes of, the hearing".

In section 146 (plea of not guilty), in subsection (3A)—

(a) for paragraph (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words "his defence at the trial" substitute "the conduct of his case at, or for the purposes of, the hearing".>

Kenny MacAskill

414 In schedule 5, page 155, line 31, leave out paragraphs 35 to 39

Kenny MacAskill

515 In schedule 5, page 157, line 8, at end insert—

<*The Offensive Weapons Act 1996 (c.26)*

In the Offensive Weapons Act 1996, section 5 is repealed.>

Kenny MacAskill

194 In schedule 5, page 157, line 8, at end insert—

<*The Defamation Act 1996 (c.31)*

In the Defamation Act 1996, section 20(2) is repealed.>

Kenny MacAskill

195 In schedule 5, page 157, line 10, leave out paragraph 44 and insert—

<(1) The Crime and Punishment (Scotland) Act 1997 is amended as follows.

(2) In section 9 (power to specify hospital unit), in subsection (1)(a), for “insane” substitute “found not criminally responsible or unfit for trial”.

(3) In section 13 (increase in sentences available to sheriff and district courts), subsection (2) is repealed.

(4) In section 56 (powers of the court on remand or committal of children and young persons), subsection (3) is repealed.>

Kenny MacAskill

196 In schedule 5, page 157, line 28, at end insert—

<*The Legal Deposit Libraries Act 2003 (c.28)*

Section 10 of the Legal Deposit Libraries Act 2003 (exemption from liability: activities in relation to publications) is amended as follows—

(a) in subsection (1), the words “, or subject to any criminal liability,” are repealed,

(b) in subsection (2)(a), the words “in the case of liability in damages” are repealed,

(c) in subsection (3), the words “, or subject to any criminal liability,” are repealed,

(d) in subsection (4)(a), the words “in the case of liability in damages” are repealed,

(e) in subsection (6)(a), the words “, or subject to any criminal liability,” are repealed, and

(f) in subsection (8), the words “and criminal liability” are repealed.>

Kenny MacAskill

459 In schedule 5, page 157, line 36, at end insert—

<*The Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5)*

In the Criminal Procedure (Amendment) (Scotland) Act 2004 the following provisions are repealed—

(a) in section 4 (prohibition on accused conducting case in person in certain cases), subsection (4),

(b) section 17 (bail conditions: remote monitoring of restrictions on movements), and

(c) in the schedule (further modifications of the 1995 Act), paragraph 55.>

Kenny MacAskill

197 In schedule 5, page 158, line 36, at end insert <and

(ii) sub-paragraph (b) is repealed.>

Kenny MacAskill

387 In schedule 5, page 159, line 12, at end insert—

<*The Sexual Offences (Scotland) Act 2009 (asp 9)*

In section 55(7) of the Sexual Offences (Scotland) Act 2009 (offences committed outside the United Kingdom), for “proceeded against, indicted” substitute “prosecuted”.>

Kenny MacAskill

198 In schedule 5, page 159, line 14, leave out <134> and insert <156>

Section 148

Robert Brown

393 In section 148, page 139, line 19, after <sections> insert <17(4) and>

Criminal Justice and Licensing (Scotland) Bill

4th Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- a list of any amendments already debated;
- the text of amendments to be debated on the fourth day of Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

Directing serious organised crime
353, 354, 355, 356

Failure to report serious organised crime
357, 106, 359, 360

Genocide, crimes against humanity and war crimes
107, 108

Clarification of existing offence prohibiting the carrying of offensive weapons
109, 11, 515

Extreme pornography – sounds accompanying images
361, 362, 363, 364, 366

Extreme pornography – excluded images
365, 367, 368, 369

Extreme pornography – sex offender notification
517

Voyeurism – additional forms of conduct
110

Sexual offences – defences in relation to offences against older children
111

Penalties for offences of brothel-keeping and living on the earnings of prostitution
370

Engaging in, advertising and facilitating paid-for sexual activities
8, 8A, 8B, 8C, 8D, 461, 9, 9A

People trafficking (and consequential provision)
371, 372, 373, 374, 375, 376, 377, 386, 387

Slavery, servitude and forced or compulsory labour
112, 143

Articles for use in fraud
113

Abolition of offences of sedition and leasing-making
114, 189, 192, 194, 196

Double jeopardy (Scottish Law Commission report)
115, 116, 117, 118, 119, 120, 120A, 121, 122, 123, 124, 125, 185

Children – age of criminal responsibility and minimum age of prosecution
379, 126, 127, 389, 549

> *Notes on amendments in this group*
> Amendment 379 pre-empts amendments 126 and 127

Offences – liability of partners
128, 129

Witness statements
130, 131

Victims' representation at Parole Board hearings
403

Convictions in other UK or EU jurisdictions
518, 519, 520, 521, 522, 540

Power of sheriff or JP to grant warrants to police based outside sheriffdom
420

Bail conditions – remote monitoring requirements
132, 197

Prosecution on indictment – Scottish Law Officers
421, 422, 423, 424, 425, 426, 427, 451

Dockets and charges in sex cases
428

Remand and committal of children and young persons
541

Prohibition of personal conduct of case by accused
429, 454, 455, 456, 458, 459

Crown appeals
462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 514

Retention of samples etc. – adults
478, 404, 405, 479, 406, 480, 407, 481, 482, 408, 494, 499, 502, 503, 504, 512, 513

Notes on amendments in this group
Amendment 478 pre-empts amendment 404

Retention of samples etc. – alternatives to prosecution
418, 419

Retention of samples etc. – children referred to children's hearings
409, 410, 380, 483, 484, 545, 381, 485, 486, 411, 546, 487, 488, 489, 490, 491, 492, 382, 493, 412

Notes on amendments in this group
Amendment 410 pre-empts amendments 380, 483, 484 and 545
Amendment 380 pre-empts amendments 483 and 484
Amendment 411 pre-empts amendments 546, 487, 488, 489, 490, 491, 492 and 382
Amendment 492 pre-empts amendment 382
Amendment 493 pre-empts amendment 412

Use of samples etc.
495, 496, 497, 498, 500, 501, 505, 506, 507, 508, 509, 510

Scottish Criminal Cases Review Commission – grounds for appeal
133, 134, 135

Prior statements by witnesses – abolition of competence test
430

Witness statements – use during trial
383

Child witnesses in proceedings for people trafficking offences
384

Witness anonymity orders
431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441

European evidence warrants
442, 450

Jurors in criminal trials
443, 415, 416, 511, 417

Data matching for detection of fraud etc.
136, 137

Closure of premises associated with human exploitation etc. (minor corrections etc.)
138, 139, 140, 141, 142, 144, 198

Foreign travel orders – surrender of passports
444, 445, 446

Sex offender notification requirements
145

Risk of sexual harm orders – spent convictions
146

Police and SCDEA – authorisation of surveillance
523, 524, 525, 526, 527, 528

Police and SCDEA – authorisation of interference with property
529, 530, 531, 532, 533, 534, 535, 536

Enhanced criminal record certificates: disclosure of sex offender notification requirements
537, 538

Rehabilitation of offenders – spent alternatives to prosecution
447, 452, 453

Medical services in prisons
448

Assistance for victim support
413

Prosecutor's duty to disclose information
147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166

Mental disorder and unfitness for trial
24, 167, 195

Conditions to which licences under the 1982 Act are to be subject
168

Licensing – powers of entry etc. (definition of "authorised civilian employee")
169

Licensing of metal dealers
385

Licensing of street trading – food hygiene certificates
170

Licensing of market operators
171, 172, 2, 3, 4

> *Notes on amendments in this group*
> Amendment 172 pre-empts amendments 2 and 3

Control of lap dancing and other adult entertainment venues
516

Applications for licences
173

Provisions to be considered as part of the Alcohol (Scotland) Bill
174, 182, 186

Premises licence applications
460, 176, 542, 180

Reviews of premises licences – notification of determinations
175

Provisional premises licences
543

Premises licence – minor variations
547

Premises licence – transfer
550

Consumption of alcohol on licensed premises outwith licensed hours
548

Occasional licences
539

Extended hours applications – notification period
449

Personal licence applications
177, 178, 181

Appeals against decisions of licensing board
179

Corruption in public bodies
183

Orders and regulations – circumstances in which affirmative procedure required
187, 188

Incest and related offences
190

Criminal law – revision
191, 193

Breach of undertakings – consequential modification
457

Amendments already debated

Offence of stalking, offence of threatening, alarming or distressing behaviour
With 399 – 402, 402A, 378, 544

Presumption against short periods of imprisonment or detention
With 100 – 392, 393

Mutual recognition of judgments and probation decisions
With 105 – 184

Involvement in serious organised crime
With 344 - 358

JUSTICE COMMITTEE

EXTRACT FROM THE MINUTES

13th Meeting, 2010 (Session 3)

Tuesday 20 April 2010

Present:

Bill Aitken (Convener)	Robert Brown
Bill Butler (Deputy Convener)	Angela Constance
Cathie Craigie	Nigel Don
James Kelly	Stewart Maxwell

Also present: Richard Baker, Margaret Curran, Trish Godman, Rhoda Grant, Johann Lamont and Margo MacDonald.

Criminal Justice and Licensing (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 4).

The following amendments were agreed to (without division): 354, 356, 358, 107, 108, 109, 402, 361, 362, 363, 364, 366, 367, 368, 369, 517, 110, 111, 370, 371, 372, 373, 374, 375, 376, 377, 112, 113 and 114.

The following amendments were disagreed to (by division):

402A (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
8A (For 0, Against 8, Abstentions 0)
8 (For 3, Against 5, Abstentions 0).

The following amendments were moved and, with the agreement of the Committee, withdrawn: 353, 357, 365 and 115.

The following amendments were not moved: 355, 106, 359, 360, 11, 8B, 8C, 8D, 461, 378, 116, 117, 118, 119, 120 (and as a consequence 120A), 121, 122, 123, 124, 125 and 544.

Sections 29, 30, 31, 32, 33, 36 and 37 were agreed to without amendment.

Sections 27, 28, 34 and 35 were agreed to as amended.

The Committee ended consideration of the Bill for the day, amendment 544 having been disposed of.

Criminal Justice and Licensing (Scotland) Bill: Stage 2

10:05

The Convener: Item 2 is the fourth day of stage 2 proceedings on the Criminal Justice and Licensing (Scotland) Bill. The committee will not proceed beyond the end of part 3 today—indeed, that estimate might be slightly optimistic.

I welcome the Minister for Community Safety, Fergus Ewing, who will be accompanied during the course of the morning by various officials, who will in all probability change places from time to time, as different matters come before the committee.

I also welcome non-committee members. Joining us today are Johann Lamont, Rhoda Grant and Trish Godman. I anticipate that other members might join us as we deal with items of specific interest to them.

Members should have before them their copies of the bill, the fourth marshalled list and the fourth grouping of amendments.

Section 27—Directing serious organised crime

The Convener: Amendment 353, in the name of Robert Brown, is grouped with amendments 354 to 356.

Robert Brown (Glasgow) (LD): The committee will recall that, when we began discussing the series of amendments on serious organised crime, I observed that there was broad agreement about the need to have weapons to tackle the Mr Bigs of serious organised crime but that there was also some anxiety about the scope of some of the offences. I think that I also commented on how difficult and complex the area is.

Section 27(1) says:

> "A person commits an offence by directing another person ... to commit a serious offence".

I might be wrong, but I thought that that was, in effect, the principle behind the offence that relates to someone being art and part of or an accessory to a crime. I am not sure that section 27(1) adds anything to the common law in that regard. The essence seems to be the direction of another person to commit serious organised crime. Amendment 353 is a probing amendment that is designed to allow us to examine whether the phraseology of the section is correct in that respect. Amendment 355 echoes it.

The minister has lodged several slightly different amendments on details of the section. It is an important section, and the question of direction is central to what the Government and the prosecution authorities are seeking to do in this area. It is important that we get the approach right, and I would like to ask the minister whether the section is sufficiently broad to deal with the people at whom we are trying to get, and whether it adds anything to the common law.

I move amendment 353.

The Minister for Community Safety (Fergus Ewing): Before I begin, I should say that I am suffering from a slight cold this morning. I hope that members will bear with me. The American humorist O Henry said:

> "Life is made up of sobs, sniffles, and smiles, with sniffles predominating."

He was right.

The matter that Robert Brown comments on was raised extensively by the committee and was considered by us extremely carefully. The Cabinet Secretary for Justice wrote to the committee on 29 January and again on 19 February on the matter. I have reread those letters in order to fully understand the matters that are before us this morning.

In response to the concerns that were raised, we have lodged a number of amendments to clarify the definition of "serious offence" and "material benefit", which the committee agreed to last week during consideration of section 25. Those definitions also apply to section 27. The clearer definitions ensure that the police and prosecution retain the flexibility to use the new offences to tackle all levels of serious organised crime, including those individuals who direct others to commit offences on their behalf. We have lodged two amendments to section 27.

Amendments 354 and 356 make changes to the detail of the provisions on serious organised crime in part 2 of the bill. Amendment 354 will delete section 27(4), which makes provision on the means by which a court can infer the intention of a person who has issued an apparent direction to commit serious organised crime. On reflection, we consider that that provision is unnecessary and that the common-law rules, to which Robert Brown alluded, can be relied on.

Amendment 356 will delete subsection (6), which sets out a rule as to when a direction under section 27 is to be treated as having been done in Scotland for the purpose of determining when a direction is an offence triable in a Scottish court. The policy is now that common-law rules will govern jurisdiction in the area. Therefore, a direction under section 27 that is made either in or outside Scotland will be an offence, provided that it is intended to have effect in Scotland. Given the intention to rely on the common law, subsection (6) is no longer required.

I appreciate that amendments 353 and 355, in the name of Robert Brown, seek to address the committee's concerns about the breadth of the provision and that the committee specifically raised those concerns in a recommendation in its report to Parliament. We considered those concerns extremely carefully—indeed, I personally reviewed all the relevant paperwork. However, the amendments seem to be intended to restrict the directing serious organised crime offence by making it an offence to direct a person to agree to become involved in serious organised crime under section 25(1) rather than to direct a person to commit a specific indictable offence. Viewed in that way, the amendments seem to take the focus of inquiry back a stage, because they would focus the provision on a direction to a person to agree to do something that they reasonably know or suspect will enable or further the commission of a serious organised crime rather than on a direction simply to commit a serious offence within the meaning that is given by section 25. The latter could more easily be established in court. Moreover, the prosecution would be required to provide a direct link between the direction and criminal activity. Amendments 353 and 355 would allow the focus to fall on very early stages of preparation that might be difficult to prove. The proposal would therefore limit the impact of the directing of serious organised crime offence, which is targeted at those who direct others to commit a serious offence. We appreciate that the intention is to ensure that directions to commit offences that are not truly connected to organised crime should not be treated as such, but that concern is more appropriately addressed in this context by the proper exercise of police and prosecutorial discretion.

We introduced the new offence at the request of the serious organised crime task force, which includes police and Crown representation, because of the difficulty under the current law of prosecuting those who direct organised crime but do not become involved in it on a day-to-day basis. Officials have discussed Mr Brown's amendments with the Crown Office, which considers that their effect would be to make the offence more difficult to understand and, in effect, unenforceable, thereby allowing those who direct others to commit offences on their behalf to avoid prosecution. Agreeing to the amendments would, in effect, render the offence unenforceable and unworkable.

For those reasons, I respectfully invite Robert Brown to withdraw amendment 353 and not to move amendment 355.

The Convener: In his preamble, Robert Brown properly and correctly underlined the issues that I think all committee members had with some of the original wording. His lodging of amendments 353 and 355 so that we could obtain clarification has been extremely useful. I think that the Government has gone a considerable way down the road of providing reassurance.

Robert Brown: I said that amendment 353 is a probing amendment. I remain not entirely clear about what section 27(1)(a) adds to the common law, but the minister rightly said that it is clearer than my amendment. I accept that and will not press amendment 353, but I have on-going reservations about whether anything is added to the common law. The provision seems to me to be a statutory codification of the common law rather than something new, but perhaps we can continue to discuss that at a later point. Against that background, with the minister's assurances and my desire not to foul up the bill, I am happy not to press amendment 353.

10:15

Amendment 353, by agreement, withdrawn.

Amendment 354 moved—[Fergus Ewing]—and agreed to.

Amendment 355 not moved.

Amendment 356 moved—[Fergus Ewing]—and agreed to.

Section 27, as amended, agreed to.

Section 28—Failure to report serious organised crime

The Convener: Amendment 357, in the name of Robert Brown, is grouped with amendments 106, 359 and 360.

Robert Brown: Section 28 is, I think, the section that has given the committee the most concern. It is the most difficult one because it goes a degree further, so it is important that we make it as clear as possible. Although we understand and support the motivation of dealing with serious organised crime, the net needs to be cast in a targeted way and not too widely.

Amendment 357 would provide that the "knowledge or suspicion" of serious organised crime must be based on "good reason". The law must have something a bit more solid than surmise before it can hold someone criminally liable, particularly for such a serious matter. The amendment is an attempt to bring a small element of definition into the provision.

I support amendment 106, in the name of the convener, which would target the senior people who profit by a connection with serious criminals, rather than the junior clerk or post boy. The convener will no doubt elaborate on that well-made point.

Amendment 359, in my name, deals with the anomaly that a police officer might not be the obvious person to make a report to. It might be a customs officer, a social security official or somebody of that sort. Surely it could not be right if someone who had properly reported an issue was still criminally liable because he had reported it to the wrong person.

I move amendment 357.

The Convener: The thinking behind the four amendments in the group is to avoid a comparatively junior person, for example, in a solicitor's or estate agent's office, being caught up in matters when their knowledge of what was going on was peripheral. Amendment 106 in my name seeks to avoid the situation in which a comparatively junior member of staff is liable for prosecution. A cashier in an office might be asked to bank cheques. He or she will do that fairly mechanically—they will simply fill in a bank pay-in slip, take the cheques to the bank and deposit them. Another example is an employee who has to pay electricity bills. Although they might consider that the electricity bill for a particular residence seems fairly high, they might not know that the house has been let out and is being used as a cannabis farm, if that is the case.

I am a little concerned that the wording of section 28 would enable the Crown Office to prefer charges against such individuals, which surely cannot be the legislative intent. Clearly, we are after the people who are euphemistically described as the Mr Bigs of the serious and organised crime world and we are not seeking to swallow up those who are somewhat further down the food chain.

Amendment 357, in the name of Robert Brown, attempts to go down the self-same route. He uses the phrase "with good reason", but there might be difficulties with the interpretation of that term. I am interested in what the minister has to say on that. Robert Brown's other amendments in the group seek to make it clear that the offences are indictable, which might have some merit.

Fergus Ewing: I fully understand the intention behind Robert Brown's three amendments and the convener's amendment 106. However, for the following reasons, we do not think that they are appropriate, necessary or helpful.

Amendment 357 would require the prosecution to prove not only that a person had a suspicion about serious organised crime, but that they had good reason for holding that suspicion. We do not think that the amendment is necessary, as sufficient safeguards are already in place. The prosecution must prove that a person who failed to report serious organised crime actually had the relevant knowledge or suspicion. It is not clear what purpose would be served, the existence of a suspicion having been proved, by having to prove in addition that the person had good reason to hold that suspicion.

We are aware of the reasons behind amendment 106, which seems to be intended to protect junior members of staff. It provides that a person is not to be under a duty to report in cases where, by reason of their inexperience or lack of seniority, it would not be reasonable to assume that they should have been aware of an offence having been committed.

I respectfully request that the committee resist amendment 106, first for a technical reason. The amendment seems to proceed on the basis of a misunderstanding of when the duty to report under section 28 applies. It does not apply where a person is assumed to have knowledge or suspicion of serious organised crime. Rather, the Crown must show that a person has actual knowledge or an actual suspicion—the Crown must prove that as a matter of fact. That is a significant safeguard, and it prevents the duty from applying to, for example, a very inexperienced member of an organisation who receives information that might have led a senior employee to suspect serious organised crime but did not lead that inexperienced junior employee to suspect serious organised crime. Viewed in that way, amendment 106 seems unnecessary, as the issue that it is intended to address does not exist.

Perhaps more important, there might also be an internal inconsistency in the bill if amendment 106 is accepted. At the moment, a person will be under a duty to report under section 28 when they are shown to have knowledge or a suspicion as to the commission of an offence as mentioned in section 28(1). As we have mentioned, that must be proved as a matter of fact. Where that is proved, what are we to make of a provision that says that, in spite of clear evidence of an accused's knowledge that an offence was committed, the duty does not apply at all, because he or she was insufficiently senior or experienced to be aware of the commission of an offence? That seems an illogical conclusion.

A more substantial—perhaps the most important—argument is that the nature of amendment 106 is problematic. We know that serious organised crime is very flexible, and it is not unknown for serious criminal networks to attempt to place members of those networks in businesses or organisations that undertake activity that will assist their aims. That may well include people in lower-level grades sometimes. Therefore, we do not believe that there should be a blanket ban protecting members of staff. That would create a significant loophole, which would inevitably be exploited by serious crime groups.

However, we recognise the committee's concerns and we wish to make it clear that we are not intending to capture people who have innocently had their suspicions raised and have not made any personal benefit from choosing not to report such activity.

Members will recall that section 28(2) specifies that, in other cases, namely where there is family involvement, there must be a "material benefit". Perhaps the issues do not arise in connection with those cases in the same way. The offence is intended to capture those people who either happily facilitate serious organised crime or are wilfully blind to the consequences of their actions such that they continue to facilitate such criminality.

In addition to the safeguard that we have already mentioned, section 28(4) sets out a defence of reasonable excuse for failing to report, which should provide further comfort to all members of staff at whatever level in the organisation who come across information without realising that it is linked to serious organised crime.

Furthermore, the Solicitor General for Scotland has made it clear that prosecutorial guidance will be issued to ensure that the offence is targeted at and used proportionately against those in a position of authority or who have used their expertise in relation to the supply of goods and services and who have benefited from their connection with serious organised crime. An additional safeguard is that any such prosecution under this offence will proceed only with Crown counsel's consent. I hope that those safeguards, which have been carefully conceived and set out, provide the committee with some assurance.

Amendments 359 and 360 seek to allow a person to discharge his or her duty to report under section 28 by reporting to a person holding a public office specified by the Scottish ministers. I was going to say that it is not clear which holders of public office Robert Brown envisages being covered by these amendments, but he has helpfully set them out in his remarks. I am advised that matters reported to customs officials, whom Mr Brown mentioned, would then be reported to the police either by the official or by the person who originally brought the matter to the official's attention. However, ultimately, only a constable is able to ensure that a proper investigation takes place following the receipt of a report and that appropriate reports are sent to the procurator fiscal. Although there is no provision for what a public official would be required to do on receiving a report, they would presumably be expected in turn to report the suspicions of another to a constable. I fully understand Mr Brown's point and believe that his remarks have been helpful but, with respect, the proposal seems to add an unnecessary layer of further reporting and bureaucracy.

I hope that that clarification assures committee members. For all those reasons, we suggest that the amendments in this group be resisted.

Robert Brown: I have listened carefully to the minister's response, some of which I found persuasive and some of which—I must confess—I did not. I was particularly unimpressed by the suggestion that the offence is targeted at people who facilitate or are wilfully blind to the existence of serious organised crime, because I do not think that that is what section 28 is saying. Indeed, that is what I find difficult about it. The crime is defined extremely widely and applies to all sorts of circumstances that go way beyond the minister's statement of what the Government is purportedly trying to get at.

The point about having to prove whether people had good reason to hold suspicions is valid. Should a junior member of an organisation, say, who has a fanciful notion about something but who nonetheless can be said to have a suspicion be charged with a serious criminal offence in that respect? I have doubts about that. I accept that there might be an issue as to whether the phrase "with good reason" has been properly defined, but I ask the Government to examine the issue between now and stage 3. Indeed, if I get such an undertaking, I will be happy to seek leave to withdraw amendment 357.

I am not persuaded by the distinction that was drawn between assumed and actual knowledge. After all, we are dealing with what can be proved against people, which is based on the inferences that can be drawn from particular factual situations. Indeed, that makes any apparent difference between assumed and actual knowledge more of a tautological dispute.

I am not sure about the convener's view, but I see the minister's point about the application of the provision to junior officials. However, we are still left with the difficulty that relatively junior officials who are not the prime movers or shakers in these crimes or the plants of the Mr Bigs can still be caught by section 28. That concerns me somewhat.

10:30

The defence, if you like, that the Government will arrange for prosecutorial guidance from the Crown Office and that prosecution will be undertaken only with the permission and agreement of Crown counsel admits that a problem exists, because such matters should not be the subject of prosecutorial guidance—we should get the legislation right.

On the question of reporting to someone other than a constable, it is a fact, which we should overcome, that the bill says that it is an offence not to make a disclosure to a constable but to make a disclosure to someone else. It might be fanciful of me to say that somebody might prosecute in that situation—perhaps that would not happen—but the phraseology should be right. The provisions are widely worded.

Given the difficulties, I do not propose to press amendment 357. I would appreciate the minister's assurance of further discussion before stage 3, because we are not quite there yet.

Fergus Ewing: I thank Robert Brown for his detailed work. It is plain that he has made many points, as is his wont. We will carefully consider the *Official Report* of his remarks and any further representations that he would like to make. I undertake that we will write to the committee as soon as we reasonably can and in any event no later than stage 3 with our response to his arguments, particularly about the use of the word "constable".

We will look at the *Official Report* and consider the remarks by Robert Brown and any other members who wish to contribute. I hope that that is helpful.

The Convener: That is a constructive way forward. Like Robert Brown, I have received some reassurance on my amendment. I am not yet totally convinced but, on the understanding that the matter will be considered again before stage 3, I will not take matters further today and I will not move amendment 106.

Amendment 357, by agreement, withdrawn.

Amendment 106 not moved.

Amendment 358 moved—[Fergus Ewing]—and agreed to.

Amendments 359 and 360 not moved.

Section 28, as amended, agreed to.

After section 28

The Convener: Amendment 107, in the name of the cabinet secretary, is grouped with amendment 108.

Fergus Ewing: Amendments 107 and 108 provide for amendments to the International Criminal Court (Scotland) Act 2001 in respect of the offences of genocide, crimes against humanity and war crimes. The amendments match changes that the Coroners and Justice Act 2009 made to the International Criminal Court Act 2001 for England and Wales and Northern Ireland.

Such serious crimes are best dealt with in the country where they took place, which is where the evidence is most easily accessible and where witnesses are easier to contact. That is the best solution, because witnesses and survivors can see justice being done.

Failing that, such crimes should be dealt with by international courts or tribunals, where they exist. However, those options might not be available in some circumstances. We have therefore decided to strengthen the relevant domestic law in the same way as the United Kingdom Parliament and Government have done.

In 2001, the Scottish Parliament decided against making the law retrospective and that there are several pragmatic reasons for not doing so. However, it is unacceptable that we can have alleged genocide and war crimes suspects resident in the UK who cannot be extradited to stand trial and who we ourselves cannot deal with. That is particularly the case because this area of offending is recognised internationally as one in which countries can take wide jurisdiction and any justice gap is intolerable.

The catalyst for the amendments made at Westminster was undoubtedly the release of the four Rwandan genocide suspects last year. Such a situation has not arisen in Scotland, but it is perhaps clearer than it was in 2001 that Scotland could be a place for those suspected of such serious offences to hide. We need to address that.

Amendment 108 will provide that, as far as is permissible under the legal principles applicable to retrospection, we should cover the categories of crime of genocide, war crimes and crimes against humanity from 1 January 1991. That is the date from which the International Criminal Tribunal for the former Yugoslavia had jurisdiction to try offences under the tribunal's statute, which was adopted by the United Nations Security Council.

We propose no change to the categories of people covered by the legislation, which should remain UK nationals and residents, including those who commit crimes and subsequently become resident. However, amendment 107 seeks to provide more certainty as to who may or may not be considered to be a UK resident.

Proposed new section 8A of the International Criminal Court (Scotland) Act 2001 will make additional provision in respect of UK residents in two ways. First, proposed new section 8A(2) lists a number of categories of person who are to be treated as being resident in the UK for the specific purposes of the 2001 act to the extent that that would not otherwise be the case. The specific categories are listed in proposed new sections 8A(2)(a) to 8A(2)(j). Secondly, proposed new section 8A(3) provides a non-exhaustive list of considerations that a court must take into account in determining whether a person is resident in the UK.

I move amendment 107.

Bill Butler (Glasgow Anniesland) (Lab): I do not know the answer to this question; I seek the minister's guidance. Obviously, I support the general thrust of both amendment 107 and amendment 108. I probably have this wrong, but I might as well ask about proposed new section 9B of the 2001 act, which is entitled "Provision supplemental to section 9A: modification of penalties". Will proposed new section 9B(2) of the 2001 act mean that there is a reduction in penalty from 30 years to 14 years? If so, what is the rationale for that? I hope that I have simply got that wrong. I would be grateful if the minister could clarify that for the record.

The Convener: As no one else wishes to contribute, I merely comment that there is merit in the amendments. I invite the minister to wind up and to answer Bill Butler's question.

Fergus Ewing: I think that the answer to Mr Butler's main question is no. I will double-check afterwards that I have fully understood that that is the case, but that is the advice that I have been given.

I commend amendments 107 and 108 to the committee.

Amendment 107 agreed to.

Amendment 108 moved—[Fergus Ewing]—and agreed to.

Sections 29 to 31 agreed to.

After section 31

The Convener: Amendment 109, in the name of the cabinet secretary, is grouped with amendments 11 and 515.

Fergus Ewing: Amendment 109 will correct a problem that exists in the provisions of the Criminal Law (Consolidation) (Scotland) Act 1995 that deal with the possession of knives and offensive weapons in public places. We have become aware of cases in which people have escaped prosecution for carrying weapons in the common parts of shared dwellings, such as the stair of a tenement block, because the courts have not found the location to be a "public place". The previous Administration recognised the lacuna in relation to prisons and took steps to resolve it in the Custodial Sentences and Weapons (Scotland) Act 2007 by inserting new section 49C into the 1995 act to deal with weapons in prisons.

Amendment 109 deals with these problems by defining a public place as any place other than domestic premises, school premises or prisons. The common areas of communal buildings are expressly included in the definition of a public place. Effectively, this turns the existing definition on its head—instead of saying what is a public place, it provides that everywhere is a public place, subject to a number of limited exceptions.

Amendment 109 also creates uniform defences to the various offences under the 1995 act that deal with knives and offensive weapons. It makes sense to have consistent defences to charges for possession of a knife or offensive weapon. Amendment 109 provides that persons charged with possession of a knife or offensive weapon under sections 47, 49, 49A or 49C of the 1995 act will have a defence if they are able to show that they have a “reasonable excuse” or “lawful authority” for being in possession of the knife or offensive weapon. Further, to achieve consistency, amendment 109 harmonises the penalties for the obstruction and concealment offences detailed in sections 48 and 50 of the 1995 act. It will increase the maximum penalty under section 50(4) of the 1995 act to a level 4 fine in order to align that provision with the similar offence under section 48(2). Amendment 515 is consequential on amendment 109.

We support the principle behind amendment 11 of ensuring that the prohibitions on carrying knives and offensive weapons that already apply to public places apply to workplaces, too. We are aware of the specific case involving a weapon being brought into a call centre that has possibly prompted Johann Lamont’s amendment. However, our amendment 109 will achieve the same effect as amendment 11 and go further, by redefining public places as anywhere other than domestic premises and those school premises and certain prisons for which bespoke offences already exist. We therefore believe that amendment 11 is superseded by amendment 109, and we respectfully invite Johann Lamont not to move amendment 11.

I move amendment 109.

Johann Lamont (Glasgow Pollok) (Lab): I am very grateful for the assistance that the clerks gave me in drafting an amendment both to identify an issue and to try to find a solution to it. I will come on to the minister’s comments in a moment, but I think that it will be helpful if first I explain the purpose of amendment 11.

The legislative process has an important role in reflecting people’s experiences and trying to close loopholes or address the apparent perpetration of injustice. That is the intention behind amendment 11. A particular experience has been brought to my attention. It was reported that an offensive weapon was brought to a workplace via the mail—it was not carried into the workplace but delivered to it, which might have been caught under other legislation. Indeed, as the minister indicated, the person who had the offensive weapon could not be charged, because the workplace was not defined as a public place. When I reflected on that, I noted the fact that, for the purposes of the smoking ban, we regarded workplaces as public places, so we perhaps had already gone some way along that route.

The aim of amendment 11 is to close that loophole by inserting a section into the Criminal Law (Consolidation) (Scotland) Act 1995 that reflects the models in section 49 of that act, which makes it an offence to carry a knife in a public place, and section 49A, which makes it an offence to carry a knife on school premises. The model for the provision in respect of workplace premises was found in the Fire (Scotland) Act 2005—but not by me, I hasten to add.

I ask that the minister confirm the position in his summing up. I welcome what he said, but perhaps he understands that my anxiety about the matter arises from not being able to understand the technicalities when I read amendment 109. I seek an assurance that amendment 109 will address the circumstances that I described. If there is a need to look again at what the Scottish Government has proposed, we could have dialogue on that before stage 3. However, the purpose of amendment 11 is to close a loophole. If I have confidence that that loophole has been closed, I am more than happy not to move amendment 11.

10:45

James Kelly (Glasgow Rutherglen) (Lab): I support amendment 109 and consequential amendment 515, which are sensible because they widen the definition of a public place and ensure that the carrying of knives in such places will be legislated against appropriately. The amendments try to achieve a sensible objective.

I also support amendment 11. Again, no one expects to go into their workplace and be threatened by an offensive weapon such as a knife. Amendment 11 seeks to close the loophole through which potential offenders in such circumstances can escape the appropriate consequences under the law.

Like Johann Lamont, I seek clarification from the minister on the purpose-and-effect notes that the Government has provided on amendment 11. They state:

> “This new offence would be in addition to the existing offences of possessing a knife in a public place”.

I assume that that was drafted under the law as it stands, not as it will be if amendment 109 is agreed to. I am not casting doubt on what the minister is saying, but I would like a more comprehensive explanation of how "public place" encompasses the workplace. It would be helpful if the minister could provide that clarification.

Robert Brown: I also support amendment 109, which, as the minister says, is intended to close definite loopholes in the existing legislation.

I have a couple of queries. I might have missed this, but I do not think that the minister dealt with proposed new section 47(1A) of the Criminal Law (Consolidation) (Scotland) Act 1995, which would be inserted by subsection (2) of amendment 109, on the

"defence for a person ... to show that the person had a reasonable excuse or lawful authority".

Indeed, I do not think that he addressed the definition of offensive weapon in proposed new section 47(4) of the 1995 act, which refers to:

"any article ... made or adapted for use".

It might be that I do not understand the links between the statutes, but my view is that that is pretty much what the existing law says. Will the minister clarify whether any changes are intended in that regard or, if not, what the purpose is of those provisions?

I am also intrigued by Johann Lamont's amendment 11 and proposed new section 49AA(4) of the Criminal Law (Consolidation) (Scotland) Act 1995, which talks about there being a reasonable defence for carrying a knife

"(a) for use at work ...

(b) for religious reasons, or

(c) as part of any national costume."

In the days when I was a scout, we wore knives for various non-criminal purposes, for the most part. I know that there are issues around Sikh costume, for example, which sometimes has a weapon attached to it, and, of course, around the sgian dubh. The phrase "reasonable excuse", as it is used in the minister's amendment 109, might cover all those instances, but I would like the minister to clarify that the Government is satisfied that it does so adequately, and that it covers the use of a knife at work, which in some ways is a much more important issue than the others.

The Convener: As the minister said, amendment 109 is predicated on an appeal court decision that held that the possession of a knife in the common close and landing of a building did not constitute an offence under the existing law. It might be worthy of note that, in that particular case, the controlled entry system of the building was defective, which is why the accused was able to get access. Nevertheless, that judgment has caused concern. Amendment 109 seeks to remedy the situation and is therefore worthy of support.

Johann Lamont's amendment 11 is perfectly understandable. She stated that she requires some reassurance that the bill, as amended, will cover eventualities such as the one that she brought to us today.

Robert Brown raised his career as a scout, which many of us might regard as an historical curiosity. Nevertheless, he raised an appropriate point. I do not wish to anticipate what the minister is going to say, but surely Robert Brown's point is covered by the wording in both the bill and existing legislation. Any such charge states that the accused had an offensive weapon in his possession without "lawful authority" or a "reasonable excuse". I would have thought that a scout or someone in national dress, within the normal and sensible confines of the definition, would have a "reasonable excuse".

The intention of the law, as it is finalised, should be that everyone, in the privacy of their own home, should be able to have knives and other implements that could be used as weapons but which are not likely to be used as weapons in domestic circumstances. Basically, we have to ensure that knives are not used or carried outwith the home or in a public place. Amendment 109 should remedy the matter, but I would be grateful if Mr Ewing could provide the reassurance asked for by Mr Kelly, Mr Brown and Ms Lamont.

Fergus Ewing: And by yourself, convener. I am in a position to be 100 per cent helpful. Ms Lamont has asked for an absolute undertaking that amendment 109 will provide a comprehensive provision, and I am happy to provide that undertaking to her. The fact that amendment 109 provides that everywhere is a public place, subject to a number of limited exceptions, means that it states a general principle that will apply to and address the problems that have been alluded to.

I thank Ms Lamont for raising with the cabinet secretary the case that she alluded to briefly today—in which the police felt powerless to act, as they held that the workplace was not a public place—because that helped us with the drafting of amendment 109, which will tackle and remove that problem. It will also remove the problem relating to incidents in common stairwells. I am thinking of one incident in which police found two men in a stairwell, one carrying a baseball bat and the other carrying a knife, but the procurator fiscal determined that no substantive crime had been committed and marked the case as no proceedings. I think that the convener alluded to the case of Templeton, in which a sword was found lying at the bottom of a stairwell in a common close and, on appeal, the appeal court found that that was not a public place, which meant that the conviction of the person responsible for the presence of the sword in the stairwell was overturned.

I am happy to provide an absolute assurance to all members who have, quite rightly, raised questions about the issue because of the importance of ensuring that there are no loopholes and that those who are found to be carrying knives and offensive weapons without reasonable excuse or authority are convicted of that serious offence.

Robert Brown raised the issue of knives being carried in connection with the national dress of this country or the dress that is associated with various religions. That issue is already dealt with by separate statutory provisions. The provisions that we are talking about today will not affect the position, and the defence will continue to apply.

The purpose of amendment 109 is to provide uniform wording of the defence provision. Members will have noted the that the wording in section 47 of the 1995 act is slightly different from that in section 49 of the same act. Section 47 talks about

"lawful authority or reasonable excuse"

and section 49 talks about

"good reason or lawful authority".

It was felt that there should be uniform wording, as the same defence applies. That will ensure that there will be no inconsistencies with regard to what is, basically, the same offence. If the offence is the same, the defence should be the same.

I think that that answers all the points. I am happy to address any points that members feel I have inadvertently neglected to deal with. However, if members are happy with what they have heard, I will press amendment 109 and respectfully ask Ms Lamont to not move amendment 11, while thanking her for lodging it.

The Convener: Members look uncharacteristically relaxed, so I think that they feel that you have covered everything.

Amendment 109 agreed to.

Amendment 11 not moved.

Amendment 402 moved—[Rhoda Grant].

Amendment 402A moved—[Robert Brown].

The Convener: The question is, that amendment 402A be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Aitken, Bill (Glasgow) (Con)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 1.

The casting vote goes against the amendment.

Amendment 402A disagreed to.

Amendment 402 agreed to.

Sections 32 and 33 agreed to.

Section 34—Extreme pornography

The Convener: Amendment 361, in the name of the cabinet secretary, is grouped with amendments 362 to 364 and 366.

Fergus Ewing: I will be brief. Amendments 361 to 364 and 366 are technical amendments that are intended to clarify the factors that may be taken into consideration in determining whether an image is a pornographic image, whether an image depicts an extreme act and whether an image extracted from a film that is classified by the British Board of Film Classification has been extracted solely or principally for the purpose of sexual arousal. The amendments will make it clear that any sounds that accompany an image are one factor that may be taken into consideration in making such a determination.

I move amendment 361.

Amendment 361 agreed to.

Amendments 362 to 364 moved—[Fergus Ewing]—and agreed to.

The Convener: Amendment 365, in the name of Robert Brown, is grouped with amendments 367 to 369.

Robert Brown: I have previously expressed concern that there is a lacuna in the arrangements for excluding classified works. There is a period of time before a classification certificate is obtained when a video or film is liable to be criminalised. If it eventually gets a certificate, it is obviously not reasonable that its makers should be prosecuted. Obviously, if it does not get a certificate, that is a different story. My amendment 365 would extend the protection back to the point when the application for classification was made, provided that the certificate was subsequently granted. I appreciate that there would still be an in-between situation, but that would exist anyway. At least the amendment would help a little to avoid criminalising people who ought not to be criminalised.

I have no comment on amendments 367 to 369, which seem perfectly reasonable.

I move amendment 365.

Stewart Maxwell (West of Scotland) (SNP): I understand what Robert Brown is trying to do, but I have a small question for him. If we move back the exclusion to the point that he suggests, rather than the point of classification, would that provide a defence for those who make the images that we want to deal with? In effect, while the images were being made and before they achieved classification, there would be a defence in law that said, “You can’t touch me, because I am going to apply for classification.” I am concerned that an unfortunate by-product of the amendment would be that those who make the kind of extreme pornography with which we wish to deal could use the defence of saying that they were going to apply for classification. I know that that is not the intention; I just wonder whether Robert Brown has considered that point.

11:00

The Convener: It might be more useful for Mr Brown to deal with that in his summing up.

Fergus Ewing: We understand that amendment 365 seeks to provide that a work will be excluded from the extreme pornography provisions if it forms all or part of a work in respect of which an application has been received by the British Board of Film Classification for a film certificate. As drafted, the bill provides that a film is excluded from the offence provisions if it forms all or part of a classified work—in other words, if it is a film to which the BBFC has granted a classification certificate.

It is important to understand the purpose of the provision excluding BBFC-certificated works. The BBFC is clear that it would not give a classification certificate to a pornographic film containing depictions of rape, serious sexual violence, bestiality or sexual activity with a corpse. The provision is intended, for the avoidance of doubt, to reassure members of the public, who may not be familiar with the detailed provisions of the offence, that they cannot face prosecution for possessing a BBFC-certified film. As it is up to film makers to ensure that their films do not constitute extreme pornography, there is no need to extend the exemption to films that have not yet received a BBFC certificate.

We are also not sure that amendment 365 as drafted achieves its intended effect. The amendment applies only to a classified work, which is defined in proposed new section 51B(5) of the Civic Government (Scotland) Act 1982, as inserted by section 34 of the bill, as

> “a video work in respect of which a ... certificate has been issued”.

As the amendment seeks to cover the work until the certificate is issued it cannot logically be a “classified work”, which would mean that someone could be committing an offence by possessing material that did not yet have a certificate until such time as the certificate was issued, at which point it would be decriminalised retrospectively.

Amendments 367 to 369 are technical amendments that seek to clarify how the terms “image” and “extreme pornographic image” are to be construed in these provisions.

I invite Robert Brown to withdraw amendment 365.

Robert Brown: The problem is that there is a difficulty either way. Even if a work ends up as classified, there is a period before it is classified in which it does not enjoy the protection of section 34. I accept that there is a risk of creating the somewhat paradoxical situation in which a work could be illegal at one point but then would suddenly become legal once it was classified. Indeed, that is one of the problems that I had when I discussed with the clerks how I might phrase an amendment.

I do not disagree with the Government’s intention to ban the kind of extreme pornography that has been indicated, but we need to be careful that the way in which we are going does not have any unintended consequences. I do not think that amendment 365 will have the effect that Stewart Maxwell has suggested, although there is, as I have said, a paradox here.

Although I am anxious for the Government to examine the provision further and satisfy itself that it does what it ought to do and does not catch things that it ought not to catch, I am not prepared to press amendment 365 against the Government’s wishes.

Amendment 365, by agreement, withdrawn.

Amendments 366 to 369 moved—[Fergus Ewing]—and agreed to.

The Convener: Amendment 517, in the name of the cabinet secretary, is in a group on its own.

Fergus Ewing: I will be brief.

Amendment 517 provides that a person who has been convicted of the offence of possession of extreme pornography, has been sentenced to imprisonment of more than 12 months, and was aged 18 or older at the time of the offence may be made subject to the sex offender notification requirements where the court considers that that is appropriate. Without any specific provision, it would be left for the courts to determine in each individual case whether there was a significant sexual aspect to the offender's behaviour in committing the offence. Amendment 517 will ensure that the most serious offenders who have been convicted of possessing extreme pornography and may pose a risk to the public can be monitored.

I move amendment 517.

Amendment 517 agreed to.

Section 34, as amended, agreed to.

After section 34

The Convener: Amendment 110, in the name of the cabinet secretary, is in a group on its own.

Fergus Ewing: Amendment 110 amends the voyeurism offences that are contained in the Sexual Offences (Scotland) Act 2009. Committee members may be aware that, shortly before stage 3 of the Sexual Offences (Scotland) Bill, a Scottish Parliament information centre briefing drew attention to a then unpublished paper by James Chalmers that raised concerns that the voyeurism offences in that bill did not criminalise so-called up-skirt voyeurism—where, for example, a person uses a camera that is hidden in a bag to film up women's skirts in a public place. James Chalmers noted that a number of instances of such behaviour had been discovered.

Amendment 110 extends the offence of voyeurism so that it is committed where a person records an image of the victim's genitals or buttocks from beneath their clothing or operates equipment beneath the victim's clothing with the intention of enabling any person to observe his or her buttocks or genitals, whether in a public place or not, in circumstances in which they would not otherwise be visible, and does so without that person's consent. As such, it ensures that so-called up-skirt voyeurism falls within the scope of the new offence. The amendment also makes equivalent changes to the offences concerning voyeurism and children. We are grateful to Mr Chalmers for his work on those matters.

I move amendment 110.

Amendment 110 agreed to.

The Convener: Amendment 111, in the name of Kenny MacAskill, is in a group on its own.

Fergus Ewing: Again, I will be brief.

Amendment 111 is a technical amendment that corrects an omission in the Sexual Offences (Scotland) Act 2009 concerning defences in relation to offences against older children.

I move amendment 111.

Amendment 111 agreed to.

The Convener: Amendment 370, in the name of the cabinet secretary, is in a group on its own.

Fergus Ewing: Amendment 370 raises the maximum penalties for a number of prostitution-related offences to ensure that they represent a more effective deterrent to criminality and give the police better tools to address issues.

Amendment 370 amends the Criminal Law (Consolidation) (Scotland) Act 1995 to increase the maximum penalties for brothel keeping, living on the earnings of prostitution and living on the earnings of male prostitution in sections 11 and 13 of that act. Currently, the maximum penalty for living on the earnings of prostitution of any kind is two years' imprisonment or a fine of £10,000, and the maximum penalty for brothel keeping is six months' imprisonment and a fine of £2,500. The Government's view is that those penalties are out of date and unrealistic, as it is clear that they do not present an effective disincentive to criminality. Therefore, we propose to increase the penalties from their current levels to a maximum penalty of seven years' imprisonment and an unlimited fine. That will bring the terms of imprisonment into line with the penalties for the equivalent offences in England and Wales, and will provide for a more realistic level of fine to be imposed, especially where it is clear that significant money is being made from those forms of exploitation.

The Government welcomes the recently launched Equality and Human Rights Commission inquiry into trafficking in Scotland and the Equal Opportunities Committee's inquiry into migration and trafficking. Trafficking for sexual exploitation in Scotland appears to be exclusively for prostitution. We therefore expect that the findings of those inquiries will address not only trafficking but connected issues relating to prostitution. We do not wish to be perceived as prejudging the outcomes of those inquiries by making substantial changes to the law on prostitution, but we consider it appropriate to lodge a simple amendment to complement the bill's existing provisions on prostitution and human trafficking, and to provide additional practical assistance to the police in tackling those issues.

I move amendment 370.

The Convener: The issues are fairly straightforward, and there are no further contributions.

Amendment 370 agreed to.

The Convener: I welcome to the committee Richard Baker and Margo MacDonald, who are joining us for some of this morning's business.

Amendment 8, in the name of Trish Godman, is grouped with amendments 8A to 8D, 461, 9 and 9A.

Trish Godman (West Renfrewshire) (Lab): I express my thanks to the clerks.

Proposed new sections 11A to 11D of the Sexual Offences (Scotland) Act 2009, which amendment 8 contains, are linked. They cover all areas, and would make it an offence to buy sex. New section 11A, "Engaging in a paid-for sexual activity", would include all forms of payment, including payment in kind and presents. I accept that those provisions might have to be sorted at a later date. New section 11B, which proposes a ban on advertising, is clear. Ann Hamilton, a witness who appeared before the committee, pointed out an example from a newspaper. I have one such example with me today, should committee members wish to see it. Proposed new section 11C is on "Facilitating engagement in a paid-for sexual activity", which refers to sexual activity as described in the Sexual Offences Act 2003. New section 11D provides a tariff following a person's arrest for said offences. I will return to those provisions in a moment.

Margo MacDonald's proposed new section 11AA of the 2009 act, which would be inserted by amendment 8A, is on "Causing alarm etc". I am disappointed that it calls only for an offence of breach of the peace to apply. I believe that the matter is much more serious. That amendment disregards the exploitation, violence and abuse that are a reality for the majority of individuals who sell sex. The proposed measures do not acknowledge the harm of prostitution, and they put no focus on the buyer of sex.

Nigel Don's proposed new section 11E, "Paying for sexual services of a prostitute subjected to force etc", would be introduced by his amendment 461, and Margo MacDonald's proposed new section 11AB, "Profiting from coerced paid-for sexual activities", would be introduced by her amendment 8B. Both those amendments distinguish between victims of trafficking or people who are under the control of a pimp, and those who are forced to sell sex as a result of circumstances, for instance poverty or drug abuse. They would create a two-tier approach to tackling prostitution, whereby only certain victims would be worthy of the protection of the law.

My amendments challenge the acceptance of prostitution. At the moment, buying sex is viewed as something that men do, to which there is an entitlement and which does not cause harm. We need to discourage the demand that feeds that exploitation. There have been interventions on behalf of prostitutes for a long time, all focused on the women. Demand has remained invisible and without scrutiny. There is now substantial evidence that prostitution causes harm and will continue to do so unless intervention moves to the buyer—in other words, those who demand sex.

I wish to comment about my impressions of the committee meeting of 23 March. It seems that reservations arose because criminalising the buyer is thought to push prostitution underground or indoors, and one witness believed that that would impact adversely on the women's economic situation. If prostitution goes underground, the services need to respond to that. If the punter can find women indoors, so can the services and so can the police. Ann Hamilton gave you examples of that happening. It might go underground or indoors, but it would not be invisible.

The committee came to a full stop when it came to statistical information. We know that people are trafficked and that people prostitute themselves for all kinds of reasons. The evidence exists. I know it does—I have read it, and it is all sourced.

The view was expressed that women have the right to be prostitutes. Those women are not the focus of the amendments. The Scottish prostitutes education project—SCOT-PEP—supports women who have made that choice. However, we must remember those women of Ipswich and Glasgow who were murdered. Prostitution is a dangerous activity, and services need to be available to any woman who wishes to leave, including those women who believe that they have the right.

The two proposals on raising awareness and banning adverts directly support the principle that the buyer commits an offence. Up until now, the response from the Government has been weak—it has been mostly about education and making people aware of the problem. That has a role to play, but it does not address the fundamental issue of demand for services.

My understanding is that the previous Government's position was that prostitution is on the spectrum of violence against women. Demand has to be the central focus of intervention, and my amendments address that.

11:15

The revelation to the committee that Scotland's information base is so limited that it leads to uncertainty about the way forward was appalling. Given the international profile of the issue of trafficked women and prostitution and the activity's known links to serious crime, such a state of affairs is untenable.

In the discussion last week about amendments 10 and 10A, which were on minimum sentencing for people who are found carrying a knife, members suggested that the fear of being caught is much more effective than the fear of going to prison. As I speak, men are raping trafficked women and men are buying sex from prostitutes. They have no fear—they will never be caught—because that is not an offence. We need to send a strong message that buying sex is not harmless or acceptable. It should be regarded in Scotland as an abuse and an exploitation that will not be tolerated. I argue that we owe it to all women who are victimised by prostitution to do what we can now.

If my amendments are not agreed to, I would be interested to know how the Government intends to move policy forward on violence against women.

I move amendment 8.

Margo MacDonald (Lothians) (Ind): I must say from the outset that the amendments that Trish Godman and I have lodged really have no place in the bill, which was not intended to cover the issue. It is certain that no commensurate consultation has taken place on the proposals, which would represent a major change in our legal system.

If the committee takes the amendments one after the other as they are set out in the marshalled list, and if Trish Godman's amendments are not supported, I will be happy to withdraw amendment 8A and not to move my other amendments. I lodged my amendments simply because I thought that balance was required in the committee's scrutiny and not because I thought that my proposals should be inserted into the bill.

I have read the evidence that was given to the committee. The police were represented by Assistant Chief Constable Livingstone, who said that, in his view, no more powers were needed at this stage to deal with prostitution. He felt that the police had a sufficient range of powers in the law as it stands to deal with prostitution. He also said that no national consensus exists and that how prostitution is carried out and how the community views it are local matters. Of course, that has something to do with the geography and history of communities and with how the police have managed the situation.

Deciding on legislation before the basic intelligence has been gathered from the police, apart from anybody else, would be putting the cart before the horse. The police gave evidence that much more intelligence is needed. As Trish Godman said, it is worrying that so little evidence is available about something that people appear to think is very important and worthy of priority law making.

The minister said earlier—I just caught his remarks—that we should not get matters out of sequence and that we should tackle them logically. The current approach to the proposals is not logical.

There is a basic flaw in the argument. I will not debate whether trying to curtail demand for the services of prostitutes would be effective, but it takes two to tango. If we decide—as Trish Godman requests—that all sexual services that are traded must be illegal, the law should treat the seller and the purchaser of sexual services equally.

We have heard reference in this committee to the Swedish approach to things—it was in Ann Hamilton's evidence. I have here a communication that I received from the Stockholm city police yesterday, which states that they do not register prostitutes, so official statistics are impossible to give. I therefore caution the committee that dangling the Swedish model in front of it as providing some sort of template for this Parliament would be wrong. In Stockholm, an estimate of the number of prostitutes is made by the police officers who work in the area, which is exactly what happens here, so Sweden has no more to teach us than we have to teach it in that regard.

As the committee will know, an attempt was made in Sweden to do what the amendments that we are discussing seek, which is to criminalise the purchase of sex. It is true that prostitutes left the streets in Stockholm, Malmö and so on, but according to the police estimate from Stockholm yesterday there are about 300 prostitutes working on the streets. On a daily basis, around 10 to 30 of them can be found on Stockholm's streets, which is a bit higher than the number we have working in Edinburgh, for example. It is a lot lower than the number in Glasgow, but figures from Glasgow are very difficult to come by, as we know.

I bring the Swedish example to the committee's attention simply to point out that there is no panacea if the objective is to eliminate prostitution. We have been told umpteen times by the people who support the Swedish experiment that it worked in Sweden. One of the things that happened in the first year after the legislation was passed was similar to what we discovered in relation to our legislation on kerb crawling—there was a change in behaviour, but things started to drift back to where they had been. I sincerely hope that that does not happen with regard to kerb crawling in Glasgow, because I thought that a fair case was made there.

In Sweden, people worked underground, and the support services were concerned, because they knew that criminality would come in to a much greater extent than previously. However, women are now drifting back to the streets without too much being said about it, because at least the support services can get to them and the police know where they are and can manage the situation to a much greater extent—that was what I suggested to the committee the last time. As well as talking about recategorising the buying and selling of sex as a nuisance crime where it affects a third person, I tried to explain that the balance was that no one was likely to try to sell sex—and therefore no one was likely to look to buy it—in an area where they knew that a third party would complain about them. A red-light district would therefore be created, which is what enabled the police in Aberdeen and Edinburgh to have much better intelligence on what was happening and at least to hold to a minimum the add-on criminality that attaches to prostitution. I do not think that that has changed, other than that many fewer women work on the streets now—they work indoors.

As I explained to the committee the last time, I hope that the Government decides to reconstitute a committee to investigate indoor prostitution. Most of the women with whom I have contact work not for pimps or managers but for their own sake. They determine how to operate and do so discreetly, so they are not lifted by the police, neighbours do not complain and so on. However, that is still not satisfactory if we believe that there is trafficking. Few women have been shown to have been trafficked into Scotland, but that is not satisfactory. We need much more knowledge about the issue and the police need to be better informed so that they can better inform us before we try to change the law so drastically.

I move amendment 8A.

The Convener: I invite Nigel Don to speak to amendment 461 and the other amendments in the group.

Nigel Don (North East Scotland) (SNP): I agree with Margo MacDonald: I do not think that this is the appropriate legislative place for these amendments, although I understand why Trish Godman has raised these pressing issues. I accept that prostitution is generally an abuse of women and that we should address that, but there is a great deal more to be said about that—mostly to us rather than by us. We need to hold a serious inquiry into this area of the law. I do not know how we would fit that in or what the Government feels it can do about it, but I do not think that we have got to the bottom of the matter yet and we should not just scrape the surface, as I fear that we would do by passing these amendments.

I remind members that my amendment 461 mimics section 14 of the Policing and Crime Act 2009 in England and Wales, which I think is about to be brought into force. It seemed to me that there was value in having similar law, particularly criminal law, north and south of the border and that we should explore that. However, most of the responses that we got to that were simply dismissive, because people preferred Trish Godman's version. The responses were not in favour of what was suggested; there were significant comments against it. I fall back on the point that we are talking about a strict liability offence, which we should not introduce lightly. We should think about introducing the suggested provisions only if people's response is, "Of course we should be doing this. It's long overdue. Everybody agrees." It is plain that that is not the case. On that basis alone, I will not move amendment 461.

Robert Brown: This has been a useful debate in which valid views have been expressed on all sides of the argument. It is useful that Trish Godman started the debate in this context. However, I believe that it is right to oppose all the amendments in the group.

I have expressed concerns about trafficking in the context of the Commonwealth games and the lack of prosecution in that area. I disagree with Margo MacDonald in one respect: I think that there is good evidence that a significant number of people are trafficked into and across Scotland. Such evidence comes from, among others, the trafficking awareness raising alliance in Glasgow, which supports people who have been trafficked. There is a big difference between the number of people who are supported in that context and the non-existence of prosecutions in this area.

Otherwise, Margo MacDonald's words of caution were wise. We have to be chary about inserting well-intentioned amendments on such wide issues into bills at stage 2. I am not saying that it cannot be done—the stalking amendments that we passed earlier were narrow enough and there was sufficient consensus on them to make that possible—but prostitution is an activity on which there are conflicting views and practices in different parts of Scotland. As Margo MacDonald said, there is no national consensus on the way forward. Prostitution is also an activity that has been with us for thousands of years. It is right to be sceptical about whether an amendment to the Criminal Justice and Licensing (Scotland) Bill in 2010 will suddenly change all that.

There are issues about the phraseology of Trish Godman's amendment. It would introduce what has been categorised as a strict liability offence, which I think is possibly right, but what is the definition of "sexual activity"? Does it include non-physical activity such as texting? Does it include escort work? Is there an objective or subjective test as to what is involved? What does "paid-for" comprise? Trish Godman indicated that it included payments in kind or in gifts, but in some respect that makes things worse, because how do you distinguish between people's multiple interactions in on-going short or long-term relationships? Would that have the effect of making prostitution more marginal and more dangerous? There are issues about that, notwithstanding the views that are held at the Glasgow end of things, if you like. Would it handicap police investigations of the murder or rape of people who are involved in this area of activity? On the other hand, it could be a price worth paying if far fewer women resorted to prostitution because demand was stifled by criminalisation, although Margo MacDonald has made the valid point that whatever the early effects of the Swedish model, it does not necessarily produce a long-term change in activity.

We have evidence from the City of Edinburgh Council that there is no consensus on the way forward. We could benefit from a rather more detailed study, either by recalling the task force or by seeking a royal commission-type study. Before I could be satisfied of the need to go in the proposed direction, I would need there to be much greater agreement and underlying justification than we have had in the limited context of today's stage 2 debate.

11:30

Richard Baker (North East Scotland) (Lab): I will speak briefly in favour of Trish Godman's amendments. It is right that she has lodged them at this stage. The bill is wide ranging, and a number of issues that were not part of the stage 1 consultation have been brought forward for consideration at stage 2. We will make different decisions on whether those issues should be advanced further, but it is right that Trish Godman has brought forward this important matter for consideration at this point.

The amendments reflect a campaign that has been waged strongly, on the basis of good evidence, by Glasgow City Council. Neither the council nor Trish Godman has described a change in the law as a panacea or a silver bullet. The council has looked at a range of interventions; Trish Godman referred to the SCOT-PEP project and help to provide routes out of prostitution. Nevertheless, a change in the laws on prostitution has been described in the campaign and by Trish Godman as a key measure to deal with the misery and exploitation that, we must remember, exists around prostitution for so many women. Unfortunately, many women are trafficked into Scotland for that purpose.

People have talked about when we should consider the issue. The problem is likely to be even more pressing at the time of the 2014 Commonwealth games. It is clear that 2010 is exactly the kind of time for us to talk about how we can have the best laws to deal with the issue.

The argument for a change in the law has been well made. People have talked about equality in the law. To me, it has always seemed perverse that prostitutes have routinely been prosecuted whereas those who have purchased sex have not; indeed, they have not even been criminalised in the eyes of the law. There are international examples—not just from Sweden but, I believe, from across Scandinavia—that indicate that criminalising the actions of the purchaser has a positive effect in tackling the problem. On that basis, I strongly support Trish Godman's amendment 8.

Margo MacDonald has lodged her amendments to enable her to take part in the debate. I appreciate the intention but, as has been said, the amendments appear to be covered by existing offences of breach of the peace and public indecency.

Amendment 461, in the name of Nigel Don, does not the reflect the change that Trish Godman seeks. As Nigel Don said, it would create a new offence of paying or promising to pay for the sexual services of a coerced prostitute, which would leave Scotland in a position similar to that which obtains on the issue in England and Wales. We do not want the laws on prostitution here to be weaker than those in England and Wales; in fact, we would support amendment 461 in the event of Trish Godman's amendments falling. In any event, we seek an opportunity to return to the matter and to move to the reform of the law that Trish Godman proposes, which we see as optimal.

Stewart Maxwell: I have a great deal of sympathy for Trish Godman's intent. The principle behind her amendments is well considered and, probably, overdue. However, I have some issues with the detail and practical application of the amendments.

Robert Brown has covered much of the ground that I had intended to cover, so I will try to keep my remarks reasonably short. We took oral evidence on this set of amendments. Richard Baker talked about the experience and evidence of the Glasgow witness, but the evidence from the Edinburgh witness and the police officer from whom we heard was very different. There is a range of opinions and, as others have said, a lack of consensus on the way forward in the area. Despite my sympathies for the intentions behind the amendments, the bottom line is that the issue is far too large and complex to be dealt with in this fashion.

I want to make two further points. First, at the meeting to which I referred, I asked witnesses about the definitions in the amendments. Trish Godman indicated that she understands that there are issues relating to the definitions and she believes that they can be dealt with at a later stage. I am not sure about that; there are problems with those definitions. I will not go over them, as we dealt with them at a previous meeting and Robert Brown has already covered the matter.

My second point concerns whether we should agree to the amendments at all. I think that the issue here is effectiveness. If I truly and genuinely believed or even thought, on balance, that the amendments would have the intended effect of helping women who find themselves in a very difficult position, preventing other women from falling into prostitution or tackling the serious organised crime behind a lot of prostitution, I might have been willing to support them. However, I question their practical effectiveness. I think that it would be much better to take the issue away, look at it on its own seriously and in great depth, tackle it properly and come up with a very effective solution that would deal with all our concerns.

As a result, I am not minded to support Trish Godman's amendments or, partly for the reasons that have been stated, Nigel Don's amendment 461. I also do not support Margo MacDonald's amendments. However, she has said that she will withdraw amendment 8A and not move her other amendments if the other amendments in the group do not progress, because she wants a much wider debate about the issues.

James Kelly: I support Trish Godman's amendments. I realise that the area is complex and controversial; indeed, that much is clear from the breadth of contributions, evidence that we have received and comments that have been made outwith the committee. I welcome the fact that Trish Godman and others have lodged the amendments and their contribution to a very much needed debate on this issue.

My support for amendments 8 and 9 is based, first, on the strong indication in the evidence that we received of the need to reduce demand if we are to tackle the adverse effects of women being dragged into the sex industry. Indeed, Trish Godman made that point strongly in her own comments and I certainly think that her amendments would tackle the issue.

Secondly, the amendments have a punishment element. Wisely, Trish Godman referred to last week's debate on the amendments concerning knife crime, in which some members supported the view that stronger penalties for such crime would act as a deterrent. If a punishment element is associated with the purchasing of sex, people are likely to be less inclined to participate in the activity, demand will reduce and fewer women will be caught in very difficult situations.

The Convener: Although Margo MacDonald is correct to say that there was no consultation on the amendments, I point out that the committee took additional evidence on the issue. That move has proved to be useful, because it has allowed me to conclude that views are very mixed. For example, the views of Ann Hamilton from Glasgow were to some extent contradicted by the other two witnesses who gave evidence with her, and I have to say that I was largely persuaded by the evidence given by the police that, if agreed to, Trish Godman's amendments would lead to difficulties.

The amendments in the group have been well thought out and were lodged in a sincere effort to combat the unfortunate and sometimes tragic situations that can arise, particularly when women have been forced into prostitution by threats, violence or other forms of coercion. In fact, we are about to debate an amendment that I believe goes some way towards dealing with trafficking, which we all want to deal with in a exceptionally severe way.

That said, I am concerned that if we agree to amendments 8 and 9 difficulties in workability will arise. For a start, the evidence that would be required to secure a conviction would be very difficult to obtain. Apart from using closed-circuit television or something of that nature, I question whether the evidence would be available to ensure a successful prosecution.

I do not intend to deal with Margo MacDonald's amendments at any great length, as she has candidly admitted that she lodged the amendments to counterbalance in some way the amendments in the name of Trish Godman. However, we will have to deal with her amendments first as they seek to amend Trish Godman's amendments and, procedurally, there is no other way forward.

Margo MacDonald: May I ask a procedural question on that point?

The Convener: I will deal with that presently.

The other arguments that have impressed me were those that were made by Robert Brown. I largely agreed with what he said under a number of headings. I am also of the view that the matter should be subject to wider and further inquiry, but I do not think that stage 2 of what is largely a legal bill is the appropriate time to agree to any of the amendments, bearing in mind the lack of consultation and the lack of an opportunity to take fuller evidence. However, I anticipate that the matter will be revisited, under some heading, in the time ahead.

Angela Constance (Livingston) (SNP): I echo the comments that have been made by most members around the table. There needs to be a more dedicated and focused examination of the issue in its entirety. Although I welcome the desire to focus more on the buyers of sex—mainly men—I have issues with that approach because, by and large, criminals do not think that they will get caught. Like others, I accept that the issues around prostitution appear to be different in different parts of the country.

All those who have lodged amendments on this issue are to be commended for bringing the issues once again to the fore, as they had slipped off the radar. All the remarks that have been made have resonated with me. The question to the Government is, rightly, focused on how we can take the issue forward, but I am not convinced that this bill is the right way in which to do so. We need to think about how we can address the issue in a more dedicated and thoughtful manner.

Fergus Ewing: In response to Trish Godman, I say that the Government treats with the utmost gravity all issues relating to violence against women, as any Government would. That is expressed by action across the directorates of Government and by the actions of the police, the justice system in general, social work and the voluntary sector. In my area of responsibility, the new strategy that is contained in "The Road to Recovery: A New Approach to Tackling Scotland's Drug Problem"—as we all recognise, drug addiction fuels much of the prostitution that takes place in Scotland—is a valuable tool that we can use to help women to find recovery and thereby exit prostitution.

I pay tribute to the work that has been done in connection to, for example, Strathclyde Police's persistent offenders project. When I visited that project, I met a young woman who, six months previously, had been 6 stone in weight, perhaps close to death, on the streets and on the game. However, she had been helped to regain her life by the intervention of the social work department and the police. I want to mention that project because the causes behind prostitution need to be considered, as they are part of the complex background that many members have alluded to.

Amendments 8, 8A to 8D, 9, 9A and 461 all deal with the issue of prostitution and propose to criminalise the purchase of sexual services and associated behaviour, although not the selling of sexual services. Those changes would represent a significant change to the law in this area. Like many others, I have previously offered strong views on the issue of prostitution, and I want to draw members' attention to the wider context in which the Government has been considering the issue.

11:45

Many members will recall the substantial and prolonged debate on prostitution that took place in the run-up to the Prostitution (Public Places) (Scotland) Act 2007, particularly during the passage of the bill through Parliament. As some of you will know, I participated fully in that debate and voiced my views on the issue along with many others who had strong views to offer. That debate made it very clear that the substantial and complex issues surrounding prostitution are not amenable to simple solutions or quick fixes—to be fair, I do not think that anyone believes that that is the case. Nevertheless, the consideration of, and debate around, the Prostitution (Public Places) (Scotland) Bill resulted in a very welcome development in the law that targeted kerb crawlers. Whereas the law had always criminalised the antisocial behaviour associated with soliciting and loitering for the purposes of selling sex—I well remember hearing committee evidence about such behaviour in the east end of Glasgow that caused huge concerns to the residents there—the 2007 act levelled the playing field by ensuring that those soliciting and loitering for the purpose of buying sex are also criminalised.

However, we remind the committee that the initial impetus for a fresh consideration of street prostitution came from the Prostitution Tolerance Zones (Scotland) Bill, which was introduced by Margo MacDonald in 2002. Although that bill proposed that prostitution should in effect be legalised, the five years of consideration and debate that led to the 2007 act came to a very different conclusion, which was that more of the antisocial behaviour associated with prostitution should be criminalised. Bearing that in mind, the committee may not be surprised to hear that the Government is concerned about making substantial changes to the law in this difficult, complex and sensitive area by means of stage 2 amendments to the bill. We are concerned that such significant changes to such a sensitive area of law have not been properly debated or consulted on. We know that the committee, too, was concerned that these amendments raised significant new issues on which there had not been proper consideration and agreed to take written and, indeed, oral evidence on those. We think that the volume of responses on the matter and the wide range of issues that they raise reinforce the concerns.

I note that, in written evidence that the committee received, a group of academics appealed for

> "more extensive consultation with all key stakeholders which would presumably help to broaden out the current narrow focus of reform into a more inclusive, research-informed reform strategy. We would urge the committee to make a careful balanced assessment of this complex area".

We would remind the committee that the stage 1 call for written evidence resulted in around 90 submissions, covering all the provisions contained in the bill, yet, in only two weeks, 93 responses have been received on these prostitution amendments alone.

The changes leading to the 2007 act had the benefit of proper consideration by the expert group on prostitution, and the Government's view is that the significant changes to the law that are proposed by these amendments require similar scrutiny. I believe that that was the thrust of Margo MacDonald's submission this morning. A more considered review of the issues is needed to ensure that any measures that are put in place are necessary, practicable and sustainable. The volume of written evidence offers overwhelming confirmation that prostitution is a complex area that requires careful consideration and debate prior to additional measures being taken to address the issue.

I carefully read the *Official Report* of the oral evidence session that took place on 23 March, particularly the contributions by Ann Hamilton, Iain Livingstone and George Lewis. Several members, including Stewart Maxwell and the convener, alluded to that evidence. I found that it raised very significant issues of concern. For example, the Association of Chief Police Officers in Scotland stated:

> "The links between prostitution and vulnerable individuals, organised crime, community concern and antisocial behaviour are probably more complex than they are in relation to any other issue ... there are gaps in our understanding—the profile of prostitution is different throughout Scotland."

Margo MacDonald has often made that point in detail. The police argued that prostitution

> "is not a single entity and does not manifest itself in any single way. It can be very complex and multilayered with regard to whether it occurs on-street or off-street".

They also expressed their anxiety about

> "legislating on a social problem and a social phenomenon when we do not have a clear understanding of prostitution and the scale and extent of the problem".

Margo MacDonald also explained to the committee this morning that similar difficulties may take place in Stockholm. It would seem sensible to suggest that we may need more evidence from that source as we proceed. The police also suggested that

> "There is value in our committing to having a longer look at the problem, its various layers and complexities and interdependencies".

The convener and other members have already proposed that solution.

Assistant Chief Constable Livingstone expressed considerable concerns about the evidential difficulties of securing successful convictions. He described those as a "fundamental reservation" and he asked:

> "would we end up with a piece of legislation on the statute book that was not enforced or utilised, which would undermine our whole approach?"—[*Official Report, Justice Committee*, 23 March 2010; c 2776, 2779, 2789, 2795 and 2784.]

Other members have characterised the evidence that was heard by the committee on 23 March as tantamount to saying that agreeing to the amendments in Trish Godman's name would lead to the problem being driven underground thereby, as members have rightly said, potentially exacerbating the already very serious threats to women. If the experts say that passing amendments might make a problem worse, it seems to me that the case for taking a further look at the evidence becomes overwhelming. Even Glasgow Community and Safety Services acknowledges that indoor prostitution has not received the type of attention and research that it requires and did not oppose further consideration of these complex issues before we legislate.

The Equality and Human Rights Commission recently announced an inquiry into human trafficking in Scotland. The inquiry, which will be chaired by Baroness Helena Kennedy, will focus on sexual exploitation. All the available intelligence indicates that any trafficking into Scotland for sexual exploitation is for the purposes of prostitution, so the inquiry will inevitably focus on prostitution. The Government welcomes the commission's inquiry and we have made clear to Baroness Kennedy that the Government will seek to support the inquiry and assist it in its consideration. Given the focus on prostitution, we are hopeful that the inquiry will reach some positive conclusions on the way forward on this issue and we look forward to reading its report on the matter. It would seem to make a lot of sense that we give Helena Kennedy the opportunity to complete her inquiries and that we contribute to them—as all members are entitled to do—and consider their outcome carefully before we proceed further. I note that ACPOS has also welcomed the helpful work that Baroness Kennedy has kicked off.

As I said during the debate on amendment 370, the Government is concerned about making substantial changes to the law in this difficult, complex and sensitive area without proper consideration of and consultation on all the issues involved.

In conclusion, rushing through a major change to the law on prostitution through stage 2 amendments, without any proper consultation and with very limited time for consideration, is a bad idea. The issues involved are complex and require proper consideration. I therefore ask the committee to reject all the amendments.

Trish Godman: I will try to address as many issues as I can.

Margo MacDonald said that there is no place in the bill for my amendments because of a lack of consultation, and others, too, have made that comment. I wonder, though, where I should have raised the issue, because other amendments have been raised late and it is a wide-ranging bill, but perhaps you know better than me.

The police say that no more powers are needed, but no one has been arrested for trafficking here. It is worrying that the police say that there is little evidence but that they have the power to do something about it.

Assistant Chief Constable Livingstone told the committee:

> "We recently visited all licensed premises—and there are a number of gay saunas in Edinburgh—with a view to engaging with people working in those establishments. They were not enforcement visits, but welfare visits."—[*Official Report, Justice Committee*, 23 March 2010; c 2786.]

I do not know how many police make welfare visits, but I do not think that many of them do. However, if I was a trafficked woman living in a foreign country where I did not speak the language and the police came into the sauna, I am not sure that I would consider that they were present for the purposes of a welfare visit. I accept that that is what the police were trying to do, but Assistant Chief Constable Livingstone's point was that he was not receiving evidence about trafficked women in saunas.

The law needs to be equal. It is certainly not equal at the moment, but amendment 8 would change that. Currently, the woman gets charged, but the man does not.

Margo MacDonald mentioned Sweden. We can copy good practice from Sweden, where there has definitely been a reduction in trafficking. Indeed, when I visited the Metropolitan Police, I was given information about two international gangs whose leaders are each serving 25 years in a Swedish prison because they were found to be trafficking women into that country.

Nigel Don said that the bill is wide ranging but that it is the wrong place for the proposed measure. I should pick him up on his point that women in prostitution are generally abused; they are, I suggest, always abused. He also mentioned that the Metropolitan Police is implementing the new legislation that has been introduced this month. However, I was told by the Metropolitan Police that the new legislation in England was introduced on the basis of roughly the same amount of information as we currently have in Scotland.

Robert Brown talked about trafficking in the context of the bill and of the Commonwealth games. I know that the Metropolitan Police has a dedicated Olympics team working in the borough of Newham, where the accommodation for the athletes is currently being built by men from the eastern European bloc. The Metropolitan Police team has already managed to help some trafficked women there. I am not sure that similar numbers of people will be trafficked for the Commonwealth games, but I certainly think that we need to address the issue.

Robert Brown also said that there is no national consensus across Scotland on my proposals. I suggest that there is no national consensus on any law that we introduce. We have introduced serious laws such as the smoking ban that were not agreed on throughout Scotland. In our job, that happens quite a lot. In response to his other point, as I have already said, the Sexual Offences Act 2003 provides a definition of "sexual activity".

I have sourced an article that suggests that there is a possibility—I repeat, this is a possibility—that Edinburgh has a thousand licensed premises, in each of which an average of 20 women might work. Even if the number of premises is half that amount and is only 500, some 20 women might work in each sauna because of shifts and so on. Therefore, I suggest that there are women out there in danger every day.

Stewart Maxwell said that he had sympathy for my proposal but had not heard enough evidence. That point has been made before. He also picked up on the definitions, and I accept that point. If my amendments are agreed to, we may need to look at that point later.

James Kelly talked about the need to reduce demand and to tackle the effects of prostitution on women. Again, the fear of getting caught is an important point. There is currently no fear because people know that they will not get caught because engaging in paid-for sexual activity is not an offence.

Bill Aitken also asked for additional evidence and said that he was persuaded by the police's evidence that the proposed measures might have difficulty in working. I am not sure about that. If the amendments are agreed to and become law, the police will need to deal with the issue in the same way as those people who currently provide services to help women who are trafficked into prostitution. Ann Hamilton explained that services need to respond to what is happening out there.

Angela Constance said that she echoed the comments of others in believing that a more dedicated focus was required for the issue. She also mentioned that the criminals do not get caught. As I have said, they do not get caught because prostitution is currently not an offence.

The minister mentioned the new strategy on drug abuse, but that is, as he will surely agree, only one part of the picture. Not all prostitutes are drug users and people enter prostitution for all kinds of different reasons. He was concerned about changes in the law on such a sensitive issue. Clearly, the issue needs to be addressed, given that we have received 93 submissions for and against the proposals, which have aroused a lot of response from the general public. Of course prostitution is a complex issue, not only because it involves organised crime but because there are gaps in our understanding on why women prostitute themselves. Prostitution is not a single entity but a multilevel problem.

However, that misses the point. I am aware of all that—I know all that—but I also know that men can currently go out and demand or buy sex from a woman in the knowledge that nothing will happen to them. I can separate that out from everything else that is going on—I can do that quite easily. An offence has been committed. If the amendments were accepted and became part of the bill, the police would have other powers to use and services would have a different way of dealing with the problem and looking at all the multifaceted issues that are involved—I do not think that my amendments will change any of that, as it is very complex subject.

I hope that committee members will support my amendments, but I suspect that you will not.

12:00

The Convener: Thank you. Before I ask Margo MacDonald to wind up, I advise her that, under rule 9.10.10 of the standing orders, it is necessary for the committee to dispose of amendments to amendments prior to the principal amendments being dealt with. That is perfectly logical. As Margo MacDonald is seeking to amend Trish Godman's amendment, we must deal with hers first.

Margo MacDonald: I apologise, convener. I should have been up a bit earlier to read rule 9.10.10.

The Convener: Clearly, you are not a full-time member of the Justice Committee or you would be up early every morning.

Margo MacDonald: Oh, please. I would work so much harder if I was, though.

The business of trafficking has been referred to, but we have no figures on it in front of us in any of the evidence that has been submitted to the committee. Despite that, it was talked about in relation to Glasgow and the assertion was made that we know that there are trafficked women. First, how do we define "trafficked women"? Are they people who come here illegally, as economic migrants, or are they people who are brought here against their will and coerced into prostitution? Even the terminology is not common to everyone who uses it. I suggest that it is no basis for a new law.

As we know, the economic situation does not exactly look promising. In every society in the world, over the past 2,000 years, there has been a record of women being forced to the extreme of selling themselves in order to put food on the table or look after their children. I do not mean to be sentimental or emotional, but it is just true that it may be the last thing that a woman has left to protect her and her family. In 2010, the situation is not so drastic; on the other hand, it could be that arrangements are made privately because women do not have money coming in to cover the necessities of everyday living. We are characterising someone in that situation in exactly the same way as we are characterising a refugee—either an illegal immigrant or someone who has been kidnapped, brought to this country and forced to prostitute themselves. However, the two things are very different.

Several members have admitted that this is a complex area. It is complex and fast changing, as women no longer sell themselves only on the street; the new technology means that the telephone and the internet are used to further the business of prostitution. If she wants to, a woman can work much more easily without a criminal gang or a pimp behind her. I know that from speaking to women who are doing that. We can expect that to be much more the pattern in the future. If the intention of the committee and the Parliament is to outlaw paid-for sex between consenting adults, they will have to tackle that, and it will need much more information than we have got this morning. Is the business of escorting to be treated in the same way as phone sex? I do not see how that can be policed or how an equitable punishment can be arrived at if that is what the committee thinks is needed.

At the end of her remarks, Trish Godman said that there are many different reasons why women prostitute themselves. That suggests that there might be an element of choice in some cases. If choice is involved, we are proceeding from an erroneous basis in saying that all prostitution is the exploitation of women and violence against women.

I hate to throw a spanner in the works at the last minute, but I could not pass up the chance. I have been trying to explain to various parliamentary committees for a long time that the answer is much more complex than simply saying that we will abolish prostitution. We must determine what prostitution is, first.

The Convener: Thank you. You have not intimated whether you are pressing or withdrawing your amendment.

Margo MacDonald: Because of rule what-you-may-call-it—

The Convener: Rule 9.10.10 of the standing orders. You are pressing your amendment.

Margo MacDonald: Does that help you, convener?

The Convener: I am entirely in your hands on the matter.

Margo MacDonald: Och, I never thought that that would happen. Yes, I will press my amendment.

The Convener: The question is, that amendment 8A be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

Against

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the amendment is: For 0, Against 8, Abstentions 0.

Amendment 8A disagreed to.

Amendments 8B to 8D not moved.

The Convener: The question is, that amendment 8 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 8 disagreed to.

Amendment 461 not moved.

12:07

Meeting suspended.

12:17

On resuming—

Section 35—People trafficking

The Convener: Amendment 371, in the name of the cabinet secretary, is grouped with amendments 372 to 377, 386 and 387.

Fergus Ewing: Human trafficking is an abhorrent crime. Our role as legislators is to ensure that we provide our police, prosecutors and courts with the right tools to tackle it.

Section 35 already seeks to make amendments to the legislation on human trafficking to broaden the application of the offences and to ensure that our courts have jurisdiction to try them. However, since the bill was introduced, there have been a number of developments in England and Wales and in Europe of which we need to take account. Over the past year, the European justice and home affairs council has worked on a new framework decision on human trafficking. Although that proposal fell with the coming into force of the Treaty of Lisbon, the draft has reappeared as a proposal for a directive. We are, therefore, taking the chance to get ahead of the game.

Section 22(1) of the Criminal Justice (Scotland) Act 2003 and section 4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 make it an offence to arrange or facilitate the trafficking of human beings into, within or out of the UK for the purposes of various forms of exploitation. Amendments 371 to 373 and 377 create new offences that deal with the arrangement or facilitation of trafficking for those forms of exploitation but also cover the trafficking of persons into, within or out of a country other than the UK. Amendments 376 and 377 provide that those new offences apply to UK nationals, people habitually resident in Scotland and UK corporate bodies. That will help to ensure compliance with any new directive.

Amendment 377 also expands in several ways the definition of "exploitation" in section 4(4) of the 2004 act. Those changes ensure that we have complete coverage of trafficking where the exploitation would involve removal of body parts including blood, rather than simply the removal of organs for transplantation.

Through the Borders, Citizenship and Immigration Act 2009, changes have been made for England, Wales and Northern Ireland to cover the use or attempted use of a person for the provision of services or the provision or acquisition of benefits of any kind, where the person is chosen on the grounds of ill health, disability, youth or family relationship. Part of amendment 377 replicates that change. The change ensures that the offence of trafficking captures those cases where the role of the person who is being exploited is entirely passive and that person is being used as a tool by which others can gain a benefit of any kind.

The existing offence in section 4(2) of the 2004 act of trafficking persons within the United Kingdom requires that the person who arranges or facilitates the travel within the UK believes that an offence under subsection (1) may have been committed—that is to say, that the person has already been trafficked into the UK. Amendment 377 adjusts section 4(2) to remove the requirement for that belief, so that the act of a person who arranges or facilitates the travel intending to exploit the victim, or believing that another person is likely to do so, is sufficient for an offence to be committed.

Amendment 377 also ensures that the sheriff court has jurisdiction over the 2004 act offences. Amendments 374 and 377 clarify that those offences can be taken by solemn or summary procedure, although, given the gravity of the offences, we would expect most cases to be dealt with on indictment.

Amendments 386 and 387 are technical amendments that clarify the jurisdiction of the sheriff court in relation to those offences for which section 11(3) of the Criminal Procedure (Scotland) Act 1995 and section 55(7) of the Sexual Offences (Scotland) Act 2009 make provision. By those provisions, proceedings can be taken in Scotland in relation to certain specified criminal activity by certain persons that has taken place outwith Scotland. The amendments clarify that both solemn and summary prosecutions may be taken in the sheriff court for those offences.

Amendment 386 also amends section 11(4) of the 1995 act to provide that persons may be prosecuted in Scotland by solemn or summary procedure for those offences to which that provision applies.

I move amendment 371.

Amendment 371 agreed to.

Amendments 372 to 377 moved—[Fergus Ewing]—and agreed to.

Section 35, as amended, agreed to.

After section 35

The Convener: Amendment 112, in the name of the cabinet secretary, is grouped with amendment 143.

Fergus Ewing: There is little doubt that slavery, servitude and forced labour are wrong and should be addressed in our criminal law. Although we think that the law in Scotland covers most of the circumstances that might constitute slavery, servitude or forced or compulsory labour, we think that there is a risk of a gap in the law in so far as it may not deal with the employer of an individual who is subject to such behaviour, particularly where that person—the employer—has not been engaged in the trafficking of the individual. That could be of particular relevance to people who are brought to this country, possibly in good faith, and taken advantage of because of their uncertain immigration status. A case against France in the European Court of Human Rights a few years ago highlighted the need to ensure that the law is clear in that area to avoid a finding that article 4 of the European convention on human rights has been breached.

Amendment 112 is designed to ensure that there is no gap in the law by creating new statutory offences of holding an individual in slavery or servitude, or requiring that individual to perform forced or compulsory labour where the offender either knew or ought to have known that the person was being held or required to perform labour in such circumstances. Slavery, servitude and forced or compulsory labour will be defined by reference to article 4 of the European convention on human rights, to ensure compliance with the convention. Given its seriousness, the offence will attract a maximum penalty of 14 years' imprisonment.

The offence mirrors the new offence that is contained in section 71 of the UK Coroners and Justice Act 2009. We consider that a provision in virtually the same terms for Scotland is appropriate, not least because a difference in approach between Scotland and the rest of the UK would be unhelpful. Any difference would also run the risk of the UK being found to be in breach of its obligations under article 4.

Amendment 143 seeks to include the new offence as an exploitation offence, as defined in section 40A of the Antisocial Behaviour etc (Scotland) Act 2004, which section 72(7) of the bill introduces. The section provides for the closure of premises that are associated with human exploitation.

I move amendment 112.

Amendment 112 agreed to.

Section 36 agreed to.

After section 36

The Convener: Amendment 113, in the name of the cabinet secretary, is in a group on its own.

Fergus Ewing: Amendment 113 inserts a new section into the bill to create two new statutory offences relating to fraud.

Following publication of "Her Majesty's Inspectorate of Constabulary for Scotland:

Thematic Inspection Serious Fraud" in May 2008, an ACPOS-led short-life working group looked at whether changes to fraud law were needed in Scotland. It noted that the common law of fraud worked well, but it recommended the creation of two new statutory offences to complement common law. The new offences are based on similar offences in sections 6 and 7 of the Fraud Act 2006, which does not extend to Scotland.

The two new offences will criminalise the possession or control of articles for use in, or in connection with, the commission of fraud; and the making, adaptation and supply or offering to supply an article that has been either designed or adapted for use in, or in connection with, the commission of fraud, or when the person intends that the article is to be used in, or in connection with, the commission of fraud.

Currently, when an individual is found with, say, a credit card skimming machine in their possession but there is no proof that they have attempted to undertake a fraud, no offence has been committed though it is clear that the article is to be used for fraudulent purposes. In future, if it can be proved that the accused possessed the article and that the article was to be used in or in connection with the commission of fraud, the new offence of possession or control of the article will apply and the person can be prosecuted.

Some may query why the new offences do not simply outlaw the possession or supply of fraudulent articles, but it would be very difficult to define exactly what is a fraudulent article. For example, a credit card skimming machine can be very similar to credit card readers that are used by shops all over the country, while a list of credit card numbers held on a computer could simply be part of a shop's retail records. We therefore believe that, in addition to a person possessing the article, it must also be established that the article was to be used in, or in connection with, the commission of fraud. We consider that the wording of the provision is sufficient to allow the courts to interpret the provision as including possession of an article intended for use in fraud.

We are glad to be able to include the two new statutory offences in the bill as they will help to ensure that our laws are comprehensive in dealing with fraud.

I move amendment 113.

Amendment 113 agreed to.

Section 37 agreed to.

After section 37

The Convener: Amendment 114, in the name of the cabinet secretary, is grouped with amendments 189, 192, 194 and 196.

Fergus Ewing: Amendments 114, 189, 192, 194 and 196 allow me to pay tribute to the Liberal Democrats—not in this Parliament, but at Westminster.

It was Dr Evan Harris MP who first raised the continuing existence in England of the offences of sedition and seditious libel during the passage through Parliament last year of the Coroners and Justice Bill. As he said, although it would be unthinkable for the state to use the offences today in the way that they were used against the likes of John Wilkes in previous centuries, they remain part of our law. Theoretically, every time that a journalist harangues the Government or a comedian insults the Crown, they are liable to be arrested.

The provisions are more than a mere theoretical curiosity to amuse law students. More importantly, the fact that the UK has such laws is used as a convenient excuse for repressive regimes worldwide to have, and to use, their own. In such countries not only is there a chilling effect—people being too afraid to air criticism of the authorities and elites—but citizens are regularly prosecuted for speaking out.

The UK Government was seized of the force of the arguments and tabled amendments to the Coroners and Justice Bill to sweep away the offences of sedition, seditious libel, obscene libel and defamatory libel in the rest of the UK. We believe that it is appropriate for us to follow suit and lay finally to rest the Scots law offences of sedition and leasing-making, which is what amendment 114 does. That will help give the UK greater moral authority when dealing with repressive regimes.

Amendments 189, 192, 194 and 196 tidy up the statute book in consequence of amendment 114 and the changes made in the rest of the UK, including the complete repeal of two antiquated acts as they apply to Scotland.

I move amendment 114.

12:30

Angela Constance: It would be interesting if the minister could explain leasing-making when he winds up.

The Convener: I am sure that he will do so. While he is being advised, I should say that there is a delicious irony in a Scottish National Party Government minister—a representative of a party that I have always thought to be a seditious bunch—moving that that part of the law be removed and those of us of greater ilk being denied the protection that the law presently allows against being traduced in such an unseemly manner.

Stewart Maxwell: I am not sure that that meets the criterion for being respectful to other members of the Parliament. [*Laughter*.]

The Convener: Mr Ewing, would you like to sum up?

Fergus Ewing: Indeed. I was not aware that every time a journalist harangues the Government, he is liable to be arrested. Had I known that, convener, history might have been somewhat different. However, as a habitually loyal colleague, I am happy to move the amendments. When I read out the words “leasing-making”, I wondered whether a typographical error had crept into my script; that is why I paused momentarily. However, there is no error—one does not expect errors from one’s officials—and it means lese-majesty, or the act of making critical remarks of Her Majesty, so I am happy to have lodged the amendment. I am pleased say that, according to the current edition of Gordon, there have been no reported prosecutions for leasing-making since 1715. Members can draw whatever conclusions they wish from that fact.

The Convener: Yes—we are entitled to some light relief after a heavy morning.

Amendment 114 agreed to.

The Convener: Amendment 378, in the name of the cabinet secretary, has been debated with amendment 399. Minister, I believe that you do not intend to move amendment 378.

Fergus Ewing: No, and I will explain briefly. Following extensive discussion at last week’s meeting, there was agreement to consider further the various amendments relating to the proposed new stalking offence that Rhoda Grant lodged, and our offence of threatening, alarming or distressing behaviour. The committee earlier agreed to Rhoda Grant’s amendment 402, and we will now work with Rhoda Grant and the committee with a view to preparing further amendments that will ensure that the final version of the stalking offence is robust and workable.

I will not move Government amendment 378 at this time. Instead, we will refine the text as necessary and engage with interested members to ensure that we can lodge an amendment at stage 3 that will address the uncertainty created by Her Majesty’s Advocate v Harris and which will, I believe, have broad parliamentary support.

Amendment 378 not moved.

The Convener: Thank you; that is useful.

Amendment 115, in my name, is grouped with amendments 116 to 120, 120A, 121 to 125 and 185. The amendments have been overtaken by events. Since they were lodged, the Government has intimated its intention to legislate separately after a consultation process. On the basis of a brief assurance from the minister that that is still the Government’s intention, I will seek to withdraw or not move my amendments, with the committee’s approval.

I move amendment 115.

Fergus Ewing: We are certainly pleased with the broad consensus in favour of reforming the law of double jeopardy. It might be helpful if I read into the record our reasons for doing so, because that is the basis on which the convener will feel able to withdraw amendment 115.

As we indicated during the debate in Parliament last month, we welcome the intention behind the amendments in the group, but they do not go far enough. The convener’s amendments adopt the provisions that were set out in the Scottish Law Commission’s recent report on double jeopardy. We are grateful to the commission for its work in the area and on the related issue of creating a Crown right of appeal—that reform is, of course, already in the bill. During last month’s debate, we outlined our reasons for conducting a consultation exercise instead of pressing ahead with the commission’s recommendations on the bill. Our view remains focused on the creation of an exception to double jeopardy where new evidence has arisen, and on the need to get this important reform right.

Although the commission provided draft legislation to create a new evidence exception to double jeopardy, it was offered on a provisional basis. The commission was unable to recommend either way on the principle of whether to have such an exception. We are in favour of a new evidence exception and share the convener’s enthusiasm for change, but the issue is complex and important and we think that we should wait for the results of the consultation exercise. In particular, we want to hear the views of the public on issues such as the offences to be covered by a new evidence exception and whether it should be made retrospective. I am pleased that the convener shares those views, if I have interpreted his remarks correctly. I hope that Mr Brown shares those views, too. We hope that the Government’s consultation exercise, which is due to close on 14 June, will form a solid foundation for taking forward reform of the law in the area.

Robert Brown: I share those views.

The Convener: As no one else wishes to contribute and I assume that the minister feels no need to sum up, I seek permission to withdraw amendment 115.

Amendment 115, by agreement, withdrawn.

Amendments 116 to 120, 120A, 121 to 125 and 544 not moved.

The Convener: In view of the lateness of the hour and the fact that one further item is likely to cause some debate, and because the committee has a couple of administrative items to deal with in private, I suspend proceedings. I am sorry that we did not reach Margaret Curran's amendment, but unfortunately time does not allow. I thank the minister and his team for their attendance.

12:39

Meeting suspended.

Criminal Justice and Licensing (Scotland) Bill

5th Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 3	Schedule 1
Sections 4 to 18	Schedule 2
Sections 19 to 66	Schedule 3
Sections 67 to 139	Schedule 4
Sections 140 to 145	Schedule 5
Sections 146 to 148	Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 38

Robert Brown

379 In section 38, page 53, line 15, leave out subsection (2) and insert—

<(2) In section 41 (age of criminal responsibility), for "eight" substitute "12".>

Bill Aitken

126 In section 38, page 53, line 17, after <not> insert <normally>

Bill Aitken

127 In section 38, page 53, line 18, after <not> insert <normally>

Richard Baker

389 In section 38, page 53, line 26, at end insert—

<(5) The Scottish Ministers must, as soon as possible after the end of each of the reporting years, lay before the Scottish Parliament and publish a report on the disposal of cases ("relevant cases") involving children who, but for section 41A of the 1995 Act (as inserted by subsection (2)), would have been prosecuted.

(6) For the purposes of subsection (5), the "reporting years" are—

(a) the period of 12 months beginning with the day on which this section comes into force, and

(b) the periods of 12 months beginning with the first and second anniversaries of that day.

(7) A report under subsection (5) must, in particular—

(a) specify the number of relevant cases disposed of during the reporting year,

(b) set out how those cases were disposed of and the costs and other resources involved in those disposals, and

(c) state what (if any) consideration the Scottish Ministers have given during the year covered by the report to the merits of altering the range of disposals available in such cases.>

Section 39

Kenny MacAskill

128 In section 39, page 53, line 32, after <offence> insert <committed by the partnership>

Kenny MacAskill

129 In section 39, page 54, line 9, at end insert—

<( ) In subsection (1), the references to a partner of a partnership include references to a person purporting to act as a partner of the partnership.>

Section 40

Kenny MacAskill

130 In section 40, page 54, line 23, leave out <all reasonable hours> and insert <a reasonable time and in a reasonable place>

Bill Aitken
Supported by: Robert Brown

131 Leave out section 40

After section 40

Margaret Curran

403* After section 40, insert—

<Parole: victims' representation

Victims' representation at Parole Board hearings

(1) Section 17 of the Criminal Justice (Scotland) Act 2003 (asp 7) is amended as follows.

(2) After subsection (1), insert—

"(1A) Representations under subsection (1) may include notification by the victim of a desire to be heard (either in person or through a representative) at the relevant hearing of the Parole Board for Scotland.

(1B) In this section, the "relevant hearing" of the Board is the hearing at which the Board is to consider the convicted person's case in order to decide whether to recommend, or direct, that person's release on licence (and if there are to be a number of hearings which otherwise meet this description, the Board may determine which is the relevant hearing for the purposes of this section).".

(3) In subsection (3), for "Parole Board for Scotland" substitute "Board".

(4) After subsection (5), insert—

“(5A) Where representations are made under subsection (1) which include notification of a desire to be heard at the relevant hearing, the Board must—

(a) give the victim reasonable notice in writing of when and where the hearing is to take place and invite the victim to—

(i) attend the hearing, with or without an accompanying person, in order to be heard in person; or

(ii) send a representative to the hearing to be heard on the victim’s behalf;

(b) in so doing, give the victim appropriate information about the hearing and how it is likely to be conducted including, in particular—

(i) information about any parts of the hearing from which the victim and any accompanying person are, or the victim’s representative is, to be excluded, and

(ii) any limits on their participation during the other parts of the hearing;

(c) at the hearing, afford the victim (or the victim’s representative) a reasonable opportunity to be heard.

(5B) A victim’s representative may only be a member of the victim’s immediate family or a friend of the victim.

(5C) In reaching its decision at or after the hearing, the Board must take account of—

(a) any written representations made under subsection (1); and

(b) anything said by the victim (or the victim’s representative) at the hearing.”.

(5) In section 20(4) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9) (Parole Board rules), after paragraph (ba) insert—

“(bb) in relation to victims who have made representations under section 17(1) of the Criminal Justice (Scotland) Act 2003 (asp 7) which include notifications of a desire to be heard at the relevant hearing (within the meaning of subsection (1B) of that section), enabling such victims to attend such hearings of the Board;”.>

Section 41

Kenny MacAskill

518 In section 41, page 55, line 22, at end insert—

<(4A) The reference in subsection (4)(c) to any previous conviction of an offence under subsection (1)(b) includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to an offence under subsection (1)(b).

(4B) The references in subsection (4)(d) to subsection (4) are to be read, in relation to a previous conviction by a court referred to in subsection (4A), as references to any provision that is equivalent to subsection (4).

(4C) Any issue of equivalence arising in pursuance of subsection (4A) or (4B) is for the court to determine.>

After section 41

Kenny MacAskill

420 After section 41, insert—

<Grant of warrants

Grant of warrants for execution by constables and police members of SCDEA

(1) A sheriff or justice of the peace does not lack power or jurisdiction to grant a warrant for execution by a person mentioned in subsection (2) solely because the person is not a constable of a police force for a police area lying wholly or partly in the sheriff's or justice's sheriffdom.

(2) The persons referred to in subsection (1) are—

(a) a constable,

(b) a police member of the Scottish Crime and Drug Enforcement Agency.>

After section 43

Kenny MacAskill

132 After section 43, insert—

<**Bail conditions: remote monitoring requirements**

Sections 24A to 24E of the 1995 Act (bail conditions: remote monitoring) are repealed.>

Section 44

Kenny MacAskill

421 In section 44, page 58, line 5, at end insert—

<( ) The title of section 287 becomes "Demission from office of Lord Advocate and Solicitor General for Scotland".>

Kenny MacAskill

422 In section 44, page 58, line 6, leave out from <subsection> to <Advocate)> and insert <that section>

Kenny MacAskill

423 In section 44, page 58, line 11, at end insert <and

( ) after "successor" insert "or the Solicitor General",>

Kenny MacAskill

424 In section 44, page 58, leave out line 13 and insert—

<( ) for “in name of” substitute “at the instance of Her Majesty’s Advocate or”, and>

Kenny MacAskill

425 In section 44, page 58, line 17, at end insert—

<(2AA) All indictments which have been raised at the instance of the Solicitor General shall remain effective notwithstanding the holder of the office of Solicitor General subsequently having died or demitted office and may be taken up and proceeded with by his successor or the Lord Advocate.>

Kenny MacAskill

426 In section 44, page 58, line 19, leave out from <as> to end of line 20

Kenny MacAskill

427 In section 44, page 58, line 24, at end insert—

<( ) in paragraph (a), after “subsection (1)” insert “or (2AA)”,>

After section 46

Kenny MacAskill

428 After section 46, insert—

<Dockets and charges in sex cases

Dockets and charges in sex cases

After section 288B of the 1995 Act insert—

“*Dockets and charges in sex cases*

288BA Dockets for charges of sexual offences

(1) An indictment or a complaint may include a docket which specifies any act or omission that is connected with a sexual offence charged in the indictment or complaint.

(2) Here, an act or omission is connected with such an offence charged if it—

- (a) is specifiable by way of reference to a sexual offence, and
- (b) relates to—
  - (i) the same event as the offence charged, or
  - (ii) a series of events of which that offence is also part.

(3) The docket is to be in the form of a note apart from the offence charged.

(4) It does not matter whether the act or omission, if it were instead charged as an offence, could not competently be dealt with by the court (including as particularly constituted) in which the indictment or complaint is proceeding.

(5) Where under subsection (1) a docket is included in an indictment or a complaint, it is to be presumed that—

(a) the accused person has been given fair notice of the prosecutor's intention to lead evidence of the act or omission specified in the docket, and

(b) evidence of the act or omission is admissible as relevant.

(6) The references in this section to a sexual offence are to—

(a) an offence under the Sexual Offences (Scotland) Act 2009,

(b) any other offence involving a significant sexual element.

288BB Mixed charges for sexual offences

(1) An indictment or a complaint may include a charge that is framed as mentioned in subsection (2) or (3) (or both).

(2) That is, framed so as to comprise (in a combined form) the specification of more than one sexual offence.

(3) That is, framed so as to—

(a) specify, in addition to a sexual offence, any other act or omission, and

(b) do so in any manner except by way of reference to a statutory offence.

(4) Where a charge in an indictment or a complaint is framed as mentioned in subsection (2) or (3) (or both), the charge is to be regarded as being a single yet cumulative charge.

(5) The references in this section to a sexual offence are to an offence under the Sexual Offences (Scotland) Act 2009.".>

Section 47

Robert Brown

541 In section 47, page 61, line 2, at end insert—

<(A1) Section 44 of the 1995 Act (detention of children) is amended in accordance with subsections (B1) and (C1).

(B1) In subsection (1), after "child" insert "aged 16 years or over".

(C1) In subsection (2), the words from "(other than" to "this Act)" are repealed.>

After section 51

Kenny MacAskill

429 After section 51, insert—

<Personal conduct of case by accused

Prohibition of personal conduct of case by accused in certain proceedings

(1) The 1995 Act is amended as follows.

(2) In section 288C (prohibition of personal conduct of defence in cases of certain sexual offences)—

(a) for subsection (1) substitute—

"(1) An accused charged with a sexual offence to which this section applies is prohibited from conducting his case in person at, or for the purposes of, any relevant hearing in the course of proceedings (other than proceedings in a JP court) in respect of the offence.

(1A) In subsection (1), "relevant hearing" means a hearing at, or for the purposes of, which a witness is to give evidence.", and

(b) subsection (8) is repealed.

(3) In section 288D (appointment of solicitor by court in cases to which section 288C applies)—

(a) in subsection (1), after "proceedings" insert "(other than proceedings in a JP court)",

(b) in subsection (2)(a), for sub-paragraphs (i) and (ii) substitute—

"(i) the conduct of his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the proceedings; or", and

(c) in subsection (6), for the words from "of the accused's defence" to the end substitute "referred to in subsection (2)(a) above.".

(4) In section 288E (prohibition of personal conduct of defence in certain cases involving child witness under the age of 12)—

(a) subsection (1) is repealed,

(b) in subsection (2)(b), for "the trial" substitute "any hearing in the course of the proceedings",

(c) after subsection (2) insert—

"(2A) The accused is prohibited from conducting his case in person at, or for the purposes of, any hearing at, or for the purposes of, which the child witness is to give evidence.",

(d) in subsection (4), at the end insert "and as if references to a relevant hearing were references to a hearing referred to in subsection (2A) above",

(e) in subsection (6)—

(i) for paragraphs (za) and (a) substitute—

"(a) that his case at, or for the purposes of, any hearing in the course of the proceedings at, or for the purposes of, which the child witness is to give evidence may be conducted only by a lawyer,", and

(ii) in paragraph (c), for the words from "preliminary" to "trial" substitute "hearing", and

(f) subsection (8) is repealed.

(5) In section 288F (power to prohibit personal conduct of defence in other cases involving vulnerable witnesses)—

(a) in subsection (1), for “the trial” substitute “any hearing in the course of the proceedings”,

(b) in subsection (2), for the words from “defence” to the end substitute “case in person at any hearing at, or for the purposes of, which the vulnerable witness is to give evidence.”,

(c) in subsection (3)(a), for “trial” substitute “hearing”,

(d) in subsection (4), for the words from “after” to the end substitute “in relation to a hearing after, as well as before, the hearing has commenced.”,

(e) subsection (4A) is repealed,

(f) in subsection (5), at the end insert “and as if references to a relevant hearing were references to any hearing in respect of which an order is made under this section”, and

(g) subsection (6) is repealed.>

Section 52

Kenny MacAskill

519 In section 52, page 64, line 11, at end insert—

<( ) A reference in this section to a conviction which occurred on or after the date of offence O is a reference to such a conviction by a court in any part of the United Kingdom or in any other member State of the European Union.”.>

Kenny MacAskill

520 In section 52, page 64, line 36, at end insert—

<( ) A reference in this section to a conviction which occurred on or after the date of offence O is a reference to such a conviction by a court in any part of the United Kingdom or in any other member State of the European Union.”.>

After section 52

Kenny MacAskill

521 After section 52, insert—

<**Convictions by courts in other EU member States**

(1) Schedule (*Convictions by courts in other EU member States*) makes modifications of the 1995 Act and other enactments for the purposes of and in connection with implementing obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).

(2) The Scottish Ministers may by order make further provision for the purposes of and in connection with implementing those obligations.

(3) The provision may, in particular, confer functions—

(a) on the Scottish Ministers,

(b) on other persons.

(4) An order under subsection (2) may modify any enactment.

(5) In this section, the "Framework Decision" means Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.>

After schedule 2

Kenny MacAskill

522 After schedule 2, insert—

<SCHEDULE

(*introduced by section (Convictions by courts in other EU member States)(1)*)

CONVICTIONS BY COURTS IN OTHER EU MEMBER STATES: MODIFICATIONS OF ENACTMENTS

PART 1

THE 1995 ACT

The 1995 Act

1 The 1995 Act is amended as follows.

2 In section 23C(2)(d)(i) (previous convictions to be taken into consideration in determining bail), for "outwith Scotland" substitute "by courts outside the European Union".

3 In section 27 (breach of bail conditions: offences), after subsection (3) insert—

"(3A) The reference in subsection (3)(b) to any previous conviction of an offence under subsection (1)(b) includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to an offence under subsection (1)(b).

(3B) The references in subsection (3)(c) to subsection (3) are to be read, in relation to a previous conviction by a court referred to in subsection (3A), as references to any provision that is equivalent to subsection (3).

(3C) Any issue of equivalence arising in pursuance of subsection (3A) or (3B) is for the court to determine.".

4 In section 202(2) (deferred sentence), for "Great Britain" substitute "the United Kingdom or in another member State of the European Union".

5 In section 204 (restrictions on passing sentence of imprisonment or detention)—

(a) in each of subsections (1) and (2), after "United Kingdom" insert "or in another member State of the European Union",

(b) after subsection (4) insert—

"(4A) The court shall, for the purpose of determining whether a person has been previously sentenced to imprisonment or detention by a court in a member State of the European Union other than the United Kingdom—

(a) disregard any previous sentence of imprisonment which, being the equivalent of a suspended sentence, has not taken effect;

(b) construe detention as meaning an equivalent sentence to any of those mentioned in subsection (4)(b).

(4B) Any issue of equivalence arising in pursuance of subsection (4A) is for the court to determine.”.

6 In section 205B (minimum sentence for third conviction of certain offences relating to drug trafficking)—

(a) in subsection (1)(b), for “been convicted in any part of the United Kingdom of two other class A drug trafficking offences” substitute “two previous convictions for relevant offences”,

(b) after subsection (1) insert—

“(1A) In subsection (1), “relevant offence” means—

(a) in relation to a conviction by a court in any part of the United Kingdom, a class A drug trafficking offence;

(b) in relation to a conviction by a court in a member State of the European Union other than the United Kingdom, an offence that is equivalent to a class A drug trafficking offence.

(1B) Any issue of equivalence arising in pursuance of subsection (1A)(b) is for the court to determine.”.

7 In section 275A (disclosure of accused’s previous convictions where court allows questioning or evidence under section 275)—

(a) in subsection (10)—

(i) the word “or” immediately following paragraph (a) is repealed,

(ii) after paragraph (a) insert—

“(aa) a conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to one to which section 288C of this Act applies by virtue of subsection (2) thereof; or”,

(b) after subsection (10) insert—

“(10A) Any issue of equivalence arising in pursuance of subsection (10)(aa) is for the court to determine.”.

8 In section 307 (interpretation)—

(a) in subsection (1), insert the following definition at the appropriate place—

““conviction”, in relation to a previous conviction by a court outside Scotland, means a final decision of a criminal court establishing guilt of a criminal offence;”, and

(b) for subsection (5) substitute—

“(5) Except where the context requires otherwise—

(a) any reference in this Act to a previous conviction is to be construed as a reference to a previous conviction by a court in any part of the United Kingdom or in any other member State of the European Union;

(b) any reference in this Act to a previous sentence is to be construed as a reference to a previous sentence passed by any such court;

(c) any reference to a previous conviction of a particular offence is to be construed, in relation to a previous conviction by a court outside Scotland, as a reference to a previous conviction of an equivalent offence; and

(d) any reference to a previous sentence of a particular kind is to be construed, in relation to a previous sentence passed by a court outside Scotland, as a reference to a previous sentence of an equivalent kind.".

PART 2

OTHER ENACTMENTS

The Civic Government (Scotland) Act 1982 (c.45)

9 In section 58 of the Civic Government (Scotland) Act 1982, after subsection (4) insert—

"(4A) In subsection (4), the reference to a conviction for theft includes a reference to a conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to theft.

(4B) Any issue of equivalence arising in pursuance of subsection (4A) is for the court to determine.".

The Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9)

10 In section 27(1) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (interpretation of Part 1), insert at the appropriate place—

""previous conviction" means a previous conviction by a court in any part of the United Kingdom or in any other member State of the European Union;".

The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)

11 (1) Section 9 of the Criminal Law (Consolidation) (Scotland) Act 1995 (permitting girl to use premises for intercourse) is amended as follows.

(2) In subsection (2A)—

(a) the word "or" immediately following paragraph (a) is repealed, and

(b) after paragraph (a) insert—

"(aa) that person has a previous conviction for a relevant foreign offence committed against a person under the age of 16; or".

(3) In subsection (3)—

(a) the word "and" immediately following paragraph (a) is repealed, and

(b) after paragraph (a) insert—

"(aa) "a previous conviction for a relevant foreign offence" has the same meaning as in section 39(5)(aa) of that Act; and".

The Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17)

12 In section 4(1) of the Custodial Sentences and Weapons (Scotland) Act 2007 (basic definitions for purposes of Part 2), insert at the appropriate place—

> "“previous conviction” means a previous conviction by a court in any part of the United Kingdom or in any other member State of the European Union,”.

The Sexual Offences (Scotland) Act 2009 (asp 9)

13 (1) Section 39 of the Sexual Offences (Scotland) Act 2009 (defences in relation to offences against older children) is amended as follows.

(2) In subsection (2)—

(a) in paragraph (a)—

(i) the word “or” immediately following sub-paragraph (i) is repealed, and

(ii) after sub-paragraph (i) insert—

“(ia) if A has a previous conviction for a relevant foreign offence committed against a person under the age of 16, or”,

(b) in paragraph (b)—

(i) the word “or” immediately following sub-paragraph (i) is repealed, and

(ii) after sub-paragraph (i) insert—

“(ia) if B has a previous conviction for a relevant foreign offence committed against a person under the age of 16, or”.

(3) In subsection (5), after paragraph (a) insert—

“(aa) “a previous conviction for a relevant foreign offence” means a previous conviction by a court in a member State of the European Union other than the United Kingdom for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1,”

(4) After subsection (5) insert—

“(5A) Any issue of equivalence arising in pursuance of subsection (5)(aa) is for the court to determine.

(5B) For that purpose, an offence may be equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1 even though, under the law of the member State (or part of the member State) in question, it is an offence—

(a) regardless of the age of the victim, or

(b) only if committed against a person under an age other than 16 years.”.>

Section 54

Kenny MacAskill

462 In section 54, page 65, line 30, leave out <the close of the whole of the evidence> and insert <one or other (but not both) of the appropriate events>

Kenny MacAskill

463 In section 54, page 65, leave out lines 39 and 40 and insert—

<( ) For the purposes of subsection (1), "the appropriate events" are—

(a) the close of the whole of the evidence,

(b) the conclusion of the prosecutor's address to the jury on the evidence.>

Kenny MacAskill

464 In section 54, page 66, line 15, leave out <the prosecutor to amend the indictment> and insert <that the indictment be amended>

Kenny MacAskill

465 In section 54, page 66, line 22, after first <of> insert <the judge or>

Kenny MacAskill

466 In section 54, page 66, line 29, leave out <the prosecutor to amend the indictment> and insert <that the indictment be amended>

Kenny MacAskill

467 In section 54, page 66, line 37, after first <of> insert <the judge or>

Kenny MacAskill

468 In section 54, page 66, line 37, at end insert—

<97D No acquittal on "no reasonable jury" grounds

(1) A judge has no power to direct the jury to return a not guilty verdict on any charge on the ground that no reasonable jury, properly directed on the evidence, could convict on the charge.

(2) Accordingly, no submission based on that ground or any ground of like effect is to be allowed.>

Section 55

Kenny MacAskill

469 In section 55, page 67, line 4, at end insert—

<(1A) If, immediately after an acquittal under section 97 or 97B(2)(a), the prosecutor moves for the trial diet to be adjourned for no more than 2 days in order to consider whether to appeal against the acquittal under subsection (1), the court of first instance must grant the motion unless the court considers that there are no arguable grounds of appeal.

(1B) If, immediately after the giving of a direction under section 97B(2)(b) or 97C(2), the prosecutor moves for the trial diet to be adjourned for no more than 2 days in order to consider whether to appeal against the direction under subsection (1), the court of first instance must grant the motion unless the court considers that it would not be in the interests of justice to do so.

(1C) In considering whether it would be in the interests of justice to grant a motion for adjournment under subsection (1B), the court must have regard, amongst other things, to—

- (a) whether, if an appeal were to be made and to be successful, continuing with the diet would have any impact on any subsequent or continued prosecution,
- (b) whether there are any arguable grounds of appeal.

(1D) An appeal may not be brought under subsection (1) unless the prosecutor intimates intention to appeal—

- (a) immediately after the acquittal or, as the case may be, the giving of the direction,
- (b) if a motion to adjourn the trial diet under subsection (1A) or (1B) is granted, immediately upon resumption of the diet, or
- (c) if such a motion is refused, immediately after the refusal.

(1E) Subsection (2) applies if—

- (a) the prosecutor intimates an intention to appeal under subsection (1)(a), or
- (b) the trial diet is adjourned under subsection (1A).>

Kenny MacAskill

470 In section 55, page 67, line 5, leave out from beginning to <Court> and insert <Where this subsection applies, the court of first instance must suspend the effect of the acquittal and>

Kenny MacAskill

471 In section 55, page 67, line 10, leave out <exceptionally and>

Kenny MacAskill

472 In section 55, page 67, line 11, at end insert—

<( ) The court may, under subsection (2)(b), order the detention of the person in custody only if the court considers that there are arguable grounds of appeal.>

Kenny MacAskill

473 In section 55, page 67, leave out lines 25 to 33

Kenny MacAskill

474 In section 55, page 68, line 5, leave out <an appeal is brought> and insert <the prosecutor intimates intention to appeal>

Kenny MacAskill

475 In section 55, page 68, line 28, leave out <or 107B>

Kenny MacAskill

476 In section 55, page 69, line 13, at end insert—

<( ) However, if the prosecutor moves for the diet to be deserted *pro loco et tempore* in relation to such other offence, the court must grant the motion.>

Section 57

Kenny MacAskill

477 In section 57, page 69, line 26, leave out <within 7 days after an appeal is brought under section 107A(1)> and insert <where the prosecutor intimates intention to appeal under section 107A(1), within 7 days after the acquittal or direction appealed against>

Section 58

Kenny MacAskill

478 In section 58, page 71, line 4, leave out from <18(7A)> to end of line 5 and insert <18 (prints, samples etc. in criminal investigations)—

( ) in subsection (3), for "section 18A" substitute "sections 18A to 18C",

( ) in subsection (7A), for "sections 19 to 20" substitute ", subject to the modification in subsection (7AA), sections 18A to 19C", and

( ) after subsection (7A) insert—

"(7AA) The modification is that for the purposes of section 19C as it applies in relation to relevant physical data taken from or provided by a person outwith Scotland, subsection (7A) is to be read as if in paragraph (d) the words from "created" to the end were omitted.".>

James Kelly

404 In section 58, page 71, line 4, leave out from <18(7A)> to <Act),> in line 5 and insert <18 (prints, samples etc. in criminal investigations)—

( ) in subsection (3), the words "or on the conclusion of such proceedings otherwise than with a conviction or an order under section 246(3) of this Act" are repealed, and

( ) in subsection (7A),>

James Kelly

405 In section 58, page 71, leave out line 6 and insert—

<( ) The title of section 18A becomes "Retention of samples, etc.: persons prosecuted but not convicted etc.", and in that section>

Kenny MacAskill

479 In section 58, page 71, leave out lines 7 to 10 and insert—

<( ) for subsection (1) substitute—

"(1) This section applies to—

(a) relevant physical data taken or provided under section 18(2), and

(b) any sample, or any information derived from a sample, taken under section 18(6) or (6A),

where the condition in subsection (2) is satisfied.",>

James Kelly

406 In section 58, page 71, line 11, after <(2)> insert—

<( ) the words "in respect of a relevant sexual offence or a relevant violent offence" are repealed, and

( )>

Kenny MacAskill

480 In section 58, page 71, line 13, leave out from <after> to <data,"> and insert <for "sample or information" substitute "relevant physical data, sample or information derived from a sample",>

James Kelly

407 In section 58, page 71, line 13, at end insert—

<( ) in subsection (4)(a), for "3" substitute "6",>

Kenny MacAskill

481 In section 58, page 71, line 14, leave out from beginning to <data,"> in line 15 and insert—

<( ) after subsection (8) insert—

"(8A) If the sheriff principal allows an appeal against the refusal of an application under subsection (5), the sheriff principal may make an order amending, or further amending, the destruction date.

(8B) An order under subsection (8A) must not specify a destruction date more than 2 years later than the previous destruction date.",

( ) in subsection (10), for "sample or information" substitute "relevant physical data, sample or information derived from a sample">

Kenny MacAskill

482 In section 58, page 71, line 18, at end insert <and

( ) in the definition of "relevant sexual offence" and "relevant violent offence", after "have" insert ", subject to the modification in subsection (12),", and

( ) after subsection (11) insert—

“(12) The modification is that the definition of “relevant sexual offence” in section 19A(6) is to be read as if for paragraph (g) there were substituted—

“(g) public indecency if it is apparent from the offence as charged in the indictment or complaint that there was a sexual aspect to the behaviour of the person charged;”.”.>

James Kelly

408 In section 58, page 71, line 18, at end insert <, and

( ) the definition of “relevant sexual offence” and “relevant violent offence” is repealed.>

After section 58

Stewart Maxwell

418 After section 58, insert—

<**Retention of samples etc. where offer under sections 302 to 303ZA accepted**

After section 18A of the 1995 Act insert—

“18AA Retention of samples etc. where offer under sections 302 to 303ZA accepted

(1) This section applies to—

(a) relevant physical data taken from or provided by a person under section 18(2), and

(b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A),

where the conditions in subsection (2) are satisfied.

(2) The conditions are—

(a) the relevant physical data or sample was taken from or provided by the person while the person was under arrest or being detained in connection with the offence or offences in relation to which a relevant offer is issued to the person, and

(b) the person—

(i) accepts a relevant offer, or

(ii) in the case of a relevant offer other than one of the type mentioned in paragraph (d) of subsection (3), is deemed to accept a relevant offer.

(3) In this section “relevant offer” means—

(a) a conditional offer under section 302,

(b) a compensation offer under section 302A,

(c) a combined offer under section 302B, or

(d) a work offer under section 303ZA.

(4) Subject to subsections (6) and (7) and section 18AB(9) and (10), the relevant physical data, sample or information derived from a sample must be destroyed no later than the destruction date.

(5) In subsection (4), "destruction date" means—

(a) in relation to a relevant offer that relates only to—

(i) a relevant sexual offence,

(ii) a relevant violent offence, or

(iii) both a relevant sexual offence and a relevant violent offence,

the date of expiry of the period of 3 years beginning with the date on which the relevant offer is issued or such later date as an order under section 18AB(2) or (6) may specify,

(b) in relation to a relevant offer that relates to—

(i) an offence or offences falling within paragraph (a), and

(ii) any other offence,

the date of expiry of the period of 3 years beginning with the date on which the relevant offer is issued or such later date as an order under section 18AB(2) or (6) may specify,

(c) in relation to a relevant offer that does not relate to an offence falling within paragraph (a), the date of expiry of the period of 2 years beginning with the date on which the relevant offer is issued.

(6) If a relevant offer is recalled by virtue of section 302C(5) or a decision to uphold it is quashed under section 302C(7)(a), all record of the relevant physical data, sample and information derived from a sample must be destroyed as soon as possible after—

(a) the prosecutor decides not to issue a further relevant offer to the person,

(b) the prosecutor decides not to institute criminal proceedings against the person, or

(c) the prosecutor institutes criminal proceedings against the person and those proceedings conclude otherwise than with a conviction or an order under section 246(3).

(7) If a relevant offer is set aside by virtue of section 303ZB, all record of the relevant physical data, sample and information derived from a sample must be destroyed as soon as possible after the setting aside.

(8) In this section, "relevant sexual offence" and "relevant violent offence" have, subject to the modification in subsection (9), the same meanings as in section 19A(6) and include any attempt, conspiracy or incitement to commit such an offence.

(9) The modification is that the definition of "relevant sexual offence" in section 19A(6) is to be read as if for paragraph (g) there were substituted—

"(g) public indecency if it is apparent from the relevant offer (as defined in section 18AA(3)) relating to the offence that there was a sexual aspect to the behaviour of the person to whom the relevant offer is issued;".

18AB Section 18AA: extension of retention period where relevant offer relates to certain sexual or violent offences

(1) This section applies where the destruction date for relevant physical data, a sample or information derived from a sample falls within section 18AA(5)(a) or (b).

(2) On a summary application made by the relevant chief constable within the period of 3 months before the destruction date, the sheriff may, if satisfied that there are reasonable grounds for doing so, make an order amending, or further amending, the destruction date.

(3) An application under subsection (2) may be made to any sheriff—

(a) in whose sheriffdom the appropriate person resides,

(b) in whose sheriffdom that person is believed by the applicant to be, or

(c) to whose sheriffdom the person is believed by the applicant to be intending to come.

(4) An order under subsection (2) must not specify a destruction date more than 2 years later than the previous destruction date.

(5) The decision of the sheriff on an application under subsection (2) may be appealed to the sheriff principal within 21 days of the decision.

(6) If the sheriff principal allows an appeal against the refusal of an application under subsection (2), the sheriff principal may make an order amending, or further amending, the destruction date.

(7) An order under subsection (6) must not specify a destruction date more than 2 years later than the previous destruction date.

(8) The sheriff principal's decision on an appeal under subsection (5) is final.

(9) Section 18AA(4) does not apply where—

(a) an application under subsection (2) has been made but has not been determined,

(b) the period within which an appeal may be brought under subsection (5) against a decision to refuse an application has not elapsed, or

(c) such an appeal has been brought but has not been withdrawn or finally determined.

(10) Where—

(a) the period within which an appeal referred to in subsection (9)(b) may be brought has elapsed without such an appeal being brought,

(b) such an appeal is brought and is withdrawn or finally determined against the appellant, or

(c) an appeal brought under subsection (5) against a decision to grant an application is determined in favour of the appellant,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the period has elapsed, or, as the case may be, the appeal is withdrawn or determined.

(11) In this section—

“appropriate person” means the person from whom the relevant physical data was taken or by whom it was provided or from whom the sample was taken,

“destruction date” has the meaning given by section 18AA(5),

“the relevant chief constable” has the same meaning as in subsection (11) of section 18A, with the modification that references to the person referred to in subsection (2) of that section are references to the appropriate person.”.>

Stewart Maxwell

419 After section 58, insert—

<**Retention of samples etc. taken or provided in connection with certain fixed penalty offences**

After section 18A of the 1995 Act insert—

“18AC Retention of samples etc. taken or provided in connection with certain fixed penalty offences

(1) This section applies to—

(a) relevant physical data taken from or provided by a person under section 18(2), and

(b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A),

where the conditions in subsection (2) are satisfied.

(2) The conditions are—

(a) the person was arrested or detained in connection with a fixed penalty offence,

(b) the relevant physical data or sample was taken from or provided by the person while the person was under arrest or being detained in connection with that offence,

(c) after the relevant physical data or sample was taken from or provided by the person, a constable gave the person under section 129(1) of the 2004 Act—

(i) a fixed penalty notice in respect of that offence (the “main FPN”), or

(ii) the main FPN and one or more other fixed penalty notices in respect of fixed penalty offences arising out of the same circumstances as the offence to which the main FPN relates, and

(d) the person, in relation to the main FPN and any other fixed penalty notice of the type mentioned in paragraph (c)(ii)—

(i) pays the fixed penalty, or

(ii) pays any sum that the person is liable to pay by virtue of section 131(5) of the 2004 Act.

(3) Subject to subsections (4) and (5), the relevant physical data, sample or information derived from a sample must be destroyed before the end of the period of 2 years beginning with—

(a) where subsection (2)(c)(i) applies, the day on which the main FPN is given to the person,

(b) where subsection (2)(c)(ii) applies and—

(i) the main FPN and any other fixed penalty notice are given to the person on the same day, that day,

(ii) the main FPN and any other fixed penalty notice are given to the person on different days, the later day.

(4) Where—

(a) subsection (2)(c)(i) applies, and

(b) the main FPN is revoked under section 133(1) of the 2004 Act,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the revocation.

(5) Where—

(a) subsection (2)(c)(ii) applies, and

(b) the main FPN and any other fixed penalty notices are revoked under section 133(1) of the 2004 Act,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the revocations.

(6) In this section—

"the 2004 Act" means the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8),

"fixed penalty notice" has the meaning given by section 129(2) of the 2004 Act,

"fixed penalty offence" has the meaning given by section 128(1) of the 2004 Act.".>

Section 59

James Kelly

409 In section 59, page 72, line 19, leave out from <such> to second <offence> and insert—

<( ) an offence of assault, categorised by the Principal Reporter as grave, or

( ) such—

(i) other relevant violent offence, or

(ii) relevant sexual offence,>

James Kelly

410 In section 59, page 72, leave out lines 21 to 36

Robert Brown

380 In section 59, page 72, leave out lines 21 and 22, and insert—

<(7) Where this section applies, the sheriff may, on summary application by the relevant chief constable, make an order that, subject to section 18C(6) and (7), the relevant physical data, sample or the information must be destroyed no later than the destruction date.

(7A) The sheriff may only make the order referred to in subsection (7) if satisfied that the child continues to pose a risk to public safety and that retention of the relevant physical data, sample or information until the destruction date is justified by that risk.>

Kenny MacAskill

483 In section 59, page 72, line 21, leave out <18C(5) and (6)> and insert <18C(6) and (7)>

Kenny MacAskill

484 In section 59, page 72, line 21, leave out <the information> and insert <information derived from a sample>

Robert Brown

545 In section 59, page 72, leave out lines 25 to 36 and insert <the date on which the relevant offence mentioned in subsection (3), (4) or, as the case may be, (5) was committed; or

(b) such later date as an order under section 18C(1) may specify.

( ) For the purposes of subsection (8)(a)—

(a) if two or more relevant offences were committed on different dates, it is the most recent of those offences that is to be taken as the offence constituting the ground of referral; and

(b) if a relevant offence was committed on more than one date, the date on which the offence was committed is to be taken as the most recent of those dates.>

Robert Brown

381 In section 59, page 72, line 40, at end insert—

<"relevant chief constable" has the same meaning as in section 18A(11), with the modification that references to the person referred to in subsection (2) of that section are references to the child referred to in subsection (1);>

Kenny MacAskill

485 In section 59, page 73, line 1, after <have> insert <, subject to the modification in subsection (11),>

Kenny MacAskill

486 In section 59, page 73, line 3, at end insert—

<(11) The modification is that the definition of "relevant sexual offence" in section 19A(6) is to be read as if for paragraph (g) there were substituted—

"(g) public indecency if it is apparent from the ground of referral relating to the offence that there was a sexual aspect to the behaviour of the child;".>

James Kelly

411 In section 59, page 73, leave out lines 4 to 40

Robert Brown

546 In section 59, page 73, line 7, leave out from <there> to end of line 8 and insert <at least one ground for doing so, specified by virtue of subsection (1A), is established, make an order amending (or further amending) the destruction date.

<(1A) The Scottish Ministers must, by regulations made by statutory instrument, specify the grounds on which an order under subsection (1) may be made.

(1B) Before making regulations under subsection (1A), the Scottish Ministers must consult such persons as they consider appropriate.

(1C) A statutory instrument containing regulations under subsection (1A) is subject to annulment in pursuance of a resolution of the Scottish Parliament.>

Kenny MacAskill

487 In section 59, page 73, line 17, at end insert—

<(4A) If the sheriff principal allows an appeal against the refusal of an application under subsection (1), the sheriff principal may make an order amending, or further amending, the destruction date.

(4B) An order under subsection (4A) must not specify a destruction date more than 2 years later than the previous destruction date.>

Kenny MacAskill

488 In section 59, page 73, line 23, leave out <expired> and insert <elapsed>

Kenny MacAskill

489 In section 59, page 73, line 28, leave out <expired> and insert <elapsed>

Kenny MacAskill

490 In section 59, page 73, line 33, after <information> insert <derived from a sample>

Kenny MacAskill

491 In section 59, page 73, line 34, leave out from <practicable> to end of line and insert <possible after the period has elapsed or, as the case may be, the appeal is withdrawn or determined.>

Kenny MacAskill

492 In section 59, page 73, line 37, leave out <section 18A(11)> and insert <subsection (11) of section 18A>

Robert Brown

382 In section 59, page 73, line 37, leave out from <18A(11)> to end of line 40 and insert <18B(10)>

Kenny MacAskill

493 In section 59, page 74, line 1, leave out subsection (2)

James Kelly

412 In section 59, page 74, line 2, leave out from <after> to end of line and insert <at beginning insert "Except where section 18B applies and">

After section 59

Kenny MacAskill

494 After section 59, insert—

<**Extension of section 19A of 1995 Act**

In section 19A(6) of the 1995 Act (definitions of certain expressions for purposes of section 19A)—

(a) in the definition of "relevant sexual offence", for paragraph (g) substitute—

"(g) public indecency if the court, in imposing sentence or otherwise disposing of the case, determined for the purposes of paragraph 60 of Schedule 3 to the Sexual Offences Act 2003 (c.42) that there was a significant sexual aspect to the offender's behaviour in committing the offence;", and

(b) in paragraph (h) of the definition of "relevant violent offence", after sub-paragraph (iv), insert—

"(v) section 47(1) (possession of offensive weapon in public place), 49(1) (possession of article with blade or point in public place), 49A(1) or (2) (possession of article with blade or point or offensive weapon on school premises) or 49C(1) (possession of offensive weapon or article with blade or point in prison) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39);".>

Section 60

Kenny MacAskill

495 In section 60, page 74, line 6, leave out <This section> and insert <Subsection (2)>

Kenny MacAskill

496 In section 60, page 74, line 7, leave out <, or any information derived from relevant physical data,>

Kenny MacAskill

497 In section 60, page 74, line 12, leave out <, a sample or an impression> and insert <or a sample>

Kenny MacAskill

498 In section 60, page 74, line 17, leave out <relevant physical data or a sample or impression> and insert <a sample>

Kenny MacAskill

499 In section 60, page 74, line 18, at end insert <and

( ) relevant physical data, a sample or information derived from a sample taken from, or provided by, a person outwith Scotland which is given by any person to—

(i) a police force,

(ii) the Scottish Police Services Authority, or

(iii) a person acting on behalf of a police force.>

Kenny MacAskill

500 In section 60, page 74, line 19, leave out <, impression or information> and insert <or information derived from a sample>

Kenny MacAskill

501 In section 60, page 74, line 23, leave out <, sample or impression> and insert <or sample>

Kenny MacAskill

502 In section 60, page 74, line 23, at end insert—

<(2A) Subsections (2B) and (2C) apply to relevant physical data, a sample or information derived from a sample falling within any of paragraphs (a) to (d) of subsection (1) (“relevant material”).

(2B) If the relevant material is held by a police force, the Scottish Police Services Authority or a person acting on behalf of a police force, the police force or, as the case may be, the Authority or person may give the relevant material to another person for use by that person in accordance with subsection (2).

(2C) A police force, the Scottish Police Services Authority or a person acting on behalf of a police force may, in using the relevant material in accordance with subsection (2), check it against other relevant physical data, samples and information derived from samples received from another person.>

Kenny MacAskill

503 In section 60, page 74, line 33, leave out <the United Kingdom> and insert <Scotland>

Kenny MacAskill

504 In section 60, page 74, line 35, leave out <the United Kingdom> and insert <Scotland>

Kenny MacAskill

505 In section 60, page 74, line 38, leave out from <, impressions> to end of line 39 and insert <or information derived from a sample>

Kenny MacAskill

506 In section 60, page 75, leave out line 2

Kenny MacAskill

507 In section 60, page 75, leave out line 5

Kenny MacAskill

508 In section 60, page 75, line 7, leave out <, impression or relevant physical data>

Kenny MacAskill

509 In section 60, page 75, line 12, leave out <, impression>

Kenny MacAskill

510 In section 60, page 75, line 14, leave out from beginning to <impression"> in line 25 and insert <, after "information" insert "derived from a sample",

( ) in subsection (5)(b), the words "with all information derived from them" are repealed,

( ) in subsection (6)(a), for "it or them" substitute "the sample",

( ) in subsection (7)(a), the words "or relevant physical data", in the second place where they occur, are repealed,>

Section 61

Kenny MacAskill

133 In section 61, page 76, line 6, after <reasons> insert <for making the reference>

Kenny MacAskill

134 In section 61, page 76, line 9, leave out from <additional> to end of line 10 and insert <the appellant to found the appeal on additional grounds>

Kenny MacAskill

135 In section 61, page 76, line 19, leave out <additional grounds to be raised> and insert <the appeal to be founded on additional grounds>

Before section 62

Kenny MacAskill

430 Before section 62, insert—

<**Admissibility of prior statements of witnesses: abolition of competence test**

(1) This section applies in relation to a prior statement made by a witness before the commencement of section 24 of the Vulnerable Witnesses (Scotland) Act 2004 (asp 3) ("the 2004 Act") (which abolishes the competence test for witnesses in criminal and civil proceedings).

(2) For the purpose of the application of subsection (2)(c) of section 260 of the 1995 Act (admissibility of prior statement depends on competence of the witness at the time of the statement) in relation to the statement, section 24 of the 2004 Act is taken to have been in force at the time the statement was made.

(3) In this section, "prior statement" has the meaning it has in section 260 of the 1995 Act.>

Section 62

Robert Brown

383 In section 62, page 77, line 1, after <may> insert <, if satisfied that there is good reason to do so,>

After section 64

Kenny MacAskill

384 After section 64, insert—

<**Child witnesses in proceedings for people trafficking offences**

In section 271 of the 1995 Act (vulnerable witnesses: main definitions)—

(a) in subsection (1)(a), for "age of 16" substitute "relevant age", and

(b) after subsection (1), insert—

"(1A) In subsection (1)(a), "the relevant age" means—

(a) in the case of a person who is giving or is to give evidence in proceedings for an offence under section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (trafficking in prostitution etc.) or section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation), the age of 18, and

(b) in any other case, the age of 16.".>

Section 66

Kenny MacAskill

431 In section 66, page 80, line 13, leave out from <other> to end of line 16 and insert <the jury>

Kenny MacAskill

432 In section 66, page 80, line 18, leave out <any persons within paragraph (a)(i) to (iii)> and insert <the judge or the jury>

Kenny MacAskill

433 In section 66, page 81, line 6, leave out <material> and insert <information>

Kenny MacAskill

434 In section 66, page 81, line 8, leave out <may> and insert <must>

Kenny MacAskill

435 In section 66, page 81, line 12, leave out <material”> and insert <information”>

Kenny MacAskill

436 In section 66, page 82, line 16, leave out <the weight of>

Kenny MacAskill

437 In section 66, page 82, line 18, leave out <the sole or decisive evidence> and insert <material in>

Kenny MacAskill

438 In section 66, page 82, line 36, leave out <warning> and insert <direction>

Kenny MacAskill

439 In section 66, page 83, leave out lines 33 to 36

Schedule 3

Kenny MacAskill

440 In schedule 3, page 148, line 28, leave out <treat the conviction as unsafe> and insert <quash the conviction>

Kenny MacAskill

441 In schedule 3, page 148, line 31, leave out <treat the conviction as unsafe> and insert <quash the conviction>

After section 67

Kenny MacAskill

442 After section 67, insert—

<**European evidence warrants**

(1) The Scottish Ministers may by order make provision for the purposes of and in connection with implementing any obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).

(2) The provision may, in particular, confer functions—

(a) on the Scottish Ministers,

(b) on the Lord Advocate,

(c) on other persons.

(3) An order under subsection (1) may modify any enactment.

(4) An order under subsection (1) may contain provision creating offences and a person who commits such an offence is liable to such penalties, not exceeding those mentioned in subsection (5), as are provided for in the order.

(5) Those penalties are—

(a) on conviction on indictment, imprisonment for a period not exceeding 2 years, or a fine, or both,

(b) on summary conviction, imprisonment for a period not exceeding 12 months, or a fine not exceeding the statutory maximum, or both.

(6) In this section, the "Framework Decision" means Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.>

Before section 68

Kenny MacAskill

443 Before section 68, insert—

<**Lists of jurors**

(1) The 1995 Act is amended as follows.

(2) In section 84 (juries: returns of jurors and preparation of lists)—

(a) in subsection (3), for "list" substitute "lists",

(b) for subsection (4) substitute—

"(4) For the purpose of a trial in the sheriff court, the sheriff principal must furnish the clerk of court with a list of names, containing the number of persons required, from lists of potential jurors of—

(a) the sheriff court district in which the trial is to be held (the "local district"), and

(b) if the sheriff principal considers it appropriate, any other sheriff court district or districts in the sheriffdom in which the trial is to be held ("other districts").

(4A) Where the sheriff principal furnishes a list containing names of potential jurors of other districts, the sheriff principal may determine the proportion as between the local district and the other districts in which jurors are to be summoned.",

(c) in subsection (5), for "list", in both places where it occurs, substitute "lists", and

(d) subsection (7) is repealed.

(3) In section 85(4) (juries: citation and attendance of jurors)—

(a) for the words from the beginning to "shall", in the first place where it occurs, substitute "The sheriff clerk of—

(a) the sheriffdom in which the High Court is to sit, or

(b) the sheriff court district in which a trial in the sheriff court is to be held,

shall", and

(b) the word "such", in the first place where it occurs, is repealed.>

Section 68

David McLetchie

415 In section 68, page 86, line 14, leave out from <for> to <relevant"> and insert <at beginning insert "subject to subsection (1A),">

David McLetchie

416 In section 68, page 86, leave out lines 17 to 19 and insert—

<"(1A) In relation to criminal proceedings, a person is qualified and liable to serve as a juror despite being over 65 years of age.">

After section 68

Kenny MacAskill

511 After section 68, insert—

<**Excusal from jury service**

(1) The Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 is amended as follows.

(2) In section 1 (qualification of jurors)—

(a) in subsection (1), after "below" insert "and to section 1A",

(b) in subsection (2), after "service" in the second place where it occurs insert "in relation to civil proceedings",

(c) in subsection (3), after "service" in the first place where it occurs insert "in relation to civil proceedings",

(d) in subsection (5), after "above" insert "or under section 1A", and

(e) in subsection (6), after paragraph (a) insert—

"(aa) section 1A;".

(3) After section 1 insert—

"1A Excusal of jurors in relation to criminal proceedings

(1) A person who is qualified under section 1(1) but is among the persons listed in Part III of Schedule 1 to this Act (being persons excusable as of right from jury service) is to be excused from jury service in relation to criminal proceedings on any occasion where the person—

(a) has been required to provide information under section 3(2) of the Jurors (Scotland) Act 1825 (c.22); and

(b) gives written notice to the sheriff principal that the person wishes to be excused, before the end of the period of 7 days beginning with the day on which the person receives the requirement.

(2) A person who is qualified under section 1(1) but is among the persons listed in Group C of Part III of Schedule 1 to this Act is to be excused from jury service in relation to criminal proceedings on any occasion where—

(a) the person has been required to provide information under section 3(2) of the Jurors (Scotland) Act 1825; and

(b) the person's commanding officer certifies to the sheriff principal that it would be prejudicial to the efficiency of the force of which the person is a member were the person required to be absent from duty.".

(4) In section 3(1)(a) (offences in connection with jury service), after "been" insert "required to provide information under section 3(2) of the Jurors (Scotland) Act 1825 or".>

Section 69

David McLetchie

417 In section 69, page 86, line 30, at end insert <and

( ) persons who have attained the age of 71;>

Section 70

Kenny MacAskill

136 In section 70, page 89, line 34, leave out <and Wales>

Kenny MacAskill

137 In section 70, page 90, line 21, leave out from <body> to end of line 23 and insert <health and social care body mentioned in paragraphs (a) to (e) of section 1(5) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 (c.1).>

After section 71

Robert Brown

551 After section 71, insert—

<Collection of information on criminal injuries

Duty of Health Boards to collect etc. information on criminal injuries

(1) The Scottish Ministers may make regulations requiring every Health Board to—

(a) collect information on criminal injuries treated in or otherwise coming to the attention of relevant hospitals, and

(b) provide that information to the relevant chief constable.

(2) The Scottish Ministers must make the first regulations under subsection (1) before the expiry of 12 months beginning with the day of Royal Assent.

(3) Regulations under subsection (1) must include provision that any information provided to a relevant chief constable must be in such a form that persons who have sustained criminal injuries cannot be identified.

(4) Regulations under subsection (1) may include provision about—

(a) the criminal injuries about which information is to be collected (including by reference to the offences involved),

(b) the information on such injuries which is to be collected (including information as to the places at which, and circumstances in which, those injuries are sustained),

(c) the types of hospitals from which such information is to be collected (including the departments within such hospitals from which information is to be collected),

(d) the times at which and manner in which such information is to be provided to relevant chief constables.

(5) In this section—

"criminal injuries" means injuries which are, or are suspected of having been, directly attributable to the commission of an offence involving violence,

"Health Board" means a board constituted by order under section 2(1)(a) of the National Health Service (Scotland) Act 1978 (c.29),

"relevant chief constable" means the chief constable for the police force whose area comprises or includes all or part of the Health Board's area,

"relevant hospitals" means hospitals the administration of which is the Health Board's responsibility.>

Section 72

Kenny MacAskill

138 In section 72, page 94, line 29, leave out <Law> and insert <Justice>

Kenny MacAskill

139 In section 72, page 94, line 41, leave out <27> and insert <37>

Kenny MacAskill

140 In section 72, page 94, line 42, leave out <penetrative>

Kenny MacAskill

141 In section 72, page 95, line 1, leave out <31> and insert <42>

Kenny MacAskill

142 In section 72, page 95, line 2, leave out <35> and insert <46>

Kenny MacAskill

143 In section 72, page 95, line 3, at end insert—

<( ) an offence under section (*Slavery, servitude and forced or compulsory labour*) (slavery, servitude and forced or compulsory labour) of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00).>

Kenny MacAskill

144 In section 72, page 95, line 14, leave out <42> and insert <54>

Section 74

Kenny MacAskill

444 In section 74, page 96, line 23, after <station> insert <in Scotland>

Kenny MacAskill

445 In section 74, page 97, line 5, leave out from <a> to end of line and insert—

<(a) a requirement under section 117A(2) (surrender of passports: England and Wales and Northern Ireland), or

(b) a requirement under section 117B(2) (surrender of passports: Scotland).".>

Kenny MacAskill

446 In section 74, page 97, line 5, at end insert—

<(1C) A person may be prosecuted, tried and punished for any offence under subsection (1B)—

(a) in any sheriff court district in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).".>

After section 74

Kenny MacAskill

145 After section 74, insert—

<*Sex offender notification requirements*

Sex offender notification requirements

(1) The Sexual Offences Act 2003 (c.42) is amended as follows.

(2) In section 85 (notification requirements: periodic notification)—

(a) in subsection (1), for "period of one year" substitute "applicable period",

(b) in subsection (3), for "period referred to in subsection (1)" substitute "applicable period", and

(c) after subsection (4) insert—

"(5) In this section, the "applicable period" means—

(a) in any case where subsection (6) applies to the relevant offender, such period not exceeding one year as the Scottish Ministers may prescribe in regulations, and

(b) in any other case, the period of one year.

(6) This subsection applies to the relevant offender if the last home address notified by the offender under section 83(1) or 84(1) or subsection (1) was the address or location of such a place as is mentioned in section 83(7)(b).".

(3) In section 86 (notification requirements: travel outside the United Kingdom), subsection (4) is repealed.

(4) In section 87 (method of notification and related matters), subsection (6) is repealed.

(5) In section 96 (information about release or transfer), subsection (4) is repealed.

(6) In section 138 (orders and regulations)—

(a) in subsection (2), after "84," insert "85,", and

(b) after subsection (3) insert—

"(4) Orders or regulations made by the Scottish Ministers under this Act may—

(a) make different provision for different purposes,

(b) include supplementary, incidental, consequential, transitional, transitory or saving provisions.".>

After section 75

Kenny MacAskill

146 After section 75, insert—

<**Risk of sexual harm orders: spent convictions**

In section 7 of the Rehabilitation of Offenders Act 1974 (c.53) (limitations on rehabilitation under the Act), in subsection (2), after paragraph (bb) insert—

"(bc) in any proceedings on an application under section 2, 4 or 5 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) or in any appeal under section 6 of that Act;".>

Section 77

Kenny MacAskill

523 In section 77, page 98, leave out lines 5 to 10

Kenny MacAskill

524 In section 77, page 98, line 14, leave out from <(including> to <operation)> in line 15

Kenny MacAskill

525 In section 77, page 98, line 22, at end insert—

<( ) After that section insert—

"**10A Authorisation of surveillance: joint surveillance operations**

In the case of a joint surveillance operation, where authorisation is sought for the carrying out of any form of conduct to which this Act applies, authorisation may be granted by any one of the persons having power to grant authorisation for the carrying out of that conduct.".>

Kenny MacAskill

526 In section 77, page 98, line 27, at end insert—

<( ) In section 14 (approval required for authorisations to take effect)—

(a) in subsection (5)(b), after "General" insert "or the Deputy Director General", and

(b) subsection (7) is repealed.>

Kenny MacAskill

527 In section 77, page 98, line 27, at end insert—

<( ) In section 16 (appeals against decisions by Surveillance Commissioners), in subsection (1), after "General" insert "or the Deputy Director General".>

Kenny MacAskill

528 In section 77, page 98, line 30, leave out from <, where> to <surveillance,> in line 31

Section 78

Kenny MacAskill

529 In section 78, page 98, line 39, leave out <(3)> and insert <(3A)>

Kenny MacAskill

530 In section 78, page 99, line 1, leave out <(3A)> and insert <(3AA)>

Kenny MacAskill

531 In section 78, page 99, line 8, leave out <or>

Kenny MacAskill

532 In section 78, page 99, line 18, leave out <(3A)> and insert <(3AA)>

Kenny MacAskill

533 In section 78, page 99, line 23, at end insert—

<( ) in paragraph (cc) of subsection (6), after "General" insert ", or Deputy Director General,".>

Kenny MacAskill

534 In section 78, page 99, line 26, leave out <(5)(a)> and insert <(5)>

Kenny MacAskill

535 In section 78, page 99, line 26, leave out <"where> and insert <"Where>

Kenny MacAskill

536 In section 78, page 99, line 29, after <operation,> insert <the person referred to in subsection (2)(h) is>

Section 79

Kenny MacAskill

537 In section 79, page 99, line 39, at end insert—

<( ) In section 113B (enhanced criminal record certificates), in subsection (3), for the words from ", or" immediately following paragraph (a) to the end of paragraph (b), substitute "(or states that there is no such matter or information), and

(b) if the applicant is subject to notification requirements under Part 2 of the Sexual Offences Act 2003 (c.42), states that fact.".>

Kenny MacAskill

538 In section 79, page 100, line 1, leave out <section 113B> and insert <that section>

After section 79

Kenny MacAskill

447 After section 79, insert—

<Rehabilitation of offenders

Spent alternatives to prosecution: Rehabilitation of Offenders Act 1974

(1) The Rehabilitation of Offenders Act 1974 (c.53) is amended as follows.

(2) After section 8A (protection afforded to spent cautions), insert—

“8B Protection afforded to spent alternatives to prosecution: Scotland

(1) For the purposes of this Act, a person has been given an alternative to prosecution in respect of an offence if the person (whether before or after the commencement of this section)—

(a) has been given a warning in respect of the offence by—

(i) a constable in Scotland, or

(ii) a procurator fiscal,

(b) has accepted, or is deemed to have accepted—

(i) a conditional offer issued in respect of the offence under section 302 of the Criminal Procedure (Scotland) Act 1995 (c.46), or

(ii) a compensation offer issued in respect of the offence under section 302A of that Act,

(c) has had a work order made against the person in respect of the offence under section 303ZA of that Act,

(d) has been given a fixed penalty notice in respect of the offence under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8),

(e) has accepted an offer made by a procurator fiscal in respect of the offence to undertake an activity or treatment or to receive services or do any other thing as an alternative to prosecution, or

(f) in respect of an offence under the law of a country or territory outside Scotland, has been given, or has accepted or is deemed to have accepted, anything corresponding to a warning, offer, order or notice falling within paragraphs (a) to (e) under the law of that country or territory.

(2) In this Act, references to an “alternative to prosecution” are to be read in accordance with subsection (1).

(3) Schedule 3 to this Act (protection for spent alternatives to prosecution: Scotland) has effect.”.

(3) After section 9A (unauthorised disclosure of spent cautions), insert—

“9B Unauthorised disclosure of spent alternatives to prosecution: Scotland

(1) In this section—

(a) “official record” means a record that—

(i) contains information about persons given an alternative to prosecution in respect of an offence, and

(ii) is kept for the purposes of its functions by a court, police force, Government department, part of the Scottish Administration or other local or public authority in Scotland,

(b) “relevant information” means information imputing that a named or otherwise identifiable living person has committed, been charged with, prosecuted for or given an alternative to prosecution in respect of an offence which is the subject of an alternative to prosecution which has become spent,

(c) “subject of the information”, in relation to relevant information, means the named or otherwise identifiable living person to whom the information relates.

(2) Subsection (3) applies to a person who, in the course of the person’s official duties (anywhere in the United Kingdom), has or has had custody of or access to an official record or the information contained in an official record.

(3) The person commits an offence if the person—

(a) obtains relevant information in the course of the person’s official duties,

(b) knows or has reasonable cause to suspect that the information is relevant information, and

(c) discloses the information to another person otherwise than in the course of the person’s official duties.

(4) Subsection (3) is subject to the terms of an order under subsection (6).

(5) In proceedings for an offence under subsection (3), it is a defence for the accused to show that the disclosure was made—

(a) to the subject of the information or to a person whom the accused reasonably believed to be the subject of the information, or

(b) to another person at the express request of the subject of the information or of a person whom the accused reasonably believed to be the subject of the information.

(6) The Scottish Ministers may by order provide for the disclosure of relevant information derived from an official record to be excepted from the provisions of subsection (3) in cases or classes of cases specified in the order.

(7) A person guilty of an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(8) A person commits an offence if the person obtains relevant information from an official record by means of fraud, dishonesty or bribery.

(9) A person guilty of an offence under subsection (8) is liable on summary conviction to a fine not exceeding level 5 on the standard scale, or to imprisonment for a term not exceeding 6 months, or to both.”.

(4) After Schedule 2 (protection for spent convictions) insert—

“SCHEDULE 3

PROTECTION FOR SPENT ALTERNATIVES TO PROSECUTION: SCOTLAND

Preliminary

1 (1) For the purposes of this Act, an alternative to prosecution given to any person (whether before or after the commencement of this Schedule) becomes spent—

(a) in the case of—

(i) a warning referred to in paragraph (a) of subsection (1) of section 8B, or

(ii) a fixed penalty notice referred to in paragraph (d) of that subsection,

at the time the warning or notice is given,

(b) in any other case, at the end of the relevant period.

(2) The relevant period in relation to an alternative to prosecution is the period of 3 months beginning on the day on which the alternative to prosecution is given.

(3) Sub-paragraph (1)(a) is subject to sub-paragraph (5).

(4) Sub-paragraph (2) is subject to sub-paragraph (6).

(5) If a person who is given a fixed penalty notice referred to in section 8B(1)(d) in respect of an offence is subsequently prosecuted and convicted of the offence, the notice—

(a) becomes spent at the end of the rehabilitation period for the offence, and

(b) is to be treated as not having become spent in relation to any period before the end of that rehabilitation period.

(6) If a person who is given an alternative to prosecution (other than one to which sub-paragraph (1)(a) applies) in respect of an offence is subsequently prosecuted and convicted of the offence—

(a) the relevant period in relation to the alternative to prosecution ends at the same time as the rehabilitation period for the offence ends, and

(b) if the conviction occurs after the end of the period referred to sub-paragraph (2), the alternative to prosecution is to be treated as not having become spent in relation to any period before the end of the rehabilitation period for the offence.

2 (1) In this Schedule, “ancillary circumstances”, in relation to an alternative to prosecution, means any circumstances of the following—

(a) the offence in respect of which the alternative to prosecution is given or the conduct constituting the offence,

(b) any process preliminary to the alternative to prosecution being given (including consideration by any person of how to deal with the offence and the procedure for giving the alternative to prosecution),

(c) any proceedings for the offence which took place before the alternative to prosecution was given (including anything that happens after that time for the purpose of bringing the proceedings to an end),

(d) any judicial review proceedings relating to the alternative to prosecution,

(e) in the case of an offer referred to in paragraph (e) of subsection (1) of section 8B, anything done or undergone in pursuance of the terms of the offer.

(2) Where an alternative to prosecution is given in respect of two or more offences, references in sub-paragraph (1) to the offence in respect of which the alternative to prosecution is given includes a reference to each of the offences.

(3) In this Schedule, "proceedings before a judicial authority" has the same meaning as in section 4.

Protection for spent alternatives to prosecution and ancillary circumstances

3 (1) A person who is given an alternative to prosecution in respect of an offence is, from the time the alternative to prosecution becomes spent, to be treated for all purposes in law as a person who has not committed, been charged with or prosecuted for, or been given an alternative to prosecution in respect of, the offence.

(2) Despite any enactment or rule of law to the contrary—

(a) where an alternative to prosecution given to a person in respect of an offence has become spent, evidence is not admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Scotland to prove that the person has committed, been charged with or prosecuted for, or been given an alternative to prosecution in respect of, the offence,

(b) a person must not, in any such proceedings, be asked any question relating to the person's past which cannot be answered without acknowledging or referring to an alternative to prosecution that has become spent or any ancillary circumstances, and

(c) if a person is asked such a question in any such proceedings, the person is not required to answer it.

(3) Sub-paragraphs (1) and (2) do not apply in relation to any proceedings—

(a) for the offence in respect of which the alternative to prosecution was given, and

(b) which are not part of the ancillary circumstances.

4 (1) This paragraph applies where a person ("A") is asked a question, otherwise than in proceedings before a judicial authority, seeking information about—

(a) A's or another person's previous conduct or circumstances,

(b) offences previously committed by A or the other person, or

(c) alternatives to prosecution previously given to A or the other person.

(2) The question is to be treated as not relating to alternatives to prosecution that have become spent or to any ancillary circumstances and may be answered accordingly.

(3) A is not to be subjected to any liability or otherwise prejudiced in law because of a failure to acknowledge or disclose an alternative to prosecution that has become spent or any ancillary circumstances in answering the question.

5 (1) An obligation imposed on a person ("A") by a rule of law or by the provisions of an agreement or arrangement to disclose any matter to another person does not extend to requiring A to disclose an alternative to prosecution (whether one given to A or another person) that has become spent or any ancillary circumstances.

(2) An alternative to prosecution that has become spent or any ancillary circumstances, or any failure to disclose an alternative to prosecution that has become spent or any ancillary circumstances, is not a ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing the person in any way in any occupation or employment.

6 The Scottish Ministers may by order—

(a) exclude or modify the application of any of paragraphs (a) to (c) of paragraph 3(2) in relation to questions put in such circumstances as may be specified in the order,

(b) provide for exceptions from any of the provisions of paragraphs 4 and 5 in such cases or classes of case, or in relation to alternatives to prosecution of such descriptions, as may be specified in the order.

7 Paragraphs 3 to 5 do not affect—

(a) the operation of an alternative to prosecution, or

(b) the operation of an enactment by virtue of which, because of an alternative to prosecution, a person is subject to a disqualification, disability, prohibition or other restriction or effect for a period extending beyond the time at which the alternative to prosecution becomes spent.

8 (1) Section 7(2), (3) and (4) apply for the purpose of this Schedule as follows.

(2) Subsection (2), apart from paragraphs (b) and (d), applies to the determination of any issue, and the admission or requirement of evidence, relating to alternatives to prosecution previously given to a person and to ancillary circumstances as it applies to matters relating to a person’s previous convictions and circumstances ancillary thereto.

(3) Subsection (3) applies to evidence of alternatives to prosecution previously given to a person and ancillary circumstances as it applies to evidence of a person’s previous convictions and the circumstances ancillary thereto.

(4) For that purpose, subsection (3) has effect as if—

(a) a reference to subsection (2) or (4) of section 7 were a reference to that subsection as applied by this paragraph, and

(b) the words “or proceedings to which section 8 below applies” were omitted.

(5) Subsection (4) applies for the purpose of excluding the application of paragraph 3.

(6) For that purpose, subsection (4) has effect as if the words “(other than proceedings to which section 8 below applies)” were omitted.

(7) References in the provisions applied by this paragraph to section 4(1) are to be read as references to paragraph 3.”>

Kenny MacAskill

448 After section 79, insert—

<*Medical services in prisons*

Medical services in prisons

(1) For section 3A of the Prisons (Scotland) Act 1989 (c.45) (medical services in prisons) substitute—

“**3A Medical officers for prisons**

(1) The Scottish Ministers must designate one or more medical officers for each prison.

(2) A person may be designated as a medical officer for a prison only if the person is a registered medical practitioner performing primary medical services for prisoners at the prison under the National Health Service (Scotland) Act 1978 (c.29).

(3) A medical officer has the functions that are conferred on a medical officer for a prison by or under this Act or any other enactment.

(4) A medical officer is not an officer of the prison for the purposes of this Act.

(5) Rules under section 39 of this Act may provide for the governor of a prison to authorise the carrying out by officers of the prison of a search of any person who is in, or is seeking to enter, the prison for the purpose of providing medical services for any prisoner at the prison.

(6) Nothing in rules made by virtue of subsection (5) allows the governor to authorise an officer of a prison to require a person to remove any of the person’s clothing other than an outer coat, jacket, headgear, gloves and footwear.”.

(2) In section 41D of that Act (unlawful disclosure of information by medical officers), for subsection (1) substitute—

“(1) This section applies to—

(a) a medical officer for a prison, and

(b) any person acting under the supervision of such a medical officer.”.

(3) In section 107 of the Criminal Justice and Public Order Act 1994 (c.33) (officers of contracted out prisons), for subsections (6) to (8) substitute—

“(6) The director must designate one or more medical officers for the prison.

(7) A person may be designated as a medical officer for the prison only if the person is a registered medical practitioner performing primary medical services for prisoners at the prison under the National Health Service (Scotland) Act 1978 (c.29).”.

(4) In section 110 of that Act (consequential modifications of the 1989 Act etc.)—

(a) in each of subsections (3) and (4), for “3A(6)” substitute “3A(5) and (6)”,

(b) subsection (4A) is repealed, and

(c) in subsection (6), for “3A(1) to (5) (medical services)” substitute “3A(1) and (2) (medical officers)”.

(5) In section 111(3) of that Act (intervention by the Scottish Ministers), in paragraph (c), after “prison” insert “and the medical officer or officers for the prison”.>

Section 80

Angela Constance

413 In section 80, page 100, line 29, after <victims> insert <(including children and young people)>

Section 85

Kenny MacAskill

696 In section 85, page 104, line 7, leave out <an accused> and insert <criminal proceedings relating to a person>

Kenny MacAskill

553 In section 85, page 104, line 7, leave out <(other than precognitions and victim statements)>

Kenny MacAskill

697 In section 85, page 104, line 9, leave out <case against the accused> and insert <proceedings>

Kenny MacAskill

555 In section 85, page 104, line 10, leave out subsection (2)

Kenny MacAskill

556* In section 85, page 104, line 20, at end insert—

<(3) In sections (*Duty to disclose after conclusion of proceedings at first instance*) to (*Review of ruling under section* (*Application by appellant for ruling on disclosure*)) "information", in relation to appellate proceedings, includes material of any kind given to or obtained by the prosecutor in connection with the appellate proceedings or the earlier proceedings.

(4) In subsection (3)—

"appellate proceedings" has the meaning given by section (*Sections (Duty to disclose after conclusion of proceedings at first instance) to* (*Review of ruling under section* (*Application by appellant for ruling on disclosure*)): *interpretation*),

"earlier proceedings" has the meaning given in section (*Duty to disclose after conclusion of proceedings at first instance*)(5).>

Section 86

Kenny MacAskill

557 Leave out section 86 and insert—

<**Provision of information to prosecutor: solemn cases**

(1) This section applies where in a prosecution—

(a) an accused appears for the first time on petition, or

(b) an accused appears for the first time on indictment (not having appeared on petition in relation to the same matter).

(2) As soon as practicable after the appearance, the investigating agency must provide the prosecutor with details of all the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained (whether by the agency or otherwise) in the course of investigating the matter to which the appearance relates.

(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that information that the prosecutor specifies in the requirement.

(4) In this section, "investigating agency" means—

(a) a police force, or

(b) such other person who—

(i) engages (to any extent) in the investigation of crime or sudden deaths, and

(ii) submits reports relating to those investigations to the procurator fiscal,

as the Scottish Ministers may prescribe by regulations.>

Section 87

Kenny MacAskill

558 In section 87, page 105, line 24, leave out <86(3)> and insert <(*Provision of information to prosecutor*: *solemn cases*)(2)>

Kenny MacAskill

559 In section 87, page 105, line 30, leave out subsection (2) and insert—

<( ) As soon as practicable after becoming aware of the further information, the investigating agency must provide the prosecutor with details of it.

( ) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that further information that the prosecutor specifies in the requirement.>

Kenny MacAskill

560 In section 87, page 105, line 33, leave out from beginning to <"the> in line 34

Kenny MacAskill

561 In section 87, page 105, line 35, leave out <86(3)> and insert <(*Provision of information to prosecutor*: *solemn cases*)(2)>

Kenny MacAskill

562 In section 87, page 106, line 1, leave out <this section> and insert <subsection (3)>

Section 88

Kenny MacAskill

563 Leave out section 88

After section 88

Kenny MacAskill

564 After section 88, insert—

<**Provision of information to prosecutor: summary cases**

(1) This section applies where a plea of not guilty is recorded against an accused charged on summary complaint.

(2) As soon as practicable after the recording of the plea, the investigating agency must inform the prosecutor of the existence of all the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained (whether by the agency or otherwise) in the course of investigating the matter to which the plea relates.

(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that information that the prosecutor specifies in the requirement.>

Kenny MacAskill

565 After section 88, insert—

<**Continuing duty of investigating agency: summary cases**

(1) This section applies where—

(a) an investigating agency has complied with section (*Provision of information to prosecutor*: *summary cases*)(2) in relation to an accused, and

(b) during the relevant period the investigating agency becomes aware that further information that may be relevant to the case for or against the accused has been obtained (whether by the agency or otherwise) in the course of investigating the accused's case.

(2) As soon as practicable after becoming aware of the further information, the investigating agency must inform the prosecutor of the existence of the information.

(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that further information that the prosecutor specifies in the requirement.

(4) In this section, "relevant period" means the period—

(a) beginning with the investigating agency's compliance with section (*Provision of information to prosecutor*: *summary cases*)(2) in relation to the accused, and

(b) ending with the agency's receiving notice from the prosecutor of the conclusion of the proceedings against the accused.

(5) For the purposes of subsection (4), proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.>

Section 89

Kenny MacAskill

566 In section 89, page 106, line 31, after <where> insert <in a prosecution>

Kenny MacAskill

567 In section 89, page 106, line 33, after <indictment> insert <(not having appeared on petition in relation to the same matter)>

Bill Aitken

147 In section 89, page 106, line 37, leave out <review all the> and insert <disclose to the accused all>

Bill Aitken

148 In section 89, page 106, line 38, leave out from <and> to end of line 14 on page 107

Kenny MacAskill

568 In section 89, page 107, line 1, leave out from beginning to <applies> in line 2 and insert—

<(b) disclose to the accused the information to which subsection (3) applies.

(3) This subsection applies to information>

Kenny MacAskill

569 In section 89, page 107, line 3, leave out <prosecution case> and insert <evidence that is likely to be led by the prosecutor in the proceedings against the accused>

Kenny MacAskill

570 In section 89, page 107, line 5, leave out <prosecution case> and insert <evidence to be led by the prosecutor in the proceedings against the accused>

Kenny MacAskill

571 In section 89, page 107, line 6, leave out subsections (4) to (6)

Kenny MacAskill

572 In section 89, page 107, line 15, leave out <(5)> and insert <(2)(b)>

Bill Aitken

149 In section 89, page 107, line 15, leave out <(5)> and insert <(2)>

After section 89

Kenny MacAskill

573 After section 89, insert—

<**Disclosure of other information: solemn cases**

(1) This section applies where by virtue of subsection (2)(b) of section 89 the prosecutor is required to disclose information to an accused who falls within paragraph (a) or (b) of subsection (1) of that section.

(2) As soon as practicable after complying with the requirement, the prosecutor must disclose to the accused details of any information which the prosecutor is not required to disclose under section 89(2)(b) but which may be relevant to the case for or against the accused.

(3) The prosecutor need not disclose under subsection (2) details of sensitive information.

(4) In subsection (3), "sensitive", in relation to an item of information, means that if it were to be disclosed there would be a risk of—

(a) causing serious injury, or death, to any person,

(b) obstructing or preventing the prevention, detection, investigation or prosecution of crime, or

(c) causing serious prejudice to the public interest.>

Section 90

Kenny MacAskill

574 In section 90, page 107, line 19, leave out <subsection (5) or (6) of section 89> and insert <section 89(2)(b)>

Bill Aitken

150 In section 90, page 107, line 19, leave out <(5) or (6)> and insert <(2)>

Kenny MacAskill

575 In section 90, page 107, line 24, leave out from beginning to <"the> in line 27 and insert <and

(b) disclose to the accused any information to which section 89(3) applies.

(2A) As soon as practicable after complying with subsection (2), the prosecutor must disclose to the accused details of any other information that may be relevant to the case for or against the accused of which the prosecutor is aware.

(2B) The prosecutor need not disclose under subsection (2A) details of sensitive information.

(2C) In subsection (2)>

Bill Aitken

151 In section 90, page 107, leave out lines 24 to 26 and insert <and

(b) disclose to the accused any such information not already disclosed under section 89(2).>

Kenny MacAskill

576 In section 90, page 107, line 28, leave out <subsection (5) or (6) of section 89> and insert <section 89(2)(b)>

Bill Aitken

152 In section 90, page 107, line 28, leave out <(5) or (6)> and insert <(2)>

Kenny MacAskill

577 In section 90, page 107, line 30, at end insert—

<"sensitive" has the meaning given by section (*Disclosure of other information*: *solemn cases*)(4).>

Kenny MacAskill

578 In section 90, page 107, line 31, leave out <this section> and insert <subsection (2C)>

Section 91

Kenny MacAskill

579 In section 91, page 108, line 5, leave out <under section 89(5) or 90(2)> and insert <by virtue of this Part>

Bill Aitken

153 In section 91, page 108, line 5, leave out <89(5) or 90(2)> and insert <89(2) or 90(2)(b)>

Kenny MacAskill

580 Move section 91 to after section 99

Section 92

Kenny MacAskill

581 In section 92, page 108, line 10, leave out from <section> to <accused> in line 11 and insert <this Part the prosecutor is required to disclose>

Bill Aitken

154 In section 92, page 108, line 10, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Kenny MacAskill

582 Move section 92 to after section 96

Section 93

Bill Aitken

155 In section 93, page 108, line 20, leave out <(5)> and insert <(2)>

Kenny MacAskill

583 Leave out section 93

Section 94

Kenny MacAskill

584 In section 94, page 108, line 30, leave out from beginning to <pre-trial> in line 31 and insert—

<(1) This section applies where the accused lodges a defence statement under section 70A of the 1995 Act.

(1A) As soon as practicable after the prosecutor receives a copy of the defence>

Kenny MacAskill

585 In section 94, page 108, leave out lines 34 to 36 and insert <and

(b) disclose to the accused any information to which section 89(3) applies.>

Kenny MacAskill

586 In section 94, page 109, line 8, leave out lines 8 to 13 and insert—

<(4) At least 7 days before the trial diet the accused must—

(a) where there has been no material change in circumstances in relation to the accused's defence since the last defence statement was lodged, lodge a statement stating that fact,

(b) where there has been a material change in circumstances in relation to the accused's defence since the last defence statement was lodged, lodge a defence statement.>

Kenny MacAskill

587 In section 94, page 109, line 13, at end insert—

<(4A) If after lodging a statement under subsection (2), (3) or (4) there is a material change in circumstances in relation to the accused's defence, the accused must lodge a defence statement.

(4B) Where subsection (4A) requires a defence statement to be lodged, it must be lodged before the trial diet begins unless on cause shown the court allows it to be lodged during the trial diet.>

Kenny MacAskill

588 In section 94, page 109, line 14, after <statement> insert—

<( )>

Kenny MacAskill

589 In section 94, page 109, line 14, leave out <other>

Kenny MacAskill

590 In section 94, page 109, line 15, at end insert <or

( ) during the trial diet if the court on cause shown allows it.>

Kenny MacAskill

591 In section 94, page 109, line 15, at end insert—

<( ) As soon as practicable after lodging a defence statement or a statement under subsection (4)(a), the accused must send a copy of the statement to the prosecutor and any co-accused.>

Kenny MacAskill

592 In section 94, page 109, line 20, at end insert—

<( ) particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence,>

Kenny MacAskill

593 In section 94, page 109, line 21, leave out <in relation to disclosure>

Kenny MacAskill

594 In section 94, page 109, line 27, at end insert—

<( ) In section 78 of the 1995 Act (special defences, incrimination, notice of witnesses etc.), after subsection (1) insert—

"(1A) Subsection (1) does not apply where—

(a) the accused lodges a defence statement under section 70A, and

(b) the accused's defence consists of or includes a special defence.".>

Bill Aitken
Supported by: Robert Brown

156 Leave out section 94

Section 95

Kenny MacAskill

595 In section 95, page 109, line 32, leave out <prosecutor receives from the accused> and insert <accused lodges>

Kenny MacAskill

596 In section 95, page 109, line 38, at end insert—

<( ) particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence,>

Kenny MacAskill

597 In section 95, page 109, line 39, leave out <in relation to disclosure>

Kenny MacAskill

598 In section 95, page 110, line 4, at end insert—

<( ) As soon as practicable after lodging a defence statement, the accused must send a copy of the statement to the prosecutor and any co-accused.>

Kenny MacAskill

599 In section 95, page 110, line 5, after <receiving> insert <a copy of>

Kenny MacAskill

600 In section 95, page 110, leave out lines 8 to 10 and insert <and

(b) disclose to the accused any information to which section 89(3) applies.>

Kenny MacAskill

601 In section 95, page 110, line 24, at end insert—

<( ) In section 149B of the 1995 Act (notice of defences), after subsection (2) insert—

"(2A) Subsection (1) does not apply where—

(a) the accused lodges a defence statement under section 95 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00),

(b) the statement is lodged—

(i) where an intermediate diet is to be held, at or before the diet, or

(ii) where such a diet is not to be held, no later than 10 clear days before the trial diet, and

(c) the accused's defence consists of or includes a defence to which that subsection applies.".>

Bill Aitken
Supported by: Robert Brown

157 Leave out section 95

After section 95

Kenny MacAskill

602 After section 95, insert—

<**Change in circumstances following lodging of defence statement: summary proceedings**

(1) This section applies where the accused lodges a defence statement under section 95 at least 14 days before the trial diet.

(2) At least 7 days before the trial diet the accused must—

(a) where there has been no material change in circumstances in relation to the accused's defence since the defence statement was lodged, lodge a statement stating that fact,

(b) where there has been a material change in circumstances in relation to the accused's defence since the defence statement was lodged, lodge a defence statement.

(3) If after lodging a statement under subsection (2) there is a material change in circumstances in relation to the accused's defence, the accused must lodge a defence statement.

(4) Where subsection (3) requires a defence statement to be lodged, it must be lodged before the trial diet begins unless on cause shown the court allows it to be lodged during the trial diet.

(5) As soon as practicable after lodging a statement under subsection (2)(a) or a defence statement under subsection (2)(b) or (3), the accused must send a copy of the statement concerned to the prosecutor and any co-accused.

(6) As soon as practicable after receiving a copy of a defence statement lodged under subsection (2)(b) or (3) the prosecutor must—

(a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

(b) disclose to the accused any information to which section 89(3) applies.

(7) In this section, "defence statement" is to be construed in accordance with section 95(2).>

Kenny MacAskill

603 After section 95, insert—

<*Court rulings on disclosure*

Application by accused for ruling on disclosure

(1) This section applies where the accused—

(a) has lodged a defence statement under section 70A of the 1995 Act or section 95 or (*Change in circumstances following lodging of defence statement: summary proceedings*) of this Act, and

(b) considers that the prosecutor has failed, in responding to the statement, to disclose to the accused an item of information to which section 89(3) applies (the "information in question").

(2) The accused may apply to the court for a ruling on whether section 89(3) applies to the information in question.

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the accused is charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question, and

(c) the accused's grounds for considering that section 89(3) applies to the information in question.

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that section 89(3) applies to the information in question.

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the accused an opportunity to be heard before determining the application.

(7) On determining the application, the court must—

(a) make a ruling on whether section 89(3) applies to the information in question or to any part of the information in question, and

(b) where the accused is charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) Except where it is impracticable to do so, the application is to be assigned to the justice of the peace, sheriff or judge who is presiding, or is to preside, at the accused's trial.>

Kenny MacAskill

604 After section 95, insert—

<**Review of ruling under section (*Application by accused for ruling on disclosure*)**

(1) This section applies where—

(a) the court has made a ruling under section (*Application by accused for ruling on disclosure*) that section 89(3) does not apply to an item of information (the "information in question"), and

(b) during the relevant period—

(i) the accused becomes aware of information (the "secondary information") that was unavailable to the court at the time it made its ruling, and

(ii) the accused considers that, had the secondary information been available to the court at that time, it would have made a ruling that section 89(3) does apply to the information in question.

(2) The accused may apply to the court which made the ruling for a review of the ruling.

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the accused is charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question and the secondary information, and

(c) the accused's grounds for considering that section 89(3) applies to the information in question.

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that section 89(3) applies to the information in question.

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the accused an opportunity to be heard before determining the application.

(7) On determining the application, the court may—

(a) affirm the ruling being reviewed, or

(b) recall that ruling and—

(i) make a ruling that section 89(3) applies to the information in question or to any part of the information in question, and

(ii) where the accused is charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) Except where it is impracticable to do so, the application is to be assigned to the justice of the peace, sheriff or judge who dealt with the application for the ruling that is being reviewed.

(9) Nothing in this section affects any right of appeal in relation to the ruling being reviewed.

(10) In this section, "relevant period", in relation to an accused, means the period—

(a) beginning with the making of the ruling being reviewed, and

(b) ending with the conclusion of proceedings against the accused.

(11) For the purposes of subsection (10), proceedings against the accused are taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the indictment or complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.>

Kenny MacAskill

605 After section 95, insert—

<**Appeals against rulings under section (*Application by accused for ruling on disclosure*)**

(1) The prosecutor or the accused may, within the period of 7 days beginning with the day on which a ruling is made under section (*Application by accused for ruling on disclosure*), appeal to the High Court against the ruling.

(2) Where an appeal is brought under subsection (1), the court of first instance or the High Court may—

(a) postpone any trial diet that has been appointed for such period as it thinks appropriate,

(b) adjourn or further adjourn any hearing for such period as it thinks appropriate,

(c) direct that any period of postponement or adjournment under paragraph (a) or (b) or any part of such period is not to count toward any time limit applying in the case.

(3) In disposing of an appeal under subsection (1), the High Court may—

(a) affirm the ruling, or

(b) remit the case back to the court of first instance with such directions as the High Court thinks appropriate.

(4) This section does not affect any other right of appeal which any party may have in relation to a ruling under section (*Application by accused for ruling on disclosure*).>

Section 96

Kenny MacAskill

606 In section 96, page 110, line 28, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2)(b), 90(2)(b), 94(1A)(b) or 95(3)(b)>

Bill Aitken

158 In section 96, page 110, line 28, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Kenny MacAskill

607 In section 96, page 110, line 32, leave out from <is> to end of line and insert <but for that plea would have been likely to have formed part of the evidence to be led by the prosecutor in the proceedings against the accused.>

After section 96

Kenny MacAskill

608* After section 96, insert—

<Disclosure after conclusion of proceedings at first instance

Sections (*Duty to disclose after conclusion of proceedings at first instance*) to (*Review of ruling under section* (*Application by appellant for ruling on disclosure*)): interpretation

In sections (*Duty to disclose after conclusion of proceedings at first instance*) to (*Review of ruling under section* (*Application by appellant for ruling on disclosure*))—

"appellant", in relation to appellate proceedings, includes a person authorised by an order under section 303A(4) of the 1995 Act to institute or continue the proceedings,

"appellate proceedings" means—

(a) an appeal under section 106(1)(a) or (f) of the 1995 Act which brings under review an alleged miscarriage of justice,

(b) an appeal under paragraph (b), (ba), (bb), (c), (d), (db) or (dc) of subsection (1) of section 106 of the 1995 Act which brings under review in accordance with subsection (3)(a) of that section an alleged miscarriage of justice,

(c) an appeal under section 175(2)(a) or (d) of the 1995 Act which brings under review an alleged miscarriage of justice,

(d) an appeal under paragraph (b), (c) or (cb) of subsection (2) of section 175 of the 1995 Act which brings under review an alleged miscarriage of justice which is based on the type of miscarriage described in subsection (5) of that section,

(e) an appeal to the Supreme Court against a determination by the High Court of Justiciary of a devolution issue,

(f) an appeal against conviction by bill of suspension under section 191(1) of the 1995 Act,

(g) an appeal against conviction by bill of advocation,

(h) a petition to the *nobile officium* in respect of a matter arising out of criminal proceedings which brings under review an alleged miscarriage of justice which is based on the existence and significance of new evidence,

(i) an appeal under section 62(1)(b) of the 1995 Act against a finding under section 55(2) of that Act,

(j) the referral to the High Court of Justiciary under section 194B of the 1995 Act of—

  (i) a conviction, or

  (ii) a finding under section 55(2) of that Act.>

Kenny MacAskill

609* After section 96, insert—

<Duty to disclose after conclusion of proceedings at first instance

(1) This section applies where appellate proceedings are instituted in relation to an appellant.

(2) As soon as practicable after the relevant act the prosecutor must—

(a) review all information of which the prosecutor is aware that relates to the grounds of appeal in the appellate proceedings, and

(b) disclose to the appellant any information that falls within subsection (3).

(3) Information falls within this subsection if it is—

(a) information that the prosecutor was required by virtue of section 89(2)(b) or 90(2)(b) to disclose in the earlier proceedings but did not disclose,

(b) information to which, during the earlier proceedings, the prosecutor considered paragraph (a) or (b) of section 89(3) did not apply but to which the prosecutor now considers one or both of those paragraphs would apply, or

(c) information of which the prosecutor has become aware since the disposal of the earlier proceedings that, had the prosecutor been aware of it during those proceedings, the prosecutor would have been required to disclose by virtue of section 89(2)(b) or 90(2)(b).

(4) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the appellant.

(5) In this section—

“earlier proceedings”, in relation to appellate proceedings, means the proceedings to which the appellate proceedings relate,

“relevant act” means—

(a) in relation to proceedings of the type mentioned in paragraph (a) or (b) of the relevant definition, the granting under section 107(1)(a) of the 1995 Act of leave to appeal,

(b) in relation to proceedings of the type mentioned in paragraph (c) or (d) of the relevant definition, the granting under section 180(1)(a) or, as the case may be, 187(1)(a) of that Act of leave to appeal,

(c) in relation to proceedings of the type mentioned in paragraph (e) of the relevant definition, the granting of leave to appeal by the High Court of Justiciary or, as the case may be, the Supreme Court,

(d) in relation to proceedings of the type mentioned in paragraph (f) of the relevant definition—

(i) if leave to appeal is required, the granting under section 191(2) of that Act of leave to appeal,

(ii) if leave to appeal is not required, service on the prosecutor under the relevant rule of a certified copy of the bill of suspension and the interlocutor granting first order for service,

(e) in relation to proceedings of the type mentioned in paragraph (g) of the relevant definition, service on the prosecutor under the relevant rule of a certified copy of the bill of advocation and the interlocutor granting first order for service,

(f) in relation to proceedings of the type mentioned in paragraph (h) of the relevant definition, service on the prosecutor under the relevant rule of a certified copy of the petition and the interlocutor granting first order for service,

(g) in relation to proceedings of the type mentioned in paragraph (i) of the relevant definition, the lodging of the appeal,

(h) in relation to proceedings of the type mentioned in paragraph (j) of the relevant definition, the lodging of the grounds of appeal by the person to whom the referral relates,

“relevant definition” means the definition of appellate proceedings in section (*Sections* (*Duty to disclose after conclusion of proceedings at first instance*) to (*Review of ruling under section* (*Application by appellant for ruling on disclosure*)): *interpretation*),

“relevant rule” means rule 29A.1(3) of the Criminal Procedure Rules 1996 (S.I. 1996/513).>

Kenny MacAskill

610 After section 96, insert—

<**Continuing duty of prosecutor**

(1) This section applies where the prosecutor has complied with section (*Duty to disclose after conclusion of proceedings at first instance*)(2) in relation to an appellant.

(2) During the relevant period, the prosecutor must—

(a) from time to time review all information of which the prosecutor is aware that relates to the grounds of appeal in the appellate proceedings which relate to the appellant, and

(b) disclose to the appellant any information that falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the appellant.

(4) In subsection (2), “relevant period” means the period—

(a) beginning with the prosecutor’s compliance with section (*Duty to disclose after conclusion of proceedings at first instance*)(2), and

(b) ending with the relevant conclusion.

(5) In subsection (4), “relevant conclusion” means—

(a) in relation to proceedings of the type mentioned in paragraph (a) or (b) of the relevant definition—

(i) the lodging under section 116(1) of the 1995 Act of a notice of abandonment, or

(ii) the disposal of the appeal under section 118 of that Act,

(b) in relation to proceedings of the type mentioned in paragraph (c) or (d) of the relevant definition—

(i) the disposal of the appeal under section 183(1)(b) to (d) of that Act,

(ii) the abandonment of the appeal under section 184(1) of that Act,

(iii) the setting aside of the conviction or sentence or, as the case may be, conviction and sentence under section 188(1) of that Act, or

(iv) the disposal of the appeal under section 190(1) of that Act,

(c) in relation to proceedings of the type mentioned in paragraph (e), (f), (g) or (h) of the relevant definition, the disposal or abandonment of the appeal,

(d) in relation to proceedings of the type mentioned in paragraph (i) of the relevant definition, the disposal of the appeal under section 62(6) of that Act or the abandonment of the appeal,

(e) in relation to proceedings of the type mentioned in paragraph (j) of the relevant definition—

(i) if the referral or finding is being treated as if it were an appeal under Part 8 of that Act, the conclusion mentioned in paragraph (a) above,

(ii) if the referral or finding is being treated as if it were an appeal under Part 10 of that Act, the conclusion mentioned in paragraph (b) above or, where the referral or finding proceeds by way of bill of suspension, bill of advocation or petition to the *nobile officium*, paragraph (c) above.

(6) In this section, "relevant definition" has the meaning given by section (*Duty to disclose after conclusion of proceedings at first instance*)(5).>

Kenny MacAskill

611 After section 96, insert—

<**Application to prosecutor for further disclosure**

(1) This section applies where—

(a) the prosecutor has complied with section (*Duty to disclose after conclusion of proceedings at first instance*)(2) in relation to an appellant, and

(b) the appellant lodges a further disclosure request—

(i) during the preliminary period, or

(ii) if the court on cause shown allows it, after the preliminary period but before the relevant conclusion.

(2) A further disclosure request must set out—

(a) by reference to the grounds of appeal, the nature of the information that the appellant wishes the prosecutor to disclose, and

(b) the reasons why the appellant considers that disclosure by the prosecutor of any such information is necessary.

(3) As soon as practicable after receiving a copy of the further disclosure request the prosecutor must—

(a) review any information of which the prosecutor is aware that relates to the request, and

(b) disclose to the appellant any of that information that falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(4) In this section—

"preliminary period", in relation to the appellate proceedings concerned, means the period beginning with the relevant act and ending with the beginning of the hearing of the appellate proceedings,

"relevant act" has the meaning given by section (*Duty to disclose after conclusion of proceedings at first instance*)(5),

"relevant conclusion" has the meaning given by section (*Continuing duty of prosecutor*)(5).>

Kenny MacAskill

612 After section 96, insert—

<**Further duty of prosecutor: conviction upheld on appeal**

(1) This section applies where—

(a) in an appeal to the High Court of Justiciary, the High Court upholds the conviction of a person, and

(b) after the conclusion of the appeal the prosecutor becomes aware of—

(i) information that the prosecutor was required by virtue of section 89(2)(b) or 90(2)(b) to disclose in the earlier proceedings but did not disclose, or

(ii) information that falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3) which would have related to the grounds of appeal but was not disclosed.

(2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.

(3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.

(4) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.

(5) In this section, "earlier proceedings" has the meaning given by section (*Duty to disclose after conclusion of proceedings at first instance*)(5).>

Kenny MacAskill

613 After section 96, insert—

<**Further duty of prosecutor: convicted persons**

(1) This section applies where—

(a) a person has been convicted,

(b) after conviction the prosecutor becomes aware of information that the prosecutor was required by virtue of section 89(2)(b) or 90(2)(b) to disclose in the earlier proceedings but did not disclose, and

(c) section (*Further duty of prosecutor*: *conviction upheld on appeal*) does not apply.

(2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.

(3) If the person institutes appellate proceedings in relation to the conviction, the prosecutor need not comply with the duty imposed by subsection (2) during the appropriate period.

(4) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.

(5) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.

(6) In this section—

“appropriate period”, in relation to appellate proceedings, means the period beginning with the relevant act and ending with the relevant conclusion,

“earlier proceedings” has the meaning given by section (*Duty to disclose after conclusion of proceedings at first instance*)(5),

“relevant act” has the meaning given by section (*Duty to disclose after conclusion of proceedings at first instance*)(5),

“relevant conclusion” has the meaning given by section (*Continuing duty of prosecutor*)(5).>

Kenny MacAskill

614 After section 96, insert—

<**Further duty of prosecutor: appeal against acquittal**

(1) This section applies where—

(a) the prosecutor appeals against the acquittal of a person, and

(b) after lodging the appeal the prosecutor becomes aware of information which relates to the appeal and falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.

(3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.

(4) The prosecutor ceases to be subject to the duty imposed by subsection (2) on the disposal of the appeal by the High Court of Justiciary.

(5) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.>

Kenny MacAskill

615 After section 96, insert—

<*Court rulings on disclosure: appellate proceedings*

Application by appellant for ruling on disclosure

(1) This section applies where the appellant—

(a) has made a further disclosure request under section (*Application to prosecutor for further disclosure*), and

(b) considers that the prosecutor has failed, in responding to the request, to disclose to the appellant an item of information falling within section (*Duty to disclose after conclusion of proceedings at first instance*)(3) (the “information in question”).

(2) The appellant may apply to the court for a ruling on whether the information in question falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(3) An application under subsection (2) is to be made in writing and must set out—

- (a) where the appellant is or was charged with more than one offence, the charge or charges to which the application relates,
- (b) a description of the information in question, and
- (c) the appellant's grounds for considering that the information in question falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

- (a) comply with subsection (3), or
- (b) otherwise disclose any reasonable grounds for considering that the information in question falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the appellant an opportunity to be heard before determining the application.

(7) On determining the application, the court must—

- (a) make a ruling on whether the information in question, or any part of the information in question, falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3), and
- (b) where the appellant is or was charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) In this section, "the court" means the court before which the appellant's appeal is brought.

(9) Except where it is impracticable to do so, the application is to be assigned to the judges who are to hear the appellant's appeal.>

Kenny MacAskill

616 After section 96, insert—

<**Review of ruling under section (*Application by appellant for ruling on disclosure*)**

(1) This section applies where—

- (a) the court has made a ruling under section (*Application by appellant for ruling on disclosure*) that an item of information (the "information in question") does not fall within section (*Duty to disclose after conclusion of proceedings at first instance*)(3), and
- (b) during the relevant period—
  - (i) the appellant becomes aware of information ("secondary information") that was unavailable to the court at the time it made its ruling, and

(ii) the appellant considers that, had the secondary information been available to the court at that time, it would have made a ruling that the information in question does fall within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(2) The appellant may apply to the court which made the ruling for a review of the ruling.

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the appellant is or was charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question and the secondary information, and

(c) the appellant's grounds for considering that the information in question falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that the information in question falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the appellant an opportunity to be heard before determining the application.

(7) On determining the application, the court may—

(a) affirm the ruling being reviewed, or

(b) recall that ruling and—

(i) make a ruling that the information in question, or any part of the information in question, falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3), and

(ii) where the appellant is or was charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) Except where it is impracticable to do so, the application is to be assigned to the judges who dealt with the application for the ruling that is being reviewed.

(9) Nothing in this section affects any right of appeal in relation to the ruling being reviewed.

(10) In this section, "relevant period", in relation to an appellant, means the period—

(a) beginning with the making of the ruling being reviewed, and

(b) ending with the relevant conclusion.

(11) In subsection (10), "relevant conclusion" has the meaning given by section (*Continuing duty of prosecutor*)(5).>

Section 97

Kenny MacAskill

617 In section 97, page 110, line 36, leave out <section 89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <this Part>

Bill Aitken

159 In section 97, page 110, line 36, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Kenny MacAskill

618 In section 97, page 111, line 2, at end insert—

<(4) Subsection (5) applies if the information is contained in—

(a) a precognition,

(b) a victim statement,

(c) a statement given by a person whom the prosecutor does not intend to call to give evidence in the proceedings, or

(d) where the proceedings relating to the accused are summary proceedings, a statement given by a person whom the prosecutor intends to call to give evidence in the proceedings.

(5) In complying with the requirement, the prosecutor need not disclose the precognition or, as the case may be, statement.

(6) Subsection (7) applies where the proceedings relating to the accused are solemn proceedings and—

(a) the information is contained in a statement given by a person whom the prosecutor intends to call to give evidence in the proceedings, or

(b) the information is contained in a statement and the prosecutor intends to apply under section 259 of the 1995 Act to have evidence of the statement admitted in the proceedings.

(7) In complying with the requirement, the prosecutor must disclose the statement.>

Section 98

Kenny MacAskill

619 In section 98, page 111, line 5, leave out <section 89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <this Part>

Bill Aitken

160 In section 98, page 111, line 5, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Kenny MacAskill

620 In section 98, page 111, line 19, at end insert—

<(4A) If despite subsection (2) the accused discloses the information or anything recorded in it other than in accordance with subsection (3), a person to whom information is disclosed must not use or disclose the information or anything recorded in it.

(4B) Subsections (2), (4) and (4A) do not apply in relation to the use or disclosure of information which is in the public domain at the time of the use or disclosure.>

Kenny MacAskill

621 In section 98, page 111, line 22, at end insert—

<( ) a petition to the *nobile officium*,

( ) proceedings in the European Court of Human Rights.>

Section 100

Bill Aitken

161 In section 100, page 111, line 36, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Kenny MacAskill

622 Leave out section 100

Section 101

Kenny MacAskill

623 Leave out section 101

Section 102

Kenny MacAskill

624 In section 102, page 112, line 26, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or (*Change in circumstances following lodging of defence statement*: *summary proceedings*)(6)(b)>

Bill Aitken

162 In section 102, page 112, line 26, leave out from <89(5)> to <information> in line 28 and insert <89(2) or 90(2)(b) the prosecutor is required to disclose an item of information to an accused>

Kenny MacAskill

625 In section 102, page 112, line 31, leave out from <serious> to <prejudice> in line 34 and insert <a real risk of substantial harm or damage>

Kenny MacAskill

626 In section 102, page 112, line 35, leave out from <a> to end of line 7 on page 113 and insert <an order under section 106 (a "section 106 order").>

Bill Aitken

163 In section 102, page 113, line 5, leave out from <89(5)> to end of line 6 and insert <89(2) or, as the case may be, 90(2)(b)>

Section 103

Kenny MacAskill

627 In section 103, page 113, line 10, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

628 In section 103, page 113, line 11, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

629 In section 103, page 113, line 12, after <may> insert <also>

Kenny MacAskill

630 In section 103, page 113, line 15, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

631 In section 103, page 113, line 16, after <may> insert <also>

Kenny MacAskill

632 In section 103, page 113, line 20, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

633 In section 103, page 113, line 24, after <section> insert <104 or>

Kenny MacAskill

634 In section 103, page 113, line 26, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

635 In section 103, page 113, line 31, leave out <non-disclosure> and insert <section 106>

Section 104

Kenny MacAskill

636 In section 104, page 114, line 4, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

637 In section 104, page 114, line 12, leave out from <non-disclosure> to <accused> in line 16 and insert <section 106 order would be likely to cause a real risk of substantial harm or damage to the public interest>

Kenny MacAskill

638 In section 104, page 114, leave out lines 23 to 26 and insert—

<(9) If after giving the prosecutor and, subject to subsection (10), the accused an opportunity to be heard, the court is satisfied that the conditions in subsection (4) of section 105 are met, the court may make an exclusion order under subsection (3) of that section.

(10) On the application of the prosecutor the court may exclude the accused from the hearing appointed under subsection (8).>

Section 105

Kenny MacAskill

639 In section 105, page 114, line 28, after <103(2)(b)> insert <or (3)>

Kenny MacAskill

640 In section 105, page 114, line 30, at end insert—

<(2A) On the application of the prosecutor the court may exclude the accused from the hearing.>

Kenny MacAskill

641 In section 105, page 114, line 31, after <and> insert <, subject to subsection (2A),>

Kenny MacAskill

642 In section 105, page 114, line 31, after <heard> insert <on the applications for the exclusion order and the section 106 order to which it relates>

Kenny MacAskill

643 In section 105, page 114, line 36, leave out from <non-disclosure> to <accused> in line 39 and insert <section 106 order relates would be likely to cause a real risk of substantial harm or damage to the public interest>

Section 106

Kenny MacAskill

644 In section 106, page 115, line 3, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

645 In section 106, page 115, line 6, leave out subsection (2) and insert—

<(2) The court must—

(a) consider the item of information to which the application for a section 106 order relates,

(b) give the prosecutor and (if the court has not made an exclusion order) the accused the opportunity to be heard, and

(c) determine—

(i) whether the conditions in subsection (3) apply, and

(ii) if so, whether subsection (4) applies.>

Kenny MacAskill

646 In section 106, page 115, line 14, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or (*Change in circumstances following lodging of defence statement*: *summary proceedings*)(6)(b)>

Bill Aitken

164 In section 106, page 115, line 14, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Kenny MacAskill

647 In section 106, page 115, line 15, at end insert—

<( ) that section 89(3)(a) or (b) applies to the information,>

Kenny MacAskill

648 In section 106, page 115, line 16, leave out from <it> to <prejudice> in line 20 and insert <there would be a real risk of substantial harm or damage>

Kenny MacAskill

649 In section 106, page 115, line 23, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

650 In section 106, page 115, line 25, leave out from beginning to <conditions> in line 27 and insert <This subsection applies if the court considers that the item of information could be disclosed or partly disclosed in such a way that—

(a) the condition>

Kenny MacAskill

651 In section 106, page 115, line 29, at end insert—

<(4A) If the court considers that subsection (3) (but not subsection (4)) applies, it may make a section 106 order preventing disclosure of the information.

(4B) If the court considers that subsection (4) applies, it may make a section 106 order requiring the information to be disclosed or partly disclosed to the accused in the manner specified in the order.>

Kenny MacAskill

652 In section 106, page 115, line 35, leave out subsection (6)

After section 106

Kenny MacAskill

653 After section 106, insert—

<*Orders preventing or restricting disclosure: Secretary of State*

Order preventing or restricting disclosure: application by Secretary of State

(1) The Secretary of State may apply to the relevant court for an order under this section (a "section (*Order preventing or restricting disclosure: application by Secretary of State*) order") in relation to the proposed disclosure by the prosecutor to the accused in relevant criminal proceedings of information which the prosecutor—

(a) is required to disclose by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or (*Change in circumstances following lodging of defence statement*: *summary proceedings*)(6)(b), or

(b) intends to disclose otherwise than by virtue of this Part.

(2) If the Secretary of State also makes an application in accordance with subsection (2) or (3) of section (*Application for ancillary orders*: *Secretary of State*), the relevant court must comply with subsections (6) and (7) of that section.

(3) Where an application is made under subsection (1), the relevant court must—

(a) consider the item of information to which the application relates,

(b) give the Secretary of State and the prosecutor the opportunity to be heard,

(c) if the application relates to information which the prosecutor is required to disclose by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or (*Change in circumstances following lodging of defence statement*: *summary proceedings*)(6)(b) and a non-attendance order has not been made, give the accused the opportunity to be heard, and

(d) determine—

(i) whether the conditions in subsection (4) apply, and

(ii) if so, whether subsection (5) applies.

(4) The conditions are—

(a) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,

(b) that withholding the item of information would be consistent with the accused's receiving a fair trial, and

(c) that the public interest would be protected only if a section (*Order preventing or restricting disclosure: application by Secretary of State*) order of the type mentioned in subsection (6) were to be made.

(5) This subsection applies if the court considers that the item of information could be disclosed or partly disclosed in such a way that—

(a) the condition in paragraph (a) of subsection (4) would not be met, and

(b) the disclosure (or partial disclosure) would be consistent with the accused's receiving a fair trial.

(6) If the court considers that subsection (4) (but not subsection (5)) applies, it may make a section (*Order preventing or restricting disclosure: application by Secretary of State*) order preventing disclosure of the information.

(7) If the court considers that subsection (5) applies, it may make a section (*Order preventing or restricting disclosure: application by Secretary of State*) order requiring the information to be disclosed or partly disclosed to the accused in the manner specified in the order.

(8) For the purposes of subsection (7) the order may in particular specify that—

(a) the item of information be disclosed after removing or obscuring parts of it (whether by redaction or otherwise),

(b) extracts or summaries of the item of information (or part of it) be disclosed instead of the item of information.

(9) If an application is made under this section the relevant criminal proceedings must be adjourned until the application is disposed of or withdrawn.

(10) In this section and sections (*Application for ancillary orders*: *Secretary of State*) to (*Application for non-attendance order*)—

"relevant court" means the court before which relevant criminal proceedings are taking place,

"relevant criminal proceedings" means criminal proceedings relating to the item of information to which the application under this section relates.>

Kenny MacAskill

654 After section 106, insert—

<**Application for ancillary orders: Secretary of State**

(1) This section applies where the Secretary of State applies for a section (*Order preventing or restricting disclosure: application by Secretary of State*) order.

(2) If the application under section (*Order preventing or restricting disclosure: application by Secretary of State*) relates to solemn proceedings, the Secretary of State may also apply to the relevant court for—

(a) a restricted notification order and a non-attendance order, or

(b) a non-attendance order (but not a restricted notification order).

(3) If the application under section (*Order preventing or restricting disclosure: application by Secretary of State*) relates to summary proceedings, the Secretary of State may also apply to the court for a non-attendance order.

(4) A restricted notification order is an order under section (*Application for restricted notification order and non-attendance order*) prohibiting notice being given to the accused of—

(a) the making of an application for—

(i) the section (*Order preventing or restricting disclosure: application by Secretary of State*) order to which the restricted notification order relates,

(ii) the restricted notification order, and

(iii) a non-attendance order, and

(b) the determination of those applications.

(5) A non-attendance order is an order under section (*Application for non-attendance order*) prohibiting the accused from attending or making representations in proceedings for the determination of the application for the section (*Order preventing or restricting disclosure: application by Secretary of State*) order to which the non-attendance order relates.

(6) Subsection (7) applies where the Secretary of State applies—

(a) by virtue of subsection (2)(a) for a restricted notification order and a non-attendance order, or

(b) by virtue of subsection (2)(a) or (b) for a non-attendance order.

(7) Before determining the application for the section (*Order preventing or restricting disclosure: application by Secretary of State*) order, the court must—

(a) in accordance with section (*Application for restricted notification order and non-attendance order*), determine any application for a restricted notification order and a non-attendance order,

(b) in accordance with section (*Application for non-attendance order*), determine any application for a non-attendance order.>

Kenny MacAskill

655 After section 106, insert—

<Application for restricted notification order and non-attendance order

(1) This section applies where by virtue of section (*Application for ancillary orders*: *Secretary of State*)(2)(a) the Secretary of State applies for a restricted notification order and a non-attendance order.

(2) On receiving the application, the relevant court must appoint a hearing to determine whether a restricted notification order should be made.

(3) The accused is not to be notified of—

(a) the applications for the section (*Order preventing or restricting disclosure: application by Secretary of State*) order, the restricted notification order and the non-attendance order, or

(b) the hearing appointed under subsection (2).

(4) The accused is not to be given the opportunity to be heard or be represented at the hearing.

(5) If, after giving the Secretary of State and the prosecutor an opportunity to be heard, the court is satisfied that the conditions in subsection (6) are met, the court may make a restricted notification order.

(6) Those conditions are—

(a) that disclosure to the accused of the making of the application for the section (*Order preventing or restricting disclosure: application by Secretary of State*) order would be likely to cause a real risk of substantial harm or damage to the public interest, and

(b) that, having regard to all the circumstances, the making of a restricted notification order would be consistent with the accused's receiving a fair trial.

(7) If the court makes a restricted notification order, it must also make a non-attendance order.

(8) If the court refuses to make a restricted notification order, the court must appoint a hearing to determine the application for a non-attendance order.

(9) If after giving the Secretary of State, the prosecutor and, subject to subsection (10), the accused an opportunity to be heard, the court is satisfied that the conditions in subsection (5) of section (*Application for non-attendance order*) are met, the court may make a non-attendance order under subsection (4) of that section.

(10) On the application of the Secretary of State the court may exclude the accused from the hearing appointed under subsection (8).>

Kenny MacAskill

656 After section 106, insert—

<**Application for non-attendance order**

(1) This section applies where by virtue of section (*Application for ancillary orders: Secretary of State*)(2)(b) the Secretary of State applies for a non-attendance order (but not a restricted notification order).

(2) On receiving the application, the relevant court must appoint a hearing.

(3) On the application of the Secretary of State the court may exclude the accused from the hearing.

(4) If after giving the Secretary of State, the prosecutor and, if not excluded under subsection (3), the accused an opportunity to be heard the court is satisfied that the conditions in subsection (5) are met, the court may make a non-attendance order.

(5) Those conditions are—

(a) that disclosure to the accused of the nature of the information to which the application for the section (*Order preventing or restricting disclosure: application by Secretary of State*) order relates would be likely to cause a real risk of substantial harm or damage to the public interest, and

(b) that, having regard to all the circumstances, the making of a non-attendance order would be consistent with the accused's receiving a fair trial.>

Section 107

Kenny MacAskill

657 In section 107, page 116, leave out lines 6 and 7 and insert—

<( ) an application for an exclusion order,

( ) an application for a section 106 order,

( ) an application for a restricted notification order,

( ) an application for a non-attendance order,

( ) an application for a section (*Order preventing or restricting disclosure: application by Secretary of State*) order,>

Kenny MacAskill

658 In section 107, page 116, line 11, leave out <to whom the application, review or appeal relates> and insert <in relation to the determination of the application, review or appeal>

Kenny MacAskill

659 In section 107, page 116, line 14, at end insert—

<( ) Before deciding whether to appoint special counsel in a non-notification case, the court—

(a) must give the prosecutor an opportunity to be heard, but

(b) must not give the accused an opportunity to be heard.

( ) Before deciding whether to appoint special counsel in a restricted notification case, the court—

(a) must give the prosecutor and the Secretary of State an opportunity to be heard,

(b) must not give the accused an opportunity to be heard.

( ) Before deciding whether to appoint special counsel in any case other than a non-notification case or a restricted notification case, the court must give all the parties an opportunity to be heard.

( ) The prosecutor may appeal to the High Court against a decision of the court not to appoint special counsel in any case.

( ) The Secretary of State may appeal to the High Court against a decision of the court not to appoint special counsel in a restricted notification case.

( ) The accused may appeal to the High Court against a decision not to appoint special counsel in any case other than a non-notification case or a restricted notification case.

( ) In this section and section (*Role of special counsel*)—

"non-notification case" means a case where the court is determining—

(a) an application for a non-notification order,

(b) an application for review of the grant or refusal of a non-notification order,

(c) an appeal relating to such an order,

"restricted notification case" means a case where the court is determining—

(a) an application for a restricted notification order,

(b) an application for review of the grant or refusal of a restricted notification order,

(c) an appeal relating to such an order.>

After section 107

Kenny MacAskill

660 After section 107, insert—

<**Persons eligible for appointment as special counsel**

The court may appoint a person as special counsel under section 107(2) only if the person is a solicitor or advocate.>

Kenny MacAskill

661 After section 107, insert—

<**Role of special counsel**

(1) Special counsel's duty is, in relation to the determination of the relevant application or appeal, to act in the best interests of the accused with a view only to ensuring that the accused receives a fair trial.

(2) Special counsel—

(a) is entitled to see the confidential information, but

(b) must not disclose any of the confidential information to the accused or the accused's representative (if any).

(3) Special counsel appointed in a non-notification case or a restricted notification case must not—

(a) disclose to the accused or the accused's representative (if any) the making of the relevant application or appeal, or

(b) otherwise communicate with the accused or the accused's representative (if any) about the relevant application or appeal.

(4) Special counsel appointed in any case other than a non-notification case or a restricted notification case must not communicate with the accused about the relevant application or appeal except—

(a) with the permission of the court, and

(b) where permission is given, in accordance with such conditions as the court may impose.

(5) Before deciding whether to grant permission, the court must give—

(a) the prosecutor, and

(b) in the case of an application for a section (*Order preventing or restricting disclosure: application by Secretary of State*) order or a non-attendance order, the Secretary of State,

an opportunity to be heard.

(6) In this section—

"the confidential information" means—

(a) the information to which the relevant application or appeal relates, and

(b) a copy of the relevant application or appeal,

"relevant application or appeal" means the application or appeal referred to in section 107(1) in respect of which special counsel is appointed.>

Kenny MacAskill

662 After section 107, insert—

<Appeals

(1) The prosecutor may appeal to the High Court against—

- (a) the making of a section 106 order under section 106(4B),
- (b) the making of a section (*Order preventing or restricting disclosure: application by Secretary of State)* order,
- (c) the making of a restricted notification order,
- (d) the making of a non-attendance order,
- (e) the refusal of an application for a non-notification order,
- (f) the refusal of an application for an exclusion order, or
- (g) the refusal of an application for a section 106 order.

(2) The accused may appeal to the High Court against the making of—

- (a) an exclusion order under section 105(3),
- (b) a section 106 order,
- (c) a section (*Order preventing or restricting disclosure: application by Secretary of State)* order, or
- (d) a non-attendance order.

(3) The Secretary of State may appeal to the High Court against—

- (a) the making of a section (*Order preventing or restricting disclosure: application by Secretary of State)* order under section (*Order preventing or restricting disclosure: application by Secretary of State)*(7),
- (b) the refusal of an application for a restricted notification order,
- (c) the refusal of an application for a non-attendance order, or
- (d) the refusal of an application for a section (*Order preventing or restricting disclosure: application by Secretary of State)* order.

(4) If special counsel was appointed in relation to an application for a non-notification order, special counsel may appeal to the High Court against the making of—

- (a) the non-notification order, or
- (b) a section 106 order in relation to the same item of information.

(5) If special counsel was appointed in relation to an application for a restricted notification order, special counsel may appeal to the High Court against the making of—

- (a) the restricted notification order, or
- (b) a section (*Order preventing or restricting disclosure: application by Secretary of State)* order in relation to the same item of information.

(6) An appeal must be lodged not later than 7 days after the decision appealed against.

(7) The prosecutor is entitled to be heard in any appeal under this section.

(8) The accused is entitled to be heard in an appeal under—

- (a) subsection (1)(a) or (g) or (2)(b) unless—
    - (i) a non-notification order has been made, or
    - (ii) an exclusion order has been made,

(b) subsection (1)(b), (2)(c) or (3)(a) or (d) unless—

  (i) a restricted notification order has been made, or

  (ii) a non-attendance order has been made,

(c) subsection (1)(d), (2)(d) or (3)(c) unless the court, on the application of the Secretary of State, excludes the accused from the hearing,

(d) subsection (1)(f) or (2)(a) unless the court, on the application of the prosecutor excludes the accused from the hearing.

(9) The Secretary of State is entitled to be heard in an appeal under subsection (1)(b), (c) or (d), (2)(c) or (d) or (5).>

Section 108

Kenny MacAskill

663 Leave out section 108

Section 109

Kenny MacAskill

664 Leave out section 109

Section 110

Kenny MacAskill

665 Leave out section 110

Section 111

Kenny MacAskill

666 In section 111, page 116, line 35, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

667 In section 111, page 117, line 3, leave out from <, and> to end of line 6

Bill Aitken

165 In section 111, page 117, line 6, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Kenny MacAskill

668 In section 111, page 117, line 7, after <be,> insert <special counsel or>

Kenny MacAskill

669 In section 111, page 117, line 8, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

670 In section 111, page 117, line 10, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

671 In section 111, page 117, line 13, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

672 In section 111, page 117, line 16, after <prosecutor> insert <or, as the case may be, special counsel>

Kenny MacAskill

673 In section 111, page 117, line 19, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

674 In section 111, page 117, line 22, after <prosecutor> insert <or, as the case may be, special counsel>

Kenny MacAskill

675 In section 111, page 117, line 26, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

676 In section 111, page 117, line 27, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

677 In section 111, page 117, line 29, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

678 In section 111, page 117, line 33, leave out <non-disclosure> and insert <section 106>

After section 111

Kenny MacAskill

679 After section 111, insert—

<**Review of section (*Order preventing or restricting disclosure: application by Secretary of State*) order**

(1) This section applies where—

(a) the court makes a section (*Order preventing or restricting disclosure: application by Secretary of State*) order, and

(b) during the relevant period the Secretary of State, the prosecutor, special counsel or the accused becomes aware of information that was unavailable to the court at the time when the order was made.

(2) The Secretary of State or, as the case may be, the prosecutor, special counsel or the accused may apply to the court to review the order.

(3) Except in the case mentioned in subsection (4), the same persons are entitled to be heard on the application for review as were entitled to be heard on the application for the order.

(4) If—

(a) a restricted notification order was granted in relation to the order which is under review, and

(b) the court is satisfied that the conditions in section (*Application for restricted notification order and non-attendance order*)(6) are met,

the court may, where the Secretary of State or, as the case may be, the prosecutor or special counsel applies for the review, make an order prohibiting notification of the application for review being given to the accused.

(5) If—

(a) a non-attendance order was granted in relation to the order which is under review, and

(b) the court is satisfied that the conditions in section (*Application for non-attendance order*)(5) are met,

the court may, where the Secretary of State or, as the case may be, the prosecutor, special counsel or the accused applies for the review, exclude the accused from the review.

(6) If the court is not satisfied that the conditions mentioned in section (*Order preventing or restricting disclosure: application by Secretary of State*)(4) are met, the court may—

(a) recall the order which is under review, or

(b) recall the order which is under review and make an order requiring the information to be disclosed or partly disclosed to the accused in the specified manner.

(7) Nothing in this section affects any right of appeal in relation to the order which is under review.

(8) In this section—

“specified” means specified in the order of the court,

“the relevant period”, in relation to an accused, means the period—

(a) beginning with the making of the section (*Order preventing or restricting disclosure: application by Secretary of State*) order, and

(b) ending with the conclusion of the proceedings against the accused.>

Section 112

Kenny MacAskill

680 In section 112, page 118, line 6, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

681 In section 112, page 118, line 6, after <order> insert <or a section (*Order preventing or restricting disclosure: application by Secretary of State*) order>

Kenny MacAskill

682 In section 112, page 118, line 7, after <consider> insert <in relation to each order>

Kenny MacAskill

683 In section 112, page 118, line 8, leave out <non-disclosure order> and insert <order concerned>

Kenny MacAskill

684 In section 112, page 118, line 10, leave out <non-disclosure order> and insert <order concerned>

Kenny MacAskill

685 In section 112, page 118, line 12, leave out <90(4)> and insert <111(8)>

Section 113

Kenny MacAskill

686 In section 113, page 118, line 21, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

687 In section 113, page 118, line 30, leave out <non-disclosure> and insert <section 106>

After section 115

Kenny MacAskill

688* After section 115, insert—

<**Abolition of common law rules about disclosure**

(1) The provisions of this Part replace any equivalent common law rules about disclosure of information by the prosecutor in connection with criminal proceedings.

(2) The common law rules about disclosure of information by the prosecutor in connection with criminal proceedings are abolished in so far as they are replaced by or are inconsistent with the provisions of this Part.

(3) Sections (*Application by accused for ruling on disclosure*) and (*Application by appellant for ruling on disclosure*) do not affect any right under the common law of an accused or appellant to seek disclosure or recovery of information by or from the prosecutor by means of a procedure other than an application under one or other of those sections.

(4) Subsection (5) applies where, following an application (the "earlier disclosure application") by the accused or the appellant under section (*Application by accused for ruling on disclosure*) or section (*Application by appellant for ruling on disclosure*), the court has made a ruling that (as the case may be)—

(a) section 89(3) does not apply to information, or

(b) information does not fall within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(5) The accused or, as the case may be, the appellant, is not entitled to seek the disclosure or recovery of the same information by or from the prosecutor by means of any other procedure at common law on grounds that are substantially the same as any of those on which the earlier disclosure application was made.

(6) Subsection (7) applies where, following an application (the "earlier common law application") by the accused under a procedure other than an application under section (*Application by accused for ruling on disclosure*) or (*Application by appellant for ruling on disclosure*), the court has decided not to make an order for the recovery or disclosure of information by or from the prosecutor.

(7) The accused or, as the case may be, the appellant is not entitled to make an application under section (*Application by accused for ruling on disclosure*) or (*Application by appellant for ruling on disclosure*) in relation to the same information on grounds that are substantially the same as any of those on which the earlier common law application was made.

(8) In this section, "appellant" has the meaning given by section (*Sections* **(***Duty to disclose after conclusion of proceedings at first instance*) *to* (*Review of ruling under section* (*Application by appellant for ruling on disclosure*)): *interpretation*).>

Section 116

Kenny MacAskill

689 In section 116, page 119, line 20, leave out from <"prosecutor"> to end of line 21 and insert—

<"investigating agency" has the meaning given by section (*Provision of information to prosecutor*: *solemn cases*)(4),

"procurator fiscal" and "prosecutor" have the meanings given by section 307(1) of the 1995 Act.>

Kenny MacAskill

690 In section 116, page 119, line 24, leave out <89(5) and (6),> and insert <89(2)(b),

( ) section (*Disclosure of other information*: *solemn cases*)(2),>

Bill Aitken

166 In section 116, page 119, line 24, leave out from <89(5)> to end of line 27 and insert <89(2),

(b) section 90(1) and (2),

(c) section 93(2) (where it first occurs),>

Kenny MacAskill

691 In section 116, page 119, leave out line 26

Kenny MacAskill

692 In section 116, page 119, leave out line 30

Section 117

Angela Constance

24 In section 117, page 120, line 10, at end insert <, or

(b) to determine or control that conduct despite being able to appreciate the nature or wrongfulness of it.>

Kenny MacAskill

167 In section 117, page 120, line 31, leave out <it> and insert <such abnormality>

Section 121

Kenny MacAskill

168 In section 121, page 123, leave out lines 2 and 3 and insert—

<(3A) No order may be made under subsection (1) unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.>

Section 122

Kenny MacAskill

169 In section 122, page 125, line 1, leave out from <5,> to <29> in line 2 and insert <5 and 11>

Section 123

Robert Brown

385 Leave out section 123

After section 124

Kenny MacAskill

170 After section 124, insert—

<**Licensing of street trading: food hygiene certificates**

(1) Section 39 of the 1982 Act (street traders' licences) is amended as follows.

(2) In subsection (4), for the words from "the requirements" to the end substitute "such requirements as the Scottish Ministers may by order made by statutory instrument specify".

(3) After subsection (4), insert—

"(5) An order under subsection (4) may specify requirements by reference to provision contained in another enactment.

(6) A statutory instrument containing an order made under subsection (4) is subject to annulment in pursuance of a resolution of the Scottish Parliament.".>

Section 125

Kenny MacAskill

171 In section 125, page 128, line 24, at beginning insert <In>

Kenny MacAskill

172 In section 125, page 128, line 24, leave out from <is> to <In> in line 26 and insert <, in>

Cathie Craigie

2 In section 125, page 128, line 25, leave out subsection (2)

Cathie Craigie

3 In section 125, page 128, line 26, leave out subsection (3)

Cathie Craigie
Supported by: Robert Brown

4 Leave out section 125

After section 127

Sandra White

516 After section 127, insert—

<**Control of lap dancing and other adult entertainment venues**

(1) The 1982 Act is amended as follows.

(2) In section 41(2) (definition of place of public entertainment), after paragraph (aa) insert—

"(ab) adult entertainment venues (as defined in section 45A) in relation to which Schedule 2 (as modified for the purposes of that section) have effect, while being used as such;".

(3) The title of Part 3 becomes "Control of sex shops and adult entertainment venues".

(4) After section 45 insert—

“45A Control of lap dancing and other adult entertainment venues

(1) A local authority may resolve that Schedule 2, as modified for the purposes of this section, is to have effect in their area in relation to adult entertainment venues; and, if they do so resolve, that Schedule (as so modified) has effect from the day specified in the resolution.

(2) The day referred to in subsection (1) must not be before the expiry of the period of one month beginning with the day on which the resolution is passed.

(3) A local authority must, not later than 28 days before the day referred to in subsection (1), publish notice that they have passed a resolution under this section in a newspaper circulating in their area.

(4) The notice is to state the general effect of Schedule 2, as modified for the purposes of this section.

(5) For the purposes of this section, Schedule 2 is modified as follows—

(a) in paragraph 1, sub-paragraphs (b)(ii) (and the word “or” immediately preceding it) and (c) are omitted;

(b) for paragraph 2 substitute—

“2 In this Schedule, “adult entertainment venue” has the same meaning as in section 45A.”;

(c) in paragraph 9—

(i) after sub-paragraph (5)(c) insert—

“(ca) where it is intended to sell alcohol in the adult entertainment venue, an application for the grant, renewal or transfer of a premises licence under Part 3 of the Licensing (Scotland) Act 2005 (asp 16) relating to that venue has been refused;”; and

(ii) after sub-paragraph (6) insert—

“(6A) A local authority may refuse an application for the grant or renewal of a licence despite the fact that a premises licence under Part 3 of the Licensing (Scotland) Act 2005 (asp 16) is in effect in relation to the adult entertainment venue.”;

(d) in paragraph 25, for “section 45” in each place where those words occur, substitute “section 45A”; and

(e) for “sex shop”, in each place where those words occur, substitute “adult entertainment venue”.

(6) In this section, “adult entertainment venue” means any premises, vehicle, vessel or stall used for a business which consists to a significant degree of providing relevant entertainment before a live audience; and, for the purposes of that definition—

“audience” includes an audience of one;

“display of nudity” means—

(a) in the case of a woman, exposure of her breasts, nipples, pubic area, genitals or anus;

(b) in the case of a man, exposure of his pubic area, genitals or anus;

"relevant entertainment" means—

(a) any live performance; or

(b) any live display of nudity,

which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means).".>

Section 128

Kenny MacAskill

173 In section 128, page 129, line 25, at end insert—

<( ) in paragraph 2(3)(b), after "application" insert "(other than the date and place of birth of any person)",

( ) in paragraph 2(8)(a), after "application" insert "(other than the date and place of birth of any person)",>

Section 129

Kenny MacAskill

174 Leave out section 129

After section 130

Bill Aitken

460 After section 130, insert—

<**Premises licence applications: crime prevention objective**

In section 23(5) of the 2005 Act (grounds for refusal of premises licence application), after paragraph (b), insert—

"(ba) that the appropriate chief constable has made a recommendation under section 21(5) that the application be refused,".>

After section 131

Kenny MacAskill

175 After section 131, insert—

<**Reviews of premises licences: notification of determinations**

(1) The 2005 Act is amended as follows.

(2) After section 39 (Licensing Board's powers on review), insert—

"**39A Notification of determinations**

(1) Where a Licensing Board, at a review hearing—

(a) decides to take one of the steps mentioned in section 39(2), or

(b) decides not to take one of those steps,

the Board must give notice of the decision to each of the persons mentioned in subsection (2).

(2) The persons referred to in subsection (1) are—

(a) the holder of the premises licence, and

(b) where the decision is taken in connection with a premises licence review application, the applicant.

(3) Where subsection (1)(a) applies, the holder of the premises licence may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(4) Where—

(a) subsection (1)(a) or (b) applies, and

(b) the decision is taken in connection with a premises licence review application,

the applicant may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(5) Where the clerk of a Board receives a notice under subsection (3) or (4), the Board must issue a statement of the reasons for the decision to—

(a) the person giving the notice, and

(b) any other person to whom the Board gave notice under subsection (1).

(6) A statement of reasons under subsection (5) must be issued—

(a) by such time, and

(b) in such form and manner,

as may be prescribed.”.>

After section 132

George Foulkes

542 After section 132, insert—

<**Premises licence applications: disability compliance statements**

In section 20 of the 2005 Act (application for premises licence), after subsection (4)(f), insert—

“(fa) a statement of compliance with Part 3 of the Disability Discrimination Act 1995, including information as to where reasonable adjustments have been or will be made to remove barriers to access for disabled people,”.>

Bill Aitken

547 After section 132, insert—

<**Premises licence: minor variations**

(1) Section 29(6) of the 2005 Act (definition of minor variations to premises licence) is amended as follows.

(2) In paragraph (a), insert at the end "or if the variation relates only to parts of the premises to which the public does not have access".

(3) After paragraph (c) insert—

"(ca) any reduction in the capacity of the premises,

(cb) any change in the name by which the business carried on in the premises is to be known or under which it trades,

(cc) any variation of the layout plan or operating plan required by virtue of any enactment relating to planning, building control, food safety or fire safety,".>

Robert Brown

550 After section 132, insert—

<**Premises licence: transfer on application of person other than licence holder**

(1) Section 34 (transfer on application of person other than licence holder) of the 2005 Act is amended as follows.

(2) In subsection (3)—

(a) the word "and" immediately preceding paragraph (d) is repealed, and

(b) after that paragraph insert ", and

"(e) for any other reason, the business that was (prior to the event in question) carried on in the licensed premises to which the licence relates ceases to be carried on in those premises.".

(3) In subsection (4), insert at the beginning "Subject to subsection (4A),".

(4) After that subsection insert—

"(4A) In the case of an application made following the event specified in subsection (3)(e)—

(a) subsection (8) of section 33 applies as if, after the words "the Board must" there were inserted ", if satisfied in all the circumstances that it is reasonable to do so,", and

(b) subsection (10)(b) of that section applies as if, after the words "if not so satisfied," there were inserted "but otherwise satisfied that in all the circumstances it is reasonable to do so.".>

Kenny MacAskill

693 After section 132, insert—

<**Premises licences: connected persons and interested parties**

(1) The 2005 Act is amended as follows.

(2) After section 40 insert—

"*Connected persons and interested parties*

40A Connected persons and interested parties: licence holder's duty to notify changes

(1) A premises licence holder must, not later than one month after a person becomes or ceases to be—

  (a) a connected person in relation to the licence holder, or

  (b) an interested party in relation to the licensed premises,

give the appropriate Licensing Board notice of that fact.

(2) A notice under subsection (1) that a person has become a connected person or an interested party must specify—

  (a) the name and address of the person, and

  (b) if the person is an individual, the person's date of birth.

(3) Where a Licensing Board receives a notice under subsection (1), the Board must give a copy of the notice to the appropriate chief constable.

(4) A premises licence holder who fails, without reasonable excuse, to comply with subsection (1) commits an offence.

(5) A person guilty of an offence under subsection (4) is liable on summary conviction to a fine not exceeding level 2 on the standard scale.".

(3) In section 48 (notification of change of name or address)—

  (a) in subsection (1)—

    (i) the word "or" immediately following paragraph (a) is repealed, and

    (ii) after paragraph (b) insert ", or

      (c) the name or address of any person who is—

        (i) a connected person in relation to the licence holder, or

        (ii) an interested party in relation to the licensed premises,",

  (b) after subsection (2) insert—

  "(2A) Where a Licensing Board receives a notice under subsection (1), the Board must give a copy of the notice to the appropriate chief constable.".

(4) In section 147 (interpretation), after subsection (4) insert—

  "(5) For the purposes of this Act, a person is an interested party in relation to licensed premises if the person is not the holder of the premises licence nor the premises manager in respect of the premises but—

    (a) has an interest in the premises as an owner or tenant, or

    (b) has management and control over the premises or the business carried on on the premises.".

(5) In section 148 (index of defined expressions), in the table, insert at the appropriate place—

"interested party section 147(5).".>

Robert Brown

543 After section 132, insert—

<**Provisional premises licences**

(1) Section 45 (provisional premises licence) of the 2005 Act is amended as follows.

(2) In subsection (6), for “2 years” substitute “5 years”.

(3) In subsection (8), paragraph (b) and the word “and” immediately preceding it are repealed.

(4) In subsection (10), for paragraphs (a) and (b) substitute—

“(a) for subsection (2) there were substituted—

“(2) An application under subsection (1) must be accompanied by—

(a) a plan sufficient to identify the site of the subject premises and give a general indication of their size,

(b) a document giving a general indication of—

(i) the anticipated capacity of the premises,

(ii) the hours during which it is proposed to serve alcohol on the premises,

(iii) the extent to which it is proposed to allow children or young persons entry to the premises, and

(c) the certificate required by section 50(2).”, and

(b) subsections (4) and (5) were omitted.”.

(5) After subsection (10) insert—

“(10A) Sections 21 to 32 have effect in relation to any provisional premises licence application and to any provisional premises licence as if references to—

(a) the operating plan were read as references to the document required under section 20(2)(b) (as substituted by subsection (10)(a)), and

(b) the layout plan were read as references to the plan required under section 20(2)(a) (as so substituted).”.>

Kenny MacAskill

176 After section 132, insert—

<**Premises licence applications: food hygiene certificates**

(1) Section 50 of the 2005 Act (certificates as to planning, building standards and food hygiene) is amended as follows.

(2) In subsection (7), for the words from “the requirements” to the end substitute “such requirements as the Scottish Ministers may, by order, specify.”.

(3) After subsection (7), insert—

“(7A) An order under subsection (7) may specify requirements by reference to provision contained in another enactment.”.

(4) In subsection (8)(c), for “the 1990 Act” substitute “section 5 of the Food Safety Act 1990 (c.16)”.>

After section 133

Bill Aitken

548 After section 133, insert—

<**Consumption of alcohol on licensed premises outwith licensed hours**

In section 63(2) of the 2005 Act (exceptions to offence of allowing sale, consumption etc. of alcohol outwith licensed hours), after paragraph (f) insert—

"(g) allow alcohol to be consumed on licensed premises at any time within 45 minutes of the end of any period of licensed hours by—

(i) the premises licence holder,

(ii) the premises manager, or

(iii) any person aged 18 or over who, at the end of that period of licensed hours, was working on the premises.".>

Section 134

Kenny MacAskill

539 In section 134, page 134, line 17, leave out from <after> to end of line 22 and insert <in sub-paragraph (4), after "Board" in the second place where it appears insert "or to a member of staff provided under paragraph 8(1)(b)".>

After section 134

Kenny MacAskill

449 After section 134, insert—

<**Extended hours applications: notification period**

(1) Section 69 of the 2005 Act (notification of extended hours application) is amended as follows.

(2) After subsection (3), add—

"(4) Subsections (5) and (6) apply where the Licensing Board is satisfied that the application requires to be dealt with quickly.

(5) Subsections (2) and (3) have effect in relation to the application as if the references to the period of 10 days were references to such shorter period of not less than 24 hours as the Board may determine.

(6) Subsection (3) has effect in relation to the application as if for the word "must" there were substituted "may".".>

Section 136

Kenny MacAskill

177 In section 136, page 135, line 3, at end insert—

<"(ba) the notice does not include a recommendation under section 73(4),>

Kenny MacAskill

178 In section 136, page 135, leave out lines 22 to 27 and insert—

<(a) hold a hearing for the purposes of considering and determining the application, and

(b) after having regard to the circumstances in which the personal licence previously held expired or, as the case may be, was surrendered—

(i) refuse the application, or

(ii) grant the application.”.>

After section 137

Kenny MacAskill

179 After section 137, insert—

<**Appeals**

In section 131(2) of the 2005 Act (appeals), the words “by way of stated case, at the instance of the appellant,” are repealed.>

Kenny MacAskill

694 After section 137, insert—

<**Liability for offences**

(1) The 2005 Act is amended as follows.

(2) In each of the following provisions, the word “knowingly” is repealed—

(a) section 1(3)(b),

(b) section 103(1),

(c) section 106(2),

(d) section 107(1),

(e) section 118(1),

(f) section 120(2) and (3),

(g) section 121(1),

(h) section 127(4), and

(i) section 128(5).

(3) After section 141 (offences by bodies corporate etc.) insert—

“**141A Defence of due diligence for certain offences**

(1) It is a defence for a person charged with an offence to which this section applies to prove that the person—

(a) did not know that the offence was being committed, and

(b) exercised all due diligence to prevent the offence being committed.

(2) This section applies to an offence under any of the following provisions of this Act—

section 1(3)(b),

section 103(1),

section 106(2),

section 107(1),

section 118(1),

section 120(2) or (3),

section 121(1),

section 127(4),

section 128(5).

141B Vicarious liability of premises licence holders and interested parties

(1) Subsection (2) applies where, on or in relation to any licensed premises, a person commits an offence to which this section applies while acting as the employee or agent of—

(a) the holder of the premises licence, or

(b) an interested party.

(2) The holder of the premises licence or, as the case may be, the interested party is also guilty of the offence and liable to be proceeded against and punished accordingly.

(3) It is a defence for a holder of a premises licence or an interested party charged with an offence to which this section applies by virtue of subsection (2) to prove that the holder of the licence or, as the case may be, the interested party—

(a) did not know that the offence was being committed by the employee or agent, and

(b) exercised all due diligence to prevent the offence being committed.

(4) Proceedings may be taken against the holder of the premises licence or the interested party in respect of the offence whether or not proceedings are also taken against the employee or agent who committed the offence.

(5) This section applies to an offence under any of the following provisions of this Act—

section 1(3),

section 15(5),

section 63(1),

section 97(7),

section 102(1),

section 103(1),

section 106(2),

section 107(1),

section 108(2) or (3),

section 113(1),

section 114,

section 115(2),

section 118(1),

section 119(1),

section 120(2),

section 121(1),

section 138(5).”.>

Schedule 4

Kenny MacAskill

180 In schedule 4, page 149, line 11, leave out <22(2) or>

Kenny MacAskill

181 In schedule 4, page 150, leave out lines 18 to 21

Section 140

Kenny MacAskill

182 Leave out section 140

Section 142

Kenny MacAskill

183 Leave out section 142

Section 143

Kenny MacAskill

184 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*Mutual recognition of judgments and probation decisions*)(1),>

Kenny MacAskill

540 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*Convictions by courts in other EU member States*)(2),>

Kenny MacAskill

450 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*European evidence warrants*)(1),>

Kenny MacAskill

186 In section 143, page 138, leave out line 33

Kenny MacAskill

187 In section 143, page 138, line 33, at end insert—

<( ) an order under section 146(1) containing provisions which modify any enactment (including this Act), or>

Kenny MacAskill

188 In section 143, page 138, line 34, leave out <146(1) or>

Robert Brown

392 In section 143, page 138, line 35, at end insert <or

( ) an order under section 148(1) bringing into force section 17(1), (2) or (3),>

Robert Brown

549 In section 143, page 138, line 35, at end insert <or

( ) an order under section 148(1) bringing into force section 38(1), (2), (3) or (4),>

Schedule 5

Kenny MacAskill

189 In schedule 5, page 151, line 35, at end insert—

<*The Libel Act 1792 (c.60)*

The Libel Act 1792 is repealed.

The Criminal Libel Act 1819 (c.8)

The Criminal Libel Act 1819 is repealed.

The Defamation Act 1952 (c.66)

In the Defamation Act 1952, section 17(2) is repealed.>

Kenny MacAskill

451 In schedule 5, page 152, line 10, at end insert—

<*The Law Officers Act 1944 (c.25)*

In section 2(3) of the Law Officers Act 1944 (Lord Advocate and Solicitor General for Scotland), for the words from "three" to the end substitute "287 of the Criminal Procedure (Scotland) Act 1995 (c.46)".>

Kenny MacAskill

452 In schedule 5, page 152, line 12, leave out from <In> to <1974> and insert—

<( ) The Rehabilitation of Offenders Act 1974 is amended as follows.

( ) In section 1>

Kenny MacAskill

453 In schedule 5, page 152, line 15, at end insert—

<( ) In section 6(6)(bb) (convictions in service disciplinary proceedings), for "the Schedule" substitute "Schedule 1".

( ) The Schedule (service disciplinary proceedings) is renumbered as Schedule 1.>

Kenny MacAskill

190 In schedule 5, page 152, line 24, at end insert—

<*The Incest and Related Offences (Scotland) Act 1986 (c.36)*

The Incest and Related Offences (Scotland) Act 1986 is repealed.>

Kenny MacAskill

191 In schedule 5, page 153, line 3, after <89> insert <, 111>

Kenny MacAskill

192 In schedule 5, page 153, line 3, at end insert—

<*The Trade Union and Labour Relations (Consolidation) Act 1992 (c.52)*

In section 243(4)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 (restriction of offence of conspiracy: Scotland), the words "or sedition" are repealed.>

Kenny MacAskill

193 In schedule 5, page 153, line 12, at end insert—

<*The Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40)*

In Schedule 4 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (minor and consequential amendments), in paragraph 44, sub-paragraph (2) is repealed.>

Kenny MacAskill

386 In schedule 5, page 153, line 35, at end insert—

<In section 11 (certain offences committed outside Scotland)—

(a) in subsection (3), for "proceeded against, indicted" substitute "prosecuted",

(b) in subsection (4), for "dealt with, indicted" substitute "prosecuted".>

Kenny MacAskill

454 In schedule 5, page 153, line 35, at end insert—

<In section 17A (right of person accused of sexual offence to be told about restriction on conduct of defence: arrest), in subsection (1)—

(a) for paragraphs (za) and (a) substitute—

“(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,”, and

(b) in paragraph (c), for the words from “preliminary” to “trial” substitute “hearing”.>

Kenny MacAskill

512 In schedule 5, page 153, line 35, at end insert—

<In section 18(8)(c) (power to take prints etc. under authority of a warrant unaffected by section), for “prints, impressions” substitute “relevant physical data”.

In section 19(1)(b) (samples etc. taken from person convicted of offence), the words “impression or”, in both places where they occur, are repealed.>

Kenny MacAskill

513 In schedule 5, page 154, line 4, at end insert—

<Section 20 (use of prints, samples etc.) is repealed.>

Kenny MacAskill

514 In schedule 5, page 154, line 5, at end insert—

<In section 23A (bail and liberation where person already in custody)—

(a) in each of subsections (1) and (4), for “23 or 65(8C)” substitute “23, 65(8C) or 107A(2)(b)”, and

(b) in subsection (3), for “22A(3) or 23(7)” substitute “22A(3), 23(7) or 107A(2)(b)”.>

Kenny MacAskill

455 In schedule 5, page 154, line 5, at end insert—

<In section 35 (judicial examination), in subsection (4A)—

(a) for paragraphs (za) and (a) substitute—

“(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,”, and

(b) in paragraph (c), for the words from “preliminary” to “trial” substitute “hearing”.>

Kenny MacAskill

456 In schedule 5, page 154, line 42, at end insert—

<In section 66 (service and lodging of indictment etc.), in subsection (6A)(a)—

(a) for sub-paragraphs (zi) and (i) substitute—

"(i) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings (including at any commissioner proceedings) may be conducted only by a lawyer,", and

(b) in sub-paragraph (iii), for the words from "preliminary" to "trial" substitute "hearing".

In section 71 (first diet)—

(a) in subsection (A1), for the words "his defence at the trial" substitute "the conduct of his case at any relevant hearing in the course of the proceedings",

(b) in subsection (B1)(c), for the words "before the trial diet" substitute "in relation to any hearing in the course of the proceedings",

(c) in subsection (1A)(a), for "the trial" substitute "any hearing in the course of the proceedings",

(d) in subsection (1B)(a), for "the trial" substitute "any hearing in the course of the proceedings",

(e) in subsection (5A)(b), for the words "his defence at the trial" substitute "the conduct of his case at any relevant hearing in the course of the proceedings", and

(f) after subsection (7), insert—

"(7A) In subsections (A1) and (5A)(b), "relevant hearing" means—

(a) in relation to proceedings mentioned in paragraph (a) of subsection (B1), any hearing at, or for the purposes of, which a witness is to give evidence,

(b) in relation to proceedings mentioned in paragraph (b) of that subsection, a hearing referred to in section 288E(2A),

(c) in relation to proceedings mentioned in paragraph (c) of that subsection, a hearing in respect of which an order is made under section 288F.".>

Kenny MacAskill

457 In schedule 5, page 155, line 3, at end insert—

<In section 79 (preliminary pleas and preliminary issues), in subsection (2)(b)(ii), after "under section" insert "22ZB(3)(b),".>

Kenny MacAskill

458 In schedule 5, page 155, line 23, at end insert—

<In section 140 (citation), in subsection (2A)—

(a) for paragraph (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings (including at any commissioner proceedings) may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words “his defence at the trial” substitute “the conduct of his case at, or for the purposes of, the hearing”.

In section 144 (procedure at first diet), in subsection (3A)—

(a) for paragraph (a) substitute—

“(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,”, and

(b) in paragraph (c), for the words “his defence at the trial” substitute “the conduct of his case at, or for the purposes of, the hearing”.

In section 146 (plea of not guilty), in subsection (3A)—

(a) for paragraph (a) substitute—

“(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,”, and

(b) in paragraph (c), for the words “his defence at the trial” substitute “the conduct of his case at, or for the purposes of, the hearing”.>

Kenny MacAskill

414 In schedule 5, page 155, line 31, leave out paragraphs 35 to 39

Kenny MacAskill

515 In schedule 5, page 157, line 8, at end insert—

<*The Offensive Weapons Act 1996 (c.26)*

In the Offensive Weapons Act 1996, section 5 is repealed.>

Kenny MacAskill

194 In schedule 5, page 157, line 8, at end insert—

<*The Defamation Act 1996 (c.31)*

In the Defamation Act 1996, section 20(2) is repealed.>

Kenny MacAskill

195 In schedule 5, page 157, line 10, leave out paragraph 44 and insert—

<(1) The Crime and Punishment (Scotland) Act 1997 is amended as follows.

(2) In section 9 (power to specify hospital unit), in subsection (1)(a), for “insane” substitute “found not criminally responsible or unfit for trial”.

(3) In section 13 (increase in sentences available to sheriff and district courts), subsection (2) is repealed.

(4) In section 56 (powers of the court on remand or committal of children and young persons), subsection (3) is repealed.>

Kenny MacAskill

196 In schedule 5, page 157, line 28, at end insert—

<*The Legal Deposit Libraries Act 2003 (c.28)*

Section 10 of the Legal Deposit Libraries Act 2003 (exemption from liability: activities in relation to publications) is amended as follows—

(a) in subsection (1), the words “, or subject to any criminal liability,” are repealed,

(b) in subsection (2)(a), the words “in the case of liability in damages” are repealed,

(c) in subsection (3), the words “, or subject to any criminal liability,” are repealed,

(d) in subsection (4)(a), the words “in the case of liability in damages” are repealed,

(e) in subsection (6)(a), the words “, or subject to any criminal liability,” are repealed, and

(f) in subsection (8), the words “and criminal liability” are repealed.>

Kenny MacAskill

459 In schedule 5, page 157, line 36, at end insert—

<*The Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5)*

In the Criminal Procedure (Amendment) (Scotland) Act 2004 the following provisions are repealed—

(a) in section 4 (prohibition on accused conducting case in person in certain cases), subsection (4),

(b) section 17 (bail conditions: remote monitoring of restrictions on movements), and

(c) in the schedule (further modifications of the 1995 Act), paragraph 55.>

Kenny MacAskill

695 In schedule 5, page 158, line 32, at end insert—

<In section 74 (appointment of stipendiary magistrates), subsection (6) is repealed.

After section 74 insert—

“**74A Exercise of functions by stipendiary magistrates**

(1) A stipendiary magistrate may, by reason of holding that office—

(a) exercise the same judicial and signing functions as are exercisable by a JP,

(b) do so in the same manner as a JP (including by using the title of office of JP).

(2) For the purpose of subsection (1)—

(a) the acts of a stipendiary magistrate are valid as if the magistrate were a JP,

(b) it does not matter if an enactment from which a JP derives authority to act in a specific case does not bear to give equivalent authority to a stipendiary magistrate.

(3) However, subsections (1) and (2) are subject to any provision of an enactment which expressly excludes a stipendiary magistrate from acting in a specific case.

(4) This section does not limit any other functions of a stipendiary magistrate (in particular, those exercisable in that capacity only).”.

In section 76 (signing functions)—

(a) in subsection (2), for “signing functions in the same manner as” substitute “the same signing functions as are exercisable by”,

(b) subsection (4) is repealed.>

Kenny MacAskill

197 In schedule 5, page 158, line 36, at end insert <and

(ii) sub-paragraph (b) is repealed.>

Kenny MacAskill

387 In schedule 5, page 159, line 12, at end insert—

<*The Sexual Offences (Scotland) Act 2009 (asp 9)*

In section 55(7) of the Sexual Offences (Scotland) Act 2009 (offences committed outside the United Kingdom), for “proceeded against, indicted” substitute “prosecuted”.>

Kenny MacAskill

198 In schedule 5, page 159, line 14, leave out <134> and insert <156>

Criminal Justice and Licensing (Scotland) Bill

5th Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- a list of any amendments already debated;
- the text of amendments to be debated on the fifth day of Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

Children – age of criminal responsibility and minimum age of prosecution
379, 126, 127, 389, 549

Notes on amendments in this group
Amendment 379 pre-empts amendments 126 and 127

Offences – liability of partners
128, 129

Witness statements
130, 131

Victims' representation at Parole Board hearings
403

Convictions in other UK or EU jurisdictions
518, 519, 520, 521, 522, 540

Power of sheriff or JP to grant warrants to police based outside sheriffdom
420

Bail conditions – remote monitoring requirements
132, 197

Prosecution on indictment – Scottish Law Officers
421, 422, 423, 424, 425, 426, 427, 451

Dockets and charges in sex cases
428

Remand and committal of children and young persons
541

Prohibition of personal conduct of case by accused
429, 454, 455, 456, 458, 459

Crown appeals
462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 514

Retention of samples etc. – adults
478, 404, 405, 479, 406, 480, 407, 481, 482, 408, 494, 499, 502, 503, 504, 512, 513

> *Notes on amendments in this group*
> Amendment 478 pre-empts amendment 404

Retention of samples etc. – alternatives to prosecution
418, 419

Retention of samples etc. – children referred to children's hearings
409, 410, 380, 483, 484, 545, 381, 485, 486, 411, 546, 487, 488, 489, 490, 491, 492, 382, 493, 412

> *Notes on amendments in this group*
> Amendment 410 pre-empts amendments 380, 483, 484 and 545
> Amendment 380 pre-empts amendments 483 and 484
> Amendment 411 pre-empts amendments 546, 487, 488, 489, 490, 491, 492 and 382
> Amendment 492 pre-empts amendment 382
> Amendment 493 pre-empts amendment 412

Use of samples etc.
495, 496, 497, 498, 500, 501, 505, 506, 507, 508, 509, 510

Scottish Criminal Cases Review Commission – grounds for appeal
133, 134, 135

Prior statements by witnesses – abolition of competence test
430

Witness statements – use during trial
383

Child witnesses in proceedings for people trafficking offences
384

Witness anonymity orders
431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441

European evidence warrants
442, 450

Jurors in criminal trials
443, 415, 416, 511, 417

Data matching for detection of fraud etc.
136, 137

Collection of information on criminal injuries
551

Closure of premises associated with human exploitation etc. (minor corrections etc.)
138, 139, 140, 141, 142, 144, 198

Foreign travel orders – surrender of passports
444, 445, 446

Sex offender notification requirements
145

Risk of sexual harm orders – spent convictions
146

Police and SCDEA – authorisation of surveillance
523, 524, 525, 526, 527, 528

Police and SCDEA – authorisation of interference with property
529, 530, 531, 532, 533, 534, 535, 536

Enhanced criminal record certificates: disclosure of sex offender notification requirements
537, 538

Rehabilitation of offenders – spent alternatives to prosecution
447, 452, 453

Medical services in prisons
448

Assistance for victim support
413

Disclosure - meaning of “information”
696, 553, 697, 555, 556

Provision of information to prosecutor
557, 558, 559, 560, 561, 562, 563, 564, 565, 689

Prosecutor’s duty to disclose information
566, 567, 147, 148, 568, 569, 570, 571, 572, 149, 573, 574, 150, 575, 151, 576, 152, 577, 578, 579, 153, 580, 581, 154, 582, 155, 583, 156, 157, 606, 158, 607, 617, 159, 619, 160, 161, 162, 163, 164, 165, 690, 166, 691

> *Notes on amendments in this group*
> Amendment 148 pre-empts amendments 568, 569, 570 and 571
> Amendment 572 and amendment 149 are direct alternatives
> Amendment 574 pre-empts amendment 150
> Amendment 575 pre-empts amendment 151
> Amendment 576 pre-empts amendment 152
> Amendment 579 pre-empts amendment 153
> Amendment 581 pre-empts amendment 154
> Amendment 606 and amendment 158 are direct alternatives
> Amendment 617 and amendment 159 are direct alternatives
> Amendment 619 and amendment 160 are direct alternatives
> Amendment 624 and amendment 162 are direct alternatives
> Amendment 626 in group (Application to court – orders preventing or restricting disclosure) pre-empts amendment 163 in this group
> Amendment 646 in group (Application to court – orders preventing or restricting disclosure) and amendment 164 in this group are direct alternatives
> Amendment 667 in group (Appeals against disclosure orders etc.) pre-empts amendment 165 in this group
> Amendment 690 pre-empts amendment 166
> Amendment 166 pre-empts amendment 691

Defence statements
584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 611, 624

Court rulings on disclosure
603, 604, 605, 615, 616

Disclosure – application to appellate proceedings
608, 609, 610, 612, 613, 614

Means of disclosure
618

Confidentiality of disclosed information and disclosure to third party
620, 621, 622, 623, 692

Application to court – orders preventing or restricting disclosure
625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 666, 669, 670, 671, 673, 675, 676, 677, 678, 680, 686, 687

Orders preventing or restricting disclosure - applications by Secretary of State
653, 654, 655, 656, 679, 681, 682, 683, 684, 685

Disclosure – appointment of special counsel
657, 658, 659, 660, 661, 668, 672, 674

Appeals against disclosure orders etc.
662, 663, 664, 665, 667

Abolition of common law rules on disclosure
688

Mental disorder and unfitness for trial
24, 167, 195

Conditions to which licences under the 1982 Act are to be subject
168

Licensing – powers of entry etc. (definition of "authorised civilian employee")
169

Licensing of metal dealers
385

Licensing of street trading – food hygiene certificates
170

Licensing of market operators
171, 172, 2, 3, 4

> *Notes on amendments in this group*
> Amendment 172 pre-empts amendments 2 and 3

Control of lap dancing and other adult entertainment venues
516

Applications for licences
173

Provisions to be considered as part of the Alcohol (Scotland) Bill
174, 182, 186

Premises licence applications
460, 542, 176, 180

Reviews of premises licences – notification of determinations
175

Premises licence – minor variations
547

Premises licence – transfer
550

Premises licences – connected persons and interested parties
693

Provisional premises licences
543

Consumption of alcohol on licensed premises outwith licensed hours
548

Occasional licences
539

Extended hours applications – notification period
449

Personal licence applications
177, 178, 181

Appeals against decisions of licensing board
179

Liability for offences under 2005 Act
694

Corruption in public bodies
183

Orders and regulations – circumstances in which affirmative procedure required
187, 188

Incest and related offences
190

Criminal law – revision
191, 193

Breach of undertakings – consequential modification
457

Exercise of functions by stipendiary magistrates
695

Amendments already debated

Community payback orders – consequential modifications
With 342 – 414

Slavery, servitude and forced or compulsory labour
With 112 – 143

Mutual recognition of judgments and probation decisions
With 105 – 184

Presumption against short periods of imprisonment or detention
With 100 – 392, 393

Abolition of offences of sedition and leasing-making
With 114 – 189, 192, 194, 196

People trafficking (and consequential provision)
With 371 – 386, 387

Clarification of existing offence prohibiting the carrying of offensive weapons
With 109 – 515

JUSTICE COMMITTEE

EXTRACT FROM THE MINUTES

14th Meeting, 2010 (Session 3)

Tuesday 27 April 2010

Present:

Bill Aitken (Convener)	Robert Brown
Bill Butler (Deputy Convener)	Angela Constance
Cathie Craigie	Nigel Don
James Kelly	Stewart Maxwell

Also present: Richard Baker, Margaret Curran and David McLetchie.

Criminal Justice and Licensing (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 5).

The following amendments were agreed to (without division): 128, 129, 130, 518, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 519, 520, 521, 522, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 479, 480, 481, 418, 419, 483, 484, 487, 488, 489, 490, 491, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 133, 134, 135, 430, 384, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443 and 511.

The following amendments were agreed to (by division):

132 (For 5, Against 3, Abstentions 0)
478 (For 5, Against 3, Abstentions 0)
482 (For 5, Against 3, Abstentions 0)
485 (For 5, Against 3, Abstentions 0)
486 (For 5, Against 3, Abstentions 0)
492 (For 5, Against 3, Abstentions 0)
493 (For 5, Against 3, Abstentions 0)
415 (For 6, Against 1, Abstentions 1)
416 (For 6, Against 1, Abstentions 1)
417 (For 7, Against 0, Abstentions 1).

The following amendments were disagreed to (by division):

379 (For 1, Against 7, Abstentions 0)
126 (For 1, Against 7, Abstentions 0)
403 (For 3, Against 5, Abstentions 0)
405 (For 3, Against 5, Abstentions 0)
406 (For 3, Against 5, Abstentions 0)
407 (For 3, Against 5, Abstentions 0)
408 (For 3, Against 5, Abstentions 0)
410 (For 3, Against 5, Abstentions 0)
380 (For 1, Against 7, Abstentions 0)

411 (For 3, Against 5, Abstentions 0)
546 (For 1, Against 7, Abstentions 0).

The following amendments were moved and, with the agreement of the Committee, withdrawn: 541, 409 and 383.

Amendments 404, 382 and 412 were pre-empted.

The following amendments were not moved: 127, 389, 131, 545 and 381.

Sections 38, 42, 43, 45, 46, 47, 48, 49, 50, 51, 53, 56, 62, 63, 64, 65 and 67 were agreed to without amendment.

Sections 39, 40, 41, 44, 52, 54, 55, 57, 58, 59, 60, 61 and 66, schedule 3, and sections 68 and 69 were agreed to as amended.

The Committee ended consideration of the Bill for the day, section 69 having been agreed to.

Criminal Justice and Licensing (Scotland) Bill: Stage 2

10:05

The Convener: Agenda item 2 is the principal business of the day—the fifth day of stage 2 proceedings on the Criminal Justice and Licensing (Scotland) Bill. The committee will not proceed beyond the end of part 5 today. I welcome the Minister for Community Safety, Fergus Ewing MSP, who is accompanied by some familiar faces among the Scottish Government officials. Members should have their copies of the bill, the fifth marshalled list and the fifth list of groupings of amendments.

Section 38—Prosecution of children

The Convener: Amendment 379, in the name of Robert Brown, is grouped with amendments 126, 127, 389 and 549. If amendment 379 is agreed to, amendments 126 and 127 will be pre-empted.

Robert Brown (Glasgow) (LD): Scotland has—notoriously—the lowest age of criminal responsibility in Europe. The idea of prosecuting a child of eight—or, indeed, of 11—is abhorrent and ridiculous. Of course, the possibility of such prosecution will cease even if section 38 is unamended.

It might be said that the difference between raising the age of criminal responsibility and raising the minimum age at which a child can be prosecuted is technical. It is true that, either way, a small number of children will be affected. Few prosecutions take place of young people who are aged between 12 and 14; the graph of prosecutions for offences shows a sharp rise only from the age of 15.

In the background is the welfare-based children's hearings system, which focuses on meeting a child's needs and which all parties broadly support. One stimulus for reform was the criticism from the United Nations Committee on the Rights of the Child in its concluding observations on the three most recent United Kingdom state party reports. Section 38 as it stands does not meet Scotland's obligation under the UN Convention on the Rights of the Child. Children who are aged between eight and 11 will continue to be referred to a children's panel on offence grounds, and in practice, if not in theory, the result will be to all intents and purposes a criminal record. Such information can be routinely disclosed through Disclosure Scotland checks, regardless of the gravity of the offending.

There is persuasive evidence that criminalising children in that way is damaging. As Dr Jonathan Sher of Children in Scotland said:

> "If we call them criminals, we can pretty much count on their adopting that identity and living down to it."—[*Official Report, Justice Committee*, 26 May 2009; c 1948.]

Children in Scotland's letter says:

> "overwhelming international evidence"

exists

> "that labelling and punishing children as criminals does not improve their behaviour"

or

> "keep communities safer, but does increase the likelihood of these children becoming ... career criminals."

The Lord Advocate said:

> "as the prosecutor, I consider the age of criminal competence of eight in Scotland to be extremely low."—[*Official Report, Justice Committee*, 25 November 2008; c 1427.]

In general, the reform in the bill is worth while, but it is arguable that it is the minimum that is appropriate and that we should do the task properly by raising the age of criminal responsibility. Nobody suggests that that means a reign of terror by lawless children. It is appropriate for the system to have powers to tackle, detain if necessary and deal with children who cause trouble. Most such children can be dealt with on other welfare grounds, but the Children's Hearings (Scotland) Bill should provide for a non-criminal offence ground for referring children to a hearing, to protect the public and in children's interests. Amendment 549 in my name would ensure that section 38—as amended, I hope—was brought into effect only after the Children's Hearings (Scotland) Bill had provided for such a situation.

I am not very keen on the convener's amendments 126 and 127—in fact, I am not keen on them at all. They seem to be designed to restore the status quo, which is undesirable.

If it is thought that there is some deficiency in the powers of hearings to tackle lawless children under 12, by all means let us look at the issue, but let us do so in the context that hearings are the appropriate forum in which to deal with it.

Amendment 389, in the name of Richard Baker, is the sort of amendment that I have proposed in some circumstances, but in this instance it seems to be overkill and unnecessary. Children under 12 who are currently prosecuted can be numbered on the fingers of two hands; we do not need a formal reporting mechanism to do that.

I may have slightly understated matters. In the last year for which statistics are available—2007-08—the figures were nothing at the ages of nine, 10 and 11; five at the age of 12; five at the age of 13; 21 at the age of 14; and 157 at the age of 15. That provides some context to the issue.

I move amendment 379.

The Convener: I concede that this is a complex and difficult matter. All the amendments in the group deal with the age of criminal responsibility or the age at which children may be prosecuted. I have some difficulties on the issue, especially with amendment 379. Robert Brown is right to argue that Scotland seems to be out of sync with most other jurisdictions, but I am not relaxed about changing the law radically in this respect.

The matter first came to the committee's attention when the Lord Advocate, in giving evidence on a somewhat unrelated matter, raised the issue of child prosecutions. I must confess that I was a little perplexed by her intervention under that heading, but it was worthy of note. Her evidence related to the fact that only a handful of children between the ages of eight and 12 have been prosecuted in recent years. It seems that the Crown Office is adopting a sensitive approach to the matter. That being the case, I am not persuaded that it is appropriate for us to agree that there should be no prosecutions until the age of 12, as Robert Brown proposes in amendment 379.

My submission in amendments 126 and 127 is that children under the age of 12 should not normally be prosecuted. Basically, the amendments would put down in statute the reality of the situation. As we stated in our stage 1 report, sometimes children of quite tender years can do terrible things. I do not want us to be in the position of not having an appropriate sanction in place to deal with the case of an 11-year-old who stabs two children in a school playground, for example. It is common knowledge that, when children of that age commit acts of serious criminality, the victims are usually other young children. We must be sensitive in that respect.

I do not suggest for one moment that such cases are everyday occurrences—they are not. Recently, the Bulger case was revisited in somewhat odd circumstances, but there was also the case of the two young boys in Doncaster who committed quite horrendous acts of violence. There are exceptions with which the law must be equipped to deal. I am not content that the law will be so equipped if amendment 379 is agreed to.

Amendment 389, in the name of Richard Baker, has some merit, in that he seeks a report back from the Scottish Government. I would be minded to support the amendment but for the fact that it seems to accept an increase to 12 in the age of prosecution. This is a difficult and sensitive matter. I agree that there are dangers in dealing with it through prosecutions, but there are also real dangers in dealing with it through a blanket prohibition of prosecutions. On balance, that is even more dangerous.

Richard Baker (North East Scotland) (Lab): As this is my final amendment at stage 2, I thank the clerks for all their assistance during the process.

The convener has alluded to the fact that the issues around the age of prosecution and the age of criminal responsibility are sensitive and difficult. We know that, unfortunately, even children can commit terrible offences. The question is, how can our justice system and our children's hearings system deal most effectively with those situations? I do not demur for a second from Robert Brown's point that such situations are highly unusual.

The argument has been well established that nothing can be gained from having children as young as eight tried in adult courts and that that is inappropriate. However, there may be some concern that changing the age of prosecution to 12 means that it will not be possible to deal effectively with the cases—however rare—of children who commit very serious offences. As a result, there may be concerns about public safety. We should be able to be confident that, regardless of whether those children are dealt with by the court or by the children's hearings system, the outcome is likely to be the same or very similar, rendering a trial in an adult court unnecessary.

10:15

Given that that means that we may hand more serious cases to the children's hearings system and that Parliament is yet to consider the Children's Hearings (Scotland) Bill, I have lodged amendment 389, which seeks to establish how cases that would otherwise have been prosecuted have been disposed of through the children's hearings system, and the costs and resources involved. That would be done through a report, published annually, for three years.

The purpose of the measure is to establish that cases that would previously have been prosecuted can be dealt with effectively through the children's hearings system, that the system has access to appropriate disposals, after the Children's Hearings (Scotland) Bill has been passed, and that panels are adequately resourced to deal with the most serious cases. I understand that that will create some work, but I have changed my amendment from the original proposal so that it involves only those cases that would otherwise have been prosecuted. As Robert Brown said, we know that very few cases should be involved. For that reason, I hope that the measure is eminently achievable.

When deciding whether to move the amendment, I will listen to the debate, but it is vital that the Scottish Government is ready to provide such information to Parliament and the committee, if the change is to go ahead. I seek the minister's view on what the Scottish Government will be prepared to do in that regard.

I have sympathy for amendments 126 and 127, in the name of Bill Aitken, because of the unusual nature of cases in which serious offences are committed. I considered lodging an amendment in those terms, but I was persuaded that that would result, in effect, in the law not being changed at all. As the convener said, amendments 126 and 127 place the current situation in statute. Like other colleagues, I have accepted that there should be change in the area.

I also have sympathy for amendment 379, in the name of Robert Brown. When the bill was introduced, it might have been better for it to have included a proposal on the age of criminal responsibility, so that that could be properly debated. However, the committee did not discuss such a proposal, although it was referred to in the debate on the age of prosecution.

I know from amendment 549 that Robert Brown is enabling the change in the age of criminal responsibility from eight to be delayed until appropriate measures to accommodate that can be taken, but at this stage that is putting the cart before the horse. A note from the Scottish Parliament information centre points out that one consequence of changing the age of criminal responsibility to 12 would be that children under the age of 12 could not be referred to children's hearings on offence grounds. The committee referred to the suggestion of creating a new non-offence ground, covering situations in which a child has behaved in a way that could be treated as criminal, if they were older. Such a proposal is not before us today.

Given where we are, we should not support a change in the age of criminal responsibility now, but we should change the age of prosecution to 12. That is the crucial issue now and the right way forward. I accept that there should be further consideration of the age of criminal responsibility. I do not believe that Parliament should wait too long to engage in such consideration, which should lead to change, but I am inclined to believe that that requires new, detailed proposals and fuller debate.

Stewart Maxwell (West of Scotland) (SNP): I will start where Richard Baker left off. I agree with his closing comments, in which he made some valid points about the age of criminal responsibility. All of us have struggled with the issue. Through the evidence and our stage 1 report, we struggled to strike the appropriate balance when dealing with the very rare cases in which young children have taken another's life.

Great moral difficulties are associated with changing the law in that area.

At the same time, great moral difficulties are associated with not changing the law in the area. As other members have said, the ages of criminal responsibility and criminal prosecution in Scotland are among the lowest—if not actually the lowest—in the developed world. That weighs heavily on a number of us.

I understand the process that Richard Baker is trying to put in place in amendment 389 and the reasons for that, but I agree with Robert Brown that it is overly onerous, given the exceptionally small number of cases to which it relates. Robert Brown noted that the number of children under 12 who are prosecuted is zero.

I do not think that Richard Baker's proposal adds anything except a rather bureaucratic and unnecessary process. Given the number of children, small though it is, who are already going through the children's hearings system at that age, for those odd cases that might have been prosecuted—we can never say whether a case would or would not have been prosecuted, which is a difficulty with the amendment—but which go to the children's hearings system in the future, I think that the children's hearings system is well placed to ensure that it does its job appropriately. Therefore, I do not think that there is a problem in that respect.

I agree that the age of prosecution in this country is too low. It should be raised to 12; therefore, I support the current provisions in the bill. However, I also support the idea that the age of criminal responsibility should remain what it is, although it may seem strange to keep those things separate. Valid arguments have been made that many children over the age of eight can understand the difference between right and wrong and can be seen to be responsible for their actions. At the same time, there is no doubt that children aged nine, 10 and 11 who commit criminal acts—heinous criminal acts, in some cases—are the responsibility of the adults who have failed to care for them and raise them properly, and I honestly think that the acts that those children have committed are more a welfare issue than a case for criminal sanction. Although I accept that the age of prosecution should be raised because of that argument, I think that there is an issue about responsibility for their actions. Therefore, I do not accept Robert Brown's amendments, nor do I support the convener's amendments.

Angela Constance (Livingston) (SNP): It will come as no surprise to anybody on the committee that I have considerable sympathy for Robert Brown's amendment 379. Although the children's hearings system is not perfect in today's world, it is nonetheless an exemplar. Like Stewart Maxwell, I make the point that, when children commit extreme acts of desperate violence against other children, they are themselves the victims of heinous violence, abuse and neglect by their parents and by the wider systems in society that are meant to look after children who are vulnerable and who do not have parents who will give them the best start in life.

My fundamental instinct is that children who offend should go through the children's hearings system, which should be equipped, in terms of resources and disposals, to deal with children who offend. Nonetheless, I will listen to what the minister says with interest. In the Government's defence, I accept that what the bill proposes is a prudent step forward, although instinctively I would rather that it were a bigger step forward. I wonder whether we should have considered the issue as part of the Children's Hearings (Scotland) Bill. The Criminal Justice and Licensing (Scotland) Bill is a huge bill, and I would have preferred a far more dedicated focus on children who are in need and who offend. Perhaps, following the committee's scrutiny of the issue, the Children's Hearings (Scotland) Bill will be able to take things further.

The Convener: There being no further comments from members, I ask the minister to defend himself to Ms Constance.

The Minister for Community Safety (Fergus Ewing): I am happy to take up that kind invitation, convener. I welcome all members' contributions to the debate. This is a difficult and sensitive issue, as members have said. Before I proceed to the scripted remarks that I want to place on record, I will respond to some of the points that have been made.

In its stage 1 report, the committee opined:

> "We recognise that children under 12 can sometimes do terrible things, and if there is to be a statutory ban on criminal prosecution in all such cases, it would be useful to have an assurance from the Cabinet Secretary that there is a sufficient range of disposals available within the children's hearings system."

In his response, the cabinet secretary rightly referred to the disposals that are available to the children's hearings system. It will come as no surprise to committee members that those include

> "placing children in secure care up to their 18th birthday if that is required."

The response continues:

> "A Panel can also place a child on intensive support which can include an electronic tag. The Panel decides on the most appropriate intervention based on the needs of the child, the support required to change their behaviour and the measures needed to protect the public."

I thought it important to mention that, as Richard Baker rightly sought an assurance about the sufficiency of the disposals that are available to the children's hearings system. Angela Constance also referred to the fact that we are seeking to legislate on and improve further the excellent system of which we are rightly proud in Scotland. That will take place shortly, under a different bill.

We all have confidence in the good work that is done, particularly in the secure estate. It is a serious step to place a child into the secure estate, and those of us who have visited secure accommodation throughout Scotland will know that it is not a soft option for those children but a severe measure that effectively deprives them of their liberty. The ultimate disposals are available to the children's hearings system. I thought it prudent to start by emphasising the fact that the sanctions are serious, irrespective of the age that is set for consent and prosecution. That said, it should be remembered that only one child under the age of 12 has been prosecuted in the past six years. I will come to that later.

The changes that are in section 38 will lead to the following system operating. First, children under the age of eight will continue to be conclusively presumed to be not guilty of an offence. Secondly, children under the age of 12 but aged eight or over who offend will be dealt with only through the children's hearings system. Thirdly, children under 16 who are aged 12 or over will be prosecuted if the offence is sufficiently serious to be dealt with on indictment; otherwise, they will be dealt with by the children's hearings system. Finally, children aged 16 or 17 who remain on supervision through the children's hearings system will either continue to be managed in that system or be prosecuted. Raising the minimum age of prosecution from eight to 12 is an important move that will—as has been said, initially by Robert Brown—bring us into line with most of mainland Europe and strengthen our commitment to the UN Convention on the Rights of the Child. I make it clear from the outset that we believe that our approach strikes the right balance between protecting the public and protecting the rights of children.

I fully understand the intention behind amendments 126 and 127. However, given the fact that only one child under the age of 12 has been prosecuted in the past six years, the normal situation is for there to be no prosecutions. That is what we are seeking to establish as the legal situation—the de facto situation is that prosecutions are so rare that they hardly ever occur. Amendments 126 and 127 would have the effect of neutralising section 38. They would create uncertainty as to the circumstances in which prosecution of a child under the age of 12 was either possible or appropriate. For those reasons, I would not recommend support for amendments 126 and 127.

I turn to amendment 379. Raising the age of criminal responsibility, as set out in section 41 of the Criminal Procedure (Scotland) Act 1995, was an option that the Scottish Law Commission considered carefully when it looked at the issue in 2002. In relation to the UN Convention on the Rights of the Child, the view of the Scottish Law Commission was that

> "the Convention's purposes are secured as much, if not more, by the provisions relating to immunity from criminal prosecution and punishment as by provisions on criminal capacity".

Accordingly, the commission recommended that there should be an amendment to the 1995 act by providing that a child under 12 years of age cannot be prosecuted. That is what is contained in section 38 of the bill.

10:30

The Scottish Government is committed to supporting children's rights as a key strand that underpins our activity to improve outcomes for all Scotland's children and young people. We believe that section 38 of the bill, as it stands, achieves that objective and is in line with Scotland's commitments under the UN Convention on the Rights of the Child.

We have addressed key concerns about the very young age at which children in Scotland can end up in the criminal justice system, ensuring that the principle is set that the children's hearings system is the most appropriate forum for a child's broader needs and welfare to be addressed alongside their behaviour.

It is important that we can support young people who continue to pose a high risk when they leave the children's hearings system. Although the overwhelming majority of children and young people are well behaved and contribute positively to their communities, there is a small number in relation to whom safeguards are necessary. As I said earlier, we seek to strike the right balance between protecting the public and protecting the rights of children. Furthermore, although children under 12 can still be referred to the reporter on offence grounds for minor offences, our Children's Hearings (Scotland) Bill, which was recently introduced to Parliament, will introduce a new ground of referral in situations in which a child's conduct has had, or is likely to have, a serious effect on the health, safety or development of the child or another person. That includes behaviour that could be considered criminal. Our expectation is that that new ground, rather than the existing offence ground, will be used for more minor offending behaviour. For those reasons, amendment 379 is unnecessary.

We appreciate the reasons behind amendment 389. It would require Scottish ministers to report annually on the disposal of cases involving children who, but for the new prohibition of the prosecution of under-12s, would have been prosecuted. The Lord Advocate's guidelines set out when a child can be prosecuted for an offence. However, there are no set criteria or offences that lead to prosecution. Currently, there is discretion within the guidelines, and it is the responsibility of the procurator fiscal to decide whether it is in the public interest to prosecute. When section 38 is implemented, all cases will be referred to the reporter and, therefore, no mechanism will exist to consider whether a case meets the public interest test. As I said, it should be remembered that only one child aged under the age of 12 has been prosecuted in the past six years, so there appears to be little merit in the reporting that Mr Baker calls for, as was pointed out by Mr Maxwell. For that reason, amendment 389 is undesirable. I state again, however, that I understand the policy intent that Richard Baker has clearly explained.

Amendment 549 would require the order commencing section 38 to be made by affirmative procedure. That would be a unique requirement. As members will be aware, commencement orders are invariably subject to no parliamentary procedure, and there is good reason for that. If the Parliament agrees to section 38, what would be the point of another debate and vote at the point of commencement? Furthermore, in the children's hearings system, we already have a robust process in place to deal with those young people. Although the Children's Hearings (Scotland) Bill might introduce improvements to the process, there is no reason for any delay.

I urge the committee to resist amendment 549 and all the amendments in the group.

Finally, I would like to address the issue of the retention and disclosure of records, which Robert Brown raised, as I thought that he might. I am aware of the issue around the retention and disclosure of information about children and young people who are referred to a hearing on offence grounds. In the interests of public safety, we believe that there is still a strong case for recording certain information. However, we recognise that the information that is made available under disclosure checks needs to be proportionate, and we are, therefore, seeking to include provisions in the Children's Hearings (Scotland) Bill that will ensure that information about children and young people who are referred to a hearing on offence grounds is retained and disclosed only where necessary. I wanted to put that on the record to provide some assurance to Mr Brown and other members.

Robert Brown: I am particularly reassured by the minister's final comment.

We are, perhaps, all left a little bit perplexed about the difference between raising the age of criminal prosecution and raising the age of criminal responsibility. We seem to be heading towards a sort of mish-mash situation with three different levels: up to the age of eight, there is no criminal responsibility; from eight to 12, there is a kind of in-between situation; and over the age of 12, there is a slightly different ball game again. That seems to me to be a bit unsatisfactory, in principle, and I am unpersuaded about the reasons why the Government and the Law Commission have gone down that route.

A number of people, including Richard Baker and the convener, touched on the fact that children can do terrible things—indeed, I touched on that myself. However, I was not entirely sure about the implications that we should take from that. We seem to be talking purely about the procedures that apply to the children in that context rather than what is done with them after that. The minister gave us some reassurance about the powers that exist in the children's hearings system to deal with children, from relatively low down the offending level right to the top. If that is accepted, the argument comes down to whether, as the convener suggests, cases should go before the court in certain limited instances, or whether they should all be dealt with by the children's hearings system. I did not hear any convincing arguments for the merits of putting children of nine, 10 or 11 years of age before the court.

Three cases involving children have been prosecuted since the Scottish Parliament was established. One, involving a child of 11, was listed as a crime of dishonesty; one, again involving a child of 11, was listed under "miscellaneous offences"; and one, involving a child of nine, was listed under "motor vehicle offences". In none of those cases can I see any obvious or overwhelming reason why there should have been a prosecution.

I was attracted by Angela Constance's suggestion that the matter could be considered afresh in the Children's Hearings (Scotland) Bill, and the minister made the point that the grounds are being tweaked somewhat to allow wider welfare issues to be considered, along with minor offending issues. That is probably a useful context in which to consider the matter. I hope that the minister will consider that suggestion, regardless of the outcome of today's debate, as I think that we have been left with a slightly mismatched position.

Stewart Maxwell said that children over eight can understand the difference between right and wrong. That might be the case, but—with great respect—I found his arguments a little confusing. I was not sure where he took that argument, because he seemed to relate it to the responsibility of the parents, which is off to side wicket, as it were. None of that indicates that there should not be a raising of the age of criminal responsibility to 12. Let us do the thing properly.

I will press amendment 379. I continue to oppose the convener's amendments—I do not think that there is much support in the committee for them. I hope that Richard Baker will not move his amendment, in the context of the number of cases involved. Are we to have a report on an issue that has arisen three times in the past 10 years? Notwithstanding the reasons that he set out, that seems a bit of an overkill.

My amendment 549 is designed to link the changes in the Children's Hearings (Scotland) Bill to the issue that we are discussing. Having made the point in that regard, I think that I will probably not move that amendment.

Convener, thank you for allowing me quite a bit of time to respond.

The Convener: It is an important issue and it is appropriate that it be debated as thoroughly as possible.

The question is, that amendment 379 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)

Against

Aitken, Bill (Glasgow) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 7, Abstentions 0.

Amendment 379 disagreed to.

Amendment 126 moved—[Bill Aitken].

The Convener: The question is, that amendment 126 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)

Against

Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 7, Abstentions 0.

Amendment 126 disagreed to.

Amendment 127 not moved.

Richard Baker: Given what has been said about the maths, and in light of the reassurances that have been given, I will not move amendment 389.

Amendment 389 not moved.

Section 38 agreed to.

Section 39—Offences: liability of partners

The Convener: Amendment 128, in the name of Kenny MacAskill, is grouped with amendment 129.

Fergus Ewing: Many statutes provide that when a body corporate is guilty of an offence, and it is proved that the offence was committed with the consent or connivance of a director, or was attributable to his neglect, that director is also guilty. Section 39 aims to put partners of partnerships in the same position as directors of bodies corporate in relation to such offences. Amendment 129 will ensure that that applies to those who purport to be partners as well as to those who are partners. That is already the position for offences that apply to bodies corporate, in relation to which those who purport to be directors are covered. It avoids the risk of a person avoiding criminal liability simply because of a defect, for example in the formation of the partnership.

Amendment 128 is a technical amendment to make it clear that the reference in section 39(1)(b) to the "corporate offence" is a reference to the corporate offence as committed by the partnership. There is no change to the effect of the provisions.

I move amendment 128.

The Convener: As other members have no comments, I will make some of my own. The amendments in this group are predicated on the need to plug a loophole that seems to exist in the present law, which resulted in an inability to prosecute in the case of the Uddingston fire that resulted in the tragic death of a number of elderly people. I make no comment on that specific case, but it is important that when there is culpability, the

Crown is able to proceed. Amendments 128 and 129 are therefore worthy of support.

Amendment 128 agreed to.

Amendment 129 moved—[Fergus Ewing]—and agreed to.

Section 39, as amended, agreed to.

Section 40—Witness statements

The Convener: Amendment 130, in the name of Kenny MacAskill, is grouped with amendment 131.

Fergus Ewing: Amendment 130 is a minor technical amendment, the purpose of which is to change the current reference to "all reasonable hours" in section 40(2)(b) to "a reasonable time and in a reasonable place", to ensure consistency with section 97(3).

Amendment 131 seeks to remove section 40 from the bill. We are aware of the concerns that were expressed during stage 1 about the provisions on witness statements, which may have given rise to amendment 131. It is useful to have a debate on those issues.

We understand the desire that has been expressed to preserve the tradition of oral evidence in Scotland. The provisions on witness statements will not put an end to that. Witnesses will still appear in court, give evidence from the witness box and be examined and cross-examined. That is not changing. It is important that the accused has a proper opportunity to test that oral evidence. The provisions on witness statements will not lead to a move towards trial by statement.

We respectfully remind the committee that Lord Coulsfield considered that provision was necessary after his thorough and detailed consideration of the law in this area as a whole. Members will remember that when the Solicitor General for Scotland spoke in support of the provisions during his evidence at stage 1, he said:

> "Many trials are really a memory test for witnesses. For example, in a cold case, witnesses who gave evidence in 1991 might be called to give evidence in 2009 and be questioned on the detail of their statement. If they cannot remember precisely what they said or if they say something slightly different, they will be accused of being inconsistent. It seems unfair that the only person in a prosecution who cannot see the statement before the trial is the witness who gave the statement in the first place."—[*Official Report, Justice Committee*, 9 June 2009; c 2070.]

Concern about the accuracy of statements appears to lie at the heart of the issue. We acknowledge the concerns of defence practitioners about the quality of statements but, like Lord Coulsfield, we believe that rigour in the way that statements are taken, which he recommended, should reduce the risk of problems arising. It should be remembered that Lord Coulsfield pointed to the fact that elsewhere in the United Kingdom, the practice of giving witnesses copies of their statement is accepted and uncontroversial.

10:45

Section 40 will help to ensure greater accuracy by allowing witnesses to review and identify any inaccuracies in their statement before trial. Removing section 40 from the bill would lead to the anomaly that witnesses would not be able to see their statement in advance of giving evidence, yet under section 62 they would be able to refer to their statement at trial. That could mean that the first time that any inaccuracies came to light would be during the trial.

As the Solicitor General said when he gave evidence to the committee at stage 1:

> "In my view, the proposed change will improve the accuracy of statements. If witnesses can see their statement in advance of giving evidence, they will be able to see whether it contains any inaccuracies that should be drawn to the attention of those involved in the case. The proposal is a further measure that will save time and improve criminal justice for witnesses. After all, we rely on witnesses to prove cases so we need to treat them with respect."

He went on to say:

> "I mentioned the accuracy of statements, which we hope the proposed change will help to improve. I see no problem with the proposals."—[*Official Report, Justice Committee*, 9 June 2009; c 2071.]

The Law Society of Scotland and the judiciary expressed concern about the accuracy of witness statements and therefore the dangers of relying on them. Indeed, much of the debate thus far has focused on the dangers of relying on statements that may not have been noted in the witness's own words. I have a tremendous amount of sympathy with that concern. I understand that it has not been uncommon—perhaps because of the circumstances in which statements are obtained—for the person who notes the statement to take notes that summarise the witness's position and to note a full statement thereafter. Against that background, it is not surprising that concerns have been expressed about the accuracy of statements and whether they are noted in the witness's own words.

In future, I understand that that is to be addressed by a change in procedure that is to be set out in the code of practice. The police officer will note a full statement from the witness in the witness's own words. The normal practice will be for the witness to be given the opportunity to sign it. If circumstances prevent a full statement being taken at the time, notes will be taken, which will remain as notes, without being expanded on by the officer. Again, the witness will have the opportunity to sign them. It is vital that statements are accurately noted, as far as possible, in the witness's own words and that they are signed by the witness. That is what Lord Coulsfield recommended, which I support.

I understand that the Lord Advocate intends to address the issue in the code of practice on disclosure, to ensure that information is accurately recorded and, in particular, that any witness statement that is obtained or generated during an investigation accurately and comprehensively reflects the evidence that is provided by the witness. I understand that it is also intended that the code of practice will provide, as far as possible, that the witness statement must contain the witness's actual words, and that the witness must be given an opportunity to sign it and to make any amendments that he wishes to make. That is to be supplemented by guidance and training for police officers, which is already under way and is due to finish at the end of May.

I remind members that under section 114 of the bill, the police, other investigating agencies and prosecutors are bound to have regard to the terms of the code of practice.

The Sheriffs Association indicated that if the law is to be changed, that should be done in primary legislation. Lord Coulsfield's recommendation is that witness statements be signed by witnesses. I respectfully suggest that that is a procedural step. We do not agree that the bill is the place for such procedural matters to be dealt with. We think that it is entirely appropriate for such a matter of practice and procedure to be dealt with in the code of practice. That is what the Lord Advocate intends to do.

The issue is one of fairness to witnesses, who could be presented with their statement for the first time in court, which could inadvertently have a detrimental effect on their ability to give evidence. In addition, witnesses are now commonly the only participants in a trial who have not seen their statement prior to trial, and we do not think that that is appropriate.

We absolutely accept that proper testing of witnesses is valid and important, but a witness's evidence should not be reduced to a one-sided memory test, in which every minor discrepancy is put under the microscope. Section 40 is designed to help to reduce the amount of time that is spent examining irrelevant minutiae and thereby allow the court to focus on the real issues at trial.

Without section 40, witnesses would still be able to refer to their statements during a trial, under section 62, without inaccuracies being addressed in advance. That would risk delay and disruption to proceedings, and it could sometimes appear as though it was the witness, rather than the accused, who was on trial. We believe that it is unreasonable to expect witnesses to recall every detail of events from many months or even years prior to their giving evidence. It is fairer to everyone, including the accused, if witnesses are allowed to refresh their memories and if decisions are reached on the best evidence that is available.

We do not share the concerns that were expressed by the Faculty of Advocates in its stage 1 evidence. It is not clear to us why the provision would exacerbate a difference of treatment between prosecution and defence witness statements. Section 40 applies to all witnesses who have given a statement, whether they are witnesses for the defence or for the prosecution. Indeed, in many cases, at the point at which the statement is noted, it might not be clear for whom the witness will give evidence. We trust Scotland's judges to manage such situations appropriately and to exercise their discretion in a way that enables the giving of good, clear, accurate evidence without risk to the tradition of oral evidence. I remind members that the judges of the High Court of Justiciary themselves said in evidence at stage 1:

> "We recognise that there may be value in allowing a witness to read a prior statement before giving evidence in court."

I have gone on at some length out of respect for those who have made strong submissions on these matters and I have sought to respond explicitly, at greater length than I would normally, to those august bodies and persons who have given evidence.

We will resist amendment 131. I move amendment 130.

The Convener: The purpose of amendment 131 was to probe exactly how this was going to pan out at the end of the day. I was seeking to avoid evidence in court being valued on the basis of who had rehearsed it best. I am not entirely satisfied on that point as yet, but I have listened with considerable interest to what Mr Ewing has said about the way in which statements will be formulated in the future. From painful experience, I can tell members that there are occasions on which, under examination by the fiscal or the defence, a witness is perplexed, has little recollection of what was said at the time and is of the view that they did not make a statement along the lines that the prosecutor suggests. However, on the basis of what Mr Ewing has said about the improved procedures that are likely to be in place, I am minded not to move amendment 131.

Robert Brown: This is a difficult area—there are no two ways about it. One must be cautious about making significant changes in procedures that have applied for a long time, with all the usual arguments about them. A trial is a search for truth and it broadly fulfils that purpose reasonably well. My view is that the basic evidence should be that of the witness—how he or she remembers things—with all its limitations. Oddities will often emerge from that, but they can be explained away without any particular damage being done. That is and ought to be the core evidence.

There is an exception for police witnesses, who can be allowed to refer to their notebooks and notes that they made at the time. I think that I am right in saying that that rule applies to other witnesses, although most of us are not organised enough to take notes at the time. Nevertheless, the so-called level playing field argument is spurious in some respects. While the police witness is giving their own statement in their own way, the so-called statements that are given by other witnesses are not statements but precognitions that are taken by somebody else. Although it is reassuring to hear of the changes that are being made to improve the accuracy of such statements, these things always fall down at the level of the weakest, not at the level of the strongest, and there will always be situations in which the procedure, however well intentioned, is not carried through to what goes on at the bottom.

We should be cautious about disrupting procedures that have been established for some time. There is a risk that doing so would divert the trial away from a search after truth and into a rather sterile dispute about whether the written precognition was what the witness said in the first place. The minister referred to best evidence. The real issue is what the best evidence is in this context. Is it rehearsed evidence or is it evidence that comes out at the time—with all its limitations—and has to be gone through in further detail?

I am a little concerned about the suggestion that inaccuracies can be addressed in advance of the trial, which has a sort of sanitised feel about it. The place to address such oddities is at the trial, when the evidence can be taken in all its glory, one way or the other. There are difficulties with the provisions, but like the convener I am not prepared to push my view against that of the minister, with his officials and his greater resource for considering the issue. However, I remain concerned about some aspects of the matter and hope that it will be kept under close scrutiny as the bill progresses, and as the matter is put into practice in due course.

James Kelly (Glasgow Rutherglen) (Lab): I support the amendment in the name of the Cabinet Secretary for Justice and the sentiments that the minister expressed in his contribution. Being required to give evidence in a trial can be quite an intimidating experience for witnesses. For many of them, it can be their first experience of appearing before a court. To stand there and be questioned by prosecution and defence can be difficult, and to try to recall events that may have taken place months or years previously can be challenging, to say the least.

In implementing justice and in prosecuting cases we want to ensure that we have an accurate record of what happened. From that point of view, it is right to allow witnesses access to their statements so that they can correct any inaccuracies. It means that witnesses can stand up in court and submit accurate evidence. Section 40 would also correct an imbalance, in that, at present, police officers are allowed to refer to their notes whereas, as the minister said, witnesses are the only people who appear at a trial who do not have access to the statements that they made previously. The provision will improve the implementation of justice and ensure that there is a more accurate record of what is being considered in a case. I support what is proposed.

Amendment 130 agreed to.

Amendment 131 not moved.

Section 40, as amended, agreed to.

After section 40

The Convener: Amendment 403, in the name of Margaret Curran, is in a group on its own. I apologise to Margaret for the fact that she came to last week's meeting but was unable to speak to her amendment.

Margaret Curran (Glasgow Baillieston) (Lab): It has been most illuminating to be here. I thank the clerks for their assistance in drafting amendment 403.

The amendment is simple but significant. It represents a stage in our move to enhance the rights of victims. The issue emerged from my work with a constituent and their family yet it has a wider resonance for Scotland.

The Parole Board for Scotland makes important decisions, whose consequences have a real impact on victims, their families and wider society. Essentially, amendment 403 would equip the Parole Board with a better means to make decisions and would give it a fuller appreciation of the impact of those decisions.

The key principle behind the amendment is that, although written representations can be very effective, it is important to add another dimension. We know that, although some victims can make their views known through written representations, a number find it difficult to do so and would find it easier to articulate their views if they were present at the parole hearing. Given the gravity of the decisions that the Parole Board makes, it is proper that we provide all possible means to ensure that it has full information. The amendment would provide the opportunity for victims to give their own testimony, which would be a very simple step forward.

11:00

Victims have the right to be heard. The Parole Board has the right to hear their representations to ensure that it understands the full impact of its decisions. Providing for direct representation—the right to say what has happened and to set out the consequences of the board's decision—would empower victims and, ultimately, would empower the board itself.

My amendment suggests a simple step forward. I very much hope that the committee will support it.

I move amendment 403.

Robert Brown: Margaret Curran has raised a very interesting issue. The Criminal Justice (Scotland) Act 2003, which a previous Government introduced, brought in victim statements at the sentencing stage and gave victims the right to make written representations to the Parole Board when it is considering releasing someone on licence. That is entirely right and I think that it helps to put victims' concerns at the heart of the process, which was often seen previously as something that did not really concern them.

I have no doctrinal view on the right to be heard by the Parole Board. I do not think that we have had any particular evidence on that one way or the other. The questions that occur to me are whether it would create any considerable cost or bureaucracy in the system and whether it would provide any advantage to most victims. Manifestly, the question of release cannot depend on the victim of one criminal believing that the offender should be detained for ever, while the victim of another offender is in a rather more forgiving camp. However, evidence that the offender would be liberated to an address two doors away from the victim or that the victim is still suffering physical or psychological trauma as a result of the crime would be highly relevant. I am not sure whether the presence of the victim at the hearing would be required or whether most victims would regard such an opportunity as a good thing. Another issue is the extension of advice facilities for people to allow them to make effective written representation.

Having said that, I know that victims have been allowed to attend parole hearings in England and that the process has subsequently been formalised—a number of people have taken advantage of that opportunity. The Parole Board for England and Wales recognised that the right to be heard was significant for some victims. It said that the process was inclusive but could be

"emotionally difficult for victims and offenders alike."

It also made the point strongly that it is absolutely necessary that victims understand the context of and the limitations to the right to be heard.

In short, there is a case for such a change, but I want to be reassured by the Government that amendment 403 gets it right. I want to hear the minister's view before I decide my approach.

Angela Constance: I cannot imagine that anybody round the table would be unsympathetic to the need to create more opportunities for victims to be heard at various points in the criminal justice system. A number of years ago, I had the opportunity to observe a meeting of the Parole Board. My recollection is that members of the board had a large number of cases to deal with at any one sitting and all the evidence before them was written. None of the professionals was there. The offender and his brief were certainly not there. Perhaps the minister could comment on current practice in such meetings. My concern would be that, if you allowed a victim in, you would have to open up the hearing to offenders and their legal team, which would change the nature of what the board does; it looks at all the evidence of all the parties but takes a step back from it.

My other concern is that the amendment deals with the Parole Board but does not deal with life prisoner tribunals. If the amendment is agreed to, we could end up with a situation where victims would have the right of representation at Parole Board hearings, which involve offenders who are serving determinate sentences of four years or more, but they would not have the parallel right to make representation to life prisoner tribunals, which does not seem right.

My understanding is that more can always be done to scrutinise the needs of victims. A core part of considering release plans must be consideration of the impact on victims. As Robert Brown said, offenders cannot be released from prison to addresses that are two doors down from their victim. Therefore, it is imperative that criminal justice social work has a role in all assessments.

I understand the desires behind amendment 403, but I am cautious about it. I wonder whether it would have unintended consequences and whether offenders would pitch up to the Parole Board with their legal teams.

James Kelly: Margaret Curran has lodged an important amendment, which I support.

I would like to address a specific issue that is not the same as the one that Margaret Curran addressed. When the committee was considering the Megrahi case, one thing that I was concerned about was that there was no proper basis on which the victims' views on compassionate release could be taken into account in the Parole Board hearing. There would at least have been more information for the Parole Board to consider if victims' views had been taken into account. It is right that we give a proper platform to victims who have suffered as a result of crimes and that we properly consider their views.

Amendment 403 is important. It would give people the opportunity to give verbal evidence. As committee members, we hear verbal evidence on many subjects that is often much stronger and that often carries much greater weight than the written evidence that we receive. The amendment seeks to let witnesses give appropriate views in the process. It is powerful, and I support it.

Stewart Maxwell: I have listened to the comments that have been made, and I think that we have never taken any evidence in the area before. I do not have detailed knowledge of the Parole Board and its daily workings. There is a danger of agreeing to amendments at this stage without having wider knowledge, but we should consider Angela Constance's comments on the Parole Board meeting that she attended, although that was some time ago. If what she saw is the norm, I share her concern that, if the process is opened up on one side, it will inevitably have to be opened up on all sides. I think that that would lead to the danger of there being almost a second trial in which people try to examine the case rather than the parole argument. It is completely understandable that victims will inevitably focus on the original incident, whereas the Parole Board's job is much wider than that. There is a danger that everybody would end up attending Parole Board meetings and focusing on the wrong things. Many complex issues are involved, and I am not minded to support the amendment without receiving further detailed evidence.

Nigel Don (North East Scotland) (SNP): I would like to continue from where James Kelly left off. He made the extremely important point that, by and large, we attribute more weight to verbal pieces of information. We naturally take more notice of a person who is in front of us than we do of the written word. I also take the point that Margaret Curran made that some victims will feel that the amendment would empower them and help them to move forward. I accept that, but I am also aware that some victims need to disengage. I merely put this forward as a possibility but, if it is perceived that one is more likely to get the right answer from the Parole Board if one engages with it, that will stop people disengaging and moving on in their life. There is a bit of personal experience behind what I am saying. I think that there would be several unintended consequences. However, I have no intention of repeating what other people have said. These things are all about balance and I do not have the right answer. I merely make the point that there is a substantial risk of unintended consequences. I am a little hesitant to suggest that we should agree to something on which we have not heard balanced evidence. We can see the point of amendment 403, and we understand why Margaret Curran lodged it. I see that she is shaking her head. I point her to the other side of the argument—I am concerned that her amendment might end up having unintended consequences.

The Convener: As no other members have comments, I will make some of my own. The case for amendment 403 is distinctly arguable. I can quite see the logic of it but, at this stage, I am not persuaded under a number of headings, the first of which is workability. No application for parole can be made prior to the convicted person having spent four years in custody. In practice, many hearings relate to cases in which the offender has spent considerably longer than that in custody. It might well be the case that the victim has moved house on several occasions since the original court case when the sentence was imposed. There would be practical difficulties involved in contacting the victim, which it might or might not be possible to overcome. That is a consideration.

Secondly, the nature of the representations that would be made is an issue that concerns me. Robert Brown was right to describe a situation that could quite easily arise, whereby the result of a hearing could be determined by the nature of the victim or the victim's representative. That could give rise to difficulty because some people are more forgiving than others, whereas others may have a degree of vindictiveness. In any event, we could end up in a situation in which, in the charged atmosphere that might well pertain at the hearing, the interests of justice might not be best served.

Questions were raised about the terms of release, which I did not think were particularly apposite, because social work departments should be able to manage that, so I have no difficulty in that regard.

My other concern is that, in many cases in which an application is made for parole, the crime to which the application relates is murder or culpable homicide. There could obviously be no representations by the victim in such cases, and it is not quite clear whether Margaret Curran believes that the right to make representations would pass to a surviving relative, for example. Perhaps she could address that issue at the appropriate juncture.

There is merit in amendment 403 but, as I said, I am not yet totally persuaded. I will make a determination after listening to the final arguments of the minister and Margaret Curran.

Fergus Ewing: First, I thank Margaret Curran for lodging amendment 403, which has enabled us to have a useful debate on an important area. She is correct to raise the issue and allow it to be debated.

As representatives of constituents, all of us will, on occasion, have received requests to assist those who have been the victims of the most serious crimes and will have had discussions with those victims in our surgeries. I have had many such discussions, including with females who have been the victims of rape in many different circumstances, none of which I can go into. Suffice it to say that the feelings that are held in those cases are obviously extremely strong. We recognise that the plight of the victim is of huge importance. Many of the individuals concerned—especially vulnerable young females—will have been scarred for life by the experiences that they have undergone. Therefore, the matters that we are considering are extremely important. I just wanted to preface my remarks on the amendment with that reflection as a constituency MSP.

11:15

We have already taken steps to improve the victim notification scheme, for example by extending it to victims of offenders who are sentenced to 18 months or more in prison. With the convener's permission, I would like to go into a bit more detail, which I think might be of some assistance. The 2003 act formalised the victim notification scheme, which had been an administrative arrangement since 1997. The VNS gives victims of prescribed offences, primarily offences against the person such as rape, or, in cases when the victim has died, an eligible family member, the right to receive certain information about an offender who has been sentenced to 18 months or more in prison. The VNS also gives victims the right to receive information regarding Parole Board for Scotland review hearings and to make written representations to Scottish ministers prior to a decision being made on the release of and on the licence conditions to be applied to a prisoner.

Offenders sentenced to four years or more are considered by the PBS for release on licence from the halfway point of sentence and automatically released on licence at the two-thirds point. The board usually has no involvement in the decision to release offenders sentenced to under four years. Those offenders are currently released automatically and unconditionally at the halfway point of their sentence—an exception being certain short-term sex offenders, where there is scope for them to be released on licence. Those comments might help to put matters in context.

It is vital that victims are aware of the role of the Parole Board and of the limits of its decision making to avoid disappointment and the possibility of the victim emerging fearful or traumatised as a result of reliving the crime at a Parole Board hearing. That is why we are currently overhauling the information provided to victims about the Parole Board and about how to make representations, to ensure that the guidance is as clear and accessible as possible.

Giving victims the choice whether or not to be heard at a Parole Board hearing is an important development in enhancing victims' participation in the criminal justice system. However, a number of practicalities need to be addressed, to cover the workability factor to which the convener alluded. There are almost 500 oral or tribunal hearings a year at which the offender is present and a further almost 1,200 casework meetings a year at which the offender is not present. An effective system would need to be put in place to ensure that victims could be present at appropriate hearings. As I have said, there is a very large number of such hearings.

In addition, as well as ensuring that victims have a clear understanding of the role of the Parole Board and are properly supported throughout the process, decisions need to be made on a number of issues, including, first, what constitutes "being heard"? Secondly, should victims be heard at all Parole Board hearings, even ones where the offender is not present or represented? Thirdly, if a sex offender is involved, should the victim and offender be in the same room, or can alternative arrangements be put in place, such as victims giving a statement by videolink, for pretty obvious reasons? Finally, what about the families of victims who have died?

Those issues all need to be resolved before a robust mechanism can be put in place that allows victims to have an effective voice at Parole Board hearings. To resolve the issues, we would take into account the views of victims organisations and the Parole Board.

We are concerned that there are also difficulties with the amendment. For example, new subsection (1A) of section 17 of the 2003 act would provide that representations under section 17(1) may include a request by the victim to be heard at the relevant hearing of the Parole Board. As I have said, as section 17 stands, representations are made to the Scottish ministers rather than to the Parole Board, for a reason that I will come on to. If the amendment were accepted, victims would be recording with Scottish ministers a desire to appear before the Parole Board, but it would be entirely inappropriate for Scottish ministers to decide whether a person can appear at a Parole Board hearing. At present, representations are made to Scottish ministers so that they can redact sensitive information and give the representations a wider context. That procedure is designed to protect victims from inadvertently disclosing sensitive information to their assailants. It is not intended to remove the victim's voice; it is intended to protect the victim in some circumstances. If the amendment were to be agreed to, it would place this duty, and others, on the Parole Board in respect of representations that it does not itself directly receive. We question whether it is appropriate to place such duties on the Parole Board in those circumstances.

In addition, if victims were able both to make written representations to Scottish ministers and to be heard at the Parole Board, what would happen if there were contradictions between the two sources? Also, there is no definition of what constitutes a victim's "immediate family" or what constitutes a "friend".

Margaret Curran will recognise that those are lawyerly objections that have been carefully considered by the officials who are ably assisting me this morning. That said, we concur with the thrust of the amendment and undertake that the Scottish Government will put together proposals that will enable victims to be heard at appropriate Parole Board hearings.

For some of the complex reasons that many members, not least Angela Constance, Stewart Maxwell, Nigel Don and the convener, have mentioned, we will be unable to complete the work in time for the passage of the bill, but the Scottish Government will bring proposals to the Parliament as soon as possible. Allowing oral representations at a Parole Board hearing might not require primary legislation but might be possible to deliver through amendments to the Parole Board rules, so it might be effected quite quickly once the practicalities are addressed. That piece of information might be of particular value to members in their consideration of how to proceed this morning. In other words, we might not necessarily have to wait for another bill to come along before taking action.

In the meantime, given the difficulties with the amendment as drafted and our commitment to work further on the issue, including a commitment that firm proposals to allow victims to make oral statements at appropriate Parole Board hearings will be brought before the Parliament, I respectfully invite the member to withdraw amendment 403.

The Convener: Thank you, Mr Ewing. That was a helpful contribution.

Margaret Curran: I thank the minister for his helpful response to my amendment. I was a bit disappointed earlier because I thought that I was meeting a wall of resistance, but I am pleased with what the minister said.

I will focus on some of the practicalities before moving on to some of the principles. I accept the importance of workability, and I have no desire to undermine the Parole Board's hearings in any way. I have tried, in the intervening week, to address some of the minister's points. He will note that I have made some amendments to my original amendment that have been accepted. For example, it picks up the point about a "relevant hearing" and tries to say what "being heard" means. I am happy to talk to the Government about that if it is not clear enough but, with the clerks' advice, I thought that those practicalities had been addressed.

I am sure that we could consider alternative arrangements when there is a particular need for privacy; that could easily be addressed. I will also take advice from the lawyers in this room and I am sure that we can find a workable definition of "family" or "relative". I cannot believe that that will be beyond our abilities, especially given the experience that we in Scotland have of such things.

I was disappointed by some of the criticisms of amendment 403. Some of the principled criticisms of the proposal could apply to written statements as much as to verbal statements. If we have conceded that victims have the right to make written representations, it is a simple step forward to say that they have the right to make verbal representations. I agreed very strongly with the minister's introduction and I think that he shares my motive because many people believe passionately that the Parole Board makes decisions without fully comprehending the victim's experience and its impact.

That is not meant in any way to undermine the Parole Board's decision-making authority. It is merely a matter of giving the Parole Board the information to inform the process. Some people were beginning to confuse that. I am not talking about a substitute for a court or a rerun of the trial but about a Parole Board making a decision. With respect, that is entirely different, and all parties understand that it is entirely different.

The one principle that I appeal to you on relates to the fact that many victims find making written statements very difficult; they do not capture the victim's experience or allow them to fully articulate what they want the Parole Board to take into account. As has been said, it can be about how the victim lives afterwards. I do not think that the process would be driven by vengeful victims or by people who want to be heard inappropriately or to misuse the system. It is about the principle of victims having the right to be heard and ensuring that, when the systems in Scotland make decisions, they fully appreciate the victim's experience. Ultimately, the decision lies with the Parole Board, and I do not think that amendment 403 undermines that in any way. I appreciate what the minister said, and I recognise the motives behind it.

If allowing oral representations at parole hearings might not require later primary legislation, I am inclined to press amendment 403. It seems to me that we have the opportunity now to make the proposal work in this bill. I would be a bit nervous about leaving it and, if I press it and lose, it does not stop the Government doing it anyway, so I am in a win-win situation.

The Convener: I comment in passing that it is unusual for you to display a degree of nervousness.

The question is, that amendment 403 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 403 disagreed to.

The Convener: The amendment falls but, on the basis of what has been said, I think that Margaret Curran can retire having achieved a result.

11:25

Meeting suspended.

11:35

On resuming—

Section 41—Breach of undertaking

The Convener: Amendment 518, in the name of the cabinet secretary, is grouped with amendments 519 to 522 and 540.

Fergus Ewing: Amendments 518 to 522 and 540 will implement the European Union framework decision on taking account of convictions in member states of the European Union in the course of new criminal proceedings. The framework decision requires to be implemented by 15 August 2010. Amendments 518 to 520 and 522 seek to amend primary legislation to ensure that Scottish courts will be able to consider previous convictions in other EU countries. Amendment 521 provides an order-making power for Scottish ministers to make further amendments to legislation to ensure that the framework decision is fully implemented. Amendment 540 requires that any such order be made using the affirmative procedure.

The framework decision is based on the principle of mutual respect for the justice systems in each member state. It seeks to assist courts across the EU in administering justice, in passing sentences and in upholding the integrity of the rule of law.

I move amendment 518.

The Convener: As no one else wishes to speak to the amendments, and as the issue is fairly straightforward, does the minister feel the need to wind up?

Fergus Ewing: No.

Amendment 518 agreed to.

Section 41, as amended, agreed to.

After section 41

The Convener: Amendment 420, in the name of the cabinet secretary, is in a group on its own.

Fergus Ewing: Amendment 420 will clarify the jurisdiction of a sheriff or justice of the peace to grant a warrant for execution by a police member of the Scottish Crime and Drug Enforcement Agency, or by a constable who is not a constable of a police force for a police area that lies within the sheriff's or JP's jurisdiction. Amendment 420 is necessary because there is, following a recent court judgment, some uncertainty about the power of a sheriff to grant a warrant in this regard. The uncertainty applies both to constables of police forces and to SCDEA police members. Amendment 420 will address that uncertainty by inserting a new section that will make it clear that a sheriff is not prevented from granting a warrant for execution by a constable or a police member of the SCDEA simply because that constable or police member is not a constable of a force that lies within the sheriff's sheriffdom.

Amendment 420 will allow a sheriff to issue a warrant to an officer from outwith his sheriffdom who is investigating an offence that potentially falls within his sheriffdom. For example, Lothian and Borders Police might be investigating a housebreaking in Edinburgh and want to search premises in Glasgow as part of that investigation. The amendment puts it beyond doubt that, in such situations, the sheriff in Glasgow will not be prevented from granting a search warrant for execution by an officer from Lothian and Borders Police. Equally, amendment 420 clarifies that a sheriff will not be prevented from granting a warrant to any police member of SCDEA simply because that police member is not a constable of the local force.

Amendment 420 will not affect any other grounds that would affect a sheriff's ability to issue a warrant.

I move amendment 420.

Amendment 420 agreed to.

Sections 42 and 43 agreed to.

After section 43

The Convener: Amendment 132, in the name of the cabinet secretary, is grouped with amendment 197.

Fergus Ewing: Amendment 132 will repeal sections 24A to 24E of the Criminal Procedure (Scotland) Act 1995, which provide for an electronically monitored movement restriction requirement to be imposed as a condition of bail in some cases.

Electronically monitored movement restriction conditions of bail were piloted in four courts, from April 2005 to December 2007. Such conditions could be imposed only in limited circumstances, where the court had already refused to grant bail and a subsequent application was made by the accused for bail with a movement restriction condition. The evaluation into the pilots highlighted low use of the provisions by the courts, high breach rates and high cost and disproportionate burdens being placed on enforcement agencies.

The previous Administration agreed that the pilots should end, so the regulations that empowered the pilot courts to impose movement restriction conditions were revoked. Repealing sections 24A to 24E of the 1995 act will remove any concerns to the effect that the Scottish Government intends now, or in the future, to resurrect them. Amendment 197 is consequential on agreement to amendment 132.

I move amendment 132.

Bill Butler (Glasgow Anniesland) (Lab): I believe that the courts should retain the right to impose, where it is deemed appropriate to do so, an electronic tag on people who are granted bail. However, I am unclear as to what the effect of amendment 132 will be. I will be grateful to be wrong, but it suggests to me that the Government's intent is that the power to impose an electronic tag as a condition of bail be removed. Closer inspection of the amendment suggests that under existing provisions of the Criminal Procedure (Scotland) Act 1995, a court is able to impose further conditions that it considers necessary to ensure that the conditions of an offender's bail are observed. Can we have clarity from the minister that the further conditions that are referred to will still include electronic tagging, where it is appropriate?

The Convener: While the minister seeks advice from his officials, I underline that this could be a matter of concern. There is a history of significant breaches and we wish to ensure that the law is adequate for the wider protection of society. Minister, are you now in a position to sum up?

Fergus Ewing: Yes. I make it clear that if amendment 132 is agreed to, it will entirely remove tagging for bail because of the results of the evaluation of the pilots, which were undertaken as I described and were found to demonstrate that electronic tagging does not work.

The Convener: The question is, that amendment 132 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

Against

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 132 agreed to.

Section 44—Prosecution on indictment: Scottish Law Officers

The Convener: Amendment 421, in the name of the cabinet secretary, is grouped with amendments 422 to 427 and 451.

Fergus Ewing: Amendments 421 to 427 and 451 are technical amendments. Section 44 of the bill will remove the requirement for indictments to be libelled in the personal name of the Lord Advocate or—as the case may be—of the Solicitor General. It will amend the existing framework, which is in place through the Criminal Procedure (Scotland) Act 1995, regarding the raising of solemn cases where there is a vacancy, or vacancies, in the office, or offices, of the Scottish law officers. It also makes provision concerning the continuing effect of such proceedings. The amendments are designed to provide additional transitional arrangements for the raising of indictments in those circumstances, and to make provision for their continued effect, both of which are considered to be necessary.

I move amendment 421.

The Convener: The amendments could remove a situation that had the potential to cause some excitement.

Amendment 421 agreed to.

Amendments 422 to 427 moved—[Fergus Ewing]—and agreed to.

Section 44, as amended, agreed to.

Sections 45 and 46 agreed to.

After section 46

11:45

The Convener: Amendment 428, in the name of the cabinet secretary, is in a group on its own.

Fergus Ewing: Amendment 428 will insert into the Criminal Procedure (Scotland) Act 1995 two new sections on prosecution of sexual offences.

Proposed new section 288BA of the 1995 act will provide a statutory basis for use of a docket attached to an indictment, or to a complaint by the Crown, to inform the defence of the Crown's intention to lead evidence of an offence that has not been charged. That approach might be used when a complainer alleges that a more serious sexual offence than that which has been charged was committed against her, but there is sufficient corroborative evidence to support only a less serious charge. For example, a complainer might allege that she was raped, but there might be corroborated evidence to support only a charge of attempted rape or sexual assault.

In the past, in order to enable the complainer to give a full and honest account of what happened to them, the Crown followed the practice of attaching a docket to the case to inform the defence of the Crown's intent to lead evidence of an offence that had not been charged. However, there is no statutory authority for the use of such dockets, and recent decisions have cast doubt on their use, in view of which the Crown has discontinued them. Amendment 428 will provide a statutory authority for their use.

The use of a docket to lead evidence of an offence that has not been charged is restricted to circumstances in which the act or omission in the docket relates to the same event as the offence that has been charged, or a series of events of which that offence is a part. Therefore, a docket cannot be used to lead evidence of an alleged offence that is unrelated to that which has been charged.

Proposed new section 288BB of the 1995 act is a technical addition. It will provide that it is competent for the Crown to libel more than one statutory sexual offence, or a combination of statutory sexual offences and common-law offences, in a single charge. It is competent to libel more than one common-law offence in a single charge, but it is not clear that it is competent to libel more than one statutory offence or a statutory offence and a common-law offence in a single charge.

At present, it is common practice for the Crown to libel physical and sexual aspects of an assault as part of a single charge in circumstances where, for example, it is alleged that the accused assaulted and raped the complainer. That benefits the prosecution because of the ruling in Campbell v Vannet that only the essential facts of a crime require to be corroborated, and not every single element of a charge. By providing a statutory basis for mixed libelling of common-law and statutory sexual offences, we will ensure that the move to a statutory framework for sexual offences under the Sexual Offences (Scotland) Act 2009 does not inadvertently make sexual offences more difficult to prosecute.

I move amendment 428.

The Convener: As I see it, amendment 428 just puts into statute what has been the practice of the courts for a lengthy period and it aims simply to overcome the problems that were caused by the Campbell case. It should be supported.

Amendment 428 agreed to.

Section 47—Remand and committal of children and young persons

The Convener: Amendment 541, in the name of Robert Brown, is in a group on its own.

Robert Brown: Amendment 541 is a probing amendment that seeks clarity. The Scottish Government has rightly set out the policy intent to end detention of children under 16 in adult establishments and young offenders institutions for young people aged 16 to 21. That intention, which is backed by all parties, is the purpose of section 47. However, it has been suggested that, although section 47 deals with section 51 of the Criminal Procedure (Scotland) Act 1995, it does not deal with section 44 of that act.

I am told that, in a recent case in Dundee, a sheriff sent a 15-year-old to Polmont YOI, allegedly under section 44 of the 1995 act. I sought to clarify the issue by way of a parliamentary question and the answer said that there had been no such occurrences under section 44 of the Criminal Procedure (Scotland) Act 1995. However, I understand that the case has been made known to the minister and I hope that it has been possible for him to check it out.

The difficulty might arise from the phrasing of section 44 of the Criminal Procedure (Scotland) Act 1995, which applies to children, who are—I presume—designated as "persons under 18", and which says that the sheriff may, but presumably does not require to, send a child who is convicted of an offence to residential accommodation that is provided by a council. Amendment 541 would restrict the relevance of that to children of 16 and 17, which would, I hope, resolve the ambiguity. There is a technical issue about whether the Government's clear intentions have been effectively put into the bill. My intention as regards the amendment will obviously depend on what the minister can say to me in reply.

I move amendment 541.

Fergus Ewing: Amendment 541 would remove a sheriff's power to place a young person in residential accommodation following conviction for an offence for which an adult could be imprisoned. We believe that it is sometimes appropriate for a sheriff to place a young person in residential accommodation, which is defined as an establishment that provides residential accommodation for children. For example, a sheriff may wish to place a young person in secure care, where their needs and risk can be best managed in the controlled care setting of secure accommodation.

When considering the abolition of unruly certificates in 2008, we consulted a number of relevant organisations on the impact of that change, including Scotland's Commissioner for Children and Young People, who supported the abolition and said that

> "this welcome change in legislation will go some way to keeping children out of prison."

It should be noted that there has been no such consultation on the impact of amendment 541, which would remove the power of sheriffs to place young persons in residential accommodation. I can tell Robert Brown that I understand that in practice, before the detention of a child under section 44 of the Criminal Procedure (Scotland) Act 1995, a sheriff will usually seek the advice of the principal reporter before sentencing and is obliged to do so where a child is subject to a supervision requirement under section 49 of the 1995 act.

Robert Brown mentioned a particular case. I say simply that I am aware of the case and that we have written to Dundee sheriff court for clarification of how that case was dealt with. It would not be appropriate for me to comment further at this stage.

Robert Brown: I have listened to the minister. My intention with amendment 541 was not to change the arrangements with regard to residential accommodation, but to focus on whether section 44 of the 1995 act did funny things that had not been got rid of. However, in the light of the minister's comments, although the matter has not been entirely bottomed out, I will not press amendment 541 at this time. Perhaps the minister can keep me advised of the outcome of his inquiries on the issue.

Amendment 541, by agreement, withdrawn.

Section 47 agreed to.

Sections 48 to 51 agreed to.

After section 51

The Convener: Amendment 429, in the name of the cabinet secretary, is grouped with amendments 454 to 456, 458 and 459.

Fergus Ewing: Amendment 429 will extend the application of sections 288C, 288E and 288F of the Criminal Procedure (Scotland) Act 1995, which prohibit an accused person from conducting their own defence in certain cases involving sexual offences, or in cases involving child witnesses or other vulnerable witnesses. Currently, the prohibition applies specifically to preliminary hearings, trials and victim statement proofs. The amendments will extend the prohibition to "any relevant hearing", which means a hearing at which, or for the purposes of which, a witness is to give evidence.

It is important that the amendments be agreed to. The prohibitions will apply in cases in which the alleged victim or a witness might be particularly intimidated or otherwise inhibited from giving their evidence. Such cases include those that involve certain sexual offences and child witnesses under the age of 12, or other vulnerable witnesses. Our intention is to ensure that victims and witnesses are not to be cross-examined by the alleged perpetrator in any relevant hearings relating to such cases. The law as it stands does not cover all the types of hearing at which it is possible for a witness to give evidence, which is why we seek to make the amendments. The accused will, of course, still be legally represented, and will be notified that they cannot conduct their own defence. However, the provisions take account of the interests of vulnerable witnesses in cases where there would be considerable potential for intimidation if the accused was to conduct their own defence.

Amendments 454 to 456 and amendment 458 will, if amendment 429 is agreed to, make a number of consequential amendments to the 1995 act. They will replace references to specific hearings with the general term “any relevant hearing”. Amendment 459 will make a consequential amendment to the Criminal Procedure (Amendment) (Scotland) Act 2004. It should be noted that paragraph (b) of amendment 459 is consequential on agreement to amendment 132.

I move amendment 429.

The Convener: When the issue was looked at in connection with earlier legislation, it was revealed that the situation to which the minister referred had happened only once in the past 50 years. Nevertheless, it is clearly undesirable that an accused person should conduct his own defence and have the opportunity of confronting or cross-examining the alleged victim. Amendment 429 simply seeks to extend that established principle, and to my mind it is worthy of support. I take it that there is no need to wind up, minister.

Fergus Ewing: There is no wind-up.

Amendment 429 agreed to.

Section 52—Disclosure of convictions and non-court disposals

Amendments 519 and 520 moved—[Fergus Ewing]—and agreed to.

Section 52, as amended, agreed to.

After section 52

Amendment 521 moved—[Fergus Ewing]—and agreed to.

After schedule 2

Amendment 522 moved—[Fergus Ewing]—and agreed to.

Section 53 agreed to.

Section 54—Submissions as to sufficiency of evidence

The Convener: Amendment 462, in the name of the cabinet secretary, is grouped with amendments 463 to 477 and 514.

Fergus Ewing: The amendments make a number of changes to the bill, creating a new Crown right of appeal against certain judicial decisions that can end a trial.

Amendments 462 and 463 make technical changes to the new statutory submission that the defence may make on the sufficiency of evidence in a case. That submission may be that the evidence is insufficient in law to justify the accused being convicted of the indicted offence or that there is no evidence to support part of the circumstances in the indictment. If successful, it will result either in the judge acquitting the accused of the indicted offence or an amendment to the indictment. The amendments ensure that the submission may be made only once, either at the close of all evidence in the case or at the conclusion of the prosecutor’s address to the jury.

Amendments 464 to 467 are technical and will ensure that the Crown appeals provisions better reflect existing criminal court practice.

Amendment 468 clarifies that it will not be possible for the defence to make a common-law submission that, on the entire evidence that has been led in the case, no reasonable jury, properly directed, could convict. That reflects the policy intention on the introduction of the bill. However, the Sheriffs Association suggested in its written evidence to the committee that the provisions in the bill would not prohibit that type of submission. Amendment 468 will make certain that that type of submission cannot be made.

Amendments 469 and 477 make provision for time limits when a prosecutor wishes to exercise the new Crown right of appeal that is created by section 55. The appeals concerned are against two types of judicial decision: first, a ruling that there is no case to answer; secondly, a direction that the Crown case is insufficient for the jury to convict on a particular charge or to support some part of the charge. The existing provisions do not currently set out time limits for the Crown to indicate that it intends to appeal. That might cause some difficulties in practice and unfairness to accused persons if it were to result in extended delay. The amendments therefore ensure that there will be an overall deadline of seven days from the making of the decision being appealed for the lodging of a note of appeal. The prosecutor will have to intimate an intention to appeal either immediately after the judicial decision or after seeking an adjournment of up to two days in order to consider whether to make an appeal. No new time limits are proposed for any appeal against a ruling during a trial that an important item of prosecution evidence is inadmissible, as that mode of appeal is subject to the leave of the court.

Amendment 470 will require the suspension of the effect of the acquittal. That will allow the court to grant bail without there appearing to be two contradictory orders in operation.

Amendment 474 makes a minor, clarifying amendment to new section 107D of the 1995 act.

Amendments 471, 472 and 514 deal with bail and remand decisions when a Crown appeal is made against an acquittal under section 55. Although the person will have been acquitted, it will be necessary for the court to decide whether they should be bailed or remanded during the period between the acquittal and the deciding of the appeal. The amendments regulate that decision.

12:00

Section 55 already covers that situation through new section 107A(2) of the 1995 act. It reflects the Scottish Law Commission's recommendation that decisions to remand an acquitted person subject to a Crown appeal should occur only in exceptional circumstances. However, the existing provision is unsatisfactory, as it suggests that the exceptional requirement would apply to both the possible options—not just to remand but to bail. We have given detailed thought to the Scottish Law Commission's reasons for recommending that a remand decision should occur only in exceptional cases. The person concerned will of course have been acquitted, and there are strong arguments of fairness against placing such a person in custody. On the other hand, courts are well versed in making bail decisions, and the normal framework allows them to look at all the circumstances before taking their decision.

The Crown appeals provisions will allow challenge to an acquittal caused by an error by a trial judge. The cases that the Crown will decide to appeal under the new provisions are likely to be at the most serious end of the spectrum and those in which the public interest is most likely to be affected by the outcome. Those appeals will be rare. The Crown anticipates that only three or four will be made in any year. An example of an appeal could be in a murder trial where the judge has ruled that there is no case to answer and that decision is closely contested by the Crown.

The Scottish Law Commission recognised that there may be cases in which it would be justified to remand someone subject to a Crown appeal. There is a clear public interest in ensuring that especially dangerous persons are not released in the period between an incorrect decision and a ruling by the appeal court to correct that mistake and quash the acquittal. The person might reoffend or seek to flee justice, and it seems vital to us that the courts should not be bound by an unreasonably high test before the safety and security of the public can be safeguarded.

After consulting the Crown Office, we have concluded that the exceptional test is not needed for remand decisions. Amendment 471 will therefore remove the word "exceptionally", which means that the normal test that courts are used to applying in making bail and remand decisions will apply. It involves a presumption in favour of bail, which can be overturned where there is a good reason for refusing it.

Amendment 472 will provide an additional safeguard by ensuring that detention can occur only where there are arguable grounds of appeal.

Amendment 514 is a consequential amendment, which will add a Crown appeal to the instances in which bail can be granted under the Criminal Procedure (Scotland) Act 1995.

Amendments 473 and 475 are technical amendments that will remove two unnecessary provisions.

Amendment 476 will allow a prosecutor to desert a case for the time being, pending the result of a Crown appeal. That should save court time and prevent a trial continuing in relation to several minor charges where there is an outstanding Crown appeal on the main charge in the indictment. Desertion will permit the prosecutor to reassess the case in its entirety, following the result of the Crown appeal.

I move amendment 462.

The Convener: This is a fairly important issue. I invite other contributions.

Robert Brown: I have a brief comment to make on amendment 471, which will remove the words "exceptionally and" with regard to the detention of the person. If that amendment were agreed to, the remnants of new section 107A(2)(b) of the 1995 act would read:

> "after giving the parties an opportunity of being heard"

the court may

> "order the detention of the person in custody or admit him to bail."

It is fair to say that no guidance is given to the court as to the circumstances, which the minister outlined carefully. Is there an issue about whether the court should have guidance from Parliament about the circumstances in which detention and custody—in these unusual situations—would be appropriate?

Fergus Ewing: Given the potential controversy of amendment 471, I sought to cover the issues involved at some length and to go through them in greater length than I did those of the other—not unimportant—amendments in the group.

By removing the phrase "exceptionally and", amendment 471 will in effect apply the normal test, so that the normal rules of considering whether to grant bail will apply. We make that change in the expectation—indeed, the certainty—that judges are very familiar with the application of that test and are therefore well aware of how it should be applied. For that reason, we do not think it necessary to specify that further guidance should be issued, as we can be confident in our expectation that those who are required to make decisions about bail are very well experienced in such decisions.

The Convener: I suspect that the amendments are predicated on the failure of the prosecution in the World's End murder case and seek to protect the Crown's position where a no-case-to-answer submission under section 97 of the 1995 act is granted by the trial judge. As the law stands at present, the only remedy for such a decision would be for the matter to be taken to the appeal court on the Lord Advocate's reference. On that basis, the prosecution would have already failed and the accused could not be subject to reindictment.

It is worth recording that instances where a no-case-to-answer submission has been successful are very few in number, as the minister has said. Amendment 469 would allow the Crown to seek to appeal such a decision by allowing for the adjournment of the trial diet while the appeal is determined. Personally, I have no difficulty with the proposed time factor, as I think that the two-day limit is appropriate. I also have no difficulty with the proposal that the accused be remanded in custody rather than be granted bail.

I am minded to support the amendments.

Does the minister wish to wind up the debate?

Fergus Ewing: Let me say briefly that the amendments reflect the recommendations of the Scottish Law Commission's "Report on Crown Appeals".

Amendment 462 agreed to.

Amendments 463 to 468 moved—[Fergus Ewing]—and agreed to.

Section 54, as amended, agreed to.

Section 55—Prosecutor's right of appeal

Amendments 469 to 476 moved—[Fergus Ewing]—and agreed to.

Section 55, as amended, agreed to.

Section 56 agreed to.

Section 57—Further amendment of 1995 Act

Amendment 477 moved—[Fergus Ewing]—and agreed to.

Section 57, as amended, agreed to.

Section 58—Retention of samples etc

The Convener: Amendment 478, in the name of the cabinet secretary, is grouped with amendments 404, 405, 479, 406, 480, 407, 481, 482, 408, 494, 499, 502 to 504, 512 and 513. I point out that if amendment 478 is agreed to, I cannot call amendment 404, because of pre-emption.

Fergus Ewing: Amendment 478 will make a number of changes to section 18 of the Criminal Procedure (Scotland) Act 1995. The amendment will apply the provisions on destruction of samples to the new sections 18B and 18C that will be inserted by section 59 of the bill and it will make consequential changes to cross-references. Amendment 478 will also insert new subsection (7AA) into section 18, which will remove the requirement that devices that are used to collect forensic data from the external skin of a person outside Scotland can only be those that are approved by the Scottish ministers. That power is considered unnecessary and bureaucratic, and we have no evidence that it has been used.

James Kelly's amendments 404 to 408 introduce significantly more stringent powers for the retention of data from people who are prosecuted for but not convicted of an offence. The aim appears to be to bring our legislation closer to the Crime and Security Act 2010, which was recently passed for England and Wales. It is worth remembering that, in the case of S and Marper v the United Kingdom, the judgment found the retention regime in England and Wales to be incompatible with article 8 of the European convention on human rights. That regime provided that forensic data on those who were not subsequently convicted of an offence could be retained for an indefinite period of time. The UK Government's Crime and Security Act 2010 amended the regime.

However, it is also worth noting what the House of Lords and House of Commons Joint Committee on Human Rights said about the provisions in the 2010 act in its 15th report of the 2009-10 session, which was published in March:

> "in our view, the proposal to continue to retain the DNA profiles of innocent people and children for up to 6 years irrespective of the seriousness of the offence concerned and without any provision for independent oversight, is disproportionate and arbitrary and likely to lead to further breaches of the ECHR."

The report concluded that

> "even if the Government is able to persuade its colleagues on the Committee of Ministers"—

whose next meeting will be in June 2010—

> "to accept its approach, we consider that there is a significant risk that the proposals in the"

2010 act

> "would lead to further litigation both at home and at the European Court of Human Rights and a significant risk of further violations of the right to respect for private life by the United Kingdom."

Mr Kelly's amendments seek to introduce a similar retention regime in Scotland, but with retention triggered following the person's being proceeded against, not arrested, as in England and Wales. That approach would mean that someone who was prosecuted for but acquitted of a minor breach of the peace would have their DNA and fingerprints retained for six years—the same period for which someone who was prosecuted for but not convicted of rape or murder would have their DNA and fingerprints retained. Given that lack of discrimination between minor and serious offences, Mr Kelly is asking us to introduce an approach that would be at greater risk of ECHR challenge. A successful challenge that found the approach to be disproportionate and unlawful may itself lead to justice being undermined. For example, an individual may be able to challenge his conviction on the ground that his DNA was retained unlawfully and therefore was inadmissible as evidence. If the DNA evidence was crucial to the case, a court could declare the DNA evidence to be inadmissible and the person could be acquitted or have his conviction quashed.

The Scottish approach to the retention of DNA that is taken from those who are not subsequently convicted of an offence, as set out in section 18A of the 1995 act, was looked upon favourably by Strasbourg, because it differentiates between the most serious offences and minor offences by providing for retention only when a person is proceeded against for certain sexual and violent offences. It allows a minimum retention period of three years, but it also enables that period to be extended if the courts deem that necessary. In fact, when an unconvicted person is considered to pose a significant risk, DNA can be retained beyond the six-year period that is allowed for in England and Wales.

There are, therefore, two strong features of the Scottish approach that do not apply in England. First, retention under section 18A does not apply to minor offences; it applies only to sexual and violent offences, which provides the differentiation that was sought by the judgment in S and Marper v the United Kingdom. Secondly, the decision on the appropriate period for which to extend the retention of DNA is taken independently by the court, taking into account the evidence that is before it. We do not want to take a backward step in terms of the ECHR by moving away from the current regime, which was considered to be proportionate.

12:15

In its response to our 2008 consultation on the acquisition and retention of forensic data, the Association of Chief Police Officers in Scotland supported the current regime, stating:

> "Members are supportive of the current procedures in relation to retention of the DNA of individuals who, having had criminal proceedings initiated against them in respect of a relevant offence, are not convicted. There is also strong support for the widening of these powers to include the retention of the fingerprint records of such persons."

The law officers have indicated that, under their responsibility for prosecuting offences in Scotland, they support Scotland's current approach and would not wish to move to an approach where there was uncertainty about ECHR compliance.

In relation to the evidence presented by the United Kingdom Government to support its new retention periods for unconvicted persons, of course if you retain more DNA you are going to get more hits and solve more crimes. However, the question is not solely about evidence, but about proportionality and finding a balance between what is acceptable to the police in terms of providing evidence to investigate crime, to the courts in terms of compatibility with the ECHR and to the people of Scotland in terms of protecting their civil liberties. We believe that we have the balance correct with the current law, and for that reason we oppose amendments 404 to 408.

Amendment 479 is a technical amendment that amends section 58(3) of the bill in order to recast the adjustment that is being made to section 18A of the Criminal Procedure (Scotland) Act 1995.

Amendment 480 amends section 58(3)(c) of the bill, which amends section 18A of the 1995 act. It substitutes a reference to ensure consistency in terminology across the forensic provisions in the 1995 act and the Criminal Justice (Scotland) Act 2003.

Amendment 481 amends section 58 of the bill to insert new provisions into section 18A of the 1995 act. It amends section 18A by providing the sheriff principal with the power to amend the date of destruction for any forensic data that are held under section 18A, should he or she allow an appeal made by a chief constable against the original decision of a sheriff not to extend the retention period. Where an appeal is successful, the sheriff principal will have the same power as the sheriff to grant an order amending or further amending the destruction date. The order is limited to a period of two years from the previous destruction date.

Amendment 499 clarifies the purposes for which Scottish police forces, the Scottish Police Services Authority or other bodies operating on behalf of the police can use forensic data from outwith Scotland. In accordance with new section 19C(2) of the 1995 act, which is inserted by section 60(1) of the bill, such data can be used for the prevention and detection of crime, the investigation of an offence, the conduct of a prosecution or the identification of a person. Amendment 502 makes provision for the sharing of forensic data by the police within Scotland and other jurisdictions for use in accordance with section 19C(2) of the 1995 act or for checking against other relevant data. The amendment also enables the police, the Scottish Police Services Authority or a person acting on behalf of a police force to use forensic data provided to them by other jurisdictions to check them against Scottish forensic data held on relevant databases. The amendments are aimed at providing a clear description in statute of the powers of the police to use and provide forensic data to support the investigation, detection and prosecution of crime, including cross-border crime. The terms of section 19C(2) of the 1995 act will ensure sufficient safeguards on the uses of the data.

Amendments 503 and 504 provide for forensic data mentioned in section 19C(1) of the 1995 act to be used for the investigation of a crime or suspected crime and the conduct of a prosecution in a country or territory outside Scotland. The effect of the amendments is that the powers under new section 19C of the 1995 act on the use of samples will be applicable to the investigation of crime or suspected crime or the conduct of a prosecution in England, Wales and Northern Ireland.

Amendment 512 inserts a new paragraph into schedule 5 to the bill, as it makes minor and technical amendments to sections 18(8)(c) and 19 of the 1995 act. It provides consistency with the policy elsewhere in the bill by removing the reference to “impressions” in section 18(8)(c) of the 1995 act. All other references to “impressions” will be removed, as this term is now considered to be obsolete for the purposes of forensic data provisions in the 1995 act. The term “relevant physical data”, as defined in section 18(7A) of the 1995 act, already catches the types of impressions that are required for these provisions. Replacing the term “prints” with “relevant physical data” will ensure that palm prints and other kinds of relevant physical data are also included for the purpose of section 18(8)(c) of the 1995 act, as the current meaning of “prints” is limited to fingerprints.

Amendment 513 repeals section 20 of the 1995 act, as it has become obsolete. That section provides the power to check physical data, prints and samples against other physical data. However, if the amendments are accepted, that will be provided for in new section 19C of the 1995 act, which clarifies the power in more detail, and explains its limits and its cross-border application, so as to render section 20 of the 1995 act unnecessary.

Amendment 482 modifies the definition of a relevant sexual offence in section 18A of the Criminal Procedure (Scotland) Act 1995. Among other things, that section grants the power to retain DNA from individuals who have been prosecuted for but not convicted of certain sexual offences. The amendment provides that public indecency is a relevant sexual offence for the purpose of section 18A only if it is narrated in the criminal proceedings that there was a sexual element to the conduct.

Amendment 494 amends the list of relevant sexual offences in section 19A of the 1995 act to include public indecency, but only where a court has made a finding that there was a sexual element to the behaviour. Following the High Court case of Webster v Dominick in 2005, it was held that the common-law offence of shameless indecency was not a relevant charge in Scots law, therefore the offence that should be prosecuted is public indecency, as it covers conduct of a sexual nature. In response to that judgment, the offence of public indecency where there is a sexual element to the behaviour has been substituted for the now obsolete offence of shameless indecency.

Amendment 494 adds offences under sections 47, 49, 49A and 49C of the Criminal Law (Consolidation) (Scotland) Act 1995 to the relevant violent offences that are listed in section 19A(6) of the Criminal Procedure (Scotland) Act 1995. The amendment has two effects. First, it allows DNA samples, DNA profiles and fingerprints to be retained from individuals who have been proceeded against but not convicted of public indecency, provided that there was a sexual element to the conduct or an offence under section 47, 49, 49A or 49C of the Criminal Law (Consolidation) (Scotland) Act 1995. Those sections concern offences involving the possession in a public place of an offensive weapon or an article with a blade or point. Secondly, the amendment will enable the police to take DNA and fingerprints under section 19A of the Criminal Procedure (Scotland) Act 1995 from any person who has been convicted of such an offence after their conviction. Statistical information shows that those who are convicted of possessing an offensive weapon have an above-average propensity to go on to commit serious violent crime. The amendment will bring that offence into line with violent offences that are already included in the list in relation to which people can have their DNA retained if they are proceeded against but not convicted.

I move amendment 478.

James Kelly: I support amendments 404 to 408, which are all in my name and seek six-year retention of DNA for all those who have been prosecuted but not convicted. I also seek provision for two-year extensions on application.

The amendments are important. The primary objective is to extend the DNA database. It is important to understand that the retention time is limited to six years; unlimited retention is not being sought. It is also important to recognise that DNA can be used not only in detecting crime but in clearing people who are innocent if it can be proven that their DNA was not at the scene of the crime.

There have always been people who have opposed extensions of the DNA database. Some argue that the DNA of people who have been found guilty of minor crimes should not be held. However, I put forward the case of John Morton, who was found guilty of rape earlier this year. The offence was committed in 2002. He was detected when his DNA was taken after a minor breach of the peace in 2007, and he was brought to court. That shows the power of the DNA database in tracking down those who commit unlawful acts. In addition, I submit that, in England and Wales, there have been 832 successful matches against the database for serious crimes over the past year. One of those matches was in the case of Paul Hutchinson, who murdered a young teenager in 1983. He has now been convicted, 27 years after his awful crime.

There are those, including the minister, who hold up the DNA system in Scotland as a model system, but given that the rape conviction rate, which was announced recently, is at a 25-year low, no one will hold up our record on rape prosecutions as an international model. I submit that the extension of the DNA database would help with tracking down offenders in the 2,000 rape cases in Scotland that remain unsolved. It is one thing to say that we all take the issue seriously, but we must look at provisions that will allow us to make progress and be successful in getting more convictions and bringing more people to trial. I submit that the extension of the DNA database is a prime example of a measure that would do that.

In relation to the minister's points about the ECHR, he noted that the UK Government moved from a position of indefinite retention of DNA data to one of retention for six years so that the legislation would be fit for purpose. Therefore, I dissent from the views that he expressed in his opening remarks.

I oppose amendments 478 and 482 because, essentially, they support the Government's position in the bill, which is that of those who are prosecuted for but not convicted of an offence, only the DNA of those who are prosecuted for but not convicted of serious violent and sexual offences should be retained.

I support amendments 479 and 480, which provide clarification on samples, and amendment 481, which provides clarification on two-year extensions. I support amendment 494, which clarifies the definitions of sexual and violent offences, and amendment 499, which seeks to allow forensic data that are obtained outwith Scotland to be used by the Scottish police. In addition, I support amendment 502 on the sharing of forensic data within Scotland, and amendments 503 and 504, which seek to allow the use of samples for prosecutions in England, Wales and Northern Ireland. Those are sensible amendments. I also support amendments 512 and 513, which are simply tidying-up amendments.

The Convener: As James Kelly said, the debate on this group is an important one. Although I regret having to postpone it, members have other commitments over the lunch hour, which will last literally one hour. I suspend the meeting until 2 o'clock but, as members will be aware, there is a briefing at 1.30.

12:28

Meeting suspended.

14:03

On resuming—

The Convener: We resume the debate on amendments to section 58, on matters pertaining to the retention of DNA samples. We have heard from the minister and James Kelly, but other members wish to contribute.

Robert Brown: I was about to launch into my devastating assault on James Kelly when the meeting was suspended, so I am feeling slightly frustrated.

I am genuinely concerned about James Kelly's amendments 404 to 408, which, if I understand them correctly, are designed greatly to widen the categories of people acquitted after trial or not proceeded against from whom DNA samples can be retained, and to double the normal time of retention from three to six years.

Mr Kelly mentioned 2,000 unsolved rape cases. I cannot believe that identification forms the issue in more than a small proportion of those cases, or that, in cases involving what might be described as violent stranger rape, the question of identification is the issue. As far as I can see, the difficulties in rape cases are almost always to do with cases of acquaintance rape, which often involve the consumption of drugs or alcohol, which complicates the issue and puts the onus on consent. None of that has anything to do with DNA samples.

I am not aware of there being any great evidence to suggest that James Kelly's amendments are good or necessary. As has been said, there is a balance between the rights of the individual—particularly one who has been found not guilty of a crime or who has not been proceeded against—and the interests of public safety.

There is a case—although I do not agree with it—for everyone having their DNA on a giant database. There might be some logic to that, providing that the authorities could be trusted not to load the database on to a memory stick and leave it on a bus. However, if it is accepted that it is not appropriate to store everyone's DNA information, which is the context within which we are operating, there can be only a limited right to retain DNA for serious matters, and for a limited time, where a person has been acquitted or not proceeded against.

I think that I am right in saying that the United Kingdom holds more DNA samples than almost any other country in Europe. James Kelly seems to be copying his amendments from the position in England, but I suggest to him that we should exercise caution in following the English model, given that the previous attempt by the Labour Government to go down that road rightly fell foul of the ECHR.

I have heard nothing to suggest that the Scottish model, which is reasonable and proportionate, causes particular problems. We know that, under section 29(2)(d) of the Scotland Act 1998, any provision that is incompatible with the ECHR is outwith the legislative competence of the Scottish Parliament.

The minister referred to the judgment in S and Marper v the UK. The criticism in that case was of the blanket and indiscriminate nature of DNA retention in England and Wales; it also highlighted the need to distinguish between adults and children in terms of the retention regime. The UK was found to be in violation of the ECHR on that basis, and I think that James Kelly's amendments raise the same issues.

The Council of Europe's Committee of Ministers has discussed the UK Government's response and has expressly stated that the regime in Scotland, which provides for the retention of the DNA of unconvicted adults only in relation to serious offences and only for three years, was in accordance with the ECHR. As the minister mentioned earlier, the highly regarded Joint Committee on Human Rights of the House of Commons and the House of Lords also argued persuasively that a six-year period of retention for unconvicted adults was a disproportionate interference with privacy rights under article 8 of the ECHR.

In short, James Kelly's amendments are not really supported by evidence, they are disproportionate and, much more significantly, they are likely to be the subject of ECHR challenge. The committee ought to reject them.

Nigel Don: I will carry on in the same vein. It is not often that I quote with approval a joint committee of the House of Lords and the House of Commons, but the Joint Committee on Human Rights was openly critical of the UK Government's stance.

Although James Kelly has quite reasonably tried to bring a policy north of the border so that there can be some similarity with what goes on in the south—I endorsed that approach in relation to previous amendments—he has ignored the real dangers, which go further than even those that Robert Brown has suggested. We could be in a position in which someone who was convicted of a heinous crime could be subsequently acquitted and freed on the basis that the DNA evidence on which they were convicted should not have been held. I do not want to take that risk, and I am astonished that anyone would. There is a risk that the entire legislative framework could be overturned by a European judgment, with the consequences that those who were convicted on the basis of stored DNA could be released and that those whose DNA was retained could claim compensation. The proposal opens up a pile of unnecessary problems, which we have already been warned about.

There is some logic in the idea that we should retain everyone's DNA at birth, as that would help to convict a few people. However, as Robert Brown said, if we are not going to do that—we are quite clear that we are not going to do it, and the ECHR is also quite clear on the matter—we need to have a system that is proportionate, as the present one is, and does not run the obvious risk of falling foul of decisions that we already know about. On that basis, I think that it would be absolutely crazy to support the Labour Party's position.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): James Kelly's amendments take account of the decisions that were reached as a result of the ECHR. To quote Nigel Don, if the committee does not accept them, it would be ignoring the very real and dangerous criminals who are out there and who could be caught if we retained their DNA. I fully support James Kelly's amendments, and I think that the argument that they do not comply with the ECHR is exaggerated scaremongering.

Stewart Maxwell: When Cathie Craigie talks about people scaremongering on the issue, she must be referring to the Joint Committee on Human Rights of the House of Commons and the House of Lords, as its members are the people who pointed out the risks that are involved in going down the road that the current, or rather previous, Labour Government suggested and which James Kelly is also suggesting, in terms of a retention period of six years. I do not think that that committee was scaremongering. It was pointing out the genuine risk that his new rules would breach the ECHR.

James Kelly's amendments completely ignore the valuable and reasoned report by the joint committee and the European ruling on proportionality as regards the retention of DNA. If we agree to the amendments we run the risk of being in breach of the ECHR right away. If the amendments pass into law that is subsequently challenged, rather than catching and keeping more dangerous criminals, we could end up detaining fewer dangerous criminals because people who had been convicted on the basis of DNA that had been retained under legislation that, according to the ECHR, was unlawful would, of course, have their convictions quashed. That is a dangerous road to go down.

I am not surprised that Labour members support that approach because that is what the Labour Party in London has been doing. Frankly, we should not follow the Labour Party in London; we have learned that lesson over many years. We should stick to the proportionate system that we have in Scotland and the recommendations on DNA retention that have been widely accepted and respected by Europe and others. We should reject amendments 404 to 408.

The Convener: The matters under discussion have been debated by the Parliament in the past. I have serious reservations about Mr Kelly's amendments—to my mind, they are simply not arguable in law. I have no issue with the retention of DNA samples that are taken on conviction. It is clear that it will be necessary for the police and other authorities to retain samples during an inquiry or investigation and for some time thereafter. That is recognised in existing law, which gives the police the additional protection of being able to apply for the retention of such samples for a maximum of three years in the case of unconvicted persons who have been charged with violent or sexual offences, with a further extension allowed on application to the sheriff. That appears to be a reasonable position.

Mr Kelly's amendments go much further and would allow the authorities to retain samples from those who have not come before a court or those who, having done so, have been acquitted. Leaving aside the issue of desirability, the amendments fly in the face of established law.

In its December 2008 judgment in the case of S and Marper v the United Kingdom, the European Court of Human Rights took the view that English law breached article 8 of the European convention. An application under article 14 also went to the court. Although they did not make a determination on that application, the indications from the justices were that, had they not disposed of the matter by making a determination under article 8, they would have found that the law was flawed under article 14, too.

In effect, Mr Kelly seeks to make our law identical to English law that has, unfortunately, already failed to clear the European hurdle. It is perhaps significant that in their judgment the European justices referred to the law of Scotland as it stands and commented that the Scottish position is satisfactory. The minister also commented on that. The justices said, albeit in Eurospeak, that England was out on a limb, being the only jurisdiction that followed that line.

I am probably the last person here who would overplay the line of human rights, civil liberties and the European dimension generally, but I feel that what Mr Kelly seeks to do would be undesirable on the one hand and completely contrary to the law as it stands on the other. Were we to change the bill to incorporate his amendments, we would inevitably be subject to challenge and we would not win. I understand Mr Kelly's frustrations, but I can suggest only that the problem was caused by his colleagues in London, who incorporated the European convention into Scots law through the Scotland Act 1998, while assiduously avoiding doing the same to English law.

14:15

Fergus Ewing: I will reply to a couple of arguments that have been made in the debate. First, Mr Kelly referred to the Morton case and demonstrated how careful we need to be about the examples that we use to demonstrate the effectiveness of retention policies.

The Morton case involved DNA that was taken from someone who was accused of a fairly minor crime in 2009. The sample was found to match DNA taken from a rape scene in 2002. All DNA taken from those arrested is checked immediately against crime scene stains for unsolved crimes on the Scottish DNA database. It does not have to be retained for that to happen. In other words, the DNA comes from the crime scene, rather than being retained DNA from a specific individual. The identification was therefore made not because the individual's DNA had been retained but because the crime scene sample had been retained. That is an entirely different matter and, therefore, I respectfully submit, wholly irrelevant to the arguments that Mr Kelly advanced.

In addition, I understand that it has been argued in the press down south that the research on which the move towards a six-year period is based is itself based in part on research from the Jill Dando institute for crime science. The institute said that its research should not have been used as a basis for the proposals, because it was unfinished.

Without repeating the arguments that the convener and other members have made, it seems to me that there is clear proof that the pre-existing regime in the Marper case has already fallen foul of the ECHR. We are not talking about a theoretical future breach of the ECHR—a breach of the ECHR by England and Wales has already been shown. They have already been rapped on the knuckles. They have sought to address the issue by proposing the six-year period, which makes no distinction at all for the gravity of offences. It seems to me that that approach is fraught with risk and, for the reasons that Mr Maxwell and Mr Don have outlined, could confound the very objectives that Mr Kelly and Ms Craigie wish to achieve. We all wish those who are guilty of serious crimes to be brought to justice. However, that objective would be confounded if we do so by using evidence that is then found to be inadmissible because it breaches the ECHR for reasons that are clearly foreseeable. For those reasons, I strongly urge Mr Kelly not to move his amendments.

The Convener: Before I put the question, because there has been a lapse in time since we started this discussion, I remind members that, if amendment 478 is agreed to, I cannot call amendment 404, because of pre-emption.

The question is, that amendment 478 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 478 agreed to.

Amendment 405 moved—[James Kelly].

The Convener: The question is, that amendment 405 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

AGAINST

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 405 disagreed to.

Amendment 479 moved—[Fergus Ewing]—and agreed to.

Amendment 406 moved—[James Kelly].

The Convener: The question is, that amendment 406 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

AGAINST

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 406 disagreed to.

Amendment 480 moved—[Fergus Ewing]—and agreed to.

Amendment 407 moved—[James Kelly].

The Convener: The question is, that amendment 407 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

AGAINST

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 407 disagreed to.

Amendment 481 moved—[Fergus Ewing]—and agreed to.

Amendment 482 moved—[Fergus Ewing].

The Convener: The question is, that amendment 482 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 482 agreed to.

Amendment 408 moved—[James Kelly].

The Convener: The question is, that amendment 408 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

AGAINST

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 408 disagreed to.

Section 58, as amended, agreed to.

After section 58

The Convener: Amendment 418, in the name of Stewart Maxwell, is grouped with amendment 419.

Stewart Maxwell: Amendment 418 inserts new sections 18AA and 18AB into the Criminal Procedure (Scotland) Act 1995.

Proposed new section 18AA provides for the retention of forensic data that are taken from an individual at the time of their arrest or detention, where that person subsequently accepts a fiscal disposal issued under sections 302 to 303ZA of the 1995 act in connection with an offence or offences. Where the fiscal disposal relates only to a relevant sexual or relevant violent offence, as defined by reference to the list of sexual and violent offences set out in section 19A(6) of the 1995 act, the forensic data can be retained for at least three years from the date on which the measure was issued. Where the fiscal disposal relates only to offences that are not relevant sexual or relevant violent offences, the data must be destroyed within two years of the date on which the disposal was issued. That period cannot be extended. A fiscal measure can be issued in relation to a number of offences. Where such a disposal is issued in respect of a mixture of offences—that is, some of the offences are relevant sexual or relevant violent offences and some are not—the forensic data can be retained for at least three years from the date on which the measure was issued.

Proposed new section 18AB provides for the extension of the retention period beyond three years where the fiscal offer was issued and accepted in relation to a relevant sexual or relevant violent offence. The police can apply to a sheriff to have the retention period extended for a further two years on a rolling basis. The decision of a sheriff can be appealed to the sheriff principal by both parties, and the sheriff principal’s decision on the application will be final.

Amendment 419 inserts a new section 18AC into the Criminal Procedure (Scotland) Act 1995. It provides that the forensic data that are taken from an individual at the time of their arrest or detention for a fixed-penalty offence, within the meaning of the Antisocial Behaviour etc (Scotland) Act 2004, can be retained if they subsequently accept a fixed-penalty notice that is issued under part 11 of that act. The forensic data must be destroyed no later than two years from the date on which the fixed-penalty notice was issued. There is no provision for an extension of the retention period. If more than one fixed-penalty notice is issued in connection with other fixed-penalty offences arising out of the same incident, the data must be destroyed no later than two years from the date of the later notice.

At present, there is no provision for forensic data to be retained when individuals accept fiscal disposals that are issued under sections 302 to 303ZA of the 1995 act, whether or not they are for sexual and violent offences. Nor is there provision to enable forensic data to be retained when individuals accept fixed-penalty notices that are issued under the 2004 act. That is despite the fact that the behaviour of the person who has been arrested or detained was serious enough, in those cases, to warrant arrest or detention for the offence in question. In fiscal disposal cases in which relevant sexual or relevant violent offences are involved, it is proportionate that the data should be kept for a three-year period with the possibility of extension. That fits in with our current rules. The police need to be able to compare data that are taken from individuals who are involved in such serious offences for the benefit of society at large.

I understand that a recent Strasbourg case looked favourably on the retention periods in existing section 18A of the 1995 act, which enables forensic data to be retained for at least three years if a person is prosecuted for certain sexual and violent offences but is not subsequently convicted. The three-year period is based on those retention periods.

Retention of the data for a maximum period of two years is appropriate in cases where a fixed-penalty notice under the Antisocial Behaviour etc (Scotland) Act 2004 is accepted or a fiscal disposal is accepted for a non-sexual or non-violent offence. That is because such offences are not as serious as sexual or violent offences, so it makes sense that there should be a lesser period of retention. Again, the individuals might not have been convicted of the offence, but in accepting an offer of a fixed-penalty notice or a fiscal disposal, they accept liability for their actions.

Procedures for the collection and retention of forensic data are already in place, so I believe that the additional costs should be minimal.

I remind colleagues that we examined this issue at stage 1 in our evidence and report. It was clear that the quite correct move to the greater use of non-court disposals has meant that DNA and so on that would have been retained is not being retained because of that administrative change. I believe that the amendments will plug a loophole in the current law.

I move amendment 418.

Robert Brown: I am grateful to Stewart Maxwell for the lengthy explanation of the detail of his amendments 418 and 419. As he rightly said, we discussed these issues at stage 1. The amendments are intended to correct what a number of people saw as an anomaly that had crept in as a result of the wider use of fixed penalties.

At first glance, the amendments look straightforward—indeed, the committee made a recommendation on the subject—but one or two aspects of them make me hesitate and I wonder whether we have considered them carefully enough. They would undoubtedly extend the retention of DNA from the current position, which has to be justified. The issue arises whether what is proposed is proportionate and whether we have really considered the material criteria required for the retention of DNA, such as the gravity of the offence. There is a certain tension between saying that the offences need to be reasonably grave and making provision in relation to offences for which a fixed penalty has been accepted. There might be issues about where we have fixed penalties and where we do not. Those points were made by the Scottish Human Rights Commission, too.

I invite the minister and Stewart Maxwell to respond to that. Putting aside the anomaly argument, which we all accept, what is the case for extending the retention of DNA in such cases? I accept that we are not talking about cases in which people were not found guilty or were not proceeded against. There is a conviction and, therefore, there is less of an argument about proportionality than there would be otherwise. Nevertheless, those issues still come into it. Some of the issues that we discussed with regard to a previous group of amendments, such as ECHR, proportionality and gravity, still have to be considered. The committee report was fairly cautious and urged a balance between consistency and proportionality.

I hasten to say that I am not necessarily against the amendments; I just think that we should put on the record a bit more of a substantial case for extending the retention of DNA.

James Kelly: I speak in support of amendments 418 and 419. I maintain the position that I argued previously—that those who are prosecuted but not convicted should have DNA retained for six years. Amendments 418 and 419 provide for a lesser period than that, but I acknowledge that my amendments were defeated. I also acknowledge that Stewart Maxwell's amendments would close existing loopholes in the law and add to the existing DNA database. I repeat what I said before: the extension of the DNA database is positive and will help us to solve more crimes.

Bill Butler: I believe that amendments 418 and 419 are proportionate, reasonable and balanced and would not have a detrimental effect in terms of ECHR. The extension of the retention of DNA would relate to those who have been convicted, which is appropriate. The amendments would close a loophole in the law. I encourage Robert Brown to see them as balanced and proportionate. If we can get consensus on that round the table, that would be a good thing.

14:30

The Convener: Stewart Maxwell will have to convince me, too. I recognise that there is an anomaly and he is right to bring it to the committee's attention, but I am not yet entirely convinced that the amendments are proportionate. The committee has some unfinished business involving summary justice reforms and the way in which the Procurator Fiscal Service is dealing with them. Although some concerns have arisen, no case has been brought to my attention in which a conditional offer, fiscal fine or fixed penalty has been given in respect of a sexual or serious violent offence. If that had happened, there would have been considerable concern on the part of all members.

I would have thought that a case in which there is an argument for DNA retention should be a matter for prosecution so that the court can apply a realistic disposal. That might not be a custodial sentence, but it would certainly make some attempt to constrain and restrain the conduct of the accused person.

I am also a little concerned about the wording of proposed new section 18AA(2)(a) of the 1995 act, which amendment 418 would insert. It states, inter alia, that the data or sample must have been taken

"while the person was under arrest or being detained".

The vast majority of these cases do not result in an individual being arrested, and "detention" is a word of variable meaning. Does the wording in the amendment relate to the person being detained at a police office or some other place of custody? Perhaps Stewart Maxwell could address that point in his summing up.

I can see what is being attempted in the amendments, but I am not totally persuaded by them. I will listen to the minister and Mr Maxwell with considerable interest.

Fergus Ewing: Stewart Maxwell's amendments 418 and 419 make a positive addition to the bill as they introduce valuable new powers for the retention of data taken from individuals who have committed acts that are serious enough to culminate in arrest or detention. Although they have not been convicted, the individuals concerned have accepted a fiscal disposal or a fixed-penalty notice issued under the Antisocial Behaviour etc (Scotland) Act 2004, and in doing so they have accepted liability for their actions.

The evidence on reconvictions supports what we see as the key premise behind the amendments—that those who commit offences may well reoffend. We are committed to reducing the number of offenders who are dealt with by the courts and the prison system. Nevertheless, it is important that provision is made in a proportionate way, as the convener said, for the retention of data from those who have offended but who have been dealt with by way of fiscal disposals. The amendments accord with the principles in the S and Marper v UK judgment, in which Strasbourg held that the retention of data from those who had not been convicted has the legitimate aim of preventing and detecting crime.

It is important to note that Strasbourg held that it is incompatible with the European convention on human rights to retain for an indefinite period data from those who have not been convicted of an offence, as we heard in the discussion on the previous group. Nothing in the amendments challenges that. They favour the approach of section 18A of the Criminal Procedure (Scotland) Act 1995, which enables forensic data that are taken from those who are not convicted to be retained for at least three years if the individuals were proceeded against for certain sexual or violent offences.

The approach that is taken in amendments 418 and 419 is fair and proportionate. First, and crucially, the amendments do not allow forensic data to be retained indefinitely. Secondly, the retention periods take account of the seriousness of the offence. Correctly, they are more stringent for those who are responsible for relevant sexual or violent offences than for those who commit less serious offences. Thirdly, the retention periods in the amendments for those who are arrested or detained in relation to a sexual or violent offence replicate the periods in section 18A of the 1995 act, which Strasbourg has already considered to be proportionate.

The measures are important and the Government supports Mr Maxwell's amendments 418 and 419.

Stewart Maxwell: I am glad that members round the table, whether or not they end up supporting amendments 418 and 419, agree that there is an anomaly in the law as it stands. That, of course, leads on to the argument about whether my amendments would introduce an extension of the law. I accept that it would be an extension in the sense that more DNA samples would be retained. However, such samples would always have been retained had the previous method of dealing with individuals carried on so that people would have been charged and would have gone to a court disposal rather than a non-court disposal. The change to that, which was made on perfectly sensible and efficient grounds, has led to what is effectively an anomaly. The proposed extension is not an extension in a different direction from what was previously envisaged for the retention of samples.

Robert Brown raised the issue of the gravity of an offence. I have tried to be proportionate and balanced—Bill Butler referred to that—in my amendments, in that the retention for more serious offences in the category of sexual or violent offences would be for three years, with possible extensions on appeal. However, less serious offences would have a retention period of two years, which would not be extended. As I said, I have tried to be proportionate and balanced in that regard.

On the convener's point about the meaning of the phrase "being detained" in amendment 419, the minister pointed out that that wording reflects the 1995 act's reference to those who are arrested or detained, so it is the same style of wording. Unless officials or the minister want to correct me, I maintain that being detained does, indeed, mean being detained at a police station or other such place. That was my intention, and it is my view that that is the definition of "being detained". In any case, it means the same as what is in the 1995 act. I am sure that that is well understood by those who operate it.

The Convener: You are taking obvious refuge in that legislation.

Stewart Maxwell: I am indeed. The purpose of my amendments comes down to an attempt to correct an anomaly but stay well within the proportionate system that we have. I think that amendments 418 and 419 do that, and I hope that members will support them.

Amendment 418 agreed to.

Amendment 419 moved—[Stewart Maxwell]—and agreed to.

Section 59—Retention of samples etc from children referred to children's hearings

The Convener: The next group of amendments is on section 59, "Retention of samples etc from children referred to children's hearings". There are a substantial number of amendments. Amendment 409, in the name of James Kelly, is grouped with amendments 410, 380, 483, 484, 545, 381, 485, 486, 411, 546, 487 to 492, 382, 493 and 412. I draw members' attention to the substantial number of pre-emptions that are noted on the groupings list.

James Kelly: I speak in support of amendments 409 to 412. I acknowledge that this is a complex and sensitive area of the law. My amendments seek to achieve the indefinite retention of the DNA of those children found guilty of serious violent or sexual offences and grave offences. This position is in line with the recommendation in the Fraser report, "Acquisition and Retention of DNA and Fingerprint Data in Scotland", that the law for children should be consistent with the law for adults in this area. The Government's proposal to retain DNA for three years does not go far enough. We are all well aware of the Bulger case and the case down in Colchester. When we look at instances like that, it fills us with fear about what might happen in the future with such offenders. Essentially, the issue is one of risk. It is about looking at offenders who have committed the crimes in question and assessing whether there is a risk that they may reoffend. I suggest that there is such a risk and that it is therefore appropriate in such cases to hold DNA indefinitely.

I oppose amendments 380, 381, 485 to 487, 545 and 546 because they support a three-year period of retention, which does not go far enough. As I said, I acknowledge that this is a sensitive area and that a balance must be sought and a risk assessed, but it is correct that, where children commit such serious crimes, DNA should be retained indefinitely.

I move amendment 409.

Robert Brown: This is a complex area. The amendments that are on offer produce a variety of principles and practices in respect of the proper approach to the retention of samples that are taken from children who appear before hearings on offence grounds. The Scottish Government is aware of the issue and wants to categorise certain serious offences as the only ones for which DNA samples would be retained. To do so, it proposes to give itself order-making powers to define the list of offences. In my view, that is an intrinsically wrong approach. When dealing with such a significant matter, we should specify the list of offences in the bill, if it is thought that automatic retention in such circumstances is the right approach.

Amendments 409 and 410, in the name of James Kelly, leave it to the principal reporter to designate an offence as sufficiently grave to warrant the retention of DNA from the child. In a way, that is a more transparent and independent approach, but it puts a new and different responsibility on the reporter that I am not sure he or she is set up to fulfil. Furthermore, it is likely to lead to a high level of inconsistency. The deletions that are proposed by amendment 410 seem to remove the requirement for a limit on how long the child's DNA may be kept. That is not the right approach.

Amendment 380 in my name, to which amendment 381 is consequential, offers a third, more appropriate approach. DNA could be kept only if there were an application by the chief constable to the sheriff, who would have to be satisfied that the child continued to pose a risk to public safety that justified DNA retention. That would occur in only a handful of cases and where there was an objective justification of public safety. It has been argued that the approach places the child in the middle of a legal dispute. However, such cases are likely to have been referred to the sheriff on the facts, and the court is a better place than the hearing to address such strictly legal issues, especially when the matter is important to both public safety and the rights of the child.

It is relevant to mention that, not long ago, I lodged a parliamentary question to find out how many cases were involved. The reply to question S3W-31832 indicated that data on 34 children aged between 12 and 15, 867 children of 16 to 17 and 157,000 people aged over 18 are held on the Scottish DNA database; I suspect that such data may be held in other places. As an interesting side report, I note that the youngest person on whom data are held is 13 and the oldest is 97.

The Nuffield Council on Bioethics recommended:

> "When considering requests for the removal of"

children's DNA profiles and the destruction of their samples

> "there should be a presumption in favour of the removal of all records, fingerprints and DNA profiles, and the destruction of samples."

Children 1st took more or less the same position, which was also supported by the Information Commissioner's Office and the Law Society of Scotland. It is important to recall the view of the Scottish Children's Reporter Administration, which thought that

> "there should be a judicial process, separate from the Children's Hearings System,"

to determine whether

> "there was a clear and justifiable reason for doing so".

Those are cogent and important witnesses on the issue.

As members have said, in some rare cases the risk that a child poses to the safety of others is significant enough to justify the interference with the child's right to privacy that the retention of their DNA represents. Amendment 380 acknowledges that DNA retention should be proportionate, based on relevant criteria, including continuing risk, and subject to appropriate safeguards for children.

Amendment 545 defines the start point from which the right to retain the DNA is calculated as the date of the offence or incident, rather than the slightly confusing welter of later dates in section 59. It also gives greater clarity and comprehension to the arrangements and makes them administratively easier to organise. The period can be extended by application to the court, if necessary.

Amendment 546 raises a different issue. There is no clarity or guidance in the bill that indicates the circumstances or criteria that justify an extension of the time for keeping or destroying DNA samples. There should be. Sheriffs will need to grapple with the issue, and they should know the Parliament's mind on it. Currently, no such criteria are specified in law. It is unclear on what basis chief constables will apply for extension or on what grounds sheriffs will decide. Amendment 546 requires the Scottish ministers to consult stakeholders and to specify such grounds in secondary legislation. That may not be the ideal way of proceeding, but it is appropriate given the current position. To a degree, it echoes the question why DNA should be kept or destroyed in the first place, which we have not really bottomed out.

Quite substantial issues of principle are involved, and we should be clear about where we are going. A number of alternatives are before the committee and I respectfully recommend the rather more restricted approach of my amendments.

14:45

Fergus Ewing: Amendment 409 seeks to establish a way of differentiating between low-level and serious assaults. The aim is to ensure that the powers to retain forensic data from children that are included in new sections 18B and 18C, which section 59 inserts into the 1995 act, are confined to assaults at the more serious end of the scale.

I support the principle behind the amendment—we do not want to retain the DNA of children who are involved in playground scuffles, after all—and we are considering how that can best be achieved. The cabinet secretary wrote to you, convener, on 8 April, setting out progress in developing the list of offences that will trigger retention, and explaining the issues around assault that James Kelly's amendment highlights.

Early discussions of the forensic data working group, which the cabinet secretary set up to take forward proposals arising from the Fraser review, and to make recommendations on the implementation of the DNA provisions in the bill, established that the principal reporter's definition was not the preferred option. There are, however, definitions used by the police and the Crown Office and Procurator Fiscal Service that could be applied. As we are working on the issue in conjunction with relevant stakeholders, I ask James Kelly whether he is prepared to withdraw amendment 409 on the understanding that we will identify a means of addressing the issue separately. I will, of course, keep the committee up to date on developments.

By removing the requirement for the destruction of forensic data after three years, James Kelly's amendments 410 to 412 appear to introduce the indefinite retention of forensic data from children who accept that they have committed a serious sexual or violent offence, or are found to have done so, in the course of a children's hearing. Again, it seems that the amendments seek to bring Scotland into closer alignment with the new retention rules introduced by the Crime and Security Act 2010 in England and Wales. Under those arrangements, the forensic data of children aged 10 and upwards who are convicted of one serious offence or of two minor offences within a specified period can be retained indefinitely. Although Mr Kelly's amendments apply only to the serious sexual and violent offences that will be covered through the existing bill provisions, I believe that indefinite retention is a step too far. With the right support, a child might not continue to pose a risk of offending throughout their adult life. Although I believe that it is right for children's forensic data to be retained for a limited period in relation to the more serious offences, retention should be extended beyond that period only if the child continues to pose a risk. I do not believe that Mr Kelly's amendments support that principle, and I do not want to undermine Scotland's justice system by introducing measures that are at far greater risk of a successful challenge under the ECHR.

Scotland has a unique approach to dealing with the majority of children who offend, which is through the children's hearings system. In contrast to England and Wales, where all children who have committed offences are taken to court, in Scotland, except in the most serious of cases, we have a system that focuses on supporting the child to change his or her behaviour. Other provisions in the bill seek to ensure that all children under the age of 12 are dealt with in that way and I believe that that is the right approach.

I come now to Robert Brown's amendments 380, 381 and 382. Although I very much doubt that it is Robert Brown's intention, there might be a technical issue with amendment 380 because there is a risk that, as drafted, it could be interpreted to allow for the indefinite retention of the forensic data of children who meet the retention criteria. That is because it removes from the bill the provision that requires forensic data to be destroyed within three years unless the chief constable applies to have that period extended. Amendment 380 gives chief constables discretion about whether to make the application to a sheriff to extend retention. As there is no requirement to make an application to a sheriff under the amendment, if the police decide not to make such an application, it could be argued that any forensic data that have been retained under proposed new section 18B of the 1995 act do not have to be destroyed and can be held indefinitely. I am pretty sure that that is not Robert Brown's intention. I will move on to address what I think that his amendments seek to achieve.

The provisions in proposed new section 18B of the 1995 act allow for automatic retention for an initial period of three years in relation to serious sexual and violent offences. Robert Brown's amendments seek to introduce an approach that requires a sheriff to assess individually each child who has committed a serious sexual or violent offence in order to make a ruling on whether their forensic data should be retained for the initial three-year period.

I can identify with the intentions behind James Kelly's amendments at one end of the scale and Robert Brown's amendments at the other, but I believe that the provisions in the bill steer a balanced middle course between those two sets of amendments. We decided at an early stage to move from the suggestion that there should be indefinite retention to ensuring that there was sufficient differentiation between the retention of data from children who accept that they have offended or are found by a sheriff to have offended and the retention of data from adults who are convicted of an offence.

The provisions of the bill as introduced were developed following careful consideration of the issues arising from Professor Jim Fraser's review and our subsequent consultation. The recommendation in Jim Fraser's report was that there should be indefinite retention of data from children who are found by a children's hearing to have committed a sexual or violent offence. However, having considered the responses to our consultation and the issues that were raised by the S and Marper v the United Kingdom judgment, we took on board the points that were made about the need to consider children's rights carefully in the development of our retention policies. As a result, the provisions seek to retain automatically for an initial period of three years forensic data only from children who are found by a children's hearing to have committed a serious sexual or violent offence. Thereafter, as Robert Brown said, a chief constable must apply to a sheriff for further extensions, which can be up to two years. In response to Mr Brown's query about how those applications would be dealt with, I suggest that it would be for the police to make the submission and for the judge to decide whether to grant the extension. As I said, I imagine that the criteria would include the extent to which a child continued to pose a risk. That is fairly straightforward.

The Cabinet Secretary for Justice wrote to you, convener, setting out the sexual and violent offences to which the provision will apply. I have already addressed issues around assault in relation to James Kelly's amendment 409. The fact that retention will be automatic does not, in my view, make the provisions in proposed new sections 18B and 18C of the 1995 act disproportionate. What is important is that the principles that are applied to the power for automatic retention are proportionate and balanced. That will be achieved by ensuring that the retention is triggered only in relation to serious offences and that it is time limited. I am concerned that, instead of bringing greater fairness, Robert Brown's amendments would involve the child in a court process and place a greater burden on the police and the courts.

Let us not pretend that children who commit serious sexual and violent offences pose no risk to others. Indeed, it is widely accepted that the victims of such offences are often other children. Those children have rights, too—the right to feel safe in the knowledge that their assailant has been identified and that their behaviour is being addressed and the right not to become victims in the first place. Let us also acknowledge that, with the correct support, many children can and will turn their lives around before they become adults. For that to happen, it must first be possible to identify that they committed the offence. Those who no longer pose a risk beyond the initial retention period should no longer have their forensic data retained. If the court decides that a child continues to pose a risk to the public, it will be possible to extend the retention period beyond the initial three years.

We have a strong tradition of protecting children's rights in Scotland, and our children's hearings system is unique in its focus on supporting the child. I believe that the provisions in the bill strike the right balance between the rights of the child and public safety; therefore, I cannot support James Kelly's amendments 410 to 412 or Robert Brown's amendments 380 to 382.

Amendment 545 would amend new section 18B, which section 59 of the bill inserts into the 1995 act. The amendment seeks to adjust the date from which the three-year period of retention starts. At present, the bill provides that the period should be calculated as starting from the date on which the child accepts having committed, or is found to have committed, a relevant offence. Amendment 545 would change the starting point of the three-year period to the date on which the offence was committed. Therefore, the overall time for which the DNA was retained would be shorter, because the starting date would be moved forward to include the time between the commitment of the offence and the point at which it was accepted. However, amendment 545 would be extremely difficult to implement in practice. It is not always possible to confirm the exact date on which offences were committed. It is also unclear how amendment 545 would work if a child was referred to a children's hearing for a historical offence that met the retention criteria but had been committed more than three years before the child's appearance at the hearing. In such a case, it appears that any forensic data taken from the child could not be retained because three years would already have lapsed since the commission of the offence. Furthermore, sexual offences often involve conduct that happens on a number of occasions on different dates. Amendment 545 does not account for what the date of destruction should be in those scenarios. For those reasons, the date when a child accepts having committed, or is found to have committed, a relevant offence is a clearer, more consistent and more reliable trigger point.

Amendment 546 would complicate the process by which a sheriff may grant an application to extend the retention period for forensic data that are taken from, or provided by, children who have been referred to a children's hearing. The amendment provides that, before granting such an application, the sheriff must be satisfied that it meets one of a number of criteria that are to be set out in regulations that are to be made by the Scottish ministers. Subsection (6) of new section 18B, which the bill inserts into the 1995 act, already provides for the Scottish ministers to make an order prescribing relevant sexual or violent offences for the purposes of section 18B. That new section sets the basis for the retention of data and provides that forensic data are to be retained only from those who have committed the most serious offences. When the police apply to a sheriff for an extension to the retention period, the justification behind the application may relate to operational policing matters, which will differ in each application made. It is impracticable to specify a list of criteria that a sheriff should consider that would apply in each case.

For those reasons, it is unnecessary and cumbersome to require the development of regulations that set out criteria that are to be applied when considering the extended retention of forensic data. The police are experienced in assessing risk and presenting such cases to the court, just as courts are experienced in weighing the arguments and facts that are presented to them in coming to a decision. Therefore, we do not support amendments 545 and 546.

Amendment 483 is a minor amendment to subsection (7) of new section 18B. The amendment will correct a cross-reference to new section 18C of the 1995 act, which is also inserted by section 59 of the bill.

Amendment 485 is a technical amendment linked to amendment 486. New section 18B of the 1995 act grants the power to retain data from children who have been referred to a children's hearing on the grounds of a relevant offence. Amendment 486 provides that public indecency can be specified as a relevant sexual offence only if it is clear in the referral to the children's hearing that there was a sexual element to the offence. Although it is unlikely that such an offence would trigger retention of data from children, the proposed change is required because the list of relevant offences applicable to children that is to be made by order of the Scottish ministers is to be drawn from the list of offences in section 19A(6) of the 1995 act.

Amendment 487 will insert new subsections (4A) and (4B) into new section 18C of the 1995 act. Subsections (4A) and (4B) will provide the sheriff principal with the power to make an order to extend retention if the sheriff principal accepts an appeal from a chief constable under section 18C(4) against the sheriff's original decision not to extend retention of forensic data from a child. That will bring the process for extending retention into line with the terms of section 18C(3), which specifies the power for a sheriff to make an order setting a new destruction date. The new destruction date that is set by the sheriff principal must not be more than two years later than the previous destruction date.

Amendments 488 and 489 are technical drafting amendments that will replace the term "expired" with the term "elapsed" in describing the period for bringing appeals under new section 18C of the 1995 act. That is for consistency with existing section 18A of the 1995 act.

15:00

Amendment 491 also ensures consistency with terminology that is used in section 18A of the 1995 act. Amendment 492 is a technical amendment to the definition of "relevant chief constable" in new section 18C(8) of the 1995 act. This is a drafting change that has no effect on the purpose of the provision. Amendment 493 is a tidying-up amendment that removes section 59(2), which is no longer required, in light of amendment 478.

I am nearing the end, convener.

The Convener: I am relieved to hear that.

Fergus Ewing: Amendments 484 and 490 are technical amendments that are designed to achieve consistency in the terminology describing the types of forensic data that are taken and retained.

I hope that that is all clear, and I urge the committee to resist the amendments in the names of James Kelly and Robert Brown.

The Convener: As has been said, many of these amendments highlight quite difficult and sensitive matters and we have to be particularly careful when considering them.

I find some merit in James Kelly's amendments. We are dealing with matters in relation to which the grounds of referral have been admitted or proved following a hearing before a sheriff, which means that we are dealing with cases in which the child has been convicted, if we can use such a term, in relation to the Social Work (Scotland) Act 1968. I also have some sympathy with James Kelly in his attempts to categorise the type of offence in relation to which he is seeking the retention of the data. However, having heard what the minister has said about that, there appears to be on-going work under that heading, and I would not be minded to support the amendments.

Clearly, there are difficulties with this issue and we must be particularly careful. I believe that this matter could do with a more leisurely approach because, inevitably, there will be problems.

I invite the minister to add any comments that he might have, after that fairly comprehensive narration of the circumstances around the amendments.

Fergus Ewing: I appreciate the arguments that you have just made, convener. We welcome the fact that James Kelly has lodged his amendments, which we support in principle. As I have indicated, we are doing further work on the issue and we will come back to the committee before stage 3 with the conclusion of our deliberations, which might involve lodging an amendment or suggesting that the issue be dealt with in secondary legislation. In either event, we will come back to the committee before stage 3, as soon as we have completed our deliberations. I say that in a desire to be helpful to members on an issue in relation to which we are all moving, or seeking to move, in the same or a similar direction.

The Convener: I do not think that there is any great division of opinion on the matter.

James Kelly: Leaving aside the technical amendments, which I support, the remaining amendments fall into two groups. My amendments 410 to 412 involve the indefinite retention of DNA for serious violent and sexual offences, and the remaining amendments consider a variety of ways of implementing the three-year retention.

I support indefinite retention, and I point the minister to his own consultation on the Fraser report, which also went down that route. That is a strong recommendation.

Various contributors to the debate have spoken about the need to be proportionate about the retention of DNA. My main concern is public safety, which is why my amendments seek to extend the DNA database. It is important that the public safety aspect has a higher priority.

I hear what the minister says about amendment 409. I welcome the work that the forensic data working group has done on definitions. Bearing that in mind, and the minister's comments, I am prepared to withdraw amendment 409 in the hope that we can make some progress in the area.

Amendment 409, by agreement, withdrawn.

The Convener: Amendment 410, in the name of James Kelly, has already been debated with amendment 409. If amendment 410 is agreed to, I will not be able to call amendments 380, 483, 484 or 545 on the ground of pre-emption.

Amendment 410 moved—[James Kelly].

The Convener: The question is, that amendment 410 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 410 disagreed to.

The Convener: Amendment 380, in the name of Robert Brown, has already been debated with amendment 409. If amendment 380 is agreed to, I will not be able to call amendments 483 or 484 on the ground of pre-emption.

Amendment 380 moved—[Robert Brown].

The Convener: The question is, that amendment 380 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)

Against

Aitken, Bill (Glasgow) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 7, Abstentions 0.

Amendment 380 disagreed to.

Amendments 483 and 484 moved—[Fergus Ewing]—and agreed to.

Amendments 545 and 381 not moved.

Amendment 485 moved—[Fergus Ewing].

The Convener: The question is, that amendment 485 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

Against

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 485 agreed to.

Amendment 486 moved—[Fergus Ewing].

The Convener: The question is, that amendment 486 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

Against

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 486 agreed to.

The Convener: Amendment 411, in the name of James Kelly, has already been debated with amendment 409. If amendment 411 is agreed to, I will not be able to call amendments 546, 487 to 492, or 382 on the ground of pre-emption.

Amendment 411 moved—[James Kelly].

The Convener: The question is, that amendment 411 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)

Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 411 disagreed to.

Amendment 546 moved—[Robert Brown].

The Convener: The question is, that amendment 546 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)

Against

Aitken, Bill (Glasgow) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 7, Abstentions 0.

Amendment 546 disagreed to.

Amendments 487 to 491 moved—[Fergus Ewing]—and agreed to.

The Convener: Amendment 492, in the name of the cabinet secretary, has already been debated with amendment 409. If amendment 492 is agreed to, I will not be able to call amendment 382.

Amendment 492 moved—[Fergus Ewing].

The Convener: The question is, that amendment 492 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

Against

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 492 agreed to.

The Convener: If amendment 493, in the name of Kenny MacAskill, is agreed to, I cannot call amendment 412.

Amendment 493 moved—[Fergus Ewing].

The Convener: The question is, that amendment 493 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

Against

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 493 agreed to.

Section 59, as amended, agreed to.

After section 59

Amendment 494 moved—[Fergus Ewing]—and agreed to.

Section 60—Use of samples etc

The Convener: Amendment 495, in the name of the cabinet secretary, is grouped with amendments 496 to 498, 500, 501 and 505 to 510.

Fergus Ewing: I will be brief.

Amendments 495 to 498, 500, 501 and 505 to 510 amend sections 59 and 60 of the bill, which, in turn, amend the forensic data provisions in the Criminal Procedure (Scotland) Act 1995 and section 56 of the Criminal Justice (Scotland) Act 2003. That is in order to achieve consistency in the terminology describing the types of forensic data that are taken and retained. The amendments are essentially tidying amendments.

I move amendment 495.

The Convener: The amendments seem to be fairly straightforward.

Robert Brown: The Government amendments are unexceptionable. However, is the Government doing any further work on the destruction of samples as opposed to DNA profiles and on the complex issue of the security and lawful usages of DNA profiling information? New section 19C of the 1995 act, which will be introduced by section 60 of the bill, seems to authorise the use of the material for criminal investigations and identification of the bodies of deceased persons, but I am not sure whether that is the same as forbidding other uses—for example, the use of samples by researchers. I imagine that that ought not to be legitimate. It does not appear to be an offence to use DNA samples for other unauthorised purposes, but perhaps it should be. To whom do the samples ultimately belong? Does an accused person have a right to part of the samples, as they do with blood or urine samples in drink-driving cases?

Section 70 of the bill gives powers for data matching that seem to be innocuous, but they are potentially wide ranging. I would appreciate the minister's view on that. It may be preferable if he wrote to the committee in detail after the meeting rather than dealing with the matter now. Nevertheless, I would be interested in an update on those background issues.

The Convener: The minister could deal with those matters in summing up, as no other member wishes to participate in the discussion.

Fergus Ewing: In my truncated comments, I said that the amendments are technical and that they basically tidy things up. I have two things to say in answer to Robert Brown's questions. First, the working group is considering all the general issues. Secondly, with respect, I think that Mr Brown's remarks relate not to section 60, but to a later section, so we could perhaps consider them later. Of course, if I have misspoken—I think that that is the Americanism—on any matter, I would be more than happy to correct what I have said later on, but I do not think that the points that Mr Brown has made are relevant to the group of amendments that we are considering.

Amendment 495 agreed to.

Amendments 496 to 510 moved—[Fergus Ewing]—and agreed to.

Section 60, as amended, agreed to.

Section 61—Referrals from Scottish Criminal Cases Review Commission: grounds for appeal

15:15

The Convener: Amendment 133, in the name of the cabinet secretary, is grouped with amendments 134 and 135.

Fergus Ewing: Amendments 133 to 135 are minor amendments to section 61, which deals with the grounds for appeal following a reference by the Scottish Criminal Cases Review Commission to the High Court.

As drafted, the proposed new subsection (4A) being inserted into section 194D of the Criminal Procedure (Scotland) Act 1995 would require that the grounds for appeal arising from an SCCRC reference must relate to one or more of the reasons contained in the commission's statement of reasons. However, the statement of reasons produced by the commission will commonly set out not only the reasons why it is making a referral, but the other possible grounds that it has considered and decided not to refer on. One interpretation of proposed new subsection (4A) might be that an appeal founded on something that the commission has said in the statement of reasons is not a reason for referral. The additional words inserted by amendment 133 avoid that.

Amendments 134 and 135 make minor adjustments to the language of proposed new subsections (4B) and (4E) to fit better with the terminology used in the High Court. Rather than referring to additional grounds of appeal being "raised", the provisions are adjusted to refer to the appeal being "founded" on additional grounds. There is no change in the effect of the provisions.

I move amendment 133.

Amendment 133 agreed to.

Amendments 134 and 135 moved—[Fergus Ewing]—and agreed to.

Section 61, as amended, agreed to.

Before section 62

The Convener: Amendment 430, in the name of the cabinet secretary, is in a group on its own.

Fergus Ewing: Amendment 430 clarifies that section 24 of the Vulnerable Witnesses (Scotland) Act 2004, which abolished the competence test in respect of all witnesses, also applies to evidence given by prior statements made before 1 April 2005, when section 24 came into force. Section 24 removed the court's entitlement to ask questions of witnesses to establish whether they could understand the difference between truth and lies, and the general duty of witnesses to tell the truth.

Amendment 430 seeks to address a gap in the current law where the Crown seeks to rely on the evidence of a witness that is contained in a prior statement made before section 24 came into force. In such circumstances, it is necessary, under section 260(2)(c) of the Criminal Procedure (Scotland) Act 1995, for the court to establish whether the witness would, at the time that the statement was made, have been a competent witness in proceedings. In certain cases, particularly those involving sexual abuse where the abuse spans a number of years, the Crown must often seek to rely on such statements. The amendment is intended to ensure that such statements are not prevented from being put before the court simply because they were made before section 24 came into force. The Scottish Government believes that it is important that all witnesses, particularly the most vulnerable, are given the opportunity to be heard. The court should also have the opportunity to hear all the relevant evidence in a case.

Amendment 430 seeks to ensure that witnesses are treated equally, and to avoid the situation where some witnesses are prevented from giving their evidence on the ground of competence and others are not. The rights of the accused are protected because the judge or jury will still have to decide whether the testimony is reliable and credible.

I move amendment 430.

Amendment 430 agreed to.

Section 62—Witness statements: use during trial

The Convener: Amendment 383, in the name of Robert Brown, is in a group on its own.

Robert Brown: To a degree, amendment 383 follows from the earlier group in which we considered amendments 130 and 131. I do not want to rehearse the arguments again, but the bill more or less gives witnesses a blanket right to refer to a prior statement, which I presume would usually mean a precognition that had been taken by the police or others rather than a verbatim statement. There are issues with that, although I can see occasions on which it would be relevant.

I would not go to the stake on the wording, but I do not believe that there should be an automatic entitlement. The bill states that the court "may" allow the witness to refer to the statement, so it is not quite an automatic entitlement, but it is heading in that direction because no criteria are laid down. In my amendment, I have tried to restrict the entitlement a little. I will be interested to hear the minister's thoughts on the matter against the background of the earlier debate.

I move amendment 383.

Bill Butler: I am not convinced by Robert Brown's amendment. I believe that there should be a uniform right. The amendment seeks to introduce the phrase

"if ... there is good reason to do so",

but how would "good reason" be defined? How would the provision be applied? It is clearer to have a uniform right for all victims. However, perhaps Robert Brown can come back to that and convince me when he sums up.

Fergus Ewing: Section 62 does not require the court to allow the witness to refer to his statement. It leaves it to the court's discretion to decide whether to permit the witness to do that. The main difficulty with amendment 383 is that it explicitly requires the court to exercise its discretion only if there is a good reason, which carries the implication that the court can exercise its discretion in other matters without having a good reason for doing so. That would be quite absurd.

Moreover, we trust the Scottish judiciary properly to exercise their discretion and we think it dangerous to suggest that they might do otherwise in the absence of an express provision, which is tautologous. Lord Coulsfield did not recommend such a test and the Scottish Government does not believe that one is necessary.

For those reasons, we do not support amendment 383.

Robert Brown: I accept most of what the minister says. Nevertheless, we are left in a funny position.

I think that Bill Butler misunderstood what section 62 does, to be honest. It does not quite give an automatic entitlement, although it is difficult to see the grounds on which the court could refuse to exercise its discretion against all the elaborate stuff about statements that is laid out. My concern is that the approach unbalances the thing a little bit. However, I will not press the amendment against the minister's desire. With the committee's agreement, I seek leave to withdraw it.

Amendment 383, by agreement, withdrawn.

Section 62 agreed to.

Sections 63 and 64 agreed to.

After section 64

The Convener: Amendment 384, in the name of the cabinet secretary, is in a group on its own.

Fergus Ewing: Amendment 384 seeks to increase from 16 to 18 the age up to which witnesses are automatically entitled to special measures when giving evidence in human trafficking cases. Young victims of human trafficking offences should be supported as much as possible to give their evidence. In saying that, however, we must also bear in mind the accused's right to a fair trial.

The amendment simply amends the Vulnerable Witnesses (Scotland) Act 2004 to increase the age under which a witness is automatically entitled to special measures in human trafficking cases from 16 to 18. That is consistent with the support that is available to child witnesses elsewhere in the UK and it will ensure future compliance with the European Commission proposal for a framework decision on preventing and combating trafficking in human beings and protecting victims. That proposal has been retabled as a European directive following the implementation of the Lisbon treaty.

I move amendment 384.

Amendment 384 agreed to.

Section 65 agreed to.

Section 66—Witness anonymity orders

The Convener: Amendment 431, in the name of the cabinet secretary, is grouped with amendments 432 to 441.

Fergus Ewing: Almost all the amendments in the group respond to the committee's request in its stage 1 report that we reconsider drafting and to evidence that was given at stage 1.

Amendments 431 and 432 clarify who in the court should be able to see the identity of a witness who is granted an anonymity order for the purposes of giving their evidence. The amendments limit that to the judge and, if there is one, the jury in order to avoid creating any possible conflict of interest for defence agents. That also removes any worries that an interpreter or supporter might be intimidated or compromised because they can see the identity of an anonymous witness.

Amendments 433 and 435 are technical. By replacing the phrase "relevant material" with "relevant information", they ensure that references to disclosure responsibilities in the context of applications for witness anonymity orders are consistent with other disclosure provisions elsewhere in the bill.

Amendment 434 strengthens the duty that is contained in new section 271P(4) of the 1995 act so that information about an application for a witness anonymity order must be disclosed by the parties in a way that does not lead to the witness's identity being disclosed. Failure to ensure that would cut across the whole point of a witness being granted an anonymity order.

Amendments 436 and 437 have been lodged in response to comments that were made by High Court judges in their evidence to the committee at stage 1. Amendment 436 removes unnecessary words from new section 271R(2)(b) of the 1995 act. Amendment 437 replaces the words

"sole and decisive evidence implicating the accused"

in new section 271R(2)(c) of the 1995 act with

"material evidence implicating the accused".

That better reflects the rules of corroboration in Scotland and the fact that the witness's evidence may or may not be decisive.

Amendment 438 reflects more accurately modern practice whereby judges give "direction" to the jury rather than a "warning". In context, the direction would be that any anonymity order that was made in relation to a witness does not prejudice the accused. The amendment is, again, a response to comments that were made by the High Court judges during their stage 1 evidence.

Amendment 439 removes the requirement to seek the leave of the court of first instance to appeal against a witness anonymity order. It is a matter of balance. On one hand, leave to appeal acts as a safeguard against spurious appeals and delaying tactics; on the other hand, given the serious implications of granting or refusing to grant a witness anonymity order, it could be argued that it should always be possible to appeal such decisions. On balance, we believe that it would be better to remove the requirement to seek leave in that context.

Amendments 440 and 441 amend schedule 3 to remove references to "unsafe conviction", as the safety of a conviction is not a concept that is used in Scots law. Those references will be replaced with more appropriate references to "quashing a conviction".

I move amendment 431.

The Convener: The issues appear to be fairly straightforward.

Amendment 431 agreed to.

Amendments 432 to 439 moved—[Fergus Ewing]—and agreed to.

Section 66, as amended, agreed to.

Schedule 3—Witness anonymity orders: transitional

Amendments 440 and 441 moved—[Fergus Ewing]—and agreed to.

Schedule 3, as amended, agreed to.

Section 67 agreed to.

After section 67

The Convener: Amendment 442, in the name of the cabinet secretary, is grouped with amendment 450.

Fergus Ewing: Amendments 442 and 450 seek to provide an order-making power to facilitate implementation of the EU framework decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. A European evidence warrant may be used to obtain evidence that is held in another member state, which could include objects that were found during a search, financial records and admissions that were made at interviews. In general, the evidence that is covered by a European evidence warrant will already exist—a warrant is not to be used to conduct interviews, take statements, carry out bodily examinations or intercept communications. We are required to implement the framework decision by 9 January 2011. Amendment 442 grants the power to the Scottish ministers to implement the framework decision by order.

There are several reasons why an order-making power is appropriate here. First, it will permit further time to consult key stakeholders on the detail of the provisions for implementing the framework decision in Scotland. Secondly, it will allow us to produce provisions in discussion with the Home Office, which has yet to take steps to implement the decision in the rest of the UK. Thirdly, we are aware of two EU initiatives that are currently under discussion that may lead to the framework decision being revised and, possibly, replaced. The likelihood of that is not clear, but implementation by order will allow us to respond to those EU developments as and when they occur.

I move amendment 442.

Amendment 442 agreed to.

Before section 68

15:30

The Convener: Amendment 443, in the name of the cabinet secretary, is grouped with amendments 415, 416, 511 and 417.

Fergus Ewing: Amendment 443 will insert before section 68 a new section that will amend the provisions in the Criminal Procedure (Scotland) Act 1995, which sets out how lists of jurors are compiled for trials in the sheriff courts. The change will increase flexibility for sheriff clerks in citing jurors and in allocating them to trials when they attend in response to citations. For that reason, the Scottish Court Service strongly supports the changes.

The first change, in proposed new subsection (2)(b), will enable jurors to be cited to a sheriff court trial not only from the sheriff court district in which that trial is to occur, but from other districts within that sheriffdom. That will obviously increase the pool of potential jurors for any sheriff court trial. It will also result in greater fairness for members of the public who are liable to be cited for jury service. Some sheriff courts in a sheriffdom are, inevitably, busier than others, which results in the potential for eligible members of the public who live in those districts to be summoned more often than those who live elsewhere in the sheriffdom. The change will provide greater equity and was supported by a large majority of respondents to a specific question on the issue in our consultation paper, "The Modern Scottish Jury in Criminal Trials".

The change leaves to the discretion of the sheriff principal the questions whether to summon jurors from a wider area, and in what proportion. Clearly, it is a different matter for someone who lives in Arbroath district to be cited to Dundee than for someone who lives in Lerwick to be cited to Inverness. Such discretion is therefore important.

Sheriff clerks will continue to have their own discretion to excuse potential jurors. Nevertheless, persons from, for example, Campbeltown who are cited to Dumbarton would be able to make a case to the sheriff clerk in the usual way. In those circumstances, we do not expect the advantages of the change to be outweighed by unreasonable burdens being placed on some members of the public.

The change that is set out in proposed new subsection (2)(d) would repeal the 1995 act's provision that restricts the availability of jurors to the trials for which they were originally listed.

Amendment 511 seeks to insert a new section after section 68. That new section will make a number of changes to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 relating to the excusal system for jurors. Two groups of people are exempt from jury service: those who are ineligible for jury service and those who are disqualified from it. There is a further category of people who are excusable as of right from service listed in the 1980 act. The purpose of the proposed new section is to require those who are entitled to be excused by right from jury service to apply for that excusal at the beginning of the citation process. Amendment 511 will not affect the right to ask for discretionary excusal, whereby potential jurors can be excused if they show good reason. A new section is required because the original section in the 1980 act refers to both civil and criminal juries and, as the committee has noted, changes to civil juries are outwith the scope of this bill.

I am removing extraneous material from my notes to foreshorten matters, convener.

The Convener: I am grateful to you, Mr Ewing.

Fergus Ewing: The proposed changes will reduce bureaucracy and improve operational effectiveness.

I move amendment 443.

At this point, I was planning to move on to Mr McLetchie's amendments. I can cover those now or after Mr McLetchie has spoken to them. I am in your hands, convener. I think that this matter was raised with the clerk earlier.

The Convener: It would perhaps be easier if you were to defer your comments until we have heard from Mr McLetchie, who I now welcome to the committee and invite to speak to amendment

415 and to the other amendments in the group, if he is so minded.

David McLetchie (Edinburgh Pentlands) (Con): Indeed I am, convener. Will I have an opportunity to sum up after Mr Ewing has commented?

The Convener: No.

David McLetchie: So, you want it all in a oner.

The Convener: Yes.

David McLetchie: Right you are. Thank you very much.

I have much pleasure in speaking to amendments 415 to 417, which are in my name. As I said in the stage 1 debate, raising the age limit for jurors is an issue on which I have campaigned since July 2005 in response to an inquiry from a then 67-year-old constituent who, on being called to serve, discovered to her disappointment that she was disqualified by reason of her age.

I was particularly pleased when proposals to raise the age limit to 70 were incorporated into the bill, and duly congratulated the minister on bringing the change to Parliament. The measure will increase the potential pool of jurors by 200,000 persons and will bring the age limit in Scotland into line with the age limits that apply in the rest of the United Kingdom. It will also correct a long-standing anomaly, which has existed notwithstanding the fact that both sit in judgment on accused persons, between the age limits for judges and for jurors.

However, as I pointed out during the stage 1 debate, it is possible to have no upper age limit, as is the case in a number of jurisdictions around the world, and to couple that with an automatic right of self-excusal in the case of a person over 70 who is called for service. That system is supported by Age Scotland, the organisation that represents the interests of older people in Scotland following the merger of Age Concern Scotland and Help the Aged in Scotland. Age Scotland asked me to lodge amendments on this important issue of principle for debate and consideration today.

Comparable systems of self-excusal from jury service for the over-70s operate successfully in Ireland and a number of states and provinces in Australia, Canada and the United States. Moreover, nearer to home the Ministry of Justice is canvassing the option, in a consultation on options for increasing the upper age limit for jurors in England and Wales, which is already 70. In other words, having finally caught up with England, we may again fall behind.

In my view, and in that of organisations such as Age Scotland, the merits of amendments 415 to 417 can be summed up as follows. First, they would remove a prominent example of unjustified age discrimination in public life. Secondly, they would allow older people in Scotland who are able and willing to perform their civic duty—and who are, in many cases, enthusiastic about that—the opportunity to do so. Such people include the constituent who first raised the issue with me five years ago. Thirdly, they would allow older people who did not feel up to serving on a jury the opportunity to excuse themselves. Fourthly, they would expand the pool of jurors significantly; at present, there are more than 600,000 people in Scotland aged 70 and over. Finally, they would reduce the cost to the Scottish Government of compensating jurors for lost earnings, given that the juror pool would encompass many more older people who have retired from work.

I call the amendments "the Arlene amendments", after Arlene Phillips. Members will recall that she is the lady whom the BBC unceremoniously dumped from the "Strictly Come Dancing" jury because, at the age of 66, she was considered to be too old to serve. At the time, that caused a storm of protest and raised a lot of interest in issues of age discrimination in our society. Many people thought that Arlene Phillips was more than capable of judging whether John Sergeant had murdered a quickstep, and resented her replacement by a younger model.

Away from the world of television juries, the amendments raise an important issue of principle as to the value that our society places on the wisdom and judgment of our older people. The idea that people are automatically incapable of exercising sound judgment when they are over the age of 65—or 70, for that matter—is manifest nonsense. I submit that it makes sense to move to a system in which there is no formal age limit. That is the essence of amendments 415 to 417.

I have been looking through a list of people who will be ineligible to serve on a jury in Scotland if my amendments are not agreed to. They include three serving members of the Scottish Parliament, one of whom is a Deputy Presiding Officer, and our former Presiding Officer, Sir David Steel. In the wider sphere, the ineligible would include Cardinal Keith Patrick O'Brien, who is apparently wise enough to participate in the election of the Pope but is considered incapable of deciding on the guilt or innocence of a person in Scotland, even after a lifetime spent hearing confessions from people in Scotland. The ranks of the disqualified would also include distinguished Scots such as Moira Anderson, Ronnie Corbett, Winnie Ewing, Alasdair Gray, Edwin Morgan, Sir Jackie Stewart and many more from all walks of life whose work and views are greatly respected and valued by all of us.

I have much pleasure in commending amendments 415 to 417 to the committee and would welcome members' support for them.

Bill Butler: Who would argue with such arguments so wittily put? I certainly would not. Amendments 415 to 417 are worthy of support. Mr McLetchie said that he has campaigned on the issue since July 2005. I suppose that this is the first and last time that I will join him in support of a campaign, but I am more than willing to do so today.

Other jurisdictions, including Canada and Australia, do not consider the lack of an upper age limit for jury service to be a problem; in fact, they consider it to be an advantage and a matter of simple justice. It helps people who wish to perform their civic duty to do so and attacks a rather senseless age discrimination.

Amendments 415 to 417 are worthy of support and include the logical option of self-excusal. They are resilient and cogent.

Robert Brown: I have considerable sympathy with David McLetchie's argument and with what Bill Butler said. The bill's approach is welcome and practical. As a matter of principle, adult citizens should be entitled to carry out certain civic duties. Indeed, if they are retired, they may have more time and convenience to sit on a jury.

However, I have two concerns on which I would be interested to hear the minister's responses. The first is about whether receipt of a jury citation would cause too much anxiety to some older people. There is no doubt that the arrival of official forms can upset some people who are not sure what they should do with them.

The second concern is whether there would be a risk of having jurors who had difficulties in carrying out their duties. An American study, which is mentioned in the English consultation that David McLetchie mentioned, indicated a clear relationship between age and recall of case facts and of the judge's instructions, with the older jurors displaying markedly poorer performance than younger ones.

Certainly, we must consider the rights of older people, but fairness in the trial must be the central and determining consideration. Do we risk having less competent juries, as the American study suggested, and less sound verdicts? I pose the question because I really do not know the answer. If there is such a risk, how significant is it and are there ways of overcoming it? Have there been problems in other countries that have got rid of the age limit?

Apart from that, there are issues of ill health and infirmity among older people. It is a matter of degree and of the individual rather than the category, so one must be careful about how it is put. However, if people have hearing difficulties for example, there could be problems.

I appreciate that one verges on being politically incorrect in making some of those points, but it is important that jury members have the ability to participate effectively in decisions. I merely raise some of those concerns as matters that would have to be dealt with adequately, not only by way of self-excusal from service. The issues are slightly wider than that and thought must be given to some of the other issues in the interest of the central matter of the trial's fairness.

Stewart Maxwell: I agree with the comments from Bill Butler and Robert Brown. There is no problem with agreeing with both of them, because it is right and proper that we remove discrimination from our society. The current age limit of 65 is discriminatory and we all welcome the change to 70, but I share Robert Brown's concerns. He is right to say that it is not a matter of category but of individuals and degree.

There is no doubt that, as some people grow older, they would have more difficulty in being able to deal with jury service for a range of reasons. We have to be careful that, in asserting the rights of one group of individuals, we do not remove or discriminate against the rights of others—the point that Robert Brown made about fair trial. There is a slight difficulty in that respect, although the logic of David McLetchie's arguments for amendments 415 to 417 is impeccable.

I wait to hear what the minister has to say on David McLetchie's amendments. I welcome the move to an upper age limit of 70, but I am not yet 100 per cent convinced of the argument that David McLetchie makes for the complete removal of an upper age limit.

I agree with Robert Brown's initial comment about official forms coming through the doors of some older people if such a change in the law is made. Those forms should be abundantly clear about the right of older people to excuse themselves so that we do not inadvertently cause distress. If the paperwork was to make that clear, it would go some way to dealing with some of the concerns. It would have to be made clear to people that they could excuse themselves and would not be letting anybody down or causing problems and that it was their right to choose, rather than a duty for which they were not putting themselves forward.

15:45

The Convener: Are there any other contributions? Having looked round the table and seen that there is no one with an interest to declare and that cognitive responses appear to be perfectly satisfactory, I ask the minister to wind up. The issues that you should be addressing are age discrimination legislation and what is happening in other jurisdictions.

Fergus Ewing: The Scottish Government has a great deal of sympathy with amendments 415 to 417 in Mr McLetchie's name. Indeed, the Cabinet Secretary for Justice met David Manion of Age Concern Scotland to discuss the issue on 31 March and to confirm that.

We are aware that groups such as Age Concern Scotland, which represent our older citizens, support older people being given the opportunity to serve in this way. I am also sure that many of those who would not be included by the Government's own proposals to increase the age limit for jury service to 70 years could nevertheless contribute a great deal as jurors, as many members have argued. Our allowing people over the age of 70 to serve would widen the pool of available jurors, which is one of the arguments that Mr McLetchie made. He has made the case for the changes very ably.

I take it as read that we are all opposed to age discrimination; the Government has a great deal of sympathy with the arguments. It is therefore in the interests of discussion and of not pre-judging the issue that I would like to put some counter-arguments, so that the committee, in reaching its decision, can give them whatever weight members think is appropriate.

First, with regard to the fairness of age limits, judges and sheriffs are required to retire from office at 70, although they may be called upon, at the discretion of the senior judiciary, to sit as retired judges or sheriffs up to the age of 75. That may be a relevant consideration when considering the upper age for people who carry out jury service who are, in a sense, also judges: they are judges of the facts.

Secondly, jury service is a civic duty, not a right—I think that that was the thrust of the argument behind Mr Brown's remarks, or perhaps his primary argument. The extent of that duty is serious and onerous and it is a very important duty. As Mr Brown argued, the matter must be seen from the perspective of the accused and their right to a fair trial. For example, having no age limit is likely to lead to an increased number of applications for excusal. According to a paper that was published recently by the Ministry of Justice in England and Wales, people aged 70 and over are, broadly, at least twice as likely as those under 70 to need to be excused or discharged from jury service on medical grounds. In addition, a proportion of people over 70 who are fit to do service may wish to be excused.

I wonder—this is not in the script—whether there is not an additional argument. Some people over 70 who are called on to do jury service might feel a sense of duty to society to fulfil what is expected of them, which is very admirable. In doing their jury duty there might, however, be reasons that are known to them—ill-health or whatever—that would make it difficult for them to complete their jury service. One can understand that there might be reluctance for a person to excuse himself or herself because of a sense that they would, somehow, be letting society down. One can envisage that approach being taken by some individuals over 70 who have perhaps served their country well in many other ways in the past.

Thirdly, there would be additional costs for the Scottish Court Service, although we do not think that those would be astronomical costs. The estimate that I have from the Scottish Court Service is that the change would cost £18,000 per annum, which is not a huge amount of money. I am not sure how the SCS reached that estimate, but that is the figure that it has provided. On the other hand, it might be said that the £18,000 could be outweighed by potential financial savings in reducing the likelihood of costs being incurred for loss of earnings for those who are working and are called on to give jury service. To present a balanced approach, there might be additional costs on the one hand, but the potential for savings on the other. Those are all matters that a full consultation might allow us to get at with greater clarity.

I am aware from our postbag that some people over 70 are keen to serve as jurors. I am also aware that there might be others for whom jury service would be an additional unnecessary burden. In the nature of things, the over-70s are more likely to start trials as jurors but might, for a wide range of reasons—I mean no disrespect to anyone in the category—be unable to complete their service. It appears to me from what was said earlier that the most serious argument against people over 70 serving as jurors is that the possibility of the jury's falling below the 12 members who are needed for it to be quorate could increase the likelihood of the court's being unable to continue the trial. The risk that that might pose to the administration of justice has not yet been quantified. In response to our proposal to increase the age limit to 70, there was comment that greater attention might have to be paid to ensure a balanced age profile. The position would be exacerbated by opening jury service to the over-70s. I am not sure that too much reliance is placed on that argument, but I offer it to the committee.

I acknowledge that placing the onus on older persons to decide whether they are able to carry out jury service is not uncommon in other jurisdictions. However, it is not an objective practice and carries risks. An American study, to which I think Robert Brown alluded in his remarks, noted a clear relationship between age and recall of case facts and of the judge's instructions, with the oldest jurors displaying markedly poorer recall than younger jurors, although I fully accept that individuals' capacities will vary greatly. Many younger jurors might have a lower capacity than many older jurors, but it might be nonetheless prudent to give further regard to that study and to ascertain whether there are other studies. The convener invited me to refer to other jurisdictions, but I cannot refer to extensive research. It might be possible to do that, were the committee to decide that more work needs to be done in the area. In some respects, our knowledge base might not be as strong as it could be, so there is no doubt that further time and consultation would allow us to increase that knowledge base. In other respects, we might still be uncertain about some matters.

The Ministry of Justice has stated specifically that it

> "has not yet reached any decision on whether a change to the present limit should be made or what form any change might take. It first wishes to receive the widest possible range of responses to this paper from the general public and those with a particular interest in criminal justice and age issues".

It is plain that a major consultation on the matter is being carried out down south. By contrast, the increase in the Scottish age limit to 70 years, as set out in section 68, has been widely consulted on and was supported by 90 per cent of those who responded on the issue.

We will be guided by the committee's views on the matter and the committee might wish to take a decision on it now. On the other hand, we would also be happy to keep the issue under review as part of consideration of how our juror changes are implemented. We will be interested in the consultation south of the border, for example, and will consider further action in the future. We are aware that should the committee agree to the amendments there will be an interaction with the Government's amendment 511, which will require people to seek excusal as of right within seven days of receiving their first notice. However, that is simply a detail. I await with interest committee members' views and the decision that they will take.

To reassure Mr McLetchie, I add that although it might appear that were I to suggest that people such as Winnie Ewing should be excluded from serving on a jury, I might get short shrift from her, she is likely to say that there is no way she would want to serve on a jury because she is far too busy electioneering.

Amendment 443 agreed to.

Section 68—Upper age limit for jurors

Amendment 415 moved—[David McLetchie].

The Convener: The question is, that amendment 415 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Don, Nigel (North East Scotland) (SNP)

Abstentions

Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 6, Against 1, Abstentions 1.

Amendment 415 agreed to.

Amendment 416 moved—[David McLetchie].

The Convener: The question is, that amendment 416 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division. [*Interruption*.]

Nigel Don: Sorry, did you count me? I did not vote.

The Convener: Are you abstaining, then?

Nigel Don: No, I am sorry—I am against amendment 416.

The Convener: It has been a long day.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Don, Nigel (North East Scotland) (SNP)

Abstentions

Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 6, Against 1, Abstentions 1.

Amendment 416 agreed to.

Section 68, as amended, agreed to.

Bill Butler: Perhaps it is as well that we are not on a jury. [*Laughter*.]

After section 68

Amendment 511 moved—[Fergus Ewing]—and agreed to.

Section 69—Persons excusable from jury service

Amendment 417 moved—[David McLetchie].

The Convener: The question is, that amendment 417 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)

Abstentions

Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 7, Against 0, Abstentions 1.

Amendment 417 agreed to.

Section 69, as amended, agreed to.

The Convener: In view of the lateness of the hour and the fact that some members are showing signs of fatigue—[*Laughter*]—I conclude today's proceedings and thank members for their considerable and constructive input.

Meeting closed at 15:57.

Criminal Justice and Licensing (Scotland) Bill

6th Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 3	Schedule 1
Sections 4 to 18	Schedule 2
Sections 19 to 66	Schedule 3
Sections 67 to 139	Schedule 4
Sections 140 to 145	Schedule 5
Sections 146 to 148	Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 70

Kenny MacAskill

136 In section 70, page 89, line 34, leave out <and Wales>

Kenny MacAskill

137 In section 70, page 90, line 21, leave out from <body> to end of line 23 and insert <health and social care body mentioned in paragraphs (a) to (e) of section 1(5) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 (c.1).>

After section 71

Robert Brown

551 After section 71, insert—

<*Collection of information on criminal injuries*

Duty of Health Boards to collect etc. information on criminal injuries

(1) The Scottish Ministers may make regulations requiring every Health Board to—

(a) collect information on criminal injuries treated in or otherwise coming to the attention of relevant hospitals, and

(b) provide that information to the relevant chief constable.

(2) The Scottish Ministers must make the first regulations under subsection (1) before the expiry of 12 months beginning with the day of Royal Assent.

(3) Regulations under subsection (1) must include provision that any information provided to a relevant chief constable must be in such a form that persons who have sustained criminal injuries cannot be identified.

(4) Regulations under subsection (1) may include provision about—

(a) the criminal injuries about which information is to be collected (including by reference to the offences involved),

(b) the information on such injuries which is to be collected (including information as to the places at which, and circumstances in which, those injuries are sustained),

(c) the types of hospitals from which such information is to be collected (including the departments within such hospitals from which information is to be collected),

(d) the times at which and manner in which such information is to be provided to relevant chief constables.

(5) In this section—

"criminal injuries" means injuries which are, or are suspected of having been, directly attributable to the commission of an offence involving violence,

"Health Board" means a board constituted by order under section 2(1)(a) of the National Health Service (Scotland) Act 1978 (c.29),

"relevant chief constable" means the chief constable for the police force whose area comprises or includes all or part of the Health Board's area,

"relevant hospitals" means hospitals the administration of which is the Health Board's responsibility.>

Section 72

Kenny MacAskill

138 In section 72, page 94, line 29, leave out <Law> and insert <Justice>

Kenny MacAskill

139 In section 72, page 94, line 41, leave out <27> and insert <37>

Kenny MacAskill

140 In section 72, page 94, line 42, leave out <penetrative>

Kenny MacAskill

141 In section 72, page 95, line 1, leave out <31> and insert <42>

Kenny MacAskill

142 In section 72, page 95, line 2, leave out <35> and insert <46>

Kenny MacAskill

143 In section 72, page 95, line 3, at end insert—

<( ) an offence under section (*Slavery, servitude and forced or compulsory labour*) (slavery, servitude and forced or compulsory labour) of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00).>

Kenny MacAskill

144 In section 72, page 95, line 14, leave out <42> and insert <54>

Section 74

Kenny MacAskill

444 In section 74, page 96, line 23, after <station> insert <in Scotland>

Kenny MacAskill

445 In section 74, page 97, line 5, leave out from <a> to end of line and insert—

<(a) a requirement under section 117A(2) (surrender of passports: England and Wales and Northern Ireland), or

(b) a requirement under section 117B(2) (surrender of passports: Scotland).”.>

Kenny MacAskill

446 In section 74, page 97, line 5, at end insert—

<(1C) A person may be prosecuted, tried and punished for any offence under subsection (1B)—

(a) in any sheriff court district in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).”.>

After section 74

Kenny MacAskill

145 After section 74, insert—

<*Sex offender notification requirements*

Sex offender notification requirements

(1) The Sexual Offences Act 2003 (c.42) is amended as follows.

(2) In section 85 (notification requirements: periodic notification)—

(a) in subsection (1), for “period of one year” substitute “applicable period”,

(b) in subsection (3), for “period referred to in subsection (1)” substitute “applicable period”, and

(c) after subsection (4) insert—

“(5) In this section, the “applicable period” means—

(a) in any case where subsection (6) applies to the relevant offender, such period not exceeding one year as the Scottish Ministers may prescribe in regulations, and

(b) in any other case, the period of one year.

(6) This subsection applies to the relevant offender if the last home address notified by the offender under section 83(1) or 84(1) or subsection (1) was the address or location of such a place as is mentioned in section 83(7)(b).".

(3) In section 86 (notification requirements: travel outside the United Kingdom), subsection (4) is repealed.

(4) In section 87 (method of notification and related matters), subsection (6) is repealed.

(5) In section 96 (information about release or transfer), subsection (4) is repealed.

(6) In section 138 (orders and regulations)—

(a) in subsection (2), after "84," insert "85,", and

(b) after subsection (3) insert—

"(4) Orders or regulations made by the Scottish Ministers under this Act may—

(a) make different provision for different purposes,

(b) include supplementary, incidental, consequential, transitional, transitory or saving provisions.".>

After section 75

Kenny MacAskill

146 After section 75, insert—

<**Risk of sexual harm orders: spent convictions**

In section 7 of the Rehabilitation of Offenders Act 1974 (c.53) (limitations on rehabilitation under the Act), in subsection (2), after paragraph (bb) insert—

"(bc) in any proceedings on an application under section 2, 4 or 5 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) or in any appeal under section 6 of that Act;".>

Section 77

Kenny MacAskill

523 In section 77, page 98, leave out lines 5 to 10

Kenny MacAskill

524 In section 77, page 98, line 14, leave out from <(including> to <operation)> in line 15

Kenny MacAskill

525 In section 77, page 98, line 22, at end insert—

<( ) After that section insert—

“10A **Authorisation of surveillance: joint surveillance operations**

In the case of a joint surveillance operation, where authorisation is sought for the carrying out of any form of conduct to which this Act applies, authorisation may be granted by any one of the persons having power to grant authorisation for the carrying out of that conduct.”.>

Kenny MacAskill

526 In section 77, page 98, line 27, at end insert—

<( ) In section 14 (approval required for authorisations to take effect)—

(a) in subsection (5)(b), after “General” insert “or the Deputy Director General”, and

(b) subsection (7) is repealed.>

Kenny MacAskill

527 In section 77, page 98, line 27, at end insert—

<( ) In section 16 (appeals against decisions by Surveillance Commissioners), in subsection (1), after “General” insert “or the Deputy Director General”.>

Kenny MacAskill

528 In section 77, page 98, line 30, leave out from <, where> to <surveillance,> in line 31

Section 78

Kenny MacAskill

529 In section 78, page 98, line 39, leave out <(3)> and insert <(3A)>

Kenny MacAskill

530 In section 78, page 99, line 1, leave out <(3A)> and insert <(3AA)>

Kenny MacAskill

531 In section 78, page 99, line 8, leave out <or>

Kenny MacAskill

532 In section 78, page 99, line 18, leave out <(3A)> and insert <(3AA)>

Kenny MacAskill

533 In section 78, page 99, line 23, at end insert—

<( ) in paragraph (cc) of subsection (6), after “General” insert “, or Deputy Director General,”.>

Kenny MacAskill

534 In section 78, page 99, line 26, leave out <(5)(a)> and insert <(5)>

Kenny MacAskill

535 In section 78, page 99, line 26, leave out <“where> and insert <“Where>

Kenny MacAskill

536 In section 78, page 99, line 29, after <operation,> insert <the person referred to in subsection (2)(h) is>

Section 79

Kenny MacAskill

537 In section 79, page 99, line 39, at end insert—

<( ) In section 113B (enhanced criminal record certificates), in subsection (3), for the words from “, or” immediately following paragraph (a) to the end of paragraph (b), substitute “(or states that there is no such matter or information), and

(b) if the applicant is subject to notification requirements under Part 2 of the Sexual Offences Act 2003 (c.42), states that fact.”.>

Kenny MacAskill

538 In section 79, page 100, line 1, leave out <section 113B> and insert <that section>

After section 79

Kenny MacAskill

447 After section 79, insert—

<*Rehabilitation of offenders*

Spent alternatives to prosecution: Rehabilitation of Offenders Act 1974

(1) The Rehabilitation of Offenders Act 1974 (c.53) is amended as follows.

(2) After section 8A (protection afforded to spent cautions), insert—

“**8B Protection afforded to spent alternatives to prosecution: Scotland**

(1) For the purposes of this Act, a person has been given an alternative to prosecution in respect of an offence if the person (whether before or after the commencement of this section)—

(a) has been given a warning in respect of the offence by—

(i) a constable in Scotland, or

(ii) a procurator fiscal,

(b) has accepted, or is deemed to have accepted—

(i) a conditional offer issued in respect of the offence under section 302 of the Criminal Procedure (Scotland) Act 1995 (c.46), or

(ii) a compensation offer issued in respect of the offence under section 302A of that Act,

(c) has had a work order made against the person in respect of the offence under section 303ZA of that Act,

(d) has been given a fixed penalty notice in respect of the offence under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8),

(e) has accepted an offer made by a procurator fiscal in respect of the offence to undertake an activity or treatment or to receive services or do any other thing as an alternative to prosecution, or

(f) in respect of an offence under the law of a country or territory outside Scotland, has been given, or has accepted or is deemed to have accepted, anything corresponding to a warning, offer, order or notice falling within paragraphs (a) to (e) under the law of that country or territory.

(2) In this Act, references to an "alternative to prosecution" are to be read in accordance with subsection (1).

(3) Schedule 3 to this Act (protection for spent alternatives to prosecution: Scotland) has effect.".

(3) After section 9A (unauthorised disclosure of spent cautions), insert—

"9B Unauthorised disclosure of spent alternatives to prosecution: Scotland

(1) In this section—

(a) "official record" means a record that—

(i) contains information about persons given an alternative to prosecution in respect of an offence, and

(ii) is kept for the purposes of its functions by a court, police force, Government department, part of the Scottish Administration or other local or public authority in Scotland,

(b) "relevant information" means information imputing that a named or otherwise identifiable living person has committed, been charged with, prosecuted for or given an alternative to prosecution in respect of an offence which is the subject of an alternative to prosecution which has become spent,

(c) "subject of the information", in relation to relevant information, means the named or otherwise identifiable living person to whom the information relates.

(2) Subsection (3) applies to a person who, in the course of the person's official duties (anywhere in the United Kingdom), has or has had custody of or access to an official record or the information contained in an official record.

(3) The person commits an offence if the person—

(a) obtains relevant information in the course of the person's official duties,

(b) knows or has reasonable cause to suspect that the information is relevant information, and

(c) discloses the information to another person otherwise than in the course of the person's official duties.

(4) Subsection (3) is subject to the terms of an order under subsection (6).

(5) In proceedings for an offence under subsection (3), it is a defence for the accused to show that the disclosure was made—

(a) to the subject of the information or to a person whom the accused reasonably believed to be the subject of the information, or

(b) to another person at the express request of the subject of the information or of a person whom the accused reasonably believed to be the subject of the information.

(6) The Scottish Ministers may by order provide for the disclosure of relevant information derived from an official record to be excepted from the provisions of subsection (3) in cases or classes of cases specified in the order.

(7) A person guilty of an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(8) A person commits an offence if the person obtains relevant information from an official record by means of fraud, dishonesty or bribery.

(9) A person guilty of an offence under subsection (8) is liable on summary conviction to a fine not exceeding level 5 on the standard scale, or to imprisonment for a term not exceeding 6 months, or to both.”.

(4) After Schedule 2 (protection for spent convictions) insert—

“SCHEDULE 3

PROTECTION FOR SPENT ALTERNATIVES TO PROSECUTION: SCOTLAND

Preliminary

1 (1) For the purposes of this Act, an alternative to prosecution given to any person (whether before or after the commencement of this Schedule) becomes spent—

(a) in the case of—

(i) a warning referred to in paragraph (a) of subsection (1) of section 8B, or

(ii) a fixed penalty notice referred to in paragraph (d) of that subsection,

at the time the warning or notice is given,

(b) in any other case, at the end of the relevant period.

(2) The relevant period in relation to an alternative to prosecution is the period of 3 months beginning on the day on which the alternative to prosecution is given.

(3) Sub-paragraph (1)(a) is subject to sub-paragraph (5).

(4) Sub-paragraph (2) is subject to sub-paragraph (6).

(5) If a person who is given a fixed penalty notice referred to in section 8B(1)(d) in respect of an offence is subsequently prosecuted and convicted of the offence, the notice—

(a) becomes spent at the end of the rehabilitation period for the offence, and

(b) is to be treated as not having become spent in relation to any period before the end of that rehabilitation period.

(6) If a person who is given an alternative to prosecution (other than one to which sub-paragraph (1)(a) applies) in respect of an offence is subsequently prosecuted and convicted of the offence—

(a) the relevant period in relation to the alternative to prosecution ends at the same time as the rehabilitation period for the offence ends, and

(b) if the conviction occurs after the end of the period referred to sub-paragraph (2), the alternative to prosecution is to be treated as not having become spent in relation to any period before the end of the rehabilitation period for the offence.

2 (1) In this Schedule, "ancillary circumstances", in relation to an alternative to prosecution, means any circumstances of the following—

(a) the offence in respect of which the alternative to prosecution is given or the conduct constituting the offence,

(b) any process preliminary to the alternative to prosecution being given (including consideration by any person of how to deal with the offence and the procedure for giving the alternative to prosecution),

(c) any proceedings for the offence which took place before the alternative to prosecution was given (including anything that happens after that time for the purpose of bringing the proceedings to an end),

(d) any judicial review proceedings relating to the alternative to prosecution,

(e) in the case of an offer referred to in paragraph (e) of subsection (1) of section 8B, anything done or undergone in pursuance of the terms of the offer.

(2) Where an alternative to prosecution is given in respect of two or more offences, references in sub-paragraph (1) to the offence in respect of which the alternative to prosecution is given includes a reference to each of the offences.

(3) In this Schedule, "proceedings before a judicial authority" has the same meaning as in section 4.

Protection for spent alternatives to prosecution and ancillary circumstances

3 (1) A person who is given an alternative to prosecution in respect of an offence is, from the time the alternative to prosecution becomes spent, to be treated for all purposes in law as a person who has not committed, been charged with or prosecuted for, or been given an alternative to prosecution in respect of, the offence.

(2) Despite any enactment or rule of law to the contrary—

(a) where an alternative to prosecution given to a person in respect of an offence has become spent, evidence is not admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Scotland to prove that the person has committed, been charged with or prosecuted for, or been given an alternative to prosecution in respect of, the offence,

(b) a person must not, in any such proceedings, be asked any question relating to the person's past which cannot be answered without acknowledging or referring to an alternative to prosecution that has become spent or any ancillary circumstances, and

(c) if a person is asked such a question in any such proceedings, the person is not required to answer it.

(3) Sub-paragraphs (1) and (2) do not apply in relation to any proceedings—

(a) for the offence in respect of which the alternative to prosecution was given, and

(b) which are not part of the ancillary circumstances.

4 (1) This paragraph applies where a person ("A") is asked a question, otherwise than in proceedings before a judicial authority, seeking information about—

(a) A's or another person's previous conduct or circumstances,

(b) offences previously committed by A or the other person, or

(c) alternatives to prosecution previously given to A or the other person.

(2) The question is to be treated as not relating to alternatives to prosecution that have become spent or to any ancillary circumstances and may be answered accordingly.

(3) A is not to be subjected to any liability or otherwise prejudiced in law because of a failure to acknowledge or disclose an alternative to prosecution that has become spent or any ancillary circumstances in answering the question.

5 (1) An obligation imposed on a person ("A") by a rule of law or by the provisions of an agreement or arrangement to disclose any matter to another person does not extend to requiring A to disclose an alternative to prosecution (whether one given to A or another person) that has become spent or any ancillary circumstances.

(2) An alternative to prosecution that has become spent or any ancillary circumstances, or any failure to disclose an alternative to prosecution that has become spent or any ancillary circumstances, is not a ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing the person in any way in any occupation or employment.

6 The Scottish Ministers may by order—

(a) exclude or modify the application of any of paragraphs (a) to (c) of paragraph 3(2) in relation to questions put in such circumstances as may be specified in the order,

(b) provide for exceptions from any of the provisions of paragraphs 4 and 5 in such cases or classes of case, or in relation to alternatives to prosecution of such descriptions, as may be specified in the order.

7 Paragraphs 3 to 5 do not affect—

(a) the operation of an alternative to prosecution, or

(b) the operation of an enactment by virtue of which, because of an alternative to prosecution, a person is subject to a disqualification, disability, prohibition or other restriction or effect for a period extending beyond the time at which the alternative to prosecution becomes spent.

8 (1) Section 7(2), (3) and (4) apply for the purpose of this Schedule as follows.

(2) Subsection (2), apart from paragraphs (b) and (d), applies to the determination of any issue, and the admission or requirement of evidence, relating to alternatives to prosecution previously given to a person and to ancillary circumstances as it applies to matters relating to a person's previous convictions and circumstances ancillary thereto.

(3) Subsection (3) applies to evidence of alternatives to prosecution previously given to a person and ancillary circumstances as it applies to evidence of a person's previous convictions and the circumstances ancillary thereto.

(4) For that purpose, subsection (3) has effect as if—

(a) a reference to subsection (2) or (4) of section 7 were a reference to that subsection as applied by this paragraph, and

(b) the words "or proceedings to which section 8 below applies" were omitted.

(5) Subsection (4) applies for the purpose of excluding the application of paragraph 3.

(6) For that purpose, subsection (4) has effect as if the words "(other than proceedings to which section 8 below applies)" were omitted.

(7) References in the provisions applied by this paragraph to section 4(1) are to be read as references to paragraph 3.">

Kenny MacAskill

448 After section 79, insert—

<*Medical services in prisons*

Medical services in prisons

(1) For section 3A of the Prisons (Scotland) Act 1989 (c.45) (medical services in prisons) substitute—

"3A Medical officers for prisons

(1) The Scottish Ministers must designate one or more medical officers for each prison.

(2) A person may be designated as a medical officer for a prison only if the person is a registered medical practitioner performing primary medical services for prisoners at the prison under the National Health Service (Scotland) Act 1978 (c.29).

(3) A medical officer has the functions that are conferred on a medical officer for a prison by or under this Act or any other enactment.

(4) A medical officer is not an officer of the prison for the purposes of this Act.

(5) Rules under section 39 of this Act may provide for the governor of a prison to authorise the carrying out by officers of the prison of a search of any person who is in, or is seeking to enter, the prison for the purpose of providing medical services for any prisoner at the prison.

(6) Nothing in rules made by virtue of subsection (5) allows the governor to authorise an officer of a prison to require a person to remove any of the person's clothing other than an outer coat, jacket, headgear, gloves and footwear.".

(2) In section 41D of that Act (unlawful disclosure of information by medical officers), for subsection (1) substitute—

“(1) This section applies to—

(a) a medical officer for a prison, and

(b) any person acting under the supervision of such a medical officer.”.

(3) In section 107 of the Criminal Justice and Public Order Act 1994 (c.33) (officers of contracted out prisons), for subsections (6) to (8) substitute—

“(6) The director must designate one or more medical officers for the prison.

(7) A person may be designated as a medical officer for the prison only if the person is a registered medical practitioner performing primary medical services for prisoners at the prison under the National Health Service (Scotland) Act 1978 (c.29).”.

(4) In section 110 of that Act (consequential modifications of the 1989 Act etc.)—

(a) in each of subsections (3) and (4), for “3A(6)” substitute “3A(5) and (6)”,

(b) subsection (4A) is repealed, and

(c) in subsection (6), for “3A(1) to (5) (medical services)” substitute “3A(1) and (2) (medical officers)”.

(5) In section 111(3) of that Act (intervention by the Scottish Ministers), in paragraph (c), after “prison” insert “and the medical officer or officers for the prison”.>

Section 80

Angela Constance

413 In section 80, page 100, line 29, after <victims> insert <(including children and young people)>

Section 85

Kenny MacAskill

696 In section 85, page 104, line 7, leave out <an accused> and insert <criminal proceedings relating to a person>

Kenny MacAskill

553 In section 85, page 104, line 7, leave out <(other than precognitions and victim statements)>

Kenny MacAskill

697 In section 85, page 104, line 9, leave out <case against the accused> and insert <proceedings>

Kenny MacAskill

555 In section 85, page 104, line 10, leave out subsection (2)

Kenny MacAskill

556 In section 85, page 104, line 20, at end insert—

<(3) In sections (*Duty to disclose after conclusion of proceedings at first instance*) to (*Review of ruling under section* (*Application by appellant for ruling on disclosure*)) "information", in relation to appellate proceedings, includes material of any kind given to or obtained by the prosecutor in connection with the appellate proceedings or the earlier proceedings.

(4) In subsection (3)—

"appellate proceedings" has the meaning given by section (*Sections (Duty to disclose after conclusion of proceedings at first instance) to* (*Review of ruling under section* (*Application by appellant for ruling on disclosure*)*): interpretation*),

"earlier proceedings" has the meaning given in section (*Duty to disclose after conclusion of proceedings at first instance*)(5).>

Section 86

Kenny MacAskill

557 Leave out section 86 and insert—

<**Provision of information to prosecutor: solemn cases**

(1) This section applies where in a prosecution—

(a) an accused appears for the first time on petition, or

(b) an accused appears for the first time on indictment (not having appeared on petition in relation to the same matter).

(2) As soon as practicable after the appearance, the investigating agency must provide the prosecutor with details of all the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained (whether by the agency or otherwise) in the course of investigating the matter to which the appearance relates.

(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that information that the prosecutor specifies in the requirement.

(4) In this section, "investigating agency" means—

(a) a police force, or

(b) such other person who—

(i) engages (to any extent) in the investigation of crime or sudden deaths, and

(ii) submits reports relating to those investigations to the procurator fiscal,

as the Scottish Ministers may prescribe by regulations.>

Section 87

Kenny MacAskill

558 In section 87, page 105, line 24, leave out <86(3)> and insert <(*Provision of information to prosecutor*: *solemn cases*)(2)>

Kenny MacAskill

559 In section 87, page 105, line 30, leave out subsection (2) and insert—

<( ) As soon as practicable after becoming aware of the further information, the investigating agency must provide the prosecutor with details of it.

( ) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that further information that the prosecutor specifies in the requirement.>

Kenny MacAskill

560 In section 87, page 105, line 33, leave out from beginning to <“the> in line 34

Kenny MacAskill

561 In section 87, page 105, line 35, leave out <86(3)> and insert <(*Provision of information to prosecutor*: *solemn cases*)(2)>

Kenny MacAskill

562 In section 87, page 106, line 1, leave out <this section> and insert <subsection (3)>

Section 88

Kenny MacAskill

563 Leave out section 88

After section 88

Kenny MacAskill

564 After section 88, insert—

<**Provision of information to prosecutor: summary cases**

(1) This section applies where a plea of not guilty is recorded against an accused charged on summary complaint.

(2) As soon as practicable after the recording of the plea, the investigating agency must inform the prosecutor of the existence of all the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained (whether by the agency or otherwise) in the course of investigating the matter to which the plea relates.

(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that information that the prosecutor specifies in the requirement.>

Kenny MacAskill

565 After section 88, insert—

<**Continuing duty of investigating agency: summary cases**

(1) This section applies where—

(a) an investigating agency has complied with section (*Provision of information to prosecutor*: *summary cases*)(2) in relation to an accused, and

(b) during the relevant period the investigating agency becomes aware that further information that may be relevant to the case for or against the accused has been obtained (whether by the agency or otherwise) in the course of investigating the accused's case.

(2) As soon as practicable after becoming aware of the further information, the investigating agency must inform the prosecutor of the existence of the information.

(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that further information that the prosecutor specifies in the requirement.

(4) In this section, "relevant period" means the period—

(a) beginning with the investigating agency's compliance with section (*Provision of information to prosecutor*: *summary cases*)(2) in relation to the accused, and

(b) ending with the agency's receiving notice from the prosecutor of the conclusion of the proceedings against the accused.

(5) For the purposes of subsection (4), proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.>

Section 89

Kenny MacAskill

566 In section 89, page 106, line 31, after <where> insert <in a prosecution>

Kenny MacAskill

567 In section 89, page 106, line 33, after <indictment> insert <(not having appeared on petition in relation to the same matter)>

Bill Aitken

147 In section 89, page 106, line 37, leave out <review all the> and insert <disclose to the accused all>

Bill Aitken

148 In section 89, page 106, line 38, leave out from <and> to end of line 14 on page 107

Kenny MacAskill

568 In section 89, page 107, line 1, leave out from beginning to <applies> in line 2 and insert—

<(b) disclose to the accused the information to which subsection (3) applies.

(3) This subsection applies to information>

Kenny MacAskill

569 In section 89, page 107, line 3, leave out <prosecution case> and insert <evidence that is likely to be led by the prosecutor in the proceedings against the accused>

Kenny MacAskill

570 In section 89, page 107, line 5, leave out <prosecution case> and insert <evidence to be led by the prosecutor in the proceedings against the accused>

Kenny MacAskill

571 In section 89, page 107, line 6, leave out subsections (4) to (6)

Kenny MacAskill

572 In section 89, page 107, line 15, leave out <(5)> and insert <(2)(b)>

Bill Aitken

149 In section 89, page 107, line 15, leave out <(5)> and insert <(2)>

After section 89

Kenny MacAskill

573 After section 89, insert—

<**Disclosure of other information: solemn cases**

(1) This section applies where by virtue of subsection (2)(b) of section 89 the prosecutor is required to disclose information to an accused who falls within paragraph (a) or (b) of subsection (1) of that section.

(2) As soon as practicable after complying with the requirement, the prosecutor must disclose to the accused details of any information which the prosecutor is not required to disclose under section 89(2)(b) but which may be relevant to the case for or against the accused.

(3) The prosecutor need not disclose under subsection (2) details of sensitive information.

(4) In subsection (3), "sensitive", in relation to an item of information, means that if it were to be disclosed there would be a risk of—

(a) causing serious injury, or death, to any person,

(b) obstructing or preventing the prevention, detection, investigation or prosecution of crime, or

(c) causing serious prejudice to the public interest.>

Section 90

Kenny MacAskill

574 In section 90, page 107, line 19, leave out <subsection (5) or (6) of section 89> and insert <section 89(2)(b)>

Bill Aitken

150 In section 90, page 107, line 19, leave out <(5) or (6)> and insert <(2)>

Kenny MacAskill

575 In section 90, page 107, line 24, leave out from beginning to <"the> in line 27 and insert <and

(b) disclose to the accused any information to which section 89(3) applies.

(2A) As soon as practicable after complying with subsection (2), the prosecutor must disclose to the accused details of any other information that may be relevant to the case for or against the accused of which the prosecutor is aware.

(2B) The prosecutor need not disclose under subsection (2A) details of sensitive information.

(2C) In subsection (2)>

Bill Aitken

151 In section 90, page 107, leave out lines 24 to 26 and insert <and

(b) disclose to the accused any such information not already disclosed under section 89(2).>

Kenny MacAskill

576 In section 90, page 107, line 28, leave out <subsection (5) or (6) of section 89> and insert <section 89(2)(b)>

Bill Aitken

152 In section 90, page 107, line 28, leave out <(5) or (6)> and insert <(2)>

Kenny MacAskill

577 In section 90, page 107, line 30, at end insert—

<"sensitive" has the meaning given by section (*Disclosure of other information*: *solemn cases*)(4).>

Kenny MacAskill

578 In section 90, page 107, line 31, leave out <this section> and insert <subsection (2C)>

Section 91

Kenny MacAskill

579 In section 91, page 108, line 5, leave out <under section 89(5) or 90(2)> and insert <by virtue of this Part>

Bill Aitken

153 In section 91, page 108, line 5, leave out <89(5) or 90(2)> and insert <89(2) or 90(2)(b)>

Kenny MacAskill

580 Move section 91 to after section 99

Section 92

Kenny MacAskill

581 In section 92, page 108, line 10, leave out from <section> to <accused> in line 11 and insert <this Part the prosecutor is required to disclose>

Bill Aitken

154 In section 92, page 108, line 10, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Kenny MacAskill

582 Move section 92 to after section 96

Section 93

Bill Aitken

155 In section 93, page 108, line 20, leave out <(5)> and insert <(2)>

Kenny MacAskill

583 Leave out section 93

Section 94

Kenny MacAskill

584 In section 94, page 108, line 30, leave out from beginning to <pre-trial> in line 31 and insert—

<(1) This section applies where the accused lodges a defence statement under section 70A of the 1995 Act.

(1A) As soon as practicable after the prosecutor receives a copy of the defence>

Kenny MacAskill

585 In section 94, page 108, leave out lines 34 to 36 and insert <and

(b) disclose to the accused any information to which section 89(3) applies.>

Kenny MacAskill

586 In section 94, page 109, line 8, leave out lines 8 to 13 and insert—

<(4) At least 7 days before the trial diet the accused must—

(a) where there has been no material change in circumstances in relation to the accused's defence since the last defence statement was lodged, lodge a statement stating that fact,

(b) where there has been a material change in circumstances in relation to the accused's defence since the last defence statement was lodged, lodge a defence statement.>

Kenny MacAskill

587 In section 94, page 109, line 13, at end insert—

<(4A) If after lodging a statement under subsection (2), (3) or (4) there is a material change in circumstances in relation to the accused's defence, the accused must lodge a defence statement.

(4B) Where subsection (4A) requires a defence statement to be lodged, it must be lodged before the trial diet begins unless on cause shown the court allows it to be lodged during the trial diet.>

Kenny MacAskill

588 In section 94, page 109, line 14, after <statement> insert—

<( )>

Kenny MacAskill

589 In section 94, page 109, line 14, leave out <other>

Kenny MacAskill

590 In section 94, page 109, line 15, at end insert <or

( ) during the trial diet if the court on cause shown allows it.>

Kenny MacAskill

591 In section 94, page 109, line 15, at end insert—

<( ) As soon as practicable after lodging a defence statement or a statement under subsection (4)(a), the accused must send a copy of the statement to the prosecutor and any co-accused.>

Kenny MacAskill

592 In section 94, page 109, line 20, at end insert—

<( ) particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence,>

Kenny MacAskill

593 In section 94, page 109, line 21, leave out <in relation to disclosure>

Kenny MacAskill

594 In section 94, page 109, line 27, at end insert—

<( ) In section 78 of the 1995 Act (special defences, incrimination, notice of witnesses etc.), after subsection (1) insert—

"(1A) Subsection (1) does not apply where—

(a) the accused lodges a defence statement under section 70A, and

(b) the accused's defence consists of or includes a special defence.".>

Bill Aitken
Supported by: Robert Brown

156 Leave out section 94

Section 95

Kenny MacAskill

595 In section 95, page 109, line 32, leave out <prosecutor receives from the accused> and insert <accused lodges>

Kenny MacAskill

596 In section 95, page 109, line 38, at end insert—

<( ) particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence,>

Kenny MacAskill

597 In section 95, page 109, line 39, leave out <in relation to disclosure>

Kenny MacAskill

598 In section 95, page 110, line 4, at end insert—

<( ) As soon as practicable after lodging a defence statement, the accused must send a copy of the statement to the prosecutor and any co-accused.>

Kenny MacAskill

599 In section 95, page 110, line 5, after <receiving> insert <a copy of>

Kenny MacAskill

600 In section 95, page 110, leave out lines 8 to 10 and insert <and

(b) disclose to the accused any information to which section 89(3) applies.>

Kenny MacAskill

601 In section 95, page 110, line 24, at end insert—

<( ) In section 149B of the 1995 Act (notice of defences), after subsection (2) insert—

"(2A) Subsection (1) does not apply where—

(a) the accused lodges a defence statement under section 95 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00),

(b) the statement is lodged—

(i) where an intermediate diet is to be held, at or before the diet, or

(ii) where such a diet is not to be held, no later than 10 clear days before the trial diet, and

(c) the accused's defence consists of or includes a defence to which that subsection applies.".>

Bill Aitken
Supported by: Robert Brown

157 Leave out section 95

After section 95

Kenny MacAskill

602 After section 95, insert—

<**Change in circumstances following lodging of defence statement: summary proceedings**

(1) This section applies where the accused lodges a defence statement under section 95 at least 14 days before the trial diet.

(2) At least 7 days before the trial diet the accused must—

(a) where there has been no material change in circumstances in relation to the accused's defence since the defence statement was lodged, lodge a statement stating that fact,

(b) where there has been a material change in circumstances in relation to the accused's defence since the defence statement was lodged, lodge a defence statement.

(3) If after lodging a statement under subsection (2) there is a material change in circumstances in relation to the accused's defence, the accused must lodge a defence statement.

(4) Where subsection (3) requires a defence statement to be lodged, it must be lodged before the trial diet begins unless on cause shown the court allows it to be lodged during the trial diet.

(5) As soon as practicable after lodging a statement under subsection (2)(a) or a defence statement under subsection (2)(b) or (3), the accused must send a copy of the statement concerned to the prosecutor and any co-accused.

(6) As soon as practicable after receiving a copy of a defence statement lodged under subsection (2)(b) or (3) the prosecutor must—

(a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

(b) disclose to the accused any information to which section 89(3) applies.

(7) In this section, "defence statement" is to be construed in accordance with section 95(2).>

Kenny MacAskill

603 After section 95, insert—

<Court rulings on disclosure

Application by accused for ruling on disclosure

(1) This section applies where the accused—

(a) has lodged a defence statement under section 70A of the 1995 Act or section 95 or (*Change in circumstances following lodging of defence statement: summary proceedings*) of this Act, and

(b) considers that the prosecutor has failed, in responding to the statement, to disclose to the accused an item of information to which section 89(3) applies (the "information in question").

(2) The accused may apply to the court for a ruling on whether section 89(3) applies to the information in question.

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the accused is charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question, and

(c) the accused's grounds for considering that section 89(3) applies to the information in question.

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that section 89(3) applies to the information in question.

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the accused an opportunity to be heard before determining the application.

(7) On determining the application, the court must—

(a) make a ruling on whether section 89(3) applies to the information in question or to any part of the information in question, and

(b) where the accused is charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) Except where it is impracticable to do so, the application is to be assigned to the justice of the peace, sheriff or judge who is presiding, or is to preside, at the accused's trial.>

Kenny MacAskill

604 After section 95, insert—

<**Review of ruling under section (*Application by accused for ruling on disclosure*)**

(1) This section applies where—

(a) the court has made a ruling under section (*Application by accused for ruling on disclosure*) that section 89(3) does not apply to an item of information (the "information in question"), and

(b) during the relevant period—

(i) the accused becomes aware of information (the "secondary information") that was unavailable to the court at the time it made its ruling, and

(ii) the accused considers that, had the secondary information been available to the court at that time, it would have made a ruling that section 89(3) does apply to the information in question.

(2) The accused may apply to the court which made the ruling for a review of the ruling.

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the accused is charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question and the secondary information, and

(c) the accused's grounds for considering that section 89(3) applies to the information in question.

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that section 89(3) applies to the information in question.

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the accused an opportunity to be heard before determining the application.

(7) On determining the application, the court may—

(a) affirm the ruling being reviewed, or

(b) recall that ruling and—

(i) make a ruling that section 89(3) applies to the information in question or to any part of the information in question, and

(ii) where the accused is charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) Except where it is impracticable to do so, the application is to be assigned to the justice of the peace, sheriff or judge who dealt with the application for the ruling that is being reviewed.

(9) Nothing in this section affects any right of appeal in relation to the ruling being reviewed.

(10) In this section, "relevant period", in relation to an accused, means the period—

(a) beginning with the making of the ruling being reviewed, and

(b) ending with the conclusion of proceedings against the accused.

(11) For the purposes of subsection (10), proceedings against the accused are taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the indictment or complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.>

Kenny MacAskill

605 After section 95, insert—

<**Appeals against rulings under section (*Application by accused for ruling on disclosure*)**

(1) The prosecutor or the accused may, within the period of 7 days beginning with the day on which a ruling is made under section (*Application by accused for ruling on disclosure*), appeal to the High Court against the ruling.

(2) Where an appeal is brought under subsection (1), the court of first instance or the High Court may—

(a) postpone any trial diet that has been appointed for such period as it thinks appropriate,

(b) adjourn or further adjourn any hearing for such period as it thinks appropriate,

(c) direct that any period of postponement or adjournment under paragraph (a) or (b) or any part of such period is not to count toward any time limit applying in the case.

(3) In disposing of an appeal under subsection (1), the High Court may—

(a) affirm the ruling, or

(b) remit the case back to the court of first instance with such directions as the High Court thinks appropriate.

(4) This section does not affect any other right of appeal which any party may have in relation to a ruling under section (*Application by accused for ruling on disclosure*).>

Section 96

Kenny MacAskill

606 In section 96, page 110, line 28, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2)(b), 90(2)(b), 94(1A)(b) or 95(3)(b)>

Bill Aitken

158 In section 96, page 110, line 28, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Kenny MacAskill

607 In section 96, page 110, line 32, leave out from <is> to end of line and insert <but for that plea would have been likely to have formed part of the evidence to be led by the prosecutor in the proceedings against the accused.>

After section 96

Kenny MacAskill

608 After section 96, insert—

<Disclosure after conclusion of proceedings at first instance

Sections (*Duty to disclose after conclusion of proceedings at first instance*) to (*Review of ruling under section* (*Application by appellant for ruling on disclosure*)): interpretation

In sections (*Duty to disclose after conclusion of proceedings at first instance*) to (*Review of ruling under section* (*Application by appellant for ruling on disclosure*))—

"appellant", in relation to appellate proceedings, includes a person authorised by an order under section 303A(4) of the 1995 Act to institute or continue the proceedings,

"appellate proceedings" means—

(a) an appeal under section 106(1)(a) or (f) of the 1995 Act which brings under review an alleged miscarriage of justice,

(b) an appeal under paragraph (b), (ba), (bb), (c), (d), (db) or (dc) of subsection (1) of section 106 of the 1995 Act which brings under review in accordance with subsection (3)(a) of that section an alleged miscarriage of justice,

(c) an appeal under section 175(2)(a) or (d) of the 1995 Act which brings under review an alleged miscarriage of justice,

(d) an appeal under paragraph (b), (c) or (cb) of subsection (2) of section 175 of the 1995 Act which brings under review an alleged miscarriage of justice which is based on the type of miscarriage described in subsection (5) of that section,

(e) an appeal to the Supreme Court against a determination by the High Court of Justiciary of a devolution issue,

(f) an appeal against conviction by bill of suspension under section 191(1) of the 1995 Act,

(g) an appeal against conviction by bill of advocation,

(h) a petition to the *nobile officium* in respect of a matter arising out of criminal proceedings which brings under review an alleged miscarriage of justice which is based on the existence and significance of new evidence,

(i) an appeal under section 62(1)(b) of the 1995 Act against a finding under section 55(2) of that Act,

(j) the referral to the High Court of Justiciary under section 194B of the 1995 Act of—

  (i) a conviction, or

  (ii) a finding under section 55(2) of that Act.>

Kenny MacAskill

609 After section 96, insert—

<**Duty to disclose after conclusion of proceedings at first instance**

(1) This section applies where appellate proceedings are instituted in relation to an appellant.

(2) As soon as practicable after the relevant act the prosecutor must—

  (a) review all information of which the prosecutor is aware that relates to the grounds of appeal in the appellate proceedings, and

  (b) disclose to the appellant any information that falls within subsection (3).

(3) Information falls within this subsection if it is—

  (a) information that the prosecutor was required by virtue of section 89(2)(b) or 90(2)(b) to disclose in the earlier proceedings but did not disclose,

  (b) information to which, during the earlier proceedings, the prosecutor considered paragraph (a) or (b) of section 89(3) did not apply but to which the prosecutor now considers one or both of those paragraphs would apply, or

  (c) information of which the prosecutor has become aware since the disposal of the earlier proceedings that, had the prosecutor been aware of it during those proceedings, the prosecutor would have been required to disclose by virtue of section 89(2)(b) or 90(2)(b).

(4) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the appellant.

(5) In this section—

“earlier proceedings”, in relation to appellate proceedings, means the proceedings to which the appellate proceedings relate,

“relevant act” means—

  (a) in relation to proceedings of the type mentioned in paragraph (a) or (b) of the relevant definition, the granting under section 107(1)(a) of the 1995 Act of leave to appeal,

(b) in relation to proceedings of the type mentioned in paragraph (c) or (d) of the relevant definition, the granting under section 180(1)(a) or, as the case may be, 187(1)(a) of that Act of leave to appeal,

(c) in relation to proceedings of the type mentioned in paragraph (e) of the relevant definition, the granting of leave to appeal by the High Court of Justiciary or, as the case may be, the Supreme Court,

(d) in relation to proceedings of the type mentioned in paragraph (f) of the relevant definition—

  (i) if leave to appeal is required, the granting under section 191(2) of that Act of leave to appeal,

  (ii) if leave to appeal is not required, service on the prosecutor under the relevant rule of a certified copy of the bill of suspension and the interlocutor granting first order for service,

(e) in relation to proceedings of the type mentioned in paragraph (g) of the relevant definition, service on the prosecutor under the relevant rule of a certified copy of the bill of advocation and the interlocutor granting first order for service,

(f) in relation to proceedings of the type mentioned in paragraph (h) of the relevant definition, service on the prosecutor under the relevant rule of a certified copy of the petition and the interlocutor granting first order for service,

(g) in relation to proceedings of the type mentioned in paragraph (i) of the relevant definition, the lodging of the appeal,

(h) in relation to proceedings of the type mentioned in paragraph (j) of the relevant definition, the lodging of the grounds of appeal by the person to whom the referral relates,

"relevant definition" means the definition of appellate proceedings in section (*Sections* (*Duty to disclose after conclusion of proceedings at first instance*) to (*Review of ruling under section* (*Application by appellant for ruling on disclosure*)): *interpretation*),

"relevant rule" means rule 29A.1(3) of the Criminal Procedure Rules 1996 (S.I. 1996/513).>

Kenny MacAskill

610 After section 96, insert—

<**Continuing duty of prosecutor**

(1) This section applies where the prosecutor has complied with section (*Duty to disclose after conclusion of proceedings at first instance*)(2) in relation to an appellant.

(2) During the relevant period, the prosecutor must—

  (a) from time to time review all information of which the prosecutor is aware that relates to the grounds of appeal in the appellate proceedings which relate to the appellant, and

  (b) disclose to the appellant any information that falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the appellant.

(4) In subsection (2), “relevant period” means the period—

(a) beginning with the prosecutor’s compliance with section (*Duty to disclose after conclusion of proceedings at first instance*)(2), and

(b) ending with the relevant conclusion.

(5) In subsection (4), “relevant conclusion” means—

(a) in relation to proceedings of the type mentioned in paragraph (a) or (b) of the relevant definition—

(i) the lodging under section 116(1) of the 1995 Act of a notice of abandonment, or

(ii) the disposal of the appeal under section 118 of that Act,

(b) in relation to proceedings of the type mentioned in paragraph (c) or (d) of the relevant definition—

(i) the disposal of the appeal under section 183(1)(b) to (d) of that Act,

(ii) the abandonment of the appeal under section 184(1) of that Act,

(iii) the setting aside of the conviction or sentence or, as the case may be, conviction and sentence under section 188(1) of that Act, or

(iv) the disposal of the appeal under section 190(1) of that Act,

(c) in relation to proceedings of the type mentioned in paragraph (e), (f), (g) or (h) of the relevant definition, the disposal or abandonment of the appeal,

(d) in relation to proceedings of the type mentioned in paragraph (i) of the relevant definition, the disposal of the appeal under section 62(6) of that Act or the abandonment of the appeal,

(e) in relation to proceedings of the type mentioned in paragraph (j) of the relevant definition—

(i) if the referral or finding is being treated as if it were an appeal under Part 8 of that Act, the conclusion mentioned in paragraph (a) above,

(ii) if the referral or finding is being treated as if it were an appeal under Part 10 of that Act, the conclusion mentioned in paragraph (b) above or, where the referral or finding proceeds by way of bill of suspension, bill of advocation or petition to the *nobile officium*, paragraph (c) above.

(6) In this section, “relevant definition” has the meaning given by section (*Duty to disclose after conclusion of proceedings at first instance*)(5).>

Kenny MacAskill

611 After section 96, insert—

<**Application to prosecutor for further disclosure**

(1) This section applies where—

(a) the prosecutor has complied with section (*Duty to disclose after conclusion of proceedings at first instance*)(2) in relation to an appellant, and

(b) the appellant lodges a further disclosure request—

(i) during the preliminary period, or

(ii) if the court on cause shown allows it, after the preliminary period but before the relevant conclusion.

(2) A further disclosure request must set out—

(a) by reference to the grounds of appeal, the nature of the information that the appellant wishes the prosecutor to disclose, and

(b) the reasons why the appellant considers that disclosure by the prosecutor of any such information is necessary.

(3) As soon as practicable after receiving a copy of the further disclosure request the prosecutor must—

(a) review any information of which the prosecutor is aware that relates to the request, and

(b) disclose to the appellant any of that information that falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(4) In this section—

"preliminary period", in relation to the appellate proceedings concerned, means the period beginning with the relevant act and ending with the beginning of the hearing of the appellate proceedings,

"relevant act" has the meaning given by section (*Duty to disclose after conclusion of proceedings at first instance*)(5),

"relevant conclusion" has the meaning given by section (*Continuing duty of prosecutor*)(5).>

Kenny MacAskill

612 After section 96, insert—

<**Further duty of prosecutor: conviction upheld on appeal**

(1) This section applies where—

(a) in an appeal to the High Court of Justiciary, the High Court upholds the conviction of a person, and

(b) after the conclusion of the appeal the prosecutor becomes aware of—

(i) information that the prosecutor was required by virtue of section 89(2)(b) or 90(2)(b) to disclose in the earlier proceedings but did not disclose, or

(ii) information that falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3) which would have related to the grounds of appeal but was not disclosed.

(2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.

(3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.

(4) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.

(5) In this section, "earlier proceedings" has the meaning given by section (*Duty to disclose after conclusion of proceedings at first instance*)(5).>

Kenny MacAskill

613 After section 96, insert—

<**Further duty of prosecutor: convicted persons**

(1) This section applies where—

(a) a person has been convicted,

(b) after conviction the prosecutor becomes aware of information that the prosecutor was required by virtue of section 89(2)(b) or 90(2)(b) to disclose in the earlier proceedings but did not disclose, and

(c) section (*Further duty of prosecutor*: *conviction upheld on appeal*) does not apply.

(2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.

(3) If the person institutes appellate proceedings in relation to the conviction, the prosecutor need not comply with the duty imposed by subsection (2) during the appropriate period.

(4) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.

(5) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.

(6) In this section—

"appropriate period", in relation to appellate proceedings, means the period beginning with the relevant act and ending with the relevant conclusion,

"earlier proceedings" has the meaning given by section (*Duty to disclose after conclusion of proceedings at first instance*)(5),

"relevant act" has the meaning given by section (*Duty to disclose after conclusion of proceedings at first instance*)(5),

"relevant conclusion" has the meaning given by section (*Continuing duty of prosecutor*)(5).>

Kenny MacAskill

614 After section 96, insert—

<**Further duty of prosecutor: appeal against acquittal**

(1) This section applies where—

(a) the prosecutor appeals against the acquittal of a person, and

(b) after lodging the appeal the prosecutor becomes aware of information which relates to the appeal and falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.

(3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.

(4) The prosecutor ceases to be subject to the duty imposed by subsection (2) on the disposal of the appeal by the High Court of Justiciary.

(5) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.>

Kenny MacAskill

615 After section 96, insert—

<*Court rulings on disclosure: appellate proceedings*

Application by appellant for ruling on disclosure

(1) This section applies where the appellant—

(a) has made a further disclosure request under section (*Application to prosecutor for further disclosure*), and

(b) considers that the prosecutor has failed, in responding to the request, to disclose to the appellant an item of information falling within section (*Duty to disclose after conclusion of proceedings at first instance*)(3) (the "information in question").

(2) The appellant may apply to the court for a ruling on whether the information in question falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the appellant is or was charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question, and

(c) the appellant's grounds for considering that the information in question falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that the information in question falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the appellant an opportunity to be heard before determining the application.

(7) On determining the application, the court must—

(a) make a ruling on whether the information in question, or any part of the information in question, falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3), and

(b) where the appellant is or was charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) In this section, “the court” means the court before which the appellant’s appeal is brought.

(9) Except where it is impracticable to do so, the application is to be assigned to the judges who are to hear the appellant’s appeal.>

Kenny MacAskill

616 After section 96, insert—

<**Review of ruling under section (*Application by appellant for ruling on disclosure*)**

(1) This section applies where—

(a) the court has made a ruling under section (*Application by appellant for ruling on disclosure*) that an item of information (the “information in question”) does not fall within section (*Duty to disclose after conclusion of proceedings at first instance*)(3), and

(b) during the relevant period—

(i) the appellant becomes aware of information (“secondary information”) that was unavailable to the court at the time it made its ruling, and

(ii) the appellant considers that, had the secondary information been available to the court at that time, it would have made a ruling that the information in question does fall within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(2) The appellant may apply to the court which made the ruling for a review of the ruling.

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the appellant is or was charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question and the secondary information, and

(c) the appellant’s grounds for considering that the information in question falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that the information in question falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the appellant an opportunity to be heard before determining the application.

(7) On determining the application, the court may—

(a) affirm the ruling being reviewed, or

(b) recall that ruling and—

(i) make a ruling that the information in question, or any part of the information in question, falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3), and

(ii) where the appellant is or was charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) Except where it is impracticable to do so, the application is to be assigned to the judges who dealt with the application for the ruling that is being reviewed.

(9) Nothing in this section affects any right of appeal in relation to the ruling being reviewed.

(10) In this section, "relevant period", in relation to an appellant, means the period—

(a) beginning with the making of the ruling being reviewed, and

(b) ending with the relevant conclusion.

(11) In subsection (10), "relevant conclusion" has the meaning given by section (*Continuing duty of prosecutor*)(5).>

Section 97

Kenny MacAskill

617 In section 97, page 110, line 36, leave out <section 89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <this Part>

Bill Aitken

159 In section 97, page 110, line 36, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Kenny MacAskill

618 In section 97, page 111, line 2, at end insert—

<(4) Subsection (5) applies if the information is contained in—

(a) a precognition,

(b) a victim statement,

(c) a statement given by a person whom the prosecutor does not intend to call to give evidence in the proceedings, or

(d) where the proceedings relating to the accused are summary proceedings, a statement given by a person whom the prosecutor intends to call to give evidence in the proceedings.

(5) In complying with the requirement, the prosecutor need not disclose the precognition or, as the case may be, statement.

(6) Subsection (7) applies where the proceedings relating to the accused are solemn proceedings and—

(a) the information is contained in a statement given by a person whom the prosecutor intends to call to give evidence in the proceedings, or

(b) the information is contained in a statement and the prosecutor intends to apply under section 259 of the 1995 Act to have evidence of the statement admitted in the proceedings.

(7) In complying with the requirement, the prosecutor must disclose the statement.>

Section 98

Kenny MacAskill

619 In section 98, page 111, line 5, leave out <section 89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <this Part>

Bill Aitken

160 In section 98, page 111, line 5, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Kenny MacAskill

620 In section 98, page 111, line 19, at end insert—

<(4A) If despite subsection (2) the accused discloses the information or anything recorded in it other than in accordance with subsection (3), a person to whom information is disclosed must not use or disclose the information or anything recorded in it.

(4B) Subsections (2), (4) and (4A) do not apply in relation to the use or disclosure of information which is in the public domain at the time of the use or disclosure.>

Kenny MacAskill

621 In section 98, page 111, line 22, at end insert—

<( ) a petition to the *nobile officium*,

( ) proceedings in the European Court of Human Rights.>

Section 100

Bill Aitken

161 In section 100, page 111, line 36, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Kenny MacAskill

622 Leave out section 100

Section 101

Kenny MacAskill

623 Leave out section 101

Section 102

Kenny MacAskill

624 In section 102, page 112, line 26, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or (*Change in circumstances following lodging of defence statement*: *summary proceedings*)(6)(b)>

Bill Aitken

162 In section 102, page 112, line 26, leave out from <89(5)> to <information> in line 28 and insert <89(2) or 90(2)(b) the prosecutor is required to disclose an item of information to an accused>

Kenny MacAskill

625 In section 102, page 112, line 31, leave out from <serious> to <prejudice> in line 34 and insert <a real risk of substantial harm or damage>

Kenny MacAskill

626 In section 102, page 112, line 35, leave out from <a> to end of line 7 on page 113 and insert <an order under section 106 (a “section 106 order”).>

Bill Aitken

163 In section 102, page 113, line 5, leave out from <89(5)> to end of line 6 and insert <89(2) or, as the case may be, 90(2)(b)>

Section 103

Kenny MacAskill

627 In section 103, page 113, line 10, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

628 In section 103, page 113, line 11, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

629 In section 103, page 113, line 12, after <may> insert <also>

Kenny MacAskill

630 In section 103, page 113, line 15, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

631 In section 103, page 113, line 16, after <may> insert <also>

Kenny MacAskill

632 In section 103, page 113, line 20, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

633 In section 103, page 113, line 24, after <section> insert <104 or>

Kenny MacAskill

634 In section 103, page 113, line 26, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

635 In section 103, page 113, line 31, leave out <non-disclosure> and insert <section 106>

Section 104

Kenny MacAskill

636 In section 104, page 114, line 4, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

637 In section 104, page 114, line 12, leave out from <non-disclosure> to <accused> in line 16 and insert <section 106 order would be likely to cause a real risk of substantial harm or damage to the public interest>

Kenny MacAskill

638 In section 104, page 114, leave out lines 23 to 26 and insert—

<(9) If after giving the prosecutor and, subject to subsection (10), the accused an opportunity to be heard, the court is satisfied that the conditions in subsection (4) of section 105 are met, the court may make an exclusion order under subsection (3) of that section.

(10) On the application of the prosecutor the court may exclude the accused from the hearing appointed under subsection (8).>

Section 105

Kenny MacAskill

639 In section 105, page 114, line 28, after <103(2)(b)> insert <or (3)>

Kenny MacAskill

640 In section 105, page 114, line 30, at end insert—

<(2A) On the application of the prosecutor the court may exclude the accused from the hearing.>

Kenny MacAskill

641 In section 105, page 114, line 31, after <and> insert <, subject to subsection (2A),>

Kenny MacAskill

642 In section 105, page 114, line 31, after <heard> insert <on the applications for the exclusion order and the section 106 order to which it relates>

Kenny MacAskill

643 In section 105, page 114, line 36, leave out from <non-disclosure> to <accused> in line 39 and insert <section 106 order relates would be likely to cause a real risk of substantial harm or damage to the public interest>

Section 106

Kenny MacAskill

644 In section 106, page 115, line 3, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

645 In section 106, page 115, line 6, leave out subsection (2) and insert—

<(2) The court must—

(a) consider the item of information to which the application for a section 106 order relates,

(b) give the prosecutor and (if the court has not made an exclusion order) the accused the opportunity to be heard, and

(c) determine—

(i) whether the conditions in subsection (3) apply, and

(ii) if so, whether subsection (4) applies.>

Kenny MacAskill

646 In section 106, page 115, line 14, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or (*Change in circumstances following lodging of defence statement*: *summary proceedings*)(6)(b)>

Bill Aitken

164 In section 106, page 115, line 14, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Kenny MacAskill

647 In section 106, page 115, line 15, at end insert—

<( ) that section 89(3)(a) or (b) applies to the information,>

Kenny MacAskill

648 In section 106, page 115, line 16, leave out from <it> to <prejudice> in line 20 and insert <there would be a real risk of substantial harm or damage>

Kenny MacAskill

649 In section 106, page 115, line 23, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

650 In section 106, page 115, line 25, leave out from beginning to <conditions> in line 27 and insert <This subsection applies if the court considers that the item of information could be disclosed or partly disclosed in such a way that—

(a) the condition>

Kenny MacAskill

651 In section 106, page 115, line 29, at end insert—

<(4A) If the court considers that subsection (3) (but not subsection (4)) applies, it may make a section 106 order preventing disclosure of the information.

(4B) If the court considers that subsection (4) applies, it may make a section 106 order requiring the information to be disclosed or partly disclosed to the accused in the manner specified in the order.>

Kenny MacAskill

652 In section 106, page 115, line 35, leave out subsection (6)

After section 106

Kenny MacAskill

653 After section 106, insert—

<Orders preventing or restricting disclosure: Secretary of State

Order preventing or restricting disclosure: application by Secretary of State

(1) The Secretary of State may apply to the relevant court for an order under this section (a "section (*Order preventing or restricting disclosure: application by Secretary of State*) order") in relation to the proposed disclosure by the prosecutor to the accused in relevant criminal proceedings of information which the prosecutor—

(a) is required to disclose by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or (*Change in circumstances following lodging of defence statement*: *summary proceedings*)(6)(b), or

(b) intends to disclose otherwise than by virtue of this Part.

(2) If the Secretary of State also makes an application in accordance with subsection (2) or (3) of section (*Application for ancillary orders*: *Secretary of State*), the relevant court must comply with subsections (6) and (7) of that section.

(3) Where an application is made under subsection (1), the relevant court must—

(a) consider the item of information to which the application relates,

(b) give the Secretary of State and the prosecutor the opportunity to be heard,

(c) if the application relates to information which the prosecutor is required to disclose by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or (*Change in circumstances following lodging of defence statement*: *summary proceedings*)(6)(b) and a non-attendance order has not been made, give the accused the opportunity to be heard, and

(d) determine—

(i) whether the conditions in subsection (4) apply, and

(ii) if so, whether subsection (5) applies.

(4) The conditions are—

(a) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,

(b) that withholding the item of information would be consistent with the accused's receiving a fair trial, and

(c) that the public interest would be protected only if a section (*Order preventing or restricting disclosure: application by Secretary of State*) order of the type mentioned in subsection (6) were to be made.

(5) This subsection applies if the court considers that the item of information could be disclosed or partly disclosed in such a way that—

(a) the condition in paragraph (a) of subsection (4) would not be met, and

(b) the disclosure (or partial disclosure) would be consistent with the accused's receiving a fair trial.

(6) If the court considers that subsection (4) (but not subsection (5)) applies, it may make a section (*Order preventing or restricting disclosure: application by Secretary of State*) order preventing disclosure of the information.

(7) If the court considers that subsection (5) applies, it may make a section (*Order preventing or restricting disclosure: application by Secretary of State*) order requiring the information to be disclosed or partly disclosed to the accused in the manner specified in the order.

(8) For the purposes of subsection (7) the order may in particular specify that—

(a) the item of information be disclosed after removing or obscuring parts of it (whether by redaction or otherwise),

(b) extracts or summaries of the item of information (or part of it) be disclosed instead of the item of information.

(9) If an application is made under this section the relevant criminal proceedings must be adjourned until the application is disposed of or withdrawn.

(10) In this section and sections (*Application for ancillary orders*: *Secretary of State*) to (*Application for non-attendance order*)—

"relevant court" means the court before which relevant criminal proceedings are taking place,

"relevant criminal proceedings" means criminal proceedings relating to the item of information to which the application under this section relates.>

Kenny MacAskill

654 After section 106, insert—

<**Application for ancillary orders: Secretary of State**

(1) This section applies where the Secretary of State applies for a section (*Order preventing or restricting disclosure: application by Secretary of State*) order.

(2) If the application under section (*Order preventing or restricting disclosure: application by Secretary of State*) relates to solemn proceedings, the Secretary of State may also apply to the relevant court for—

(a) a restricted notification order and a non-attendance order, or

(b) a non-attendance order (but not a restricted notification order).

(3) If the application under section (*Order preventing or restricting disclosure: application by Secretary of State*) relates to summary proceedings, the Secretary of State may also apply to the court for a non-attendance order.

(4) A restricted notification order is an order under section (*Application for restricted notification order and non-attendance order*) prohibiting notice being given to the accused of—

(a) the making of an application for—

(i) the section (*Order preventing or restricting disclosure: application by Secretary of State*) order to which the restricted notification order relates,

(ii) the restricted notification order, and

(iii) a non-attendance order, and

(b) the determination of those applications.

(5) A non-attendance order is an order under section (*Application for non-attendance order*) prohibiting the accused from attending or making representations in proceedings for the determination of the application for the section (*Order preventing or restricting disclosure: application by Secretary of State*) order to which the non-attendance order relates.

(6) Subsection (7) applies where the Secretary of State applies—

(a) by virtue of subsection (2)(a) for a restricted notification order and a non-attendance order, or

(b) by virtue of subsection (2)(a) or (b) for a non-attendance order.

(7) Before determining the application for the section (*Order preventing or restricting disclosure: application by Secretary of State*) order, the court must—

(a) in accordance with section (*Application for restricted notification order and non-attendance order*), determine any application for a restricted notification order and a non-attendance order,

(b) in accordance with section (*Application for non-attendance order*), determine any application for a non-attendance order.>

Kenny MacAskill

655 After section 106, insert—

<**Application for restricted notification order and non-attendance order**

(1) This section applies where by virtue of section (*Application for ancillary orders*: *Secretary of State*)(2)(a) the Secretary of State applies for a restricted notification order and a non-attendance order.

(2) On receiving the application, the relevant court must appoint a hearing to determine whether a restricted notification order should be made.

(3) The accused is not to be notified of—

(a) the applications for the section (*Order preventing or restricting disclosure: application by Secretary of State*) order, the restricted notification order and the non-attendance order, or

(b) the hearing appointed under subsection (2).

(4) The accused is not to be given the opportunity to be heard or be represented at the hearing.

(5) If, after giving the Secretary of State and the prosecutor an opportunity to be heard, the court is satisfied that the conditions in subsection (6) are met, the court may make a restricted notification order.

(6) Those conditions are—

(a) that disclosure to the accused of the making of the application for the section (*Order preventing or restricting disclosure: application by Secretary of State*) order would be likely to cause a real risk of substantial harm or damage to the public interest, and

(b) that, having regard to all the circumstances, the making of a restricted notification order would be consistent with the accused's receiving a fair trial.

(7) If the court makes a restricted notification order, it must also make a non-attendance order.

(8) If the court refuses to make a restricted notification order, the court must appoint a hearing to determine the application for a non-attendance order.

(9) If after giving the Secretary of State, the prosecutor and, subject to subsection (10), the accused an opportunity to be heard, the court is satisfied that the conditions in subsection (5) of section (*Application for non-attendance order*) are met, the court may make a non-attendance order under subsection (4) of that section.

(10) On the application of the Secretary of State the court may exclude the accused from the hearing appointed under subsection (8).>

Kenny MacAskill

656 After section 106, insert—

<**Application for non-attendance order**

(1) This section applies where by virtue of section (*Application for ancillary orders*: *Secretary of State*)(2)(b) the Secretary of State applies for a non-attendance order (but not a restricted notification order).

(2) On receiving the application, the relevant court must appoint a hearing.

(3) On the application of the Secretary of State the court may exclude the accused from the hearing.

(4) If after giving the Secretary of State, the prosecutor and, if not excluded under subsection (3), the accused an opportunity to be heard the court is satisfied that the conditions in subsection (5) are met, the court may make a non-attendance order.

(5) Those conditions are—

(a) that disclosure to the accused of the nature of the information to which the application for the section (*Order preventing or restricting disclosure: application by Secretary of State*) order relates would be likely to cause a real risk of substantial harm or damage to the public interest, and

(b) that, having regard to all the circumstances, the making of a non-attendance order would be consistent with the accused's receiving a fair trial.>

Section 107

Kenny MacAskill

657 In section 107, page 116, leave out lines 6 and 7 and insert—

<( ) an application for an exclusion order,

( ) an application for a section 106 order,

( ) an application for a restricted notification order,

( ) an application for a non-attendance order,

( ) an application for a section (*Order preventing or restricting disclosure: application by Secretary of State*) order,>

Kenny MacAskill

658 In section 107, page 116, line 11, leave out <to whom the application, review or appeal relates> and insert <in relation to the determination of the application, review or appeal>

Kenny MacAskill

659 In section 107, page 116, line 14, at end insert—

<( ) Before deciding whether to appoint special counsel in a non-notification case, the court—

(a) must give the prosecutor an opportunity to be heard, but

(b) must not give the accused an opportunity to be heard.

( ) Before deciding whether to appoint special counsel in a restricted notification case, the court—

(a) must give the prosecutor and the Secretary of State an opportunity to be heard,

(b) must not give the accused an opportunity to be heard.

( ) Before deciding whether to appoint special counsel in any case other than a non-notification case or a restricted notification case, the court must give all the parties an opportunity to be heard.

( ) The prosecutor may appeal to the High Court against a decision of the court not to appoint special counsel in any case.

( ) The Secretary of State may appeal to the High Court against a decision of the court not to appoint special counsel in a restricted notification case.

( ) The accused may appeal to the High Court against a decision not to appoint special counsel in any case other than a non-notification case or a restricted notification case.

( ) In this section and section (*Role of special counsel*)—

"non-notification case" means a case where the court is determining—

(a) an application for a non-notification order,

(b) an application for review of the grant or refusal of a non-notification order,

(c) an appeal relating to such an order,

"restricted notification case" means a case where the court is determining—

(a) an application for a restricted notification order,

(b) an application for review of the grant or refusal of a restricted notification order,

(c) an appeal relating to such an order.>

After section 107

Kenny MacAskill

660 After section 107, insert—

<**Persons eligible for appointment as special counsel**

The court may appoint a person as special counsel under section 107(2) only if the person is a solicitor or advocate.>

Kenny MacAskill

661 After section 107, insert—

<**Role of special counsel**

(1) Special counsel's duty is, in relation to the determination of the relevant application or appeal, to act in the best interests of the accused with a view only to ensuring that the accused receives a fair trial.

(2) Special counsel—

(a) is entitled to see the confidential information, but

(b) must not disclose any of the confidential information to the accused or the accused's representative (if any).

(3) Special counsel appointed in a non-notification case or a restricted notification case must not—

(a) disclose to the accused or the accused's representative (if any) the making of the relevant application or appeal, or

(b) otherwise communicate with the accused or the accused's representative (if any) about the relevant application or appeal.

(4) Special counsel appointed in any case other than a non-notification case or a restricted notification case must not communicate with the accused about the relevant application or appeal except—

(a) with the permission of the court, and

(b) where permission is given, in accordance with such conditions as the court may impose.

(5) Before deciding whether to grant permission, the court must give—

(a) the prosecutor, and

(b) in the case of an application for a section (*Order preventing or restricting disclosure: application by Secretary of State*) order or a non-attendance order, the Secretary of State,

an opportunity to be heard.

(6) In this section—

"the confidential information" means—

(a) the information to which the relevant application or appeal relates, and

(b) a copy of the relevant application or appeal,

"relevant application or appeal" means the application or appeal referred to in section 107(1) in respect of which special counsel is appointed.>

Kenny MacAskill

662 After section 107, insert—

<**Appeals**

(1) The prosecutor may appeal to the High Court against—

(a) the making of a section 106 order under section 106(4B),

(b) the making of a section (*Order preventing or restricting disclosure: application by Secretary of State)* order,

(c) the making of a restricted notification order,

(d) the making of a non-attendance order,

(e) the refusal of an application for a non-notification order,

(f) the refusal of an application for an exclusion order, or

(g) the refusal of an application for a section 106 order.

(2) The accused may appeal to the High Court against the making of—

(a) an exclusion order under section 105(3),

(b) a section 106 order,

(c) a section (*Order preventing or restricting disclosure: application by Secretary of State)* order, or

(d) a non-attendance order.

(3) The Secretary of State may appeal to the High Court against—

(a) the making of a section (*Order preventing or restricting disclosure: application by Secretary of State)* order under section (*Order preventing or restricting disclosure: application by Secretary of State)*(7),

(b) the refusal of an application for a restricted notification order,

(c) the refusal of an application for a non-attendance order, or

(d) the refusal of an application for a section (*Order preventing or restricting disclosure: application by Secretary of State)* order.

(4) If special counsel was appointed in relation to an application for a non-notification order, special counsel may appeal to the High Court against the making of—

(a) the non-notification order, or

(b) a section 106 order in relation to the same item of information.

(5) If special counsel was appointed in relation to an application for a restricted notification order, special counsel may appeal to the High Court against the making of—

(a) the restricted notification order, or

(b) a section (*Order preventing or restricting disclosure: application by Secretary of State)* order in relation to the same item of information.

(6) An appeal must be lodged not later than 7 days after the decision appealed against.

(7) The prosecutor is entitled to be heard in any appeal under this section.

(8) The accused is entitled to be heard in an appeal under—

(a) subsection (1)(a) or (g) or (2)(b) unless—

(i) a non-notification order has been made, or

(ii) an exclusion order has been made,

(b) subsection (1)(b), (2)(c) or (3)(a) or (d) unless—

(i) a restricted notification order has been made, or

(ii) a non-attendance order has been made,

(c) subsection (1)(d), (2)(d) or (3)(c) unless the court, on the application of the Secretary of State, excludes the accused from the hearing,

(d) subsection (1)(f) or (2)(a) unless the court, on the application of the prosecutor excludes the accused from the hearing.

(9) The Secretary of State is entitled to be heard in an appeal under subsection (1)(b), (c) or (d), (2)(c) or (d) or (5).>

Section 108

Kenny MacAskill

663 Leave out section 108

Section 109

Kenny MacAskill

664 Leave out section 109

Section 110

Kenny MacAskill

665 Leave out section 110

Section 111

Kenny MacAskill

666 In section 111, page 116, line 35, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

667 In section 111, page 117, line 3, leave out from <, and> to end of line 6

Bill Aitken

165 In section 111, page 117, line 6, leave out <89(5), 90(2)(c), 94(1)(c) or 95(3)(c)> and insert <89(2) or 90(2)(b)>

Kenny MacAskill

668 In section 111, page 117, line 7, after <be,> insert <special counsel or>

Kenny MacAskill

669 In section 111, page 117, line 8, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

670 In section 111, page 117, line 10, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

671 In section 111, page 117, line 13, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

672 In section 111, page 117, line 16, after <prosecutor> insert <or, as the case may be, special counsel>

Kenny MacAskill

673 In section 111, page 117, line 19, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

674 In section 111, page 117, line 22, after <prosecutor> insert <or, as the case may be, special counsel>

Kenny MacAskill

675 In section 111, page 117, line 26, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

676 In section 111, page 117, line 27, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

677 In section 111, page 117, line 29, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

678 In section 111, page 117, line 33, leave out <non-disclosure> and insert <section 106>

After section 111

Kenny MacAskill

679 After section 111, insert—

<**Review of section (*Order preventing or restricting disclosure: application by Secretary of State*) order**

(1) This section applies where—

(a) the court makes a section (*Order preventing or restricting disclosure: application by Secretary of State*) order, and

(b) during the relevant period the Secretary of State, the prosecutor, special counsel or the accused becomes aware of information that was unavailable to the court at the time when the order was made.

(2) The Secretary of State or, as the case may be, the prosecutor, special counsel or the accused may apply to the court to review the order.

(3) Except in the case mentioned in subsection (4), the same persons are entitled to be heard on the application for review as were entitled to be heard on the application for the order.

(4) If—

(a) a restricted notification order was granted in relation to the order which is under review, and

(b) the court is satisfied that the conditions in section (*Application for restricted notification order and non-attendance order*)(6) are met,

the court may, where the Secretary of State or, as the case may be, the prosecutor or special counsel applies for the review, make an order prohibiting notification of the application for review being given to the accused.

(5) If—

(a) a non-attendance order was granted in relation to the order which is under review, and

(b) the court is satisfied that the conditions in section (*Application for non-attendance order*)(5) are met,

the court may, where the Secretary of State or, as the case may be, the prosecutor, special counsel or the accused applies for the review, exclude the accused from the review.

(6) If the court is not satisfied that the conditions mentioned in section (*Order preventing or restricting disclosure: application by Secretary of State*)(4) are met, the court may—

(a) recall the order which is under review, or

(b) recall the order which is under review and make an order requiring the information to be disclosed or partly disclosed to the accused in the specified manner.

(7) Nothing in this section affects any right of appeal in relation to the order which is under review.

(8) In this section—

"specified" means specified in the order of the court,

"the relevant period", in relation to an accused, means the period—

(a) beginning with the making of the section (*Order preventing or restricting disclosure: application by Secretary of State*) order, and

(b) ending with the conclusion of the proceedings against the accused.>

Section 112

Kenny MacAskill

680 In section 112, page 118, line 6, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

681 In section 112, page 118, line 6, after <order> insert <or a section (*Order preventing or restricting disclosure: application by Secretary of State*) order>

Kenny MacAskill

682 In section 112, page 118, line 7, after <consider> insert <in relation to each order>

Kenny MacAskill

683 In section 112, page 118, line 8, leave out <non-disclosure order> and insert <order concerned>

Kenny MacAskill

684 In section 112, page 118, line 10, leave out <non-disclosure order> and insert <order concerned>

Kenny MacAskill

685 In section 112, page 118, line 12, leave out <90(4)> and insert <111(8)>

Section 113

Kenny MacAskill

686 In section 113, page 118, line 21, leave out <non-disclosure> and insert <section 106>

Kenny MacAskill

687 In section 113, page 118, line 30, leave out <non-disclosure> and insert <section 106>

After section 115

Kenny MacAskill

688 After section 115, insert—

<**Abolition of common law rules about disclosure**

(1) The provisions of this Part replace any equivalent common law rules about disclosure of information by the prosecutor in connection with criminal proceedings.

(2) The common law rules about disclosure of information by the prosecutor in connection with criminal proceedings are abolished in so far as they are replaced by or are inconsistent with the provisions of this Part.

(3) Sections (*Application by accused for ruling on disclosure*) and (*Application by appellant for ruling on disclosure*) do not affect any right under the common law of an accused or appellant to seek disclosure or recovery of information by or from the prosecutor by means of a procedure other than an application under one or other of those sections.

(4) Subsection (5) applies where, following an application (the "earlier disclosure application") by the accused or the appellant under section (*Application by accused for ruling on disclosure*) or section (*Application by appellant for ruling on disclosure*), the court has made a ruling that (as the case may be)—

(a) section 89(3) does not apply to information, or

(b) information does not fall within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(5) The accused or, as the case may be, the appellant, is not entitled to seek the disclosure or recovery of the same information by or from the prosecutor by means of any other procedure at common law on grounds that are substantially the same as any of those on which the earlier disclosure application was made.

(6) Subsection (7) applies where, following an application (the "earlier common law application") by the accused under a procedure other than an application under section (*Application by accused for ruling on disclosure*) or (*Application by appellant for ruling on disclosure*), the court has decided not to make an order for the recovery or disclosure of information by or from the prosecutor.

(7) The accused or, as the case may be, the appellant is not entitled to make an application under section (*Application by accused for ruling on disclosure*) or (*Application by appellant for ruling on disclosure*) in relation to the same information on grounds that are substantially the same as any of those on which the earlier common law application was made.

(8) In this section, “appellant” has the meaning given by section (*Sections* **(***Duty to disclose after conclusion of proceedings at first instance*) *to* (*Review of ruling under section* (*Application by appellant for ruling on disclosure*)): *interpretation*).>

Section 116

Kenny MacAskill

689 In section 116, page 119, line 20, leave out from <“prosecutor”> to end of line 21 and insert—

<“investigating agency” has the meaning given by section (*Provision of information to prosecutor*: *solemn cases*)(4),

“procurator fiscal” and “prosecutor” have the meanings given by section 307(1) of the 1995 Act.>

Kenny MacAskill

690 In section 116, page 119, line 24, leave out <89(5) and (6),> and insert <89(2)(b),

( ) section (*Disclosure of other information*: *solemn cases*)(2),>

Bill Aitken

166 In section 116, page 119, line 24, leave out from <89(5)> to end of line 27 and insert <89(2),

(b) section 90(1) and (2),

(c) section 93(2) (where it first occurs),>

Kenny MacAskill

691 In section 116, page 119, leave out line 26

Kenny MacAskill

692 In section 116, page 119, leave out line 30

Section 117

Angela Constance

24 In section 117, page 120, line 10, at end insert <, or

(b) to determine or control that conduct despite being able to appreciate the nature or wrongfulness of it.>

Kenny MacAskill

167 In section 117, page 120, line 31, leave out <it> and insert <such abnormality>

Section 121

Kenny MacAskill

168 In section 121, page 123, leave out lines 2 and 3 and insert—

<(3A) No order may be made under subsection (1) unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.>

Section 122

Kenny MacAskill

169 In section 122, page 125, line 1, leave out from <5,> to <29> in line 2 and insert <5 and 11>

Section 123

Robert Brown

385 Leave out section 123

After section 124

Kenny MacAskill

170 After section 124, insert—

<**Licensing of street trading: food hygiene certificates**

(1) Section 39 of the 1982 Act (street traders' licences) is amended as follows.

(2) In subsection (4), for the words from "the requirements" to the end substitute "such requirements as the Scottish Ministers may by order made by statutory instrument specify".

(3) After subsection (4), insert—

"(5) An order under subsection (4) may specify requirements by reference to provision contained in another enactment.

(6) A statutory instrument containing an order made under subsection (4) is subject to annulment in pursuance of a resolution of the Scottish Parliament.".>

Section 125

Kenny MacAskill

171 In section 125, page 128, line 24, at beginning insert <In>

Kenny MacAskill

172 In section 125, page 128, line 24, leave out from <is> to <In> in line 26 and insert <, in>

Cathie Craigie

2 In section 125, page 128, line 25, leave out subsection (2)

Cathie Craigie

3 In section 125, page 128, line 26, leave out subsection (3)

Cathie Craigie
Supported by: Robert Brown

4 Leave out section 125

After section 127

Sandra White

516 After section 127, insert—

<**Control of lap dancing and other adult entertainment venues**

(1) The 1982 Act is amended as follows.

(2) In section 41(2) (definition of place of public entertainment), after paragraph (aa) insert—

"(ab) adult entertainment venues (as defined in section 45A) in relation to which Schedule 2 (as modified for the purposes of that section) have effect, while being used as such;".

(3) The title of Part 3 becomes "Control of sex shops and adult entertainment venues".

(4) After section 45 insert—

"**45A Control of lap dancing and other adult entertainment venues**

(1) A local authority may resolve that Schedule 2, as modified for the purposes of this section, is to have effect in their area in relation to adult entertainment venues; and, if they do so resolve, that Schedule (as so modified) has effect from the day specified in the resolution.

(2) The day referred to in subsection (1) must not be before the expiry of the period of one month beginning with the day on which the resolution is passed.

(3) A local authority must, not later than 28 days before the day referred to in subsection (1), publish notice that they have passed a resolution under this section in a newspaper circulating in their area.

(4) The notice is to state the general effect of Schedule 2, as modified for the purposes of this section.

(5) For the purposes of this section, Schedule 2 is modified as follows—

(a) in paragraph 1, sub-paragraphs (b)(ii) (and the word "or" immediately preceding it) and (c) are omitted;

(b) for paragraph 2 substitute—

"2 In this Schedule, "adult entertainment venue" has the same meaning as in section 45A.";

(c) in paragraph 9—

(i) after sub-paragraph (5)(c) insert—

"(ca) where it is intended to sell alcohol in the adult entertainment venue, an application for the grant, renewal or transfer of a premises licence under Part 3 of the Licensing (Scotland) Act 2005 (asp 16) relating to that venue has been refused;"; and

(ii) after sub-paragraph (6) insert—

"(6A) A local authority may refuse an application for the grant or renewal of a licence despite the fact that a premises licence under Part 3 of the Licensing (Scotland) Act 2005 (asp 16) is in effect in relation to the adult entertainment venue.";

(d) in paragraph 25, for "section 45" in each place where those words occur, substitute "section 45A"; and

(e) for "sex shop", in each place where those words occur, substitute "adult entertainment venue".

(6) In this section, "adult entertainment venue" means any premises, vehicle, vessel or stall used for a business which consists to a significant degree of providing relevant entertainment before a live audience; and, for the purposes of that definition—

"audience" includes an audience of one;

"display of nudity" means—

(a) in the case of a woman, exposure of her breasts, nipples, pubic area, genitals or anus;

(b) in the case of a man, exposure of his pubic area, genitals or anus;

"relevant entertainment" means—

(a) any live performance; or

(b) any live display of nudity,

which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means).".>

Section 128

Kenny MacAskill

173 In section 128, page 129, line 25, at end insert—

<( ) in paragraph 2(3)(b), after "application" insert "(other than the date and place of birth of any person)",

( ) in paragraph 2(8)(a), after "application" insert "(other than the date and place of birth of any person)",>

Section 129

Kenny MacAskill

174 Leave out section 129

After section 130

Bill Aitken

460 After section 130, insert—

<**Premises licence applications: crime prevention objective**

In section 23(5) of the 2005 Act (grounds for refusal of premises licence application), after paragraph (b), insert—

"(ba) that the appropriate chief constable has made a recommendation under section 21(5) that the application be refused,".>

After section 131

Kenny MacAskill

175 After section 131, insert—

<**Reviews of premises licences: notification of determinations**

(1) The 2005 Act is amended as follows.

(2) After section 39 (Licensing Board's powers on review), insert—

"**39A Notification of determinations**

(1) Where a Licensing Board, at a review hearing—

(a) decides to take one of the steps mentioned in section 39(2), or

(b) decides not to take one of those steps,

the Board must give notice of the decision to each of the persons mentioned in subsection (2).

(2) The persons referred to in subsection (1) are—

(a) the holder of the premises licence, and

(b) where the decision is taken in connection with a premises licence review application, the applicant.

(3) Where subsection (1)(a) applies, the holder of the premises licence may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(4) Where—

(a) subsection (1)(a) or (b) applies, and

(b) the decision is taken in connection with a premises licence review application, the applicant may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(5) Where the clerk of a Board receives a notice under subsection (3) or (4), the Board must issue a statement of the reasons for the decision to—

(a) the person giving the notice, and

(b) any other person to whom the Board gave notice under subsection (1).

(6) A statement of reasons under subsection (5) must be issued—

(a) by such time, and

(b) in such form and manner,

as may be prescribed.”.>

After section 132

George Foulkes

542 After section 132, insert—

<**Premises licence applications: disability compliance statements**

In section 20 of the 2005 Act (application for premises licence), after subsection (4)(f), insert—

“(fa) a statement of compliance with Part 3 of the Disability Discrimination Act 1995, including information as to where reasonable adjustments have been or will be made to remove barriers to access for disabled people,”.>

Bill Aitken

547 After section 132, insert—

<**Premises licence: minor variations**

(1) Section 29(6) of the 2005 Act (definition of minor variations to premises licence) is amended as follows.

(2) In paragraph (a), insert at the end “or if the variation relates only to parts of the premises to which the public does not have access”.

(3) After paragraph (c) insert—

“(ca) any reduction in the capacity of the premises,

(cb) any change in the name by which the business carried on in the premises is to be known or under which it trades,

(cc) any variation of the layout plan or operating plan required by virtue of any enactment relating to planning, building control, food safety or fire safety,”.>

Robert Brown

550 After section 132, insert—

<Premises licence: transfer on application of person other than licence holder

(1) Section 34 (transfer on application of person other than licence holder) of the 2005 Act is amended as follows.

(2) In subsection (3)—

(a) the word "and" immediately preceding paragraph (d) is repealed, and

(b) after that paragraph insert ", and

"(e) for any other reason, the business that was (prior to the event in question) carried on in the licensed premises to which the licence relates ceases to be carried on in those premises.".

(3) In subsection (4), insert at the beginning "Subject to subsection (4A),".

(4) After that subsection insert—

"(4A) In the case of an application made following the event specified in subsection (3)(e)—

(a) subsection (8) of section 33 applies as if, after the words "the Board must" there were inserted ", if satisfied in all the circumstances that it is reasonable to do so,", and

(b) subsection (10)(b) of that section applies as if, after the words "if not so satisfied," there were inserted "but otherwise satisfied that in all the circumstances it is reasonable to do so.".>

Kenny MacAskill

693 After section 132, insert—

<Premises licences: connected persons and interested parties

(1) The 2005 Act is amended as follows.

(2) After section 40 insert—

"*Connected persons and interested parties*

40A Connected persons and interested parties: licence holder's duty to notify changes

(1) A premises licence holder must, not later than one month after a person becomes or ceases to be—

(a) a connected person in relation to the licence holder, or

(b) an interested party in relation to the licensed premises,

give the appropriate Licensing Board notice of that fact.

(2) A notice under subsection (1) that a person has become a connected person or an interested party must specify—

(a) the name and address of the person, and

(b) if the person is an individual, the person's date of birth.

(3) Where a Licensing Board receives a notice under subsection (1), the Board must give a copy of the notice to the appropriate chief constable.

(4) A premises licence holder who fails, without reasonable excuse, to comply with subsection (1) commits an offence.

(5) A person guilty of an offence under subsection (4) is liable on summary conviction to a fine not exceeding level 2 on the standard scale.”.

(3) In section 48 (notification of change of name or address)—

(a) in subsection (1)—

(i) the word “or” immediately following paragraph (a) is repealed, and

(ii) after paragraph (b) insert “, or

(c) the name or address of any person who is—

(i) a connected person in relation to the licence holder, or

(ii) an interested party in relation to the licensed premises,”,

(b) after subsection (2) insert—

“(2A) Where a Licensing Board receives a notice under subsection (1), the Board must give a copy of the notice to the appropriate chief constable.”.

(4) In section 147 (interpretation), after subsection (4) insert—

“(5) For the purposes of this Act, a person is an interested party in relation to licensed premises if the person is not the holder of the premises licence nor the premises manager in respect of the premises but—

(a) has an interest in the premises as an owner or tenant, or

(b) has management and control over the premises or the business carried on on the premises.”.

(5) In section 148 (index of defined expressions), in the table, insert at the appropriate place—

“interested party	section 147(5).”.>

Robert Brown

543 After section 132, insert—

<**Provisional premises licences**

(1) Section 45 (provisional premises licence) of the 2005 Act is amended as follows.

(2) In subsection (6), for “2 years” substitute “5 years”.

(3) In subsection (8), paragraph (b) and the word “and” immediately preceding it are repealed.

(4) In subsection (10), for paragraphs (a) and (b) substitute—

“(a) for subsection (2) there were substituted—

“(2) An application under subsection (1) must be accompanied by—

(a) a plan sufficient to identify the site of the subject premises and give a general indication of their size,

(b) a document giving a general indication of—

(i) the anticipated capacity of the premises,

(ii) the hours during which it is proposed to serve alcohol on the premises,

(iii) the extent to which it is proposed to allow children or young persons entry to the premises, and

(c) the certificate required by section 50(2).", and

(b) subsections (4) and (5) were omitted.".

(5) After subsection (10) insert—

"(10A) Sections 21 to 32 have effect in relation to any provisional premises licence application and to any provisional premises licence as if references to—

(a) the operating plan were read as references to the document required under section 20(2)(b) (as substituted by subsection (10)(a)), and

(b) the layout plan were read as references to the plan required under section 20(2)(a) (as so substituted).".>

Kenny MacAskill

176 After section 132, insert—

<**Premises licence applications: food hygiene certificates**

(1) Section 50 of the 2005 Act (certificates as to planning, building standards and food hygiene) is amended as follows.

(2) In subsection (7), for the words from "the requirements" to the end substitute "such requirements as the Scottish Ministers may, by order, specify.".

(3) After subsection (7), insert—

"(7A) An order under subsection (7) may specify requirements by reference to provision contained in another enactment.".

(4) In subsection (8)(c), for "the 1990 Act" substitute "section 5 of the Food Safety Act 1990 (c.16)".>

After section 133

Bill Aitken

548 After section 133, insert—

<**Consumption of alcohol on licensed premises outwith licensed hours**

In section 63(2) of the 2005 Act (exceptions to offence of allowing sale, consumption etc. of alcohol outwith licensed hours), after paragraph (f) insert—

"(g) allow alcohol to be consumed on licensed premises at any time within 45 minutes of the end of any period of licensed hours by—

(i) the premises licence holder,

(ii) the premises manager, or

(iii) any person aged 18 or over who, at the end of that period of licensed hours, was working on the premises.".>

Section 134

Kenny MacAskill

539 In section 134, page 134, line 17, leave out from <after> to end of line 22 and insert <in sub-paragraph (4), after "Board" in the second place where it appears insert "or to a member of staff provided under paragraph 8(1)(b)".>

After section 134

Kenny MacAskill

449 After section 134, insert—

<**Extended hours applications: notification period**

(1) Section 69 of the 2005 Act (notification of extended hours application) is amended as follows.

(2) After subsection (3), add—

"(4) Subsections (5) and (6) apply where the Licensing Board is satisfied that the application requires to be dealt with quickly.

(5) Subsections (2) and (3) have effect in relation to the application as if the references to the period of 10 days were references to such shorter period of not less than 24 hours as the Board may determine.

(6) Subsection (3) has effect in relation to the application as if for the word "must" there were substituted "may".".>

Section 136

Kenny MacAskill

177 In section 136, page 135, line 3, at end insert—

<"(ba) the notice does not include a recommendation under section 73(4),>

Kenny MacAskill

178 In section 136, page 135, leave out lines 22 to 27 and insert—

<(a) hold a hearing for the purposes of considering and determining the application, and

(b) after having regard to the circumstances in which the personal licence previously held expired or, as the case may be, was surrendered—

(i) refuse the application, or

(ii) grant the application.".>

After section 136

James Kelly

698 After section 136, insert—

<**24 hour licences: refusal, revocation etc. on advice or recommendation of Local Licensing Forum**

(1) The 2005 Act is amended as follows.

(2) In section 64 (24 hour licences to be granted only in exceptional circumstances)—

(a) in subsection (1), for “Subsection (2) applies” substitute “Subsections (2) to (4) apply”,

(b) in subsection (2), at the end insert “(the granting of any such application being referred to in this section and section 64A as “24 hour licensing”)”, and

(c) after subsection (2) insert—

“(3) In reaching a decision under subsection (2), the Licensing Board must have regard to any advice given or recommendations made by the Local Licensing Forum for the Board’s area that allowing 24 hour licensing in the area in which the subject premises are situated would be inappropriate or undesirable.

(4) Where the Local Licensing Forum has not, at the time the application is made, given any advice or made any recommendations about the appropriateness or desirability of allowing 24 hour licensing, the Licensing Board may invite it to do so before reaching a decision under subsection (2).”.

(3) After that section insert—

“**64A Revocation etc. of 24 hour licence on advice or recommendation of Local Licensing Forum**

(1) This section applies where—

(a) a Licensing Board has granted, under section 64, an application for 24 hour licensing, and

(b) the Local Licensing Forum for the Board’s area subsequently gives advice or makes recommendations to the Board to the effect that 24 hour licensing in the area in which the subject premises are situated is inappropriate or undesirable.

(2) The Licensing Board—

(a) must have regard to the advice or recommendations of the Local Licensing Forum, and

(b) may either revoke the licence or vary it so as to restrict the licensed hours during which alcohol may be sold on the premises to a continuous period of less than 24 hours.”.>

After section 137

Kenny MacAskill

179 After section 137, insert—

<**Appeals**

In section 131(2) of the 2005 Act (appeals), the words “by way of stated case, at the instance of the appellant,” are repealed.>

Kenny MacAskill

694 After section 137, insert—

<**Liability for offences**

(1) The 2005 Act is amended as follows.

(2) In each of the following provisions, the word “knowingly” is repealed—

(a) section 1(3)(b),

(b) section 103(1),

(c) section 106(2),

(d) section 107(1),

(e) section 118(1),

(f) section 120(2) and (3),

(g) section 121(1),

(h) section 127(4), and

(i) section 128(5).

(3) After section 141 (offences by bodies corporate etc.) insert—

“**141A Defence of due diligence for certain offences**

(1) It is a defence for a person charged with an offence to which this section applies to prove that the person—

(a) did not know that the offence was being committed, and

(b) exercised all due diligence to prevent the offence being committed.

(2) This section applies to an offence under any of the following provisions of this Act—

section 1(3)(b),

section 103(1),

section 106(2),

section 107(1),

section 118(1),

section 120(2) or (3),

section 121(1),

section 127(4),

section 128(5).

141B Vicarious liability of premises licence holders and interested parties

(1) Subsection (2) applies where, on or in relation to any licensed premises, a person commits an offence to which this section applies while acting as the employee or agent of—

(a) the holder of the premises licence, or

(b) an interested party.

(2) The holder of the premises licence or, as the case may be, the interested party is also guilty of the offence and liable to be proceeded against and punished accordingly.

(3) It is a defence for a holder of a premises licence or an interested party charged with an offence to which this section applies by virtue of subsection (2) to prove that the holder of the licence or, as the case may be, the interested party—

(a) did not know that the offence was being committed by the employee or agent, and

(b) exercised all due diligence to prevent the offence being committed.

(4) Proceedings may be taken against the holder of the premises licence or the interested party in respect of the offence whether or not proceedings are also taken against the employee or agent who committed the offence.

(5) This section applies to an offence under any of the following provisions of this Act—

section 1(3),

section 15(5),

section 63(1),

section 97(7),

section 102(1),

section 103(1),

section 106(2),

section 107(1),

section 108(2) or (3),

section 113(1),

section 114,

section 115(2),

section 118(1),

section 119(1),

section 120(2),

section 121(1),

section 138(5).”.>

After section 138

Kenny MacAskill

699 After section 138, insert—

<**Powers of Licensing Standards Officers**

(1) Section 15 of the 2005 Act is amended as follows.

(2) The section title becomes “Powers of entry, inspection and seizure”.

(3) In subsection (2)—

(a) the word “and” immediately preceding paragraph (b) is repealed, and

(b) after that paragraph insert—

“(c) power to take copies of, or of an entry in, any document found on the premises, and

(d) power to seize and remove any substances, articles or documents found on the premises.”.

(4) In subsection (3)—

(a) for “either” substitute “any”, and

(b) in paragraph (b), after “information” insert “or explanation”.

(5) After subsection (4) insert—

“(4A) Subsection (3)(c) includes power to require any document which is stored in electronic form and which is accessible from the premises to be produced in a form—

(a) in which it is legible, and

(b) in which it can be removed from the premises.

(4B) Nothing in subsection (3) requires a person to produce any document if the person would be entitled to refuse to produce that document in any proceedings in any court on the grounds of confidentiality of communications.

(4C) Nothing in subsection (3) requires a person to provide any information or explanation or produce any document if to do so would incriminate that person or that person’s spouse or civil partner.”.

(6) After subsection (6) insert—

“(7) The Scottish Ministers may by regulations make further provision about the procedure to be followed in the exercise of a power under this section.

(8) Where a Licensing Standards Officer seizes any substance, article or document under subsection (2)(d), the Officer must leave on the premises a notice—

(a) stating what was seized, and

(b) explaining why it was seized.

(9) The Scottish Ministers may by regulations make provision about the treatment of substances, articles or documents seized under subsection (2)(d).

(10) Regulations under subsection (9) may, in particular, make provision—

(a) about the retention, use, return, disposal or destruction of anything seized,

(b) about compensation for anything seized.”.>

Schedule 4

Kenny MacAskill

180 In schedule 4, page 149, line 11, leave out <22(2) or>

Kenny MacAskill

181 In schedule 4, page 150, leave out lines 18 to 21

Section 140

Kenny MacAskill

182 Leave out section 140

Section 142

Kenny MacAskill

183 Leave out section 142

Section 143

Kenny MacAskill

184 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*Mutual recognition of judgments and probation decisions*)(1),>

Kenny MacAskill

540 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*Convictions by courts in other EU member States*)(2),>

Kenny MacAskill

450 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*European evidence warrants*)(1),>

Kenny MacAskill

186 In section 143, page 138, leave out line 33

Kenny MacAskill

187 In section 143, page 138, line 33, at end insert—

<( ) an order under section 146(1) containing provisions which modify any enactment (including this Act), or>

Kenny MacAskill

188 In section 143, page 138, line 34, leave out <146(1) or>

Robert Brown

392 In section 143, page 138, line 35, at end insert <or

( ) an order under section 148(1) bringing into force section 17(1), (2) or (3),>

Robert Brown

549 In section 143, page 138, line 35, at end insert <or

( ) an order under section 148(1) bringing into force section 38(1), (2), (3) or (4),>

Schedule 5

Kenny MacAskill

189 In schedule 5, page 151, line 35, at end insert—

<*The Libel Act 1792 (c.60)*

The Libel Act 1792 is repealed.

The Criminal Libel Act 1819 (c.8)

The Criminal Libel Act 1819 is repealed.

The Defamation Act 1952 (c.66)

In the Defamation Act 1952, section 17(2) is repealed.>

Kenny MacAskill

451 In schedule 5, page 152, line 10, at end insert—

<*The Law Officers Act 1944 (c.25)*

In section 2(3) of the Law Officers Act 1944 (Lord Advocate and Solicitor General for Scotland), for the words from "three" to the end substitute "287 of the Criminal Procedure (Scotland) Act 1995 (c.46)".>

Kenny MacAskill

452 In schedule 5, page 152, line 12, leave out from <In> to <1974> and insert—

<( ) The Rehabilitation of Offenders Act 1974 is amended as follows.

( ) In section 1>

Kenny MacAskill

453 In schedule 5, page 152, line 15, at end insert—

<( ) In section 6(6)(bb) (convictions in service disciplinary proceedings), for "the Schedule" substitute "Schedule 1".

( ) The Schedule (service disciplinary proceedings) is renumbered as Schedule 1.>

Kenny MacAskill

190 In schedule 5, page 152, line 24, at end insert—

<*The Incest and Related Offences (Scotland) Act 1986 (c.36)*

The Incest and Related Offences (Scotland) Act 1986 is repealed.>

Kenny MacAskill

191 In schedule 5, page 153, line 3, after <89> insert <, 111>

Kenny MacAskill

192 In schedule 5, page 153, line 3, at end insert—

<*The Trade Union and Labour Relations (Consolidation) Act 1992 (c.52)*

In section 243(4)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 (restriction of offence of conspiracy: Scotland), the words "or sedition" are repealed.>

Kenny MacAskill

193 In schedule 5, page 153, line 12, at end insert—

<*The Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40)*

In Schedule 4 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (minor and consequential amendments), in paragraph 44, sub-paragraph (2) is repealed.>

Kenny MacAskill

386 In schedule 5, page 153, line 35, at end insert—

<In section 11 (certain offences committed outside Scotland)—

(a) in subsection (3), for "proceeded against, indicted" substitute "prosecuted",

(b) in subsection (4), for "dealt with, indicted" substitute "prosecuted".>

Kenny MacAskill

454 In schedule 5, page 153, line 35, at end insert—

<In section 17A (right of person accused of sexual offence to be told about restriction on conduct of defence: arrest), in subsection (1)—

(a) for paragraphs (za) and (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words from "preliminary" to "trial" substitute "hearing".>

Kenny MacAskill

512 In schedule 5, page 153, line 35, at end insert—

<In section 18(8)(c) (power to take prints etc. under authority of a warrant unaffected by section), for "prints, impressions" substitute "relevant physical data".

In section 19(1)(b) (samples etc. taken from person convicted of offence), the words "impression or", in both places where they occur, are repealed.>

Kenny MacAskill

513 In schedule 5, page 154, line 4, at end insert—

<Section 20 (use of prints, samples etc.) is repealed.>

Kenny MacAskill

514 In schedule 5, page 154, line 5, at end insert—

<In section 23A (bail and liberation where person already in custody)—

(a) in each of subsections (1) and (4), for "23 or 65(8C)" substitute "23, 65(8C) or 107A(2)(b)", and

(b) in subsection (3), for "22A(3) or 23(7)" substitute "22A(3), 23(7) or 107A(2)(b)".>

Kenny MacAskill

455 In schedule 5, page 154, line 5, at end insert—

<In section 35 (judicial examination), in subsection (4A)—

(a) for paragraphs (za) and (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words from "preliminary" to "trial" substitute "hearing".>

Kenny MacAskill

456 In schedule 5, page 154, line 42, at end insert—

<In section 66 (service and lodging of indictment etc.), in subsection (6A)(a)—

(a) for sub-paragraphs (zi) and (i) substitute—

"(i) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings (including at any commissioner proceedings) may be conducted only by a lawyer,", and

(b) in sub-paragraph (iii), for the words from "preliminary" to "trial" substitute "hearing".

In section 71 (first diet)—

(a) in subsection (A1), for the words "his defence at the trial" substitute "the conduct of his case at any relevant hearing in the course of the proceedings",

(b) in subsection (B1)(c), for the words "before the trial diet" substitute "in relation to any hearing in the course of the proceedings",

(c) in subsection (1A)(a), for "the trial" substitute "any hearing in the course of the proceedings",

(d) in subsection (1B)(a), for "the trial" substitute "any hearing in the course of the proceedings",

(e) in subsection (5A)(b), for the words "his defence at the trial" substitute "the conduct of his case at any relevant hearing in the course of the proceedings", and

(f) after subsection (7), insert—

“(7A) In subsections (A1) and (5A)(b), “relevant hearing” means—

(a) in relation to proceedings mentioned in paragraph (a) of subsection (B1), any hearing at, or for the purposes of, which a witness is to give evidence,

(b) in relation to proceedings mentioned in paragraph (b) of that subsection, a hearing referred to in section 288E(2A),

(c) in relation to proceedings mentioned in paragraph (c) of that subsection, a hearing in respect of which an order is made under section 288F.”.>

Kenny MacAskill

457 In schedule 5, page 155, line 3, at end insert—

<In section 79 (preliminary pleas and preliminary issues), in subsection (2)(b)(ii), after “under section” insert “22ZB(3)(b),”.>

Kenny MacAskill

458 In schedule 5, page 155, line 23, at end insert—

<In section 140 (citation), in subsection (2A)—

(a) for paragraph (a) substitute—

“(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings (including at any commissioner proceedings) may be conducted only by a lawyer,”, and

(b) in paragraph (c), for the words “his defence at the trial” substitute “the conduct of his case at, or for the purposes of, the hearing”.

In section 144 (procedure at first diet), in subsection (3A)—

(a) for paragraph (a) substitute—

“(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,”, and

(b) in paragraph (c), for the words “his defence at the trial” substitute “the conduct of his case at, or for the purposes of, the hearing”.

In section 146 (plea of not guilty), in subsection (3A)—

(a) for paragraph (a) substitute—

“(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,”, and

(b) in paragraph (c), for the words “his defence at the trial” substitute “the conduct of his case at, or for the purposes of, the hearing”.>

Kenny MacAskill

414 In schedule 5, page 155, line 31, leave out paragraphs 35 to 39

Kenny MacAskill

515 In schedule 5, page 157, line 8, at end insert—

<*The Offensive Weapons Act 1996 (c.26)*

In the Offensive Weapons Act 1996, section 5 is repealed.>

Kenny MacAskill

194 In schedule 5, page 157, line 8, at end insert—

<*The Defamation Act 1996 (c.31)*

In the Defamation Act 1996, section 20(2) is repealed.>

Kenny MacAskill

195 In schedule 5, page 157, line 10, leave out paragraph 44 and insert—

<(1) The Crime and Punishment (Scotland) Act 1997 is amended as follows.

(2) In section 9 (power to specify hospital unit), in subsection (1)(a), for "insane" substitute "found not criminally responsible or unfit for trial".

(3) In section 13 (increase in sentences available to sheriff and district courts), subsection (2) is repealed.

(4) In section 56 (powers of the court on remand or committal of children and young persons), subsection (3) is repealed.>

Kenny MacAskill

196 In schedule 5, page 157, line 28, at end insert—

<*The Legal Deposit Libraries Act 2003 (c.28)*

Section 10 of the Legal Deposit Libraries Act 2003 (exemption from liability: activities in relation to publications) is amended as follows—

(a) in subsection (1), the words ", or subject to any criminal liability," are repealed,

(b) in subsection (2)(a), the words "in the case of liability in damages" are repealed,

(c) in subsection (3), the words ", or subject to any criminal liability," are repealed,

(d) in subsection (4)(a), the words "in the case of liability in damages" are repealed,

(e) in subsection (6)(a), the words ", or subject to any criminal liability," are repealed, and

(f) in subsection (8), the words "and criminal liability" are repealed.>

Kenny MacAskill

459 In schedule 5, page 157, line 36, at end insert—

<*The Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5)*

In the Criminal Procedure (Amendment) (Scotland) Act 2004 the following provisions are repealed—

(a) in section 4 (prohibition on accused conducting case in person in certain cases), subsection (4),

(b) section 17 (bail conditions: remote monitoring of restrictions on movements), and

(c) in the schedule (further modifications of the 1995 Act), paragraph 55.>

Kenny MacAskill

695 In schedule 5, page 158, line 32, at end insert—

<In section 74 (appointment of stipendiary magistrates), subsection (6) is repealed.

After section 74 insert—

“74A Exercise of functions by stipendiary magistrates

(1) A stipendiary magistrate may, by reason of holding that office—

(a) exercise the same judicial and signing functions as are exercisable by a JP,

(b) do so in the same manner as a JP (including by using the title of office of JP).

(2) For the purpose of subsection (1)—

(a) the acts of a stipendiary magistrate are valid as if the magistrate were a JP,

(b) it does not matter if an enactment from which a JP derives authority to act in a specific case does not bear to give equivalent authority to a stipendiary magistrate.

(3) However, subsections (1) and (2) are subject to any provision of an enactment which expressly excludes a stipendiary magistrate from acting in a specific case.

(4) This section does not limit any other functions of a stipendiary magistrate (in particular, those exercisable in that capacity only).”.

In section 76 (signing functions)—

(a) in subsection (2), for “signing functions in the same manner as” substitute “the same signing functions as are exercisable by”,

(b) subsection (4) is repealed.>

Kenny MacAskill

197 In schedule 5, page 158, line 36, at end insert <and

(ii) sub-paragraph (b) is repealed.>

Kenny MacAskill

387 In schedule 5, page 159, line 12, at end insert—

<*The Sexual Offences (Scotland) Act 2009 (asp 9)*

In section 55(7) of the Sexual Offences (Scotland) Act 2009 (offences committed outside the United Kingdom), for “proceeded against, indicted” substitute “prosecuted”.>

Kenny MacAskill

198 In schedule 5, page 159, line 14, leave out <134> and insert <156>

Criminal Justice and Licensing (Scotland) Bill

6th Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- a list of any amendments already debated;
- the text of amendments to be debated on the sixth day of Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

Data matching for detection of fraud etc.
136, 137

Collection of information on criminal injuries
551

Closure of premises associated with human exploitation etc. (minor corrections etc.)
138, 139, 140, 141, 142, 144, 198

Foreign travel orders – surrender of passports
444, 445, 446

Sex offender notification requirements
145

Risk of sexual harm orders – spent convictions
146

Police and SCDEA – authorisation of surveillance
523, 524, 525, 526, 527, 528

Police and SCDEA – authorisation of interference with property
529, 530, 531, 532, 533, 534, 535, 536

Enhanced criminal record certificates: disclosure of sex offender notification requirements
537, 538

Rehabilitation of offenders – spent alternatives to prosecution
447, 452, 453

Medical services in prisons
448

Assistance for victim support
413

Disclosure - meaning of “information”
696, 553, 697, 555, 556

Provision of information to prosecutor
557, 558, 559, 560, 561, 562, 563, 564, 565, 689

Prosecutor’s duty to disclose information
566, 567, 147, 148, 568, 569, 570, 571, 572, 149, 573, 574, 150, 575, 151, 576, 152, 577, 578, 579, 153, 580, 581, 154, 582, 155, 583, 156, 157, 606, 158, 607, 617, 159, 619, 160, 161, 162, 163, 164, 165, 690, 166, 691

> *Notes on amendments in this group*
> Amendment 148 pre-empts amendments 568, 569, 570 and 571
> Amendment 572 and amendment 149 are direct alternatives
> Amendment 574 pre-empts amendment 150
> Amendment 575 pre-empts amendment 151
> Amendment 576 pre-empts amendment 152
> Amendment 579 pre-empts amendment 153
> Amendment 581 pre-empts amendment 154
> Amendment 606 and amendment 158 are direct alternatives
> Amendment 617 and amendment 159 are direct alternatives
> Amendment 619 and amendment 160 are direct alternatives
> Amendment 624 in group (Defence statements) and amendment 162 are direct alternatives
> Amendment 626 in group (Application to court – orders preventing or restricting disclosure) pre-empts amendment 163 in this group
> Amendment 646 in group (Application to court – orders preventing or restricting disclosure) and amendment 164 in this group are direct alternatives
> Amendment 667 in group (Appeals against disclosure orders etc.) pre-empts amendment 165 in this group
> Amendment 690 pre-empts amendment 166
> Amendment 166 pre-empts amendment 691

Defence statements
584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 611, 624

Court rulings on disclosure
603, 604, 605, 615, 616

Disclosure – application to appellate proceedings
608, 609, 610, 612, 613, 614

Means of disclosure
618

Confidentiality of disclosed information and disclosure to third party
620, 621, 622, 623, 692

Application to court – orders preventing or restricting disclosure
625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 666, 669, 670, 671, 673, 675, 676, 677, 678, 680, 686, 687

Orders preventing or restricting disclosure - applications by Secretary of State
653, 654, 655, 656, 679, 681, 682, 683, 684, 685

Disclosure – appointment of special counsel
657, 658, 659, 660, 661, 668, 672, 674

Appeals against disclosure orders etc.
662, 663, 664, 665, 667

Abolition of common law rules on disclosure
688

Mental disorder and unfitness for trial
24, 167, 195

Conditions to which licences under the 1982 Act are to be subject
168

Licensing – powers of entry etc. (definition of "authorised civilian employee")
169

Licensing of metal dealers
385

Licensing of street trading – food hygiene certificates
170

Licensing of market operators
171, 172, 2, 3, 4

> *Notes on amendments in this group*
> Amendment 172 pre-empts amendments 2 and 3

Control of lap dancing and other adult entertainment venues
516

Applications for licences
173

Provisions to be considered as part of the Alcohol etc. (Scotland) Bill
174, 182, 186

Premises licence applications
460, 542, 176, 180

Reviews of premises licences – notification of determinations
175

Premises licence – minor variations
547

Premises licence – transfer
550

Premises licences – connected persons and interested parties
693

Provisional premises licences
543

Consumption of alcohol on licensed premises outwith licensed hours
548

Occasional licences
539

Extended hours applications – notification period
449

Personal licence applications
177, 178, 181

24 hour licensing
698

Appeals against decisions of licensing board
179

Liability for offences under 2005 Act
694

Powers of Licensing Standards Officers
699

Corruption in public bodies
183

Orders and regulations – circumstances in which affirmative procedure required
187, 188

Incest and related offences
190

Criminal law – revision
191, 193

Breach of undertakings – consequential modification
457

Exercise of functions by stipendiary magistrates
695

Amendments already debated

Community payback orders – consequential modifications
With 342 – 414

Slavery, servitude and forced or compulsory labour
With 112 – 143

Mutual recognition of judgments and probation decisions
With 105 – 184

Presumption against short periods of imprisonment or detention
With 100 – 392

Abolition of offences of sedition and leasing-making
With 114 – 189, 192, 194, 196

People trafficking (and consequential provision)
With 371 – 386, 387

Clarification of existing offence prohibiting the carrying of offensive weapons
With 109 – 515

Children – age of criminal responsibility and minimum age of prosecution
With 379 – 549

Convictions in other UK or EU jurisdictions
With 518 – 540

Bail conditions – remote monitoring requirements
With 132 – 197

Prosecution on indictment – Scottish Law Officers
With 421 – 451

Prohibition of personal conduct of case by accused
With 429 – 454, 455, 456, 458, 459

Crown appeals
With 462 – 514

Retention of samples etc. – adults
With 478 – 512, 513

European evidence warrants

With 442 – 450

JUSTICE COMMITTEE

EXTRACT FROM THE MINUTES

15th Meeting, 2010 (Session 3)

Tuesday 4 May 2010

Present:

Bill Aitken (Convener)	Robert Brown
Angela Constance	Cathie Craigie
Nigel Don	James Kelly
Stewart Maxwell	Dr Richard Simpson (Committee Substitute)

Apologies were received from Bill Butler (Deputy Convener).

Criminal Justice and Licensing (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 6).

The following amendments were agreed to (without division): 136, 137, 138, 139, 140, 141, 142, 143, 144, 444, 445, 446, 145, 146, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 447, 448, 696, 553, 697, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692 and 167.

Amendment 586 was agreed to (by division: For 6, Against 2, Abstentions 0).

The following amendments were moved and, with the agreement of the Committee, withdrawn: 551, 413 and 24.

Amendments 150, 151, 152, 153, 154, 163, 165 and 166 were pre-empted.

The following amendments were not moved: 147, 148, 149, 155, 156, 157, 158, 159, 160, 161, 162 and 164.

Sections 71, 73, 75, 76, 80, 81, 82, 83, 84, 99, 114, 115, 118, 119 and 120 were agreed to without amendment.

Sections 70, 72, 74, 77, 78, 79, 85, 86, 87, 89, 90, 91, 92, 94, 95, 96, 97, 98, 102, 103, 104, 105, 106, 107, 111, 112, 113, 116 and 117 were agreed to as amended.

The Committee ended consideration of the Bill for the day, section 120 having been agreed to.

Scottish Parliament

Justice Committee

Tuesday 4 May 2010

[The Convener *opened the meeting at 10:03*]

Criminal Justice and Licensing (Scotland) Bill: Stage 2

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I ask everyone to ensure that mobile phones are switched off. We have an apology from Bill Butler, who is replaced by the Labour Party committee substitute, Dr Richard Simpson, whom I welcome to the meeting.

There is only one item on the agenda—stage 2 of the Criminal Justice and Licensing (Scotland) Bill, which is in its sixth day. The committee will not proceed beyond section 125 today. I welcome the Cabinet Secretary for Justice, Kenny MacAskill MSP. I welcome, too, the Scottish Government officials who are accompanying the cabinet secretary. Members should have copies of the bill, the sixth marshalled list of amendments and the sixth list of groupings of amendments for consideration today.

Section 70—Data matching for detection of fraud etc

The Convener: Amendment 136, in the name of the minister, is grouped with amendment 137.

The Cabinet Secretary for Justice (Kenny MacAskill): Amendments 136 and 137 are minor and technical amendments to section 70. They will update references to the names of United Kingdom bodies following recent changes.

I move amendment 136.

Amendment 136 agreed to.

Amendment 137 moved—[Kenny MacAskill]—and agreed to.

Section 70, as amended, agreed to.

Section 71 agreed to.

After section 71

The Convener: Amendment 551, in the name of Robert Brown, is in a group on its own.

Robert Brown (Glasgow) (LD): Amendment 551 relates to knife crime and to what is known as the Cardiff model. We all know that an astonishing number of victims of knife crime refuse to report incidents of assault on them to the police. The Cardiff model was introduced by Professor Jonathan Shepherd of Cardiff University, a face and jaw surgeon, who was dismayed by the number of young victims of violent crime whose faces he had to stitch up. Under the Cardiff model, accident and emergency wards collect information about the precise locations and times of violent incidents and share the anonymised information with the police, thus assisting them in implementing prevention action plans to greater effect. That has happened in Cardiff since 2002 and has, reportedly, led to a 40 per cent fall in violent assaults over the first five years, up to 2007. Cardiff moved to being the safest city of the family of 15 comparable cities that were surveyed by the Home Office.

The model has been followed in parts of Scotland: it is being rolled out by Lanarkshire NHS Board, Glasgow royal infirmary Edinburgh royal infirmary, in Fife and in Aberdeen. The purpose of amendment 551 is to empower Scottish ministers to require the use of the programme throughout the country. Too often, we have been mystified by the failure of Government—I hasten to say that this is not a crack at the current Government, but a generality—to replicate apparently successful projects or ideas throughout the country. Here is an idea that has made a significant contribution to cutting violent crime—particularly knife crime—that is far more relevant and far more evidence based than the provisions on mandatory sentences that the committee approved earlier in stage 2, and which will have to be removed at stage 3. It saves lives, cuts crime and facilitates successful crime prevention by the police. It would be criminal if it were not made a feature of joint working between hospitals and police services throughout Scotland. That is why the amendment contains not just a power but—in subsection (2)—a duty on Scottish ministers to get on with the job.

I move amendment 551.

Stewart Maxwell (West of Scotland) (SNP): I am delighted that Robert Brown has seen the light and has been converted to the idea, given that I campaigned for its introduction back in the 2003 to 2007 session of Parliament. Unfortunately, the then justice minister opposed it, as did Labour and the Liberal Democrats. It is nice to see that if you stick at something, eventually your opponents will see that they were wrong and you were right. However, as was stated at the time and since, as far as I am aware, it is totally unnecessary to introduce to the bill regulations that would require health boards to collect and provide information on criminal offences. As Mr Brown said, a number of health boards are already rolling out the programme. It has been piloted in a paper-based exercise, which seems to have proved to be a difficult and complicated way to do it. My understanding, from my discussions with A and E consultants and others, is that the electronic system that is currently being rolled out is the one that should succeed in allowing the programme to happen. Work is being done on kinks and difficulties with that system.

As far as I can see, the Cardiff model is already being used. I will be delighted when it is rolled out throughout the country. Previous justice ministers did not support the idea, but the current justice ministers have supported the roll-out, and are working closely with the violence reduction unit and others to ensure that it goes ahead. There is no requirement for amendment 551.

Dr Richard Simpson (Mid Scotland and Fife) (Lab): The first thing to say is that an important feature of the system is that the information that it gathers provides the police with a detailed and graphic look at where violence is focused in postcode areas. Secondly, health boards might be required or asked to gather the information, but can that be enforced? Can it be made part of the information technology structure? At the moment, the IT structure does not collect the data in the way in which it should.

The issue also goes beyond the knife crime to which Robert Brown referred. The surgeon whom he mentioned has been dealing with people who are drunk and incapable, or falling-down drunk. How are we going to define criminal injuries? As a doctor, I know that determining what is a criminal injury as opposed to an injury might be easy when it is knife crime, but there are other forms of assault that do not involve a knife or a gun, and it might be difficult to determine whether an injury is a criminal injury. The definition of criminal injury is pretty important, and as it is offered in amendment 551, it is rather light. It simply talks about

> "injuries which are, or are suspected of having been, directly attributable to the commission of an offence involving violence".

That is a slightly difficult definition.

From a health point of view, however, I welcome the thrust of what Robert Brown is trying to achieve through amendment 551.

The Convener: As there are no other contributions, I will make one myself. As Stewart Maxwell has already pointed out, and as the good book says, there is no greater joy in heaven than when a sinner repenteth. Some of us who are sitting around this table will hope that Robert Brown will, similarly, repent in his attitude to mandatory sentencing for knife crime.

Amendment 551 is arguable and it has merit. The statistical information that it would require would be of considerable value, as the Cardiff experiment has demonstrated. There does, however, seem to be a contrary argument on the basis that what Robert Brown is seeking is already happening anyway, and it might not be necessary to put it into the bill. I will listen with interest to what the cabinet secretary has to say because Mr Brown's idea has considerable interest.

Kenny MacAskill: We acknowledge the well-intentioned nature of amendment 551. The majority of patient contacts do not raise issues about public safety or the investigation of a crime. However, many health professionals, including in the Scottish Ambulance Service, accident and emergency departments, minor injury clinics and general practitioner surgeries, might have contact with individuals who have been involved in crimes or who have been injured as a consequence of crimes. For that reason, guidance on sharing information between NHS Scotland and the police was developed and issued to NHS Scotland and chief constables in March 2008. NHS boards should, therefore, already be operating policies and procedures that support health professionals who are employed or contracted by them in adopting a consistent approach to sharing information in order to promote public safety and aid in the prevention and detection of crime, while respecting and safeguarding the interests of patients and the public, and the confidentiality of personal information.

We also support work to introduce injury surveillance in Scotland, particularly the pilot that is being undertaken by the national police-led violence reduction unit at NHS Lanarkshire. The pilot addresses three major challenges: the collection of relevant data at accident and emergency departments; matching those data with police data; and using the data in police tasking processes. The more widespread use of injury surveillance would significantly benefit police forces and health boards, but it is necessary to do further work around ensuring that data are collected accurately and consistency, and that they can be made available to police forces in an appropriate format. We expect the evaluation of the pilot and learning from the injury surveillance work that is going on elsewhere in Scotland to inform our understanding of how best to deliver injury surveillance in Scottish hospitals.

We are also unclear about the drafting of amendment 551. On the one hand, it seeks to give Scottish ministers the power to make regulations that would require health boards to collect information on criminal injuries that are treated in or otherwise come to the attention of hospitals, and to provide that information to the relevant chief constables. It would then impose a duty on Scottish ministers to make the regulations within 12 months. We are therefore unclear whether a power or a duty is sought.

In the light of the existing guidance and the current pilot to address the issues that lie behind amendment 551, we do not think that the amendment is necessary, so we ask the committee to reject it, with the caveat that the Government is committed to supporting the pilot and will, after proper evaluation, seek to disseminate the practice more widely.

10:15

Robert Brown: It was worth lodging amendment 551. The cabinet secretary's final point about whether the amendment seeks a power or a duty is answered by the terms of the amendment itself. I am trying to empower ministers, although it is possible that that is not necessary, and to require them to move forward on the issue.

The one element of disappointment is that the cabinet secretary did not give us much information about the timescale for evaluation of the pilot. Perhaps we can follow that up hereafter.

Richard Simpson and Stewart Maxwell made some useful points about background information. The questions of IT structures and the supporting definitions are important, but they are subsidiary to the principle of what we are trying to do with the bill. If there is the political will to continue working on the issue—the cabinet secretary has assured us that there is—it can, I hope, be sorted out.

Given that the proposed system has been in use in Cardiff since 2002, and given that we are piloting it in Scotland, I hope that any difficulties will not take too long to resolve and that it should be possible to move forward. Against that background, and with a view to checking some details with the cabinet secretary, I seek to withdraw amendment 551, with the committee's permission, while reserving the right to come back to it at stage 3 if I think that that is appropriate.

Amendment 551, by agreement, withdrawn.

Section 72—Closure of premises associated with human exploitation etc

The Convener: Amendment 138, in the name of the minister, is grouped with amendments 139 to 142, 144 and 198.

Kenny MacAskill: When the bill was introduced in March 2009, the Sexual Offences (Scotland) Act 2009 was still in bill form and was passing through the Parliament. Amendments 139 to 142 and 144 are technical amendments that reflect the format of the finalised Sexual Offences (Scotland) Act 2009. Amendments 138 and 198 are also minor technical amendments.

I move amendment 138.

Amendment 138 agreed to.

Amendments 139 to 144 moved—[Kenny MacAskill]—and agreed to.

Section 72, as amended, agreed to.

Section 73 agreed to.

Section 74—Foreign travel orders

The Convener: Amendment 444, in the name of the minister, is grouped with amendments 445 and 446.

Kenny MacAskill: Amendments 444, 445 and 446 will amend section 74, which will amend various sections of the Sexual Offences Act 2003 that deal with foreign travel orders.

One of the principal changes that will be introduced by section 74 is the requirement for sex offenders who are subject to a foreign travel order that prohibits them from travelling to a country outside the UK to surrender their passports to the police. The intention behind the changes to the foreign travel order regime is to strengthen the police's ability to manage sex offenders in the community and to increase the use of foreign travel orders with the aim of preventing child-sex tourism. The changes that we are making to the foreign travel order regime in Scotland will mirror those that have already been introduced in the rest of the UK by the Policing and Crime Act 2009.

Section 74(5) will insert new section 117B into the Sexual Offences Act 2003, and provides that if a Scottish court imposes a foreign travel order on a sex offender that prohibits him or her from travelling to any country outside the UK, that order must require the offender to surrender all their passports at the police station that is specified in the order. Amendment 444 seeks to make a minor but necessary amendment to section 74(5) that will make it clear that if a Scottish court imposes a foreign travel order on a sex offender, the offender can be required to surrender their passports at a police station only in Scotland, and not to a police station anywhere in the UK.

Amendment 445 will make it an offence in Scots law for a sex offender who is subject to a foreign travel order that has been issued by a court in England, Wales or Northern Ireland and which prohibits him or her from travelling to a country outside the UK to fail to surrender their passport, without reasonable excuse, at a police station in England, Wales or Northern Ireland. It will therefore ensure that, in such circumstances, it will be an offence in Scots law to fail to surrender a passport in any part of the UK. Without that change, sex offenders who are based in other parts of the UK would have leeway to travel to airports or ports in Scotland to use their passports to leave the UK.

Amendment 446 makes it clear that the sheriff court will have jurisdiction to deal with the failure to surrender passport offence under section 122(1B) of the Sexual Offences Act 2003.

I move amendment 444.

The Convener: That seems straightforward. As members have no comments, there is no need for the minister to wind up.

Amendment 444 agreed to.

Amendments 445 and 446 moved—[Kenny MacAskill]—and agreed to.

Section 74, as amended, agreed to.

After section 74

The Convener: Amendment 145, in the name of the minister, is in a group on its own.

Kenny MacAskill: Amendment 145 responds to the Justice 2 Sub-Committee's report on child sex offenders and our stated intention to introduce legislative change that will require sex offenders who do not have permanent homes to report more frequently to police stations to verify information that they have previously notified to the police. It will confer on the Scottish ministers a power to make regulations that will prescribe the increased frequency of such reporting. At present, such offenders are required to attend a police station to verify their information only once a year. Homeless sex offenders are recognised as presenting a higher risk to the public because they are harder to monitor because they have no fixed abode. To require a homeless offender to attend a police station in person more frequently to notify the police that he is still living at the place or address of which he last notified them, and that his personal details are correct, will provide greater confidence that the police can effectively manage and monitor homeless sex offenders.

The detail of the regulations, including the optimum level of increased frequency of reporting, is being discussed by justice officials and representatives of the Association of Chief Police Officers in Scotland. Given the importance of the measures and the effect that they will have on the people who will need to comply with them, the regulations will be subject to the Parliament's affirmative resolution procedure.

Failure to comply with the requirements under amendment 145 without reasonable excuse will carry the same maximum penalty as other breaches of the notification regime, namely up to five years' imprisonment. The amendment will bring Scotland into line with the rest of the UK, where parallel amendments were made through the Criminal Justice and Immigration Act 2008.

The proposed changes to section 138 of the Sexual Offences Act 2003 are largely technical in nature and replicate amendments that have been made for the rest of the UK.

I move amendment 145.

The Convener: Again, that is fairly straightforward.

Amendment 145 agreed to.

Section 75 agreed to.

After section 75

The Convener: Amendment 146, in the name of the minister, is in a group on its own.

Kenny MacAskill: Amendment 146 is a minor amendment that will allow spent conviction information to be disclosed in proceedings under the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 for the making, variation, renewal and discharge of, and appeals in relation to, risk of sexual harm orders. Such spent conviction information may be placed before a court in equivalent proceedings in England and Wales, as it can in Scotland in proceedings on sexual offences prevention orders and other orders under the Sexual Offences Act 2003. However, when the 2005 act introduced risk of sexual harm orders in Scotland, the necessary amendment was not made to the Rehabilitation of Offenders Act 1974 to allow a court to consider spent conviction information in proceedings relating to such orders. Amendment 146 addresses that anomaly.

I move amendment 146.

Amendment 146 agreed to.

Section 76 agreed to.

Section 77—Grant of authorisations for directed and intrusive surveillance

The Convener: Amendment 523, in the name of the minister, is grouped with amendments 524 to 528.

Kenny MacAskill: Members will be aware that crime does not respect police force boundaries. We want to ensure that the law supports the police in tackling crime while maintaining relevant safeguards.

Section 77 will amend the Regulation of Investigatory Powers (Scotland) Act 2000 so that directed and intrusive surveillance can be authorised as part of a joint police or joint police and Scottish Crime and Drug Enforcement Agency operation, which will ensure that when the police consider it necessary to use such techniques in a joint operation, there is no need for time-consuming multiple applications and authorisations. Instead, a single force will be identified to take the lead in authorising such activity, which will remove unnecessary bureaucracy while maintaining the existing safeguards.

Continuing consultation with ACPOS has identified the need to extend the original provisions of section 77 to include the use of covert human intelligence sources in joint operations. Without such a provision, we will reduce unnecessary bureaucracy for some, but not all, types of surveillance.

None of the amendments in the group will give extra powers of investigation to the police, nor will any of them add to the list of bodies that can use the investigatory powers in question. Rather, they will ensure that the powers that are already in place can be authorised in the most effective and efficient manner while appropriate checks and safeguards are maintained. Existing safeguards in the application procedure will be maintained, and the independent oversight of surveillance operations that is provided by the Office of Surveillance Commissioners will continue. The OSC inspects all police forces annually to ensure that powers are used appropriately and that the proper processes are followed.

Amendment 523 seeks to remove section 77(2), as the inclusion of provision for the use of covert human intelligence sources in a joint operation allows for a simpler drafting approach to be taken. Amendment 524 will adjust section 77(3)(a) and amendment 528 will adjust section 77(6) as a consequence of that new approach.

Amendment 525 seeks to replace proposed new section 9A of the Regulation of Investigatory Powers (Scotland) Act 2000 with a new section 10A which, in joint operations, will allow the lead force to authorise the use of all forms of surveillance that are covered by the 2000 act, thereby avoiding the need for multiple authorisations.

Amendment 526 will include in section 77 provision to amend section 14(5)(b) of the 2000 act by adding the rank of deputy director general of the Scottish Crime and Drug Enforcement Agency to the definition of

> "the most senior relevant person"

to whom a surveillance commissioner must make a report, should he or she decide not to approve an intrusive surveillance authorisation. In removing section 14(7) from the 2000 act, amendment 526 reflects amendments that were made in the Police, Public Order and Criminal Justice (Scotland) Act 2006.

Amendment 527 will include in section 77 provision to amend section 16 of the 2000 act by adding the deputy director general of the SCDEA to the list of the ranks of people who may appeal to the chief surveillance commissioner about a decision by a surveillance commissioner. Provision was included in section 77 to allow the deputy director general to approve authorisations for intrusive surveillance. Amendments 526 and 527 are technical amendments that are required to provide the deputy director general with the same approval rights as the director general.

I move amendment 523.

The Convener: In the past, the process must have been fairly convoluted and could have caused delays, so it is clear that the amendments have value.

Amendment 523 agreed to.

Amendments 524 to 528 moved—[Kenny MacAskill]—and agreed to.

Section 77, as amended, agreed to.

Section 78—Authorisations to interfere with property etc

The Convener: Amendment 529, in the name of the minister, is grouped with amendments 530 to 536.

Kenny MacAskill: Amendments 529, 530 and 532 are technical amendments to section 78 that will update subsection references to take account of changes that UK legislation has made to section 93 of the Police Act 1997 since the introduction of the bill.

Amendment 531 will remove unnecessary wording from section 78(2)(a). Amendment 533 will update section 78(2)(b) to include the rank of deputy director general of the SCDEA in section 93(6)(cc) of the 1997 act, which defines the relevant area for which the deputy director general of the SCDEA will be able to approve authorisations for property interference.

10:30

Amendment 534 is a technical amendment that will alter the position at which the change in section 78(3)(b) is made in section 94 of the Police Act 1997. Amendment 535 will make a minor editing change to section 78(3)(b) that is required as a result of the movement of text by amendment 534.

Section 78(3)(c) will add proposed new section 94(6) to the Police Act 1997 to provide for an urgent single authorisation of property interference in a joint operation. Amendment 536 will improve the wording of section 78(3)(c) to add a corresponding reference to section 94(2)(h) of the 1997 act.

I move amendment 529.

Amendment 529 agreed to.

Amendments 530 to 536 moved—[Kenny MacAskill]—and agreed to.

Section 78, as amended, agreed to.

Section 79—Amendments of Part 5 of Police Act 1997

The Convener: Amendment 537, in the name of the minister, is grouped with amendment 538.

Kenny MacAskill: Amendments 537 and 538 ensure that notification requirements under part 2 of the Sexual Offences Act 2003 will be included on enhanced criminal record certificates, which are commonly referred to as enhanced disclosures. Amendments to the Police Act 1997 that were made by the Protection of Vulnerable Groups (Scotland) Act 2007 were intended to ensure that notification requirements under part 2 of the 2003 act were included on basic, standard and enhanced disclosures. Section 49 of the 2007 act makes similar provision for scheme record disclosures under that act.

As preparations for the implementation of the 2007 act intensified, however, it came to light that the amendments did not have the intended policy effect. Including the information on the other disclosures but not on enhanced disclosures would be inconsistent. Amendments 537 and 538 correct the oversight in the existing provisions and bring the arrangements for disclosure of notification requirements under part 2 of the 2003 act into line.

I move amendment 537.

The Convener: Again, the amendments are clearly of value.

Amendment 537 agreed to.

Amendment 538 moved—[Kenny MacAskill]—and agreed to.

Section 79, as amended, agreed to.

After section 79

The Convener: Amendment 447, in the name of the minister, is grouped with amendments 452 and 453.

Kenny MacAskill: Amendment 447 inserts after section 79 a new section that amends provisions in the Rehabilitation of Offenders Act 1974. At present, there is an anomaly under the 1974 act. In Scotland, individuals who have a spent conviction are treated as if they have not committed an offence, whereas people who accepted an alternative to prosecution such as a fiscal fine or a fiscal compensation order may be indefinitely required to disclose the fact if, for example, they are asked the right question at a job interview or when filling in an insurance form. That happens because people who have accepted an alternative to prosecution in Scotland are not afforded protection under the 1974 act, which provides protection only for people who have been convicted of an offence. The 1974 act does not protect people who have accepted a penalty as an alternative to prosecution, as they have not been convicted.

However, that is no longer the position in England and Wales. The Criminal Justice and Immigration Act 2008 extended protection under the 1974 act for people with spent convictions to cover situations involving cautions, reprimands, warnings and any equivalent order that is issued outside England and Wales. A person who accepts an alternative to prosecution in Scotland or a caution in England might therefore find it more difficult to get a job or might have to pay higher insurance costs in Scotland as a result of the lack of protection under the 1974 act. Amendment 447 corrects that anomaly by inserting two new sections—8B and 9B—and a new schedule 3 into the 1974 act.

The effect of amendment 447 is that, when an alternative to prosecution becomes spent, the person will not have to declare it or any circumstances that were ancillary to the offence, and failure to do so will not be a ground for dismissing or excluding the person from any office, profession, occupation or employment or prejudicing the person in any way.

Amendments 452 and 453 are minor consequential amendments.

I move amendment 447.

Amendment 447 agreed to.

The Convener: Amendment 448, in the name of the minister, is in a group on its own.

Kenny MacAskill: In early 2007, ministers established the prison health care advisory board to explore the feasibility of transferring enhanced primary health care services in Scottish prisons from the Scottish Prison Service to the national health service. The advisory board comprised senior staff from the SPS and NHS boards, NHS and SPS staff organisations, and Scottish Government advisers. The board's report recommended that all primary care services in prisons should become the responsibility of NHS boards.

The alignment of primary care services in prisons with those that are available to the public is recommended by the World Health Organization. A similar change was completed in England and Wales in 2006 and in Northern Ireland in 2008. Amendment 448 facilitates that transfer of responsibility in Scotland. It amends the Prisons (Scotland) Act 1989 and the Criminal Justice and Public Order Act 1994 to remove the duty on Scottish ministers to provide medical services in state-run prisons and the duty on the contractor to provide those services in contracted-out prisons. The responsibility for providing primary care services in prisons will fall to NHS boards under general health legislation.

Amendment 448 maintains the special role and status of medical officers in prisons. It requires the Scottish ministers or contractors to designate one or more medical officers for each prison and limits who can be designated as a medical officer. It provides that medical officers will no longer be deemed to be prison officers as they will no longer be appointed by the Scottish ministers to provide medical services in prisons. Medical practitioners will be appointed by health boards to provide medical services in prisons and the Scottish ministers will designate certain of those practitioners to be medical officers for the purposes of the 1989 act and the Prisons and Young Offenders Institutions (Scotland) Rules 2006.

The rest of amendment 448 ensures that the medical officers who are designated under the new powers will have much the same status within the prison as the medical officers who are appointed under current powers have, for example in relation to searches and restrictions on the disclosure of information.

I move amendment 448.

Robert Brown: I support the general intent of the amendment. I say in passing that I am hugely impressed by the number of amendments that we have considered so far in which the Scottish National Party Government is seeking to bring us into line with the position in England. However, I have a question about the practical implications of amendment 448, because moving from one system to another often creates hiccups and difficulties. Will the minister give the committee some information on how the system will work in practice? I am particularly interested to know whether different standards of service will apply to prisoners and to the general population.

It has long been accepted that there are high levels of people with mental health problems, developmental difficulties and other challenges in prisons. The issue arose recently with regard to the number of psychologists. Nobody pretends that the level of support under the present system is necessarily what it ought to be. However, my point is that there probably require to be significantly higher levels of support by psychiatrists, psychologists and certain therapists than is available to the general community, and those higher levels are not in place in prisons at present. How will that be reflected in the level of provision that is made on the ground? We certainly do not want any negative unintended consequences from what is otherwise a positive move. Any such consequences would impact badly on the effectiveness of the criminal justice system.

Dr Simpson: I have two points to raise, the first of which is technical. I ask the minister whether the phrase "registered medical practitioner" in proposed new section 3A(2) of the 1989 act should read "licensed medical practitioner" given that, since November last year, those who are actually practising are required to be licensed as well as registered. I think that the wording will need to be updated at stage 3. I will be interested to hear whether the minister's officials agree.

Secondly, I have questions about paragraphs (5) and (6) of proposed new section 3A of the 1989 act.

Paragraph (5) refers to the purpose of the search as

> "the purpose of providing medical services for any prisoner at the prison",

but it states that the search is

> "a search of any person who is in, or is seeking to enter, the prison".

I would like the minister or his officials to explain the link between the prisoner to whom medical services are intended to be provided and the person entering the prison who is to be the subject of a search.

Finally, I wonder whether paragraph (6) takes the right approach. The amendment refers to

> "the person's clothing other than an outer coat, jacket, headgear, gloves and footwear".

Rather than state that the rules do not allow the governor

> "to authorise an officer of a prison to require a person to remove"

garments, should it not be stated that those officers are not authorised to require persons to remove those garments? The descriptions, as drafted, are not all-embracing.

Those are my slight concerns. Otherwise, I very much support the Government's action in moving health care in prisons back into the national health service. It should not have been taken out of the NHS under a previous Government. That was understandable at the time because of difficulties in providing primary medical services to the prisoners at an appropriate cost—that was why services were put out to Blue Arrow and Medacs Healthcare. However, I welcome the intention to return those services to the health service. We should not underestimate the difficulties or the costs involved—those are the reasons why, although the policy has been agreed in principle, it is taking a lengthy period to implement.

Angela Constance (Livingston) (SNP): I did not intend to be political with regard to the amendment. Nevertheless, I say to Robert Brown that it is interesting that it has taken an SNP

Government to move health care in prisons towards best practice.

Like Richard Simpson, I remember well the difficulties associated with contracting out health care in prisons. From experience, I know that medical services in prisons were, at times, not what they should have been. In general, the amendment is a sensible, pragmatic move towards doing the right thing. Our national health service should apply to us all, irrespective of our rank or status and irrespective of whether we are law-abiding citizens or offenders. If we are even remotely serious about making prison work, we must ensure a good standard of health care in prisons.

The Convener: Those who are detained should receive the same degree of care as anyone in the outside world. On that subject, I recently wrote to the cabinet secretary about a particular prisoner of some notoriety who has now been released. I received the appropriate assurance in that respect, for which I am grateful. When someone's liberty is taken away, we must ensure that the care that is provided is as we would all wish it to be.

A number of points of a technical nature have been raised by Robert Brown and Richard Simpson, which I invite the cabinet secretary to address in his response to the debate.

Kenny MacAskill: On the comments that have been made by Richard Simpson and others, we welcome the general direction of travel. The Government has not taken an ideological position on the subject; we are simply trying to do the right thing, as has been mentioned.

The reference to garments and searches will allow prison rules to reflect the change that is being made. We are more than happy to reflect on the matter and if there are better ways of achieving that change, we will see what can be done at stage 3. We are simply trying to ensure that matters remain as they are.

On whether the wording should be "licensed medical practitioner" rather than "registered medical practitioner", my understanding is that it should be "registered medical practitioner". However, we will check and address the matter if changes are necessary.

On Robert Brown's points, the support was never provided by the NHS; it was provided by the civil service before being outsourced. The intention is not to take one step forward and two steps back. It would be counterproductive if we allowed health care in prisons—especially in the field of mental health, where we know that there are significant problems for the Prison Service and prison officers—to deteriorate. A programme board will oversee the issue. Its members will work together according to a principle of equivalence, to try to end the situation that exists in health care—as in other areas—whereby there is no joining up of services when people are released from prison back into the community, and to place on the NHS a duty to ensure a smooth transition.

10:45

The Convener: We accept that this significant change or transformation will not be problem free. However, all parties—unions, management, governors and health boards—are working together. We will check the small print to ensure that it is correct and appropriate. Equally, we will take on board the points that Robert Brown and others correctly made, because we must ensure that this well-intentioned direction of travel does not have unforeseen consequences.

Amendment 448 agreed to.

Section 80—Assistance for victim support

The Convener: Amendment 413, in the name of Angela Constance, is in a group on its own.

Angela Constance: Amendment 413 is a probing amendment that I lodged after discussions with Action for Children Scotland. The amendment seeks to insert, after "victims" in section 80(1), the phrase

> "including children and young people".

The purpose of the amendment is to ensure that bodies that provide support to victims of crime include in their work a strong focus on assisting children and young people who have been victims of offending.

Members will be aware that section 80 provides the Scottish Government with the power to make grants to bodies

> "for the purposes of or in connection with the provision of assistance to victims, witnesses or other persons affected by an offence."

I hope that this probing amendment will clarify how such grants will help to support children and young people who have been victims of offences, given that young people are far more likely to be the victims than the perpetrators of crimes. I always think that it is worth reiterating that children and young people are more likely to be victims than perpetrators.

I am sure that, in the bill, "victims" means "victims of all ages", but I am interested in the cabinet secretary's views as to whether there is any added value in specifically mentioning children and young people. I appreciate that there may be no legal or technical need to mention them specifically, but I wonder whether there would be merit in doing so and whether that would bring a focus on work with children and young people. As

I said, children and young people are more likely to be victims than perpetrators.

I move amendment 413.

James Kelly (Glasgow Rutherglen) (Lab): I oppose amendment 413. It is well intentioned, but I do not think that it is necessary. Section 80 as drafted covers children and young people. The amendment focuses on victims, whereas section 80 makes provision for grants to assist witnesses, too. I also believe that there would be unintended consequences from our agreeing to amendment 413 that could lead to confusion.

Kenny MacAskill: As Mr Kelly said, section 80 will give the Scottish ministers greater flexibility in this area—for example, flexibility to fund local authority support for victims of human trafficking. Section 80 provides for an enabling power; it does not signal a change to the overall approach to paying grants to organisations that support victims and witnesses. Although we understand and appreciate the intention that lies behind amendment 413, the existing wording of section 80 covers all victims, regardless of age, so it allows the payment of grants to organisations that support children or young people who are victims of crime. Moreover, singling out one group of victims for specific mention could lead to questions about support for other groups. The amendment is therefore unnecessary.

Furthermore, if the amendment were agreed to, section 80 could arguably be read as limiting Scottish ministers to paying grants only to organisations that support both adults and young people. That would inadvertently reduce, rather than enhance, ministers' ability to help victims, which we are sure is not the intention. We invite the member to withdraw amendment 413, given the assurances that I hope we have provided.

The Convener: I invite Angela Constance to wind up and press or withdraw amendment 413.

Angela Constance: I think that I have made my point that children and young people are more likely to be victims than perpetrators.

The Convener: Three times, in fact.

Angela Constance: Four, actually.

I am content with the cabinet secretary's answer and take on board members' comments. Amendment 413 was certainly not meant to have unintended consequences for victims who are not children or young people, so I will withdraw it.

Amendment 413, by agreement, withdrawn.

Section 80 agreed to.

Sections 81 to 84 agreed to.

Section 85—Meaning of "information"

The Convener: Amendment 696, in the name of the minister, is grouped with amendments 553, 697, 555 and 556.

Kenny MacAskill: Amendments 696, 553, 697, 555 and 556 are minor technical amendments that seek to simplify section 85, which establishes the meaning of "information" for the purposes of part 6. The simplification of the provision is, in part, a response to concerns that were expressed during stage 1 about the overall complexity of the provisions contained in part 6 of the bill as introduced.

We will no doubt return to this theme when we debate later groups of amendments, but it might assist members if I explain some of the challenges that we face. In his concluding remarks during the stage 1 debate in the chamber, the Minister for Community Safety reminded members that disclosure is complex. There is no escaping that. Nonetheless, we are trying to achieve a body of law that is clear, coherent and effective. We do not consider that we can leave the development of the detail of the fundamental duty on the prosecutor to the development of the common law.

Prosecutors, investigators and accused persons need certainty. We have reviewed the provisions in part 6 to remove as much complexity as possible from the bill. Our amendments seek to remove provisions that can then be placed in secondary legislation or in the code of practice. We accept we have not been able to go as far as members of the committee might have liked. We also accept that part 6 remains a complex and highly technical part of the bill, but we want to impress on members the reasons for that.

First, it is important to put the length and complexity of the provisions in context. Lord Coulsfield's report ran to some 110 pages and contained 21 chapters and 13 annexes. He made 44 recommendations, 14 of which referred explicitly to the need for legislation. The current Crown Office guidance on disclosure runs to some 300 pages. There is also an ACPOS guidance manual for police forces, which runs to some 200 pages. That gives a flavour of the detailed requirements of work on disclosure and of the intricate nature of what we are trying to distil into legislation.

There is a statutory scheme for disclosure in England, Wales and Northern Ireland, where the Criminal Procedure and Investigations Act 1996 and supporting legislation have disclosure provisions of a similar length to those we are proposing. In that context, we believe that the level of detail that we are proposing is reasonable.

If our amendments are accepted, the provisions in the bill will be longer than they were previously. That is because, although some of our amendments will simplify the provisions, there are also areas that were not covered when the bill was introduced but which we consider we need to seek to add in. Those include provisions on disclosure post conclusion of first-instance proceedings, on appeals and on ensuring that there is a means of representing reserved interests in decisions about the non-disclosure of information on public interest grounds.

The need for statutory provision on disclosure post conclusion of first-instance proceedings arose from the decision of the Judicial Committee of the Privy Council in McDonald v HMA, which did not issue until October 2008 and therefore post-dated Lord Coulsfield's review. It was not possible to develop provisions on this substantive matter prior to the introduction of the bill.

Similarly, the need for a mechanism for the secretary of state to be able to make applications to the court for information to be withheld to protect the public interest became clear only during engagement with UK Government officials following the introduction of the bill.

Finally, we stress the importance of certainty in creating a statutory disclosure scheme. One of the key motivations for creating a statutory scheme is to ensure that the duties and responsibilities in the scheme are as clear as possible and to get away from the moving target of constantly evolving substantive common law in this area.

Unless we make clear in legislation all the significant rights and duties, the risk is that those gaps will be filled in through case law, which will undermine certainty for police and prosecutors, which is one of the most important benefits of a statutory scheme.

Although many of the interests that responded at stage 1 would not be adversely affected by the continuing evolution of the law, prosecutors and the police most certainly would. We therefore ask the committee to give appropriate weight to the evidence of the bodies that play a central role in operating the scheme.

In particular, we remind the committee of the Lord Advocate's evidence at stage 1, when she said:

> "Although the essential concept appears to be breathtakingly simple, its practical application is extremely complex ... Much more streamlined legislation would be more attractive, but to leave open some issues might imperil future convictions because a decision that the obligations were different from those that had been understood by prosecutors would, to some extent, have retrospective effect."

The Solicitor General for Scotland echoed the Lord Advocate's comments when he said:

> "Prosecutors need certainty. You need to know with which rules you must comply in order to comply with disclosure obligations ... The bill gives us a comprehensive set of rules so that the police and the prosecutor know that if they comply with those rules, they will comply with their disclosure obligations, which will ensure a fair trial in accordance with article 6 of the European convention on human rights."—[*Official Report*, *Justice Committee*, 9 June 2009; c 2072-73.]

Given that our proposed statutory disclosure regime is of a similar size to that which operates in England and Wales, and for the reasons that we have set out today, we are convinced of the need to ensure that we have appropriate statutory provisions in Scotland, which we accept results in complex and technical provisions.

We have sympathy with Lord Coulsfield's concern that police officers should have a clear and simple statement of what they are supposed to do. The bill does not stand alone; it is supplemented by the ACPOS guidance, and all Scottish police officers are undergoing training on disclosure to ensure that what is expected is clear to them. Attempts to set out the duty more simply often miss critical elements. Although the formulation offered by Lord Coulsfield in his written submission to the committee is helpful, it omitted an essential element of the duty: namely, that of providing the accused with material, relevant information that the prosecutor intends to lead in evidence against him. It is vital that the bill covers all aspects of the prosecutor's duty. It is also essential that developments in the nature of that duty in appellate proceedings that post-date Lord Coulsfield's report are included in the bill.

We remain willing to keep the provisions under review and to continue searching for means of simplifying the provisions ahead of stage 3. Although such opportunities might be limited for the reasons that I have just set out, we will look positively at any suggestions that come forward from any source. As a start, we hope that members will agree that amendments 696, 553, 697, 555 and 556 offer a useful simplification of section 85 and ensure that the meaning of "information" in the section extends across all criminal proceedings at first instance and appeal.

I move amendment 696.

Robert Brown: As the minister said, this is a complex area. I accept his rationale for adding in the new things. Having said that, I was conscious that although he used the words "clear" and "coherent", the word "concise" did not enter into his explanation. It seems to me that there is a relationship between the length and complexity of the provisions and their comprehensibility to those who have to operate them in practice.

I will make a number of points, starting with the general observation that it is very difficult for the committee to seek with any confidence to amend the provisions that the Government has put forward in this very technical area. I certainly do not feel confident about doing that to great effect, even though I have a legal background. I will restrict myself to probing one or two bits.

It seems to me that the main effect of the amendments is to widen the definition of "information" to include precognitions and victim statements. I am not clear about the exact effect of that. The point is developed in a later group, on means of disclosure, but I want to know what the purpose is. Amendment 618, which we will come to later, makes it clear that the Crown—rightly in my view—is under no duty to release either a Crown precognition or a victim statement as such to the defence. As far as I can see, the only purpose of the amendments is to make positive provision for situations in which the Crown intends to rely on a statement by referring to it in court. That seems a very complex approach, given that I think I am right in saying that the Crown is currently under no duty to reveal precognitions. I wonder whether we are getting into a way of doing something that is slightly more complex than it has to be, when a relatively simple and straightforward point is at the heart of it.

Stewart Maxwell: I agree with much of what Robert Brown and the minister said. This has been a very difficult area for the committee. I want to make one or two general remarks. Since our stage 1 report was produced, many of us have thought about this area quite a lot and have examined it in detail.

I supported the report's comments about the difficulty that we faced in dealing with the complexity in part 6, which deals with disclosure. However, examination since stage 1 of some of the reasons for that has helped me to come to a fairly simple conclusion.

11:00

I accept that the requirement for clarity and certainty overrides the preference for conciseness. I am concerned that, if the bill ends up being too concise, it will result in less certainty and clarity. The people from whom we took evidence and with whom we discussed the matter indicated that the requirement for clarity and certainty with regard to disclosure is paramount. The provisions are necessary. They may not be perfect and may not be exactly how we would like all law to be—concise, if at all possible—but the need for clarity and certainty is paramount. It is important that we support amendments that lead to that outcome.

James Kelly: I will make some general comments. I agree with what other members have said about the complex nature of part 6. Given the technical nature of a number of the provisions and amendments, it is difficult for the committee to get to grips with.

I accept the comments that have been made about the rationale for lodging some of the amendments, given the additional court cases and discussions that have taken place at UK level. I also accept the cabinet secretary's point that it is important to ensure that there are no gaps in law that would allow case law and precedent to develop as the basis for thinking in the area. Although the provisions are complex and some of the amendments are lengthy, in general I favour an approach that provides for certainty.

The Convener: To save time later in proceedings, I will make my contribution now. This is undoubtedly a complex matter. There is no division in principle between what the Government is trying to do and what anyone else is trying to do. With the incorporation of European human rights requirements in Scots law, it was necessary to do something under this heading; the McDonald case simply underlined that.

No one has a reasonable problem with the principle of disclosure, which is a continuation of the well-established Scots law principle of best evidence. Where, in the course of a police inquiry, evidence that could exculpate the accused comes to light, it is important and, understandably, in the interests of justice that that be disclosed to the defence. There is no difficulty with that.

My difficulties related to the complexity of the provisions. I had a real fear that we were making life a bit more difficult for our prosecuting authorities than was necessary. Lord Coulsfield, who produced the original report on the issue, took the same view, although I accept the cabinet secretary's point that work on the report predated some of the appeal cases that have been determined not only at the Scottish court of criminal appeal but in the House of Lords, as was.

I thought that we could simplify matters, but the amendments that have been lodged would add 20 sections to the bill. There is undoubtedly a degree of irony in that, although the good intentions of all are under no particular scrutiny. Some of the amendments that I lodged are basically wrecking amendments in respect of this part of the bill, but they contain a probing element. The secondary target has been achieved. The committee was reassured by our visit to the procurator fiscal's office in Edinburgh, where we had a lengthy, detailed discussion of the disclosure requirements. I particularly found comfort in the fact that a thorough process is in place that involves the fiscals, the advocate deputes, and the police. Accordingly, I am as confident as I can be that the appropriate procedures will be followed. Inevitably, things go wrong from time to time, as they do in any organisation, but the systems are in place. I put on record the committee's appreciation of the facility that was given to us, which was a very positive experience; I am sure that those who attended the visit will agree.

That brings me to the other questions that arise about whether it is appropriate to have everything codified in the bill. My preferred option is to keep it simple. That said, I accept the arguments made by those whom we met during our visit, and those to whom we spoke last week during our useful lunchtime session with the officials, and that were made in the evidence that was provided by the Lord Advocate and the Solicitor General when they addressed the committee. Therefore, with some slight misgivings, I am prepared to allow matters to proceed. We should consider the issue again before stage 3, because some points might arise that we have not anticipated until now. However, this has been a constructive exercise to which all members of the committee have contributed. That being the case, I see no particular need to pursue my blocking amendments to remove disclosure from the bill. I am as reassured as I can be.

Kenny MacAskill: I put on record my gratitude to the committee for its forbearance and understanding. Disclosure is a complex area of law, but it is important to get it right, otherwise injustices might occur and guilty people might go free. We have to provide as much certainty as we can, albeit in a changing world with court cases being heard regularly in appeal courts and elsewhere. We have to provide some basis for understanding by the police and prosecutors about what is involved.

I will deal first with Robert Brown's specific issue, and then with more general points. Precognitions and victim statements were not previously supplied to the court, and that situation does not change, but the Crown will have to see whether any information contained within them should be provided to the court. There is no change, in that documentation will not be provided, but any appropriate information that requires to be disclosed that would be relevant to the defence and which forms the basis of the prosecution will have to be transmitted. That is simply a replication.

On the more general matter, we accept, and it is my own view, that the law should be as simple as possible and should be easily understood by the man or woman in the street. Equally, we live in a world with the European convention on human rights, court challenges and obligations to be a bit more specific for front-line practitioners. We are happy to undertake to seek to review the situation as we go into stage 3. I cannot say that we have identified any particular areas to review, but we acknowledge the committee's direction of travel and we will see what we can do. We all agree that disclosure is a complex area of law that needs to be reviewed, but if we do not set out some guidance, constant challenges could be made that would make life difficult for the police and prosecutors and that could fundamentally undermine justice being served.

Amendment 696 agreed to.

Amendments 553, 697, 555 and 556 moved—[Kenny MacAskill]—and agreed to.

Section 85, as amended, agreed to.

Section 86—Provision of information to prosecutor

The Convener: Amendment 557, in the name of the minister, is grouped with amendments 558 to 565 and 689.

Kenny MacAskill: As was touched on previously, we acknowledge the stage 1 evidence that expressed concern about the complexity of the provisions in part 6 of the bill. We are conscious that the provisions about schedules of information attracted particular comment and we considered very carefully how best to address that. We do not wish to set in stone administrative arrangements for investigators and prosecutors that might need to change and adapt over time and which, for that reason, would more properly belong in the code of practice or in guidance that will operate alongside the new legislation. Therefore, amendments 557 to 565 seek to address that by removing the provisions that deal with the administrative aspects of the scheduling of information. They will now be dealt with in the code of practice or in guidance.

The amendments do not, however, change the scheme that we envisaged at introduction. There will still be schedules of information in solemn cases. All that the amendments do is remove from the bill the administrative and practical details of that scheme. The amendments also adjust the provisions as necessary to ensure that the prosecutor is able to comply with the duties imposed by virtue of this part of the bill.

I move amendment 557.

The Convener: That seems straightforward.

Robert Brown: I have just a couple of comments—I said earlier that I wanted to probe one or two things. Sections 86, 87 and 88 are all about the duty of the investigating agencies, particularly the police, to give information to the prosecutor. I accept that there is an issue about schedules, but I am not clear what the duty adds to the current position. When I was a procurator fiscal depute, I expected the police to provide me with all the relevant information and would have caused a bit of a fuss if they had not done so.

Surely it is entirely unnecessary to state that specifically in statute.

Leaving aside the issue of the schedules, I am not clear what the duty adds to the existing position. I would have thought that the issue could be dealt with through a behind-the-scenes arrangement between the police and the prosecuting authorities that does not need to be in the bill. It might well be that the matter is carried forward practically through the schedules, but do we really need to get into all the detail of it in the bill?

Kenny MacAskill: The police have a statutory duty to provide information to the prosecutor, but it is not as comprehensive as what we propose in the bill. The amendments put on record that information must be provided. It is not so much a question of practice as one of principle. As the Solicitor General said in evidence to the committee when he spoke about the duty of the prosecutor:

> "You need to know with which rules you must comply in order to comply with disclosure obligations."—[*Official Report, Justice Committee*, 9 June 2009; c 2072.]

In the same way, investigators need to know the rules with which they must comply so that the prosecutor can comply with his disclosure obligations. The amendments are about ensuring that we provide some statutory basis for what the police require to do so that people work in conjunction. There is no duty to make the prosecutor aware of the existence of information not provided to him nor to provide details of that information. As I said, the amendments ensure that we set things out clearly. There will be ACPOS guidance, but it is appropriate that we state in the bill what we expect from officers as well as from prosecutors.

Amendment 557 agreed to.

Section 86, as amended, agreed to.

Section 87—Continuing duty to provide schedules of information

Amendments 558 to 562 moved—[Kenny MacAskill]—and agreed to.

Section 87, as amended, agreed to.

Section 88—Review and adjustment of schedules of information

Amendment 563 moved—[Kenny MacAskill]—and agreed to.

After section 88

Amendments 564 and 565 moved—[Kenny MacAskill]—and agreed to.

Section 89—Prosecutor's duty to disclose information

The Convener: A number of the arguments under section 89 have been dealt with. Amendment 566, in the name of the minister, is grouped with amendments 567, 147, 148, 568 to 572, 149, 573, 574, 150, 575, 151, 576, 152, 577 to 579, 153, 580, 581, 154, 582, 155, 583, 156, 157, 606, 158, 607, 617, 159, 619, 160 to 165, 690, 166 and 691. I draw members' attention to the pre-emption information on the list of groupings.

11:15

Kenny MacAskill: Amendments 566, 567, 569, 570, 577 to 583, 591, 606, 607, 617, 619, 690 and 691 are a range of minor technical amendments, many of which seek to simplify the provisions in part 6.

Amendments 568 and 571 and consequential amendments 572, 574 and 576 simplify the duty of disclosure by removing unnecessary detail from the bill—detail that is explanatory and administrative in nature and, as such, can more properly sit in the code of practice or rules of court.

Amendment 573 introduces a new section after section 89 that applies to solemn proceedings. The provision is designed to replace the provisions concerning schedules that were in sections 86 to 88 when the bill was introduced and is aimed at removing unnecessary administrative detail. Amendment 575 works alongside amendment 573 by simplifying provisions in section 90.

Most of the other amendments are relatively minor technical ones. Amendment 566 makes it clear that section 89 is triggered by the events listed in section 89(1). Amendment 567 is a minor technical amendment to section 89(1)(b) to make it clear that, in solemn proceedings, that section applies when the accused appears for the first time on indictment only when he has not previously appeared on petition in relation to the same matter. Without the amendment, it could be argued that the duty is triggered at the stage at which an accused person appears on indictment for the first time.

Amendment 571 seeks to remove subsections (4), (5) and (6) of section 89. Amendment 568 seeks to reinstate the duty of disclosure set out in section 89(5) and give it greater prominence in the section. The effect of amendment 568 is to require the prosecutor to disclose to the accused information that meets the tests set out in subsection (3). Amendments 572, 574 and 576 are consequential on amendment 568.

Amendments 569 and 570 are minor technical amendments, the purpose of which is to make it clear that the prosecutor must disclose to the accused information that is likely to be led by the prosecutor in the course of the criminal proceedings.

Amendment 573 will leave the provisions to focus on the core, statutory, duty to disclose details of non-sensitive information that is relevant to the case for or against the accused. Amendment 573 also seeks to make it clear that, in assessing the sensitivity of information, it is the risk as opposed to the likelihood of harm that is to be weighed.

The effect of amendment 573 is to set out a specific duty for the prosecutor to disclose to the accused details of information that is not sensitive and that the prosecutor is not required to disclose under section 89 but which may nonetheless be relevant to the case for or against the accused. Amendment 573 defines "sensitive" in relation to an item of information and has the effect of requiring that prosecutors assess the risk of any of the harms specified in proposed new subsection (4) coming to pass as a result of the disclosure of that information, rather than the likelihood of any of those harms occurring.

Amendment 580 is a minor technical amendment to section 91. Amendment 581 is a minor technical amendment to section 92 that is designed to simplify the provisions, and amendment 582 is a minor technical amendment that reorders the provisions by moving section 92 to sit after section 96. Amendment 583 is a technical amendment that seeks to remove section 93 and is consequential on amendment 573. Amendment 591 is, in turn, a technical amendment that is consequential on amendment 583.

The purpose of amendment 575 concerns the nature of the continuing duty of the prosecutor to disclose information to the accused and to make provision for a continuing duty, following the duty proposed by amendment 573. The effect of amendment 575 is therefore to remove the unnecessary specific process step for the prosecutor to consider whether section 89(3) applies and, instead, simply impose a duty to disclose information to which section 89(3) applies. Amendment 578 is a minor, technical amendment that is consequential on amendment 575. Amendment 579 is a minor, technical amendment, as is amendment 606, which is consequential on other amendments in the group in relation to the duties of the prosecutor to disclose information to the accused.

The convener's amendments 156 and 157 are likely a response to the concerns expressed during stage 1 about defence statements. Those concerns were, in the main, focused on the proposal to require a defence statement to be lodged in solemn proceedings. Our position on defence statements is simple and twofold. First, the provisions in the bill are designed to ensure that everything that should be disclosed to the accused in order for them to receive a fair trial, is disclosed. That is fundamental, and we cannot risk something not being disclosed, inadvertently and through no fault of the prosecutor, because they did not appreciate and could not have appreciated its significance—that would not be fair or just. Secondly, if the defence seeks additional information, it should be required to provide some information to explain the materiality and relevance of the information sought. If the defence challenges lack of disclosure, we believe that it must explain why it is making that challenge and, to do that, must refer to those aspects of the accused's defence to which the information is material and relevant. The question is not one of payment, as the Glasgow Bar Association suggested in its submission to the committee, but rather one of proper argument being made in what is, after all, an adversarial procedure.

We also remind members that we are seeking to implement Lord Coulsfield's recommendations on the matter. He stated:

> "The legislation or the statutory code of practice should explicitly place on the Crown a responsibility to review disclosure decisions in the light of any new information provided by the defence."

In reaching that conclusion, Lord Coulsfield said:

> "There is no doubt that it can be to the advantage of the defence to provide such a statement if there is a particular and positive line of defence and the defence are looking for material to support it. Any system of disclosure therefore needs to enable and encourage the defence to make an advance statement of their position whenever they perceive that this would help to secure fuller relevant disclosure and a fair trial for their client."

I urge members to reject the convener's amendments.

Amendment 607 is a minor, technical amendment, as indeed are the other outstanding amendments.

I move amendment 566.

The Convener: I intimate that, in line with what I said earlier, I will not pursue the matter, so I will not move amendment 147. Do other members wish to contribute?

Robert Brown: I have one or two little comments. This may be a slight quibble, but amendment 566 seeks to add the phrase "in a prosecution" after the word "where" in section 89, which states:

> "This section applies where—
>
> (a) an accused appears for the first time on petition".

I confess that I am at a total and utter loss to understand what that phrase would add to the meaning of section 89. As far as I am aware, petitions, indictments and summary complaints always relate to prosecutions. I cannot think of any circumstance in which they might relate to something else. What on earth would the phrase add?

I also have small quibble about amendment 567. The Government's proposal is to add in parenthesis after the word "indictment" in section 89(1)(b) the words:

> "not having appeared on petition in relation to the same matter".

Surely to goodness the insertion of the word "or" after section 89(1)(a) would achieve the same effect without having to add all those words. I mention those amendments as examples because I came across them, but it seems to me that they echo a slightly more general point.

The convener's wording of his amendments 147 and 148 on disclosing rather than reviewing was, dare I say, more lucid than that of the Government's amendment 568. Similarly, Government amendments 569 and 570 seem to me to add nothing but words, without making any clarification.

I will say a brief word about defence statements, which we will discuss in more substance when we come to a later group of amendments. The cabinet secretary appeared to say that their introduction was justified because the defence had to explain why it was asking for more disclosure and the proper way forward was to do that by defence statement. Any judge who received a request for more disclosure would require justification and background before he could address the specific point.

It is worth observing that, as the committee noted in its stage 1 report, the view of Lord Coulsfield—whom the cabinet secretary drew in evidence—was that there should be an option for defence statements, rather than a duty on the defence to provide them. That presents a substantial difference to the position that the Government takes, which is not justified by Lord Coulsfield's view.

Nigel Don (North East Scotland) (SNP): I will allow the cabinet secretary to draw breath for a moment by commenting on general principles.

A lay reader of the *Official Report* or anyone who has tuned in and is watching the meeting live is entitled to ask themselves whether committee members are absolutely aware of the detail of every provision that is in front of them. Speaking personally, it is clear that I am not. Before the committee meeting, I looked at the cabinet secretary's purpose and effect notes, which run to 44 pages on the amendments on disclosure.

It is worth acknowledging that I cannot pretend that I am familiar with every detail of the matter. I am grateful that we have a qualified lawyer on the committee but, as a layman, I am content to rest on the knowledge that the Crown Office and the Government have liaised on disclosure and are trying to put together a comprehensive and workable system. They and the police will have to work it out. I am grateful to them for all the hard work that has gone into it but, as a layman, I have to hope that they have got it right.

Perhaps disclosure should have been the subject of a separate bill. I am probably not alone in thinking that the Criminal Justice and Licensing (Scotland) Bill has grown so big that it is very difficult for any of us to see the wood for the trees. That is not a criticism of how the Government has managed what has turned up, but perhaps there is a lesson for the future in that some of the issues should have been put into separate bills to enable us to address them more comprehensively.

Kenny MacAskill: There are two specific matters. In amendments 566 and 567, we are trying to clarify that section 89 relates to a particular prosecution. People can appear on a petition warrant but that is not the first indictment. Amendments 566 and 567 seek to clarify that the provisions are concerned with the first indictment.

The second issue concerns disclosure and whether defence statements should be optional. The position could be resolved by the court, which could sit in an administrative capacity to try to work out what information should be passed between the Crown and the defence. However, the purpose of putting some onus on the defence is to give the Crown notice of what it should be looking for. It would be perfectly open to a defence agent simply to say that the defence was one of case denied, in which case the Crown would have to put together what it could. Equally, if the defence said, "It wasn't them. They weren't there. It was somebody else," that would put the Crown on notice that it should provide any relevant information that it found when looking through precognitions or victim statements.

The purpose of introducing disclosure is to try to ensure that we resolve as much as possible and focus in. The courts will still be able to intercede, but the provisions on defence statements are meant to ensure that, before we even get to court, we know the situation so that the defence and the Crown provide appropriate information. The provisions will not force people to make incriminatory statements and the option will exist for the defence simply to say that the case is denied. Equally, if there were something relevant, it would be helpful if the Crown knew what it should be looking for in any victim statements, or whatever—for example, that a man in a red jersey was seen running in a north-westerly direction.

The provisions on disclosure are being introduced in an attempt to draw matters together before a case gets to court.

The Convener: We will shortly revisit the issue of defence statements.

11:30

Amendment 566 agreed to.

Amendment 567 moved—[Kenny MacAskill]—and agreed to.

Amendments 147 and 148 not moved.

Amendments 568 to 572 moved—[Kenny MacAskill]—and agreed to.

Amendment 149 not moved.

Section 89, as amended, agreed to.

After section 89

Amendment 573 moved—[Kenny MacAskill]—and agreed to.

Section 90—Continuing duty of prosecutor

Amendment 574 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 150 is pre-empted.

Amendment 575 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 151 is pre-empted.

Amendment 576 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 152 is pre-empted.

Amendments 577 and 578 moved—[Kenny MacAskill]—and agreed to.

Section 90, as amended, agreed to.

The Convener: This is an appropriate point at which to adjourn for a few minutes.

11:34

Meeting suspended.

11:45

On resuming—

Section 91—Exemptions from disclosure

The Convener: If amendment 579 is agreed to, I cannot call amendment 153, on the ground of pre-emption.

Amendment 579 moved—[Kenny MacAskill]—and agreed to.

Section 91, as amended, agreed to.

Amendment 580 moved—[Kenny MacAskill]—and agreed to.

Section 92—Redaction of non-disclosable information by prosecutor

The Convener: If amendment 581 is agreed to, I cannot call amendment 154, on the ground of pre-emption.

Amendment 581 moved—[Kenny MacAskill]—and agreed to.

Section 92, as amended, agreed to.

Amendment 582 moved—[Kenny MacAskill]—and agreed to.

Section 93—Solemn cases: additional disclosure requirement

Amendment 155 not moved.

Amendment 583 moved—[Kenny MacAskill]—and agreed to.

Section 94—Defence statements: solemn proceedings

The Convener: Amendment 584, in the name of the minister, is grouped with amendments 585 to 602, 611 and 624.

Kenny MacAskill: This matter was touched on earlier. The amendments will ensure that the prosecutor is well placed, first, to assess all the information of which they are aware and, secondly, to disclose information that the bill requires them to disclose. That ensures, in turn, that the criminal proceedings are fair to the accused.

Amendments 584 to 601 make a number of technical amendments to those provisions that are aimed at simplifying the prosecutor's duties in response to receiving a defence statement and the interplay between defence statements and special defences, to avoid duplication. They also insert new provisions that are designed to make clear the accused's responsibilities. The accused must provide an update on his defence statement at least seven days before the trial in summary proceedings. The amendments also require the accused in both solemn and summary proceedings to provide a further update covering the period right up to the trial date and even during the trial, if permitted by the court. The amendments also insert provision requiring the lodging of defence statements in court and the provision of copies to the prosecutor and any co-accused.

Amendments 591 and 596 amend provisions in sections 94 and 95 to expand on the information that the accused must include in his defence statement.

Amendment 602 makes new provisions on the lodging of defence statements in summary proceedings where there has been a material change in circumstances. The provisions are necessary to ensure that the accused has every opportunity to inform the prosecutor of any material change in his defence and that, in turn, the prosecutor has every opportunity to ensure that any additional information that needs to be disclosed as a result is disclosed.

Amendment 611 relates to appellate proceedings and ensures that there are mechanisms for an accused person to seek disclosure of items of information in appeals. That does not detract from the prosecutor's duties, but we believe that it is an important right for the appellant to have.

Amendment 624 is a minor, consequential amendment.

I move amendment 584.

Robert Brown: I appreciate that defence statements are covered in a number of sections, but it might be appropriate to comment on them now. The minister is aware of the committee's scepticism on the issue. He will recall that we reported at stage 1:

> "the Committee is not currently persuaded that there is merit in the proposal to make defence statements compulsory in solemn cases, as it appears that the timing of their production may risk jeopardising important principles of justice."

We requested further information on the Scottish Government's position.

I am reluctant to seek to override the professional view of the Government and its team of advisers on these matters, but I ask the minister to justify further the commitment to the concept of defence statements, which I must say smacks of an inappropriate import from English law. Indeed, we took some evidence to that effect, if I recall correctly, from Ian Duguid of the Faculty of Advocates and others. There have been difficulties in English law anyway, but the context is also procedurally different.

I am not totally struck by subsection (4) of proposed new section 70A of the Criminal Justice and Procedure (Scotland) Act 1995 as inserted by section 94 of the bill, nor by the Government's recasting of it in amendment 587, or by amendment 602, which extends it to summary procedure. Not only is there to be a defence statement, there is also to be a supplementary procedure about whether there is to be a second defence statement. Surely subsection (5), which allows the defence to lodge a defence statement at any time, is enough. The more complicated the provisions are, the more scope there is for problems. I dissent from the view, which the minister expressed earlier, that stating the whole thing in statute necessarily makes it clearer. The longer and more complicated it gets, the more likely it is that there will be problems.

Amendments 589 and 590, on the other hand, are sensible changes if there are to be defence statements at all. I am not sure that I see the point of amendments 592 and 596, which seem to replicate in different words new section 70A(6)(a) of the 1995 act and section 95(2)(a) of the bill.

We also have amendment 611, which provides for a second shot at disclosure. Again, there might be a reason for that, but one would have thought that it could be stated in one sentence without the need to repeat the whole thing ad longum. Again, the amendment seems to make things more complicated rather than more straightforward.

The Convener: As Robert Brown says, defence statements are dealt with under a number of headings but it is probably appropriate to have the debate now. I, too, have some reservations.

As the law stands, accused persons or their representatives require under certain circumstances to lodge special defences, such as incrimination of an individual or a number of individuals or an alibi, which is probably the most common special defence that is lodged. Notice must be given to the Crown two weeks before the preliminary diet that the accused intends to lead such a defence. The purpose of the requirement is self-evident. It gives the Crown the opportunity to investigate the special defence and adjust the case accordingly if necessary. We could not have a situation in which a trap could be set for a prosecutor whereby evidence was introduced that incriminated a third party and the Crown had not had an opportunity to have the police investigate the matter.

The requirements under some of the amendments are a little different in that the defence would be asked to lodge with the Crown a defence statement on which the defence case would be based. That approach could have dangers. An accused person has the presumption of innocence and it is for the Crown to prove beyond reasonable doubt that the accused committed the crime that is libelled against him. Nothing in our existing law states that we have to make life easy for the Crown. Indeed, if we make life too easy in some instances, it could be contrary to natural justice. It is a question of balance. This is an unfortunate import from the law south of the border, which at this stage I think we could do without. I will listen to the cabinet secretary's response and other contributions with considerable interest. At this stage, I am a little short of being persuaded that the general measure is appropriate.

Kenny MacAskill: I assure both the convener and Robert Brown that we are not simply bringing in an English import. There are many defences that do not fall within the category of special defences, which are entirely separate from defence statements. If we do not have supplementary defence statements, how do we ensure that the procurator fiscal and the Crown are up to date? A defence position can change during the course of a prosecution. It is not about setting a trap for the defence but about ensuring that the Crown can make available any appropriate information that is relevant. If the Crown does not know what the nature, or intended nature, of the defence is, it has to either trawl through information and make assumptions or simply provide whatever information it thinks is relevant. It is perfectly appropriate and acceptable for the defence to change position and direction, which happens in many instances, but it would be helpful for the conduct of the case if that could be made clear, so that the Crown could review whether any further information might be relevant and, as we have discussed, whether any precognitions and victim statements should be made available.

The point has been made by the Crown, whether through the Lord Advocate or through the Solicitor General, that in many major cases the number of witnesses is huge. Some are there not to deal with substantial matters but to say that they secured perimeters, for example. A prosecutor might originally think that that is not of any relevance. However, if the defence was made at some stage that the area of ground in question was of significance and that something had happened there, it would be appropriate for that information to be made clear—even though, during the Crown's first trawl, the fact of an officer stating his name and age and saying that he roped off a bit of land at a crime locus might appear to be of little relevance or benefit to others. That is why we have to ensure that we have the ability to update information and that we do so throughout.

Lord Coulsfield recommended standard forms for defence statements. He clearly saw some merit in them and some benefit of them in Scotland, although we accept that he did not necessarily see them as mandatory.

Amendments 592 and 593 are intended to ensure that defence statements are as effective and comprehensive as they need to be and, to that end, that they contain all the information that might have a bearing on the prosecutor's duty of disclosure. Amendment 592 will insert a new paragraph into new section 70A(6) of the 1995 act, which will require that the accused sets out in his defence statement

> "particulars of the matters of fact on which the accused intends to rely for the purpose of the accused's defence".

At present new section 70A(6)(c) of the 1995 act requires only that the defence statement sets out

> "any point of law in relation to disclosure".

On further reflection, we considered that the limitation of the phrase "in relation to disclosure" is unnecessary and could lead to the unintended consequence that points of law that do not expressly relate to disclosure but nevertheless have a bearing on what might require to be disclosed are not intimated to the prosecutor. In turn, there could be a risk that information that the prosecutor requires to disclose for the accused to receive a fair trial is, inadvertently, not disclosed. Amendment 593 will give effect to that by removing the words "in relation to disclosure".

Amendment 596 will insert a new paragraph into section 95(2) of the bill, which will require that the accused sets out in his defence

> "particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence".

At present, subsection (2) requires only that they set out

> "any point of law in relation to disclosure".

On further reflection, we considered that the limitation of that phrase was unnecessary.

The convener is, quite correctly, concerned about the unintended consequences and dangers of defence statements. Prosecutors need some understanding of the nature of the defence if they are to be able to check out matters, but a defence statement should, by its very nature, be helpful to the accused rather than incriminatory. The requirement for a defence statement is not meant to set a trap, which the convener is correctly concerned about. In trials of significant size and complexity that involve huge numbers of witnesses and productions—many of which, quite correctly, might not necessarily be relevant to the issue of who did what—the defence statement will provide some focus so that the Crown can ensure that matters of relevance are provided. The defence statement provides that appropriate assurance.

12:00

The English provisions are much more complicated and detailed. We have not adopted them wholesale, but we have learned from them. As I said, we believe that the issues that were raised in stage 1 will be addressed through the amendments, but we are happy to review matters if the committee requires further details.

If the Crown failed to provide information on the basis not that it sought to deny information to the defence but that it considered the information not to be relevant, justice would not have been provided for. However, if the Crown is to be able to fulfil its duty and obligation to the accused, the Crown needs some information about what the defence is looking for in the victim statements, precognitions and other productions. As I said, the purpose of defence statements is not to incriminate the accused but to ensure that the Crown has sufficient knowledge to be able to provide all the relevant information that will allow the defence to put forward its position.

The Convener: That concludes what has been a reasonably full debate on another difficult matter.

Amendment 584 agreed to.

Amendment 585 moved—[Kenny MacAskill]—and agreed to.

Amendment 586 moved—[Kenny MacAskill].

The Convener: The question is, that amendment 586 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Maxwell, Stewart (West of Scotland) (SNP)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)

Against

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)

The Convener: The result of the division is: For 6, Against 2, Abstentions 0.

Amendment 586 agreed to.

Amendments 587 to 594 moved—[Kenny MacAskill]—and agreed to.

Amendment 156 not moved.

Section 94, as amended, agreed to.

Section 95—Defence statements: summary proceedings

Amendments 595 to 601 moved—[Kenny MacAskill]—and agreed to.

Amendment 157 not moved.

Section 95, as amended, agreed to.

After section 95

Amendment 602 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group of amendments is about court rulings on disclosure. Amendment 603, in the name of the minister, is grouped with amendments 604, 605, 615 and 616.

Kenny MacAskill: Amendments 603 to 605, 615 and 616 will assist accused persons and appellants who disagree with a prosecutor's assessment of the information that is to be disclosed under the new statutory regime. The bill already contains some provision to allow accused persons to challenge the prosecutor's decision, but our amendments go one step further by allowing accused persons and appellants to apply to the court for a ruling on whether the information in dispute is material. Accused persons will be able to do that only following the prosecutor's determination of a defence statement, and appellants will be able to do that only after they have lodged a statement seeking further disclosure under the provision to be inserted by amendment 611, which was dealt with in the previous grouping. There is no intention to interfere with the principle that the prosecutor is the main decision maker in relation to information that is to be disclosed; our amendments simply provide a mechanism for the prosecutor's assessment to be tested by the court.

I move amendment 603.

Robert Brown: I am sorry to be difficult on this one, but amendments 603 and 604 seem to add yet more verbiage about court rulings on disclosure and a review of them by the court. I would have thought that a ruling by the court and perhaps even a request for a review of new information would be implicit powers of the court in any event. Can the minister confirm that that is the case? The specific appeal provision may be necessary, but the Government seems to require the equivalent of "War and Peace" to state the procedure, which is surely commonplace in other circumstances, and that seems unnecessary. Do we need amendments 605, 615 and 616?

The Convener: I think that that question needs to be addressed, Mr MacAskill. Once again, there is a danger of overcomplicating matters.

Kenny MacAskill: This is a brand new procedure and there are no obvious existing provisions for it. It is about making things clear to the court, providing relevant information to the court and setting the scene for the court.

Amendment 603 will allow an accused to apply to the court for a ruling when information has not been disclosed in response to a defence statement. The application may be made when the information would materially weaken or undermine the evidence that is likely to be led by the prosecutor; when the information would materially strengthen the accused's case; or when the information would be likely to form part of the evidence to be led by the prosecutor. Amendment 603 sets out the procedure by which the court will appoint a hearing for the purposes of making a ruling on the information that is in dispute.

Amendment 604 will permit an accused person to seek a review when further information that was not available at the time of the ruling has emerged that is considered to have a material bearing on the court's consideration. Amendment 604 also sets out the procedure by which the court will appoint a hearing for a review for the purposes of a determination of the application. The court may affirm or recall, in full or in part, the ruling in respect of the information that is in dispute.

Amendment 605 will allow the prosecutor or the accused to appeal to the High Court against the ruling made under the provision that is inserted by amendment 603, and the High Court may affirm the ruling or remit the case back to the court of first instance.

Amendments 615 and 616 make the same provision that I have outlined in respect of amendments 603 and 604. However, instead of applying to criminal proceedings in the first instance, they enable an appellant in appellate proceedings to seek a ruling on disclosure in the same way.

If we did not have the procedure that is provided for in amendment 604, the accused would have no remedy through a review. I appreciate the committee's concerns on a whole array of issues relating to the amendments, but they introduce a new procedure regarding defence statements and it is important that there should be some opportunity for the accused and their agents to seek a review, whether in the first instance or on appeal. That is why we must insert this formal procedure for appeals to the courts and the opportunities for review. It is regrettable that we must do that, but if we want to ensure that the accused has a remedy, we must provide for it and specify what that remedy is.

Amendment 603 agreed to.

Amendments 604 and 605 moved—[Kenny MacAskill]—and agreed to.

Section 96—Effect of guilty plea

Amendment 606 moved—[Kenny MacAskill]—and agreed to.

Amendment 158 not moved.

Amendment 607 moved—[Kenny MacAskill]—and agreed to.

Section 96, as amended, agreed to.

After section 96

The Convener: The next group of amendments is on disclosure—application to appellate proceedings. Amendment 608, in the name of the minister, is grouped with amendments 609, 610 and 612 to 614.

Kenny MacAskill: Sections 86 to 90 set out the duties of disclosure on prosecutors and investigating agencies in proceedings at first instance, before a verdict has been reached in a case.

We are conscious that these amendments add new provisions that are technical and may appear rather complex in nature. We believe that they are necessary, though, to take into account the most up-to-date and authoritative jurisprudence of the higher courts on the crucial question of what the prosecutor requires to disclose to persons to whom criminal proceedings relate before those proceedings can be fair and compliant with the European convention on human rights.

The case of McDonald v HMA, to which we referred earlier, affirmed that the duty of disclosure is a continuing one, which continues even after an accused person is convicted. It made clear that the nature of the duty after conviction and during appeals is different from the duty at first instance. Lord Coulsfield did not envisage, and could not have envisaged, that when he was carrying out his review. In light of that decision, we are seeking to add in provisions to reflect those differences in the duty.

The purpose of the amendments is to define the nature of the duty after the conclusion of the proceedings and in any appellate proceedings that follow any first instance proceedings. The amendments will ensure that the prosecutor's duty of disclosure is laid out in statute for all criminal proceedings, not only those at first instance, and including after the proceedings have come to an end. Without them, there would be an incomplete picture in statute as to the prosecutor's obligations.

The provisions to be inserted by amendments 612 to 614 make it clear that there is no requirement on the prosecutor to proactively review the information he holds, as to do so would place an undue burden on prosecutors.

We appreciate that that adds complexity to the scheme for disclosure of evidence, but that complexity is unavoidable if we are to ensure that prosecutors have certainty as to their duties and convicted persons and appellants have certainty and comfort that their rights to disclosure will continue to be met by prosecutors throughout the proceedings relating to them, and beyond.

As the Solicitor General said in his evidence to members at stage 1,

> "You need to know with which rules you must comply in order to comply with disclosure obligations."—[*Official Report*, *Justice Committee*, 9 June 2009; c 2072.]

I move amendment 608.

Robert Brown: Why do the amendments in this section that relate to appellate proceedings and things of that kind not simply say something like, "The duty of disclosure applies on appeal as it does at first instance and the provisions of this part apply to appellate proceedings with any necessary modifications," and set out any kind of exception? The minister touched on reasons why the detail of the need to review the whole thing again did not apply on appeal. I did not entirely catch the point there. There may be exceptions to it. Why do we not have just a general statement of principle, rather than going through the whole thing all over again. To my mind, that adds complexity to the whole arrangements.

Kenny MacAskill: Mr Brown makes a valid point. The reason is that the McDonald v HMA case made it clear that the proceedings were different and distinct. Therefore, I think that it is necessary that we differentiate between what happens at first instance and what happens in appellate matters. It is not simply a matter of replicating the duty, because there are differences.

Amendment 608 agreed to.

Amendments 609 to 616 moved—[Kenny MacAskill]—and agreed to.

Section 97—Means of disclosure

Amendment 617 moved—[Kenny MacAskill]—and agreed to.

Amendment 159 not moved.

12:15

The Convener: The next group of amendments is on the means of disclosure. Amendment 618, in the name of the cabinet secretary, is the only amendment in the group.

Kenny MacAskill: Amendment 618 seeks to clarify and simplify the bill's provision on the treatment of witness statements in the context of the prosecutor's duty of disclosure. It goes hand in hand with amendments 553 and 555, which remove the existing provision on the issue, which was set out in section 85.

Amendment 618 is a technical amendment and our policy has not changed. The intention is still to conform to Lord Coulsfield's recommendations that witness statements, as a class of document, should have to be disclosed only in solemn proceedings in respect of those witnesses whom the prosecutor intends to lead in evidence.

Our position has also not changed on summary proceedings. In practice, prosecutors will continue to provide the accused with a summary of the evidence for and against him, but they will not be under a duty to disclose the statements, as a class of documents, of any witnesses regardless of whether they intend to lead the witness in evidence. However, comments that we have received about the complexity of the provisions have made us think that the provision should be moved and adjusted, and amendment 618 seeks to do that.

I move amendment 618.

Amendment 618 agreed to.

Section 97, as amended, agreed to.

Section 98—Confidentiality of disclosed information

The Convener: Amendment 619, in the name of the minister, has already been debated with amendment 566. I point out, however, that amendment 619 and amendment 160, which follows, are direct alternatives.

Amendment 619 moved—[Kenny MacAskill]—and agreed to.

Amendment 160 not moved.

The Convener: We turn now to the confidentiality of disclosed information, and disclosure to third parties. Amendment 620, in the cabinet secretary's name, is grouped with amendments 621 to 623 and 692.

Kenny MacAskill: Section 98 makes provision on the confidentiality of disclosed information, and section 99 creates an offence when a person knowingly uses or discloses information in contravention of section 98.

Amendment 620 makes it clear that sections 98 and 99 apply to persons who have received disclosed information in an unauthorised manner, and it clarifies that the confidentiality provisions do not apply to information that is in the public domain at the time of its use or disclosure.

Section 98 permits the accused to use information that has been disclosed to him for the preparation and presentation of an appeal. Amendment 621 will ensure that that includes petitions to the nobile officium and proceedings in the European Court of Human Rights.

Amendment 622 seeks to remove section 100 as, on reflection, we do not think that it is necessary to include specific provisions on the accused being able to apply to the court for an order allowing him to disclose information to a third party. There are sufficient existing mechanisms for an accused person to seek information through requests under data protection and freedom of information legislation, and also to seek the recovery of information and documents in civil court proceedings. Amendments 623 and 692 are consequential amendments that arise from amendment 622.

I move amendment 620.

Amendment 620 agreed to.

Amendment 621 moved—[Kenny MacAskill]—and agreed to.

Section 98, as amended, agreed to.

Section 99 agreed to.

Section 100—Order enabling disclosure to third party

Amendment 161 not moved.

Amendment 622 moved—[Kenny MacAskill]—and agreed to.

Section 101—Contravention of order under section 100

Amendment 623 moved—[Kenny MacAskill]—and agreed to.

Section 102—Application for non-disclosure order

The Convener: Amendment 624, in the name of the cabinet secretary, has already been debated with amendment 584. Once again, I point out that amendment 624 and amendment 162, which follows, are direct alternatives.

Amendment 624 moved—[Kenny MacAskill]—and agreed to.

Amendment 162 not moved.

The Convener: Amendment 625, in the minister's name, is grouped with amendments 626 to 652, 666, 669 to 671, 673, 675 to 678, 680, 686 and 687.

Kenny MacAskill: Sections 102 to 106 implement Lord Coulsfield's recommendation that legislation should provide for a system of public interest immunity hearings in Scotland. We are conscious of reservations that were expressed at stage 1 about the complexity of the scheme for primary legislation and we have sympathy with those views. However, as we said in our response to the stage 1 report, it is vital that the bill sets out the procedure and considerations that are to be taken into account in such decisions, so that sufficient judicial safeguards are in place to ensure that information is not withheld on the ground of public interest unless doing so is strictly necessary.

The scheme as a whole must be compatible with the accused's rights under the European convention on human rights. Leaving important elements of it to subordinate legislation might mean that ECHR compatibility was achieved only later, when rules were made. We need to be able to demonstrate to Parliament here and now that the scheme as a whole is compatible.

We have looked again at the provisions and considered whether scope exists to fillet out parts of them to be dealt with in subordinate legislation. We have concluded that it would be inappropriate to extract elements of the scheme and put them in subordinate legislation. Instead, we have lodged several amendments to simplify some of the more complex provisions in the scheme and to make clearer the tests that the court is to apply.

We have also responded to the Sheriffs Association's concern at the apparent anomaly that the proposed test for non-notification orders appears to be lower than that for exclusion orders.

I move amendment 625.

Amendment 625 agreed to.

The Convener: If amendment 626 is agreed to, amendment 163 will be pre-empted.

Amendment 626 moved—[Kenny MacAskill]—and agreed to.

Section 102, as amended, agreed to.

Section 103—Application for non-notification order or exclusion order

Amendments 627 to 635 moved—[Kenny MacAskill]—and agreed to.

Section 103, as amended, agreed to.

Section 104—Application for non-notification order and exclusion order

Amendments 636 to 638 moved—[Kenny MacAskill]—and agreed to.

Section 104, as amended, agreed to.

Section 105—Application for exclusion order

Amendments 639 to 643 moved—[Kenny MacAskill]—and agreed to.

Section 105, as amended, agreed to.

Section 106—Application for non-disclosure order: determination

Amendments 644 and 645 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendments 646 and 164 are direct alternatives.

Amendment 646 moved—[Kenny MacAskill]—and agreed to.

Amendment 164 not moved.

Amendments 647 to 652 moved—[Kenny MacAskill]—and agreed to.

Section 106, as amended, agreed to.

After section 106

The Convener: Amendment 653, in the name of the minister, is grouped with amendments 654 to 656, 679 and 681 to 685.

Kenny MacAskill: Members will recall that Lord Coulsfield recommended that legislation should provide for a system of public interest immunity hearings in Scotland, and provisions for that are included in the bill. The amendments in this group are designed to create a parallel system to enable the secretary of state to apply for similar orders in the public interest.

The purpose of amendments 653 to 656, 679 and 681 to 685 is to establish a system to enable applications to be made to the court by a UK Government minister for orders prohibiting the disclosure of information that the prosecutor is otherwise required to disclose, and for other orders ancillary to such orders where, if the information were to be disclosed, there would be a real risk of substantial harm or damage to the public interest.

The scheme that is set out in our amendments broadly mirrors the scheme that is set out in sections 102 to 106, which enables such applications to be made by the prosecutor. The amendments recognise that public interest issues might arise in criminal proceedings in which secretaries of state might have an interest.

The new scheme might use different terminology to the scheme that is set out in sections 102 to 106, but the concepts and procedures are broadly the same. A section 106 order corresponds to an order preventing or restricting disclosure, an exclusion order corresponds to a non-attendance order and a non-notification order corresponds to a restricted notification order.

The key to that is that, despite any differences in terminology, in considering the applications and in any review by the court of its decisions in relation to those applications, the court will broadly do the same thing. It will always closely consider disclosure versus non-disclosure, balancing the competing interests of the injury to the public interest imperative on the one side with the private individual's interests and their right to receive a fair trial on the other.

Amendments 679 and 681 to 685 repeat and mirror those further aspects that already exist in the domestic regime.

I move amendment 653.

Amendment 653 agreed to.

Amendments 654 to 656 moved—[Kenny MacAskill]—and agreed to.

Section 107—Special counsel

The Convener: Amendment 657, in the name of the cabinet secretary, is grouped with amendments 658 to 661, 668, 672 and 674.

Kenny MacAskill: Sections 102 to 106 establish a scheme to enable the court, on the application of the prosecutor, to determine whether information that the prosecutor would otherwise be required to disclose should be withheld on public interest grounds. Amendments 653 to 685 seek to establish a similar scheme to enable applications to be made by the secretary of state.

Section 107 makes provision regarding the appointment of special counsel by the court and their duties in those hearings. Amendment 657 is consequential on amendments 653 to 685 and extends section 107 to cover applications by the secretary of state for orders to prevent or restrict disclosure in the public interest.

Amendment 658 is a technical amendment that is designed to clarify that the special counsel role is limited to the determination of the applications and does not apply to the whole criminal trial proceedings.

Amendment 659 seeks to ensure that the prosecutor or, as the case may be, the secretary of state and, in certain circumstances, the accused are able to make representation to the court before the court decides whether to appoint special counsel. It also makes provision for appeals against the decision of the court not to appoint special counsel. Amendment 659 also gives the prosecutor and secretary of state the power to appeal against a decision not to appoint special counsel and gives the accused a similar power to appeal in any case other than a non-notification or restricted notification case.

Amendment 660 provides that only solicitors or advocates may be appointed as special counsel.

Amendment 661 makes provision to regulate the role and functions of special counsel and the interaction between the accused and special counsel. It will establish a duty on special counsel to act in the best interests of the accused in so far as to ensure that the accused receives a fair trial. It also specifies the rules that special counsel must follow in respect of information to which they have access and how they will interact with the accused.

Amendments 668, 672 and 674 will enable special counsel to seek a review of the decision of the court in respect of a section 106 order and will extend the powers that are available to the court in reviews that are carried out under section 111 to reviews by special counsel.

I move amendment 657.

12:30

Robert Brown: I think that the provisions on special counsel are necessary in rare cases, but I query how section 107 and the new section that is proposed by amendment 660 would operate in practice. The implication seems to be that any solicitor or advocate may be appointed as special counsel, but, given that we are talking about cases that might involve terrorists or people with a background in organised crime, I assume that anyone who acts as special counsel will have to have some experience or special expertise beyond the normal. Will the court keep a list of such people? Who will suggest such people? Could the defence do so? On what basis will the matter be decided by the court? In short, how will people be chosen to act as special counsel?

The Convener: Mr MacAskill will deal with that in his summing up.

Kenny MacAskill: There will be a list, but the details of how it will be provided are still being worked out.

We must take those points on board to ensure that there is a fair balance and that not just anyone is appointed as special counsel. Those matters are being worked out and we will keep the member and the committee informed.

Amendment 657 agreed to.

Amendments 658 and 659 moved—[Kenny MacAskill]—and agreed to.

Section 107, as amended, agreed to.

After section 107

Amendments 660 and 661 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 662, in the name of the minister, is grouped with amendments 663 to 665 and 667.

Kenny MacAskill: Sections 108, 109 and 110 enable appeals to be brought in relation to section 106 orders, exclusion orders and non-notification orders. Amendments 663, 664 and 665 will remove those sections from the bill, and amendment 662 will insert, in their place, a new, expanded section on appeals, which will give the prosecutor, the accused, the secretary of state and special counsel appropriate rights of appeal in relation to the various orders that can be made under the bill. In addition, amendment 662 specifies how appeals will be dealt with under the revised scheme.

Amendment 667 seeks to simplify section 111.

I move amendment 662.

Amendment 662 agreed to.

Section 108—Appeal by prosecutor against refusal of application for order

Amendment 663 moved—[Kenny MacAskill]—and agreed to.

Section 109—Appeal by accused against making of exclusion order or non-disclosure order

Amendment 664 moved—[Kenny MacAskill]—and agreed to.

Section 110—Appeal by special counsel

Amendment 665 moved—[Kenny MacAskill]—and agreed to.

Section 111—Review of grant of non-disclosure order

Amendment 666 moved—[Kenny MacAskill]—and agreed to.

The Convener: I point out that if amendment 667 is agreed to, I will not be able to call amendment 165 on the ground of pre-emption.

Amendment 667 moved—[Kenny MacAskill]—and agreed to.

Amendments 668 to 678 moved—[Kenny MacAskill]—and agreed to.

Section 111, as amended, agreed to.

After section 111

Amendment 679 moved—[Kenny MacAskill]—and agreed to.

Section 112—Review by court of non-disclosure order

Amendments 680 to 685 moved—[Kenny MacAskill]—and agreed to.

Section 112, as amended, agreed to.

Section 113—Applications and reviews: general provisions

Amendments 686 and 687 moved—[Kenny MacAskill]—and agreed to.

Section 113, as amended, agreed to.

Sections 114 and 115 agreed to.

After section 115

The Convener: Amendment 688, in the name of the minister, is in a group on its own.

Kenny MacAskill: Amendment 688 introduces a new section into the bill that ensures that the disclosure provisions in the bill will displace the current common law rules on disclosure, but only to the extent that they are replaced by or are inconsistent with the bill's provisions. The new section also clarifies the interaction between the scheme that is proposed in our amendments for court rulings on materiality and existing common law remedies that allow persons to recover documents. That is to ensure that, in making applications to the court, whether under the bill or at common law, the accused does not get a second bite at the cherry by being able to go back to the court for a ruling on broadly the same grounds. That is necessary to avoid delays to cases and duplication of work by our courts.

I move amendment 688.

Amendment 688 agreed to.

Section 116—Interpretation of Part 6

Amendment 689 moved—[Kenny MacAskill]—and agreed to.

The Convener: I call amendment 690, in the name of the minister. If amendment 690 is agreed to, I cannot call amendment 166, on the ground of pre-emption.

Amendment 690 moved—[Kenny MacAskill]—and agreed to.

Amendment 691 moved—[Kenny MacAskill]—and agreed to.

Amendment 692 moved—[Kenny MacAskill].

The Convener: The question is, that amendment 116 be agreed to. Are we agreed? I am sorry. There is a typo in the brief. For the record, the question is, that amendment 692 be agreed to.

Amendment 692 agreed to.

The Convener: We turn to section 117—[*Interruption.*] Unfortunately, there is another typo in the brief. First, I must put the question on section 116.

Section 116, as amended, agreed to.

Section 117—Criminal responsibility of persons with mental disorder

The Convener: The next group is on mental disorder and unfitness for trial. Amendment 24, in the name of Angela Constance, is grouped with amendments 167 and 195.

Angela Constance: I seek assurances that those who should have access to the special statutory defence do, indeed, have it. The purpose of amendment 24 is to ensure that all those with a mental disorder that is diagnosed by a psychiatrist and defined by law and who commit an offence have access to the statutory special defence where appropriate and necessary, even when the individual knows that what they are doing is wrong but they have nonetheless committed the act because their illness compels them to do so.

I remind the committee of the recommendation in our stage 1 report, in which we concluded:

> "However, we are not yet confident that the proposed special defence of mental disorder has been appropriately defined, given the concerns raised in evidence and the differences of interpretation between ... witnesses about whether the special defence would be available to people who know their conduct is wrong, but are driven by their mental illness to do it anyway."

The Mental Welfare Commission for Scotland raised concerns on the definition, saying that

> "a mental disorder may not just impair an individual's ability 'to appreciate the nature or wrongfulness of the conduct', but may also impair their ability to control their behaviour even though they may appreciate that their actions are wrong."

Similar concerns were raised by the Law Society of Scotland and the Scottish Association for Mental Health.

The Law Society of Scotland said that the mental disorder defence might not be available to someone who commits an offence while "suffering from a depressive illness", for example, or who is compelled to act because of command hallucinations. Of course, the committee also heard from the very learned James Chalmers who felt that that was not the case. He said that the Law Society of Scotland had misunderstood the position as it had wrongly assumed that the bill relied on the "much criticised English position".

In response to the committee's concerns, the Government was clear in stating that the statutory special defence did not include reference to a volitional element. In giving its reasons for saying that, the Government said:

> "We take the view that if the 'appreciation' criterion"—

by which I think that it means a person's understanding and rational thinking—

> "is to be understood in a wide sense, as we argue that it should, then there is no need for any volitional element.

> Indeed, there might be dangers in adding on a volitional part to the defence as doing so might give rise to narrow interpretations of the scope of the appreciation element."

In its discussion paper, the Scottish Law Commission said that it was inclined to adopt the position that the test for defence should not contain a volitional element. However, it went on to say:

> "we have not reached a concluded view".

I am most concerned about the latter point.

The SLC also said that, although most of its consultees were divided on the question, most agreed that the wider cognitive criterion of appreciation would cover any relevant volitional failing. About half of the consultees who responded on the issue accepted that there was no need for any volitional element and two consultees gave clear support for it. I suppose that it is of significance that none of the consultees could provide any example of an instance in which a person might fail the test for the defence on the appreciation criterion but satisfy it purely on the volitional element.

I seek clear reassurance that people who require a special defence are indeed covered by that defence, as it is not in the interests of justice for people wrongly not to be subject to the measures of compulsion that are available under the Mental Health (Care and Treatment) (Scotland) Act 2003. To put it in blunt terms, it is not in anybody's interests for those who have a mental disorder and who should be cared for by the mental health system to end up inadvertently in prison.

I move amendment 24.

12:45

Dr Simpson: I thank Angela Constance for raising this issue, which is clearly difficult. The question of insight as opposed to compulsion is difficult. I was not involved in the committee's consideration of the bill at stage 1, but I can fully understand the consultees' difficulty in reaching a conclusion on the issue. I will be interested to hear whether the cabinet secretary can provide clarification, because it is an extremely difficult issue on which to reach a conclusion.

The Convener: Yes, this is a difficult issue—we seem to be running into a lot of them this morning. In speaking to amendment 24, Angela Constance demonstrated in a very sensitive manner the knowledge that she acquired in her previous occupation. The committee wants to get this right, and seeks the appropriate reassurance from the cabinet secretary. I do not think that the concerns on the issue are restricted to Ms Constance.

Kenny MacAskill: Amendment 167 is a minor technical amendment that is aimed at improving the readability of section 117. Amendment 195 is a minor technical amendment that will help to tidy the statute book of redundant provisions.

Section 117 introduces a new statutory defence to replace the common-law defence of insanity. This new statutory test provides for a special defence in respect of persons who lack criminal responsibility by reason of mental disorder at the time of the commission of the offence with which they are charged. There are two elements to the test, both of which must be met for the test to be met. The first element is the presence of a mental disorder suffered by the accused at the time of the conduct constituting the offence. The second element is that, for the defence to be available, the mental disorder must have a specific effect on the accused: the inability of the accused to appreciate either the nature or wrongfulness of the conduct constituting the offence.

Amendment 24 seeks to alter the test so that a person could also claim the special defence when the effect of their mental disorder was such that they were unable to determine or control their conduct despite being able to appreciate the nature or wrongfulness of it. That would likely be a departure from the current common-law defence of insanity and would certainly be a departure from the test recommended by the Scottish Law Commission in its 2002 report, upon which the provisions in sections 117 to 120 are based.

During its careful consideration of the proposed test, the Scottish Law Commission looked closely at whether a volitional element of the sort proposed by amendment 24 should feature as an explicit part of the test, and thought that it should not. It may be helpful if I quote from the Scottish Law Commission's considerations as they relate to the issues raised by amendment 24. Paragraph 2.53 of the SLC's 2002 report states:

> "Volitional issues pose major practical questions. How can the law distinguish between someone who could have desisted from criminal conduct but chose not to desist, and someone who could do no other than commit the act? As this question is often put, what is the difference between an irresistible impulse and resistible, but not-resisted, impulse? This issue can only be resolved by looking to the reasons for the person's acting as they did, but this approach leads back to considerations of what are essentially cognitive matters."

The report goes on to say:

> "The use of an expanded cognitive base for the test could cover all the cases where a person should not be found criminally responsible. Consider the example of a woman who feels she is 'driven' to killing her children to save them from her own bad parenting. This case essentially involves a cognitive failing (based on the depression which gives rise to her perception of inadequacy as a parent) rather than a purely volitional one. The question becomes one of trying to identify any case

> where a person who committed criminal conduct would be found criminally responsible on the appreciation test but would be treated as lacking criminal responsibility in respect of a volitional incapacity."

In response to the Scottish Law Commission's consultation, the majority of consultees considered the question and offered the view that the wider cognitive criterion of appreciation would cover any relevant volitional failing. None of the consultees could provide an example in which a person might fail the test for the special defence on the appreciation criterion, but satisfy it purely on a volitional one.

The Scottish Law Commission concluded that:

> "We take the view that if the 'appreciation' criterion is to be understood in a wide sense, as we argue that it should, then there is no need for any volitional element. Indeed, there might be dangers in adding on a volitional part to the defence as doing so might give rise to narrow interpretations of the scope of the appreciation element."

We agree with the Scottish Law Commission's reasoning on the framing of the test and we do not support amendment 24.

Angela Constance: Thank you. I think that I am satisfied with the cabinet secretary's answer, particularly his clear statement that, if it is the view that the

> "'appreciation' criterion is to be understood in a wide sense as we argue that it should, then there is no need for any volitional element."

To reserve my position, I will study the cabinet secretary's response in detail. However, at this stage, and with the committee's permission, I will withdraw amendment 24.

Amendment 24, by agreement, withdrawn.

Amendment 167 moved—[Kenny MacAskill]—and agreed to.

Section 117, as amended, agreed to.

Sections 118 to 120 agreed to.

The Convener: We should be moving to a new topic—licensing—so this is an appropriate point at which to finish for the morning. I thank members and the ministerial team for their attendance and contributions. We have discussed a number of issues on which individual members and the committee in general are keen to ensure a continuing dialogue up to and including stage 3.

The deadline for stage 2 will be the subject of consideration by the Parliamentary Bureau this afternoon.

Meeting closed at 12:53.

Criminal Justice and Licensing (Scotland) Bill

7th Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 3	Schedule 1
Sections 4 to 18	Schedule 2
Sections 19 to 66	Schedule 3
Sections 67 to 139	Schedule 4
Sections 140 to 145	Schedule 5
Sections 146 to 148	Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 121

Kenny MacAskill

168 In section 121, page 123, leave out lines 2 and 3 and insert—

<(3A) No order may be made under subsection (1) unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.>

Section 122

Kenny MacAskill

169 In section 122, page 125, line 1, leave out from <5,> to <29> in line 2 and insert <5 and 11>

Section 123

Robert Brown

385 Leave out section 123

After section 124

Kenny MacAskill

170 After section 124, insert—

<**Licensing of street trading: food hygiene certificates**

(1) Section 39 of the 1982 Act (street traders' licences) is amended as follows.

(2) In subsection (4), for the words from "the requirements" to the end substitute "such requirements as the Scottish Ministers may by order made by statutory instrument specify".

(3) After subsection (4), insert—

"(5) An order under subsection (4) may specify requirements by reference to provision contained in another enactment.

(6) A statutory instrument containing an order made under subsection (4) is subject to annulment in pursuance of a resolution of the Scottish Parliament.".>

Section 125

Kenny MacAskill

171 In section 125, page 128, line 24, at beginning insert <In>

Kenny MacAskill

172 In section 125, page 128, line 24, leave out from <is> to <In> in line 26 and insert <, in>

Cathie Craigie

2 In section 125, page 128, line 25, leave out subsection (2)

Cathie Craigie

3 In section 125, page 128, line 26, leave out subsection (3)

Cathie Craigie
Supported by: Robert Brown

4 Leave out section 125

After section 127

Sandra White

516 After section 127, insert—

<**Control of lap dancing and other adult entertainment venues**

(1) The 1982 Act is amended as follows.

(2) In section 41(2) (definition of place of public entertainment), after paragraph (aa) insert—

"(ab) adult entertainment venues (as defined in section 45A) in relation to which Schedule 2 (as modified for the purposes of that section) have effect, while being used as such;".

(3) The title of Part 3 becomes "Control of sex shops and adult entertainment venues".

(4) After section 45 insert—

“45A Control of lap dancing and other adult entertainment venues

(1) A local authority may resolve that Schedule 2, as modified for the purposes of this section, is to have effect in their area in relation to adult entertainment venues; and, if they do so resolve, that Schedule (as so modified) has effect from the day specified in the resolution.

(2) The day referred to in subsection (1) must not be before the expiry of the period of one month beginning with the day on which the resolution is passed.

(3) A local authority must, not later than 28 days before the day referred to in subsection (1), publish notice that they have passed a resolution under this section in a newspaper circulating in their area.

(4) The notice is to state the general effect of Schedule 2, as modified for the purposes of this section.

(5) For the purposes of this section, Schedule 2 is modified as follows—

- (a) in paragraph 1, sub-paragraphs (b)(ii) (and the word “or” immediately preceding it) and (c) are omitted;
- (b) for paragraph 2 substitute—

“2 In this Schedule, “adult entertainment venue” has the same meaning as in section 45A.”;

- (c) in paragraph 9—
  - (i) after sub-paragraph (5)(c) insert—

“(ca) where it is intended to sell alcohol in the adult entertainment venue, an application for the grant, renewal or transfer of a premises licence under Part 3 of the Licensing (Scotland) Act 2005 (asp 16) relating to that venue has been refused;”; and

  - (ii) after sub-paragraph (6) insert—

“(6A) A local authority may refuse an application for the grant or renewal of a licence despite the fact that a premises licence under Part 3 of the Licensing (Scotland) Act 2005 (asp 16) is in effect in relation to the adult entertainment venue.”;

- (d) in paragraph 25, for “section 45” in each place where those words occur, substitute “section 45A”; and
- (e) for “sex shop”, in each place where those words occur, substitute “adult entertainment venue”.

(6) In this section, “adult entertainment venue” means any premises, vehicle, vessel or stall used for a business which consists to a significant degree of providing relevant entertainment before a live audience; and, for the purposes of that definition—

“audience” includes an audience of one;

“display of nudity” means—

- (a) in the case of a woman, exposure of her breasts, nipples, pubic area, genitals or anus;
- (b) in the case of a man, exposure of his pubic area, genitals or anus;

“relevant entertainment” means—

(a) any live performance; or

(b) any live display of nudity,

which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means).”.>

Section 128

Kenny MacAskill

173 In section 128, page 129, line 25, at end insert—

<( ) in paragraph 2(3)(b), after “application” insert “(other than the date and place of birth of any person)”,

( ) in paragraph 2(8)(a), after “application” insert “(other than the date and place of birth of any person)”,>

Section 129

Kenny MacAskill

174 Leave out section 129

After section 130

Bill Aitken

460 After section 130, insert—

<**Premises licence applications: crime prevention objective**

In section 23(5) of the 2005 Act (grounds for refusal of premises licence application), after paragraph (b), insert—

“(ba) that the appropriate chief constable has made a recommendation under section 21(5) that the application be refused,”.>

After section 131

Kenny MacAskill

175 After section 131, insert—

<**Reviews of premises licences: notification of determinations**

(1) The 2005 Act is amended as follows.

(2) After section 39 (Licensing Board’s powers on review), insert—

“**39A Notification of determinations**

(1) Where a Licensing Board, at a review hearing—

(a) decides to take one of the steps mentioned in section 39(2), or

(b) decides not to take one of those steps,

the Board must give notice of the decision to each of the persons mentioned in subsection (2).

(2) The persons referred to in subsection (1) are—

(a) the holder of the premises licence, and

(b) where the decision is taken in connection with a premises licence review application, the applicant.

(3) Where subsection (1)(a) applies, the holder of the premises licence may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(4) Where—

(a) subsection (1)(a) or (b) applies, and

(b) the decision is taken in connection with a premises licence review application,

the applicant may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(5) Where the clerk of a Board receives a notice under subsection (3) or (4), the Board must issue a statement of the reasons for the decision to—

(a) the person giving the notice, and

(b) any other person to whom the Board gave notice under subsection (1).

(6) A statement of reasons under subsection (5) must be issued—

(a) by such time, and

(b) in such form and manner,

as may be prescribed.”.>

After section 132

George Foulkes

542 After section 132, insert—

<**Premises licence applications: disability compliance statements**

In section 20 of the 2005 Act (application for premises licence), after subsection (4)(f), insert—

“(fa) a statement of compliance with Part 3 of the Disability Discrimination Act 1995, including information as to where reasonable adjustments have been or will be made to remove barriers to access for disabled people,”.>

Bill Aitken

547 After section 132, insert—

<**Premises licence: minor variations**

(1) Section 29(6) of the 2005 Act (definition of minor variations to premises licence) is amended as follows.

(2) In paragraph (a), insert at the end "or if the variation relates only to parts of the premises to which the public does not have access".

(3) After paragraph (c) insert—

"(ca) any reduction in the capacity of the premises,

(cb) any change in the name by which the business carried on in the premises is to be known or under which it trades,

(cc) any variation of the layout plan or operating plan required by virtue of any enactment relating to planning, building control, food safety or fire safety,".>

Robert Brown

550 After section 132, insert—

<**Premises licence: transfer on application of person other than licence holder**

(1) Section 34 (transfer on application of person other than licence holder) of the 2005 Act is amended as follows.

(2) In subsection (3)—

(a) the word "and" immediately preceding paragraph (d) is repealed, and

(b) after that paragraph insert ", and

"(e) for any other reason, the business that was (prior to the event in question) carried on in the licensed premises to which the licence relates ceases to be carried on in those premises.".

(3) In subsection (4), insert at the beginning "Subject to subsection (4A),".

(4) After that subsection insert—

"(4A) In the case of an application made following the event specified in subsection (3)(e)—

(a) subsection (8) of section 33 applies as if, after the words "the Board must" there were inserted ", if satisfied in all the circumstances that it is reasonable to do so,", and

(b) subsection (10)(b) of that section applies as if, after the words "if not so satisfied," there were inserted "but otherwise satisfied that in all the circumstances it is reasonable to do so.".>

Kenny MacAskill

693 After section 132, insert—

<**Premises licences: connected persons and interested parties**

(1) The 2005 Act is amended as follows.

(2) After section 40 insert—

“*Connected persons and interested parties*

40A Connected persons and interested parties: licence holder’s duty to notify changes

(1) A premises licence holder must, not later than one month after a person becomes or ceases to be—

(a) a connected person in relation to the licence holder, or

(b) an interested party in relation to the licensed premises,

give the appropriate Licensing Board notice of that fact.

(2) A notice under subsection (1) that a person has become a connected person or an interested party must specify—

(a) the name and address of the person, and

(b) if the person is an individual, the person’s date of birth.

(3) Where a Licensing Board receives a notice under subsection (1), the Board must give a copy of the notice to the appropriate chief constable.

(4) A premises licence holder who fails, without reasonable excuse, to comply with subsection (1) commits an offence.

(5) A person guilty of an offence under subsection (4) is liable on summary conviction to a fine not exceeding level 2 on the standard scale.”.

(3) In section 48 (notification of change of name or address)—

(a) in subsection (1)—

(i) the word “or” immediately following paragraph (a) is repealed, and

(ii) after paragraph (b) insert “, or

(c) the name or address of any person who is—

(i) a connected person in relation to the licence holder, or

(ii) an interested party in relation to the licensed premises,”,

(b) after subsection (2) insert—

“(2A) Where a Licensing Board receives a notice under subsection (1), the Board must give a copy of the notice to the appropriate chief constable.”.

(4) In section 147 (interpretation), after subsection (4) insert—

“(5) For the purposes of this Act, a person is an interested party in relation to licensed premises if the person is not the holder of the premises licence nor the premises manager in respect of the premises but—

(a) has an interest in the premises as an owner or tenant, or

(b) has management and control over the premises or the business carried on on the premises.”.

(5) In section 148 (index of defined expressions), in the table, insert at the appropriate place—

“interested party	section 147(5).”.>

Robert Brown

543 After section 132, insert—

<**Provisional premises licences**

(1) Section 45 (provisional premises licence) of the 2005 Act is amended as follows.

(2) In subsection (6), for “2 years” substitute “5 years”.

(3) In subsection (8), paragraph (b) and the word “and” immediately preceding it are repealed.

(4) In subsection (10), for paragraphs (a) and (b) substitute—

“(a) for subsection (2) there were substituted—

“(2) An application under subsection (1) must be accompanied by—

(a) a plan sufficient to identify the site of the subject premises and give a general indication of their size,

(b) a document giving a general indication of—

(i) the anticipated capacity of the premises,

(ii) the hours during which it is proposed to serve alcohol on the premises,

(iii) the extent to which it is proposed to allow children or young persons entry to the premises, and

(c) the certificate required by section 50(2).”, and

(b) subsections (4) and (5) were omitted.”.

(5) After subsection (10) insert—

“(10A) Sections 21 to 32 have effect in relation to any provisional premises licence application and to any provisional premises licence as if references to—

(a) the operating plan were read as references to the document required under section 20(2)(b) (as substituted by subsection (10)(a)), and

(b) the layout plan were read as references to the plan required under section 20(2)(a) (as so substituted).”.>

Kenny MacAskill

176 After section 132, insert—

<**Premises licence applications: food hygiene certificates**

(1) Section 50 of the 2005 Act (certificates as to planning, building standards and food hygiene) is amended as follows.

(2) In subsection (7), for the words from “the requirements” to the end substitute “such requirements as the Scottish Ministers may, by order, specify.”.

(3) After subsection (7), insert—

“(7A) An order under subsection (7) may specify requirements by reference to provision contained in another enactment.”.

(4) In subsection (8)(c), for “the 1990 Act” substitute “section 5 of the Food Safety Act 1990 (c.16)”.>

After section 133

Bill Aitken

548 After section 133, insert—

<**Consumption of alcohol on licensed premises outwith licensed hours**

In section 63(2) of the 2005 Act (exceptions to offence of allowing sale, consumption etc. of alcohol outwith licensed hours), after paragraph (f) insert—

"(g) allow alcohol to be consumed on licensed premises at any time within 45 minutes of the end of any period of licensed hours by—

(i) the premises licence holder,

(ii) the premises manager, or

(iii) any person aged 18 or over who, at the end of that period of licensed hours, was working on the premises.".>

Section 134

Kenny MacAskill

539 In section 134, page 134, line 17, leave out from <after> to end of line 22 and insert <in sub-paragraph (4), after "Board" in the second place where it appears insert "or to a member of staff provided under paragraph 8(1)(b)".>

After section 134

Kenny MacAskill

449 After section 134, insert—

<**Extended hours applications: notification period**

(1) Section 69 of the 2005 Act (notification of extended hours application) is amended as follows.

(2) After subsection (3), add—

"(4) Subsections (5) and (6) apply where the Licensing Board is satisfied that the application requires to be dealt with quickly.

(5) Subsections (2) and (3) have effect in relation to the application as if the references to the period of 10 days were references to such shorter period of not less than 24 hours as the Board may determine.

(6) Subsection (3) has effect in relation to the application as if for the word "must" there were substituted "may".".>

Section 136

Kenny MacAskill

177 In section 136, page 135, line 3, at end insert—

<"(ba) the notice does not include a recommendation under section 73(4),>

Kenny MacAskill

178 In section 136, page 135, leave out lines 22 to 27 and insert—

<(a) hold a hearing for the purposes of considering and determining the application, and

(b) after having regard to the circumstances in which the personal licence previously held expired or, as the case may be, was surrendered—

(i) refuse the application, or

(ii) grant the application.”.>

After section 136

James Kelly

698 After section 136, insert—

<**24 hour licences: refusal, revocation etc. on advice or recommendation of Local Licensing Forum**

(1) The 2005 Act is amended as follows.

(2) In section 64 (24 hour licences to be granted only in exceptional circumstances)—

(a) in subsection (1), for “Subsection (2) applies” substitute “Subsections (2) to (4) apply”,

(b) in subsection (2), at the end insert “(the granting of any such application being referred to in this section and section 64A as “24 hour licensing”)”, and

(c) after subsection (2) insert—

“(3) In reaching a decision under subsection (2), the Licensing Board must have regard to any advice given or recommendations made by the Local Licensing Forum for the Board’s area that allowing 24 hour licensing in the area in which the subject premises are situated would be inappropriate or undesirable.

(4) Where the Local Licensing Forum has not, at the time the application is made, given any advice or made any recommendations about the appropriateness or desirability of allowing 24 hour licensing, the Licensing Board may invite it to do so before reaching a decision under subsection (2).”.

(3) After that section insert—

“**64A Revocation etc. of 24 hour licence on advice or recommendation of Local Licensing Forum**

(1) This section applies where—

(a) a Licensing Board has granted, under section 64, an application for 24 hour licensing, and

(b) the Local Licensing Forum for the Board’s area subsequently gives advice or makes recommendations to the Board to the effect that 24 hour licensing in the area in which the subject premises are situated is inappropriate or undesirable.

(2) The Licensing Board—

(a) must have regard to the advice or recommendations of the Local Licensing Forum, and

(b) may either revoke the licence or vary it so as to restrict the licensed hours during which alcohol may be sold on the premises to a continuous period of less than 24 hours.”.>

After section 137

Kenny MacAskill

179 After section 137, insert—

<**Appeals**

In section 131(2) of the 2005 Act (appeals), the words “by way of stated case, at the instance of the appellant,” are repealed.>

Kenny MacAskill

694 After section 137, insert—

<**Liability for offences**

(1) The 2005 Act is amended as follows.

(2) In each of the following provisions, the word “knowingly” is repealed—

(a) section 1(3)(b),

(b) section 103(1),

(c) section 106(2),

(d) section 107(1),

(e) section 118(1),

(f) section 120(2) and (3),

(g) section 121(1),

(h) section 127(4), and

(i) section 128(5).

(3) After section 141 (offences by bodies corporate etc.) insert—

“**141A Defence of due diligence for certain offences**

(1) It is a defence for a person charged with an offence to which this section applies to prove that the person—

(a) did not know that the offence was being committed, and

(b) exercised all due diligence to prevent the offence being committed.

(2) This section applies to an offence under any of the following provisions of this Act—

section 1(3)(b),

section 103(1),

section 106(2),

section 107(1),

section 118(1),

section 120(2) or (3),

section 121(1),

section 127(4),

section 128(5).

141B Vicarious liability of premises licence holders and interested parties

(1) Subsection (2) applies where, on or in relation to any licensed premises, a person commits an offence to which this section applies while acting as the employee or agent of—

(a) the holder of the premises licence, or

(b) an interested party.

(2) The holder of the premises licence or, as the case may be, the interested party is also guilty of the offence and liable to be proceeded against and punished accordingly.

(3) It is a defence for a holder of a premises licence or an interested party charged with an offence to which this section applies by virtue of subsection (2) to prove that the holder of the licence or, as the case may be, the interested party—

(a) did not know that the offence was being committed by the employee or agent, and

(b) exercised all due diligence to prevent the offence being committed.

(4) Proceedings may be taken against the holder of the premises licence or the interested party in respect of the offence whether or not proceedings are also taken against the employee or agent who committed the offence.

(5) This section applies to an offence under any of the following provisions of this Act—

section 1(3),

section 15(5),

section 63(1),

section 97(7),

section 102(1),

section 103(1),

section 106(2),

section 107(1),

section 108(2) or (3),

section 113(1),

section 114,

section 115(2),

section 118(1),

section 119(1),

section 120(2),

section 121(1),

section 138(5).”.>

After section 138

Kenny MacAskill

699 After section 138, insert—

<**Powers of Licensing Standards Officers**

(1) Section 15 of the 2005 Act is amended as follows.

(2) The section title becomes “Powers of entry, inspection and seizure”.

(3) In subsection (2)—

(a) the word “and” immediately preceding paragraph (b) is repealed, and

(b) after that paragraph insert—

“(c) power to take copies of, or of an entry in, any document found on the premises, and

(d) power to seize and remove any substances, articles or documents found on the premises.”.

(4) In subsection (3)—

(a) for “either” substitute “any”, and

(b) in paragraph (b), after “information” insert “or explanation”.

(5) After subsection (4) insert—

“(4A) Subsection (3)(c) includes power to require any document which is stored in electronic form and which is accessible from the premises to be produced in a form—

(a) in which it is legible, and

(b) in which it can be removed from the premises.

(4B) Nothing in subsection (3) requires a person to produce any document if the person would be entitled to refuse to produce that document in any proceedings in any court on the grounds of confidentiality of communications.

(4C) Nothing in subsection (3) requires a person to provide any information or explanation or produce any document if to do so would incriminate that person or that person’s spouse or civil partner.”.

(6) After subsection (6) insert—

“(7) The Scottish Ministers may by regulations make further provision about the procedure to be followed in the exercise of a power under this section.

(8) Where a Licensing Standards Officer seizes any substance, article or document under subsection (2)(d), the Officer must leave on the premises a notice—

(a) stating what was seized, and

(b) explaining why it was seized.

(9) The Scottish Ministers may by regulations make provision about the treatment of substances, articles or documents seized under subsection (2)(d).

(10) Regulations under subsection (9) may, in particular, make provision—

(a) about the retention, use, return, disposal or destruction of anything seized,

(b) about compensation for anything seized.”.>

Schedule 4

Kenny MacAskill

180 In schedule 4, page 149, line 11, leave out <22(2) or>

Kenny MacAskill

181 In schedule 4, page 150, leave out lines 18 to 21

Section 140

Kenny MacAskill

182 Leave out section 140

Section 142

Kenny MacAskill

183 Leave out section 142

Section 143

Kenny MacAskill

184 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*Mutual recognition of judgments and probation decisions*)(1),>

Kenny MacAskill

540 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*Convictions by courts in other EU member States*)(2),>

Kenny MacAskill

450 In section 143, page 138, line 32, at end insert—

<( ) an order under section (*European evidence warrants*)(1),>

Kenny MacAskill

186 In section 143, page 138, leave out line 33

Kenny MacAskill

187 In section 143, page 138, line 33, at end insert—

<( ) an order under section 146(1) containing provisions which modify any enactment (including this Act), or>

Kenny MacAskill

188 In section 143, page 138, line 34, leave out <146(1) or>

Robert Brown

392 In section 143, page 138, line 35, at end insert <or

( ) an order under section 148(1) bringing into force section 17(1), (2) or (3),>

Robert Brown

549 In section 143, page 138, line 35, at end insert <or

( ) an order under section 148(1) bringing into force section 38(1), (2), (3) or (4),>

Schedule 5

Kenny MacAskill

189 In schedule 5, page 151, line 35, at end insert—

<*The Libel Act 1792 (c.60)*

The Libel Act 1792 is repealed.

The Criminal Libel Act 1819 (c.8)

The Criminal Libel Act 1819 is repealed.

The Defamation Act 1952 (c.66)

In the Defamation Act 1952, section 17(2) is repealed.>

Kenny MacAskill

451 In schedule 5, page 152, line 10, at end insert—

<*The Law Officers Act 1944 (c.25)*

In section 2(3) of the Law Officers Act 1944 (Lord Advocate and Solicitor General for Scotland), for the words from “three” to the end substitute “287 of the Criminal Procedure (Scotland) Act 1995 (c.46)”.>

Kenny MacAskill

452 In schedule 5, page 152, line 12, leave out from <In> to <1974> and insert—

<( ) The Rehabilitation of Offenders Act 1974 is amended as follows.

( ) In section 1>

Kenny MacAskill

453 In schedule 5, page 152, line 15, at end insert—

<( ) In section 6(6)(bb) (convictions in service disciplinary proceedings), for “the Schedule” substitute “Schedule 1”.

( ) The Schedule (service disciplinary proceedings) is renumbered as Schedule 1.>

Kenny MacAskill

190 In schedule 5, page 152, line 24, at end insert—

<*The Incest and Related Offences (Scotland) Act 1986 (c.36)*

The Incest and Related Offences (Scotland) Act 1986 is repealed.>

Kenny MacAskill

191 In schedule 5, page 153, line 3, after <89> insert <, 111>

Kenny MacAskill

192 In schedule 5, page 153, line 3, at end insert—

<*The Trade Union and Labour Relations (Consolidation) Act 1992 (c.52)*

In section 243(4)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 (restriction of offence of conspiracy: Scotland), the words “or sedition” are repealed.>

Kenny MacAskill

193 In schedule 5, page 153, line 12, at end insert—

<*The Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40)*

In Schedule 4 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (minor and consequential amendments), in paragraph 44, sub-paragraph (2) is repealed.>

Kenny MacAskill

386 In schedule 5, page 153, line 35, at end insert—

<In section 11 (certain offences committed outside Scotland)—

(a) in subsection (3), for “proceeded against, indicted” substitute “prosecuted”,

(b) in subsection (4), for “dealt with, indicted” substitute “prosecuted”.>

Kenny MacAskill

454 In schedule 5, page 153, line 35, at end insert—

<In section 17A (right of person accused of sexual offence to be told about restriction on conduct of defence: arrest), in subsection (1)—

(a) for paragraphs (za) and (a) substitute—

“(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,”, and

(b) in paragraph (c), for the words from “preliminary” to “trial” substitute “hearing”.>

Kenny MacAskill

512 In schedule 5, page 153, line 35, at end insert—

<In section 18(8)(c) (power to take prints etc. under authority of a warrant unaffected by section), for “prints, impressions” substitute “relevant physical data”.

In section 19(1)(b) (samples etc. taken from person convicted of offence), the words “impression or”, in both places where they occur, are repealed.>

Kenny MacAskill

513 In schedule 5, page 154, line 4, at end insert—

<Section 20 (use of prints, samples etc.) is repealed.>

Kenny MacAskill

514 In schedule 5, page 154, line 5, at end insert—

<In section 23A (bail and liberation where person already in custody)—

(a) in each of subsections (1) and (4), for “23 or 65(8C)” substitute “23, 65(8C) or 107A(2)(b)”, and

(b) in subsection (3), for “22A(3) or 23(7)” substitute “22A(3), 23(7) or 107A(2)(b)”.>

Kenny MacAskill

455 In schedule 5, page 154, line 5, at end insert—

<In section 35 (judicial examination), in subsection (4A)—

(a) for paragraphs (za) and (a) substitute—

“(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,”, and

(b) in paragraph (c), for the words from “preliminary” to “trial” substitute “hearing”.>

Kenny MacAskill

456 In schedule 5, page 154, line 42, at end insert—

<In section 66 (service and lodging of indictment etc.), in subsection (6A)(a)—

(a) for sub-paragraphs (zi) and (i) substitute—

“(i) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings (including at any commissioner proceedings) may be conducted only by a lawyer,”, and

(b) in sub-paragraph (iii), for the words from "preliminary" to "trial" substitute "hearing".

In section 71 (first diet)—

(a) in subsection (A1), for the words "his defence at the trial" substitute "the conduct of his case at any relevant hearing in the course of the proceedings",

(b) in subsection (B1)(c), for the words "before the trial diet" substitute "in relation to any hearing in the course of the proceedings",

(c) in subsection (1A)(a), for "the trial" substitute "any hearing in the course of the proceedings",

(d) in subsection (1B)(a), for "the trial" substitute "any hearing in the course of the proceedings",

(e) in subsection (5A)(b), for the words "his defence at the trial" substitute "the conduct of his case at any relevant hearing in the course of the proceedings", and

(f) after subsection (7), insert—

"(7A) In subsections (A1) and (5A)(b), "relevant hearing" means—

(a) in relation to proceedings mentioned in paragraph (a) of subsection (B1), any hearing at, or for the purposes of, which a witness is to give evidence,

(b) in relation to proceedings mentioned in paragraph (b) of that subsection, a hearing referred to in section 288E(2A),

(c) in relation to proceedings mentioned in paragraph (c) of that subsection, a hearing in respect of which an order is made under section 288F.".>

Kenny MacAskill

457 In schedule 5, page 155, line 3, at end insert—

<In section 79 (preliminary pleas and preliminary issues), in subsection (2)(b)(ii), after "under section" insert "22ZB(3)(b),".>

Kenny MacAskill

458 In schedule 5, page 155, line 23, at end insert—

<In section 140 (citation), in subsection (2A)—

(a) for paragraph (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings (including at any commissioner proceedings) may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words "his defence at the trial" substitute "the conduct of his case at, or for the purposes of, the hearing".

In section 144 (procedure at first diet), in subsection (3A)—

(a) for paragraph (a) substitute—

“(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,”, and

(b) in paragraph (c), for the words “his defence at the trial” substitute “the conduct of his case at, or for the purposes of, the hearing”.

In section 146 (plea of not guilty), in subsection (3A)—

(a) for paragraph (a) substitute—

“(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,”, and

(b) in paragraph (c), for the words “his defence at the trial” substitute “the conduct of his case at, or for the purposes of, the hearing”.>

Kenny MacAskill

414 In schedule 5, page 155, line 31, leave out paragraphs 35 to 39

Kenny MacAskill

515 In schedule 5, page 157, line 8, at end insert—

<*The Offensive Weapons Act 1996 (c.26)*

In the Offensive Weapons Act 1996, section 5 is repealed.>

Kenny MacAskill

194 In schedule 5, page 157, line 8, at end insert—

<*The Defamation Act 1996 (c.31)*

In the Defamation Act 1996, section 20(2) is repealed.>

Kenny MacAskill

195 In schedule 5, page 157, line 10, leave out paragraph 44 and insert—

<(1) The Crime and Punishment (Scotland) Act 1997 is amended as follows.

(2) In section 9 (power to specify hospital unit), in subsection (1)(a), for “insane” substitute “found not criminally responsible or unfit for trial”.

(3) In section 13 (increase in sentences available to sheriff and district courts), subsection (2) is repealed.

(4) In section 56 (powers of the court on remand or committal of children and young persons), subsection (3) is repealed.>

Kenny MacAskill

196 In schedule 5, page 157, line 28, at end insert—

<*The Legal Deposit Libraries Act 2003 (c.28)*

Section 10 of the Legal Deposit Libraries Act 2003 (exemption from liability: activities in relation to publications) is amended as follows—

(a) in subsection (1), the words “, or subject to any criminal liability,” are repealed,

(b) in subsection (2)(a), the words “in the case of liability in damages” are repealed,

(c) in subsection (3), the words “, or subject to any criminal liability,” are repealed,

(d) in subsection (4)(a), the words “in the case of liability in damages” are repealed,

(e) in subsection (6)(a), the words “, or subject to any criminal liability,” are repealed, and

(f) in subsection (8), the words “and criminal liability” are repealed.>

Kenny MacAskill

459 In schedule 5, page 157, line 36, at end insert—

<*The Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5)*

In the Criminal Procedure (Amendment) (Scotland) Act 2004 the following provisions are repealed—

(a) in section 4 (prohibition on accused conducting case in person in certain cases), subsection (4),

(b) section 17 (bail conditions: remote monitoring of restrictions on movements), and

(c) in the schedule (further modifications of the 1995 Act), paragraph 55.>

Kenny MacAskill

695 In schedule 5, page 158, line 32, at end insert—

<In section 74 (appointment of stipendiary magistrates), subsection (6) is repealed.

After section 74 insert—

“**74A Exercise of functions by stipendiary magistrates**

(1) A stipendiary magistrate may, by reason of holding that office—

(a) exercise the same judicial and signing functions as are exercisable by a JP,

(b) do so in the same manner as a JP (including by using the title of office of JP).

(2) For the purpose of subsection (1)—

(a) the acts of a stipendiary magistrate are valid as if the magistrate were a JP,

(b) it does not matter if an enactment from which a JP derives authority to act in a specific case does not bear to give equivalent authority to a stipendiary magistrate.

(3) However, subsections (1) and (2) are subject to any provision of an enactment which expressly excludes a stipendiary magistrate from acting in a specific case.

(4) This section does not limit any other functions of a stipendiary magistrate (in particular, those exercisable in that capacity only).”.

In section 76 (signing functions)—

(a) in subsection (2), for "signing functions in the same manner as" substitute "the same signing functions as are exercisable by",

(b) subsection (4) is repealed.>

Kenny MacAskill

197 In schedule 5, page 158, line 36, at end insert <and

(ii) sub-paragraph (b) is repealed.>

Kenny MacAskill

387 In schedule 5, page 159, line 12, at end insert—

<*The Sexual Offences (Scotland) Act 2009 (asp 9)*

In section 55(7) of the Sexual Offences (Scotland) Act 2009 (offences committed outside the United Kingdom), for "proceeded against, indicted" substitute "prosecuted".>

Kenny MacAskill

198 In schedule 5, page 159, line 14, leave out <134> and insert <156>

Criminal Justice and Licensing (Scotland) Bill

7th Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- a list of any amendments already debated;
- the text of amendments to be debated on the seventh day of Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

Conditions to which licences under the 1982 Act are to be subject
168

Licensing – powers of entry etc. (definition of "authorised civilian employee")
169

Licensing of metal dealers
385

Licensing of street trading – food hygiene certificates
170

Licensing of market operators
171, 172, 2, 3, 4

> *Notes on amendments in this group*
> Amendment 172 pre-empts amendments 2 and 3

Control of lap dancing and other adult entertainment venues
516

Applications for licences
173

Provisions to be considered as part of the Alcohol etc. (Scotland) Bill
174, 182, 186

Premises licence applications
460, 542, 176, 180

Reviews of premises licences – notification of determinations
175

Premises licence – minor variations
547

Premises licence – transfer
550

Premises licences – connected persons and interested parties
693

Provisional premises licences
543

Consumption of alcohol on licensed premises outwith licensed hours
548

Occasional licences
539

Extended hours applications – notification period
449

Personal licence applications
177, 178, 181

24 hour licensing
698

Appeals against decisions of licensing board
179

Liability for offences under 2005 Act
694

Powers of Licensing Standards Officers
699

Corruption in public bodies
183

Orders and regulations – circumstances in which affirmative procedure required
187, 188

Incest and related offences
190

Criminal law – revision
191, 193

Breach of undertakings – consequential modification
457

Exercise of functions by stipendiary magistrates
695

Amendments already debated

Community payback orders – consequential modifications
With 342 – 414

Mutual recognition of judgments and probation decisions
With 105 – 184

Presumption against short periods of imprisonment or detention
With 100 – 392

Abolition of offences of sedition and leasing-making
With 114 – 189, 192, 194, 196

People trafficking (and consequential provision)
With 371 – 386, 387

Clarification of existing offence prohibiting the carrying of offensive weapons
With 109 – 515

Children – age of criminal responsibility and minimum age of prosecution
With 379 – 549

Convictions in other UK or EU jurisdictions
With 518 – 540

Bail conditions – remote monitoring requirements
With 132 – 197

Prosecution on indictment – Scottish Law Officers
With 421 – 451

Prohibition of personal conduct of case by accused
With 429 – 454, 455, 456, 458, 459

Crown appeals
With 462 – 514

Retention of samples etc. – adults
With 478 – 512, 513

European evidence warrants
With 442 – 450

Closure of premises associated with human exploitation etc. (minor corrections etc.)
With 138 – 198

Rehabilitation of offenders – spent alternatives to prosecution
With 447 – 452, 453

Mental disorder and unfitness for trial
With 24 – 195

JUSTICE COMMITTEE

EXTRACT FROM THE MINUTES

16th Meeting, 2010 (Session 3)

Tuesday 11 May 2010

Present:

Bill Aitken (Convener)	Robert Brown
Bill Butler (Deputy Convener)	Aileen Campbell (Committee Substitute)
Angela Constance	Cathie Craigie
Nigel Don	James Kelly

Also present: Sandra White. Apologies were received from Stewart Maxwell.

Criminal Justice and Licensing (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 7).

The following amendments were agreed to (without division): 168, 169, 170, 173, 174, 175, 693, 176, 539, 449, 177, 178, 179, 694, 699, 180, 181, 182, 183, 184, 540, 450, 186, 187, 188, 189, 451, 452, 453, 190, 191, 192, 193, 386, 454, 512, 513, 514, 455, 456, 457, 458, 414, 515, 194, 195, 196, 459, 695, 197, 387 and 198.

The following amendments were agreed to (by division):

385 (For 5, Against 3, Abstentions 0)
2 (For 5, Against 0, Abstentions 3)
3 (For 5, Against 0, Abstentions 3)
4 (For 5, Against 0, Abstentions 3).

The following amendments were disagreed to (by division):

171 (For 3, Against 5, Abstentions 0)
172 (For 3, Against 5, Abstentions 0)
548 (For 1, Against 7, Abstentions 0).

The following amendments were moved and, with the agreement of the Committee, withdrawn: 516, 550, 543 and 698.

The following amendments were not moved: 460, 542, 547, 392 and 549.

Sections 124, 126, 127, 130, 131, 132, 133, 135, 137, 138, 139, 141, 144, 145, 146, 147 and 148 and the long title were agreed to without amendment.

Sections 121, 122, 128, 134 and 136, schedule 4, section 143 and schedule 5 were agreed to as amended.

The Committee completed Stage 2 consideration of the Bill.

Criminal Justice and Licensing (Scotland) Bill: Stage 2

10:05

The Convener: Agenda item 2, which is the seventh day of stage 2 proceedings on the Criminal Justice and Licensing (Scotland) Bill, is our principal business today. The committee aims to complete stage 2 today. That may or may not be possible; we shall see what progress we make.

I welcome the Cabinet Secretary for Justice, Kenny MacAskill MSP. As is usual on such occasions, he is accompanied by Scottish Government officials, who may alternate, depending on the nature of the business that is to be discussed.

Members should have their copies of the bill, the seventh marshalled list of amendments and the seventh list of groupings of amendments for consideration.

Section 121—Conditions to which licences under 1982 Act are to be subject

The Convener: Amendment 168, in the name of the cabinet secretary, is in a group on its own.

The Cabinet Secretary for Justice (Kenny MacAskill): Amendment 168 is a technical amendment to section 121 to make the power to prescribe mandatory conditions in respect of licences under the Civic Government (Scotland) Act 1982 subject to the affirmative procedure. The amendment follows comments that were received from the Subordinate Legislation Committee.

I move amendment 168.

Amendment 168 agreed to.

Section 121, as amended, agreed to.

Section 122—Licensing: powers of entry and inspection for civilian employees

The Convener: Amendment 169, in the name of the cabinet secretary, is in a group on its own.

Kenny MacAskill: Amendment 169 is purely a minor technical amendment that tidies up provisions in section 122 by removing an unnecessary reference to section 29 of the 1982 act.

I move amendment 169.

Amendment 169 agreed to.

Section 122, as amended, agreed to.

Section 123—Licensing of metal dealers

The Convener: Amendment 385, in the name of Robert Brown, is in a group on its own.

Robert Brown (Glasgow) (LD): Amendment 385 would delete section 123. In essence, the bill as it stands seeks to make the licensing of metal dealers optional, but I am not convinced that that is a particularly good idea, particularly in a time of recession, and I am not—so far at least—satisfied that the case has been made for it. I am all in favour of local discretion, but I am not sure that things should be done in such a way in the area that we are discussing.

The licensing and control of metal dealers seems to me to be very useful. We are talking about a trade that can deal with the proceeds of certain types of crime. The area is well regulated at the moment, and it should continue to be.

The committee heard evidence on the matter at stage 1. Several councils commented it would be odd to make such a change at a time of economic downturn. I am not persuaded of the need for the change, which is why I seek to delete section 123.

I move amendment 385.

The Convener: I have a degree of sympathy with the amendment. It is well known that the theft of precious metals is a major criminal activity; the theft of base metals should also be of concern. Criminal acts are, of course, a matter for the criminal courts, but I think that an additional sanction should be present that would result in a metal dealer who was guilty of reset potentially losing his or her licence. That in itself would act as a deterrent. I am therefore minded to support the amendment, unless the cabinet secretary can persuade me otherwise.

Kenny MacAskill: We understand the concerns that the convener and Robert Brown have expressed, but let me explain why we do not support amendment 385.

Amendment 385 seeks to remove from the bill provisions that were recommended to the Scottish Government by local authorities and the police as a means of future-proofing the licensing of metal dealers. The effect of the amendment would be to maintain the 20-year-old ceiling of £100,000 annual turnover above which licensing boards are not able to license the operation of metal dealers. It may help if I explain that we will ensure in the transitional arrangements for the commencement of section 123 that no local authority will be left without a licensing scheme if it wishes to maintain one. In addition, any local authority that chooses to move to the optional scheme using the new powers that are contained in section 123 must consult the relevant bodies in their area, in particular the police, before they are able to do so.

It should be left open to local authorities to remove licensing burdens should circumstances—both social and economic—no longer require them. In many areas, local authorities might decide to continue with the current licensing arrangements. However, local authorities should have the flexibility to move to an optional licensing regime for metal dealers if they consider that appropriate for their areas. That is why we oppose Robert Brown's amendment 385, although we recognise the underlying concern.

Robert Brown: I intend to press amendment 385. A technical issue might relate to the £100,000 limit, but it could be dealt with in another way, if that were necessary.

The law of unintended consequences applies. It is all very well for one council to decide that it does not need a metal dealers licensing regime, but that has implications for surrounding councils, particularly as council areas are fairly small. For example, Glasgow City Council is surrounded by several other authorities. One can readily see that people who want to operate at the dubious end of the market might move to a surrounding local authority's area if it took a slightly more lax view than Glasgow did. Section 123 has considerable dangers, so I will press amendment 385.

The Convener: The question is, that amendment 385 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Campbell, Aileen (South of Scotland) (SNP)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 385 agreed to.

Section 124 agreed to.

After section 124

The Convener: The next group is entitled "Licensing of street trading—food hygiene certificates". Amendment 170, in the cabinet secretary's name, is the only amendment in the group.

Kenny MacAskill: Amendment 170 updates references to food hygiene legislation in the Civic Government (Scotland) Act 1982. Section 39 of the 1982 act provides that applications for a street trader's licence when the activity includes a food business and involves the use of a vehicle, kiosk or moveable stall must be refused by the licensing authority unless a food hygiene certificate is produced. The food hygiene certificate must be signed on the food authority's behalf and must say that the premises comply with the requirements of regulations that are made under section 16 of the Food Safety Act 1990. However, food safety regulations are now made under section 2(2) of the European Communities Act 1972 in order to implement various European Union regulations, rather than under section 16 of the 1990 act. The result is that the reference in the 1982 act no longer works properly.

Amendment 170 allows the Scottish ministers to specify in an order the requirements with which a food hygiene certificate is to state compliance. That will allow the references to keep up with changes in food safety regulation.

I move amendment 170.

The Convener: The issue is fairly straightforward.

Amendment 170 agreed to.

Section 125—Licensing of market operators

The Convener: Amendment 171, in the cabinet secretary's name, is grouped with amendments 172 and 2 to 4. I draw members' attention to the pre-emption information in the list of groupings.

Kenny MacAskill: Amendments 171 and 172 implement the commitment that we made in December 2009 to reinstate the blanket exemption that charities enjoy from the market operator provisions of the 1982 act. As we said, the licensing provisions in the bill were the result of recommendations from an independent task group that the previous Administration established and which undertook an extensive review of civic government licensing throughout Scotland. The group recommended that charities should no longer be exempt from applying for a market operator's licence and that exemption should be left to licensing authorities' discretion.

However, we received many representations and understood the concerns that the change in the bill would have an impact on fundraising events in general. We therefore decided that the proposal should not proceed, and our amendments 171 and 172 deliver on that.

We acknowledge the fact that Cathie Craigie's amendment 2 would achieve substantially the same effect. However, the clear advantage of our amendments 171 and 172 is that they leave section 125 in a neater form.

Amendment 3 seeks to remove section 125(3). That provision implements another recommendation of the task group to ensure that licensing authorities are able to regulate car boot sales. The current reference in section 40(4) of the 1982 act to sale "by retail" has caused doubt about licensing authorities' ability to do that. Unlike the charities exemption, the provision in the bill has raised no concerns and we are not sure why Cathie Craigie might want to remove it. The retention of the charities exemption means that only commercially organised car boot sales could ever come within the scope of the licensing regime. We therefore oppose amendment 3.

Amendment 4 would remove section 125 entirely. We believe that section 125, in its shortened form, should be retained and we therefore oppose amendment 4.

I move amendment 171.

10:15

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I call on members of the committee to support amendments 2 to 4 and to reject the Government's amendments 171 and 172.

When the committee took evidence during its stage 1 consideration of the bill, it was clear that charitable organisations were concerned that they could find themselves facing a charge if they wanted to put on a summer fair or a garden fête. There was concern about that across the board, particularly among religious groups, uniformed organisations and sporting groups. My amendments would take us back to the status quo and the position that is currently enjoyed by charitable organisations.

Amendment 171 would leave in section 125(3) the reference to sale "by retail". The committee will confirm that, during stage 1, it was unclear to us just what "by retail" meant. I do not think that the bill would be improved by leaving that provision as it is. The phrase "by retail" could refer to an organisation going along to a wholesaler and buying things to resell at its garden fête or whatever. As the purpose and effect notes that have been provided by the Government acknowledge, licensing authorities already have the power, under existing legislation, to license car boot sales if that is an issue of concern. It would be up to the Government to provide clarity on that through guidance, if necessary. If some local authorities are using the existing legislation to license sellers at car boot sales, what is to prevent all local authorities from doing that? I do not accept the need to leave the phrase "by retail" in the bill.

Robert Brown: I support Cathie Craigie's amendments. The original proposal to require voluntary sector or non-commercial groups to obtain a market trader's licence would have been a bureaucratic nonsense in 95 per cent of instances. There was, in any event, some uncertainty about how far the council's discretion to allow exemptions would extend if the change were made. Restoration of the status quo through the removal of section 125 seems to be the simplest solution and would give relief to many voluntary sector groups.

In defence of the Government's initial position, it is fair to say that there could be issues with large-scale events such as free concerts and the like. I would be interested to know whether the Government's thinking on that issue has advanced.

Car boot sales vary from the large-scale events that take place at places such as Polmadie to much smaller events that are organised by churches, care homes and other such organisations. There must be a degree of proportionality to any action that is taken in relation to such things. In recent years, there has been quite a lot of legislation that has increased the burdens on voluntary sector and local organisations, and I do not think that we should add what the Government proposes to those burdens.

The Convener: If no other members wish to contribute, I too will speak to the amendments.

Government amendment 171 seems a genuine effort to correct a failure where the existing bill is simply not proportionate. Cathie Craigie highlighted those difficulties in speaking to amendment 2. Clearly, where an event that is held for whatever purpose is attended by a large number of individuals, the local authority will require to involve environmental health officers, building control and so on. Therefore, it is totally appropriate that such events should be subject to licensing. On the other side of the argument, one cannot equate an event such as T in the Park with a church flower show. Clearly, we need to do something, as the bill as it stands is simply not an appropriate response to what has been a particularly limited difficulty.

Having heard what the cabinet secretary said, I recognise that amendment 171 is a genuine attempt to remedy matters, but at this stage I am minded to support amendment 2 in the name of Cathie Craigie. This might not be my last word on the matter, as the wording could be tidied up again at stage 3. There might also be problems for car boot sales, as Cathie Craigie articulated. That is my position on the matter in the meantime.

Kenny MacAskill: Obviously, the issue has fundamentally been driven by the Convention of Scottish Local Authorities, and we are more than happy to enter into discussions with COSLA to ensure that we strike the appropriate balance. As the convener pointed out, we need to ensure that we can deal with commercial enterprises—including those that run car boot sales for considerable profit and which sometimes even masquerade as charitable ventures. However, at the same time, we need to protect church flower shows and other events for worthy charitable organisations, which is the tenor of the argument made by Cathie Craigie and Robert Brown. Obviously, we are happy to discuss the issue with the committee and with COSLA, both at present and hereafter.

The Convener: The question is, that amendment 171 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Campbell, Aileen (South of Scotland) (SNP)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)

Against

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 171 disagreed to.

The Convener: Before proceeding, I point out that, if amendment 172 is agreed to, I cannot call amendments 2 and 3 on the grounds of pre-emption.

Amendment 172 moved—[Kenny MacAskill].

The Convener: The question is, that amendment 172 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Campbell, Aileen (South of Scotland) (SNP)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)

Against

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 172 disagreed to.

Amendment 2 moved—[Cathie Craigie].

The Convener: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Abstentions

Campbell, Aileen (South of Scotland) (SNP)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 0, Abstentions 3.

Amendment 2 agreed to.

Amendment 3 moved—[Cathie Craigie].

The Convener: The question is, that amendment 3 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Abstentions

Campbell, Aileen (South of Scotland) (SNP)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 0, Abstentions 3.

Amendment 3 agreed to.

Amendment 4 moved—[Cathie Craigie].

The Convener: The question is, that amendment 4 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Abstentions

Campbell, Aileen (South of Scotland) (SNP)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 0, Abstentions 3.

Amendment 4 agreed to.

Sections 126 and 127 agreed to.

After section 127

The Convener: The next group is on control of lap-dancing and other adult entertainment venues. Amendment 516, in the name of Sandra White, is the only amendment in the group.

Sandra White (Glasgow) (SNP): I wish to concentrate on three areas: what the amendment will do; what it will not do; and why the amendment is necessary. Even though it is early in the morning, I would like to mix things up a bit and start by talking about what the amendment will not do.

The committee has received submissions from theatre companies and Scottish Ballet. However, amendment 516 does not affect theatrical performances at all. That is not the intention. Proposed new section 45A(6) of the 1982 act defines "relevant entertainment" as

> "any live performance; or ... any live display of nudity, which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means)."

I draw the committee's attention to that, because the wording relates specifically to lap-dancing clubs. Theatrical performances are not "solely or principally" for that particular purpose.

In response to representations that have been made to me, I point out that local authorities would not be forced to implement the legislation, if amendment 516 is agreed to. The provision is not mandatory; there is no blanket ban. However, local authorities would have the choice of implementing the legislation if they so wished. At the moment, local authorities' regulation in this area is based on four grounds and it is difficult for them to get the outcome that they want; usually they have to appeal the decision, and it goes to the courts, which costs them a lot of money. Those four grounds are: preventing crime and disorder; preventing public nuisance; protecting children from harm; and securing public safety. It is difficult for councils to prove cases on those grounds, and members of the public who want to register objections have to reside within the area, which makes it difficult for some people to do so. I live in an area that has lap-dancing clubs and I, along with others, have given evidence to the local court in Glasgow. However, we have found it difficult to have our objections passed through.

Lap-dancing clubs objectify women. "Safer Lives: Changed Lives", which was published by the Scottish Government and the Convention of Scottish Local Authorities, recognises activities that are undertaken as part of commercial sexual exploitation, including table dancing and lap dancing, as forms of violence against women that have been shown to be

> "harmful for the individual women involved and have a negative impact on the position of all women through the objectification of women's bodies."

I have visited lap-dancing clubs and have spoken to men who were there. I asked a group of young chaps from Belfast what they thought of the girls in the club and was told that they thought they were "slags" and "slappers". When I asked them how they would feel if their sister, girlfriend or wife were performing the dance, they said that there was no way that anyone that they knew would do that. You can see the difference in how the girls are perceived by men who visit those places.

I do not want to take up too much time, in case members want to ask questions. I believe that amendment 516 will be beneficial to women and will tackle the perception that men have of them. It will also enable local authorities to make a legitimate choice about whether they wish this type of entertainment—I would place inverted commas around that word—to be allowed to operate in their areas.

I move amendment 516.

10:30

Robert Brown: I think that Sandra White has put forward her case reasonably and logically, but amendment 516 gives rise to some issues. First, the committee has not taken significant oral evidence on the issue that it deals with—although we have received quite a volume of written evidence on it—so the proposal has not been tested. I confess that I am feeling my way on the issue.

Sandra White tried to deal with the objection that her amendment might apply to theatrical performances. I hear what she says about the terms of subsection (6) of proposed new section 45A of the 1982 act, but I am not sure that the proposed provision provides as clear an exemption as one would hope. It says that relevant entertainment

> "must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience".

That takes us into quite complex territory and makes for a difficult situation, unless an exemption is provided specifically for theatrical performances. The interplay between morality and theatrical or literary issues has a long history, which goes right back to "Lady Chatterley's Lover".

My second point is about what might be described as grandfather rights. As I understand it, there are a number of existing lap-dancing clubs in Glasgow and Edinburgh. According to information in the paperwork, no new applications for such clubs have been granted since 2004, so the position does not appear to be changing. There does not appear to be a problem with local authorities knocking back new applications, but I would like to know how amendment 516 would apply to existing establishments, in which people have invested money. How those establishments would be dealt with is an issue.

Another issue is unintended consequences. A submission from a chap called Allan Balsillie—I do not know who he is; the submission does not provide any background—makes what seems to me to be the valid point that

> "All that would be required is a business element, a degree of nudity and an audience of one."

If that is the case—I think that I am right in saying that that would be the case, as I read the proposed provision—it would, as Allan Balsillie says, apply to prostitution and activities of that kind. We have already had a debate, in a different context, about moving into that area. Many of us would agree that there is limited justification for doing so, but it is an area in which more substantial investigation, background research and perhaps an inquiry would be required to allow us to arrive at a solution. I would be interested to know whether amendment 516 would apply to such situations; it seems to me that it would.

My final point is about whether the amendment is necessary at all. COSLA and the Law Society of Scotland express doubts about that. They say that, in their view, the Civic Government (Scotland) Act 1982 provides adequate powers in this area. Given that we are talking about provisions that would amend sections of other pieces of legislation, I am not entirely clear about how everything fits together, but when two reputable bodies that are closely involved in the legalities of the issue and the council end of it express such views, we must take them seriously.

I have a number of concerns about amendment 516, which are to do with unintended consequences and other implications, grandfather rights and the views that have been expressed by the responsible bodies, which seem to go against us giving a positive response to the amendment.

James Kelly (Glasgow Rutherglen) (Lab): In lodging her amendment, Sandra White has raised some important issues. It is clear that the objective behind it is to restrict inappropriate entertainment in venues such as lap-dancing clubs. As Sandra

White said, we do not want to promote situations in which women are regarded with a lack of dignity. From that point of view, I sympathise with her objectives.

However, there are issues with the drafting of amendment 516. I have some sympathy with what Robert Brown said. We have not taken any evidence on the issue, and some of the submissions are contradictory. I cannot say that I am qualified to come down on one side or the other, but I note from submissions such as the one from Scottish Ballet that what is proposed could have unintended consequences for the entertainment arena. Therefore, Sandra White might want to reconsider her amendment, have appropriate discussions and lodge a redrafted version of it at stage 3. As amendment 516 is currently drafted, I do not feel able to support it.

The Convener: The subject matter of amendment 516 is a particularly seedy and unattractive aspect of the entertainment industry, and I know that Sandra White has, properly, spent some time on the issue. That said, I have serious reservations about the amendment on three grounds.

First, I do not think that the issue around theatrical performances has been satisfactorily resolved. I will listen to what Sandra White says on that point in summing up, but I think that the amendment as drafted is deficient in that respect. Secondly, the amendment, although certainly arguable, is not in terms of law strictly speaking necessary. I refer Sandra White to section 23 of the Licensing (Scotland) Act 2005, which I think covers the matter adequately—this is a matter for local authorities. Thirdly, I have a problem with the matter coming before the committee in connection with this bill, although I am mindful of the difficulty that Sandra White faced in that the bill, which is becoming more comprehensive by the week, was probably the only place in which she could have this argument ventilated. Nevertheless, it seems to me that the matter is more for local government; it is more a matter of the licensing function. Bearing in mind the extraneous matters that have come before the committee under this heading, I understand why it is here, but it would rest much more comfortably with local government legislation and should be a matter for the Local Government and Communities Committee.

Kenny MacAskill: The Government's position echoes that of Mr Brown and Mr Kelly. We understand and support Sandra White's wish for communities to be able to refuse to host venues that provide such entertainment, but we have significant concerns about amendment 516. Although we support the policy intention behind the amendment, in giving local authorities that discretion, as Mr Brown articulated there are drafting difficulties with the amendment in its current form, which will require to be addressed.

I therefore ask Sandra White to withdraw amendment 516, with an offer from us to assist and support a stage 3 amendment that clarifies exactly when an adult entertainment licence is required and the premises for which it is required. We hope that that will address the concerns of Mr Brown and Mr Kelly, and maintain the ethos of what Ms White wishes to achieve.

Sandra White: I have listened to members and the cabinet secretary. The convener mentioned local government legislation, but it has been difficult to find a place in that legislation where I can add this provision. Legislation exists, but local authorities are certainly not as able to implement it as they would like to be. That is why an amendment is needed to ensure that there is zero tolerance of lap-dancing clubs.

Mr Brown referred to the chap who mentioned the prostitution issue. I do not think that it has anything to do with that. The chap also said in his submission that Glasgow wishes to put forward its morality with a blanket ban throughout Scotland; I have explained that that is not absolutely true. The ethos of amendment 516 is to enable local authorities—the provision is not mandatory—to choose whether they want lap-dancing clubs.

I will take up the cabinet secretary's offer and will be happy to work with him and the officials. On that basis, I wish to withdraw the amendment.

Amendment 516, by agreement, withdrawn.

Section 128—Applications for licences

The Convener: The next group is on applications for licences. Amendment 173, in the name of the cabinet secretary, is the only amendment in the group.

Kenny MacAskill: Amendment 173 amends section 128, which deals with applications for licences under the Civic Government (Scotland) Act 1982. Section 128 makes a number of changes to schedules to that act, one of which requires people who are applying for licences under the act to provide details of their date and place of birth on the application forms. For licence applications that are covered by part 2 of the 1982 act, there is a requirement to display a notice detailing various pieces of information about the licence application. In certain circumstances, a licensing authority must, following receipt of the licence application, publish a notice detailing pieces of information about that application. That is part of the licence application process.

The convener will recall writing to me in September last year, expressing concern that personal details of applicants could be placed in the public domain, as well as being used by the applicable statutory bodies to assist them with their background checks into applicants. In my written response of 7 September 2009, I indicated that the Government would expect local authorities to use the additional information that is provided in the application—that is, the applicant's date and place of birth—only for the purposes of assisting relevant authorities such as the police in looking into the background of the applicant.

Unfortunately, although our response of 7 September correctly summarised our policy, the effect of the provisions in section 128 was incorrectly summarised. We thank the committee for drawing the matter to our attention. Amendment 173 ensures that an applicant's date and place of birth will not be included in the notices that are required for the purposes of a licence application under part 2 of the 1982 act.

I move amendment 173.

The Convener: On the basis of the constructive response that the committee received from the Scottish Government, I do not think that the matter need be discussed further.

Amendment 173 agreed to.

Section 128, as amended, agreed to.

Section 129—Sale of alcohol to persons under 21 etc

The Convener: Amendment 174, in the name of the cabinet secretary, is grouped with amendments 182 and 186.

Kenny MacAskill: Amendments 174, 182 and 186 are necessary as a result of the Government's decision to introduce the Alcohol etc (Scotland) Bill. With some minor alterations, provisions dealing with the topics that are covered by sections 129 and 140 of the Criminal Justice and Licensing (Scotland) Bill are now included in the Alcohol etc (Scotland) Bill, which was introduced on 25 November 2009. Amendments 174 and 182 therefore seek to remove sections 129 and 140 from the Criminal Justice and Licensing (Scotland) Bill. Amendment 186 is consequential on amendment 182.

I move amendment 174.

Amendment 174 agreed to.

Section 130 agreed to.

After section 130

The Convener: The next group is on premises licence applications. Amendment 460, in my name, is grouped with amendments 542, 176 and 180. I will circumvent procedures by indicating that I will not move amendment 460.

Amendment 460 not moved.

The Convener: I would invite George Foulkes to speak to amendment 542, but he is not present. Mr Kelly can enlighten us.

James Kelly: I can indicate that George Foulkes wishes not to move amendment 542.

Kenny MacAskill: Amendment 176 updates references to food hygiene legislation in the Licensing (Scotland) Act 2005. Amendment 180 is a minor technical amendment to paragraph 5 of schedule 4.

We have had discussions with Capability Scotland, which probably explains why Mr Kelly will not move amendment 542. We are happy to work towards the ethos of what George Foulkes was seeking to achieve.

Section 131 agreed to.

After section 131

The Convener: The next group is on reviews of premises licences—notification of determinations. Amendment 175, in the name of the cabinet secretary, is the only amendment in the group.

Kenny MacAskill: Amendment 175 seeks to improve the transparency of the premises licence review process that is provided for in the Licensing (Scotland) Act 2005. First, it ensures that adequate notification of a licensing board's decision following a review hearing is given to the licence holder and to the person who applied for a review.

Secondly, the amendment ensures that, when a licensing board takes action against a licence holder following a review hearing, the licence holder is able to request a statement of reasons from the board. Such provisions already exist in the 2005 act in connection with the premises licence application process.

Finally, the amendment ensures that a statement of reasons can be requested by a person who applies for a review of the licence, whether or not any action is taken by the board following the review hearing.

I move amendment 175.

Amendment 175 agreed to.

Section 132 agreed to.

After section 132

Amendments 542 and 547 not moved.

The Convener: The next group is on premises licence—transfer. Amendment 550, in the name of Robert Brown, is the only amendment in the group.

10:45

Robert Brown: Amendment 550 is one of a number of amendments that have come to me and to other committee members through the licensed trade. They express what people in the trade see as issues of practical difficulty with the operation of the Licensing (Scotland) Act 2005 as opposed to the Licensing (Scotland) Act 1976.

I do not pretend to have expertise in the area, but it is right to put before the committee the views that have been given to me on the issue of licence transfers. It has been suggested that the practical and legal difficulties under section 34 of the 2005 act have not been as fully understood by the people dealing with them as perhaps they should be. The 2005 act provides that the transferee lodges an application for transfer in certain limited circumstances, such as when the premises licence holder has died, become incapacitated or insolvent, or when the business that is carried on in the licensed premises to which the licence relates is transferred. That is fairly straightforward in itself.

However, there are many circumstances in which those criteria cannot be satisfied, and it has been suggested that that gives rise to serious if not fatal consequences for the premises licence concerned. A useful example can be seen when company A owns licensed premises that it has let to company B, to a partnership, or to someone else. The premises licence is in the name of company B, who is the tenant or the subsidiary. The business finds that it can no longer continue, and the premises licence holder advises the owners that they are unable to trade further. They then renounce the lease, vacate the premises and hop it: they cannot be found and are not interested in what will happen thereafter. Even if they can be contacted, it might not be possible to reach agreement.

In such circumstances, the tenant and current licence holder has gone: they might not be contactable, they might not be interested in assisting with the transfer of the licence or whatever, or they might be seeking to hold the owners to ransom. The designated premises manager who is appointed by the premises licence holder might well also have left and have no interest in replacing themselves, so the premises cannot trade. The owners cannot apply for a new licence because they are not the licence holder. No one else can trade and the premises are left in limbo because the licence remains with the current premises licence holder. The terms of section 34(3) of the 2005 act are not satisfied because the licence holder has not died or has not become incapacitated or insolvent, and the company has not been dissolved or become insolvent. Without the support of the premises licence holder, there can be no transfer of the licence under section 33 of the 2005 act, and that can put the business and any related jobs at risk, too.

An application for a new premises licence is costly and time consuming; it would also be subject to overprovision assessment and other things of that sort. An application cannot be made for the same premises, because there cannot be two premises licences at the same time. The proposition is that the owner or other interested party, including perhaps financial institutions that have lent money, need to be able to apply for transfer of a premises licence in such circumstances. That argument seems to be reasonably persuasive. I am conscious that the matter is quite technical, and I am interested to hear the cabinet secretary's response.

I move amendment 550.

The Convener: As Robert Brown said, the matter is technical. However, it has the capacity to impact significantly on the operation of the licensed trade. We are in a little bit of a jam because the bill, as it stands, does not contain the appropriate level of flexibility. Two years might seem a long time to those of us round this table, but bearing in mind all the inevitable time-consuming exercises that have to be performed in the circumstances that Robert Brown described, it is not a significantly long time. I found Mr Brown's arguments fairly persuasive and I will listen with considerable interest to the cabinet secretary.

Kenny MacAskill: We are grateful to Robert Brown for lodging amendment 550 and we understand the spirit in which it is intended. Although the factual example to which he referred is true, it is the only instance that the Law Society and the licensed trade have been able to suggest to us would occur. Equally, it would not be the case that there would be two outstanding licences, as one would automatically fall.

We have doubts about amendment 550 because it could enable a licence transfer application to be made on the cessation of the business operating from licensed premises and that would restrict local communities and the police's ability to comment on the suitability of the premises to reopen. If a tenant who holds the premises licence simply ceases to trade and leaves, it is a contractual matter between the tenant and their landlord. We do not believe that primary legislation is the correct place to deal with such disagreements. The 2005 act enables the landlord to hold the premises licence. Alternatively, such situations could be dealt with through both parties' contractual arrangements. It should not be a matter for licensing boards.

That is why we ask Robert Brown to withdraw amendment 550. The matter that he mentioned is correct, but we do not believe that it occurs in practice. If the amendment were to be agreed to, licences could be transferred, which would restrict the licensing boards from having their say.

Robert Brown: I accept to some extent what the cabinet secretary says; I was concerned when I saw the purpose and effect notes about some of the possible implications that might emerge from the amendment. Against that background, I am prepared to seek to withdraw the amendment, but I would like some assurance from the cabinet secretary, if he is prepared to go that far, that he accepts that the example I gave causes some problems—it is perhaps an unusual example, but it happens nevertheless. Is he prepared to look further at that to see whether there is a way round the problem? As I said, although I do not want to impose on the bill technical amendments that I am not entirely confident will do what I want them to do, I want my concerns to be taken forward. If the cabinet secretary can give me that assurance, I will be prepared not to press amendment 550 today.

Kenny MacAskill: I am happy to give the assurance that we will look at the matter. Our understanding is that the best way of dealing with it is to ensure that the contractual arrangement entered into between the major company and the tenant specifies that if one goes, the licence falls automatically. We are happy to look at whether we can take other steps. Primarily, it is a case of ensuring that such considerations are part and parcel of every lease and contractual arrangement drawn up in respect of licensed premises.

Amendment 550, by agreement, withdrawn.

The Convener: The next group is on premises licences—connected persons and interested parties. Amendment 693, in the name of the cabinet secretary, is the only amendment in the group.

Kenny MacAskill: Amendment 693 is the first of two amendments that seek to address issues relating to vicarious responsibility for licensing offences. Amendment 694 will be dealt with in a later group.

Amendment 693 tackles a concern that was highlighted to us by the police that there is a tier of people and organisations responsible for the operation of licensed premises who cannot be held to account for the operation of licensed premises. The premises licence might be held by the property owner, but a tenant might be in control of operating the business on the premises. Alternatively, a management company with no property rights over the premises might be employed by the property owner to exercise management control over the business that is carried on in the premises.

However, at present the police are unable to make representations to licensing boards on the conduct of those groups or to take action against them if offences take place on the premises. Indeed, there is no requirement on the part of the licence holder to notify the licensing board of the existence of those groups.

Amendment 693 ensures that the licence holder must notify the existence of those "interested parties" to the licensing board. That would enable the board to consider the conduct of those parties in determining licence applications or considering whether to review an existing licence. Amendment 693 also seeks to ensure that any changes in the details of "connected persons" are notified to licensing boards, which will, in turn, forward the information to the chief constable. As a result, the licensing board and the police will be kept informed of the details of, for example, the partners of firms and the directors of companies that hold premises licences, which will enable a premises licence to be reviewed if the police or the board have concerns about the conduct of the partners or directors of licence-holding partnerships or companies.

I move amendment 693.

The Convener: A degree of vicarious liability applies in this provision. Does not existing licensing legislation deal with the matter already, given the separation of licences into premises and personal licences?

Kenny MacAskill: The answer is no. To some extent, this sits in the middle ground between premises and operating licences and the fact is that, if the amendment is not agreed to, we will not be able to deal with these related people. There is a lacuna here, if I can put it that way, and we are trying to close it to ensure that the boards and the police have this information.

The Convener: With that reassurance, I will proceed.

Amendment 693 agreed to.

The Convener: The next group is on provisional premises licences. Amendment 543, in the name of Robert Brown, is the only amendment in the group.

Robert Brown: Amendment 543 is not dissimilar to amendment 550 in that it emerges from comments that were made by the licensed trade on practical difficulties with the operation of the 2005 act. The trade believes that the Government has not fully understood the considerable implications of the current situation for jobs and investment in Scotland. It is claimed, for example, that the lack of a provisional premises licence akin to a site-only licence under the Licensing (Scotland) Act 1976 has meant that some major leisure projects have not progressed and there is concern that the same will happen in future. The trade makes the obvious point that that would be bad for jobs, investment and the industry.

Unlike site-only applications under the 1976 act, where the information provided could be sketchy and the board had little or no control over the final product, a premises licence has an operating plan that, in site-only format, can give a broad but clear indication of whether a proposed development is to be, say, a five-star international hotel, a specialist facility of some sort, a restaurant or whatever. The Government will remember that before a premises licence can even be applied for, planning permission must be granted to ensure that the council has considered and addressed any major concerns.

Without the option of a site-only-type provisional premises licence, all that developers can do is produce a full and detailed plan, obtain a building warrant for a finished product and then apply to the board, following which the proposals might or might not be accepted. However, it is alleged that the costs incurred in such preliminary considerations can for major projects easily run to six figures or more. Faced with the stark choice of constructing a new hotel, which requires a licence and will incur significant costs, or a retail park, a pension fund or developer will find the former a very unattractive option. Moreover, most projects do not have an agreed occupier and other deals have to be done before they can go ahead.

I do not usually lodge amendments that are so sympathetic to big developers, but the point seems to me to be valid. In any case, it will also be a considerable issue for smaller developments such as chain restaurants. Unlike the position with the 1976 act, under which the information provided was scant and controls were almost non-existent, the board would be able to see what was in the operating plan, which could have fairly broad parameters to begin with, and to decide whether the proposal fell within its own policies. Indeed, if any operational difficulties arose, boards would have a considerable number of options at their disposal.

I am subject to the Government's views but, as I say, a valid point has been made that requires to be answered. If I recall correctly, the committee also received at least some written evidence on the matter for its stage 1 report.

I move amendment 543.

James Kelly: I must be honest; I am not persuaded by amendment 543. Robert Brown has raised a reasonable issue and I appreciate that the licensed trade needs certainty about some applications before building work can progress, but I do not think that the proposed approach to handling applications is correct. The provisional licence would be granted on the basis of a brief outline, but when the licence came to be confirmed the licensing board's power to refuse the application would be restricted and the public and the police would have no input into the discussion on whether to confirm the licence. On that basis, I oppose amendment 543.

11:00

Nigel Don (North East Scotland) (SNP): I have some sympathy with the position that Robert Brown has outlined. It was not very long ago that I sat on a licensing board. In my experience, there are applications in relation to which it is fairly clear what the licensed premises are about, particularly if we are talking about a hotel, so the current situation, whereby a detailed application is required, goes a bit too far. However, amendment 543 would go too far in the other direction.

There might be some middle ground that ought to be explored. I am interested to hear what the Government has to say. There is a point lurking behind amendment 543, which we need to address if we are to achieve some kind of balance.

The Convener: Amendment 543 is yet another arguable amendment. A two-year provisional licence might not be appropriate in respect of larger-scale developments. The last thing that any member wants to do is to inhibit development, in particular in the difficult economic times that are likely to be faced by the licensed trade and everyone else.

I understand James Kelly's argument. He made a valid point. The matter is difficult. I look to the Government to give a view, on the basis of which I will make my determination.

Kenny MacAskill: I appreciate that Robert Brown is putting forward, as a courtesy, the industry's concerns. There are matters to clarify. Mr Don is right to say that sometimes a hotel is a hotel. However, a short distance from where we sit there are establishments that started out as hotels but are now superpubs and there are establishments that started out as entertainment complexes that are now super-superpubs—if we can call them that. Matters are not always straightforward, which is why we have concerns about amendment 543.

On many occasions we have considered representations from lawyers representing the licensed trade who wanted to change the requirements for a provisional premises licence. The changes in amendment 543 would represent a significant departure from the legislation that was put in place by the previous Administration and would significantly undermine the ability of the public, the police and licensing boards to know what was being proposed in their communities.

Amendment 543 would enable vague outlines to be submitted as part of the provisional premises licence application, thereby in effect reducing sensible consideration of what was going to be built. When premises were completed there would be no effective method for the public, the police or even the licensing board to influence the licence until the premises were operating.

We are concerned that to some extent licensing boards would be asked to buy a pig in a poke, because the premises that open at the end of construction might be somewhat different from what was initially outlined. That would have wide implications, including for the police and for boards' assessments of overprovision.

There must be an ability to scrutinise applications effectively, either at the start or at the end of the process. Amendment 543 would deny that. We question why premises that are already built should be subject to more scrutiny than premises that are merely planned—after all, both establishments have the same effect on the local community when they are open. We ask Robert Brown to withdraw amendment 543.

Robert Brown: It was worth having the debate, because we have aired a number of the issues. I accept that the public's right to know what is proposed is important—like other members, I have been on that side of the argument more than once—but I am not sure that we have got the balance right. Nigel Don made a valid point in that respect. It is about striking a balance between giving developers a reasonable indication as to whether things are going in the right direction, before they have spent huge amounts of money, and not prejudicing the rights of the public.

We might look again at whether the provisional premises licence should last two years. Although there may be argument about a period of five years, it has been indicated that one or two years is a bit too tight for some more complex developments. I am keen for the minister to look further at the detail of the issue, but I will not press amendment 543 at this stage.

Amendment 543, by agreement, withdrawn.

The Convener: I call amendment 176, which is in the name of the cabinet secretary.

Kenny MacAskill: Amendment 176 updates references to food hygiene legislation in the Licensing (Scotland) Act 2005. Amendment 180 is a minor technical amendment to paragraph 5 of schedule 4.

I move amendment 176.

Amendment 176 agreed to.

Section 133 agreed to.

After section 133

The Convener: Amendment 548, in my name, is in a group on its own and relates to the consumption of alcohol on licensed premises outwith licensed hours.

To some extent, it has been a tradition in the licensed trade that those who work in public houses, in particular, should have the opportunity at the close of business to have a drink on the premises. The 2005 act was somewhat deficient in, effectively, precluding that. I doubt that that was the intention.

It is important to stress what we are talking about. Like the rest of us, people who work in the licensed trade take the view that they are entitled to a refreshment after a hard shift. Many people in the licensed trade work hard. By the time that they are required to finish work, it is late in the evening. They are left with the choice of either drinking at home, which is not the most sociable way of drinking—depending on whom they live with—or going to a club, which is somewhat pricey. Many people of a certain vintage might not view going to a club as the highlight of their social day.

In amendment 548, I suggest simply that, once the doors have closed and the premises are no longer strictly speaking a public house, as all of us would understand the term, it is appropriate for those who work there to be given a drink on a non-commercial basis by those for whom they work. That is no different from someone who works in an office or a factory being offered a refreshment from the drinks cabinet by their boss at the end of a particularly hard shift. It is unfortunate that the 2005 act prohibits that, which cannot be the intention.

I move amendment 548.

Angela Constance (Livingston) (SNP): In my 10 years of working many a hard shift in the social work department, I was never offered a drink at the end of the day, sadly.

The Convener: That may speak volumes about your lack of a relationship with your boss, but we had better not pursue that.

Bill Butler (Glasgow Anniesland) (Lab): The amendment might create an unintended loophole, as it would allow what are colloquially known as lock-ins further rein. I may be wrong about that, but I am interested to hear what the Government has to say about the issue.

Kenny MacAskill: Bill Butler is on the right path and is heading in the right direction. We appreciate that employers may wish to reward their staff at the end of a day's trading by permitting them to have a drink for a limited period at the end of prescribed licensing hours. However, we have consulted the police and support the view of the Association of Chief Police Officers in Scotland that amendment 548 would open a loophole that would be open to abuse.

It would be difficult for the police to confirm whether the people who were drinking on premises after licensed hours were doing so legitimately or whether there had been a breach of the relevant provisions of the 2005 act. Amendment 548 would require the police, in monitoring the after-hours consumption of alcohol, to identify those who had been working on the premises at the end of the licensed hours. That would place an additional burden on the police at a time when they are already faced with monitoring the after-hours consumption of alcohol by the residents of licensed premises and their guests.

I therefore ask Bill Aitken to withdraw his amendment 548, albeit that he lodged it for the benefit of those who have been working hard.

The Convener: I do not accept the cabinet secretary's argument or, on this occasion, ACPOS's argument. I do not think that it is beyond the wit of man—particularly Strathclyde's finest, or whoever else is involved—to ascertain who works on the premises. It would not be a particularly lengthy exercise.

The commonsense approach would be to consider how many people were enjoying the facility. If they were limited in number, it would be clear that they were people who worked on the premises, and a routine check could be done to ensure that there was no abuse. The other safety valve in that respect would surely be whether cash was changing hands. If people were on the premises and the cash registers were clinking away merrily, that would be a commercial undertaking and, as such, a breach of the spirit of what I am seeking to do with my amendment.

I find it deeply depressing that the cabinet secretary—who himself has been known to socialise from time to time—is taking a harsh view and, basically, a doctrinal approach to those who seek simply to have a genuine refreshment at the end of the day. Accordingly, I press my amendment.

The question is, that amendment 548 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)

AGAINST

Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 1, Against 7, Abstentions 0.

Amendment 548 disagreed to.

The Convener: Unfortunately for the licensed trade, the views of the killjoys predominate. [*Laughter*.]

Bill Butler: That was not said with your usual objectivity, convener.

Section 134—Occasional licences

The Convener: Having had the entertainment for the morning, we proceed back to business. Amendment 539, in the name of the cabinet secretary, is in a group on its own.

Kenny MacAskill: Amendment 539 deals with an issue that Nigel Don raised at stage 1, which we thank him for raising.

Amendment 539 enables licensing board staff below the clerk of the licensing board to assess an occasional licence application and determine whether it should be fast tracked. If no objections or representations are made within the shortened notice period that the bill provides, the member of staff will be permitted to grant the application.

The provision removes a concern that was raised by Glasgow licensing board—and further explored by Nigel Don—about what would happen to an application if the clerk was absent, for example because of illness. We are pleased that we are able to propose an adjustment through amendment 539 to ensure that applications are not delayed through no fault of the applicant.

Amendment 539 also ensures that the determination of occasional licence applications may be delegated to members of support staff only when no objections to or representations on the application have been received. That clears up an inconsistency in the 2005 act whereby an occasional licence application can be determined by support staff even when objections to or representations on the application have been lodged.

I move amendment 539.

The Convener: Again, the issue is fairly straightforward.

Amendment 539 agreed to.

Section 134, as amended, agreed to.

After section 134

The Convener: Amendment 449, in the name of the cabinet secretary, is in a group on its own.

Kenny MacAskill: We have already made provision in section 134 to enable licensing boards to introduce fast-track procedures for granting occasional licences. At the request of the licensed trade we are introducing the same procedure for extended hours applications, through amendment 449.

Extended hours applications enable licensed premises to apply for additional hours—above those agreed in their licence—for certain specified events. In rural areas, a licensed premises might be the only venue that is available to cater for events such as funeral lunches, which by their nature are required at short notice. Amendment 449 enables the licensed hours of such premises to be extended at short notice to cater for such events.

We will expect each licensing board to update their licensing policies, indicating where the use of fast-track procedures is acceptable, but also to review their use in connection with the local licensing forums to ensure that they are being used proportionately. We believe that that is a reasonable measure to improve the working of the licensing system for the trade, licensing boards and the communities that they serve.

I move amendment 449.

11:15

The Convener: Thank you. I think that to some extent that addresses a concern that was raised in the committee's report.

Amendment 449 agreed to.

Section 135 agreed to.

Section 136—Personal licences

The Convener: We turn to personal licence applications. Amendment 177, in the name of the cabinet secretary, is grouped with amendments 178 and 181.

Kenny MacAskill: Amendments 177 and 181 are minor technical amendments that will remove an inconsistency between two provisions in the bill that deal with the determination of personal licence applications. Amendment 178 is a minor technical amendment that will address a concern raised by Glasgow licensing board in relation to new section 74(8) of the 2005 act, which will be inserted by section 136(2)(c) of the bill. Section 74 of the 2005 act deals with the determination of personal licence applications by licensing boards. Glasgow licensing board was concerned that new section 74(8) could be interpreted so as to suggest that a hearing on a personal licence application could be held only after the application had been granted or refused. The policy intention is that a hearing may be held to determine whether to grant or refuse a personal licence application. Amendment 178 will change the wording of new section 74(8) to remove any confusion as to when the hearing may be held and make a minor correction to the punctuation of the provision.

I move amendment 177.

Amendment 177 agreed to.

Amendment 178 moved—[Kenny MacAskill]—and agreed to.

Section 136, as amended, agreed to.

After section 136

The Convener: We turn to 24-hour licensing. Amendment 698, in the name of James Kelly, is in a group on its own.

James Kelly: The law at present allows the granting of 24-hour licences in exceptional circumstances, which is correct. There are special occasions for which 24-hour licenses are appropriate. However, such licences, where not appropriate, can lead to concerns in communities about the overconsumption of alcohol spilling over into crime and antisocial behaviour and having an adverse effect on communities. On licensing, it is important to listen to communities' views, so local licensing forums have a key role to play in liaising not only with the community but with the licensing board.

Amendment 698 would give the local licensing forum greater influence, but, ultimately, the powers would remain with the licensing board. That would allow the local licensing forum to advise on the appropriateness of current 24-hour licence applications and allow the local licensing forum to make representations on existing licences. That would allow licensing forums to take representations from communities and make appropriate representations to the licensing board where it felt that such licences were inappropriate and could have an adverse impact on the community. Ultimately, the power to grant or revoke licences would remain with the licensing board. The amendment would give the licensing board the power not only to revoke such licences but to vary them if it thought that that was appropriate.

Amendment 698 is worth while. It would strengthen the role of local licensing forums, provide for some key communication between licensing forums and licensing boards, and improve the process of granting and monitoring 24-hour licences.

I move amendment 698.

Robert Brown: I am attracted, subject to the cabinet secretary's comments, to James Kelly's amendment 698. It seems that we have rowed back a bit from advocating the 24-hour city and the modern lifestyle that we used to hear about a great deal. In some areas, extended drinking hours are a curse to local residents, passers-by and the police. This is a genuine matter for local decision making in local circumstances. Amendment 698 seems to strengthen the hand of both the public and the licensing board in that regard. Subject to comments, I am sympathetic to amendment 698.

The Convener: I, too, have some sympathy with what Mr Kelly says. Licensing boards should take on board comments that are made by licensing forums. However, I am a little uncertain as to whether it is appropriate to state that in the bill. It seems to me that what is proposed is a matter of good and sound practice, which I hope will be adhered to, but the problem with such things is that if one puts them in a bill, even with these undoubted good intentions, they can be a little meaningless. As Robert Brown said, we have come back from the 24-hour licensing concept. My own view, for what it is worth, is that I see nothing wrong with 24-hour licensing, provided that the situation of the licensed premises is such that it is not going to be a nuisance to local residents and create the difficulties to which James Kelly, quite properly, referred.

This is a matter upon which one would expect the licensing forum to comment. I would find it profoundly disappointing if any licensing board refused to take cognisance of what had been said. I am a little uncertain as to the desirability of putting a matter like this in the bill, but I will listen to the cabinet secretary.

Kenny MacAskill: Convener, we all have sympathy with the points that you, Mr Kelly and Mr Brown have elucidated. However, let me explain why we have concerns about amendment 698.

Our position is that the licensing legislation already provides what the amendment seeks to achieve. Unlike in England and Wales, there is a legislative presumption against 24-hour licensing in Scotland. Licensing boards must refuse an application for 24-hour licensing unless satisfied that there are exceptional circumstances. The Scottish ministers' guidance to licensing boards states that more detailed consideration should be given to any application for a licence that requests opening times in excess of 14 continuous hours. A number of safeguards are therefore in place that restrict the ability of licensing boards to grant 24-hour licences.

In any event, amendment 698 would effectively duplicate provisions that already exist in the Licensing (Scotland) Act 2005. The amendment would require licensing boards to have regard to the advice or recommendations of the local licensing forum in determining any application for a 24-hour licence. However, licensing boards are already under a general obligation to have regard to the advice given or recommendations made by the local licensing forum under section 12 of the 2005 act.

Amendment 698 seeks to allow licensing boards to revoke or vary a 24-hour licence on the recommendation of the local licensing forum. However, licensing boards are already able to take those steps following a review of the licence under sections 36 and 37 of the 2005 act. Therefore, if a 24-hour licence is granted and subsequently causes concerns relevant to any of the licensing objectives, a licensing board can, under its existing powers, take the action envisaged in amendment 698.

The safeguards for local communities against 24-hour licensing are already contained in the 2005 act, and amendment 698 could undermine the effectiveness of those safeguards.

While I understand, and do not just sympathise with but agree with, Mr Kelly's worries about the situation, we argue that we currently have the powers within the 2005 act, which was brought in by the previous Administration, and we therefore request that he withdraw his amendment, given the assurances that are currently in place.

James Kelly: I recognise, from the comments made by committee members, that we have rowed back from the original position on 24-hour licences. In my original comments, I said that such licences, as the cabinet secretary said in his summing up, are only granted in exceptional circumstances.

I am keen to give a voice to local communities, through the local licensing forums, on 24-hour licences. That is the purpose of amendment 698. I take on board the cabinet secretary's comments and will reflect on whether the current legislation meets the requirements of the amendment. If I am not satisfied that that is the case, I will bring back the matter at stage 3.

Amendment 698, by agreement, withdrawn.

Section 137 agreed to.

After section 137

The Convener: Amendment 179, in the name of the cabinet secretary, is in a group on its own.

Kenny MacAskill: The 2005 act introduced a new appeals system based on the stated case procedure used in criminal appeals, as recommended by the Nicholson committee. A number of concerns about that system have been raised by licensing practitioners from the trade and licensing boards, concerns that were repeated by witnesses to the Justice Committee. The system has been criticised for being slow, time consuming and expensive. Amendment 179 will amend the appeals system to return to the summary application process used in the Licensing (Scotland) Act 1976, as requested by licensing practitioners.

I move amendment 179.

The Convener: The amendment acknowledges concerns expressed by the licensed trade and should be agreed to.

Amendment 179 agreed to.

The Convener: Amendment 694, in the name of the cabinet secretary, is in a group on its own.

Kenny MacAskill: We believe that those who operate licensed premises must carry a high degree of responsibility for the operation of their premises and the actions of their staff. No licence holder should be able to evade responsibility by staying away from their premises without fear of being convicted of an offence arising from an act or omission by a member of their staff while they are absent. In part, that problem was addressed in the Licensing (Scotland) Act 2005, which ensures that there is a person directly responsible for the sale of alcohol on a licensed premises in the form of a designated premises manager, who must hold a personal licence.

However, for a significant and growing proportion of the trade, the present operational structure is that head office dictates the policies that must be pursued on individual premises. Often, managers have no freedom about what signage is used or what products are placed on offer. Therefore, whether or not the manager is the designated premises manager, how the premises operate is dictated from elsewhere. In effect, the licence-holding company can simply continue by sacking managers and not being held responsible for their actions.

The importance of holding the premises licence holder to account is best demonstrated by the attempts to tackle underage sales, the law against which has always been difficult to enforce. In the past, many licensees did not enforce that law as rigorously as they could have done, but that changed with the introduction of test purchasing. The threat to the premises licence encouraged many organisations to train their staff to ask for proof of age. Although an offence is committed by the server, such positions in the service sector and the retail trade are sometimes low paid, low skilled and suffer a high turnover in staff, so it is vital that adequate staff training is carried out and proper operational systems are maintained.

Currently, the licence holder can escape punishment by claiming ignorance of the conduct in question and cannot be held to account for failures to introduce adequate management systems and staff training. Amendment 694, which has been drafted in consultation with the police, ensures that premises licence holders can be held liable for a number of offences committed by members of their staff. Amendment 694 also ensures that premises licence holders are correctly afforded a defence of due diligence, where they can demonstrate the consistent steps that they took to prevent those offences from being committed.

Amendment 693 was debated with an earlier group and introduces the concept of “interested parties” to the Licensing (Scotland) Act 2005.

Amendment 694 ensures that those interested parties may be prosecuted under many of the offences listed in the 2005 act for the conduct of their staff on the premises. The defence of due diligence will be available to interested parties, as it will be to licence holders.

I move amendment 694.

11:30

Robert Brown: I find the cabinet secretary’s arguments highly persuasive, particularly with regard to the defence of due diligence in relation to the management issue. However, we have had representations from the licensing law subcommittee of the Law Society of Scotland, which is fairly critical of amendment 694. It indicates that there will be considerable discouragement for large companies that currently hold premises licences and are obviously far removed, practically and physically, from the day-to-day activities within the premises. It seems to me that the defence of due diligence is an adequate cover for that kind of situation.

The Law Society’s subcommittee also raises the point that there would be significant issues with regard to administrators, receivers and trustees in bankruptcy, where there has not been the same personal control of management at that stage. I am not quite sure how everything would happen in terms of timescales and so on. Can the cabinet secretary assure us that the criticisms of the Law Society’s subcommittee are not, in fact, valid?

The Convener: My concerns are similar to those of Robert Brown. Clearly, I am totally sympathetic with what the Government seeks to do in the amendment in that, if someone is failing to administer, supervise and train their staff properly, they cannot escape the consequences of a breach of the 2005 licensing act, the most apparent one being the selling of drink to underage people. I can see what the

Government's intent is, but I am a bit dubious; we might be going a bit over the top. That view is explained very clearly in the Law Society's submission. We want to think this amendment through quite carefully, cabinet secretary.

Kenny MacAskill: I disagree with the Law Society's view. Clearly, in the circumstances of liquidations, we expect the usual practices to be in force and systems to be in place. For example, we expect that in the case of health and safety. We would be astounded if a large operating company did not seek to ensure that staff were trained in, understood and implemented health and safety legislation. We seek to take a similar attitude on licensing as it is inappropriate for someone simply to say that they sent out a notice three years ago, or whatever else. We would not accept that for health and safety, so we should not accept it in the case of licensing.

Are there difficulties for those who come in as receivers or liquidators? Well, of course there are complications, but it is about ensuring that you have the system and structures in place. Again, we would not expect a liquidator to say, "I'm only the liquidator, so I'm not implementing health and safety legislation." Of course there are some difficulties for large companies, but they tend to have the appropriate staff. Frankly, if they do not, they should not carry out the operation. As I said, there is an analogy here between health and safety and licensing. We are simply asking that licence holders take responsibility for the right that we as a community are giving them to sell alcohol, and do not simply say, "It wisnae me."

Amendment 694 agreed to.

Section 138 agreed to.

After section 138

The Convener: The next group is on the powers of licensing standards officers. Amendment 699, in the name of the cabinet secretary, is the only amendment in the group.

Kenny MacAskill: Amendment 699 amends section 15 of the Licensing (Scotland) Act 2005 to widen the powers available to licensing standards officers. LSOs were created under the 2005 act and have the role of providing information and guidance in the operation of the 2005 act, supervising compliance by licence holders with licence conditions in the provisions of the act and providing mediation services for disputes between licence holders and other persons concerning compliance with the act's provisions. In carrying out those duties, a number of LSOs have raised concerns about the lack of any power in the 2005 act to enable them to seize documents in the course of an investigation of licensed premises. There are a number of consumer protection regimes whereby authorised officers can seize items in the course of their investigations. A number of LSOs have expressed the view that the lack of any powers of seizure in the 2005 act leaves them at a distinct disadvantage when compared with other consumer protection regimes. The effect of amendment 699 will be that LSOs will be able to call on powers that will enable them to take copies of documents found on the premises, including electronic documents that are accessible from the premises, and seize and remove any substances, articles or documents found there.

Amendment 699 provides protection for those wishing to withhold documents or information from an LSO on grounds of confidentiality or in the interests of avoiding self-incrimination. It also allows ministers to make regulations on the procedures that are to be followed by LSOs in exercising their powers and in relation to the treatment of items that are seized.

We wish to ensure that LSOs are fully equipped to carry out their compliance and enforcement duties effectively. We think that amendment 699 will assist in that regard.

I move amendment 699.

The Convener: As members have no questions for the cabinet secretary, I ask him to deal with the question of situations in which the seizure of computer material might have an inhibiting effect on the ability of the licensee to run the business.

Kenny MacAskill: A copy can be made of any document found, leaving the original on the premises. There are regulatory powers that enable ministers to revisit the matter. We are working on the issue. The main aim is to be able to access the information, not to retain it in perpetuity.

Amendment 699 agreed to.

Section 139 agreed to.

11:36

Meeting suspended.

11:45

On resuming—

Schedule 4—Further modifications of 2005 Act

Amendments 180 and 181 moved—[Kenny MacAskill]—and agreed to.

Schedule 4, as amended, agreed to.

Section 140—Licensed premises: social responsibility levy

Amendment 182 moved—[Kenny MacAskill]—and agreed to.

Section 141 agreed to.

Section 142—Corruption in public bodies

The Convener: Amendment 183, in the name of the cabinet secretary, is in a group on its own.

Kenny MacAskill: Amendment 183 seeks to remove section 142 from the bill. The Bribery Bill was introduced into the United Kingdom Houses of Parliament in late 2009 and became an act in April 2010. The act's sections extend to Scotland and modernise the law on bribery and corruption. The committee will recall its consideration earlier this year of the legislative consent motion for the Bribery Bill. The Parliament approved the LCM on 11 February. As part of this modernisation of the law, the Bribery Act 2010 repeals, among other statutes, both the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906 in their entirety. As such, section 142 of the bill, which seeks to make minor technical changes to both acts, is no longer needed.

I move amendment 183.

Amendment 183 agreed to.

Section 143—Orders and regulations

The Convener: Amendments 184, 540, 450 and 186, all in the name of the cabinet secretary, have all been previously debated. In the circumstances, and if no member objects to the question being put en bloc, I ask the cabinet secretary to move all four amendments.

Amendments 184, 540, 450 and 186 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 187, in the name of the cabinet secretary, is grouped with amendment 188.

Kenny MacAskill: We lodged amendments 187 and 188 following discussion with the Subordinate Legislation Committee after the introduction of the bill. Section 146 of the bill contains standard provisions that permit the Scottish ministers by order to

> "make such supplementary, incidental or consequential provision as they consider appropriate for the purposes of, in consequence of or for giving full effect to any provision of the Act."

Section 146(2) contains the usual provision allowing orders under this section to modify acts or other enactments. Acts can be modified either by making express changes to the text or by changing the effect of the act without changing the actual text. In the bill as introduced, the effect of sections 143(3) and 143(4)(b) would be that an order under section 146 would be subject to negative procedure except where the order seeks to

> "add to, replace or omit any part of the text of an Act".

In those cases, affirmative procedure would be followed for the order. The Subordinate Legislation committee raised a concern that the approach in sections 143(3) and 143(4)(b) would permit an order under section 146 that modifies the effect of an act through non-textual amendments to be subject to negative procedure. The effect of non-textual amendments to an act can often be as significant as that of textual amendments. Given that the bill impacts on the rights and liberties of individuals, we committed to the Subordinate Legislation Committee that we would lodge stage 2 amendments that would mean that affirmative procedure would be required for any order under section 146 that makes any modification of any enactment, whether through textual or non-textual amendments. Amendments 187 and 188 meet that commitment.

I move amendment 187.

Amendment 187 agreed to.

Amendment 188 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 392, in the name of Robert Brown, was debated with amendment 100 on 13 April, which indicates the length of the proceedings in dealing with this fairly complex bill. Are you moving the amendment, Mr Brown?

Robert Brown: As the section to which it relates is no longer in the bill, there is not much point.

The Convener: That is clearly the appropriate position.

Amendment 392 not moved.

The Convener: Amendment 549, in the name of Robert Brown, has been debated with amendment 379 and is of equal antiquity to amendment 392.

Amendment 549 not moved.

Section 143, as amended, agreed to.

Sections 144 and 145 agreed to.

Schedule 5—Modifications of enactments

Amendments 189, 451, 452 and 453 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group is on incest and related offences. Amendment 190, in the name of the cabinet secretary, is the only amendment in the group.

Kenny MacAskill: Amendment 190 is a minor amendment to repeal the Incest and Related

Offences (Scotland) Act 1986 in its entirety. The amendments made by that act have now been completely superseded. This modest contribution will help to tidy the statute book.

I move amendment 190.

Amendment 190 agreed to.

The Convener: Amendment 191, in the name of the cabinet secretary, is grouped with amendment 193.

Kenny MacAskill: Amendment 191 repeals one of the minor amendments contained in schedule 15 to the Criminal Justice Act 1988 relating to investigations of serious or complex fraud. The changes that were made by paragraph 111 of that schedule have now been superseded by more recent legislation, and that paragraph can be repealed

Amendment 193 will tidy up the statute book. It repeals an amendment that was made by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 to the Civic Government (Scotland) Act 1982, as the amended provisions will be overtaken by further amendments made by section 34 of the bill.

I move amendment 191.

Amendment 191 agreed to.

Amendments 192, 193, 386, 454, 512 to 514, 455 and 456 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group is on breach of undertakings—consequential modification. Amendment 457, in the name of the cabinet secretary, is the only amendment in the group.

Kenny MacAskill: Section 41 adds proposed new sections 22ZA and 22ZB to the Criminal Procedure (Scotland) Act 1995. It makes provision in relation to offences that are committed while a person is subject to a police undertaking, and the provisions are broadly similar to those that apply when an accused person commits an offence while liberated on bail. Proposed new section 22ZB makes provision for evidential and procedural matters in relation to offences that are committed or dealt with under proposed new section 22ZA. Amendment 457 is consequential on proposed new section 22ZB and will ensure that the standard provisions in section 79 of the 1995 act relating to preliminary pleas and preliminary issues apply to proposed new section 22ZB.

I move amendment 457.

Amendment 457 agreed to.

Amendments 458, 414, 515, 194 to 196 and 459 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group is on the exclusively Glasgow situation and the exercise of functions by stipendiary magistrates. Amendment 695, in the name of the cabinet secretary, is the only amendment in the group.

Kenny MacAskill: Despite its length, amendment 695 is merely a technical amendment to the Criminal Proceedings etc (Reform) (Scotland) Act 2007 to clarify that stipendiary magistrates may exercise the very same judicial and signing functions as a justice of the peace. It also clarifies that a member of a local authority who is not a justice of the peace may exercise the same signing functions as a justice of the peace. In each case, that is meant to be the obvious result under the existing references in the 2007 act to exercising functions in the same manner as a JP. However, we would like to take the opportunity to make the position explicit for the avoidance of doubt.

I move amendment 695.

The Convener: Will the cabinet secretary briefly fill us in on the situation with regard to sheriffs?

Kenny MacAskill: They are not affected. The amendment relates to the interaction between stipendiary magistrates and JPs. We do not believe that provisions are necessarily required, but there has been some doubt, and the amendment seeks to clarify matters. Sheriffs are above and beyond the amendment, which clarifies the position with stipendiary magistrates and JPs.

The Convener: Yes. I have noticed such issues in the past. However, I will leave that issue on the side.

Amendment 695 agreed to.

Amendments 197, 387 and 198 moved—[Kenny MacAskill]—and agreed to.

Schedule 5, as amended, agreed to.

Sections 146 to 148 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. The work on the bill has undoubtedly been complex and difficult, and the fact that we have achieved what we have with, I would like to think, reasonable clarity speaks volumes about the commitment of individual committee members, the efficiency of the clerks and the co-operation of the Scottish Government. I am grateful to all concerned.

There will be a brief suspension before we continue with our other business.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Church of Scotland Presbytery of Edinburgh

Aware that the proposals of the Scottish Prisons Commission to establish Community Payback Sentences and a presumption against custodial sentences of six months and less are contained within the Criminal Justice and Licensing (Scotland) Bill presently before the Scottish Parliament, I write on behalf of the Church of Scotland's Presbytery of Edinburgh to express support for these proposals.

These developments will make a positive difference for many: victims of crime will be given the assurance that with prison reserved for fewer people in custody for longer periods, there is a greater chance of significant work being done to help address offending behaviour, reducing the likelihood of more people becoming victims of crime in the future. Offenders will be able to keep intact their family relationships, their accommodation and, for some, their employment and so stand a better chance of desisting from future crime. Communities will not only benefit from action to right the damage caused by crime but from the sense of communities being valued and relationships being restored.

The report "Scotland's Choice" invites communities to support people who have served their time by giving people "a fair chance for a fresh start" (Section 3.51). We welcome this opportunity and believe that Churches already participate in such and will continue to want to do so through the pastoral care of the victims of crime, of prisoners and ex-offenders, and of the families of those affected by crime, through initiatives such as Fresh Start, GROW (Greyfriars Recycles Old Wood), through prisoner and community service placements, and the counselling offered by Simpson House and others.

We think that these proposals will go some way to making Scotland a more forgiving society. The Presbytery of Edinburgh therefore offers its support for the presumption against custodial sentences for six months or less and the introduction of Community Payback Orders contained in the proposed Criminal Justice and Licensing (Scotland) Bill.

Rev Dr George J Whyte
Presbytery Clerk
10 February 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Glasgow Bar Association

Observations and thoughts concerning Part 6 (Disclosure) of the Criminal Justice and Licensing (Scotland) Bill

Relevant materials:-

1. European Convention on Human Rights
2. The Scotland Act 1998
3. The Human Rights Act 1998
4. Sinclair v HMA
5. Holland v HMA
6. McDonald v HMA
7. Regina v H & Others, (2004) UKHL3
8. Heaney & McGuinness v Ireland, ECHR 34720/97, decision 21st December 2000
9. Article v Italy, ECHR
10. Starrs & Chalmers v HMA
11. Murray v United Kingdom
12. HMA v Murtagh (PC) 2009 SCCR, 610

There is a fundamental difficulty in presenting a GBA position in relation to disclosure as addressed within the Criminal Justice and Licensing (Scotland) Bill (the Bill) at this stage.

As I write there is presently awaited a hearing upon an Advocate General's Reference from the Appeal Court in Edinburgh to the Privy Council in the case of Murtagh set for 24th and 25th June 2009. The case of Murtagh seeks to settle the question posed in the earlier Privy Council case of McDonald v HMA wherein Lord Roger advised that the Privy Council awaited a case which would seek to address the contention that it would be appropriate for the Crown, in certain circumstances with reference to Article 8 of the Convention, to withhold the previous convictions of Crown witnesses which were not "material" in their assessment.

Section 85(2)(c) of the Bill makes reference to this thinking. This is a position which is being opposed in the case of Murtagh, and should be opposed by the legal profession as a whole. Article 6(1) is an absolute right and the disclosure of statements and previous convictions as earlier addressed in the cases of Sinclair and Holland affords to the Crown no ability to withhold any material by way of statement of previous conviction which is subjected to a "materiality" test.

It appears that the whole thrust of the Bill as far as matters of disclosure is concerned is to attempt to narrow the scope of material which would be provided to the defence and second, adjudge upon the "materiality" of that information as decided by the Crown themselves.

This would not in my opinion be Convention compliant.

Further, the Bill seeks to differentiate between solemn and summary cases, both in relation to the information to be disclosed, and in relation to the duties upon the defence in order to trigger disclosure.

Paragraphs (d) and (e) of section 85(2) of the Bill make this differential explicit.

Paragraph (d) states, as far as solemn cases are concerned, that statements of witnesses are to be disclosed but only those whom the prosecutor intends to call in the proceedings. Paragraph (e) states that in summary cases the statements of witnesses shall be disclosed from witnesses whom the prosecutor intends to lead in evidence.

There is a subtle but very important difference. In paragraph (d) the prosecutor intends to delimit his responsibilities for disclosure to those persons identified on his list of witnesses. In paragraph (e) the Crown seeks to delimit the circumstance even further to those witnesses the prosecutor actually intends to lead in evidence.

This shall be a sharp deflection away from the present circumstance of disclosure where the Crown are presently required to disclose to the defence all statements ingathered by the Crown in relation to potential witnesses in the case. Paragraphs (d) and (e) are a clear attempt by the Crown to prevent enquiry by the defence in line with the accused's Article 6 rights.

This is to be seen as a very serious retrograde step, not only actively delimiting the accused's Convention rights but nurturing a culture of secrecy and ownership of the statements ingathered in a case which is reflective of pre-Convention proceedings.

The Scottish Government needs to be reminded that Convention rights require to be "practical and effective" and not "hypothetical and illusive". (Article v Italy, ECHR).

Sections 86 – 90 of the Bill deal in general terms with the prosecutor's duty to ensure the ingathering of information from all agencies involved in the investigation of crime, and the dissemination of that information to the defence. This is in line with perceived practice within the English jurisdiction and reflects to a degree, comments made in the prior cases of Holland, Sinclair and McDonald.

However, section 86(6) of the Bill introduces categories of information without specifying in any detail what the categories propose to represent. The categories themselves are identified as sensitive, highly sensitive and non sensitive. The Bill thereafter reflects within subsequent sections and subsections a degree of non disclosure or reticence to disclose information which is termed sensitive or highly sensitive. Again this flies in the face of the accused's Article 6 Convention rights of full disclosure as articulated in the earlier European and JCPC jurisprudence. In short, the use of the categories within section 86(6) is a means of enabling the prosecuting authorities not only to decide upon "the materiality" of information to the defence but to restrict that information when the Crown determines it should do so.

The Scottish Government is to be reminded that the defence cannot "rely upon the intellectual honesty of the Crown" (Starrs & Chalmers v HMA).

Section 89(3) again illuminates the thinking of the Crown in that they specifically take to themselves decisions in relation to the "materiality" of information.

Section 91 of the Bill, exemptions from disclosure, specifies material which is not to be disclosed as prohibited by section 17 the Regulation of Investigatory Powers Act 2000. There is however no undertaking within the Bill that the defence must be notified of this withholding of information where it should apply in any specific case such that at present as the Bill is drafted, there may be a withholding of information relevant to section 17 of RIPA but the defence are not informed that it is even an issue far less that they are being availed of that information.

Section 92 of the Bill seeks to enshrine in statutory format the pernicious, and creeping, practice of the Crown to "redact" information from any disclosable material. Again, this is a practical and ongoing exercise by the Crown in adjudging the materiality of information, whether said material is sensitive, or indeed simply superfluous, and thus falling to be redacted, without notification of any reasons for such redaction to the defence.

In such circumstances the Crown are given a free rein in relation to their determination of materiality or superfluity, and in relation to the "intellectual honesty" which is applied to the task.

Sections 93 and 94 of the Bill differentiate solemn from summary proceedings.

In short, under section 93 the Crown are under a greater onus of disclosure and explanation than they would be in a summary case. We cannot as a profession allow a differential in disclosure, and the stringency for such, to exist between solemn and summary procedure. The European Convention on Human Rights, Article 6, makes no distinction whatsoever between the Scottish concept of solemn and summary procedures in relation to the rights of the accused. The ease of operation of procedures in the Scottish jurisdiction is not a matter of any concern to the accused or the Convention and the Scottish Government must be pressed to ensure that Convention rights are guaranteed for all accused persons appearing under both procedures in all jurisdictions in Scotland. In short, disclosure must be equitable for the accused whether he is appearing in the High Court of Appeal or in the Baillie Court at Glasgow District Court. There is simply no justification in European jurisprudence for an accused person to be treated differently in either forum.

The driver, which is obviously a financial one as far as the Scottish Government and the Crown is concerned, is not acceptable as a reason for delimiting the Convention rights of any citizen faced with a criminal charge.

Perhaps the most pernicious aspect of the Bill is addressed in section 94 and section 95 of the Bill.

Section 94 is a section dealing with defence statements, solemn proceedings whereas section 95 deals with defence statements, summary proceedings.

The concept of the defence statement as either a means of triggering disclosure to the defence or as a means of "payment" for such disclosure is highly pernicious and corrosive to the interests of justice. The European Court of Human Rights has repeatedly condemned any attempt at compelling an accused person to self-incriminate or to make statement in relation to his case overruling the accused's right to silence.

Although the right not to incriminate oneself guaranteed by Article 6(1) is not an absolute right it is a right which is highly jealously guarded and not to be abrogated without serious reason (Heaney & McGuinness v Ireland).

The Bill as presently proposed by way of the necessary provision of a defence statement by an accused person in solemn proceedings would be incompatible with Article 6 on the same basis as that found in the case of Murray v United Kingdom in that it would "in effect it destroyed the very essence of the privilege against self incrimination" as the "degree of compulsion" which had been applied through criminal proceedings would have been incompatible with the accused's Convention rights.

It is notable that Bill as presently drafted does not advise of any sanction against an accused person for failing to deliver a defence statement. In my opinion the GBA should support a position whereby the proposed section 70A of the 1995 Act as outlined at section 94(2) of the Bill, be treated as an anathema to the interests of justice. An attempt to compel an accused person to set out "the nature of the accused's defence, including any particular defences upon which the accused intends to rely" is not only offensive to the Convention but flows contrary to the historical Scottish position. The same proposed section 70A further seeks to require the defence to disclose any "point of law in relation to disclosure which the accused wishes to take and any authority on which the accused intends to rely for that purpose" as part of the accused's defence statement.

There is absolutely no requirement in good sense for a challenge to lack of disclosure to be necessarily married to a requirement by the defence to disclose the nature of the accused's defence. A mechanism for statutory challenge to lack of disclosure is capable of standing alone, as it presently does under Devolution Issue Minute or other Minute under the Human Rights Act, or Specification of Documents, without any requirement of payment for it by way of defence statement.

The circumstance under section 95 of the proposed Bill is somewhat different in relation to summary proceedings in that although a defence statement is not required in summary proceedings, it is required in order to articulate the Crown to actively review the information within its keeping as far as materiality to the case is concerned. The defence should not be placed under this onus as the onus is clearly upon the Crown as per the cases of Holland and Sinclair and McDonald, which is an ongoing duty to make full and ongoing disclosure to the defence.

Moving on to section 97 of the Bill, Means of Disclosure, subsection (2) states that the prosecutor may disclose the information by any means. This is a subsection that requires the attention of the defence agent in that there have been a number of occasions where it was necessary to seek disclosure of the original handwritten statements, which once perused, showed a marked differential between the content of the handwritten statements and the subsequent typed version of statement. Differential was noted on a number of occasions either by way of material that was edited out of the typed statement or material which was added in to the typed statement, or material which was in a wrong order from that set out in the original handwritten statement. Therefore the Crown should of necessity be required to disclose the statements of witnesses in their original format, and also provide the typed versions for ease of perusal.

Subsection 3 of section 97 again is a curtailment of the “facilities” that should be made available to the defence under Article 6(3) of the Convention, in that the Crown seek to control not only the method of release of disclosure material but further constrain the defence in relation to the time and place of perusal of same. This is simply unacceptable and disclosure materials should be disclosed in full and handed over to the defence for the defence to peruse same at their own leisure and not that of the Crown.

Section 98, Confidentiality of Disclosed Information, subsection (3)(a) restricts the use of disclosed materials to the “original proceedings”. There may be a number of occasions where a defence agent, perhaps dealing with the same client charged with a number of offences stretching across more than one complaint may be able to use disclosed information from one case relevant to another, perhaps in relation to an attack upon the credibility or reliability of Crown witnesses. The section and subsection is therefore drafted far too narrowly, and unnecessarily restrictively to the interests of justice and the particular accused in any case. This is most important given there are rather severe criminal sanctions envisaged by the Bill in relation to any unauthorised disclosure.

Said sanctions are outlined under section 99 of the Bill.

Section 100, subsection (3)(b) gives an opportunity to the defence to be heard in relation to seeking an order enabling disclosure of disclosed information to a third party. I would presume that in solemn proceedings that there would be payment for Court proceedings and preparations as per normal. However, if this is a mechanism which requires to be utilised under summary procedure that is a very significant additional portion of work which should be funded separately from present Legal Aid Regulations in order not to delimit the raising and articulation of such points in pursuit of the client’s rights under Article 6 of the Convention.

Similar funding issues are important in relation to summary procedure in relation to any application by the Procurator Fiscal under section 102 of the Bill, Application for Non Disclosure Order.

Section 103, Application for Non Notification Order or Exclusion Order, is again a matter of great significance for the defence in that the Crown seek to take to themselves non disclosure of items of information and also the authority of the Court that that particular non disclosure is not made known to the defence.

This is a very serious turn of events and should of course be opposed at every turn in that the defence cannot fully pursue the accused's Article 6 right to a fair trial if matters of necessary disclosure are being withheld from them and also if notification that the Crown are acting in that way is also being withheld from them.

Section 107, Special Counsel, is a section which seeks to bring the Scottish jurisdiction in line with the English jurisdiction as detailed in the case of Regina v H.

Said developments within Scots Law should be vigorously opposed as it is as further attempt by the Crown to orchestrate the decisions concerning materiality, and also whether information is to be handed to the defence, or whether said decisions not to hand material to the defence are to be kept secret from the defence and should be vigorously opposed. Our Lordships in Regina v H were content that Special Counsel be selected by the Attorney General (equivalent of the Lord Advocate in Scotland). Therefore, in effect, even though the list of Special Counsel selected by the Attorney General is "approved" by "appropriate professional bodies" the "gift" of being Special Counsel would be very much at the hand of the prosecutor. This is a system which should be strenuously opposed as, as outlined in the case of Starrs and Chalmers, the "intellectual honesty" of the Crown should not be relied upon by the defence to safeguard the rights of any accused.

Again, these are issues which shall be discussed in detail before the Privy Council in the forthcoming case of Murtagh set for 24th and 25th June 2009 wherein the Advocate General shall no doubt seek the impra matter of the Privy Council for the imposition upon the Scottish jurisdiction of a similar system for Special Counsel within the Scottish jurisdiction as articulated under the draft Bill, as is already existing in the English jurisdiction.

As an overview, the thrust of the Bill is not simply as promulgated by the Justice Department as being a means of creating a statutory framework for disclosure to be made to the defence as was required under the cases of Holland, Sinclair and McDonald but rather, and perniciously, to restrict the scope and means of disclosure to the defence and also in certain circumstances, to withhold disclosure from the defence whilst maintaining the defence in ignorance of said lack of disclosure.

The necessity within the grounds of the draft Bill for the defence to give notice to the Crown of their line of defence is wholly novel within the Scottish jurisdiction a complete anathema to the spirit and wording of the Convention itself. Similar, and strident, opposition should be made in relation to the proposed system of "Special Counsel" which seeks to formularise not only the secrecy of proceedings in determination of the materiality of information which may fall to be disclosed, but also selecting at the hand of the prosecutor those individuals who are charged with making the decision. In simple terms, the use of a Special Counsel in determining materiality of any information would be a "Chinese wall" between the Special Counsel and the Lord Advocate's office. Such a system would not be adversarial or public.

Update following decision of JCPC in HMA v Murtagh

The decision of the court in Murtagh, given that it followed a reference by the Advocate General for Scotland, is most significant regarding the treatment of disclosure throughout the UK jurisdiction.

The decision encapsulates not only previous convictions of all witnesses, but details of outstanding cases and prosecutors fines, (in short, previous convictions and outstanding cases, or PCOCs).

Lord Hope in the chair, adopted unanimously, stated that the Crown disclosure manual, June 2009 edition, shall require to be reviewed in the light of the court's opinions such that 'greater emphasis needs to be placed on the need for a generous approach to be taken'. [para 37]

Specifically, 'the balance is in need of adjustment towards a general working rule that only those parts of the criminal history should be withheld that are likely to be embarrassing or damaging to the witness if disclosed to the defence **and** do not satisfy the test of materiality. Should a dispute arise which the parties cannot resolve for themselves, the procedure which Lord Rodger recommends at para 69 should be adopted so that the decision can be made by the court'. [para 37]

At para 69 Lord Rodger states – 'If, however, a dispute arises which the parties cannot resolve, it must be decided by the judge. It is not for the Board to devise the appropriate procedure, beyond saying that it should not be elaborate. Basically, the Crown should place the convictions before the judge with a brief indication, agreed with the defence, of the matter on which the witness is expected to give evidence. It is then up to the judge to decide whether the conviction is material and should therefore be disclosed. There should be no need for submissions by either side.'

Arbitrary Crown redaction or withholding of information, in relation to PCOCs, has now been checked by the Judicial Committee. The principles laid down by the court being:

1) The Crown must disclose all PCOCs unless they are perceived by them to be –

    a. immaterial to the case

    AND

    b. embarrassing/damaging to the witness [to be viewed in the light of PCOCs already disclosed]

2) In the event of dispute, the Crown should advise the defence of their 'difficulties' and seek resolution with them.

3) If resolution cannot be achieved parties are to seek the determination of the court on the issue in dispute.

4) The High Court of Justiciary are charged with formulating a simple procedure to give determination in such disputes, which should not require direct submissions.

Gerry Sweeney
Solicitor-Advocate
January 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Peter Schevtschenko

I am concerned that there is a proposal to criminalise indoor paid sex.

I could understand in a way if this was meant to target only those persons who have paid sex with a person subject to violence or threats (as in England) but this proposal intends to criminalise all indoor paid sex.

What is the logic behind criminalising consenting indoor paid sex? Is it merely to punish those who freely participate? If that's the reason then we are on the slide towards a totalitarian regime.

Gay men will be subject to persecution as happened in the past merely because money changes hands. Perhaps this is the hidden agenda?

The logistics of enforcing such a law, is it feasible? How much police time and public money will be wasted on a victimless crime when there are more serious crimes that take place - murder, terrorism, rape, arson, burglary, criminal damage, vandalism.

If this is just to send out a message then the only message I see is that a minority of people who are in positions of power take great delight in imposing their prejudices on others just to feel morally superior.

Peter Schevtschenko
24 February 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Amy Vergnes

I am writing in horror and disbelief at the news of this last minute amendment which proposes to criminalise prostitution and it's advertising in Scotland, and although I am based in England I would like to express my disgust at the apparent intention to police what consenting adults can and cannot do behind closed doors.

I am a working prostitute based in the North of England and have friends, colleagues and clients in Scotland, Edinburgh in particular. To wholesale outlaw our work is to force the responsible and legitimate side of the industry underground where workers are more susceptible to attacks and robberies as the unscrupulous will know we will not be able to go to the Police for fear of being arrested ourselves - this situation already exists in America. You will not stop men and women working as prostitutes, only make it more difficult and dangerous for us all.

The despicable practices of sex-trafficking (and the sex industry itself is NOT intrinsically linked to trafficking any more than catering, domestic service, manufacturing or agricultural industries are - do you propose to ban those too?) would be far more easily forced out if workers and punters alike could freely report suspect events, plus the proper police of existing laws on fraud, coercion, kidnap and rape. All of the practices that need to be stopped are already illegal, and legislation such as this does nothing other than put all sex workers at risk - why do those of us working happily, successfuly and independently (and there are many thousands of us all over the UK) deserve to be punished because it is too much trouble to concentrate on those who deserve the full attention of the law? Why should we lose our livelihoods? As for our advertising, how do you propose to police the Internet anyway, especially bearing in mind that most of our websites are not hosted in the UK? Why should the Scottish taxpayers fund such a preposterous and unworkable law?

Some people object to prostitutes and prostitution because it offends their personal beliefs and moral sensibilities - that is entirely up to them and there are plenty of aspects of law and day to day that I also find morally objectionable. But this is the 21st century, and morals have no place in law.

I urge you to throw this patronising, abusive, ill-informed shambles in the bin where it belongs.

Amy Vergnes
25 February 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the International Union of Sex Workers

Response to amendments 11A to 11C to the Criminal Justice and Licensing (Scotland) Bill

The International Union of Sex Workers is the only UK organisation of individuals themselves working in the sex industry. We are the people who see reality of the industry day to day. We are the people who will be living with the consequences of the decisions that you make.

We campaign for laws that prioritise and protect the human rights and safety of everyone in the sex industry, whether by choice, circumstance or coercion, and for the inclusion of those who will be affected in decisions which concern our rights and safety. Although the amendments proposed do not explicitly criminalise selling sex, they vastly increase the web of criminality by which sex workers are surrounded: this cannot be to our benefit.

It is generally the case that proposals for increased criminalisation of consensual adult commercial sex are based on the allegation that they will decrease violence against people in the sex industry, prevent trafficking and coercion in the sex industry, and dissuade people from entering the sex industry in the first place.

There is no evidence for these outcomes. Indeed research suggests that increased criminalisation at best *makes no difference* if measured against these outcomes, and that a range of harmful unintended consequences ensue.

- There is no evidence that demand for commercial sex is the primary cause of trafficking: trafficking occurs in the sex industry for the same reasons it occurs in other industries.
- There is no evidence that the majority of sex workers are unwilling. Research finds a range of reasons people enter and remain in sex work.
- There is no evidence that trafficking for sexual exploitation is demand led.
- There is no evidence that most purchasers of sexual services wish to buy services from the unwilling.

There is considerable evidence that criminalising consenting commercial sex is harmful both to those directly involved and to society as a whole – criminalisation has been recognised by UNAIDS and the UN Secretary General as contributing to the spread of HIV.

"In countries without laws to protect sex workers, drug users and men who have sex with men, only a fraction of the population has access to prevention. Conversely, in countries with legal protection and the protection of human rights for these people, many more have access to services. … Not only is it unethical not to protect these groups; it makes no sense from a health

perspective. It hurts all of us."
United Nations Secretary General Ban Ki-moon

Amendment 11A Engaging in a paid-for sexual activity
This seems intended to criminalise sex workers' clients, i.e., giving the state the power to overrule a woman's consent to sex, but is so broadly drafted that sex workers may be subject to prosecution as well as our clients.

The Swedish National Board of Health and Welfare has carried out surveys since the criminalisation of clients and in 2007 concluded "This is the third time we have done such a survey … once again … it is difficult to get a clear cut picture on the extent of prostitution."

Don Kulick sums up the harm done to people in the sex industry by "the Swedish model": "The truly surprising thing is not that the law impacts extremely negatively ... The truly surprising thing is that politicians and feminist groups … resolutely ignore these negative consequences in their continual insistence that the law is good. … the law may indeed feel good for those who are only interested in … 'sending a message' they don't like prostitution. But for those involved in sex work, the law … is a disastrous throwback to an era of violence, exploitation, persecution and police harassment that many of us thought could never be possible in a country that is supposedly so enlightened and progressive as Sweden."

The only UK academic to repeatedly examine the role of demand in trafficking into the sex industry, Julia O'Connell Davidson, concludes: "…we could almost say that supply generates demand rather than the other way about… attempts to suppress the prostitution market, whether focused on sex workers or their clients, necessarily implies subjecting those who sell sex to what Radin describes as "the degradation and danger of the black market … *it is … hard to see why anyone genuinely concerned with protecting and promoting human rights would place measures to tackle consumer demand for commercial sex at the top of their policy agenda*" (Italics ours.)

Amendment 11B Advertising paid-for sexual activities
If made law, this amendment sends a clear message to everyone in the Scottish sex industry that our lives and our livelihoods are of no importance to our elected representatives. It is disingenuous and hypocritical to allow the sale of sexual services to be described as a legal act, and yet prevent us from advertising that legal service.

The amendment will directly push sex workers into the hands of (criminal) third parties as we will be committing an offence if we advertise our own (legal) services.

11C Facilitating engagement in a paid-for sexual activity
This amendment is the one that will have the most immediate consequences in terms of increased violence against sex workers, as it imposes a legally enforced isolation. Although all the amendments combine to infringe the Universal Declaration of Human Rights, this is the most direct breach - Article 20, section 1 states "Everyone has the right to freedom of peaceful assembly and association." Again, the breadth of criminalisation means that everyone

associated with sex workers if we work together in ways that increase our safety will be at risk of prosecution.

These amendments, if passed, ensure that the isolation, vulnerability and social exclusion of everyone in the sex industry are built solidly into Scottish law. The social and legal framework in which the sex industry is placed perpetuates our exclusion and increases our vulnerability to violence and other abuses.

Exclusion and vulnerability are perpetuated by those who refuse to listen to our complaints of actual violence and real abuses because they consider all our work to be violent and abusive. The abuses we suffer are used to argue for the eradication of our work, by those who dismiss the voices of sex workers that contradict their ideological positions.

Tackling violence against people in the sex industry requires listening to what we say when we talk about actual violence. That this can be done successfully has been demonstrated in Liverpool. With the assistance of specialist services, Liverpool police are achieving a 40% detection rate for rapes committed against street sex workers reported to the police; six times higher than the national average for *all* women. 90% of cases for violence against sex workers that went to court during 2005 to end March 2009 resulted in convictions. To do this means treating crimes of violence – rather than the placement of advertisements – as a priority: there is an inherent contradiction between the police role of protection and enforcement.

A community's worth is measured by the way it treats the most vulnerable. We ask that the Scottish government treat women, men and transgender people who sell sex and adult entertainment services as equal members of society and pursue policies that prioritise our rights and safety.

26 February 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Margo MacDonald MSP

Amendments to the Criminal Justice and Licensing (Scotland) Bill in the name of Trish Godman - Offences of engaging in, advertising and facilitating paid-for sexual activities

My reason for asking that these points on the amendments on paid-for sexual activities in my name and that of Trish Godman should be circulated to Justice Committee members is that following two surgical procedures last week, I cannot be sure that I will be fit enough to attend the committee when the amendments are considered.

In general, I would seek to persuade the committee that although proposed for laudable reasons, the amendments in Trish Godman's name should be rejected.

Firstly, the term "sexual activities" is too imprecise to withstand examination. Ms Godman casts her prohibitive net too wide by trying to net with catch-all amendments such diverse activities as lap or table dancing, brothel keeping, escorting, massage, advertising and paid for sex.

For example, do "sexual activities" extend to lap dancing if there is no physical contact between dancer and spectator (s)? Is the test of whether an offence has been committed (a) that money has changed hands between the spectator(s) and the dancer or his/her representative(s)/employer(s), or (b) that sexual arousal was experienced by the spectator(s)?

If (b) is the determining factor, how will this be policed? Will this definition of sexual activities extend to the electronic or filmed transmission of lap dancing and its variants? Will it be an offence to view such activities in cinemas, or in the privacy of spectators' homes?

As for "paid for" sex, does this extend to an agreement between two adults that for a sexual act performed by one on another person(s), an agreed sum will be paid, or a favour returned, for example, by the "buyer" ensuring advantage in obtaining promotion at work , or gifts e.g. jewellery being given to the "seller" by the "buyer"? How will such activities be policed?

As regards "advertising," does this term extend to the wearing of provocative clothing? What is to be the determining factor in the event of a positive response? Will this extend to electronic images transmitted without description or comment on the subject's reason for publicising such an image?

These amendments do not recognise the complexities of sexual behaviour and the contemporary means of accessing and providing paid for sex. The

motivation to bring about an end to paid for sex has not resulted in amendments to existing law, or the creation of new laws that could be policed effectively without severely straining local financial and human resources. Were these to become law, paid for sex would be driven underground, away from the Police, away from the support services for the victims of the sex trade's possible violence and exploitation.
Reject these amendments, please.

Amendments in the name of Margo MacDonald

The amendments in my name echo, to a greater or lesser degree, the *de facto* situation in Scotland's cities following the discontinuation of the "management zone" policies introduced by Lothian and Borders and Grampian Police for the better management of street prostitution in their areas.

The pattern of prostitution has changed following the change in the law on so-called "kerb-crawling." Although some street prostitution is still obvious in Glasgow, and less so in Aberdeen and Edinburgh, paid for sex is now more commonly available indoors. Contact between potential buyers and sellers is by mobile phone or via the internet.

My amendments are closer to the actual situation that now exists in regard to prostitution, and if enacted, would be more likely to produce local policies customised to the needs of local communities as well as minimising the potential harm associated with the provision of sexual services.

I commend these amendments to the committee as pragmatic, relevant and more likely to achieve a better situation as regards paid for sex than Ms Godman's amendments.

Margo MacDonald MSP
1 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Terrence Higgins Trust

I am writing in relation to the Stage 2 amendments to the above Bill lodged by Trish Godman MSP in respect of ‘offences of engaging in, advertising and facilitating paid-for sexual activities.’

Terrence Higgins Trust (THT) is the UK’s largest HIV and sexual health charity, providing a wide range of services for people living with, affected by or at risk of HIV and STIs. We work across Scotland in areas including Ayrshire & Arran, Lanarkshire, Grampian, Highland and Argyll & Bute and have centres in Glasgow, Aberdeen and Inverness. Women and men involved in prostitution can be at increased risk of sexual ill health and as such they are a group of people that we aim to work with and support.

The amendments lodged cover a complex range of issues and the purpose of our letter is not to examine these. Rather, we would like to encourage the Committee to take evidence on these amendments in order to ensure robust scrutiny of a potential legal change that could have broad implications. In particular, we would like clarification of how these measures, in particular those which pertain to the ‘facilitating’ of paid for sexual activities, could impact on the provision of support services for women and men involved in selling sex.

We would be grateful of the opportunity to take part in any further written evidence taking that the Committee considers appropriate, particularly in relation to the health needs of people involved in selling sex. Thank you in anticipation.

Catherine Murphy
Policy & Parliamentary Officer
25 February 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Terrence Higgins Trust

I am writing in relation to the Stage 2 Amendments to the above Bill lodged by Trish Godman MSP in respect of 'offences of engaging in, advertising and facilitating paid-for sexual activities.'

We previously wrote to the Committee to ask that it consider taking further evidence on these amendments and we welcome its decision to do so. As outlined in our initial letter, our role as a leading sexual health and HIV charity means that our interest in these amendments relates to their potential impact on the safety, health and wellbeing of people involved in selling sex and the implications for wider public health.

Currently in Scotland, the prevalence of HIV remains low among people involved in sex work. However, the existence of complicating factors such violence and coercion in the sex work setting, sexual risk taking, drug misuse and the movement of people from areas of the world with a high prevalence of HIV means that individuals can be at increased risk of sexual ill health and that the accessibility of appropriate support remains crucial.

Concerns have been raised at both a national and international level regarding the structural barriers which the criminalisation of selling sex creates; potentially compromising access to support, health and wellbeing, and human rights for men and women involved in prostitution.

The Joint United Nations Programme on HIV/AIDS, UNAIDS identifies close consideration of structural barriers as a key action for Governments around the world:

"In addition to service provision, structural barriers including policies, legislation and customary practices that prevent access and utilization of appropriate HIV prevention, treatment and care services must be addressed.

The risk of infection is highest where sex workers are most powerless and therefore unable to negotiate or insist on the use of condoms by their clients, or to resist violent and coercive sex. Therefore both social and structural efforts to reduce violence in sex work settings are needed. "[1]

More locally, the Royal College of Nursing has in recent years expressed a number of concerns in relation to the impact which the criminalisation of selling sex has on access to healthcare services and support for people involved in prostitution. [2]

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[1] http://www.unaids.org/en/PolicyAndPractice/KeyPopulations/SexWorkers/default.asp

With regards to the amendments proposed, we understand that amendment 8* 11A: ‘Engaging in a paid for sexual activity’ aims to further move the focus of criminalisation away from the seller towards the purchaser of sex. However, in the absence of a repeal or significant review of Section 46 of the Civic Government (Scotland) Act we are concerned that these amendments can only serve to provide further opportunities to criminalise and marginalise men and women involved in selling sex and subsequently strengthen structural barriers to support and services.

Specifically, we are concerned that a complete ban on the advertising of paid for sexual activity, as outlined in amendment 11B, could serve to disempower individuals who are working independently; potentially making them more vulnerable to engaging with or being exploited by third parties or entering into more dangerous situations. In other areas of the UK where enforcement of the law has been tightened we have seen our service users taking more risks (working alone, working in places they are unfamiliar with, seeing clients they are unsure about etc).

Similarly, we are anxious that amendment 11C: ‘Facilitating engagement in a paid for sexual activity;’ will negatively impact on the arrangements which people selling sex may make to enhance their personal safety, such as working together with additional support. We appreciate that the aim of this amendment is to address coercion by third parties. However, the concept of ‘facilitation’ as outlined in the amendment is broad enough to potentially criminalise people working in a supportative capacity either as instructed by the person selling sex for reasons of safety in the case of reception workers or cleaners, or in terms of outreach provided by agencies or organizations. In the case of off street sex work, we would expect that access for support agencies into premises where sex was being sold could be made considerably more difficult by this amendment. Again we are concerned that this amendment could also result in more people entering into risky or isolated situations.

We entirely understand that there is eagerness to try to improve the situation for women and men involved in sex work in Scotland. However, we do not believe that legislating in this way will achieve that aim. Much more has to be done to increase our understanding of the health and social justice concerns and needs of people who sell sex in Scotland before truly informed decisions on legislation can be taken.

The Expert Group on Prostitution set up in 2003 was intended to examine, amongst other things, the health and social justice issues surrounding the selling of sex in Scotland. The Group elected to break down their review into three in-depth reports over a number of years. The first report *Being Outside,* published in December 2004 focussed on the issues for women involved in selling sex in on street environments. The second and third reports were earmarked to examine the issues for women in off street locations and for men involved in selling sex respectively.

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[2] http://www.rcn.org.uk/newsevents/press_releases/uk/rcn_reacts_to_government_decision_to_drop_key_amendments_on_sex_workers_from_criminal_justice_and_immigration_bill

A number of considerations, including the time constraints imposed by the Scottish Parliamentary elections in 2007, meant that the group did not complete the latter reports. THT believes that these reports could have made a significant contribution to informing understanding and future policy on two significantly marginalised and unseen populations.

A renewed commitment to honour the review process outlined by the Expert Group on Prostitution in 2003, ensuring that the health and social justice issues of these vulnerable groups are examined, would be a welcome way to move consideration of this issue forward. Legislating in the absence of such work could have a number of unforeseen implications and could further marginalise or compromise the safety of women and men involved in sex work.

Thank you in anticipation of your consideration

Catherine Murphy
Policy and Parliamentary Officer
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Violette Dew

I am writing this email to express my concern about the proposed amendment to the Scottish Police Bill. It is a constant struggle now with restrictions and legalities to work in a safe and productive was as a sex worker. This current proposal on the table will only endanger sex workers and push the industry underground, where we will have to not only deal with the afore mentioned restrictions and legalities, but also a very real criminal threat and endangerment of our lives. At the end of the day, we just wish to work in peace, pay our taxes, and live our lives in peace.

Violette Dew
25 February 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Laura Lee

I write to object in the strongest possible terms to the proposed amendments to the law regarding prostitution in Scotland.

I am an independent escort and have been a sex worker for 16 years. In my time as a sex worker I have come to gain an invaluable amount of first hand knowledge of the industry. At present, it is possible for sex workers to enjoy an open relationship with the authorities, and we can feel confident in the full support of the police should we need to report any attacks, robberies etc.

If prostitution is criminalised, those open channels of communication will be severed and an environment of mistrust will develop. I strongly urge you to consider that if we look towards regulation rather than prohibition, a workable solution can be reached for everyone. It is my firm belief that if the industry becomes more clandestine, it is then that the real criminals will emerge, those who will seek to offer "protection" to the women.

Turning to advertising, it will be impossible to monitor internet advertising in particular, since the vast majority of sites are hosted off shore and are outside the jurisdiction of the UK. The recent calling by Harriet Harman to shut down Punternet is an example of that.

With regard to targeting the clients, I fail to see why Scottish taxpayers should have to fund such a preposterous project. The real criminals to be targeted are those who traffic women into this country and force them to work against their will. Is it really an appropriate use of valuable police and court time to arrest and charge those men who choose to use the services of a sex worker? Surely our valuable resources would be better deployed in finding those women who so desperately need our help and prosecuting those who have trafficked them?

It is possible now to open a copy of a tabloid newspaper and make an appointment to go and visit any number of working "flats" around the UK. This is therefore an important link in being able to identify and assist trafficked women, so if that is outlawed, it will be far more difficult to trace them. To take that one step further, if we had a system of licensed brothels with regular inspections then we would have no need for street workers, the women could work in safety and it would open up the channels of communication between sex workers and the authorities.

In terms of our acceptance in society, these proposed regulations will turn the clock back 20 years and increase the marginalisation and stigma that we already experience, prostitutes are not criminals and should never be treated as such.

Finally, I am willing to meet with MSPs and discuss these proposals further.

Laura Lee
1 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Jane Scoular, Jane Pitcher, Dr Jo Phoenix, Dr Maggie O'Neill, Dr Teela Sanders, Professor Phil Hubbard

We write in relation to the proposed amendments to section 34 of the Criminal Justice and Licensing (Scotland) Bill which seek to criminalise the purchasing of sex and related activities in Scotland. Given that these proposals were carefully considered and rejected by the Expert Committee on Prostitution in 2004, we are concerned to see their reappearance in the form of a late amendment to a more general bill. We write to urge the Committee to engage in a more extensive consultation over the amendment, a more detailed debate and create a more research and evidence- informed strategy of reform for the issues arising from prostitution.

The proposal to criminalise commercial sexual transactions represents a radical change to the criminal law in this area. No Parliament in the UK has ever taken such a step, particularly one that is not well supported by either public opinion or academic evidence from the UK or abroad.

It is important to clarify issues and avoid unnecessary polarisation on this issue. We fully support the intended aims of section 34 that is: to promote the safety of women and children, to address issues of vulnerability, to improve the welfare of those in prostitution and to create viable alternatives to selling sex. We do, however, question whether these aims can be achieved through the 'seemingly' simple solution of criminalising the purchase of sex and related activities and/or through the introduction of interventions which target the individual and leave the wider economic and social context of that individual untouched.

Prostitution, like drug and alcohol abuse, is multi-faceted and multi-factorial. Research from across a range of settings has indicated that simply criminalising one side of such a profoundly complex social issue will not solve the problems that the proposal is attempting to solve. Criminalising the purchase of sex has not, so far, produced any conclusively tangible effects in terms increasing the safety of women, or decreasing levels of male violence and exploitation in prostitution. There are only a small number of international comparators and these are with countries with distinctive cultural and social contexts. It is extremely difficult to measure the impact since much research has been *ex post facto*, but what credible research there is suggests displacement of sex work and further threats to the safety of workers[1].

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[1] Kulick, D (2003) 'Sex in the new Europe: The criminalization of clients and Swedish fear of penetration. *Anthropological Theory* 3(2):199-21; Scoular, J (2004b) 'Criminalising 'Punters': evaluating the Swedish position on prostitution' *Journal of Social Welfare and Family Law 26:195-210*) Hubbard, P.J., Matthews, R. And Scoular, J. *Regulating the Spaces of Sex Work: Assessing the Impact of Prostitution Law* ESRC (June 2005- Nov 2006) and (2008) 'Re-regulating sex work in the EU: prostitute women and the new spaces of exception' *Gender Place Culture* 15:2, 137-152.

Research literature from within the UK would indicate that attempts to further regulate or control the more troubling aspects of prostitution through the use of powers of criminalisation (of women or of the men who buy sex): (i) will result in displacement of prostitution (geographically or temporally) (cf WHAT WORKS); (ii) can potentially drive prostitution underground as women shift the patterns and places they sell sex away from places most likely to be policed, making women more reliant on third parties and engendering even more risky behaviours in the women; (iii) will not be easily enforceable and may prove extremely costly to enforce what is only a low level criminal charge and (iv) will not achieve the stated aims of the change in law. Criminalising the purchase of sex does nothing to ameliorate the social stigma and marginalisation that research has amply demonstrated produces many of the negative consequences of prostitution[2]. More than anything else, criminalising the purchase of sex and using increased criminal justice interventions is a very blunt tool when the overall objective is to increase gender equality and social justice[3].

Given the complexity of prostitution and the difficulties of enforcing such a law, the real consequence of section 34 is likely to be only symbolic at best i.e. it will send a message. At worst, by assuming that the economic, social, welfare, educational, health and psychological factors of prostitution can be reduced to the issue of male power alone, the proposal to criminalise the purchasing of sex works to marginalise possible alternative political and legal strategies that might be more effective in achieving safety, security, equality and social justice for people in prostitution. One issue that tends to be forgotten in the political discussions is that two hundred years of research also tells us that for many women the choice is to engage in prostitution, as risky as it is, is at times a better choice. For some women, the choices are as stark as selling sex, shoplifting, stealing and/or robbery. Criminalising the purchase of sex will not stop women selling sex. It could, as research would indicate, lead to more ‘legitimate’, less violent or abusive purchasers of sex being harder for these women to find.

Given the equivocal nature of this evidence and the seriousness of the issue, it is one which requires much wider consultation and research-based evidence than this forum provides, given the range of other measures the committee will have to consider.

Notably, similar proposals were made but not pursued in England and Wales in ‘Paying the Price’ and ‘A Co-ordinated Strategy’ which was met with a substantial body of criticism from some of the leading academic experts in the field[4]. Concerns were expressed specifically about the use of criminal law to tackle a complex issue of social inequality, the introduction of compulsory orders designed to exit women from prostitution and the lack of consultation with sex workers as stakeholders. These important issues do not appear to have been taken into account in formulating these most recent proposals, which have not been widely debated.

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[2] Sanders, T and Campbell, R (2007) ‘Designing out vulnerability, building in respect: violence, safety and sex work policy’ *British Journal of Sociology* 58: 1,pp1-19; Hubbard, P and Scoular,J (2009) 'Making the dangerous more dangerous?: The contradictions of British street prostitution policy' in Canter, D. (Ed) *Safer Sex In the City* (Ashgate, Aldershot);).

[3] Scoular, J and O'Neill, M (2008) 'Legal Incursions into Supply/ Demand: Criminalising & Responsibilising the Buyers and Sellers of Sex' in Munro, V & Della Giusta, M (eds) *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Ashgate, Aldershot); Scoular, J and O'Neill, M (2007) 'Regulating Prostitution: Social Inclusion, Responsibilisation and the Politics of Prostitution Reform' *British Journal of Criminology* 47(5) 764-778.

We would urge the Justice Committee to engage in a more extensive consultation with all key stakeholders which would presumably help to broaden out the current narrow focus of reform into a more inclusive, research-informed reform strategy. We would urge the committee to make a careful balanced assessment of this complex area before undertaking steps that are not based in credible authoritative, peer-reviewed research, arise from a weak consensus and will result in harmful consequences.

Finally we should add that all of these points are supported by research evidence which we would be happy to present to the committee.

Jane Scoular, Reader in Law, University of Strathclyde
Jane Pitcher, Independent Social Researcher
Dr Jo Phoenix, Reader in Criminology, Co-Director of the Crime, Violence and Abuse Research Group, Deputy Head of Faculty, Durham University
Dr Maggie O'Neill, Reader in Criminology, Durham University
Dr Teela Sanders, Senior Lecturer in Sociology of Crime, University of Leeds
Professor Phil Hubbard, Head of Department, Department of Geography, Loughborough University

1 March 2010

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[4] There are many such academic papers in a peer-reviewed journals, for a good overview see Phoenix, J. 2009. *Regulating Sex for Sale: Prostituion, Policy Reform and the UK*. Bristol: Policy Press.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Action Scotland Against Stalking

Scottish Government's proposed amendment for anti stalking legislation.

I am delighted the Scottish Government is taking forward an amendment but having looked at the proposed legislation there are one or two matters which cause us some concern.

We feel that the omission of stalking as a specific named crime and defined behaviour is an omission which could lead to an abuse of this proposed legislation by those guilty of the crime.

Our major concern is that the Scottish Government's proposed amendment is so general, it will result in no change in court sentencing, whereas if stalking is specifically identified as a crime where the behaviours involved are broadly categorised within a specific framework, it leaves no room for any ambiguity. This has already been achieved in many other countries and American States and not without good cause or reason. It narrows the focus of sentencing and gives weight to the severity of the crime.

Stalking is not just simply threatening, alarming and distressing behaviour but can be frequently a precursor to violence, rape and murder. Whilst any threatening, alarming and distressing behaviour may disrupt lives it does not necessarily carry the implicit or explicit threat of violent action and may not necessary cause the psychological damage commonly experienced by stalking victims.

It is for this reason stalking needs to stand alone separately and individually and it is only through this that the severity of the crime will be fully identified, acknowledged and appreciated.

Identifying stalking as a specific crime, rather than being treated as an example of threatening, alarming or distressing behaviour, will encourage the correct interventions to be put in place at a much earlier stage.

The Scottish Government's proposal does not differentiate between threatening, alarming and distressing behaviour which can occur within Breach of the Peace legislation and stalking - for example: someone throwing a brick into a crowd of people as opposed to a dedicated campaign of terror conducted by one individual against another specific individual.

Stalking is not a general anti social behaviour: it is a targeted terrorist attack against a chosen individual. Stalking and threatening, alarming and distressing behaviour are therefore worlds apart in terms of behaviour, context, intent and impact.

The concept of stalking, what it is and what it means already exists within public consciousness.

Whilst the term stalking is a euphemism for a particular phenomenon which involves motive, intent and purpose it is none the less a shared global concept understood by all within every public and private domain of society and the term widely used by the media.

It is time our legislation utilised this shared knowledge and understanding and caught up with the reality of stalking and its deviant behaviours by placing it within its own legislative framework, which proves not just a clear legislative definition but an operational definition which identifies the motive, the mode and the perspective.

Society is well aware of what stalking is, but it is the courts, the authorities and legislation which do not.

Rhoda Grant’s amendment has set out to achieve this. It has recognised the disparity between public and legislative awareness and has attempted to close this gap.

Rhoda Grant’s amendment has also helped operationally define the broad categories of behaviour which constitutes stalking. Stalking consists of a broad category of behaviours. As we are well aware a stalker does not concentrate on one specific act of stalking or category of acts, but a constellation of several acts. It is the constellation of acts which is a very important element of stalking and these are defined within Rhoda Grant's amendment thus providing clarity and better operational precision.

The individual acts may not initially be construed as threatening by the recipient but when viewed as a whole stalking can be identified as occurring.

It is important to avoid invalidation on vagueness grounds.

Whilst the law does not need to define the forbidden conduct with mathematical precision, it does need to distinguish the blurriness between lawful activity and stalking activity.

Again Rhoda Grant’s amendment has achieved this.

Stalking by its very nature is a silent and hidden crime describing behaviours between one individual and another and unless it is named and the behaviour defined specifically within a legislative framework it will continue to remain hidden thereby putting 1 in 6 women and 2% of men at risk.

Because threatening, alarming and distressing behaviour is such a broad term it is hard for implementation of legislation to be consistent across the board. By defining stalking as a specific and named crime, consistency of application of legislation will be easier to achieve and the amendment will be seen as having more power in the public perception.

The Scottish Government's proposed amendment has failed to address key areas to protect victims of stalking behaviour.

Therefore, in conclusion, my argument is against any legislation which fails to name the crime specifically, accurately or appropriately. Placing stalking under a law which is not specifically tailored to this particular and unusual type of crime will result in it being unconstitutionally vague, when "the forbidden range of behaviour" is so poorly defined that a person or persons of common intelligence must necessarily guess at its meaning and differ as to its application, or it is so indefinite that it permits arbitrary arrests or discriminatory enforcement.

It is our contention that in failing to take this opportunity to define stalking as a specific crime the Scottish Government will be seen as having missed a great opportunity to address a social ill which is far more pervasive, damaging and dangerous than is acknowledged under the present proposal.

Any anti stalking legislation must set explicit, objective standards for a defendant's actions, knowledge, and the effect of his conduct on his victim.

Whilst the Scottish Government's amendment is welcome and deals with the issues arising out of the Harris case we feel we need Rhoda Grant's amendment to address the crime of stalking.

Ann Moulds
Action Scotland Against Stalking
1 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the UK Network of Sex Work Projects

Comments on proposed amendments 11a, 11b and 11c of section 34 of the Criminal Justice and Licensing (Scotland) Bill

1. Background: about UKNSWP

The UK Network of Sex Work Projects is a voluntary sector umbrella organisation to which projects providing support services to sex workers and sexually exploited people can affiliate. UKNSWP is a charity which facilitates networking and the sharing of good practice in the provision of support services for sex workers. The aim of the UKNSWP is:

"To promote the health, safety, civil and human rights of sex workers, including their rights to live free from violence, intimidation, coercion or exploitation, to engage in the work as safely as possible, and to receive high quality health and other services in conditions of trust and confidentiality, without discrimination on the grounds of gender, sexual orientation, disability, race, culture or religion"

Our criteria for assessing policy and law relating to prostitution is that it should enhance the health, safety, civil and human rights of sex workers and enable the provision of accessible, quality and needs based support services. UKNSWP is also committed to a policy and practice approach based on needs assessment and rigorously collected knowledge and research evidence.

UKNSWP has 60 member projects (including members in Scotland) who offer frontline support services to and have direct contact with thousands of female and male sex workers throughout the UK. Member projects work with a diverse range of people involved in sex work and also sexually exploited people. Amongst our members are projects offering support to people across different sectors of the sex industry.

UKNSWP facilitates the sharing of good practice in the provision of support services for sex workers and promotes the health and safety of sex workers. Members are well placed to observe the impact of laws and policies on sex workers and on targeted services themselves. We also have associate members amongst whom are some of the key academic and policy researchers on prostitution in the UK.

2. Member consultation and concern about timescale for submission

UKNSWP only became aware of proposed amendment during the week of 15 February, hence we have been unable to submit a comprehensive response in the timeframe nor have we been able to carry out the level of consultation with our members that we would generally undertake on a specific piece of legislation. The UKNSWP Policy Group meeting (a networking meeting open to all members) was scheduled for 19 February so we were able to take these amendments to that group for discussion and feedback. During the last two years members have been widely consulted generally about approached to polices and laws to relating to men who paying for sexual services, hence we have been able to draw on that consultation material.

UKNSWP also expresses concern that key organisations that have a role in offering support to sex workers and people experiencing sexual exploitation, plus other stakeholders, may not have been made aware of the proposed amendments and process to respond to these.

Overall our main concern relating to all three parts of the proposed amendment are that they would be likely to make sex work in Scotland more covert and more dangerous, be likely to impede the work of social care and health projects in providing support services to sex workers and are unlikely to do anything to reduce trafficking or other forms of coercion due to their untargeted nature.

A number of international bodies recognise that frameworks of criminalisation of sex work are not conducive to the protecting the rights of sex workers, their safety and access to health social care and other support for sex workers.

3. 11a Engaging in a paid-for sexual activity

We read this legislation as being targeted at people who pay for sexual services and we read this amendment as criminalisation all people who pay for sexual services or “activity” as referred to in the amendment. We urge the Scottish parliament to consider our concerns for such blanket criminalisation of people who pay for sexual services. Are concerns about this amendment are:

- It does not address sex workers’ exposure to violence since violence against sex workers is frequently associated with *refusal* to pay (Kinnell, 2008)[i]. It fails to understand the dynamics of violence against sex workers in Britain. Criminalising payment for sexual services could increase this kind of violence and make prosecutions for violence more difficult. It would also inhibit clients from coming forward as witnesses in murder cases.
- There is already concern that the criminalisation of clients of street sex workers via the Prostitution (Public Places) Scotland Act 2007 has already undermined street sex workers’ safety by making their activities more covert and criminalisation of clients who patronise indoor workers is likely to have the same effect.
- It would oblige police to target a very wide range of clients, thus diverting them from pursuing those who are abusive to sex workers.
- UKNSWP also consider this approach to be ineffective and potentially counter-productive in addressing trafficking and coercion by making sex work more covert. It would also inhibit clients with concerns about coercion or trafficking from passing information to the police.
- Would be extremely difficult to police: bringing the police into potentially all situations where consenting adults agree to paid for sex activity

4. 11b Advertising paid-for sexual activities

We are concerned that this amendment if accepted would bring a blanket ban on advertising. This has a wide number of impacts and risks including:

- Preventing men and women themselves involved voluntarily in sex work using any form of advertising for their own services without them committing a crime. Hence it will bring into the criminal framework a whole group of sex workers who are currently not criminalised.
- Making sex workers more dependent on intermediates to find clients and host their advertising, hence leaving then more vulnerable to financial and other forms of exploitation.
- Forcing sex work further underground and more illicit, furthering the social exclusion of sex workers and marginalising sex workers from support services and other authorities such as the police.
- Further heightening the invisibility, and with that, vulnerability of sex workers to violence and exploitation.
- Making it more difficult for health social care, support services, the police and other authorities to identify sex workers and make contact with them.
- Increasing the control and power of organised criminals and exploitative and abusive individuals who are willing to take the risk of advertising

In this amendment bans all advertising no distinction is made between:

- Exploitative individuals, for example those involved in trafficking who use advertisements in some way, and independent sex workers themselves placing their own advertisement (e.g. an independent female escort working for herself via a personal website, an independent male sex worker advertising via Gaydar, or two female or transgender sex workers sharing a working flat).
- Advertising that includes for example explicit sexual imagery placed in general public spaces and discrete advertising in discrete locations or specific websites.

We are unclear of the aims of this amendment. If it is intended to address trafficking and exploitation we are not aware of research that demonstrates that banning all forms of advertising of sexual services is effective in preventing, detecting and prosecuting traffickers and people who force people into prostitution.

5. 11c Facilitating engagement in a paid-for sexual activity

One of the consequences of this proposed amendment is that it can remove relatively safer environments for sex work to take place and can force people to work in more dangerous or exploitative conditions. It increases the possibility of sex workers working alone, working in more dangerous conditions, moving on to other venues without safety precautions.

As we read this amendment maids and receptionists employed by a sex worker could become subject to this law. A key safety measure in off street settings is the presence of a maid or receptionist (Sanders and Campbell, 2006)[ii]. Also in the situation where two sex workers work together by mutual agreement, but use a flat in the name of one of the sex workers, that sex worker would be subject to this offence.

As currently written this amendment would be applied equally to a receptionist working for an independent sex worker taking money from clients for the sex worker, a driver employed by a sex worker AND a trafficker who uses violence or threats to force some one to sell sexual services.

6. Concluding comments: law and policy to prevent and address violence against sex workers and enhance access to support services

Creating policy and law to address sexual, violent and other crimes committed against sex workers, exploitation of people in the sex industry, the trafficking of people for sexual exploitation, the sexual exploitation of children and young people, are supported and commended by UKNSWP. We want to see these human rights abuses addressed and perpetrators of such crimes brought to justice. Indeed our members are actively working around these issues and support people who have been victimised. However, these proposed amendments appear misdirected and it is unclear to UKNSWP how these will:

- Focus police and other criminal justice resources to bring exploiters to justice.
- Address violence against sex workers.
- Improve the safety and welfare of sex workers.
- Create a legal framework which encourage sex workers to access health and social care support services.

Since its establishment UKNSWP has advised those in government and policy makers to adopt laws and policies which:

- Prevent and address violence against sex workers, including appropriate criminal justice responses to sexual, violent and other crimes committed against sex workers. Also we encourage policy makers to avoid adopting laws which themselves create conditions that can jeopardise the safety of sex workers. The majority of projects in our network provide safety interventions and support for sex workers who have been victims of crime. We would urge the Scottish government to consider the implications for safety of this proposed legislation as outlined in this paper. We also urge the Scottish government to support initiatives that have seen real success in addressing violence against sex workers e.g. policing and local authorities treating crimes against sex workers as hate crime, investing in specialist staff within support services to support sex workers who are victims of crime (following the model of a specialist Independent Sexual Violence Advisor in Liverpool NB the “Merseyside” model as reported at the National ACPO Vice Conference 2009 has seen a large increase in sex workers reporting crimes to the police and in convictions for rape), supporting campaigns/schemes to encourage sex workers to report crimes committed against them, funding specialist projects to enhance their “ugly mugs/incident reporting schemes” and safety work.
- Improve access to a range of holistic support be that; health promotion, primary health care, harm reduction interventions, drug treatment, legal advice, housing advice and support, specialist support to migrant sex workers,

specialist support to trafficked people and exit support amongst many other elements of support interventions. We urge the Scottish Government to consider the concern that the proposed amendments may further impede the work of social care and health projects and make access to support services more difficult for sex workers.

Rosie Campbell
Co-Chair Policy Group
25 February 2010

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[i] Kinnell (2008) in the most comprehensive analysis of violence against sex workers in the UK "Violence and Sex Work in Britain", Willan Publishing, found that a high proportion of the violence suffered by both street and off-street sex workers comes from those who **do not pay for sex**. At indoor premises the vast majority of violence occurs in the course of robberies. A substantial amount of violence to street sex workers comes from members of the 'general public', such as gangs of youths, aggrieved local residents and vigilantes. Violence from these sources will not be addressed by criminalizing paying for sex. Those who approach sex workers in the guise of 'clients', and then perpetrate sexual or physical assaults, are already very unlikely to be paying for sex. Kinnell found that re-examination of numerous instances of violence against sex workers indicates that a very high proportion of attacks arise in situations where the aggressor is *not* paying for sex, and so, by definition, is *not* a client. The confusion arises because aggressors frequently imitate client behaviour, to gain access to sex workers' premises, or to persuade an individual sex worker to go with him to a location where she has no protection from the violence that he intends. She found that some attackers rationalize their aggression by claiming that they did not know their victim was a sex worker until she asked to be paid, and that this request provoked rage. She found many cases where attackers felt "insulted" by the suggestion that they "need" to pay for sex; they found it degrading to their self-esteem to see themselves as insufficiently attractive or persuasive to obtain sex partners without offering monetary inducement. She found that in most accounts of attacks that have taken place in these circumstances, it is clear that the aggressor has approached the victim in circumstances which show that he *did* know the woman was a sex worker, so must have anticipated that he would be asked to pay. She argues that closer examination of the language and behaviour of men, who use the "client disguise" or the "non-client excuse", reveals common attitudes of misogyny and contempt towards sex workers, and numerous instances where rape and assault have been used to demonstrate their power, to deny that they are clients, and to deny the woman's right to demand payment. Initiatives that construct a discourse of "shame" around paying for sex could further fuel the attitudes of this group of men. She also highlights the "discourse of disposability" which sustains cultural attitudes that shape attitudes to sex workers and urges responsible authorities not to adapt laws and polices which feed into this discourse.

[ii] Sanders, T and Campbell, R (2007)"Designing Out Vulnerability, Building in Respect: violence, safety and sex work policy" British Journal of Sociology, Vol 58, Issue 1.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Lieutenant Colonel R E P Spencer

Amendments in the name of Trish Godman

My attention has been drawn to certain (apparently classified as "minor) amendments to this Bill, currently before your Committee, proposed by Trish Godman MSP, which appear on page 59 of the Marshalled List of Amendments. I understand that your Committee has put consideration of these amendments off for a short while, to enable mature consideration. I hope that that consideration will lead to their rejection.

As a Scot, my view of this matter suffers, possibly, from the fact that I am an English Solicitor, but is helped by my career having been as a military prosecutor, which brought me into contact with the sex-industry, and its consequences, in a good variety of different jurisdictions.

I comment on the basis that whatever the merits (and for me, I am for reasonable control, rather than a futile attempt to abolish the sex industry) that human sexuality will continue to express itself in many ways, including commercial ones, whatever legislation may be passed to outlaw "paid-for" sex.

In my respectful opinion, the proponent of this amendment, which if passed into law would bring about a substantial change in principle, is wrongly seeking to insinuate this matter as a late amendment, in the less than honest hope that there will not be time for it to have proper consideration, and will simply be accepted without debate.

There is no doubt whatever that there are serious social problems in Glasgow and its environs, which are manifested by violence, drug use and street prostitution and other undesirable activities. I seriously question, however, whether driving prostitution deeper underground will help solve any problems whatsoever. Indeed, leaving aside the matter of making All-Scotland legislation to solve Glasgow's problems, by attacking symptoms rather than causes, I would suggest that these amendments, if passed, will make things worse for the providers of sexual services, who are often presented as victims.

Intriguingly, this proposal, which is loosely, even sloppily, drafted, will penalise the poor man whose fifty pound back seat sex will be criminalised, but have no effect on the rich man who provides a flat, jewellery, clothing and so forth for his mistress.

Certainly there are women (and men too) who drift, sadly and unwillingly, into the sex industry, where they are abused, and, in a few terrible cases, murdered.

There are also many women who have taken a considered decision to enter the industry, in a wide variety of roles – I spoke a few years ago to one woman, who told me that she did not think it right that her partner should support her son, so provided for him through prostitution. I have met others who, deserted by the fathers, have decided that their children would benefit from private education, and found that the best way that they could finance that would be through work as “escorts”. The key in most cases lies in the departure, for whatever reason, of the husband, or co-habitee, leaving the woman to pay the mortgage and otherwise support herself and a child or children.

There are also Courtesans, who, intelligent, highly educated and cultured, have made a fully considered life/career choice.

Mrs Godman's proposal seeks to criminalise all varieties of “paid for sexual activity”, which seems intended to cover everything from strip-tease, lap dancing, through telephone sex and safe escort work to dangerous back-street prostitution, and, indeed on into the “bondage and discipline” world, but seems, fundamentally, aimed at prostitution.

Currently, although the law, rightly, penalises many coercive and exploitative activities ancillary to the sex-industry, as well as soliciting and kerb crawling, for one person, alone, to provide to another person, for a money payment is not illegal – indeed it does, of course, provide a taxable income to the provider, which HMRC taxes with enthusiasm. (Unfortunately, currently, the law does act against the bodily security of sex-workers, by classifying premises where more than one person works at the same time as a “brothel”.)

What this means is that a woman, active in the sex industry has, at least nominally, the proper protection of herself and her property under the law, and, subject to the prejudices of police and prosecutors, can expect any complaint that she may make of assault, rape or robbery, to be properly and promptly investigated.

The current proposal does not make it an offence, *per se*, for a person (woman mostly) to sell her sexual services – but if the purchaser is a criminal, surely, the vendor is at least his accomplice?

If this proposal is accepted, I suggest that the consequences will be as follows:

- The sex-industry will be driven further underground, out of the reach of the various agencies which seek to help and support those involved.
- There will be substantial loss to the Revenue – a tolerated industry pays taxes, but an underground one does not!
- A surprisingly large number of hard working women, and men, will be deprived of their incomes, and thrown onto dependence on benefits from central and local government.
- There will be a considerable increase in traffic down the M74 to

> Carlisle, Preston and Manchester, which will not contribute to road safety, or to Scotland's carbon footprint but will put money into the English sex-industry!

These amendments should be rejected.

Lieutenant Colonel R E P Spencer
3 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Dr Lorraine Sheridan

The proposed amendment by Rhona Grant, MSP, is, in my view, too specific. Despite the fact that I will use the term 'stalking' here, the relevant research evidence would indicate that the term 'stalking' is not gainfully utilised in anti-stalking legislation. Widely drafted terms tend to lead to greater numbers of successful prosecutions. As such, "threatening, alarming or distressing behaviour" is preferable, as these terms are easily understood and do not demand definition. Employment of the term 'stalking' does tend to demand strict definition, which is not suited to this (perhaps uniquely) nebulous crime.

It is essential that stalking is loosely drafted in law as virtually any behaviour can, when repeated and targeted, constitute 'stalking'. Examples of ostensibly routine and harmless behaviours include walking past the target's house and asking the target out on dates. Providing examples of inherently more sinister behaviours in law would only serve to undermine how damaging ostensibly harmless behaviours can be to the victim. It is the chronicity of stalking that makes it unique (most interpersonal crimes are acute in nature) and presents a special case for particularly loosely drafted legislation. Case law around Europe presents a picture of legal practice that leaves more than enough room for stalkers to be effectively punished without a need for lists of definitive behaviours.

The specific stalking type behaviours listed do not cover what the now extensive empirical literature recognises as the primary stalking behaviours. Even if the list were reflective of the major actual stalking behaviours, it would likely be soon outdated as stalking activities are dynamic and alter according to technological innovations and social changes. European case law demonstrates that anti stalking laws are usually interpreted with a lack of rigidity, and that this is beneficial in that it leads to larger numbers of stalkers being prosecuted. For instance, the Dutch anti-staking law is loosely drafted and sees 93% of all cases proven.

A real plus of Rhona Grant's amendment is that fear of harm is not limited to the victim alone, and is extended to persons associated with the victim (subsection 2 (ii)). Research demonstrates that the average number of persons directly affected in a stalking case is 21 (principally children, other family members and friends of the victim).

Dr Lorraine Sheridan
Chartered Forensic Psychologist and Senior Research Fellow
Heriot-Watt University
8 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Coalition Against Trafficking in Women

Amendment 8 (Godman) to the Criminal Justice and Licensing (Scotland) Bill

I write in support of an amendment to the Criminal Justice and Licensing Bill that would create an offence of "engaging in, advertising and facilitating paid-for sexual activity." The Coalition Against Trafficking in Women (CATW) supports this amendment because it is based on the understanding that any society that purports to encourage and defend women's equality must reject any act or policy that institutionalizes the buying of women as sexual commodities.

Background and Expertise

I am Professor Emerita at the University of Massachusetts, Amherst, in the United States. I have received research and program grants from the US Department of Justice, the US Department of State, the Norwegian Organization for International Research and Development Aid (NORAD), UNESCO, and other foundations to study prostitution policy in various countries and advocate for legislation that supports women's right to be free from sexual exploitation. My publications focus primarily on national and international prostitution policy and legislation, international and domestic sex trafficking, and the health effects of violence against women, including prostitution, and human sexuality.

From 1994-2007, I was the co-executive director of the Coalition Against Trafficking in Women, International, an international non-governmental organization in consultative status with the UN Economic and Social Council. Currently, I am on the Board of Directors. I have specialized expertise working in UN, regional and national contexts where I have advised governments and NGOs on public policy related to the links between sex trafficking and prostitution and the negative consequences of decriminalization and legalization of prostitution. I have testified on prostitution legislation and policy before numerous congressional and parliamentary committees in Albania, Canada, Croatia, Latvia, Lithuania, Sweden, the United Kingdom, the United States and the European Union.

In 2008, the Attorney General's office in Canada asked me to serve as an expert witness in a legal case that was a Charter Challenge to the prostitution laws in Canada. As part of my affidavit, I was asked to undertake a report on Sweden's prostitution policy and on the consequences of the Swedish law that penalizes the buyers of sexual services. I will summarize below my major findings, which are relevant to the new offence of engaging in paid-for sexual activity that the Justice Committee is now considering.

Findings from Sweden Relevant to the Scottish Amendment that would create an offence of "engaging in, advertising and facilitating paid-for sexual activity:"

The success of the Swedish model is confirmed by its results, documented in several reports of the Swedish National Rapporteur on Trafficking/National Criminal Investigation Department.

1. **Sweden appears to be the only country in Europe where sex trafficking has not seen a substantial increase**. In her report published in 2004, the Swedish National Rapporteur on Trafficking estimated that between 400-600 women were trafficked into Sweden during 2003. This is a number that has remained fairly constant since the law came into force in 1999.

2. **The Swedish figures should be compared to trafficking figures in neighboring countries such as Denmark where there are no legal prohibitions against the purchase of women in prostitution.** Denmark has a smaller population than Sweden (roughly 5 ½ million to Sweden's 9 million), yet higher numbers of victims of trafficking. In Denmark, which has decriminalized aspects of prostitution and has no law against the buying of sexual activities, 5,500-7,800 women are prostituted every year, 50 percent of whom are estimated to be trafficked from outside the country.

3. **Swedish police who monitor the phone conversations of suspects indicate that traffickers see Sweden as an inhospitable climate to set up business**. The National Rapporteur further reports that the traffickers state that potential buyers are fearful they will be arrested, causing traffickers to change their prostitution venues frequently – a costly practice.

4. **The police, who originally opposed the law, now generally see the law penalizing the buyers as an important tool in their fight against organized crime and sex trafficking.** Europol, police forces in other European countries, and testimonies from women in prostitution have also confirmed that Sweden is not an attractive market for traffickers.

5. The Swedish National Rapporteur on Trafficking has stated that **the number of those involved in prostitution has dropped 40 percent in Sweden,** from 2,500 in 1998 to 1,500 in 2003, 4 years after the law was passed. The Swedish National Board of Health and Welfare has also reported that "There have been no changes in the extent of prostitution since 1999," [and] "the current total is still less than before the new law went into effect."

6. **In 2005, a European Parliament-commissioned report concluded that Sweden's legislation, with its penalization of demand, seems to produce fewer victims of trafficking than in 11 countries in Europe that were**

studied. The study was undertaken by the Transcrime Institute entitled “Study on National Legislation on Prostitution and the Trafficking in Women and Children.” It examined the way in which a country’s prostitution legislation influenced the number of trafficking victims.

7. **Swedish women’s organizations and shelters report that increased numbers of women in prostitution are seeking help and receiving many of the resources they need since the law penalizing the buying of sexual services came into force.** For example, representatives of the Pros-Centre in Stockholm whose work is to provide services for women in prostitution state that “Of the 130 persons with whom they had contact during the past 3 years [2002-04], 60% have left prostitution permanently, and many women point to the Law as an incentive in their having sought assistance.”

I draw the following conclusions about Sweden and laws penalizing the demand for sexual activities. Men who formerly bought women in prostitution now think seriously before they do so, because they know the law will be enforced. The law against the purchasing of “sexual services” has had a chilling effect on sex trafficking.

Other Countries that Penalize the Demand for Sexual Services

Norway - The success of the Swedish model is also confirmed by a new 2009 law in Norway against the buying of sexual activities that was passed by a parliamentary vote of 44-28. The Norwegian legislation added two enhancements to the Swedish model: it changes the wording from the purchase of a “sexual service” to the purchase of a “sexual act;” and it covers the purchase of a sexual act outside Norway.

The Norwegian legislation criminalizing the demand follows other laws that penalize the buyers, all which have been passed since the 1999 Swedish law came into force: for example, in the Philippines and Korea. For the first time, these laws target the demand for prostitution that promotes supply.

One year after the Norwegian law came into force, police estimate that the number of women in street prostitution has decreased by 20 percent. Indoor prostitution is also estimated to be down by 16 percent.

The police in Oslo also report that there are many fewer buyers on the street. In 2009, 334 buyers were arrested, charged and fined. In Bergen, police report that advertisements for sexual services have dropped 60 percent. Bergen police have effectively monitored telephone numbers in these advertisements to identify buyers and have charged them. An added value to this monitoring is that it reveals a wider network of criminal organizations involved in prostitution and trafficking and their links to other criminal groups involved in child prostitution, pornography and drug trafficking.

Iceland - In 2009, Iceland passed a law criminalizing the purchase of a sexual service. Art. 206 states: “Any person who pays, or promises to pay or render consideration of another type, for prostitution shall be fined or imprisoned for up to 1 year.” The penalty for buying a child under age 18 for prostitution is a fine or imprisonment for 2 years.

United Nations - Likewise, the United Nations and several countries have made it a punishable offense for their military, peacekeepers and related personnel to buy women for sexual activities in prostitution. The human trafficking policy of the UN Department of Peacekeeping Operations (DPKO) prohibits the purchase of sexual services by UN peacekeepers and related personnel. Even if prostitution is not a crime in the jurisdiction in which the peacekeepers operate, the UN policy prohibits the purchase of “sexual services” since it identifies prostitution itself as an act of sexual exploitation.

Objections to Criminalizing the Demand for Sexual Services: Prostitution Goes Underground?

The most common objection to legislation penalizing the demand for sexual services is that it drives prostitution and prostituted women underground. This objection is mainly anecdotal and comes predominantly from individuals and organizations who opposed the Swedish legislation before and after it was passed.

I examined these objections and the alleged evidence for them in my affidavit to the Attorney General in Canada. I also examined allegations of increased violence directed against prostituted women by more dangerous buyers.

1. What does it mean to say that prostitution and prostituted women “go underground?” Most of these allegations refer to Internet-mediated contacts between women and men who buy women on Internet sites. Prostitution and pornography industries have always taken advantage of technological innovation in videos, DVDs and the Internet. These developments are not a consequence of the Swedish legislation penalizing the demand.

2. In 2004, the Swedish National Board of Health and Welfare (NBHW) concluded that there is no evidence that the Swedish Law penalizing the buying of sexual services has caused an increase in prostitution-related contacts on the Internet. Their report maintained that the number of women who are prostituted via the Internet remained stable at around 80-100.

3. While there may be an increase of Internet advertising of sexual services, the same women advertise on many different sites.

4. Prostitution cannot go underground in the sense that contacts need to be established initially between women and those men who want to buy sexual services and, later, for the act of prostitution to take place. In most countries, the majority of prostitution takes place indoors. Internet sites, brothels and sex clubs are hardly underground meeting places.

5. Police report that they have not found any increase in the extent of violence against women in prostitution that would supposedly result from the presence of more dangerous clients remaining when the “safer” buyers leave the streets for fear of being caught by the police (NBHW).

Some Comparative Points with Other Countries

1. Countries that have no laws against the demand for sexual services, even countries that have legalized prostitution such as the Netherlands, report that there are increased prostitution services advertised on the Internet.

2. Since legalization of prostitution in the Netherlands and Germany, many women do not obtain working permits and do not register as the law requires because they want to retain their anonymity. Thus, they must go underground to avoid being arrested and penalized. It is more correct to state that legalization of prostitution, NOT penalizing the demand, drives women underground (Daalder Report, 2007).

3. Amsterdam, Rotterdam and The Hague have closed their prostitution tolerance zones because of the increased criminal presence and violence to women in prostitution that resulted after the new legalization legislation in 2000.

4. In 2006-07, Amsterdam closed down 1/3 of the window brothels in the city. The city concluded that these brothels were either in the hands of organized crime or its allies.

5. In 2007, a report commissioned by the Ministry of Justice in the Netherlands and authored by A.L. Daalder entitled *Prostitution in the Netherlands since the Lifting of the Ban* took a hard look at whether the legalization legislation had fulfilled its goals. It found that the situation of women in prostitution had not improved, their emotional well-being was lower than it was in 2001, and most women had not accessed the proclaimed social and economic benefits that were to follow legalization. Pimping is still prevalent with the added benefit to pimps of being legal entrepreneurs, and a large number of young women are induced into prostitution. Trafficking appears to be rampant as evidenced by the majority of foreign-born women in the legal and non-legal sectors. Former criminals run many of the brothels and sex clubs, and ties with organized crime permeate the legal and non-legal brothels.

6. **Even the Netherlands proposes penalizing the buyers** - A series of measures has been proposed to address the damaging consequences of the Netherlands legalized prostitution policy. In 2008, the Ministry of Justice announced plans to criminalize the purchasing of illegal persons in prostitution and those without licenses. Based on the fact that "There are still too many problems in the prostitution sector, including human trafficking," the Ministry of Justice has sent a bill to Parliament to prosecute the buyers -- what the press has called "taking a step in the direction of how Sweden has been approaching the problem."

Conclusion

Amendment 8 proposing changes to the Sexual Offences Act of 2009 that creates an offence of engaging in paid-for sexual activity will place Scotland in the company of those countries who recognize that to discourage prostitution and trafficking, they must address the demand – the men who buy women in prostitution. Demand has been largely invisible in national, regional and international prostitution policy, but this is beginning to change.

It would be unfortunate if Parliament approved Amendments 8A-AD (Macdonald) because they seriously weaken Amendment 8. These amendments restrict the offence of engaging in paid-for sexual activities to those that "cause alarm" and are "coerced."

In 2006, Finland passed legislation simply penalizing the buyers of coerced and trafficked women in prostitution. There have been few buyers arrested, charged and prosecuted under this legislation because it is almost impossible to prove coercion in the prostitution context, thus exempting the majority of buyers from the reach of the law.

Like all laws, the proposed legislation penalizing the buyers of sexual activities fulfills a normative function by prohibiting the sale of women for prostitution. Law is normative as well as protective and punitive. This is one of Amendment 8's most important functions. The Amendment to create an offence of engaging in paid-for sexual activity signals a country's will to discourage the treatment of any woman as a sexual instrument and commodity. If passed, this new legislation in Scotland will serve as an international model for the promotion of equal rights and protections for the some of the most vulnerable women in law and life.

Dr Janice G. Raymond
10 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Roger Matthews

I have been engaged in conducting a strategic review in Glasgow over the last year. This review has involved conducting interviews with women working on street and indoors as well as with relevant practitioners.

It is clear from this research that controlling prostitution in its various forms requires that we address the issue of demand. At the extremes are coercive clients who threaten, intimidate and violent towards women working in prostitution who are seen as vulnerable targets as well as those whose use of prostitutes is largely 'recreational' and who only seem to pay for sexual services because there is no explicit legislation deterring them from paying for sex.

Research carried out in Glasgow and elsewhere suggests that the majority of these clients are married or are living with partners or that they pay these women to engage in forms of sexual activity that their 'respectable' wives and partners refuse to do. The price for indulging these men's sexual appetites is hundreds of women whose lives are ruined while sending out a message to the wider community that buying the sexual services of women is a legitimate activity.

Considerable gains have been made in Glasgow in recent years in relation to reducing the number of women working on the streets and there are currently strategies in place to reduce the off street trade. Reducing the demand for sexual services would allow these gains to be extended and consolidated and it would also be advantageous to introduce legislation to control those who exploit and coerce women involved in prostitution.

Roger Matthews
Head of Crime Reduction and Community Safety Research Group
London South Bank University
10 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Rosie Macintyre

I am writing to voice my profound concern and disgust towards the proposed amendments to the Scottish Police Bill which will have a seriously detrimental affect on the lives of currently legitimate sex workers within Scotland.

As one of the many sex workers in Scotland who has made an informed and elected choice to enter such a profession, I am horrified to learn of the proposed amendments you are keen to introduce. Currently, as an independant escort I am able to work in a safe and legal environment where I can pay my taxes - as any other self employed professional - and work in the comforting knowledge that I have the support of the police.

Despite your pathetically poor attempts to mask this amendment as a positive change to the sex industry in Scotland, you are in fact - very naively - doing the exact opposite. Instead of making the streets of Scotland a safer, cleaner place, you will actually be creating an underground prostitution scene. It goes without saying that this will be a very dangerous and unsafe environment for woman and men alike to work in.

The problem of prostitution that you need to address is that of trafficking. Open any red top news paper and you will find a wealth of adverts "selling" woman. Why are you not focusing your attention on helping these woman and convicting the monsters who instigating these rings?

I find it astonishing that you believe you can eradicate the Scottish sex industry by simply putting these amendments into place. Sex workers will migrate south! Those that don't will continue to work in what will then be an incredibly unsafe environment. Wisen up!

It should go without saying, I strongly oppose these amendments.

Rosie Macintyre
10 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Professor Neil Hutton and Professor Fergus McNeill

Sentencing for Knife Crime - Amendments 10 and 10A

1. The assumption underpinning both of these amendments is presumably that the proposed minimum sentences will act as a deterrent to those who might consider carrying knives. If this assumption is correct, then the incidence of knife crime would decrease. However, while many people believe that criminal sentences have a deterrent effect, there is no evidence to support this. A recent authoritative review of the international research literature by the former Director of the Cambridge Institute of Criminology, Professor Michael Tonry, concludes that there is little credible evidence that changes in sanctions affect crime rates. For example, neither the Californian three strikes legislation nor the zero tolerance policing project in New York, both of which were claimed to demonstrate reductions in crime, had no significant impact on criminal behaviour. In New York, the decline in crime rates which occurred had begun four years previously (1990-91) and continued through the process of the zero tolerance policing project and did so across the USA (where quite different policing policies were being pursued) and not just in New York.

2. Though it may seem counter-intuitive to suggest that the threat of sanctions does not exercise much influence on criminal behaviour, it is in fact relatively easy to see why this is the case. For punishment to have a deterrent effect on behaviour, certain conditions need to be met. The first of these is *certainty*: the prospective offender needs to believe that there is a very high chance of being apprehended. The second is *celerity*: the punishment needs to be immediate. The third is *severity:* the offender must experience the punishment as a significant 'pain' to be avoided. The fourth is *intelligibility*: the offender has to see the pain of the punishment as flowing (more or less automatically and immediately) from the behaviour. It is for all of these reasons that, for example, human beings learn very quickly not to place their hands in a fire. However, the reality is that none of these conditions can be applied in relation to sentencing for knife crime. Offenders know that there is a low chance of being apprehended; proper punishment can only occur after arrest, prosecution and trial have taken place; and so the link between the pains of imprisonment and the knife-carrying behaviour is both contingent and remote. Knife carrying is better understood as part of a problematic culture amongst certain young males, not simply an individual rational decision – and the measures that we use to address it must recognise this.

3. Judges already have the power to sentence offenders to a prison sentence for carrying a knife and do so regularly. These amendments are therefore unnecessary.

4. The culture of knife carrying is dangerous and undesirable, but the imposition of minimum sentences will do nothing to change this culture. It is misleading or misconceived to expect that it could. The Violence Reduction Unit promotes a public health approach to dealing with violence which is more likely to have a real impact on behaviour.

Reference

Tonry, Michael, (2008) “Learning from the Limitations of Deterrence Research” in Tonry, M.(ed) (2008), Crime and Justice: A Review of Research pp279-311, Chicago, University of Chicago Press.

Professor Neil Hutton
Centre for Sentencing Research
University of Strathclyde

Professor Fergus McNeill
Scottish Centre for Crime and Justice Research
University of Glasgow

12 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Linda Cusick

Amendment proposed by Trish Godman MSP: Engaging in, advertising and facilitating paid-for sexual activities

The Justice Committee has pointed out that there is a need for evidence rather than opinion on this issue. I am an academic with considerable experience of research in this field. I will start with the one absolute certainty about prostitution from the academic literature. This is that there are many forms of prostitution and that harms are concentrated only where sex workers are afraid and can be manipulated by predators such as traffickers, pimps, corrupt police and unscrupulous business managers.

Beyond that certainly, there is a great wealth of high standard academic literature that provides evidence on prostitution but it is not clear what kind of evidence the justice committee are looking for. That the debate has focused on assertions may be because ultimately this debate is one about values and rights. What evidence is needed to discuss rights? What evidence is needed to show that people do not experience sex as violence and that receiving money from a sex partner does not render sex violent? Sex workers are very keen on preventing violence in their work and have no difficulty in differentiating sex work with a client from violence from an attacker.

Where sex workers advocate for their right to say yes to prostitution, the chief concern is about their fundamental rights to peaceful assembly, freedom of expression and opinion, security of the person and equal protection of the law, to participate in public life without discrimination or violence, freedom from arbitrary interference with their private and family life.

The current proposal to criminalise paid for sexual activity ignores the complexities of sex market variations and instead deliberately conflates prostitution (the exchange of sex and money) with some of the harms that stem from its criminalised organisation. Specifically, by conflating prostitution with violence and with trafficking, the current proposals ignore prostitutes' voices and their concerns that their rights will be ignored. Women and gay men in particular have campaigned and won the right to have sex without shame and on their terms. The proposed legislation would appear to reverse these social advances and to give the state the authority to over-rule consenting adults.

If evidence is sought on the impacts of criminalising prostitution, there are plenty of international examples including the USA and Sweden. How inferences are drawn from the situation in these countries depends on the view of the writers and again the arguments come down to values or competing morals. The only country to try to end all prostitution has been China and even with the full power of the Chinese state this was not accomplished. The only country to completely decriminalise prostitution has been New Zealand and the very recent thesis by Gillian Abel from the University of Otago is the only full report on the (overwhelmingly positive) impacts of this.

On the extent of this proposed legislation, the law applies to everyone and there can be few sexual relationships where there is no financial understanding. Just how will a couple prove that although sex took place and money changed hands that this was not prostitution? The answer appears to lie in establishing motive: whether sex was exchanged 'for' money or money was exchanged ‘for’ sex. Establishing motive is always a difficult thing to prove in court and with a law that would appear to apply to most adults in the country, the courts will be overwhelmed.

There is a specialist library collection on sex work at the University of the West of Scotland which may be consulted by all who are interested http://www.uws.ac.uk/schoolsdepts/library/specialcollections/uknswp.asp

Linda Cusick
Reader in Substance Use
University of the West of Scotland
4 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Hamish Brown MBE

New offences in relation to stalking

History of Experience

My name is Hamish Brown and I retired in 2004 as a Detective Inspector on the Specialist Crime Directorate at New Scotland Yard after over thirty years service with the Metropolitan Police. Although I have a thorough investigative background, especially in relation to particularly serious matters including rape and murder, I went on to specialise in stalking cases. I am considered an authority on the subject of stalking and was awarded the MBE for my work in this area.

I first became involved in the issue of stalking in 1997 (before the Protection from Harassment Act 1997) when I investigated a protracted and complex case of an eighteen year old female victim being stalked by means of anonymous letters. These letters, which ultimately numbered sixty four over six months, were either sent to her home address or left on her car and were of a frightening and intimidatory nature. The perpetrator was finally caught through surveillance and observation operations and transpired to be someone the victim had previously casually known through working at a fast food outlet. During the investigation a second female victim, of the same age, came to light and who was subject to a lesser number of letters and over a shorter period of time.

There was no stalking legislation in place at the time and I considered offences such as threatening behaviour did not reflect the seriousness of the crimes. Both victims, although not physically injured, were traumatised over what had happened and I called for them to be psychologically examined. As a result of the examinations I brought one of the first prosecutions for psychological injuries with the defendant being charged with grievous bodily harm and actual bodily harm to the mind. The defendant pleaded guilty and was sentenced to four and a half years imprisonment. I was commended by the trial judge at Kingston upon Thames Crown Court and later by the Metropolitan Police Assistant Commissioner for determination, leadership and detective ability.

I was subsequently selected to research the subject of stalking under the Home Office Police Research Award Scheme. I conducted national and international research which involved liaising with police forces throughout the United Kingdom, prosecutors, charities and other interested parties. I also visited and worked with the Los Angeles Police Department Threat Management Unit (Stalking Squad) as well as the San Diego District Attorney's Stalking Strike Force. I went on to produce the publication *Stalking and other forms of harassment; an investigators' guide* which is an easy to follow manual. This was distributed throughout the UK and internationally and had to be reprinted to meet demand. I was awarded by the then Home Secretary (Rt. Hon. Jack Straw) as a winner under the Home Office Police Award Research Scheme.

I later went on research the issue of child bullying and created the advice leaflet *Protection from stalking and harassment; a guide to minimising the risk to children*. My work was acknowledged by the Minister of State for the Home Office.

Since retirement I have continued to be substantially involved with stalking and I lecture extensively to diverse audiences both nationally and internationally. My audiences in the UK have included to police, NHS mental health, probation, Rape Crisis, Woman's Aid, domestic violence forums, universities and colleges and many victim support groups. On the international front I have addressed audiences throughout the United States and Europe. This has included being key note speaker in Houston, Texas when I addressed the conference of 'End Violence Against Women International,' in Beverly Hills to the entertainment industry and law enforcement and in Los Angeles to the Association of Threat Assessment Professionals annual conference. In Europe, whilst lecturing at many major events, I spoke in Kassel, Germany at a European Stalking Symposium attended by judges, lawyers, politicians and senior police officers.

In respect of consultancy work I have been commissioned by the Home Office to examine 'witness intimidation' from a stalking perspective and advised on the formation of national guidance. I have also been engaged with police forces, including the Metropolitan Police, to advise and to formulate policy. In addition I have advised with an Australian charitable organisation regarding the creation and wording of a stalking victims' safety plan.

In the media I often appear on TV and radio giving opinion of stalking matters. I am also regularly appear to comment on other serious criminal matters.

Consideration of Amendments

It is my view is that stalking is a unique offence that requires specific legislation to deal with it. This is important as it will identify what is becoming an ever increasing crime and one, it has been proved, to be a precursor, on occasions, to murder and other serious crimes especially in the domestic violence arena.

What must be remembered is the acts in isolation are usually not criminal offences in themselves but it is the totality of the behaviour that counts. For example, it is not a crime to stand outside a person's house, constantly follow them or leave innocent articles (such as flowers) on their car. This attention, if unwelcome, can be immensely upsetting for the victim although no actual offence has been committed.

It is necessary to have a lateral thinking approach to the crime of stalking to understand how the crime works. If someone approaches the police with a bleeding nose and complains they have been assaulted it is not difficult to see the physical evidence to support the allegation. In the case of stalking, however, the situation is entirely difficult and that is why clear law is required to deal with, what I describe as, abstract evidence. To illustrate this consider the following real life scenarios where there is no physical assault or damage but the actions have been subtle, not unlawful in themselves, but succeeded in terrifying the victims. These cases all involve a man stalking a woman but it must be remembered women can, and do, stalk men and there can be same sex stalking as well.

A man is aware his former partner dislikes a certain piece of music to such an extent she cries when she hears it. The reason for this is because it was played at the funeral of her younger brother who was killed in a car crash. The man telephones her during the day, knowing she is out at work, and when the message recording machine comes on he plays that music down the telephone.

A lady, who is estranged from her husband, is walking down the road holding her five year old son's (John) hand. She receives a text message that says,' John's shoe lace is undone.'

A female victim answers her door one evening to find undertakers with a coffin to collect her.

A lady returns home one night when it is dark and goes to bed. When she awakes the next morning and opens the bedroom curtains she sees a grave had been dug in her back garden.

The case where a man was living with a female and when the relation ended he moved out but must have kept a key. The lady was in the habit of leaving post-it type notes around the house reminding her to do certain things. One day she was in the kitchen and left a note on the kitchen table reminding herself to buy some bread. She left the house for the afternoon to have coffee with a friend and when she returned there, on the kitchen table, was................ a loaf of bread.

To each of the above victims this was a personal attack but one that left no physical scar. It is of paramount importance that there is law that legislates for this behaviour and which is easy to understand, follow and enforce. In dealing with this somewhat mystic type of crime it is essential the law is focused on what the offence entails and what the ingredients are. This will help the police investigations with a framework into what can constitute an offence, it assists prosecutors in considering and conducting prosecutions, it will give the defence a clear break down of the crime and what they will expect to be proved against their client and will give clarity to the courts hearing the cases and, when appropriate, imposing sentences.

I am used to dealing in England with the Protection from Harassment Act 1997 which I welcome having specific legislation for a specific offence. There has to be interpretation of the alleged stalking acts and the words ‘harassment’ (which includes alarm or distress) and ‘fear of violence’ are used for the two offences. Although I find this good legislation difficulties have arisen with the police not identifying the stalking acts as crimes. Whilst this can be rectified through training it must be the case the law has to be easier to follow if there is a ‘list method’ as identified with the amendment proposed by Rhoda Grant. Furthermore this amendment mentions the offence of stalking and clearly legislates what the offence is about.

The Government proposal, on the other hand, although technically covering stalking behaviour, does not go far enough, in my view, in demonstrating it has identified stalking as a particular problem. It is my experience the words incorporated in legislation of ‘Threatening, alarming or distressing behaviour’ can lend themselves soley for public order situations. It is my concern, with stalking being such a unique offence, and one that has been shown can lead to substantially more serious matters, this crime will not receive the recognition it deserves and will be lost in this definition.

I support the amendment by Rhoda Grant and commend it to you. I am willing to appear to give oral evidence.

Hamish Brown MBE
11 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Amanda Lewis

I am writing to lodge my objection to the amendment proposed by Trish Godman.

Whilst I would dearly love to see all forms of coercion and trafficking in the sex industry eradicated once and for all. I fail to see how making prostitution illegal will help anybody.

Trafficking, violence against women and rape are already illegal and more legislation won't make them go away. In this case it will make them more difficult to find though. If what is desired is an “out of sight, out of mind” situation, then by all means criminalise prostitution. I and others like me will then, for all intents and purposes, lose our recourse to the law. There will be people who will use this fact against us.

I am an independent prostitute currently working in the North of Scotland. Should you - against all sane reasoning – choose to vote for this amendment, I will become a commuter. I will travel to places where the law is on my side, but not everyone will be able to do so. The less fortunate, the girls who may well be coerced etc will not be able to jump into their cars and pop over the border to England for a few days. They will be forced to work in back alleys, away from prying eyes. Without any legal way to advertise, they will find pimps to provide punters. Rather than help these people, this amendment will drive them underground and leave them at the mercy of criminals.

As independent, law abiding, taxpaying sex workers I would question why we are seemingly the subject of a sudden witch hunt? Why amendments are quietly added at the eleventh hour? Should we not have our chance to speak and defend ourselves and our industry? Since when have we been governed by Puritans who seek to legislate on our activities in the bedroom? Since when have sexual relations between consenting adults been anyone else's business?

I urge you to reject this amendment.

Amanda Lewis
12 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Cassandra Bay

I am appalled at this last minute amendment, which proposes to criminalise prostitution and it's advertising in Scotland.

I work as an independent prostitute in England and carry out my business in a responsible and legitimate manner, as do the friends and associates I have in the sex industry. I cannot believe that anyone can fail to see that making prostitution illegal rather than regulating it is endangering our livelyhoods and more importantly our lives.

All I have to say has already been said by Amy Vergnes and Laura Lee and I wish to add my voice to theirs.

Cassandra Bay
12 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Christopher Isherwood

I write in reaction to the group of proposed amendments to section 34 of the Criminal Justice and Licensing (Scotland) Bill the effect of which will, if passed into law, criminalise paid-for sexual activities in Scotland and would respectfully ask the Committee to consider the following grounds of objection:-

1. **The Assault on the Liberty of the Individual:** The proposed change in the law is an unjustified assault on the freedom of the individual, a freedom which in its present conception has been valued in Western society since the 18th Century. The French 'Declaration of Human Rights and of the Citizen' (1789), penned with the help of the later American President, Thomas Jefferson, states in Article 4: 'Liberty consists in the freedom to do everything which injures no one else.' The nineteenth century philosopher John Stuart Mill enunciated in his essay 'On Liberty' (1859) the principle that government should not forcibly prevent people from engaging in victimless crimes or offences against private morality. The touchstone of intervention by government is the 'harm principle' by which power can only be rightfully exercised over any member of a civilized community, against his will, to prevent harm to others. The respected American jurist, Oliver Wendell Holmes, Jr, expressed the harm principle succinctly as follows: 'The right to swing my fist ends where the other man's nose begins'. The mere act of parties privately engaging in consensual sexual activity for money is not a matter which justifies the intervention of the law.

2. **A Breach of Human Rights:** The proposed amendments are in breach of Articles 8 and 17 of the European Convention on Human Rights. Article 8 of the Convention specifically states that 'everyone has the right to respect for his private and family life, his home and his correspondence.' Article 17 prohibits a State from abusing the rights of its citizens. Both the Human Rights Committee of the United Nations and the European Court have treated sexual life as an integral part of a person's privacy and autonomy and in a number of cases in recent years ruled that laws prohibiting consensual homosexual acts between adults violated the right to respect for family life, notwithstanding that these acts may be viewed by the public as immoral, shocking or offensive. It is well established by the European Court that adult consensual sexual activity in private is covered by the concept of 'privacy'. In the recent case of Mosley v News of the World (2008), where Mr Max Mosley achieved a victory against the News of the World for publishing details of his sex life, Mr Justice Eady said 'People's sex lives are to be regarded as essentially their own business.'

3. **Legislation, if any, should be stand-alone:** The measures represent such a far-ranging incision into the liberty of individuals that if they were to be enacted at all, it should be through legislation purely confined to the issues in

hand rather than being grafted onto and masked by an anonymous sounding Executive Bill.

4. **The financial understandings of sexual relations:** The underlying nature of sexual relations, even within marriage, always involves a financial understanding which may be defined broadly to include a mutual exchange of services to the equal benefit of both parties and where not, may amount to sexual slavery. The social reformer Mary Wollstonecraft (1759 – 1797) first articulated this. Social *mores* are presently so permissive that a man may take a woman to dinner on a first date and spent a couple of hundred of pounds on food, drink and entertainment in the clear expectation that the evening will end with a pleasurable sexual encounter. The woman may accept the date with the same expectation. Yet in terms of the amendments such an encounter could be interpreted as a financial sexual transaction through payment being made 'in kind' by the supply of food, drink and entertainment.

5. **Oppressive Power of Arrest:** Even if a case could be made for criminalising paid-for sexual activity, in terms of the last amendment of the group a constable is entitled to arrest without warrant any person whom he suspects is committing an offence. This in itself is an arrogation of power which cannot be justified or regarded as proportionate to the 'offence'.

6. **Prostitution as a necessary social safety valve:** A person who supplies sexual services in return for payment is in fact fulfilling an important role in society as a necessary safety valve; this has been the case in all societies since time immemorial. A survey carried out in the United Kingdom in 2000 revealed that 10% of men in a sample of 11,000 over a given period had availed themselves of paid sex with a female prostitute; this percentage is likely in fact to be higher as fear of disclosure would have depressed truthful responses from the sampled group. The attraction of this service for the man is that he can have sex without any commitment to the woman allowing both parties to walk free from the encounter, both satisfied from their differing perspectives. Physical sexual satisfaction without emotional commitment is essentially the theme of the relationship between prostitute and client. It is well established by research data that married men with families occupying responsible positions form a substantial group within society who use the services of female prostitutes. Such men probably do so as a means of escape from the tedium of being tied to one long-term sexual partner, safe in the knowledge that their short extramarital encounter need not damage the lasting relationship with their married partner.

7. **The happiness of the prostitute:** The prostitute is also entitled morally and legally to his or her sexual freedom and happiness and to enjoy the full protection of the law. At the upper end of the profession of female prostitution most women engage in that occupation entirely of their own free will, without being controlled for gain or trafficked and independently enjoy expressing their sexuality without the emotional or financial commitment to one man. These women are not working in dilapidated conditions to support a drug habit and many of them are people of intellect, wit and education. They carry

on their business in a self-regulated manner from clean and well-appointed premises with full respect and regard to their own health and that of their clients, with far greater care than that applied by the casual ‘civilian’ heterosexual society outside prostitution. Calling themselves ‘professional escorts’ they attract their clients by sophisticated internet advertising and discreetly enjoy the freedom and financial advantage which prostitution gives them with the social excitement of meeting and giving pleasure to different men, to whom they may act as unofficial counsellors, advisers and therapists; such women generally enjoy high respect from their clients. Prostitutes are people too and long term loving relationships emerging from this social interaction are not unknown.

8. **The mistake of generalisation:** The parties seeking to pass these amendments confuse the women at the higher end of the sexual services market with women working at the lower end who may be trafficked or selling their services to fund an addictive drug habit. Any legislator should try to understand the many reasons why a woman becomes a prostitute and to accept the fact that the prostitute may find fulfillness and happiness in her life by that occupation. If a woman is sufficiently courageous to overcome the social opprobrium of engaging in prostitution and accept the risk of exposure, by becoming a prostitute she re-defines her own sexuality in her own terms and takes charge of that sexuality to find a sense of empowerment. She makes herself available but at the same time exclusive only to those who pay her for her time which she decides how, when and where to allocate and to whom. She does not need to exist within a conventional relationship with all its moral obligations and instead offers herself to a section of society which is prepared to seek her out and pay for her company and comforts. She has freed herself from such relationships and can choose any partner she wishes entirely on her terms. The American philosopher Camille Paglia has said ‘The prostitute has come to symbolize for me the ultimate liberated woman, who lives on the edge and whose sexuality belongs to no-one.’

9. **A legislative over-reaction:** The range of amendments is a legislative over-reaction to the failure of the earlier legislation which criminalised the purchase of sexual services on the streets of Scotland resulting in that market being transferred to flats and houses. Where there is harm caused by the sale of sex by women who have been trafficked into Scotland or are engaging in prostitution to support a drug habit, bringing forth additional punitive legislation will fail, driving prostitution ‘underground’ and leading to a general loss of respect for the law and the legislators. The problems arising from harm to women where it does exist in the sale of sexual services will not be solved by punitive, prohibitive legislation but rather by active, caring intervention to remove or at least reduce the identified harm.

10. **Difficulties of detection and proof:** Proving that there has been a financial sexual transaction will be very difficult (a) to detect and (b) to prove beyond all reasonable doubt in a court of law. Will police budgets be increased to deal with the increased responsibility in the detection of the new crime? Will a new Moral Police be established to enforce the new law akin to the Moral Police which exists in Iran? The experience of the South African

Police in enforcing the amended Immorality Act of 1950 which notoriously criminalised sexual relations between different races and involved spying on couples through windows and keyholes may be useful for the Scottish Police to refer to. It is however doubtful whether in the present permissive society the morale of individual police officers will actually support the difficult detective work needed to pursue what they may regard as a criminalised moral offence.

11. **A Final Exhortation not to cast the stone:** Prostitutes are people too and most are law-abiding citizens who in some instances occupy responsible jobs outside their sexual lives. They are morally and legally entitled to their own freedom and happiness and to pursue their avocation, without oppression, with the full protection of the law. These discriminatory and oppressive amendments represent a stone to be cast against the present and future prostitute and his or her client. They will do nothing to serve Scotland except to present her as an intolerant country in the eyes of Europe and the World. Members are respectfully exhorted not to cast that stone and instead pause to consider the wisdom of legislating against the harmless expression of the sexual urge which is the strongest instinct of mankind and without which there would be no Scotland and no Scottish Parliament. Members may also be reminded that the Roman Emperor Justinian, on whose Institutes the Law of Scotland is based, was married to a prostitute, Theodora, some 20 years his younger.

Christopher Isherwood
12 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the *Demand Change!* Campaign (A joint campaign by Eaves and OBJECT)

About us

Eaves is a women's organisation that provides high quality housing and support to vulnerable women. We support and accommodate women who have been trafficked into prostitution via our POPPY Project, whilst our LEA Project helps women exploited in prostitution in London to exit the sex industry safely. Eaves also carries out research, advocacy and campaigning to prevent all forms of violence against women www.eaves4women.co.uk

OBJECT is the leading human rights organisation which challenges the sexual objectification of women in the media and popular culture because of its links to discrimination and violence against women www.object.org.uk

About the *Demand Change!* Campaign

The *Demand Change!* Campaign was launched by Eaves and OBJECT in June 2009. It has three key aims:

1. To promote an increased understanding of the myths and realities surrounding prostitution
2. To call for prostitution to be seen and widely understood as a form of violence against women
3. To lobby for adoption of the 'Nordic model' which tackles demand for prostitution, decriminalises those selling sexual acts and provides adequate resources to assist people to exit prostitution.

For more information about the campaign please visit
www.demandchange.org.uk

Following the submission of expert evidence, alongside a series of high profile lobbying, influencing and awareness raising activities, the *Demand Change!* Campaign was instrumental in ensuring the safe passage of Section 14 (Section 15 in respect of Northern Ireland) of the Policing and Crime Act[1] through Westminster Parliament in November 2009. This new legislation makes it an offence to pay or attempt to pay for sexual services from someone who has been subject to force or exploitation, and it comes into effect in England, Wales and Northern Ireland on 1st April 2010.

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[1] http://www.opsi.gov.uk/acts/acts2009/pdf/ukpga_20090026_en.pdf *[Link no longer operates]*

Overview

Eaves and OBJECT have expertise on the subject of sexual exploitation, therefore our submission relates specifically to the proposed ‘Offences of engaging in paid-for sexual activity’ in Scotland’s Criminal Justice and Licensing Bill. The *Demand Change!* Campaign wholeheartedly endorses the new proposed offence of engaging in a paid-for sexual activity, providing that it is the *buyer* of sexual services that is criminalised in these circumstances and *not* those who are purchased for sexual purposes.

Rationale

Prostitution is a form of violence against women

Prostitution is a human rights violation – which, whilst affecting some men and boys – is profoundly gendered and is defined by the United Nations as an act of violence against women[2]. Treating women merely as sexual objects through commercial sexual exploitation rather than as individuals contributes to attitudes underpinning gender-based discrimination and violence[3]. For many women, poverty, marginalisation and vulnerabilities trigger entry into prostitution for their own survival or for the benefit of others. Consider the following:

- 75% of women in prostitution became involved when they were under the age of eighteen[4].
- Up to 70% of women in prostitution spent time in care. 45% report experiencing sexual abuse and 85% physical abuse during their childhoods[5].
- 74% of women in prostitution identify poverty, the need to pay household expenses and support their children, as primary motivators for being drawn into prostitution.[6]
- More than half of UK women in prostitution have been raped and/or seriously sexually assaulted and at least 75% have been physically assaulted at the hands of both pimps and punters.[7]
- 68% of women in prostitution meet the criteria for Post Traumatic Stress Disorder (PTSD) in the same range as victims of torture and combat veterans undergoing treatment[8].

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[2] As defined in the United Nations Declaration on the Elimination of Violence against Women.

[3] Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against women (Eleventh session, 1992), U.N. Doc. A/47/38 at 1 (1993), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 243 (2003).

[4] Women’s Resource Centre http://www.wrc.org.uk/includes/documents/cm_docs/2008/s/statistics.pdf

[5] Home Office (2004a). *Paying the Price: A Consultation Paper on Prostitution.* London: UK Government.

[6] Women’s Resource Centre, *op cit*.

[7] Home Office (2004b). *Solutions and Strategies: Drug Problems and Street Sex Markets*. London: UK Government.

[8] Farley, M., (2003). ‘Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder’. In *Journal of Trauma Practice*, 2:3/4, pp.33-74.

- Women in prostitution in London suffer from a mortality rate that is 12 times higher than the national average[9].
- 9 out of 10 women surveyed would like to exit prostitution[10].

The harsh realities of prostitution are further revealed in the testimonies of survivors who approached the *Demand Change!* Campaign to tell their stories – please see attached.

The importance of tackling the demand for prostitution

Criminalising those exploited in prostitution fails to address the reasons that led to their involvement in the first instance – such as poverty, drug use or fear and coercion by a third party. Instead we must focus on the buyer – those who have the power and financial resources to actively choose to purchase women, men, girls and boys who have been exploited in prostitution, and in doing so create the demand that fuels the growth of the sex industry and associated crimes such as trafficking.

Indeed, the UK has multiple international and domestic obligations to tackle the demand for prostitution, in recognition of the harms inherent within it. The most important of these obligations is Article 6 of the Convention on the Elimination Of All Forms Of Discrimination Against Women (CEDAW), which calls on State Parties to: *Take all appropriate measures, **including legislation**, to suppress all forms of traffic in women and exploitation of the prostitution of women*. Other relevant international instruments in this context include:

- Council of Europe’s Convention on Action against Trafficking in Human Beings (2005)
- Universal Declaration of Human Rights (1948)
- UN Slavery Convention (1926)
- Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956)
- European Convention of Human Rights (1950)
- International Convention on Civil and Political Rights (1966)
- UN Working Group on Contemporary Forms of Slavery (est. 1975)
- UN Declaration on the Elimination of Violence against Women (1994)
- UN Fourth Conference on Women (Platform for Action) (1995)
- UN Convention against Transnational Organised Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) (1998)
- EU Council Framework Decision on Combating Trafficking in Human Beings (2002).

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[9] Home Office (2004b). *op cit*.
[10] Farley, M., (2003), *op cit*.

The need for strong legislation

For the first time in UK law welcome attempts are being made to more directly tackle demand. Section 14 of the Policing and Crime Act will have the effect of shifting criminal liability away from people exploited through prostitution to those who purchase sexual acts, ensuring that buyers take responsibility for their exploitative actions. This legislation signifies an important step towards gender equality and social justice. However, this law, as it applies to England, Wales and Northern Ireland, *does not go far enough*.

Global evidence points to the fact that the most effective way to address prostitution is to fully decriminalise those who are sold for sexual purposes, while at the same time placing a blanket ban on the purchase of sexual services. This approach, which is commonly known as the 'Nordic model', has been introduced in Norway, Sweden and Iceland, the three countries that top global polls in terms of gender equality. Its positive effects are best seen in Sweden, where this legislation has been in force for more than ten years. Since its introduction there has been a dramatic drop in the number of women in street prostitution[11], Sweden is a no longer an attractive destination for traffickers[12], and the number of men purchasing sexual services has fallen significantly[13].

Closer to home, evidence gathered from men who purchase sex also highlights the crucial importance and indeed power of legislation to tackle this exploitative behaviour. In a study of 103 London men who pay for sex, 55% believed that a majority of women in prostitution are 'lured, tricked or trafficked' and 50% said that they themselves had used a woman in prostitution who they knew was under the control of a pimp[14]. Similarly, 50% of 110 men who buy sex interviewed in Scotland believed that women in prostitution are victimised by pimps[15]. However, buyers' knowledge of exploitation in no way deters them from using women in prostitution. In fact, the most effective deterrent identified in both research studies was the law – 89% of Scottish buyers and 85% of London buyers would be deterred by having their name placed on the sex offenders register, 84% of Scottish buyers and 83% of London buyers would be deterred by their picture and/or name appearing in a local newspaper and 69% of Scottish buyers and 80% of London buyers would be deterred by a higher monetary fine.

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[11] Ekberg, Gunilla (2008) Summary of Speech given at a conference organised by the Coalition Against Trafficking in Women Asia-Pacific (CATW AP), April 25 2008, Manila, the Philippines.

[12] *Ibid*.

[13] Swedish government, published November 2008 (Swedish language only).

[14] Farley, M., Bindel, J., and Golding, J., (2009). *Men Who Buy Sex: Who They Buy and What They Know*. London: Eaves and San Francisco: Prostitution Research and Education http://www.eaves4women.co.uk/Documents/Recent_Reports/Men%20Who%20Buy%20Sex.pdf

[15] Macleod, J., Farley, M., Anderson, L, and Golding, J., (2008) *Challenging Men's Demand for Prostitution in Scotland: A Research Report Based on Interviews with 110 Men Who Bought Women in Prostitution.* Glasgow: Women's Support Project http://www.prostitutionresearch.com/ChallengingDemandScotland.pdf

Conclusion

In light of all of the above evidence, the *Demand Change!* Campaign urges the Scottish Government to take the bold and visionary move of fully criminalising the purchase of sexual services through the proposed new offence of engaging in a paid-for sexual activity.

In doing so, Scotland will not only be following the excellent example set by the Nordic countries in this respect, it will also be taking the clearest, most courageous and most progressive approach to addressing prostitution of all the nations in the UK.

This offence will be perfectly complemented by the accompanying proposed offences of ‘advertising paid-for sexual activities’, and ‘facilitating engagement in a paid-for sexual activity’ as a way of tackling those legitimate and illegitimate ‘business people’ who profit from the sexual exploitation of others.

At the same time, the *Demand Change!* Campaign strongly recommends that measures are taken in Scotland to ensure that those who are victims of sexual exploitation are fully *decriminalised*, and adequate resources are injected into developing and expanding holistic support services to help those involved in prostitution to exit the sex industry safely and permanently, overcome the damage caused by it, and enable them to avail of other life opportunities including training, education and employment.

Ruth Breslin
Research and Development Manager
Eaves

Anna van Heeswijk
Campaigns Coordinator
OBJECT

12 March 2010

Demand Change! Women Exploited in Prostitution Speak Out

Shelly's Story

I want you to imagine that you were me. Do not think of it happening to someone far away. Do not view the reality with detachment or with pity. Imagine being so dead inside that you cannot care what happens to your body.

To see that, I must take you back to my first night in prostitution.

On that first night, I was gang-raped. That was the test to see if I was suitable material for prostitution. When I say I was gang-raped, it was many gang-rapes over several hours.

Imagine queues of men raping you everywhere, inside every hole in your body. Imagine that it seems endless. Imagine that you go in and out of consciousness.

Then imagine that you don't, cannot care. Haven't you learnt long ago, that your body is there to be damaged. That you have no right to say no. That your purpose is to service men in any and every way they can think of.

Johns know that they can do any violence to prostituted women and girls - knowing that the majority of our society will refuse to care. After all, it cannot be rape if the man has paid for it.

Angel's Story

My partner's addiction meant he needed drugs, needed money, and my body was a pathway to both. The word 'pimp' wasn't in my vocabulary, though looking back I see that's what he was.

Pornography was involved, first as a teaching aide, and later, I was made to be in it. Other men were involved, too, taking pictures, using me, laughing at me, hurting me, and laughing some more if I responded. I'd shake and vomit before, shake and vomit after, sometimes pass out with pain.

When I finally managed to crawl away from my partner, I was a mess. So when I saw an ad in the local paper advertising Escorts, I felt it was inevitable.

Life as an escort isn't the glamorous, well paid life you read about in womens' magazines. Put bluntly, it's being paid to be f****d, and because they've paid, johns [punters] are going to get their money's worth. They expect you to do anything and everything, whatever turns them on. It was frightening – you didn't know what you were turning up to.

Ada's Story

When I was 23 I was trafficked by my boyfriend into prostitution.

My parents had thrown me out of the house, and my father had beaten me.

I was finding life very hard living with my friend, so when my boyfriend suggested that we move to the UK and get married, I was very excited. I thought it was a good chance to start a new life.

He paid for everything and we travelled together straight to London. I carried my own papers and travel documents. I was happy.

Three men picked us up from the airport. I thought they were my boyfriend’s friends. They took us to a house and while we were there, my boyfriend left. I did not see him go but after he had gone one of the men raped me.

They took me to a brothel and made me work there for six months. I had to have sex with two or three men a day and I was kept locked in at all times. I was exhausted as I had to see customers at whatever time they came to the brothel, so I was often woken up in the middle of the night. The men had guns and I was threatened a lot with physical violence, so I was afraid to say no.

I saw a lot of bad things while I was at the brothel. I saw the other women being beaten and raped. I was raped too.

I escaped at New Year, when the men held a New Year’s Eve party and I managed to run out of the back door.

I find it very hard to trust people now and I do not like myself. I can't believe my boyfriend did this to me.

Danielle’s Story

I worked for a woman who ran 4 brothels and would alternate between them. This was not a cozy collective of women helping each other out. This was a business and profit was what mattered. If I had my period I had to do my shift, if I was sore and exhausted I had to carry on. When I had to have an abortion and was still bleeding I had to do my shift.

Punters could be very aggressive. In groups they would have a ‘pack mentality’ and they would often be very rude and would be grabbing, slapping and touching us in the main seating area. They would often make very degrading comments about the way that women looked. The overwhelming feeling that I got was that they really hated us.

It was in saunas that I realised the extent of trafficking and the number of women there in that position. Some of these women didn't know where they were and were terrified. I worked with one woman who was talking about the fact that she and her boyfriend were going to get married and she was hoping to get pregnant and get out of the job. The next week she wasn't at work so I asked the other women if she'd got pregnant. They laughed and said that her boyfriend had sold her to another gang as she was becoming too much trouble. This was normal - something to laugh at.

Another woman came in one day with her head shaved and her finger cut off. I later found out that she had tried to escape from her trafficker and so he had cut her finger off as a warning. She was too scared to go to hospital so just put a bandage over the protruding bone.

If this happened in any other job you would be shocked and outraged but it wasn't really shocking. The whole nature of the job is people treating you as a thing, something to be penetrated and ejaculated over, something that shouldn't argue back, something that shouldn't display emotion. So you stop displaying emotion. You just try to get to the end of the shift.

Jo’s Story

I was thirteen when I started working. And I worked most afternoons/evenings after school. In my school uniform, no less. Not one guy ever, ever complained or mentioned that I was too young. Not one. In fact, it was quite the opposite - the guys were positively pleased that I was such a 'little slut, so young, and she f*****g loves it too'. The same guys who had girlfriends/wives, and houses, and cars, and weren't perverts who f****d children, oh no, only strange old men in raincoats do that.

Different when it's a 'whore', though, isn't it? Because, hell, we're asking for it! Whether we're children or not. And tell me really, in your heart of hearts, if you don't actually think that a prostitute will be much more likely to die a violent and early death.

Then ask yourself why that should be. What it is about the sex industry that excuses violence towards its' employees?

Laura’s Story

I was never the kind of prostitute that worked on the street. I graduated a year early top of my class, honourable, and accepted into University.

I know that often times people make the connection that only low class hookers who work on a street corner are the ones that end up hurt and abused. But that’s a myth.

My clientele base consisted of names that groupies would wanna give their first borns for. I would accompany them on business meetings on their private jets to different functions to different conferences.

Still in the midst of all of this there were often times where I would be beaten or ostracised. If someone thought they deserved to get more than I was willing to give for what they spent, they would just take it.

Jo

No matter how fancily the trade is dressed up, the violence and disrespect are always there. Men regard buying a prostitute in the same way as hiring a slave that they can do with as they please, despite any laws or verbal agreements. It is that dynamic of prostitution that is so dangerous, and this dynamic will not change unless women are seen as on an equal footing with men, and not just sex objects.

Angel

When I see all over the media the message that sex work is fun and ok, it hurts me.

On the TV, it's always fun, always light, always a choice, a witty anecdote, entertainment. When I was working, I had to say I enjoyed it and that I chose it – it's what the johns want to hear, and as a prostitute I existed for their pleasure, my body and words were there for their pleasure. The real me was effectively mute.

Shelly

I am so p****d off with the 'choice' argument being used to dismiss so many women and girls.

What is 'choice' when it comes to being prostituted?

A free choice is not being prostituted in order to pay rent, to afford to care for your children.

A free choice is not being on the receiving end of childhood abuse, whether sexual, neglect or physical.

A free choice is not being brainwashed by the porn culture to believe that prostitution is glamorous and an easy way to make a pile of money.

A free choice would mean the prostituted woman or girl could turn away men if they had bad feelings about them without any consequences.

A free choice would be not being pushed by a pimp, manager or boyfriend to "just try it".

A free choice would mean freedom of movement and knowledge of the world outside prostitution.

A free choice would mean there would be no need to use drink or drugs to blank out the reality.

A free choice would mean prostituted women and girls would not self-harm.

Free choice would mean all prostituted women and girls have real self-confidence, and would not have to make being happy a performance.

I don't see any prostituted women and girls I know who had free choice. I am sick, so sick that it has to be said again and again about the harms of being prostituted.

It is always the man's choice whether he will be gentle or "decent".

Angel

It makes sense to target the johns and criminalise them, because they hold the money and they have all the power. Demand change.

NB Pseudo names have been given to protect the identity of women.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Anjali Be

I would like to lend my support to the previous submissions of Amy and Laura, at the very least I believe this amendement is going to do nothing more than prevent some ladies legally earn a living, which will no doubt have a knock on effect.

Anjali Be
15 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Sacro

Sentencing for knife crime - amendment to section 10

Sacro is aware of the proposals to amend the aforementioned Bill to require a court to impose a sentence of imprisonment of at leat six months unless the court is aware of exceptional circumstances which justify not doing so.

It is the view of Sacro that this amendment is unneccessary for a number of reasons. These include:

The courts currently have the power to imprison those found gulity of carrying knives and already use this power appropriately when it is known that there was intention on the part of the offender to use the knife for malicious parposes.

There are numerous reasons why people carry knives in public. Some of these will be for entirely legitimate means including those who use knives as part of their work or leisure persuits (fishing etc). To place pressure on sentencers to impose a cusodial sentence on those found carrying knives for legitimate reasons is inappropriate and could result in the imprisonment of those who pose no risk to society at all.

Sacro are of the view that the carrying of knives by certain groups of young people is directly related to their involvement in gang culture, and ther cultural issues. There is a significant body of anecdotal evidence which suggests that many young people involved in gang culture and/ the the carrying of knives do so out of fear for their own safety. This behaviour is not excusable. However, our view is that mandatory imprisonment will not address the wider issues relating to the use of knives as weapons within society. It would be better to focus on the cultural issues behind the behaviour and attempt to address this using an educational approach as is currently the case in the work of the Violence Reduction Unit and campaigns such as the current “no knives – bettter lives” iniatiative.

Sacro
15 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Perth and Kinross Violence Against Women Partnership

Offence of stalking:

Perth and Kinross Violence Against Women Partnership welcomes and supports the introduction of this new offence.

- Stalking is a feature within many cases of domestic abuse and sexual violence and we welcome the introduction of this as a separate offence in its own right.
- Recognition that stalking can take many different forms (texts, email, in person) as outlined within the suggested amendments (lodged by Rhoda Grant and the Scottish Government) is also welcome.

(6) states : "course of conduct" involves conduct on at least two occasions.

- Again, we welcome this as stalking within Domestic Abuse and sexual harassment occurs frequently throughout the day, for example, perpetrator texting or emailing the partner or victim at work.

Offences of engaging in, advertising and facilitation of paid-for sexual activities:

Perth and Kinross Violence Against Women Partnership welcomes all amendments to this section. They are positive measures which we envisage would serve to inhibit those involved in purchasing or organising sexual activities.

11A. Engaging in paid-for sexual activity:

- This amendment is welcome as it provides a legal tool for beginning to address the actions of those who purchase sexual activity. In particular, assisting in addressing the issue of 'off-street' prostitution which is a key feature of Commercial Sexual Exploitation.
- Holding the purchaser of sexual activity accountable regardless of who receives the payment is a positive development and we welcome this.

11B. Advertising Paid-for sexual activities

- Perth and Kinross Violence Against Women Partnership welcomes this amendment as it provides a legal tool for tackling the very hidden element of commercial sexual exploitation, namely those involved in organising prostitution and trafficking of mainly women, children and young people for the purposes of prostitution.

11C Facilitating engagement in a paid-for sexual activity

- As above, this is welcome as it provides a legal tool for tackling ‘off-street’ prostitution. Allowing for those who support Commercial Sexual Exploitation through renting out a flat, house or any other premises to be held accountable for their actions and or decisions.

We would welcome clarification as to how the above could be enforced in relation to the internet which is frequently used to advertise and promote commercial sexual exploitation. Unfortunately, the internet appears to be an effective advertising medium, one which can facilitate and encourage the external/internal trafficking of largely (but not exclusively) women and girls across the country from location to location, in response to any demand for the ‘sexual activity’.

In addition to the above, we also support the introduction of the new offence criminalising the possession of extreme pornographic material which includes all images of rape and non consensual penetrative sexual activity.

Perth and Kinross Violence Against Women Partnership
15 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Sofia Helgadottir

I am writing to express my shock and dismay at the recently proposed amendments which, if approved, will criminalise purchase of sex in Scotland and advertising of paid-for sex.

I am an escort in London but have close friends working in Scotland and I would like to join them in opposing this proposed legislation. I am Swedish and let me tell you, this so called Swedish model doesn't do what you expect - prevent trafficking and pimping, but instead punishes people who haven't done anything wrong and drives desperate single mothers right into the hands of pimps who promise to find clients for them but instead exploit and rob them.

I always thought that my right to sexuality is intrinsic and not dependent on government. I am free to choose who I have sex with, when and how, and what I receive in return. What sort of totalitarian regime (through possible jealousy and lack of sexual release) would want to meddle in what two people over the age of 18 get up to once the doors are closed? Let's have a closer look at your proposed amendment 11A.

(1) A person ("A", aka a husband with a job) commits an offence, to be known as the offence of engaging in a paid-for sexual activity, if A knowingly engages in a paid-for sexual activity with another person ("B" aka a housewife, A's wife and mother of his 3 children under the age of 5).

(2) A sexual activity is paid for where B engages in that activity in exchange for payment (since B has been off work for the past 5 years as she had to look after 3 children, she has had no income of her own and had to rely entirely on her husband for providing her and their children with everything, so B has to provide sexual services to A or A will find someone else to engage in sexual activities with and leave B and the children with nothing to live on, which, by the way, is what drives most Bs to prostitution).

(3) For the purposes of subsection (2), it is immaterial whether the payment is made –

> (a) by A (the husband) or by any other person (e.g. his employer), or
> (b) to B (the wife whose name is on the bills) or to another person on B's behalf (the owner of a utility company or the local authority).

Another good example of a paid-for sex would be a bar scenario where a lonely guy buys a few drinks for a bored-looking girl on her own in hope of being invited to hers in return. So we have a housewife who provides sexual services out of desperation and a girl who was bought at the price of a few drinks. To me, this sounds more like abuse and exploitation than charging

150GBP for an hour of my time. Not to mention that in both cases the men commit a crime.

Since the dawn of times, women have used their sexuality and men's lust to achieve what they wanted. Even female monkeys are known to engage in sexual activities in return for food and protection. If you think this can be changed overnight, it would be right to deem your chances as slim. So why not accept the fact that sex in exchange for payment will always be there and make it safe for all those participating in it?

Licensed parlours will make it safe for women to work and will help you "clear the streets" as those women who can't take work home will have a parlour to go to rather than a car park, and have a madam to make sure they are not abused, raped and robbed. Licensed parlours will also be easily inspected which will facilitate identifying victims of trafficking and the people behind it.

Women working independently will be able to safely work in groups, providing more services and attracting more clients, thus making more money and paying more tax which will provide the police with some modern equipment that will help them fight real crimes like murder, rape, robbery, etc.

I have been in sex trade for over 7 years, I have worked in parlours, saunas, flats and on my own, I have sold sex in Sweden, England, Wales and Scotland. I have met over a hundred women (and a few men) who, like me, came to prostitution of their free will and do not find it abusive or exploitative but rather empowering as through selling sex they have been able to gain independence and financial security, which they were denied before through poor social security system, family circumstances, lack of education or country of origin. I urge you to stop telling us what to do with our bodies and let us get on with our lives.

Sofia Helgadottir
13 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Crown Office and Procurator Fiscal Service

As you know the Crown regards this Bill as one of the most important pieces of criminal justice legislation to come before the Scottish Parliament. In particular COPFS regards Part 6 of the Bill, which provides a statutory framework for disclosure of evidence in criminal proceedings, as particularly important to its work. You will no doubt be aware, as background to these provisions, Lord Coulsfield's Review was initiated following an approach by the Lord Advocate to the then Justice Minister, Cathy Jamieson, as there was a clear need to place the common law system on a statutory footing to provide a degree of clarity and certainty to the process within which the police, the Crown and the accused can operate with certainty.

It is therefore, with some interest, that I observe your proposed amendments to the provisions, particularly your proposals to amend section 89 of the Bill to remove the "materiality" test, the effect of which would be that the accused would be provided with all relevant information obtained during the investigation regardless of whether that information might materially weaken the prosecution case or materially strengthen the defence case.

I thought it might be helpful if I provide some information on why the materiality test was included in the Bill. Lord Coulsfield recommended that the statutory definition of the duty of disclosure should be to disclose to the defence all material evidence or information which would tend to exculpate the accused whether by weakening the Crown case or providing a defence to it, as was set out in McLeod v HMA (No.2) 1998 JC 67. In making this recommendation, Lord Coulsfield recognised that there was very substantial reason to think that totally unrestricted disclosure would be impracticable and probably damaging to the operation of the criminal justice system.

I understand that some of the submissions made to the Justice Committee, most recently by the Glasgow Bar Association, have questioned whether a system whereby the Crown takes the initial decisions regarding the materiality of information would be compatible with an accused person's right to a fair trial. It may be that these submissions have influenced your decision to table these amendments.

I hope I can offer you some reassurance in this respect, as this issue has been considered by the European Courts and by the Judicial Committee of the Privy Council.

In Edwards v United Kingdom [1992] 15 EHRR 417, the European Court held that it was a requirement of fairness under Article 6 that the prosecution authorities disclose to the defence all material evidence for or against the accused. In McDonald v HMA 2008 SLT 993 the JCPC stated that the

Crown's obligation was to disclose any statements or other material of which it is aware and which materially weakens the prosecution case or materially strengthens the defence case. The Court considered the current common law regime whereby the Crown makes initial determination of the materiality of information, disclosing only that information to the defence and not all the relevant information, and held that the system, which includes provision for defence applications to the court to enforce the Crown's duty of disclosure is compatible with an accused's article 6(1) Convention rights.

The JCPC considered this issue again in HMA v Murtagh 2009 SCCR 610 in the particular context of criminal history records. In that case Lord Hope stated that it must be for the Crown to determine which parts of a witness's criminal history record is material and which are not. Effectively, therefore, the JCPC concluded that it was compatible with an accused's article 6(1) Convention rights for the Crown to make the initial determination of materiality.

Finally on this point, and for the sake of completeness, I would add that the new Supreme Court considered this issue again in the recent case of McInnes v HMA Hilary Term [2010] UKSC 7. In its judgement issued on 10 February 2010, the court stated that the law as to the duty of disclosure in Scotland is now reasonably well settled and article 6(1) of the Convention requires that the Crown disclose to the defence any information of which it is aware which would tend to materially weaken the prosecution case or materially strengthen the defence case.

I hope that the above cases provide you with the reassurance that a disclosure regime where materiality and not merely relevancy is the cornerstone of the Crown's obligation is not only compatible with the accused's right to a fair trial under the Convention but is also consistent with the current common law regime.

I appreciate fully the Committee's concerns that the disclosure provisions are difficult and complex. It may be that a regime whereby the Crown discloses all relevant information would look much simpler on paper. However, it would render many of the other disclosure provisions within the Bill defunct. For example, there would be no need for the investigating agency to provide the Crown with details of relevant information as there would be no corresponding need to provide the defence with details of the relevant but immaterial non-sensitive information. Similarly, as the Crown would have to provide the defence with all relevant information, there would be no benefit in the investigating agency identifying the sensitive information.

While, at first glance, this may appear desirable, the ramifications of such a change would be very wide reaching. The system proposed in the provisions provides an important degree of protection to sensitive information, which relates not just to intelligence information but also to sensitive information regarding witnesses, victims and other third parties. If the Crown were obliged to give the defence all relevant information, then we could no longer redact sensitive and immaterial personal information from witness statements, medical records etc. Similarly we could no longer withhold immaterial personal data of individuals, which the Crown have obtained as part of the investigation but consider that it neither materially weakens the prosecution case or materially strengthens the defence case.

Such a fundamental change in the Crown's duty would negatively impact on the article 8 rights of witnesses and other individuals and would result in much more personal data being disclosed than under the current regime. Lord Coulsfield recognised in his report that the Crown are also under an obligation to comply with articles 2 and 8 of the European Convention and the Crown must have regard to the protecting the safety and personal lives of individuals insofar as this does not interfere with the accused's overarching right to a fair trial. This analysis, set out in paragraphs 6.2-6.4 of his report was expressly endorsed by the Privy Council in HMA v Murtagh.

Lord Hope specifically stated that where information falls within the scope of a witness's private life then its release would be incompatible with that witness's article 8(1) and should only be disclosed if the interference can be justified under article 8(2), i.e. in order to ensure that the accused can have a fair trial.

Given that the European jurisprudence makes it clear that it is only the disclosure of material information that is necessary to ensure a fair trial, I anticipate that any statutory regime that extends the Crown's disclosure duty at a domestic level to all relevant information would result in a significant increase in applications by the Crown to withhold information, which was never envisaged when the non-disclosure provisions were prepared.

You will no doubt also recall that the submission to the Committee by Rape Crisis was particularly concerned that the provisions not compromise the rights of witnesses under Article 8 of the Convention.

While you may be concerned that section 89 as currently drafted may be complex, it is an accurate depiction of the current obligation. I would point out that the Supreme Court recognised in McInnes v HMA, that the one area of the common law disclosure regime that is reasonably well settled is that of the disclosure test. Changing the test in such a significant way may jeopardise this.

COPFS has demonstrated a strong commitment to ensuring that everything that can be done by way of instruction, organisation and training is done to eliminate the possibility of error, as is demonstrated by the Crown's Disclosure Manual, which is publicly available on our Internet. If it would assist you, I would be more than happy to provide you will full briefing on how the Crown carries out its disclosure obligations, or if you would prefer, I could arrange for you to be given a demonstration, which could include how the new secure disclosure website will operate.

I hope that the above provides you with a greater understanding of the importance of the materiality test. I would of course be more than happy to meet with you to discuss this or any other aspect of disclosure.

Frank Mulholland
Solicitor General
16 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Stirling Council

In relation to the above I am writing on behalf of Stirling Council in support of amendment 8 lodged by Trish Godman and I urge the Justice Committee to support it too.

Prostitution is a form of violence against women, representing violation and inequality of women – not a free exchange between adults - and all women prostituted are participating in a system which is itself unequal.

The Scottish Government must challenge the normalisation of this so-called ‘industry’ and take a lead in rejecting this form of exploitation.

Harm-reduction approaches can still be promoted while condemning the systems and structures that promote inequality.

Demand for prostitution should be criminalised and women supported to exit prostitution with more education for all to prevent the continuation of this aspect of violence against women.

Anne Salter
Lead Officer Child Protection
Stirling Child Protection Committee
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Scottish Violence Reduction Unit

Sentencing for knife crime

Knife related violence in Scotland is a significant problem which receives significant, focused and sustained attention from the police and criminal justice agencies as well as many other groups and individuals. Violence is a wicked and persistent problem and tackling it in all its forms requires persistent and coordinated efforts across a myriad of agencies and groups. It is everyone's problem and there is no single solution to it.

Mandatory sentencing is a particularly emotive subject which elicits vigorous debate over its merits and impact. The majority of the research relating to the impact of mandatory sentencing and broader sentencing policy emanates from the United States. The US has some of the toughest sentencing policies in the world and the largest prison population (2.5 million prison capacity and approx 1 in 18 males in the US are currently serving time or being monitored).

Research looking at the significant decrease in crime (including violent crime) in the early 90s in New York suggested that the decline was due to the tougher sentencing policy. However, these decreases have also been attributed to zero tolerance policing, a collapse/stabilisation in the crack cocaine market and, more controversially, a change in the abortion policy in the 1970s. It is difficult to establish which, if any, of these factors were responsible for the decrease. The FBI suggest that across the country there has been a 20-25% decrease in crime since the introduction of tougher sentencing, heralding this policy as a significant deterrence. However, during the same time period the number of incarcerations have increased from below 2 million to over 7.5 million per annum, suggesting tougher sentencing has no impact on deterrence and that the reduction is due to the removal of criminals from society.

In Strathclyde the number of people arrested for possession of a bladed weapon is decreasing[1] and the estimated number of serious violent incidents involving a knife has also declined[2]. In addition, although violence is under recorded in Scotland, reports like the Scottish Crime Survey indicate that overall violence is decreasing on a year by year basis. However, the recent homicide report in Scotland indicates that despite the decrease in overall homicides there has been an increase in the number of knife related homicides[3]. This overall effect of decreasing levels of knife violence yet no real impact in the number of knife related homicides was also seen in the England and Wales, where there was a decrease of 17% in the priority areas yet an increase of homicides with a knife[4]. Despite the debate over the overall impact of tougher sentencing policy on crime in general there is little debate on the impact of tougher sentences on homicide and it is widely accepted that there is no impact. Therefore it is projected that the provision of mandatory sentences for knife carrying would have no overall effect on the number of homicides per year in Scotland.

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[1] 11% decrease from 2008 to 2009

[2] 20% decrease on serious violence where details of a weapon were included

[3] Due to the relatively low levels of homicide compared to other serious violence the increase in knife related homicide is not statistically significant.

In 2009, 1780 individuals were arrested for possession of a bladed weapon in public (in Strathclyde). If all of these individuals were subsequently sentenced to a year for their crime then this would have an estimated financial burden approaching £60 million and require an approximate 20% increase in prison capacity to house offenders. The alternative in this scenario is to liberate others to make space for the knife carriers; who would they be?. In light of the current prison stock and the projected new build(s), mandatory sentences would bring the current system to a standstill and involve dangerous levels of overcrowding which would lead to serious problems of violence within the prison system and possible litigation against the government. Based on these statistics, which relate only to Strathclyde, we would need to build three new prisons. Has there been any thought given over to the mandatory term of imprisonment those who reoffend, once, twice?

There is debate over whether or not the application of minimum sentences is unconstitutional and degrades judicial independence. The key example from the UK relating to minimum sentences is from England and Wales, where research suggests that even the mandatory five year sentence for possession of a firearm is not applied: over 50% of those convicted of possession of a firearm get less than three years.

The Violence Reduction Unit asked for consideration of mandatory sentencing in 2005 at which point it was discounted; however the increase from two to four years for knife possession was introduced in 2006. Over the last few years evidence from sentencing for knife related offences in Strathclyde have shown an upwards trend in the length of sentencing. The VRU have since reconsidered their initial stance based on the unworkable nature of the sentence, the lack of evidence demonstrating sustainable benefits and the evidence from re-offending rates that prison does not reduce violence.

The VRU is in favour of mandatory interventions and alternatives to prison disposals for first time offenders, whereby the offenders have to confront their behaviour and deal with the potential consequences of their actions in a way that will benefit them and the communities in which they live. At times custodial sentences are necessary if the individual presents a potential danger to society however, this is complicated if not impossible to capture under the guise of mandatory sentencing. The decision should be down to the judge on the day: they are in possession of all the salient facts including context and with this knowledge can best decide the most appropriate and effective disposal.

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[4] http://www.crimereduction.homeoffice.gov.uk/violentstreet/violentstreet014.htm

The VRU is committed to the sustainable long term reduction of violence in Scotland and believe that this will only be achieved by tackling the root causes of violence. Pursuing a mandatory policy for sentencing is costly and is unlikely to have the desired effect. The budget required to fund such a policy would be better used on strategies that have an evidence base of effectiveness and where sustainable reductions can be made making Scotland a safer place where all citizens can lead active productive lives.

There is no such thing as a single group of knife carriers, each sub group/individual comes with a different set of reasons why they carry knifes. Only a small subsection of this group is affected by the influence of criminal justice and policing. More dangerously, the group of knife carriers that are most intent on doing harm would do so under any circumstance and just change their means of causing harm. Early indications suggest that knife carrying is more endemic in some areas of the country than others (other than Glasgow and the west coast), but if combined with the violence stats it is less likely that such carriers will inflict harm and their reasons for carrying may well be different and more transitional[5]. For example, should an individual who has a history of knife carrying and or violence be treated in the same way as a young man who has no history and is caught carrying a knife for the first time because he is scared of being a victim? Mandatory sentences would not necessarily account for individual circumstance and may lead to more harm than good.

Summary

There has been a significant decrease in the number of serious violent incidents involving a knife in Strathclyde. During this time we have seen a number of changes in the way that we police in Scotland, changing cultural attitudes, unrelenting campaigns, school based programmes and the treatment of individuals in court. There is no way to determine definitively which of these changes is causal in the reductions. In terms of sentencing we have not seen any real changes in the number of individuals given custodial sentences however, those who do receive custodial sentences are given longer sentences. There has also been an increase in the number of community based sentences and a decrease in the number of fines which may have also have had an impact. Scotland is moving in the right direction and we are starting to see some real changes. These statistics only relate to those where possession of a knife is the most serious charge brought against them and not any other acts of violence. The Sheriffs and Judges are the only ones with the full knowledge of circumstance in each individual case and therefore are in the best position to consider the likely outcomes from the disposal. Mandatory sentences do not work; they do not account for individual circumstance. They are a punitive measure and will have a significant and negative impact on the life chances of many of our young men who through bad judgment have made a wrong decision, maintaining a continuing cycle of offending.

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[5] Unpublished, draft research Scottish Government of Gangs and Knifes

Detective Chief Superintendent John Carnochan QPM
Head, Scottish Violence Reduction Unit
16 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Victim Support Scotland

1. The need for a new offence relating to stalking

People who engage in behaviour constituting stalking in Scotland are currently prosecuted under the offence 'breach of the peace'. The appeal court in Harris vs. HMA did however rule last year that in order for the activity to be seen as a breach of the peace, it requires a 'public element'. Since stalking may be conducted in private and does as such not have a 'public element', Victim Support Scotland is delighted that amendments have been made to introduce a new offence of stalking in the Criminal Justice & Licensing (Scotland) Bill. Of the two different amendments presented to address stalking, we prefer the amendment introduced by Rhoda Grant since it is more explicit and straight forward, proscribing clearly the conducts covered and defines the impact of these conducts on the victim.

2. Name of the new offence relating to stalking

We strongly support Rhoda Grant's suggestion to label the new offence as "stalking", since this is a well-known term amongst the general public. As Ann Moulds from Action Scotland Against Stalking states, "the concept of stalking, what it is and what it means already exists within public consciousness". An increasing number of countries are currently developing anti-stalking legislation, so we believe this is a good time for Scotland to do the same.

3. Behaviours and conducts covered by the new offence of stalking

The crime of stalking may comprise of behaviours that, by themselves, may not be criminal, for instance making phone calls, sending letters etc. Threats may be explicit or implicit or conveyed without words. Acts that appear meaningless or non-threatening to other people may be terrifying to the victim. Flowers sent to the victim's work – a seemingly non-threatening and often appreciated gesture – may make the victim terrified to leave work out of fear that the stalker is waiting outside. We find it important to stress that stalking is not always related to domestic abuse and the victim may not necessarily have had a relationship with the stalker. To understand stalking, attention must be paid to the context of the behaviour. Victim Support Scotland is therefore in favour of a clear definition of the acts and behaviours covered by the offence, such as the non-exhaustive list of conducts introduced by Rhoda Grant in section 6. We find it very important to stress that this list is non-exhaustive and that other behaviours can be covered if it brings out the same reactions for the victim, listed in section 2(c). Stalking affects every part of a victim's life. It brings fear of random attacks, loss of trust in society and the criminal justice system, long-term distress and frustration. Psychological responses may include anxiety, fear and paranoia but also feelings of guilt, self-blame, isolation, anger, rage and depression. As such, we believe that the definition of "harm" in section 2(c)(i) should be widespread to include a wide scope of adverse physical and psychological reactions.

Regarding section 6(c), covering the conduct of "publishing any statement or other material", we believe this conduct should be interpreted widely to include, for instance, posting material on networking sites such as Facebook, Bebo and Twitter.

Regarding section 6(h), we would like to receive further guidance on what is to constitute keeping a person "under surveillance". We believe this should not only cover situations where the accused is using technical equipment, video cameras or surveillance software, but also cover instances where the accused observes the victim (or any other person) in person.

We are pleased to see that the suggested offence of stalking covers conducts where the accused knew or ought to have known (as stated in section 4) that the actions were likely to cause harm, apprehension or fear for the victim or any other person. We believe this will aim to eliminate the possibility for the accused to escape conviction by claiming that he/she was unaware of the impacts of the conduct on the victim.

4. Threatening, alarming or distressing behaviour

Although we believe that Rhoda Grant's amendment is more suitable to tackle behaviours and conducts relating to stalking, we do feel there is a need for an offence comprising of "threatening, alarming or distressing behaviour", as proposed by the Government. This would be particularly suitable for cases that are currently being prosecuted under the offence "breach of the peace" but that lack the "public element", for instance domestic abuse cases that occur behind closed doors. Following the Harris case, it has become increasingly difficult to raise domestic cases under "breach of the peace" and we are therefore pleased to see that amendment 378 intends to create a separate offence without the need for a "public element".

Frida Petersson
Senior Research and Policy Officer
16 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Helen Johnson, Trustee of the Zero Tolerance Trust

I am writing to express my support for Trish Godman's proposed amendment to create a new offence of engaging in paid-for sex. This is a really important opportunity to tackle the demand for prostitution in Scotland and create a significant cultural shift, placing responsibility for the harms of prostitution with the men who pay for it and in so doing, working to prevent violence against women and children. I recently completed some research into the sex industry and this has persuaded me that the industry is essentially exploitative. Debates on the agency of women put too much focus on responsibilising the women involved as opposed to addressing the exploitation of economic power that leads to the coercion of women into sex for money. It is my view that sexual wellbeing cannot be fostered in a culture where sexual relationships are commodified.

Helen Johnson
Zero Tolerance Trustee
15 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Lyn Tett, Trustee of the Zero Tolerance Trust

Submission in support of amendment 8

I wish to support amendment 8 because I view prostitution as part of the spectrum of men's violence against women and this amendment will help to ensure that prostitution does not become normalised. Women become involved in prostitution for a variety of reasons such as homelessness, child sexual abuse, mental ill health, trauma, previous sexual violence, drug and alcohol misuse, money pressures and poverty. These factors, which serve to lead or force women into prostitution, should not be mistaken for the cause of prostitution itself, which is the demand from men to buy sex. Labelling prostitution as work or legitimate employment actually legitimises exploitation. Therefore it is unfair to criminalise those who are abused and exploited since prostitution is not a choice for women.

Lyn Tett
Zero Tolerance Trustee
16 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Zero Tolerance

Submission in support of amendment 8

About Zero Tolerance

Zero Tolerance is a small national charity promoting innovative policy and practice to address the root causes of male violence against women and children. We pioneered the 3 P's approach to tackling male violence – protection, provision and prevention. Of these, we believe that the prevention of violence through changing attitudes, structures and values is the key to changing the culture of endemic violence in which we live.

Summary of our position

We are strongly supportive of amendment 8 lodged by Trish Godman and urge the Justice Committee to support it. Our arguments in favour of this amendment can be summarised as follows:

- **We see prostitution as a form of violence against women, representing violation and inequality of women – not a free exchange between adults - and believe that all women prostituted are participating in a system which is itself unequal.**

- **We wish to challenge the normalisation of this so-called 'industry' and we aspire to a world without these forms of exploitation**

- **We believe that you can still promote harm-reduction approaches while condemning the systems and structures that promote inequality. We would like to see demand criminalised and women supported to exit prostitution, and more education for all to prevent prostitution from happening.**

- **It is time for the 'invisible man' to be recognised and tackled.**

Prostitution represents violation and inequality

We see prostitution as a form of violence against women and children, and also recognise that it causes harms to the smaller number of men who participate as sellers of sex, and to some extent to the men who buy sex. The Scottish Government has also described it as such in the '*Safer Lives: Changed Lives'* document – noting therein that the harm that commercial sexual exploitation causes to *all* women, by sanctioning objectification of women's bodies, happens regardless of whether individuals claim liberation or empowerment from the activity.

Prostitution is a manifestation of gender inequality. It is not a coincidence that the vast majority of people selling sex in Scotland are women and the vast majority of those buying sex from women are men. There is considerable evidence that selling sex for the vast majority of these women is not a freely made, positive choice but in fact a socially structured decision, which represents a submission to a *lack* of choice and options and a reflection of women's wider economic inequality. The decision to sell sex is driven by necessity or desperation, by factors such as poverty, drug dependency, domestic abuse or child sexual abuse. But these individual factors are not root causes – the root cause of a system wherein men buy women's bodies is the unequal distribution by gender of power, wealth and opportunity.

A Home Office report from 2007 said 'The majority [of individuals involved in street prostitution]… live chaotic lives and have complex needs, and most are Class A drug users. They often face a multiplicity of risks to their physical, emotional and psychological health as well as problems relating to homelessness, lack of food, clothes, warmth, shelter, money and lack of family networks. Many are disengaged from mainstream services such as healthcare, housing and benefits and have a history of frequent contact with the Criminal Justice System.'[1]

The Tyneside Cyrenians '*Hidden for survival'* study (Feb 2008) found that sex was sold for as little as £5 (the average charge was £37), dispelling the myth of the lucrative career that media portrayals of prostitution perpetuate. This cannot be understood in isolation from a wider analysis of women's poverty – women experience significantly more poverty, in significantly different ways from men. Women have a lower income than men during work and retirement; smaller, if any, savings; and are more likely than men to experience unmanageable debt.[2] This is the context in which prostitution flourishes.

Prostitution can also be a consequence of other forms of neglect or abuse - 70% of those involved in street prostitution have a history of local authority care and 45% report experiencing sexual abuse during their childhoods (Home Office 2006). The Tyneside study found links with other forms of violence such as domestic violence – 41% of respondents reported being in a violent relationship and there was evidence of domestic abuse deterring women's involvement in drug treatment as partners did not allow it.

Prostitution also represents the exploitation of children and young people. A Glasgow study showed that 24.5% of the women surveyed had entered prostitution before age 18, with 8.2% starting at age 16 or under.[3]

On the issue of choice, we believe that individuals who claim that this is activity freely chosen constitute a minority of women participating in this industry, and further note that women working as prostitutes often describe the activity as freely chosen as a coping mechanism - for example in the European Women's Lobby film '*Not for Sale*'[4], Fiona Broadfoot, a survivor of prostitution, says "Women have to tell themselves they have made a choice to survive. I told myself for many, many years I was OK. I had to do that to survive the industry". Once in prostitution, 9 out 10 surveyed women would like to exit but feel unable to do so.[5]

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[1] 'Drug Interventions Programme: Good Practice Guide to Increasing the Engagement of Adults involved in Prostitution within the Drug Interventions Programme', Home Office, 2007

[2] http://www.oxfam.org.uk/resources/ukpoverty/gender.html

[3] "Where is she tonight? Women, street prostitution and homelessness in Glasgow", Audrey Stewart, 2000.

It is clear to us from this evidence that women selling sex are victims of an exploitative and violent system and that it is time for more emphasis to be placed on those buying sex, generating the demand, and facilitating the system, hence our support for these amendments.

Prostitution should not be normalised

In February 2010, the Home Office published a review of Sexualisation of Young People. This review examined culture and society in the UK and found that jobs in brothels and lap-dancing clubs (where prostitution routinely happens) are advertised by Job Centre Plus and that "we are seeing the normalisation of [sex work] as viable career choices" which "sends out a powerful message to young people about what is of value" (para 29). The review also concludes that popular culture lends "credence to the idea that women are there to be used and that men are there to use them" (para 30).

In this climate, it is easy for young people to be groomed for involvement in prostitution: young women groomed as sellers and young men as users and controllers of women. It is increasingly seen as normal for men to use prostitutes as part of a night out with friends or colleagues[6], or a 'stag' night[7] – and many regret doing so. A significant number of men who buy sex later regret it: 25% of men interviewed in Scotland said that they felt "significant shame and regret" at having bought sex.[8] One study of men who use prostitutes found that for 29% of the men, prostitution was their first sexual experience.[9]

To call a halt to this culture of prostitution as mainstream it is vital to curb demand and send out a message that prostitution is not a normal, legitimate form of work or entertainment. Tackling demand would send a message that Scotland rejects this exploitative industry and those who create and support it.

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[4] http://www.womenlobby.org/site/video_en.asp
[5] Farley et al, 2003
[6] http://www.fawcettsociety.org.uk/documents/Corporate%20Sexism.pdf.pdf
[7] http://news.bbc.co.uk/1/hi/8457172.stm
[8] 'Challenging Men's Demand for Prostitution in Scotland', Women's Support Project, 2008
[9] 'Men who buy sex: Who they buy and what they know' – Farley, Bindle and Golding – Dec 2009.

Supporting this amendment and protecting those in prostitution are not mutually exclusive

Whilst we strongly support amendment 8, we do not believe that this change alone would represent a panacea. We would also ask the Justice Committee to consider other measures including better funding and support for prostitution exit programmes, changing the fact that prostitution can never be a spent conviction, decriminalising the selling of sex, and developing or promoting educational programmes to prevent prostitution and promote gender equality.

However, we would urge the Committee to keep in mind that supporting amendments to criminalise the purchase of sex and developing policy or legislation to protect women involved in selling sex are *not* mutually exclusive. Supporters of the move to criminalise the purchase of sex are often characterised by our opponents as uninterested in the experiences of prostituted women or men and unconcerned with harm reduction, which is not the case. We have no wish to place women at further risk. In fact what we seek to do is to protect them from a systematic industry of exploitation and abuse, while also protecting all women and children from the wider and longer term impacts of this industry.

We would therefore urge the adoption of amendment 8 now, and ask the committee to support the development and funding of clear exit strategies and other forms of support for women alongside the changes set out in the amendment.

It is time for the ‘invisible man’ to be recognised and tackled

Zero Tolerance has always believed that public discourse about violence against women focuses too much on women, and what they should do or not do to prevent violence, and too little on challenging the men who perpetrate the abuse. This is slowly changing and many statutory authorities are very clear now that the perpetrators of abuse need to be central to our decision making. For example, many local authorities have run ‘Zero Tolerance’ campaigns to tell perpetrators that there is no excuse for domestic abuse; Lothian and Borders Police recently ran an anti-rape campaign developed to communicate that “responsibility for rape will always lie with the rapist”[10]; and many authorities now run perpetrator programmes for abusive men.

Yet in terms of prostitution, the focus for years has been on the women who sell sex rather than the men who buy it. Women have been arrested and imprisoned for soliciting, earning convictions that can never be spent. Men have largely been ignored. Kerb-crawling legislation has had some impact but by and large men have been free to purchase sex with impunity. This has to change.

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[10] http://www.lbp.police.uk/press_release/articles/2009%5CDecember%5C10%5C1.htm

Other jurisdictions have successfully legislated to criminalise demand (Sweden, Iceland) and have seen a resultant reduction in prostitution and trafficking but also a change in social attitudes. In Sweden, which has legislated to criminalise the purchase of sex, there has been a marked change in public perception with 80% of the public now viewing prostitution as unacceptable, compared to 49% in 1999[11]. We believe that the proposed amendments, if supported, could deliver a similar cultural shift in Scotland, which would drive us closer to gender equality, and ultimately to a fairer society in which all women and men can achieve their potential and live life free of abuse and violence. We urge the committee to support amendment 8.

We do not support amendments 8A-D (lodged by Margo Macdonald) or amendment 461 (lodged by Nigel Don).

Jenny Kemp
Prevention Network Officer, Zero Tolerance
15 March 2010

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[11] See Ekberg, Gunilla (2005) 'The Swedish law that prohibits the purchase of a sexual service: Best practice for prevention of prostitution and trafficking in human beings'(update of article in journal of Violence Against Women 2004)

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Scottish Police Federation

I refer to the above and thank you for inviting the Scottish Police Federation (SPF) to submit additional written evidence. The SPF has itself consulted widely on these amendments and in the time available gathered the following for your consideration;

Offence of engaging in paid-for sexual activity (and related new offences)
Amendments 8, 8A, 8B, 8C, 8D, 9 & 9A

The SPF shares the view that prostitution is as old as human civilisation itself. We believe that irrespective of any well intentioned legislation, the resilience and nature of prostitution will ensure its survival 'till the end of time. We believe the activities of prostitutes are largely driven by desperation and believe any approach to this subject should be one of support and not seeking to further criminalise those who take part. Against that background, we believe there is nothing in these proposed amendments that will either assist those who engage with or in prostitution and indeed may increase the risk of harm in what is clearly a very dangerous 'profession'.

At this time many of the areas in which prostitutes operate (at street level) are generally well known to police officers and areas are policed with sensitivity. The prospect of criminalising further prostitution and those who use prostitutes risks driving prostitution underground and into areas that will receive less police attention. This is also a real possibility for those who currently operate from premises, where an element of increased safety can be secured often due to the presence of a third party in the building. We recognise the issue of pimping is a serious one but believe many who facilitate or tolerate prostitution in or on their premises (and not pimps as understood in common parlance) do so because this is the 'least worse' option. Accordingly we believe this legislation may well penalise many who tolerate rather than those who actually 'gain' from the activities of prostitutes.

In addition to the statutory provisions of the Civic Government (Scotland) Act 1982 and the Prostitution (Public Places)(Scotland) Act 2007 the age old common law offence of breach of the peace is available to police officers for those who both solicit sexual activity and those who engage with them. Whilst there will always be those who argue the police should and could do more, the existence of breach of the peace can effectively deal with the majority of events the proposed amendments seek to cover.

On the whole question of prostitution we believe the parliament must firstly determine whether it believes it is possible to either eradicate or minimise the effects of prostitution through yet further legislation or whether it simply wishes to control and restrict its impact. If parliament agrees with us that prostitution will survive all attempts to criminalise it, then it is our view the issue of control and restriction will not be achieved through these proposed amendments.

Sentencing for knife crime Amendment 10 & 10A

The SPF is acutely aware of the politicisation of this issue and offer our comments on a guarded basis. We previously offered comments in support of the establishment of a sentencing council and believe any attempts to undermine the impartiality and ability of that sentencing council, by means of legislated minimum sentences to be a retrograde step. In addition, we believe the risks of imprisoning young adults for what could be a moment of madness and foolishness could result in a fool entering prison only to leave 6 months or two years later as an educated criminal with a grudge against society. We believe everyone is capable of making a mistake and that in many cases learning from that mistake is ultimately of greater benefit than punishing it. Whilst representatives for sheriffs will have their own view and notwithstanding the reference to two years it is our opinion that the proposed amendment 10A to be a close reflection of the status quo.

New offences relating to stalking Amendments 402 & 378

The common law offence of Breach of the Peace is defined as follows;

Breach of the Peace is a crime at common law and is constituted by one or more persons conducting himself or themselves in a riotous or disorderly manner anywhere to the alarm, annoyance or disturbance of the lieges.

It appears to us that the provisions of the proposed amendments are by and large a rewrite and translation of this offence onto the statute book.

Calum Steele
General Secretary
16 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Anna Ritchie

Submission in support of amendment 8

I am strongly supportive of amendment 8 lodged by Trish Godman and urge the Justice Committee to support it. I believe that prostitution is a form of violence against women, representing the violation and inequality of women and believe that all women prostituted are participating in a system which is in itself unequal. I think that the normalisation of this so-called 'industry' must be challenged in order that we can eradicate these forms of exploitation

I believe that the demand for prostitution must be criminalised and that women should be supported to exit prostitution.

Anna Ritchie
16 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Scottish Women's Aid

Foreword

Scottish Women's Aid is a national organisation working for change on issues of domestic abuse and an umbrella body to a membership of 40 autonomous Women's Aid groups throughout Scotland, which provide temporary accommodation (refuge), information and support to women, children and young people who experience domestic abuse in Scotland.

Introduction

Scottish Women's Aid welcomes the opportunity to comment on these additional amendments to the Bill. We have specified below those amendments we agree to and would urge the Justice Committee to also give them their support.

Offence of engaging in paid-for sexual activity (and related new offences) Amendment 8 (lodged by Trish Godman)

We support this amendment.

Prostitution is part of the spectrum of men's violence against women and impacts both on those directly involved and on our wider culture. It is a significant social problem and is harmful, not only to the individual prostituted person, but also to society at large. It acts as a barrier to gender equality and this equality will be unattainable for women so long as society continues to sanction the perpetration of violence through men buying, selling and exploiting women and children through prostitution.

We do not view prostitution as a choice for women; it breaches their right to dignity, equality, respect and physical and mental well-being and is innately harmful.

The concept of the prostituted person having "choice" is a false distinction as it assumes the prostituted person always has freedom and the luxury of making an informed decision. This viewpoint also implies consent through the exchange of money; consent cannot be bought and the fact that money changes hands and the sexual services are paid for in no way validates the transaction.

In saying this, we acknowledge the fact that some women will take the decision to become involved in prostitution, but these are a minority, and we as a society cannot be responsible for enforcing the status quo and building policy for a minority, whilst ignoring the most vulnerable majority.

Further, there are no "distinctions" between forced and so-called "free" or "voluntary" prostitution and men purchasing sex do not make this "distinction". It is our position that all prostitution is a social wrong and is exploitation of the person prostituted, regardless of the context, or whether that person is said to have consented to the prostitution.

There are a number of reasons as to why women become involved in prostitution - mental health and substance misuse issues, poverty, homelessness, having experienced domestic abuse or child sexual abuse- and for these vulnerable women, prostitution is often the last option of survival open to them. Prostitution should not be normalised as a viable career option.

Therefore, to address this exploitation, we must put the focus and responsibility for prostitution firmly on those who are inevitably invisible when this issue is discussed, that is those who create the demand and who purchase sex.[1]

Given that human slavery, and the notion of individuals as commodities, was deemed unacceptable in 1833, it is a condemnation of our society that prostitution has continued to exist unchallenged until the 21st century.

On January 1, 1999, the Swedish Legislation, the Law that Prohibits the Purchase of Sexual Services ("the Law") entered into force. This Law recognizes that it is the man who buys women (or men) for sexual purposes who should be criminalized, and not the woman. This was regarded as "*the first attempt by a country to address the root cause of prostitution and trafficking in beings: the demand, the men who assume the right to purchase persons for prostitution purposes. This groundbreaking law is a cornerstone of Swedish efforts to create a contemporary, democratic society where women and girls can live lives free of all forms of male violence. In combination with public education, awareness-raising campaigns, and victim support, the Law and other legislation establish a zero tolerance policy for prostitution and trafficking in human beings.* "[2]

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[1] Men Create the Demand; Women Are the Supply; Donna M. Hughes; University of Rhode Island; Lecture on Sexual Exploitation, Queen Sofia Center, Valencia, Spain, November 2000 *http://www.uri.edu/artsci/wms/hughes/demand.htm*

[2] The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings; GUNILLA EKBERG, Ministry of Industry, Employment, and Communications; Violence Against Women, Vol. 10, No. 10, 1187-1218 (2004) *http://www.prostitutionresearch.com/pdf/EkbergVAW.pdf*
and *http://www.prostitutionresearch.com/laws/000024.htm*l

See *http://www.prostitutionresearch.com/c-prostitution-research.htm*l generally for research on the negative impacts of prostitution

The issue of addressing prostitution through legislation is not a new concept for the Scottish Parliament. Most recently, the Prostitution (Public Places) (Scotland) Act 2007 addressed the issue of "kerb crawling". This legislation only partly addressed the issues of demand and, thus, these much needed amendments close the gap, removing the distinction between street prostitution and indoors prostitution.

Scotland has international obligations to address the address the demand for prostitution, under:

- Article 6 of the Convention on the Elimination Of All Forms Of Discrimination Against Women, ("CEDAW"), UN General Assembly 1979
- Article 6 of the European Convention on Human Rights ("ECHR"), given force in Scotland through the Human Rights Act 1998 and the Scotland Act 1998
- UN Declaration on the Elimination of Violence against Women 1993

The purchase of women, children and young people for sex is fundamentally unacceptable and an affront to a modern Scotland. We must end prostitution now and these amendments will give us the power to make that happen

We would also make a further comment. In Sweden, prostitution is officially acknowledged as a form of male sexual violence against women and children. Therefore, prostituted women and children are seen as victims of male violence who do not risk legal penalties.

In accepting prostitution as exploitation, we must also recognise that it is not right to criminalise those who are victimised and exploited. Therefore, these amendments must supported by additional interventions, such as the decriminalisation of those who are purchased for sexual activity, and the availability of appropriate and adequate support for women wishing to exit prostitution.

Amendments lodged by Margo MacDonald and by Nigel Don

We are unable to support these amendments

Amendments 399, 400, 401, 402, introducing a new offence of stalking (lodged by Rhoda Grant)

We support the introduction of a new offence of stalking. This, along with amendments 5, 6, 7 already lodged by Rhoda Grant, making the process of applying for non-harassment orders more accessible, will increase the options available to, and therefore, provide further support for, women, children and young people experiencing domestic abuse.

Amendment 378, relating to threatening, alarming or distressing behaviour (lodged by Kenny MacAskill)

It should be noted that this amendment has a separate and entirely different focus from the amendments in relation to stalking and harassment lodged by Rhoda Grant. We overwhelmingly support amendment 378, and the creation of a statutory offence clarifying the law on breach of the peace.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Dr Anne Macdonald

Proposed stalking amendments

I am a consultant forensic psychiatrist with a particular interest in the management of stalking and the current proposals for specific legislation, and I hope the Justice Committee will accept this submission.

I have worked in various areas of forensic psychiatry in Scotland for 27 years; including as Scottish Ministers' Advisor on forensic psychiatry 1997 – 2001, in which capacity I was the Health Department's representative on the Ministerial Working Group on Domestic Violence. From 1985 and 2008 I was registered as a psychoanalytical psychotherapist and working with adult survivors of sexual trauma. I continue to work clinically with stalkers (men and women) and their victims, and helping to formulate a human resource policy on stalking in the NHS mental health workplace.

I am employed by NHS Greater Glasgow & Clyde, and a Non-Executive Lay Board Member of the Risk Management Authority in Scotland. This submission is my own and does not necessarily represent the views of any other person or organisation.

Rhoda Grant's proposal 25 to introduce the words and concept of stalking in Section 31 (1) are welcome as the beginning of a process of acknowledgement of this problem. A definition would be helpful to avoid a circular argument. A variety of definitions exist but they have common characteristics. Badcock[1] (2005) notes that the term "…continues to be apt in its image of a hunter pursuing prey in a sustained but unequal relationship…" and Meloy et al[2] (2008) refer to a unwanted fixation by one person on another with 'a behavioral progression…during which the fixation alienates others, undermines social networks, and erodes finances, leaving the person often isolated and destitute."

Kropp et al[3] (2006) define stalking for the purpose of their structured risk assessment of stalkers as '...unwanted and repeated communication, contact, or other conduct that deliberately or recklessly causes people to experience reasonable fear or concern for their safety or the safety of others known to them."

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[1] Badcock, R 2005 Chapter 8 in Stalking and Psychosexual Obsession ed Boon J.and Sheridan L

[2] Meloy, J.R., Sheridan, L., and Hoffman, J (2008) Stalking, Threatening and Attacking Public Figures Oxford University Press

[3] Kropp, Hart, & Lyon, (2006) *Guidelines for Stalking Assessment and Management* ProActive ReSolutions Inc

Stalking does not require particular physical behaviour or acts and crucially includes targeted violence taking place over time, even decades, such as severe persistent harassment. It is important to emphasise the imbalance and the unwanted nature of the process.

I propose the Committee might consider for the purposes of the legislation ”**Stalking is defined here as a pattern of unwanted and repeated communication, contact, or other course of conduct that deliberately or recklessly causes people to experience reasonable fear, alarm or concern for their safety or the safety of others known to them.”**

Stalking destroys a target’s social links and may cause real harm to their livelihood. A person who is being stalked will be shunned, disbelieved and treated with circumspection. This may happen without direct contact or knowledge of the target, without intent (as with bullying and harassment) and might be termed reputational harm or damage. I propose therefore that under section 31(3)(a) ‘**or reputational harm’** should be added; also ‘**harm to others associated with B’**.

Section 31(3): Stalking is a pattern of behaviour which provokes a bodily survival reaction known as a ‘flight or fight’ response. It causes real harm, including physical and psychological damage to the target and to people relating to them. It carries the risk of death, directly as an effect of extreme fear on the body (for instance heart attack); indirectly secondary to avoidance action; directly through physical assault; and also at the hands of the target themselves in their state of fear or despair. I propose that ‘**alarm**’ be added to (b) as in ‘…arousing alarm, apprehension…’.

Section 31(4): A perpetrator will argue that most people would not expect such an extreme reaction. The ‘deliberate or reckless’ part of the definition proposed would be useful here or as in Scottish Government’s proposal.

Section 3(5)(a): I agree this paragraph is necessary and if included it allows for the word ‘reasonable’ to be removed from the ‘fear or concern’ paragraph below.

Stalking shares with fraud that it is open to the perpetrators’ ingenuity to use multifarious ways in which to enact harm. Hurt and control of the object are key issues for the stalker. Section 31 (6)(a) to (h) as proposed is therefore too specific, may be helpful for information or teaching but in the legal context carries the risk of reducing stalking to a series of acts. So wording such as ‘unwanted and repeated communication, contact or conduct’ (as above) should be sufficient. If examples are required a more general line such as ‘telephone calls, emails, following, gifts, complaints, threats, libel, property damage or physical assault” would be preferable.

Section 31(6)(b): Stalking works by isolating the target precisely because a reasonable person (whether colleague, police or family or friend) does not understand the alarm experienced by the target. If section 5 is included as a disclaimer there is no need to use the ‘reasonable person’ test in my view and

I propose that '**acting in any way that causes alarm, fear or concern in B…**' would be better. Front line staff including health workers as well as police need to be educated in stalking and how it presents, as does society. Many of the harmful results would be mitigated by early identification and use of systems to record incidents.

The letter from the Cabinet Secretary for Justice dated 19 February 2010 introduces an amendment at Stage 2 to create a new statutory offence of 'engaging in threatening, alarming or distressing behaviour'. It is helpful to understand the situation in which this need arises and it is reassuring that potential problems arising in terms of stalking have been considered. There is some overlap with domestic violence; stalking as severe and persistent harassment overlaps with vexacious complaints; and when physical assault is involved other charges are used. However, as stated earlier, naming stalking will be useful.

There is a great deal that can be done for victims before or instead of prosecution, with or without the direct aid of the criminal justice system, but a separate offence would enable this. My earlier comments about the definition pertain and the reasonable person test is not useful. Stalking is not reasonably anxiety provoking, but rather terrifying; and the reaction of the victim may appear disproportionate to an observer. While this may be an immediate response, victims learn that this tends to negatively impact on them and then withdraw.

Targets will not always be able to articulate what the problem is or why they are so upset. They may be made to feel that they have done something unforgivably wrong, or simply consider that disengagement requires an act which may place them or someone else at further risk. The external observer sees the target's inactivity as a sign of consent, or is presented with an inexplicable extreme physical or emotional reaction. Non-physical violence has particular power in being invisible to observers, in contrast to the reaction of the individual who feels the attack.

Labels commonly associated with sexual offending are useful here even when sexual issues are not directly relevant. Grooming describes the predator's strategy of gradually acclimatisation of a target with a psychological contract which does not cause alarm until they feel caught by implication. If the target attempts to inform someone in authority and is not believed this is further isolating, and, appearing unable to disconnect reinforces bonding with their abuser, thus labelled entrapment.

The perpetrator is by definition the active partner and drives the way in which the relationship is seen as well as its progress, but it cannot be assumed that this person will be easily identified. Factitious victimisation describes the predator who presenting him or herself as the victim while retaining the advantage of setting the frame. For the perpetrator this may be even easier to manage at one removed, by proxy, using an innocent go-between. So an observer finds it impossible to identify a victim, and the target has difficulty in extricating themselves.

Predatory behaviour in animals involves picking off those perceived as vulnerable, so making a person vulnerable may of itself be harmful. In any group at a point in time some will be at the centre and others at the perimeter. When a threat is identified those perceived to be most at risk or most precious to the group will be moved towards the centre for safety. The process of naming stalking could become a part of society's move to recognising it's duty of care towards targets which would be of great benefit.

Dr Anne Macdonald
16 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Glasgow Addiction Services

Submission in respect to amendment 8

Glasgow Addiction Services is the key delivery mechanism for alcohol and drug related treatment services in the city. We act as a critical frontline response to the needs of some of the most vulnerable clients in Glasgow and Clyde.

We recognise that there is significant crossover between prostitution and addiction. As part our ongoing service developments we have been proactive in contributing to the City's strategic ambition of eradicating prostitution and aim to assist both women and men to permanently exit from prostitution.

Glasgow Addiction Services believes that prostitution is inherently harmful. We witness the damage that prostitution causes to those involved. While it is our core business to address the presenting drug and alcohol issues we cannot do this in isolation. Many of our service users have extremely complex physical, social and psychological issues which are caused by or exacerbated by involvement in prostitution. Some are coerced into prostitution by partners or pimps, others are drawn to it as a means of survival e.g. roof over their head or simply because they have limited life opportunities. Many if not all experience low self worth and trauma and believe that they are of no value within society.

We believe that many vulnerable women and men are unable to be heard. We therefore have a duty of care to speak out on behalf of those who experience the detrimental consequences of prostitution. We strive to help service users rebuild their lives and as part of this we must ensure that we also contribute to building a society that rejects the exploitation of others for either personal gratification or commercial gain.

We therefore welcome and support the proposed changes lodged by Trish Goodman to challenge the demand for prostitution.

Jim McBride
Head of Addiction Service East CHCP
16 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Sarah Warhol

I am writing to submit my support for the legislation to criminalise demand for prostitution.

As a psychotherapist who has worked to support women to exit prostitution I have seen the long term psychological and physical impact that their involvement has created.

For many legislators, criminal justice officials, government bodies and agencies, health care and social care workers and women working with women involved in prostitution the focus of their significant attention has been on the harm, violence and risk both physically and psychologically not only to the women involved in prostitution but to society as a whole. “Prostitution, pornography, and other forms of commercial sex are a multibillion dollar industry. They enrich a small minority of predators, while the larger community is left to pay for the damage.

People used in prostitution often need medical care as a result of the ever-present violence. They may need treatment for infectious diseases, including AIDS. Survivors frequently need mental health care for post-traumatic stress disorder, psychotic episodes and suicide attempts. “About a third end up chronically disabled and on Social Security.

The sex trade plays an active role in promoting alcohol and drug problems. Pimps also use prostituted women in forgery and credit card fraud. The community must pay for chemical dependency treatment, insurance costs and incarceration.” (Parker.2007).

Glasgow City Council in Scotland is one of the very few councils worldwide who take a very determined, proactive and radical approach to women involved in prostitution and to social exclusion stating “This Council will support the development of a strategic, long term approach in the context of the Council’s Objectives and other policies such as Social Inclusion, Equality, Community safety, and Violence against women.

Violence, experience of abuse, homelessness, poverty and drugs are at the root of street prostitution in Glasgow. (Stewart. A. 2000). The Council absolutely rejects the view of prostitution as work, which merely requires legalising and regulating. The Council rejects the argument that prostitution is a civil right – no woman wants the right to be sexually exploited, abused and demeaned.

For all these reason I believe the demand has to be challenged as we know in a capitalist society with no demand there is no supply.

Sarah Warhol
16 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from East Ayrshire Women's Aid

We are writing to submit our support for the submission sent by Scottish Women's Aid in response to the call for additional evidence in relation to the Criminal Justice and Licensing (Scotland) Bill. We endorse their comments in full.

Karen Gardner
Training Worker
16 March 2010

CJL/S2/43

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Challenging Demand

The Women's Support Project (WSP) is a feminist charity working to raise awareness about and improve services, to tackle violence against women and children which includes women exploited through commercial sexual exploitation. There are clear links between child abuse, childhood neglect and domestic violence to women's involvement in prostitution. These factors, along with poverty, addictions homelessness, trauma and mental health issues create vulnerability and inequality, which is exploited through men's payment for sexual activity.

The WSP manages the Challenging Demand project (CD), which receives monies from the Scottish Government Violence against women funding. CD has 3 broad aims:

1. To increase understanding of the myths and realities surrounding commercial sexual exploitation including prostitution.
2. To increase awareness of prostitution and other forms of commercial sexual exploitation as a form of violence against women.
3. To lobby for approaches which focus on and target the men who make up the demand for prostitution. This strategy should also decriminalize all those involved in prostitution and resource support for exiting.

CD believes that focus must be on the demand - the men who assume the right to purchase others for prostitution, commodifying and marketing their bodies. No one has the right to exploit, nor profit from the exploitation of, another person regardless of any form of exchange of money, goods or services. We therefore support Amendment 8 (lodged by Trish Godman), which proposes changes to the Sexual Offences (Scotland) Act 2009 to create three new offences – engaging in a paid-for sexual activity, advertising paid-for sexual activities, and facilitating engagement in a paid-for sexual activity. We believe that this will effectively challenge those who profit from prostitution, i.e. pimps, brothel owners and traffickers. Equally importantly it will send out a strong message that such exploitation will not be tolerated in Scotland.

This criminalization of the demand should not be used as opportunity to further criminalise those who are purchased for sexual purposes.

We do not support amendment 8 (8A-8D, lodged by Margo Macdonald), proposing the addition of two further offences – causing alarm etc. by engaging in a paid-for sexual activity and profiting from coerced paid-for sexual activities.

Prostitution is inherently harmful and this is what must be addressed – not whether it causes “alarm” to a third party.

“Prostitution and trafficking in women are seen as harmful practices that cannot, and should not be separated; in order to effectively eliminate trafficking in women, concrete measures against prostitution must be put in place” (Ekberg, 2003, p. 69). We do not support amendment 461 (lodged by Nigel Don) which creates an offence of paying for sexual services of a prostitute subjected to force. CD believe that the burden of proving ‘force’ or coercion would be unworkable and we do not support a distinction between forced and voluntary prostitution. Most male consumers do not debate these alleged distinctions and whilst an occasional man may report trafficking concerns, most consumers do not ask whether women and girls choose to, are forced into or have been trafficked from abroad for prostitution. This disregard is also shown by 50% of 110 men who buy sex in Scotland (Challenging Demand report 2007) who believed that women in prostitution are victimised by pimps. This knowledge did not prevent them continuing the exploitation.

Scotland is obliged to address the demand for prostitution through Article 6 of the Convention on the Elimination Of All Forms Of Discrimination Against Women (CEDAW). This calls on State Parties to: *Take all appropriate measures,* ***including legislation****, to suppress all forms of traffic in women and exploitation of the prostitution of women*. A number of other relevant international strategies call for the UK to intervene including :

- Universal Declaration of Human Rights (1948)
- UN Slavery Convention (1926)
- Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956)
- European Convention of Human Rights (1950)
- International Convention on Civil and Political Rights (1966)
- UN Declaration on the Elimination of Violence against Women (1994)UN Fourth Conference on Women (Platform for Action) (1995)
- (Palermo Protocol) (1998)

The recognition already exists in Scottish legislation *“that offence provisions which specifically target purchasers would provide a more unambiguous message about the unacceptability of this behaviour and might assist in focusing efforts to tackle the demand for street prostitution”. (*Deputy Minister for Finance and Public Service Reform, 2007). It is incongruent to recognize the role of The Prostitution (Public Places) (*Scotland*) Act 2007 in indicating the unacceptability of purchasing sexual activity but continuing to make a distinction between purchasing in a public place and purchase facilitated online or through a telephone call.

CD has a clear anti-prostitution stance but does not judge or criticise women involved. We do not deny that some women choose to become involved in prostitution but they represent a minority of the women and girls involved in Scotland. Any legislative approach must be based on the needs and experiences of many women for whom the element of choice is greatly reduced. It is important that we also hear their voices and experiences of women.

"*During the time I was in prostitution I had to tell myself I was enjoying it, that I wanted to do it, I couldn't admit to anyone particularly myself how much I hated it. In the end, no man should have the right to buy or sell women or girls, just for a sexual fantasy. He has no right to take away the prostituted woman's or girl's human rights*." (Fiona Broadfoot, founder of EXIT, in conversation).

"*To be honest, when I hear the language of a safer form of prostitution, I know I am hearing the words of all those who will gain from the sex trade. Even though some say it from the goodness of their heart, they have fallen naively into traps of pimps, managers and johns. There is a huge belief that indoors prostitution must be safe, or at least safer than street prostitution. This I cannot get my head round. What is safe about being struck in a room with a strange man who knows he has permission to do whatever he wants to you, when he can use as much time as he wants to fulfill his porn fantasy. The only thing stopping him is not having enough money.. All the sex trade is built on and makes its huge profits from having a class of women and girls who have no choice, no voice and no power. … These are women and girls that can be manipulated into whatever violent porn fantasy makes the biggest profit. We can only make it safe enough when we built a world that refuses to allow any john to buy any prostitute for any reason. Then we can slowly destroy the sex trade. Then we can truly speak of safety*." R. Mott – formerly involved in prostitution.

For the majority of women in street prostitution (62.7%) was their main reason for involvement with most of the Glasgow women were using heroin (81.3%). For women indoors there were other reduced options driving them towards prostitution – financial pressures, household expenses and child-care were the main reasons. Whilst illegal drug use was not common amongst women indoors, they (34%) had higher usage of alcohol during work hours than women in street prostitution (14%).

Consumer violence

Consumer violence may not have obvious physical health consequences for many women in prostitution but it is almost uniformly violent and harmful to those involved in it. Research has shown that high levels of women experience some type of violence while prostituted. Another study reported that 82% of women reported being physically assaulted since entering prostitution, with 55% being assaulted by the demand. 88% had been physically threatened and 80% reported physical attacks that had resulted in serious injury. 68% of respondents reported having been raped whilst in prostitution.

A study on client violence by Hart, Bernard and Church 2006 found high levels of consumer violence experienced by women in prostitution (63%) with 37% experiencing it in the recent past. Whilst women in street prostitution reported higher levels of violence than women indoors and were also more likely to sustain injuries, prostitution indoors is not without high levels of violence. Indoor prostitutes were most likely to report vaginal or anal 'attempted rape' (17%).

Focusing on the demand

"Male demand is a primary factor in the expansion of the sex industry worldwide and sustains commercial sexual exploitation, and that the buyer has largely escaped examination, analysis, censure, and penalty for his actions" (J Raymond, 2002). CD recognises that male demand is not the only promoter of prostitution with different economic policies; globalization; an organized sex industry; financial and political crisis's; female poverty preyed on by recruiters, traffickers, and pimps; stereotypes; and women's inequality all contributing to the rise in global sexual exploitation. These factors, too, are highly gendered. Male demand drives this profitable exploitation so pimps, recruiters, and traffickers seek out a supply of women.

This amendment would help create a contemporary, democratic Scottish society where women and girls have lives free of all forms of male violence. It is a progressive and courageous move recognising that prostitution, like all forms of violence against women, constitutes a barrier to gender equality and any legislative approach should seek to remove such a barrier. This is a significant social problem, harmful not only to the individual prostituted person but also to society at large. Gender equality will not be attained while men buy, sell and exploit women and children by prostituting.

At the same time, CD strongly recommends that those who are victims of sexual exploitation are fully *decriminalised*, and resources are directed into holistic services to support people exit the sex industry permanently and overcome, overcome the damage caused by it, and provide other opportunities including training, education and employment.

Challenging Demand
16 March 2010

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Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Scottish Coalition Against Sexual Exploitation

SCASE is a collation of individuals throughout Scotland which works to raise awareness of the harm caused to women through prostitution and other forms of commercial sexual exploitation, including stripping, lap dancing, pornography, sex tourism, mail order brides, and trafficking for the purposes of prostitution. It campaigns for legislative change necessary to: reduce the harm caused through prostitution and other forms of sexual exploitation; remove current gender inequality in the law; challenge the behaviour of men who buy sexual services.

SCASE takes the view that prostitution and other forms of sexual exploitation are part of a spectrum of men's violence against women and children, which includes incest, rape, sexual harassment and domestic violence. There are clear links between issues such as childhood experience of abuse and neglect, domestic violence, poverty, homelessness, addiction, and women's involvement in prostitution.

We oppose efforts, which focus on the "choice" women involved in sexual exploitation, which label prostitution as 'sex work' or which legitimize prostitution. These do not remove the harm caused but simply legitimize it. We do not view prostitution as a choice for women, irrespective of age, and believe that it is contradictory to condemn child prostitution whilst condoning or ignoring adult prostitution. Neither do we recognise the false distinctions between forced and so-called 'free' prostitution. All prostitution is exploitative of the person prostituted, regardless of the context, or of whether that person is said to have consented to the prostitution. Sexual exploitation eroticizes women's inequality and is a vehicle for racism; Black women, minority ethnic women and indigenous women suffer disproportionately.

Although women in prostitution are agreeing to sexual activity, this is *unwanted* sex. In order to repeatedly endure this unwanted sex women have to dissociate, and many use alcohol or drugs to do so. This is the case irrespective of whether the prostitution happens on the street, in a brothel, or in a fancy hotel.

The vast majority of women in prostitution have suffered childhood neglect, violence and abuse. Most are poor and many are homeless and drug addicted. The vast majority of women come out of prostitution as poor as when they went in.

Many women have to resort to prostitution out of desperation or insurmountable financial hardship – when she finds herself impoverished with children to care for but lacking viable job skill. It is not as the media commonly suggests – that these women are all supposedly involved because when presented with a wide variety of attractive options, they've decided the sex industry has the most to offer. These reduced economic options are exploited and the most vulnerable women - poor women, women of color, and women with few job skills are more likely to find themselves in situations in which commercial sexual exploitation are their only options.

A woman might choose to become involved in prostitution because she can't make that kind of money in any other field. A man, however, can. Why should we be prepared to accept that women who are poor, vulnerable and homeless should be "made available" for sexual exploitation by men. Most men however do not buy sex – studies have shown that between 10 and 15% of men in the UK have done so. The vast majority of men in Scotland choose to not exploit others for sex and this amendment goes some way to validating their choice.

SCASE questions why Scotland needs a "sex" industry where women's bodies and sexuality are aggressively commodified and exploited. This is a cultural phenomenon with the demand for a never-ceasing availability of women for men to use sexually. We believe this amendment goes some way to highlight this fundamental problem in our culture where men's sense of entitlement and privilege remains unchallenged.

Scottish Coalition Against Sexual Exploitation
16 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Simon Brooke

Before going on to the primary matter of my submission, I should like to take issue with your preference for receiving submissions in the proprietary format of an illegal foreign monopoly. This is not exactly the best way to run an open parliament, nor to encourage our native software industry.

The Scottish Parliament has, over the past two years, shown a shocking tendency to introduce extremely regressive and puritanical legislation in areas of sexual conduct. We have criminalised fifteen year old girls who have sex. We have banned the possession of images of '...*rape and other non-consensual penetrative sexual activity, whether violent or otherwise...*', without any concept of how one tells, from an image, whether or not the participants were consenting; and thus, have essentially banned the possession of any image of human sexuality. And now we see a proposal to outlaw anyone '*engaging in paid for sexual activities*'.

What, pray, is a 'sexual activity'? When a doctor prescribes viagra for a patient, is that a 'sexual activity'? When a nurse takes a swab from a student who fears she may have a sexually transmitted disease, is that a 'sexual activity'? When a woman who is in employment makes love to her spouse who is unemployed, is that a 'paid for sexual activity'? When I, as an author, write a story in which my characters have sex, and some person reading the story later experiences a frisson of arousal, is that a 'paid for sexual activity'? When a man pays a pro-domme to beat him with a whip, is that a 'paid for sexual activity', and if it is, how do you propose to distinguish that scenario from a man who pays an osteopath to help him with back pain? When your daughter goes out for a meal with a new boyfriend, and he pays, and they later find themselves in bed together, is that a 'paid for sexual activity'?

No-one denies that there are problems around coerced prostitution, and there is clearly a genuine public policy interest in protecting victims from such coercion. But coerced prostitution is explicitly covered by other provisions of the proposed bill. Given that, it is clear that the amendment tabled by Ms Godman deals exclusively with uncoerced, consensual acts. The state proposes to step into the bedroom, and determine what acts consenting adult citizens can and cannot choose to pay one another for.

When the Taleban introduced legislation like this into Afghanistan, the West rightly held them up to ridicule as puritanical, and trampling all over the human rights of the population. Do we really want Scotland to be seen as the moral heirs of the Taleban? Do we want Scotland to become once again a nation afraid of its own sexuality?

This proposed amendment is literally scandalous. It is shameful that any civilised person could even suggest it. It is no business either of Ms Godman's or of the Parliament's what adult citizens choose to do, consensually, in the privacy of their own homes.

Simon Brooke
15 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Lynn Anderson

Offence of engaging in paid-for sexual activity (and related new offences)

I am writing in support of Amendment 8 to the Criminal Justice and Licensing (Scotland) Bill. Like many activities that involve the exploitation of others, prostitution is a profitable business. These profits do not find their way to the women who have to endure the repeated acts of unwanted sex, the violence and the degradation. No, these profits are strictly for those who facilitate the prostitution of others. If Scotland is serious about becoming a society that respects humanity, that stands against those that abuse and exploit then we must tackle these facilitators of abuse. I therefore support the new offences of advertising paid-for sexual activities and facilitating engagement in a paid-for sexual activity.

The Scottish Government is to be commended in its efforts to address the driving force behind prostitution – the men who demand access to women's bodies on their terms. By criminalising those that pay for sex through the Prostitution (Public Places) (Scotland) Act 2007, the Scottish Government let society know that they believe men should take responsibility for their actions and pay the price if they are found to be sexually exploiting women on the streets. As we all know prostitution or the commercial sexual exploitation of women and girls is not limited to the outdoors. I therefore support the new offence of engaging in a paid-for sexual activity, which sends out the message that in Scotland we believe commercial sexual exploitation is unacceptable, regardless of the setting.

I do not support the further amendments by Margo Macdonald and Nigel Don as they do not appear to address the fact that all prostitution is harmful. It is widely documented that in order to endure the constant unwanted sexual acts that are prostitution, women use drugs and alcohol and disassociation to help them survive. If you try and imagine yourself in the position of a prostituted woman it is not difficult to understand why. These methods of survival have an extremely negative physical, emotional and mental affect upon the women.

The amendments refer to forced or coerced prostitution. How many women do we think make a free choice to become a 'prostitute'? Desperation and a lack of choice "force" or "coerce" women into prostitution. Will these amendments cover these women? Lets not make laws that suggest some prostitution is acceptable and some isn't, lets make laws that will provide the police, the courts, and communities with the teeth to tackle all types of prostitution.

Surely no humane person can argue in support of the purchase and sale of bodies? Surely any civilised society would do all within its powers to stop such a trade? Surely if men and women are to become truly equal we cannot be complicit in any activity that enables and entitles one group to reduce the other group to objects for sale?

I implore our Government to accept Amendment 8 and move Scotland towards a more equal society, free of abuse.

Lynn Anderson
16 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Professor R A Duff, Professor L Farmer, Professor S E Marshall, Professor V Tadros and Dr M Renzo

Amendments 8, 461 and 378 exemplify the urge towards over-extensive criminalization that mars too much contemporary penal policy.

Each amendment is directed at a genuine mischief that does properly concern the criminal law: the mischief of the exploitation and coercion to which so many of those engaged in the provision of sexual services for payment are subjected; the mischief of harassment that falls short of causing physical harm. In each case, however, the proposed offence is defined in such over-broad terms that it is no longer focused on that mischief, and defines as criminal too much conduct that, unworthy or disreputable as it might be, should not concern the criminal law.

In relation to paid-for sexual activity, Amendment 461 imports s.14 of the English *Policing and Crime Act* 2009. The objective elements of the offence are acceptable, since they specify a real mischief that should concern the criminal law, but subsection 2(b), declaring that it is 'irrelevant ... whether A is, or ought to be, aware that C has engaged in exploitative conduct', is objectionable, since it convicts someone who had no reason to believe that the person from whom he purchased sexual services had been subjected to exploitative conduct. Amendment 8 is even more objectionable, since it does not even require proof that the person being paid has been subjected to any kind of exploitation. What could justify the broader offence proposed in this amendment?

- If it is aimed at the real mischief of exploitation, that should be made explicit, and proof should be required not merely that sexual activity was paid for, but that the transaction was not free and uncoerced. That will of course create difficulties of proof, and there *may* be an argument for giving prosecutors some assistance—for instance by creating a legal presumption of exploitation or coercion on the basis of more easily proved facts, and then placing on the defendant the onus of at least adducing evidence that the transaction was, or that he reasonably believed it to be, free and uncoerced. That would require further discussion; but what is in principle illegitimate is to define an offence in terms that reach so much further than the mischief at which it is aimed.
- Or is the amendment aimed at the supposed immorality of prostitution, rather than at the exploitation and coercion to which many prostitutes are subjected? If so, it is surely time to retrieve the wisdom of the Wolfenden Committee, and to recognise that whatever the moral status of prostitution, it is not as such the criminal law's business in what aspires to be a liberal society.

Both these amendments should be rejected.

In relation to Amendment 378, ‘Threatening, alarming or distressing behaviour’, much of the conduct that it covers is already (and rightly) criminal. Insofar as it goes well beyond existing law it goes too far. A person who behaves, in private (see subsection 3(c)(ii)) in a way that a reasonable person would find threatening, alarming or distressing (subsection 1), and who is reckless as to whether the conduct would cause such fear, alarm or distress (subsection 2(b)), is guilty of an offence even if no one is actually frightened, alarmed or distressed—or is even aware of the conduct (see subsection 3(b)-(c)). Again, the law has been extended so far that it loses touch with the real mischief (harassment, including domestic harassment) at which it is properly aimed. This amendment too should be rejected: if there is evidence that the current legal provisions are inadequate to deal with the mischief, more carefully considered proposals (based on decent research) are needed.

A larger issue of concern here relates to procedure. The amendments noted above (and others) introduce a number of new offences (in particular on stalking, engaging in paid-for sexual activity and related offences, voyeurism, carrying a knife on workplace premises etc). Irrespective of the general question of whether or not these are appropriate areas for criminalization, we are particularly concerned that these amendments are introducing major new elements to the Bill at Stage 2. There is thus no opportunity for proper debate or thorough scrutiny of either the amendments individually or the Bill as a revised whole. The proper procedure for introducing such offences should be in a stand-alone piece of legislation or at a much earlier stage in the legislative process. Without this there is a risk that the democratic process is being subverted and that the law is being developed in an ad hoc and haphazard way, without due care and attention to either the principles of the criminal law or the likely impact and utility of the enacted provisions. For this reason we would strongly urge that the amendments introducing new offences be removed from the draft Bill and presented to Parliament in separate legislation.

Professor R A Duff (Department of Philosophy, University of Stirling)
Professor L Farmer (School of Law, University of Glasgow)
Professor S E Marshall (Department of Philosophy, University of Stirling)
Professor V Tadros (School of Law, University of Warwick)
Dr M Renzo (Department of Philosophy, University of Stirling)

Researchers on a Research Council funded project on Criminalization

17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Consenting Adult Action Network

Offences relating to the criminalisation of paid-for sexual activities

Consenting Adult Action Network (CAAN) Statement:

> 'We believe in the right of consenting adults to make their own sexual choices, in respect of what they do, see and enjoy alone or with other consenting adults, unhindered and unfettered by government.'
>
> 'We believe that it is not the business of government to intrude into the sex lives of consenting adults.'

Several in-depth and well-researched submissions from the International Union of Sex Workers, the UK Network of Sex Work Projects, academics and sex workers themselves have already made many fine points on the matter, so this evidence will not repeat their arguments. CAAN wishes to register their matching opposition to the proposal to criminalise paying for sexual activities and urges the Scottish Government to take oral evidence from actual sex workers regarding this proposed legislation.

This Bill will not stop non-consensual (forced) sex work

As the CAAN Statement says, we believe that consenting adults should be allowed to pursue their own sexual interests without government interference. We do not subscribe to the theory that all sex workers are forced into their profession; to say so denies them both the status of adults and the ability to consent. We feel that legislation of the type proposed serves only to punish consenting adults and will not protect any vulnerable groups. CAAN urges you to listen to the voices of sex workers when they explain how this bill would create a climate of fear and lower their standard of living.

The International Union of Sex Workers and others successfully demonstrate how this amendment will serve to reduce positive interaction with authorities, endangering both independent sex workers and forced (i.e. trafficked) sex workers. We support their arguments on the matter, and will instead look at Nigel Don’s amendment 11E.

Mr Don’s amendment 11E (specifically section (2)b) removes the clients’ ability to make conscious decisions to make a responsible choice in avoiding trafficked sex workers. By making it a crime to engage in business with a trafficked sex worker regardless of the ignorance of the situation, the responsibility is placed entirely upon the sex worker, not on the consumer. If the trafficked sex worker lies because they are afraid of the criminals who trafficked them in the first place, the consumer cannot be faulted for being given erroneous information. If the Scottish Government truly believes that forced prostitution is a product of supply and demand, they'll let the consumers vote with their feet. If people are allowed to choose FairTrade chocolate, surely they should be allowed to choose non-trafficked sex workers in a similar fashion.

Sexual diversity, not gendered oppression

CAAN supports diversity in sexuality. The Scottish Government, by contrast, seems to deny that diversity in sexuality exists. The term "sexual activities" in Ms Godman's proposed amendments covers a wide range of activities, well beyond the scope of mere intercourse in exchange for money.

Ms MacDonald seems to think that Ms Godman's intention is to target activities such as lap dancing; her concern for the definition of the term "sexual activities" is well-placed. Edinburgh in particular is known as a popular stag and hen night destination. If the term "sexual activities" encompasses lap dancing, what's to stop it from being applied to Festival acts such as the Lady Boys of Bangkok and the Chippendales? How many strip-o-grams will lose their strippers? The effect on the local economy has not been considered.

Another popular type of business that may be targeted by the legislation is professional domination, the proprietors of which you may know as dominatrixes or pro-dommes. It is quite common to confuse dominatrixes with prostitutes, and people can be both, but the two are often separated by the fact that one may involve sexual actions (such as intercourse) and the other does not. Would the term "sexual actions" cover erotic sadomasochistic activities that do not result in orgasm? Would the people who choose to avoid forcing their partner or spouse to beat them be punished by the law as well? Would people who pay to use a dungeon for sexual enjoyment also be criminalised? The term "sexual activities" must be defined or striken entirely from the legislation. The law cannot be vague.

As several submissions (such as Jane Scoular et al) have pointed out, these amendments are based upon vast generalisations. They assume that all sexual activities are prostitution. They assume that all prostitutes are victims and have not freely chosen their career. They assume that all clients are men and abusers. These assumptions clearly show that these amendments are based upon stereotypes, not real-life examples. The oppressive views exhibited in these amendments are damaging not only to sex workers and their clients, but also to women (and indeed all people) in general in that they foster gender inequality and negative attitudes towards sex.

What is the "problem" that the Scottish Government is trying to solve with these amendments? It surely cannot be one relating to the welfare of the sex workers, as shown by several of the submissions. The narrow view of sexuality demonstrated by these amendments can only come from a viewpoint based in naïve moral superiority, not practical experience. The problem then can only then be a moral problem: People are having sex for fun and it makes other people mad. The solution is not to bow down to the constrictive dogmas of arm-chair moralists, but instead to listen to actual sex workers to find out what problems they face.

Listen to actual sex workers, not arm-chair moralists

CAAN strongly rejects all of the proposed legislation on criminalising paid-for sexual services. We urge the Scottish Government to take oral evidence from actual sex workers such as those who have submitted written evidence.

Becky Dwyer
Consenting Adult Action Network
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Allan Balsillie

Offence of engaging in paid-for sexual activity

I was invited to give evidence on the recent amendments to the Criminal Justice and Licensing (Scotland) Bill, presumably because of my previous submission on extreme pornography. My interest is in sexual freedom and so I'd like to make a few comments on the paid-for sexual activity amendment.

1. This would be legislation which would criminalise a significant portion of the population. It would impact on the sexual freedom of the individual and could breach article 8 of the ECHR, I'm unsure whether that could be derogated simply because money changes hands. It therefore deserves a full consultation period and should not be tacked on as an afterthought to an existing Bill late in the process.

2. The term "paid-for sexual activity" is too broad. It could be interpreted as the simply erotic activity. Laws should be clear in their meaning.

3. The proponents of such legislation tend to be very outspoken and persistent in their demands for action. As a result there is a danger that their views have simply become received wisdom. The Justice Committee needs to be more rigorous in identifying and challenging evidence which is neither strong nor impartial.

4. I attended the Equality and Human Rights Commission debate on prostitution. One thing that struck me was how disinterested the people who wanted to criminalise the use of prostitutes were in the opinions of the prostitutes themselves. The message that there were large numbers of people happily working in the sex trade as a career choice was not welcome and there were attempts to suggest the prostitutes who had gone to the trouble of attending weren't representative. Clearly there is a gap in the evidence here; prostitutes feel they have no voice and their opinions are being ignored. Their practical concerns for their livelihoods, their safety and for their clients should have a greater influence than ideological or moralistic argument.

5. Clients are also unrepresented in the evidence. It actually appears to be the pro-criminalisation groups who portray the opinions of clients and it's no surprise they choose to do so in a negative way. I notice there have even been attempts to label clients as rapists which must be far from the truth. A similar situation occurs with pornography; with campaigners claiming misogynistic attitudes among porn-users, and yet the research proves the exact opposite.

6. In summary this is too complex an issue for such simplistic treatment. Sort out what the government wants to achieve, ensure it's objectives are

justified by the evidence and at least try to adopt a strategy which doesn't create yet more criminals for society to deal with. The one proposal I wouldn't object too immediately is the profiting from coerced paid-for sexual activity, but why does it have to be a sexual activity? What's wrong with simply "profiting from a coerced activity"?

Allan Balsillie
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Angus Council Social Work and Health Department

New offences relating to stalking

- The emphasis on intent in the section on **threatening, alarming or distressing behaviour** is welcome
- The relationship between the procedures for this behaviour and the offence of Breach of the Peace is unclear

Sentencing for knife crime

- The ‘‘exceptional circumstances’’ relating to the offence or to the offender which justify not imposing a custodial sentence of at least six months would benefit from further definition

Offence of engaging in paid-for sexual activity

- The proposed offence of ‘‘causing alarm’’ to another person by engaging in a paid-for sexual activity is a welcome introduction
- Section 11AB ‘‘profiting from coerced paid-for sexual activities’’ is a welcome means of addressing enforced prostitution.

17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Church of Scotland Church and Society Council

Amendment 10 (lodged by Richard Baker) and, as an amendment to that amendment, 10A (lodged by Bill Aitken):

When responding to the call for written evidence on the Criminal Justice and Licensing (Scotland) Bill the Church and Society of the Church of Scotland supported the Joint Faiths Advisory Board on Criminal Justice evidence to support the introducing of a presumption against short periods of detention and in favour of Community Payback Orders. This response covers the same issue, namely the value of custodial sentences.

Those that call for stronger and mandatory sentences for knife crime and even carrying a knife might sound popular but they miss the deeper issue. Knives only become weapons when they are in some-one's hands. The target of our efforts needs to be the choice to lift the knife, not wait until the knife has been lifted. We need to ask what kind of fear of others or lack of sense of self worth means carrying a knife seems like a good choice. There is little evidence that tougher sentences and greater powers for stop and search change behaviour positively. Instead they usually mean the talents and ingenuity of these young people are put to finding new ways of avoiding being caught because the source of the problem, fear and identity, has not been dealt with. We need to see past the knife and look into the eyes of the young person holding it and say "no, there is another way, let me walk with you to find it."

This approach takes much more effort, demands that we search for the humanity in folk who might otherwise instill fear in those around them and be willing to walk with them even as they stumble. It takes longer but will bring about real change in real people and in the end, cost society a lot less in both cash and the human cost of damaged lives and grieving families.

On this basis the Church and Society Council is opposed to the introduction of a harsh mandatory custodial sentence in relation to carrying an article with a blade or point. Such a rigid response is at odds with the real need of society which is to address the underlying reasons for people choosing to carry knives.

Chloe Clemmons
Scottish Churches Parliamentary Officer
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Jill Mariengoff

I'm writing to object to the amendments suggesting that purchase of sex and advertising of paid-for sex be criminalised in Scotland. I trust that with these amendments Scottish government means well, but in reality the outcome will be the opposite.

I am a private companion currently working in Scotland so should the amendments pass, my business might suffer, but not necessarily so since my website is not hosted in the UK and is thus outside Scottish jurisdiction. Also, I do not see how my clients can be monitored (surely, Scottish police have better things to do than look through my keyhole day and night) - as I understand, if they are not seen handing me the payment, then nothing can be proven and no one can be charged with a criminal offence. I even have a feeling that, for some of them, the idea of a clandestine affair will only add charm to our encounter.

I am, however, concerned when it comes to other women involved in prostitution, most of whom will be hit hard by this proposed legislation. I've been working with ECP (English Collective of Prostitutes) for a few years now and I know for a fact that most women at the lower end of sex industry are single mothers trying to provide for their families. There are two things you can do to change their situation:

- Improve the social welfare system so mothers could rely on the state when they can't rely on their men, or
- Legalise parlours and saunas so these women didn't have to walk the streets and could work safely indoors.

But do not criminalise clients and advertising - this is where pimps come in and the women we are talking about have no other choice but to agree to pimps' terms.

Other issues that often come up alongside prostitution are trafficking, coercion and violence. As far as I'm aware, these are already criminalised and having a second ban on them will not make them disappear.

I am sure many people before me have listed the benefits of controlled sex industry as opposed to criminalised one, so I'll leave it at this. There are two more issues I would like to point out though.

First of all, please take it into consideration that there are men out there who, through age, physical disfigurement, personality traits, ablutophobia or a particular fetish, are not able to find partners who'd be willing to engage in sexual activities with them without being rewarded for it. The new amendments will deprive them of any sexual contact. The same refers to disabled people. Can you imagine a life where the only physical touch you get is when someone pushes you on a bus?

Also, I would like to remind you that there are some sexually frustrated men out there who, when they can't buy what they want, will take it by force, which puts women and children in their proximity at risk of rape and sexual abuse.

I have only moved to Scotland 2 months ago and don't want to have to pack my bags again, however, should my business suffer, I will move back to England and settle down in Carlisle or Newcastle to enjoy the benefits of both English and Scottish clientele (for whom it will only be an hour's drive). I'm pretty sure I will not be the only one to move. This brings up the issue of money. Scots are known to be sexually insatiable and most working girls pay taxes, so if not our safety and wellbeing, then, hopefully, at least the thought of how much money will be going from Scotland to England will bring you back to reality.

Whether you criminalise clients or sex workers or both, prostitution will always be there - it's been around since time immemorial and a few words on a piece of paper will not change the fact that men want women, it will only make things difficult for you and for us. So please reconsider these amendments. Should you require any additional information, I am willing to meet the Justice Committee to give oral evidence.

Jill Mariengoff
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Dr Cyrus Tata

Amendments 8, 10 and 10A

Amendment 8

How is 'engaging in paid-for sexual activity' to be determined?

Section 8 will result in confusion.

First, *how should 'sexual activity' to be defined?*

How will the law decide whether or not an activity is 'sexual'? What does and doe not count as 'engage'? Is this to include non-physical activity, such as that conducted by phone, email, text-messaging, or paid-for transmissions of sexual activity etc? Should it include 'escort' work? Is 'sexual' to be defined objectively, or, subjectively? What will and will not count as 'sexual activity' and according to what principle? What is to be the test of whether or not 'sexual activity' has been committed? The implementation and policing of such legislation will not only problematic but is also likely to subject the law to ridicule.

How should 'paid for' be defined?

Will this include only monetary payment, or, will it include the provision of 'gifts' and/or payments-in-kind? Presumably the aim must be to target sexual activity which is purchased in a transaction. It would surely be anomalous only to focus on monetary payment alone and will create a huge loophole. At the same time, however, the more logical and broader definition will criminalise a huge range of explicit and implicit exchanges in which sexual activity is engaged in-return-for some apparent benefit. Logically, it will include all kinds of explicit and implicit arrangements, incorporating transactions between people in on-going relationships.

Amendment 8 will expose vulnerable women and men working in prostitution to even less protection, not more.

The proposed amendment 8 is likely to have the overall effect of making sex work more covert, more marginal, more dangerous and more likely to inhibit the vital work of services trying to assist vulnerable people working in prostitution.
It will also inhibit the work of police in investigating assaults, rapes and murders of people working in prostitution: witnesses are far less likely to be willing to come forward if they may be the subject of criminal charges.

Amendments 10 and 10A: Mandatory sentences for unlawful possession of knives.

What are the reasons for wishing to introduce mandatory minimum sentences? There tend to be two main arguments among politicians who have wanted mandatory sentencing: general deterrence; and secondly to ensure certainty in sentencing by eradicating (or nearly eradicating) judicial discretion in sentencing individuals.

1. **Mandatory sentencing leads to injustice.**

   Mandatory sentencing is, by definition, insensitive to individual differences between cases, in terms of both the relative seriousness of the offence and the individual brought to court. It turns judges into machines. Sentencing becomes rigid and leads to perverse results (see below). It is welcome that there are 'escape clauses' in both Amendment 10 and 10A which allow judges to depart from the norm. However, on the other hand, to the extent that these escape clauses have an impact they defeat the very claim of automatic mandatory sentencing. (see point 10 below).

2. **The 'general deterrent' effect of mandatory sentencing is weak-to-negligible.**

   This is not to deny that there will be some individuals who can be deterred, but the *overall* evidence is that where mandatory sentencing has been tried before it has done little if anything to reduce crime. General deterrence *can* work but *only if* certain assumptions are made. Most importantly, deterrence relies on the assumption that the people being targeted are careful, rationally-calculating individuals who think through their long-term futures, and are not impulsive or feckless. It also the assumption that people will expect to be caught. This works well for certain kinds of offences (e.g. traffic offences like speeding) which are relatively easy to detect. The carrying (as opposed to using) of knives is by its nature concealed and thus much more difficult to detect.

3. **To the extent that general deterrence can work, we should expect displacement.**

   The broader empirical research literature about general deterrence underlines the point that to the extent that it can work, policy-makers should expect adaptation and displacement. While the overall effect of these amendments is likely to be minimal (and far less than other preventative initiatives), a few individuals may well think-through the penal consequences and, (assuming there is a huge increase in detection rates), opt to change their behaviour. However, it would, of course, be naïve to suppose that these rationally-calculating individuals will not consider carrying alternative types of weapons which are not covered by mandatory minimum penalties. This then begs the question: why not extend such penalties to the carrying of all weapons?

4. **Proportionality. Why single out the carrying of pointed/bladed weapons and not a range of other offences which also cause great public concern?**

If the argument is ‘x crime is a scourge therefore mandatory minimum sentences must be introduced’, why not also pass legislation making it mandatory that judges must give minimum sentences (at whatever level) for say, the carrying of other kinds of weapons; possessing so-called ‘date-rape’ drugs; possession of child pornography, etc? What is the difference of principle?

5. **Mandatory sentencing leads to perverse results.**

Mandatory minimum sentences have perverse results. By singling out the carrying of knives for mandatory minimum sentences, people who carry and brandish weapons other than knives will often be treated more leniently than people who are convicted of carrying a knife (but without any attempt to use it). Let us imagine, for instance, the convictions of two young men from the same neighbourhood and with roughly similar backgrounds. Eric is convicted of one charge of carrying a knife, but not of any attempt to brandish, nor to use it nor issue any threats to so. His is the standard kind of offence at which this proposed legislation is aimed. Eric must be sentenced to the mandatory term (six months under Amendment 10, or, two years under Amendment 10A). Peter, on the other hand, is convicted of also brandishing a different offensive weapon (ie not a bladed/pointed weapon). The sentence in Peter’s case is a discretionary matter and a shorter custodial sentence is passed than in Eric’s case. The sheriff recognises the absurdity – since Eric’s behaviour is patently more serious- but there are no exceptional or mitigating circumstances in Peter’s case to permit a departure from the automatic sentence.

6. **Mandatory sentencing shifts discretionary power from the sentencing judge to the prosecutor.**

In most cases there is more than one charge which the prosecution can choose to bring and there is an element of discretion in how to do so, including whether or not bring certain charges and in what forms. Under mandatory sentencing the prosecutor greatly increases his/her power at the expense of the judge. The decision as to how to prosecute a case effectively becomes the sentencing decision as well: prosecutors become *de facto* sentencers and the judge’s role is correspondingly diminished. This would be a retrograde step, not least since judicial decision-making is inherently more open and more challengeable than prosecutorial decision-making.

7. **Mandatory minima laws contradict the policy drive to achieve greater efficiency in the justice system.**

Where penalties are mandatory minima there tend to be fewer guilty pleas than when they are discretionary.[1] This runs contrary to the aims of successive governments in trying to speed-up the justice system; will be a drain on precious resources at a time of major public spending cuts; and will cause witnesses additional and inconvenience and anxiety.

8. **Amendment 10A requires a mimimum custodial sentence of two years and thus will always have to be set for jury trial.**

A consequence of amendment 10A means that where prosecutors choose to prosecute a case where there is a knife-carrying element **the case will automatically have to be brought as a jury-triable procedure**. This is because a custodial sentence of two years or more (the mandatory minimum specified by Amendment 10A) can only be passed under jury-triable (solemn) procedure. As the Committee will be aware, jury trial procedure is much stricter than summary procedure and has historically been reserved for extremely grave matters such as rape, treason, and murder. If prosecutors are applying the law they will be forced to prosecute every single eligible alleged knife-carrying case under jury-triable procedure.[2] Will that be an efficient or sensible way to proceed?

9. **Adaptive prosecutorial behaviour.**

Given the near-automatic nature of mandatory minima, prosecutorial decision-making will, in fact, probably adapt in different parts of the country and in different ways, (as it has in other countries where mandatory mimima has been tried). For example, a study conducted by the United States Sentencing Commission found that prosecutors only filed charges in around one quarter of eligible cases. To avoid what many prosecutors (and judges) regarded as potentially unjust or unworkable consequences[3], many prosecutors circumvented mandatory mimima by bringing different charges.[4]

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[1] For example, the US Sentencing Commission found that trial rates were 250% higher for offences carrying a mandatory minimum sentence.

[2] It would not be lawful for prosecutors to depart from this – under Amendment 10A such departures can only be determined by the judge.

[3] D. Provine (2002) 'Sentencing Policy and Racial Justice' in C. Tata and N. Hutton (eds) *Sentencing & Society: International Perspectives* (Ashgate)

[4] M.Tonry (1996) *Sentencing Matters* (Oxford University Press)

10. **'Escape clauses' can only lead to subsequent criticism.**

    Escape clauses (which allow 'departures' from the basic automatic character of the amendments) will operate either too restrictively or too permissively.[5] Their effect will be to stoke public cynicism about law and criminal justice. Amendments 10 and 10A are drawn slightly differently, but both are problematic because both begin with the 'headline' claim that the law will require that knife-carrying automatically mandates a minimum custodial sentence. Both amendments are being touted to the public as ensuring certainty and automatic consequences. If either escape clause is interpreted very restrictively it is bound to lead to cases of obvious injustice. On the other hand, if it interpreted permissively then it defeats the point of mandatory sentencing and will only increase public cynicism.

11. **Mandatory minimum sentences have been tried before.**

    Both at national and state level, the USA has had the most experience of mandatory minima. Ironically, at the time Scotland is considering this move across the USA mandatory minima are being reversed[6].

12. **There are many far more effective ways that Parliament can seek to shape sentencing and encourage certainty.**

    There are much more effective techniques which can encourage certainty in sentencing, including the use of a Sentencing Information System so that judges can have all the information available to them about sentencing patterns for certain kinds of cases, recent legislation, and narrative judicial-created Guidelines created in conjunction with a sentencing council.

Mandatory sentencing is **a distraction from the serious, painstaking work of crime reduction.** What we need to be concentrating on is supporting and resourcing the much more difficult but productive preventative strategies (joined-up between police, health, social services) which can and do work.

Dr. Cyrus Tata
Centre for Sentencing Research
Law School, Strathclyde University
17 March 2010

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[5] D. Van Zyl Smit (2002) 'Mandatory Sentences: a Conundrum for the New South Africa?' in C. Tata and N. Hutton (eds) *Sentencing & Society: International Perspectives* (Ashgate)

[6] N.Porter (2010) *The State of Sentencing 2009: Developments in Policy and Practice* (sentencing project)

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Selina Duncan

Amendment 8

I am in favour of the proposal submitted by Trish Godman (Amendment 8) which asks for changes to the Sexual Offences (Scotland) Act 2009 by creating three new offences – engaging in a paid-for sexual activity, advertising paid-for sexual activities, and facilitating engagement in a paid-for sexual activity.

I still can't believe that vulnerable woman are subjected to such a degrading and soul destroying way of life for the financial benefit and enjoyment of others. These women need help in order to get themselves out of this sex slave industry. Its people like you and I who can help them do so. I'm doing my bit.

Selina Duncan
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Rape Crisis Scotland

Amendment 8

1. Rape Crisis Scotland welcomes the opportunity to provide written evidence on this amendment. This is a crucial opportunity for the Justice Committee to consider the legislative framework in Scotland in relation to prostitution.

2. The harm caused to women by involvement in prostitution has been well documented and has been accepted by the Scottish Government in its policy document 'Safer Lives, Changed Lives: A Shared Approach to Tackling Violence Against Women in Scotland' which recognises prostitution as a form of violence against women.

3. In order to repeatedly endure this unwanted sex women have to dissociate, and many use alcohol or drugs to do so. This is the case irrespective of whether the prostitution happens on the street, in a brothel, or in a hotel. The vast majority of women in prostitution have suffered childhood neglect, violence and abuse. Most are poor and many are homeless and drug addicted. The vast majority of women come out of prostitution as poor as when they went in. Prostitution undermines gender equality. Why should we be prepared to accept that women who are poor, vulnerable and homeless should be "made available" for sexual exploitation?

4. Most men do not buy sex - studies have shown that somewhere between 10 and 15% of men in the UK have done so. A significant number of men who buy sex later regret it. 25% of men interviewed in Scotland said that they felt "significant shame and regret" at having bought sex.
See www.womenssupportproject.co.uk/content/publications/183,182,216/ChallengingMensDemandforProstitutioninScotland2008.htm

5. In our experience, discussion around legislative and policy approaches to prostitution can often be unhelpfully polarised between those who advocate for prostitution as 'sex work' and a free choice and those who recognise the harms caused by prostitution. As an organisation, Rape Crisis Scotland believes that it is possible to work to reduce the harm caused to women in prostitution and at the same time put in place strategies to assist women to exit prostitution and to challenge the notion that it is acceptable for women's bodies to be purchased in this way.

6. For too long in Scotland, institutional discrimination has existed within our legal approach to prostitution, with women involved in prostitution being criminalised but men who used women in prostitution not facing any real legal sanction. The Prostitution (Public Places) (Scotland) Action 2007 was a welcome step in starting to address this unequal treatment by the law. The current amendment before the Committee provides an opportunity to consider further our responses to men who buy sex. If we are serious about eradicating prostitution in Scotland, it is essential that we tackle the demand for prostitution. The best way of doing this is to criminalise demand. This must be combined with programmes to provide support to women involved in prostitution, and assistance with exiting prostitution. Public education about the harm caused by prostitution is also crucial.

7. Rape Crisis Scotland supports Amendment 8 and we urge members of the Justice Committee to consider giving this amendment their support.

Sandy Brindley
National Co-ordinator
3 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Maisie Campbell

The personal, social, moral and political perspective of a professional escort

Why is it that some Members in the Scottish Parliament and some social researchers further afield treat us women like children or imbeciles, unable to make our own choices in entering prostitution? We are not all young girls brought in from Eastern Europe or craving for our next drug fix. It is a joyful occupation to be a professional escort working at the high end of the market and one gets to meet a lot of interesting people, but it is still hard work which I have done for the last 10 years since I graduated. The decision to take up sex-work was entirely my own without any pressure from anyone. That remains the case and it seems to me to be complete and unrealistic nonsense for armchair feminists and social theorists to claim that all women engaged in sex-work are abused and exploited simply by selling sex and that violence is necessarily associated with that work. I and all my independent escort friends at the high end of this ancient profession really enjoy what we are doing and take pride in it. We like the social connection of serving our loyal clients, meeting new ones and greatly enjoy the physical and material comforts which that work gives us. They say that a prostitute is a woman who makes many men happy rather then one man sad, and overall we are probably talking about serving the needs of nearly 20% of the Scottish male population, of all classes and occupations, high and low. For my part I am extremely selective, choosing my clients carefully and restricting myself to seeing one or two at most in any one day, and that on intermittent days. Many of us support our families with our earnings. During my 10 years in the profession I have never suffered abuse or violence of any kind and in fact am sure that many of my clients treat me with greater respect and kindness than their own wives. In that time I have learnt a lot about the strengths and weaknesses of the human character and often discuss my clients' problems with them, offering sound advice where I can. There is actually a large element of caring for other human beings which goes into sex-work and it pays to be a good listener. First one must relax the client, then engage him in conversation, entertain him, find his sense of humour and try to become involved in his interests, whether in sport, art, music, business, politics or current affairs which generally means trying to keep up to date on several fronts; I do this by reading the Sunday 'heavies' to keep up with events of the week before. The actual sex bit, if there is any at all, is actually a small part of the total experience. This is a very high personal-maintenance occupation and one must constantly look to one's physical appearance to remain attractive to the client. This includes watching one's diet and visiting the gym two or three times a week, renewing one's wardrobe with new lingerie, dresses and shoes, purchasing expensive beauty products and regularly visiting the beautician and tanning parlour. It involves detailed and extreme attention to personal hygiene and cleanliness and also keeping one's flat or house perfectly clean for oneself and one's clients before, throughout, and between dates in order to stave off health risks. It involves attention to one's internet advertising to keep one's image and profile fresh and exciting for the clients. And it involves time spent travelling to and from dates ('outcalls'), including to other parts of the UK. It is a constant process of invention and re-invention and it requires the application of a lot of time, mental effort, money and work. Constantly living up to the expectations and interests of different men, always being in a good mood for a date, pushing one's own day-to-day personal problems to the back of one's mind and not taking them out on the client during a date, is all hard mental work requiring self discipline. The mark of a good escort is that she is able to meet her client's expectations and help him leave the real world of problems outside the door for an hour or two and enter a world of fantasy with her in which he is made to feel very, very special. The moment of physical intimacy, when the escort and her client are the most important people in the world for each other at that instant, is actually only a small but important part of the experience; true love is just one style of having sex but simply because one might not be in love with the client does not mean that the act of love is not personal and intimate. The act of sex is not actually the whole experience of a date and to view it as such is to regard the occupation of an escort very crudely. Sometimes in fact sexual activity, by which I mean penetrative vaginal sexual intercourse, or 'full vanilla' as it is referred to in our business, does not take place at all. Some clients simply wish to talk, others simply wish evening companionship at dinner, others wish prostate massage or other 'comforts', some wish role play of various kinds, including being dominated in a manner reminiscent of their childhood, while others wish the application of pain on some part of their bodies. Being a professional escort therefore is all about the social service of responding to a masculine demand in the provision in a number of forms of a full 'gfe' ('girl friend experience') or acting like a part time and caring wife, though sometimes providing services that a wife may not willingly provide. Human beings are all different and that makes sex-work exciting.

I am afraid therefore that I will regard it as a form of violence perpetrated on me if paternalistic legislation is used to take away my right to work as an escort and with it my income, happiness and self-respect, as well as a form of violence against the rights to happiness of nearly 20% of the male population of this country. It is sad to reflect that if prohibition takes place it will be following the impulsive and recent initiative of one angry Glasgow Councillor against the low end of the profession supported by one MSP.

I have been told that in England the law is to change next month to criminalise a sexual transaction with a coerced woman, but not to ban the sale of sex altogether. I could live with that more tolerant position and wonder why everyone in Scotland cannot be treated in the same way. It seems to me to be unjust and unfair that the responsible top end of the profession should suffer by a total ban on its activities for the irresponsible behaviour of a few bad men at the bottom.

To the extent that Parliament may allow the majority of us to be penalised as a result of the activities of some nasty criminal elements possibly controlling a minority of women at the low end of the sex market, the suspicion will linger that there is concealed in such legislation an underlying moral judgement; that is that Parliament is simply passing these amendments because it does not like prostitution at any level. With such a morally fundamentalist position Parliament may be seen as a sort of ‘Tartan Taliban’, taking Scotland back hundreds of years. And if Parliament does criminalise paid-for sex it will be trying to send the water back up the waterfall; the need for sex and comfort is a human need, as real and natural as eating and drinking and all the other functions of the body, and if that need is frustrated it will lead to damaging social consequences elsewhere.

What I and the rest of the adult population in Scotland do willingly with our bodies, without causing harm to anybody, in the privacy of our own bedrooms and on what terms and with whom is in my view absolutely not the affair of any legislature and I know of no political party in Parliament with any mandate to make laws about these very private things.

I would therefore respectfully request the Justice Committee to reject the amendments to Section 34 of the Bill.

Maisie Campbell
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from West Dunbartonshire Violence Against Women Partnership

In support of amendment 8

About WDVAWP

West Dunbartonshire Violence Against Women Partnership is a Multi- Agency VAW Partnership committed to tackling all forms of Violence Against Women as defined by the Scottish Government's National Strategy to tackle Violence Against Women - Safer Lives: Changed Lives - A shared approach to tackling VAW in Scotland, 2009[1]. This document takes its definition of violence Against Women from the United Nations Declaration on the Elimination of Violence Against Women (1993) which follows:

Gender based violence is a function of gender inequality, and an abuse of male power and privilege. It takes the form of actions that result in physical, sexual and psychological harm or suffering to women and children, or affront to their human dignity, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. It is men who predominantly carry out such violence, and women who are predominantly the victims of such violence

Accordingly, violence against women encompasses but is not limited to:

Physical, sexual and psychological violence occurring in the family, within the general community or in institutions, including: domestic abuse, rape, incest and child sexual abuse;

Sexual harassment and intimidation at work and in the public sphere; commercial sexual exploitation, including prostitution, pornography and trafficking;

Summary of our position

The WDVAWP workers are strongly supportive of amendment 8 lodged by Trish Godman and urge the Justice Committee to support it. Our arguments in favour of this amendment can be summarised as follows:

- WDVAWP view prostitution as a form of violence against women, representing violation and inequality of women – not a free exchange between adults - and believe that all women prostituted are participating in a system which is itself unequal.

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[1] Scottish government, COSLA: Safer Lives: Changed Lives - A shared approach to tackling VAW in Scotland, 2009

- WDVAWP wish to challenge the normalisation of this so-called ‘industry’ and we aspire to a world without these forms of exploitation

- WDVAWP believe that you can still promote harm-reduction approaches while condemning the systems and structures that promote inequality. We would like to see demand criminalised and women supported to exit prostitution, and more education for all to prevent prostitution from happening.

- WDVAWP agree that it is time the ‘invisible man’ should be recognised and tackled.

WDVAWP workers believe that the activities stated above have been shown to be harmful for the individual women involved and have a negative impact on the position of all women through the objectification of women’s bodies. This happens irrespective of whether individual women claim success or empowerment from the activity. It is essential to separate sexual activity from exploitative sexual activity.

A sexual activity becomes sexual exploitation if it breaches a person’s human right to dignity, equality, respect and physical and mental wellbeing. It becomes commercial sexual exploitation when another person, or group of people, achieves financial gain or advancement through the activity.

WDVAWP agree with current research and literature that for the majority of women entering into prostitution their choice is not a freely made positive choice. This organisation agree that the facilitation into prostitution stems from lack of choice due to structural inequalities in society whereby a women's body can be viewed as a commercial commodity to bought and sold and normalised as to be no different to that of the trading of goods and services in the market place.

Women enter into prostitution for a variety of reasons such as homelessness, child sexual abuse, mental ill health, trauma, previous sexual violence, drug and alcohol misuse, money pressures and poverty. These factors, which serve to lead or force women into prostitution, should not be mistaken for the cause of prostitution itself, which is the demand from men to buy sex. If men were not prepared to buy sex, then prostitution would not work as a survival behaviour.

With this view, WDVAWP have raised awareness and organised training with partners across West Dunbartonshire to develop a range of services that support women and their children affected by violence including the supporting vulnerable young women who are at risk of entering into to all forms of commercial sexual exploitation.

Therefore WDVAWP workers support the amendment 8 proposed by Trish Goodman and would also urge the Justice Committee to consider other measures including better funding and support for prostitution exit programmes, changing the fact that prostitution can never be a spent conviction, decriminalising the selling of sex, and developing or promoting educational programmes to prevent prostitution and promote gender equality.

We would therefore urge the adoption of amendment 8 now, and ask the committee to support the development and funding of clear exit strategies and other forms of support for women alongside the changes set out in the amendment.

Carol Young
Administrator
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Eileen Stevenson

I am writing to you in support of Glasgow City Council's ENDPROSTITUTIONNOW campaign which highlights the harm caused through prostitution and puts the focus firmly on the buyers of sex - who create the demand - and who have in the past been invisible from public debate.

I am a supporter of this campaign, no woman wants to be on the street meeting the needs of men who think the woman that THEY are buying sex from have no feelings and do this soul destroying job putting themselves in danger every day because they want to, women whether it be the street corner, a flat, or the lobby of some plush hotel. This women has emotions and feelings, is someone’s daughter, someone's sister, someone’s mother, women find themselves in the seedy world of prostitution for many reasons its not a 1st choice. No young girl/young woman’s dreams and hopes for the future are to be bought by men so they can own them to fulfil there sad sexual demands

I believe that it is the demand which fuels the sex industry and, only by targeting the men who buy sex and by challenging attitudes, will we be able to put a stop to this harmful activity which blights cities and towns across Scotland.

Legislation which criminalises the purchase, advertising and facilitation of sex is needed as a matter of urgency. The Criminal Justice and Licensing (Scotland) Bill provides an opportunity for Members of the Scottish Parliament to support an amendment to this effect and to criminalise the buying of sex.

I call on my Member of the Scottish Parliament to support this change in legislation. It is time to assign responsibility where it belongs, with the purchasers of sex, and, ultimately, to ENDPROSTITUTIONNOW.

Eileen Stevenson
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written Submission from the Glasgow Bar Association

We write with our submissions in relation to the Criminal Justice and Licensing (Scotland) Bill as invited by the Justice Committee.

We have restricted our comments to points of principle rather than a detailed review. The headings under which our submission is presented are as follows:-

Definitions
GBA
New Offences Relating to Stalking
Offence of Engaging in Paid-for Sexual Activity
Sentencing for Knife Crime

We submit as follows:-

Definitions

1 GBA means Glasgow Bar Association
2 COPFS means Crown Office & Procurator Fiscal Service
3 The words "we" and "our" refer to the Executive Committee of the Glasgow Bar Association which has approved this submission to the Justice Committee.

GBA

1. The Glasgow Bar Association was formed in 1959. The objects of the Association, as contained in its constitution, include the promotion of access to legal services and to justice; to consider and, if necessary, formulate proposals and initiate action for law reform and to consider and monitor proposals made by other bodies for law reform. The GBA also offers legal education programmes and sponsors and supports legal education and debate at Scotland's Universities. We are an independent representative body.

2. Today the GBA remains a strong, independent body. It has just amended its constitution to allow Corporate Membership and current member levels sit at around three hundred, by far the biggest Bar Association in the country. Recent membership applications have been received from Govan Law Centre, Messrs Macroberts and Messrs Thompsons Solicitors. The GBA would encourage the Justice Committee to continue to seek its views on all legislative matters.

3. The contents of the submission are based on GBA members practising in the Summary Sheriff and JP Courts in Glasgow on a daily basis.

New Offences Relating To Stalking

4. In Principle the GBA has no difficulty with this proposed amendment. It is apparent that with the increased usage of mobile phone and internet communication, the capacity for forms of harassment and stalking conducted by means of telecommunications has increased. There are cogent public policy reasons for introducing this new offence which the GBA has considered and accepts. Harassment by e-mail can be a particularly disturbing type of harassment and one which is particularly convenient and easy to perpetrate.

Offence of Engaging in Paid-for Sexual Activity

5. The GBA has no comment to make on this proposed amendment. It supports the general public policy principle of the amendment.

Sentencing for Knife Crime

6. Knife Crime is a particular problem in Glasgow and the GBA welcomes any initiative which might help to address the problem. It is apparent from recent publicity that Strathclyde Police appear to be stopping and searching for knives on a wide-spread basis. We shall address both amendments in the one submission by explaining that, on summary complaint, if convicted of an offence under Section 49 of the Criminal Law Consolidation (Scotland) Act 1995, an accused can receive a maximum sentence of twelve months imprisonment. On indictment, the maximum sentence is one of four years imprisonment. We understand that COPFS has a policy whereby an accused charged with a contravention of Section 49 as aforesaid and who already has a Section 49 conviction, will be prosecuted by way of solemn procedure (maximum four years).

With regard to Mr Baker's amendment, it seems to us that a likely consequence of this amendment if enacted would be that an individual who is caught in possession of a knife but who had perhaps forgotten that the knife was in his or her possession would be imprisoned for six months. Often a situation is presented to the Sheriff whereby a tradesperson who will use a knife or sharp instrument in the course of his or her employment, will be found in possession of the knife when not in the course of his or her employment. Often it is submitted to the Sheriff that the accused had forgotten that the knife was in his or her possession. It seems to us that Mr Baker's amendment would result in such an accused person, as a first offender being sentenced to six months imprisonment. It is unlikely that the courts given the circumstances mentioned would treat such a case as "exceptional".

Similarly, the amendment by Mr Aitken would have the effect of placing an onus on the accused to satisfy the court in mitigation, that a period of two years imprisonment would not be justified.

Generally speaking, we do not think that it is in the interests of justice for pressures to be placed upon Sheriffs with regard to the exercise of their discretion in sentencing. The recent case of MM v. Watson SCCR 2009 847 explains the difficulties that courts may face when the discretion of the Sheriff is fettered and can only be exercised in “exceptional” circumstances.

Glasgow Bar Association
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Quarriers

Quarriers is a Scottish charity providing practical care and support in the areas of adult disability, children and families, epilepsy and young adults. Through more than 120 services in Scotland and south west England, we challenge inequality of opportunity and choice, to bring about positive change in people's lives.

Amendment 8 - Offences of engaging in, advertising and facilitating paid-for sexual activities

Many of the people supported by Quarriers youth housing support services can be vulnerable to sexual exploitation by reason of their age, background and previous traumatic experiences. This response has been developed by Quarriers' staff with considerable experience of working with young women and men who have been sexually exploited.

We have concerns that this legislative amendment will do little to achieve the cultural and attitudinal changes required to ensure that the purchase of sex becomes unacceptable.

- It is unclear whether "paid-for" includes transactions other than money. For example, young people can often be rewarded for sex with gifts of drugs, alcohol, clothes etc, either as a stand-alone transaction, or as part of a deliberate grooming process aimed at sexual abuse or exploitation, or normalising prostitution.

- Young people are often persuaded to encourage others to attend "parties", usually held by older men, where money may not change hands, but where gifts are usually expected, and given, in exchange for sex. We are concerned that, in circumstances like this, young people may be committing the offence of "facilitating engagement in a paid-for sexual activity" and the actual perpetrators of the offence escape any culpability.

- The proposed fine would not be seen as a deterrent, and we feel that, given the background and social standing of some of the people who engage in paid-for sexual activity, consideration needs to be given to sentencing options that would have a greater reputational impact.

Whilst the criminalisation of engaging in paid-for sexual activity might form a useful part of a far wider set of proposals aimed at addressing prostitution, more needs to be done to prevent the circumstances that lead to the vulnerability of young people and the consequent risk of their involvement in prostitution. Key priorities must include addressing issues of poverty, lack of opportunity, poor education and low levels of skills, employability and self-confidence, to ensure that young people are able to raise their aspirations and to achieve their full potential.

Kate Sanford
Policy Manager
19 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Action for Children Scotland

About Action for Children

Action for Children is one of the UK's largest children's charities working with over 156,000 children, young people and their families at around 420 projects across the UK. In Scotland we work in partnership to run more than 60 services for almost 8000 of Scotland's most vulnerable children and young people. Action for Children Scotland welcomes the opportunity to submit supplementary evidence to the Scottish Parliament's Justice Committee for its Stage 2 consideration of amendments on knife crime. Action for Children Scotland's evidence draws upon our proven track record of successfully engaging young people who offend, or are at risk of offending or of re-offending, in robust community based alternatives to custody. These have proved highly effective in significantly reducing the likelihood of offending and of re-offending amongst the young people we work with. Many of these young people have been affected by knife crime, both as victims and/or as offenders. Action for Children Scotland's evidence also reflects the key findings of the *Step inside our shoes* survey, which we carried out to find out more about young people's attitudes to, and experience of, gun and knife crime across the UK.

General

Action for Children Scotland notes the proposals in Amendment Nos. 10 and 10A which would, if agreed by the Justice Committee, require the courts to impose mandatory sentences of at least six months or a minimum of two years respectively for carrying a knife. Our concern is that introducing mandatory custodial sentences for carrying knives will simply lead to more people being sent to jails which are already overcrowded, without tackling the underlying causes of knife crime and violence within our society.

Action for Children Scotland is also aware of the recent report published by the Scottish Government, *Criminal Proceedings in Scottish Courts statistics*, which confirms that Scottish courts are already imposing tough sentences for knife crime although there are concerns that only a minority (30%) of convicted offenders receive custodial sentences. Given this situation, we believe it is essential that sufficient time is allowed to assess the impact that longer sentences for knife crime are having on the level of offending, and of re-offending. Action for Children Scotland considers that, without such an assessment, there is a strong risk that the introduction of mandatory sentences could be both premature, and potentially ineffective. Achieving a lasting, long term solution to knife crime and violence will, instead, require the adoption and implementation of a package of measures.

These measures should include the greater use of community based disposals, and increasing the availability of affordable and accessible social and leisure opportunities for young people. The Scottish Government, local authorities, the police, the voluntary sector and other key agencies all have a key role to play in progressing the measures which we believe are necessary to deliver significant success in this area. Young people should be involved in the design and delivery of these measures, given the impact of knife crime on their lives. Young people are more often the victims of violent crime, than the perpetrators, and they want safer communities just as we all do. It should also be highlighted that many young people experience knife crime both as perpetrators and victims. Action for Children Scotland, therefore, believes that policy makers should engage with young people, and learn from their experiences, to help solve the problems of knife crime in our society.

What do young people tell us about knife crime?

Action for Children Scotland's *Step inside our shoes* survey was conducted across the UK in 2008 to find out what young people think about gun and knife crime. A total of 821 young people responded to the survey, including 175 young people from Scotland, many of whom were accessing our services. Almost eight out of 10 were unemployed. They came from vulnerable communities where gun and knife crime is a significant problem. The results specifically reflect the views of those most affected by the problem, giving them the chance to be heard, to highlight their experiences and to have a role in shaping the solutions. The results provide a unique insight into the issue of gun and knife crime in Scotland, and across the UK.

How many young people have been affected?

- 31% of those who responded in Scotland told us they had been affected by gun and knife crime (29% across the UK);
- 20% had been personally affected (15% across the UK); and
- 40% knew someone who had been personally affected (41% across the UK)

What are the main reasons for young people's involvement?

- 73% said the main reason young people got involved in knife and gun crime was to protect themselves (63% across the UK);
- 72% blamed drugs (66% across the UK);
- 71% blamed alcohol (53% across the UK);
- 67% said it was to get revenge (61% across the UK); and
- 53% said peer pressure (63% across the UK)

How safe do young people feel?

- Only 37% said they feel 'very safe' in their community (28% across the UK); and
- 22% were worried about gangs in their area (36% across the UK)

Need for effective action to tackle knife crime

Action for Children Scotland believes that, if action to tackle knife crime is to succeed, it is essential the Scottish Government, local authorities, the police, NHS Boards, the voluntary sector and other key agencies adopt an integrated, joined-up approach to progressing the measures outlined below:

- ***Provide greater access to structured activities***
  Evidence suggests that structured activities provided by youth services, including local authorities and voluntary organisations, and by other organisations working with children and young people, can reduce the risks of offending and of anti-social behaviour within local communities. Our Positive Options programme in Highland has shown how sport and leisure pursuits can be used to divert young people from troublesome behaviour. Action for Children Scotland, therefore, welcomes the Scottish Government's commitment to implement the proposals outlined in *Moving Forward: A Strategy for Improving Young People's Chances Through Youth Work*. We also welcome the financial support provided for community based projects and activities by the Scottish Government's *CashBack for Communities* initiative. Action for Children Scotland hopes that these initiatives, by providing greater access to structured activities, will help to reduce the risks of children and young people getting involved in knife crime and other offences.

- ***Give young people a greater say in how to tackle violence***
  Young people must be given greater encouragement and support by local authorities and the police to have a say in the design and delivery of the local anti-social behaviour strategies..

- ***Increase the availability of information about the impact of violence***
  More information should be made available by the Scottish Government, local authorities, schools, the police and other agencies on the dangers and consequences of being involved in gun and knife crime, and/or gang-related violence. Action for Children Scotland, therefore, welcomes the launch of the Scottish Government's *No Knives, Better Lives initiative*, which we believe can make an important contribution in this area.

- ***Increase employment training opportunities***
  We welcome the Scottish Government's commitment to implement *More Choices, More Chances*, and its continued focus on those young people who are not in employment, education or training. Real jobs and training opportunities can provide a way out for young people caught up in violence, and in the gang culture. The young people who need more choices and more chances lack basic opportunities to fulfil their potential. They face barriers which are often challenging, particularly in the current harsh economic climate, unless targeted support is available through services such as Action for Children Scotland's Youthbuild.

Action for Children Scotland's Youthbuild provides disadvantaged young people with that initial chance to access such opportunities, and to turn their lives around. It works with young people aged 16-24, including those who have been involved in knife crime, who face multiple challenges in finding work. Most have left school without any qualifications. The Youthbuild project provides every trainee with personalised one-to-one support as they learn a range of skills that are needed in the construction industry. Many of the young people then go on to start an apprenticeship, or to take-up a full-time position, in the construction industry.

The project is very much a collaborative approach between the private, public and voluntary sectors with many agencies getting involved in the delivery and support aspects of Youthbuild. Partners include Inspiring Scotland, Glasgow City Council, the European Social Fund, Inverclyde Council, City of Edinburgh Council, Clackmannanshire Council, West Dunbartonshire Council, East Ayrshire Council, Skills Development Scotland and the Scottish Government. About 60 private sector construction companies are involved, along with local housing associations such as the Oak Tree, Link, Cloch, Milnbank, Shettleston and Govanhill housing associations.

The Action for Children Scotland Youthbuild model was piloted in Glasgow and Inverclyde. An independent evaluation noted:

- a 70 % success rate for helping young people move into employment ;
- high completion rates for those involved in the programme; and
- considerable savings from diverting young people from trouble - the annual cost of a place for a male in prison, or on remand or in a young offenders' institution is estimated at £31,106.

Together with our partners, we have now rolled Youthbuild out to West Dunbartonshire, Edinburgh, Clackmannanshire and East Ayrshire.

- ***Invest in for early intervention***
  We believe that the Scottish Government, local authorities, NHS Boards and other agencies must put in place sustainable funding for services that can intervene early to support vulnerable and difficult to reach young people, and to prevent them from getting involved in knife crime. Many of the young people caught up in gun and knife crime fall within this group, and it is vital that they receive support at an early stage to address their behaviour, and to help turn their lives around.

- ***Support community based projects***
  Community based projects such as, for example, Action for Children Scotland's Ayrshire Crossover Project can make a significant contribution to help reduce knife crime in local communities. The Crossover Project works with young people who have offended, or are at risk of offending or of re-offending, including those involved in knife crime. Since its launch in June 2001, the project has developed

innovative ways to help marginalised young people, including young offenders, to address their behaviour, and to get them involved in positive ways in their local communities. The project won the Young Scot Heritage Award for a community project where young people worked with the local community to regenerate an area in East Ayrshire. Together they landscaped a garden, which they chose to name The Miners' Memorial Walk. The experience of the Crossover Project demonstrates that, with the right support and opportunities, marginalised young people have a lot to contribute to their communities

Robert McGeachy
Policy and Public Affairs Manager
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from John Muir

Knife Crime (Mandatory Sentencing) (PE 1171)

My offer to Parliament to withdraw the word mandatory has been on the table since Tuesday 9 September 2008. No one from any party made any indication or offer to pursue the withdrawal of the word mandatory, yet all persisted in trying to score points off each other, rather a shame don't you think.

However, it was left to me to try and redress the proposed content of the petition, and it was on 20 February 2010. It now reads: Calling on the Scottish Government to introduce mandatory custodial sentencing for persons found carrying knives or other dangerous weapons in public except where there are exceptional circumstances relating to the carrying of a knife or other similar sharp implement.

The withdrawal of the word (mandatory) is still on offer to this Justice Committree and indeed to all members of this elected parliament, if it is so desired.

At the Scottish Parliament petition meeting on Friday 23 January 2009 I offered to withdraw the mandatory clause, a matter which seemed to do little to appease the overwhelming and angering apathy and weakness from some quarters. Views ranged from 'prison does not work' to even the suggestion that no individual should go to prison. They are in contempt and detached from public opinion and demand.

The importance of 'Damians Law' was never specifically the absolute introduction of mandatory sentencing but more importantly an attempt to shake the government, the judiciary, the police and the public out of complacency and sanitised academic approach to serious violent crime which is largely responsible for the situation we find Scotland and indeed the UK facing. We have perhaps become as used to violent crime over such a long period of time that our resolve and horror is not truly reflected in penalties regardless of political gesturing. Is it any wonder the criminal fraternity does not respond?

Taking out 6 months sentences will serve no purpose - knife possession offenders will be put on a community service order which is a slap on the wrist for a potential thug and a killer if you carry a weapon you are considered a user.

The public want their streetsback! You are not listening to your electorate you do-gooding politicians.

Q. DOES PRISON REHABILITATE INDIVIDUALS?
A. In general, no. Prison has a poor record on that front as re-offending is high and it is very obvious that the facilities to rehabilitate do not exist in sufficient capacity despite the efforts of prison staff and associated agencies.

Q. DOES PRISON ACT AS A DETERRENT?
A. In truth, prison acts as a deterrent to the wider public and if it did not exist we would be subjected to considerable higher levels of offending by a section of the public who would not normally consider criminal behaviour? The section of society that it does not generally deter are the ones that currently use it as a full board hotel and see prison as part of their lifestyle and in some cases a club.

Q. DOES PRISON PROTECT THE PUBLIC?
A. Unequivocally, yes. If an individual is a danger or potential danger to the public, then if he or she is behind bars, the public are safe for that period. It is what we do with them in prison that may determine what type of individual comes out the other side and that is where the question of rehabilitation importantly raises its head, but concern about prison being a nasty horrible place that leaves an individual with low self esteem and creates animals, as true as it may be, it does not excuse the fact that the individual did what they did in the first instance that made them a danger to the public.

IT IS UTTERLY CONTEMPTABLE OR DETACHED FROM REALITY FOR ANY INDIVIDUAL TO SUGGEST OTHERWISE.
Prison in truth does no good apart from the undeniable fact that it puts a safety curtain between the public and the violent offender and that always was the true purpose of prison. The initial concept of prison has been polluted and needs redressed in order that we can assess what prison does and does well, and if we identify something that it does not do well, then we must balance the safety of the public against option custodial or otherwise.

EARLY INTERVENTION
What do we mean by this widely misused term?

Early by definition means to intervene before the event we fear happens.

We as a family were clearly let down by the overlooking of the facts in our case as fingers can be pointed at the judiciary – the prosecution service, welfare, and others including the police that a recidivist with a violent record was able to flaunt it and be released on bail.

Had early intervention been practiced my son would not be in his grave, and Damian's situation is sadly not unique.

Because an individual holds public office or rank, that does not assume they know best. It seems to me that some in this debate think this precisely. The politicians and authorities must have the support of the public and if they fail to deal with the current problem whilst singing the praises of untested solutions, the entire venture will fail, not least from lack of confidence from the public.

STATISTICS ... this is a scandal. Not only that the true use of knives is unknown, as is clearly identified between hospital statistics and government statistics.

Further to that, many robberies involve knives, yet the government cannot identify how many involved knives, or indeed, how many of the recorded violent crimes, involved knives. They can only identify possession. How are they placed to determine the solution if they do not know the extent of the problem? Early intervention must also include preventing a violent individual being at large to commit a murder or serious violent crime. That is also early intervention. Mr Carnochan stated knives do not kill people, people kill people. While that is a fair point, can I suggest equally that people carrying knives or weapons are far more likely to kill than if they were not?

DIS-INVENT PRISON

The point we are making is this. Should we be dis-inventing traditional prison as it currently stands? Should prison be taken back to what it originally was, somewhere to put somebody who is considered an immediate or potential danger to the public? If the nswer to this is Yes, then prison has a place in society and therefore prison is good, providing the function of prison is clarified.

THE FINAL OPTION OF ESTABLISHMENT INCARCERATION

This option seems to alarm those of the mind that we should never abandon anybody and throw away the key. There is inherent weakness and gross naivety in this position as some do need locked up, however, nobody, and certainly not the principle of Damians Law, suggested throwing away the key. There must be punishment as well as opportunity, but punishment must be considered in the question, what is prison for?

Prison is not paying any kind of debt back to society. That is a legal nonsense term. Who drives by Greenock or Barlinnie prisons and thinks where a murderer or serious violent criminal recidivist is concerned, 'Oh good, he is paying back society a debt?' One thinks, 'Thank goodness that person, who may be likely to harm me or my family, is now behind bars and walls where they cannot, in the meantime, do harm.' Prison is nothing more than where you put somebody who is an unacceptable risk to the public.

REHABILITATION

Where does the Justice Secretary get the funding to have a rehab process in operation when prison officers have not been properly trained to counsel or advise. In 2010 when nothing has been undertaken to re-group what facilities they have or have not. The Justice Secretary has clearly stated that prison is a skoosh – prison should be a place of punishment with a designated period of the sentence must be served before more convivial conditions of confinement are offered to all prisoners. Failure to comply to whatever programme the prison has set will incur time added on and not time taken off.

The soft conditions prisoners have at the moment is quite disgraceful – they have TV channels, a comfortable bed, best of food, and if they don't like the menu outside catering is provided. There is a even temperature, good hot water for showers and washing facilities.

They then have all the wonderful civil liberties – civil rights to claim for all the sundries that upset their cosy lifestyles. 'What about my son.' He will always be 34-years, never grow old, yet no-one from the do-gooders society refer to his civil rights. The victims and their families are totally overlooked, ignored, yet the scum of our society thumb their noses at us – the surviving victims.

The simple fact is this. If the courts had enforced the maximum penalties for carrying knives many years ago, we would not be in this situation and debate to the same extent we are. We must re-introduce fear of penalty and totally disenfranchise the benefit and attraction of carrying a knife or a weapon.

Prison officers and staff must be given back control of their establishments. The complaints system and 'I know my rights' mentality has to go, even if this means taking on European Law.

Damian’s Law is and always was about common sense, the same common sense that should have been applied to Damian's assailant but was not. The courts did not early intervene when they should have, otherwise Damian would be alive.

Most of the great changes in history are brought about by the common man and not the high and mighty who in fact have more often than not been swept aside where the common man is not being served. Whether the judicial, executive, or any other institutions have not served the community as well as they could have, or not at all, then they face being swept aside.

In conclusion may I respectfully ask why does the Scottish Justice Secretary have such a fetish for shiny buttons as it appears he is only taking advice from police officers at the higher level. He has said, and I quote: The Strathclyde Chief Constable and his colleague from Lothian and Borders plus the Violence Reduction Unit sumpremo if they thought that mandatory sentences would work they would implement them. Is it not the Scottish Parliament who should be taking that sort of decision?

May I also add a further point. The Public Petitions Committee asked ACPOS and the Violence Reduction Unit for their written comments, and surprise, surprise, both letters are almost identical in layout and content, suggests that the same person compiled the written form and had two others sign them. It is little wonder the public are confused.

In January 2009 I made the following statement to the knife crime summit was a pivotal point in the fight against knife and weapon crime. And also said any and all honest men would recognise that there had very nearly criminal institutional failure and neglect on the part of the authorities in which the protection of the Scottish nation is vested. That failure was borne out by the frequency of incidences of knife crime and by the disgraceful statistics that shame Scotland. May I reminded this learned committee that these statistics relate to real people and are not an academic board game.

Each and every one of these statistics represents a real victim a person whose life has been taken or shattered along with the lives of their family and friends. Blame will achieve little and as I have said political in-fighting will also achieve nothing. Systemic failure by us - the Scottish nation – to remove decisively the menace of knife crime in terms that criminal recidivists understand, will mean more needless carnage on the streets of Scotland.

A main question to this committee is this: are we going to allow the blood of the general innocent majority to be spilled on our streets because of the concerns and the rights of the criminal minority.

I submit for your further perusal, an extract from a newspaper:

> *It is depressing nowadays to take up one's paper and read the daily catalogue of assaults and murders with knives, razors and other lethal weapons. Indeed slashings and stabbings are becoming so common that they appear to be accepted as part of our modern youth's recreation.*

This is from the Letters Page of the Glasgow Evening Times dated 14.3.1930. Eighty years ago!

Is it not time for change?

John C Muir
Damian's Law Campaigner
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Law Society of Scotland

I refer to the call for written evidence from the Scottish Parliament's Justice Committee with regard to amendments lodged for Stage 2, which the Committee considers raise significant new issues which were not considered during the Justice Committee Stage 1 enquiry.

The Criminal Law Committee of the Law Society of Scotland ("the Committee") has had an opportunity to consider the issues raised in terms of these amendments and should like to respond as follows:-

New offences relating to stalking

The Committee has considered this group of amendments and has also considered the opinion of the Court delivered by the Lord Justice General in the Appeal by Mark Harris against HMA (2009 HCJAC 80).

In all the circumstances, the Committee question whether it is necessary to have a narrower definition enshrined in statute with regard to the crime of breach of the peace, which is of course a crime of effect and covers a variety of courses of conduct at common law where intent does not require to be proved.

Moreover, it is the Committee's view that the decision in Harris does not mean that private conduct does not amount to breach of the peace, but simply that there may be a defence to breach of the peace where the conduct complained of took place in private. The High Court in its reasoning in Harris stated that where conduct complained of did take place in private, there should be evidence that there was a realistic risk of the conduct being discovered.

In all the circumstances, the Committee notes that both Amendments 402 and 387 narrow the range of criminality with regard to the common law crime of breach of the peace and also require the conduct to be committed intentionally.

The Committee highlights the offences as listed in the Telecommunications Act 1984 and in particular refers to Section 43 of the 1984 Act whereby a person who

(a) sends, by means of a public telecommunications system, a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or

(b) sends, by those means, for the purpose of causing annoyance, inconvenience or needless anxiety to another, a message that he knows to be false, or persistently makes use for that purpose of a public telecommunications system, shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding 12 months or a fine not exceeding Level 5 on the standard scale, or both.

The Committee notes that certain aspects of stalking may of course be prosecuted in terms of the 1984 Act and would also refer to the Protection from Harassment Act 1997 whereby a victim can apply for a civil order against a person who is pursuing a course of conduct which amounts to harassment or occurs in circumstances where it would appear to a reasonable person that it would amount to harassment.

In terms of Section 9 of the 1997 Act, a breach of a Non Harassment Order is punishable by five years' imprisonment following upon conviction on indictment and one year's imprisonment following upon a summary conviction.

On the basis, however, that the Scottish Parliament legislates for a new offence of stalking, the Committee believes intent will have to be proved as provided for in the amendments but has concerns with regard to the provision at Amendment 378 that the behaviour is directed at anyone in particular, and with regard to Amendment 402 that conduct could be with “any other person” as opposed to the complainer as being too widely drafted.

Sentencing for knife crime

The Committee notes the terms of Amendment 10, which seeks to amend Section 49 of the Criminal Law (Consolidation) (Scotland) Act 1995 by obliging the Court to impose a sentence of imprisonment of at least 6 months (with or without a fine), unless the Court is of the opinion that there are exceptional circumstances relating to the offence, or to the offender which justify not doing so (as amended by Amendment 10A which increases the sentence to 2 years (with or without a fine) unless the Court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal circumstances of the conviction and thinks fit to order the offender to be imprisoned for a shorter period or not to order the offender to be imprisoned.

The Committee is of the view that it can be difficult to produce genuine exceptional circumstances as outlined in Amendment 10 and accordingly possession of a knife without reasonable excuse may oblige the Court to impose a custodial sentence where one was not appropriate.

The Committee notes that the Scottish Parliament’s Public Petitions Committee held a knife crime debate on Friday 23 January 2009, at which the Committee was represented by Peter Lockhart, Solicitor, Ayr.

It is the Committee’s understanding that, following this debate, the consensus of those participating was that mandatory minimum custodial sentences was not the way forward.

The Committee would, however, respectfully suggest that this is a matter which would require further parliamentary scrutiny and debate, and would be required to consider an evidence base which points to minimum mandatory custodial sentences with regard to possession of knives, being an effective measure put in place in order to reduce knife crime.

The Committee also notes from recent reports that the average custodial sentence with regard to possession of knife crime has risen by almost two thirds over the last two years.

Offence of engaging in paid for sexual activity (and related new offences)

The Committee would refer to its comments above in that this is perhaps a matter which is worthy of further parliamentary scrutiny and debate.

In particular, the Justice Committee may wish to ascertain the number of successful prosecutions obtained under the recently enacted Prostitution (Public Places) (Scotland) Act 2007.

The Committee notes, however, that, unlike the 2007 Act, there is no "relevant place" and highlights potential difficulties in the enforcement of these proposed provisions should these new offences be committed in private.

I trust that these comments are of some assistance.

Alan McCreadie
Deputy Director, Law Reform
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Clydebank Women's Aid Collective

Clydebank Women's Aid has existed since 1981 and has a depth of experience in relation to supporting women and children experiencing domestic abuse. We provide local direct services. Domestic abuse as with other forms of exploitation and violence against women, including prostitution, is allowed by a society that still undervalues and objectifies women. We often support women who have or are experiencing many forms of violence against women at the same time, including prostitution. We wish to associate ourselves, as an individual autonomous group, with the submission made by Scottish Women's Aid. Their submission gives a voice to those who are most marginalised, not organised and who don't have vested interests lobbying vociferously on their behalf.

Clydebank Women's Aid Collective
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Christian Institute

Amendment 378

Introduction

The Christian Institute is a non-denominational charity established for the promotion of the Christian faith. We have over 3,000 supporters throughout Scotland, including 530 churches and church leaders. The Institute holds to the mainstream historic beliefs of Biblical Christianity. We have strongly opposed attempts to censor religious or ethical debate using the criminal law. We opposed the religious hatred offence, which in theory applied only to England and Wales, but would in practice have profoundly affected Scotland.[1]

Amendment 378 introduces a new offence of "Threatening, alarming or distressing behaviour". The very low threshold and extremely wide breadth of the offence as drafted give rise to serious free speech concerns. The offence introduces a speech crime. Religious believers could easily use the offence to silence their critics. But that is not what we want.

In England and Wales there have been shocking cases of unacceptable interference with free speech caused by public order and hate crime legislation. With a separate legislative framework, Scotland has been largely untouched by such cases, but this proposed new offence would bring with it a serious risk of free speech being inhibited.

Low threshold and broad scope

At its most extreme, the draft offence criminalises private behaviour which is *not intended* to cause fear, alarm or distress, and *causes no one* fear, alarm or distress. A huge range of conduct is caught by the offence. Our concern is not at the upper end: stalking and domestic violence must, of course, be criminalised. However, at the lower end, we are very concerned that the offence will restrict free speech.

The following scenarios could all be argued to fall within the ambit of the offence:

- A cartoonist produces images of Mohammed. Muslims say they are distressed by such a representation of their central religious figure.

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[1] *The Impact on Scotland of the Racial And Religious Hatred Bill*, Herbert A. Kerrigan QC and Neil Addison - Barrister, 5 October 2005, paras 10-12, (available at http://www.christian.org.uk/scotland_archive/religioushatred/kerrigan&addison_opinion.pdf as at 17 March 2010)

- A boy holds up a sign outside a building owned by the Church of Scientology which reads: “Scientology is not a religion, it is a dangerous cult.”
- A Glasgow art gallery has an exhibition featuring the Bible, inviting those who feel excluded from it to ‘write themselves back in’. Obscene and offensive messages are scrawled over the Bible. Christians are distressed.
- A well known advocate of atheism speaks at a public debate at St Andrew’s University, in which he likens Christian belief in Christ to belief in fairies. He also makes parallels between raising children as Christians with forms of child abuse. A number of Christians present at the debate are shocked and distressed by these comments.
- A group campaigning against field sports holds a demonstration on the occasion of a local hunt near Dumfries. In a leaflet they give out to passers-by there is a picture of a seriously injured animal caught, which distresses some of the recipients.

Some of these situations have already arisen in Scotland. None of them would be intended to fall within a stalking offence. However, the threshold and scope of the offence as drafted mean that it is entirely possible such incidents would be covered by the wording. There is also a clear danger that an offence with such a low threshold will lead to the criminal law intervening in legitimate debate and will encourage people to use complaints to the police in an attempt to silence those who disagree with them.

The willingness of some to try to get the police involved in order to silence an opposing viewpoint was amply demonstrated by Patrick Harvie MSP in 2006. After Mario Conti, the Roman Catholic Archbishop of Glasgow, said in a sermon that marriage had been undermined by the introduction of civil partnerships, Mr Harvie asked the police to investigate the Archbishop’s remarks. Mr Harvie said: “What he [Conti] said was clearly homophobic. This is a matter for the police.”[2]

Introducing an offence with a low threshold like amendment 378 could serve to encourage such complaints against perfectly legal statements or activity, with an inevitable detrimental effect on free speech. Part of this detriment is the chilling effect – the culture of fear that is created when people are led to believe that the law criminalises far more than it actually does. People begin to censor themselves because they have been intimidated by the threat of the law being used against them, and this shuts down debate.

The justification for the new offence

We accept that the criminal law must be able to deal with “a wide range of behaviours constituting stalking” as the Government’s February news release stated.[3] However, the definition of this offence is far broader than is necessary to criminalise stalkers. In fact, by the Government's own admission, the offence is not "limited in scope to stalking related activity".[4] The offence is also designed to cover other areas, such as domestic abuse.[5]

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[2] *Sunday Herald*, 15 January 2006

[3] Scottish Government Press Release, *Move to Strengthen Law on Stalking*, 21 February 2010

Both stalking and domestic abuse are matters that the criminal law must address. However, attempting to do both within an 'all singing all dancing' single offence is, we submit, unwise, and perhaps explains the dangerous breadth of amendment 378.

Section 5 of the Public Order Act 1986

The drafting of the new offence invites a comparison with the public order offence of causing harassment, alarm or distress, which exists in England and Wales. Under section 5 of the Public Order Act 1986 (see appendix A), a person commits an offence if he engages in "threatening, abusive or insulting" conduct "within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby".

Whilst there are differences between amendment 378 and section 5, there are striking similarities:

- The words "alarm" and "distress" are used in both offences, indicating that the potential impact of the behaviour on the victim is of the same order of seriousness.
- Neither offence requires that harassment/fear, alarm or distress be intended.
- Neither offence requires it to be proven that someone is actually caused harassment/fear, alarm or distress.
- In both cases, written and spoken words are included as part of the conduct which could constitute the offence.

In fact, the threshold of amendment 378 appears to be significantly lower, and the requirements of the offence therefore more easily met, than those of section 5:

- The offence under amendment 378 could take place in private, opening up the possibility that it could occur when both the perpetrator and the other person are inside a dwelling. This is explicitly excluded from the scope of the section 5 offence (section 5(2)).
- "Psychological well-being" is potentially more subjective and has a potentially lower threshold than anything in section 5.
- The element of 'reasonableness' in the section 5 offence is arguably a stronger safeguard. It incorporates an objective assessment of all the facts of the case including the alleged perpetrator's circumstances and not just how the facts may appear to a "reasonable person". There is therefore greater scope for mitigating factors to be taken into account in section 5 than amendment 378.

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[4] *Loc cit*

[5] *Loc cit*

The issue of threshold is important because we would like to cite two cases of the use of section 5 to indicate the problems of its threshold, and therefore why we are concerned about the introduction of an offence with a similar threshold in Scotland. The dangers are even more acute when it is considered that the potential sentence in the new draft offence is considerably heavier than that under section 5.

Ben and Sharon Vogelenzang

In 2009 Christian hotel owners Ben and Sharon Vogelenzang were prosecuted under section 5 of the Public Order Act as a result of a religious debate over breakfast. The accusation was made against the couple by a Muslim guest who had been staying at their hotel. The case against the Vogelenzangs was dismissed last December by District Judge Richard Clancy.[6]

Even after the judge had dismissed the case, the Crown Prosecution Service maintained that there had been enough evidence for a realistic chance of conviction. CPS lawyer Nicola Inskip said: "In looking at the evidence in this case we had to consider whether there was any evidence that the defendants had caused harassment, alarm or distress…we were satisfied that there was sufficient evidence for a realistic prospect of conviction".[7]

The readiness of the CPS to pursue a case against a couple over a religious discussion shows the danger of an offence drafted in such broad terms. It must be noted that even though the Vogelenzangs were found innocent, the consequences of the prosecution have been severe for them, particularly in terms of its financial impact on their business. Offences with a low threshold of this sort have an impact well beyond just those who are convicted.

Harry Hammond

Perhaps the most alarming case of injustice under section 5 is that of the pensioner Harry Hammond, who suffered from Asperger Syndrome, a form of autism. Sufferers can lack awareness of the effect their behaviour is having on others. When preaching in Bournemouth town centre, Mr Hammond held up a sign saying: "Stop Immorality", "Stop Homosexuality", "Stop Lesbianism", "Jesus is Lord".[8] Mr Hammond was physically attacked by a group of protesters. Despite being forced to the ground and having mud and water thrown over him, it was Mr Hammond who was arrested, prosecuted and convicted under section 5 of the Public Order Act. One of the police officers on duty disagreed with his colleague over the arrest and he appeared as a witness for the defence.[9] Peter Tatchell described Mr Hammond's conviction as "an outrageous infringement of free speech".[10] A leading textbook on this area of law calls the court's rationale "grossly inadequate" [11] and says the decision "puts the expression of all controversial ideas at risk of punishment under the Public Order Act".[12]

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[6] *The Daily Telegraph*, 10 December 2009

[7] *BBC News Online*, 9 December 2009, see http://news.bbc.co.uk/1/hi/england/merseyside/8404212.stm as at 15 March 2010

[8] Ahdar, R and Leigh, I, *Religious Freedom in the Liberal State*, OUP, 2005, page 377

[9] *The Mail on Sunday*, 5 May 2002

The obvious concern is that amendment 378, because of its broad drafting and consequently similar threshold to section 5, would give rise in Scotland to cases like Hammond or the Vogelenzangs. There is no reason to believe from the face of the amendment that either of these sets of facts would be outside the scope of the proposed new offence.

Criticism of section 5

The existing drafting of section 5 of the Public Order Act 1986 has been strongly criticised from several quarters, not least the Westminster Parliament's Joint Committee on Human Rights (JCHR). Two recent reports have attacked the low threshold of the offence. In March 2009, the Committee stated:

> "In our view, section 5 of the Public Order Act gives the police a wide discretion to decide what language or behaviour is 'threatening, abusive or insulting'. …We consider that the Government should amend section 5 of the Public Order Act 1986 so that it cannot be used inappropriately to suppress the right to free speech, by deleting the reference to 'insulting' language."[13]

The JCHR focused here on the issue of "insulting" being incorporated in the definition of the offence. However, we submit that amendment 378 has an even deeper flaw.

The only stipulation in amendment 378 about the nature of the behaviour is that it is likely to cause fear, alarm or distress to the reasonable person. The conduct which constitutes the offence is therefore only defined in terms of its potential consequences rather than its own offensive nature. There is no requirement that the conduct be threatening, abusive or insulting, let alone only threatening or abusive. The conduct simply needs to have the potential to cause distress. Such a threshold is much lower than the one criticised in England and Wales, and represents an even greater threat to free speech.

Human rights campaigning organisation Liberty submitted evidence to the JCHR expressing its concern about the use of section 5. Liberty said:

> "Liberty has recently had cause for concern in relation to the application of section 5 of the POA. …On 10 May 2008, a young

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[10] *Guardian Online,* 10 October 2007, see http://www.guardian.co.uk/commentisfree/2007/oct/10/hatespeechvfreespeech as at 15 March 2010

[11] Hare, I and Weinstein, J (Eds) *Extreme Speech and Democracy*, OUP, 2009, page 32

[12] *Ibid*, page 40

[13] House of Lords, House of Commons Joint Committee on Human Rights, Session 2008-09, HL Paper 57, HC 362, page 54, para. 1.180

> person was issued a summons by the City of London Police for refusing to remove his sign which read: “Scientology is not a religion, it is a dangerous cult.” The boy was taking part in a group protest outside the Church of Scientology’s central London headquarters and the police said that his use of the word “cult” violated section 5. Although City of London police later informed the boy that the prosecution would not be pursued, Liberty has concerns over police policy in this area and the chilling effect of such cases on legitimate free speech.”[14]

Cases such as Hammond, the Vogelenzangs and the Scientology example cited by Liberty only arise because of the way section 5 is drafted. It is extremely broad, allowing the police too much discretion and creating a situation in which they believe certain activity is contrary to the law when the offence in question was never intended by legislators to be applied so widely. This is the clear danger of amendment 378, which is simply too broad for the role the Government claims it is intended to fulfil.

Amendment 378 - a sweeping public order offence

The headline of the Government’s news release (“Move to strengthen law on stalking”) simply does not reflect the draft offence that has been brought forward. As has been shown, amendment 378 does not resemble a stalking-specific offence, but is much more akin to a general public order offence.

Rhoda Grant MSP’s amendment 402 is specifically targeted at stalking and to that extent would seem much more likely to achieve its aim without the unintended consequences for free speech that amendment 378 could have. Inherent in any stalking offence should be the requirement for a course of conduct, i.e. a minimum of two instances of behaviour. This is the key feature of the offence of stalking under the Protection from Harassment Act 1997 in England and Wales (see appendix B), and is also a feature of Rhoda Grant’s amendment.

As drafted, amendment 378 is a sweeping public order offence which would apply in a whole range of circumstances, carrying such a low threshold and such a heavy sanction that it represents a serious threat to free speech. Experience of a similar offence in England and Wales has shown the problems such a threshold can cause. The offence is unsuitable for its intended purpose of dealing with stalking and needs to be radically redrafted.

The Christian Institute
17 March 2010

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[14] Memorandum from Liberty, House of Lords, House of Commons Joint Committee on Human Rights, Session 2008-09, HL Paper 47-2, HC 320-2, vol. 2, Ev. 161, para. 21

APPENDIX A

Public Order Act 1986
Part I New Offences

5 Harassment, alarm or distress[15]

(1) A person is guilty of an offence if he--

(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,

within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

(3) It is a defence for the accused to prove--

(a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or

(b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or

(c) that his conduct was reasonable.

(4) . . .

(5) . . .

(6) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

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[15] **NOTES:** Sub-ss (4), (5): repealed by the Serious Organised Crime and Police Act 2005, ss 111, 174(2), Sch 7, Pt 1, para 26(1), (5), Sch 17, Pt 2

APPENDIX B

Protection from Harassment Act 1997

England and Wales

1 Prohibition of harassment[16]

(1) A person must not pursue a course of conduct--
(a) which amounts to harassment of another, and
(b) which he knows or ought to know amounts to harassment of the other.

[(1A) A person must not pursue a course of conduct--
(a) which involves harassment of two or more persons, and
(b) which he knows or ought to know involves harassment of those persons, and
(c) by which he intends to persuade any person (whether or not one of those mentioned above)--
(i) not to do something that he is entitled or required to do, or
(ii) to do something that he is not under any obligation to do.]

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to [or involves] harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to [or involved] harassment of the other.
(3) Subsection (1) [or (1A)] does not apply to a course of conduct if the person who pursued it shows--
(a) that it was pursued for the purpose of preventing or detecting crime,
(b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

2 Offence of harassment[17]

(1) A person who pursues a course of conduct in breach of [section 1(1) or (1A)] is guilty of an offence.
(2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.

(3) . . .

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[16] **NOTES:** Sub-s (1A): inserted by the Serious Organised Crime and Police Act 2005, s 125(1), (2)(a); Sub-s (2): words "or involves" and "or involved" in square brackets inserted by the Serious Organised Crime and Police Act 2005, s 125(1), (2)(b); Sub-s (3): words "or (1A)" in square brackets inserted by the Serious Organised Crime and Police Act 2005, s 125(1), (2)(c).

[17] **NOTES:** Sub-s (1): words "section 1(1) or (1A)" in square brackets substituted by the Serious Organised Crime and Police Act 2005, s 125(1), (3); Sub-s (3): repealed by the Police Reform Act 2002, s 107(2), Sch 8.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Engender

Engender welcomes the opportunity to provide written evidence to the Scottish Parliament's Justice Committee on legislative amendments to the *Criminal Justice and Licensing (Scotland) Bill* as lodged for Stage 2 consideration. We can confirm that we are in support of the following proposed amendments:

- **New offences relating to stalking**
- **Sentencing for knife crime**

We are also very much in support of Trish Godman's amendment (8) and would like in particular to comment in relation to the **Offence of engaging in paid-for sexual activity (and related new offences)**.

Engender takes a clear stance on prostitution which we believe is part of the spectrum of men's violence against women. As an organisation working on an anti-sexist agenda to make Scotland a fairer, safer place where women can flourish and contribute to both the social and market economies with dignity, freedom and justice, we have long been committed to raising awareness of the harm caused through prostitution. In line with amendment 8 we hold that it is vitally important to put the focus firmly on those who purchase sex, who create the demand, and who have in the past been invisible from public debate.

At Engender we believe that legislation must go further and that amendment 8 on the **Offence of engaging in paid-for sexual activity (and related new offences)** will go a long way in sending an unequivocal message that buying sex will not be tolerated.

During one of our recent 'Inspiring Women' discussion sessions at Engender our members were in agreement that the women involved in prostitution and other forms of commercial sexual exploitation will *always* be there as long as a demand and a market for prostitution exists. In order to change this we need to make a fundamental change, similar to that which has happened with domestic abuse and around sexual assault… 15 years ago these were seen as private matters but we now have a wider recognition that they are very much public and social issues. Our members are keen to have the same kind of cultural and attitudinal change happen in relation to prostitution.

At Engender we are in no doubt that prostitution is inherently harmful to those involved and also upon our wider culture. The harm that commercial sexual exploitation causes to all women, by sanctioning the objectification of women's bodies, happens regardless of whether the paid-for sexual activity is 'coerced' and for this reason Engender does not support amendments 8A-D lodged by Margo Macdonald or amendment 461 lodged by Nigel Don.

We wholeheartedly endorse the work carried out by our sister organisations which include 'Rape Crisis Scotland', 'Scottish Women's Aid', the 'Women's Support Project' and 'Zero Tolerance' and we recognise and value their respective roles in shining a light on this form of oppression and exploitation of women. For us, the proposed amendments present an effective means of challenging demand for prostitution although this in itself should not be viewed as a 'stand alone' measure. Consideration must also be given to supplementary interventions such as:

- The decriminalisation of those who are purchased for sexual activity
- Appropriate and adequate resources being available to support women wishing to exit prostitution.

Carol Flack
Projects Director
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Glasgow City Council Social Work Services

Amendment 8

Glasgow has provided services to support women involved in prostitution for many years. Base 75 was established 20 years ago in response to concerns about the spread of blood borne viruses and increasing levels of violence against women involved in prostitution. The six murders and one suspicious death in the years between 1991-98 generated widespread media concern and brought the issue of street prostitution in the city to public and political attention with the Routes Out Of Prostitution Intervention Team being established in 2000.

Over this period Glasgow City Council's policy has evolved into one that rejects the notion of prostitution as a choice, work or sexual behaviour. Rather, the policy considers prostitution to be a form of violence against women which is harmful to them, their families, communities and society generally. Reflecting this, services have evolved from a focus on harm reduction characteristic of the Base 75 service response to one supporting women exit prostitution implemented by the Routes out of Prostitution Intervention Team. Since 1995, over 2000 women have registered at Base 75 with the Intervention Team supporting over 500 women since 2001. More recently we have been able to evidence the usage of Base 75 drop in by women from outwith Glasgow and estimate this to account for 20 – 25% of service usage.

We have just completed a major review of Base 75 and the Routes Out Of Prostitution Intervention Team underpinned by extensive service usage analysis and service user consultation. The service user profile is one characterised by childhood abuse, domestic abuse and abusive relationships, mental health issues and substance / alcohol abuse issues. Women report a range of complex and multi faceted reasons for their involvement in prostitution: fund substance misuse, coerced, groomed, to support children. Women also report horrendous stories of the violence and abuse they have been subjected to and a third party reporting system is in operation with the Police Street Liaison Team. There is a huge crossover between involvement in prostitution and drug use and irrespective of women's reason for first becoming involved in prostitution drug use escalates once they are involved.

A specific consultation exercise was undertaken with a group of very vulnerable frequent Base 75 service users. It is particularly striking that 98% of them had ceased involvement in prostitution but had become involved again due to relapse coming out of prison / leaving rehab, debt, homelessness, funding other's habits, need for money and the negative influence of peer groups. By their own account women feel trapped in a situation they need support to escape from and whilst they value the non judgmental approach characteristic of Base 75 they are clear about the nature of support they need. When asked about any other help they would like to receive they identified addiction; alcohol counselling; benefits advice; debt advice; safe accommodation; mental health support; support to access college; education support; employment; support re children; opportunities for genuine friendships. It is the ambition of the redesigned service operating in the city centre and in Community Addiction Teams in CHCPs to enable women to access this help and support.

In Glasgow we have had a strong focus on supporting women involved in prostitution for over twenty years and we have seen how the reality of that involvement explodes the myths and stereotypes about prostitution. Prostitution is a form of commercial sexual exploitation privileging powerful interests and endangering women. We have seen the harm and damage it causes to the women whose bodies are bought, to their families, to communities and to our society.

We therefore very much welcome the developing focus on the purchase of sex. A senior Police Officer has warned about Scotland becoming the Bangkok of Europe and we believe that the amendment lodged by Trish Godman will enable the authorities to effectively challenge those who profit from prostitution. If supported it will send out a strong message that exploitation will not be tolerated in Scotland. Consequently, we strongly support the amendment lodged by Trish Godman.

Bridget Curran
Principal Officer Development, Children & Families
Social Work Services, Glasgow City Council
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Scottish Trades Union Congress

Introduction

The STUC is Scotland's trade union centre. Its purpose is to coordinate, develop and articulate the views and policies of the trade union movement in Scotland; reflecting the aspirations of trade unionists as workers and citizens.

The STUC represents over 640,000 working people and their families throughout Scotland. It speaks for trade union members in and out of work, in the community and in the workplace. Our affiliated organisations have interests in all sectors of the economy. Our representative structures are constructed to take account of the specific views of women members, young members, Black/minority ethnic members, LGBT members, and members with a disability, as well as retired and unemployed workers.

The STUC welcomes the opportunity to contribute to this short consultation at Stage 2 of the Scottish Parliament's Justice Committee scrutiny of the Criminal Justice and Licensing Bill.

As indicated in earlier correspondence to Committee members from STUC General Secretary Grahame Smith, the STUC is supportive of Amendment 8, as submitted by Trish Godman MSP.

Policy

The amendment seeks to create an offence of 'engaging in, advertising and facilitating paid sexual services'.

The STUC annual Congress 2009 called for *'the criminalisation of the purchase of sex, whether in public places or private clubs and brothels throughout the UK, as a means of tackling human trafficking, exploitation and violence against women'*

It is our view that tackling demand will reduce the exploitation of women, and reduce prostitution. Most women who are in prostitution are vulnerable, poor, and in bad health, many with drug and alcohol addictions. The STUC wishes to see investment in public services which can give appropriate support to women who are living with mental health problems, addictions, and in poverty, encouraging alternatives to prostitution. We have strong concerns that the worsening economic situation will expose more women to risk and harm through prostitution. Reducing demand is crucial.

The STUC would urge support for this Amendment to the Criminal Justice and Licensing Bill, in the context of that additional investment to support women exiting prostitution.

Violence against women should be tackled wherever it occurs, and seeking to remove the current legitimacy that surrounds the purchase of sex is to be welcomed.

This would give a clear message, not just within Scotland, but wider afield, which would make a positive contribution to reducing the trafficking for sexual services and the exploitation that is associated with that.

The STUC Women's Conference in 2008 raised strong concerns over the prospect of a significant rise in the commercial exploitation of women as the Commonwealth Games come to Glasgow in 2012.

Supporting this Amendment will give Scotland an appropriate legislative framework to address those concerns, and to continue to work across all agencies to tackle violence against women.

STUC
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Tamsin Groom, Sandyford, Glasgow

Comments on proposed amendments to sexual offences act regarding prostitution

Sandyford is a community sexual health service providing a holistic sexual health service to men, women and young people across Greater Glasgow and Clyde.

Part of our service includes providing support and sexual health care to women involved in prostitution at Base 75.

For many years we have provided a service to women engaging in prostitution both on and in off street locations.

We would agree with our partners and colleagues including Glasgow City Council, Glasgow Community Safety Services, TARA and Women's Support Project that prostitution is inherently harmful to the women (and men) involved in selling sex but I would like to make a few additional comments regarding the proposed amendments:

1. Engaging in paid for sexual activity

I would have concerns that this will also mean women and men that are involved in prostitution, once again making it easier to punish those involved rather than those who use and abuse.

This change would have the effect of making prostitution illegal and although perhaps seen as the ideal position by a number of agencies within Scotland it should be made clear that this is the case./aim of the Scottish Government.

2. Advertising paid-for sexual activities

Again although perhaps laudable this will punish those involved in prostitution and not those paying for it.

Given that much of Advertising is via the internet this will be extremely difficult to police/implement how can it be Scotland only? and it also means that those involved in prostitution are further hidden and open to abuse.

Why not fine those magazines and papers that advertise, and look at banning pornography.

3. Facilitating engagement in a paid-for sexual activity

Surely should be subject to more than a fine, coercing vulnerable young people and adults into prostitution should be a custodial sentence in my opinion.

4.Causing alarm etc. by engaging in a paid-for sexual activity
Uncertain what this would relate to?

Prostitution undertaken off street is unlikely to cause alarm so unsure who you are aiming to protect here.

Certainly those who find out their partners/relatives have been engaging in paid for sexual activity would experience alarm amongst a number of other emotions that would be difficult to legislate against.

I don't think you can legislate against concerns from neighbours but significant disturbances could be addressed via Antisocial behaviour/breeches of the peace as is the current position.

5. Profiting from coerced paid-for sexual activities
Anyone coerced into prostitution should be supported to exit and the perpetrators should have custodial sentences.

This could include traffickers… they should be subject to more that a £1000 fine.

Those running establishments where paid for sex takes place and allowing coerced sexual exploitation should also be subject to more that a fine.

I would support an amendment that looked at penalising anyone who is responsible for arranging or facilitating the prostitution or involvement in Pornography of anyone…not just those who are under 18.

These are my own comments and may not reflect the opinion of everyone within our organisation.

Tamsin Groom
Lead for vulnerable adults and consultant in sexual and reproductive health
Sandyford, Glasgow
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill - Stage 2

Written submission from Glasgow City Marketing Bureau

Offence of engaging in paid-for sexual activity (and related new offences)

Glasgow City Marketing Bureau is responsible for promoting the city at home and overseas and has an important role in terms of Scotland's tourism industry. We want Glasgow to be viewed as a city where all its citizens are treated with respect, equality and dignity and we believe that this cannot fully happen while prostitution continues to be tolerated and treated as an acceptable activity. We welcome the opportunity to write to the Justice Committee and overwhelmingly urge them to support Trish Godman's amendment which would create an offence of engaging in paid for sexual activity.

Summary of our position:

- We believe that prostitution is a form of violence against women and harmful for those that are involved and also for the communities in where it exists.

- We consider that prostitution exacerbates existing gender inequality as it is predominantly women who sell sex and men who buy. It is also unsatisfactory that at the moment within the indoor sex industry it is largely the sellers who are charged e.g. with brothel keeping or living off immoral earnings, whereby the buyers are treated with impunity.

- We think legislation would challenge the normalisation of the sex industry in Scotland.

- There is a clear link between prostitution, trafficking and organised crime.

- We think it is important that the law considers "facilitation" as part of the offence as this would help disrupt the organisers, pimps and traffickers who arrange the transport and accommodation for those involved in the sex trade.

- From a marketing perspective, it is clear that advertising for sexual services is widespread not only on the internet but in newspapers and magazines across the city. Although enforcing the legislation on advertising would not be without challenge, we believe that it would still be a crucial step in targeting those that profit, create and support the sex trade in Scotland.

- We believe that by putting the focus on the buyers of sex this may act as a deterrent and make men think twice before they purchase a vulnerable women. Tackling demand would send out the important message that Scotland rejects prostitution and the exploitation inherent in this industry.

We do not support amendments 8A-D (lodged by Margo Macdonald) or amendment 461 (lodged by Nigel Don).

Glasgow City Marketing Bureau
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Fun Times

Response to amendments 11a, 11b, and 11c of the Criminal Justice and Licensing Bill

I find it absolutely deplorable and completely shocking that members of the Scottish Executive would consider such draconian legislation as that proposed by amendments 11a, 11b, and 11c.

Myths. There are hundreds of myths about the industry, far too many to list here in this response. Many of these myths are the basis for amendments such as those proposed by Trish Godman. Below I have listed only a small number.

- Figures of the number of trafficked women of 4000/year. Proven wrong (see below).
- The "Job Description" published by "Safer Glasgow". These claims are blatantly untrue. To claim that every sex worker will be treated as the site claims is ludicrous to say the least. Workers in the sex industry are not penetrated the way this site claims. Payment is agreed in advance and paid up front, unlike the claims made on this site. Most other claims made by this site are completely untrue.
- The figures claimed by "Demand Change" are unlikely to be accurate across the whole sex industry. It always depends what questions were asked, and who were asked by the various agencies that produced the figures. I could ask a different sector of the sex industry the same questions, and come up with figures of less than 1% for each claim made. Never forget the quote "There are lies, damned lies, and statistics". The choice of statistics used may have been chosen to suit a particular agenda. Thus creating more myths about the industry as a whole, as opposed to giving a true and balanced view of it.
- Most sex workers are drug addicts. This may be accurate for street workers, but is most certainly not true for off-street workers. The numbers of off-street sex workers using drugs would be no higher than non sex workers in society.
- Sex workers carry and spread STIs. Sex workers in the main are some of the most aware people in the country about STIs, and will never risk infection of themselves or others. Many of the workers actively promote safe sex, not just within the industry, but out-with as well.

Demand. The demand for sexual services will never go away, irrespective of legislation. The sex industry has been around for hundreds, if not thousands of years, and even occurs in other species (but I'll stick to the human race). Legislation produced by nations and civilisations throughout the ages, has failed to eliminate demand, and in some cases even increased it. Why would some legislation from the Scottish Executive be any different? It will not.

Trafficking. Much has bee made of Trafficking south of the border in relation to the sex industry. Figures were published and used in the House of Commons of 4000 women trafficked into the UK each year with regard to the sex industry. This figure is still being published and used here in Scotland to try to push these amendments through. These figures were proven to be completely false. The Guardian proved beyond doubt that the figures quoted, and used to try to push through legislation at Westminster, were simply plucked from thin air, then hyped by MPs, radical feminists, the media and anyone else with an agenda. Thankfully, the House of Lords could see that the proposed legislation was wrong in it's earlier drafts. The figures used then, and now, were used on the premise of "If you repeat a lie often enough, and loud enough, it becomes the truth", well, not in the modern digital age it doesn't, and the Guardian has proven this. Ref: http://www.guardian.co.uk/uk/2009/oct/20/trafficking-numbers-women-exaggerated *[Link no longer operates]*

In actual fact, most trafficked people in the UK end up working in the building industry, on farms, in the fish processing industry, in catering, and in many other industries.

Trafficking does need to be stopped. These proposed amendments will do nothing to stop it, but will in fact increase it through fear of reporting it. Trafficking should not be used to try to force these amendments through, as Baroness Kennedy has just begun an investigation into the effects of trafficking in Scotland. The Executive should wait for the publication of the report.

Street Prostitution. This section of the industry is driven predominantly by drug addiction, mainly crack cocaine and heroin. Street prostitution could be virtually eliminated from the streets of Scotland by taking the correct approach to drug treatment of addicts, and education of our children and young people. This is the area where most good could be done by MSPs. Not only would street prostitution be drastically reduced, but also street robbery, house breaking, and numerous other drug related crimes will also see a dramatic drop. Is this not something the Executive would like to see? Of course it is, but the proposed amendments will never achieve this. Only a step change in drug policy will, not anti sex work legislation. Scotland could have the lowest drug related crime rates in the UK, if not Europe. It is an achievable goal, but these amendments will only serve to hamper any efforts made in this area by forcing the industry underground and into the hands of pimps, drug dealers, or other criminals. Street work is an area of prostitution is where the vast majority of abuse, robberies, physical attacks, rapes, etc take place. I talked recently to a serving police officer. This officer suggested that the ending of tolerance zones has made their job infinitely more difficult. Workers and clients now fear the police, instead of assisting them to reduce abuse, theft, rape, etc. The amendments proposed will make workers lives even more difficult, and much more dangerous than they are now.

Saunas/Massage Parlours/Escort Agencies. This is an area that some positive legislation could be applied. Agencies, saunas, etc, should be licensed and regulated. This will ensure the workers are treated properly, and fairly. A licensing scheme for them could easily be brought in allowing them to trade, and the rights of workers protected. The amendments proposed will push them further into the black economy, where workers could be exploited or abused. There are also tax benefits to regulation and licensing.

Independent Escorts. Independent Escorts create no problems at all for our society. Many of they are very well educated, some to degree level (take Dr. Brooke Maganti, writer of the book Belle De Jour, as an example). There's a site which was created by escorts, for escorts. The purpose of the site is to provide advice on a range of issues, including personal safety, warnings of dangerous clients, scams, health issues, and more. The escorts provide this resource free to all at their own expense. They are responsible professional people. They have entered the industry through personal choice, not through force, coercion, or any other method which was not their choice. The majority of them pay taxes, NI, etc. They don't solicit in bars, clubs, or on the streets. They are happy with the choice they have made, and are free to leave the industry any time they want to. Why force them out of business into low paid work, or onto state benefits? It makes no sense whatsoever. How many workers from other industries can work legally, but be banned from advertising, and all clients automatically become criminals for using their services?

Advertising. Banning the advertising of sexual services will be the most futile legislation that the Scottish Executive will ever have produced. You can only ban advertising from places within Scotland. A ban will do nothing to prevent workers advertising on websites and publications based out with Scotland, and out with the UK, such as one very well known US based one), and another very well known Belize based one. Workers who do not have direct access to sites like this will end up driven to unscrupulous, and possibly criminal people, to place adverts on their behalf. Those people then have the ability to control, manipulate, and possibly abuse the workers. A ban on workers placing adverts would be a huge backward step.

Disabled Clients. There are a significant number of disabled clients that use the services of sex workers. It is often the only form of intimate physical contact they get. Should they now be branded criminals for seeking something that is a basic human instinct? No, they should not, but the proposed amendments will make them criminals. Will any MSP be prepared to stand up and say it is right to deny disabled people this most basic of human needs?

The proposed amendments have been introduced at the latest point in time in an attempt to have them pushed though without proper debate, or consultation. These amendments have been ill though out. Introducing blanket bans (prohibition) to an area such as an industry so complex as the sex industry would be nothing short of wrong in every respect. The workers in the industry would be put at significantly more risk than they are at present.

No consideration of the health, safety, welfare, etc of the workers has been made with regard to these amendments. What are the reasons for bringing in such draconian legislation? I feel it is to appease the moral stance of MSPs, or to be "seen to be doing something" which in actual fact would be "out of sight, out of mind". Personal morals should never be a reason to introduce or alter any legislation. It could be a vain attempt to do what Westminster couldn't, without consideration for the workers affected. Scotland has perfectly ample laws to cover rape, abuse, harassment, trafficking, kerb crawling, etc. Our Police forces struggle to keep up with the existing laws through budgetary or operational reasons. There's no need for any new legislation.

Similar legislation was proposed in England and Wales, but the House of Lords stopped it. I urge the Justice committee to reject these amendments.

G. Alexander
Fun Times
14 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Scot-PEP

History and background

Scot-PEP was founded in 1989, as a self-help group run by sex workers for sex workers. In the 21 years that it has been in existence, it has worked across most sectors of the sex industry. For 15 years, it carried out the HIV prevention strategy of NHS Lothian as it affected female sex workers. It has also carried out projects funded by such as the National Lottery, Lloyds TSB Foundation for Scotland, Scottish Enterprise, the (former) Scottish Office, the Scottish Mental Health Foundation, the European Commission, World Health Organisation, UNAIDS and UNFPA. Other funders have included the City of Edinburgh Council and Lothian and Borders Police.

During that time, Scot-PEP has developed a reputation as one of the leading sex-work projects in the United Kingdom. Indeed, it has been used as a model for many similar projects throughout the country and beyond. Its Ugly Mugs scheme, which is an early warning system for sex workers to alert them about potentially dangerous clients and situations, was introduced in 1990. It has developed to the extent that it has been copied by many projects and police forces elsewhere.

Scot-PEP was also involved in establishing the Remote Reporting scheme for sex workers, which allows those who have been attacked to make reports to the police through them.

Both of these schemes have resulted in convictions which would not have been possible otherwise. They are a testament to the spirit and reality of co-operation which can, and does, exist, between sex-workers and the authorities.

We were part of the working group who developed Edinburgh's protocol on support for victims of trafficking and I have regularly attended and given evidence to the EU Expert Group on the Trafficking of Human Beings. We are members of the Global Alliance Against Trafficking in Women.

One of our Board members co-chairs the UNAIDS Advisory Group on HIV and Sex Work.

Above all, Scot-PEP has remained an organisation which is run for and by sex workers. As a user-led organisation, it has always been available to provide a listening ear to those in the industry, whether in crisis or otherwise, and to point them in the right direction when many agencies and other authorities make uninformed or moralistic judgements.

Response to the proposed legislation

Scot-PEP has always considered itself a non-judgemental organisation. Whilst there are times when it does become involved in ideological debates (and it has the resources to do so), it has always seen itself as a practical organisation. It deals with the realities of the sex industry.

It is in the spirit of that practical approach, and its experience and knowledge, that Scot-PEP wishes to put on record its extreme concern about the amendments tabled by Trish Godman.

Over the past 25 years there has been, according to local polls, what most people consider a pragmatic, practical and enlightened approach to the management of paid-for sex in Edinburgh. It is also worth noting that policing the sale of sex is more efficient and effective in such an environment, as can be seen by the Grampian Police publication on the policies they had devised for the management zone in the Aberdeen area.

The licensing of indoor establishments has made the job of support services (such as Scot-PEP) much easier, with a consequent positive effect on public health. Additionally, it has brought income to local councils in terms of Rates, and the Treasury in terms of V.A.T. and direct taxes. It reduced the level of criminality that was previously associated with those establishments. It has also helped in the protection of young people from under-age exploitation, as evidenced by a number of convictions over the years. Finally, it is also an important element in the combatting of trafficking.

To criminalise those who frequent these establishments will wipe away all of those benefits.

We also had, for a number of years, a so-called Toleration Zone operating in Leith. This was a zone where street-based sex workers could operate in a relatively safe environment, under principles established by and agreed with the local police. In terms of safety, access to services and co-operation with the police, it was a great success. It also helped to minimise the extent of pimping and involvement of other criminal elements. However, it was particularly notable that a community spirit grew between those who worked there, and the success of the Ugly Mugs Scheme grew. Many attacks were prevented as a result of this spirit, and many attackers brought to justice.

In December 2001, the Toleration Zone was abolished, as a result of the increase in development into residential areas of formerly dilapidated areas of Leith, the traditional working areas for those in street prostitution.

In the first year of there being no zone, reported attacks on street-based sex-workers increased ten fold. This was a direct result of women being forced to work in areas away from the former Toleration Zone, in poorly-lit and quiet back streets, thereby putting themselves at greater risk. It also made it more difficult for service providers to access the women, with a potential knock-on effect on the spread of HIV and associated illnesses. Finally, it helped to dilute the previous spirit of co-operation with the police, which of course made their job much more difficult when it came to tracking down attackers.

That was the first of what turned out to be a three-pronged assault, in our opinion, on street-based sex workers. The second came in the autumn of 2007, when Parliament introduced its kerb-crawling legislation. It is a matter of record that Scot-PEP opposed the introduction of such measures, as we expected that the threat to the safety of the women would be similar to that of the withdrawal of the Toleration Zone.

It was, and more so. The formerly traditional areas of working in Leith have been largely abandoned, in favour of more isolated and outlying places, chosen by clients to minimise the chance of being challenged by the police. In addition, because of pressure by clients to conclude a deal quickly in order to avoid detection, the women have less time to evaluate the client on first contact, thus exposing them to greater potential danger.

The effects on numbers are plain. In the calendar year 2006, there were 66 attacks reported to us and the police through our Ugly Mugs Scheme. In 2007, the year in which the kerb-crawling legislation was introduced, there were 126. In the first nine months of 2008 alone, there were 85. Due to our loss of funding, and consequent staff cuts, we do not have data for the period since then.

From discussions with women, we are aware that levels of violence and harassment continue to grow, but that women are still not reporting to police as they see the violence as “normal” and do not see the benefit of reporting crimes. We believe that this increase in violence is a direct result of the increasing marginalisation that we have described.

The legislation is now almost 2 and a half years old, and we are not aware of there having been many, if any, convictions. However, this should not be read as a sign that the law has been successful in eradicating street prostitution. Far from it. Sex-workers and their clients are simply becoming increasingly inventive in their attempts to avoid the law.

This is perhaps not the correct forum in which to raise this, but we would like to put on record our call for this particular legislation to be reviewed and evaluated, from all perspectives, as soon as possible.

We are now faced with the third wave of measures that was mentioned earlier. Based on our experience of the previous two, the proposed legislation will, in our opinion:

1. further disperse the outdoor industry, driving it further underground.

2. drive the indoor industry (licensed and unlicensed establishments, and independent escorts working through the internet) underground.

3. further increase the potential harm to those who work in it.

4. at a time when HIV and sexually transmitted infections among those with multiple partners, including sex workers, are on the increase, be a further threat to their spread.

5. increase the risk of infection of HIV and Hepatitis C for those sex-workers who are injecting drug-users.

6. increase the risk of the involvement of criminality within the sex industry, particularly in drug supply and people trafficking.

7. finally eradicate the co-operation that existed for a long time between those who work in it and those who would regulate it.

8. by denying sex-workers the ability to earn a livelihood, they are more easily drawn into areas of criminality.

The International Perspective

Michel Sidibe, Executive Director of UNAIDS, and Ban Ki Moon, General Secretary, have both in the last year called for the decriminalisation of sex work to enable universal access to HIV prevention, treatment, care and support for especially marginalised groups including female, male and transgender sex workers. The proposed legislation flies in the face of that humanitarian call.

The Swedish Model

There has been much talk in the media about the so-called “Swedish Model”, where the Government of that country has criminalised the purchase of sex. I would caution the Committee not to place any reliance on the claimed “success” of that initiative.

As far as we are aware, the legislation has yet to be evaluated, either by the Swedish Government or anyone else. We understand that there are plans to evaluate it later this year, but only in terms of how well the justice system has dealt with the legislation; there will be no evaluation of its impact upon the lives of sex workers or its “success” or otherwise in eradicating prostitution.

We have our own regular contact with sex workers in Sweden. Although, of course, their experience is anecdotal, they do tell us that the industry has not been eradicated. Any claims about a reduction in activity are dubious; all that has happened is that, as we have already experienced here, there has been an increasing marginalisation, with those working being driven out of sight. One cannot call that “success”.

Scot-PEP
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the City of Edinburgh Council

Amendment 8

The City of Edinburgh Council submits the following in relation to Amendment 8, relating to new offences of engaging in a paid-for-sexual activity, advertising a paid for sexual activity and facilitating engagement in a paid-for-sexual activity. The views outlined in this response are also relevant to consideration of amendments 8A- to 8D and consequential amendments 9 and 9A.

Response to current legislation

1. The Scottish Parliament has considered issues relating to prostitution in Session 1 and 2 via scrutiny of a private member's bill and the Prostitution (Public Places) Scotland Act 2007. Despite extensive consideration of available evidence proposing wider legislation, the legislative measures were limited to tackling the impact of kerb crawling. There did not appear to be sufficient support for wider measures such as those envisaged by the amendments. This may be because there is disagreement about how effective further criminal offences may be in reducing demand.

2. The Council is committed to responding to prostitution and associated problems by enforcement of the current legislation and providing support and routes out for women involved. Edinburgh's approach to tackling prostitution has evolved since the mid 1980's, providing an informal, unofficial and pragmatic response to the complex issues associated with street prostitution. This area is currently dealt with as part of broader community safety strategies.

3. Since the introduction of the 2007 Act the frequency and volume of complaints about antisocial behaviour associated with prostitution has reduced. The number of complaints last year was in single figures compared to approximately 4000 other antisocial behaviour complaints recorded citywide.

4. There are widely differing estimates of the number of women involved in prostitution within the city. The Edinburgh Community Safety Partnership allocated funding to projects for 'routes out' of prostitution during 2008 and 2009. The projects actively sought to engage with women involved in the sex industry or at risk of becoming involved. Overall the projects engaged with 108 women of which 72 had direct links with the sex industry.

5. Whilst supporting the need to reduce demand for paid for sexual activity, the Council strongly believes that there is no consensus currently for creating new offences as a means of tackling demand.

Proposed legislation

6. The Council is concerned that there is lack of evidence based analysis to justify the introduction of new offences as an “add on” to the proposed legislation. This route does not allow in-depth consideration of all the complex issues surrounding prostitution, in terms of demand, and reasons why women become involved.

7. Effective and detailed pre-legislative scrutiny can only be achieved as part of a Bill that deals with the totality and complexity of the issues associated with prostitution.

8. Where similar legislation, dealing with demand, has been introduced in other countries, the effectiveness of the legislation appears to be disputed*.* The Swedish approach is often cited in this context with, it is argued, positive outcomes. Research carried out for the Home Office suggests however there may be gaps in the evidence of the effectiveness of that legislation.

9. The Council would point out that in addition to criminalising the purchase of sex, the Swedish legislation decriminalised the supply of sex. The Council understands that there are no proposals to remove existing offences in relation to supply of sex for payment. In that context the Council would argue that direct comparisons with the Swedish approach are limited.

10. The Council would strongly argue effective consideration and potential legislation should consider:-

    - the complexity of the environment as a whole
    - the enforceability and effectiveness of potential legislation
    - the impact and costs upon Local Authorities, Police, Procurator Fiscal service and the courts
    - the most effective means of providing support for women seeking to exit prostitution
    - displacement of criminal behaviour and associated risks if new offences introduced, and how these issues should be dealt with
    - any alternatives available for challenging demand for prostitution services.

City of Edinburgh Council
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Andrew R Wilson

I am the editor of *SCOLAG Legal Journal*, a director of the Scottish Legal Action Group and a postgraduate student at the Law School of the University of Edinburgh. I write in a personal capacity in response to the call for submissions on the Stage 2 amendments to the Criminal Justice and Licensing (Scotland) Bill, specifically in respect to amendment number eight - Offence of engaging in paid-for sexual activity (and related new offences).

I wish to bring my strong objection to the proposals within Amendment 8 to the attention of the Committee. I object to the proposed provisions for the following reasons:

1. It is inappropriate to create these new crimes in such a manner;
2. Enacting the proposals would undermine the Rule of Law;
3. They lack a firm basis in empirical evidence;
4. The proposals are a retrograde step;
5. They unfairly discriminate against LGBT people;
6. They are an unwarranted interference with the right to a private life;
7. The supposed harm is better addressed outwith the criminal justice system;
8. The implications for the safety of sex workers and public health are unacceptable.

1. It is inappropriate to create new crimes in such a manner
It is not appropriate to create new crimes by way of a Stage 2 amendment to a wide-ranging Bill. Such a procedure may be utilised to close a loophole in the drafting of the Bill or address a lacuna in current law. However, to seek at Stage 2 to criminalise previously lawful behaviour unconnected with the Bill as it was introduced is simply wrong. To do so denies the people and the Parliament the opportunity of proper examination and consultation provided for at Stage 1. Indeed, it would go against the very spirit of open, inclusive and consultative democracy which devolution sought to deliver for the people of Scotland.

2. Enacting the proposals would undermine the Rule of Law
Amendment 8 seeks to create offences of what has always been lawful behaviour which the people of Scotland simply do not consider criminal. Deliberately enacting an unenforceable law brings Scots law and the Scottish Parliament into disrepute. Further, it undermines the very concept of the rule of law, central to which is the principle that the law must mean what it says. The longstanding prohibition of brothel keeping goes unenforced throughout Scotland because it is neither in the public interest nor supported by the general populace. Consequently, local authorities, police forces and the Crown Office effectively turn a blind eye to the prohibition. It is likely they would have little choice but to do the same for offences created by Amendment 8.

3. They lack a firm basis in empirical evidence

Public policy, especially in relation to criminal justice, should be firmly based on evidence. However, the prohibitionist lobby, which seeks to outlaw all commercial sex work, is not supported by sound evidence. Research cited in support of a prohibitionist line repeatedly fails on a number of grounds. Writing advocating prohibition is often predicated on ideological and/or moral presumptions which are infused with sexist assumptions of differences between male and female sexuality. Furthermore, focused primarily on street prostitution, much research and the prohibitionist stance itself, fails to recognise the diversity of commercial sex work and the marked differences that the various modes of work have on sex workers, clients, local communities and Scottish society. Research, evidence or testimony which refutes the contention that prostitution *per se* constitutes a form of violence against women is dismissed, sidelined or ignored.

4. The proposals are a retrograde step

The proposals within Amendment 8 would, if enacted, represent a retrograde step in public policy. They would in an instant reverse the slow progress made in public policy since the Wolfenden Report (1956-57 Cmnd. 247 *Report of the Committee on Homosexual Offences and Prostitution*). To date that progress has been a principled retreat of criminal law from the private sexual morality of consenting adults. That is not a policy which is only relevant to past decades. Rather it is one which continues to form the basis for progressive law reform, as is evidenced by the work of the Scottish Law Commission and the Scottish Parliament in drafting and enacting the Sexual Offences (Scotland) Act 2009.

5. They unfairly discriminate against LGBT people

The advocated prohibition of prostitution is not only heterosexist in failing to take account of LGBT people, it is inherently homophobic. Amongst others, it deliberately ignores and seeks to criminalise the male clients of male sex workers. Yet, by definition a commercial sex transaction between consenting males is not an act of violence against women.

6. They are an unwarranted interference with the right to a private life

Amendment 8 goes far beyond criminalising male clients of male sex workers and even female clients of male sex workers as a form of ‘collateral damage’. It fundamentally denies any sex worker the right to exercise personal autonomy in their private lives. With no sound evidence base, and the criminalisation of the clients of male sex workers, the provisions would constitute an unwarranted interference with the human rights of all sex workers and their clients.

7. The supposed harm is better addressed outwith the criminal justice system

Prohibitionists seek to outlaw all sex work on the grounds that it is part of the systematic inequality of women. The remedies to such structural problems that may be related with commercial sex work lie beyond the blunt instrument of the criminal justice system. They must be properly addressed through education, health and social services.

8. The implications for the safety of sex workers and public health are unacceptable

Enacting the provisions in Amendment 8 will not end commercial sex work in Scotland, for the same reasons and in the same way that the prohibition on brothels has not eradicated brothels from Scotland. Rather, these provisions would further endanger sex workers and public health, driving commercial sex work even further underground and putting sex workers beyond the reach of health and support services which they need and Scottish citizens wish them to have. For a committee of the Scottish Parliament, currently sitting in a city which has historically had a relatively high incidence of heterosexual HIV infection the negative implications of Amendment 8 for the provision of health services to sex workers and their clients should be a decisive factor.

Andrew R. Wilson
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from White Ribbon Scotland

In support of amendment 8

About White Ribbon Scotland

The White Ribbon Scotland campaign is for men in Scotland who want to end violence against women. Campaign supporters pledge ‘never to commit, condone or remain silent about violence against women.’ We are part of a global campaign of men and boys committed to taking action to stop violence against women through raising awareness of the issues and providing education and support for others to take action against men’s violence against women. Our focus is on involving men, but we welcome the support of women too. We work collaboratively with women's organisations and urge men to support their work.

Summary of our position

We are strongly supportive of amendment 8 lodged by Trish Godman and urge the Justice Committee to support it. Prestitution is a form of violence against women and its continued prevalence is a result of gender inequality. Current legislation reflects this and we wish to challenge demand for prostitutes by criminalisation of the purchase of sex. This would be a positive policy shift towards tackling the issue of prostitution and with adequate support provided for women to exit prostitution as well improved education of the harm caused by prostitution we can address this exploitative practice and go some way to addressing its normalisation.

Callum Hendry
White Ribbon Scotland
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill - Stage 2

Written submission from the Women's National Commission

Offence of engaging in paid-for sexual activity

I am writing to you as Chair of the Women's National Commission (WNC). The WNC is the only official, independent, UK organisation providing the views of women across the four nations to the Governments. We have over 550 partner organisations, many of whom work directly with women who have experienced violence. Our Violence Against Women (VAW) Working Group, chaired by Professor Liz Kelly, includes a long established group of academics, service providers and activists, who work across all forms of violence against women in each of the four nations.

The WNC welcomes the opportunity to write to the Justice Committee and **we overwhelmingly urge the Committee to support amendment 8 to the Criminal Justice and Licensing Bill (Scotland) as lodged by Trish Godman, which would create an offence of engaging in paid for sexual activity**, for the following reasons:

Prostitution is one of the clearest expressions of gender inequality in our society; the majority of women selling sex are women and the majority of people buying sex are men. This is not coincidental; the purchase of women's bodies is the result of the unequal distribution of wealth, power and opportunity in our society. We believe that prostitution is a form of violence against women and harmful for those that are involved and also for the communities where it exists. It is also unsatisfactory that at the moment within the indoor sex industry it is largely the sellers who are charged e.g. with brothel keeping or living off immoral earnings, whereby the buyers are treated with impunity. We believe that by putting the focus on the buyers of sex this may act as a deterrent and make men think twice before they purchase a vulnerable women. By tackling prostitution at the point of demand, the Scottish Government will be sending out a clear message that this exploitative industry is not tolerated in Scotland.

Between March – May 2009, the WNC was commissioned by the Home Office to carry out a series of focus groups with women to inform the development of the Violence Against Women and Girls Strategy (England). We consulted a diverse range of women, including women in prostitution. Their stories, which involve growing up in care, drug abuse, self harm, domestic and sexual violence, childhood sexual abuse, and many other complex issues, illustrated to us that many women's involvement in the sex industry was driven by necessity or deprivation. All of the women we spoke to said they would like help and support to exit prostitution.

> *"We're in no-man's land, constantly being judged. People in services are so judgemental, they ask us 'what do you do' – what do I say? I'm a crack-head, smack-head prostitute, what would you think? You wouldn't talk to me. And how do I get any other job? I've got a criminal record; I've been 5 years in prison, what's out there for me? I'm still young, but what help am I going to get now to get my life back on track? Nothing." (Still We Rise, 2009)*
>
> *"Abuse in childhood was what got me where I am now. I was put in care, into foster care, children's homes, a secure unit, everything changed for me then when I was 8." (Still We Rise, 2009)*[1]

By criminalising demand for prostitution and supporting women to exit prostitution, meaningful action can take place to challenge the normalisation of the sex industry in Scotland, which is having a negative effect on all women, and will lead to a change in social attitudes towards prostitution, as witnessed by other countries that have enacted similar legislation. For example in Sweden, which has legislated to criminalise the purchase of sex, there has been a marked change in public perception with 80% of the public now viewing prostitution as unacceptable, compared to 49% in 1999[2].

We also think it is important that the law considers "facilitation" as part of the offence as this would help disrupt the organisers, pimps and traffickers who arrange the transport and accommodation for those involved in the sex trade. There is a clear link between prostitution; trafficking and organised crime and strong legislation may also go some way to prevent an influx of trafficked women into Glasgow to meet the demand during the Commonwealth Games in 2014.

The continued growth of the sex industry continues to hamper efforts to reduce and prevent violence against women. Furthermore it legitimises the objectification of women's bodies, which has negative consequences for all women and poses a major obstacle for achieving gender equality in Scotland. From a marketing perspective, it is clear that advertising for sexual services is widespread not only on the internet but in newspapers and magazines across the city. Although enforcing the legislation on advertising would not be without challenge, we believe that it would still be a crucial step in targeting those that profit, create and support the sex trade in Scotland.

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[1] WNC (2009) 'Still We Rise: WNC Focus Groups Report to inform the cross-government consultation Together We Can End Violence Against Women and Girls', Home Office. http://www.thewnc.org.uk/publications/doc_download/418-still-we-rise-wnc-focus-groups-report-november-2009.html *[Link no longer operates]*

[2] See Ekberg, Gunilla (2005) 'The Swedish law that prohibits the purchase of a sexual service: Best practice for prevention of prostitution and trafficking in human beings'(update of article in journal of Violence Against Women 2004)

The WNC believes that the proposed amendments, if supported, could deliver a similar cultural shift in Scotland, which would drive us closer to gender equality, and ultimately to a fairer society in which all women and men can achieve their potential and live life free of abuse and violence.

We urge the Committee to support amendment 8.

Baroness Joyce Gould of Potternewton
Chair, Women's National Commission
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill - Stage 2

Written Submission from Open Road - NHS Greater Glasgow and Clyde

Amendment 8 (lodged by Trish Godman) proposes changes to the Sexual Offences (Scotland) Act 2009 to create three new offences – engaging in a paid-for sexual activity, advertising paid-for sexual activities, and facilitating engagement in a paid-for sexual activity, all to be subject, on summary conviction, to a fine of up to £1,000.

Open Road - NHS Greater Glasgow and Clyde supports amendment 8 as proposed by Trish Godman. Open Road is NHS Greater Glasgow and Clyde's service for men who are involved in prostitution, taking the strategic lead for NHSGGC on this issue, providing a frontline service for the men involved and translating our learning into service redesign for mainstream services.

Males involved in prostitution are one of the hardest to reach and most vulnerable groups of men in Scotland. The health outcomes for this group of men are poor, with drug and alcohol addiction, depression, suicidal ideation, attempted suicide and sexual ill health including risk of exposure to HIV and STIs frequently reported.[1,2] While Open Road would not subscribe to the notion of a "standard presentation" the issues presented by the men that have engaged with the service depict themes of early trauma, including:

- Childhood neglect and familial domestic abuse
- Direct emotional, physical and sexual abuse
- Experience of statutory residential care
- Early entry into homelessness services
- Experience of addiction to substances by self and/or carer/partner

It is with this in mind that Open Road believes prostitution to be exploitative and harmful. It is our belief that prostitution is a survival behaviour and should not be viewed as a sexual behaviour. As such, prostitution should not be confused and conflated with the right of an individual to participate in a mutually consenting and fulfilling private life. The core harm which prostitution creates is the psychological trauma of having to repeatedly submit to unwanted sex, which is in clear breach of the Scottish Government's national sexual health strategy, *Respect & Responsibility,* which endorses the World Health Organisation's definition of sexual health, namely:

> "[T]he possibility of having pleasurable and safe sex experiences, free of coercion, discrimination and violence. For sexual health to be

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[1] Connell, J. & Hart, G., An Overview of Male Sex Work in Edinburgh and Glasgow: The Male Sex Worker Perspective, Medical Research Council Social and Public Health Sciences Unit, Glasgow, 2003

[2] Cox, G. & Whitaker, T., Drug Use, Sex Work and the Risk Environment in Dublin, National Advisory Committee on Drugs, Dublin, 2009

> attained and maintained, the sexual rights of all persons must be respected, protected and fulfilled." [3]

This definition precludes the possibility of prostitution being contextualised as anything other than exploitative, harmful and at odds with the endorsement of the WHO definition. Further, if we are prepared to accept the psychological trauma of unwanted sex as the core harm, then we must also accept the reality that prostitution cannot be made safe. To eradicate the harm caused by prostitution, then the circumstances which allow prostitution to exist must be challenged.

Recognising the exaggerated vulnerability of the many men and women involved in prostitution, services should continue to offer support for men and women involved to reduce and ultimately exit from their involvement in prostitution, without fear of further disadvantage through their actions being criminalised. In the transaction between individual involved in prostitution and purchaser or organiser of sexual acts, it is the purchaser and/or organiser who has the choice of whether to exploit another person's vulnerability through coercive paid-for sex.

It is in this spirit that Open Road supports the amendment proposed by Trish Godman to place the criminal justice responsibility upon the purchaser and/or organiser, both for creating the demand for prostitution and for creating the central harm of causing coercive and unwanted sex. We would ask for explicit clarity in respect of whom the phrase "engaging in a paid-for sexual activity" refers to, with an understanding that it encompasses the purchaser and not the person involved in prostitution.

Similarly, we support the principle of creating an offence of "advertising paid-for sexual activities" and would again ask for explicit clarity in respect of whom this offence refers to. While it is in the public interest to challenge organised crime and the advertising of sexual contact venues and industries, we do not feel it is in the public interest to prosecute against lone men and women who are involved in prostitution and who have advertised themselves.

We would be happy to provide further detail in evidence of our support and participate in relevant debate regarding the proposed amendment.

Julian Heng
Service Manager, NHS Open Road
17 March 2010

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[3] Respect and Responsibility: Strategy and Action Plan for improving Sexual Health, Scottish Government, Edinburgh, 2005

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Scottish Women's Convention

The purpose of the Scottish Women's Convention (SWC) is to communicate and consult with women in Scotland to influence public policy. Through the Convention's policy work, round table and celebratory events the SWC strives to have contact with women and relevant organisations. The SWC aims to provide an effective way of consulting with a diverse range of women in Scotland.

The Scottish Women's Convention has a network of over 300,000 women from relevant organisations throughout Scotland.

This paper provides a response by the Scottish Women's Convention to the call for written evidence on Stage 2 amendments to the Criminal Justice and Licensing (Scotland) Bill

Amendment 8 lodged by Trish Godman MSP – proposed changes to the Sexual Offences (Scotland) Act 2009

This proposes to create 3 new offences:

- Engaging in a paid-for sexual activity;
- Advertising paid-for sexual activities;
- Facilitating engagement in a paid-for sexual activity.

SWC Submission

The Scottish Women's Convention offers strong support to the amendments proposed by Trish Godman MSP. Our organisation believes that the proposed amendments, which would make it an offence to engage in paid for sexual activity, will effectively deter a large number of men from buying sex. Recent research suggests that men would be reluctant to buy sex if there was a real threat of public exposure or criminal proceedings[1]

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[1] Women's Support Project - Challenging Men's Demand for Prostitution in Scotland - Page 28 - 69-79% of punters stated that they would be deterred by greater criminal penalties. Some of the men suggested that a combination of criminal sanctions and public exposure would be most effective. Apr 2008.

EAVES project - Men Who Buy Sex – 4.19 Deterrence – Being added to a sex offender register, prison or being publicly exposed. Higher fines, greater criminal penalties would deter these men from buying sex, if they were convinced that laws and penalties would actually be enforced. Dec 2009

The proposed amendments would also send out a strong message to those who profit from prostitution, i.e. pimps, traffickers and brothel owners - a message that says Scotland will challenge the exploitation of individuals bought for sex. The proposed amendments are a very positive and much needed approach towards eliminating the demand for prostitution that drives the supply.

In the longer term it also offers an opportunity to change conflicting attitudes in Scotland about "commericalised sex" and violence against women (VAW). The Scottish Government hope to change these attitudes as outlined in their publication "Safer Lives: Changed Lives". Prostitution is clearly included as part of a wide spectrum of behaviours that constitute male violence against women.

> "*Activities such as pornography, prostitution, stripping, lap dancing, pole dancing and table dancing are forms of commercial sexual exploitation. These activities have been shown to be harmful for the individual women involved and have a negative impact on the position of all women through the objectification of women's bodies."* [2]

It could be reasonably argued that most purchasers of sex in Scotland are men and most sellers of sex are women. The SWC believe the proposed amendments, if supported, would demonstrate a binding commitment by policymakers to the eradication all forms of violence against women.

The SWC strongly believes that the purchase of sex and the facilitation of paid-for sex contribute significantly to much wider gender exploitation. Too many women, working both on and off the street are subject to coercion, control and exploitation. By criminalising the seller of sex we attribute blame to those who are exploited while allowing those who buy sex to abdicate all responsibility for creating the demand for prostitution.

Furthermore, a core element of the eradication of VAW in Scotland is to educate young people in "respect and responsibility" and in doing so create a more equal society where respect is embedded in our culture. The SWC believe Scotland will not achieve this outcome whilst there are conflicting sexual behaviour messages about who is a victim and who is perpetrator or what constitutes abuse, violation or exclusion. This lack of consistency exacerbates the inequalities that force women to be exploited by selling sex and allow men to purchase it.

A number of those opposed to these amendments suggest that making it an offence to purchase sex will drive the "industry" underground and make women more vulnerable. The SWC would like to stress that we do not wish to place women at further risk of violence, persecution or exploitation and point to the Swedish Strategy as a way forward.

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[2] **4.1 Violence Against Women: A Definition -** "Safer Lives: Changed Lives - A shared approach to tackling violence against women in Scotland" (June 2009). http://www.scotland.gov.uk/Publications/2009/06/02153519/5

The criminalisation of the purchaser of sex has been in place in Sweden since 1999. The SWC believes that the noted success of the Swedish legislation is due to the structures which support the law in assisting women to find routes out of prostitution.

The Swedish Government have put in place a fully funded support mechanism whereby women are offered housing, healthcare, counselling and financial support which offers a route out of prostitution.

These interventions are critical to ensure those exposed to the exploitative nature of prostitution are able to exit their situation safely and with adequate support. It must be recognised that exposure to adverse circumstances and lack of support drive many into prostitution in the first place.

The overwhelming majority of women that the SWC have consulted with throughout Scotland do not concur with the view that it is an issue of choice for women to engage in prostitution - that selling sex is a choice freely made. Considerable evidence is available to support our participants' view that many young girls and women enter prostitution as a result of a critical lack of choice in their life.[3] In most circumstances it is only the buyer of sex who is exercising free choice.

Women have told the SWC they are willing to accept there is a very small minority in prostitution who stipulate they have chosen to sell sex. However, their view is that the vast majority of prostituted women have been exposed to multiple social and material disadvantages including homelessness, poverty and leaving the care system. Risk factors for entry into prostitution also include experience of physical and mental trauma as a result of domestic or child sexual abuse.

There was a strong indication in feedback that if it is unlawful to buy sex from someone under 18 years old it was equally unlawful to purchase it from someone over 18 years old, particularly as it was likely the seller had been forced into prostitution below the age of eighteen. Many women said that the high percentage of drug and alcohol misuse among those engaged in prostitution supports a view that it is not in any way a “chosen” career path or one that those providing sexual services feel is voluntary or desired.

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[3] http://www.fawcettsociety.org.uk/documents/Prostitution%20Factsheet%201.9.07.pdf

52% of women in street prostitution were under 18 when they first worked in prostitution.
Three quarters of women in street prostitution report being physically abused by their partners.
37% of women in prostitution have spent time in care.
22% of women in prostitution were homeless or living in temporary accommodation when they first sold sex.
74% of women in indoor prostitution, and 28% of those in street prostitution cite household expenses and supporting their children financially as their primary motivation.

For those who suggest free choice and lucrative earnings compels their desire to work in prostitution, evidence from the Tyneside Cyrenians “Hidden for survival” study (Feb 2008) found sex is sold for as little as £5 – the average price being £37. This SWC believe this suggests desperation forces the selling of sex not the expectations of a lucrative freely chosen profession.

Women have told the SWC that there is a worrying trend towards the normalising of sex work (for example jobs in massage parlours and lap dancing clubs being advertised in Job Centre Plus) and mainstreaming the “sex industry” through the internet and “clubs”. This is potentially grooming our young people to condone wider clusters of attitudes related to sexual behaviours that normalise and justify both gender inequality and gender exploitation. It is increasingly seen as normal for men to use prostitutes as part of a “boys’ night out” or attending international sporting events such as the Olympics and World Cup.

Women will continue to be subjected to exploitation and wider inequalities while male demand for financially procured sexual activity is viewed purely as a commercial transaction for “punters” and not a criminal offence. We therefore urge the Scottish Parliament to support Amendment 8.

The SWC do not support the two further amendments 8A – 8D lodged by Margo Macdonald

- Causing alarm etc. by engaging in a paid-for sexual activity and profiting from coerced paid-for sexual activities.

Nor do we support amendment 461 lodged by Nigel Don which creates an offence of paying for sexual services of a prostitute subjected to force etc.

It is the view of the SWC that prostitution is harmful to both the individual and society as a whole irrespective of whether the person is forced or not. In addition we believe that the burden of proving force or coercion would make such legislation unworkable.

Isabelle Lannon
Policy Officer, Scottish Women’s Convention
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from James Chalmers, University of Edinburgh School of Law

I wish to make a submission only in respect of the new offences relating to stalking. The amendment lodged by the Scottish Government seems at first sight preferable to that lodged by Rhoda Grant: it is more concise and easier to understand. It rightly avoids the need to prove actual fear in court in all cases. However, it gives rise to two concerns: it is too broad in one respect and too narrow in another.

First, I am concerned by the fact that the proposed offence could be committed merely by behaviour which is merely "alarming or distressing". A reasonable individual might be distressed, for example, by the sight of someone begging on the street, or a film or theatrical performance - even one which was advertised as distressing - but it would be an abuse of the criminal law to make begging an offence in this way, or to criminalise popular entertainment (even if only theoretically). This is particularly problematic because there is no "reasonableness" defence as there is in the amendment lodged by Rhoda Grant.

It is not appropriate for the Parliament to pass overly broad laws and then rely on police and prosecutorial discretion to prevent abuse: criminal offences should be narrowly drawn and should specify clearly what it is that should be covered. If the offence were restricted to conduct which would cause a reasonable person to "fear for the safety of any person" (i.e. if subsection (2)(b) were deleted), that would seem sufficient to meet the underlying aims of this legislation while avoiding the problem of overcriminalisation.

Secondly, the offence's use of the "reasonable person" standard gives cause for concern and may result in an overly narrow offence in some respects. Suppose, for example, that B is in some way more susceptible to being put in fear of harm - perhaps B has learning difficulties of some sort which have this consequence - and A chooses maliciously to exploit that sensitivity. Alternatively, suppose that A's conduct over time has resulted in B suffering psychological illlness and B is now more susceptible to fear. Under this definition, A could now exploit that psychological illness to put B in fear for his or her safety with impunity.

Even if the reasonable person might not have been put in fear, the fact that A has intentionally put B in fear for their safety should result in their conduct being covered by this offence. A better approach might be for the offence to cover intentionally or recklessly behaving in such a way as would put a reasonable person in fear for their safety, or intentionally putting a person in actual fear for their safety.

James Chalmers
Senior Lecturer and Director of Postgraduate Studies
University of Edinburgh School of Law
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Jan Beattie and Susan Devlin

Offence of engaging in paid-for sexual activity (and related new offences)

We welcome the opportunity to write to the Justice Committee and overwhelmingly urge them to support Trish Godman's amendment which would create an offence of engaging in paid for sexual activity.

Summary of our position:

- We believe that prostitution is a form of violence against women and harmful for those that are involved and also for the communities in where it exists.

- We consider that prostitution exacerbates existing gender inequality as it is predominantly women who sell sex and men who buy. It is also unsatisfactory that at the moment within the indoor sex industry it is largely the sellers who are charged e.g. with brothel keeping or living off immoral earnings, whereby the buyers are treated with impunity.

- We think legislation would challenge the normalisation of the sex industry in Scotland.

- There is a clear link between prostitution, trafficking and organised crime and strong legislation may go some way to prevent an influx of trafficked women into Glasgow to meet the demand during the Commonwealth Games in 2014.

- We think it is important that the law considers "facilitation" as part of the offence as this would help disrupt the organisers, pimps and traffickers who arrange the transport and accommodation for those involved in the sex trade.

- From a marketing perspective, it is clear that advertising for sexual services is widespread not only on the internet but in newspapers and magazines across the city. Although enforcing the legislation on advertising would not be without challenge, we believe that it would still be a crucial step in targeting those that profit, create and support the sex trade in Scotland.

- We believe that by putting the focus on the buyers of sex this may act as a deterrent and make men think twice before they purchase a vulnerable women. Tackling demand would send out the important message that Scotland rejects prostitution and the exploitation inherent in this industry.

We do not support amendments 8A-D (lodged by Margo Macdonald) or amendment 461 (lodged by Nigel Don).

Jan Beattie and Susan Devlin
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Glasgow Community and Safety Services

New offences relating to stalking

Glasgow Community and Safety Services coordinate and deliver on all work related to violence against women on behalf of Glasgow City Council including domestic abuse, rape and sexual assault and commercial sexual exploitation. GCSS are an active partner within the Glasgow Violence Against Women Partnership. GCSS services in relation to violence against women include ASSIST, Routes Out of Prostitution and TARA.

We are pleased to respond to this call for written evidence in relation to new offences relating to stalking.

The extent and seriousness of stalking in Scotland remains largely hidden, and is prosecuted under common law as a Breach of the Peace, sentencing options are limited and do not offer victims sufficient protection in law.

We would fully support the amendment proposed by Rhoda Grant (402). Stalking by its nature is a hidden crime and is often invisible to all but the intended victim. It is vitally important that we seize this opportunity to identify stalking as a specific crime. Stalking and harassment most commonly occurs within the context of domestic abuse and women experience these behaviours long after they have exited the relationship.

Domestic abuse occurs on a continuum that ranges from emotional abuse to murder and the escalation of abuse often follows a predictable pattern. It is imperative that the goal is to formulate responses that break the cycle of abuse through effective intervention at the earliest stages. Understanding the nature of domestic abuse can help prevent the further escalation of criminal activity, this includes stalking behaviour.

Opportunities for perpetrators to engage in this behaviour are often masked and disguised and it is vital that a clear message in law is send to perpetrators that their behaviour is visible and more so is a crime and one which the police, prosecutors and the courts will treat seriously and respond robustly to.

While there is no clear cut definition of stalking and harassment, the 2 terms are often used interchangeably. However stalking and harassment is generally used to describe planned, premeditated, intentional, repeated behaviour which causes fear, distress, alarm, upset and annoyance to the intended victim and severely impacts on their ability to function on a day to day basis for fear for their personal safety and wellbeing or that of their family and friends.

The vast majority of women experience stalking and harassment from current or former intimate partner. A variety of methods are deployed by the perpetrator to facilitate contact and these include **unwanted** text messages, visits, telephone calls, letters, and gifts. Perpetrators will also use a network of family and friends to stalk their intended victim. We are aware of one woman whose former partner was a taxi driver, he used his colleagues to report on the woman's whereabouts, on some occasions on an hour by hour basis. They also reported back to him any hires they had from her address, on one instance she reported that a male relative was quizzed rigorously by a third party on why he had been at that address and what his relationship was with the woman concerned.

With the growth of the Internet, the instances of online stalking are increasing. The Internet has become a useful tool for stalkers. The veil of anonymity allows the perpetrator to exercise power and control over the victim by threatening the victim directly or posting messages that lead third parties to engage in harassment and threatening behaviour toward the victim.

Similar to domestic abuse, victims who experience stalking do not report the first incident to the police and one study estimates that it is not until the 100th incident does the victim take any action. Often each incident is seen in isolation and the cumulative effect is not visible. It is therefore very difficult to prosecute under existing law.

The impact stalking has on its intended victim can never be underestimated. Stalking creates a psychological prison that deprives its victims of basic liberty of movement and security in their homes. Any allegation of stalking needs to be taken seriously as it is synonymous with increased risk of serious harm including murder.

Similarly we also support the amendment proposed by Kenny MacAskill (378). GCSS take the view that this is not an alternative to the stalking amendment as proposed by Rhoda Grant but provides additional teeth to common law Breach of the Peace. It is the experience of ASSIST that where an allegation/charge of a Breach of the Peace has been made but there is no other witness other than the intended victim, it is highly unlikely that there will be a successful prosecution as there is no public element. There is a reluctance by Sheriff's to accept that a Breach of the Peace has taken place if no one else was disturbed by the behaviour regardless of the impact it had on the intended victim. It is important that there are robust responses by the police, prosecutors and the courts and that offenders are held accountable for their behaviour.

We are also in support of the further amendments (399; 400;401) proposed by Rhoda Grant.

Glasgow Community and Safety Services
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill - Stage 2

Written submission from Glasgow Community and Safety Services on behalf of Glasgow City Council and Community Planning partners

Offence of engaging in paid-for sexual activity (and related new offences)

Introduction

Glasgow Community and Safety Services (GCSS) welcomes the opportunity to provide evidence to the Justice Committee and to strongly urge that Amendment 8 lodged by Trish Godman MSP, which would create new offences criminalising those involved in the purchase, marketing and facilitation of paid for sexual activity, is supported. This proposed change to the legislative framework in Scotland is a crucial step in addressing this harmful activity which blights the lives of individuals and families in cities, towns and rural areas across Scotland. We believe that the Scottish Parliament should recognise the inherent harm of prostitution to those involved, by focusing on the source of the problem – the men who buy vulnerable women and men in prostitution.

GCSS is a charitable organisation formed by Glasgow City Council and Strathclyde Police to prevent crime, tackle anti-social behaviour and promote community safety in the city. GCSS has specific responsibility for taking forward work on violence against women on behalf of the Council. Managing support provision for women involved in prostitution and women who have been trafficked for sexual exploitation provides a wealth of specialised knowledge on the issue of prostitution and trafficking and in particular the experience and needs of women.

There have been robust, strategic and well developed partnership arrangements in Glasgow to address the various issues of violence against women and children since 1998. Whilst this response has been drawn up by GCSS on behalf of GCC the views are shared across Community Planning partners in the city. It is also worth noting that Commercial sexual exploitation and trafficking are priorities within the City's Annual Strategic Safety Assessment.

Summary of our position

In 2009, the Scottish Government published "Safer Lives: Changed Lives" which recognises prostitution as a form of violence against women which has "been shown to be harmful for the individual women involved and have a negative impact on the position of all women through the objectification of women's bodies. This happens irrespective of whether individual women claim success or empowerment from the activity". We consider that the approach in "Safer Lives" firmly implies that the Scottish Government now have a clear duty to implement measures aimed to assist local authorities, community planning partners and the Police with tackling the demand for prostitution. Not only is prostitution harmful for those directly involved but the mainstreaming of the sex industry also has a broader cultural harm which normalises and condones sexual violence.

We believe that there are 3 key aims addressed by this amendment

1. Disruption of the sex industry

There is a clear link between prostitution, trafficking and organised crime and we believe that the proposed amendment would help disrupt the organisers, pimps and traffickers who profit from, create and support the Scottish sex industry.

2. Reduction of the 'market' by lowering demand

75% of women in prostitution became involved when they were under the age of eighteen. Source: Women's Resource Centre
http://www.wrc.org.uk/includes/documents/cm_docs/2008/s/statistics.pdf
[Link no longer operates]
Up to 70% of women in prostitution spent time in care. 45% report experiencing sexual abuse and 85% physical abuse during their childhoods. Source: Home Office (2004a). *Paying the Price: A Consultation Paper on Prostitution.* London: UK Government.

74% of women in prostitution identify poverty, the need to pay household expenses and support their children, as primary motivators for being drawn into prostitution. Source: Women's Resource Centre, *op cit*.

A comprehensive analysis of routes into prostitution identified that: Certain vulnerable groups of girls and women were more likely to become involved in prostitution; these were those who had suffered physical or sexual violence or neglect. This group were further marginalised by experiences that included running away, being in local authority care, being involved in crime, substance misusing and being excluded from education. These girls and women were then 'facilitated' into prostitution as a result of grooming by pimps or other procurers. Source: Matthews, R., (2008). *Prostitution, Politics and Policy.*

More than half of UK women in prostitution have been raped and/or seriously sexually assaulted and at least 75% have been physically assaulted at the hands of both pimps and punters. Source: Home Office (2004b). *Solutions and Strategies: Drug Problems and Street Sex Markets*. London: UK Government.

3. Promotion of a more positive attitude to the issue of prostitution and challenging the inevitability

Tackling demand for prostitution would have the important role of challenging current attitudes towards prostitution and send out a message that prostitution is not a normal, legitimate form of work or entertainment.

Evidence supporting the amendment:

- Research suggests that arrest of the purchaser may be the single biggest specific deterrent to buying sex. (*Wilcox et al) A rapid assessment of the literature as part of the Tackling Demand for Prostitution Review (Home Office, 2008).*

- Evidence in Sweden shows that criminalising demand has positive results with the Swedish Government describing a dramatic drop in the numbers of individuals involved in selling sex and the number of men buying services. Comparisons were made in 2004 by *Kasja Wahlberg, Detective Inspector at the National Police Board in Sweden and National Rapporteur for Trafficking in Human Beings* between Sweden, Finland and Denmark in relation to the number of women trafficked. It was estimated that between 400 and 600 women were trafficked into Sweden each year for sexual purposes. Estimates put the number in Finland as between 10,000 and 15,000 and Denmark as 5,500 to 7800. Sweden appears not to be an attractive destination country for traffickers. (*Give Prostitution the Red Light? A Question Time style debate on Prostitution in Scotland – Reform, Regulate or Reject, Equality and Human Rights Commission 2009).* Jonas Trolle, an Inspector with the Stockholm Police Trafficking and Prostitution Unit visited Glasgow in March 2008. He described how Sweden now has "significantly less prostitution than our neighbouring countries….we only have between 105 and 130 women – both on the internet and on the street active in prostitution in Stockholm today." Norway and Iceland have introduced similar legislation.

- Laws to tackle the demand for prostitution also have an impact on the social acceptability of the sex industry. Since Sweden introduced this legislation, there has been a marked change in public perception with 80% of the public now viewing prostitution as unacceptable, compared to 49% in 1999. Additionally, at the time of the change in legislation in 1999, it was estimated that 1 in 8 men bought sex. This is now estimated to be 1 in 14 men in 2009. *(Gunilla Ekberg, Former Advisor to Swedish Government on Issues of Prostitution and Human Trafficking)*

- This year England and Wales introduced measures to tackle demand in the Policing and Crime Act. Section 14 creates an offence of paying for sexual services of a prostitute who has been exploited or subjected to force by someone else. It is a strict liability offence whereby it is irrelevant whether the person who pays for sex is, or ought to be aware that the person has been exploited and whilst this is clearly a step in the right direction, we would urge the Scottish Parliament to go further and make a stand against this social evil. We believe that Section 14 may serve to exacerbate what we believe is a false distinction between "freely chosen" prostitution and the physically coerced trafficking of women and children. We believe that some forms of coercion are simply more visible than others. For example Liz Kelly in *Shifting*

Sands: A Comparison of Prostitution Regimes Across Nine Countries (2009) notes that "desperation for money – which can be linked to drugs, debt bondage, a controlling pimp, or material need – place women in contexts where they take decisions which compromise their safety or involve accepting exploitative conditions. They are not 'victims' in the narrowest sense of that concept: they are actively making choices. These choices, however, take place in situations not of their own choosing, and within which there are few, if any options". Glasgow has recognised, and responded to, prostitution as survival behaviour since 1999.

- The most recent analysis by the Home Office estimated that up to 4000 women in the UK had been trafficked for sexual exploitation and that the UK market in trafficked women was worth up to £275 million. The Home Office admits that this is likely to be a significant underestimate *(Home Office, Tackling the Demand for Prostitution: A Review, 2008).* We believe that if the proposed amendment was to be adopted now this would assist in the creation of a hostile environment for those viewing the Commonwealth Games in 2014 as an opportunity to increase their earnings through the sex industry.

- Advertising for prostitution is now at an overwhelming level on the internet, newspapers and in magazines. Ireland has adopted laws against advertising of prostitution and brothels. Vera Baird, Solicitor General and Harriet Harman MP have taken inspiration from this and are now proposing laws aimed at legislating against third parties profiting from the sex industry – namely newspapers. Trish Godman's amendment will be effective in prosecuting those directly involved in profiting from the sex industry and reducing the numbers of men paying for sex.

- The proposed legislative change would allow the Government to fully meet its obligations under Article 23 of the Council of Europe Convention on Action against Trafficking in Human Beings, which encourages ratifying states to adopt measures allowing the temporary or permanent closure of establishments used to carry out trafficking of human beings. We consider that there is scope within the Criminal Justice and Licensing Bill to widen Police powers through Amendment 8 so that at the same time as instructing a closure order on premises, those caught purchasing sex indoors would be penalised. This would bridge the gap that has been created in law by the Prostitution (Public Places) (Scotland) Act 2007, which has led to the unsatisfactory legal situation whereby buying sex indoors remains unchallenged and unpunished.

Our response to common objections:

- The most common misconception is that "criminalising the purchase of sex drives prostitution underground making it less safe for those involved". Although the very nature of the sex industry makes it covert, prostitution can never truly exist underground as if the punters are able to find the women selling sex, then so can the Police and those offering services to help exit prostitution. Prostitution can never be safe. Indeed evidence from Germany, in Liz Kelly's *Shifting Sands (2009)* report, where brothels are legal found that "more than three quarters (78%) had suffered physical violence while selling sex and almost two-thirds (63%) had been sexually assaulted (Bruckner and Oppenheimer, 2006). This is one of few studies to compare women in and outside the sex industry, finding higher levels of injury and health consequences – including problematic drug use – among women involved in prostitution. A key finding crucial to our response to this proposed amendment is that "the levels of violence sustained by women in prostitution are now widely acknowledged as disproportionate and whilst setting has some influence on its scale and seriousness, there is no evidence to date that any setting renders prostitution 'safe'".

- We firmly reject the notion of prostitution as a form of work. Normalising prostitution makes the abuse and exploitation invisible and turns pimps, traffickers and punters into business people and legitimate consumers. It fails to recognise the marginalisation and poverty which drives the majority of people into prostitution in the first place.

- It is clear from looking at the sex industry worldwide that prostitution is inextricably linked with organised criminal gangs and trafficking. In Amsterdam regulation of prostitution gave a green light for pimps and traffickers to operate. The Major of Amsterdam stated in 2004 that "the city's legal prostitution zone has become a magnet for traffickers and that the prostitution zone was unsafe for women. The zone has become a haven for traffickers and drug dealers and has not achieved its aim, to break the links between prostitution and organised crime" *(Melissa Farley, Prostitution and Trafficking in Nevada – Making the Connections, 2007).* In Sweden, the Russian mafia, through the Kemerovo group from Estonia has attempted to involve themselves in Sweden on three occasions. This group is the most powerful of the Russian Estonian mafia. In each case, the Swedish police has intercepted them. The Estonian Police confirm that this group has decided to no longer pursue Sweden due to it being a bad market for prostitution activities (as a result of the law) and because they were charged and prosecuted several times. *(Kasja Wahlberg, Detective Inspector at the National Police Board in Sweden and National Rapporteur for Trafficking in Human Beings)*

- The Women Support Project's research *Challenging Demand (2008)* which interviewed 110 men in Scotland about their experience of buying sex, found that several punters believed that prostitution could be justified as a form of "rape prevention". There is no evidence to support the theory that without prostitution to provide for men's sexual needs there would be an increase in rape. Rape rate statistics from the US raise the possibility that there may even be a positive association between legal prostitution in Nevada and higher rape rates in that state. Melissa Farley has highlighted that "Nevada's women are

> raped at rates that are twice that of New York and a fourth higher than the US average. Women are 3 times as likely to be raped in Las Vegas than New York. Men in the state tend to normalise sexual violence" (*Prostitution and Trafficking in Nevada – Making the Connections, 2007).*

We believe that the measures proposed by Trish Godman would not only reduce the demand to buy sex, but also make Scotland a less attractive destination country for traffickers and a more attractive place to live. However, more than just criminalising demand, we feel that the main impact of the proposed amendment would be to challenge attitudes and to send out a strong message that buying sex is not a harmless or acceptable activity. It is time to assign responsibility to where it belongs and put the focus on the demand. It is also clear that legislation is only part of the answer. It is important that attention is also paid to addressing inequality and promoting respect through education and prevention work with a particular focus on young people.

We do not support amendments 8A-D (lodged by Margo Macdonald) or amendment 461 (lodged by Nigel Don).

Glasgow Community and Safety Services on behalf of Glasgow City Council and Community Planning partners
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill - Stage 2

Written submission from the LGBT Domestic Abuse Project

In support of amendment 8 to the Criminal Justice and Licensing (Scotland) Bill

About LGBT Youth Scotland

LGBT Youth Scotland is a charity working towards a Scotland in which every lesbian, gay, bisexual and transgender (LGBT) young person is included in society, can grow up happy and healthy, enjoys a safe and supportive upbringing, and is able to reach their full potential.

LGBT Youth Scotland provides a range of services and opportunities for young people, families and professionals, which aim to increase awareness and confidence, and reduce isolation and discrimination.

LGBT Youth Scotland works towards this vision by mainstreaming LGBT equality into generic services, and through the provision of specialist services directly to young people. Direct youth work including youth groups, volunteering and outreach are key aspects of the organisation's activity as are policy, research and training work.

About the LGBT Domestic Abuse Project

LGBT Youth Scotland also house Scotland's innovative LGBT Domestic Abuse Project which is working to increase the visibility and awareness of LGBT people's experience of domestic abuse. We are working with mainstream service providers to enable them to support LGBT people experiencing domestic abuse to ensure that no matter what service they access they will receive a good response – in line with the Scottish Government's national training strategy on domestic abuse.

Our organisational position

We are strongly supportive of amendment 8 lodged by Trish Godman and urge the Justice Committee to support it.

We recognise that prostitution is a form of gender based violence which impacts on women and this must be addressed. Gender based violence is also experienced by Lesbian, Gay, Bisexual and Transgender people and our response is going to focus on that.

There is little information about the impacts of prostitution on lesbian, bisexual women and transgender men as there is little written evidence in terms of research, however we are aware that prostitution is a particular issue for gay men, bisexual men and transgender women.

The sexual orientation of lesbian and bisexual women will likely become invisible in any research around women involved in prostitution as their experiences of prostitution will be captured more broadly under the experience of women involved in prostitution. We are therefore unable to comment on whether this is an issue or not.

Studies carried out in Glasgow including **An Overview of Male Sex Workers in Glasgow and Edinburgh J Connell and G Hart 2003** highlight prostitution for gay and bisexual men and young people.

Some of the particular issues were related to their previous experience of abuse in the form of domestic abuse or childhood sexual abuse. Some young people were groomed into prostitution from an early age.

Young gay and bisexual men are particularly vulnerable to becoming involved in prostitution particularly when there is a lack of family and peer support, positive role models and not knowing what to expect of a same sex relationship. Some felt that they could affirm their sexual orientation through prostitution:

> *I wasn't listening to anybody, it's, like, 'no, this is my life!, I'm going to go out and do it (rent)'… it (renting) can be soul destroying, but it's also maybe the first adult choice you make and it can be a way of reaffirming yourself (your sexuality), if you are having to lie to your parents, lie to your friends 'yes, I'm straight, yes I'm straight'….*[1]

On the issue of choice, we believe that individuals who claim that this is activity freely chosen constitute a minority of individuals participating in this industry, and further note that women and men involved in prostitution often describe the activity as freely chosen as a coping mechanism:

> *As the majority of men saw no real viable alternative, or simply felt they had no choice, in selling sex, it was not surprising that their initial feelings surrounding sex work were ones of fear, apprehension and repulsion. Words frequently used to describe their initial experience of sex work included:* ***disgust; scared; threatened; nerve racking; worried.***[2]

There is little written evidence about transgender people involved in prostitution however anecdotal evidence would suggest that it is an issue for some trans women. Anecdotal evidence suggests that transphobia is a major factor which contributes to trans people getting involved in prostitution. For example, experiencing transphobia from neighbours and feeling that prostitution is the only route out to safer accommodation. Another factor is maintaining employment while experiencing transphobia from colleagues, this can therefore result in poverty which we know is a factor which can lead people into prostitution.

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[1] Pg 38 An Overview of Male Sex Workers in Glasgow and Edinburgh J Connell and G Hart 2003

[2] Pg 42 An Overview of Male Sex Workers in Glasgow and Edinburgh J Connell and G Hart 2003

It has to recognised that prostitution is an issue which affect LGBT people however there must be more research carried out to discover the full impact that prostitution has on the LGBT community.

LGBT Domestic Abuse Project
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill - Stage 2

Written submission from the Scottish Centre for Crime and Justice Research (SCCJR)

The amendments added at Stage 2 to the Bill are a cause for concern as they accelerate a trend of over criminalization and penalization in Scotland. Some of us have submitted more detailed comments on the mechanics of specific amendments, but in this brief statement we at the SCCJR are writing to express our consensus that these amendments, taken together, would make for an unwieldy, unevidenced and over complicated law. Enacting these amendments will create pressures to divert scarce resources into the justice system and thereby undermine the current strategies for securing community safety.

Additionally, by deleting the sections relating to the principles of sentencing, watering down the sentencing council proposals of the Scottish Prisons Commission, hardening the approach to breaches of bail and police undertakings, defining serious and organised crime so broadly, Scotland is not only losing its chance to do something progressive and bold in realising a more effective justice system, but it is adopting a reactionary stance to come up with a law that almost certainly will lead to net widening, penal expansion and worsening rates of reoffending.

Just as America, the world's most aggressive user of prisons, has begun to recognise the error of its ways in the face of a fiscal crisis caused by penal expansion[1], Scotland would take up such discredited practices as mandatory minimum sentences; imprisonment as the main strategy of managing breaches of bail, probation and parole; and wide ranging criminalization of behaviour much of which is already prosecutable under common law or existing legislation. The amendments to the law hence appear to us to lack foundation in evidence or logic.

We also raise a separate concern about the procedure by which these amendments were made. The amendments proposed here introduce a number of new offences (in particular on stalking, engaging in paid-for sexual activity and related offences, voyeurism etc). Irrespective of the general questions of whether or not these are appropriate areas for criminalization, we are particularly concerned that these amendments are introducing major new elements to the Bill at Stage 2. There is thus no opportunity for proper debate or thorough scrutiny of either the amendments individually or the Bill as a revised whole. The proper procedure for introducing such offences should be in a stand-alone piece of legislation or at a much earlier stage in the legislative process. As things stand there is a risk that the democratic process is being subverted. Our concern, therefore, is that this Bill is becoming increasingly poor law. For this reason we would strongly urge that the amendments introducing new offences be removed from the draft Bill and presented to Parliament in separate legislation.

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[1] Center on Sentencing and Justice (2009), *The Fiscal Crisis in Corrections: Rethinking Policies and Practices*, New York: Vera Institute of Justice; Pew Center on the States (2010), *Prison Count 2010: State Prison Populations Decline for First Time in 38 Years* (www.pewcenteronthestates.org).

The Bill as originally introduced proposed reforms to sentencing based on a review of Scottish penal policy which included a widescale review of the empirical evidence related to the impact of sentencing on the prison population and put forward proposals on the basis of this evidence. The reforms proposed were a coherent package which sought to implement these proposals. We are concerned that the proposed amendments not only dilute the original proposals, but run the risk of replacing a principled and coherent approach to penal policy with just the kind of muddled and incoherent approach to sentencing that was identified as having created the problem for penal policy. This cannot be the most appropriate way to reduce re-offending and secure safer communities in Scotland.

Submitted by:

Dr Sarah Armstrong (University of Glasgow)
Dr Andy Aitchison (University of Edinburgh)
Dr Monica Barry (University of Strathclyde)
Dr (University of Glasgow)
Prof Michele Burman (University of Glasgow)
Dr Liz Campbell (University of Aberdeen)
Prof Antony Duff (University of Stirling)
Prof Lindsay Farmer (University of Glasgow)
Prof Roisin Hall (Glasgow Caledonian University)
Prof Neil Hutton (University of Strathclyde)
Dr Claire Lightowler (SCCJR)
Dr Fiona Leverick (University of Glasgow)
Prof Gill McIvor (University of Stirling)
Prof Fergus McNeill (University of Glasgow)
Mr David Moran (University of Stirling)
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Dr Anna Souhami (University of Edinburgh)
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17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill - Stage 2

Written submission from CARE for Scotland

Amendment 8 *(lodged by Trish Godman) proposes changes to the Sexual Offences (Scotland) Act 2009 to create three new offences – engaging in a paid-for sexual activity, advertising paid-for sexual activities, and facilitating engagement in a paid-for sexual activity, all to be subject, on summary conviction, to a fine of up to £1,000.*

CARE welcomes this amendment as a positive step towards reducing commercial sexual exploitation in Scotland. Whilst we recognise that there are some people who identify themselves as being empowered through prostitution, we also recognise that the vast majority of people caught in commercial sexual exploitation are there because of negative push factors, some of which are mentioned below.

Demand for paid sex is increasing in Scotland and the rest of the UK[1]. Some may say *"So what? Although the idea of prostitution might offend the moral sensibilities of some, in a liberal society if adults agree to have sex on the basis that one pays the other this is really a private matter. There is no justification for state intervention."*

This argument sounds compelling but it overlooks an important fact.

The rationale for legal intervention is not to placate the foibles of enthusiasts for particular approaches to personal morality.

It is actually for the purpose of addressing inequality, lack of opportunity, poverty, homelessness, drug dependency and abuse of vulnerability. It certainly is not the place of the Scottish Parliament to be censorious but it is its responsibility to protect the vulnerable.

Commercial Sexual Exploitation in Scotland

As many as 70% of women involved in prostitution in the UK were drawn into prostitution, often by grooming, when they were children[2]. Up to 70% of women in prostitution spent time in care. 45% report experiencing sexual abuse and 85% physical abuse during their childhoods[3]. Individuals experiencing factors such as homelessness, living in care, problematic drug use, alcohol abuse, experience of violence and abuse in the home and debt are at particular risk of being drawn into prostitution[4].

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[1] H Ward et al, *Who pays for sex? An analysis of the increasing prevalence of female commercial sex contacts among men in Britain*. Sexually Transmitted Infections 2005; 81: 467-471. The proportion of men who reported paying for sex in the previous five years increased from 2% in 1990 to 4.2% in 2000. Given the growth of the sex industry since 2000, it would seem likely that demand will have continued to grow since 2000.

[2] Home Office (2004) *Paying the Price*

[3] Ibid

68% of women in prostitution meet the criteria for Post Traumatic Stress Disorder in the same range as torture victims undergoing treatment[5] More than half of UK women in prostitution have been raped and/or seriously sexually assaulted. At least three quarters have been physically assaulted[6].

The Association of Chief Police Officers in Scotland (ACPOS) estimates that Scotland has 13.5% of the UK's trade in human beings[7]. During Operation *Pentameter 2*, Scottish police forces raided over 50 premises in Scotland: 59 people were dealt with as victims of trafficking and 35 suspects were arrested.

Trafficking for the purpose of sexual exploitation is currently a high profit, low risk venture for those who trade in people. It has been reported that some drug trafficking gangs have switched to people trafficking as there is more money to be made and less risk of being caught[8]. A batch of heroin can be sold and used once but a human being can be sold and used again and again and again.

Conclusion

A reduction in the grooming, coercion and trafficking of so many vulnerable people must be reached. At present there is insufficient deterrent to gangs, traffickers, pimps and those buying sex in an off street context. Although Kerb crawling in Scotland was made an offence in the Prostitution (Public Places) (Scotland) Act 2007, at present there is no deterrent in the law to deal with demand in an off-street context. Until this root cause is addressed, a significant reduction in sex trafficking and other forms of commercial sexual exploitation will not be realised.

Whilst legislation which criminalises the payment of sexual services with someone who is under direct force is a good step forward, it does not protect people who may be in prostitution due to inequality, lack of opportunity, poverty, drug dependency or a history of abuse and grooming. If a person’s early experiences are shaped in such a way that there is little option other than engaging in prostitution, then even once they are away from the direct control of a pimp, the dominant influence of those experiences may still remain. It is important that the Justice Committee recognises this fact and accepts Amendment 8, which would work to protect all women, men and children who are being exploited through the sex industry.

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[4] Ibid

[5] Ramsay, R. *et al* (1993). *Psychiatric Morbidity in Survivors of Organized State Violence Including Torture*. 162:55-59, British Journal of Psychiatry and Farley, M Prostitution and Trafficking in Nine Countries: An update on Violence and Posttraumatic Stress Disorder, *The Journal of Trauma Practice*

[6] Home Office (2004) *Paying the Price*

[7] *Scotland's Slaves,* Amnesty International (August 2008)

[8] In 2002 at a meeting in Bangkok the Organisation for Security and Co-operation in Europe (OSCE) reported that one of the main factors the trade is rising is because traffickers feel there are fewer risks involved in trading humans compared with drugs.

CARE for Scotland
17 March 2010

Appendix: Current legislation

In March 2007, the then Scottish Executive Minister for Justice, Cathy Jamieson MSP, and Home Secretary Dr John Reid MP, launched the UK Action Plan on Trafficking. The Action Plan is a living document which sets out the Government strategy to tackle human trafficking in the UK.

The Council of Europe Convention on Action against Trafficking in Human Beings sets out measures to protect and give support to survivors of trafficking. The UK Government ratified the Convention on 17th December 2008 and has committed to giving a 45 day reflection period to rescued victims during which time they will receive safe housing, medical care and assistance.

Section 22 of the Criminal Justice (Scotland) Act 2003 introduced an offence for trafficking of persons into and out of Scotland for the purpose of sexual exploitation. However, the legislation did not cover trafficking within Scottish borders. There is a penalty of up to 14 years imprisonment for committing an offence of trafficking for sexual exploitation.

Prostitution itself is not illegal although activities surrounding prostitution in an on-street context are. The majority of legislation focuses on the individual in prostitution rather than the buyer although Kerb crawling was made an offence in the Prostitution (Public Places) (Scotland) Act 2007. Running a brothel is an offence under section 11 of the Criminal Law (Consolidation) (Scotland) Act 1995 as is procuring (pimping) under section 7. The majority of trafficked victims in prostitution end up in brothels and other premises rather than working on the street. Currently the law does not offer any deterrents to buyers in an off-street context. The present law passively and indifferently sanctions this aspect of the trade.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill - Stage 2

Written submission from Unite the Union

Offence of engaging in paid-for sexual activity (and related new offences)

Unite fully supports the amendment proposed by Trish Godman MSP which would create an offence of engaging in paid for sexual activity.

Summary of our position:

- We believe that prostitution is a form of violence against women and harmful for those that are involved and also for the communities in where it exists.
- We consider that prostitution exacerbates existing gender inequality as it is predominantly women who sell sex and men who buy. It is also unsatisfactory that at the moment within the indoor sex industry it is largely the sellers who are charged e.g. with brothel keeping or living off immoral earnings, whereby the buyers are treated with impunity.
- We firmly reject the notion of prostitution as a form of work. Legitimising prostitution as a normal job fails to acknowledge the marginalisation and lack of choices which results in women being drawn into the sex industry in the first place.
- There is a clear link between prostitution, trafficking and organised crime and strong legislation may go some way to prevent an influx of trafficked women into Glasgow to meet the demand during the Commonwealth Games in 2014.
- We think it is important that the law considers “facilitation” and “advertising” as part of the offence as this would help disrupt the organisers, pimps and traffickers, who profit from, create and support the sex trade in Scotland.
- Tackling demand for prostitution would have the important role of challenging current attitudes towards prostitution and send out a message that prostitution is not a normal, legitimate form of work or entertainment.
- We would like to see demand criminalised and women supported to exit prostitution, and more education for all to prevent prostitution from happening.

We do not support amendments 8A-D (lodged by Margo Macdonald) or amendment 461 (lodged by Nigel Don).

Unite the Union
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill - Stage 2

Written submission from the Scottish Justices Association

Amendment 402 grouped with Amendments 378, 399,400 & 401(new offence of stalking/threatening, alarming or distressing behaviour);
Amendment 10 grouped with Amendment 10A (sentencing for knife crime);
Amendment 8 grouped with Amendments 8A-8D, 9 & 9A (new offences in relation to paid-for sexual activity)

Preliminary

1. The Scottish Justices Association (SJA) is glad to receive the opportunity to provide written evidence on the above Amendments. However, it regrets the brief period allowed for the production of such comments.

2. Also, it suggests that, where new criminal offences are contemplated, in the absence of an emergency, they are better introduced into a Bill at the initial stage, after consultation, and with reference in the Policy Memorandum and Explanatory Notes, to allow fuller discussion.

New offence of stalking/threatening, alarming or distressing behaviour

3. It will be recalled that the previous Scottish Executive undertook a Consultation on stalking and harassment a few years ago[1]. This considered four options, one of which was "to introduce a more radical, new statutory offence to deal specifically with stalking and harassment"[2]. The arguments for and against were canvassed[3], and it noted that "a statutory offence might reduce the flexibility offered by the common law without obvious compensation"[4]. It also observed that there was difficulty of definition, for "[a]ny definition would have to be drawn very generally if it were not to exclude a wide range of [objectionable] behaviour"[5], and questioned whether any difference would be made in practice and whether any benefits would be "substantive or presentational"[6].

4. The Consultation concluded that "the case for creating a new offence is not clear-cut" and that "the Scots common law [of breach of the peace, and of uttering

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[1] Scottish Executive *Stalking and Harassment Consultation Paper* (2000) ("*Stalking and Harassment Consultation*").
[2] *Stalking and Harassment Consultation,* para 25.
[3] *Stalking and Harassment Consultation,* paras 40-47.
[4] *Stalking and Harassment Consultation,* para 45.
[5] *Stalking and Harassment Consultation,* para 45.
[6] *Stalking and Harassment Consultation,* para 47.

threats] appears to enable the court to deal with the relevant type of offending behaviour and, if appropriate, hand down severe penalties”[7].

5. This conclusion was re-inforced by the research commissioned thereafter[8], which found that “there is little enthusiasm among practitioners (**or victims**) for a change in current legislative arrangements”[9] (emphasis added). It concluded that more effective use of “breach of the peace” by police and procurator fiscals was the appropriate way forward[10].

6. It may be that the redefinition of “breach of the peace” arising out of the line of cases including *Smith v Donnelly* 2001 SLT 1007, *Paterson v HM Advocate* 2008 SLT 465 and *Harris v HM Advocate* 2009 S.L.T. 1078 means that the offence might not cover some examples of the behaviour in consideration. There is also certainly a “fair labelling” argument that the inherent vagueness of “breach of the peace” should be departed from. But, particularly because the conclusion of the Consultation was against new legislation, and the subsequent research agreed, it is suggested that, if a new offence is proposed, it should be preceded by consultation in advance of a Bill, rather than at Stage 2.

7. In any case, important drafting problems remain for, as the Consultation Paper remarked “What do we mean by stalking or harassment? There are no clear-cut definitions ...” [11]. There are precedents for a definition, in that the Protection from Harassment Act 1997, s8, permits civil “non-harassment” orders (breach of which is an offence, incidentally), and the same Act, in s1, creates an offence of “harassment” in England and Wales (though interestingly, the definitions of harassment for these purposes are not identical). However, neither Amendment 408 nor Amendment 378 follows either of those precedents (though clearly some phrases have been picked from them), and a multiplicity of different definitions is of itself unfortunate. (It is also worth noting that the Draft Criminal Code for Scotland[12] includes offences of “violent and alarming behaviour”[13] and “intrusive and alarming behaviour”[14] which appear likely to cover the behaviour in question, and might be considered).

8. Both Amendments are drafted in considerable detail. It is not possible or appropriate to make detailed drafting suggestions. However, it is suggested that

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[7] *Stalking and Harassment Consultation,* para 45.

[8] S.Morris, S.Anderson & L.Murray *Stalking and Harassment in Scotland* (Crime and Criminal Justice Research Programme, Research Findings No. 676/2002) (Scottish Executive), 2002 (“*Stalking and Harassment Research*”).

[9] *Stalking and Harassment Research*, p3 (“Conclusions”).

[10] *Stalking and Harassment Research,* pp3-4 (“Conclusions”).

[11] *Stalking and Harassment Consultation*, para 4.

[12] E.Clive, P.Ferguson, C.Gane and A.McCall-Smith *A Draft Criminal Code for Scotland* (SO 2003) (“*Draft Criminal Code*”).

[13] *Draft Criminal Code*, s49.

[14] *Draft Criminal Code*, s50.

the Amendment 402 (“stalking”) offence may preserve the vagueness of “breach of the peace” insofar as it can turn in part on the concept of “physical or psychological harm” (subsection (2)(c)(i)) caused by a course of conduct which the alleged perpetrator “ought, in all the circumstances to have known ... would be likely to cause such harm ...” (subsection (4)). The approximate equivalent in the Amendment 378 offence may be preferred insofar as it rests on the concepts of “fear for the safety of any person” and being “alarmed or distressed” (subsection (1)(a)(i),(ii)).

9. On the other hand, the former restricts itself to the effect on the complainant, whereas the latter includes “fear for the safety of **any** person” (emphasis added), and the alleged perpetrator’s “behaviour [need not be] directed at anyone in particular” (subsection (3)(a)), and need not “actually [cause] anyone fear, alarm or distress” and can be “in public or private” (subsection (3)(c)(i),(ii)).

10. In short, detailed consideration of either version (and of the further relevant Amendments) is necessary to reasonably ensure that the proposed offence reasonably accurately hits its target (though, given the debate as to what is meant by “stalking” or “harassment”, touched upon in the earlier Consultation, this exercise is made more difficult uncertainty as to what the precise target of either proposal actually is).

11. The SJA concludes that, although it is by no means unwelcoming of a new offence of broadly this nature, in the absence of an emergency, these proposals should be put out for full consultation.

Minimum sentence for knife crime

12. Both amendments seek to impose a minimum sentence on conviction of an offence under s49 of the Criminal Law (Consolidation) (Scotland) Act 1995 by a person of 16 or over. One would make the minimum 6 months “unless the court is of the opinion that there are exceptional circumstances relating to the offence or the offender which justify not doing so”. The other would make it two years “unless the court, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction and thinks fit to order the offender to be imprisoned for a shorter period or not to order the offender to be imprisoned”.

13. Minimum sentences can be seen to be, in principle, inappropriate , even when accompanied by “exceptional case” provisions. This is because they tend to reflect feeling in relation to high profile cases, and possibly because they assume that mimima constitute a deterrent. High profile cases are, of course, almost certainly atypical, and mean that either the minimum operates on cases which were not envisaged, or the “exceptional case” provisions have frequently to be

invoked. Whether minimum sentences are in practice a deterrent is an empirical question, and it is not known if any studies suggest that such a minimum would have any effect in cases of this type.

14. In any case, as it is likely that the Sentencing Commission will be set up in the near future, and its guidelines will be produced after input from the Government, minima introduced now will be a hindrance to its activities.

15. The SJA therefore considers that neither version of the amendment should become law.

Offences in relation to "paid-for" sexual activities

16. A number of broad approaches to the law on prostitution are possible. One is that prostitution is immoral, and should therefore be suppressed by criminalising it. Another is that it may be immoral, but ineradicable, and criminalisation, by driving it underground, creates risks for those involved in it so great that while some associated activities might be criminalised, prostitution itself should not. A third is that, again it may be immoral, but ineradicable, and it impinges upon most people as a form of nuisance. A fourth is that prostitution is an acceptable activity and might be regulated, but should not be otherwise criminalised.

17. The fourth of these broad approaches is unlikely to be adopted in Scotland in the foreseeable future. Policy has in general swithered uneasily between the third and second approaches, which explains the non-criminalisation of prostitution itself, and the nature of the related offences described below, including their curiously *ad hoc* appearance in different pieces of legislation. The first has not been tried for some centuries.

18. At present, prostitution is not an offence, either for prostitute, or client, but there are related offences of:

(i) soliciting and importuning (as defined) for the purposes of prostitution by a prostitute in a public place (as one of a number of "Offences of annoying, offensive, obstructive or dangerous behaviour")[15];
(ii) soliciting or importuning by a man "for immoral purposes"[16] (as an offence of "Trading in prostitution and brothel-keeping");
(iii) reverse soliciting (as defined) by a potential client in a public place (as an "Offence related to prostitution")[17];

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[15] Civic Government (Scotland) Act 1982, s46.
[16] Criminal Law (Consolidation) (Scotland) Act 1995, s11(1)(b).
[17] Prostitution (Public Places) (Scotland) Act 2007, s1(1).

(iv) living on the earnings of male[18] (as a "Homosexual offence") or female[19] prostitution (also as an offence of "Trading in prostitution and brothel-keeping"); and

(v) arranging the arrival in, or departure from, the United Kingdom of an individual, "intend[ing] to exercise control over prostitution by the individual or to involve the individual in the making or production of obscene or indecent material" (as an offence of "Traffic in prostitution, etc")[20].

19. Thus, there is a case for consolidation of such offences. However, while the proposed Amendment 8 appears to include all of the above, it not only alters the drafting by replacing terms such as "solicit" and "importune" with "advertise", "facilitate" (and possibly "engage in"), by using the very phrase "engage in", it also appears to include prostitution itself. This would constitute a major change of policy.

20. Moreover, it does not appear that the "paid for sexual activities", "advertising paid for sexual activities", or "facilitating paid for sexual activities" are required to be in public, as is presumably implicit in the aim of criminalising prostitution, as such. Apart from any other consideration, this raises questions of enforceability.

21. It is also noticeable that, while the details of what constitutes payment are dealt with extensively (ss 11A(2), (3)(a),(b), 11C(2), (3), (4)(b)), Amendment 8 turns on the phrase "sexual activity" without actually defining it. Admittedly, the existing offences do not define "prostitution", but "sexual activities" seems a good deal broader, including, for example, kissing, so it is not clear what activities are intended to be covered.

22. (Incidentally, Amendment 8B would create an offence of "profiting from co-erced paid-for sexual activities", which may already be covered by "facilitating engagement" in the proposed s11C. However, Amendment 8A would extend coverage by including "Causing alarm etc. by engaging in paid-for sexual activity").

23. Thus, the SJA concludes that any proposed amendments of this kind should again only be preceded by proper consultation.

The Scottish Justices Association
17 March 2010

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[18] Criminal Law (Consolidation) (Scotland) Act 1995, s13(9).
[19] Criminal Law (Consolidation) (Scotland) Act 1995, s11(1)(a).
[20] Criminal Justice (Scotland) Act 2003, s22.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Women's Support Project

Amendment 8

The Women's Support Project takes the view that in a Scotland that strives towards equality and human rights, it is not acceptable to condone or ignore the exploitation of women (and men) in prostitution. Condoning or accepting prostitution undermines work on gender equality and on violence against women. What sense could we make of work against rape, sexual harassment at work, stalking and underage sex if men can simply buy these activities through prostitution?

We therefore support Amendment 8 (lodged by Trish Godman), which proposes changes to the Sexual Offences (Scotland) Act 2009 to create three new offences – engaging in a paid-for sexual activity, advertising paid-for sexual activities, and facilitating engagement in a paid-for sexual activity. We believe that this legislation will empower the authorities to effectively challenge those who profit from prostitution, i.e. pimps, brothel owners and traffickers. Equally importantly it will send out a strong message that exploitation will not be tolerated, and in the longer term this will change attitudes towards 'paid-for sexual activity' and so reduce the demand from men to buy sex in prostitution.

We do not support amendment 8 (8A-8D, lodged by Margo Macdonald), which proposes the addition of two further offences – causing alarm etc. by engaging in a paid-for sexual activity and profiting from coerced paid-for sexual activities. Nor do we support amendment 461 (lodged by Nigel Don) which creates an offence of paying for sexual services of a prostitute subjected to force etc, Our view is that prostitution is inherently harmful, irrespective of whether the person is forced and this is what must be addressed – not whether it causes "alarm" to a third party. In addition we believe that the burden of proving 'force' or coercion would make such legislation unworkable.

Background

The Scottish Government includes prostitution and other forms of sexual exploitation in the spectrum of male violence against women (see for example 'Safer Lives: Changed Lives. A shared approach to tackling violence against women in Scotland')

Women become involved in prostitution for a variety of reasons such as homelessness, child sexual abuse, mental ill health, trauma, previous sexual violence, drug and alcohol misuse, money pressures and poverty. These factors, which serve to lead or force women into prostitution, should not be mistaken for the cause of prostitution itself, which is the *demand* from men to buy sex. If men were not prepared to buy sex, then prostitution would not work as survival behaviour.

Once the factors behind women's involvement in prostitution are understood it makes no sense to label prostitution as work or legitimate employment – to do so would legitimise exploitation. Neither, if we accept prostitution as exploitation, is it fair to criminalise those who are abused and exploited – in what other area of 'violence against women' would we criminalise the victims?

We are aware of individuals and organisation who defend a woman's 'right to choose prostitute', but in our experience such women represent a *very* small minority and are not representative of women involved in prostitution, either in Scotland or globally. We do not view prostitution as a choice for women, irrespective of age, and believe that it is contradictory to condemn child prostitution whilst condoning or ignoring adult prostitution. Neither do we recognise the false distinctions between forced and so-called 'free' prostitution.

It is estimated that approximately 1 in 10 men in the UK has bought sex – in other words approximately 9 out of 10 men have *not* bought sex. Why should vulnerable women (and men) be abused in prostitution in order to satisfy this minority interest?

Demand and Supply

Prostitution is essentially a market, driven by the demand from men to buy sex in prostitution. As Professor Donna Hughes has written:

"Prostitution is not natural or inevitable; it is abuse and exploitation of women and girls that results from structural inequality between women and men on a world scale.

The global sexual exploitation of women and girls is a supply and demand market. Men create the demand and women are the supply. Cities and countries where men's demand for women in prostitution is legalized or tolerated are the receiving sites, while countries and areas where traffickers easily recruit women are the sending regions. "http://www.uri.edu/artsci/wms/hughes/demand.htm

The negative impact of prostitution

There is much evidence to show that prostitution is harmful to women directly involved, women in general, to men who buy women in prostitution to families and to communities:

The negative impact of prostitution on men is often overlooked. Our Scottish research study found that 25% of men who had bought sex in prostitution expressed "*significant* regret or shame" about having done so. Challenging Demand 2008.

"I felt guilty. I had used her. I classed it as bad as rape"

This indicates that buying sex can have a significant negative impact on men's sense of self worth and self-esteem in the longer term.

The research noted that 41% of the men interviewed had been with a friend or groups of friends on the first occasion when they bought sex, and that in some instances this encouraged the man to buy sex, whilst in others it led to men being coerced or pressurized.

"There was an atmosphere of all the lads egging each other on. One in particular was a virgin and seemed like he didn't want to do it but all the guys pushed him into it and he did it."

"There was pressure to go along with the guys. It was a common experience for young guys, for their 16th or 18th birthday."

"I've always wished I hadn't and just pretended to my friends that I'd done it."

The research also noted links between sports events, including football, and abuse of women in prostitution.

One punter mentioned that he had taken Viagra before visiting a brothel, because *"I wanted to do (my football team) proud."* Another said, *"It was a celebration – our team won – and we thought let's go and get laid."*

Popular culture, including music, film and 'lad's mags' normalises sexual exploitation and sends out the message that it is 'harmless fun'. We do not wish to see young men fall for this message, only to regret it later in life.

"It's sleazy, you feel bad afterwards, maybe not that night. It's just using someone and messing with their feelings. I wouldn't advise it."

"It's nothing other than a release, an expensive one. It's a bit degrading on both accounts. It's an empty experience."

There is ample evidence to highlight the negative impact of prostitution on women, families and communities. Prostitution is harmful in and of itself, i.e. the constantly repeated experience of submitting to *unwanted sex* is very damaging to women's mental health, self-esteem and sexuality.

- Having to endure *unwanted sex* leads to the need to dissociate – often using drugs and/or alcohol. Whatever the reason for women entering prostitution, her drug and alcohol use is likely to hugely increase.
- Many women involved in street prostitution do not have care of their children (usually as a consequence of drug and alcohol misuse). This has a strong impact on the women themselves and is a common issue they need support on through services. It also has an impact on the children, the extended family, for example grandparents bringing up grandchildren, and on child protection services.
- Only 19% of women prostituted in flats, parlours and saunas are originally from the UK www.eaves4women.co.uk/POPPY_Project/POPPY_Project.php
- 3 out of 4 women in prostitution become involved aged 21 or younger, and 1 in 2 aged 18 or younger www.cwasu.org/
- 87% of women in street-based prostitution use heroin www.homeoffice.gov.uk/rds/pdfs04/hors279.pdf *[Link no longer operates]*
- 75% of children abused through prostitution had been missing from school
- As many as 85% women in prostitution report physical abuse in the family, with 45% reporting familial sexual abuse. 'Paying the Price' *[Link no longer operates]*
- In the UK as many as 60 women involved in prostitution have been murdered in the last 10 years. 80,000 women work in 'on-street' prostitution in the UK. The average age women become involved being just 12yrs old. 'Paying the Price' *[Link no longer operates]*

Options for responding:

Harm Reduction. Work with women currently involved in prostitution needs to include harm reduction as a necessary response for the short term - but we also should be working to end prostitution forever. Harm reduction must be coupled with interventions to support women leave prostitution, which can often take many years. These interventions need to offer safe accommodation, drug treatment, robust counseling and support services, opportunities for women to develop their confidence and self esteem, learn new skills and training for future employment.

Decriminalisation. It is important that any move to decriminalise prostitution comes from the principle that prostitution is harmful and therefore must be ended. All forms of prostitution should be included, especially street prostitution as this is where many of the most vulnerable women are exploited.

In order to be effective, the decriminalisation of prostituted women ***must*** be preceded or accompanied by: criminalisation of third parties profiting from prostitution; criminalisation of buyers of sexual services; adequate resources to help women get out of prostitution; public education work to reduce the demand from men to buy sex

We urge the Scottish Parliament to support Amendment 8 and by doing so move towards a fairer Scotland for all.

Jan Macleod
Senior Development Officer
Women's Support Project
15 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Association of Chief Police Officers in Scotland

I refer to your correspondence dated 4 March 2010 in connection with the above subject, which has been considered by members of the ACPOS Crime and Criminal Justice Business Areas, and can now offer the following by way of comment.

New offences Relating to Stalking

The existing dominant strategies in tackling Domestic Abuse are victim-centred. While this remains an essential factor, effective impact on Domestic Abuse, and particularly stalking behaviour, cannot be borne from such isolation. Boundaries must be expanded upon to allow for the efficient targeting of its perpetrators.

The amendments proposed by both Rhoda Grant MSP and the Cabinet Secretary for Justice, Mr Kenny MacAskill MSP are entirely relevant and both should be accepted with consideration given to the comments provided below.

- **Amendment 402, Section 2(c)(ii) – "apprehension or fear for B's own safety or for the safety of any other person".**

This section requires clarification as it remains unclear if 'apprehension' is a subject in its own right or whether it is an alternative choice to 'fear' for B's own safety. For the purposes of clarity, it is suggested that this subsection be extended to include 2(c)(iii) as detailed below.

(2)(c) A's course of conduct causes B to suffer –

(i) physical or psychological harm, or
(ii) fear for B's own safety or for the safety of others, or
(iii) apprehension for B's own safety or for the safety of others

Clarification is sought on the use of the term 'psychological harm' and the burden of proof required to substantiate the charge. Would it be sufficient for a victim to describe psychological harm or is the degree of harm required to prove the charge such that it would require professional evidence to prove it?

- **Amendment 402, Section 4**

For the purpose of this section it is suggested that additional wording reflect that which is already enacted in England and Wales under the Protection from Harassment Act 1997 and the following is offered as a suggestion;

(4)(a) the person whose course of conduct is in question ought to know that it would be likely to cause such harm or arouse such apprehension or fear of another if a reasonable person in possession of the same information would think the course of conduct would be likely to cause such harm or arouse such apprehension or fear of another.

- **Amendment 402, Section 7**

It is suggested that the powers of arrest for police officers be clearly defined as 'Unconditional'.

- **Amendment 378 – Threatening, alarming, or distressing behaviour, Section 6**

It is suggested that the powers of arrest for police officers be clearly defined as 'Unconditional'

Sentencing for Knife Crime

The Chair of the Criminal Justice Business Area (CJBA), Chief Constable David Strang of Lothian and Borders Police, has recently made public comment on this matter, in that a mandatory minimum sentence does not represent an effective disposal.

ACPOS believes discretion in relation to sentencing should remain with sheriffs who would consider the full circumstances of each offence and determine an appropriate sentence based on this.

ACPOS is committed to making Scotland a safer place and to reducing re-offending. We believe that this will not be achieved by sending people to prison unnecessarily.

In order to achieve a long term solution to crime the root causes should be addressed. Sentencing should be community based to address offenders' behaviour and encourage them to make reparations to that community.

Offence of Engaging in Paid-For Sexual Activity and Related New Offences

ACPOS offers the following comments for consideration:

- **Amendment 370 - Penalties for offences of brothel-keeping and living on the earnings of prostitution.**

ACPOS believes a period of national research into prostitution, its causal factors, impact and successful intervention, diversion and support strategies would be beneficial to this issue.

Notwithstanding, given the lucrative financial opportunities for those involved in sexual exploitation and human trafficking for sexual purposes, the investigation, disruption and dismantling of prostitution-related organised crime groups operating in Scotland is a key part of our strategic aim for prostitution. ACPOS agrees that, at present, the penalties for brothel-keeping and living on the earnings of prostitution are wholly disproportionate and do not act as a deterrent for those profiting from such sexual exploitation. ACPOS, therefore, supports the proposed amendment.

- **Amendment 8 (Section 11A) - 'engaging in a paid-for sexual activity'.**

ACPOS has significant concerns as to how the proposed offence would be put into practice. It would appear that the police would have to secure a sufficiency of evidence to prove the two main component parts, that: -

1. Sexual activity had taken place, *and*
2. Payment was made for the sexual activity

It is presumed that the type of activity proposed is those services provided by prostitutes. Given the vast majority of 'paid-for' sexual activities take place 'off street' and, in any case out with the public's view, ACPOS has concerns as to how sufficient evidence of such activities could be secured when balanced against the issues of proportionality and necessity.

As a consequence of there being no definition for the term '*paid-for'* (and if it is assumed it will be interpreted around a monetary payment), there may be difficulty in evidencing the fact a 'suspect' had been in possession of cash and a transaction had occurred, especially if the transaction was carried out in a private place. In addition, given any suspected payment would be seized for evidential purposes, it is suggested that there may be a reluctance on the part of the 'witness' to cooperate with the enquiry, given the probability of a financial disadvantage.

ACPOS are of the opinion that officers may have difficulty obtaining sufficient evidence to report to the Procurator Fiscal, which in turn means there may be too few convictions for the proposed new offence to deter others. The Home Office publication '*Tackling the Demand for Prostitution: A Review*' highlighted research indicating that, while risk of arrest may be a deterrent, the perceived risk of arrest is low, meaning any deterrent effect is limited. The Review quoted Rapid Evidence Assessment notes that 'when the risk of discovery is so low, even in the most visible sector of the market, the consequences of paying for sex are sufficiently remote as to be exciting, yet not sufficiently high as to discourage'.

The ACPOS position is that further research in relation to outcomes and further consideration as to the practical application of such an offence is required and, as such, does not support the proposed amendment at this time.

- **Amendment 8 (Section 11B) - advertising paid-for sexual activities.**

Prostitution is, in many of its forms, a 'market crime' and follows the principles of supply and demand. ACPOS is of the opinion that strategies which address only one aspect of the 'market' will not deliver sustainable solutions and further consideration as to how buyers access the market, including the advertisement of paid-for sexual activities, would be worthwhile.

While agreeing with the principle, ACPOS believes the suggested amendment is not suitable in its present format and further research in relation to outcomes and the practical application would be of benefit.

The Republic of Ireland experience may provide an insight into the application of such an offence; legislation against third-party profiteering from the sex industry was introduced there in 1994. The Irish legislation creates an offence for any person to publish or cause to be published or distribute or cause distribution of an advertisement which advertises a brothel or the services of a prostitute in circumstances or manner which gives rise to the reasonable inference that the premises is a brothel or that the service is one of prostitution. The legislation includes those advertising prostitution services in other ways, for example displaying notices or posters, circulating leaflets or cards (such as those in telephone boxes) or on radio, television, computer, telephone, fax or photography. ACPOS can see value in considering the above legislation and its impact prior to considering the implementation of similar provisions.

ACPOS supports the need to legislate to control the advertisement of sexual activities, but has some reservations (outlined above) regarding the proposed amendment.

- **Amendment 8 (Section 11C) - facilitating engagement in a paid-for sexual activity.**

ACPOS has concerns as to how the proposed offence would be put into practice. It would appear that the police would have to secure a sufficiency of evidence to prove that: -

1. Sexual activity had taken place; and
2. Payment was made for the sexual activity; and
3. The sexual activity was knowingly facilitated

The concerns are based around those outlined in respect of Section 11A

The ACPOS position is that further research in relation to outcomes, and further consideration as to the practical application of such an offence, is required and, as such, does not support the proposed amendment at this time.

- **Amendment 8A (Section 11AA) - causing alarm etc by engaging in paid-for sexual activity.**

As outlined above, ACPOS is of the view that a multi agency approach to prostitution is required, with a policing approach that balances the 3 elements of individuals, communities and the investigation and prosecution of those who exploit and abuse. ACPOS is fully aware of the impact such crimes can have on communities, which can be victimised as a consequence of this 'market crime'.

While complaints from communities regarding 'on street' activities are routinely responded to using legislation contained within the Civic Government (Scotland) Act, 1982 or Prostitution (Public Places) (Scotland) Act, 2007, there is no specific legislation which covers the more prevalent 'off street' activities that cause alarm, endangerment or nuisance. That said, there exists generic legislation in Scots Law, which, it is suggested, would be competent.

The recent Appeal at the High Court of Justiciary (*Harris v HMA 2009)* ruled that conduct which occurs in private and without affecting the community does not constitute a breach of the peace. Notwithstanding, the court declined to provide definitive guidance as to what public element would be sufficient to transform private conduct into a breach of the peace, observing that disturbance or potential disturbance of even a small group of individuals in a private house might suffice, provided there was a realistic risk of it being discovered. As such, it is suggested a charge of breach of the peace, in circumstances where there is a community complaint, may still be competent.

In addition, the common law crime of public indecency, and provisions contained within the Antisocial Behaviour etc (Scotland) Act, 2004, could be competent.

It is important that new legislation does not, inadvertently, make it more difficult to prosecute cases and, given the very specific nature of the proposed offence and the need to prove each of the component parts, ACPOS is of the view that this could be an unintended outcome.

- **Amendment 8B (Section 11AB) - profiting from coerced paid-for sexual activities.**

Section 4 of the Sexual Offences (Scotland) Act 2009 is entitled 'sexual coercion' and outlines: -

If a person (A)—
(a) without another person (B) consenting to participate in a sexual activity, and
(b) without any reasonable belief that B consents to participating in that activity,
intentionally causes B to participate in that activity, then A commits an offence, to be known as the offence of sexual coercion.

It is suggested that coercion to participate in any sexual activity, whether paid for or not, would be prosecuted under this section and any person who was in any way an ‘accomplice’, whether aiding and abetting (more commonly referred to in Scotland as Art and Part Liability) would also be charged with Section 4, Sexual Offences (Scotland) Act, 2009.

ACPOS does not support separate offences for coercion for sexual activity and coercion for paid-for sexual activities.

I trust that the foregoing is of assistance to you.

Caroline Scott
Assistant Chief Constable
ACPOS General Secretary
15 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Fiona Mactaggart MP

The attached report was submitted by Fiona Mactaggart MP as evidence on the Criminal Justice and Licensing (Scotland) Bill Stage 2 amendments.

HOUSE OF COMMONS
LONDON SW1A 0AA

ALL-PARTY PARLIAMENTARY GROUP ON PROSTITUTION AND THE GLOBAL SEX TRADE

CLAUSE 13 (now Clause 14), POLICING AND CRIME BILL: WHY THIS IS NEEDED TO TACKLE EXPLOITATION

REPORT AND EVIDENCE

Contents

Introduction: *Fiona Mactaggart MP* 2

Clause 14 (previously Clause 13), Policing and Crime Bill 4

Prostitution, Violence against Women and Human Rights: *Rights of Women* 5

Submission to the APPG on Prostitution and the Global Sex Trade: *Fawcett Society* 12

Survivor testimonies: *EAVES Housing* (which runs the Poppy Project supporting women who have been trafficked into prostitution and has dealt with almost 1400 women) 14

Voices from the streets: *CARE* (Christian Action Research Education) 18

Prostitution in New Zealand: *CARE* 20

Our position on prostitution: *OBJECT* 23

Clause 14, Policing and Crime Bill: *National Association of People Abused in Childhood* 27

Views: *Salvation Army* 29

Introduction by Fiona Mactaggart MP

Chair, All-Party Group on Prostitution and the Global Sex Trade

The All-Party Group on Prostitution and the Global Sex Trade has existed for a year. It was formed with the purpose:

“to raise awareness of the impact of the sale of sexual services on those involved and to develop proposals for government action to tackle individuals who create demand for sexual services as well as those who control prostitutes; to protect prostituted women by helping them to exit prostitution and to prevent girls from entering prostitution.”

The current opportunity for change in the law is Clause 14 (previously Clause 13) of the Policing and Crime Bill, which is passing through the House of Lords at present. It would insert a new section 53A into the Sexual Offences Act 2003, and would make it a strict liability offence to pay, or attempt to pay, for the sexual services of a woman (or child or man) who has been subjected to force, threats or any other form of coercion, or deception.

It seeks to ensure there are consequences for the man who chooses to buy sex, instead of for a seller who has no choice.

The clause has widespread support. The All-Party Group launched a statement signed by 54 organisations on 12 October 2009, calling for this clause to be passed as the most effective way of protecting women in prostitution from violence.

Tackling demand for prostitution

Until now attempts to deal with the sex trade in the UK have not focused strongly enough on preventing its growth. Most women who are prostituted are doing it because they are under the control of someone who is making a profit from them, they may be trafficked or groomed into prostitution as children, they may be dependent on drugs and need money for that, they have little choice.

Residents in areas where prostitutes work on the streets also have little choice, if they see prostitutes having sex in the alleys behind their homes or find condoms and drug paraphernalia in the street as they are walking children to school.

But the buyers who want to pay for sex do have a choice. If this clause is passed, it would mean that they might choose not to pay a prostitute unless they are 100% sure she is willing. If not, they risk getting a criminal record.

One intention of the clause is to encourage a change in the behaviour of men purchasing sex. It is not necessary to have large numbers of prosecutions. When car seat belts were made mandatory in the 1960s, behaviour swiftly changed. There were few prosecutions and drivers got in to the habit of wearing seat belts. It made them and all others using the roads safer.

Strict liability

It is relatively easy to prosecute a strict liability offence. The All-Party Group on Prostitution and the Global Sex Trade met Chief Constable Tim Brain, then ACPO lead on prostitution. He agreed that the new offence could work well if prosecutions could be targeted. As it is a strict liability offence, evidence would just need to show that a woman has suffered coercion or exploitation, and a man has paid or intends to pay to have sex with her, an offence is committed.

The proposed offence does not make paying for sex illegal. It would make paying for sex with a woman who has been coerced into prostitution illegal. It does not stop prostitution nor attempt to stop women deciding to do this freely. It could contribute towards making all prostitutes safer, if their customers become a bit more thoughtful.

Experience in other countries

Sweden made buying sex illegal ten years ago and the numbers of prostitutes and the numbers of trafficked women there have gone down. Sweden is no longer seen as an attractive destination by traffickers.[1] The European countries which have legalised the sex industry have the highest numbers of trafficked women, with estimates of 50% of prostitutes in the Netherlands being trafficked and 90% in Germany.[2]

The way forwards

Tackling demand is a way to make women safer and to reduce trafficking. But not everyone agrees. So I asked other organisations working with prostitutes, working for women's rights and working to support women in leaving prostitution to contribute to this report, to explain their views. It was quickly produced to make sure that Parliamentarians have the information before Clause 14 (previously 13) is again debated. This report is the result.

The APPG hopes that this report will help to raise the vital issues covered in this clause and that Members of the House of Lords will support the clause when the Policing and Crime Bill returns to the House for debate at Report stage, on 3 November 2009.

Prostitutes are more likely than other women to be killed and attacked and to be dependent on illegal drugs. It has been found that women in prostitution have a mortality rate 12 times higher than the national average.[3] This clause is a crucial step towards the protection of women.

Fiona Mactaggart
Chair, APPG on Prostitution and the Global Sex Trade
October 2009

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[1] Kajsa Wahlberg, national rapporteur on trafficking in human beings, 2004 report

[2] P. Monzini, *Sex Traffic: prostitution, crime and exploitation* (2005)

[3] Ward, H., Day, S., Weber, J, 'Risky business: health and safety in the sex industry over a 9 year period', Sex Transm Infect. 1999 Oct 75(5), 340-3; Church, S., Henderson, M., Barnard, M. and Hart, G., (2001) 'Violence by clients towards female prostitution in different work settings', British Medical Journal, no 322, pp. 524-525

Clause 14 (previously 13), Policing and Crime Bill 2009

The clause states:

14 Paying for the sexual services of a prostitute subjected to force etc: England and Wales

After section 53 of the Sexual Offences Act 2003 (c. 42) insert –

53A Paying for sexual services of a prostitute subjected to force etc.

(1) A person (A) commits an offence if –
(a) A makes or promises payment for the sexual services of a prostitute (B),
(b) a third person (C) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and
(c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).

(2) The following are irrelevant –
(a) where in the world the sexual services are to be provided and whether those services are provided,
(b) whether A is, or ought to be, aware that C has engaged in exploitative conduct

(2A) C engages in exploitative conduct if
(a) C uses force, threats (whether or not relating to violence) or any other form of coercion, or
(b) C practises any form of deception.

(3) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

RIGHTS OF WOMEN

Prostitution, Violence Against Women and Human Rights: Clause 14 (previously Clause 13) of the Policing and Crime Bill

Evidence for the All-Party Group on Prostitution and the Global Sex Trade

Introduction

Rights of Women[4] has been providing women with free, specialist legal advice for over 30 years. Our areas of expertise include all forms of violence against women (including domestic and sexual violence), family, immigration and asylum law and we frequently run conferences and training on these issues.

Rights of Women operates the UK's only legal advice line for survivors of sexual violence. On this line we advise hundreds of women every year who have experienced rape and other forms of sexual violence, including women involved in prostitution and women who have been trafficked into the UK for the purposes of sexual exploitation. Working with the Home Office, we have also produced *From Report to Court: A Handbook for Adult Survivors of Sexual Violence*[5], ten thousand copies of which have been distributed across England and Wales over the past year to survivors, their supporters, police officers and other professionals in the criminal justice system.

Rights of Women's position on Clause 14 is directly informed by the experiences of the women we support and from our commitment to secure equality, justice and respect for all women. We support the clause because we believe that it offers a unique opportunity to discourage the demand to sexually exploit through prostitution vulnerable women, men and children as required under international human rights law.

Prostitution Is a Form of Violence Against Women

Prostitution involves the commodification and sale of sexual services for financial or other gain. In the UK it is estimated that 80,000[6] people are involved in prostitution with the prostitution market calculated to be worth up to £1 bn. Home Office research in 2003 into organised crime markets estimates that up to 4,000 women are trafficked in the UK for the purposes of sexual exploitation. Given the growth in people trafficking since 2003, this figure is now believed to be a **"significant underestimate"**.[7]

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[4] Rights of Women advises, educates and empowers women by:
- Providing women with free, confidential legal advice by specialist women solicitors and barristers.
- Enabling women to understand and benefit from their legal rights through accessible and timely publications and training.
- Campaigning to ensure that women's voices are heard and law and policy meets all women's needs.

[5] This publication, along with a range of information sheets, can be downloaded free of charge from our website at www.rightsofwomen.org.uk.

[6] A Coordinated Prostitution Strategy and Summary of Responses to Paying the Price (2006) Home Office.

There is no legal definition of what conduct or forms of harm constitute violence against women within the law of England and Wales. However, the *UN Declaration on the Elimination of Violence against Women*[8] defines violence against women in Article 1 as:

> **"any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".**

Article 2 of the *Declaration* further states that violence against women encompasses, but is not limited to:

> **"…Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution…"**

It is upon this definition that the Government's definition of violence against women is based[9].

The use of the term **"forced prostitution"** in Article 2 of the *Declaration* has been used by some to argue that it is possible to differentiate between women in prostitution who have 'chosen' this form of 'work' and those who are forced into prostitution by traffickers or organised crime networks. However, the definition is focussed on the *effects* of the conduct or behaviour in question on the woman concerned. Therefore, any conduct that results in **"physical, sexual or psychological harm"** is a form of violence against women.

Prostitution (often referred to euphemistically as 'sex-work') is normalised by those who seek to legalise the sex industry as a form of entertainment like any other, with sexual services being exchanged for payment with both the prostituted woman[10] and the purchaser able to make free and meaningful choices. Within this context, sexual services are viewed as simply another commodity that can be bought and sold without harm to either of the parties involved and for the mutual benefit of both.

The evidence from prostituted women themselves tells another story. Research carried out on the harm caused by prostitution in nine countries found that:

- 71% of women interviewed had been physically assaulted;
- 63% had been raped;
- 68% met the criteria for post-traumatic stress disorder (this figure is in the same range as that for soldiers seeking treatment following active service and for survivors of torture); and,
- 89% wanted to leave prostitution.[11].

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[7] Tackling the Demand for Prostitution: A Review (2008) Home Office.

[8] A/RES/48/104 – 1993

[9] See www.homeoffice.gov.uk/documents/cons-2009-vaw for further information. *[Link no longer operates]*

[10] I am using the term "prostituted woman" to indicate that what is actually being done is the prostitution of one person (usually a woman) by another person (usually a man) for commercial reasons.

[11] Farley, M (2003) Prostitution and Trafficking in Nine Countries: An update on Violence and Posttraumatic Stress Disorder in the Journal of Trauma Practice.

Roger Matthews' comprehensive analysis of research on routes into prostitution identified that:

- Certain vulnerable groups of girls and women were more likely to become involved in prostitution; these were those who had suffered physical or sexual violence or neglect.
- This group were further marginalised by experiences which included running away, being in local authority care, being involved in crime, drug addicted and being excluded from education.
- These girls and women were then 'facilitated' into prostitution as a result of grooming by pimps or other procurers[12].

The world average age for entry into prostitution is 13 years old, with as many as 75% of those in Britain prostituted, entering before their 18th birthday. The average age of first involvement in prostitution in the UK is at just 15 years old.[13]

The evidence is clear that for the vast majority of prostituted women, the experience is one that involves physical, mental and sexual violence which traumatises and de-humanises, causing significant and long-lasting physical and emotional harm. It is perhaps not surprising therefore that Sigma Huda, the former UN Special Rapporteur on Trafficking concluded that:

> **"Prostitution as it is actually practised in the world does satisfy the elements of trafficking. It is rare that one finds a case in which the path to prostitution and/or a person's experience does not involve, at the very least an abuse of power and/or an abuse of vulnerability. Power and vulnerability in this context must be understood to include power disparities based on gender, race, ethnicity and poverty." [14]**

The exploitation of women through prostitution is, therefore, a form of violence against women as defined in the *UN Declaration on the Elimination of Violence against Women*.

Once prostitution is understood to be a form of violence against women the UK's obligations under international human rights law[15] are engaged. It is therefore important to understand what the key obligations on the UK government are.

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[12] R Matthews *Prostitution, Politics and Policy*, 2008, Routlage.

[13] *Paying the Price,* page 16, the report can be downloaded from http://www.homeoffice.gov.uk/documents/paying_the_price.pdf?view=Binary. *[Link no longer operates]*

[14] Special Rapporteur on Trafficking from 2004 to 2008 in Integration of the human rights of women and a gender perspective, United Nations. E/CN.4/2006/62.

[15] Relevant international law includes, but is not limited to:

- Universal Declaration of Human Rights (1948)
- UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)
- European Convention of Human Rights (1950) (the ECHR)
- UN Declaration on the Elimination of Violence against Women (1994)
- UN Fourth Conference on Women (1995) Platform for Action
- UN Convention against Transnational Organised Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (known as the Palermo Protocol) (1998)
- The Convention on the Elimination of All Forms of Discrimination Against Women (1971) and its Optional Protocol (1999) (CEDAW)
- The European Union Council Framework Decision on Combating Trafficking in Human Beings (the Framework Decision).
- Convention on Action against Trafficking in Human Beings (the Trafficking Convention).

The UK is a signatory of the *Convention on the Elimination of Discrimination Against women (1979)* (CEDAW). Article 5 CEDAW requires States, including the UK, to challenge social attitudes that tolerate inequality and discrimination and:

> **"…to modify the social and cultural patterns of men and women, with a view to achieving the elimination of prejudices and customary and other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women"**.

Article 6 goes on to require States to take **"all appropriate legislative and other measures"** to deal with trafficking and the **"exploitation of the prostitution of women"**.

General Recommendations are issued by the Committee that monitors compliance with CEDAW. *General Recommendation 12 (1989*) sets out the positive obligations on States to eliminate gender-based violence while *General Recommendation 19 (1992)*[16] goes further in describing the positive obligations on States to eliminate gender-based violence (including sexual violence, forced prostitution and trafficking), making clear that States may be responsible for private acts if they fail to act with due diligence to prevent the violation of rights or to investigate and punish acts of violence.

The Committee that monitors States' compliance with CEDAW has found that **"gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men"**. In a recent case in the European Court of Human Rights on domestic violence, the Court concluded that a State's failure to protect women against violence was discrimination because it breached their right to equal protection of the law[17].

The *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)* recognises that both prostitution and trafficking are **"incompatible with the dignity and worth of the human person"**. The *Convention* requires States to:

- Criminalise those who groom or coerce anyone into prostitution or exploit the prostitution of others (regardless of the purported consent of the prostituted person).
- Criminalise those who are involved in brothel keeping.

The *Convention* is interesting because of its recognition that it is not possible to separate trafficking from prostitution and that in order to discourage the former, States need to take action against the latter.

Article 9.5 of the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)* requires States to **"discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking".** *The Council of Europe Convention on Action Against Trafficking in Human Beings (2005)* also requires States to analyse and respond to the factors that result in women being trafficked and suppress them, including the demand to sexually exploit women.

The 1995 UN Fourth Conference on Women's *Platform for Action* also recognised sexual violence, trafficking and forced prostitution as forms of violence which require positive State action. Thus under strategic objective D.3, which is focused on eliminating trafficking in women and assisting victims of violence due to prostitution and trafficking, the *Platform For Action* calls on States to:

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[16] General Recommendation No. 19 (11th Session, 1992) on Violence against women.

[17] **Opuz v Turkey [2009]** *(Application no. 33401/02)* para 191

> **“Take appropriate measures to address the root factors, including external factors, that encourage trafficking in women and girls for prostitution and other forms of commercialized sex, forced marriages and forced labour in order to eliminate trafficking in women, including by strengthening existing legislation with a view to providing better protection of the rights of women and girls and to punishing the perpetrators, through both criminal and civil measures”.**

The international human rights law outlined above sets out the myriad of positive obligations on the UK Government to discourage the demand to exploit individuals through prostitution and trafficking. Positive obligations require States to do more than simply exercise due diligence in the investigation of criminal activity. Rather, they require States to analyse and respond to the causes of prostitution, trafficking and violence against women and take concrete steps to discourage demand.

Clause 13 (now Clause 14)

Clause 14 will discourage demand by making it a criminal offence to pay for the sexual services of a woman (child or man) who has been subjected to force. Force in this context includes coercion by threats and other psychological means, including exploitation of vulnerability.

Clause 14: A person (A) commits an offence if—
(a) A makes or promises payment for the sexual services of a prostitute (B),
(b) a third person (C) has used force, deception or threats of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and
(c) C acted for or in the expectation of gain for C or another person (apart from A or B).

A person convicted of this offence would have a criminal record and may be fined.

Strict liability and human rights

Strict liability offences are often used in the UK to secure the protection of particularly vulnerable people. For example, rape of a child under 13 is a strict liability offence under section 5 of the Sexual Offences Act 2003. This means that a person who has sexual intercourse with a child who is under 13 commits the offence whether or not:

- he knew the child’s age; or,
- the child concerned purported to consent to the sexual activity.

Section 5 of the Sexual Offences Act was examined for its compatibility with the right to a fair trial by the House of Lords in case of **R v G**[18] which concerned consensual sexual intercourse between a boy of 15 and a girl of 12. The House of Lords examined case law from the European Court of Human Rights and found that strict liability offences were compatible with the right to a fair trial.

Part of Clause 14 is strict liability as the purchaser of sexual services will commit an offence whether or not he knows that the person he is buying has been subjected to force. However, the burden of proof is still on the Prosecution, who have to show that the purchaser intended to pay, or make a promise of payment, for sexual services. Both the House of Lords and the European Court of Human Rights have made it clear that strict liability offences like this are compatible with defendant's rights under Article 6 of the *European Convention on Human Rights* to a fair trial[19].

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[18] **R v G [2008] UKHL 37**

Women involved in prostitution who are exploited by a third person (whether a pimp, trafficker or boyfriend) are a vulnerable group in need of particular protection. Unlike the person who chooses to purchase sex, the exploitative conduct that the woman has experienced (defined in Clause 14 to include threats of violence, coercion or deception) results in her not having a choice about whether or not to provide sexual services. As Baroness Hale said in relation to the strict liability sexual offence analysed in **R v G: "The perpetrator has to intend to penetrate. Every male has a choice about where he puts his penis."**[20]

The strict liability element of Clause 14 is also necessary for the offence to achieve the broader social aim of causing those who purchase sex to consider the position of those that they purchase and to challenge the pervasive, but false, idea that prostitution is always a matter of choice for the woman concerned. It is this wider social function that would enable the UK to meet its obligation to modify attitudes that cause inequality and discourage demand and which has proved so effective in the countries that have criminalised the purchase of sexual services[21]. It is also this element of the offence that makes the offence effective from a law enforcement perspective. The Crown Prosecution Service has advised that a strict liability element in an offence aimed at discouraging demand is the **"most effective"** way of shifting responsibility on to those that purchase sexual services[22].

These views are endorsed by the Northern Ireland Human Rights Commission, who conclude in their analysis of Clause 13 (now Clause 14) that:

> **"Arguments against criminalising any aspect of the purchase of sexual services rely on the assumption that the decisions to practice prostitution and how to practice it are usually made in an environment of equality and autonomy. This assumption is not borne out by the evidence. In fact, the entry into prostitution, and the experience of prostitution, whether legal or not, is characterised by high levels of coercion and abuse, and high levels of continuing trauma, from the earliest experience of recruitment at an age when consent is irrelevant…**
>
> **Given that the commercial sex trade is usually characterised by vulnerability to abuse, coercion, exploitation and control for gain, the Commission commends the provision for 'strict liability' in the provision"[23].**

Evidential issues

The fact that a particular offence may be challenging to investigate or prosecute is not normally used as an argument for not criminalising the behaviour or harm concerned.

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[19] See **R v G [2008] UKHL 3** and **Salabiaku v France (1981) 26 DR 171**

[20] **R v G [2008] UKHL 37** para 46.

[21] This approach has been successfully replicated in counties as diverse as Norway, Iceland, South Africa and South Korea.

[22] Evidence of Vernon Coaker to the Joint Committee of Human Rights, Tenth Report of Session 2008-9, HL Paper 68, HC 395, page 10.

[23] Northern Ireland Human Rights Commission response to the Policing and Crime Bill, paragraphs 28 and 31. The full response can be read here: http://www.nihrc.org/index.php?page=subresources&category_id=26&from=0&resources_id=112&searchcontent=&Itemid=61. *[Link no longer operates]*

However, there are those who appear to be apprehensive about the police's ability to investigate and prosecute an offence of this nature.

It is clear that investigating sexual offences poses unique challenges, as the current conviction rate for rape indicates. Investigations and prosecutions that are supported by the person involved in prostitution should present fewer difficulties than those where the prostituted individual does not support the prosecution. However, this is the case with all sexual offences and is not a problem specific to the proposed new offence. It is important to note in this regard that:

- those giving evidence in relation to the proposed new offence would benefit from special measures under the **Youth Justice and Criminal Evidence Act 1999**[24] and would be given anonymity under **Sexual Offences (Amendment) Act 1992**; and,
- there have been a number of successful prosecutions for related offences, including for example, controlling prostitution for gain[25].

There are debates to be had on the ability of legislation and the legal process to address social problems. However, it is clear that in recent years the law has successfully been used to offer protection to diverse groups of particularly vulnerable people. This shift has seen legislation on issues as challenging and complex as domestic violence, female genital mutilation and forced marriage. It is difficult to understand why an offence that criminalises those who purchase sexual services from someone who has been subjected to force is so qualitatively different from these issues as to prevent any legislative action being taken.

Conclusion

Enshrined within the UK's current legislation is men's right to buy vulnerable and exploited women, children and men[26]. This is contrary to the approach required by international law which recognises that prostitution and trafficking cannot meaningfully be separated from each other and requires States to discourage the demand that causes sexual exploitation.

Rights of Women supports Clause 14 because we believe that it will reframe the debate on prostitution, focussing attention on those who purchase sexual services and deterring them from doing so. A man who is not deterred, who buys sex from a woman who has been forced to sell it by a trafficker or her violent pimp will, quite rightly, risk prosecution. For the first time, the word that is so often used in relation to prostitution, "choice", will come to mean something to all those women, children and men who are prostituted, as those who choose to purchase what they have not chosen to sell risk being held accountable for the devastating consequences of their actions.

Catherine Briddick
Senior Legal Officer at Rights of Women

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[24] Special measures are practical measures designed to make the process of giving evidence less intimidating for vulnerable witnesses. Special measures are available under the Youth Justice and Criminal Evidence Act 1999 and include: screens, a live link, exclusion from the court of the public and video recorded examination-in-chief.

[25] See for example, the Court of Appeal case of **R v Massey [2007] EWCA Crim 2664** which involved the conviction of a man who controlled the activities of a woman exploited in prostitution contrary to section 53(1) of the Sexual Offences Act 2003. The woman concerned entered into a relationship with an older man whilst she was under 18 and in the care of her Local Authority. He later exploited her through prostitution for his own financial gain.

[26] O'Connor M and Healy G (2006), *The Links Between Prostitution and Sex Trafficking: a Briefing Handbook*, Dublin: Coalition Against Trafficking in Women, European Women's Lobby.

Fawcett Society submission to the All-Party Parliamentary Group on Prostitution and the Global Sex Trade

15th September 2009

About the Fawcett Society

The Fawcett Society is the UK's leading campaign for gender equality. When individual women are able to realise their potential, the benefits will be felt across society. The Fawcett Society makes a difference by campaigning for legislative change, influencing practice, and empowering women and men to effect change at a grassroots level. The Fawcett Society campaigns for:

- Economic rights: women's right to fair pay and fair treatment in the workplace
- Political rights: women's right to a powerful voice in decision making
- Social rights: women and men to break free from stereotypes
- Bodily rights: women's freedom from violence, harassment and objectification

Fawcett's work on the sex industry: In 2008 the Fawcett Society launched a campaign in partnership with OBJECT to reform the licencing of lap dancing clubs in recognition that lap dancing is a form of commercial sexual exploitation. In 2009 Fawcett published research into the impact of the sex industry on the contemporary workplace.

Summary

The Fawcett Society supports Clause 13 of the Policing and Crime Bill as an important and necessary means of tackling commercial sexual exploitation in the UK. The sexual commodification of women's bodies through the sex industry is incompatible with a society in which women and men live and are treated as equal citizens. Fawcett's research reveals that the sex industry not only has a damaging impact on the women involved, but also wider societal relations between women and men – particularly in the workplace. In order to uphold its legal responsibilities to tackle commercial sexual exploitation and promote gender equality, the UK Government should criminalise the act of paying or attempting to pay for sexual services from a person who has been subject to force – as stipulated in Clause 13 of the Policing and Crime Bill.

The sex industry in the UK

During the 1990s and 2000s there was an unprecedented expansion and normalisation of the sex industry in the UK. While the first lap dancing club in the UK opened in 1995, there are now over 300 clubs, and during the 1990s the number of men paying for sex acts in the UK doubled. In London alone there are now at least 921 brothels spread across every borough, mostly in residential settings[27]. All the various elements of the sex industry – such as lap dancing, pornography and prostitution - are intimately linked, and they all involve someone (usually a man) paying another individual (usually a woman) to sexually stimulate him.

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[27] Bindel, J. & Atkins, H. (2008) Big Brothel: A Survey of the Off-Street Sex Industry in London, The POPPY Project

The impact of the sex industry on gender equality at work

In 2009 the Fawcett Society conducted research into what impact the sex industry is having on the contemporary workplace[28]. It revealed that women's full participation at work is being undermined by the infiltration of the workplace by the sex industry, manifested in particular in a growing trend of using lap dancing clubs and displaying pornography in a work context. Fawcett also obtained anecdotal evidence during the course of the research of prostitution being used in a corporate setting:

> "At after-work drinks very senior managers asked around publically if any of us knew any good brothels because they had Russian dignitaries visiting and they just wanted a couple of nice fit mature women to give them a blow job before going out to dinner. This kind of thing was just accepted."[29]

> "I worked at an inter-dealing brokerage firm where my male colleagues regularly entertained their trader clients with drugs and prostitutes. My line manager in particular routinely organised sexual 'extra services' for his clients at lapdancing clubs, in return for the clients providing him with substantial volumes of business… he also criticised my business-winning skills on the basis that I was female, and therefore, as he put it, not able to take clients out to prostitutes…It was sickeningly demeaning to work in this environment, but I felt I had to put up with it, to prove that I could succeed."[30]

Fawcett's research also revealed that the sex industry is increasingly targeting its marketing at the corporate sector. For example, 41% of lap dancing clubs directly target employers through their websites[31]. This includes the promotion of corporate membership options and tailored corporate hospitality packages. 86% of lap dancing clubs in London also provide 'discrete receipts' which don't feature the name of the lap dancing club. These enable employees who use the clubs in a work context to claim back expenses from their employers without it being evident the money was spent in a lap dancing club.

The expansion and normalization of the sex industry – including prostitution - poses a serious threat to gender equality in the workplace. The sex industry involves women being dehumanised and treated as sex objects and, as a result, its use in a work context creates a degrading and hostile environment for female employees - in violation of the Sex Discrimination Act 1975.

In recognition of the serious harms caused by prostitution, experienced both by women involved directly in the industry and those in wider society, the Fawcett Society strongly recommends the Government tackles demand for commercial sexual exploitation. Clause 13 of the Policing and Crime bill seeks to criminalise demand for sex acts with women who have been subject to force. We believe this is a crucial step towards ending commercial sexual exploitation and tackling gender inequality more broadly within the UK.

For further information about this submission please contact Kat Banyard, Campaigns Officer: kat.banyard@fawcettsociety.org.uk; 020 7253 2598

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[28] Banyard, K. & Lewis, R. (2009) *Corporate Sexism*, the Fawcett Society
[29] Personal testimony obtained by the Fawcett Society, 2008
[30] Personal testimony obtained by the Fawcett Society from a solicitors practice, 2009
[31] Ibid (*Corporate Sexism*)

eaves
putting women first

SURVIVOR TESTIMONIES

Eaves runs the POPPY Project, which was set up in 2003 to support women who have been trafficked into prostitution. Since March 2003, the project has received more than 1300 referrals of women from over 80 countries spanning five continents. Nearly 30% of our referrals come from police, typically via brothel raids, where police have actively sought out trafficked women. This suggests that the women who come to us are only the tip of the iceberg.

Through our own work and the work of our partner organisations we also come into contact with British women in prostitution. Their experiences are in many ways very similar to those of the trafficked women we work with – as you would expect common characteristics include high levels of physical and sexual abuse experienced as children, compounded by poverty and lack of opportunity, all of which serve to make these women and girls vulnerable to traffickers and pimps. Once trafficked or drawn into prostitution another common factor is the high level of serious physical and sexual violence these women experience at the hands of pimps and punters.

It is very clear to us that prostitution constitutes **Violence Against Women** – the daily reality of violence, degradation and despair faced by our service users and the other women in prostitution we come into contact with in the course of our work.

The following survivors testimonies both from British women in prostitution and women trafficked into prostitution say it all.

JIERA, LITHUANIA

My name is Jiera and I come from Lithuania. I am 23 years old and last year I was trafficked to a city called York in the UK, where I was forced to be a prostitute.

Before that I lived in Lithuania with my parents. When I finished my business studies course in college I got a job, but I didn't like it. I told my friends I was looking for a new job and after about three months a woman called Ona called me, and said she could get me well paid work abroad as a cleaner in a sports complex.

I met with Ona. She seemed very nice and she wrote a contract saying I had the job, and that I would be paid £500 per month. I signed the contract. She told me the company would pay for my flight to London and they would find me accommodation.

I already had a passport and I flew on my own to London. I was very excited. At London I was met by two men, who drove me in a car to Yorkshire. They were nice to me.

When we arrived, the men took me to a house and then sold me to another man. It was a brothel. I couldn't believe what was happening to me. My new trafficker raped me and then made me work straight away. I had to sleep with at least 12 men per day, sometimes without a condom.

There were lots of other women in the house with me, but we weren't allowed to talk to each other. I was lucky that my customers were never violent, but I had to work all night so I was very tired all the time. My trafficker wanted sex too, so he would rape me every night. He beat me too, and shouted at me all the time, and threatened my family. I was very frightened.

I couldn't get out because all the doors were locked, and I did not think I would ever be able to escape, but after I had been there for four months, one of my customers called the police for me.

The police came and raided the brothel and took the man away, and told me about the POPPY Project. I am receiving help now, but I still have scars from the beatings. I have headaches and I am very sad about what happened to me

OLENA, UKRAINE

I am 23 years old. I come from a very poor area of Ukraine. I was not happy there. I lived with my father, mother and brother and my child. I was not married and my father and my brother did not like that. They beat me and called me names for not being married but having a child.

I did not have a proper job and spent a lot of time looking after my child and my sister's.

After a while I could not bear to be there any more, so I went to Moldova with a friend of my sister who said he could help me get work there in a restaurant, and help me start a new life. But when I got to Moldova he sold me to some Albanians who took me to their house. They locked me in, raped me and made me watch pornography. They beat me regularly.

I was forced to work at that house as a prostitute for two months, and then I escaped. They found me and brought me back to the house, but they decided I was trouble and they sold me again, to more Albanian men.

These men got me a false passport and took me by plane to the UK, to a massage parlour in Sheffield. There were other women there, but none of them was British.

When I was in Sheffield I was forced to see many clients per day – as many as 15. I worked every day, even during my periods; they made me put a sponge inside me to stop the blood. I got a very bad infection doing this and was very ill.

I was expected to make up to £400 per day for the men. I was not allowed to keep any of it and the other women would tell the men if they did not think I was working hard enough.

They did not let me contact my family, but they had connections in Ukraine and they visited my mother and threatened her. They told her that if I returned home they would kill me.

I was able to escape when I was sold again. The maid helped me to run away before the new gang arrived to fetch me. Altogether I had been kept as a prostitute for nearly two years.

Since I escaped I have had to have a big operation inside, as a result of my infection while working during my periods. I am not really sure what the operation was for, as I did not understand what the doctors said in the hospital. I have very bad headaches now, and I am scared to go out. But mainly I am angry. I am very angry that this happened to me and I can't control myself. And I do not trust anybody any more.

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KATE, UK
“I worked as an escort and later in a brothel - I have found it almost impossible to find any validation of my absolute belief (from first hand experience) that the sex industry is not empowering or liberating for women, and that the mainstreaming of pornography and women as objects does immense damage. Talk of 'choices' for women caught in the trap is meaningless: as a sex worker one is in the unenviable position of having to defend the indefensible - clients and the people making money from you simply won't entertain the truth. All of the women I worked alongside had drug or alcohol abuse problems and or a history of sexual abuse or mental health problems.

But I have found that people are unwilling or unable to listen when I have tried to open up about the truth behind the lies of the sex industry: I have been told 'it's not illegal' (pornography), 'men just do that' and that maybe I had a bad experience but the other women involved have chosen it - I need to 'get over it' and 'accept how things are', that I can't change things. I have found myself isolated and felt utterly hopeless with it. I am still trying to get over the emotional damage that working as a prostitute has done me”.

JO, UK

“As an ex-prostitute myself, and as someone who has worked with and also studied prostitution as part of my degree/MA studies, I've looked at prostitution, and the case for legalisation is not good. The vast majority of women start working as prostitutes before the age of eighteen (in fact, the average age is just fourteen...I was thirteen, and yes, I'm British, and yes, I worked in Coventry, in the late 1980s, and no, not one punter complained or refused due to my age).

My argument against legalisation is not a moral one, it is purely functional. You cannot ensure the safety of women in sex work by making it legal, because by creating rules around it you will automatically marginalise a lot of women who have to work outside of that framework. The only way to ensure the safety of women in prostitution is to ensure men treat them as equals, not just a doll to smack about and come inside. Because trust me, no matter how fancily the trade is dressed up, no matter how legalised and expensive, the violence (whether physical or verbal) and disrespect are always there. Men regard buying a prostitute in the same way as hiring a slave that they can do with as they please, despite any laws or verbal agreements. It is that dynamic of prostitution that is so dangerous, and this dynamic will not change unless women are seen as on an equal footing with men, and not just sex objects. Legalising prostitution only compounds the problem and legitimises regarding women as sex objects - 'oh, she was a whore, she was asking for it'. The illegality of prostitution is not the problem, and it's not the reason why so many prostitutes resort to drugs, self harm, and even suicide - it's the endless violence that is. And you WILL be called a whore, b*tch, sl*t etc and treated like dirt, even in a legal brothel. No amount of health checks and security guards will make the hurt of that, day in and day out, any easier to deal with. Why legitimise it in the first place?”

Recently Eaves together with OBJECT launched the Demand Change! campaign. This campaign calls on government to tackle **the demand** for prostitution. At the moment the buyer of sexual acts is that shadowy figure who goes about his business of purchasing sexual acts with relative impunity and anonymity. The Demand Change! campaign seeks to ensure that the buyers of sexual acts are held responsible for their actions.

At present the law in the UK effectively gives men the right to purchase women's bodies for sexual acts. This is totally unacceptable in the 21st century. Clause 13 (now Clause 14) of the Policing and Crime Bill which is currently passing through the House of Lords is a positive first step in terms of tackling the demand for prostitution. Clause 13 (now Clause 14) seeks to shift criminal liability from people exploited through prostitution to those who purchase sexual acts, ensuring that buyers take responsibility for their exploitative actions. This initiative signifies an important step towards gender equality and social justice. We urge you to back Clause 14, which would have the positive effects of protecting vulnerable women exploited through prostitution, deterring men who pay for sexual acts from this exploitative behaviour, halting the growth of the sex industry, and improving public awareness and understanding of the harsh realities of prostitution.

For further information on the campaign please visit the Demand Change! website - http://www.demandchange.org.uk/

For further information on facts of prostitution please visit
http://www.eaves4women.co.uk/Resources/Factsheets_And_Resources.php
http://www.demandchange.org.uk/index.php/resources

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Voices from the streets

As Parliament considers making significant changes to the law, it is important that it listens to the voices of those who have experienced exploitation through prostitution first hand, and also to the many projects across the UK which work with people in the sex industry.

Clause 13 (now Clause 14) aims to specifically protect those who are coerced, forced, deceived or threatened into prostitution. At present there is no element in UK law which prohibits an individual from entering a brothel and paying for sex with someone who is there under duress.

The effect of exploitation through prostitution can be devastating and leave the mark of trauma for many years afterwards. Sarah* was first sold for sex in Reading when she was a young child. Sarah comments “I support clause 13 totally as I was given money for sex at 6 years old. I then began selling my body at 12-14 years old, then spent the following 29 years selling my body, as I believed this was normal. I have for the past 14 years been dealing with the reality, and devastating effects that it has had on me and my family.”

The human rights of people such as Sarah, who are being exploited in this way, need to be better protected by the law.

International trafficking for the purpose of sexual exploitation is currently a high profit, low risk venture for those who trade in people. It has been reported that some drug trafficking gangs have switched to people trafficking as there is more money to be made and less risk of being caught[32]. Similarly, coercing British women into prostitution through deception or force is a relatively risk free way to generate substantial levels of income. At present there is insufficient deterrent to gangs, traffickers, pimps and those buying sex in an off street context. The number of British men buying sexual services has more than doubled in a recent ten year period[33]. There is a ready made market for pimps, gangs and traffickers to exploit and make high levels of profit.

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[32] In 2002 at a meeting in Bangkok the Organisation for Security and Co-operation in Europe (OSCE) reported that one of the main factors the trade is rising is because traffickers feel there are fewer risks involved in trading humans compared with drugs.

[33] H Ward et al, *Who pays for sex? An analysis of the increasing prevalence of female commercial sex contacts among men in Britain*. Sexually Transmitted Infections 2005; 81: 467-471.

The demand side of the payment of sex with people under force or coercion cannot be ignored. *Citylight* supports women involved in prostitution and female victims of sex exploitation and sex trafficking in Brighton.

A spokesperson from *Citylight* notes “There are many factors that contribute to a woman’s vulnerability and ultimately to her sexual exploitation. On a macro level, global conditions such as gender inequality, economic instability, poverty, racism, migration, restrictive immigration measures and the forces of globalisation, contribute significant push factors into the sex industry. On a micro level, economic deprivation, homelessness, substance misuse, and a history of childhood sexual abuse confound global conditions and act as secondary push factors. However, without a thriving market to receive these vulnerable women, no amount of push factors alone could facilitate a woman’s sexual exploitation. Like any other economic market, the sex industry operates on basis of supply and demand. Whilst demand in the UK continues to remain unhindered, the supply of vulnerable women will continue.”

Beyond the Streets is a UK Charity led by practitioners who have over 70 years combined experience in working with people who have been sexually exploited through prostitution. Its network of over 50 grassroots outreach projects seek to offer freedom and change to those involved in prostitution.

Beyond the Streets director, Mark Wakeling, states that Clause 13 [now Clause 14] is a vital step forward “It is important that the Government takes a human rights approach to the issue and implements legislation and initiatives which protect the most vulnerable.”

He adds “The clause must be part of a holistic approach, including moves which ensure that people in prostitution receive the help they need rather than fines and imprisonment. Resources need to be made available to help women exit the industry and rebuild their lives.”

“A reduction in the grooming, coercion and trafficking of so many people must be reached. Clause 13 [now Clause 14] is an important part of the solution.”

Rachel Davies
Human Trafficking Policy Officer
CARE
53 Romney St
London, SW1P 3RF
September 2009

*Sarah’s name has been changed to protect her identity

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Prostitution in New Zealand

In June 2003, the New Zealand Parliament passed the *Prostitution Reform Act 2003* (PRA) which decriminalises soliciting, brothel keeping, procuring and living on the earnings of prostitution. New Zealand largely decriminalised prostitution, but the PRA still has some regulatory aspects.[34] A report was published in 2008 by the Prostitution Law Review Committee assessing the efficacy of the PRA.

There are a range of issues that require addressing with regards to New Zealand's experience in prostitution reform. The Committee Report asserts a perceived positive impact of the PRA on the welfare of individuals involved in prostitution. These assertions, however, can be seen to be lacking in evidence or have since been questioned by other sources.

Human Trafficking

The Committee states in the Report that 'there is no link between the sex industry and human trafficking'.[35] However, reports from the New Zealand media express a different conclusion. In a recent case this month, a New Zealand lawyer brought to light two Ukrainian women who were trafficked to an Auckland brothel and prosecuted for passport fraud rather than assisted as victims of trafficking.[36]

The research conducted by the Department of Public Health and General Practice[37] for the Committee fails to explore this sufficiently. The interviews conducted were all with English speaking people involved in prostitution, non-English speakers were excluded. The reasons given for their exclusion were due to the sensitive nature of the topic (interpreters may have compromised confidentiality); lack of funds to employ interpreters; and, finally, 'foreign workers are especially vulnerable and some may not be working legally'.[38] It is precisely this group that is the most likely to have been trafficked. This exclusion makes it hard to take definitive statements on the lack of human trafficking in New Zealand seriously, especially in light of the emerging evidence cited above.

Decriminalising brothel keeping has depleted police powers to effectively investigate and prevent cases of slavery and abuse within the sex industry. The police force must now obtain a warrant in advance of entering a brothel where they suspect cases of trafficking or underage prostitution. This acts as a barrier to discovering and rescuing victims of abuse as brothel owners are given prior warning that the police will be visiting and can remove any evidence before their arrival. More worryingly, the vocal denial of trafficking in New Zealand by advocates of the PRA is a detrimental barrier to progress in tackling the crime.

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[34] Dr. Elaine Mossman, *International Approaches to Decriminalising or Legalising Prostitution*, October 2007, Chapter 3

[35] Report of the Prostitution Law Review Committee, 2008:167.

[36] 'Human trafficking an issue in New Zealand', *The New Zealand Herald*, 07/09/09.

[37] The research was carried out at the University of Otago, Christchurch

[38] Abel *et al*, 2009:45.

Numbers of people involved in prostitution

Prior to the PRA, Streetreach[39], an Auckland based project, would come into contact with an average of 35 women on a busy night. Since the introduction of the PRA, a count of 35 women indicates a quiet night. They are much more likely to meet between 65 – 100 women and girls per night. The PRA review report acknowledges the increase of women in street prostitution in 2007[40]. Due to an increase in people in prostitution since the PRA came into force, the prices have gone down and therefore the women have to work longer hours to make the money they need.

Child prostitution

Mama Tere, a woman who used to be in prostitution, commented in the New Zealand Newspaper *Morning Report* that the PRA has normalised behaviour and youth gangs are now pimping their members.

The Report on the PRA states that the Act does not address the issue of underage prostitution. However, underage prostitution is a serious issue and is directly impacted by attempts to ‘normalise’ prostitution and make it acceptable. Enforcing the criminalisation of the purchase of sex exclusively from minors can be difficult. For example, the police have difficulties in proving that a sexual act has been performed by a minor for money as it is not illegal to sit in a car with a sixteen year old. Unless the police catch couples in the act of breaking the law it is difficult to protect underage people in prostitution.

Where cases of men using underage women in prostitution have been identified, often the punishments metered out are cursory and light. For example, New Zealand media reported in August this year that a brothel-owner who hired two underage girls to work in prostitution was sentenced to five months home detention.[41] Some NGOs have observed a rise in underage girls in prostitution and have even attributed this to the passing of the PRA and the impact on policing: ‘The Act has taken police resources off the street and has therefore sent the message to pimps and gangs that there are opportunities to get away with things’.[42]

Stigma

Despite attempts by advocates of the PRA to normalise prostitution, it remains, by its very nature, a discrete and secret practice. The PRA attempts to regulate the industry, but this is hard to do when those who are involved in prostitution wish to remain anonymous due to stigmatisation.[43] The Report states that 'the reason for the law reform was to neither decrease, nor increase, the number of people involved in the sex industry; but to provide sex workers the same protections enjoyed by other workers in New Zealand'.[44] However, the Report goes on to acknowledge that the industry is so secretive that it is difficult to study. The academic Melissa Farley notes a reluctance by women in prostitution to register as such, and a concern that registration would lead to a loss of anonymity.[45] In an environment where secrecy and anonymity characterise the industry, it is hard to see how any attempts to regulate the prostitution will meet with success.

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[39] Streetreach, an Auckland based project, provides a confidential support service for those involved in prostitution, with the goal of encouraging them to exit from prostitution, and be empowered in the choices they make in their everyday life. Streetreach actually teaches their clients how to make informed decisions in regards to their personal life. They introduce courses and "life-skills" teaching which provides better choice alternatives. Streetreach currently has connection with about 500 individuals in prostitution and has regular contact from clinics, refuge centres and other agencies.

[40] Report of the Prostitution Law Review Committee, 2008:34

[41] ‘Home detention for hiring underage prostitutes’, *Sunday Star Times*, 05/08/2009.

[42] Mamatere Strickland, an NGO co-founder in Auckland, quoted in ‘Older sex workers go hungry’, *Manukau Courier*, 04/02/08.

The New Zealand experience clearly shows that decriminalising the pimping, brothel keeping and purchasing of sex with regards to prostitution creates an environment where instances of force, coercion, threats and deception within the industry become hidden or ignored. In order to create a culture where abuse within the sex industry is not a taboo subject, it must be acknowledged in Parliament and addressed through legislation. Clause 13 (now Clause 14) is a positive step towards reducing commercial sexual exploitation in the UK.

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September 2009

Further information can be found in the CARE report *New Zealand and the Impact of the Prostitution Reform Act, 2003* which can be downloaded from the CARE website.

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[43] Report of the Prostitution Law Review Committee, 2008:52.
[44] Report of the Prostitution Law Review Committee, 2008:29.
[45] Farley, 2004:1094.

OBJECT
Women not Sex Objects

OBJECT

OBJECT is a human rights organisation that challenges and raises awareness of the increased sexual objectification of women and girls in the media and popular culture, in particular via mainstreaming of the sex industries. We undertake such work because of the links between the sexual objectification of women and attitudes underpinning ongoing gender-based discrimination and violence. Object facilitates grassroots lobbying and works closely with colleagues in the women's sector, acting as an advisor to Amnesty International UK, and providing educational material to groups such as the NSPCC, WOMANKIND worldwide and Rape Crisis.

OBJECT position on prostitution

For OBJECT, tackling the demand for prostitution is a crucial part of challenging the sexual objectification of women**. Prostitution is the ultimate form of objectification** as it is based on the idea that it is acceptable for women to be treated like commodities to be bought and sold for sexual use. This **harms women and girls in prostitution,** many of whom experience violence and abuse and are unable to speak out. The **facts** speak for themselves:

- **75% of women involved in prostitution were drawn into prostitution when they were children. 74% of women cite poverty and the need to pay household expenses and support their children as a primary motivator for entering prostitution (Melrose 2002)**
- **Up to 70% of women in prostitution spent time in care, 45% report sexual abuse and 85% physical abuse within their families (Home Office 2006).**
- **Up to 95% of women in prostitution are problematic drug users, including around 78% heroin users and rising numbers of crack cocaine addicts (Home Office 2004a).**
- **More than half of UK women in prostitution have been raped and/or seriously sexually assaulted. At least three quarters have been physically assaulted (Home Office 2004b).**
- **68% of women in prostitution meet the criteria for Post Traumatic Stress Disorder in the same range as torture victims and combat veterans undergoing treatment (Ramsey et al 1993).**

The prostitution industry **also harms women in wider society.**

Normalising prostitution **normalises an extreme form of sexual subordination and objectification**; it **legitimises the existence of an underclass of women** and it **reinforces male dominance over women.**

It also undermines our struggle for gender equality as it **undermines efforts to combat sexual harassment and male violence** in the home, the workplace and the streets **if men can buy the right to perpetrate these very same acts against women and girls in prostitution.**

So, what do we do about this form of commercial sexual exploitation?

The last thing we want is for people in prostitution to be criminalised. We therefore call for **decriminalisation for all prostituted people** (who are mainly women and children) **and the criminalisation of all people who choose to buy women for sexual use**. This is essential to tackle the **demand** for prostitution **which expands prostitution and fuels trafficking for commercial sexual exploitation.**

Total decriminalisation of the whole industry - including pimps, traffickers and punters- does not make women safer. Why?

As the market for prostitution expands, so does the illegal sector. In **New Zealand**, where they have legalised the whole industry - including pimps and punters - the illegal sector has actually expanded more than the legal sector so that **the illegal sector makes up 80% of the industry** (Instone and Margerison 2007). This has also happened in Amsterdam where authorities have done a U turn on legalisation and are now closing down areas of the red light district. According to the **Mayor of Amsterdam "*it is impossible to create a safe and controllable zone for women that is not open to abuse by organised crime*"** (Bindel and Kelly 2004).

Furthermore, **decriminalisation of the entire industry and treating prostitution like any other job doesn't deal with the long term psychological and physical effects** of having unwanted and often violent & abusive sex numerous times a day and having to act like you enjoy it and are turned on by it.

Jo, a former prostituted woman who started at the age of 13 says: "*When was the last time you enjoyed being penetrated by twenty lairy, half-pissed blokes who spit all over you, call you a variety of names, and demand you act as though you are really getting off on it in an evening, every evening?*".

To be able to do this many women need to 'split off' from this process in their head, hence why drug and alcohol dependency is such a big part of prostitution.

To make women in prostitution safer we have to offer exit strategies and support to get out of prostitution, not legitimise commercial sexual exploitation by making it legal and by giving a green light for the industry to expand.

Furthermore, we have to work towards ending the exploitative industry of prostitution to ensure that future generations of vulnerable women and children are no longer drawn into or coerced into having to sell their bodies. To do this we have to tackle the problem at its route – we have to tackle demand.

DEMAND CHANGE!

This is why OBJECT has launched **Demand Change!** in partnership with our sister organisation Eaves (www.eaves4women.org) to raise awareness about the reality of **prostitution as a form of violence against women** and to lobby for the government to adopt **a human rights based approach to prostitution** and to follow the **'Nordic' model** as adopted by Sweden, Norway and Iceland – countries which consistently top the global polls in terms of gender equality**.**

The 'Nordic model' completely decriminalises those who sell sex acts whilst offering support services to exit prostitution. It further criminalises the purchase of sex acts to tackle the demand which expands prostitution and fuels trafficking for sexual exploitation.

This sends out a **powerful message** that it is **not acceptable for women's bodies to be bought and sold like commodities** for sexual use and it overturns outdated legislation which essentially enshrines men's right to buy women by focussing on those who sell sex acts whilst completely ignoring those who buy them.

In this way, the 'Nordic model' **shifts criminal liability away from those who are exploited through prostitution and towards those who contribute to this exploitatio**n by choosing to buy sex acts.

Furthermore, the 'Nordic' model has a **broad and progressive political vision** in that it actually aims to end the exploitative industry of prostitution rather than legitimise it which essentially ends up expanding it.

Laws change attitudes. Legalising or decriminalising the entire prostitution industry sends out a message that it is acceptable to buy and sell women's bodies for sexual use. This encourages future generations of boys to grow up thinking that it is perfectly normal for men to have entitlement over women's bodies. And for girls to grow up thinking that a man can use her body how he chooses, as long as he can pay.

Alternatively, we could call for the UK Government to take a human rights based approach to prostitution and to follow in the footsteps of the Nordic countries to send out the powerful message that no human being is for sale.

For more information about the Demand Change! campaign see the website at www.demandchange.org

PERSONAL TESTIMONIES

REBECCA*

"*I am so p*ssed off with the 'choice' argument being used to dismiss so many women and girls. I, for one, would never deny there are some women who may choose to be in prostitution. But they are very privileged and a very tiny minority, maybe around 2-4% of prostituted women*"
*Read Rebecca's blog at http://rmott62.wordpress.com/

THE PARENTS OF MARNIE FREY, A YOUNG GIRL MURDERED IN PROSTITUTION*:

"*To think the best we can do for these women is giving them a safe place to sell their bodies is a joke. There's no such thing as a clean safe place to be abused in. For a man to think he can buy a woman's body is insane. And should show us the attitudes that women have to fight against in society. Marnie did not choose prostitution. Her addictions did. And any man who bought her body for their sexual pleasure should go to jail for exploiting her desperation.*" (Lynn and Rick Frey 2008).

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Clause 14, Policing and Crime Bill

National Association for People Abused in Childhood
42 Curtain Road, London EC2A 3NH
www.napac.org.uk

NAPAC offers the UK's only national free phone support line for adult survivors of all forms of childhood abuse. We currently receive an average of 1000 calls to the line each week. We also receive many emails and letters, all of which receive a personal reply. At present we are only able to answer about 10% of calls but we are working hard to expand our service. We receive no statutory funding.

In the years that NAPAC has been around we have been contacted by a number of people, male and female, who, having been abused as children, have fallen into prostitution. This was never an experience any of them benefited from in any way whatsoever. In fact, I believe that research indicates a huge connection between abuse in childhood and abuse in adulthood including the descent into prostitution.

I have personally spoken to dozens of people over the years who have contacted NAPAC and have subsequently found themselves in the nasty world of what is often described as the 'sex trade'.

If I may give one or two examples? Two years ago I visited a young man in Manchester Prison who told me his life story. After being brutalized as a child he was taken into care where he was systematically abused over many years. At 17/18 he found himself on the street, homeless and with no support. He was picked up by pimps who then exploited his vulnerability and he became a male prostitute. The accompanying drug world that he entered led to the first of many arrests and imprisonments. From age 19 to 30 he was in and out of prison like it was a conveyor belt. When I spent time with him he didn't even remember committing the offence for which he was serving 18 months because of his drug induced state.

A week after visiting him we received a letter from this young man to say thank you for the visit and that it was going to "change his life". He had *never* been asked about his past. When I last visited HMP Manchester a few months ago I was told that the young man had not re-offended during the past two years and was making a real go of getting his life together.

One of our former volunteers at NAPAC was formerly a female prostitute and she was also abused throughout childhood. As a young person growing up she felt so worthless that she was easy pray for the 'sex trade' to suck her in and she ended up in brothels all over London and the Midlands. She now has her life fully on track, recognizes that she didn't really 'choose' to enter that seedy world but that circumstances led her into the clutches of the pimps.

The people who 'bought' these people's bodies were not really buying a freely given commodity (as disgusting as it is to refer to someone's body in such cold terms) but they were both victims of exploitation and anyone considering going to a prostitute really needs to think very carefully about the world they are entering. In fact, it's quite hard to believe, given the many films and documentaries about the subject, that ‘punters’ don’t know that they are fuelling a nasty and exploitative trade and that given real choices these people, the people they use for sex and domination, are not really consenting but *are* being exploited.

The thought that some people will stand up and say prostitution has been around since time immemorial and is therefore with us forever, is disturbing and wrong. Two centuries ago we put children down coal mines and up chimneys. Doubtless people opposing reforms to protect children then would have cited child slavery going back to ancient times. It doesn’t make it right and it doesn’t mean we shouldn’t act to stop it.

A significant number of calls to our free phone line mention that the caller was lured into prostitution following abuse. We even hear of parents who pimped their own children. This is now, not two hundred years ago!

The NAPAC service is completely confidential, we don’t ask for names or contact details of any callers. The only time we would break confidentiality is if a child or vulnerable person is at risk of harm and at this point we will contact and work alongside the police, social services etc.

We know for a fact that most adult survivors of child abuse find it extremely difficult to talk about the subject and for many it takes years before they can attempt to come to a place of healing. When those young survivors have also been sucked into the world of prostitution please consider just how much harder it must be for them to speak out?

The law needs to protect them and not criminalise them. The criminals are those who profit from this nasty trade and those who use other people’s bodies knowing that they are not really freely given.

This issue, along with many others around the protection of vulnerable people, is one that NAPAC feels very strongly about.

We do not have the resources to employ lawyers or media specialists so our voice is a simple one. We are all survivors of abuse at NAPAC and we know far too much about that sordid world that exists behind so many closed doors. The more we all speak out, when the opportunity arises, the better it will be for future generations. They shouldn’t have to suffer the pain and humiliation that we did.

Peter Saunders FRSA
Founder and Chief Executive

Views from the Salvation Army

The Salvation Army welcomes the opportunity to respond to the call for evidence in support of Clause 13 (now Clause 14) of the Policing and Crime Bill 2008. As a front-line service provider to the most vulnerable and marginalised of society, The Salvation Army witnesses on a daily basis the harms and suffering that enforced prostitution and trafficking for the purposes of sexual exploitation can have on women, some of whom, for many reasons, are not able to give voice to their distressing experiences.

The Salvation Army has committed itself to speaking out on behalf of the voiceless and marginalised of society. The Salvation Army has provided and continues to provide services to those who have been subject to control and coercion in varying senses and degrees. The Salvation Army sees the introduction of Clause 13 (now Clause 14), and particularly its strict liability element, as a most welcome move towards the protection of those who are vulnerable to ‘control’ in *any* sense and a significant step towards reducing the exploitation of women in the form of payment for sexual services and a corresponding reduction in violence against women.

Given the various possible routes into prostitution, combined with the clear evidence of the violent means which those who seek to control the vulnerable often employ, The Salvation Army would strongly advocate for the Government to adopt Clause 13, in its most undiluted form, both as a more effective means of reducing the demand to sexually exploit women and as a significantly more convincing step towards fulfilling the Government’s stated obligations towards addressing violence against women.

We look forward to the continued Parliamentary debate on this issue with the anticipation that clause 13 (now Clause 14) will receive overwhelming support in debate and in the votes and we look forward to it becoming law in the near future.

Gareth Wallace
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Salvation Army
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Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Steve Jarvis

I am a concerned man who believes the proposed amendment will harm sex workers. Although I do not live in Scotland, I have spent several years working in the fine city of Edinburgh where I believe there is a safe and discrete regime in place for the sex workers. Prohibition never works, the USA has tried to prohibit sex work for years, and it continues as ever. Prohibition of alcohol in the states saw the rise of the Chicago gangs.

I have taken a look at the submission by Eaves [please see Demand Change! Campaign's submission] of why the purchase of sex should be criminalised. Their view on prostitution is not the view of the hundreds of prostitutes I communicate with. If you read the 'facts' presented by Eaves and follow up their references, you will see they are being rather disingenuous and using statistics from street prostitution rather than prostitution in general. They are being very selective in quoting research, and quoting it out of context to make their case. Street prostitution statistics are easier to gather from police interviews, than statistics from the far greater incidence of indoor prostitution. Street prostitution statistics are also useful for the prohibitionists as there is little to say that is positive. You must differentiate between the abuses that occur in street prostitution with what happens elsewhere in indoor sex work and escorting.

75% of women in prostitution become involved when they are under the age of eighteen.

The reference for this is from.
http://www.wrc.org.uk/includes/documents/cm_docs/2008/s/statistics.pdf
[Link no longer operates]

Up to 75% of women involved in prostitution began when they were under 18 years of age and most teenager prostitutes are involved in street prostitution, which is estimated to be ten times more dangerous than working from houses or flats.

That document uses the figures from an American study specifically on street prostitution, not indoor prostitution. Benson, C. and Matthews, R. (1995), Street prostitution: Ten facts in search of a policy in International Journal of Sociology of the Law, Vol. 23, pp395-415

Up to 70% of women in prostitution spent time in care. 45% report experiencing sexual abuse and 85% physical abuse during their childhoods.

The reference for this the UK's Paying the price. These figures were gained from a profile of 333 prostitutes detailed in the paper by Hester & Westmarland (2004). Those interviewed would have been from a Crime

Reduction program, which can only have been looking at Street Prostitution. This again is street prostitution and not main stream sex work.

74% of women in prostitution identify poverty, the need to pay household expenses and support their children, as primary motivators for being drawn into prostitution.

I won't argue this one. I can't though see how this justifies the criminalization of the purchase of sexual services. It looks to me the target of policy should be, the reason why women get into poverty. One plus side of prostitution for many women in poverty is the ease in which they can start and stop working. For many the cash can be made, and unlike 'proper jobs' they won't lose state benefits they may be receiving.

More than half of UK women in prostitution have been raped and/or seriously sexually assaulted and at least 75% have been physically assaulted at the hands of both pimps and punters.

This figure again is taken from street prostitution, and not indoor/agency work. The title of the paper makes that plain. Other research papers show few working indoors are physically assaulted. From those who are assaulted, the minority are from clients. Most of the assaults on indoor sex workers are from criminal gangs raiding premises because they know the sex workers will not go to the police to report the crime.

Home Office (2004b). Solutions and Strategies: Drug Problems and Street Sex Markets. London: UK Government.

Women in prostitution in London suffer from a mortality rate that is 12 times higher than the national average.

This statistic was taken from the following document.

Home Office (2004b). Solutions and Strategies: Drug Problems and Street Sex Markets. London: UK Government.

Again this is from street markets, and taking the quote, which Eaves missed from the document
http://www.wrc.org.uk/includes/documents/cm_docs/2008/s/statistics.pdf
[Link no longer operates]

Up to 75% of women involved in prostitution began when they were under 18 years of age and most teenager prostitutes are involved in street prostitution, which is **estimated to be ten times more dangerous than working from houses or flats.**

One ends up wondering why Government policies continue to criminalise indoor prostitution with few exceptions like the licensed saunas of Edinburgh which are inspected by the police and are safe environments to work in. A good model for Scotland as a whole to follow.

9 out of 10 women surveyed would like to exit prostitution.

I do wonder how this question was phrased. If I was asked whether I wanted to stop my well paid professional job, the answer would be yes. I would love to stop if I could afford it.

This statistic is completely at odds with a large number of surveys done in the US, Holland, Australia which show that women working in prostitution are happy and have a high self esteem.

In The Netherlands, three-quarters of indoor workers report that they enjoy their work (Dalder, 2004: 34). Research on 95 call girls in Sydney, Australia found that they were generally emotionally healthy (Perkins and Lovejoy, 1996).

This is quoted in greater detail later. Please you must differentiate between these headline catching scare stories published by the anti prostitution campaigners with the actual facts of prostitution as practiced indoors, by independent escorts, by agency escorts and brothel workers.

This review of a number of research articles shows a differentiation between indoor prostitutes, call girls and street prostitutes. Reading this review of research would leave you feeling that for a majority of indoor prostitutes, the work was a benefit to their health and mental well being.

http://www.bayswan.org/New_Directions_prost.pdf

Research on streetwalkers and call girls in California and legal brothel workers in Nevada found that 97% of the call girls reported an increase in self-esteem after they began working in prostitution, compared with 50% of the brothel workers but only 8% of the streetwalkers (Prince, 1986: 454). Call girls expressed positive views of their work; brothel workers were generally satisfied with their work; but street prostitutes evaluated their work more negatively (Prince, 1986: 497). Similarly, a study of indoor prostitutes (most of whom worked in bars) in a Midwestern city in the United States found that three-quarters of them felt that their life had improved after entering prostitution (the remainder reported no change; none said it was worse than before); more than half said that they generally enjoy their work (Decker, 1979: 166, 174). In The Netherlands, three-quarters of indoor workers report that they enjoy their work (Dalder, 2004: 34). Research on 95 call girls in Sydney, Australia found that they were generally emotionally healthy (Perkins and Lovejoy, 1996). All of the escorts studied by Foltz (1979: 128) took pride in their profession and viewed themselves as morally superior to others: they consider women who are not ‘in the life’ to be throwing away woman’s major source of power and control [sexual capital], while they as prostitutes are using it to their own advantage as well as for the benefit of society. And an Australian study found that half of call girls and brothel workers felt that their work was a major source of satisfaction in their lives, while 7 out of 10 said they would definitely choose this work if they had it to do overagain (Woodward et al., 2004: 39). Other studies of indoor work report that the workers felt the job had at least some positive effect on their lives or believed that they were providing a valuable service (Brents and Hausbeck, 2005; Bryant and Palmer, 1975; Chapkis, 1997; Farley and Davis, 1978; Lever and Dolnick, 2000; Lucas, 1998; Verlarde and Warlick, 1973; West, 1993).

You may want to look at a more recent research paper published by Dr. Suzanne Jenkins, from Keele University, Staffs on prostitution. BEYOND GENDER: AN EXAMINATION OF EXPLOITATION IN SEX WORK. Available at http://www.sexworker.at/phpBB2/download.php?id=479

Facts like 72% female escorts like the work for the independence, 67% for meeting people and of course 93% for the money.

When asked about client relationships 54% put the transaction as an equality, 26% that the client was vulnerable. Only 6% saw that the client had power over them.

77% of escorts felt their clients respected them, and a similar number also respected their client.

72% of escorts felt their self confidence had been increased.

56.6% of escort felt they had never been exploited by their clients, while only 3% were exploited often.

Eaves make a point of our international and domestic obligation to CEDAW. Below I have quoted from their statement

> Indeed, the UK has multiple international and domestic obligations to tackle the demand for prostitution, in recognition of the harms inherent within it. The most important of these obligations is Article 6 of the Convention on the Elimination Of All Forms Of Discrimination Against Women (CEDAW), which calls on State Parties to: *Take all appropriate measures, including legislation, to suppress all forms of traffic in women and* ***exploitation*** *of the prostitution of women*. Other relevant international instruments in this context

This does not request you to legislate against prostitution, but to legislate to allow women to prostitute themselves without exploitation.

Trafficking

I would like to make some general comments on trafficking. It is thought among many that the number of trafficked women for sexual purposes is 4000. I have seen this as 4000 women a year brought in, or 4000 at any one time. The figure is quoted as a UK home office estimate, but the way it was generated is a best a guess, using an assumption that 90% of women working in the Soho area of London were all trafficked. I would point you to the UK Governments link to this document, but it appears to have been removed. They were probably too embarrassed. I can only point you presently to this article from Guardian Journalist Nick Davies (Prostitution and trafficking the anatomy of a moral panic) who charts the rise and rise of the number of trafficked women in the UK.

http://www.guardian.co.uk/uk/2009/oct/20/trafficking-numbers-women-exaggerated

Trafficking women against their will into the UK for sexual purposes is a heinous crime, but it does no one any good to exaggerate and inflate the figure. The size of problem has to be understood to be able to combat it.

In the same article by Nick Davies an analysis of the numbers of trafficked women in Pentameter 2 is exposed.

> The internal analysis of Pentameter Two, obtained by the Guardian, reveals that after six months of raids across the UK, **11 women were finally "made safe".** This clashes with early police claims that Pentameter had rescued 351 victims. By the time that Brain held his press conference in July last year, that figure had been reduced to 167 victims who were said to have been "saved from lives of abuse, exploitation and misery".

Research published recently by Dr Nick Mai of London Metropolitan University, concludes that, contrary to public perception, the majority of migrant sex workers have chosen prostitution as a source of "dignified living conditions and to increase their opportunities for a better future while dramatically improving the living conditions of their families in the country of origin". After detailed interviews with 100 migrant sex workers in the UK, Mai found: "For the majority, working in the sex industry was a way to avoid the exploitative working conditions they had met in their previous non-sexual jobs."

http://www.londonmet.ac.uk/research-units/iset/projects/esrc-migrant-workers.cfm

Steve Jarvis
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Equality Now

Submission in support of amendment 8

Equality Now is an international women's rights organisation dedicated to ending violence and discrimination against women and girls around the world. We work to end all forms of trafficking in women and girls and partner with many grassroots organisations, several of whom are survivor led, to end the commercial sexual exploitation of women and girls.

We write in strong support of amendment 8 lodged by Trish Godman insofar as it would criminalise the purchase of sex and any third-party facilitators of the purchase of sex and urge the Justice Committee to support these measures.

Equality Now considers that the commercial sale of sex constitutes an abuse arising from and perpetuating gender inequality. Consequently we believe that those who patronise and promote prostitution perpetuate sexual exploitation and gender inequality, yet they remain largely hidden and unpunished. The vast majority of people selling sex in Scotland are women and those buying sex from them are men.

The layers of discrimination and abuse in prostitution are manifold. A 2006 Home Office study found 70% of those involved in street prostitution to have a history of local authority care and 45% reported experiencing childhood sexual abuse. To allow prostitution to flourish is to consign the most vulnerable to a life of violence, despair and inequality.

By punishing the demand for prostitution, the Scottish Parliament would be sending a strong signal that sexual exploitation is neither acceptable nor will gender inequality be officially sanctioned in Scotland. At the same time we urge the Justice Committee to consider other measures that would rather promote gender equality and prevent prostitution, including support for broader educational programmes, decriminalisation of the selling of sex and provision of better funding and support for prostitution exit.

Please give your full support to criminalising the purchase of sex. Women are not for sale.

Jacqueline Hunt
Director
17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from [name withheld]

Note: Certain details have been redacted to protect the identities of individuals referred to.

I would like this letter to be considered in the decision making of your current justice bill regarding the introduction of mandatory sentencing for those caught carrying knives.

In October of 2009 my close friend [name withheld] was stabbed to death outside his family home in a brutal, senseless and cowardly attack. On the evening of the attack I had been with [name withheld], his mother, sister, girlfriend and other family members and friends at a charity event. At the end of this event we all entered taxis to take us safely home, this was the last time I would see [name withheld] alive. The senselessness of [name withheld]'s attack has been documented and during the trial into his murder I am sure that the public will agree that his death could have been prevented.

[Name withheld] was a kind, compassionate and generous man. He always looked out for those around him and his job as [details withheld] was an extension of his personality, adventurous, intelligent and determined to live his life to the full. Having been tragically taken from those who loved him has made us all question not only details of the law, but question why people are able to commit cruel acts of violence. The unparalleled grief that has struck all of [name withheld]'s family and friends cannot be expressed as it is more than clear that this should not have happened. Currently there is no mandatory sentencing for those caught carrying knives and it is our will and determination to fight to change this. Adequate deterrents must be in place to try to combat the knife culture we currently live in. Having listened to many politicians defend the argument against the introduction of mandatory sentencing we remain entirely unconvinced. There should be no circumstances or reasoning that allow people to carry knives – protection is certainly the most flawed of them all as no-one was protected by the knife used to murder [name withheld].

It is my understanding that we live in one of the wealthiest and most democratic countries in the world, I therefore question why anyone would need knives for protection. We are not at war or fear the threat of invasion; we do not live in a dictatorship whereby people are isolated or under threat of government persecution. It is not good enough to accept excuses; it is also not acceptable for the government to make claims that prisons are too full to pass a law which could reduce the number of knives on our streets. While the current punishment for committing crimes, especially of violence, is prison, we do not accept that prison is therefore not the answer. The government has a responsibility to ensure that all of its citizens are safe. We elect our politicians on the basis that they will act on the behalf of law abiding members of communities. We do not expect politicians to make excuses for or consider the criminal who has committed these horrendous acts. We do expect politicians to take action to protect and consider the victims of these horrendous acts.

Alongside [name withheld]'s family I have helped gather signatures for the petition that requests minimum sentencing. In doing so we have met hundreds of people who agree with the petition and are surprised that such a law is not presently in place. If politicians are elected to represent their constituents by ignoring thousands of signatures, they are concretely ignoring those who have given them their jobs.

I currently work in a secondary school in [details withheld] and it is my experience and that of the more experienced staff I work with, that in school (as it appears in the rest of society) we currently make too many excuses for the actions of the minority of people who act aggressively and violently and break the law. The new Curriculum for Excellence initiative clearly states that we must try to ensure pupils leave school as 'responsible citizens'. This is impossible if we do not continue this in wider society. If we continue to look only to the reasons why people commit crimes then we do not encourage people to take responsibility for their actions or actually deter them from committing such crimes again.

To us the facts are clear, [name withheld] died as a result of knife crime. It appears that people do not fear the repercussions of their actions and due to this we have lost a truly wonderful person in our lives. [name withheld]'s mother [name withheld] has been left devastated at the loss of her child; she was present at the time and has to cope each day with the memory of holding her dying child in her arms. [Name withheld], [name withheld]'s sister is heartbroken at knowing her brother's life was stolen from her, that she will not see him again. Being a close friend to the whole family I cannot comfort them, there is no comfort, as there is no reasoning behind this. [Name withheld] is not another knife crime statistic. [Name withheld] was a son, a brother, a friend and a [details withheld]. [Name withheld] fought for his country. He entered war zones knowing the life threatening dangers he faced and did so with true courage and bravery of which he has been rewarded. [Name withheld] died in the alleged safety of his own front doorstep. The government cannot possibly offer any excuses as to why this happened nor is it enough to offer their sympathies. We are asking the elected Scottish Parliament to attempt to make changes and prevent tragedies like this from happening again. [Name withheld]'s case is certainly not an isolated case, there are many families who are facing the same grief due to the loss of a loved one to a knife and we must recognise that tough measures have to be in place to deal with it. We wholeheartedly and fully support plans to educate young people of the dangers of carrying a knife; to try and understand the causes of why groups in society carry weapons, to alleviate poverty and tackle alcohol and drug abuse that often contribute to violent acts. However we must also act now to ensure that people are deterred now, and start by introducing a mandatory sentence for carrying a knife!

[Name withheld] and other victims of knife crime are not government statistics but are the tragedy and shame of government and society failures. Their lives, the lives of the Scottish electorate, must be valued and politicians must demonstrate that they are valued by passing this bill.

Thank you for reading my letter and please take great consideration over this.

17 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from [name withheld]

Note: Certain details have been redacted to protect the identities of individuals referred to.

My name is [name withheld] and my brother [name withheld] was brutally murdered on the [date withheld] 2009. He was stabbed outside our family home.

Knife crime has completely destroyed my family. Our lives will never be the same again. I write this letter as a voice for my mother, family, friends AND most importantly my brother. His life was cruelly taken away as a result of knife crime; he has no voice to speak of the injustice which he suffered. As a result of [name withheld]'s murder my family and I are calling on the Scottish Government to introduce mandatory minimum custodial sentencing for those caught carrying knives or other dangerous weapons in public. This is a personal statement which shows how knives destroy lives. I therefore hope this statement will be considered as written evidence for the amendments lodged for the sentencing of knife criminals.

Myself, my mother, our family and friends lives have been shattered as a result of knife crime. We are living a life sentence since [name withheld]'s senseless murder. No-one should have to suffer the misery and trauma that we are going through.

You may have heard about my brother and possibly some of the circumstances surrounding his death. We think it is important that people know a little about [name withheld] and have a brief insight into his senseless death. It not only highlights the total tragedy of his death, but also the complete waste of a truly remarkable human being. He was a young man, who had so much of his life ahead of him. However, this was taken away from him in a totally shocking and barbaric manner.

[Details withheld]

All I can say about the night [name withheld] died was that he was a hero for the second time in his short life. My brother was stabbed for standing up for right. This was a completely random attack. [Details withheld]. It disgusts me to know that [name withheld]'s death is not an isolated case.

What happened that night still haunts my family [details withheld]. We are in complete turmoil having lost our beloved [name withheld]. The pain and misery we are suffering is unimaginable. When [name withheld] was [details withheld], my mother and I prepared ourselves, to some extent, of the possibility that he may not come home. He was [details withheld], doing a job that he loved, we were aware of the dangers that he faced. When he was home, we could all relax. He was no longer in a danger zone, he was safe … or so we thought! We now know it is wrong to have been so presumptuous. Even yards away from his own front door, [name withheld] was not safe. I will not ask you to imagine how my family and I feel. Unless you have experienced what we have, no-one could possibly understand the absolute devastation and aching we have in our hearts for the loss of our hero [name withheld]. Because of the type of society we live in it is likely that another family will be going through what we are this very weekend.

Official Government figures stated that there were fifty-seven homicide victims killed by the use of a sharp instrument in 2008-09. Thus on average, someone is dying EVERY WEEK as a result of knife crime. Of the 99 homicide victims, over a half (58 per cent) were killed by the use of a sharp instrument. Every year the number of deaths from knife crime has increased. With data like this it is clear that Scotland’s deplorable knife culture is not being dealt with adequately.

It distresses my mother and I to think that [name withheld] will be classed as another knife crime statistic. He was my mothers first born child, my only brother and a dear friend to so many people. He was a decent law abiding citizen, a kind, compassionate and generous man who lived life to the full. He, along with the many other innocent knife crime victims, was a human being, a real person, whose life was cut short at the hands of a knife criminal.

Of the 132 persons accused in homicide cases last year, 41% were reported to have been drunk and/or on drugs at the time (30% were drunk, 5% were on drugs and 6% were both drunk and on drugs). I agree wholeheartedly with Justice Secretary Mr MacAskill when he stated, “urgent action is required to deal with Scotland's drinking culture”. However, what is to happen in the meantime? Are we meant to just accept such deaths until Scotland's drinking culture is dealt with?! We are all responsible for our actions, we should all know right from wrong at a young age. There are no excuses for someone’s life being taken at the hands of another.

There is no doubt in my mind that a person who carries a knife has the intent to use it. Currently there is no adequate deterrent in place for people carrying a blade. I believe that mandatory minimum custodial sentences for knife carriers will make people think twice about carrying a blade in public.

According to official government figures 3,529 people were convicted of handling an offensive weapon in 2008-09, an increase of 3% from the previous year. Of those convicted only 30% were given a custodial sentence as their main penalty. Thus 70% avoided jail all together. Of this 70%, 16% were given community service and 24% were given a fine. The Justice Secretary has stated on numerous occasions that “those who use a knife should expect to go to jail." This is quite clearly a very misguided statement. What kind of message are we sending out to people who think it is acceptable to carry knives? Clearly not a very strong and concise one! At the end of the day, people who carry a blade in a public place are committing an offence, they are carrying a dangerous and lethal weapon and they have the potential to ruin numerous lives. Why therefore are they not being adequately punished if they are caught? We must also remember that just because a person has been unlucky enough to have been caught carrying a knife, it is very unlikely it was their first time actually carrying a weapon.

I welcome the 21% increase of the average custodial sentence for handling an offensive weapon. However, the percentage of persons receiving custodial sentences has never increased beyond 30% in the last ten years. We know that currently knife carriers can receive a MAXIMUM of 4 years behind bars, but such a sentence is rarely given. Of the 1054 persons in 2008-09 who were given a custodial sentence for the handling of an offence weapon, only 39 were given more than 2 years. This equates to only 4%.

Education is a key part to tackling Scotland’s blade culture, but the “here and now” must be dealt with also. Do we need to wait 10 or 20 years down the line to see a reduction in knife crime? What about those in their 20s and 30s? Last year, 2,358 people over the age of 21 were convicted of carrying an offensive weapon, double the number who were under 21 years of age (1171). I would like to know how the Scottish government plans to educate the older generation to not carry a knife. A clear message of “zero tolerance” needs to be sent out to all those people who think it is acceptable to carry knives. Currently the government is not doing this adequately enough.

It is often stated by the SNP Government that a number of people carry knives for “protection”. I do not accept this feeble statement. My brother never carried a knife to protect himself; he never felt the need to. Where was his protection? I acknowledge gang culture exists in Scotland, but the fact of the matter is, knife crime is spilling onto the streets of innocent people. I am led to believe that for every 100 knife incidents that occur, whether it is murder, assault, slashing; 89 of the victims are not carrying a weapon. Knife crime is not just happening in the inner cities, it is also occurring in rural areas such as [details withheld]! Disturbingly the true extent of knife crime is not fully known as it is estimated only around half of all knife attacks are actually reported to the Police.

It is not acceptable for the government to make claims that prisons are too full and that introducing minimum sentences for knife carriers is “completely unaffordable”. I would like to ask what they think the cost is to the victims of knife crime. It is immeasurable. We are the ones who are living with the aftermath of knife crime everyday. It is not good enough to accept excuses from the government. The current punishment for committing crimes is prison. I do not accept that jail is not the answer. If the government thinks that prisons do not work, then they should be doing something to ensure that they do. Prison is supposed to be a place of punishment and rehabilitation! Law abiding citizens all have a right to be safe within their own communities. They have a right to be safe from those who carry knives. It is the job of the government to ensure this happens. Politicians need to take action to protect and consider the victims, and potential victims, of knife crime.

My mother and I started a petition calling for mandatory minimum custodial sentences for knife carriers. So far, we have had overwhelming support. We started the campaign on 3 January 2010 and to date we have collected around 10,000 signatures. Such a figure shows quite clearly that people want knives and knife carriers off their streets. Politicians should be acknowledging that the people of Scotland want change; they want to feel safe when walking out of their own front door. Politicians are elected to represent their constituents', therefore if they ignore their requests they are effectively ignoring those who have given them their jobs

I accept that there are sometimes genuine circumstances where people need to carry a knife e.g. joiner carrying a Stanley knife. I do not think these people should be jailed. However, I do not accept that 70% of those caught carrying knives were such exceptional cases. If there is a legitimate reason to carry a blade in public, then that person should surely be able to prove this and they would have no problem in doing so.

When more people are killed by the use of a sharp instrument in comparison to being shot, why is there is a minimum sentence in place for gun carriers and not knife carriers? I cannot understand the logic behind this.

[Name withheld] was [details withheld] who contributed more to this country than the average citizen. For him to come home for weekend leave and to be stabbed outside his own front door is a DISGRACE. It shames Scotland. We ALL need to stand up and make people aware that we are not going to tolerate this any longer and stop pandering to knife criminals.

I want to feel safe when I go out of my own front door; I want my family to be safe. My brother never had this opportunity or right. We want to help ensure that other families do not suffer the way we have.

Thank you for reading my letter and I hope you will take great consideration over it being used as written evidence.

16 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill - Stage 2

Written submission from the Salvation Army

Offence of engaging in paid-for sexual activity (and related new offences)

The Salvation Army in the United Kingdom with the Republic of Ireland welcomes the opportunity to write to the Justice Committee and overwhelmingly urge them to support Trish Godman's amendment which would create an offence of engaging in paid-for sexual activity.

Summary of our position:

- From its early days in Victorian England, The Salvation Army has been concerned about, challenged policy on and supported the victims of sexual exploitation. The first work among homeless people in London was with vulnerable street women, and early Salvationists highlighted the sale of girls for prostitution. In the UK and all over the world, The Salvation Army still works with and supports people who find themselves in the sex industry, without judgement of their situation.

- In recent years, The Salvation Army has become more aware of the connection between the sex industry, particularly prostitution, and international human trafficking. The Salvation Army's international work on anti-human tracking has alerted us all to the evils of this trade and in the United Kingdom The Salvation Army has begun to work closely with the victims of sexual trafficking and with the authorities, including government agencies, working to try to put an end to what is effectively the 'modern slave trade'.

- We believe that prostitution is a form of violence, particularly against women and harmful for those who are involved and also for the communities where it exists.

- While some would claim that there is a 'right to choice' we believe that even for those who do 'choose' this lifestyle, most are desperately unhappy with that life choice. The Salvation Army's historical and on-going work with women who once believed that their only option for employment was to sell their bodies for a variety of sexual activities has shown us that this life choice invariably can lead not only to greater and greater depravity but also to self-loathing and a loss of self confidence and esteem which fundamentally alters their lives.

- The Salvation Army believes that people who find themselves in the sex industry invariably would welcome a way out which is financially as rewarding as paid-for sex and that as a culture we need to help people to exit with dignity including education and intensive support where appropriate. The Salvation Army wishes to be part of that answer.

- We consider that prostitution exacerbates existing gender inequality as it is predominantly women who sell sex and men who buy. It is also unsatisfactory that at the moment, within the indoor sex industry, it is largely the sellers who are charged e.g. with brothel keeping or living off immoral earnings, while the buyers – the punters - are treated with impunity.

- The Salvation Army is deeply concerned that as a culture prostitution is now so ‘normalised’ and is considered by punters as their right, and as just another ‘innocent leisure past time’ that we have forgotten that one person’s ‘fun’ can be another person’s misery. We think legislation which would make it an offence for punters to pay for sex, would challenge this normalisation of the sex industry in Scotland.

- There are now indications that there is often a clear link between prostitution, the trafficking of people for sexual purposes and organised crime. Strong legislation may go some way to prevent an influx of trafficked women into Glasgow to meet the demand during the Commonwealth Games in 2014.

- We think it is important that the law considers “facilitation” as part of the offence as this would help disrupt the organisers, pimps and traffickers who arrange the transport and accommodation for those involved in the sex trade.

- From a marketing perspective, it is clear that advertising for sexual services is widespread not only on the internet but in newspapers and magazines across the city. Although enforcing the legislation on advertising would not be without challenge, we believe that it would still be a crucial step in targeting those who profit, create and support the sex trade in Scotland.

- We believe that by putting the focus on the buyers of sex this may act as a deterrent and make men think twice before they purchase a vulnerable women. Tackling demand would send out the important message that Scotland rejects prostitution and the exploitation inherent in this industry.

We do not support amendments 8A-D (lodged by Margo Macdonald) or amendment 461 (lodged by Nigel Don).

Anne Read, Major	Alan Dixon, Major
Anti-Trafficking Response Co-ordinator	Assistant to the Scotland Secretary

23 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from [names withheld]

Impact statement of [name withheld]

I am [name withheld] and reside at [address withheld] with my wife [name withheld] and our six month old daughter.

Four years ago, when I was single, I met a woman and dated her for approximately 2-3 months. After this time I soon realised she wanted more from the relationship than I did. I ended the relationship and tried to stop all contact with this female.

This female has since become what we describe as my 'stalker'. She has persistently telephoned me, contacted me by email, social network sites, followed me, jumped out of doorways and attempted to attack me. She has also tried to infiltrate my circle of friends. This woman will simply not take 'no' for an answer.

Through the course of the last four years I have changed phone numbers approximately seven times.

I have blocked her email address, IP address, social internet sites and complained to police about her behaviour approximately seven times.

This female has recently been convicted of Breach of the Peace, specifically harassing me, and we currently await her sentencing.

This woman’s behaviour has significantly affected my work, my business and my state of mind, but because I'm a man, socially I'm expected to just deal with it.

This woman even targets friends and family members as she cannot contact me directly; her behaviour has been described by a friend (who is a psychologist) as a 'rejected vengeful stalker'.

Because of this female’s behaviour I try to ensure I am always accompanied by a family/friend/colleague wherever I go.

This woman's course of conduct places myself and my family in a constant state of fear as we never know what this woman will resort to next.

We will constantly live looking over our shoulder for the rest of our lives.

Impact statement of [name withheld]

I am [name withheld] and reside at [address withheld] along with my husband [name withheld], and our six month old daughter.

I have resided here permanently since January 2009. Shortly after this I also discovered I was pregnant.

For the past year and a half my husband's stalker has placed me under a significant amount of stress, so much so that I do feel as though I am a victim of her crimes (although at times, personnel within the criminal justice process have told me I am not a victim of her crimes).

Throughout her course of conduct, whilst residing at the address with [name withheld], I have suffered the constant harassment of phone calls (silent and verbal, at all times of the day and night), and disgusting text messages, to our house phone. I have not only heard the accused verbally abuse and threaten my husband, but she has also verbally abused me.

At times this woman has stated she wants [name withheld] 'dead' and will 'do time for him'.

At 14 weeks of pregnancy I was under a significant amount of stress due to this female's behaviour and woke one morning to find myself bleeding. At this time I worried that I would miscarry and attended at my local Maternity Unit. Thankfully I was checked over, later released and continued the pregnancy.

Because of the ongoing harassment and the fact [name withheld] works away from home (sometimes for weeks at a time), a panic alarm has been fitted to our home address. However, each time I leave my house or place of work I am constantly looking over my shoulder to check if she is following me. Because of this I also carry a personal attack alarm.

At one point this female sent an email to [name withheld] stating 'I'm a lookin…' three words to some people, a significant threat to us as a family.

[Name withheld] and I perceived this to be that she was in fact watching and stalking us. At this point we became even more worried she may be waiting outside our home, tampering with our cars (as she previously alluded to) or following us.

On one occasion, [name withheld] received messages on his business website and showed me these same messages, which clearly came from the accused email and IP address. On one of these emails there was an icon (emotion face – a face holding guns) named 'guns out'. Again a funny face to some people, but a significant threat to us.

At seven months pregnant, I went on sick leave from work. I left my home address and stayed with my sister for a period of time, as I no longer felt safe in my own home. At this point I was under too much stress about the ongoing harassment and my doctor signed me off work until my maternity leave commenced.

At eight months pregnant, I attended the local procurator fiscal office for precognition in relation to the case against the 'stalker'. Later that day I was admitted to the local maternity hospital as my baby was not moving. That weekend, due to the consultant being significantly concerned re the baby not moving, I was induced and had my baby that weekend.

Thankfully, we now have a healthy child; however I firmly believe that the stress I have been under with regards to this case is due to this female's conduct.

It has been a form of mental torture.

My view on this is that this female ruined my pregnancy, almost causing me to miscarry, and is deliberately trying to sabotage my relationship with [name withheld].

In addition to this, I am constantly looking over my shoulder in fear she is following myself because of her obsession with my husband.

This woman has put me into this state of fear and due to this I am also deeply concerned for our child's safety, so much so I only allow close family members and close friends look after my child when I am at work or elsewhere.

I have never even met this woman, yet she has put me in this complete state of fear due to her continued and relentless course of conduct. I feel she is a ticking time bomb waiting to go off.

Comments on amendements to the law

I, [name withheld] and I, [name withheld] fully support the two proposed amendments to the law in relation to harassment and stalking behaviour. In particular we welcome Rhoda Grant's proposal that stalking is identified as a single offence under statute law.

We have personal experience in dealing with the police and observed how difficult it has been for police to define this female's course of conduct in individual incidents as a crime or offence.

Only when you look at the 'bigger picture' in relation to this woman's course of conduct do people recognise that her behaviour is calculated, intentional and designed to take effect on her primary victim and the family.

We request that the committee, when reviewing the amendments, give consideration that non-harassment orders automatically cover immediate family and not just the stalker's primary victim.

We respectfully request this information (including our names) be passed to the Justice Committee for their consideration in relation to the amendment to law, and further request our names are excluded from public domain, to ensure the press are not allowed to publish our names in relation to same.

19 March 2010

CJL/S2/96a

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from [name withheld]

Proposed Anti Stalking Legislation

I have been closely following the ongoing parliamentary debate with regards to the proposed amendments for anti stalking legislation lodged by the Government and Rhoda Grant MSP.

I am a victim of an ongoing stalking campaign, which is affecting not just my life, but also my husband’s and the stress, and pressure we are experiencing is a crime within its own right.

I have submitted written evidence on the impact and history of our 4-year case, however we believe the perpetrator is now threatening to pursue our daughter.

Her contact is now by email, gathering information about us via others, leaving messages on Facebook, and so it goes on.

Whilst the police and the procurator fiscal are doing everything they can, they are experiencing extreme difficulty.

I am a wife and a mother. I also have an occupation within the criminal justice process so I appreciate the challenges the justice system currently faces. In my role, I have dealt with victims who are experiencing situations not unlike what my family and I are experiencing. I can tell you from a professional and personal angle how frustrating it can be hearing the words 'I understand and believe what you are telling me, but this conduct does not amount to a criminal offence'.

Try for a second to put yourself in the victims’ shoes, constantly living on their nerves and feel how helpless they feel. The law does not protect them.

That is how I feel on a daily basis.

I did not appreciate up until now the trauma stalking inflicts on victims and the devastating effects of this crime.

I followed the hearing at Parliament on 13 April 2010.

My interpretation is that there are two separate issues. No defined stalking legislation, and the problem the Harris case raised, that in fact Breach of the Peace no longer covers a private locus.

I write to voice my concern on the Justice Minister's view that stalking should be integrated into his ‘alarm, fear and distress' amendment.

Given the seriousness of this crime, I ask myself why is Scotland not pushing forward to secure its own specific anti stalking legislation as proposed by Rhoda Grant? This is a growing crime in Britain and Rhoda Grant’s amendment appears to be a way forward to meet the challenges of this calculated and evil crime.

Is it in the public’s best interest to integrate or accept the Government’s amendment? Just the other week the law didn’t recognise that when our stalker messaged my nephew on Facebook, that it put him, myself, my immediate and extended family in a state of fear and alarm. The police and the procurator fiscal did not define this calculated act under Breach of the Peace or any other legislation, so why would they recognise it under the Government’s new amendment?

The Government amendment discusses ‘reckless’ behaviour; our stalker's behaviour, or any others I have been privy to, has never been reckless. The law, as it stands, already defines Culpable and Reckless conduct in its own specific crime.

No, never have I seen or heard of a 'reckless' act from a stalker. Stalking behaviour is evil, calculated and designed to take effect on the victim and their family.

There are other instances where areas of Breach of the Peace have been unpicked to form statute laws (i.e. Sexual Offences Act, racial crime and Protection for Emergency Workers). I agree with this entirely, but stalking is every bit as serious and dangerous, surely it deserves the same consideration and its own 'pigeon-hole'.

It deeply concerns me that at present there is nowhere to place certain incidents, given Breach of the Peace does not hold a private element. Last year our stalker phoned us throughout my pregnancy, at all times of day and night, verbally abusing me and my husband, telling us she would tamper with our cars, wanted my husband 'dead' and would 'do time' for him. However because only my husband and myself heard this, the procurator fiscal informed us it was no longer a Breach of the Peace due to the Harris case.

When I listened to the meeting yesterday, I was immediately concerned at the feedback response to the Governments amendment. As it stands, and if implemented, innocent people like my family and myself are still going to be left unprotected as we are just now.

I am urging you to consider Rhoda Grant’s legislation. It gives this terrible crime a name, helps identify it and validates that what I am experiencing in my life really does exist.

The rest of America, most of Europe and Australia have made moves towards anti stalking legislation and I hope that Parliament and Government recognise it is time to move forward and not into the past with Breach of the Peace or the tightened version of Alarm, Fear or Distress.

I am off my work with what my doctor defines as a 'stress reaction', a result of what our stalker is doing to my life and I now appreciate the true horrors of this crime.

People in Scotland need to be protected from this serious crime with serious legislation and I suggest Rhoda Grant has offered this. The non-exhaustive list provides a framework and dare I say, idiot-proof guide to examples of stalking behaviour.

I am writing to urge you to consider the importance of Rhoda Grant’s amendment and the consequences of not having it in place.

I am well aware that this legislation cannot help our family in relation to what has already happened to us, but it will help protect us and other victims in the future.

15 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Age Concern and Help the Aged in Scotland

Removing the age limit for jurors

Introduction

Although Age Concern and Help the Aged in Scotland welcomes the proposal to increase the age limit on jurors in criminal trials from 65 to 70, we believe there is no evidence to justify setting a rigid upper limit at 70.

In their consultation document Modern Juries in Scottish Criminal Trials, published in 2008, the Scottish Government argued that unspecified evidence showed that people above the age of 70 are strongly likely to have significant cognitive decline that would prevent them from serving as jurors. Age Concern and Help the Aged in Scotland believe this is not backed up by any of the available evidence. Instead we argue that Scotland should adopt a similar system to that used in the Republic of Ireland and allow people aged over 70 the choice of whether or not to exempt themselves from jury service.

Increasing the age limit for jurors

There are strong arguments for increasing the age limit, many of which were mentioned in the Scottish Government's consultation document. For example, as the consultation points out, it is contradictory to talk on the one hand of the important contribution that older people can make to society whilst with the other hand denying them the opportunity to participate in jury service, one of the most important elements of civic life.

The Scottish Government refers to research showing that 70 year olds today are comparable to 65 year olds living thirty years ago and argues that the concerns of the Thompson review – that older people would not be able to cope with the mental demands of jury service – no longer have much support or evidence to back them up. But the only evidence offered to back up why 70 should be the new upper age limit is unnamed research showing most older people "maintain their level of everyday intelligence or mental achievement until around age 70"[1]. This seems to imply that after the age of 70 most people lose their everyday intelligence, a claim that simply does not stand up to examination.

While mental function does generally decrease with age, it does not mean that people over the age of 70 suddenly become incapable of jury service – an allegation that many older people would find deeply offensive. In fact, a recent report of the English Longitudinal Study of Ageing shows that although there is evidence that function declines with age and poverty, the decline is gradual and even in the 80+ category, three quarters show no impairment at all in key literacy and numeracy skill tests[2]. Those in their early 70s show little literacy impairment and only the women show any significant numeracy impairment – still only one in five of the population.

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[1] Scottish Government (2008) *Modern Juries in Scottish Criminal Trials*: p7

[2] ELSA (2006) '*The 2004 English Longitudinal Study of Ageing – Wave 2 (2006)*'. London: Institute for Fiscal Studies. (p.226)

Additional evidence comes from the Seattle Longitudinal Study (SLS) which began in 1956 and focuses particularly on age related changes in cognitive ability. Analysis of their results published in 2006 showed that "even at age 81 less than half of all observed individuals experienced reliable decremental change on a particular ability over the preceding seven years[3]. In addition, average decrement before age 60 amounts to less than two-tenths of a standard deviation, while by age 81 average decrement rises to approximately one standard deviation for most variables." Although this shows an increasing likelihood of cognitive decline, it is a very small average decline and the study's authors go on to note that "the magnitude of decrement, moreover, is significantly reduced when the effects of age changes in perceptual speed are removed."

Given other factors such as extra experience, life skills and available time, it is hard to see any justification for drawing a line at any age. We also note that there are numerous examples of people aged over 70 continuing to perform with notable mental alacrity in fields as diverse as science, art, medicine, law and even in Scottish politics itself.

Other jurisdictions

The case for removing the upper age limit is strengthened further by the situation in a number of other countries. Ireland recently removed the upper age limit for jury service – which had previously been 65 – and have moved to a system whereby anyone over the age of 65 is eligible to serve on a jury but can choose not to if they wish[4]. Similar systems of jury eligibility operate in New South Wales[5] and Victoria[6] in Australia, New York State in the USA[7], and Saskatchewan in Canada[8] and there are no doubt other jurisdictions where the case is the same.

Age Concern and Help the Aged in Scotland believes that such a system here would offer advantages for the court system by increasing the number of available jurors and would also send a strong signal that the Scottish Parliament is willing to eliminate age discrimination. If Scotland were to adopt a system similar to those in place in the jurisdictions listed above, it would most likely be desirable to also adopt the 'optional exemption' for people aged over 70 so as not to interfere with the original aim of Section 68 of the Criminal Justice and Licensing (Scotland) Bill. This would allow people over the age of 70 who did not feel capable of performing jury service to exempt themselves whilst allowing those people over the age of 70 who are willing and able to participate in jury service.

Scotland also has an ageing population as well as an increasingly active older population. Although increasing the age limit to 70 will provide an increase in the number of eligible jurors, the ageing demographics of Scottish society means that in the long term there would most likely be future contractions in the eligible pool of jurors. In areas of Scotland where the proportion of older people is predicted to rise more significantly than average the long-term effect will be more pronounced.

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[3] Warner Schaie et al (2004). 'The Seattle Longitudinal Study: Relationship Between Personality and Cognition', in *Aging, Neuropsychology, and Cognition*. 11(2-3): 303-324.

[4] This change was made in the "Civil Law (Miscellaneous Provisions) Act 2008"

[5] http://www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/SHO_jury_exemptions *[Link no longer operates]*

[6] http://www.liv.asn.au/public/legalinfo/court/court-Juries.html#Heading23 *[Link no longer operates]*

[7] http://www.nyjuror.gov/general-information/questions-and-answers.php *[Link no longer operates]*

[8] http://www.sasklawcourts.ca/default.asp?pg=qb_jury_info *[Link no longer operates]*

The Irish system, as well as the others listed above, explicitly recognises that a fixed age limit wastes the abilities of the many older people willing and able to perform jury service. It also recognises that older people themselves are generally the best judges of their capabilities, which is why their system allows people aged 65 or over to decline jury service if they do not feel able to do it. In the unlikely circumstance that an older person who is not capable of performing jury duty does not exempt themselves, the selection process that takes place before the trial begins would weed them out.

Allowing people over the age of 70 the choice would address the concerns of those older people who feel that they have fulfilled their civic duties by that age and should be excused on that basis, whilst still allowing people aged over 70 who wanted to be eligible for jury service to make that choice for themselves.

UK Context

The case for amending the Criminal Justice and Licensing (Scotland) Bill is strengthened by a recent consultation launched by the UK Government's Ministry of Justice on options for increasing the upper age limit on jurors in England and Wales. The intention of Section 68 of the Bill is to bring Scotland in line with England and Wales but it is highly likely that the goalposts will shortly be moved again in those jurisdictions. One of the options highlighted in the Ministry of Justice consultation document is to remove the upper age limit but allow people aged over 70 excusal by right on grounds of age, and we would maintain that the general thrust of the arguments contained within the document lead in that direction. The consultation document can be found online:

http://consultations.cjsonline.gov.uk/downloads/Jury_service_age_limit_consultation.pdf *[Link no longer operates]*

Conclusion

In light of the available evidence and the experiences from other jurisdictions, we see no reason to exclude members of the older population from their civic rights and responsibilities purely on the basis of their age. We would strongly support not just increasing the age limit for jurors to 70, but allowing people over the age of 70 the choice of whether they want to participate in jury service.

Age Concern and Help the Aged in Scotland believes that the Criminal Justice and Licensing (Scotland) Bill offers the opportunity to place Scotland ahead of the rest of the UK in terms of age limits on jury service, while offering benefits for the court system by increasing the number of eligible jurors and, importantly, striking a significant blow against age discrimination in public life.

26 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Louise Scollay

I am writing to you in support of Rhoda Grant's proposed amendments to the Criminal Justice and Licensing (Scotland) Bill.

As a victim of a stalker for over 4 years I feel that is imperative that there is a new offence to classify stalking. Breach of the Peace is not a satisfactory punishment for the torment and physical and mental effects that this crime has on its victims. For too long people have suffered as victims of stalking and it is time for the offence to be recognised and for those people to be held up to a much more severe offence. The punishment must fit the crime.

Louise Scollay
7 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Hemat Gryffe Womens Aid

We at Hemat Gryffe Womens Aid fully support these amendments ldged by Rhoda Grant (402), Scottish Government (378) and Trish Godman (8) and amendments to amendment 8 (8A – 8D) lodged by Margo MacDonald.

Thank you all for supporting women's causes.

Nusrat Raza
Outreach and Development Worker for Hemat Gryffe Womens Aid
8 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from [name withheld]

I am a stalking victim and am writing to support the amendment proposed by Rhoda Grant for specific anti stalking legislation. It is in my opinion the government's amendment is a catch all amendment which will be adequate for all breach of the peace offences but is not tight enough nor specific enough to cover stalking.

I spent over three years of my life in a living hell and can't put into words the mixture of fear, anger, frustration and exhaustion I lived with on a daily basis. It greatly saddened and distressed me that there was little in way of law to help me against a person that was causing me constant stress. I believe we must have specific legislation to identify stalking for the crime that it is and raise awareness of what stalking is and the effects it has.

I myself didn't realise that what I was experiencing was stalking until over two years of harassment. With this in mind I think we also need to raise awareness of this crime.

Thank you for your time.

16 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from [name withheld]

I am writing to you in support of the campaign to fight for a stalking law in Scotland.

Due to the unacceptable behaviour of my ex partner I have had to move home to a new town with my daughter (not his). This has caused major stress for us both. In particular, my daughter has had to move school and make new friends at a difficult age. She went through hell for about 10 months before she accepted the situation. In total I have spent around 30k in legal fees. I now owe money to my parents, my lawyer, and the bank.

He would constantly call at my house, watch my house. Park and sit in his car round the corner, sit at my door all of the night. He even had a tracking device fitted to my car. He knew my every move.

The police were not interested. I would be told "ignore him and get on with your life", "no crime has been committed", "a crime has been committed but too difficult to prove". Each time I called the police a statement was taken and nothing done about it. I tried to get them to deal with the cases collectively but no, each case was listed on its own and not related to any of the other calls I made. So each time I called them it was treated as a "new complaint" and did not take into account that I had previously called many times before. I remember telling them that nothing would be done until they found a dead body behind the door.

He was ignoring an interdict that I was eventually given (but no power of arrest was attached therefore it meant nothing...money wasted!)

After getting nowhere with the police I eventually contacted my local MP. She had a meeting with them and at that point they started to look back at all the complaints I had made.

He was eventually charged (there were numerous charges, mainly under breach of the peace). Several years have gone by and he still leaves flowers, valentine cards, concert tickets etc at my door, even though his bail conditions are supposed to prevent him from such acts. The trial date has been put back several times. Why? Who knows? At least he is being looked after whilst no one seems to care what life is like for me and my daughter.

We need the police to understand that this is a serious issue. All interdicts should have a power of arrest attached. The whole thing has made me very ill and unable to function properly. I can't see him ever leaving me alone. He thinks he is above the police. I think he is right.

Please help us.

29 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from [name withheld]

I wanted to contact you and let you know that I am in support Rhoda Grant MSP proposed changes to the Criminal Justice and Licensing Bill making stalking an offence and making the crime have a more suitable punishment than the current breach of the peace.

My sister was stalked for 4 years by another woman and the affect it had on her has been awful to watch. She was a single lady living on her own and was a prisoner in her own home until eventually she had to move home. There was no support in place for her apart from us (her family), she had to wait a long time on the NHS waiting list to see a councillor to deal with the affects it had on her. At the same time her stalker walked free with no realisation or care for what she did. 4 years on from the ordeal starting she is now making ready to move away again and continue her university course that she had to leave when she moved home. Stalkers need a proper punishment and this also helps the victims work to get through the ordeal.

I thank you for your time.

7 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Joint Faiths Advisory Board on Criminal Justice

Presumption against short periods of imprisonment or detention and amendments to section 17

The Joint Faiths Advisory Board on Criminal Justice (JFABCJ) has had a long history of engaging with the criminal justice system from the perspective of the communities in which often both the offender and the victim live. Members of the JFABCJ have experience as prison chaplains and have developed relationships with offenders and their families in prison visitors centres and community based projects.

It is clear that short periods of imprisonment can destroy the lives of those who receive them and of their families. A short period of imprisonment cannot provide meaningful activity or rehabilitation. It is simply a means of removing someone from their community, potentially breaking their ties to home and employment, and then releasing them back into the environment which they left. Short sentences presume that if a person is convicted of a crime then imprisonment is the best form of punishment. This argument is without depth; it is short sighted and it ignores the real consequences for us as a society in which punishment is seen in isolation from rehabilitation and reduction of re-offending. Meaningful community sentences enable offenders to pay something back to the community in which they offended while still maintaining the links to their homes and families which can enable them to build a future without continuing to offend.

Alternatives to custody can be far more challenging for the offender than an unconditional period of detention; they also have a lasting effect. The Church of Scotland, a member of JFABCJ, reported to the General Assembly on alternatives to custody in 2007. Their report included an interview with a prisoner who said "Alternatives to custody will only work if they are sufficiently onerous on the offender, such that they can be seen as practical. In addition, it must be made clear that a term of imprisonment carries similar requirements for the offender to address their behaviour. If not, persistent offenders would prefer an unconditional period in custody to a non-custodial sentence with onerous conditions." This report is available from www.churchofscotland.org. A short period of imprisonment simply does not have the capacity to introduce conditions of this type.

The Justice Committee stated in its Stage 1 Report on the Criminal Justice and Licensing (Scotland) Bill that “Where Committee members do not agree is on how far short-term custodial sentences should continue to be regarded as an appropriate disposal (other than in exceptional circumstances), and on whether they are currently being overused, or inappropriately used.”

We challenge the Committee to ask a different question: when is it appropriate to lock up people who do not pose a threat to public safety, with huge cost to the taxpayer and without any expectation of rehabilitation?

The proposals in section 17 of the Criminal Justice and Licensing Bill, which are based on the independent Report of the Scottish Prison Commission, represent a modernisation of the criminal justice system and a real opportunity to change the relationship between offenders and their communities. Members of the Committee are urged to retain the presumption against short periods of imprisonment and to call on the Government to ensure that adequate resources are in place to provide the number of Community Payback Orders that these provisions would require.

Rev Elaine MacRae
Convener, Joint Faiths Advisory Board on Criminal Justice
12 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Scotland's Commissioner for Children and Young People

Scottish Government's Forensic Data Working Group

I am aware that you have recently received a letter from the Cabinet Secretary for Justice that included a draft list of 'trigger' offences for inclusion in an order to give effect to the provision in s.59 (6) of the Criminal Justice and Licensing (Scotland) Bill (*Retention of samples etc from children referred to children's hearings*). The letter, and some of the appended lists of offences refer to differences of opinion within the group and particularly the inability of my representative on the group to commit my office to the inclusion of a number of offences in the draft list.

I welcomed the opportunity for my office to participate in the Forensic Data Working Group as it provided a means to make a positive contribution to the debate around how to achieve a DNA retention regime, which is proportionate and respects the rights of children and young people.

I am writing to you today to further clarify my position on this provision and the draft list of 'trigger' offences.

Retention of DNA from children – SCCYP's position

My office has consistently put forward the view that it may be proportionate to retain DNA profiles of a small number of children who pose a high risk of harm to others on the Scottish DNA Database (SDNAD). We have been equally consistent in raising the points that (1) any such retention regime must be proportionate and based on the actual risk posed by the child to others; (2) appropriate safeguards need to be put into place to protect the rights of children facing retention of their DNA; and (3) retention of DNA as a result of a children's hearing would undermine the welfare-based ethos of the system, and an application to the sheriff for retention should therefore be required in respect of each individual child, outside of the children's hearings system.

I welcome the Scottish Government's stated commitment to children's rights under the United Nations Convention on the Rights of the Child (UNCRC), and its commitment to progressive implementation of the Convention through Scots Law. In my view this policy tests that commitment. A proportionate DNA retention regime would carefully balance the competing rights of a child who committed an offence with the legitimate interests of victims of such an offence and society more widely to be protected. The current proposal does not in my view reflect such a rights-based approach. I would respectfully request that the Committee ask the Scottish Government to publish the details of its assessment of the impact of the current proposal on the rights of children. Further, it would be helpful if Ministers clarified whether in their view, the policy is compatible with the European Court of Human

Rights' judgment in *S & Marper v United Kingdom* (2008), and how they came to that view.

Comments on the list of 'trigger' offences

The lists of offences distributed to Committee members by the Cabinet Secretary include a number of offences to whose inclusion my office would not commit. This position has to be considered in the context of my opposition to the policy of automatic retention contained in s.59 of the Bill. These offences, which include assault, sexual assault, fire-raising, and others, were singled out because some of the problems with the policy approach taken in the Bill are most evident in those offences. They span a very wide range of behaviours, from minor transgressions at the lower end of the scale to very serious offences at the high end.

I oppose the provision in s.59 in its current form, because it will lead to disproportionate outcomes for children. My view is that the policy will have unintended outcomes because of its interaction with the welfare-based decision-making process undertaken by Children's Reporters. Reporters decide whether to arrange a hearing in respect of a child referred to them on the basis of a number of criteria; the key test in that decision is whether the child is in need of compulsory supervision, not merely the gravity of the offence or the risk of reoffending. What 'tips the balance' in the Reporter's decision to arrange a hearing may be any matter of significant concern about the child's welfare. Under the retention regime provided for in the Bill, this may disproportionately lead to retention of the DNA of Scotland's most vulnerable children rather than those who pose the highest risk of harm to others.

I previously raised the example of an 8-year old child who is referred to the Reporter on the offence ground following a playground scuffle, and charged with assault. If assault is included in the list of offences without robust safeguards in place, this child's DNA would be retained on the SDNAD if they accept the ground of referral at a children's hearing. In my view, this would be disproportionate and discriminatory, and the more recently proposed operational safeguards to be included in guidance will in my view be insufficient to mitigate the negative effects of the policy.

Conclusion

I would respectfully request that the Committee take my position into account when considering the Government's draft list of offences and the wider policy on this important matter. The current provision, if enacted, will fail some of Scotland's most vulnerable children and young people and contribute to their demonisation. Given the concerns raised with the Committee at stage 1 and throughout the life of the FDWG to date, I would suggest that the Cabinet Secretary reconsider the provision in s.59 and return to Parliament at a later point with a revised proposal for a proportionate DNA retention regime, which takes proper account of the rights of children.

Tam Baillie
Scotland's Commissioner for Children and Young People
12 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from [names withheld]

We are writing to you to give written support of Rhoda Grant MSP for the amendment for specific anti-stalking legislation in Scotland to make stalking a specific crime to make it easier for police to tackle offenders.

Our reason for this is that we have been the victims of stalking for six years now, [name withheld] in particular, and this is still ongoing. We have had the Anti Social Task Force (ASTF) and police involved, with a stalker pleading guilty to charges. Even though [name withheld] is the main victim of stalking, this has had a huge impact on the whole family. We have had support from the ASTF support service though this service has been withdrawn.

In our situation the stalkers use a variety of methods of surveillance, damage property, give us and in particular [name withheld] unwanted attention and send us things we don't want and our problems at present are not recognised under Scottish law as a stalking campaign and there is no law in place for prosecution.

We are aware that stalking is a very difficult crime to tackle because the individual acts alone aren’t always unlawful; sending somebody a letter or card is not against the law, but it’s the course of conduct. This is not recognised under our present law in Scotland.

Therefore, we strongly support Rhoda Grant MSP for the amendment for specific anti-stalking legislation in Scotland.

12 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from [name withheld]

I am writing with regards to the current stalking law in Scotland and I feel that it is long overdue that the law is changed and also that police forces take the matter much more seriously.

I have recently moved house in an attempt to shake the unwanted attention of a male (who was not an ex partner) in an attempt to get a feeling of safety in my life again. This individual has harassed me for over three years and despite being verbally told by myself and ignoring a solicitor's letter to stay away has really faced no consequences for his actions. The police telephoned him once, advising him to refrain from contacting me and despite my many phone calls top them that he was at my door etc, no further action has been taken by them, except to give me a crime reference number. Needless to say I gave up even telephoning them, my safety is not important to my local constabulary.

So please do give a lot of consideration to changing the law as being a victim of stalking is the most lonely, traumatic experience I (and many others) have endured.

Thank you for your time.

30 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from [name withheld]

After reading the advertisement looking for women to tell their story about stalking I decided to tell you mine as I feel a law has to be brought in to protect women from stalkers as stalking has the same effects as domestic abuse on a woman and you have to be at the receiving end to know what it feels like.

I remarried in 2006 to what I thought was a nice kind man who had done a lot of work for charity. Never having lived with the guy before marriage there was a side to him that I didn't know. I gave up my house, my job at [details withheld] to move up to [details withheld] to be with him and also left my teenage son to finish school in [details withheld] only seeing him at weekends and living with his father during the week.

Once I moved into the flat that we bought together I then saw a different side to the guy that I married. He became very jealous and possessive over myself and also my son. Problems came in quick to the marriage and after six months I decided to move back to [details withheld] so the flat went on the market. It was sold after nine months. My husband begged myself to give the marriage another go but try it in [details withheld]. I agreed to this and we rented a flat in [details withheld]. But things went from bad to worse so I asked him to leave. This he did but both him and his family begged myself to give it one more try as he had a fright and promised to change.

Meanwhile I was looking for a flat to buy as I was back to work at the hospital and the rent was very high and I thought that I would be better off with a mortgage. This I did in my own name and told him it was the only way I would give things another go.

So this happened and we flitted to [details withheld] together and my life went from bad to worse. After a major fall a few months later I told him we need to talk so we went out in the car for a drive, parked the car and talked things over. I told him that I had given him enough chances and it was time for him to leave. We went back to [details withheld], stopped the car and he stole my car keys with the flat key on it for me and refused to give them back until I gave him yet another chance. Enough was enough so I telephoned that police. Once I proved I was the owner of the flat the police sent him on his way after making arrangements for him to come and collect his belongings.

Then the stalking began. My landline rang constantly along with my mobile. I got calls like "am outside watching you". I changed both my landline and mobile numbers, then the letters started coming. I telephoned him, told him there was no other chance and asked him to stop annoying myself. It was over by no matter what I tried it got worse. He started sleeping in his car close to my flat and even gave up his job at [details withheld]. I kept in touch with his family. They tried to talk to him without success. The letters came every second day. Flowers were being sent to myself or being tied to the door handle. Everywhere I looked he was there driving around [details withheld] waiting for me to come out of the flat. Then he would follow me. I even saw him in lay-bys on my way to work to start at 7.00am in the morning and he would be there again at 7.30 at night. I could tell you every registration of every [details withheld] in the area. He was even in the street one day. I saw him and ran into the charity shop. He followed me round the shop. I ran out and into the close of the flat shouting at him to leave me alone. My neighbour from the flat below came out and asked him to leave or he would make him leave.

I had a word with the police. They found him about the street and asked him to leave me alone. But this never happened, it got worse. He even started going to my friends' houses and my family, trying to destroy friendships and family ties. He even tried to grab my son and take him in his car. I took my son inside where he broke down in tears. I put my son in the car and drove straight to the police station where my son had to go and speak to a police woman. The police telephoned my husband's mobile and verbally asked him to leave me and my son. It didn't make a difference. Things continued and three times he was escorted out of [details withheld] as far as [details withheld].

The police asked myself to go to a lawyer. The lawyer asked myself to get witnesses where in [details withheld] I knew no-one apart from the neighbour who was back living with parents and going through a divorce himself so I didn't like to ask him.

Meantime different nurses from the hospital were approaching me and saying I heard your request on West Sound Radio last night. As I didn't listen to West Sound I wondered what they were talking about. So I listened in to the radio station where I heard the request. It said "To my loving wife [name withheld] from your loving husband [name withheld]". He used my maiden name as people knew me by it rather than [name withheld], my married name. Flowers continued to be tied to my door handle. Friends' family got fed up with him and started telling him not to come back near their homes and my best friend and I fell out over him.

This continued for 18 months in total. I had to move to [details withheld] and inform the neighbours not to give out information as to where I was. This helped and I only ever saw him the odd occasion. But my confidence was lost. I was paranoid, locking myself in at all times, taking different roads to my work in fear of meeting him on the roads. This all happened it 2006 and still to this day I lock my doors at all times. The affect it has is just as bad as domestic abuse so please bring out a new law to protect victims of stalking.

I hope this letter helps a bit. I am now a support worker in the community and if I ever come across a victim of stalking I would do all I could to help that person as it is a frightening experience which has a lasting affect in someone's life so please help whatever way you can.

18 March 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Scottish Ballet

Amendment 516

With reference to the above noted amendment to the Criminal Justice and Licensing (Scotland) Bill, I believe that the wording of the amendment may have unintended consequences on arts organisations and theatrical companies producing performances with any element of nudity.

Nudity, as defined, would rule out presentations of some of the most powerful performance work of the 20th and 21st centuries, including numerous critically and publically acclaimed productions created and/or presented in Scotland, including at the Edinburgh International Festival. It would rule out iconic works by world-renowned directors and choreographers.

I note that the amendment is very similar to recent changes in the law in England and Wales (Policing and Crime Act 2009), but without the protective clauses relating to exemptions.

The Committee may wish to consider including an exemption for plays and related entertainment as defined and outlined in the Theatres Act 1968. Furthermore, the Committee might consider exempting premises covered by either the Theatre Licence or the Public Entertainment Licence.

Cindy Sughrue
Chief Executive/Executive Producer
Scottish Ballet
16 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Scottish Coalition Against Sexual Exploitation (SCASE)

SCASE is a coalition of individuals throughout Scotland, working to raise awareness of the harm caused to women through prostitution and other forms of commercial sexual exploitation, including stripping, lap dancing, pornography, sex tourism, mail order brides, and trafficking for the purposes of prostitution. It campaigns for legislative change necessary to: reduce the harm caused through prostitution and other forms of sexual exploitation; remove current gender inequality in the law; challenge the behaviour of men who buy sexual services. SCASE therefore supports the amendment, lodged by Sandra White MSP, seeks to allow local authorities to apply a specific licensing regime to adult entertainment venues, including limiting the number of premises in the local authority area that are permitted to provide adult entertainment. In our view activities such as stripping, lap dancing, pole dancing, and table dancing are forms of commercial sexual exploitation. We are supporting this extremely important amendment, which would, amongst other things, empower Local Authorities to decide on a local level of provision for lap dancing clubs.

Current licensing

Current licensing regulations do not provide sufficient controls for lap dancing and related activities. For example regulations limit both who is eligible to object to licensing applications, and the grounds on which objections can be made. This effectively means that it is not possible to object to the nature of the activity itself. Since we view such activities as exploitative we are opposed to any regulation that condones or manages these activities. Local authorities should have the option of refusing to license these activities because they are exploitative. These activities are incompatible with work on gender equality and on violence against women. It makes no sense to sign up to prevention and awareness work on male violence against women, or to fight for improved protection for women from sexual assault and harassment, and then condone such behaviour under the guise of ‘entertainment’. We cannot have an equal Scotland while women are abused and exploited in this way.

Definition and use of term ‘entertainment’

Lap dancing is referred to in the amendment as a form of ‘Adult Entertainment’. There are forms of entertainment suitable for adults (as opposed to children), but we are strongly of the view that it is inappropriate to use the term ‘entertainment’ when referring to exploitation. Whilst we accept that ‘adult entertainment’ is the commonly used term, it should be made clear that this is a euphemism designed to disguise the true nature of these activities, and to normalise sexual exploitation. Activities such as lap dancing are harmful for the individual women

involved and have a negative impact on the position of all women through the objectification of women's bodies. This happens irrespective of whether individual women claim success or empowerment from the activity. It is essential to separate sexual activity or 'titillation', from exploitative sexual activity. In our view a sexual activity becomes sexual exploitation if it breaches a person's human right to dignity, equality, respect, and physical and mental wellbeing. It becomes commercial sexual exploitation when another person, or group of people, achieves financial gain or advancement through the activity. The fact that there is a demand for sexually exploitative activities does not make these activities legitimate: for example there is also a demand for child pornography. On the contrary, once the idea exists there is pressure on vulnerable women to become involved. There is evidence that once involved, there is pressure on women to take part in further sexual activity. See, for example, the report 'Profitable Exploits: Lap Dancing in the UK'.
http://www.glasgow.gov.uk/en/Search/search.htm?Query=profitable exploits
[Link no longer operates]

Lap dancing as gateway to prostitution
Scottish research with men who had bought sex in prostitution found that 31% of the men had located accessed prostitution through a lap-dancing club. 34% of the men interviewed in Edinburgh who bought sex indoors reported that they had located prostitutes in a lap-dancing club. Significantly fewer (13%) of the men interviewed in Glasgow had located prostitutes in lap dancing clubs. Edinburgh currently has seven lap dance clubs whereas Glasgow has four. Although Glasgow City Council considers lap dancing to be a form of sexual exploitation, current licensing legislation does not prohibit it.
http://www.womenssupportproject.co.uk/content/publications/183,182,216/ChallengingMensDemandforProstitutioninScotland2008.html

Impact on communities
Women who live or work near lap dancing clubs have reported harassment and verbal abuse from men leaving / arriving at clubs. There can be no doubt that the mixture of explicit sexual 'dances', and the availability of alcohol creates an atmosphere, which is extremely unsafe for women, and that woman with children, and families will avoid such areas if possible. This effectively creates city centre areas which are 'no go' areas for women and children. Public attitudes to 'adult entertainment' are changing, partly due to the normalisation of prostitution and pornography in popular culture. Findings show that younger people are more likely to be in favour of clubs opening in their neighbourhood than older people, and opposition to them is greater amongst women (63% opposed) than men (48%) (MORI/AEWG research). Research carried out by Glasgow Chamber of Commerce in 2003 found that three-quarters of city centre business believed that lap-dancing clubs would damage the reputation of the city; half were concerned about the safety of their staff in the vicinity of the clubs.

Negative impact on women 'dancers'
Women who have worked in clubs report assaults, attempted assaults, and

verbal abuse from men in the audience, and research has shown that a worrying number of women report being stalked by customers. (See ‘Strip Club Testimony’ by Kelly Holsopple, http://www.uri.edu/artsci/wms/hughes/stripc1.htm

[Link no longer operates]

A report ‘Violence and Stress at Work and in the Performing Arts’, by Giga, Hoel and Cooper, University of Manchester, published by the International Labour Office, Geneva, 2004, states that “Some dancers, particularly those employed in “exotic dancing” such as stage dancing, table dancing and lap dancing report social disillusionment and increased health problems due to: costume and appearance restrictions, dirty work environments, coercion by management and customers to perform particular types of dance, sexual harassment, physical assault, forced sex and the effects of stigmatisation”. Lap dancing has increased the vulnerability of all dancers. It presents a potential for direct skin to skin, genital-to-genital, or oral to genital contact in the guise of dancing. It increases the probability that dancers may be sexually coerced or assaulted, and blurs the boundary between entertainment that relies on sexual fantasy and that which involves physical contact. Although many dancers were supportive of regulating lap dancing, regulations introduced to date have not helped in reducing the impact of lap dancing on the lives of dancers. The findings of this study suggest that there is a need for a change in policy regarding the regulation of strip clubs and their patrons. (From Erotic /exotic dancing: HIV related risk factors, Lewis & Maticka-Tyndale, University of Windsor, 1998) Whilst the sex industry promotes lap dancing as a glamorous and lucrative dance form, the experience of women dancers is almost always very different. As one woman said, "If you're masturbating someone through his trousers with your arse then that's definitely a sexual service. It's outrageous that lap-dancing clubs are offering that kind of experience when they only need the same license as a cafe ... No matter what the owners tell you, these places are 100% sex industry." (Jenni, quoted in Libby Brooks article, The Guardian, 19th March 2009)

Numerous articles and research studies have highlighted the poor working conditions for women, as for example Nadine De Montagnac reported at a Westminster parliamentary hearing: “I have witnessed a lot of things going on and the attitude towards women by the people in charge is appalling…the women entering the industry are vulnerable people…they think they will be protected and safeguarded but are being abused and brainwashed into it…It is a celebrity lifestyle which is sold to them and they think that being sexy is empowering. You are only empowered for three minutes when you are on stage; the rest of the time you are not empowered… you have no rights; there is no sick pay; if you do not like it you can leave, that is the answer to every complaint.” (From House of Commons Minutes of Evidence taken before the Culture, Media and Sport Committee, Tues 25th Nov 2008, available at: http://www.publications.parliament.uk/pa/cm200708/cmselect/cmcumeds/uc1093-iv/uc109302.html

Many women have to resort to lap dancing out of desperation or insurmountable financial hardship – when she finds herself impoverished with children to care for but lacking viable job skill. It is not as the media commonly suggests – that these women are all supposedly involved because when presented with a wide variety of attractive options, they've decided the sex industry has the most to offer. These reduced economic options are exploited and the most vulnerable women - poor women, women of color, and women with few job skills are more likely to find themselves in situations in which commercial sexual exploitation are their only options. A woman might choose to become involved commercial sexual exploitation because of limited alternative options. Why should we be prepared to accept that women who are poor, vulnerable and homeless should be "made available" for sexual exploitation by men. SCASE questions why Scotland needs a "sex" industry where women's bodies and sexuality are aggressively commodified and exploited. This is a cultural phenomenon with the demand for a never-ceasing availability of women for men to use sexually.

We believe this amendment goes some way in giving power back to local authorities and communities to oppose applications for commercial sexual exploitation venues in their areas and to highlight the fundamental problem in our culture where men's sense of entitlement and privilege for paid for sexual activity remains unchallenged.

26 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Challenging Demand Women's Support Project

The Women's Support Project (WSP) is a feminist charity working to raise awareness about and improve services, to tackle violence against women and children which includes women exploited through commercial sexual exploitation (CSE). There are clear links between child abuse, childhood neglect and domestic violence to women's involvement in CSE. These factors, along with poverty, addictions homelessness, trauma and mental health issues create vulnerability and inequality, which is exploited through men's payment for sexual activity.

The WSP manages the Challenging Demand project (CD), which receives monies from the Scottish Government Violence against women funding. CD has 3 broad aims:

1. To increase understanding of the myths and realities surrounding commercial sexual exploitation.
2. To increase awareness of commercial sexual exploitation as a form of violence against women
3. To lobby for approaches which focus on and target the men who make up the demand for CSE.

CD believes that focus must be on the demand - the men who assume the right to purchase others for sexual activity, commodifying and marketing their bodies. No one has the right to exploit, nor profit from the exploitation of, another person regardless of any form of exchange of money, goods or services.

We therefore support Amendment 516 (lodged by Sandra White), which seeks to allow local authorities to apply a specific licensing regime to adult entertainment venues, including limiting the number of premises in the local authority area that are permitted to provide adult entertainment.

In our view activities such as stripping, lap dancing, pole dancing, and table dancing are forms of commercial sexual exploitation. We are supporting this extremely important amendment, which would, amongst other things, empower Local Authorities to decide on a local level of provision for lap dancing clubs.

Current licensing regulations do not provide sufficient controls for lap dancing and related activities. For example regulations limit both who is eligible to object to licensing applications, and the grounds on which objections can be made. This effectively means that it is not possible to object to the nature of the activity itself. Since we view such activities as exploitative we are opposed to any regulation that condones or manages these activities. Local authorities should have the option of refusing to license these activities because they are exploitative.

We believe this amendment goes some way in giving power back to local authorities and communities to oppose applications for commercial sexual exploitation venues in their areas and to highlight the fundamental problem in our culture where men's sense of entitlement and privilege for paid for sexual activity remains unchallenged.

In the longer term it also offers an opportunity to change conflicting attitudes in Scotland about "commericalised sex" and violence against women (VAW). The Scottish Government hope to change these attitudes as outlined in their publication "Safer Lives: Changed Lives". Lap dancing / "adult entertainment" is clearly included as part of a wide spectrum of behaviours that constitute male violence against women.

> "*Activities such as pornography, prostitution, stripping, lap dancing, pole dancing and table dancing are forms of commercial sexual exploitation. These activities have been shown to be harmful for the individual women involved and have a negative impact on the position of all women through the objectification of women's bodies."*

These activities are incompatible with work on gender equality and on violence against women. It makes no sense to sign up to prevention and awareness work on male violence against women, or to fight for improved protection for women from sexual assault and harassment, and then condone such behaviour under the guise of 'entertainment'. We cannot have an equal Scotland while women are abused and exploited in this way.

26 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Scottish Women's Convention

Introduction

The purpose of the Scottish Women's Convention (SWC) is to communicate and consult with women in Scotland to influence public policy. Through the Convention's policy work, round table and celebratory events the SWC strives to have contact with women and relevant organisations. The SWC aims to provide an effective way of consulting with a diverse range of women in Scotland.

The Scottish Women's Convention has a network of over 300,000 women from relevant organisations throughout Scotland.

Background

This paper provides a response by the Scottish Women's Convention to the Scottish Parliament Justice Committee's request for written evidence for a further amendment which it considers raises a significant new issue that was not considered in detail during the Stage 1 enquiry.

Amendment 516, lodged by Sandra White MSP, seeks to allow local authorities to apply a specific licensing regime to adult entertainment venues, including limiting the number of premises in the local authority area that are permitted to provide adult entertainment.

SWC Submission

As the SWC are totally committed to condemning all violence and exploitation of women and children we welcome consideration of this amendment by the Justice Committee and fully support the amendment put forward by Sandra White MSP.

It is our view that 'adult entertainment' is frequently a euphemism for commercial sexual exploitation and it normalises activities which disguise more abusive, controlling and demeaning behaviour towards women. We strongly believe that there is a critical need for a comprehensive review of the powers presently available to local authorities and communities to challenge or limit licences issued to lap dancing clubs and similar venues.

Current licensing regulations do not provide sufficient controls for lap dancing and related activities. We would therefore welcome any legislation that embeds greater powers with local authorities to curtail/reduce or otherwise restrict the availability or accessibility of adult entertainment venues.

Local authorities should be provided with the power in law to respond effectively to community resistance to and public concerns about the prevalence of adult entertainment venues in their area. Women who have spoken to the SWC have expressed real concern about the potential these venues provide for other exploitative sexual activities, namely prostitution, being conducted illicitly under the guise of adult entertainment businesses.

Feedback given to the SWC also strongly suggests consideration should be given to extending power sufficiently to enable interested groups to voice their concerns to licensing authorities regarding these establishments, regardless of whether their profile is national or local. Women have told the SWC that the ability of these groups to participate in the decision making process would assist often unprepared communities to formulate and challenge the granting of licenses.

The SWC believe that through legislative intervention local authorities must be provided with the powers to grant licences on the basis of the activity itself. We believe the powers should be focused on the interpretation of 'public entertainment' and do not agree with these establishments being licensed in the same way as entertainment for adults as opposed to something which is not suitable for children.

Finally, the SWC think that any advertising or promotion of jobs in this 'industry' by Job Centres conflicts with the gender equality responsibilities required by public service providers. Local Authorities should therefore be extended the power to exclude this type of advertising in their region of governance to protect women from latent exploitation and abuse.

The effect of conflicting messages when dealing with all forms of violence and exploitation of women must not be ignored. As a society we cannot condone the unlimited licensing of these establishments while rightfully condemning violence against women in our culture.

Isabelle Lannon
Policy Officer
26 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Engender

Engender works on a feminist anti-sexist agenda to make visible the impact of sexism on women, men, children, society and our social, economic and political development. We do this by making the causes and impact of women's inequality visible, promoting gender equality in policy and practice and increasing women's power and influence.

We welcome this opportunity to provide a written submission to Justice Committee with regard to the Criminal Justice and Licensing (Scotland) Bill – Stage 2 amendment 516 on the control of lap dancing and other adult entertainment venues.

Views of our members

Since 2004 Engender has continually worked to raise discussion among our members and the public about the issues surrounding certain forms of so-called 'adult entertainment' such as lap-dancing, stripping, pole-dancing and table dancing. The outcome of our research and discussion has been clear – rather than promoting female empowerment, financial security and freedom of expression, the normalisation of lap-dancing and strip-tease instead develops the illusion of sexual availability, while actively damaging women and reinforcing gender inequality.

Annual turnover in the UK 'Adult Entertainment' industry is estimated to be in excess of £300 million (approximately £15 million in Scotland alone) and is one of the fastest growing elements in the UK's "leisure services" industry. This is of great concern to our members who view this 'industry' as legitimized commercial sexual exploitation.

Tackling commercial sexual exploitation

Engender holds that activities such as stripping, lap dancing, pole dancing, and table dancing are forms of commercial sexual exploitation. For this reason, we support the amendment lodged by Sandra White MSP which seeks to allow local authorities to apply a specific licensing regime to 'adult entertainment' venues, including limiting the number of premises in the local authority area that are permitted to provide 'adult entertainment'.

We believe that Local Authorities should be empowered to decide on a local level of provision for lap dancing clubs and that current licensing regulations do not provide sufficient controls for lap dancing and related activities. Because we view such activities as exploitative we are opposed to any regulation that condones or manages them.

There is a recognisable link to prostitution and human trafficking (Holsopple, 1998; Bindel 2004). It can be argued that the clubs should be viewed and licensed as sex establishments and subject to the same controls.

Scottish research with men who had bought sex in prostitution found that 31% of the men had located accessed prostitution through a lap-dancing club. 34% of the men interviewed in Edinburgh who bought sex indoors reported that they had located prostitutes in a lap-dancing club.

Negative impacts on local communities and society as a whole

These establishments can also have negative consequences for those not directly involved. The areas surrounding ‘adult entertainment’ clubs are subject to higher levels of crime, sexual violence and increased levels of fear amongst women travelling in the vicinity (Lilith project 2007). The mixture of explicit sexual ‘dances’, and the availability of alcohol creates an atmosphere, which is extremely unsafe for women, and we know from our members that they will avoid such areas if possible which effectively creates city centre areas which are ‘no go’ areas for women and children. During a recent survey carried out with our members, 90% of respondents asserted that they would, or already had, objected to ‘adult entertainment’ premises being located within their neighbourhood. Again this demonstrates that members have concerns about the detrimental effects of such establishments and these concerns are supported by research. It has been shown that sexual assaults have increased in the geographic area surrounding ‘adult entertainment’ venues.

Advocates of ‘adult entertainment’ clubs argue that they are purely entertainment, not prostitution and the women work of their own volition. However, there is little doubt that the way that lap-dance clubs are organised, and the conditions that the dancers operate in, reinforces gender inequality, and normalises men’s sexual objectification of women.

At Engender we fully support Sandra White’s amendment because we believe that it gives power back to local authorities and to communities to oppose applications for commercial sexual exploitation venues in their areas. It would also potentially work to highlight the fundamental problem in our culture where men’s expectation of entitlement to paid-for sexual activity remains unchallenged.

Carol Flack
Projects Officer
26 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Stirling Action for Change Multi Agency Partnership

Stirling Action for Change is a multi-agency partnership committed to building a strategic framework in the Stirling area for tackling violence against women and children. The partnership brings together key statutory and voluntary organisations throughout Stirling. These agencies support the Scottish Government's position that violence against women and children is any action which harms or causes suffering or indignity to women and children, where those carrying out the action are mainly men and where women and children are predominantly the victims.

Stirling Action for Change also supports the Scottish Government view that a shared approach is necessary to achieve greater consistency of service provision across Scotland to improve outcomes for women, children and communities, and we are working towards progress in bringing about the changes in Scottish society that are required to eradicate violence against women.

Our position

We are supportive of the amendment 516 lodged by Sandra white MSP and urge the Justice Committee to support it. Our arguments in favour of this amendment can be summarised as follows:

- Lap dancing is a form of commercial sexual exploitation and, as such, is a form of violence against women. It sanctions the objectification of women, glamorises exploitation and harms work to achieve gender equality.
- The proliferation of lap dancing clubs is harmful to women individually, women collectively, and communities, and we support measures to prevent this.

Scotland has been innovative in its approaches to tackling forms of violence against women and is admired internationally for its progress on domestic abuse. It would be fitting if Scotland could now become as progressive in tackling the harmful effects of the sex industry. Lap dancing clubs harm communities. They make women feel uncomfortable, unsafe, and can create 'no-go' areas in our towns and cities.

Councils should have the power to limit the number of clubs – setting the limit at zero if they wish to – and, therefore, we support amendment 516. We urge the committee to take a stand against exploitation and stand for a safer and more equal society and to support this amendment.

Anne Meikle, VAW Policy Coordinator
27 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill - Stage 2

Written submission from Glasgow Community and Safety Services on behalf of Glasgow City Council and Community Planning Partners

Amendment 516: control of lap dancing and other adult entertainment venues

Introduction

Glasgow Community and Safety Services (GCSS) welcome the opportunity to provide evidence to the Justice Committee and to strongly urge that Amendment 516 lodged by Sandra White MSP, which would allow local authorities to apply a specific licensing regime to adult entertainment venues, is supported. The City Council and GCSS have been concerned about the current licensing regime which provides little scope for Licensing Boards to consider the nature of the activities involved. In attempting to respond to the concerns raised by individual citizens, organisations and businesses the Council has submitted a number of objections to applications but the criteria for refusals are extremely limited. This new proposal would provide local authorities with greater powers to determine the number, if any, of clubs in their area.

GCSS is a charitable organisation formed by Glasgow City Council and Strathclyde Police to prevent crime, tackle anti-social behaviour and promote community safety in the city. GCSS has specific responsibility for taking forward work on violence against women on behalf of the Council including Glasgow's commercial sexual exploitation policy. Managing support provision for women involved in prostitution and women who have been trafficked for sexual exploitation also provides a wealth of specialised knowledge on the issue of prostitution and trafficking and in particular the experience and needs of women.

There have been robust, strategic and well developed partnership arrangements in Glasgow to address the various issues of violence against women and children since 1998. Whilst this response has been drawn up by GCSS on behalf of GCC the views are shared across Community Planning partners in the city. It is also worth noting that Commercial sexual exploitation is a priority for action within the City's Annual Strategic Safety Assessment.

Why this change is needed?

In 2009, the Scottish Government published "Safer Lives: Changed Lives" which recognises commercial sexual exploitation, including table dancing and lap dancing as forms of violence against women which has "been shown to be harmful for the individual women involved and have a negative impact on the position of all women through the objectification of women's bodies. This happens irrespective of whether individual women claim success or empowerment from the activity". We consider that the approach in "Safer Lives" firmly implies that the Scottish Government now have a clear duty to implement measures aimed to assist local authorities, community planning partners and the Police with tackling all forms of violence against women. Not only is commercial sexual exploitation harmful for those directly involved but the mainstreaming of the sex industry also has a broader cultural harm which normalises and condones sexual violence.

- GCSS views lap dancing as one form of commercial sexual exploitation which degrades women and encourages men to objectify women for their own gratification. This runs counter to Glasgow City Council's aim to promote a city in which all citizens are treated with respect and dignity. The fact that there is a demand for these activities does not make them legitimate.

- **Current situation unsatisfactory.** There are 4 lap dancing clubs operating in Glasgow at present, all within the City Centre boundary. Intelligence would suggest that these venues are in fact linked to, and part of, the sex industry and that buying and selling of sexual services does occur in some clubs. In 2009, with the introduction of the Licensing (Scotland) Act 2005, premises licences were refused for 2 of the clubs after inspections from Licensing Standards Officers identified several areas of non-compliance. These breaches related to advertising of low cost alcohol promotions, rules relating to nudity being broken as well as violations of the "no touching" rules. Appeals for these licences are currently pending.

- **Concern about the harmful impact on women dancers.** Research shows that buying and selling of sexual services occurs in some clubs and women performers face poor working conditions and high levels of harassment. *(Profitable Exploits: Lap Dancing in the UK, Julie Bindel, August 2004).* An interview with a performer in the *Adult Entertainment Working Group Report* published by the *Scottish Executive in 2006* detailed that she was a "self-employed contractor and has no working rights". Commission taken by club owners can be as much as 50% of the dancer's earnings on a shift. It is not unusual for a performer to finish a shift in "debt" to the club, as there have been no customers willing to pay for a dance. By creating conditions where it is very difficult for dancers to make a profit, this may lead to performers offering sexual services in order to top up their earnings.

- **Lap dancing can be a gateway to prostitution.** Scottish research with men who had bought sex in prostitution found that 31% of the men had accessed prostitution through a lap-dancing club. 34% of the men interviewed in Edinburgh who bought sex indoors reported that they had accessed this in a lap-dancing club. This had been the case for significantly fewer (13%) of the men interviewed in Glasgow. *(Challenging Men's Demand for Prostitution in Scotland, Women's Support Project, 2008)*

- **Negative impact on communities.** Those living or working nearby clubs are concerned about harassment. The *Adult Entertainment Working Group Report, Scottish Executive 2006,* outlines a significant point raised by the Sandyford Initiative that "men who are aroused when they leave adult entertainment venues pose a threat for those walking past or residents nearby, especially if they are in groups of stag parties. Women in particular may feel more fearful in these areas." The Report also highlights that The City of Edinburgh Council had in the years before the Report's publication seen a vast increase in complaints from residents and workers in the Tollcross area, in relation to" incidents of harassment and intimidation of local women and men, by the users of the areas lap dance clubs". Local businesses and residents generally agree that the presence of lap dancing clubs in the city has not only the effect of public nuisance, but a generally adverse impact on a city's image.

- **Current licensing regime is ineffective.** Although Glasgow City Council has for years attempted to clamp down on the provision of these clubs the current licensing framework does not grant sufficient powers. At the moment, the licensing of such clubs is regulated as part of the leisure industry as opposed to sex industry under Section 41 of the Civic Government (Scotland) Act 1982 which outlines the need for a "Public Entertainment Licence" in order to legally operate. The term "public entertainment" is inaccurate and misleading in light of the activities offered by these clubs. Portraying women as sexual objects plays a part in normalising sexual violence and contributes to the male abuse of women being acceptable, tolerated, condoned and excused. The provision of "grandfather rights" under the 2005 Act also creates another obstacle, making it very difficult for a local authority to refuse a licence, where one has been granted under previous legislation. These rights also make it difficult to impose new conditions on such clubs.

- **Changes in England and Wales.** In 2008, the Home Office announced its intention to introduce a number of measures in England and Wales to tackle demand and improve protection for women involved in the sex industry. These measures are now in force through the recently enacted Policing and Crime Bill which has re-categorised lap dancing venues as "sex entertainment venues", giving local authorities the same licensing powers as apply in sex shops in order to ensure better regulation and give local people a greater say. In light of these recent changes in England and Wales, it is clear that the time is right for Scotland too, to take decisive action to ensure greater consistency throughout the UK.

Conclusion

This amendment to the Criminal Justice and Licensing Bill provides the Scottish Government with the opportunity to grant local authorities the necessary powers to control and restrict the provision of lap dancing clubs within their area. Indeed it may be appropriate to set the provision of adult entertainment premises at nil. We firmly believe that local authorities must have the option to refuse to licence such establishments. There is an overwhelming contradiction in licensing such exploitative activities while at the same time trying to promote a Scotland grounded on principles of equality, dignity and human rights for all. We would hope that this amendment would also cover new applications as well as variations of existing licences in order to prevent pubs and clubs from providing adult entertainment activities on their premises.

We would urge the Justice Committee to consider legislative reform of the licensing law relating to activities such as lap dancing by supporting Amendment 516.

27 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Convention of Scottish Local Authorities

Stage 2 amendment on the control of lap dancing and other adult entertainment venues.

Introduction

1. COSLA, as the representative organisation of all Scottish Councils, is pleased to respond to the invitation to comment on Amendment 516 lodged by Sandra White MSP seeking to allow local authorities to apply a specific licensing regime to adult entertainment venues, including by limiting the number of premises in a local authority area that are permitted to provide adult entertainment.

2. In the time available it has not proved possible to obtain responses from all our member councils, so the comments below are based on a restricted number of views. Neither has it been possible to obtain political approval of this submission but it is hoped to confirm that approval shortly until which time these comments have the status of an officer submission only.

Background

3. COSLA has identified issues around the commercial exploitation, trafficking and violence against women inrelation to lap dancing. In this connection, members of the Justice Committee may already be aware that the Scottish Government and COSLA are joint signatories to Safer Lives: Changed Lives – a Shared Approach to Tackling Violence Against Women in Scotland. This includes the statement that *Activities such as pornography, prostitution, stripping, lap dancing, pole dancing and table dancing are forms of commercial sexual exploitation. These activities have been shown to be harmful for the individual women involved and have a negative impact on the position of all women through the objectification of women's bodies. This happens irrespective of whether individual women claim success or empowerment from the activity. It is essential to separate sexual activity from exploitative sexual activity. A sexual activity becomes sexual exploitation if it breaches a person's human right to dignity, equality, respect and physical and mental wellbeing. It becomes commercial sexual exploitation when another person, or group of people, achieves financial gain or advancement through the activity.*

Comments

4. It is noted that the proposal is not to ban adult entertainment but to regulate it.

5. Generally, the proposed amendment requires clarification as to its intent and consideration needs to be given to the processes that would stem from its implementation, and whether it would add to local authorities' ability to control lap dancing/commercial sexploitation.

6. It is understood that the thinking behind the Licensing (Scotland) Act 2005 was that this Act and its associated regulations contained sufficient powers for Licensing Boards to regulate adult entertainment in premises with a licence under that Act. It would appear that the proposed amendment would require lap dancing and other adult entertainment venues to apply for an adult entertainment licence in the same way as a sex shop licence.

7. This skirts round the issue of the provisions of the Civic Government (Scotland) Act 1982 section 41(2)(F) as amended which exempts liquor licensed premises from the need to apply for a public entertainment licence. The new licensing requirement would apply both to adult entertainment premises with and without a liquor licence. It is felt that there can be few that fall into the second category.

8. Inviting Boards to consider premises licence applications - incorporating proposed operating plans including adult entertainment - and then inviting Councillors as Licensing Committees to consider applications for Civic Government licences for lap dancing and other adult entertainment venues would be at the very least confusing. It does not equate with the generally accepted principle of 'light touch' regulation and would not be helpful to businesses. The activity should be subject to one regulatory regime.

9. Clarification would be helpful as to whether the proposer is seeking to cover adult entertainment venues at which alcohol is not sold and for which premises licences are therefore not required. If this is the case, before introducing a new form of licensing, the question must be debated as to whether this is an issue.

10. On the basis of the limited views available, COSLA's view is that the amendment is unnecessary unless the desire is for councils to take control of the regulation of adult entertainment in place of Licensing Boards. That would allow a more proactive control than has been allowed to Boards. The principle of affording discretion to regulate if so minded, is generally acceptable to COSLA, but in this instance the detail would require further consideration to avoid double regulation.

11. From the resource perspective, no particularly adverse impact is foreseen from the perspective of enforcement or resources unless there is a level of application not presently anticipated. If the amendment is passed, however, COSLA would wish an assurance that the situation will be monitored with additional resources being provided if required.

27 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Scottish Women's Aid

Scottish Women's Aid would like to lend their support to Amendment 516, lodged by Sandra White MSP, which seeks to allow local authorities to apply a specific licensing regime to adult entertainment venues, including by limiting the number of premises in the local authority area that are permitted to provide adult entertainment.

We echo the argument put forward by Zero Tolerance in their submission to the Committee in this matter:

- Lap dancing is a form of commercial sexual exploitation, and as such as a form of violence against women. It sanctions objectification of women, glamorises exploitation and harms work to achieve gender equality.
- The normalisation of the sex encounter 'industry' must be challenged.
- The proliferation of lap dancing clubs is harmful to women individually, women collectively, and communities, and we support all measures to prevent this.

Louise Johnson
National Worker, Legal Issues
28 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Law Society of Scotland

I refer to amendment 516 by Sandra White MSP which seeks to allow local authorities to apply a specific licensing regime to adult entertainment venues, including limiting the number of premises in the local authority area that are permitted to provide adult entertainment.

The Licensing Law Sub-Committee of the Law Society of Scotland (the Sub-Committee) has the following comments to make.

The Sub-Committee questions whether this proposed amendment is necessary given that it is the Sub-Committee's understanding that all such venues have a premises licence under the Licensing (Scotland) Act 2005 (the "2005 Act")

With particular reference to section 23 of the 2005 Act, the Board must, in terms of section 23(4) in considering and determining an application for a premises licence, consider where any of the grounds for refusal apply and if any of the grounds apply (section 23(4)(b)), the Board must refuse the application.

With particular reference to section 23(5) which sets out the grounds for refusal (including overprovision at section 23(5)(e)) the Sub-Committee notes in particular the terms of section 23(5)(d) being a ground of refusal namely:

23(5)(d) that, having regard to –
(i) The nature of the activities proposed to be carried on in the subject premises
(ii) The location, character and condition of the premises, and
(iii) The persons likely to frequent the premises, the Board considers that the premises are unsuitable for use for the sale of alcohol.

More generally, the Sub-Committee notes that the ground of refusal set out at section 23(5)(c) is that the Licensing Board considers that the granting of the application would be inconsistent with one or more of the licensing objectives and that in considering whether the granting of application would be inconsistent with any licensing objective (section 23(6)(b)), the Licensing Board must take into account any report made by the appropriate Chief Constable under subsection (3)(b) of section 21.

The licensing objectives in terms of section 4 of the 2005 Act are preventing crime and disorder, securing public safety, preventing public nuisance, protecting and improving public health and protecting children from harm.

This amendment could lead to a curious and anomalous situation whereby a

Licensing Board grants a premises licence in respect of premises providing adult entertainment all in terms of section 23 of the Licensing (Scotland) Act 2005 yet a local authority refuses a public entertainment licence in respect of the same premises where the local authority has resolved in terms of schedule 2 of the Civic Government (Scotland) Act 1982 to have effect in their area in relation to adult entertainment venues.

The Sub-Committee notes that this is specifically provided for in terms of the amendment which seeks to insert paragraph 6(A) after sub paragraph (6) to schedule 2 of the 1982 Act in that “a local authority may refuse an application for the grant or renewal of a licence despite the fact that a premises licence under Part 3 of the Licensing (Scotland) Act 2005 is in effect in relation to the adult entertainment venue.

This becomes particularly problematic where a Licensing Board has granted a premises licence and a local authority has resolved, in terms of schedule 2(9) sub-paragraph 6 of the 1982 Act to fix "Nil" as the appropriate number of adult entertainment venues for the purposes of schedule 2(9) sub-paragraph (5)(c).

The Sub-Committee is concerned that a double licensing system will be brought into effect as a result of this amendment despite the extensive regulatory and enforcement powers available to Licensing Boards in terms of the 2005 Act.

The Sub-Committee therefore questions whether it is correct to allow the closure of licensed premises which offer this nature of activity in a well managed environment where the Licensing Board has no cause for concern simply as a result of a policy decision of a local authority.

Alan McCreadie
Deputy Director, Law Reform
27 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Lynn Anderson

Written submission in support of amendment 516

When we refer to lap dancing as “adult entertainment”, who are adults that are being entertained? It is adult men that are being entertained and at whose expense? At the expense of girls, women and communities, but also at the expense of boys and men. How do we expect young men to form healthy, fulfilling relationships with women when we license venues for them to go and objectify women, to use the power of their pound to get women to act in a way that the men want. These venues are only teaching men that they can control women, not respect them or treat them like equals or understand them as sentient beings who are entitled to define their own sexuality – not having it prescribed to them by male demands.

Even in daylight I feel uncomfortable walking by lap dancing or “gentlemen” clubs, but I can’t avoid them because they are on (or just off) our high streets. I feel uncomfortable because I know these are places where women are reduced to bodies, and the purpose of these bodies is to sexually arouse men. They serve me as a reminder of how far we have still to go to achieve equality. Women will never be seen as equal to men while they are still reduced to body parts whose purpose is to serve men’s wants. I avoid the parts of town in the evening where these clubs are, as I do not want to come across men exiting the clubs. I fear the sexual harassment I may receive from a group of men whose “entertainment” has just involved their sexual arousal. Lets be clear, these clubs are not entertaining for women.

The Scottish Government has made some acknowledgement of the harm that men cause with their demand for prostitution and has taken steps to address this demand. But what is lap dancing? Lap dancing venues involve men paying money to get women to perform sexually. The rules may state that there should be no physical contact, but the aim of the woman’s performance is the sexual gratification of the man. Lap dancing is just a version of prostitution, and a gateway to the legally defined version of prostitution. Please continue with your work in addressing the harm caused by the commercial sexual exploitation of women and girls by supporting this amendment. Please provide local councils with the tools to react to their communities’ concerns.

I fully support Sandra White’s amendment, which will let communities and local councils take back some control of the proliferation of these venues in their area.

Lynn Anderson
26 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Evelyn Tett

I am strongly in support of amendment 516 to the above Bill (lodged by Sandra White). This is because I see lap-dancing as a form of exploitation of women.

Lap dancing and other forms of so-called ‘adult entertainment’ are sexually exploitative and damaging to women’s lives and to gender equality. The Scottish Government document ‘*Safer Lives: Changed Lives*’ notes that commercial sexual exploitation causes harm to *all* women, by sanctioning objectification of women’s bodies, and further notes that this harm to women collectively happens regardless of whether individuals claim liberation or empowerment from the activity.

Lap dancing glamorises exploitation whereas the reality is that lap-dancing clubs are highly exploitative. Unlike other dance performances where the audience members pay for a ticket and the organisation staging the performance pays the performers, in ‘adult entertainment’ the women have to pay the club in order to perform (often around £80-£100 per night), and then the men pay the women directly. Women also pay for club outfits and pay fines for being late or missing shifts.

Clubs maintain a high ‘performer to punter’ ratio to offer the customer maximum choice of varieties of women – in itself an indicator of their view that women are objects for consumption and not human beings with rights and dignity – and this means there is intense competition between performers, which in turns escalates the types of performance on offer. Increasingly men expect explicit sexualised behaviour and full nudity. Even in clubs where licensing conditions are adhered to many women report a heavy psychological toll linked to dealing with, in effect, normalised sexual harassment on a nightly basis.

Lap dancing is a manifestation of gender inequality. It is not a coincidence that the performers in lap-dancing clubs in Scotland are almost all women and the customers and business owners are almost all men. This industry thrives on the systematic exploitation of women by men – and a gendered hierarchy of power. An industry like this has no place in modern Scotland.

Evelyn Tett
26 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Federation of Scottish Theatre

Thank you for the opportunity to submit evidence in relation to the above amendment to the Criminal Justice and Licensing (Scotland) Bill.

We are supportive of proper regulation of lap dancing and other adult entertainment venues, but we are concerned that Amendment 516 as currently worded may have unintended consequences for nudity or semi-nudity within the context of theatre or live art performances.

We would like to see two additional clauses excluding, firstly, ‘plays’ as defined in the Theatres Act 1968[1] and secondly, theatre and performance premises who hold a Theatre or Public Entertainment Licence.

Jon Morgan
Director
Federation of Scottish Theatre
27 April 2010

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[1] “Play” is defined in the 1968 Theatres Act as “any dramatic piece, whether involving improvisation or not, which is given wholly or in part by one or more persons actually present and performing and in which the whole or a major proportion of what is done by the person or persons performing, whether by way of speech, singing or action, involves the playing of a role”.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Steven McDonald on behalf of Diamond Dolls, Glasgow and Hooters, Edinburgh

Diamond Dolls has operated since October 2000 and Hooters has operated since February 2004. My current role with the two venues are senior management and promoter.

I have had a career in the lap dancing industry in Scotland since 1997.

In 2005 I was invited to the Scottish Executive to meet with reporters for the Nicholson report and share my knowledge of the lap dancing industry in Scotland.

I submit amendment 516 is unnecessary and its true purpose unclear. It is apparent there is a desire to side step the stringent licensing laws and current legislation for lap dancing venues.

I am somewhat surprised that a call for a specific licensing regime is presented in the amendment.

The author of the amendment should be aware that licensing boards have produced and implemented for several years a code of practise relative to the provision of lap dance entertainment and licensed premises. The code of practice covers all aspects of the operation of lap dancing venues.

The code describes its expectations and compliance with its terms and any failure to do so will be taken into account in assessing the continuing suitability of any affected premises for the sale of alcoholic liquor.

A measure of the success of the implementation of the code of practise is the reality that there is NO EVIDENCE that there are significant problems of disorder, antisocial behaviour or public nuisance surrounding the operation of lap dancing clubs and indeed all the evidence points to the contrary.

The lap dancing industry as it is currently regulated is one of the most closely monitored and tightly regulated licensed activities in the country. With the additional powers given to licensing boards under the Licensing (Scotland) Act 2005; such boards are even more empowered than in the past to deal with any matters arising from these venues.

The licensing boards have wide-ranging powers from mere warnings through to suspension to revocation of a licence. Clearly with out a licence the premises would not be able to operate.

The utilization of Licensing Standards Officers under the new regime has provided a further layer of enforcement to licensing boards over and above the traditional involvement of the police. It has been noted on many occasions by police officers representing chief constables at the time of lap dancing licence application renewals, that these premises do not present a concern to the police.

In regard to limiting the number of premises in a local authority area an example of both Edinburgh and Glasgow can show that in fact no new lap dancing venues have been permitted to operate in either city since 2004.

Finally, it is difficult to comprehend that there is not a hidden agenda behind the proposed amendment 516 when for example one considers the guidance notes for sex shop applications in Glasgow reads:

> “Be advised that applications for sex shops have been refused on the grounds that the committee felt that the number of sex shops for the locality should be NIL.”

The current licensing regime has proven to be completely effective in the control of lap dancing / adult entertainment venues

Please reject amendment 516.

Steven Macdonald
26 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Lisa Kember

I just want to send a message of support in favour of the above amendment to the Criminal Justice and Licensing (Scotland) Bill. I work in the violence against women sector but on a personal level I have had to live in areas with a high percentage of lap dancing venues and it is horrible. The noise and lewd behaviour of the customers towards the general public outside of the establishments is unacceptable and frightening. I also believe that lap dancing, stripping and 'adult' clubs demean and objectify women and we should be doing everything we can as a society to eradicate this inequality.

Lisa Kember
27 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Allan Balsillie

My understanding of the law is not good, so I apologise if I've misunderstood any part of the latest amendment to the Criminal Justice and Licensing Bill.

My main concern about this amendment is in its definition of an adult entertainment venue. Purportedly intended to cover places of public adult entertainment, the definition actually appears designed to throw its net far wider. All that would be required is a business element, a degree of nudity and an audience of one.

The most obvious group to suffer would be prostitutes. I understand prostitutes are allowed to work alone from their own premises. This amendment would demand that they hold an adult entertainment licence, which they certainly would not apply for (given the cost, the public nature of the application process and the chances of being refused). Therefore the adult entertainment venue definition would turn every indoor prostitute into a criminal. The client could also be criminalised if he/she arranged for a prostitute to visit. The criminalisation of prostitution may have been intentional but I do not believe it's a desirable outcome.

There are other situations which the definition could cover inappropriately. Private adult events/parties where the business element is simply to cover costs rather than make money; does the term "used as a business" exclude such financial arrangements? Would a photographic studio require a licence if if there was nude modelling taking place? I believe the definition should be tightened.

My other concern is that the amendment is overly hostile to what is relatively tame adult entertainment. The public entertainment licence already permits adequate control of the entertainment being provided. Setting in place a presumably more expensive hurdle is unfair and panders to intolerant attitudes.

Allan Balsillie
26 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Donna Sparrow

Lap dancing is a form of commercial sexual exploitation, and as such as a form of violence against women. It sanctions objectification of women, glamorises exploitation and harms work to achieve gender equality.

Donna Sparrow
26 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Consenting Adult Action Network - Scotland

Amendment 516: Control of lap dancing and other adult entertainment venues

Consenting Adult Action Network (CAAN) Statement:

> 'We believe in the right of consenting adults to make their own sexual choices, in respect of what they do, see and enjoy alone or with other consenting adults, unhindered and unfettered by government.'
>
> 'We believe that it is not the business of government to intrude into the sex lives of consenting adults.'

Introduction

CAAN wishes to register their opposition to Amendment 516 regarding the control of lap dancing and other adult entertainment venues.

It is with no small pleasure that we notice that the amendments regarding prostitution have been deferred, partially on the grounds that the topic requires more research than the short evidence gathering for amendments to the Criminal Justice and Licensing Bill allowed. Prostitution is no doubt a complex issue, but lap dancing is equally complex with its duel commercial and social taboo implications. We would ask that Amendment 516 likewise be deferred pending further research.

1) What is the purpose behind creating this amendment?

There is no clear goal for the Justice Committee to accept this amendment as proposed by MSP Sandra White.

The first most obvious reason behind Ms White's amendment is that lap dancing, and indeed all erotic displays, are morally reprehensible. It should come of no surprise that this amendment comes from Sandra White from Glasgow, the city which states on its application for a sex shop license

(http://www.glasgow.gov.uk/en/Business/Licences/Trading/sexshoplicensing2.htm): *[Link no longer operates]*

> Be advised that, in the past, applications for a sex shop licence have been refused on the grounds that the committee felt that the number of sex shops for the locality (ie. Glasgow) should be nil.

Glasgow's stance on lap dancing, sex shops, and all manner of consenting sexual adult behaviour is clear, but it is not Glasgow with which this amendment is concerned – it is all of Scotland. Is Glasgow attempting to enforce its morals upon all of Scotland? Or is this Glasgow's revenge after the failure to close the lap dancing clubs in their city? The question of whether it is appropriate for a government to enforce morality must be addressed.

A second possible reason for this amendment might be "protection of women". Putting aside arguments about sex causing aggression (because that's all these arguments state, is that pornography, lap dancing, even erotic short stories, all serve to make men violent by making them think about sex – and these arguments remain unproven), are not the dancers in these clubs women too? Is the Scottish Government not obliged to protect the most vulnerable members of society, such as these dancers?

If the Scottish Government believes that erotic dancers are victims, how does Ms White's proposed amendment serve to protect them? The answer is it doesn't. Julie Bindel's 2003 report on lap-dancing found that "Many of the dancers were convinced that these [dress codes] are rules imposed by the licensing boards, rather than club owners. One dancer commented that "The council (sic) make us wear longer clothes that cover up more earlier in the evening." In fact, these rules are imposed by management." The legislation will further isolate the dancers from mainstream society and make them ripe for exploitation, a concern echoed in the 2006 Adult Entertainment Working Group report. Removing the social pariah aspect of erotic dancing would be a good step in allowing any dancer abused by staff or customers to go to the proper authorities.

There might be several reasons why the Scottish Government would decide to change the law regarding adult entertainment venues, but the reasoning behind any changes must be clear to the public.

2) Why is the Scottish Government allowing this legislation to be an amendment onto the Criminal Justice and Licensing Bill?

The original consultation on adult entertainment was performed in 2006. If the matter was so pressing that it required its own research, why is the matter being treated as an afterthought? Surely this is important enough to have as its own piece of legislation, or otherwise it would have been included in the 2010 CJLB from the beginning. The public needs to know why lap dancing is being introduced at Stage 2 of this bill.

3) On what research is this amendment based?

While various debates about adult entertainment venues have raged for decades, the four pieces most likely to be referenced in this situation would be the 2003 Lilith Report on Lap Dancing and Striptease in the Borough of Camden, the 2004 Profitable Exploits: Lap Dancing in the UK (commissioned by Glasgow City Council, conducted by Julie Bindel), and the 2006 Adult Entertainment Working Group (Scottish Executive).[i]

The first piece, most commonly quoted, is riddled with errors. A number of anti-sex activists quote the Lilith Report as saying that “Comparing the rape and indecent assault figures for 1999, before the establishment of Spearmint Rhino and Secrets Holborn, Finchley Road and Euston, and 2002…rape of women in Camden has increased by 50%, …[and] indecent assault of women in Camden has increased by 57%.” These figures were disproven in a Guardian retraction:
(http://www.guardian.co.uk/theguardian/2009/jan/12/corrections) in January 2009: *[Link no longer operates]*

“Three articles cited statistics from a 2003 study which said that the number of rapes increased by 50% and indecent assaults by 57% in the London borough of Camden after four lap dancing venues opened. According to the Lilith Report on Lap Dancing and Striptease in the Borough of Camden the statistics were based on information published by the Metropolitan police relating to the financial years 1998-99 and 2001-02. The Metropolitan police have provided us with the following figures: 72 rapes and 162 indecent assaults in the borough in 1998-99, and 96 rapes and 251 indecent assaults in 2001-02, which corresponds to a 33% increase in rape and a 55% increase in indecent assault ('I was seen as an object, not a person', 19 March 2008, page 18, G2; Lapdancing's naked truths, 23 April 2008, page 29). In one article it was unclear that the study focused on a limited period; the latest figures, for 2007-08, show declines in both crimes from their 1998-99 levels ('It becomes wallpaper', 17 November 2008, page 12, G2).”

In short, the links between sexual crime and lap dancing clubs is not as strong as people quoting the Lilith Report would have you believe. It would be wise for the Justice Committee to take any references to the Lilith Report with a grain of salt.

The other two reports are more closely related. Both Ms Bindel and the AEWG found that working conditions needed improvement in order to protect the dancers from exploitation[ii]. Ms Bindel found resistance in club owners to dancers joining the GMB (General Trade Union). Corporations are usually wary of unions, one example being Asda[iii]. Recently in Japan, hostesses are unionising to fight for better working conditions[iv] which shows that working conditions are the most important issue for women in these sorts of industries.

Both reports also mention alcohol as being a problem. Ms Bindel flat out states “drunkenness” as a problem, whereas the AEWG lists “alcohol induced rudeness from clients”. This suggests that alcohol regulation in adult entertainment establishments may be a better method of improving the dancers’ working conditions.

The AEWG’s public opinion research was more in depth than Ms Bindel’s. Ms Bindel interviewed some 20 individuals outside the clubs whereas the AEWG had a more standardized poll of 822 individuals. To be honest, I find most of the complaints listed in Ms Bindel’s research to be remarkably similar to my own personal experience living on the Grassmarket in Edinburgh – a location with no lap dancing clubs. Similar complaints about anti-social behaviour have also been documented about stag night apartments in Edinburgh[v]. Again, this points towards alcohol being more of a problem than sex, sex work, or lap dancing.

Among the numerous recommendations from Ms Bindel were:

- Specific licensing conditions should be introduced to address issues of employment practice and working conditions for the dancers
- Licensing, codes of conduct for dancers and club rules/conditions should be regularised
- The rules of the club and the licence should be prominently displayed in all lap dance venues, including at the entrance and on tables and bar areas
- Clubs should be subject to regular, obligatory checks by undercover police officers
- Dancers' 'rent' payment to management should be abolished
- VIP suites and curtained areas should be eradicated
- CCTV coverage should be introduced throughout the performance, including in the seating areas

Among the recommendations from the AEWG were:

> 4.3 Performers should not touch, or be touched by, customers. In order to remove any doubts about touching, and for the safety of performers, there must be a distance of one metre between performer and any other person during entertainment activities.
> 4.4 There should be adequate health and safety protection for performers, including
>> 1. Dedicated and private changing, washing and toilet facilities, separate from public facilities. The Local Authority should determine what is adequate given the layout and circumstances of the venue.
>> 2. A minimum temperature of 20°C, confirmed by fixed thermometer, in all working and changing areas.
>> 3. Adequate lighting in all working and changing areas.
>> 4. All work and changing areas must be kept clean, free from obstruction and with surfaces that are fit for purpose.
>> 5. Adequate and hygienic facilities to make hot drinks and eat meals, and a supply of cold drinking water.
>
> 4.5 There should be adequate security to ensure compliance with the regulations and prevent illegal activity.

These are all commendable recommendations that would improve the working conditions of dancers and make it easier for councils to shut down exploitative businesses.

None of these are addressed in the current amendment.

If the points brought up in the research named above are not the ones that influenced the design of this amendment, then what is the research that did?

4) Further concerns about the reach of the legislation

CAAN approaches the topic from the view that there is a diversity of sexuality. Many of the activities involved in alternative sexualities are not specifically the aim of this legislation, yet may still fall under its regime. While the AEWG report is clear that certain loopholes of location and payment should be closed, the "closing" of the "loopholes" means that activities outside of the assumed aim of the legislation will be in danger.

We ask the Justice Committee to consider as an example: the recent Torture Garden night in Edinburgh (you can view a video review of the event on Youtube). The event has many shows, among which were burlesque acts. Burlesque is quite in vogue at the moment, and is often considered more socially acceptable than lap dancing, even though the two are essentially the same. Research conducted replacing "lap dancing" with "burlesque" may reveal different results.

Torture Garden also has fashion shows showcasing fetish fashion (think lots of rubber). Some of the outfits are quite daring, and may fall under the law. Would other fashion shows (say, a lingerie fashion show) fall under the adult entertainment description?

The Torture Garden event also had a small dungeon for sadomasochists to use. This included equipment which couples used in various ways for their own amusement whilst others watched. There is, admittedly, a slightly exhibitionist quality to such "public play" among BDSM enthusiasts, but the goal of "sexual stimulation" is mainly the sexual stimulation of the "performer", not the "audience". In most Scottish fetish clubs, the erotic aspect of the play would be the only aspect that would qualify the "performance" under this description, as most fetish clubs in Scotland do not allow nudity and "performers" are not paid.

There is a danger that sadomasochistic play in public space (i.e. a fetish club) might be qualified as adult entertainment under this amendment and thus be subject to the same hate campaign that prostitution and lap dancing clubs face. Further, the need to publicly announce where the club will be will result in fewer applications because of the reduced protection of anonymity. People can still lose their job for being a sadomasochist, and thus practitioners reasonably seek some measure of privacy. If fetish clubs are subject to this amendment because it is poorly written, then it will increase the climate of fear among BDSM enthusiasts in Scotland. A similar argument can also be made for swingers clubs and other clubs for consenting adults.

We also share the Scottish Ballet's concern that banning all nudity in performances will create a deficit in culture in Scotland. It will probably also effect acts at the various festivals in Scotland, including the popular Chippendale show at last year's Edinburgh Festival. What about singers and rappers that perform with dancers with low-cut shirts and short skirts? Would their hip-hop dancers be forced to cover up? Or would only the female dancers be forced to oblige because male dancers can bare their chests while female dancers can't? CAAN extends their question to include the phrase "whether by verbal or other means" and asks what other businesses it may include (e.g. erotic poetry or stories, phone sex operators, professional dominatrixes, pole dancing exercise classes, strip-o-grams, etc.)

5) Conclusions

- Both the goal and timing of this amendment are questionable and must be made transparent.
- Most research suggests that working conditions are of a great concern to dancers in clubs – yet this amendment does not address those issues.
- The attempt to close loopholes means that alternative sexualities and art will be caught up in red tape and lead to general fear and mistrust of the local councils.

CAAN asks that amendment 516 be rejected because it is not fit for purpose.

25 April 2010

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[i] CAAN rejects the Scottish Government's 2009 Safer Lives: Changed Lives on the grounds that the statement: "Activities such as pornography, prostitution, stripping, lap dancing, pole dancing and table dancing are forms of commercial sexual exploitation" runs counter to Our Statement.

[ii] Definition of "exploitation" used in this evidence:
"In different terms, "exploitation" refers to the use of people as a resource, with little or no consideration of their well-being. This can take the following basic forms:

- Taking something off a person or group that rightfully belongs to them
- Short-changing people in trade
- Directly or indirectly forcing somebody to work
- Using somebody against his will, or without his consent or knowledge
- Imposing an arbitrary differential treatment of people to the advantage of some and the disadvantage of others (as in ascriptive discrimination)" (http://www.answers.com/topic/exploitation)

[iii] "Asda under threat of prosecution for union busting" Guardian 13 June 2006 http://www.guardian.co.uk/business/2006/jun/13/politics.supermarkets

[iv] "Charm offensive: the hostess bites back" Independent on Sunday 21 April 2010 http://www.independent.co.uk/news/world/asia/charm-offensive-the-hostess-bites-back-1949638.html

[v] "Neighbours beg MSPs for crackdown on party flats" Scotsman 30 March 2009 http://edinburghnews.scotsman.com/edinburgh/Neighbours-beg--MSPs-for.5120629.jp

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from OBJECT

Why licensing reforms are needed for lap dancing clubs

About Object

OBJECT is a human rights organisation which campaigns against 'sex object culture' – the increased sexual objectification of women and the mainstreaming of the sex and pornography industries in the media and popular culture. These industries promote attitudes which underpin discrimination and violence based against women. OBJECT spearheaded the Stripping the Illusion campaign and worked in partnership with the Fawcett Society to lobby for the successful implementation of Section 27 of the Policing and Crime Act which enables local councils to licence lap dancing clubs as Sexual Entertainment Venues and gives local communities greater powers to control the number of lap dancing clubs in their area (please see the annexe for our legal briefing for England and Wales).

Executive Summary

In Scotland, just as was the case in England and Wales, the current licensing regime fails to offer adequate controls and regulations of lap dancing clubs, and it acts as a green light for the expansion of the industry. Regulations limit both who is eligible to object to licensing applications, and the grounds on which objections can be made. This restricts local democracy and prevents councils from considering gender equality issues in the licensing process.

OBJECT therefore supports the amendment, lodged by Sandra White MSP, which seeks to allow local authorities to apply a specific licensing regime to 'adult entertainment' venues, including limiting the number of premises in the local authority area that are permitted to provide 'adult entertainment'.

Definition and use of the term 'adult entertainment'

In the amendment the terminology 'adult entertainment industry' is used. OBJECT does not recognise the sex industry as a legitimate form of entertainment given that a significant proportion consists of commercial sexual exploitation. However, for the sake of consistency and clarity for all those who read this submission we have used the same terminology as the amendment. However, we have placed the term 'adult entertainment industry' in inverted commas to demonstrate that we recognise this phrase as a euphemism to disguise the exploitation inherent to the sex industry.

1. What are lap dancing clubs?

Lap dancing clubs are venues where customers pay female performers to dance their on their lap whilst removing most or all of their clothing. This occurs at tables, in private rooms or in private booths.

2. Current licensing of lap dancing clubs in scotland

Current licensing regulations do not provide sufficient controls for lap dancing and related activities. For example regulations limit both who is eligible to object to licensing applications, and the grounds on which objections can be made. This effectively means that it is not possible to object to the nature of the activity itself.

3. Why is this a problem: local councils

- Local authorities may only apply regulation to lap dancing clubs which corresponds directly to four licensing objectives; *preventing crime and disorder; securing public safety; preventing public nuisance; protecting and improving public health and; protecting children from harm.* This prevents them from putting in place conditions relevant to lap dancing clubs such as how many licences are granted in an area or the use of private booths.
- In England and Wales, the vast majority of local authorities consulted about their powers to regulate lap dancing clubs responded saying that they felt unhappy with current licensing provisions – with at least 25 local authorities across England and Wales having experienced serious problems in the licensing of lap dancing clubs. There is no reason to believe that the situation would be any different in Scotland where local councils are effectively straight-jacketed in terms of regulating this growing part of the sex industry. This was identified as part of the Adult Entetainment Working Group report and more latterly from Glasgow City Council.

4. Why this is a problem: local people

- The Licensing (Scotland) Act introduced restrictions on who can have a say in the licensing of lap dancing clubs. This fails to take into account the impact of lap dancing clubs on people who work in or travel near the area who are unable to raise their objections.
- It is extremely difficult for residents to prove that licensing objectives will be breached and the Act places the onus on residents to provide evidence of this rather than placing the onus on club operators to justify their application.
- Prior to the Act residents could contribute to licence renewal hearings which took place every 1-3 years. However a Premises Licence runs in perpetuity unless an application for a review finds a licensing objective has been breached.

5. Why this is a problem: gender equality

- Lap dancing clubs are part of the commercial sex industry and have a different social impact from ordinary leisure venues. This is not accounted for in ‘one size fits all’ licensing.
- Lap dancing clubs promote seeing women as sex objects, not people. They fit into a wider culture of sexual objectification which underpins discrimination and violence based on gender – as Object’s *Stripping the Illusion* campaign highlights. However a local authority cannot take this into account when licensing lap dancing clubs - the Licensing (Scotland) Act 2005 prevents them from using policy (such as a gender

equality policy) to overrule the five licensing objectives. This runs directly counter to the 2007 Gender Equality Duty which requires local authorities to promote gender equality in all they do.

6. The only viable solution: recognise and license lap dancing clubs as part of the 'adult entertainment industry'

Local councils should be enabled to licence lap dancing clubs as part of the 'Adult Entertainment industry'.

Lap dancing clubs are clearly part of the 'Adult Entertainment industry' – yet this is not legally recognised. The law should be changed so that lap dancing clubs can be required to purchase both a Premises Licence (for alcohol) and an 'Adult Entertainment' licence for lap dancing. This will restore democracy to the licensing process by giving local communities greater powers to decide on whether any lap dancing clubs should be operating in their area. Crucially it will allow gender equality to be considered in the licensing of lap dancing clubs.

Anna van Heeswijk
Campaigns Coordinator
27 April 2010

Annexe

LEGAL BRIEFING USED FOR ENGLAND AND WALES

LAPDANCING ESTABLISHMENTS: LEGAL BRIEFING BY PHILIP KOLVIN, 2-3 GRAYS INN SQUARE

ADVICE

INTRODUCTION

1. I am instructed on behalf of Object and the Fawcett Society to advise briefly on the system for the regulation of lap dancing in England and Wales. The context is that Gerry Sutcliffe MP, a Minister in the Department of Culture, Media and Sport, has written to the Chief Executives of local authorities, inviting them to state whether they desire additional powers to control such establishments, and in the light of their response the Home Secretary has indicated that additional powers will be granted to local authorities. I understand that this advice will be shared with Members of Parliament.

THE PROBLEM

2. Under the Licensing Act 2003, licensing authorities may only impose controls on lap dancing establishments (whether by attaching conditions or outright refusal) if a) a relevant representation has been made on the application by a responsible authority (e.g. the police) or interested party (a local resident or business) and b) the authority considers it “necessary” in order to promote one of the licensing objectives. These are the prevention of crime and disorder, public safety, prevention of public nuisance and the protection of children from harm.

3. The experience of licensing authorities is largely that the Act provides an ineffective tool to control the proliferation of such establishments or to prevent fully nude dancing or the maintenance of distance between dancers and customers. The reasons for this are at least threefold. First, objecting residents have to live in the vicinity. It is not enough if they just visit there to shop or enjoy leisure. Second, it is very difficult for residents to prove that a particular harm will arise from the licence. This problem has recently been exacerbated by the decision of the High Court in Thwaites v Wirral Borough Magistrates Court [2008] EWHC 838 (Admin) which emphasised that findings as to future harm need to be based on **evidence.** Of course, it is very difficult to prove harm to the licensing objectives prospectively. Third, the ambit of the licensing objectives is inapt to reflect wider community objectives, e.g. tourism or regeneration policies; or the kind of concerns to which lap dancing establishments may give rise, regarding the character of the area and the fears of those, particularly women, who have to pass by such establishments.

4. A further difficulty facing authorities is provided by the Secretary of State's Guidance under section 182 of the Licensing Act 2003, to which authorities are obliged to have regard. This provides:

> *2.17 The Indecent Displays Act 1981 prohibits the public display of indecent matter, subject to certain exceptions. It should not therefore be necessary for any conditions to be attached to licences or certificates concerning such displays in or outside the premises involved. For example, the display of advertising material on or immediately outside such premises is regulated by this legislation. Similarly, while conditions relating to public safety in respect of dancing may be necessary in certain circumstances, the laws governing indecency and obscenity are adequate to control adult entertainment involving striptease and lap-dancing which goes beyond what is lawful. Accordingly, conditions relating to the content of such entertainment which have no relevance to crime and disorder, public safety, public nuisance or the protection of children from harm could not be justified. In this context, however, it should be noted that it is in order for conditions relating to the exclusion of minors or the safety of performers to be included in premises licence or club premises certificate conditions where necessary. The Local Government (Miscellaneous Provisions) Act 1982 insofar as its adoptive provisions relate to sex establishments – sex shops, sex cinemas and in London sex encounter establishments – also remains in force.*

5. In fact, the Local Government (Miscellaneous Provisions) Act 1982 ("LGMPA") provides no control over the proliferation of lap dancing establishments. Object and the Fawcett Society's argument is that it should do so. It is easy to understand the justification.

6. The LGMPA allows local authorities to licence and regulate sex establishments in their area. It is important to note that the provisions are adoptive, so that an authority which does not wish to have these powers may simply refrain from adopting the legislation.

7. The benefit of the LGMPA is that it provides a much wider list of grounds for refusal of a licence than is provided for under the Licensing Act 2003. These include that the number of sex establishments in the locality is equal to or exceeds the number which the authority consider is appropriate for that locality; and that a licence would be inappropriate, having regard to the character of the relevant locality, or the use to which any premises in the vicinity are put, or the layout, character or condition of the premises themselves.[1] Indeed, if the licence is refused on those particular grounds, there is no appeal to the magistrates court.[2]

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[1] LGMPA 1982, Sch 3 para 12.

[2] LGMPA 1982, Sch 3 para 27(3).

8. However, the LGMPA cannot currently be used to regulate lap dancing. This is because of the definition of "sex establishment."

9. Outside London, a sex establishment is defined as a sex cinema or a sex shop.[3] Therefore, outside London, while the LGMPA regulates sex on celluloid or on the page, it does not regulate live sex. The reason for the lacuna is principally historic rather than logical.

10. In London, the definition of "sex establishment" goes wider than merely a sex cinema or a sex shop. It includes "sex encounter establishments." These are premises supplying (inter alia) performances *"which wholly or mainly comprise the sexual stimulation of persons admitted to the premises"*, services provided by persons *"who are without clothes or who expose their breasts or genital, urinary or excretory organs while they are providing the service"* (e.g. topless bars), and entertainments by persons *"who are without clothes or who expose their breasts or genital, urinary or excretory organs during the entertainment"* (striptease).[4] Thus, the definition in London is plainly wide enough to encompass lap dancing. However, any premises which have and use a licence under the Licensing Act 2003 for regulated entertainment or late night refreshment are taken out of the definition of sex encounter establishments.[5] Thus, in London a live sex show is regulated under the LGMPA, but not if customers can buy a pizza with the show. Again, the logic is hard to discern.

THE SOLUTION

11. Object and the Fawcett Society therefore argue for a simple amendment to the LGMPA:

    a. to give authorities outside London the same power to regulate sex encounter establishments as are enjoyed by London authorities;

    b. to remove the exemption for premises with licences for regulated entertainment or late night refreshment.

12. This is the thrust of the Ten Minute Rule Bill presented to Parliament by Roberta Blackman Woods MP on 18th June of this year, which obtained cross-party support.

13. In short the benefit for local authorities would be that they could obtain wider powers to control the proliferation of lap dancing establishments than they currently enjoy under the Licensing Act 2003, with less risk of appeal (and therefore costs). Those authorities who do not wish to have the powers need not adopt the legislation. It is important to note that an amendment to the LGMPA would not require authorities to refuse licences. It would simply give authorities wider powers than they

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[3] LGMPA Sch 3 para 2.
[4] LGMPA Sch 3 para 3A.
[5] LGMPA Sch 3 para 3A.

currently have to regulate whether, where and on what terms lap dancing premises may be established, to reflect the priorities and wishes of the wider community.

14. In his letter, the Minister requested views as to whether planning law might assist in the control of lap dancing establishments. The answer is that planning plays at best a marginal role. Any premises currently enjoying a D2 (assembly and leisure) use would not need planning consent to introduce stripping. Even if they enjoyed a different planning use, such as A4 (pubs), they might be able to argue that stripping was merely incidental to the primary use and did not involve a change of use requiring planning permission. Even if this argument did not avail them, it is fair to say that national and local planning policy is largely silent on stripping as a species of entertainment, and it would be hard to use planning powers effectively to protect against such proliferation. I am far from saying that planning is entirely toothless, for the character of the area and legitimate fears of crime among local people are material planning considerations. But for practical purposes, planning does not provide a significant hurdle for those wishing to establish lap dancing venues. The benefit of the licensing regime is that it is far more sensitive to the precise content of the "entertainment" being offered, and any variations in the nature of such entertainment over time.

LEGISLATIVE AMENDMENTS

15. The legislative amendments required are brief. A suggested Bill is attached at Appendix 1.

16. One other matter worthy of consideration is how to ensure that nudity as part of a dramatic work is not accidentally picked up by the definition. I do not believe that the definition of sex encounter set out above could seriously be held to encompass nudity incidental in a play. However, should it be considered necessary, the definition may be followed by a new section: *"For the avoidance of doubt nudity incidental to a dramatic work shall not require a licence under this Act."*

17. I also understand that the Home Office is considering whether pubs which have a weekly striptease would be made to seek a sex encounter licence. It does not seem to me that this raises any issue of principle. The definition of sex cinema and sex shop in Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 both include the test of "significant degree". That leaves the matter as one of sensible judgment by the licensing authority. There is no reason for a different approach in the case of sex encounter. The authority would have to consider a) whether the entertainment or service provided meets the definition of sex encounter, and b) whether this is occurring to a significant degree. These are pre-eminently licensing judgments for the licensing authority, of a kind which authorities are well-used to making.

ARGUMENTS OF THE LAP DANCING ASSOCIATION

18. The Lap Dancing Association has published certain arguments against tighter restriction, and it is right that I deal with them here.

Argument	Response
Lap dancing is entertainment, not sex encounter.	The fundamental nature of the transaction is that a man pays a woman to take her clothes off and place her sexual organs near his face. The notion that this is not part of the commercial sex industry is not seriously sustainable.
Performances are ancillary to alcohol	No customer believes that he goes into a lap dancing club primarily to drink. The clue is in the title.
Anyone can object to a lap dancing club	This is untrue. Under the Licensing Act 2003 objections from local people have to come from those living or working in the vicinity. “Vicinity” is usually taken by licensing authorities to mean 200 metres or less. There is no scope for a local resident to object to a lap dancing club on their local high street unless they happen to live or work within that radius.
Councils have sufficient powers to impose restrictions on premises licences.	This is simply untrue, as the councils who have taken on the lap dancing industry and lost will testify. The problem is that the Licensing Act 2003 does not provide sufficient tools for any control over the quantum, location or operating conditions of establishments, because the licensing objectives are not directed at the real concerns to which these premises give rise.
Lap dancing clubs are not sexist establishments because many are owned and run by women. Performers are self-employed so choose when, where and for whom to perform.	The viewing of young women as objects whose nudity can be procured for a sum of money is of course inherently sexist. But in any event this argument does not begin to address the real point, which is that communities are entitled to some choice as to the quantity and location of such establishments.
To licence premises as sex encounter establishments	“Red tape” is simply a derogatory synonym for a licence. There are many establishments that require more than one consent, e.g. casinos and bingo clubs with bars. This is no different. Should there be an issue regarding fees, the

will add red tape.	Secretary of State can issue Guidance that fees should be limited to cost recovery.
The industry will go underground.[6]	That is an argument against regulation of anything. If it does, it will be the duty of the enforcement authorities to prosecute. Furthermore, it is revealing that the Lap Dancing Association argues that if an attempt is made to regulate its members they will conduct their business criminally. This is an argument for more, not less, regulation.
Regulation will do nothing about prostitution and drugs.	The argument for greater regulation is not principally concerned with prostitution and drugs. The Chairman of the Lap Dance Association is reported as saying: *"Like Object we are concerned about the practises of irresponsible operators and potential links with prostitution and drugs."*[7] If prostitution and drugs are linked with lap dancing establishments, that again is an argument for greater regulation.
It would be sufficient to ensure that the introduction of adult entertainment is treated as a major variation of a premises licence under the Licensing Act 2003.	That does not address the problem, because the licensing objectives provide insufficient criteria for the control of the quantity, location and operating conditions of such premises.
An obligatory code of practice would suffice.	Even were such a code of practice to be introduced and observed, that could only control the operational practises of the clubs, not whether and where they should be permitted in particular local authority areas.

CONCLUSION

19. It seems to me that to bring lap dancing into the same category as sex cinemas and sex shops and to licence them as such is a modest and sensible response to the recent proliferation in such venues, enabling authorities to exercise greater control if they want to.

Philip Kolvin

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[6] This claim was made by Simon Warr, President of Lap Dancing Association, reported in the Morning Advertiser of 22.4.08 and the Independent of 26.4.08.

[7] Morning Advertiser, ibid.

10th October 2008

APPENDIX 1
PROPOSED AMENDMENTS TO THE LOCAL GOVERNMENT (MISCELLANEOUS PROVISIONS) ACT 1982

A Bill to extend the law regarding the licensing of sex establishments from London to the rest of England and Wales and for other purposes.

1. The provisions for the licensing of sex encounter establishments in London contained in the Local Government (Miscellaneous Provisions) Act 1982 shall apply to England and Wales.
2. In Schedule 2 paragraph 3A of the Local Government (Miscellaneous Provisions Act) 1982, sub-paragraphs (i) and (ii) shall cease to have effect.
3. Schedule 1 (which makes minor and consequential amendments) shall have effect.

Schedule 1

Local Government (Miscellaneous Provisions) Act 1982

1. In section 12, after the words “borough council” insert the words “in England and Wales.”
2. In Schedule 2 paragraph 3A omit sub-paragraphs (i) and (ii).
3. In Schedule 2 paragraph 3A omit the notation “(iii)”.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Festival Fringe Society

Amendment 516

With reference to the above noted amendment to the Criminal Justice and Licensing (Scotland) Bill, we believe that the wording of the amendment as currently lodged may unintentionally prevent the staging of theatrical and other cultural performances that contain elements of nudity.

The definition of nudity could rule out plays such as *Trilogy* written by Nic Green and staged by Glasgow's *The Arches Theatre* at the 2009 Edinburgh Fringe to much critical acclaim. The play went on to win a *Herald Angel* award and a clutch of five-star reviews and has now embarked on a UK national tour. Described by the author as a feminist work, *Trilogy* includes at one point an invitation to female audience members to shed their clothes and join the performance on stage.

This is just one example of the numerous plays, musicals and operas which over the years have included nudity as an integral part of their story. As the largest arts festival in the world, the Edinburgh Festival Fringe is a vital launch pad for innovative artistic development, encompassing a wide variety of art forms and we would not wish to see any performances restricted. We do not believe that it is the intention of the Member who has lodged this amendment to ban such performances but this could be an unintended consequence of passing the amendment in its current form.

If the Committee decides that it wishes to support this amendment in principle then Members might want to consider including an exemption for plays and related entertainment as defined and outlined in the Theatres Act 1968. Furthermore, the Committee might consider exempting premises covered by either a Theatre Licence or a Public Entertainment Licence.

Neil Mackinnon
Head of External Affairs
28 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Lesley Walker

I am aware the Criminal Justice and Licensing (Scotland) Bill is currently going through the Scottish Parliament. A new amendment to the Bill has been lodged, on the control of lap dancing and other adult entertainment venues. Amendment 516, lodged by Sandra White MSP, seeks to allow local authorities to apply a specific licensing regime to adult entertainment venues, including by limiting the number of premises in the local authority area that are permitted to provide adult entertainment, potentially with a zero limit.

I strongly support this amendment.

- Lap dancing clubs objectify and demean women and their existence harms our work for a society free of violence in which women have full equality.

- Lap dancing is a form of commercial sexual exploitation, and as such as a form of violence against women. It sanctions objectification of women, glamorises exploitation and harms work to achieve gender equality.

- Lap dancing does not have to be seen as a normal part of society. We believe it is realistic to aspire to a society where they do not exist. It is a matter of political will. Iceland has just banned all strip clubs and any employer profiting from the nudity of its employees.

- Lap dancing clubs routinely breach their licenses, for example by enabling prostitution. Scottish research with 110 men who had bought sex in prostitution found that 31% of the men had accessed prostitution through a lap dancing club.

- Lap dancing is a manifestation of gender inequality. It is not a coincidence that the performers in lap dancing clubs in Scotland are almost all women and the customers and business owners are almost all men. This industry thrives on the systematic exploitation of women by men. An industry like this has no place in modern Scotland.

- The Fawcett Society’s ‘Corporate Sexism’ report noted the commonness of firms holding business meetings, entertaining clients and celebrating deals at lap dancing venues, with some establishments offering unmarked receipts for expenses. They identify this as a major new threat to women’s equality at work.

- Lap dancing clubs also harm communities. They make women feel uncomfortable and unsafe, and create no-go areas in our towns and cities. In 2001, the female rape rate in the London Borough of Camden, which then had seven clubs sited mainly in residential areas, was three times the national average; researchers at the Lilith Project say that since 1999, rape of women in Camden has increased by 50 per cent and indecent assault by 57 per cent.

Lesley Walker
26 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Zero Tolerance

About Zero Tolerance

Zero Tolerance is a small national charity promoting innovative policy and practice to address the root causes of male violence against women and children. We pioneered the 3 P's approach to tackling male violence – protection, provision and prevention. Of these, we believe that the prevention of violence through changing attitudes, structures and values is the key to changing the culture of endemic violence in which we live.

Summary of our position

We are strongly supportive of amendment 516 lodged by Sandra White MSP and urge the Justice Committee to support it. Our arguments in favour of this amendment can be summarised as follows:

- We see lap-dancing as a form of commercial sexual exploitation, and as such as a form of violence against women. It sanctions objectification of women, glamorises exploitation and harms work to achieve gender equality.

- We challenge the normalisation of the sex encounter 'industry': we aspire to a world without these forms of so-called 'entertainment' and believe it is realistic to aspire to a society where they do not exist

- We regard the proliferation of lap-dancing clubs as harmful to women individually, women collectively, and communities, and support all measures to prevent this.

Lap-dancing is a form of exploitation of women

We see lap-dancing and other forms of so-called 'adult entertainment' as sexually exploitative and damaging to women's lives and to gender equality. Ultimately, we see it as part of the spectrum of male violence against women. The Scottish Government document '*Safer Lives: Changed Lives'* notes that commercial sexual exploitation causes harm to *all* women, by sanctioning objectification of women's bodies, and further notes that this harm to women collectively happens regardless of whether individuals claim liberation or empowerment from the activity.

Lap-dancing glamorises exploitation. The sex industry has pushed to glamorise lap dancing, and promotes it as exciting and lucrative 'work' for women. The reality is that lap-dancing clubs are highly exploitative. Unlike other dance performances where the audience members pay for a ticket and the organisation staging the performance pays the performers, in 'adult entertainment' the women have to pay the club in order to perform (often around £80-£100 per night), and then the men pay the women directly. Women also pay for club outfits and pay fines for being late or missing shifts.

Clubs maintain a high 'performer to punter' ratio to offer the customer maximum choice of varieties of women – in itself an indicator of their view that women are objects for consumption and not human beings with rights and dignity – and this means there is intense competition between performers, which in turns escalates the types of performance on offer. Increasingly men expect explicit sexualised behaviour and full nudity. It is in this context that the buying and selling of sex acts occurs in some clubs. Scottish research with 110 men who had bought sex in prostitution found that 31% of the men had accessed prostitution through a lap dancing club.[1]

Even in clubs where licensing conditions are adhered to many women report a heavy psychological toll linked to dealing with, in effect, normalised sexual harassment on a nightly basis. Testimonies from women who have worked in lap-dancing clubs confirm that they are harmful places to 'work'; for example, 'Alexandra' says "The management in all the clubs treated the girls very badly, they were discriminatory, frequently derogatory in their comments to and about the girls…The customers' attitudes varied between politeness to downright hostility and abuse."[2] Other testimony indicates that being a performer in a lap-dancing club is harmful to performers' personal relationships, self-esteem, health, substance use, and financial situation.[3]

Lap-dancing is a manifestation of gender inequality. It is not a coincidence that the performers in lap-dancing clubs in Scotland are almost all women and the customers and business owners are almost all men. This industry thrives on the systematic exploitation of women by men – and a gendered hierarchy of power. An industry like this has no place in modern Scotland.

The sex industry should not be normalised

Over the past ten years, lap-dancing has entered the mainstream. It has increasingly featured in the media, with storylines in soap operas, newspapers, documentaries and films. A 2007 Lilith Project report stated that, "When East Enders ran a storyline featuring a lap dancer in 1998, the actor was sent 'sackfuls' of mail from men asking her to do private dancing for them and requests from Sunday tabloid newspapers asking her to do 'glamour' modelling."

Clubs are not discreet or hidden venues. They are advertised on flyers, in magazines, on local taxis and on larger billboards, and promotional staff (often dressed in lingerie) hand out flyers in shopping areas, high streets and in pubs / clubs. The clubs themselves are very apparent on the high street, many with shop-style frontage which makes it very clear what is on offer inside. Some clubs offer lessons to women marketed for those who want to dance for their partner, and some leisure and fitness centres now offer 'pole fitness' classes to teach the skills for pole-dancing. This increasing presence of the sex industry in mainstream culture normalises activities that are based on gender inequality, exploitation and objectification.

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[1] Challenging Men's Demand for Prostitution in Scotland - Women's Support Project – 2008.

[2] Testimony to OBJECT campaign - http://www.object.org.uk/files/Testimony_%20Alexandra%281%29.pdf

[3] http://www.object.org.uk/index.php/lapdancing-testimonies

It is an illustration of how mainstream the sex industry has become that in 2006 Comic Relief, which funds projects for young people affected by sexual violence, included a show called 'Strictly Come Pole Dancing' in its plans for fundraising – this was later dropped due to the volume of protests.

In February 2010, the Home Office published a review of Sexualisation of Young People. This review examined culture and society in the UK and found that jobs in brothels and lap-dancing clubs are advertised by Job Centre Plus and that "we are seeing the normalisation of [sex work] as viable career choices" which "sends out a powerful message to young people about what is of value" (para 29). The review also concludes that popular culture lends "credence to the idea that women are there to be used and that men are there to use them" (para 30).

In this climate, it is easy for young people to be groomed for involvement in the sex industry – and for escalation to occur. Many young women who work in lap-dancing clubs do not intend initially to become involved in prostitution but soon find that is the norm in these clubs and become prostituted women, not the high-earning dancers they set out to be.

To call a halt to this culture of exploitative 'sex-work' as mainstream it is vital to curb the proliferation of adult entertainment venues and give control back to the local authorities which have to license these clubs. This would also send out a message that lap-dancing clubs are not a normal, legitimate form of entertainment and that Scotland rejects this exploitative industry and those who create and support it.

It is not unrealistic to aspire to a society with no lap-dancing clubs. It is a matter of political will. Iceland recently legislated to ban all strip clubs. The law was passed with no votes against and only two abstentions. It makes it illegal for any business in Iceland to profit from the nudity of its employees.

At a UK level, the Westminster Parliament has not gone as far as this, but has still passed important and hopefully culture-changing legislation to change the licensing of lap-dancing clubs, so they will in future be licensed as 'sex encounter establishments' – currently they are licensed in the same way as a coffee shop or bar offering karaoke or comedy. The 'Stripping the Illusion' campaign led by OBJECT and the Fawcett Society convinced the Parliament that clubs should face much more stringent licensing conditions, due to their social impact.

Scotland has led the way in tackling other forms of violence against women and is rightly admired for its progress on, for example, domestic abuse. It would be very fitting if we now became as progressive in tackling the harms of the sex industry.

Lap-dancing clubs harm women and communities

There are myriad other ways in which lap-dancing and strip clubs harm women, in addition to sanctioning their objectification.

Their presence in society also harms women in the workplace. Large companies and financial institutions such as the National Westminster Bank have had corporate accounts with a lap dance club[4], as do other city firms in London, with a corresponding negative impact on women's equality in the workplace.

The Fawcett Society's 'Corporate Sexism' report noted the commonness of firms holding business meetings, entertaining clients and celebrating deals at lap-dancing venues, with some establishments offering unmarked receipts for expenses.[5] They identify this as a major new threat to women's equality at work. In a society with a large gender pay gap and working women still clustered in low-pay and low-status jobs, any factors feeding this that are *preventable* should be tackled.

At an individual level, these clubs do not offer legitimate 'work'. As Sarah, who worked in a lap-dancing club, puts it: "There's no hierarchy. You can't be promoted. It's for quick money .There's no holiday or sickness pay. Shifts are booked on a weekly basis. If you're ill you can't work. There's no pension!"[6]

These clubs also harm communities. They make women feel uncomfortable and unsafe, and create no-go areas in our towns and cities. The presence of strip clubs in a neighbourhood draws potentially violent men and unlicensed minicabs, putting women at risk of sexual violence. In 2001, the female rape rate in the London Borough of Camden, which then had seven clubs sited mainly in residential areas, was three times the national average; researchers at the Lilith Project say that since 1999, rape of women in Camden has increased by 50 per cent and indecent assault by 57 per cent.

In 2002, a report from the council's environmental health department recorded that some streets had turned into "a no-go area for female shoppers and male passers-by who are often accosted by pimps and other strip clubs offering sexual services and favours".

Councils should have the power to limit the number of clubs, setting the limit at zero if they wish to, and we strongly support amendment 516. We urge the Committee to stand against exploitation and stand for a safer, more just and equal society and to support this amendment.

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[4] 'Profitable Exploits: Lap dancing in the UK', by Julie Bindel, CWASU, London Metropolitan University, Aug 2004. http://www.cwasu.org/displayAuthorsPublications.asp?author_key=16

[5] http://www.fawcettsociety.org.uk/index.asp?PageID=990

[6] http://www.object.org.uk/files/Testimony_Sarah.pdf

Jenny Kemp
Prevention Network Officer
26 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Argyll and Bute Rape Crisis Centre

Lap-dancing clubs objectify and demean women and their existence harms our work for a society free of violence in which women have full equality. Please do not allow them!

Dee Hancock
Education/Support Worker
27 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from Margaret Paul

I would like to offer my support for the Amendment 516 to the Criminal Justice and Licensing (Scotland) Bill. I have experience of working with women affected by domestic violence and women involved in the criminal justice system. Through this experience it is my belief that the women involved in the lap dancing industry are vulnerable women with very limited life choices. This type of work exploits their already fragile status and can lead to more involvement in substance misuse and criminal activity as well as increased exposure to verbal and sexual abuse.

It is important that the loophole which allows lap dancing clubs to operate under a cafe or bar license is closed and local authorities are allowed to control the set up of these premises. It is only by making Local Authorities accountable for these types of licenses that some kind of accountability can be held over thier existence and day to day running.

27 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from NHS Grampian Gender Based Violence Programme

We strongly support limiting, preferably to zero, the areas permitted to provide so called adult entertainment. These clubs are degrading, promoting women as objects for consumption and not human beings with rights and dignity. Our society can never be free of violence against women while this kind of gender exploitation exists.

Ann Sutherland and Margaret Stafford
Operational Leads for Gender Based Violence Programme
NHS Grampian
27 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from SAY Women

About Us

SAY Women is a voluntary sector charity supporting young women survivors of childhood sexual abuse who are homeless, at risk of homelessness or in unsafe accommodation.

Our services comprise of an Accommodation Project for 7 young women with a Follow On service and a Resource Service providing emotional support to young women and men who are living in other homeless projects or temporary accommodation, eg. Hospital psychiatry units, prison, etc.

Experience

High numbers of our service users have addictions, mental health issues and involvement in prostitution ranges from 12% to 45% across our services. Therefore the young people we support are at the most severe end of the spectrum of sexual violence/abuse and exploitation.

Comments

Services such as ours and related services, i.e. addiction teams, mental health services, sexual health services deal with the everyday harm caused by men's exploitation and abuse of women and children. The phenomenon of male violence is rooted in women's inequality and the issue of lap dancing must be placed in this context and the committee basing their deliberations on this as a staring point.

UNICEF – "In to-day's world to be born female is to be born high risk."

UN – "Violence against women is the world's most pervasive form of human rights abuse."

A very simple question has to be asked – why are all forms of objectification, commercial sexual exploitation exclusively aimed at women?

Whilst the young people we support have not been involved with lap dancing directly and more likely to be involved in prostitution, they are clear that such activities are part and parcel of men's exploitation of women and children and reinforce their expectations that they will face such abuse throughout their lives.

A few of the young women are attending lap dancing fitness classes and pole dancing kits are now available through catalogues as a fitness regime. Both these new developments normalise lap dancing and are wholly aimed at women. The normalisation of sexual exploitation is a worrying trend, for example Playboy bunny is now part of mainstream accessories and design; celebrities such as David and Victoria Beckham gain media attention by visiting a lapdancing/strip club[1] and yet David Beckham is a UNICEF Ambassador.

Lap dancing clubs are usually part of a chain network such as Stringfellows, Playboy that have links with wider pornography distribution. There is also a competitive culture of the more sexually explicit the act the more money is earned. Research by the Women's Support Project highlighted that 31% of Scottish men interviewed about prostitution were introduced to prostitution through a lap dancing club.

There are numerous reports on the harm caused by 'exotic' dancing and any legislation to end this situation should be supported[2].

Lap dancing is only available to young women who have pre-conceived 'beautiful/desirable' bodies. This contributes to any general lack of confidence and low self esteem for young women who don't meet the 'desirable' body image of lap dancers and linked to consumer pressure on women to achieve levels of beauty, slimness, sexual attraction.

Meanwhile we should be encouraging girls and young women to be confident in themselves, in their own skin, and to identify their aspirations and help them meet those.

Generally the existence of lap dancing clubs increases women's fears and undermines their safety around the areas where they exist. Ask any women and she will admit that she avoids areas where there is lap dancing clubs if she is on her own or with friends in the city centre at night. Research by Glasgow Chamber of Commerce (2003) found that three-quarters of city centre businesses believed that lap dancing clubs would damage the reputation of the city and half were concerned about the safety of their staff in the vicinity of the clubs.

The fact that there is a demand for such clubs is not a reason to justify their existence. There is a demand for prostitution, child and women trafficking, pornography, paedophile networks and we accept that these are not indicators of a healthy and safe society for all our citizens.

Support for this amendment would add to the campaign to deal with the increased sexualisation of girls and young women which is raising widespread concerns and to the overall measures necessary across various government departments in order to deal with the exploitation of women and girls.

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[1] Showbiz Spy 12/12/07 and Marie Claire 13/12/07

[2] Strip Club Testimony – Kelly Holsopple

Violence and Stress At Work and in the Performing Arts – Giga, Hoel and Cooper, Manchester University.

House of Commons Minutes of Evidence, Culture, Media, Sports Committee, 25 November 2008.

We view this amendment as an important signal that there is now a fightback to highlight the exploitative nature of such activities and their role in the continuation of the subordination and objectification of women and girls.

The Scottish Parliament has a better record than Westminster on the issue of violence against women and had introduced some of the most progressive legislation and support in the UK. Support for this amendment would continue the reputation of the Parliament as a champion of women's rights in the context of overall human rights.

Rosina McCrae
Director
26 April 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Written submission from the Law Society of Scotland Licensing Law Sub-Committee

I write to you in my capacity as the Secretary to the Law Society of Scotland's Licensing Law Sub-Committee.

I have received some comments from the Society's Licensing Law Sub-Committee with regard to a number of amendments to Part 9 of the Bill which I understand are to be considered at the next meeting of the Justice Committee to be held on 11 May 2010. I note that there are a large number of amendments and that some of these reflect the Sub-Committee's previously stated position to the Committee eg. transfer of premises licence, site only applications and appeals procedures. I would therefore, not propose to comment on all the amendments, but just provide a number of comments on those amendments on which the Sub-Committee has raised some concerns.

These comments are as follows:

Amendment 516, Sandra White, Control of Lap Dancing and other Adult Entertainment Venues

The Sub-Committee has already responded to a call for written evidence from the Justice Committee under separate cover.[1]

Amendment 542, George Foulkes, Premises Licence Applications: Disability Compliance Statements

The Sub-Committee questions the necessity for this amendment, as it duplicates building control provisions and seems at odds with section 27(7)(c) of the Licensing (Scotland) Act 2005.

All new premises capable of compliance will be required to comply with the terms of Part 3 of the Disability Discrimination Act 1995 in any event.

Reasons for non-compliance where changes cannot be made due to an inability to obtain either planning or other statutory consents require to be made to the appropriate authorities.

The Sub-Committee makes particular reference to section 50(1)(b) of the 2005 Act, whereby premises licence applications require, in any event, to be accompanied by a building standards certificate.

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[1] [Note: available at: http://www.scottish.parliament.uk/s3/committees/justice/inquiries/CriminalJusticeandLicensing/Stage%202%20correspondence/CJL.S2.117LawSocietyofScotland.pdf]

Amendment 694, Kenny MacAskill, Liability for Offences

The Sub-Committee questions the requirement for this amendment given the separation within the 2005 Act of premises and personal licences and is concerned about its implications.

From a practical point of view, this amendment will discourage operators from holding premises licences if they can be held vicariously liable for the actions of the tenants.

This issue becomes particularly problematic given that most owners/landlords/ pension funds and such like would choose to hold the premises licence as opposed to the tenant in occupation of the premises on the basis that the premises licence holder is in a position to surrender the licence in terms of section 28(6)(b) of the 2005 Act.

The Sub-Committee notes the terms of the Nicholson Report at Paragraph 7.18 which stated that it would be inappropriate to hold a premises licence holder vicariously liable, albeit a licensing board should be entitled to hold a premises licence holder to account as well as considering the position of the personal licence holder. To depart from this view should be fully consulted on and considered in depth.

The practical difficulties with this amendment are considerable.

This amendment would, of necessity, discourage large companies who at present hold premises licences (and in most cases being far removed from the day-to-day activities carried on within the licensed premises) in respect of a large number of licensed premises and indeed independent landlords from holding a premises licence. There would also be serious issues as regards administrators, receivers and trustees in bankruptcy who would be very unlikely to hold premises licences if there was vicarious liability. It should also be noted that such an application to transfer by administrators, etc. has to be made within 28 days all in terms of section 34 of the 2005 Act. The effect would be that those licences would be lost to the severe detriment of jobs, owners and creditors. This is not in the public interest.

Amendment 699, Kenny MacAskill, Powers of Licensing Standards Officers

The Sub-Committee is of the view that this amendment, which seeks to augment the powers of Licensing Standards Officers (LSOs) in terms of section 15 of the 2005 Act is perhaps too widely drafted. With particular reference to the proposed new section 15(4A), the Sub-Committee is concerned that this would allow Licensing Standards Officers to take e.g. computer disks and hard drives, etc. in order to obtain the documents in an electronic form. This particular example would make it next to impossible to operate the business concerned and would certainly remove the licence holders’ ability to monitor what was going on.

The Society, however, welcomes the provisions contained within this amendment with regard to confidentiality and the requirement for the LSO to leave notices stating what was seized and why it was seized.

I trust that this information is of some assistance to you.

Alan McCreadie
Deputy Director, Law Reform
7 May 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Letter from the Cabinet Secretary for Justice to the Convener

Part 6 – Disclosure in Criminal Proceedings

I am writing to follow up on some of the points that were raised at the Committee's informal session on disclosure on 27 April. The disclosure provisions are clearly a major element of the Criminal Justice and Licensing (Scotland) Bill and I wanted to put on record a number of issues that I would ask the Committee to consider before it comes to formally consider these on 4 May. I have enclosed, also, at Annexe A, a draft "marked up" version of Part 6 of the Bill and, at Annexe B, a summary of the principal amendments, to assist members in understanding the effect on the Bill of the Government amendments proposed.

The central issue that was raised by the Committee in the informal session was the complexity and length of the provisions. It is beyond doubt that this is a complex and highly technical part of the Bill, but I want to impress on you the reasons why this is the case.

Firstly, I think it is important to put the length and complexity of these provisions in context. The current Crown Office guidance on disclosure runs to some 300 pages. This gives a sense of the detailed nature of work on disclosure and of the intricate nature of what we are trying to distil into legislation. The other comparison I would draw your attention to is the Criminal Procedure and Investigations Act 1996 and supporting legislation in England, Wales and Northern Ireland, where the disclosure provisions are of a similar length to those we are proposing. In this context, I believe the level of detail we are proposing is reasonable.

The second area I want to explain is why the provisions are now longer than at Stage 1. That is because, although we have simplified some areas in response to the Committee's Stage 1 report – by seeking to remove provisions on schedules in sections 85 to 88, by simplifying the duty of disclosure in section 89 and 90, by revising the provisions in sections 102 to 106 concerning non-disclosure of information to simplify the tests which apply and by seeking to delete sections 100 and 101 – there are also areas that were not covered at introduction that we are now adding in.

These include provisions on disclosure in appeals and ensuring that there is a means of representing reserved interests in decisions about the non-disclosure of information on public interest grounds. The need for provisions on disclosure in appeals arose from the decision of the Judicial Committee of the Privy Council (functions of which have since transferred to the Supreme Court) in McDonald v HMA, which did not issue until October 2008 and it was not possible, therefore, to develop provisions on this prior to introduction. Similarly, the need for a mechanism for a Secretary of State to be able to make applications to the court for information to be withheld to protect the public interest only became clear during discussions with officials of the United Kingdom government following introduction. Therefore, while we have responded to the Stage 1 report, the overall effect in reaching a fully rounded set of proposals for Stage 2 has been to lengthen the provisions.

Finally, I want to stress the importance of certainty in creating a statutory disclosure scheme. One of the key motivations for creating a statutory scheme is to make sure that the duties and responsibilities within the scheme are as clear as possible, and to get away from the moving target of constantly evolving substantive common law in this area. Unless we make clear all of the significant rights and duties in legislation, the risk is that those gaps will be filled in through case law which will undermine the certainty for police and prosecutors which is one of the most important benefits, and is the main driver, of the scheme. While many of the interests that responded at Stage 1 would not be adversely affected by continuing evolution of the law, COPFS and police most certainly would. I would therefore ask you to give appropriate weight to the evidence of the bodies that play the central role in operating the whole scheme.

Given that our proposed disclosure statutory regime is of a similar size to that which operates in England, Wales and Northern Ireland, and for the reasons noted above, I am convinced of the need to ensure we have appropriate statutory provision in Scotland which does, I accept, result in complex and technical provisions.

I remain willing to keep the provisions under review and to continue searching for means of simplifying the provisions ahead of Stage 3. While I have to say I believe such opportunities may be limited for the reasons set out above, I will look positively on any suggestions that come forward from any source.

I stand ready to engage with you further ahead of the session on Tuesday if that would be helpful.

Kenny MacAskill MSP
Cabinet Secretary for Justice
28 April 2010

Annexe A

MARKED UP VERSION: 27 APRIL 2010

PART 1

DISCLOSURE

Meaning of "information"

85 Meaning of "information"

(1) In this Part "information", in relation to criminal proceedings relating to a person, means material of any kind given to or obtained by the prosecutor in connection with the proceedings.

(3) In sections (*Duty to disclose after conclusion of proceedings at first instance*) to (*Review of ruling under section* (*Application by appellant for ruling on disclosure*)) "information", in relation to appellate proceedings, includes material of any kind given to or obtained by the prosecutor in connection with the appellate proceedings or the earlier proceedings.

(4) In subsection (3)—

"appellate proceedings" has the meaning given by section (*Sections (Duty to disclose after conclusion of proceedings at first instance) to* (*Review of ruling under section* (*Application by appellant for ruling on disclosure*)): *interpretation*),

"earlier proceedings" has the meaning given in section (*Duty to disclose after conclusion of proceedings at first instance*)(5).

Solemn cases: schedules of information

Provision of information to prosecutor: solemn cases

(1) This section applies where in a prosecution—

(a) an accused appears for the first time on petition, or

(b) an accused appears for the first time on indictment (not having appeared on petition in relation to the same matter).

(2) As soon as practicable after the appearance, the investigating agency must provide the prosecutor with details of all the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained (whether by the agency or otherwise) in the course of investigating the matter to which the appearance relates.

(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that information that the prosecutor specifies in the requirement.

(4) In this section, "investigating agency" means—

(a) a police force, or

(b) such other person who—

(i) engages (to any extent) in the investigation of crime or sudden deaths, and

(ii) submits reports relating to those investigations to the procurator fiscal,

as the Scottish Ministers may prescribe by regulations.

87 Continuing duty to provide schedules of information

(1) This section applies where—

(a) an investigating agency has complied with (*Provision of information to prosecutor*: *solemn cases*)(2) in relation to an accused, and

(b) during the relevant period the investigating agency becomes aware that further information that may be relevant to the case for or against the accused has been obtained (whether by the agency or otherwise) in the course of investigating the accused's case.

( ) As soon as practicable after becoming aware of the further information, the investigating agency must provide the prosecutor with details of it.

( ) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that further information that the prosecutor specifies in the requirement.

(3) In this section—

"relevant period" means the period—

(a) beginning with the investigating agency's compliance with (*Provision of information to prosecutor*: *solemn cases*)(2) in relation to the accused, and

(b) ending with the agency's receiving notice from the prosecutor of the conclusion of the proceedings against the accused.

(4) For the purposes of subsection (3), proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the indictment falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

Provision of information to prosecutor: summary cases

(1) This section applies where a plea of not guilty is recorded against an accused charged on summary complaint.

(2) As soon as practicable after the recording of the plea, the investigating agency must inform the prosecutor of the existence of the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained (whether by the agency or otherwise) in the course of investigating the matter to which the plea relates.

(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that information that the prosecutor specifies in the requirement.

Continuing duty of investigating agency: summary cases

(1) This section applies where—

- (a) an investigating agency has complied with section (*Provision of information to prosecutor*: *summary cases*)(2) in relation to an accused, and
- b) during the relevant period the investigating agency becomes aware that further information that may be relevant to the case for or against the accused has been obtained (whether by the agency or otherwise) in the course of investigating the accused's case.

(2) As soon as practicable after becoming aware of the further information, the investigating agency must inform the prosecutor of the existence of the information.

(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that further information that the prosecutor specifies in the requirement.

(4) In this section "relevant period" means the period—

- (a) beginning with the investigating agency's compliance with section (*Provision of information to prosecutor*: *summary cases*)(2) in relation to the accused, and
- (b) ending with the agency's receiving notice from the prosecutor of the conclusion of the proceedings against the accused.

(5) For the purposes of subsection (4), proceedings against an accused are to be taken to be concluded if—

- (a) a plea of guilty is recorded against the accused,
- (b) the accused is acquitted,
- (c) the proceedings against the accused are deserted *simpliciter*,
- (d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,
- (e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or
- (f) the complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

Duties

89 Prosecutor's duty to disclose information

(1) This section applies where in a prosecution—

(a) an accused appears for the first time on petition,

(b) an accused appears for the first time on indictment (not having appeared on petition in relation to the same matter), or

(c) a plea of not guilty is recorded against an accused charged on summary complaint.

(2) As soon as practicable after the appearance or the recording of the plea, the prosecutor must—

(a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

( ) disclose to the accused the information to which subsection (3) applies.

(3) This subsection applies to information if—

(a) the information would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused,

(b) the information would materially strengthen the accused's case, or

- the information is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused.

(7) The prosecutor need not disclose under subsection (2)(b) anything that the prosecutor has already disclosed in relation to the same matter (whether because the same matter has been the subject of an earlier petition, indictment or complaint or otherwise).

Disclosure of other information: solemn cases

(1) This section applies where by virtue of subsection (2)(b) of section 89 the prosecutor is required to disclose information to an accused who falls within paragraph (a) or (b) of subsection (1) of that section.

(2) As soon as practicable after complying with the requirement, the prosecutor must disclose to the accused details of any information which the prosecutor is not required to disclose under section 89(2)(b) but which may be relevant to the case for or against the accused.

(3) The prosecutor need not disclose under subsection (2) details of sensitive information.

(4) In subsection (3), "sensitive", in relation to an item of information, means that if it were to be disclosed there would be a risk of—

(a) causing serious injury, or death, to any person,

(b) obstructing or preventing the prevention, detection, investigation or prosecution of crime, or

(c) causing serious prejudice to the public interest.

90 Continuing duty of prosecutor

(1) This section applies where the prosecutor has complied with sections 89(2)(b) in relation to an accused.

(2) During the relevant period, the prosecutor must—

(a) from time to time review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

( ) disclose to the accused any information to which section 89(3) applies.

(2A) As soon as practicable after complying with subsection (2), the prosecutor must disclose to the accused details of any other information that may be relevant to the case for or against the accused of which the prosecutor is aware.

(2B) The prosecutor need not disclose under subsection (2A) details of sensitive information.

(2C) In subsection (2)

"relevant period" means the period—

(a) beginning with the prosecutor's compliance with section 89(2)(b) in relation to an accused, and

(b) ending with the conclusion of the proceedings against the accused.

"sensitive" has the meaning given by section (*Disclosure of other information*: *solemn cases*)(4).

(4) For the purposes of subsection (2C), proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the indictment or complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

Defence statements

94 Defence statements: solemn proceedings

( ) This section applies where the accused lodges a defence statement under section 70A of the 1995 Act.

( ) As soon as practicable after the prosecutor receives a copy of the defence statement, the prosecutor must—

(a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

( ) disclose to the accused any information to which section 89(3) applies.

(2) After section 70 of the 1995 Act insert—

“70A Defence statements

(1) This section applies where an indictment is served on an accused.

(2) The accused must lodge a defence statement at least 14 days before the first diet.

(3) The accused must lodge a defence statement at least 14 days before the preliminary hearing.

(4) At least 7 days before the trial diet the accused must—

(a) where there has been no material change in circumstances in relation to the accused’s defence since the last defence statement was lodged, lodge a statement stating that fact,

(b) where there has been a material change in circumstances in relation to the accused’s defence since the last defence statement was lodged, lodge a defence statement.

(4A) If after lodging a statement under subsection (2), (3) or (4) there is a material change in circumstances in relation to the accused’s defence, the accused must lodge a defence statement.

(4B) Where subsection (4A) requires a defence statement to be lodged, it must be lodged before the trial diet begins unless on cause shown the court allows it to be lodged during the trial diet.

(5) The accused may lodge a defence statement—

( ) at any time before the trial diet or

( ) during the trial diet if the court on cause shown allows it.

( ) As soon as practicable after lodging a defence statement or a statement under subsection (4)(a), the accused must send a copy of the statement to the prosecutor and any co-accused.

(6) In this section “defence statement” means a statement setting out—

(a) the nature of the accused’s defence, including any particular defences on which the accused intends to rely,

(b) any matters of fact on which the accused takes issue with the prosecution and the reason for doing so,

( ) particulars of the matters of fact on which the accused intends to rely for the purposes of the accused’s defence,

(c) any point of law which the accused wishes to take and any authority on which the accused intends to rely for that purpose,

(d) by reference to the accused's defence, the nature of any information that the accused requires the prosecutor to disclose, and

(e) the reasons why the accused considers that disclosure by the prosecutor of any such information is necessary.".

( ) In section 78 of the 1995 Act (special defences, incrimination, notice of witnesses etc.), after subsection (1) insert—

"(1A) Subsection (1) does not apply where—

(a) the accused lodges a defence statement under section 70A, and

(b) the accused's defence consists of or includes a special defence.".

95 Defence statements: summary proceedings

(1) This section applies where—

(a) a plea of not guilty is recorded against an accused charged on summary complaint, and

(b) during the relevant period the accused lodges a defence statement.

(2) A defence statement must set out—

(a) the nature of the accused's defence, including any particular defences on which the accused intends to rely,

(b) any matters of fact on which the accused takes issue with the prosecution and the reason for doing so,

( ) particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence,

(c) any point of law which the accused wishes to take and any authority on which the accused intends to rely for that purpose,

(d) by reference to the accused's defence, the nature of any information that the accused wishes the prosecutor to disclose, and

(e) the reasons why the accused considers that disclosure by the prosecutor of any such information is necessary.

( ) As soon as practicable after lodging a defence statement, the accused must send a copy of the statement to the prosecutor and any co-accused.

(3) As soon as practicable after receiving a copy of the defence statement the prosecutor must—

(a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

( ) disclose to the accused any information to which section 89(3) applies

(4) In this section "the relevant period", in relation to the accused, is the period—

(a) beginning with the recording of the accused's plea of not guilty, and

(b) ending with the conclusion of the proceedings to which the plea relates.

(5) For the purposes of subsection (4), proceedings are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

( ) In section 149B of the 1995 Act (notice of defences), after subsection (2) insert—

"(2A) Subsection (1) does not apply where—

(a) the accused lodges a defence statement under section 95 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00),

(b) the statement is lodged—

(i) where an intermediate diet is to be held, at or before the diet, or

(ii) where such a diet is not to be held, no later than 10 clear days before the trial diet, and

(c) the accused's defence consists of or includes a defence to which that subsection applies.".

Change in circumstances following lodging of defence statement: summary proceedings

(1) This section applies where the accused lodges a defence statement under section 95 at least 14 days before the trial diet.

(2) At least 7 days before the trial diet the accused must—

(a) where there has been no material change in circumstances in relation to the accused's defence since the defence statement was lodged, lodge a statement stating that fact,

(b) where there has been a material change in circumstances in relation to the accused's defence since the defence statement was lodged, lodge a defence statement.

(3) If after lodging a statement under subsection (2) there is a material change in circumstances in relation to the accused's defence, the accused must lodge a defence statement.

(4) Where subsection (3) requires a defence statement to be lodged, it must be lodged before the trial diet begins unless on cause shown the court allows it to be lodged during the trial diet.

(5) As soon as practicable after lodging a statement under subsection (2)(a) or a defence statement under subsection (2)(b) or (3), the accused must send a copy of the statement concerned to the prosecutor and any co-accused.

(6) As soon as practicable after receiving a copy of a defence statement lodged under subsection (2)(b) or (3) the prosecutor must—

- (a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and
- (b) disclose to the accused any information to which section 89(3) applies.

(7) In this section, "defence statement" is to be construed in accordance with section 95(2).

Court rulings on disclosure

Application by accused for ruling on disclosure

(1) This section applies where the accused—

- (a) has lodged a defence statement under section 70A of the 1995 Act or section 95 or (*Change in circumstances following lodging of defence statement: summary proceedings*) of this Act, and
- (b) considers that the prosecutor has failed, in responding to the statement, to disclose to the accused an item of information to which section 89(3) applies (the "information in question").

(2) The accused may apply to the court for a ruling on whether section 89(3) applies to the information in question.

(3) An application under subsection (2) is to be made in writing and must set out—

- (a) where the accused is charged with more than one offence, the charge or charges to which the application relates,
- (b) a description of the information in question, and
- (c) the accused's grounds for considering that section 89(3) applies to the information in question.

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

- (a) comply with subsection (3), or
- (b) otherwise disclose any reasonable grounds for considering that section 89(3) applies to the information in question.

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the accused an opportunity to be heard before determining the application.

(7) On determining the application, the court must—

(a) make a ruling on whether section 89(3) applies to the information in question or to any part of the information in question, and

(b) where the accused is charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) Except where it is impracticable to do so, the application is to be assigned to the justice of the peace, sheriff or judge who is presiding, or is to preside, at the accused's trial.

Review of ruling under section (*Application by accused for ruling on disclosure*)

(1) This section applies where—

(a) the court has made a ruling under section (*Application by accused for ruling on disclosure*) that section 89(3) does not apply to an item of information (the "information in question"), and

(b) during the relevant period—

(i) the accused becomes aware of information (the "secondary information") that was unavailable to the court at the time it made its ruling, and

(ii) the accused considers that, had the secondary information been available to the court at that time, it would have made a ruling that section 89(3) does apply to the information in question.

(2) The accused may apply to the court which made the ruling for a review of the ruling.

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the accused is charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question and the secondary information, and

(c) the accused's grounds for believing that section 89(3) applies to the information in question.

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that section 89(3) applies to the information in question.

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the accused an opportunity to be heard before determining the application.

(7) On determining the application, the court may—

(a) affirm the ruling being reviewed, or

(b) recall that ruling and—

(i) make a ruling that section 89(3) applies to the information in question or to a part of the information in question, and

(ii) where the accused is charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) Except where it is impracticable to do so, the application is to be assigned to the justice of the peace, sheriff or judge who dealt with the application for the ruling that is being reviewed.

(9) Nothing in this section affects any right of appeal in relation to the ruling being reviewed.

(10) In this section, “the relevant period”, in relation to an accused, means the period—

(a) beginning with the making of the ruling being reviewed, and

(b) ending with the conclusion of proceedings against the accused.

(11) For the purposes of subsection (10), proceedings against the accused are taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the indictment or complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

Appeals against rulings under section (*Application by accused for ruling on disclosure*)

(1) The prosecutor or the accused may, within the period of 7 days beginning with the day on which a ruling is made under section (*Application by accused for ruling on disclosure*), appeal to the High Court against the ruling.

(2) Where an appeal is brought under subsection (1), the court of first instance or the High Court may—

(a) postpone any trial diet that has been appointed for such period as it thinks appropriate,

(b) adjourn or further adjourn any hearing for such period as it thinks appropriate,

(c) direct that any period of postponement or adjournment under paragraph (a) or (b) or any part of such period is not to count toward any time limit applying in the case.

(3) In disposing of an appeal under subsection (1), the High Court may—

(a) affirm the ruling, or

(b) remit the case back to the court of first instance with such directions as Court thinks appropriate.

(4) This section does not affect any other right of appeal which any party may have in relation to a ruling under section (*Application by accused for ruling on disclosure*).

Effect of guilty plea

96 Effect of guilty plea

(1) This section applies where—

(a) by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b) or 95(3)(b) the prosecutor is required to disclose information to an accused, but

(b) before the prosecutor does so, a plea of guilty is recorded against the accused.

(2) The prosecutor need not comply with the requirement in so far as it relates to the disclosure of information which but for that plea would have been likely to have formed part of the evidence to be led by the prosecutor in the proceedings against the accused.

(3) Subsections (1) and (2) cease to apply if the accused withdraws the plea of guilty.

Redaction of non-disclosable information by prosecutor

(1) Subsection (2) applies where—

(a) by virtue of this Part the prosecutor is required to disclose an item of information (the “disclosable information”), and

(b) the disclosable information forms part of, or contains, other information (the “non-disclosable information”) which the prosecutor is not required to disclose by virtue of any of those sections.

(2) Before disclosing the disclosable information, the prosecutor may (whether by redaction or otherwise) remove or obscure the non-disclosable information.

Disclosure after conclusion of proceedings at first instance

Sections (*Duty to disclose after conclusion of proceedings at first instance*) to (*Review of ruling under section* (*Application by appellant for ruling on disclosure*)): interpretation

In sections (*Duty to disclose after conclusion of proceedings at first instance*) to (*Review of ruling under section* (*Application by appellant for ruling on disclosure*))—

"appellant", in relation to appellate proceedings, includes a person authorised by an order under section 303A(4) of the 1995 Act to institute or continue the proceedings,

"appellate proceedings" means—

(a) an appeal under section 106(1)(a) or (f) of the 1995 Act which brings under review an alleged miscarriage of justice,

(b) an appeal under paragraph (b), (ba), (bb), (c), (d), (db) or (dc) of subsection (1) of section 106 of the 1995 Act which brings under review in accordance with subsection (3)(a) of that section an alleged miscarriage of justice,

(c) an appeal under section 175(2)(a) or (d) of the 1995 Act which brings under review an alleged miscarriage of justice,

(d) an appeal under paragraph (b), (c) or (cb) of subsection (2) of section 175 of the 1995 Act which brings under review an alleged miscarriage of justice which is based on the type of miscarriage described in subsection (5) of that section,

(e) an appeal to the Supreme Court against a determination by the High Court of Justiciary of a devolution issue,

(f) an appeal against conviction by bill of suspension under section 191(1) of the 1995 Act,

(g) an appeal against conviction by bill of advocation,

(h) a petition to the *nobile officium* in respect of a matter arising out of criminal proceedings which brings under review an alleged miscarriage of justice which is based on the existence and significance of new evidence,

(i) an appeal under section 62(1)(b) of the 1995 Act against a finding under section 55(2) of that Act,

(j) the referral to the High Court of Justiciary under section 194B of the 1995 Act of—

  (i) a conviction, or

  (ii) a finding under section 55(2) of that Act.

Duty to disclose after conclusion of proceedings at first instance

(1) This section applies where appellate proceedings are instituted in relation to an appellant.

(2) As soon as practicable after the relevant act the prosecutor must—

  (a) review all information of which the prosecutor is aware that relates to the grounds of appeal in the appellate proceedings, and

  (b) disclose to the appellant any information that falls within subsection (3).

(3) Information falls within this subsection if it is—

(a) information that the prosecutor was required by virtue of section 89(2)(b) or 90(2)(b) to disclose in the earlier proceedings but did not disclose,

(b) information to which, during the earlier proceedings, the prosecutor considered paragraph (a) or (b) of section 89(3) did not apply but to which the prosecutor now considers one or both of those paragraphs would apply, or

(c) information of which the prosecutor has become aware since the disposal of the earlier proceedings that, had the prosecutor been aware of it during those proceedings, the prosecutor would have been required to disclose by virtue of section 89(2)(b) or 90(2)(b).

(4) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the appellant.

(5) In this section—

“earlier proceedings”, in relation to appellate proceedings, means the proceedings to which the appellate proceedings relate,

“relevant act” means—

(a) in relation to proceedings of the type mentioned in paragraph (a) or (b) of the relevant definition, the granting under section 107(1)(a) of the 1995 Act of leave to appeal,

(b) in relation to proceedings of the type mentioned in paragraph (c) or (d) of the relevant definition, the granting under section 180(1)(a) or, as the case may be, 187(1)(a) of that Act of leave to appeal,

(c) in relation to proceedings of the type mentioned in paragraph (e) of the relevant definition, the granting of leave to appeal by the High Court of Justiciary or, as the case may be, the Supreme Court,

(d) in relation to proceedings of the type mentioned in paragraph (f) of the relevant definition—

(i) if leave to appeal is required, the granting under section 191(2) of that Act of leave to appeal,

(ii) if leave to appeal is not required, service on the prosecutor under the relevant rule of a certified copy of the bill of suspension and the interlocutor granting first order for service,

(e) in relation to proceedings of the type mentioned in paragraph (g) of the relevant definition, service on the prosecutor under the relevant rule of a certified copy of the bill of advocation and the interlocutor granting first order for service,

(f) in relation to proceedings of the type mentioned in paragraph (h) of the relevant definition, service on the prosecutor under the relevant rule of a certified copy of the petition and the interlocutor granting first order for service,

(g) in relation to proceedings of the type mentioned in paragraph (i) of the relevant definition, the lodging of the appeal,

(h) in relation to proceedings of the type mentioned in paragraph (j) of the relevant definition, the lodging of the grounds of appeal by the person to whom the referral relates,

"relevant definition" means the definition of appellate proceedings in section (*Sections* (*Duty to disclose after conclusion of proceedings at first instance*) to (*Review of ruling under section* (*Application by appellant for ruling on disclosure*)): *interpretation*),

"relevant rule" means rule 29A.1(3) of the Criminal Procedure Rules 1996 (S.I. 1996/513).

Continuing duty of prosecutor

(1) This section applies where the prosecutor has complied with section (*Duty to disclose after conclusion of proceedings at first instance*)(2) in relation to an appellant.

(2) During the relevant period, the prosecutor must—

(a) from time to time review all information of which the prosecutor is aware that relates to the grounds of appeal in the appellate proceedings which relate to the appellant, and

(b) disclose to the appellant any information that falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the appellant.

(4) In subsection (2), "relevant period" means the period—

(a) beginning with the prosecutor's compliance with section (*Duty to disclose after conclusion of proceedings at first instance*)(2), and

(b) ending with the relevant conclusion.

(5) In subsection (4), "relevant conclusion" means—

(a) in relation to proceedings of the type mentioned in paragraph (a) or (b) of the relevant definition—

(i) the lodging under section 116(1) of the 1995 Act of a notice of abandonment, or

(ii) the disposal of the appeal under section 118 of that Act,

(b) in relation to proceedings of the type mentioned in paragraph (c) or (d) of the relevant definition—

(i) the disposal of the appeal under section 183(1)(b) to (d) of that Act,

(ii) the abandonment of the appeal under section 184(1) of that Act,

(iii) the setting aside of the conviction or sentence or, as the case may be, conviction and sentence under section 188(1) of that Act, or

(iv) the disposal of the appeal under section 190(1) of that Act,

(c) in relation to proceedings of the type mentioned in paragraph (e), (f), (g) or (h) of the relevant definition, the disposal or abandonment of the appeal,

(d) in relation to proceedings of the type mentioned in paragraph (i) of the relevant definition, the disposal of the appeal under section 62(6) of that Act or the abandonment of the appeal,

(e) in relation to proceedings of the type mentioned in paragraph (j) of the relevant definition—

(i) if the referral or finding is being treated as if it were an appeal under Part 8 of that Act, the conclusion mentioned in paragraph (a) above,

(ii) if the referral or finding is being treated as if it were an appeal under Part 10 of that Act, the conclusion mentioned in paragraph (b) above or, where the referral or finding proceeds by way of bill of suspension, bill of advocation or petition to the *nobile officium*, paragraph (c) above.

(6) In this section, "relevant definition" has the meaning given by section (*Duty to disclose after conclusion of proceedings at first instance*)(5).

Application to prosecutor for further disclosure

(1) This section applies where—

(a) the prosecutor has complied with section (*Duty to disclose after conclusion of proceedings at first instance*)(2) in relation to an appellant, and

(b) the appellant lodges a further disclosure request—

(i) during the preliminary period, or

(ii) if the court on cause shown allows it, after the preliminary period but before the relevant conclusion.

(2) A further disclosure request must set out—

(a) by reference to the grounds of appeal, the nature of the information that the appellant wishes the prosecutor to disclose, and

(b) the reasons why the appellant considers that disclosure by the prosecutor of any such information is necessary.

(3) As soon as practicable after receiving a copy of the further disclosure request the prosecutor must—

(a) review any information of which the prosecutor is aware that relates to the request, and

(b) disclose to the appellant any of that information that falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(4) In this section—

"preliminary period", in relation to the appellate proceedings concerned, means the period beginning with the relevant act and ending with the beginning of the hearing of the appellate proceedings,

"relevant act" has the meaning given by section (*Duty to disclose after conclusion of proceedings at first instance*)(5),

"relevant conclusion" has the meaning given by section (*Continuing duty of prosecutor*)(5).

Further duty of prosecutor: conviction upheld on appeal

(1) This section applies where—

(a) in an appeal to the High Court of Justiciary, the High Court upholds the conviction of a person, and

(b) after the conclusion of the appeal the prosecutor becomes aware of—

(i) information that the prosecutor was required by virtue of section 89(2)(b) or 90(2)(b) to disclose in the earlier proceedings but did not disclose, or

(ii) information that falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3) which would have related to the grounds of appeal but was not disclosed.

(2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.

(3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.

(4) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.

(5) In this section, "earlier proceedings" has the meaning given by section (*Duty to disclose after conclusion of proceedings at first instance*)(5).

Further duty of prosecutor: convicted persons

(1) This section applies where—

(a) a person has been convicted,

(b) after conviction the prosecutor becomes aware of information that the prosecutor was required by virtue of section 89(2)(b) or 90(2)(b) to disclose in the earlier proceedings but did not disclose, and

(c) section (*Further duty of prosecutor*: *conviction upheld on appeal*) does not apply.

(2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.

(3) If the person institutes appellate proceedings in relation to the conviction, the prosecutor need not comply with the duty imposed by subsection (2) during the appropriate period.

(4) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.

(5) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.

(6) In this section—

"appropriate period", in relation to appellate proceedings, means the period beginning with the relevant act and ending with the relevant conclusion,

"earlier proceedings" has the meaning given by section (*Duty to disclose after conclusion of proceedings at first instance*)(5),

"relevant act" has the meaning given by section (*Duty to disclose after conclusion of proceedings at first instance*)(5),

"relevant conclusion" has the meaning given by section (*Continuing duty of prosecutor*)(5).

Further duty of prosecutor: appeal against acquittal

(1) This section applies where—

(a) the prosecutor appeals against the acquittal of a person, and

(b) after lodging the appeal the prosecutor becomes aware of information which relates to the appeal and falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.

(3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.

(4) The prosecutor ceases to be subject to the duty imposed by subsection (2) on the disposal of the appeal by the High Court of Justiciary.

(5) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.

Court rulings on disclosure: appellate proceedings

Application by appellant for ruling on disclosure

(1) This section applies where the appellant—

(a) has made a further disclosure request under section (*Application to prosecutor for further disclosure*), and

(b) considers that the prosecutor has failed, in responding to the request, to disclose to the appellant an item of information falling within section (*Duty to disclose after conclusion of proceedings at first instance*)(3) (the “information in question”).

(2) The appellant may apply to the court for a ruling on whether the information in question falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the appellant is or was charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question, and

(c) the appellant’s grounds for considering that the information in question falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that the information in question falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the appellant an opportunity to be heard before determining the application.

(7) On determining the application, the court must—

(a) make a ruling on whether the information in question, or any part of the information in question, falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3), and

(b) where the appellant is or was charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) In this section, “the court” means the court before which the appellant’s appeal is brought.

(9) Except where it is impracticable to do so, the application is to be assigned to the judges who are to hear the appellant’s appeal.

Review of ruling under section (*Application by appellant for ruling on disclosure*)

(1) This section applies where—

(a) the court has made a ruling under section (*Application by appellant for ruling on disclosure*) that an item of information (the “information in question”) does not fall within section (*Duty to disclose after conclusion of proceedings at first instance*)(3), and

(b) during the relevant period—

(i) the appellant becomes aware of information (“secondary information”) that was unavailable to the court at the time it made its ruling, and

(ii) the appellant considers that, had the secondary information been available to the court at that time, it would have made a ruling that the information in question does fall within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(2) The appellant may apply to the court which made the ruling for a review of the ruling.

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the appellant is or was charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question and the secondary information, and

(c) the appellant’s grounds for considering that the information in question falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that the information in question falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the appellant an opportunity to be heard before determining the application.

(7) On determining the application, the court may—

(a) affirm the ruling being reviewed, or

(b) recall that ruling and—

(i) make a ruling that the information in question, or any part of the information in question, falls within section (*Duty to disclose after conclusion of proceedings at first instance*)(3), and

(ii) where the appellant is or was charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) Except where it is impracticable to do so, the application is to be assigned to the judges who dealt with the application for the ruling that is being reviewed.

(9) Nothing in this section affects any right of appeal in relation to the ruling being reviewed.

(10) In this section, “relevant period”, in relation to an appellant, means the period—

(a) beginning with the making of the ruling being reviewed, and

(b) ending with the relevant conclusion.

(11) In subsection (10), “relevant conclusion” has the meaning given by section (*Continuing duty of prosecutor*)(5).

Means of disclosure

97 Means of disclosure

(1) This section applies where by virtue of this Part the prosecutor is required to disclose information to an accused.

(2) The prosecutor may disclose the information by any means.

(3) In particular, the prosecutor may disclose the information by enabling the accused to inspect it at a reasonable time and in a reasonable place.

(4) Subsection (5) applies if the information is contained in—

(a) a precognition,

(b) a victim statement,

(c) a statement given by a person whom the prosecutor does not intend to call to give evidence in the proceedings, or

(d) where the proceedings relating to the accused are summary proceedings, a statement given by a person whom the prosecutor intends to call to give evidence in the proceedings.

(5) In complying with the requirement, the prosecutor need not disclose the precognition or, as the case may be, statement.

(6) Subsection (7) applies where the proceedings relating to the accused are solemn proceedings and—

(a) the information is contained in a statement given by a person whom the prosecutor intends to call to give evidence in the proceedings, or

(b) the information is contained in a statement and the prosecutor intends to apply under section 259 of the 1995 Act to have evidence of the statement admitted in the proceedings.

(7) In complying with the requirement, the prosecutor must disclose the statement.

Confidentiality

98 Confidentiality of disclosed information

(1) This section applies where by virtue of this Part the prosecutor discloses information to an accused.

(2) The accused must not use or disclose the information or anything recorded in it other than in accordance with subsection (3).

(3) The accused may use or disclose the information—

(a) for the purposes of the proper preparation and presentation of the accused's case in the proceedings in relation to which the information was disclosed ("the original proceedings"),

(b) with a view to the taking of an appeal in relation to the matter giving rise to the original proceedings,

(c) for the purposes of the proper preparation and presentation of the accused's case in any such appeal.

(4) A person to whom information is disclosed by virtue of subsection (3) must not use or disclose the information or anything recorded in it other than for the purpose for which it was disclosed.

(4A) If despite subsection (2) the accused discloses the information or anything recorded in it other than in accordance with subsection (3), a person to whom information is disclosed must not use or disclose the information or anything recorded in it.

(4B) Subsections (2), (4) and (4A) do not apply in relation to the use or disclosure of information which is in the public domain at the time of the use or disclosure.

(5) In subsection (3) "appeal" includes the reference of a case to the High Court of Justiciary by the Scottish Criminal Cases Review Commission under section 194B of the 1995 Act.

( ) a petition to the *nobile officium*,

( ) proceedings in the European Court of Human Rights.

(6) Nothing in this section affects any other restriction or prohibition on the use or disclosure of information, whether the restriction or prohibition arises by virtue of an enactment (whenever passed or made) or otherwise.

99 Contravention of section 98

(1) A person who knowingly uses or discloses information in contravention of section 98 commits an offence.

(2) A person guilty of an offence under subsection (1) is liable—

(a) on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both,

(b) on conviction on indictment to imprisonment for a term not exceeding 2 years or to a fine or to both.

Exemptions from disclosure

Information must not be disclosed by virtue of this Part to the extent that it is material the disclosure of which is prohibited by section 17 of the Regulation of Investigatory Powers Act 2000 (c.23).

Applications to court: orders restricting disclosure

102 Application for non-disclosure order

(1) This section applies where—

(a) by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or *(Change in circumstances following lodging of defence statement: summary proceedings*)(6)(b) the prosecutor is required to disclose an item of information to an accused,

(b) section 89(3)(a) or (b) applies to the information, and

(c) the prosecutor considers that subsection (2) applies.

(2) This subsection applies if disclosure of the item of information—

(a) would be likely to cause serious injury, or death, to any person,

(b) would be likely to obstruct or prevent the prevention, detection, investigation or prosecution of crime, or

(c) would be likely to cause a real risk of substantial harm or damage to the public interest.

(3) The prosecutor must apply to the court for an order under section 106 (a "section 106 order").

103 Application for non-notification order or exclusion order

(1) This section applies where the prosecutor is required by section 102(3) to apply to the court for a section 106 order.

(2) If the application for a section 106 order relates to solemn proceedings, the prosecutor may also apply to the court for—

(a) a non-notification order and an exclusion order, or

(b) an exclusion order (but not a non-notification order).

(3) If the application for a section 106 order relates to summary proceedings, the prosecutor may also apply to the court for an exclusion order.

(4) A non-notification order is an order under section 104 prohibiting notice being given to the accused of—

(a) the making of an application for—

(i) the section 106 order to which the non-notification order relates,

(ii) the non-notification order, and

(iii) an exclusion order, and

(b) the determination of those applications.

(5) An exclusion order is an order under section 104 or 105 prohibiting the accused from attending or making representations in proceedings for the determination of the application for a section 106 order to which the exclusion order relates.

(6) Subsection (7) applies where the prosecutor applies—

(a) by virtue of subsection (2)(a) for a non-notification order and an exclusion order, or

(b) by virtue of subsection (2)(a) or (b) for an exclusion order.

(7) Before determining in accordance with section 106 the application for the section 106 order, the court must—

(a) in accordance with section 104, determine any applications for a non-notification order and an exclusion order,

(b) in accordance with section 105, determine any application for an exclusion order.

104 Application for non-notification order and exclusion order

(1) This section applies where the prosecutor applies for a section 106 order and an exclusion order.

(2) On receiving the application, the court must appoint a hearing to determine whether a non-notification order should be made.

(3) The accused is not to be notified of—

(a) the applications for the non-disclosure order, non-notification order and exclusion order, or

(b) the hearing appointed under subsection (2).

(4) The accused is not to be given the opportunity to be heard or be represented at the hearing.

(5) If, after giving the prosecutor an opportunity to be heard, the court is satisfied that the conditions in subsection (6) are met, the court may make a non-notification order.

(6) Those conditions are—

(a) that disclosure to the accused of the making of the application for the section 106 order would be likely to cause a real risk of substantial harm or damage to the public interest, and

(b) that, having regard to all the circumstances, the making of a non-notification order would be consistent with the accused's receiving a fair trial.

(7) If the court makes a non-notification order, it must also make an exclusion order.

(8) If the court refuses to make a non-notification order—

the court must appoint a hearing to determine the application for an exclusion order,

(9) If after giving the prosecutor and, subject to subsection (10), the accused an opportunity to be heard, the court is satisfied that the conditions in subsection (4) of section 105 are met, the court may make an exclusion order under subsection (3) of that section.

(10) On the application of the prosecutor the court may exclude the accused from the hearing appointed under subsection (8).

105 Application for exclusion order

(1) This section applies where by virtue of section 103(2)(b) or (3) the prosecutor applies for an exclusion order (but not a non-notification order).

(2) On receiving the application the court must appoint a hearing.

(2A) On the application of the prosecutor the court may exclude the accused from the hearing.

(3) If after giving the prosecutor and, subject to subsection (2A), the accused an opportunity to be heard on the applications for the exclusion order and the section 106 order to which it relates the court is satisfied that the conditions in subsection (4) are met, the court may make an exclusion order.

(4) Those conditions are—

(a) that disclosure to the accused of the nature of the information to which the application for the section 106 order relates would be likely to cause a real risk of substantial harm or damage to the public interest, and

(b) that, having regard to all the circumstances, the making of an exclusion order would be consistent with the accused's receiving a fair trial.

106 Application for non-disclosure order: determination

(1) This section applies where—

(a) the prosecutor applies for a section 106 order, and

(b) any application for a non-notification order or an exclusion order has been determined by the court.

(2) The court must—

(a) consider the item of information to which the application for a section 106 order relates,

(b) give the prosecutor and (if the court has not made an exclusion order) the accused the opportunity to be heard, and

(c) determine—

(i) whether the conditions in subsection (3) apply, and

(ii) if so, whether subsection (4) applies.

(3) The conditions are—

(a) that by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or (*Change in circumstances following lodging of defence statement: summary proceedings*)(6)(b) the prosecutor is required to disclose the item of information,

( ) that section 89(3)(a) or (b) applies to the information,

(b) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,

(c) that withholding the item of information would be consistent with the accused's receiving a fair trial, and

(d) that the public interest would be protected only if a section 106 order were to be made.

(4) This subsection applies if the court considers that the item of information could be disclosed or partly disclosed in such a way that—

(a) the condition in paragraph (b) of subsection (3) would not be met, and

(b) the disclosure (or partial disclosure) would be consistent with the accused's receiving a fair trial.

(4A) If the court considers that subsection (3) (but not subsection (4)) applies, it may make a section 106 order requiring the information to be withheld.

(4B) If the court considers that subsection (4) applies, it may make a section 106 order requiring the information to be disclosed or partly disclosed to the accused in the manner specified in the order.

(5) For the purposes of subsection (4) the ways in which the item of information might be disclosed or partly disclosed include in particular—

(a) providing the information after (whether by redaction or otherwise) removing or obscuring parts of it,

(b) providing extracts or summaries of the information or part of it.

Orders preventing or restricting disclosure: Secretary of State

Order preventing or restricting disclosure: application by Secretary of State

(1) The Secretary of State may apply to the relevant court for an order under this section (a "section (*Order preventing or restricting disclosure: application by Secretary of State*) order") in relation to the proposed disclosure by the prosecutor to the accused in relevant criminal proceedings of information which the prosecutor—

(a) is required to disclose by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or (*Change in circumstances following lodging of defence statement*: *summary proceedings*)(6)(b), or

(b) intends to disclose otherwise than by virtue of this Part.

(2) If the Secretary of State also makes an application in accordance with subsection (2) or (3) of section (*Application for ancillary orders*: *Secretary of State*), the relevant court must comply with subsections (6) and (7) of that section.

(3) Where an application is made under subsection (1), the relevant court must—

(a) consider the item of information to which the application relates,

(b) give the Secretary of State and the prosecutor the opportunity to be heard,

(c) if the application relates to information which the prosecutor is required to disclose by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or (*Change in circumstances following lodging of defence statement*: *summary proceedings*)(6)(b) and a non-attendance order has not been made, give the accused the opportunity to be heard, and

(d) determine—

(i) whether the conditions in subsection (4) apply, and

(ii) if so, whether subsection (5) applies.

(4) The conditions are—

(a) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,

(b) that withholding the item of information would be consistent with the accused's receiving a fair trial, and

(c) that the public interest would be protected only if a section (*Order preventing or restricting disclosure: application by Secretary of State*) order of the type mentioned in subsection (6) were to be made.

(5) This subsection applies if the court considers that the item of information could be disclosed or partly disclosed in such a way that—

(a) the condition in paragraph (a) of subsection (4) would not be met, and

(b) the disclosure (or partial disclosure) would be consistent with the accused's receiving a fair trial.

(6) If the court considers that subsection (4) (but not subsection (5)) applies, it may make a section (*Order preventing or restricting disclosure: application by Secretary of State*) order preventing disclosure of the information.

(7) If the court considers that subsection (5) applies, it may make a section (*Order preventing or restricting disclosure: application by Secretary of State*) order requiring the information to be disclosed or partly disclosed to the accused in the manner specified in the order.

(8) For the purposes of subsection (7) the order may in particular specify that—

(a) the item of information be disclosed after removing or obscuring parts of it (whether by redaction or otherwise),

(b) extracts or summaries of the item of information (or part of it) be disclosed instead of the item of information.

(9) If an application is made under this section the relevant criminal proceedings must be adjourned until the application is disposed of or withdrawn.

(10) In this section and sections (*Application for ancillary orders*: *Secretary of State*) to (*Application for non-attendance order*)—

"relevant court" means the court before which relevant criminal proceedings are taking place,

"relevant criminal proceedings" means criminal proceedings relating to the item of information to which the application under this section relates.

Application for ancillary orders: Secretary of State

(1) This section applies where the Secretary of State applies for a section (*Order preventing or restricting disclosure: application by Secretary of State*) order.

(2) If the application under section (*Order preventing or restricting disclosure: application by Secretary of State*) relates to solemn proceedings, the Secretary of State may also apply to the relevant court for—

- (a) a restricted notification order and a non-attendance order, or
- (b) a non-attendance order (but not a restricted notification order).

(3) If the application under section (*Order preventing or restricting disclosure: application by Secretary of State*) relates to summary proceedings, the Secretary of State may also apply to the court for a non-attendance order.

(4) A restricted notification order is an order under section (*Application for restricted notification order and non-attendance order*) prohibiting notice being given to the accused of—

- the making of an application for—
  - (i) the section (*Order preventing or restricting disclosure: application by Secretary of State*) order to which the restricted notification order relates,
  - (ii) the restricted notification order, and
  - (iii) a non-attendance order, and
- (b) the determination of those applications.

(5) A non-attendance order is an order under section (*Application for non-attendance order*) prohibiting the accused from attending or making representations in proceedings for the determination of the application for the section (*Order preventing or restricting disclosure: application by Secretary of State*) order to which the non-attendance order relates.

(6) Subsection (7) applies where the Secretary of State applies—

- (a) by virtue of subsection (2)(a) for a restricted notification order and a non-attendance order, or
- (b) by virtue of subsection (2)(a) or (b) for a non-attendance order.

(7) Before determining the application for the section (*Order preventing or restricting disclosure: application by Secretary of State*) order, the court must—

(a) in accordance with section (*Application for restricted notification order and non-attendance order*), determine any application for a restricted notification order and a non-attendance order,

(b) in accordance with section (*Application for non-attendance order*), determine any application for a non-attendance order.

Application for restricted notification order and non-attendance order

(1) This section applies where by virtue of section (*Application for ancillary orders*: *Secretary of State*)(2)(a) the Secretary of State applies for a restricted notification order and a non-attendance order.

(2) On receiving the application, the relevant court must appoint a hearing to determine whether a restricted notification order should be made.

(3) The accused is not to be notified of—

(a) the applications for the section (*Order preventing or restricting disclosure: application by Secretary of State*) order, the restricted notification order and the non-attendance order, or

(b) the hearing appointed under subsection (2).

(4) The accused is not to be given the opportunity to be heard or be represented at the hearing.

(5) If, after giving the Secretary of State and the prosecutor an opportunity to be heard, the court is satisfied that the conditions in subsection (6) are met, the court may make a restricted notification order.

(6) Those conditions are—

(a) that disclosure to the accused of the making of the application for the section (*Order preventing or restricting disclosure: application by Secretary of State*) order would be likely to cause a real risk of substantial harm or damage to the public interest, and

(b) that, having regard to all the circumstances, the making of a restricted notification order would be consistent with the accused's receiving a fair trial.

(7) If the court makes a restricted notification order, it must also make a non-attendance order.

(8) If the court refuses to make a restricted notification order, the court must appoint a hearing to determine the application for a non-attendance order.

(9) If after giving the Secretary of State, the prosecutor and, subject to subsection (10), the accused an opportunity to be heard, the court is satisfied that the conditions in subsection (5) of section (*Application for non-attendance order*) are met, the court may make a non-attendance order under subsection (4) of that section.

(10) On the application of the Secretary of State the court may exclude the accused from the hearing appointed under subsection (8).

Application for non-attendance order

(1) This section applies where by virtue of section (*Application for ancillary orders*: *Secretary of State*)(2)(b) the Secretary of State applies for a non-attendance order (but not a restricted notification order).

(2) On receiving the application, the relevant court must appoint a hearing.

(3) On the application of the Secretary of State the court may exclude the accused from the hearing.

(4) If after giving the Secretary of State, the prosecutor and, if not excluded under subsection (3), the accused an opportunity to be heard the court is satisfied that the conditions in subsection (5) are met, the court may make a non-attendance order.

(5) Those conditions are—

(a) that disclosure to the accused of the nature of the information to which the application for the section (*Order preventing or restricting disclosure: application by Secretary of State*) order relates would be likely to cause a real risk of substantial harm or damage to the public interest, and

(b) that, having regard to all the circumstances, the making of a non-attendance order would be consistent with the accused's receiving a fair trial.

Special counsel

107 Special counsel

(1) This section applies where the court is determining—

(a) an application for—

(i) a non-notification order,

( ) an application for an exclusion order,

( ) an application for a section 106 order,

( ) an application for a restricted notification order,

( ) an application for a non-attendance order,

( ) an application for a section (*Order preventing or restricting disclosure: application by Secretary of State)* order,

(b) an application for review of the grant or refusal of any of those orders,

(c) an appeal relating to any of those orders.

(2) If the condition in subsection (3) is met, the court may appoint a person ("special counsel") to represent the interests of the accused in relation to the determination of the application, review or appeal.

(3) The condition is that the court considers that the appointment of special counsel is necessary to ensure that the accused receives a fair trial.

( ) Before deciding whether to appoint special counsel in a non-notification case, the court—

(a) must give the prosecutor an opportunity to be heard, but

(b) must not give the accused an opportunity to be heard.

( ) Before deciding whether to appoint special counsel in a restricted notification case, the court—

(a) must give the prosecutor and the Secretary of State an opportunity to be heard,

(b) must not give the accused an opportunity to be heard.

( ) Before deciding whether to appoint special counsel in any case other than a non-notification case or a restricted notification case, the court must give all the parties an opportunity to be heard.

( ) The prosecutor may appeal to the High Court against a decision of the court not to appoint special counsel in any case.

( ) The Secretary of State may appeal to the High Court against a decision of the court not to appoint special counsel in a restricted notification case.

( ) The accused may appeal to the High Court against a decision not to appoint special counsel in any case other than a non-notification case or a restricted notification case.

( ) In this section and section (*Role of special counsel*)—

"non-notification case" means a case where the court is determining—

(a) an application for a non-notification order,

(b) an application for review of the grant or refusal of a non-notification order,

(c) an appeal relating to such an order,

"restricted notification case" means a case where the court is determining—

(a) an application for a restricted notification order,

(b) an application for review of the grant or refusal of a restricted notification order,

(c) an appeal relating to such an order.

Persons eligible for appointment as special counsel

The court may appoint a person as special counsel under section 107(2) only if the person is a solicitor or advocate.

Role of special counsel

(1) Special counsel's duty is, in relation to the determination of the relevant application or appeal, to act in the best interests of the accused with a view only to ensuring that the accused receives a fair trial.

(2) Special counsel—

(a) is entitled to see the confidential information, but

(b) must not disclose any of the confidential information to the accused or the accused's representative (if any).

(3) Special counsel appointed in a non-notification case or a restricted notification case must not—

(a) disclose to the accused or the accused's representative (if any) the making of the relevant application or appeal, or

(b) otherwise communicate with the accused or the accused's representative (if any) about the relevant application or appeal.

(4) Special counsel appointed in any case other than a non-notification case or a restricted notification case must not communicate with the accused about the relevant application or appeal except—

(a) with the permission of the court, and

(b) where permission is given, in accordance with such conditions as the court may impose.

(5) Before deciding whether to grant permission, the court must give—

(a) the prosecutor, and

(b) in the case of an application for a section (*Order preventing or restricting disclosure: application by Secretary of State*) order or a non-attendance order, the Secretary of State,

an opportunity to be heard.

(6) In this section—

"the confidential information" means—

(a) the information to which the relevant application or appeal relates, and

(b) a copy of the relevant application or appeal,

"relevant application or appeal" means the application or appeal referred to in section 107(1) in respect of which special counsel is appointed.

Appeals

(1) The prosecutor may appeal to the High Court against—

(a) the making of a section 106 order under section 106(4B),

(b) the making of a section (*Order preventing or restricting disclosure: application by Secretary of State)* order,

(c) the making of a restricted notification order,

(d) the making of a non-attendance order,

(e) the refusal of an application for a non-notification order,

(f) the refusal of an application for an exclusion order, or

(g) the refusal of an application for a section 106 order.

(2) The accused may appeal to the High Court against the making of—

(a) an exclusion order under section 105(3),

(b) a section 106 order,

(c) a section (*Order preventing or restricting disclosure: application by Secretary of State)* order, or

(d) a non-attendance order.

(3) The Secretary of State may appeal to the High Court against—

(a) the making of a section (*Order preventing or restricting disclosure: application by Secretary of State)* order under section (*Order preventing or restricting disclosure: application by Secretary of State)*(7),

(b) the refusal of an application for a restricted notification order,

(c) the refusal of an application for a non-attendance order, or

(d) the refusal of an application for a section (*Order preventing or restricting disclosure: application by Secretary of State)* order.

(4) If special counsel was appointed in relation to an application for a non-notification order, special counsel may appeal to the High Court against the making of—

(a) the non-notification order, or

(b) a section 106 order in relation to the same item of information.

(5) If special counsel was appointed in relation to an application for a restricted notification order, special counsel may appeal to the High Court against the making of—

(a) the restricted notification order, or

(b) a section (*Order preventing or restricting disclosure: application by Secretary of State)* order in relation to the same item of information.

(6) An appeal must be lodged not later than 7 days after the decision appealed against.

(7) The prosecutor is entitled to be heard in any appeal under this section.

(8) The accused is entitled to be heard in an appeal under—

(a) subsection (1)(a) or (g) or (2)(b) unless—

  (i) a non-notification order has been made, or

  (ii) an exclusion order has been made,

(b) subsection (1)(b), (2)(c) or (3)(a) or (d) unless—

  (i) a restricted notification order has been made, or

  (ii) a non-attendance order has been made,

(c) subsection (1)(d), (2)(d) or (3)(c) unless the court, on the application of the Secretary of State, excludes the accused from the hearing,

(d) subsection (1)(f) or (2)(a) unless the court, on the application of the prosecutor excludes the accused from the hearing.

(9) The Secretary of State is entitled to be heard in an appeal under subsection (1)(b), (c) or (d), (2)(c) or (d) or (5).

Reviews

111 Review of grant of non-disclosure order

(1) This section applies where—

(a) the court makes a section 106 order, and

(b) during the relevant period—

(i) the prosecutor or the accused becomes aware of information that was unavailable to the court at the time when the order was made.

(2) The prosecutor or, as the case may be, special counsel or the accused may apply to the court to review the section 106 order.

(3) Except in the case mentioned in subsection (4), the same persons are entitled to be heard on the application for review as were entitled to be heard on the application for the section 106 order.

(4) If—

(a) a non-notification order was granted in relation to the section 106 order which is under review, and

(b) the court is satisfied that the conditions in section 104(6) are met,

the court may, where the prosecutor or, as the case may be, special counsel applies for the review, make an order prohibiting notification being given to the accused of the application for review.

(5) If—

(a) an exclusion order was granted in relation to the section 106 order which is under review, and

(b) the court is satisfied that the conditions in section 105(4) are met,

the court may, where the prosecutor or, as the case may be, special counsel or the accused applies for the review, exclude the accused from the review.

(6) If the court is not satisfied that the conditions mentioned in section 106(3) are met, the court may—

(a) recall the section 106 order, or

(b) recall the section 106 order and make an order requiring disclosure to the specified extent.

(7) Nothing in this section affects any right of appeal in relation to the section 106 order.

(8) In this section—

"specified" means specified in the order of the court,

"the relevant period", in relation to an accused, means the period—

(a) beginning with the making of the section 106 order, and

(b) ending with the conclusion of the proceedings against the accused.

(9) For the purposes of this section, proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal.

(e) any appeal by the prosecutor is determined or abandoned, or

(f) the accused is convicted and any appeal is determined or abandoned.

Review of section (*Order preventing or restricting disclosure: application by Secretary of State*) order

(1) This section applies where—

(a) the court makes a section (*Order preventing or restricting disclosure: application by Secretary of State*) order, and

(b) during the relevant period the Secretary of State, the prosecutor, special counsel or the accused becomes aware of information that was unavailable to the court at the time when the order was made.

(2) The Secretary of State or, as the case may be, the prosecutor, special counsel or the accused may apply to the court to review the order.

(3) Except in the case mentioned in subsection (4), the same persons are entitled to be heard on the application for review as were entitled to be heard on the application for the order.

(4) If—

(a) a restricted notification order was granted in relation to the order which is under review, and

(b) the court is satisfied that the conditions in section (*Application for restricted notification order and non-attendance order*)(6) are met,

the court may, where the Secretary of State or, as the case may be, the prosecutor or special counsel applies for the review, make an order prohibiting notification of the application for review being given to the accused.

(5) If—

(a) a non-attendance order was granted in relation to the order which is under review, and

(b) the court is satisfied that the conditions in section (*Application for non-attendance order*)(5) are met,

the court may, where the Secretary of State or, as the case may be, the prosecutor, special counsel or the accused applies for the review, exclude the accused from the review.

(6) If the court is not satisfied that the conditions mentioned in section (*Order preventing or restricting disclosure: application by Secretary of State*)(4) are met, the court may—

  (a) recall the order which is under review, or

  (b) recall the order which is under review and make an order requiring the information to be disclosed or partly disclosed to the accused in the specified manner.

(7) Nothing in this section affects any right of appeal in relation to the order which is under review.

(8) In this section—

“specified” means specified in the order of the court,

“the relevant period”, in relation to an accused, means the period—

  (a) beginning with the making of the section (*Order preventing or restricting disclosure: application by Secretary of State*) order, and

  (b) ending with the conclusion of the proceedings against the accused.

112 Review by court of non-disclosure order

(1) This section applies where the court makes a section 106 order or a section (*Order preventing or restricting disclosure: application by Secretary of State*) order.

(2) During the relevant period, the court must from time to time consider in relation to each order whether, having regard to the information of which the court is aware, the order concerned continues to be appropriate.

(3) If the court considers that the order concerned might no longer be appropriate, the court must appoint a hearing to review the matter.

(4) In this section “the relevant period” has the same meaning as in section 111(8).

Applications and reviews: general

113 Applications and reviews: general provisions

(1) This section applies in relation to—

  (a) an application for an order mentioned in subsection (2), and

  (b) a review relating to such an order.

(2) The orders are—

  (a) a non-notification order.

  (b) an exclusion order,

  (c) a section 106 order.

(3) Except where it is impracticable to do so, the application or review is to be assigned to the same justice of the peace, sheriff or, as the case may be, judge as has been (or is to be assigned) to the trial diet in the proceedings against the accused to which the application relates.

(4) The accused is not entitled to see or be made aware of the contents of an application for—

- (a) a non-notification order,
- (b) an exclusion order,
- (c) a section 106 order,
- (d) a review made by the prosecutor.

Code of practice

114 Code of practice

(1) The Lord Advocate—

- (a) must issue a code of practice providing guidance about this Part, and
- (b) may from time to time revise the code for the time being in force.

(2) The persons mentioned in subsection (3) must have regard to the code of practice for the time being in force in carrying out their functions in relation to the investigation and reporting of crime and sudden deaths.

(3) Those persons are—

- (a) police forces,
- (b) prosecutors,
- (c) such other persons who—
  - (i) engage (to any extent) in the investigation of crime or sudden deaths, and
  - (ii) submit reports relating to those investigations to the procurator fiscal,

as the Scottish Ministers may prescribe by regulations.

(4) The Lord Advocate must lay before the Scottish Parliament any code or revised code issued under this section.

Acts of Adjournal

115 Acts of Adjournal

The High Court may by Act of Adjournal make such rules as it considers necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of this Part.

Abolition of common law rules about disclosure

(1) The provisions of this Part replace any equivalent common law rules about disclosure of information by the prosecutor in connection with criminal proceedings.

(2) The common law rules about disclosure of information by the prosecutor in connection with criminal proceedings are abolished in so far as they are replaced by or are inconsistent with the provisions of this Part.

(3) Sections (*Application by accused for ruling on disclosure*) and (*Application by appellant for ruling on disclosure*) do not affect any right under the common law of an accused or appellant to seek disclosure or recovery of information by or from the prosecutor by means of a procedure other than an application under one or other of those sections.

(4) Subsection (5) applies where, following an application (the "earlier disclosure application") by the accused or the appellant under section (*Application by accused for ruling on disclosure*) or section (*Application by appellant for ruling on disclosure*), the court has made a ruling that (as the case may be)—

(a) section 89(3) does not apply to information, or

(b) information does not fall within section (*Duty to disclose after conclusion of proceedings at first instance*)(3).

(5) The accused or, as the case may be, the appellant, is not entitled to seek the disclosure or recovery of the same information by or from the prosecutor by means of any other procedure at common law on grounds that are substantially the same as any of those on which the earlier disclosure application was made.

(6) Subsection (7) applies where, following an application (the "earlier common law application") by the accused under a procedure other than an application under section (*Application by accused for ruling on disclosure*) or (*Application by appellant for ruling on disclosure*), the court has decided not to make an order for the recovery or disclosure of information by or from the prosecutor.

(7) The accused or, as the case may be, the appellant is not entitled to make an application under section (*Application by accused for ruling on disclosure*) or (*Application by appellant for ruling on disclosure*) in relation to the same information on grounds that are substantially the same as any of those on which the earlier common law application was made.

(8) In this section, "appellant" has the meaning given by section (*Sections* **(***Duty to disclose after conclusion of proceedings at first instance*) *to* (*Review of ruling under section* (*Application by appellant for ruling on disclosure*)): *interpretation*).

Interpretation of Part 6

116 Interpretation of Part 6

(1) In this Part—

"investigating agency" has the meaning given by section (*Provision of information to prosecutor: solemn cases*)(4),

"procurator fiscal" and "prosecutor" have the meanings given by section 307(1) of the 1995 Act.

(2) References in the following sections to the accused include references to a solicitor or advocate acting on behalf of the accused—

(a) 89(2)(b),

( ) section (*Disclosure of other information*: *solemn cases*)(2),

(b) section 90(1),

(c) section 95(1)(b),

(d) section 97,

(e) section 98(1), and (2) and (where it first occurs) (3),

(f) section 102,

(g) section 103,

(h) section 104,

(i) section 105,

(j) section 106(2), and

(k) section 111(1), (2), (4) and (5).

Annexe B

Criminal Justice and Licensing (Scotland) Bill – Stage 2

Summary of Amendments

Amendments 552 to 556 are proposed in response to concerns expressed at stage 1 at the complexity of the provisions in section 85 of the Bill and aim to simplify what "information" is for the purposes of part 6 and make clearer how witness statements, precognitions and victim statements are to be handled by prosecutors.

Amendments 557 to 565 simplify the arrangement proposed in sections 86 to 88 which set out a system of schedules in solemn cases, removing all reference to "schedules" and the administrative processes for their being handled. In its place, they insert duties on investigating agencies to provide information, and details of information, to prosecutors and thereafter duties on prosecutors to provide the accused with details of information that may be relevant to the case, but which is not sensitive in nature.

These amendments also address comments in the Justice Committee's report at stage 1 questioning the need for provisions distinguishing "sensitive" information and "highly sensitive" information by removing the reference to "highly sensitive" information. That was concerned only with the administrative handling of the information by prosecutors and investigating agencies and, after reflection, it is considered that this level of detail is not needed in primary legislation.

Amendments 566 to 583, 617, 619 and 690 to 691 simplify the provisions which define the duty to disclose information by removing both detailed examples of information which would fall under the duty and procedural steps which, on reflection, would be better to be included in the Code of Practice, or in other guidance. Amendments 606 and 607 also clarify what the trigger point is for the commencement of the duty to disclose information in solemn cases.

Amendments 584 to 602 make a number of technical amendments to the scheme for defence statements designed to simplify and clarify these provisions and their interaction with provisions on the duty of disclosure and new provisions providing for court rulings on materiality.

Amendments 620 to 623 make amendments to the provisions in sections 98 to 101 in relation to the confidentiality of disclosed information to clarify what accused persons and persons to whom he passes that information can, and cannot do, with it. They also seek to remove sections 100 and 101 from the Bill which we consider now on reflection are not necessary as there are existing statutory and other mechanisms to enable accused persons to obtain information for uses other than the preparation or presentation of his case.

Amendments 625 to 645 and various subsequent amendments are aimed at simplifying the provisions relating to orders under section 104 to 106 for non-disclosure of information on public interest grounds and adjusting the tests to be applied by the Court in such cases to simplify and clarify what the court must do.

Amendments 660 and 661 seek to clarify that only solicitors and advocates may be appointed as special counsel and set out the role of special counsel and regulate their communication with the accused and his representatives.

We also propose a number of new provisions.

Amendments 653 to 656 and 681 to 684 establish a system to enable a Secretary of State to apply to the court for an order prohibiting disclosure of information which the prosecutor is otherwise required to disclose and for other orders ancillary to that order where, if the information were to be disclosed there would be a real risk of substantial harm or damage to the public interest. The scheme broadly mirrors the scheme set out in sections 102 to 106 of the Bill which enables applications to be made by the prosecutor. These amendments are necessary to recognise that there may be public interest issues which arise in criminal proceedings in which Secretaries of State may have an interest.

Amendments 603 to 605 and amendments 615 to 616 establish a system for court rulings on disclosure, offering the accused/appellant a remedy in cases where the prosecutor decides that an item of information does not require to be disclosed and the accused/appellant considers that the information should be disclosed on account of it meeting the duty. This is in response to concerns expressed by the legal profession, and the Glasgow Bar Association, in particular, that the Bill, at introduction, provided no such remedy.

Amendment 688 will ensure that the existing common law rules on disclosure are displaced by the provisions in Part 6 only insofar as the common law is replaced by, or is inconsistent with, the Bill. Provision is also made here detailing how the scheme under the new legislation will, in due course, operate in relation to the new provisions which set up court rulings on materiality and with the existing common law remedies available regarding the recovery of information.

The case of McDonald v HMA was reported after Lord Coulsfield concluded his review. In it, the High Court affirmed that the duty of disclosure is a continuing one, and one which continues even after an accused person is convicted - although the nature of the duty after conviction and during appeals is different to the duty at first instance. Amendments 608 to 610 and 612 to 614 are necessary to define the different nature of the duty after the conclusion of the proceedings at 1st instance.

Criminal Justice and Licensing (Scotland) Bill

[AS AMENDED AT STAGE 2]

CONTENTS

Section

PART 1

SENTENCING

The Scottish Sentencing Council

3 The Scottish Sentencing Council
4 The Council's objectives
5 Sentencing guidelines
6 Consultation on proposed sentencing guidelines
6A Approval of sentencing guidelines by High Court
7 Effect of sentencing guidelines
8 Ministers' power to request that sentencing guidelines be prepared or reviewed
9 High Court's power to require preparation or review of sentencing guidelines
9A Publication of High Court guideline judgements
10 Scottish Court Service to provide sentencing information to the Council
11 The Council's power to provide information, advice etc.
12 Business plan
13 Annual report

Community payback orders

14 Community payback orders

Non-harassment orders

15 Non-harassment orders

Short sentences

16 Short periods of detention
18 Amendments of Custodial Sentences and Weapons (Scotland) Act 2007
19 Early removal of certain short-term prisoners from the United Kingdom

Other sentencing measures

20 Reports about supervised persons
20A Pre-sentencing reports about organisations
21 Extended sentences for certain sexual offences
22 Effect of probation and absolute discharge
23 Offences aggravated by racial or religious prejudice
24A Mutual recognition of judgments and probation decisions
24B Minimum sentence for having in a public place an article with a blade or point

PART 2

CRIMINAL LAW

Serious organised crime

25 Involvement in serious organised crime
26 Offences aggravated by connection with serious organised crime
27 Directing serious organised crime
28 Failure to report serious organised crime

Genocide, crimes against humanity and war crimes

28A Genocide, crimes against humanity and war crimes: UK residents
28B Genocide, crimes against humanity and war crimes: retrospective application

Articles banned in prison

29 Articles banned in prison

Crossbows, knives etc.

30 Sale and hire of crossbows to persons under 18
31 Sale and hire of knives and certain other articles to persons under 18

Offensive weapons etc.

31A Offensive weapons etc.

Stalking

31B Offence of stalking

Sexual offences

32 Certain sexual offences by non-natural persons
33 Indecent images of children
34 Extreme pornography
34A Voyeurism: additional forms of conduct
34B Sexual offences: defences in relation to offences against older children
34C Penalties for offences of brothel-keeping and living on the earnings of prostitution

People trafficking

35 People trafficking

Slavery, servitude and forced or compulsory labour

35A Slavery, servitude and forced or compulsory labour

Fraud and embezzlement

36 Alternative charges for fraud and embezzlement
36A Articles for use in fraud

Conspiracy

37 Conspiracy to commit offences outwith Scotland

Abolition of offences of sedition and leasing-making

37A Abolition of offences of sedition and leasing-making

PART 3

CRIMINAL PROCEDURE

Children

38 Prosecution of children

Offences: liability of partners

39 Offences: liability of partners

Witness statements

40 Witness statements

Police liberation

41 Breach of undertaking

Grant of warrants

41A Grant of warrants for execution by constables and police members of SCDEA

Bail

42 Bail review applications
43 Bail condition for identification procedures etc.
43A Bail conditions: remote monitoring requirements

Prosecution on indictment

44 Prosecution on indictment: Scottish Law Officers

Transfer of justice of the peace court cases

45 Transfer of justice of the peace court cases

Additions to complaint

46 Additional charge where bail etc. breached

Dockets and charges in sex cases

46A Dockets and charges in sex cases

Remand and committal of children

47 Remand and committal of children and young persons

Prosecution of organisations

48 Meaning of "organisation"
49 Proceedings on indictment against organisations
50 Prosecution of organisations by summary procedure
51 Manner of citation of organisations in summary proceedings

Personal conduct of case by accused

51A Prohibition of personal conduct of case by accused in certain proceedings

Disclosure of convictions etc.

52 Disclosure of convictions and non-court disposals
52A Convictions by courts in other EU member States

Appeals: time limits

53 Time limits for lodging certain appeals

Crown appeals

54 Submissions as to sufficiency of evidence
55 Prosecutor’s right of appeal
56 Power of High Court in appeal under section 107A of 1995 Act
57 Further amendment of 1995 Act

Retention and use of samples etc.

58 Retention of samples etc.
58A Retention of samples etc. where offer under sections 302 to 303ZA accepted
58B Retention of samples etc. taken or provided in connection with certain fixed penalty offences
59 Retention of samples etc. from children referred to children’s hearings
59A Extension of section 19A of 1995 Act
60 Use of samples etc.

Referrals from the Scottish Criminal Cases Review Commission

61 Referrals from Scottish Criminal Cases Review Commission: grounds for appeal

PART 4

EVIDENCE

61A Admissibility of prior statements of witnesses: abolition of competence test
62 Witness statements: use during trial
63 Spouse or civil partner of accused a compellable witness
64 Special measures for child witnesses and other vulnerable witnesses
64A Child witnesses in proceedings for people trafficking offences
65 Amendment of Criminal Justice (Scotland) Act 2003
66 Witness anonymity orders
67 Television link evidence
67A European evidence warrants

PART 5

CRIMINAL JUSTICE

Jury service

67B Lists of jurors
68 Upper age limit for jurors
68A Excusal from jury service
69 Persons excusable from jury service

Data matching for detection of fraud etc.

70 Data matching for detection of fraud etc.

Sharing information with anti-fraud organisations

71 Sharing information with anti-fraud organisations

Closure of premises associated with human exploitation etc.

72 Closure of premises associated with human exploitation etc.

Sexual offences prevention orders

73 Sexual offences prevention orders

Foreign travel orders

74 Foreign travel orders

Sex offender notification requirements

74A Sex offender notification requirements

Risk of sexual harm orders

75 Risk of sexual harm orders
75A Risk of sexual harm orders: spent convictions

Obtaining information from outwith United Kingdom

76 Obtaining information from outwith United Kingdom

Surveillance

77 Grant of authorisations for surveillance

Interference with property

78 Authorisations to interfere with property etc.

Amendments of Part 5 of Police Act 1997

79 Amendments of Part 5 of Police Act 1997

Rehabilitation of offenders

79A Spent alternatives to prosecution: Rehabilitation of Offenders Act 1974

Medical services in prisons

79B Medical services in prisons

Miscellaneous

80 Assistance for victim support
81 Public defence solicitors
82 Compensation for miscarriages of justice
83 Financial reporting orders
84 Compensation orders

PART 6

DISCLOSURE

Meaning of "information"

85 Meaning of "information"

Provision of information to prosecutor

86 Provision of information to prosecutor: solemn cases
87 Continuing duty to provide information: solemn cases
88A Provision of information to prosecutor: summary cases
88B Continuing duty of investigating agency: summary cases

Prosecutor's duty to disclose information

89 Prosecutor's duty to disclose information
89A Disclosure of other information: solemn cases
90 Continuing duty of prosecutor

Defence statements

94 Defence statements: solemn proceedings
95 Defence statements: summary proceedings
95A Change in circumstances following lodging of defence statement: summary proceedings

Court rulings on disclosure

95B Application by accused for ruling on disclosure
95C Review of ruling under section 95B
95D Appeals against rulings under section 95B

Effect of guilty plea

96 Effect of guilty plea

Disclosure after conclusion of proceedings at first instance

96A Sections 96B to 96I: interpretation
96B Duty to disclose after conclusion of proceedings at first instance
96C Continuing duty of prosecutor
96D Application to prosecutor for further disclosure
96E Further duty of prosecutor: conviction upheld on appeal
96F Further duty of prosecutor: convicted persons
96G Further duty of prosecutor: appeal against acquittal

Court rulings on disclosure: appellate proceedings

96H Application by appellant for ruling on disclosure
96I Review of ruling under section 96H

Redaction

92 Redaction of non-disclosable information by prosecutor

Means of disclosure

97 Means of disclosure

Confidentiality

98 Confidentiality of disclosed information
99 Contravention of section 98

Exemptions from disclosure

91 Exemptions from disclosure

Applications to court: orders preventing or restricting disclosure

102 Application for section 106 order
103 Application for non-notification order or exclusion order
104 Application for non-notification order and exclusion order
105 Application for exclusion order
106 Application for section 106 order: determination

Orders preventing or restricting disclosure: Secretary of State

106A Order preventing or restricting disclosure: application by Secretary of State
106B Application for ancillary orders: Secretary of State
106C Application for restricted notification order and non-attendance order
106D Application for non-attendance order

Special counsel

107 Special counsel
107A Persons eligible for appointment as special counsel
107B Role of special counsel

Appeals

107C Appeals

Review of section 106 and 106A orders

111 Review of section 106 order
111A Review of section 106A order
112 Review by court of section 106 order and section 106A order

Applications and reviews: general

113 Applications and reviews: general provisions

Code of practice

114 Code of practice

Acts of adjournal

115 Acts of adjournal

Abolition of common law

115A Abolition of common law rules about disclosure

Interpretation of Part 6

116 Interpretation of Part 6

PART 7

MENTAL DISORDER AND UNFITNESS FOR TRIAL

117 Criminal responsibility of persons with mental disorder
118 Acquittal involving mental disorder: procedure
119 Unfitness for trial
120 Abolition of common law rules

PART 8

LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982

121 Conditions to which licences under 1982 Act are to be subject
122 Licensing: powers of entry and inspection for civilian employees
124 Licensing of taxis and private hire cars
124A Licensing of street trading: food hygiene certificates

126 Licensing of public entertainment
127 Licensing of late night catering
128 Applications for licences

PART 9

ALCOHOL LICENSING

130 Premises licence applications: notification requirements
131 Premises licence applications: modification of layout plans
131A Reviews of premises licences: notification of determinations
132 Premises licence applications: antisocial behaviour reports
132A Premises licenses: connected persons and interested parties
132B Premises licence applications: food hygiene certificates
133 Sale of alcohol to trade
134 Occasional licences
134A Extended hours applications: notification period
135 Extended hours applications: variation of conditions
136 Personal licences
137 Emergency closure orders
137A Appeals
137B Liability for offences
138 False statements in applications: offence
138A Powers of Licensing Standards Officers
139 Further modifications of 2005 Act

PART 10

MISCELLANEOUS

141 Annual report on Criminal Justice (Terrorism and Conspiracy) Act 1998

PART 11

GENERAL

143 Orders and regulations
144 Interpretation
145 Modification of enactments
146 Ancillary provision
147 Transitional provision etc.
148 Short title and commencement

Schedule 1—The Scottish Sentencing Council
Schedule 1A—Community payback orders: consequential modifications
    Part 1—The 1995 Act
    Part 2—Other enactments
Schedule 2—Short-term custody and community sentences: consequential amendments
Schedule 2A—Convictions by courts in other EU member States: modifications of enactments
    Part 1—The 1995 Act
    Part 2—Other enactments
Schedule 3—Witness anonymity orders: transitional
Schedule 4—Further modifications of 2005 Act

Schedule 5—Modifications of enactments

Amendments to the Bill since the previous version are indicated by sidelining in the right margin. Wherever possible, provisions that were in the Bill as introduced retain the original numbering.

Criminal Justice and Licensing (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision about sentencing, offenders and defaulters; to make provision about criminal law, procedure and evidence; to make provision about criminal justice and the investigation of crime (including police functions); to amend the law relating to the licensing of certain activities by local authorities; to amend the law relating to the sale of alcohol; and for connected purposes.

PART 1

SENTENCING

The Scottish Sentencing Council

3 The Scottish Sentencing Council

(1) There is established a body corporate to be known as the "Scottish Sentencing Council" (referred to in this Part as the "Council").

(2) Schedule 1 makes further provision about the Council.

4 The Council's objectives

The Council must, in carrying out its functions, seek to—

(a) promote consistency in sentencing practice,

(b) assist the development of policy in relation to sentencing,

(c) promote greater awareness and understanding of sentencing policy and practice.

5 Sentencing guidelines

(1) The Council is from time to time to prepare, for the approval of the High Court of Justiciary, guidelines relating to the sentencing of offenders.

(2) Such guidelines are to be known as "sentencing guidelines".

(3) Sentencing guidelines may in particular relate to—

(a) the principles and purposes of sentencing,

(b) sentencing levels,

(c) the particular types of sentence that are appropriate for particular types of offence or offender,

(d) the circumstances in which the guidelines may be departed from.

(4) Sentencing guidelines may be general in nature or may relate to a particular category of offence or offender or a particular matter relating to sentencing.

(5) The Council must, on preparing any sentencing guidelines, also prepare—

(a) an assessment of the costs and benefits to which the implementation of the guidelines would be likely to give rise,

(b) an assessment of the likely effect of the guidelines on the criminal justice system generally.

(8) The Council—

(a) must from time to time review any sentencing guidelines published by it, and

(b) may prepare, for the approval of the High Court of Justiciary, revised guidelines.

(9) In this section and sections 6 to 13, references to sentencing guidelines include references to revised sentencing guidelines.

6 Consultation on proposed sentencing guidelines

(1) The Council must, before submitting any sentencing guidelines to the High Court of Justiciary for approval—

(a) publish a draft of the proposed guidelines together with a draft of the assessments referred to in section 5(5), and

(b) consult the following persons about the drafts—

(i) the Scottish Ministers,

(ii) the Lord Advocate,

(iii) such other persons as the Council considers appropriate.

(3) The Council must, in finalising the guidelines and assessments for submission to the High Court of Justiciary, have regard to any comments made on the drafts following publication and consultation under subsection (1).

6A Approval of sentencing guidelines by High Court

(1) Sentencing guidelines have no effect unless approved by the High Court of Justiciary.

(2) On submitting sentencing guidelines to the High Court for approval, the Council must also provide the High Court with the assessments referred to in section 5(5).

(3) Where the Council submits sentencing guidelines to the High Court for approval, the Court may—

(a) approve the proposed guidelines—

(i) in whole or in part,

(ii) with or without modifications, or

(b) reject the proposed guidelines, in whole or in part.

(4) Where the High Court—

(a) rejects any of the proposed guidelines, or

(b) modifies any of them,

the Court must state its reasons for doing so.

(5) Sentencing guidelines approved by the High Court take effect on such date as the Court may determine.

(6) Different dates may be determined in relation to—

(a) different provisions of the guidelines, or

(b) different purposes.

(7) As soon as possible after the approval of sentencing guidelines by the High Court, the Council must publish—

(a) the guidelines as approved (including the date on which they take effect), and

(b) the assessments referred to in section 5(5) (revised as necessary to take account of any modifications of the guidelines prior to their approval).

(8) The guidelines and assessments are to be published in such manner as the Council considers appropriate.

7 Effect of sentencing guidelines

(1) A court (whether at first instance or on appeal) must—

(a) in sentencing an offender in respect of an offence, have regard to any sentencing guidelines which are applicable in relation to the case,

(b) in carrying out any other function relating to the sentencing of offenders, have regard to any sentencing guidelines applicable to the carrying out of the function.

(2) If the court decides not to follow the guidelines, or to depart from them in accordance with provision contained in them under section 5(3)(d), it must state the reasons for its decision.

(3) The sentencing guidelines to which the court must have regard under subsection (1) are those applicable to the case at the time the court is sentencing the offender or, as the case may be, carrying out the function.

(4) Subsection (5) applies where, on appeal in any case, the High Court of Justiciary passes another sentence under one of the following provisions of the 1995 Act—

(a) section 118(3),

(b) section 118(4)(b),

(c) section 118(4A)(b),

(d) section 118(4A)(c)(ii),

(e) section 189(1)(b).

(5) The sentencing guidelines which the High Court must have regard to under subsection (1) in passing that other sentence are those applicable to the case at the time it is passed.

(6) A revision of the sentencing guidelines after an offender is sentenced in respect of an offence is not a ground for the referral of the case to the High Court of Justiciary under section 194B of the 1995 Act (references to the High Court of cases dealt with on indictment).

(7) In section 108 of the 1995 Act (Lord Advocate's right of appeal against disposal where conviction on indictment), after subsection (2) insert—

> "(2A) In deciding whether to appeal under subsection (1) in any case, the Lord Advocate must have regard to any sentencing guidelines which are applicable in relation to the case.".

(8) In section 175 of the 1995 Act (prosecutor's right of appeal against disposal in summary proceedings), after subsection (4B) insert—

> "(4C) In deciding whether to appeal under subsection (4) in any case, the prosecutor must have regard to any sentencing guidelines which are applicable in relation to the case.".

8 Ministers' power to request that sentencing guidelines be prepared or reviewed

(1) The Scottish Ministers may request that the Council consider—

(a) preparing, for the approval of the High Court of Justiciary, sentencing guidelines on any matter, or

(b) reviewing any sentencing guidelines published by the Council.

(2) The Council must have regard to any request made by the Scottish Ministers.

(3) If the Council decides not to comply with a request made by the Scottish Ministers, it must provide the Scottish Ministers with reasons for its decision.

9 High Court's power to require preparation or review of sentencing guidelines

(1) Where the High Court of Justiciary pronounces an opinion under section 118(7) or 189(7) of the 1995 Act, the Court may require the Council to—

(a) prepare, for the Court's approval, sentencing guidelines on any matter, or

(b) review any sentencing guidelines published by the Council on any matter.

(2) On making a requirement under subsection (1), the High Court must state its reasons for doing so.

(3) The Council must comply with a requirement made under subsection (1) and, in doing so, must have regard to the High Court's reasons for making the requirement.

9A Publication of High Court guideline judgments

(1) The Council must publish the opinions of the High Court of Justiciary pronounced under section 118(7) or 189(7) of the 1995 Act.

(2) As soon as possible after the High Court pronounces such an opinion, the Scottish Court Service must provide the Council with a copy of the opinion.

(3) The copy opinion is to be provided in such form and by such means as the Council may require.

(4) The opinions are to be published in such manner, and at such times, as the Council considers appropriate.

(5) This section does not affect any power or responsibility of the Scottish Court Service in relation to the publication of opinions of the High Court.

10 Scottish Court Service to provide sentencing information to the Council

(1) The Scottish Court Service must provide the Council with such information relating to the sentences imposed by courts as the Council may reasonably require for the purposes of its functions.

(2) The information must be provided in such form and by such means as the Council may require.

(3) The Council must from time to time publish information about the sentences imposed by courts.

11 The Council's power to provide information, advice etc.

(1) The Council may—

- (a) publish or otherwise disseminate information about sentencing matters,
- (b) provide advice or guidance of a general nature about such matters,
- (c) conduct research into such matters.

(4) In this section, "sentencing matters" means—

- (a) sentencing guidelines,
- (b) the practice of the courts in relation to sentencing, and
- (c) any other matter relating to sentencing.

12 Business plan

(1) The Council must, before the submission day for each period of 3 years, prepare and submit to the Scottish Ministers a plan (a "business plan") describing how the Council proposes to carry out its functions during the period.

(2) The "submission day" is—

- (a) for the period of 3 years beginning on the day on which this section comes into force, the day specified by order made by the Scottish Ministers,
- (b) for each succeeding period of 3 years, the first day of the period.

(3) A business plan must—

- (a) be prepared in such form as the Scottish Ministers may direct,
- (b) contain the information specified in subsection (4) and such other information as they may direct, and
- (c) be submitted by such time as they may direct.

(4) The information referred to in subsection (3)(b) is details of the matters in relation to which the Council proposes to prepare sentencing guidelines.

(5) The Council may include in a business plan such other information as it considers appropriate.

(6) In preparing a business plan, the Council must consult—

- (a) the Scottish Ministers,
- (b) the Lord Advocate, and
- (c) such other persons as it considers appropriate.

(7) The Scottish Ministers must lay before the Scottish Parliament each business plan submitted to them.

(8) The Council must, as soon as practicable after a business plan has been laid before the Parliament, publish it in such manner as it considers appropriate.

(9) The Council may at any time during a period covered by a business plan review the plan for the period and submit to the Scottish Ministers a revised plan.

(10) Subsections (3) to (8) apply to a revised plan as they apply to a business plan.

13 Annual report

(1) The Council must, as soon as practicable after the end of each financial year, prepare and submit to the Scottish Ministers a report on the carrying out of its functions during the year.

(2) The report must—

(a) be prepared in such form as the Scottish Ministers may direct,

(b) contain the information specified in subsection (3) and such other information as they may direct, and

(c) be submitted by such time as they may direct.

(3) The information referred to in subsection (2)(b) is details of—

(a) the sentencing guidelines published or revised during the year (if any),

(aa) any sentencing guidelines submitted during the year to the High Court of Justiciary for approval and of the Court's response to them,

(b) any draft sentencing guidelines being consulted upon,

(c) requests made by the Scottish Ministers under section 8 and of the Council's response to them, and

(d) requirements made by the High Court of Justiciary under section 9 and of the Council's response to them.

(4) The Council may include in the report such other information as it considers appropriate.

(5) The Scottish Ministers must lay before the Scottish Parliament each report submitted to them.

(6) The Council must, as soon as practicable after the report has been laid before the Parliament, publish it in such manner as it considers appropriate.

Community payback orders

14 Community payback orders

(1) After section 227 of the 1995 Act insert—

"*Community payback orders*

227A Community payback orders

(1) Where a person (the "offender") is convicted of an offence punishable by imprisonment, the court may, instead of imposing a sentence of imprisonment, impose a community payback order on the offender.

(2) A community payback order is an order imposing one or more of the following requirements—

(a) an offender supervision requirement,
(aa) a compensation requirement,
(b) an unpaid work or other activity requirement,
(c) a programme requirement,
(d) a residence requirement,
(e) a mental health treatment requirement,
(f) a drug treatment requirement,
(g) an alcohol treatment requirement,
(h) a conduct requirement.

(3) A court must not impose a community payback order on an offender unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was serious enough to warrant the imposition of such an order.

(4) Where an offender is convicted of an offence other than one punishable by imprisonment, the court may impose a community payback order on the offender imposing—

(za) a supervision requirement,
(a) a level 1 unpaid work or other activity requirement,
(c) a conduct requirement.

(5) A justice of the peace court may only impose a community payback order imposing one or more of the following requirements—

(a) an offender supervision requirement,
(aa) a compensation requirement,
(b) an unpaid work or other activity requirement,
(c) a residence requirement,
(d) a conduct requirement.

(6) Subsection (5)(b) is subject to section 227J(3).

(7) Before imposing a community payback order imposing two or more requirements falling within subsection (2), the court must consider whether, in the circumstances of the case, the requirements are compatible with each other.

(8) The Scottish Ministers may by order made by statutory instrument amend subsection (5) so as to add to or omit requirements that may be imposed by a community payback order imposed by a justice of the peace court.

(9) An order is not to be made under subsection (8) unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.

(10) In this section and sections 227B to 227ZI, except where the context requires otherwise—

"court" means the High Court, the sheriff or a justice of the peace court,

"imprisonment" includes detention.

227B Community payback order: procedure prior to imposition

(1) This section applies where a court is considering imposing a community payback order on an offender.

(2) The court must not impose the order unless it has obtained, and taken account of, a report from an officer of a local authority containing information about the offender and the offender's circumstances.

(2A) An Act of Adjournal may prescribe—

(a) the form of a report under subsection (2), and

(b) the particular information to be contained in it.

(2B) Subsection (2) does not apply where the court is considering imposing a community payback order—

(a) imposing only a level 1 unpaid work or other activity requirement, or

(b) under section 227M(2).

(3) The clerk of the court must give a copy of any report obtained under subsection (2) to—

(a) the offender,

(b) the offender's solicitor (if any), and

(c) the prosecutor.

(4) Before imposing the order, the court must explain to the offender in ordinary language—

(a) the purpose and effect of each of the requirements to be imposed by the order,

(b) the consequences which may follow if the offender fails to comply with any of the requirements imposed by the order, and

(c) where the court proposes to include in the order provision under section 227W for it to be reviewed, the arrangements for such a review.

(5) The court must not impose the order unless the offender has, after the court has explained those matters, confirmed that the offender—

(a) understands those matters, and

(b) is willing to comply with each of the requirements to be imposed by the order.

(6) Subsection (5) does not apply where the court is considering imposing a community payback order under section 227M(2).

227C Community payback order: responsible officer

(1) This section applies where a court imposes a community payback order on an offender.

(2) The court must, in imposing the order—

(a) specify the locality in which the offender resides or will reside for the duration of the order,

(b) require the local authority within whose area that locality is situated to nominate, within two days of its receiving a copy of the order, an officer of the authority as the responsible officer for the purposes of the order,

(c) require the offender to comply with any instructions given by the responsible officer—

(i) about keeping in touch with the responsible officer, or

(ii) for the purposes of subsection (3),

(e) require the offender to report to the responsible officer in accordance with instructions given by that officer,

(f) require the offender to notify the responsible officer without delay of—

(i) any change of the offender's address, and

(ii) the times, if any, at which the offender usually works (or carries out voluntary work) or attends school or any other educational establishment, and

(g) where the order imposes an unpaid work or other activity requirement, require the offender to undertake for the number of hours specified in the requirement such work or activity as the responsible officer may instruct, and at such times as may be so instructed.

(3) The responsible officer is responsible for—

(a) making any arrangements necessary to enable the offender to comply with each of the requirements imposed by the order,

(b) promoting compliance with those requirements by the offender,

(c) taking such steps as may be necessary to enforce compliance with the requirements of the order or to vary, revoke or discharge the order.

(4) References in this Act to the responsible officer are, in relation to an offender on whom a community payback order has been imposed, the officer for the time being nominated in pursuance of subsection (2)(b).

(5) In reckoning the period of two days for the purposes of subsection (2)(b), no account is to be taken of a Saturday or Sunday or any day which is a local or public holiday.

227E Community payback order: further provision

(1) Where a community payback order is imposed on an offender, the order is to be taken for all purposes to be a sentence imposed on the offender.

(2) On imposing a community payback order, the court must state in open court the reasons for imposing the order.

(3) The imposition by a court of a community payback order on an offender does not prevent the court imposing a fine or any other sentence (other than imprisonment), or making any other order, that it would be entitled to impose or make in respect of the offence.

(4) Where a court imposes a community payback order on an offender, the clerk of the court must ensure that—

(a) a copy of the order is given to—

(i) the offender, and

(ii) the local authority within whose area the offender resides or will reside, and

(b) a copy of the order and such other documents and information relating to the case as may be useful are given to the clerk of the appropriate court (unless the court imposing the order is that court).

(5) A copy of the order may be given to the offender—

(a) by being delivered personally to the offender, or

(b) by being sent—

(i) by a registered post service (as defined in section 125(1) of the Postal Services Act 2000 (c.26)), or

(ii) by a postal service which provides for the delivery of the document to be recorded.

(6) A community payback order is to be in such form, or as nearly as may be in such form, as may be prescribed by Act of Adjournal.

227F Requirement to avoid conflict with religious beliefs, work etc.

(1) In imposing a community payback order on an offender, the court must ensure, so far as practicable, that any requirement imposed by the order avoids—

(a) a conflict with the offender's religious beliefs,

(b) interference with the times, if any, at which the offender normally works (or carries out voluntary work) or attends school or any other educational establishment.

(2) The responsible officer must ensure, so far as practicable, that any instruction given to the offender avoids such a conflict or interference.

227FA Payment of offenders' travelling and other expenses

(1) The Scottish Ministers may by order made by statutory instrument provide for the payment to offenders of travelling or other expenses in connection with their compliance with requirements imposed on them by community payback orders.

(2) An order under subsection (1) may—

(a) specify expenses or provide for them to be determined under the order,

(b) provide for the payments to be made by or on behalf of local authorities,

(c) make different provision for different purposes.

(3) An order under subsection (1) is subject to annulment in pursuance of a resolution of the Scottish Parliament.

Offender supervision requirement

227G Offender supervision requirement

(1) In this Act, an "offender supervision requirement" is, in relation to an offender, a requirement that, during the specified period, the offender must attend appointments with the responsible officer or another person determined by the responsible officer, at such time and place as may be determined by the responsible officer, for the purpose of promoting the offender's rehabilitation.

(2) On imposing a community payback order, the court must impose an offender supervision requirement if—

(a) the offender is under 18 years of age at the time the order is imposed, or

(b) the court, in the order, imposes—

(zi) a compensation requirement,

(i) a programme requirement,

(ii) a residence requirement,

(iii) a mental health requirement,

(iv) a drug treatment requirement,

(v) an alcohol treatment requirement, or

(vi) a conduct requirement.

(3) The specified period must be at least 6 months and not more than 3 years.

(3A) Subsection (3) is subject to subsection (3B) and section 227ZB(7B).

(3B) In the case of a supervision requirement imposed on a person aged 16 or 17 along with only a level 1 unpaid work or other activity requirement, the specified period must be no more than whichever is the greater of—

(a) the specified period under section 227L in relation to the level 1 unpaid work or other activity requirement, and

(b) 3 months.

(4) In this section, "specified", in relation to a supervision requirement, means specified in the requirement.

Compensation requirement

227H Compensation requirement

(1) In this Act, a "compensation requirement" is, in relation to an offender, a requirement that the offender must pay compensation for any relevant matter in favour of a relevant person.

(2) In subsection (1)—

"relevant matter" means any personal injury, loss, damage or other matter in respect of which a compensation order could be made against the offender under section 249 of this Act, and

"relevant person" means a person in whose favour the compensation could be awarded by such a compensation order.

(3) A compensation requirement may require the compensation to be paid in a lump sum or in instalments.

(4) The offender must complete payment of the compensation before the earlier of the following—

(a) the end of the period of 18 months beginning with the day on which the compensation requirement is imposed,

(b) the beginning of the period of 2 months ending with the day on which the supervision requirement imposed under section 227G(2) ends.

(5) The following provisions of this Act apply in relation to a compensation requirement as they apply in relation to a compensation order, and as if the references in them to a compensation order included a compensation requirement—

(a) section 249(3), (4), (5) and (8) to (10),

(b) section 250(2),

(c) section 251(1), (1A) and (2)(b), and

(d) section 253.

Unpaid work or other activity requirement

227I Unpaid work or other activity requirement

(1) In this Act, an "unpaid work or other activity requirement" is, in relation to an offender, a requirement that the offender must, for the specified number of hours, undertake—

(a) unpaid work, or

(b) unpaid work and other activity.

(1A) Whether the offender must undertake other activity as well as unpaid work is for the responsible officer to determine.

(2) The nature of the unpaid work and any other activity to be undertaken by the offender is to be determined by the responsible officer.

(3) The number of hours that may be specified in the requirement must be (in total)—

(a) at least 20 hours, and

(b) not more than 300 hours.

(4) An unpaid work or other activity requirement which requires the work or activity to be undertaken for a number of hours totalling no more than 100 is referred to in this Act as a "level 1 unpaid work or other activity requirement".

(5) An unpaid work or other activity requirement which requires the work or activity to be undertaken for a number of hours totalling more than 100 is referred to in this Act as a "level 2 unpaid work or other activity requirement".

(6) The Scottish Ministers may by order made by statutory instrument substitute another number of hours for any of the numbers of hours for the time being specified in subsections (3) to (5).

(6A) An order under subsection (6) may only substitute for the number of hours for the time being specified in a provision mentioned in the first column of the following table a number of hours falling within the range set out in the corresponding entry in the second column.

Provision	*Range*	
	No fewer than	*No more than*
Subsection (3)(a)	10 hours	40 hours
Subsection (3)(b)	250 hours	350 hours
Subsections (4) and (5)	70 hours	150 hours

(7) An order under subsection (6) is subject to annulment in pursuance of a resolution of the Scottish Parliament.

(8) In this section, "specified", in relation to an unpaid work or other activity requirement, means specified in the requirement.

227J Unpaid work or other activity requirement: further provision

(1) A court may not impose an unpaid work or other activity requirement on an offender who is under 16 years of age.

(2) A court may impose such a requirement on an offender only if the court is satisfied, after considering the report mentioned in section 227B(2), that the offender is a suitable person to undertake unpaid work in pursuance of the requirement.

(2A) Subsection (2) does not apply where the court is considering imposing a community payback order—

(a) imposing only a level 1 unpaid work or other activity requirement, or

(b) under section 227M(2).

(3) A justice of the peace court may impose a level 2 unpaid work or other activity requirement only if—

(a) the Scottish Ministers by regulations made by statutory instrument so provide, and

(b) the requirement is imposed in such circumstances and subject to such conditions as may be specified in the regulations.

(4) Regulations are not to be made under subsection (3) unless a draft of the statutory instrument containing them has been laid before and approved by resolution of the Scottish Parliament.

227K Allocation of hours between unpaid work and other activity

(1) Subject to subsection (2), it is for the responsible officer to determine how many out of the number of hours specified in an unpaid work or other activity requirement are to be allocated to undertaking, respectively—

(a) unpaid work, and

(b) any other activity to be undertaken.

(2) The number of hours allocated to undertaking an activity other than unpaid work must not exceed whichever is the lower of—

(a) 30% of the number of hours specified in the requirement, and

(b) 30 hours.

(3) The Scottish Ministers may by order made by statutory instrument—

(a) substitute another percentage for the percentage for the time being specified in subsection (2)(a),

(b) substitute another number of hours for the number of hours for the time being specified in subsection (2)(b).

(4) An order is not to be made under subsection (3) unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.

227L Time limit for completion of unpaid work or other activity

(1) The number of hours of unpaid work and any other activity that the offender is required to undertake in pursuance of an unpaid work or other activity requirement must be completed by the offender before the end of the specified period beginning with the imposition of the requirement.

(2) The “specified period” is—

(a) in relation to a level 1 unpaid work or other activity requirement, 3 months or such longer period as the court may specify in the requirement,

(b) in relation to a level 2 unpaid work or other activity requirement, 6 months or such longer period as the court may specify in the requirement.

227M Fine defaulters

(1) This section applies where—

(a) a fine has been imposed on an offender in respect of an offence,

(b) the offender fails to pay the fine or an instalment of the fine,

(c) the amount of the fine or the instalment does not exceed level 2 on the standard scale, and

(d) apart from this section, the court would have imposed a period of imprisonment on the offender under section 219(1) of this Act in respect of the failure to pay the fine or instalment.

(2) The court must, instead of imposing a period of imprisonment under section 219(1) of this Act, impose a community payback order on the offender imposing a level 1 unpaid work or other activity requirement.

(2A) The court, in imposing a community payback order under subsection (2) on a person aged 16 or 17, must also impose a supervision requirement.

(3) Where the amount of the fine or the instalment does not exceed level 1 on the standard scale, the number of hours specified in the requirement must not exceed 50.

(4) On completion of the hours of unpaid work and any other activity specified in an unpaid work or other activity requirement imposed under this section, the fine in respect of which the requirement was imposed is discharged (or, as the case may be, the outstanding instalments of the fine are discharged).

(5) If, after a community payback order is imposed on an offender under this section, the offender pays the fine or the full amount of any outstanding instalments, the appropriate court must discharge the order.

(7) A level 1 unpaid work or other activity requirement may be imposed on an offender under this section whether or not the offender indicates a willingness to comply with the requirement.

(9) Subsection (2) is subject to sections 227J(1) and 227N(2), (3) and (6).

(10) In this section, "court" does not include the High Court.

227N Offenders subject to more than one unpaid work or other activity requirement

(1) This section applies where—

(a) a court is considering imposing an unpaid work or other activity requirement on an offender (referred to as the "new requirement"), and

(b) at the time the court is considering imposing the requirement, there is already in effect one or more community payback orders imposing such a requirement on the same offender (each referred to as an "existing requirement").

(2) The court may, in imposing the new requirement, direct that it is to be concurrent with any existing requirement.

(3) Where the court makes a direction under subsection (2), hours of unpaid work or other activity undertaken after the new requirement is imposed count for the purposes of compliance with that requirement and the existing requirement.

(4) Subsection (5) applies where the court does not make a direction under subsection (2).

(5) The maximum number of hours which may be specified in the new requirement is the number of hours specified in section 227I(3)(b) less the aggregate of the number of hours of unpaid work or activity still to be completed under each existing requirement at the time the new requirement is imposed.

(5A) In calculating that aggregate, if any existing requirement is concurrent with another (by virtue of a direction under subsection (2)), hours that count for the purposes of compliance with both (or, as the case may be, all) are to be counted only once.

(6) Where that maximum number is less than the minimum number of hours that can be specified by virtue of section 227I(3)(a), the court must not impose the new requirement.

227O Rules about unpaid work and other activity

(1) The Scottish Ministers may make rules by statutory instrument for or in connection with the undertaking of unpaid work and other activities in pursuance of unpaid work or other activity requirements.

(2) Rules under subsection (1) may in particular make provision for—

(a) limiting the number of hours of work or other activity that an offender may be required to undertake in any one day,

(b) reckoning the time spent undertaking unpaid work or other activity,

(d) the keeping of records of unpaid work and any other activity undertaken.

(2A) Rules under subsection (1) may—

(a) confer functions on responsible officers,

(b) contain rules about the way responsible officers are to exercise functions under this Act.

(3) Rules under subsection (1) are subject to annulment in pursuance of a resolution of the Scottish Parliament.

Programme requirement

227P Programme requirement

(1) In this Act, a "programme requirement" is, in relation to an offender, a requirement that the offender must participate in a specified programme, at the specified place and on the specified number of days.

(2) In this section, "programme" means a course or other planned set of activities, taking place over a period of time, and provided to individuals or groups of individuals for the purpose of addressing offending behavioural needs.

(3) A court may impose a programme requirement on an offender only if the specified programme is one which has been recommended by an officer of a local authority as being suitable for the offender to participate in.

(4) If an offender's compliance with a proposed programme requirement would involve the co-operation of a person other than the offender, the court may impose the requirement only if the other person consents.

(5) A court may not impose a programme requirement that would require an offender to participate in a specified programme after the expiry of the period specified in the offender supervision requirement to be imposed at the same time as the programme requirement (by virtue of section 227G(2)(b)).

(6) Where the court imposes a programme requirement on an offender, the requirement is to be taken to include a requirement that the offender, while attending the specified programme, complies with any instructions given by or on behalf of the person in charge of the programme.

(7) In this section, "specified", in relation to a programme requirement, means specified in the requirement.

Residence requirement

227Q Residence requirement

(1) In this Act, a "residence requirement" is, in relation to an offender, a requirement that, during the specified period, the offender must reside at a specified place.

(2) The court may, in a residence requirement, require an offender to reside at a hostel or other institution only if the hostel or institution has been recommended as a suitable place for the offender to reside in by an officer of a local authority.

(3) The specified period must not be longer than the period specified in the offender supervision requirement to be imposed at the same time as the residence requirement (by virtue of section 227G(2)(b)).

(4) In this section, "specified", in relation to a residence requirement, means specified in the requirement.

Mental health treatment requirement

227R Mental health treatment requirement

(1) In this Act, a "mental health treatment requirement" is, in relation to an offender, a requirement that the offender must submit, during the specified period, to treatment by or under the direction of a registered medical practitioner or a registered psychologist (or both) with a view to improving the offender's mental condition.

(2) The treatment to which an offender may be required to submit under a mental health treatment requirement is such of the kinds of treatment described in subsection (3) as is specified; but otherwise the nature of the treatment is not to be specified.

(3) Those kinds of treatment are—

- (a) treatment as a resident patient in a hospital (other than a State hospital) within the meaning of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) ("the 2003 Act"),
- (b) treatment as a non-resident patient at such institution or other place as may be specified, or
- (c) treatment by or under the direction of such registered medical practitioner or registered psychologist as may be specified.

(4) A court may impose a mental health treatment requirement on an offender only if the court is satisfied—

- (a) on the evidence of an approved medical practitioner (within the meaning of the 2003 Act), that Condition A is met,
- (b) on the written or oral evidence of the registered medical practitioner or registered psychologist by whom or under whose direction the treatment is to be provided, that Condition B is met, and
- (c) that Condition C is met.

(5) Condition A is that—

(a) the offender suffers from a mental condition,

(b) the condition requires, and may be susceptible to, treatment, and

(c) the condition is not such as to warrant the offender's being subject to—

(i) a compulsory treatment order under section 64 of the 2003 Act, or

(ii) a compulsion order under section 57A of this Act.

(6) Condition B is that the treatment proposed to be specified is appropriate for the offender.

(7) Condition C is that arrangements have been made for the proposed treatment including, where the treatment is to be of the kind mentioned in subsection (3)(a), arrangements for the offender's reception in the hospital proposed to be specified in the requirement.

(8) The specified period must not be longer than the period specified in the offender supervision requirement to be imposed at the same time as the mental health treatment requirement (by virtue of section 227G(2)(b)).

(9) In this section, "specified", in relation to a mental health treatment requirement, means specified in the requirement.

227S Mental health treatment requirements: medical evidence

(1) For the purpose of making a finding under section 227R(4)(a) or (b), a written report purporting to be signed by an approved medical practitioner (within the meaning of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)) may be received in evidence without the need for proof of the signature or qualifications of the practitioner.

(2) Where such a report is lodged in evidence otherwise than by or on behalf of the offender, a copy of the report must be given to—

(a) the offender, and

(b) the offender's solicitor (if any).

(3) The court may adjourn the case if it considers it necessary to do so to give the offender further time to consider the report.

(4) Subsection (5) applies where the offender is—

(a) detained in a hospital under this Act, or

(b) remanded in custody.

(5) For the purpose of calling evidence to rebut any evidence contained in a report lodged as mentioned in subsection (2), arrangements may be made by or on behalf of the offender for an examination of the offender by a registered medical practitioner.

(6) Such an examination is to be carried out in private.

227T Power to change treatment

(1) This section applies where—

(a) a mental health treatment requirement has been imposed on an offender, and

(b) the registered medical practitioner or registered psychologist by whom or under whose direction the offender is receiving the treatment to which the offender is required to submit in pursuance of the requirement is of the opinion mentioned in subsection (2).

(2) That opinion is—

(a) that the offender requires, or that it would be appropriate for the offender to receive, a different kind of treatment (whether in whole or in part) from that which the offender has been receiving, or

(b) that the treatment (whether in whole or in part) can be more appropriately given in or at a different hospital or other institution or place from that where the offender has been receiving treatment.

(3) The practitioner or, as the case may be, psychologist may make arrangements for the offender to be treated accordingly.

(4) Subject to subsection (5), the treatment provided under the arrangements must be of a kind which could have been specified in the mental health treatment requirement.

(5) The arrangements may provide for the offender to receive treatment (in whole or in part) as a resident patient in an institution or place even though it is one that could not have been specified for that purpose in the mental health treatment requirement.

(6) Arrangements may be made under subsection (3) only if—

(a) the offender and the responsible officer agree to the arrangements,

(b) the treatment will be given by or under the direction of a registered medical practitioner or registered psychologist who has agreed to accept the offender as a patient, and

(c) where the treatment requires the offender to be a resident patient, the offender will be received as such.

(7) Where arrangements are made under subsection (3)—

(a) the responsible officer must notify the court of the arrangements, and

(b) the treatment provided under the arrangements is to be taken to be treatment to which the offender is required to submit under the mental health treatment requirement.

Drug treatment requirement

227U Drug treatment requirement

(1) In this Act, a "drug treatment requirement" is, in relation to an offender, a requirement that the offender must submit, during the specified period, to treatment by or under the direction of a specified person with a view to reducing or eliminating the offender's dependency on, or propensity to misuse, drugs.

(2) The treatment to which an offender may be required to submit under a drug treatment requirement is such of the kinds of treatment described in subsection (3) as is specified (but otherwise the nature of the treatment is not to be specified).

(3) Those kinds of treatment are—

(a) treatment as a resident in such institution or other place as is specified,

(b) treatment as a non-resident at such institution or other place, and at such intervals, as is specified.

(4) The specified person must be a person who has the necessary qualifications or experience in relation to the treatment to be provided.

(5) The specified period must not be longer than the period specified in the offender supervision requirement to be imposed at the same time as the drug treatment requirement (by virtue of section 227G(2)(b)).

(6) A court may impose a drug treatment requirement on an offender only if the court is satisfied that—

(a) the offender is dependent on, or has a propensity to misuse, any controlled drug (as defined in section 2(1)(a) of the Misuse of Drugs Act 1971 (c.38)),

(b) the dependency or propensity requires, and may be susceptible to, treatment, and

(c) arrangements have been, or can be, made for the proposed treatment including, where the treatment is to be of the kind mentioned in subsection (3)(a), arrangements for the offender's reception in the institution or other place to be specified.

(7) In this section, "specified", in relation to a drug treatment requirement, means specified in the requirement.

Alcohol treatment requirement

227V Alcohol treatment requirement

(1) In this Act, an "alcohol treatment requirement" is, in relation to an offender, a requirement that the offender must submit, during the specified period, to treatment by or under the direction of a specified person with a view to the reduction or elimination of the offender's dependency on alcohol.

(2) The treatment to which an offender may be required to submit under an alcohol treatment requirement is such of the kinds of treatment described in subsection (3) as is specified (but otherwise the nature of the treatment is not to be specified).

(3) Those kinds of treatment are—

(a) treatment as a resident in such institution or other place as is specified,

(b) treatment as a non-resident at such institution or other place, and at such intervals, as is specified,

(c) treatment by or under the direction of such person as is specified.

(4) The person specified under subsection (1) or (3)(c) must be a person who has the necessary qualifications or experience in relation to the treatment to be provided.

(5) The specified period must not be longer than the period specified in the offender supervision requirement to be imposed at the same time as the alcohol treatment requirement (by virtue of section 227G(2)(b)).

(6) A court may impose an alcohol treatment requirement on an offender only if the court is satisfied that—

(a) the offender is dependent on alcohol,

(b) the dependency requires, and may be susceptible to, treatment, and

(c) arrangements have been, or can be, made for the proposed treatment, including, where the treatment is to be of the kind mentioned in subsection (3)(a), arrangements for the offender's reception in the institution or other place to be specified.

(7) In this section, "specified", in relation to an alcohol treatment requirement, means specified in the requirement.

Conduct requirement

227VA Conduct requirement

(1) In this Act, a "conduct requirement" is, in relation to an offender, a requirement that the offender must, during the specified period, do or refrain from doing specified things.

(2) A court may impose a conduct requirement on an offender only if the court is satisfied that the requirement is necessary with a view to—

(a) securing or promoting good behaviour by the offender, or

(b) preventing further offending by the offender.

(3) The specified period must be not more than 3 years.

(4) The specified things must not include anything that—

(a) could be required by imposing one of the other requirements listed in section 227A(2), or

(b) would be inconsistent with the provisions of this Act relating to such other requirements.

(5) In this section, "specified", in relation to a conduct requirement, means specified in the requirement.

Community payback orders: review, variation etc.

227W Periodic review of community payback orders

(1) On imposing a community payback order on an offender, the court may include in the order provision for the order to be reviewed at such time or times as may be specified in the order.

(2) A review carried out in pursuance of such provision is referred to in this section as a "progress review".

(3) A progress review may be carried out by the court which imposed the community payback order or (if different) the appropriate court, and, where those courts are different, the court must specify in the order which of those courts is to carry out the reviews.

(4) A progress review is to be carried out in such manner as the court carrying out the review may determine.

(5) Before each progress review, the responsible officer must give the court a written report on the offender's compliance with the requirements imposed by the community payback order in the period to which the review relates.

(6) The offender must attend each progress review.

(7) If the offender fails to attend a progress review, the court may—

(a) issue a citation requiring the offender's attendance, or

(b) issue a warrant for the offender's arrest.

(8) The unified citation provisions apply in relation to a citation under subsection (7)(a) as they apply in relation to a citation under section 216(3)(a) of this Act.

(8A) Subsections (8B) and (8C) apply where, in the course of carrying out a progress review in respect of a community payback order, it appears to the court that the offender has failed to comply with a requirement imposed by the order.

(8B) The court must—

(a) provide the offender with written details of the alleged failure,

(b) inform the offender that the offender is entitled to be legally represented, and

(c) inform the offender that no answer need be given to the allegation before the offender—

(i) has been given an opportunity to take legal advice, or

(ii) has indicated that the offender does not wish to take legal advice.

(8C) The court must then—

(a) if it is the appropriate court, appoint another hearing for consideration of the alleged failure in accordance with section 227ZB, or

(b) if it is not the appropriate court, refer the alleged failure to that court for consideration in accordance with that section.

(9) On conclusion of a progress review in respect of a community payback order, the court may vary, revoke or discharge the order in accordance with section 227Y.

227X Applications to vary, revoke and discharge community payback orders

(1) The appropriate court may, on the application of either of the persons mentioned in subsection (2), vary, revoke or discharge a community payback order in accordance with section 227Y.

(2) Those persons are—

(a) the offender on whom the order was imposed,

(b) the responsible officer in relation to the offender.

227Y Variation, revocation and discharge: court's powers

(1) This section applies where a court is considering varying, revoking or discharging a community payback order imposed on an offender.

(2) The court may vary, revoke or discharge the order only if satisfied that it is in the interests of justice to do so having regard to circumstances which have arisen since the order was imposed.

(2A) Subsection (2) does not apply where the court is considering varying the order under section 227ZB(5)(c).

(3) In varying an order, the court may, in particular—

(a) add to the requirements imposed by the order,

(b) revoke or discharge any requirement imposed by the order,

(c) vary any requirement imposed by the order,

(d) include provision for progress reviews under section 227W,

(e) where the order already includes such provision, vary that provision.

(4) In varying a requirement imposed by the order, the court may, in particular—

(a) extend or shorten any period or other time limit specified in the requirement,

(b) in the case of an unpaid work or other activity requirement, increase or decrease the number of hours specified in the requirement,

(c) in the case of an offender compensation requirement, vary the amount of compensation or any instalment.

(6) The court may not, under subsection (4)(b), increase the number of hours beyond the appropriate maximum.

(6A) The appropriate maximum is the number of hours specified in section 227I(3)(b) at the time the unpaid work or other activity requirement being varied was imposed less the aggregate of the number of hours of unpaid work or other activity still to be completed under each other unpaid work or other activity requirement (if any) in effect in respect of the offender at the time of the variation (a "current requirement").

(6B) In calculating that aggregate, if any current requirement is concurrent with another (by virtue of a direction under section 227N(2)), hours that count for the purposes of compliance with both (or, as the case may be, all) are to be counted only once.

(6C) The court may not, under subsection (4)(c), increase the amount of compensation beyond the maximum that could have been awarded at the time the requirement was imposed.

(7) Where the court varies a restricted movement requirement imposed by a community payback order, the court must give a copy of the order making the variation to the person responsible for monitoring the offender's compliance with the requirement.

(8) Where the court revokes a community payback order, the court may deal with the offender in respect of the offence in relation to which the order was imposed as it could have dealt with the offender had the order not been imposed.

(8A) Subsection (8) applies in relation to a community payback order imposed under section 227M(2) as if the reference to the offence in relation to which the order was imposed were a reference to the failure to pay in respect of which the order was imposed.

(9) Where the court is considering varying, revoking or discharging the order otherwise than on the application of the offender, the court must issue a citation to the offender requiring the offender to appear before the court (except where the offender is required to appear by section 227W(6)) or 227ZB(2)(b).

(10) If the offender fails to appear as required by the citation, the court may issue a warrant for the arrest of the offender.

(11) The unified citation provisions apply in relation to a citation under subsection (9) as they apply in relation to a citation under section 216(3)(a) of this Act.

227Z Variation of community payback orders: further provision

(1) This section applies where a court is considering varying a community payback order imposed on an offender.

(2) The court must not make the variation unless it has obtained, and taken account of, a report from the responsible officer containing information about the offender and the offender's circumstances.

(2A) An Act of Adjournal may prescribe—

(a) the form of a report under subsection (2), and

(b) the particular information to be contained in it.

(2B) Subsection (2) does not apply where the court is considering varying a community payback order—

(a) which imposes only a level 1 unpaid work or other activity requirement, or

(b) imposed under section 227M(2).

(3) The clerk of the court must give a copy of any report obtained under subsection (2) to—

(a) the offender,

(b) the offender's solicitor (if any).

(4) Before making the variation, the court must explain to the offender in ordinary language—

(a) the purpose and effect of each of the requirements to be imposed by the order as proposed to be varied,

(b) the consequences which may follow if the offender fails to comply with any of the requirements imposed by the order as proposed to be varied, and

(c) where the court proposes to include in the order as proposed to be varied provision for a progress review under section 227W, or to vary any such provision already included in the order, the arrangements for such a review.

(5) The court must not make the variation unless the offender has, after the court has explained those matters, confirmed that the offender—

(a) understands those matters, and

(b) is willing to comply with each of the requirements to be imposed by the order as proposed to be amended.

(6) Where the variation would impose a new requirement—

(a) the court must not make the variation if the new requirement is not a requirement that could have been imposed by the order when it was imposed,

(b) if the new requirement is one which could have been so imposed, the court must, before making the variation take whatever steps the court would have been required to take before imposing the requirement had it been imposed by the order when it was imposed.

(6A) Subsection (6)(a) does not prevent the imposition of a restricted movement requirement under section 227ZB(5)(c).

(6B) In determining for the purpose of subsection (6)(a) whether an unpaid work or other activity requirement is a requirement that could have been imposed by the order when the order was imposed, the effect of section 227N(6) is to be ignored.

(7) Where the variation would vary any requirement imposed by the order, the court must not make the variation if the requirement as proposed to be varied could not have been imposed, or imposed in that way, by the order when it was imposed.

(8) Subsections (4) and (5) of section 227E apply, with the necessary modifications, where a community payback order is varied as they apply where such an order is imposed.

227ZA Change of offender's residence to new local authority area

(1) The section applies where—

(a) the offender on whom a community payback order has been imposed proposes to change, or has changed, residence to a locality ("the new locality") situated in the area of a different local authority from that in which the locality currently specified in the order is situated, and

(b) the court is considering varying the order so as to specify the new local authority area in which the offender resides or will reside.

(2) The court may vary the order only if satisfied that arrangements have been, or can be, made in the local authority area in which the new locality is situated for the offender to comply with the requirements of the order.

(3) Where the court varies the order, the court must also vary the order so as to require the local authority for the area in which the new locality is situated to nominate an officer of the authority to be the responsible officer for the purposes of the order.

Breach of community payback order

227ZB Breach of community payback order

(1) This section applies where it appears to the appropriate court that an offender on whom a community payback order has been imposed has failed to comply with a requirement imposed by the order.

(2) The court may—

- (a) issue a warrant for the offender's arrest, or
- (b) issue a citation to the offender requiring the offender to appear before the court.

(3) If the offender fails to appear as required by a citation issued under subsection (2)(b), the court may issue a warrant for the arrest of the offender.

(4) The unified citation provisions apply in relation to a citation under subsection (2)(b) as they apply in relation to a citation under section 216(3)(a) of this Act.

(4A) The court must, before considering the alleged failure—

- (a) provide the offender with written details of the alleged failure,
- (b) inform the offender that the offender is entitled to be legally represented, and
- (c) inform the offender that no answer need be given to the allegation before the offender—
    - (i) has been given an opportunity to take legal advice, or
    - (ii) has indicated that the offender does not wish to take legal advice.

(4B) Subsection (4A) does not apply if the offender has previously been provided with those details and informed about those matters under section 227W(8B) of this Act.

(5) If the court is satisfied that the offender has failed without reasonable excuse to comply with a requirement imposed by the order, the court may—

- (a) impose on the offender a fine not exceeding level 3 on the standard scale,
- (b) where the order was imposed under section 227A(1), revoke the order and deal with the offender in respect of the offence in relation to which the order was imposed as it could have dealt with the offender had the order not been imposed,
- (ba) where the order was imposed under section 227A(4), revoke the order and impose on the offender a sentence of imprisonment for a term not exceeding—
    - (i) where the court is a justice of the peace court, 60 days,
    - (ii) in any other case, 3 months,

(bb) where the order was imposed under section 227M(2), revoke the order and impose on the offender a period of imprisonment for a term not exceeding—

(i) where the court is a justice of the peace court, 60 days,

(ii) in any other case, 3 months,

(c) vary the order so as to impose a new requirement, vary any requirement imposed by the order or revoke or discharge any requirement imposed by the order, or

(d) both impose a fine under paragraph (a) and vary the order under paragraph (c).

(5A) Where the court revokes a community payback order under subsection (5)(b) or (ba) and the offender is, in respect of the same offence, also subject to—

(a) a drug treatment and testing order, by virtue of section 234J, or

(b) a restriction of liberty order, by virtue of section 245D(3),

the court must, before dealing with the offender under subsection (5)(b) or (ba), revoke the drug treatment and testing order or, as the case may be, restriction of liberty order.

(5B) If the court is satisfied that the offender has failed to comply with a requirement imposed by the order but had a reasonable excuse for the failure, the court may, subject to section 227Y(2), vary the order so as to impose a new requirement, vary any requirement imposed by the order or revoke or discharge any requirement imposed by the order.

(6) The requirements which the court may impose under subsection (5)(c) include a restricted movement requirement.

(7) If the court varies the order so as to impose a restricted movement requirement, the court must also vary the order so as to impose an offender supervision requirement, unless an offender supervision requirement is already imposed by the order.

(7A) The court must ensure that the specified period under section 227G in relation to the supervision requirement is at least as long as the period for which the restricted movement requirement has effect and, where the community payback order already imposes a supervision requirement, must vary it accordingly, if necessary.

(7B) The minimum period of 6 months in section 227G(3) does not apply in relation to a supervision requirement imposed under subsection (7).

(8) Where the court varies the order so as to impose a restricted movement requirement, the court must give a copy of the order making the variation to the person responsible for monitoring the offender's compliance with the requirement.

(10) If during the period for which the restricted movement requirement is in effect it appears to the person responsible for monitoring the offender's compliance with the requirement that the offender has failed to comply with the requirement, the person must report the matter to the offender's responsible officer.

(11) On receiving a report under subsection (10), the responsible officer must report the matter to the court.

(14) Subsections (5)(b) and (ba) and (5A) are subject to section 42(9) of the Criminal Justice (Scotland) Act 2003 (asp 7) (powers of drugs courts to deal with breach of community payback orders).

227ZC Breach of community payback order: further provision

(3) Evidence of one witness is sufficient for the purpose of establishing that an offender has failed without reasonable excuse to comply with a requirement imposed by a community payback order.

(4) Subsection (5) applies in relation to a community payback order imposing an offender compensation requirement.

(5) A document bearing to be a certificate signed by the clerk of the appropriate court and stating that the compensation, or an instalment of the compensation, has not been paid as required by the requirement is sufficient evidence that the offender has failed to comply with the requirement.

(6) The appropriate court may, for the purpose of considering whether an offender has failed to comply with a requirement imposed by a community payback order, require the responsible officer to provide a report on the offender's compliance with the requirement.

227ZD Restricted movement requirement

(1) In this Act, a "restricted movement requirement" is, in relation to an offender, a requirement restricting the offender's movements to such extent as is specified.

(2) A restricted movement requirement may in particular require the offender—

(a) to be in a specified place at a specified time or during specified periods, or

(b) not to be in a specified place, or a specified class of place, at a specified time or during specified periods.

(3) In imposing a restricted movement requirement containing provision under subsection (2)(a), the court must ensure that the offender is not required, either by the requirement alone or the requirement taken together with any other relevant requirement or order, to be at any place for periods totalling more than 12 hours in any one day.

(3A) In subsection (3), "other relevant requirement or order" means—

(a) any other restricted movement requirement in effect in respect of the offender at the time the court is imposing the requirement referred to in subsection (3), and

(b) any restriction of liberty order under section 245A in effect in respect of the offender at that time.

(4) A restricted movement requirement—

(a) takes effect from the specified day, and

(b) has effect for such period as is specified.

(4A) The period specified under subsection (4)(b) must be—

(a) not less than 14 days, and

(b) subject to subsections (4B) and (4C), not more than 12 months.

(4B) Subsection (4C) applies in the case of a restricted movement requirement imposed for failure to comply with a requirement of a community payback order—

(a) where the offender was under 18 years of age at the time the order was imposed, or

(b) where the only requirement imposed by the order is a level 1 unpaid work or other activity requirement.

(4C) The period specified under subsection (4)(b) must be not more than—

(a) where the order was imposed by a justice of the peace court, 60 days, or

(b) in any other case, 3 months.

(5) A court imposing a restricted movement requirement must specify in it—

(a) the method by which the offender's compliance with the requirement is to be monitored, and

(b) the person who is to be responsible for monitoring that compliance.

(6) The Scottish Ministers may by regulations made by statutory instrument substitute—

(a) for the number of hours for the time being specified in subsection (3) another number of hours,

(b) for the number of months for the time being specified in subsection (4A)(b) another number of months.

(7) Regulations are not to be made under subsection (6) unless a draft of the statutory instrument containing the regulations has been laid before and approved by resolution of the Scottish Parliament.

(8) In this section, "specified", in relation to a restricted movement requirement, means specified in the requirement.

227ZE Restricted movement requirements: further provision

(1) A court may not impose a restricted movement requirement requiring the offender to be, or not to be, in a specified place unless it is satisfied that the offender's compliance with the requirement can be monitored by the method specified in the requirement.

(2) Before imposing a restricted movement requirement requiring the offender to be in a specified place, the appropriate court must obtain and consider a report by an officer of the local authority in whose area the place is situated on—

(a) the place, and

(b) the attitude of any person (other than the offender) likely to be affected by the enforced presence of the offender at the place.

(3) The court may, before imposing the requirement, hear the officer who prepared the report.

227ZF Variation of restricted movement requirement

(1) This section applies where—

(a) a community payback order which is in force in respect of an offender imposes a restricted movement requirement requiring the offender to be at a particular place specified in the requirement for any period, and

(b) the court is considering varying the requirement so as to require the offender to be at a different place (“the new place”).

(2) Before making the variation, the appropriate court must obtain and consider a report by an officer of the local authority in whose area the new place is situated on—

(a) the new place, and

(b) the attitude of any person (other than the offender) likely to be affected by the enforced presence of the offender at the new place.

(3) The court may, before making the variation, hear the officer who prepared the report.

227ZG Remote monitoring

Section 245C of this Act, and regulations made under that section, apply in relation to the imposition of, and compliance with, restricted movement requirements as they apply in relation to the imposition of, and compliance with, restriction of liberty orders.

227ZH Restricted movement requirements: Scottish Ministers’ functions

(1) The Scottish Ministers may by regulations made by statutory instrument prescribe—

(a) which courts, or class or classes of courts, may impose restricted movement requirements,

(b) the method or methods of monitoring compliance with a restricted movement requirement which may be specified in such a requirement,

(c) the class or classes of offender on whom such a requirement may be imposed.

(2) Regulations under subsection (1) may make different provision about the matters mentioned in paragraphs (b) and (c) of that subsection in relation to different courts or classes of court.

(3) Regulations under subsection (1) are subject to annulment in pursuance of a resolution of the Scottish Parliament.

(4) The Scottish Ministers must determine the person, or class or description of person, who may be specified in a restricted movement requirement as the person to be responsible for monitoring the offender’s compliance with the requirement (referred to in this section as the “monitor”).

(5) The Scottish Ministers may determine different persons, or different classes or descriptions of person, in relation to different methods of monitoring.

(6) The Scottish Ministers must notify each court having power to impose a restricted movement requirement of their determination.

(7) Subsection (8) applies where—

(a) the Scottish Ministers make a determination under subsection (4) changing a previous determination made by them, and

(b) a person specified in a restricted movement requirement in effect at the date the determination takes effect as the monitor is not a person, or is not of a class or description of person, mentioned in the determination as changed.

(8) The appropriate court must—

(a) vary the restricted movement requirement so as to specify a different person as the monitor,

(b) send a copy of the requirement as varied to that person and to the responsible officer, and

(c) notify the offender of the variation.

227ZI Documentary evidence in proceedings for breach of restricted movement requirement

(1) This section applies for the purposes of establishing in any proceedings whether an offender on whom a restricted movement requirement has been imposed has complied with the requirement.

(2) Evidence of the presence or absence of the offender at a particular place at a particular time may be given by the production of a document or documents bearing to be—

(a) a statement automatically produced by a device specified in regulations made under section 245C of this Act, by which the offender's whereabouts were remotely monitored, and

(b) a certificate signed by a person nominated for the purposes of this paragraph by the Scottish Ministers that the statement relates to the whereabouts of the offender at the dates and times shown in the statement.

(3) The statement and certificate are, when produced in evidence, sufficient evidence of the facts stated in them.

(4) The statement and certificate are not admissible in evidence at any hearing unless a copy of them has been served on the offender before the hearing.

(5) Where it appears to any court before which the hearing is taking place that the offender has not had sufficient notice of the statement or certificate, the court may adjourn the hearing or make any order that it considers appropriate.

Local authorities: annual consultation about unpaid work

227ZJ Local authorities: annual consultations about unpaid work

(1) Each local authority must, for each year, consult prescribed persons about the nature of unpaid work and other activities to be undertaken by offenders residing in the local authority's area on whom community payback orders are imposed.

(2) In subsection (1), "prescribed persons" means such persons, or class or classes of person, as may be prescribed by the Scottish Ministers by regulations made by statutory instrument.

(3) A statutory instrument containing regulations under subsection (2) is to be subject to annulment in pursuance of a resolution of the Scottish Parliament.

Community payback order: meaning of "the appropriate court"

227ZK Meaning of "the appropriate court"

(1) In sections 227A to 227ZI, "the appropriate court" means, in relation to a community payback order—

(a) where the order was imposed by the High Court of Justiciary, that Court,

(b) where the order was imposed by a sheriff, a sheriff having jurisdiction in the locality mentioned in subsection (2),

(c) where the order was imposed by a justice of the peace court—

(i) the justice of the peace court having jurisdiction in that locality, or

(ii) if there is no justice of the peace court having jurisdiction in that locality, a sheriff having such jurisdiction.

(2) The locality referred to in subsection (1) is the locality for the time being specified in the community payback order under section 227C(2)(a).".

(2) Schedule 1A modifies enactments in consequence of this section.

Non-harassment orders

15 Non-harassment orders

In section 234A of the 1995 Act (non-harassment orders)—

(a) in subsection (1), for "harassment of" substitute "misconduct towards",

(b) in subsection (2), for "further harassment" substitute "harassment (or further harassment)",

(c) after subsection (2) insert—

"(2A) The court may, for the purpose of subsection (2) above, have regard to any information given to it for that purpose by the prosecutor—

(a) about any other offence involving misconduct towards the victim—

(i) of which the offender has been convicted, or

(ii) as regards which the offender has accepted (or has been deemed to have accepted) a fixed penalty or compensation offer under section 302(1) or 302A(1) or as regards which a work order has been made under section 303ZA(6),

(b) in particular, by way of—

(i) an extract of the conviction along with a copy of the complaint or indictment containing the charge to which the conviction relates, or

(ii) a note of the terms of the charge to which the fixed penalty offer, compensation offer or work order relates.

(2B) But the court may do so only if the court may, under section 101 or 101A (in a solemn case) or section 166 or 166A (in a summary case), have regard to the conviction or the offer or order.

(2C) The court must give the offender an opportunity to make representations in response to the application.”, and

(d) for subsection (7) substitute—

“(7) For the purposes of this section—

“harassment” and “conduct” are to be construed in accordance with section 8 of the Protection from Harassment Act 1997 (c.40),

“misconduct” includes conduct that causes alarm or distress.”.

Short sentences

16 Short periods of detention

(1) The 1995 Act is amended as follows.

(2) Section 169 (detention in precincts of court) is repealed.

(3) In section 206 (minimum periods of detention)—

(a) in subsection (1), for “five” substitute “15”, and

(b) subsections (2) to (6) are repealed.

18 Amendments of Custodial Sentences and Weapons (Scotland) Act 2007

(1) The Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17) is amended as follows.

(2) In section 4 (basic definitions)—

(a) in subsection (1)—

(i) the definitions of “custody-only prisoner” and “custody-only sentence” are repealed,

(ii) in the definition of “custody and community sentence” for “15 days or more” substitute “at least the prescribed period”,

(iii) after the definition of “Parole Board” insert—

““prescribed period” means such period as the Scottish Ministers may by order specify,”, and

(iv) after the definition of "punishment part" insert—

""short-term custody and community prisoner" means a person serving a short-term custody and community sentence,

"short-term custody and community sentence" means a sentence of imprisonment for an offence for a term of less than the prescribed period", and

(b) subsection (2) is repealed.

(3) For section 5 (release of custody-only prisoners on completion of sentence) substitute—

"Short-term custody and community prisoners

5 Release of short-term custody and community prisoners

As soon as a short-term custody and community prisoner has served one-half of the prisoner's short-term custody and community sentence the Scottish Ministers must release the prisoner on short-term community licence.".

(4) In Chapter 3 of Part 2, in the chapter title, for "Community" substitute "Short-term community, community".

(5) In section 29 (release on licence of certain prisoners: the supervision conditions), in subsection (2)(a)—

(a) in sub-paragraph (ii), the words from "serving" to the end are repealed,

(b) sub-paragraph (iii) is repealed,

(c) in sub-paragraphs (iv) and (v), for "person" substitute "short-term custody and community prisoner",

(d) in sub-paragraph (vi), for "person" substitute "short-term custody and community prisoner serving a sentence of imprisonment of 6 months or more and", and

(e) in sub-paragraph (vii), at the beginning insert "a short-term custody and community prisoner who is".

(6) After section 29 insert—

"Short-term community licences

29A Release on short-term community licence: conditions

(1) This section applies where, by virtue of section 5, the Scottish Ministers release a prisoner on short-term community licence.

(2) The Scottish Ministers must include in the prisoner's short-term community licence—

(a) the standard conditions, and

(b) where the prisoner falls within section 29(2), the supervision conditions.

(3) The Scottish Ministers may include in the prisoner's short-term community licence—

(a) where the prisoner does not fall within section 29(2), any of the supervision conditions,

(b) such other conditions as they consider appropriate.

(4) The Scottish Ministers may—

(a) vary any condition mentioned in subsection (2) or (3),

(c) cancel any condition mentioned in subsection (3),

(b) include any further conditions in the licence.

(5) The Scottish Ministers may not cancel any condition mentioned in subsection (2).

(6) Before exercising any of the powers conferred by subsection (3) or (4), the Scottish Ministers must, in pursuance of arrangements established under section 46A(1), co-operate with the appropriate local authority.

(7) In this section, "appropriate local authority", in relation to a short-term custody and community prisoner, means the local authority for the area in which the prisoner—

(a) resided immediately before the imposition of the short-term custody and community sentence, or

(b) intends to reside on release on short-term community licence.

(8) If, by virtue of subsection (7), two or more local authorities are the appropriate local authority in relation to a short-term custody and community prisoner, those authorities may agree that the functions conferred on them by subsection (5) and section 46A(2) may be carried out by only one of them.".

(7) After section 46 insert—

"*Assessment of conditions for short-term community licences*

46A Joint arrangements between Scottish Ministers and local authorities

(1) The Scottish Ministers and each local authority must jointly establish arrangements for the assessment and management of the risk posed in the local authority's area by short-term custody and community prisoners released on licence subject to the supervision conditions.

(2) For the purposes of assisting the Scottish Ministers in deciding whether, under section 29A(3)(a), to include any of the supervision conditions in a prisoner's short-term community licence, the Scottish Ministers and the appropriate local authority must, during the first half of a short-term custody and community prisoner's sentence, assess, in accordance with arrangements established under subsection (1), whether any of those conditions are appropriate.

(3) In this section, "appropriate local authority" is to be construed in accordance with section 29A(7) and (8).".

(8) In section 47 (curfew licences)—

(a) in subsection (1), after "to" insert "a short-term custody and community prisoner or",

(b) in subsection (2) for "the custody part of the prisoner's sentence" substitute—

"(a) in the case of a short-term custody and community prisoner, the first half of the prisoner's sentence,

(b) in the case of a custody and community prisoner, the custody part of the prisoner's sentence",

(c) after subsection (3) insert—

"(3A) The Scottish Ministers may release a short-term custody and community prisoner on curfew licence only—

(a) after the later of—

(i) the day on which the prisoner has served the greater of one-quarter or four weeks of the prisoner's sentence, or

(ii) the day falling 166 days before the expiry of one-half of the prisoner's sentence, and

(b) before the day falling 14 days before the expiry of one-half of the prisoner's sentence.",

(d) in subsection (4)—

(i) after "a" insert "custody and community", and

(ii) in paragraph (a)(ii), for "135" substitute "166", and

(e) in subsection (8), for "the custody part of the prisoner's sentence" substitute—

"(a) in the case of a short-term custody and community prisoner, the first half of the prisoner's sentence,

(b) in the case of a custody and community prisoner, the custody part of the prisoner's sentence".

(9) Schedule 2 amends the Custodial Sentences and Weapons (Scotland) Act (asp 17) and the 1995 Act in consequence of amendments made by this section.

19 Early removal of certain short-term prisoners from the United Kingdom

For schedule 6 to the Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17) (transitory amendments of the Prisoners and Criminal Proceedings (Scotland) Act 1993) substitute—

"SCHEDULE 6

(introduced by section 66(3))

TRANSITORY AMENDMENTS

1 Until the coming into force of the repeal by this Act of Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9), that Part has effect in accordance with paragraphs 2 to 4.

2 In section 1 (release of short-term and long-term prisoners), subsection (3) has effect as if for paragraphs (a) and (b) there were substituted "must,".

3 Section 9 (persons liable to removal from the United Kingdom) has effect as if—

(a) subsection (1) were repealed, and

(b) in subsection (3), after "section", where it first occurs, there were inserted "and sections 9A and 9B".

4 That Part has effect as if after section 9 there were inserted—

"**9A Persons eligible for removal from the United Kingdom**

(1) For the purposes of this Part, to be "eligible for removal from the United Kingdom" a person must show, to the satisfaction of the Scottish Ministers, that the condition in subsection (2) is met.

(2) The condition is that the person has the settled intention of residing permanently outside the United Kingdom if removed from prison under section 9B.

(3) The person must not be one who is liable to removal from the United Kingdom.

9B Early removal of certain short-term prisoners from the United Kingdom

(1) Subject to subsection (2), where a short-term prisoner is liable to, or eligible for, removal from the United Kingdom, the Scottish Ministers may remove the prisoner from prison under this section at any time during the period of 180 days ending with the day on which the prisoner will have served one-half of the prisoner's sentence.

(2) Subsection (1) does not apply in relation to a prisoner unless the prisoner has served one-quarter of the sentence.

(3) A prisoner removed from prison under this section—

(a) if liable to removal from the United Kingdom, is so removed only for the purpose of enabling the Secretary of State to remove the prisoner from the United Kingdom under powers conferred by—

(i) Schedule 2 or 3 to the Immigration Act 1971 (c.77), or

(ii) section 10 of the Immigration and Asylum Act 1999 (c.33),

(b) if eligible for removal from the United Kingdom, is so removed only for the purpose of enabling the prisoner to leave the United Kingdom in order to reside permanently outside the United Kingdom, and

(c) in either case, so long as remaining in the United Kingdom, remains liable to be detained in pursuance of the prisoner's sentence until the prisoner has served one-half of the sentence.

(4) So long as a prisoner removed from prison under this section remains in the United Kingdom but has not been returned to prison, any duty or power of the Scottish Ministers under section 1(1), 1AA or 3 is exercisable in relation to the prisoner as if the prisoner were in prison.

(5) The Scottish Ministers may by order amend the number of days for the time being specified in subsection (1).

(6) A statutory instrument containing an order under subsection (5) may not be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.

9C Re-entry into United Kingdom of prisoner removed from prison early

(1) This section applies in relation to a person (referred to in this section as "the removed person") who, after being removed from prison under section 9B, has been removed from the United Kingdom before serving one-half of the sentence.

(2) Where the removed person re-enters the United Kingdom at any time before the date on which the person would have served the person's sentence in full (but for the person's removal from prison under section 9B), the person is liable to be detained in pursuance of the person's sentence until the earlier of the following—

(a) the date of the expiry of the outstanding custodial period,

(b) the date on which the person would have served the person's sentence in full (but for the person's removal from prison under section 9B).

(3) In the case of a person liable to be detained under subsection (2), the duty to release the person under section 1(1) or 1AA(1) applies only after the expiry of the outstanding custodial period.

(4) A person who is liable to be detained by virtue of subsection (2) is, if at large, to be taken for the purposes of section 40 of the Prisons (Scotland) Act 1989 (c.45) (persons unlawfully at large) to be unlawfully at large.

(5) Subsection (2) does not prevent—

(a) the further removal from prison under section 9B(1) of a person falling within that subsection, or

(b) the further removal from the United Kingdom of such a person.

(6) In this section, the "outstanding custodial period" means, in relation to a removed person, a period of time equal to the period beginning with the date of removal from the United Kingdom and ending with the date on which the person would, but for the removal, have served one-half of the sentence.".

5 Until the coming into force of the repeal by this Act of Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9), paragraph (c) of section 24 of the International Criminal Court (Scotland) Act 2001 (asp 13) (limited disapplication of certain provisions relating to sentences) has effect as if—

(a) after "9" there were inserted ", 9A, 9B, 9C", and

(b) after "transfer" there were inserted ", removal".".

Other sentencing measures

20 Reports about supervised persons

(1) Section 203 of the 1995 Act (reports) is amended as follows.

(2) In subsection (3), for the words from "the offender" to the end substitute—

"(a) the offender,

(b) the offender's solicitor (if any), and

(c) the prosecutor.".

20A Pre-sentencing reports about organisations

After section 203 of the 1995 Act (reports), insert—

"203A Reports about organisations

(1) This section applies where an organisation is convicted of an offence.

(2) Before dealing with the organisation in respect of the offence, the court may obtain a report into the organisation's financial affairs and structural arrangements.

(3) The report is to be prepared by a person appointed by the court.

(4) The person appointed to prepare the report is referred to in this section as the "reporter".

(5) The court may issue directions to the reporter about—

(a) the information to be contained in the report,

(b) the particular matters to be covered by the report,

(c) the time by which the report is to be submitted to the court.

(6) The court may order the organisation to give the reporter and any person acting on the reporter's behalf—

(a) access at all reasonable times to the organisation's books, documents and other records,

(b) such information or explanation as the reporter thinks necessary.

(7) The reporter's costs in preparing the report are to be paid by the clerk of court, but the court may order the organisation to reimburse to the clerk all or a part of those costs.

(8) An order under subsection (7) may be enforced by civil diligence as if it were a fine.

(9) On submission of the report to the court, the clerk of court must provide a copy of the report to—

(a) the organisation,

(b) the organisation's solicitor (if any), and

(c) the prosecutor.

(10) The court must have regard to the report in deciding how to deal with the organisation in respect of the offence.

(11) If the court decides to impose a fine, the court must, in determining the amount of the fine, have regard to—

(a) the report, and

(b) if the court makes an order under subsection (7), the amount of costs that the organisation is required to reimburse under the order.

(12) Where the court—

(a) makes an order under subsection (7), and

(b) imposes a fine on the organisation,

any payment by the organisation is first to be applied in satisfaction of the order under subsection (7).

(13) Where the court also makes a compensation order in respect of the offence, any payment by the organisation is first to be applied in satisfaction of the compensation order before being applied in accordance with subsection (12).".

21 Extended sentences for certain sexual offences

In section 210A of the 1995 Act (extended sentences for sex and violent offenders)—

(a) in subsection (10), at the end of the definition of "sexual offence" add—

"(xxviii) an offence (other than one mentioned in the preceding paragraphs) where the court determines for the purposes of this paragraph that there was a significant sexual aspect to the offender's behaviour in committing the offence;", and

(b) after subsection (11) add—

"(12) An extended sentence may be passed by reference to paragraph (xxviii) only if the offender is or is to become, by virtue of Schedule 3 to the Sexual Offences Act 2003 (c.42), subject to the notification requirements of Part 2 of that Act.".

22 Effect of probation and absolute discharge

(1) In section 1(4) of the Rehabilitation of Offenders Act 1974 (c.53) (construction of references in Act to "conviction"), for "section 9 of the Criminal Justice (Scotland) Act 1949" substitute "section 247 of the Criminal Procedure (Scotland) Act 1995 (c.46)".

(2) In section 49(6) of the 1982 Act (offences relating to dangerous and annoying creatures: power to order disposal of creature), the words "or makes a probation order in relation to him" are repealed.

(3) In section 58(3) of the 1982 Act (convicted thief in possession: power to order forfeiture of tools etc.)—

(a) the words "or makes a probation order in relation to him" are repealed, and

(b) for the words from "discharged absolutely" to the end substitute ", as the case may be, discharged absolutely.".

(4) In section 96 of the 2005 Act (exclusion orders: supplementary provision), after subsection (2) insert—

"(2A) For the purposes of section 94, section 247(1) of the Criminal Procedure (Scotland) Act 1995 (c.46) (convictions deemed not be convictions where offender placed on probation or discharged absolutely) does not apply to a conviction for a violent offence within the meaning of section 94.".

(5) In section 129 of the 2005 Act (relevant and foreign offences), after subsection (4) add—

“(5) For the purposes of the provisions of this Act specified in subsection (6), section 247(1) and (2) of the Criminal Procedure (Scotland) Act 1995 (c.46) (convictions deemed not to be convictions where offender placed on probation or discharged absolutely) does not apply to a conviction for a relevant offence.

(6) Those provisions are—

(a) section 21(4),

(b) section 23(6),

(c) section 24,

(d) section 33(6),

(e) sections 41 to 44,

(f) section 73(3),

(g) section 75,

(h) sections 80 to 83,

(i) section 89(4) and (5),

(j) subsection (3) of this section, and

(k) section 130.”.

23 Offences aggravated by racial or religious prejudice

(1) In section 96 of the Crime and Disorder Act 1998 (c.37) (racially aggravated offences), for subsection (5) substitute—

“(5) The court must—

(a) state on conviction that the offence was racially aggravated,

(b) record the conviction in a way that shows that the offence was so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.”.

(2) In section 74 of the Criminal Justice (Scotland) Act 2003 (asp 7) (offences aggravated by religious prejudice)—

(a) after subsection (2) insert—

“(2A) It is immaterial whether or not the offender’s malice and ill-will is also based (to any extent) on any other factor.”,

(b) subsections (3) and (4) are repealed, and

(c) after subsection (4) insert—

“(4A) The court must—

(a) state on conviction that the offence was aggravated by religious prejudice,

(b) record the conviction in a way that shows that the offence was so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.”.

24A Mutual recognition of judgments and probation decisions

(1) The Scottish Ministers may by order make provision for the purposes of and in connection with implementing any obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).

(2) The provision may, in particular, confer functions—

(a) on the Scottish Ministers,

(b) on other persons.

(3) An order under subsection (1) may modify any enactment.

(4) In this section, the “Framework Decision” means Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

24B Minimum sentence for having in a public place an article with a blade or point

(1) In section 49 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (offence of having in a public place an article with a blade or point), after subsection (5) insert—

“(5A) Subsection (5B) applies where—

(a) a person is convicted of an offence under subsection (1),

(b) the offence was committed after the commencement of this subsection, and

(c) when the offence was committed, the person was aged 16 or over.

(5B) Where this subsection applies, the court must impose a sentence of imprisonment of at least 6 months (with or without a fine) unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify not doing so.”.

(2) In section 207(3A) of the 1995 Act (detention of young offenders: minimum sentences), after paragraph (a) insert—

"(aa) section 49(5B) of the Criminal Law (Consolidation) (Scotland) Act 1995 (minimum sentence for having in a public place an article with a blade or point);".

PART 2

CRIMINAL LAW

Serious organised crime

25 Involvement in serious organised crime

(1) A person who agrees with at least one other person to become involved in serious organised crime commits an offence.

(1A) Without limiting the generality of subsection (1), a person agrees to become involved in serious organised crime if the person—

(a) agrees to do something (whether or not the doing of that thing would itself constitute an offence), and

(b) knows or suspects, or ought reasonably to have known or suspected, that the doing of that thing will enable or further the commission of serious organised crime.

(2) For the purposes of this section and sections 26 to 28—

"serious organised crime" means crime involving two or more persons acting together for the principal purpose of committing or conspiring to commit a serious offence or a series of serious offences,

"serious offence" means an indictable offence—

(a) committed with the intention of obtaining a material benefit for any person, or

(b) which is an act of violence committed or a threat made with the intention of obtaining such a benefit in the future, and

"material benefit" means a right or interest of any description in any property, whether heritable or moveable and whether corporeal or incorporeal.

(3) A person guilty of an offence under subsection (1) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both.

26 Offences aggravated by connection with serious organised crime

(1) This subsection applies where it is—

(a) libelled in an indictment or specified in a complaint that an offence is aggravated by a connection with serious organised crime, and

(b) proved that the offence is so aggravated.

(2) An offence is aggravated by a connection with serious organised crime if the person committing the offence is motivated (wholly or partly) by the objective of committing or conspiring to commit serious organised crime.

(3) It is immaterial whether or not in committing the offence the person in fact enables the person or another person to commit serious organised crime.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated by a connection with serious organised crime.

(5) Where subsection (1) applies, the court must—

  (a) state on conviction that the offence is aggravated by a connection with serious organised crime,

  (b) record the conviction in a way that shows that the offence was so aggravated,

  (c) take the aggravation into account in determining the appropriate sentence, and

  (d) state—

    (i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

    (ii) otherwise, the reasons for there being no such difference.

27 Directing serious organised crime

(1) A person commits an offence by directing another person—

  (a) to commit a serious offence,

  (b) to commit an offence aggravated by a connection with serious organised crime under section 26.

(2) A person commits an offence by directing another person to direct a further person to commit an offence mentioned in subsection (1).

(3) For the purposes of subsections (1) and (2), a person directs another person to commit an offence if the person—

  (a) does something, or a series of things, to direct the person to commit the offence,

  (b) intends that the thing or things done will persuade the person to commit the offence, and

  (c) intends that the thing or things done will—

    (i) result in a person committing serious organised crime, or

    (ii) enable a person to commit serious organised crime.

(5) The person directing the other person commits an offence under subsection (1) whether or not the other person in fact commits—

  (a) a serious offence, or

  (b) an offence aggravated by a connection with serious organised crime under section 26.

(7) In this section "directing" a person to commit an offence includes inciting the person to commit the offence.

(8) A person guilty of an offence under subsection (1) or (2) is liable—

  (a) on conviction on indictment, to imprisonment for a term not exceeding 14 years or to a fine or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both.

28 Failure to report serious organised crime

(1) This section applies where—

(a) a person ("the person") knows or suspects that another person ("the other person") has committed—

(i) an offence under section 25 or 27, or

(ii) an offence which is aggravated by a connection with serious organised crime under section 26, and

(b) that knowledge or suspicion originates from information obtained—

(i) in the course of the person's trade, profession, business or employment, or

(ii) as a result of a close personal relationship between the person and the other person.

(2) In the case of knowledge or suspicion originating from information obtained by the person as a result of a close personal relationship between the person and the other person, this section applies only where the person has obtained a material benefit as a result of the commission of serious organised crime by the other person.

(3) The person commits an offence if the person does not disclose to a constable—

(a) the person's knowledge or suspicion, and

(b) the information on which that knowledge or suspicion is based.

(4) It is a defence for a person charged with an offence under subsection (3) to prove that the person had a reasonable excuse for not making the disclosure.

(5) Subsection (3) does not require disclosure by a person who is a professional legal adviser (an "adviser") of—

(a) information which the adviser obtains in privileged circumstances, or

(b) knowledge or a suspicion based on information obtained in privileged circumstances.

(6) For the purpose of subsection (5), information is obtained by an adviser in privileged circumstances if it comes to the adviser, otherwise than for the purposes of committing serious organised crime—

(a) from a client (or from a client's representative) in connection with the provision of legal advice by the adviser to that person,

(b) from a person seeking legal advice from the adviser (or from that person's representative), or

(c) from a person, for the purpose of actual or contemplated legal proceedings.

(7) The reference in subsection (3) to a constable includes a reference to a police member of the Scottish Crime and Drug Enforcement Agency.

(8) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both.

Genocide, crimes against humanity and war crimes

28A Genocide, crimes against humanity and war crimes: UK residents

(1) The International Criminal Court (Scotland) Act 2001 (asp 13) is amended as follows.

(2) After section 8, insert—

“**8A Meaning of “United Kingdom national” and “United Kingdom resident”**

(1) In this Part—

“United Kingdom national” means—

(a) a British citizen, a British Overseas Territories citizen, a British National (Overseas) or a British Overseas citizen,

(b) a person who under the British Nationality Act 1981 (c.61) is a British subject, or

(c) a British protected person within the meaning of that Act,

“United Kingdom resident” means a person who is resident in the United Kingdom.

(2) To the extent that it would not otherwise be the case, the following individuals are to be treated for the purposes of this Part as being resident in the United Kingdom—

(a) an individual who has indefinite leave to remain in the United Kingdom,

(b) any other individual who has made an application for such leave (whether or not it has been determined) and who is in the United Kingdom,

(c) an individual who has leave to enter or remain in the United Kingdom for the purposes of work or study and who is in the United Kingdom,

(d) an individual who has made an asylum claim, or a human rights claim, which has been granted,

(e) any other individual who has made an asylum claim or a human rights claim (whether or not the claim has been determined) and who is in the United Kingdom,

(f) an individual named in an application for indefinite leave to remain, an asylum claim or a human rights claim as a dependant of the individual making the application or claim if—

(i) the application or claim has been granted, or

(ii) the named individual is in the United Kingdom (whether or not the application or claim has been determined),

(g) an individual who would be liable to removal or deportation from the United Kingdom but cannot be removed or deported because of section 6 of the Human Rights Act 1998 (c.42) or for practical reasons,

(h) an individual—

(i) against whom a decision to make a deportation order under section 5(1) of the Immigration Act 1971 (c.77) by virtue of section 3(5)(a) of that Act (deportation conducive to the public good) has been made,

(ii) who has appealed against the decision to make the order (whether or not the appeal has been determined), and

(iii) who is in the United Kingdom,

(i) an individual who is an illegal entrant within the meaning of section 33(1) of the Immigration Act 1971 or who is liable to removal under section 10 of the Immigration and Asylum Act 1999 (c.33),

(j) an individual who is detained in lawful custody in the United Kingdom.

(3) When determining for the purposes of this Part whether any other individual is resident in the United Kingdom regard is to be had to all relevant considerations including—

(a) the periods during which the individual is, has been or intends to be in the United Kingdom,

(b) the purposes for which the individual is, has been or intends to be in the United Kingdom,

(c) whether the individual has family or other connections to the United Kingdom and the nature of those connections, and

(d) whether the individual has an interest in residential property located in the United Kingdom.

(4) In this section—

"asylum claim" means—

(a) a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention for the claimant to be removed from, or required to leave, the United Kingdom,

(b) a claim that the claimant would face a real risk of serious harm if removed from the United Kingdom,

"Convention rights" means the rights identified as Convention rights by section 1 of the Human Rights Act 1998,

"detained in lawful custody" means—

(a) detained in pursuance of a sentence of imprisonment or detention, a sentence of custody for life or a detention and training order,

(b) remanded in or committed to custody by an order of a court,

(c) detained pursuant to an order under section 2 of the Colonial Prisoners Removal Act 1884 (c.31) or a warrant under section 1 or 4A of the Repatriation of Prisoners Act 1984 (c.47),

(d) detained under Part 3 of the Mental Health Act 1983 (c.20) or by virtue of an order under section 5 of the Criminal Procedure (Insanity) Act 1964 (c.84) or section 6 or 14 of the Criminal Appeal Act 1968 (c.19) (hospital orders etc.),

(e) detained by virtue of an order under Part 6 of the Criminal Procedure (Scotland) Act 1995 (c.46) (other than an order under section 60C) or a hospital direction under section 59A of that Act, and includes detention by virtue of the special restrictions set out in Part 10 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) to which a person is subject by virtue of an order under section 59 of the Criminal Procedure (Scotland) Act 1995,

(f) detained under Part 3 of the Mental Health (Northern Ireland) Order 1986 (SI 1986/595) or by virtue of an order under section 11 or 13(5A) of the Criminal Appeal (Northern Ireland) Act 1980 (c. 47),

"human rights claim" means a claim that to remove the claimant from, or to require the claimant to leave, the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Convention) as being incompatible with the person's Convention rights,

"the Refugee Convention" means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol to the Convention,

"serious harm" has the meaning given by article 15 of Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

(5) In this section, a reference to having leave to enter or remain in the United Kingdom is to be construed in accordance with the Immigration Act 1971.

(6) This section applies in relation to any offence under this Part (whether committed before or after the coming into force of this section).".

(3) In section 28(1) (interpretation), the definitions of "United Kingdom national" and "United Kingdom resident" are repealed.

28B Genocide, crimes against humanity and war crimes: retrospective application

After section 9 of the International Criminal Court (Scotland) Act 2001 (asp 13) insert—

"9A Retrospective application of certain offences

(1) Section 1 of this Act applies to acts committed on or after 1 January 1991.

(2) But that section does not apply to an act committed before 17 December 2001 which constitutes a crime against humanity or a war crime within article 8.2(b) or (e) unless, at the time the act was committed, it amounted in the circumstances to a criminal offence under international law.

(3) Section 2 of this Act applies to conduct engaged in on or after 1 January 1991.

(4) The references in subsections (1), (3) and (5) of that section to an offence include an act or conduct that would not constitute an offence but for this section.

(5) Any enactment or rule of law relating to an offence ancillary to a relevant offence applies—

(a) to conduct engaged in on or after 1 January 1991, and

(b) even if the act or conduct constituting the relevant offence would not constitute such an offence but for this section.

(6) But section 2 of this Act, and any enactment or rule of law relating to an offence ancillary to a relevant offence, do not apply to—

(a) conduct engaged in before 17 December 2001, or

(b) conduct engaged in on or after that date which was ancillary to an act or conduct that—

(i) was committed or engaged in before that date, and

(ii) would not constitute a relevant offence but for this section,

unless, at the time the conduct was engaged in, it amounted in the circumstances to a criminal offence under international law.

(7) Section 5 of this Act, so far as it has effect in relation to relevant offences, applies—

(a) to failures to exercise control of the kind mentioned in subsection (2) or (3) of that section which occurred on or after 1 January 1991, and

(b) even if the act or conduct constituting the relevant offence would not constitute an offence but for this section.

(8) But section 5 of this Act, so far as it has effect in relation to relevant offences, does not apply to a failure to exercise control of the kind mentioned in subsection (2) or (3) of that section which occurred before 17 December 2001 unless, at the time it occurred, it amounted in the circumstances to a criminal offence under international law.

(9) In this section, "relevant offence" means an offence under section 1 or 2 of this Act or an offence ancillary to such an offence.

9B Provision supplemental to section 9A: modification of penalties

(1) This section applies in relation to—

(a) an offence under section 1 of this Act on account of an act committed before 17 December 2001 constituting genocide, if at the time the act was committed it also amounted to an offence under section 1 of the Genocide Act 1969,

(b) an offence under section 1 of this Act on account of an act committed before 1 September 2001 constituting a war crime, if at the time the act was committed it also amounted to an offence under section 1 of the Geneva Conventions Act 1957 (c.52) (grave breaches of the Conventions),

(c) an offence ancillary to an offence within paragraph (a) or (b) above.

(2) Section 3(5) of this Act has effect in relation to such an offence as if for "30 years" there were substituted "14 years".".

Articles banned in prison

29 Articles banned in prison

(1) In section 41 of the Prisons (Scotland) Act 1989 (c.45) (unlawful introduction of tobacco etc. into prison)—

(a) for subsection (1) substitute—

"(1) A person commits an offence if without reasonable excuse the person—

(a) brings or otherwise introduces into a prison a proscribed article (or attempts to do so),

(b) takes out of or otherwise removes from a prison a proscribed article (or attempts to do so).

(1A) A person who commits an offence under this section—

(a) where the proscribed article falls within paragraphs (b) to (f) of subsection (9A), is liable on summary conviction to imprisonment for a period not exceeding 30 days or to a fine not exceeding level 3 on the standard scale (or to both),

(b) where the proscribed article falls within paragraph (a) of subsection (9A) (whether or not also within paragraph (f) of that subsection), is liable to the penalties set out in section 41ZA(5).",

(b) in subsection (2), for "the foregoing subsection" substitute "subsection (1)(a),",

(c) in subsection (2A)—

(i) for "article mentioned in paragraphs (a) to (e) of subsection (1) above" substitute "proscribed article", and

(ii) for "article mentioned in those paragraphs" substitute "proscribed article",

(d) in subsection (2B)(c), for the words from "mentioned" to "that subsection)" substitute "that is a proscribed article falling within paragraph (d) to (f) of subsection (9A) (but not also within paragraph (b) or (c) of that subsection), or falling within paragraph (a) of that subsection",

(e) in subsection (3), for "subsection (1) above" substitute "this section or section 41ZA",

(f) after subsection (9) insert—

"(9A) In this section, a "proscribed article" is—

(a) any personal communication device,

(b) any drug,

(c) any firearm or ammunition,

(d) any offensive weapon,

(e) any article which has a blade or is sharply pointed,

(f) any article (or other article) which is a prohibited article within the meaning of rules made under section 39.

(9B) In this section, a "personal communication device" includes—

(a) a mobile telephone,

(b) any other portable electronic device that is capable of transmitting or receiving a communication of any kind,

(c) any—

(i) component part of a device mentioned in paragraph (a) or (b),

(ii) article that is designed or adapted for use with such a device.”, and

(g) in subsection (10), in the definition of “offensive weapon”, for “the Prevention of Crime Act 1953” substitute “section 47 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)”.

(2) After section 41 of that Act insert—

“41ZA Further provision for communication devices

(1) A person commits an offence if, knowing another person to be a prisoner, the person gives a personal communication device to the prisoner while the prisoner is inside a prison.

(2) A person commits an offence if, by means of a personal communication device, the person—

(a) transmits, from inside a prison, a communication of any kind, or

(b) intentionally receives, when inside a prison, a communication of any kind.

(3) A person commits an offence if, while inside a prison, the person is in possession of a personal communication device.

(4) A person who commits an offence under subsections (1) to (3) is liable to the penalties set out in subsection (5).

(5) The penalties are—

(a) on conviction on indictment, to imprisonment for a period not exceeding 2 years or to a fine (or to both),

(b) on summary conviction, to imprisonment for a period not exceeding 12 months or to a fine not exceeding the statutory maximum (or to both).

(6) In this section, “personal communication device” is to be construed in accordance with section 41(9B).

41ZB Exceptions as to communication devices

(1) No offence—

(a) under section 41, where the proscribed article falls within paragraph (a) of subsection (9A) (whether or not also within paragraph (f) of that subsection), or

(b) under section 41ZA(1) to (3),

is committed by a person where subsection (2) applies.

(2) This subsection applies—

(a) if (and in so far as) the act which constitutes the offence is done by the person at or in relation to a designated area at the prison, or

(b) if (and in so far as) the person is acting in circumstances to which an authorisation under subsection (8) applies.

(3) No offence—

(a) under section 41, where the proscribed article falls within paragraph (a) of subsection (9A) (whether or not also within paragraph (f) of that subsection), or

(b) under section 41ZA(2) or (3),

is committed by a prison officer (or other prison official) where subsection (4) applies.

(4) This subsection applies—

(a) if the device is one supplied to the person specifically for use in the course of the person's official duties at the prison, or

(b) if (and in so far as) the person is acting in accordance with those duties.

(5) No offence under section 41ZA(3) is committed by a person other than a prisoner if in the circumstances there is a reasonable excuse for the possession.

(6) The defences mentioned in subsection (7) apply in any proceedings for an offence under—

(a) section 41(1), where the proscribed article falls within paragraph (a) of subsection (9A) (whether or not also within paragraph (f) of that subsection), or

(b) section 41ZA(1) to (3).

(7) In relation to such an offence, it is a defence for the accused person to show that—

(a) the person reasonably believed that the person was acting in circumstances to which an authorisation under subsection (8) applied (even though no such authorisation did apply), or

(b) in the circumstances there was an overriding public interest which justified the person's actions.

(8) An authorisation under this subsection is a written authorisation that is given—

(a) in favour of any person specified in the authorisation (or person of a specified description),

(b) for a specified purpose, and

(c) by—

(i) the governor or director of a prison in relation to activities at that prison, or

(ii) the Scottish Ministers in relation to activities at any specified prison.

(9) A designated area referred to in subsection (2)(a) is any part of the prison, used solely or principally for an administrative or similar purpose, that is specified as such by a written designation given under this paragraph by the governor or director of the prison.

(10) Prison officers (or other prison officials) who are Crown servants or agents do not benefit from Crown immunity in relation to an offence under—

(a) section 41, where the proscribed article falls within paragraph (a) of subsection (9A) of that section (whether or not also within paragraph (f) of that subsection), or

(b) section 41ZA.".

Crossbows, knives etc.

30 Sale and hire of crossbows to persons under 18

(1) The Crossbows Act 1987 (c.32) is amended as follows.

(2) In section 1 (sale and letting on hire), the words from "unless" to the end are repealed.

(3) After that section insert—

"1A Defences

(1) It is a defence for a person charged with an offence under section 1 (referred to in this section as "the accused") to show that—

(a) the accused believed the person to whom the crossbow or part was sold or let on hire (referred to in this section as "the purchaser or hirer") to be aged 18 or over, and

(b) either—

(i) the accused had taken reasonable steps to establish the purchaser or hirer's age, or

(ii) no reasonable person could have suspected from the purchaser or hirer's appearance that the purchaser or hirer was under the age of 18.

(2) For the purposes of subsection (1)(b)(i), the accused is to be treated as having taken reasonable steps to establish the purchaser or hirer's age if and only if—

(a) the accused was shown any of the documents mentioned in subsection (3), and

(b) the document would have convinced a reasonable person.

(3) Those documents are any document bearing to be—

(a) a passport,

(b) a European Union photocard driving licence, or

(c) such other document, or a document of such other description, as the Scottish Ministers may by order made by statutory instrument prescribe.

(4) A statutory instrument containing an order under subsection (3)(c) is subject to annulment in pursuance of a resolution of the Scottish Parliament.".

(4) After section 3 insert—

"3A Test purchasing

(1) A person under the age of 18 who buys or hires, or attempts to buy or hire, a crossbow or a part of a crossbow does not commit an offence under section 2

or 3 if the person is authorised to do so by the chief constable for the purpose of determining whether an offence is being committed under section 1.

(2) A chief constable may authorise a person under the age of 18 to buy or hire, or attempt to buy or hire, a crossbow or a part of a crossbow only if satisfied that all reasonable steps have been or will be taken to—

(a) ensure the person's safety, and

(b) avoid any risk to the person's welfare.".

31 Sale and hire of knives and certain other articles to persons under 18

(1) Section 141A of the Criminal Justice Act 1988 (c.33) (sale of knives and certain articles with blade or point to persons under eighteen) is amended as follows.

(2) In subsection (1), after "sells" insert "or lets on hire".

(3) In subsection (3A), after "sell" insert "or let on hire".

(4) For subsection (4) substitute—

"(4) It is a defence for a person charged with an offence under subsection (1) (referred to in this section as "the accused") to show that—

(a) the accused believed the person to whom the article was sold or let on hire (referred to in this section as "the purchaser or hirer") to be of or above the relevant age, and

(b) either—

(i) the accused had taken reasonable steps to establish the purchaser or hirer's age, or

(ii) no reasonable person could have suspected from the purchaser or hirer's appearance that the purchaser or hirer was aged under the relevant age.

(4A) For the purposes of subsection (4)(b)(i), the accused is to be treated as having taken reasonable steps to establish the purchaser or hirer's age if and only if—

(a) the accused was shown any of the documents mentioned in subsection (4B), and

(b) the document would have convinced a reasonable person.

(4B) Those documents are any document bearing to be—

(a) a passport,

(b) a European Union photocard driving licence, or

(c) such other document, or a document of such other description, as the Scottish Ministers may by order prescribe.

(4C) In subsection (4), "the relevant age" is—

(a) in the case where the article is a knife or knife blade designed for domestic use, 16 years, and

(b) in any other case, 18 years.".

Offensive weapons etc.

31A Offensive weapons etc.

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.

(2) In section 47 (prohibition of the carrying of offensive weapons)—

(a) in subsection (1), the words from "without" to "him," are repealed,

(b) after subsection (1), insert—

"(1A) It is a defence for a person charged with an offence under subsection (1) to show that the person had a reasonable excuse or lawful authority for having the weapon with the person in the public place.", and

(c) for subsection (4), substitute—

"(4) In this section—

"offensive weapon" means any article—

(a) made or adapted for use for causing injury to a person, or

(b) intended, by the person having the article, for use for causing injury to a person by—

(i) the person having it, or

(ii) some other person,

"public place" means any place other than—

(a) domestic premises,

(b) school premises (within the meaning of section 49A(6)),

(c) a prison (within the meaning of section 49C(7)),

"domestic premises" means premises occupied as a private dwelling (including any stair, passage, garden, yard, garage, outhouse or other appurtenance of such premises which is not used in common by the occupants of more than one such dwelling).".

(3) In section 49 (offence of having in public place article with blade or point)—

(a) in subsection (4), for the words "prove that he had good reason" substitute "show that the person had a reasonable excuse",

(b) in subsection (5), for "prove" substitute "show", and

(c) for subsection (7), substitute—

"(7) In this section, "public place" has the same meaning as in section 47(4).".

(4) In section 49A (offence of having article with blade or point (or offensive weapon) on school premises)—

(a) in subsection (3), for the words "prove that he had good reason" substitute "show that the person had a reasonable excuse", and

(b) in subsection (4), for "prove" substitute "show".

(5) In section 49C(2) (offence of having offensive weapon etc. in prison), for the words "prove that he had good reason" substitute "show that the person had a reasonable excuse".

(6) In section 50(4) (extension of constable's power to stop, search and arrest without warrant), for "3" substitute "4".

Stalking

31B Offence of stalking

(1) A person ("A") commits an offence, to be known as the offence of stalking, where A stalks another person ("B").

(2) For the purposes of subsection (1), A stalks B where—

(a) A engages in a course of conduct,

(b) subsection (3) or (4) applies, and

(c) A's course of conduct causes B to suffer—

(i) physical or psychological harm, or

(ii) apprehension or fear for B's own safety or for the safety of any other person.

(3) This subsection applies where A engages in the course of conduct with the intention of causing such harm to B or of arousing such apprehension or fear in B.

(4) This subsection applies where A knows, or ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause such harm or arouse such apprehension or fear.

(5) It is a defence for a person charged with an offence under this section to show that the course of action—

(a) was authorised by virtue of any enactment or rule of law,

(b) was engaged in for the purpose of preventing or detecting crime, or

(c) was, in the particular circumstances, reasonable.

(6) In this section—

"conduct" includes (but is not limited to)—

(a) following B or any other person,

(b) contacting B or any other person by post, telephone, email, text message or any other method,

(c) publishing any statement or other material—

(i) relating or purporting to relate to B or to any other person,

(ii) purporting to originate from B or from any other person,

(d) tracing the use by B or by any other person of the internet, email or any other form of electronic communication,

(e) entering or loitering in the vicinity of—

(i) the place of residence of B or of any other person,

(ii) the place of work or business of B or of any other person,

(iii) any place frequented by B or of any other person,

(f) interfering with any property in the possession of B or of any other person,

(g) giving offensive material to B or to any other person or leaving such material where it may be found by, given to or brought to the attention of B or any other person,

(h) keeping B or any other person under surveillance,

(i) acting in any other way that a reasonable person would expect would arouse apprehension or fear in B for B's own safety or for the safety of any other person, and

"course of conduct" involves conduct on at least two occasions.

(7) A person convicted of the offence of stalking is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or to both.

Sexual offences

32 Certain sexual offences by non-natural persons

(1) The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) is amended as follows.

(2) At the end of each of the following provisions insert "or a fine or both"—

(a) subsections (4)(b) and (5)(b) of section 9 (paying for sexual services of a child),

(b) subsection (2)(b) of section 10 (causing or inciting provision by child of sexual services or child pornography),

(c) subsection (2)(b) of section 11 (controlling a child providing sexual services or involved in pornography), and

(d) subsection (2)(b) of section 12 (arranging or facilitating provision by child of sexual services or child pornography).

(3) After section 14 insert—

"14A Offences by bodies corporate etc.

(1) Subsection (2) applies where an offence under sections 10 to 12 committed—

(a) by a body corporate, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—

(i) is a director, manager, secretary or other similar officer of the body corporate, or

(ii) purports to act in any such capacity,

(b) by a Scottish partnership, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—

(i) is a partner, or

(ii) purports to act in that capacity,

(c) by an unincorporated association other than a Scottish partnership, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—

(i) is concerned in the management or control of the association, or

(ii) purports to act in the capacity of a person so concerned.

(2) The individual (as well as the body corporate, Scottish partnership or, as the case may be, unincorporated association) commits the offence and is liable to be proceeded against and punished accordingly.

(3) Where the affairs of a body corporate are managed by its members, this section applies in relation to acts and defaults of a member in connection with the member's function of management as if the member were a director of the body corporate.".

33 Indecent images of children

(1) In the 1982 Act—

(a) in section 52 (indecent photographs etc. of children)—

(i) in subsection (2C)(b), for "a pseudo-photograph" substitute "an indecent pseudo-photograph",

(ii) after subsection (8) add—

"(9) In this section, references to a photograph also include a tracing or other image, whether made by electronic or other means (of whatever nature), which is not itself a photograph or pseudo-photograph but which is derived from the whole or part of a photograph or pseudo-photograph (or a combination of either or both).

(10) And subsection (2B) applies in relation to such an image as it applies in relation to a pseudo-photograph.", and

(b) in section 52A (possession of indecent photographs of children), in subsection (4), for "and (8)" substitute "and (8) to (10)".

(2) In Schedule 1 to the 1995 Act (offences against children under the age of 17 years to which special provisions apply), in paragraph 2B, after "photograph" insert "or pseudo-photograph".

(3) In Schedule 3 to the Sexual Offences Act 2003 (c.42) (list of sexual offences for the purposes of Part 2)—

(a) in paragraph 44, for the words from "the" where it third occurs to the end substitute—

"(a) the prohibited goods included indecent photographs or pseudo-photographs of persons under 16 and the offender—

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph.".

(b) in paragraph 97(b), for "and (8)" substitute "and (8) to (10)".

34 Extreme pornography

(1) In section 51 of the 1982 Act (obscene material)—

(a) for subsection (3) substitute—

“(3) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a period not exceeding 12 months or to a fine not exceeding the statutory maximum or to both, or

(b) on conviction on indictment—

(i) in a case where the obscene material is or includes an extreme pornographic image, to imprisonment for a period not exceeding 5 years or to a fine or to both, or

(ii) in any other case, to imprisonment for a period not exceeding 3 years or to a fine or to both.”, and

(b) in subsection (8)—

(i) before the definition of “material” insert—

““extreme pornographic image” is to be construed in accordance with section 51A;”, and

(ii) the definition of “prescribed sum” is repealed.

(2) After section 51 of that Act insert—

“51A Extreme pornography

(1) A person who is in possession of an extreme pornographic image is guilty of an offence under this section.

(2) An extreme pornographic image is an image which is all of the following—

(a) obscene,

(b) pornographic,

(c) extreme.

(3) An image is pornographic if it is of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal.

(4) Where (as found in the person’s possession) an image forms part of a series of images, the question of whether the image is pornographic is to be determined by reference to—

(a) the image itself, and

(b) where the series of images is such as to be capable of providing a context for the image, its context within the series of images,

and reference may also be had to any sounds accompanying the image or the series of images.

(5) So, for example, where—

(a) an image forms an integral part of a narrative constituted by a series of images, and

(b) having regard to those images as a whole, they are not of such a nature that they must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal,

the image may, by virtue of being part of that narrative, be found not to be pornographic (even if it may have been found to be pornographic where taken by itself).

(6) An image is extreme if it depicts, in an explicit and realistic way any of the following—

(a) an act which takes or threatens a person's life,

(b) an act which results, or is likely to result, in a person's severe injury,

(c) rape or other non-consensual penetrative sexual activity,

(d) sexual activity involving (directly or indirectly) a human corpse,

(e) an act which involves sexual activity between a person and an animal (or the carcase of an animal).

(7) In determining whether (as found in the person's possession) an image depicts an act mentioned in subsection (6), reference may be had to—

(a) how the image is or was described (whether the description is part of the image itself or otherwise),

(b) any sounds accompanying the image,

(c) where the image forms an integral part of a narrative constituted by a series of images—

(i) any sounds accompanying the series of images,

(ii) the context provided by that narrative.

(8) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a period not exceeding 12 months or to a fine not exceeding the statutory maximum or to both,

(b) on conviction on indictment, to imprisonment for a period not exceeding 3 years or to a fine or to both.

(9) In this section, an "image" is—

(a) a moving or still image (made by any means), or

(b) data (stored by any means) which is capable of conversion into such an image.

51B Extreme pornography: excluded images

(1) An offence is not committed under section 51A if the image is an excluded image.

(2) An "excluded image" is an image which is all or part of a classified work.

(3) An image is not an excluded image where—

(a) it has been extracted from a classified work, and

(b) it must be reasonably be assumed to have been extracted (whether with or without other images) from the work solely or principally for the purpose of sexual arousal.

(4) In determining whether (as found in the person's possession) the image was extracted from the work for the purpose mentioned in subsection (3)(b), reference may be had to—

(a) how the image was stored,

(b) how the image is or was described (whether the description is part of the image itself or otherwise),

(c) any sounds accompanying the image,

(d) where the image forms an integral part of a narrative constituted by a series of images—

(i) any sounds accompanying the series of images,

(ii) the context provided by that narrative.

(5) In this section—

"classified work" means a video work in respect of which a classification certificate has been issued by a designated authority,

"classification certificate" and "video work" have the same meanings as in the Video Recordings Act 1984 (c.39),

"designated authority" means an authority which has been designated by the Secretary of State under section 4 of that Act,

"extract" includes an extract of a single image,

"image" is to be construed in accordance with section 51A.

51C Extreme pornography: defences

(1) Where a person ("A") is charged with an offence under section 51A, it is a defence for A to prove one or more of the matters mentioned in subsection (2).

(2) The matters are—

(a) that A had a legitimate reason for being in possession of the image concerned,

(b) that A had not seen the image concerned and did not know, nor had any cause to suspect, it to be an extreme pornographic image,

(c) that A—

(i) was sent the image concerned without any prior request having been made by or on behalf of A, and

(ii) did not keep it for an unreasonable time.

(3) Where A is charged with an offence under section 51A, it is a defence for A to prove that—

(a) A directly participated in the act depicted, and

(b) subsection (4) applies.

(4) This subsection applies—

(a) in the case of an image which depicts an act described in subsection (6)(a) of that section, if the act depicted did not actually take or threaten a person's life,

(b) in the case of an image which depicts an act described in subsection (6)(b) of that section, if the act depicted did not actually result in (nor was it actually likely to result in) a person's severe injury,

(c) in the case of an image which depicts an act described in subsection (6)(c) of that section, if the act depicted did not actually involve non-consensual activity,

(d) in the case of an image which depicts an act described in subsection (6)(d) of that section, if what is depicted as a human corpse was not in fact a corpse,

(e) in the case of an image which depicts an act described in subsection (6)(e) of that section, if what is depicted as an animal (or the carcase of an animal) was not in fact an animal (or a carcase).

(5) The defence under subsection (3) is not available if A shows, gives or offers for sale the image to any person who was not also a direct participant in the act depicted.

(6) In this section "image" and "extreme pornographic image" are to be construed in accordance with section 51A.".

(3) In Schedule 3 to the Sexual Offences Act 2003 (c.42) (sexual offences for the purposes of Part 2 of that Act), after paragraph 44 insert—

"44A An offence under section 51A of the Civic Government (Scotland) Act 1982 (c.45) (possession of extreme pornography) if—

(a) the offender—

(i) was 18 or over, and

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of more than 12 months, and

(b) in imposing sentence, the court determines that it is appropriate that Part 2 of this Act should apply in relation to the offender.".

34A Voyeurism: additional forms of conduct

(1) The Sexual Offences (Scotland) Act 2009 (asp 9) is amended as follows.

(2) In section 9 (voyeurism)—

(a) after subsection (4), insert—

"(4A) The fourth thing is that A—

(a) without another person ("B") consenting, and

(b) without any reasonable belief that B consents,

operates equipment beneath B's clothing with the intention of enabling A or another person ("C"), for a purpose mentioned in subsection (7), to observe B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,

records an image beneath B’s clothing of B’s genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B’s genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at the image.”,

(b) in subsection (5)—

(i) for “fourth” substitute “sixth”, and

(ii) for paragraph (b), substitute—

“(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).”, and

(c) in subsection (7), for “and (4)” substitute “, (4), (4A) and (4B)”.

(3) In section 10(2) (interpretation of section 9), after “section 9(3)” insert “and (4A)”.

(4) In section 26 (voyeurism towards a young child)—

(a) after subsection (4), insert—

“(4A) The fourth thing is that A operates equipment beneath B’s clothing with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe—

(a) B’s genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B’s genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A records an image beneath B’s clothing of—

(a) B’s genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B’s genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at the image.”,

(b) in subsection (5)—

(i) for “fourth” substitute “sixth”, and

(ii) for paragraph (b), substitute—

“(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).”,

(c) in subsection (7), for “and (4)” substitute “, (4), (4A) and (4B)”, and

(d) in subsection (8)—

(i) after “section 9(3)” insert “, (4A)”, and

(ii) after “subsections (3)” insert “, (4A)”.

(5) In section 36 (voyeurism towards an older child)—

(a) after subsection (4), insert—

“(4A) The fourth thing is that A operates equipment beneath B’s clothing with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe—

(a) B’s genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B’s genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A records an image beneath B’s clothing of—

(a) B’s genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B’s genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at the image.”,

(b) in subsection (5)—

(i) for “fourth” substitute “sixth”, and

(ii) for paragraph (b), substitute—

“(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).”,

(c) in subsection (7), for “and (4)” substitute “, (4), (4A) and (4B)”, and

(d) in subsection (8)—

(i) after “section 9(3)” insert “, (4A)”, and

(ii) after “subsections (3)” insert “, (4A)”.

34B Sexual offences: defences in relation to offences against older children

In section 39 of the Sexual Offences (Scotland) Act 2009 (asp 9) (defences in relation to offences against older children), in subsection (4)(c), after “section 30(2)(d)” insert “or (e)”.

34C Penalties for offences of brothel-keeping and living on the earnings of prostitution

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.

(2) In section 11 (trading in prostitution and brothel-keeping)—

(a) in subsection (1), for the words from "liable" to the end substitute "guilty of an offence and liable to the penalties set out in subsection (1A)",

(b) after that subsection insert—

"(1A) A person—

(a) guilty of the offence set out in subsection (1)(a) is liable—

(i) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(ii) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both,

(b) guilty of the offence set out in subsection (1)(b) is liable—

(i) on conviction on indictment, to imprisonment for a term not exceeding two years,

(ii) on summary conviction, to imprisonment for a term not exceeding 12 months.",

(c) in subsection (4), for "subsection (1)" substitute "subsection (1A)(a)", and

(d) for subsection (6) substitute—

"(6) A person guilty of an offence under subsection (5) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both.".

(3) In section 13(9) (living on earnings of another from male prostitution), for paragraphs (a) and (b) substitute—

"(a) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both.".

People trafficking

35 People trafficking

(1) In section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (traffic in prostitution etc.)—

(a) in subsection (1)(a)—

(i) after "arrival in" insert "or the entry into",

(ii) after "such arrival" insert "or entry",

(aa) after subsection (1) insert—

"(1A) A person to whom subsection (6) applies commits an offence if the person arranges or facilitates—

(a) the arrival in or the entry into a country (other than the United Kingdom), or travel there (whether or not following such arrival or entry) by, an individual and—

(i) intends to exercise control over prostitution by the individual or to involve the individual in the making or production of obscene or indecent material; or

(ii) believes that another person is likely to exercise such control or so to involve the individual,

there or elsewhere; or

(b) the departure from a country (other than the United Kingdom) of an individual and—

(i) intends to exercise such control or so to involve the individual; or

(ii) believes that another person is likely to exercise such control or so to involve the individual,

outwith the country.",

(ab) in subsection (2), for "subsection (1)" substitute "subsections (1) and (1A)",

(b) for subsection (4) substitute—

"(4) Subsections (1) and (1A) apply to anything done in or outwith the United Kingdom.",

(c) for subsection (5) substitute—

"(5) A person may be prosecuted, tried and punished for any offence to which this section applies—

(a) in any sheriff court district in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).", and

(d) in subsection (6)—

(i) the word "and" immediately following paragraph (e) is repealed, and

(ii) after paragraph (f) insert—

"(g) a person who at the time of the offence was habitually resident in Scotland, and

(h) a body incorporated under the law of a part of the United Kingdom.".

(2) In section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation)—

(a) in subsection (1), after "arrival in" insert "or the entry into",

(b) in subsection (2), the words from "in" where it first occurs to "committed" are repealed,

(c) after subsection (3) insert—

"(3A) A person to whom section 5(2) applies commits an offence if—

(a) in relation to an individual (the "passenger"), he arranges or facilitates—

(i) the arrival in or the entry into a country other than the United Kingdom of the passenger,

(ii) travel by the passenger within a country other than the United Kingdom,

(iii) the departure of the passenger from a country other than the United Kingdom, and

(b) he—

(i) intends to exploit the passenger, or

(ii) believes that another person is likely to exploit the passenger,

(wherever the exploitation is to occur).",

(d) in subsection (4)—

(i) in paragraph (b), the words from "as a result" to "Act 2004," become sub-paragraph (i),

(ii) immediately following that sub-paragraph insert "or

(ii) which, were it done in Scotland, would constitute an offence mentioned in sub-paragraph (i),",

(iii) after paragraph (b) insert—

"(ba) he is encouraged, required or expected to do anything in connection with the removal of any part of a human body—

(i) as a result of which he or another person would commit an offence under the law of Scotland (other than an offence mentioned in paragraph (b)(i)), or

(ii) which, were it done in Scotland, would constitute such an offence,", and

(iv) for paragraph (d) substitute—

"(d) another person uses or attempts to use him for any purpose within sub-paragraph (i), (ii) or (iii) of paragraph (c), having chosen him for that purpose on the grounds that—

(i) he is mentally or physically ill or disabled, he is young, or he has a family relationship with a person, and

(ii) a person without the illness, disability, youth or family relationship would be likely to refuse to be used for that purpose.".

(3) In section 5 of that Act—

(a) in subsection (1), for the words from "(3)" to the end substitute "(3A) of section 4 apply to anything done in or outwith the United Kingdom.",

(b) in subsection (2)—

(i) the word "and" immediately following paragraph (e) is repealed, and

(ii) after paragraph (f) insert—

"(g) a person who at the time of the offence was habitually resident in Scotland, and

(h) a body incorporated under the law of a part of the United Kingdom.”,

(c) after subsection (2) insert—

“(2A) A person may be prosecuted, tried and punished for any offence to which section 4 applies—

(a) in any sheriff court district in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).

(2B) In subsection (2A), “sheriff court district” is to be construed in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995 (c.46) (interpretation).”.

Slavery, servitude and forced or compulsory labour

35A Slavery, servitude and forced or compulsory labour

(1) A person (“A”) commits an offence if—

(a) A holds another person in slavery or servitude and the circumstances are such that A knows or ought to know that the person is so held, or

(b) A requires another person to perform forced or compulsory labour and the circumstances are such that A knows or ought to know that the person is being required to perform such labour.

(2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention (which prohibits a person from being held in slavery or servitude or being required to perform forced or compulsory labour).

(3) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 14 years, or to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

(4) In this section “Human Rights Convention” means the Convention for the Protection of Human Rights and Fundamental Freedoms agreed by the Council of Europe at Rome on 4 November 1950.

Fraud and embezzlement

36 Alternative charges for fraud and embezzlement

In Schedule 3 to the 1995 Act (indictments and complaints), after paragraph 8(3) insert—

“(3A) Under an indictment or a complaint for breach of trust and embezzlement, an accused may be convicted of falsehood, fraud and wilful imposition.

(3B) Under an indictment or a complaint for falsehood, fraud and wilful imposition, an accused may be convicted of breach of trust and embezzlement.”.

36A Articles for use in fraud

(1) A person (“A”) commits an offence if A has in A’s possession or under A’s control an article for use in, or in connection with, the commission of fraud.

(2) A person guilty of an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine, or to both.

(3) A person commits an offence if the person makes, adapts, supplies or offers to supply an article—

(a) knowing that the article is designed or adapted for use in, or in connection with, the commission of fraud, or

(b) intending the article to be used in, or in connection with, the commission of fraud.

(4) A person guilty of an offence under subsection (3) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine, or to both.

(5) In this section, “article” includes a program or data held in electronic form.

Conspiracy

37 Conspiracy to commit offences outwith Scotland

(1) The title of section 11A of the 1995 Act becomes “Conspiracy to commit offences outwith Scotland”.

(2) In that section—

(a) in subsection (1), for “in a country or territory outside the United Kingdom” substitute “outwith Scotland”,

(b) in subsection (3)—

(i) for “the law in force in the country or territory where the act or other event was intended to take place” substitute “the relevant law”, and

(ii) for “the law in force in the country or territory” where it second occurs substitute “that law”, and

(c) after subsection (3) insert—

“(3A) In subsection (3) above, “the relevant law” is—

(a) if the act or event was intended to take place in another part of the United Kingdom, the law in force in that part,

(b) if the act or event was intended to take place in a country or territory outwith the United Kingdom, the law in force in that country or territory.”.

Abolition of offences of sedition and leasing-making

37A Abolition of offences of sedition and leasing-making

The following offences under the common law of Scotland are abolished—

(a) the offence of sedition,

(b) the offence of leasing-making.

PART 3

CRIMINAL PROCEDURE

Children

38 Prosecution of children

(1) The 1995 Act is amended as follows.

(2) After section 41 insert—

“41A Prosecution of children under 12

(1) A child under the age of 12 years may not be prosecuted for an offence.

(2) A person aged 12 years or more may not be prosecuted for an offence which was committed at a time when the person was under the age of 12 years.”.

(3) In section 42 (prosecution of children), in subsection (1)—

(a) for “No child under the age of 16 years shall” substitute “A child aged 12 years or more but under 16 years may not”,

(b) for “his instance” substitute “the instance of the Lord Advocate”, and

(c) for “a child under the age of 16 years” substitute “such a child”.

(4) In section 234AA (antisocial behaviour order), in subsection (2), paragraph (b) is repealed.

Offences: liability of partners

39 Offences: liability of partners

(1) A partner of a partnership (other than a limited liability partnership) is guilty of a corporate offence where—

(a) the partnership is guilty of the corporate offence, and

(b) it is proved that the corporate offence committed by the partnership—

(i) was committed with the consent or connivance of the partner (whether alone or among others), or

(ii) was attributable to the neglect of the partner (whether alone or among others).

(2) In subsection (1), a "corporate offence" is an offence in relation to which an enactment has the effect that where—

(a) a body corporate is guilty of the offence, and

(b) it is proved that the offence—

(i) was committed with the consent or connivance of a director (whether alone or among others), or

(ii) was attributable to the neglect of a director (whether alone or among others),

the director (as well as the body corporate) is guilty of the offence.

(2A) In subsection (1), the references to a partner of a partnership include references to a person purporting to act as a partner of the partnership.

(3) Subsection (1) does not apply in relation to a corporate offence if an enactment (other than subsection (1)) makes provision in relation to the offence having the same effect as that subsection.

Witness statements

40 Witness statements

(1) This section applies where—

(a) in the course of a criminal investigation, a witness makes a statement in relation to the matter to which the investigation relates,

(b) the statement is contained in a document, and

(c) the witness is likely to be cited to give evidence in criminal proceedings arising from the matter.

(2) Before the witness gives evidence in the criminal proceedings, the prosecutor may—

(a) give the witness a copy of the statement, or

(b) make the statement available for inspection by the witness at a reasonable time and in a reasonable place.

(3) Section 262 of the 1995 Act (interpretation of certain expressions for purposes of sections 259 to 261A of that Act) applies for the purposes of this section as it applies for the purposes of section 261A of that Act except that for the purposes of this section "statement" does not include a victim statement.

Police liberation

41 Breach of undertaking

After section 22 of the 1995 Act insert—

"22ZA Offences where undertaking breached

(1) A person who without reasonable excuse breaches an undertaking given by the person under section 22—

(a) by reason of failing to appear at court as required under subsection (1C)(a) of section 22, or

(b) by reason of failing to comply with a condition imposed under subsection (1D) of that section,

is guilty of an offence.

(2) A person who is guilty of an offence under subsection (1) is liable on summary conviction to—

(a) a fine not exceeding level 3 on the standard scale, and

(b) imprisonment for a period—

(i) where conviction is in the JP court, not exceeding 60 days,

(ii) where conviction is in the sheriff court, not exceeding 12 months.

(3) Despite subsection (1)(b), where (and to the extent that) the person breaches the undertaking by reason of committing an offence while subject to the undertaking—

(a) the person is not guilty of an offence under that subsection, and

(b) subsection (4) applies instead.

(4) The court, in determining the sentence for the subsequent offence, must have regard to—

(a) the fact that the subsequent offence was committed in breach of the undertaking,

(b) the number of undertakings to which the person was subject when that offence was committed,

(c) any previous conviction of the person of an offence under subsection (1)(b),

(d) the extent to which the sentence or disposal in respect of any previous conviction differed, by virtue of this subsection, from that which the court would have imposed but for this subsection.

(4A) The reference in subsection (4)(c) to any previous conviction of an offence under subsection (1)(b) includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to an offence under subsection (1)(b).

(4B) The references in subsection (4)(d) to subsection (4) are to be read, in relation to a previous conviction by a court referred to in subsection (4A), as references to any provision that is equivalent to subsection (4).

(4C) Any issue of equivalence arising in pursuance of subsection (4A) or (4B) is for the court to determine.

(5) Subsections (3)(b) and (4) apply only if the fact that the subsequent offence was committed while the person was subject to an undertaking is specified in the complaint or indictment.

(6) In this section and section 22ZB, "the subsequent offence" is the offence committed by a person while the person is subject to an undertaking.

22ZB Evidential and procedural provision

(1) In any proceedings in relation to an offence under section 22ZA(1), the fact that a person—

(a) breached an undertaking given by the person under section 22 by reason of failing to appear at court as required under subsection (1C)(a) of that section, or

(b) was subject to any particular condition imposed under subsection (1D) of that section,

is, unless challenged by preliminary objection before the person's plea is recorded, to be held as admitted.

(2) In any proceedings in relation to an offence under section 22ZA(1) or (as the case may be) the subsequent offence—

(a) something in writing, purporting to be an undertaking given by a person under section 22 (and bearing to be signed and certified), is sufficient evidence of the terms of the undertaking so given,

(b) a document purporting to be a notice (or copy of a notice) effected under subsection (1F) of that section is sufficient evidence of the terms of the notice,

(c) an undertaking whose terms are modified under paragraph (b) of that subsection is to be regarded as if given in the terms as so modified.

(3) The fact that the subsequent offence was committed while the person was subject to an undertaking is to be held as admitted, unless challenged—

(a) in summary proceedings, by preliminary objection before the person's plea is recorded, or

(b) in the case of proceedings on indictment, by giving notice of a preliminary objection in accordance with section 71(2) or 72(6)(b)(i) of this Act.

(4) Where the maximum penalty in respect of the subsequent offence is specified by (or by virtue of) any enactment, that maximum penalty is, for the purposes of the court's determination of the appropriate sentence or disposal in respect of that offence, increased—

(a) where it is a fine, by the amount equivalent to level 3 on the standard scale, and

(b) where it is a period of imprisonment—

(i) as respects conviction in the JP court, by 60 days,

(ii) as respects conviction in the sheriff court or the High Court, by 6 months,

even if the maximum penalty as so increased exceeds the penalty which it would otherwise be competent for the court to impose.

(5) A penalty under section 22ZA(2) may be imposed in addition to any other penalty which it is competent for the court to impose even if the total of penalties imposed may exceed the maximum penalty which it is competent to impose in respect of the original offence.

(6) The reference in subsection (5) to a penalty being imposed in addition to another penalty means, in the case of sentences of imprisonment or detention—

(a) where the sentences are imposed at the same time (whether or not in relation to the same complaint), framing the sentences so that they have effect consecutively,

(b) where the sentences are imposed at different times, framing the sentence imposed later so that (if the earlier sentence has not been served) the later sentence has effect consecutive to the earlier sentence.

(7) Subsection (6)(b) is subject to section 204A of this Act.

(8) The court must state—

(a) where the sentence or disposal in respect of the subsequent offence is different from that which the court would have imposed but for section 22ZA(4), the extent of and the reasons for that difference, or

(b) otherwise, the reasons for there being no such difference.

(9) A court which finds a person guilty of an offence under section 22ZA(1) may remit that person for sentence in respect of that offence to any court which is considering the original offence.

(10) At any time before the trial of an accused in summary proceedings for the original offence, it is competent to amend the complaint to include an additional charge of an offence under section 22ZA(1).

(11) In this section, "the original offence" is the offence in relation to which an undertaking is given.".

Grant of warrants

41A Grant of warrants for execution by constables and police members of SCDEA

(1) A sheriff or justice of the peace does not lack power or jurisdiction to grant a warrant for execution by a person mentioned in subsection (2) solely because the person is not a constable of a police force for a police area lying wholly or partly in the sheriff's or justice's sheriffdom.

(2) The persons referred to in subsection (1) are—

(a) a constable,

(b) a police member of the Scottish Crime and Drug Enforcement Agency.

Bail

42 Bail review applications

(1) The 1995 Act is amended as follows.

(2) In section 30 (bail review)—

(a) for subsection (2A) substitute—

"(2A) On receipt of an application under subsection (2), the court must—

(a) intimate the application to the prosecutor, and

(b) before determining the application, give the prosecutor an opportunity to be heard.

(2AA)Despite subsection (2A)(b), the court may grant the application without having heard the prosecutor if the prosecutor consents.", and

(b) in subsection (2C), in paragraph (b), for "heard" substitute "determined".

(3) In section 31 (bail review on prosecutor's application)—

(a) after subsection (2), insert—

"(2ZA) Despite subsection (2)(b), the court may grant the application without fixing a hearing if the person granted bail consents.", and

(b) in subsection (3), the word "hearing" is repealed.

43 Bail condition for identification procedures etc.

In section 24 of the 1995 Act (bail and bail conditions)—

(a) in paragraph (b) of subsection (4), sub-paragraph (ii) and the word "and" immediately preceding it are repealed,

(b) in subsection (5), after paragraph (ca) insert—

"(cb) whenever reasonably instructed by a constable to do so—

(i) participates in an identification parade or other identification procedure; and

(ii) allows any print, impression or sample to be taken from the accused;".

43A Bail conditions: remote monitoring requirements

Sections 24A to 24E of the 1995 Act (bail conditions: remote monitoring) are repealed.

Prosecution on indictment

44 Prosecution on indictment: Scottish Law Officers

(1) The 1995 Act is amended as follows.

(2) In section 64 (prosecution on indictment), in subsection (1), for "in name" substitute "at the instance".

(2A) The title of section 287 becomes "Demission from office of Lord Advocate and Solicitor General for Scotland".

(3) In that section—

(a) in subsection (1)—

(i) for "by a Lord Advocate" substitute "at the instance of Her Majesty's Advocate",

(ii) for "his" where it first occurs substitute "the holder of the office of Lord Advocate", and

(iii) after "successor" insert "or the Solicitor General",

(b) in subsection (2)—

(i) for "in name of" substitute "at the instance of Her Majesty's Advocate or", and

(ii) the words "then in office" are repealed,

(c) after subsection (2), insert—

"(2A) Any such indictments in proceedings at the instance of the Solicitor General may be signed by the Solicitor General.

(2AA) All indictments which have been raised at the instance of the Solicitor General shall remain effective notwithstanding the holder of the office of Solicitor General subsequently having died or demitted office and may be taken up and proceeded with by his successor or the Lord Advocate.

(2B) Subsection (2C) applies during any period when the offices of Lord Advocate and Solicitor General are both vacant.

(2C) It is lawful to indict accused persons at the instance of Her Majesty's Advocate.", and

(d) in subsection (4)—

(i) after "Advocate" insert "or Solicitor General",

(ia) in paragraph (a), after "subsection (1)" insert "or (2AA)",

(ii) in paragraph (b), for "in the name" substitute "raised at the instance", and

(iii) after that paragraph, insert—

"(c) by virtue of subsection (2C) above, is raised at the instance of Her Majesty's Advocate".

(4) In Schedule 2, the words "A.F.R. (*name of Lord Advocate*)," are repealed.

Transfer of justice of the peace court cases

45 Transfer of justice of the peace court cases

After section 137C of the 1995 Act insert—

"137CA Transfer of JP court proceedings within sheriffdom

(1) Subsection (2) applies—

(a) where the accused person has been cited in summary proceedings to attend a diet of a JP court, or

(b) if the accused person has not been cited to such a diet, where summary proceedings against the accused have been commenced in a JP court.

(2) The prosecutor may apply to a justice for an order for the transfer of the proceedings to another JP court in the sheriffdom (and for adjournment to a diet of that court).

(3) On an application under subsection (2), the justice may make the order sought.

(4) In this section and sections 137CB and 137CC, "justice" does not include the sheriff.

137CB Transfer of JP court proceedings outwith sheriffdom

(1) Subsection (2) applies where the clerk of a JP court informs the prosecutor that, because of exceptional circumstances which could not reasonably have been foreseen, it is not practicable for the JP court or any other JP court in the sheriffdom to proceed with some or all of the summary cases due to call at a diet.

(2) The prosecutor shall as soon as practicable apply to the sheriff principal for an order for the transfer of the proceedings to a JP court in another sheriffdom (and for adjournment to a diet of that court).

(3) Subsection (4) applies where—

(a) either—

(i) the accused person has been cited in summary proceedings to attend a diet of a JP court, or

(ii) if the accused person has not been cited to such a diet, summary proceedings against the accused have been commenced in a JP court, and

(b) there are also summary proceedings against the accused person in a JP court in another sheriffdom.

(4) The prosecutor may apply to a justice for an order for the transfer of the proceedings to a JP court in the other sheriffdom (and for adjournment to a diet of that court).

(5) Subsection (6) applies where—

(a) the prosecutor intends to take summary proceedings against an accused person in a JP court, and

(b) there are also summary proceedings against the accused person in a JP court in another sheriffdom.

(6) The prosecutor may apply to a justice for an order for authority for the proceedings to be taken at a JP court in the other sheriffdom.

(7) On an application under subsection (2), the sheriff principal may make the order sought with the consent of the sheriff principal of the other sheriffdom.

(8) On an application under subsection (4) or (6), the justice is to make the order sought if—

(a) the justice considers that it would be expedient for the different cases involved to be dealt with by the same court, and

(b) a justice of the other sheriffdom consents.

(9) On the application of the prosecutor, the sheriff principal who has made an order under subsection (7) may, with the consent of the sheriff principal of the other sheriffdom—

(a) revoke the order, or

(b) vary it so as to restrict its effect.

(10) On the application of the prosecutor, the justice who has made an order under subsection (8) (or another justice of the same sheriffdom) may, with the consent of a justice of the other sheriffdom—

(a) revoke the order, or

(b) vary it so as to restrict its effect.

137CC Custody cases: initiating JP court proceedings outwith sheriffdom

(1) Subsection (2) applies where the prosecutor believes—

(a) that, because of exceptional circumstances (and without an order under subsection (3)), it is likely that there would be an unusually high number of accused persons appearing from custody for the first calling of cases in summary prosecutions in the JP courts in the sheriffdom, and

(b) that it would not be practicable for those courts to deal with all the cases involved.

(2) The prosecutor may apply to the sheriff principal for an order authorising summary proceedings against some or all of the accused persons to be—

(a) taken at a JP court in another sheriffdom, and

(b) maintained—

(i) at that JP court, or

(ii) at any of the JP courts referred to in subsection (1) as may at the first calling of the case be appointed for further proceedings.

(3) On an application under subsection (2), the sheriff principal may make the order sought with the consent of the sheriff principal of the other sheriffdom.

(4) An order under subsection (3) may be made by reference to a particular period or particular circumstances.”.

Additions to complaint

46 Additional charge where bail etc. breached

(1) In section 27 of the 1995 Act (breach of bail conditions: offences), after subsection (8) insert—

“(8A) At any time before the trial of an accused in summary proceedings for the original offence, it is competent to amend the complaint to include an additional charge of an offence under this section.”.

(2) In section 150 of that Act (failure of accused to appear), for subsection (10) substitute—

“(10) At any time before the trial in the prosecution in which the failure to appear occurred, it is competent to amend the complaint to include an additional charge of an offence under subsection (8).”.

Dockets and charges in sex cases

46A Dockets and charges in sex cases

After section 288B of the 1995 Act insert—

"*Dockets and charges in sex cases*

288BA Dockets for charges of sexual offences

(1) An indictment or a complaint may include a docket which specifies any act or omission that is connected with a sexual offence charged in the indictment or complaint.

(2) Here, an act or omission is connected with such an offence charged if it—

(a) is specifiable by way of reference to a sexual offence, and

(b) relates to—

(i) the same event as the offence charged, or

(ii) a series of events of which that offence is also part.

(3) The docket is to be in the form of a note apart from the offence charged.

(4) It does not matter whether the act or omission, if it were instead charged as an offence, could not competently be dealt with by the court (including as particularly constituted) in which the indictment or complaint is proceeding.

(5) Where under subsection (1) a docket is included in an indictment or a complaint, it is to be presumed that—

(a) the accused person has been given fair notice of the prosecutor's intention to lead evidence of the act or omission specified in the docket, and

(b) evidence of the act or omission is admissible as relevant.

(6) The references in this section to a sexual offence are to—

(a) an offence under the Sexual Offences (Scotland) Act 2009,

(b) any other offence involving a significant sexual element.

288BB Mixed charges for sexual offences

(1) An indictment or a complaint may include a charge that is framed as mentioned in subsection (2) or (3) (or both).

(2) That is, framed so as to comprise (in a combined form) the specification of more than one sexual offence.

(3) That is, framed so as to—

(a) specify, in addition to a sexual offence, any other act or omission, and

(b) do so in any manner except by way of reference to a statutory offence.

(4) Where a charge in an indictment or a complaint is framed as mentioned in subsection (2) or (3) (or both), the charge is to be regarded as being a single yet cumulative charge.

(5) The references in this section to a sexual offence are to an offence under the Sexual Offences (Scotland) Act 2009.".

Remand and committal of children

47 Remand and committal of children and young persons

(1) Section 51 of the 1995 Act (remand and committal of children and young persons) is amended in accordance with subsections (2) and (3).

(2) The following provisions are repealed—

(a) in subsection (1)—

(i) in paragraph (a) the words from "but" to "applies", and

(ii) paragraph (bb),

(b) in subsection (2A), the words "Subject to subsection (4) below",

(c) subsections (3) and (4), and

(d) in subsection (4A), the words "or subsection (4) above".

(3) In subsection (5), for "(1)(aa), (b)(ii), (bb)(ii) or (3)(b)" substitute "(1)(aa) or (b)(ii)".

(4) In section 23 of the Criminal Justice (Scotland) Act 2003 (asp 7) (remand and committal of children and young persons), subsections (6) and (7) are repealed.

Prosecution of organisations

48 Meaning of "organisation"

In section 307(1) of the 1995 Act (interpretation), after the definition of "order for lifelong restriction", insert—

> ""organisation" means—
>
> (a) a body corporate;
>
> (b) an unincorporated association;
>
> (c) a partnership;
>
> (d) a body of trustees;
>
> (e) a government department;
>
> (f) a part of the Scottish Administration;
>
> (g) any other entity which is not an individual;".

49 Proceedings on indictment against organisations

(1) The title of section 70 of the 1995 Act (proceedings against bodies corporate) is amended by substituting "organisations" for "bodies corporate".

(2) Section 70 of that Act is amended as follows.

(3) In subsection (1), for "a body corporate" substitute "an organisation".

(4) For subsection (2) substitute—

> "(2) The indictment may be served by delivery of a copy of the indictment together with notice to appear at—
>
> (a) in the case of a body of trustees—
>
> (i) the dwelling-house or place of business of any of the trustees, or

(ii) if the solicitor of the body of trustees is known, the place of business of the solicitor,

(b) in the case of any other organisation, the registered office or, if there is no registered office or the registered office is not in the United Kingdom, at the principal place of business in the United Kingdom of the organisation.”.

(5) In subsection (3)—

(a) for “the registered office or principal place of business of the body corporate” substitute “any place”, and

(b) for “the registered office or place of business” substitute “that place”.

(6) In subsection (4)—

(a) for “A body corporate” substitute “An organisation”, and

(b) the words “of the body corporate” are repealed.

(7) In subsection (5), for “body corporate” in both places that expression occurs substitute “organisation”.

(8) In subsection (5A)(a), for “body corporate” substitute “organisation”. and

(9) In subsection (6)—

(a) for “a body corporate” substitute “an organisation”, and

(b) for “the body corporate” substitute “the organisation”.

(10) In subsection (7), for “a body corporate” substitute “an organisation”.

(11) In subsection (8), for paragraph (c) substitute—

“(ba) in the case of a partnership (other than a limited liability partnership), a partner or other person in charge, or locally in charge, of the partnership’s affairs;

(bb) in the case of an unincorporated association, the secretary or other person in charge, or locally in charge, of the association’s affairs;

(c) in the case of any other organisation, an employee, officer or official of the organisation duly appointed by it for the purposes of the proceedings.”.

(12) In subsection (9), after paragraph (b) insert—

“(c) in the case of a partnership (other than a limited liability partnership), purporting to be signed by a partner;

(d) in the case of an unincorporated association, purporting to be signed by an officer of the association;

(e) in the case of a government department or a part of the Scottish Administration, purporting to be signed by a senior officer in the department or part,”.

50 Prosecution of organisations by summary procedure

(1) Section 143 of 1995 Act (prosecution of companies etc.) is amended as follows.

(2) In subsection (1), for "a partnership, association, body corporate or body of trustees" substitute "an organisation".

(3) In subsection (2), for "partnership, association, body corporate or body of trustees in their" substitute "organisation in its".

(4) In subsection (4), for "A partnership, association, body corporate or body of trustees" substitute "An organisation".

(5) In subsection (5)(b), for "of the partnership, association, body corporate or body of trustees" substitute ", officer or official of the organisation".

(6) In subsection (6), after paragraph (d) insert—

> "(e) in the case of a government department or part of the Scottish Administration, purporting to be signed by a senior officer in the department or part,".

(7) In subsection (7)—

- (a) for "a partnership, association, body corporate or body of trustees" substitute "an organisation",
- (b) for "partnership, association, body corporate or (as the case may be) body of trustees" substitute "organisation".

51 Manner of citation of organisations in summary proceedings

In section 141 of the 1995 Act (manner of citation), in subsection (2)(b), for "a partnership, association or body corporate" substitute "an organisation other than a body of trustees".

Personal conduct of case by accused

51A Prohibition of personal conduct of case by accused in certain proceedings

(1) The 1995 Act is amended as follows.

(2) In section 288C (prohibition of personal conduct of defence in cases of certain sexual offences)—

- (a) for subsection (1) substitute—

> "(1) An accused charged with a sexual offence to which this section applies is prohibited from conducting his case in person at, or for the purposes of, any relevant hearing in the course of proceedings (other than proceedings in a JP court) in respect of the offence.
>
> (1A) In subsection (1), "relevant hearing" means a hearing at, or for the purposes of, which a witness is to give evidence.", and

- (b) subsection (8) is repealed.

(3) In section 288D (appointment of solicitor by court in cases to which section 288C applies)—

- (a) in subsection (1), after "proceedings" insert "(other than proceedings in a JP court)",
- (b) in subsection (2)(a), for sub-paragraphs (i) and (ii) substitute—

"(i) the conduct of his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the proceedings; or", and

(c) in subsection (6), for the words from "of the accused's defence" to the end substitute "referred to in subsection (2)(a) above.".

(4) In section 288E (prohibition of personal conduct of defence in certain cases involving child witness under the age of 12)—

(a) subsection (1) is repealed,

(b) in subsection (2)(b), for "the trial" substitute "any hearing in the course of the proceedings",

(c) after subsection (2) insert—

"(2A) The accused is prohibited from conducting his case in person at, or for the purposes of, any hearing at, or for the purposes of, which the child witness is to give evidence.",

(d) in subsection (4), at the end insert "and as if references to a relevant hearing were references to a hearing referred to in subsection (2A) above",

(e) in subsection (6)—

(i) for paragraphs (za) and (a) substitute—

"(a) that his case at, or for the purposes of, any hearing in the course of the proceedings at, or for the purposes of, which the child witness is to give evidence may be conducted only by a lawyer,", and

(ii) in paragraph (c), for the words from "preliminary" to "trial" substitute "hearing", and

(f) subsection (8) is repealed.

(5) In section 288F (power to prohibit personal conduct of defence in other cases involving vulnerable witnesses)—

(a) in subsection (1), for "the trial" substitute "any hearing in the course of the proceedings",

(b) in subsection (2), for the words from "defence" to the end substitute "case in person at any hearing at, or for the purposes of, which the vulnerable witness is to give evidence.",

(c) in subsection (3)(a), for "trial" substitute "hearing",

(d) in subsection (4), for the words from "after" to the end substitute "in relation to a hearing after, as well as before, the hearing has commenced.",

(e) subsection (4A) is repealed,

(f) in subsection (5), at the end insert "and as if references to a relevant hearing were references to any hearing in respect of which an order is made under this section", and

(g) subsection (6) is repealed.

Disclosure of convictions etc.

52 Disclosure of convictions and non-court disposals

(1) After section 101 of the 1995 Act insert—

"101A Post-offence convictions etc.

(1) This section applies where an accused person is convicted of an offence ("offence O") on indictment.

(2) The court may, in deciding on the disposal of the case, have regard to—

(a) any conviction in respect of the accused which occurred on or after the date of offence O but before the date of conviction in respect of that offence,

(b) any of the alternative disposals in respect of the accused that are mentioned in subsection (3).

(3) Those alternative disposals are—

(a) a—

(i) fixed penalty under section 302(1) of this Act, or

(ii) compensation offer under section 302A(1) of this Act,

that has been accepted (or deemed to have been accepted) on or after the date of offence O but before the date of conviction in respect of that offence,

(b) a work order under section 303ZA(6) of this Act that has been completed on or after the date of offence O but before the date of conviction in respect of that offence.

(4) The court may have regard to any such conviction or alternative disposal only if it is—

(a) specified in a notice laid before the court by the prosecutor, and

(b) admitted by the accused or proved by the prosecutor (on evidence adduced then or at another diet).

(5) A reference in this section to a conviction which occurred on or after the date of offence O is a reference to such a conviction by a court in any part of the United Kingdom or in any other member State of the European Union.".

(2) For section 166A of that Act substitute—

"166A Post-offence convictions etc.

(1) This section applies where an accused person is convicted of an offence ("offence O") on summary complaint.

(2) The court may, in deciding on the disposal of the case, have regard to—

(a) any conviction in respect of the accused which occurred on or after the date of offence O but before the date of conviction in respect of that offence,

(b) any of the alternative disposals in respect of the accused that are mentioned in subsection (3).

(3) Those alternative disposals are—

(a) a—

(i) fixed penalty under section 302(1) of this Act, or

(ii) compensation offer under section 302A(1) of this Act,

that has been accepted (or deemed to have been accepted) on or after the date of offence O but before the date of conviction in respect of that offence,

(b) a work order under section 303ZA(6) of this Act that has been completed on or after the date of offence O but before the date of conviction in respect of that offence.

(4) The court may have regard to any such conviction or alternative disposal only if it is—

(a) specified in a notice laid before the court by the prosecutor, and

(b) admitted by the accused or proved by the prosecutor (on evidence adduced then or at another diet).

(5) A reference in this section to a conviction which occurred on or after the date of offence O is a reference to such a conviction by a court in any part of the United Kingdom or in any other member State of the European Union.".

(3) In section 302 of that Act (fixed penalty: conditional offer by procurator fiscal), in subsection (2), after sub-paragraph (ii) of paragraph (e) insert—

"(iia)that that fact may be disclosed to the court also in any proceedings for an offence to which the alleged offender is, or is liable to become, subject at such time as the offer is accepted;".

(4) In section 302A of that Act (compensation offer by procurator fiscal), in subsection (2), after sub-paragraph (ii) of paragraph (f) insert—

"(iia)that that fact may be disclosed to the court also in any proceedings for an offence to which the alleged offender is, or is liable to become, subject at such time as the offer is accepted;".

(5) In section 303ZA of that Act (work orders), in subsection (3)—

(a) after sub-paragraph (i) of paragraph (e) insert—

"(ia) that if a work offer is not accepted, that fact may be disclosed to the court in any proceedings for the offence to which the offer relates;",

(b) in sub-paragraph (ii) of that paragraph, for "the offer has been accepted" substitute "a resultant work order has been completed",

(c) after sub-paragraph (ii) of that paragraph insert—

"(iia)that that fact may be disclosed to the court also in any proceedings for an offence to which the alleged offender is, or is liable to become, subject at such time as the offer is accepted;", and

(d) in sub-paragraph (iii) of that paragraph, for "work order under subsection (6) below" substitute "resultant work order".

52A Convictions by courts in other EU member States

(1) Schedule 2A makes modifications of the 1995 Act and other enactments for the purposes of and in connection with implementing obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).

(2) The Scottish Ministers may by order make further provision for the purposes of and in connection with implementing those obligations.

(3) The provision may, in particular, confer functions—

(a) on the Scottish Ministers,

(b) on other persons.

(4) An order under subsection (2) may modify any enactment.

(5) In this section, the "Framework Decision" means Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

Appeals: time limits

53 Time limits for lodging certain appeals

(1) The 1995 Act is amended as follows.

(2) In section 74 (appeals in connection with preliminary diets), in subsection (2)(b), for "2" substitute "seven".

(3) In section 174 (appeals relating to preliminary pleas), in subsection (1), for "two" substitute "seven".

Crown appeals

54 Submissions as to sufficiency of evidence

After section 97 of the 1995 Act insert—

> **"97A Submissions as to sufficiency of evidence**
>
> (1) Immediately after one or other (but not both) of the appropriate events, the accused may make either or both of the submissions mentioned in subsection (2) in relation to an offence libelled in an indictment (the "indicted offence").
>
> (2) The submissions are—
>
> (a) that the evidence is insufficient in law to justify the accused's being convicted of the indicted offence or any other offence of which the accused could be convicted under the indictment (a "related offence"),
>
> (b) that there is no evidence to support some part of the circumstances set out in the indictment.
>
> (2A) For the purposes of subsection (1), "the appropriate events" are—
>
> (a) the close of the whole of the evidence,
>
> (b) the conclusion of the prosecutor's address to the jury on the evidence.
>
> (4) A submission made under this section must be heard by the judge in the absence of the jury.

97B Acquittals etc. on section 97A(2)(a) submissions

(1) This section applies where the accused makes a submission of the kind mentioned in section 97A(2)(a).

(2) If the judge is satisfied that the evidence is insufficient in law to justify the accused's being convicted of the indicted offence, then—

(a) where the judge is satisfied that the evidence is also insufficient in law to justify the accused's being convicted of a related offence—

(i) the judge must acquit the accused of the indicted offence, and

(ii) the trial is to proceed only in respect of any other offence libelled in the indictment,

(b) where the judge is satisfied that the evidence is sufficient in law to justify the accused's being convicted of a related offence, the judge must direct that the indictment be amended accordingly.

(3) If the judge is not satisfied as is mentioned in subsection (2)—

(a) the judge must reject the submission, and

(b) the trial is to proceed as if the submission had not been made.

(4) The judge may make a decision under this section only after hearing both (or all) parties.

(5) An amendment made by virtue of this section must be sufficiently authenticated by the initials of the judge or the clerk of court.

(6) In this section, "indicted offence" and "related offence" have the same meanings as in section 97A.

97C Directions etc. on section 97A(2)(b) submissions

(1) This section applies where the accused makes a submission of the kind mentioned in section 97A(2)(b).

(2) If the judge is satisfied that there is no evidence to support some part of the circumstances set out in the indictment, the judge must direct that the indictment be amended accordingly.

(3) If the judge is not satisfied as is mentioned in subsection (2)—

(a) the judge must reject the submission, and

(b) the trial is to proceed as if the submission had not been made.

(4) The judge may make a decision under this section only after hearing both (or all) parties.

(5) An amendment made by virtue of this section must be sufficiently authenticated by the initials of the judge or the clerk of court.

97D No acquittal on "no reasonable jury" grounds

(1) A judge has no power to direct the jury to return a not guilty verdict on any charge on the ground that no reasonable jury, properly directed on the evidence, could convict on the charge.

(2) Accordingly, no submission based on that ground or any ground of like effect is to be allowed.”.

55 Prosecutor’s right of appeal

After section 107 of the 1995 Act insert—

“107A Prosecutor’s right of appeal: decisions on section 97 and 97A submissions

(1) The prosecutor may appeal to the High Court against—

(a) an acquittal under section 97 or 97B(2)(a), or

(b) a direction under section 97B(2)(b) or 97C(2).

(1A) If, immediately after an acquittal under section 97 or 97B(2)(a), the prosecutor moves for the trial diet to be adjourned for no more than 2 days in order to consider whether to appeal against the acquittal under subsection (1), the court of first instance must grant the motion unless the court considers that there are no arguable grounds of appeal.

(1B) If, immediately after the giving of a direction under section 97B(2)(b) or 97C(2), the prosecutor moves for the trial diet to be adjourned for no more than 2 days in order to consider whether to appeal against the direction under subsection (1), the court of first instance must grant the motion unless the court considers that it would not be in the interests of justice to do so.

(1C) In considering whether it would be in the interests of justice to grant a motion for adjournment under subsection (1B), the court must have regard, amongst other things, to—

(a) whether, if an appeal were to be made and to be successful, continuing with the diet would have any impact on any subsequent or continued prosecution,

(b) whether there are any arguable grounds of appeal.

(1D) An appeal may not be brought under subsection (1) unless the prosecutor intimates intention to appeal—

(a) immediately after the acquittal or, as the case may be, the giving of the direction,

(b) if a motion to adjourn the trial diet under subsection (1A) or (1B) is granted, immediately upon resumption of the diet, or

(c) if such a motion is refused, immediately after the refusal.

(1E) Subsection (2) applies if—

(a) the prosecutor intimates an intention to appeal under subsection (1)(a), or

(b) the trial diet is adjourned under subsection (1A).

(2) Where this subsection applies, the court of first instance must suspend the effect of the acquittal and may—

(a) make an order under section 4(2) of the Contempt of Court Act 1981 (c.49) (which gives a court power, in some circumstances, to order that publication of certain reports be postponed) as if proceedings for the offence of which the person was acquitted were pending or imminent,

(b) after giving the parties an opportunity of being heard, order the detention of the person in custody or admit him to bail.

(3) The court may, under subsection (2)(b), order the detention of the person in custody only if the court considers that there are arguable grounds of appeal.

107B Prosecutor's right of appeal: decisions on admissibility of evidence

(1) The prosecutor may appeal to the High Court against a finding, made after the jury is empanelled and before the close of the evidence for the prosecution, that evidence that the prosecution seeks to lead is inadmissible.

(2) The appeal may be made only with the leave of the court of first instance, granted—

(a) on the motion of the prosecutor, or

(b) on that court's initiative.

(3) Any motion for leave to appeal must be made before the close of the case for the prosecution.

(4) In determining whether to grant leave to appeal the court must consider—

(a) whether there are arguable grounds of appeal, and

(b) what effect the finding has on the strength of the prosecutor's case.

107C Appeals under section 107A and 107B: general provisions

(1) In an appeal brought under section 107A or 107B the High Court may review not only the acquittal, direction or finding appealed against but also any direction, finding, decision, determination or ruling in the proceedings at first instance if it has a bearing on the acquittal, direction or finding appealed against.

(2) The test to be applied by the High Court in reviewing the acquittal, direction or finding appealed against is whether it was wrong in law.

107D Expedited appeals

(1) Subsection (2) applies where—

(a) the prosecutor intimates intention to appeal under section 107A or leave to appeal is granted by the court under section 107B, and

(b) the court is able to obtain confirmation from the Keeper of the Rolls that it would be practicable for the appeal to be heard and determined during an adjournment of the trial diet.

(2) The court must inform both parties of that fact and, after hearing them, must decide whether or not the appeal is to be heard and determined during such an adjournment.

(3) An appeal brought under section 107A or 107B which is heard and determined during such an adjournment is referred to in this Act as an "expedited appeal".

(4) If the court decides that the appeal is to be an expedited appeal the court must, pending the outcome of the appeal—

(a) adjourn the trial diet, and

(b) where the appeal is against an acquittal, suspend the effect of the acquittal.

(5) Where the court cannot obtain from the Keeper of the Rolls confirmation of the kind mentioned in subsection (1)(b), the court must inform the parties of that fact.

(6) Where the High Court in an expedited appeal determines that an acquittal of an offence libelled in the indictment was wrong in law it must quash the acquittal and direct that the trial is to proceed in respect of the offence.

107E Other appeals under section 107A: appeal against acquittal

(1) This section applies where—

(a) an appeal brought under section 107A is not an expedited appeal,

(b) the appeal is against an acquittal, and

(c) the High Court determines that the acquittal was wrong in law.

(2) The court must quash the acquittal.

(3) If the prosecutor seeks leave to bring a new prosecution charging the accused with the same offence as that libelled in the indictment, or a similar offence arising out of the same facts as the offence libelled in the indictment, the High Court must grant the prosecutor authority to do so in accordance with section 119, unless the court considers that it would be contrary to the interests of justice to do so.

(4) If—

(a) no motion is made under subsection (3), or

(b) the High Court does not grant a motion made under that subsection,

the High Court must in disposing of the appeal acquit the accused of the offence libelled in the indictment.

107F Other appeals under section 107A or 107B: appeal against directions etc.

(1) This section applies where—

(a) an appeal brought under section 107A or 107B is not an expedited appeal, and

(b) the appeal is not against an acquittal.

(2) The court of first instance must desert the diet *pro loco et tempore* in relation to any offence to which the appeal relates.

(3) The trial is to proceed only if another offence of which the accused has not been acquitted and to which the appeal does not relate is libelled in the indictment.

(3A) However, if the prosecutor moves for the diet to be deserted *pro loco et tempore* in relation to such other offence, the court must grant the motion.

(4) If the prosecutor seeks leave to bring a new prosecution charging the accused with the same offence as that libelled in the indictment, or a similar offence arising out of the same facts as the offence libelled in the indictment, the High Court must grant the prosecutor authority to do so in accordance with section 119, unless the court considers that it would be contrary to the interests of justice to do so.”.

56 Power of High Court in appeal under section 107A of 1995 Act

In section 104(1) of the 1995 Act (which makes provision as regards the power of the High Court in appeals under section 106(1) or 108 of that Act), after “106(1)” insert “, 107A, 107B”.

57 Further amendment of 1995 Act

(1) In section 110(1) of the 1995 Act (note of appeal), after paragraph (b), add—

“(c) where the prosecutor intimates intention to appeal under section 107A(1), within 7 days after the acquittal or direction appealed against, the prosecutor may, except in the case of an expedited appeal, lodge such a note with the Clerk of Justiciary, who must send a copy to the judge and to the accused or to the accused’s solicitor,

(d) within 7 days after leave to appeal under section 107B(1) is granted, the prosecutor may, except in the case of an expedited appeal, lodge such a note with the Clerk of Justiciary, who must send a copy to the judge and to the accused or to the accused’s solicitor,

(e) in the case of an expedited appeal, as soon as practicable after the decision as to hearing and determining the case is made under section 107D(2), the prosecutor may—

(i) lodge such a note with the Clerk of Justiciary, and

(ii) provide a copy to the judge and to the accused or to the accused’s solicitor.”.

(2) In section 113(1) of that Act (judge’s report), after “under” insert “any of paragraphs (a) to (d) of”.

(3) After section 113 of that Act insert—

“113A Judge’s observations in expedited appeal

(1) On receiving a note of appeal given under section 110(1)(e), the judge who presided at the trial may give the Clerk of Justiciary any written observations that the judge thinks fit on—

(a) the case generally,

(b) the grounds contained in the note of appeal.

(2) The High Court may hear and determine the appeal without any such written observations.

(3) If written observations are given under subsection (1), the Clerk of Justiciary must give a copy of them to—

(a) the accused or the accused’s solicitor, and

(b) the prosecutor.

(4) The written observations of the judge are available only to—

(a) the High Court,

(b) the parties, and

(c) any other person or classes of person prescribed by Act of Adjournal, in accordance with any conditions prescribed by Act of Adjournal.”.

(4) In section 119 of that Act (provision where High Court authorises new prosecution)—

(a) in each of subsections (1) and (10), after “118(1)(c)” insert “or 107E(3) or 107F(4)”,

(b) for subsection (2), substitute—

“(2) In a new prosecution under this section—

(a) where authority for the prosecution is granted under section 118(1)(c), the accused must not be charged with an offence more serious than that of which the accused was convicted in the earlier proceedings,

(b) where authority for the prosecution is granted under section 107E(3), the accused must not be charged with an offence more serious than that of which the accused was acquitted in the earlier proceedings,

(c) where authority for the prosecution is granted under section 107F(4), the accused must not be charged with an offence more serious than that originally libelled in the indictment in the earlier proceedings.”,

(c) after subsection (2) insert—

“(2A) In a new prosecution under this section brought by virtue of section 107F(4), the circumstances set out in the indictment are not to be inconsistent with any direction given under section 97B(2)(b) or 97C(2) in the proceedings which gave rise to the appeal in question unless the High Court, in disposing of that appeal, determined that the direction was wrong in law.”, and

(d) in subsection (9), after “setting aside the verdict” insert “or under section 107E(3) or 107F(4) granting authority to bring a new prosecution”.

Retention and use of samples etc.

58 Retention of samples etc.

(1) The 1995 Act is amended as follows.

(2) In section 18 (prints, samples etc. in criminal investigations)—

(a) in subsection (3), for “section 18A” substitute “sections 18A to 18C”,

(b) in subsection (7A), for “sections 19 to 20” substitute “, subject to the modification in subsection (7AA), sections 18A to 19C”, and

(c) after subsection (7A) insert—

“(7AA) The modification is that for the purposes of section 19C as it applies in relation to relevant physical data taken from or provided by a person outwith Scotland, subsection (7A) is to be read as if in paragraph (d) the words from “created” to the end were omitted.”.

(3) In section 18A (retention of samples)—

(a) for subsection (1) substitute—

“(1) This section applies to—

(a) relevant physical data taken or provided under section 18(2), and

(b) any sample, or any information derived from a sample, taken under section 18(6) or (6A),

where the condition in subsection (2) is satisfied.”,

(b) in subsection (2), after “whom” insert “the relevant physical data was taken or by whom it was provided or, as the case may be, from whom”,

(c) in subsection (3), for “sample or information” substitute “relevant physical data, sample or information derived from a sample”,

(ca) after subsection (8) insert—

“(8A) If the sheriff principal allows an appeal against the refusal of an application under subsection (5), the sheriff principal may make an order amending, or further amending, the destruction date.

(8B) An order under subsection (8A) must not specify a destruction date more than 2 years later than the previous destruction date.”,

(d) in subsection (10), for “sample or information” substitute “relevant physical data, sample or information derived from a sample”,

(e) in subsection (11)—

(i) in paragraph (a) of the definition of “the relevant chief constable”, after “who” insert “took the relevant physical data or to whom it was provided or who”, and

(ii) in the definition of “relevant sexual offence” and “relevant violent offence”, after “have” insert “, subject to the modification in subsection (12),”, and

(f) after subsection (11) insert—

“(12) The modification is that the definition of “relevant sexual offence” in section 19A(6) is to be read as if for paragraph (g) there were substituted—

“(g) public indecency if it is apparent from the offence as charged in the indictment or complaint that there was a sexual aspect to the behaviour of the person charged;”.”.

58A Retention of samples etc. where offer under sections 302 to 303ZA accepted

After section 18A of the 1995 Act insert—

“18AA Retention of samples etc. where offer under sections 302 to 303ZA accepted

(1) This section applies to—

(a) relevant physical data taken from or provided by a person under section 18(2), and

(b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A),

where the conditions in subsection (2) are satisfied.

(2) The conditions are—

(a) the relevant physical data or sample was taken from or provided by the person while the person was under arrest or being detained in connection with the offence or offences in relation to which a relevant offer is issued to the person, and

(b) the person—

(i) accepts a relevant offer, or

(ii) in the case of a relevant offer other than one of the type mentioned in paragraph (d) of subsection (3), is deemed to accept a relevant offer.

(3) In this section "relevant offer" means—

(a) a conditional offer under section 302,

(b) a compensation offer under section 302A,

(c) a combined offer under section 302B, or

(d) a work offer under section 303ZA.

(4) Subject to subsections (6) and (7) and section 18AB(9) and (10), the relevant physical data, sample or information derived from a sample must be destroyed no later than the destruction date.

(5) In subsection (4), "destruction date" means—

(a) in relation to a relevant offer that relates only to—

(i) a relevant sexual offence,

(ii) a relevant violent offence, or

(iii) both a relevant sexual offence and a relevant violent offence,

the date of expiry of the period of 3 years beginning with the date on which the relevant offer is issued or such later date as an order under section 18AB(2) or (6) may specify,

(b) in relation to a relevant offer that relates to—

(i) an offence or offences falling within paragraph (a), and

(ii) any other offence,

the date of expiry of the period of 3 years beginning with the date on which the relevant offer is issued or such later date as an order under section 18AB(2) or (6) may specify,

(c) in relation to a relevant offer that does not relate to an offence falling within paragraph (a), the date of expiry of the period of 2 years beginning with the date on which the relevant offer is issued.

(6) If a relevant offer is recalled by virtue of section 302C(5) or a decision to uphold it is quashed under section 302C(7)(a), all record of the relevant physical data, sample and information derived from a sample must be destroyed as soon as possible after—

(a) the prosecutor decides not to issue a further relevant offer to the person,

(b) the prosecutor decides not to institute criminal proceedings against the person, or

(c) the prosecutor institutes criminal proceedings against the person and those proceedings conclude otherwise than with a conviction or an order under section 246(3).

(7) If a relevant offer is set aside by virtue of section 303ZB, all record of the relevant physical data, sample and information derived from a sample must be destroyed as soon as possible after the setting aside.

(8) In this section, "relevant sexual offence" and "relevant violent offence" have, subject to the modification in subsection (9), the same meanings as in section 19A(6) and include any attempt, conspiracy or incitement to commit such an offence.

(9) The modification is that the definition of "relevant sexual offence" in section 19A(6) is to be read as if for paragraph (g) there were substituted—

"(g) public indecency if it is apparent from the relevant offer (as defined in section 18AA(3)) relating to the offence that there was a sexual aspect to the behaviour of the person to whom the relevant offer is issued;".

18AB Section 18AA: extension of retention period where relevant offer relates to certain sexual or violent offences

(1) This section applies where the destruction date for relevant physical data, a sample or information derived from a sample falls within section 18AA(5)(a) or (b).

(2) On a summary application made by the relevant chief constable within the period of 3 months before the destruction date, the sheriff may, if satisfied that there are reasonable grounds for doing so, make an order amending, or further amending, the destruction date.

(3) An application under subsection (2) may be made to any sheriff—

(a) in whose sheriffdom the appropriate person resides,

(b) in whose sheriffdom that person is believed by the applicant to be, or

(c) to whose sheriffdom the person is believed by the applicant to be intending to come.

(4) An order under subsection (2) must not specify a destruction date more than 2 years later than the previous destruction date.

(5) The decision of the sheriff on an application under subsection (2) may be appealed to the sheriff principal within 21 days of the decision.

(6) If the sheriff principal allows an appeal against the refusal of an application under subsection (2), the sheriff principal may make an order amending, or further amending, the destruction date.

(7) An order under subsection (6) must not specify a destruction date more than 2 years later than the previous destruction date.

(8) The sheriff principal's decision on an appeal under subsection (5) is final.

(9) Section 18AA(4) does not apply where—

(a) an application under subsection (2) has been made but has not been determined,

(b) the period within which an appeal may be brought under subsection (5) against a decision to refuse an application has not elapsed, or

(c) such an appeal has been brought but has not been withdrawn or finally determined.

(10) Where—

(a) the period within which an appeal referred to in subsection (9)(b) may be brought has elapsed without such an appeal being brought,

(b) such an appeal is brought and is withdrawn or finally determined against the appellant, or

(c) an appeal brought under subsection (5) against a decision to grant an application is determined in favour of the appellant,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the period has elapsed, or, as the case may be, the appeal is withdrawn or determined.

(11) In this section—

"appropriate person" means the person from whom the relevant physical data was taken or by whom it was provided or from whom the sample was taken,

"destruction date" has the meaning given by section 18AA(5),

"the relevant chief constable" has the same meaning as in subsection (11) of section 18A, with the modification that references to the person referred to in subsection (2) of that section are references to the appropriate person.".

58B Retention of samples etc. taken or provided in connection with certain fixed penalty offences

After section 18A of the 1995 Act insert—

"18AC Retention of samples etc. taken or provided in connection with certain fixed penalty offences

(1) This section applies to—

(a) relevant physical data taken from or provided by a person under section 18(2), and

(b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A),

where the conditions in subsection (2) are satisfied.

(2) The conditions are—

(a) the person was arrested or detained in connection with a fixed penalty offence,

(b) the relevant physical data or sample was taken from or provided by the person while the person was under arrest or being detained in connection with that offence,

(c) after the relevant physical data or sample was taken from or provided by the person, a constable gave the person under section 129(1) of the 2004 Act—

(i) a fixed penalty notice in respect of that offence (the "main FPN"), or

(ii) the main FPN and one or more other fixed penalty notices in respect of fixed penalty offences arising out of the same circumstances as the offence to which the main FPN relates, and

(d) the person, in relation to the main FPN and any other fixed penalty notice of the type mentioned in paragraph (c)(ii)—

(i) pays the fixed penalty, or

(ii) pays any sum that the person is liable to pay by virtue of section 131(5) of the 2004 Act.

(3) Subject to subsections (4) and (5), the relevant physical data, sample or information derived from a sample must be destroyed before the end of the period of 2 years beginning with—

(a) where subsection (2)(c)(i) applies, the day on which the main FPN is given to the person,

(b) where subsection (2)(c)(ii) applies and—

(i) the main FPN and any other fixed penalty notice are given to the person on the same day, that day,

(ii) the main FPN and any other fixed penalty notice are given to the person on different days, the later day.

(4) Where—

(a) subsection (2)(c)(i) applies, and

(b) the main FPN is revoked under section 133(1) of the 2004 Act,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the revocation.

(5) Where—

(a) subsection (2)(c)(ii) applies, and

(b) the main FPN and any other fixed penalty notices are revoked under section 133(1) of the 2004 Act,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the revocations.

(6) In this section—

"the 2004 Act" means the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8),

"fixed penalty notice" has the meaning given by section 129(2) of the 2004 Act, “fixed penalty offence” has the meaning given by section 128(1) of the 2004 Act.”.

59 Retention of samples etc. from children referred to children’s hearings

After section 18A of the 1995 Act insert—

“18B Retention of samples etc.: children referred to children’s hearings

(1) This section applies to—

(a) relevant physical data taken from or provided by a child under section 18(2); and

(b) any sample, or any information derived from a sample, taken from a child under section 18(6) or (6A),

where the first condition, and the second, third or fourth condition, are satisfied.

(2) The first condition is that the child’s case has been referred to a children’s hearing under section 65(1) of the Children (Scotland) Act 1995 (c.36) (the “Children Act”).

(3) The second condition is that—

(a) a ground of the referral is that the child has committed an offence mentioned in subsection (6) (a “relevant offence”);

(b) both the child and the relevant person in relation to the child accept, under section 65(5) or (6) of the Children Act, the ground of referral; and

(c) no application to the sheriff under section 65(7) or (9) of that Act is made in relation to that ground.

(4) The third condition is that—

(a) a ground of the referral is that the child has committed a relevant offence;

(b) the sheriff, on an application under section 65(7) or (9) of the Children Act—

(i) deems, under section 68(8) of the Children Act; or

(ii) finds, under section 68(10) of that Act,

the ground of referral to be established; and

(c) no application to the sheriff under section 85(1) of that Act is made in relation to that ground.

(5) The fourth condition is that the sheriff, on an application under section 85(1) of the Children Act—

(a) is satisfied, under section 85(6)(b) of that Act, that a ground of referral which constitutes a relevant offence is established; or

(b) finds, under section 85(7)(b) of that Act, that—

(i) a ground of referral, which was not stated in the original application under section 65(7) or (9) of that Act, is established; and

(ii) that ground constitutes a relevant offence.

(6) A relevant offence is such relevant sexual offence or relevant violent offence as the Scottish Ministers may by order made by statutory instrument prescribe.

(7) Subject to section 18C(6) and (7), the relevant physical data, sample or information derived from a sample must be destroyed no later than the destruction date.

(8) The destruction date is—

(a) the date of expiry of the period of 3 years following—

(i) where the second condition is satisfied, the date on which the ground of referral was accepted as mentioned in that condition;

(ii) where the third condition is satisfied, the date on which the ground of referral was established as mentioned in that condition;

(iii) where the ground of referral is established as mentioned in paragraph (a) of the fourth condition, the date on which that ground was established under section 68(8) or, as the case may be, (10) of the Children Act; or

(iv) where the ground of referral is established as mentioned in paragraph (b) of the fourth condition, the date on which that ground was established as mentioned in that paragraph; or

(b) such later date as an order under section 18C(1) may specify.

(9) No statutory instrument containing an order under subsection (6) may be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.

(10) In this section—

"relevant person" has the same meaning as in section 93(2) of the Children Act;

"relevant sexual offence" and "relevant violent offence" have, subject to the modification in subsection (11), the same meanings as in section 19A(6) and include any attempt, conspiracy or incitement to commit such an offence.

(11) The modification is that the definition of "relevant sexual offence" in section 19A(6) is to be read as if for paragraph (g) there were substituted—

"(g) public indecency if it is apparent from the ground of referral relating to the offence that there was a sexual aspect to the behaviour of the child;".

18C Retention of samples etc. relating to children: appeals

(1) On a summary application made by the relevant chief constable within the period of 3 months before the destruction date the sheriff may, if satisfied that there are reasonable grounds for doing so, make an order amending, or further amending, the destruction date.

(2) An application under subsection (1) may be made to any sheriff—

(a) in whose sheriffdom the child mentioned in section 18B(1) resides;

(b) in whose sheriffdom that child is believed by the applicant to be; or

(c) to whose sheriffdom that child is believed by the applicant to be intending to come.

(3) An order under subsection (1) must not specify a destruction date more than 2 years later than the previous destruction date.

(4) The decision of the sheriff on an application under subsection (1) may be appealed to the sheriff principal within 21 days of the decision.

(4A) If the sheriff principal allows an appeal against the refusal of an application under subsection (1), the sheriff principal may make an order amending, or further amending, the destruction date.

(4B) An order under subsection (4A) must not specify a destruction date more than 2 years later than the previous destruction date.

(5) The sheriff principal's decision on an appeal under subsection (4) is final.

(6) Section 18B(7) does not apply where—

(a) an application under subsection (1) has been made but has not been determined;

(b) the period within which an appeal may be brought under subsection (4) against a decision to refuse an application has not elapsed; or

(c) such an appeal has been brought but has not been withdrawn or finally determined.

(7) Where—

(a) the period within which an appeal referred to in subsection (6)(b) may be brought has elapsed without such an appeal being brought;

(b) such an appeal is brought and is withdrawn or finally determined against the appellant; or

(c) an appeal brought under subsection (4) against a decision to grant an application is determined in favour of the appellant,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the period has elapsed or, as the case may be, the appeal is withdrawn or determined.

(8) In this section—

"destruction date" has the meaning given by section 18B(8); and

"relevant chief constable" has the same meaning as in subsection (11) of section 18A, with the modification that references to the person referred to in subsection (2) of that section are references to the child referred to in section 18B(1).".

59A Extension of section 19A of 1995 Act

In section 19A(6) of the 1995 Act (definitions of certain expressions for purposes of section 19A)—

(a) in the definition of "relevant sexual offence", for paragraph (g) substitute—

"(g) public indecency if the court, in imposing sentence or otherwise disposing of the case, determined for the purposes of paragraph 60 of Schedule 3 to the Sexual Offences Act 2003 (c.42) that there was a significant sexual aspect to the offender's behaviour in committing the offence;", and

(b) in paragraph (h) of the definition of "relevant violent offence", after sub-paragraph (iv), insert—

"(v) section 47(1) (possession of offensive weapon in public place), 49(1) (possession of article with blade or point in public place), 49A(1) or (2) (possession of article with blade or point or offensive weapon on school premises) or 49C(1) (possession of offensive weapon or article with blade or point in prison) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39);".

60 Use of samples etc.

(1) After section 19B of the 1995 Act insert—

"19C Sections 18 and 19 to 19AA: use of samples etc.

(1) Subsection (2) applies to—

(a) relevant physical data taken or provided under section 18(2), 19(2)(a), 19A(2)(a) or 19AA(3)(a),

(b) a sample, or any information derived from a sample, taken under section 18(6) or (6A), 19(2)(b) or (c), 19A(2)(b) or (c) or 19AA(3)(b) or (c),

(c) relevant physical data or a sample taken from a person—

(i) by virtue of any power of search,

(ii) by virtue of any power to take possession of evidence where there is immediate danger of its being lost or destroyed, or

(iii) under the authority of a warrant,

(d) information derived from a sample falling within paragraph (c), and

(e) relevant physical data, a sample or information derived from a sample taken from, or provided by, a person outwith Scotland which is given by any person to—

(i) a police force,

(ii) the Scottish Police Services Authority, or

(iii) a person acting on behalf of a police force.

(2) The relevant physical data, sample or information derived from a sample may be used—

(a) for the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or

(b) for the identification of a deceased person or a person from whom the relevant physical data or sample came.

(2A) Subsections (2B) and (2C) apply to relevant physical data, a sample or information derived from a sample falling within any of paragraphs (a) to (d) of subsection (1) ("relevant material").

(2B) If the relevant material is held by a police force, the Scottish Police Services Authority or a person acting on behalf of a police force, the police force or, as the case may be, the Authority or person may give the relevant material to another person for use by that person in accordance with subsection (2).

(2C) A police force, the Scottish Police Services Authority or a person acting on behalf of a police force may, in using the relevant material in accordance with subsection (2), check it against other relevant physical data, samples and information derived from samples received from another person.

(3) In subsection (2)—

(a) the reference to crime includes a reference to—

(i) conduct which constitutes a criminal offence or two or more criminal offences (whether under the law of a part of the United Kingdom or a country or territory outside the United Kingdom), or

(ii) conduct which is, or corresponds to, conduct which, if it all took place in any one part of the United Kingdom would constitute a criminal offence or two or more criminal offences,

(b) the reference to an investigation includes a reference to an investigation outside Scotland of a crime or suspected crime, and

(c) the reference to a prosecution includes a reference to a prosecution brought in respect of a crime in a country or territory outside Scotland.

(4) This section is without prejudice to any other power relating to the use of relevant physical data, samples or information derived from a sample.".

(2) In section 56 of the Criminal Justice (Scotland) Act 2003 (asp 7) (use of samples etc. voluntarily given)—

(a) in subsection (1), after "from," insert "or provided by",

(b) in subsection (2), for the words from "may" where it first occurs to the end substitute ", or information derived from that sample may be held and used—

(a) for the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or

(b) for the identification of a deceased person or a person from whom the sample or relevant physical data came.",

(c) in subsection (3), after "information" insert "derived from a sample",

(ca) in subsection (5)(b), the words "with all information derived from them" are repealed,

(f) in subsection (6)(a), for "it or them" substitute "the sample",

(h) in subsection (7)(a), the words "or relevant physical data", in the second place where they occur, are repealed, and

(i) after subsection (7) insert—

"(7A) In subsection (2)—

(a) the reference to crime includes a reference to—

(i) conduct which constitutes a criminal offence or two or more criminal offences (whether under the law of a part of the United Kingdom or a country or territory outside the United Kingdom), or

(ii) conduct which is, or corresponds to, conduct which, if it all took place in any one part of the United Kingdom would constitute a criminal offence or two or more criminal offences,

(b) the reference to an investigation includes a reference to an investigation outside the United Kingdom of a crime or suspected crime, and

(c) the reference to a prosecution includes a reference to a prosecution brought in respect of a crime in a country or territory outside the United Kingdom.".

Referrals from the Scottish Criminal Cases Review Commission

61 Referrals from Scottish Criminal Cases Review Commission: grounds for appeal

In section 194D of the 1995 Act (further provisions as to references to the High Court by the Scottish Criminal Cases Review Commission), after subsection (4) insert—

"(4A) The grounds for an appeal arising from a reference to the High Court under section 194B of this Act must relate to one or more of the reasons for making the reference contained in the Commission's statement of reasons.

(4B) Despite subsection (4A), the High Court may, if it considers it is in the interests of justice to do so, grant leave for the appellant to found the appeal on additional grounds.

(4C) An application by the appellant for leave under subsection (4B) must be made and intimated to the Crown Agent within 21 days after the date on which a copy of the Commission's statement of reasons is sent under subsection (4)(b).

(4D) The High Court may, on cause shown, extend the period of 21 days mentioned in subsection (4C).

(4E) The Clerk of Justiciary must intimate to the persons mentioned in subsection (4F)—

(a) a decision under subsection (4B), and

(b) in the case of a refusal to grant leave for the appeal to be founded on additional grounds, the reasons for the decision.

(4F) Those persons are—

(a) the appellant or the appellant's solicitor, and

(b) the Crown Agent.".

PART 4

EVIDENCE

61A Admissibility of prior statements of witnesses: abolition of competence test

(1) This section applies in relation to a prior statement made by a witness before the commencement of section 24 of the Vulnerable Witnesses (Scotland) Act 2004 (asp 3) ("the 2004 Act") (which abolishes the competence test for witnesses in criminal and civil proceedings).

(2) For the purpose of the application of subsection (2)(c) of section 260 of the 1995 Act (admissibility of prior statement depends on competence of the witness at the time of the statement) in relation to the statement, section 24 of the 2004 Act is taken to have been in force at the time the statement was made.

(3) In this section, "prior statement" has the meaning it has in section 260 of the 1995 Act.

62 Witness statements: use during trial

(1) The 1995 Act is amended as follows.

(2) After section 261 insert—

"*Witness statements*

261A Witness statements: use during trial

(1) Subsection (2) applies where—

(a) a witness is giving evidence in criminal proceedings,

(b) the witness has made a prior statement,

(c) the prosecutor has seen or has been given an opportunity to see the statement, and

(d) the accused (or a solicitor or advocate acting on behalf of the accused in the proceedings) has seen or has been given an opportunity to see the statement.

(2) The court may allow the witness to refer to the statement while the witness is giving evidence.".

(3) In section 262 (construction of sections 259 to 261 of Act)—

(a) in the title, for "261" substitute "261A",

(b) in each of subsections (1) to (4), for "261" substitute "261A", and

(c) in subsection (3)—

(i) in the definition of "criminal proceedings", after "include" insert "(other than in section 261A)", and

(ii) in the definition of "made", after "includes" insert "(other than in section 261A)".

63 Spouse or civil partner of accused a compellable witness

(1) For section 264 of the 1995 Act (spouse of accused a competent witness) substitute—

“264 Spouse or civil partner of accused a compellable witness

(1) The spouse or civil partner of an accused is a competent and compellable witness for the prosecution, the accused or any co-accused in the proceedings against the accused.

(2) Subsection (1) is, if the spouse or civil partner is a co-accused in the proceedings, subject to any enactment or rule of law by virtue of which an accused need not (by reason of being an accused) give evidence in the proceedings.

(3) Subsection (1) displaces any other rule of law that would (but for that subsection) prevent or restrict, by reference to the relationship, the giving of evidence by the spouse or civil partner of an accused.”.

(2) Section 130 of the Civil Partnership Act 2004 (c.33) (civil partner of accused a competent witness) is repealed.

64 Special measures for child witnesses and other vulnerable witnesses

(1) The 1995 Act is amended as follows.

(2) In section 271 (vulnerable witnesses: main definitions)—

(a) in subsection (1)—

(i) for “a trial” substitute “a hearing in relevant criminal proceedings”, and

(ii) for “the trial”, wherever it occurs, substitute “the hearing”, and

(b) in subsection (5)—

(i) the definition of “trial” is repealed, and

(ii) after the definition of “court” insert—

““hearing in relevant criminal proceedings” means any hearing in the course of any criminal proceedings in the High Court or the sheriff court.”.

(3) In section 271A (child witnesses)—

(a) in subsection (1), for “a trial” substitute “a hearing in relevant criminal proceedings”,

(b) in subsection (5A)(c), for “the trial diet” substitute “the hearing at which the evidence is to be given”,

(c) in subsection (6)(a), for “the trial” substitute “a hearing in relevant criminal proceedings”,

(d) in subsection (7)(b)(ii), for “the trial” substitute “the hearing at which the evidence is to be given”,

(e) in subsection (8), for “the trial diet” substitute “the hearing at which the evidence is to be given”,

(f) in subsection (10)(b)(i), for “the trial diet” substitute “the hearing at which the evidence is to be given”,

(g) in subsection (12), for “the trial diet in the case” substitute “the hearing at which the evidence is to be given”, and

(h) in subsection (13A)(c), for "the trial diet" substitute "the hearing at which the evidence is to be given".

(4) In section 271B (further special provision for child witnesses under the age of 12)—

(a) in subsection (1)(a), for "a trial" substitute "a hearing in relevant criminal proceedings",

(b) in subsection (1)(b), for "the trial" substitute "the hearing", and

(c) in subsection (3)(b)(i), for "the trial" substitute "the hearing".

(5) In section 271C (vulnerable witnesses other than child witnesses)—

(a) in subsection (1), for "a trial" substitute "a hearing in relevant criminal proceedings",

(b) in subsection (5A)(c), for "the trial diet" substitute "the hearing at which the evidence is to be given",

(c) in subsection (6), for "the trial diet" substitute "the hearing at which the evidence is to be given",

(d) in subsection (10), for "the trial diet in the case" substitute "the hearing at which the evidence is to be given", and

(e) in subsection (12)(c), for "the trial diet" substitute "the hearing at which the evidence is to be given".

(6) In section 271D (review of arrangements for vulnerable witnesses)—

(a) in subsection (1)—

(i) for "the trial", where it first occurs, substitute "a hearing in relevant criminal proceedings", and

(ii) for "the trial", where it second occurs, substitute "the hearing", and

(b) in subsection (4)(b)(i), for "the trial" substitute "the hearing".

(7) In section 271F (the accused)—

(a) in subsection (1)—

(i) for "the trial", where it first occurs, substitute "a hearing in relevant criminal proceedings", and

(ii) for "the trial", where it second occurs (in subsection (1)(a)), substitute "the hearing",

(b) in subsection (2)—

(i) for "the trial", where it first occurs, substitute "the hearing",

(ii) for "the trial", where it second occurs (in subsection (2)(a)(iii)), substitute "a hearing in relevant criminal proceedings", and

(iii) for "the trial", where it third occurs (in subsection (2)(b)(i)), substitute "a hearing in relevant criminal proceedings",

(c) in subsection (3), for "the trial" substitute "a hearing in relevant criminal proceedings", and

(d) in subsection (5), for "the trial" substitute "the hearing".

(8) In section 271J (live television link)—

(a) in subsection (1), for "the trial" substitute "the hearing",

(b) in subsection (2)(b), for "the trial" substitute "the hearing", and

(c) in subsection (5)(a), for "the trial" substitute "the hearing".

(9) In section 271L (supporters), in subsection (2), for "the trial" substitute "that or any other hearing in the proceedings".

(10) In section 288E (prohibition of personal conduct of defence in certain cases involving child witnesses under the age of 12), in subsection (5), for "a child witness referred to in subsection (2)(b) above" substitute "the trial".

64A Child witnesses in proceedings for people trafficking offences

In section 271 of the 1995 Act (vulnerable witnesses: main definitions)—

(a) in subsection (1)(a), for "age of 16" substitute "relevant age", and

(b) after subsection (1), insert—

"(1A) In subsection (1)(a), "the relevant age" means—

(a) in the case of a person who is giving or is to give evidence in proceedings for an offence under section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (trafficking in prostitution etc.) or section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation), the age of 18, and

(b) in any other case, the age of 16.".

65 Amendment of Criminal Justice (Scotland) Act 2003

Section 15A of the Criminal Justice (Scotland) Act 2003 (asp 7) (application of certain vulnerable witness provisions in proofs) is repealed.

66 Witness anonymity orders

(1) After section 271M of the 1995 Act insert—

"*Witness anonymity orders*

271N Witness anonymity orders

(1) A court may make an order requiring such specified measures to be taken in relation to a witness in criminal proceedings as the court considers appropriate to ensure that the identity of the witness is not disclosed in or in connection with the proceedings.

(2) The court may make such an order only on an application made in accordance with section 271P, if satisfied of the conditions set out in section 271Q having considered the matters set out in section 271R.

(3) The kinds of measures that may be required to be taken in relation to a witness include in particular measures for securing one or more of the matters mentioned in subsection (4).

(4) Those matters are—

(a) that the witness's name and other identifying details may be—

(i) withheld,

(ii) removed from materials disclosed to any party to the proceedings,

(b) that the witness may use a pseudonym,

(c) that the witness is not asked questions of any specified description that might lead to the identification of the witness,

(d) that the witness is screened to any specified extent,

(e) that the witness's voice is subjected to modulation to any specified extent.

(5) Nothing in this section authorises the court to require—

(a) the witness to be screened to such an extent that the witness cannot be seen by the judge or the jury,

(b) the witness's voice to be modulated to such an extent that the witness's natural voice cannot be heard by the judge or the jury.

(6) An order made under this section is referred to in this Act as a "witness anonymity order".

(7) In this section "specified" means specified in the order concerned.

271P Applications

(1) An application for a witness anonymity order to be made in relation to a witness in criminal proceedings may be made to the court by the prosecutor or the accused.

(2) Where an application is made by the prosecutor, the prosecutor—

(a) must (unless the court directs otherwise) inform the court of the identity of the witness, but

(b) is not required to disclose in connection with the application—

(i) the identity of the witness, or

(ii) any information that might enable the witness to be identified,

to any other party to the proceedings (or to the legal representatives of any other party to the proceedings).

(3) Where an application is made by the accused, the accused—

(a) must inform the court and the prosecutor of the identity of the witness, but

(b) if there is more than one accused, is not required to disclose in connection with the application—

(i) the identity of the witness, or

(ii) any information that might enable the witness to be identified,

to any other accused (or to the legal representatives of any other accused).

(4) Accordingly, where the prosecutor or the accused proposes to make an application under this section in respect of a witness, any relevant information which is disclosed by or on behalf of that party before the determination of the application must be disclosed in such a way as to prevent—

(a) the identity of the witness, or

(b) any information that might enable the witness to be identified,

from being disclosed except as required by subsection (2)(a) or (3)(a).

(5) "Relevant information" means any document or other material which falls to be disclosed, or is sought to be relied on, by or on behalf of the party concerned in connection with the proceedings or proceedings preliminary to them.

(6) The court must give every party to the proceedings the opportunity to be heard on an application under this section.

(7) Subsection (6) does not prevent the court from hearing one or more of the parties to the proceedings in the absence of an accused and the accused's legal representatives, if it appears to the court to be appropriate to do so in the circumstances of the case.

(8) Nothing in this section is to be taken as restricting any power to make rules of court.

271Q Conditions for making orders

(1) This section applies where an application is made for a witness anonymity order to be made in relation to a witness in criminal proceedings.

(2) The court may make the order only if it is satisfied that Conditions A to D below are met.

(3) Condition A is that the proposed order is necessary—

(a) in order to protect the safety of the witness or another person or to prevent any serious damage to property, or

(b) in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities or otherwise).

(4) Condition B is that, having regard to all the circumstances, the effect of the proposed order would be consistent with the accused's receiving a fair trial.

(5) Condition C is that the importance of the witness's testimony is such that in the interests of justice the witness ought to testify.

(6) Condition D is that—

(a) the witness would not testify if the proposed order were not made, or

(b) there would be real harm to the public interest if the witness were to testify without the proposed order being made.

(7) In determining whether the measures to be specified in the order are necessary for the purpose mentioned in subsection (3)(a), the court must have regard in particular to any reasonable fear on the part of the witness—

(a) that the witness or another person would suffer death or injury, or

(b) that there would be serious damage to property,

if the witness were to be identified.

271R Relevant considerations

(1) When deciding whether Conditions A to D in section 271Q are met in the case of an application for a witness anonymity order, the court must have regard to—

(a) the considerations mentioned in subsection (2), and

(b) such other matters as the court considers relevant.

(2) The considerations are—

(a) the general right of an accused in criminal proceedings to know the identity of a witness in the proceedings,

(b) the extent to which the credibility of the witness concerned would be a relevant factor when the witness's evidence comes to be assessed,

(c) whether evidence given by the witness might be material in implicating the accused,

(d) whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without the witness's identity being disclosed,

(e) whether there is any reason to believe that the witness—

(i) has a tendency to be dishonest, or

(ii) has any motive to be dishonest in the circumstances of the case,

having regard in particular to any previous convictions of the witness and to any relationship between the witness and the accused or any associates of the accused,

(f) whether it would be reasonably practicable to protect the witness's identity by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court.

271S Direction to jury

(1) Subsection (2) applies where, in a trial on indictment, any evidence has been given by a witness at a time when a witness anonymity order applied to the witness.

(2) The judge must give the jury such direction as the judge considers appropriate to ensure that the fact that the order was made in relation to the witness does not prejudice the accused.

271T Discharge and variation of order

(1) This section applies where a court has made a witness anonymity order in relation to any criminal proceedings.

(2) The court may discharge or vary (or further vary) the order if it appears to the court to be appropriate to do so in view of the provisions of sections 271Q and 271R that applied to the making of the order.

(3) The court may do so—

(a) on an application made by a party to the proceedings if there has been a material change of circumstances since the relevant time, or

(b) on its own initiative.

(4) The court must give every party to the proceedings the opportunity to be heard—

(a) before determining an application made to it under subsection (3)(a), and

(b) before discharging or varying the order on its own initiative.

(5) Subsection (4) does not prevent the court from hearing one or more of the parties to the proceedings in the absence of an accused and the accused's legal representatives, if it appears to the court to be appropriate to do so in the circumstances of the case.

(6) In subsection (3)(a) "the relevant time" means—

(a) the time when the order was made, or

(b) if a previous application has been made under that subsection, the time when the application (or the last application) was made.

271U Appeals

(1) The prosecutor or the accused may appeal to the High Court against—

(a) the making of a witness anonymity order under section 271N,

(b) the kinds of measures that are required to be taken in relation to a witness under a witness anonymity order made under that section,

(c) the refusal to make a witness anonymity order under that section,

(d) the discharge of a witness anonymity order under section 271T,

(e) the variation of a witness anonymity order under that section, or

(f) the refusal to discharge or vary a witness anonymity order under that section.

(3) The procedure in relation to the appeal is to be prescribed by Act of Adjournal.

(4) If an appeal is brought under this section, the High Court may—

(a) postpone the trial diet for any period that appears to it to be appropriate, and

(b) direct that the period, or some part of it, is not to count towards any time limit applying in respect of the case.

(5) An appeal under this section does not affect any right of appeal in relation to any other decision of any court in the criminal proceedings.

271V Appeal against the making of a witness anonymity order

(1) This section applies where—

(a) an appeal is brought under section 271U(1)(a) against the making of a witness anonymity order, and

(b) the High Court determines that the decision of the judge at first instance was wrong in law.

(2) The High Court must discharge the order and the trial is to proceed as if the order had not been made.

271W Appeal against the refusal to make a witness anonymity order

(1) This section applies where—

(a) an appeal is brought under section 271U(1)(c) against the refusal to make a witness anonymity order in relation to a witness in criminal proceedings, and

(b) the High Court determines that the decision of the judge at first instance was wrong in law.

(2) The High Court must make an order requiring such specified measures to be taken in relation to the witness in the proceedings as the court considers appropriate to ensure that the identity of the witness is not disclosed in or in connection with the proceedings.

271X Appeal against a variation of a witness anonymity order

(1) This section applies where—

(a) an appeal is brought under section 271U(1)(e) against a variation of a witness anonymity order, and

(b) the High Court determines that the decision of the judge at first instance was wrong in law.

(2) The High Court must discharge the variation.

(3) If the High Court determines that it is appropriate to make an additional variation in view of the provisions of sections 271Q and 271R, the court may do so.

271Y Appeal against a refusal to vary or discharge a witness anonymity order

(1) This section applies where—

(a) an appeal is brought under section 271U(1)(f) against a refusal to discharge or vary a witness anonymity order, and

(b) the High Court determines that the decision of the judge at first instance was wrong in law.

(2) The High Court must discharge the order, or make the variation, as the case requires.

(3) If, in the case of a variation, the High Court determines that it is appropriate to make an additional variation in view of the provisions of sections 271Q and 271R, the court may do so.”.

(2) Sections 271N to 271Y of the 1995 Act apply to proceedings in cases where the trial or hearing begins on or after the day on which this section comes into force.

(3) Nothing in this section or sections 271N to 271Y of the 1995 Act affects the power of a court under any rule of law to make an order for securing that the identity of a witness in a trial or hearing in criminal proceedings is withheld from the accused (or, on a defence application, from other accused), where the trial or hearing begins before the day on which this section comes into force.

(4) Schedule 3 makes provision about certain appeals.

67 Television link evidence

(1) The 1995 Act is amended as follows.

(2) In section 273 (television link evidence from abroad), in subsection (1), for "solemn" substitute "criminal".

(3) After that section insert—

"*Evidence from other parts of the United Kingdom*

273A Television link evidence from other parts of the United Kingdom

(1) In any criminal proceedings in the High Court or the sheriff court a person other than the accused may give evidence through a live television link if—

(a) the witness is within the United Kingdom but outside Scotland,

(b) an application under this section for the issue of a letter of request has been granted, and

(c) the court is satisfied as to the arrangements for the giving of evidence in that manner by that witness.

(2) The prosecutor or the defence in any proceedings referred to in subsection (1) may apply for the issue of a letter of request.

(3) The application must be made to a judge of the court in which the trial is to take place or, if that court is not yet known, to a judge of the High Court.

(4) The judge may, on an application under this section, issue a letter to a court or tribunal exercising jurisdiction in the place where the witness is ordinarily resident requesting assistance in facilitating the giving of evidence by that witness through a live television link, if the judge is satisfied of the matters set out in subsection (5).

(5) Those matters are—

(a) that the evidence which it is averred the witness is able to give is necessary for the proper adjudication of the trial,

(b) that the granting of the application—

(i) is in the interests of justice, and

(ii) in the case of an application by the prosecutor, is not unfair to the accused.".

67A European evidence warrants

(1) The Scottish Ministers may by order make provision for the purposes of and in connection with implementing any obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).

(2) The provision may, in particular, confer functions—

(a) on the Scottish Ministers,

(b) on the Lord Advocate,

(c) on other persons.

(3) An order under subsection (1) may modify any enactment.

(4) An order under subsection (1) may contain provision creating offences and a person who commits such an offence is liable to such penalties, not exceeding those mentioned in subsection (5), as are provided for in the order.

(5) Those penalties are—

(a) on conviction on indictment, imprisonment for a period not exceeding 2 years, or a fine, or both,

(b) on summary conviction, imprisonment for a period not exceeding 12 months, or a fine not exceeding the statutory maximum, or both.

(6) In this section, the "Framework Decision" means Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

PART 5

CRIMINAL JUSTICE

Jury service

67B Lists of jurors

(1) The 1995 Act is amended as follows.

(2) In section 84 (juries: returns of jurors and preparation of lists)—

(a) in subsection (3), for "list" substitute "lists",

(b) for subsection (4) substitute—

"(4) For the purpose of a trial in the sheriff court, the sheriff principal must furnish the clerk of court with a list of names, containing the number of persons required, from lists of potential jurors of—

(a) the sheriff court district in which the trial is to be held (the "local district"), and

(b) if the sheriff principal considers it appropriate, any other sheriff court district or districts in the sheriffdom in which the trial is to be held ("other districts").

(4A) Where the sheriff principal furnishes a list containing names of potential jurors of other districts, the sheriff principal may determine the proportion as between the local district and the other districts in which jurors are to be summoned.",

(c) in subsection (5), for "list", in both places where it occurs, substitute "lists", and

(d) subsection (7) is repealed.

(3) In section 85(4) (juries: citation and attendance of jurors)—

(a) for the words from the beginning to "shall", in the first place where it occurs, substitute "The sheriff clerk of—

(a) the sheriffdom in which the High Court is to sit, or

(b) the sheriff court district in which a trial in the sheriff court is to be held,

shall", and

(b) the word "such", in the first place where it occurs, is repealed.

68 Upper age limit for jurors

(1) Section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55) (qualification of jurors) is amended as follows.

(2) In subsection (1)—

(a) in paragraph (b), at beginning insert "subject to subsection (1A),", and

(b) the words ", civil or criminal" are repealed.

(3) After subsection (1) insert—

"(1A) In relation to criminal proceedings, a person is qualified and liable to serve as a juror despite being over 65 years of age.".

68A Excusal from jury service

(1) The Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 is amended as follows.

(2) In section 1 (qualification of jurors)—

(a) in subsection (1), after "below" insert "and to section 1A",

(b) in subsection (2), after "service" in the second place where it occurs insert "in relation to civil proceedings",

(c) in subsection (3), after "service" in the first place where it occurs insert "in relation to civil proceedings",

(d) in subsection (5), after "above" insert "or under section 1A", and

(e) in subsection (6), after paragraph (a) insert—

"(aa) section 1A;".

(3) After section 1 insert—

"1A Excusal of jurors in relation to criminal proceedings

(1) A person who is qualified under section 1(1) but is among the persons listed in Part III of Schedule 1 to this Act (being persons excusable as of right from jury service) is to be excused from jury service in relation to criminal proceedings on any occasion where the person—

(a) has been required to provide information under section 3(2) of the Jurors (Scotland) Act 1825 (c.22); and

(b) gives written notice to the sheriff principal that the person wishes to be excused, before the end of the period of 7 days beginning with the day on which the person receives the requirement.

(2) A person who is qualified under section 1(1) but is among the persons listed in Group C of Part III of Schedule 1 to this Act is to be excused from jury service in relation to criminal proceedings on any occasion where—

(a) the person has been required to provide information under section 3(2) of the Jurors (Scotland) Act 1825; and

(b) the person's commanding officer certifies to the sheriff principal that it would be prejudicial to the efficiency of the force of which the person is a member were the person required to be absent from duty.".

(4) In section 3(1)(a) (offences in connection with jury service), after "been" insert "required to provide information under section 3(2) of the Jurors (Scotland) Act 1825 or".

69 Persons excusable from jury service

In the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55), in Schedule 1 (ineligibility for and disqualification and excusal from jury service), Part 3, Group F, for paragraph (a) substitute—

"(a) where citation for jury service would result in a person's serving as a juror in relation to criminal proceedings—

(i) persons who have served as a juror in the period of 5 years ending with the date on which the person is cited first to attend;

(ii) persons who have attended for jury service in relation to criminal proceedings, but have not served as a juror, in the period of 2 years ending with the date on which the person is cited first to attend; and

(iii) persons who have attained the age of 71;

(aa) where citation for jury service would result in a person's serving as a juror in relation to civil proceedings, persons who have served, or duly attended for service, as a juror in the period of 5 years ending with the date on which the person is cited first to attend;".

Data matching for detection of fraud etc.

70 Data matching for detection of fraud etc.

(1) The Public Finance and Accountability (Scotland) Act 2000 (asp 1) is amended as follows.

(2) In section 11 (Audit Scotland: financial provisions)—

(a) after subsection (1)(c) insert—

"(ca) carrying out a data matching exercise under section 26A,", and

(b) after subsection (5) insert—

"(5A) Charges under subsection (1)(ca) may be imposed on (either or both)—

(a) persons who disclose data for a data matching exercise,

(b) persons who receive the results of such an exercise.”.

(3) After section 26 insert—

“PART 2A

DATA MATCHING

26A Power to carry out data matching exercises

(1) Audit Scotland may carry out data matching exercises or arrange for them to be carried out on its behalf.

(2) A data matching exercise is an exercise involving the comparison of sets of data to determine how far they match (including the identification of any patterns and trends).

(3) The power in subsection (1) may be exercised for one or more of the following purposes—

(a) assisting in the prevention and detection of fraud,

(b) assisting in the prevention and detection of crime (other than fraud),

(c) assisting in the apprehension and prosecution of offenders.

(4) A data matching exercise may not be used for the sole purpose of identifying patterns and trends in a person’s characteristics or behaviour which suggest the person is likely to commit fraud in the future.

26B Voluntary disclosure of data to Audit Scotland

(1) For the purposes of a data matching exercise, any person may disclose data to Audit Scotland (or a person acting on its behalf).

(2) Such disclosure does not breach—

(a) any duty of confidentiality owed by the person making the disclosure, or

(b) any other restriction on the disclosure of data.

(3) Nothing in this section authorises a disclosure—

(a) which contravenes the Data Protection Act 1998 (c.29),

(b) which is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000 (c.23) (interception, acquisition and disclosure of communications data), or

(c) of data comprising or including patient data.

(4) “Patient data” means data relating to an individual which is held for medical purposes and from which the individual can be identified.

(5) “Medical purposes” are the purposes of—

(a) preventative medicine,

(b) medical diagnosis,

(c) medical research,

(d) the provision of care and treatment,

(e) the management of health and social care services, and

(f) informing individuals about their physical or mental health or condition, the diagnosis of their condition or their care and treatment.

(6) Nothing in this section prevents disclosure of data under any other provision of this Act, another enactment or any rule of law.

(7) Data matching exercises may include data disclosed by a person outside Scotland.

26C Power to require disclosure of data

(1) Audit Scotland may require the persons mentioned in subsection (2) to disclose to it (or a person acting on its behalf) such data as it (or the person acting on its behalf) may reasonably require for the purpose of carrying out data matching exercises in such form as it (or such person) may so require.

(2) Those persons are—

(a) a body or an office holder any of whose accounts is an account in relation to which sections 21 and 22 apply,

(b) a body whose accounts must be audited under Part 7 of the Local Government (Scotland) Act 1973 (c.65) (finance),

(c) a Licensing Board continued in existence by or established under section 5 of the Licensing (Scotland) Act 2005 (asp 16), or

(d) an officer or a member of a body, office holder or board mentioned in paragraph (a), (b) or (c).

(3) Audit Scotland must not require a person to disclose data if—

(a) the disclosure would contravene the Data Protection Act 1998 (c.29),

(b) the disclosure is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000 (c.23) (interception, acquisition and disclosure of communications data).

(4) A disclosure made in response to a requirement imposed under subsection (1) does not breach—

(a) any duty of confidentiality owed by the person making the disclosure, or

(b) any other restriction on the disclosure of data.

(5) A person mentioned in subsection (2) who without reasonable excuse fails to comply with a requirement made in accordance with this section is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

26D Disclosure of results of data matching

(1) This section applies to the following data—

(a) data relating to a particular person obtained by or on behalf of Audit Scotland for the purpose of carrying out a data matching exercise, and

(b) the results of such an exercise.

(2) Data to which this section applies may be disclosed by or on behalf of Audit Scotland if the disclosure is—

(a) for, or in connection with, a purpose for which a data matching exercise is carried out,

(b) to a Scottish audit agency, or a related party, for, or in connection with a function of that audit agency under—

(i) Part 2 of this Act, or

(ii) Part 7 of the Local Government (Scotland) Act 1973 (c.65) (finance),

(c) to a United Kingdom audit agency, or a related party, for, or in connection with, a function of that audit agency corresponding or similar to—

(i) the functions of a Scottish audit agency, or

(ii) the functions of Audit Scotland under this Part, or

(d) in pursuance of a duty imposed by or under an enactment.

(3) "Scottish audit agency", for the purpose of subsections (2)(b) and (c)(i), means—

(a) the Auditor General, or

(b) the Accounts Commission.

(4) "United Kingdom audit agency", for the purposes of subsection (2)(c), means—

(a) the National Audit Office,

(b) the Audit Commission for Local Authorities and the National Health Service in England,

(c) the Auditor General for Wales,

(d) the Comptroller and Auditor General for Northern Ireland, or

(e) a person designated as a local government auditor under article 4 of the Local Government (Northern Ireland) Order 2005 (S.I. 2005/1968 (NI.18)).

(5) "Related party", in relation to a Scottish or United Kingdom audit agency means—

(a) a person acting on its behalf,

(b) a body or office holder whose accounts are required to be audited by it or by a person appointed by it, or

(c) a person appointed by it to audit those accounts.

(6) If the data used for a data matching exercise includes patient data—

(a) subsection (2)(a) applies only so far as the purpose for which the disclosure is made relates to a relevant NHS body, and

(b) subsection (2)(b) or (c) applies only so far as the function for, or in connection with, which the disclosure is made relates to such a body.

(7) In subsection (6)—

"patient data" has the same meaning as section 26B(4), and "relevant NHS body" means—

(a) an NHS body as defined in section 22(1) of the Community Care and Health (Scotland) Act 2002 (asp 5),

(b) a health service body as defined in section 53(1) of the Audit Commission Act 1998 (c.18),

(c) a Welsh NHS body as defined in section 60 of the Public Audit (Wales) Act 2004 (c.23),

(d) a health and social care body mentioned in paragraphs (a) to (e) of section 1(5) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 (c.1).

(8) Data disclosed under subsection (2) may not be further disclosed except—

(a) for, or in connection with—

(i) the purpose for which it was disclosed under subsection (2)(a), or

(ii) the function for which it was disclosed under subsection (2)(b) or (c),

(b) otherwise for the investigation or prosecution of an offence, or

(c) in pursuance of a duty imposed by or under an enactment.

(9) Except as authorised by subsections (2) and (8), a person who discloses data to which this section applies is guilty of an offence and liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine or to both, or

(b) on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both.

26E Publication of reports on data matching

(1) Audit Scotland may publish a report on a data matching exercise (including a report on the results of an exercise).

(2) Such a report must not include data relating to a particular person if—

(a) the person is the subject of any data included in the data matching exercise,

(b) the person can be identified from the data, and

(c) the data is not otherwise in the public domain.

(3) A report published under subsection (1) is to be published in such manner as Audit Scotland considers appropriate for the purposes of bringing it to the attention of those members of the public who may be interested.

(4) Nothing in section 26D prevents publication under this section.

(5) This section does not affect any powers of an auditor where the data matching exercise in question forms part of an audit under—

(a) Part 2 of this Act, or

(b) Part 7 of the Local Government (Scotland) Act 1973 (c.65) (finance).

26F Data matching code of practice

(1) Audit Scotland must prepare, and keep under review, a code of practice with respect to data matching exercises.

(2) Regard must be had to the code in carrying out and participating in any such exercise.

(3) Audit Scotland must consult the following persons before preparing or altering the code of practice—

(a) the Information Commissioner,

(b) the persons mentioned in section 26C(2), and

(c) any other person Audit Scotland thinks fit.

(4) Audit Scotland must, from time to time, publish the code.

26G Powers of the Scottish Ministers

(1) The Scottish Ministers may by order amend this Part—

(a) to add a public body to the persons mentioned in section 26C(2),

(b) to modify the application of this Part in relation to a public body so added, or

(c) to remove a person from the persons mentioned in section 26C(2).

(2) An order under this section may include such incidental, consequential, supplementary or transitional provision as the Scottish Ministers think fit.

(3) In this section, "public body" means a person whose functions—

(a) are functions of a public nature, or

(b) include functions of a public nature.

(4) A person referred to in subsection (3)(b) is a public body to the extent only of the functions referred to in that subsection.".

Sharing information with anti-fraud organisations

71 Sharing information with anti-fraud organisations

In the Serious Crime Act 2007 (c.27), the following provisions are repealed—

(a) in section 68 (disclosure of information to prevent fraud), subsections (5) and (6),

(b) in section 69 (offence for certain further disclosures of information), subsection (3), and

(c) in section 71 (code of practice for disclosure of information to prevent fraud)—

(i) subsection (4), and

(ii) in subsection (6), the definition of "relevant public authority".

Closure of premises associated with human exploitation etc.

72 Closure of premises associated with human exploitation etc.

(1) In section 26 of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8) (authorisation of closure notice)—

(a) in subsection (1), for "and (3)" substitute "to (3B)",

(b) in subsection (3), after "may" insert ", in a case involving antisocial behaviour,", and

(c) after subsection (3) insert—

"(3A) A senior police officer may, in a case involving an exploitation offence, authorise the service of a closure notice only where the senior police officer—

(a) has reasonable grounds for believing that—

(i) such an offence is being (or, at any time in the immediately preceding 3 months, was) committed in the premises, or

(ii) the premises are being (or, at any time in the immediately preceding 3 months, have been) used for or in connection with the commission of such an offence, and

(b) is satisfied that—

(i) the local authority for the area in which the premises are situated has been consulted, and

(ii) reasonable steps have been taken to establish the identity of any person who lives on, has control of, has responsibility for or has an interest in the premises.

(3B) Subsection (3A) is without prejudice to subsection (3) (including in so far as subsection (3) is applicable in relation to a brothel or other place where prostitution may occur).".

(2) In section 27 of that Act (service etc.), in subsection (2)—

(a) in paragraph (b)(i), after "section 26(3)(b)(ii)" insert "or (as the case may be) (3A)(b)(ii)", and

(b) in paragraph (b)(ii), for "in that subsection" substitute "there".

(3) In section 30 of that Act (application: determination)—

(a) in subsection (1), after "subsection (2)" insert "or (2A)",

(b) in subsection (2), for "Those" substitute "Where the application is in a case involving antisocial behaviour, the",

(c) after subsection (2) insert—

"(2A) Where the application is in a case involving an exploitation offence, the conditions are—

(a) that it appears that—

(i) such an offence is being (or was recently) committed in the premises, or

(ii) the premises continue to be (or recently have been) used for or in connection with the commission of such an offence, and

(b) that the making of the order is necessary to prevent the commission of such an offence for the period specified in the order.”,

(d) in subsection (3)(b), for the words from “engaged” to the end substitute “(as the case may be)—

(i) engaged in antisocial behaviour which has occurred in the premises, or

(ii) involved in the commission of an exploitation offence in or connected with the premises.”, and

(e) after subsection (3) insert—

“(3A) For the purpose of paragraph (b)(ii) of subsection (3), a person such as is mentioned in paragraph (a) of that subsection is not involved in the commission of an exploitation offence where that person is the victim of the offence.”.

(4) In section 32 of that Act (extension)—

(a) after subsection (1) insert—

“(1A) The sheriff may, on the application of a senior police officer and if satisfied that it is necessary to do so to prevent the commission of an exploitation offence, make an order extending the period for which a closure order has effect for a period not exceeding the maximum period.”,

(b) in subsection (2), for “subsection (1)” substitute “subsections (1) and (1A)”,

(c) in subsection (3)—

(i) after “may” insert “, in a case involving antisocial behaviour,”, and

(ii) for “this section” substitute “subsection (1)”, and

(d) after subsection (3) insert—

“(3A) A senior police officer may, in a case involving an exploitation offence, make an application under subsection (1A) only if—

(a) it is made while the closure order has effect, and

(b) the senior police officer—

(i) has reasonable grounds for believing that it is necessary to extend the period for which the closure order has effect for the purpose of preventing the commission of an exploitation offence, and

(ii) is satisfied that the appropriate local authority has been consulted about the intention to make the application.”.

(5) In section 33 of that Act (revocation), in subsection (1), for the words from “the occurrence” to the end substitute “(as the case may be)—

(a) the occurrence of relevant harm, or

(b) the commission of an exploitation offence,

revoke the order.”.

(6) In section 36 of that Act (appeals), in subsection (5), after “section 32(1)” insert “or (1A)”.

(7) After section 40 of that Act insert—

“40A Exploitation offences

(1) In this Part, an “exploitation offence” is any of the following offences—

(a) so far as concerning travel or identity documentation for enabling the trafficking of people (including passports, visas and work permits)—

(i) fraud, or

(ii) uttering a forged document,

(b) so far as concerning the trafficking of people, an offence under section 26(1)(d) of the Immigration Act 1971 (c.77) (falsification of documentation),

(c) an offence under section 52 or 52A of the Civic Government (Scotland) Act 1982 (c.45) (possession, taking or distribution of indecent images of children),

(d) an offence under sections 7 to 12 or 13(9) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (offences relating to prostitution and brothels),

(e) an offence under section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (traffic in prostitution etc.),

(f) an offence under section 1 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) (meeting a child following certain preliminary contact),

(g) an offence under sections 9 to 12 of that Act (offences relating to provision by child of sexual services or child pornography),

(h) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation),

(i) an offence under Part 1 of the Sexual Offences (Scotland) Act 2009 (asp 9) (rape etc.),

(j) an offence under Part 4 of that Act (sexual offences involving children) other than an offence under section 37 (older children engaging in sexual conduct with each other),

(k) an offence under section 42 of that Act (sexual abuse of trust),

(l) an offence under section 46 of that Act (sexual abuse of trust of a mentally disordered person),

(m) an offence under section 35A (slavery, servitude and forced or compulsory labour) of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00).

(2) For the purposes of subsection (1)(a) and (b), a reference to trafficking of people is a reference to a person intentionally doing something in respect of at least one other person which involves the commission of an offence mentioned in subsection (1)(e) or (h).

(3) For the purposes of subsection (1), a reference to an offence includes a reference to—

(a) an attempt to commit an offence,

(b) incitement to commit an offence,

(c) counselling or procuring the commission of an offence,

(d) involvement art and part in an offence, and

(e) an offence as modified by section 54 of the Sexual Offences (Scotland) Act 2009 (asp 9) (incitement to commit certain sexual acts outside the United Kingdom).

(4) The Scottish Ministers may by order add to or otherwise modify the specification of offences listed in subsection (1).".

Sexual offences prevention orders

73 Sexual offences prevention orders

(1) In section 141 of the Criminal Justice and Immigration Act 2008 (c.4) (sexual offences prevention orders: relevant sexual offences), subsection (2) is repealed.

(2) In the Sexual Offences Act 2003 (c.42)—

(a) in section 106 (applications and grounds for sexual offences prevention orders: supplemental), in subsection (13), the words from "in their" to the end are repealed,

(b) in section 109 (interim SOPOs), in subsection (5), for "107(3)" substitute "107(2)",

(c) after section 111 insert—

"111A SOPO and interim SOPO requirements: Scotland

(1) This section applies in relation to a sexual offences prevention order or an interim sexual offences prevention order made, or to be made, by a court in Scotland.

(2) Such an order, in addition to or instead of prohibiting the defendant from doing anything described in the order, may require the defendant to do anything described in the order.

(3) Accordingly, in relation to such an order—

(a) the references in sections 107(2) and 108(5) to a prohibition include a reference to a requirement, and

(b) the reference in section 113(1) to a person's doing anything which he is prohibited from doing includes a reference to his failing to do anything which he is required to do.", and

(d) in section 112 (provisions relating to sexual offences prevention orders in Scotland), in subsection (1), after paragraph (d) insert—

"(da) a court may make an order under section 104(1)—

(i) at its own instance, or

(ii) on the motion of the prosecutor;".

Foreign travel orders

74 Foreign travel orders

(1) The Sexual Offences Act 2003 (c.42) is amended as follows.

(2) In section 115 (definition of "protecting children generally or any child from serious sexual harm from the defendant outside the United Kingdom"), in subsection (2), for "16" in both places it occurs substitute "18".

(3) In section 116 (qualifying offenders: offences), in subsection (2)(d), for "16" substitute "18".

(4) In section 117(1) (foreign travel orders: effect), for "6 months" substitute "5 years".

(5) Before section 118, insert—

"**117B Surrender of passports: Scotland**

(1) This section applies in relation to a foreign travel order which contains a prohibition within section 117(2)(c).

(2) The order must require the person in respect of whom the order has effect to surrender all of the person's passports, at a police station in Scotland specified in the order—

(a) on or before the date when the prohibition takes effect, or

(b) within a period specified in the order.

(3) Any passports surrendered must be returned as soon as reasonably practicable after the person ceases to be subject to a foreign travel order containing a prohibition within section 117(2)(c).

(4) Subsection (3) does not apply in relation to—

(a) a passport issued by or on behalf of the authorities of a country outside the United Kingdom if the passport has been returned to those authorities;

(b) a passport issued by or on behalf of an international organisation if the passport has been returned to that organisation.

(5) In this section "passport" means—

(a) a United Kingdom passport within the meaning of the Immigration Act 1971 (c.77);

(b) a passport issued by or on behalf of the authorities of a country outside the United Kingdom, or by or on behalf of an international organisation;

(c) a document that can be used (in some or all circumstances) instead of a passport.".

(6) In section 122 (breach of foreign travel order), before subsection (2) insert—

"(1B) A person commits an offence if, without reasonable excuse, the person fails to comply with—

(a) a requirement under section 117A(2) (surrender of passports: England and Wales and Northern Ireland), or

(b) a requirement under section 117B(2) (surrender of passports: Scotland).

(1C) A person may be prosecuted, tried and punished for any offence under subsection (1B)—

(a) in any sheriff court district in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine, as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).".

Sex offender notification requirements

74A Sex offender notification requirements

(1) The Sexual Offences Act 2003 (c.42) is amended as follows.

(2) In section 85 (notification requirements: periodic notification)—

(a) in subsection (1), for "period of one year" substitute "applicable period",

(b) in subsection (3), for "period referred to in subsection (1)" substitute "applicable period", and

(c) after subsection (4) insert—

"(5) In this section, the "applicable period" means—

(a) in any case where subsection (6) applies to the relevant offender, such period not exceeding one year as the Scottish Ministers may prescribe in regulations, and

(b) in any other case, the period of one year.

(6) This subsection applies to the relevant offender if the last home address notified by the offender under section 83(1) or 84(1) or subsection (1) was the address or location of such a place as is mentioned in section 83(7)(b).".

(3) In section 86 (notification requirements: travel outside the United Kingdom), subsection (4) is repealed.

(4) In section 87 (method of notification and related matters), subsection (6) is repealed.

(5) In section 96 (information about release or transfer), subsection (4) is repealed.

(6) In section 138 (orders and regulations)—

(a) in subsection (2), after "84," insert "85,", and

(b) after subsection (3) insert—

"(4) Orders or regulations made by the Scottish Ministers under this Act may—

(a) make different provision for different purposes,

(b) include supplementary, incidental, consequential, transitional, transitory or saving provisions.".

Risk of sexual harm orders

75 Risk of sexual harm orders

(1) The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) is amended as follows.

(2) In section 2 (risk of sexual harm orders: applications, grounds and effect)—

(a) in subsection (7)(a), after "doing" insert ", or requires that person to do,", and

(b) in subsection (8), after "prohibitions" insert "or requirements".

(3) In section 4 (risk of sexual harm orders: variations, renewals and discharges), in subsection (4), after "prohibitions" in both places where it occurs insert "or requirements".

(4) In section 5 (interim risk of sexual harm orders), in subsection (3), after "doing" insert ", or requiring that person to do,".

(5) In section 7 (offence: breach of risk of sexual harm order or interim risk of sexual harm order), in subsection (1), after "doing" insert ", or fails to do anything which the person is required to do,".

75A Risk of sexual harm orders: spent convictions

In section 7 of the Rehabilitation of Offenders Act 1974 (c.53) (limitations on rehabilitation under the Act), in subsection (2), after paragraph (bb) insert—

> "(bc) in any proceedings on an application under section 2, 4 or 5 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) or in any appeal under section 6 of that Act;".

Obtaining information from outwith United Kingdom

76 Obtaining information from outwith United Kingdom

After section 194I of the 1995 Act insert—

> **"194IA Power to request assistance in obtaining information abroad**
>
> (1) Where it appears to the Commission that there may be information which they require for the purposes of carrying out their functions, and the information is outside the United Kingdom, they may apply to the High Court to request assistance.
>
> (2) On an application made by the Commission under subsection (1), the High Court may request assistance if satisfied that it is reasonable in the circumstances.
>
> (3) In this section, "request assistance" means request assistance in obtaining outside the United Kingdom any information specified in the request for use by the Commission for the purposes of carrying out their functions.
>
> (4) Section 8 of the Crime (International Co-operation) Act 2003 (c.32) (sending requests for assistance) applies to requests for assistance under this section as it applies to requests for assistance under section 7 of that Act.
>
> (5) Subsections (2), (3) and (6) of section 9 of that Act (use of evidence obtained) apply to information obtained pursuant to a request for assistance under this section as they apply under subsection (1) of that section to evidence obtained pursuant to a request for assistance under section 7 of that Act.".

Surveillance

77 Grant of authorisations for surveillance

(1) The Regulation of Investigatory Powers (Scotland) Act 2000 (asp 11) is amended as follows.

(3) In section 10 (authorisation of intrusive surveillance)—

(a) in subsection (1), for the words from "the" where it second occurs to the end substitute "any of the persons mentioned in subsection (1A) may grant authorisations for the carrying out of intrusive surveillance.", and

(b) after that subsection insert—

"(1A) Those persons are—

(a) the chief constable of every police force,

(b) the Director General of the Scottish Crime and Drug Enforcement Agency,

(c) the Deputy Director General of the Scottish Crime and Drug Enforcement Agency.".

(3A) After that section insert—

"**10A Authorisation of surveillance: joint surveillance operations**

In the case of a joint surveillance operation, where authorisation is sought for the carrying out of any form of conduct to which this Act applies, authorisation may be granted by any one of the persons having power to grant authorisation for the carrying out of that conduct.".

(4) In section 11 (rules for grant of authorisations), in subsection (3), after "General" insert "or the Deputy Director General".

(5) In section 12A (grant of authorisations in cases of urgency: Scottish Crime and Drug Enforcement Agency), in subsection (1), after "General" insert "or the Deputy Director General".

(5A) In section 14 (approval required for authorisations to take effect)—

(a) in subsection (5)(b), after "General" insert "or the Deputy Director General", and

(b) subsection (7) is repealed.

(5B) In section 16 (appeals against decisions by Surveillance Commissioners), in subsection (1), after "General" insert "or the Deputy Director General".

(6) In section 31 (interpretation), in subsection (1), after the definitions of "directed" and "intrusive" insert—

""joint surveillance operation" means a case involving—

(a) at least two police forces in Scotland working together; or

(b) at least one police force in Scotland and the Scottish Crime and Drug Enforcement Agency working together;".

Interference with property

78 Authorisations to interfere with property etc.

(1) The Police Act 1997 (c.50) is amended as follows.

(2) In section 93 (authorisations to interfere with property etc.)—

(a) after subsection (3A) insert—

"(3AA)In the case of a joint operation, an authorising officer mentioned in subsection (3B) may authorise a person mentioned in subsection (3C) to take such action as is referred to in subsection (1).

(3B) Those authorising officers are—

(a) the chief constable of a police force—

(i) maintained under or by virtue of section 1 of the Police (Scotland) Act 1967, and

(ii) involved in the joint operation,

(b) where the Scottish Crime and Drug Enforcement Agency is involved in the joint operation, the Director General or Deputy Director General of that Agency.

(3C) The persons who may be authorised under subsection (1) are—

(a) a constable of any of the police forces involved in the joint operation (whether or not the authorised action is to be carried out in the area of operation of the constable's police force),

(b) where the joint operation falls within paragraph (b) of subsection (3B), a police member of the Scottish Crime and Drug Enforcement Agency.

(3D) In subsection (3AA), "joint operation" means a case involving—

(a) at least two police forces in Scotland working together, or

(b) at least one police force in Scotland and the Scottish Crime and Drug Enforcement Agency working together.",

(b) in paragraph (j) of subsection (5), after "General" insert ", or Deputy Director General,", and

(c) in paragraph (cc) of subsection (6), after "General" insert ", or Deputy Director General,".

(3) In section 94 (authorisations given in absence of authorising officer)—

(a) in subsection (2)(h), after "(5)" insert "or, as the case may be, subsection (6)",

(b) in subsection (5), at the beginning insert "Where the case is not a joint operation,", and

(c) after subsection (5), add—

"(6) Where the case is a joint operation, the person referred to in subsection (2)(h) is the chief constable of a police force involved in the joint operation in the relevant area.

(7) In subsections (5) and (6)—

"joint operation" has the meaning given by section 93(3D), and

"relevant area" means the area—

(a) for which the police forces involved in the joint operation are maintained, and

(b) to which the application for authorisation relates.".

Amendments of Part 5 of Police Act 1997

79 Amendments of Part 5 of Police Act 1997

(1) The Police Act 1997 (c.50) is amended as follows.

(1A) In section 113B (enhanced criminal record certificates), in subsection (3), for the words from “, or” immediately following paragraph (a) to the end of paragraph (b), substitute “(or states that there is no such matter or information), and

(b) if the applicant is subject to notification requirements under Part 2 of the Sexual Offences Act 2003 (c.42), states that fact.”.

(2) After that section insert—

“113BA Information held outside the United Kingdom

(1) The Scottish Ministers may by order made by statutory instrument amend the definition of—

(a) “criminal conviction certificate” in section 112(2),

(b) “central records” in sections 112(3) and 113A(6),

(c) “criminal record certificate” in section 113A(3),

(d) “relevant matter” in section 113A(6),

(e) “enhanced criminal record certificate” in section 113B(3).

(2) An order under subsection (1) may be made only for the purposes of, or in connection with, enabling certificates issued under this Part to include details of information held outside the United Kingdom.

(3) No order may be made under subsection (1) unless a draft of the statutory instrument containing the order has been laid before, and approved by resolution of, the Scottish Parliament.”.

(3) In section 120ZB (regulations about registration), after subsection (2) insert—

“(2A) The provision which may be made by virtue of subsection (2)(a) includes in particular provision for—

(a) the payment of fees in respect of applications to be listed in the register,

(b) the payment of different fees in different circumstances,

(c) annual or other recurring fees to be paid in respect of registration, and

(d) such annual or other recurring fees to be paid in advance or in arrears.

(2B) Where provision is made under subsection (2)(a) for a fee to be charged in respect of an application to be listed in the register, the Scottish Ministers need not consider the application unless the fee is paid.”.

Rehabilitation of offenders

79A Spent alternatives to prosecution: Rehabilitation of Offenders Act 1974

(1) The Rehabilitation of Offenders Act 1974 (c.53) is amended as follows.

(2) After section 8A (protection afforded to spent cautions), insert—

“8B Protection afforded to spent alternatives to prosecution: Scotland

(1) For the purposes of this Act, a person has been given an alternative to prosecution in respect of an offence if the person (whether before or after the commencement of this section)—

(a) has been given a warning in respect of the offence by—

(i) a constable in Scotland, or

(ii) a procurator fiscal,

(b) has accepted, or is deemed to have accepted—

(i) a conditional offer issued in respect of the offence under section 302 of the Criminal Procedure (Scotland) Act 1995 (c.46), or

(ii) a compensation offer issued in respect of the offence under section 302A of that Act,

(c) has had a work order made against the person in respect of the offence under section 303ZA of that Act,

(d) has been given a fixed penalty notice in respect of the offence under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8),

(e) has accepted an offer made by a procurator fiscal in respect of the offence to undertake an activity or treatment or to receive services or do any other thing as an alternative to prosecution, or

(f) in respect of an offence under the law of a country or territory outside Scotland, has been given, or has accepted or is deemed to have accepted, anything corresponding to a warning, offer, order or notice falling within paragraphs (a) to (e) under the law of that country or territory.

(2) In this Act, references to an "alternative to prosecution" are to be read in accordance with subsection (1).

(3) Schedule 3 to this Act (protection for spent alternatives to prosecution: Scotland) has effect.".

(3) After section 9A (unauthorised disclosure of spent cautions), insert—

"9B Unauthorised disclosure of spent alternatives to prosecution: Scotland

(1) In this section—

(a) "official record" means a record that—

(i) contains information about persons given an alternative to prosecution in respect of an offence, and

(ii) is kept for the purposes of its functions by a court, police force, Government department, part of the Scottish Administration or other local or public authority in Scotland,

(b) "relevant information" means information imputing that a named or otherwise identifiable living person has committed, been charged with, prosecuted for or given an alternative to prosecution in respect of an offence which is the subject of an alternative to prosecution which has become spent,

(c) "subject of the information", in relation to relevant information, means the named or otherwise identifiable living person to whom the information relates.

(2) Subsection (3) applies to a person who, in the course of the person's official duties (anywhere in the United Kingdom), has or has had custody of or access to an official record or the information contained in an official record.

(3) The person commits an offence if the person—

(a) obtains relevant information in the course of the person's official duties,

(b) knows or has reasonable cause to suspect that the information is relevant information, and

(c) discloses the information to another person otherwise than in the course of the person's official duties.

(4) Subsection (3) is subject to the terms of an order under subsection (6).

(5) In proceedings for an offence under subsection (3), it is a defence for the accused to show that the disclosure was made—

(a) to the subject of the information or to a person whom the accused reasonably believed to be the subject of the information, or

(b) to another person at the express request of the subject of the information or of a person whom the accused reasonably believed to be the subject of the information.

(6) The Scottish Ministers may by order provide for the disclosure of relevant information derived from an official record to be excepted from the provisions of subsection (3) in cases or classes of cases specified in the order.

(7) A person guilty of an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(8) A person commits an offence if the person obtains relevant information from an official record by means of fraud, dishonesty or bribery.

(9) A person guilty of an offence under subsection (8) is liable on summary conviction to a fine not exceeding level 5 on the standard scale, or to imprisonment for a term not exceeding 6 months, or to both.".

(4) After Schedule 2 (protection for spent convictions) insert—

"SCHEDULE 3

PROTECTION FOR SPENT ALTERNATIVES TO PROSECUTION: SCOTLAND

Preliminary

1 (1) For the purposes of this Act, an alternative to prosecution given to any person (whether before or after the commencement of this Schedule) becomes spent—

(a) in the case of—

(i) a warning referred to in paragraph (a) of subsection (1) of section 8B, or

(ii) a fixed penalty notice referred to in paragraph (d) of that subsection,

at the time the warning or notice is given,

(b) in any other case, at the end of the relevant period.

(2) The relevant period in relation to an alternative to prosecution is the period of 3 months beginning on the day on which the alternative to prosecution is given.

(3) Sub-paragraph (1)(a) is subject to sub-paragraph (5).

(4) Sub-paragraph (2) is subject to sub-paragraph (6).

(5) If a person who is given a fixed penalty notice referred to in section 8B(1)(d) in respect of an offence is subsequently prosecuted and convicted of the offence, the notice—

(a) becomes spent at the end of the rehabilitation period for the offence, and

(b) is to be treated as not having become spent in relation to any period before the end of that rehabilitation period.

(6) If a person who is given an alternative to prosecution (other than one to which sub-paragraph (1)(a) applies) in respect of an offence is subsequently prosecuted and convicted of the offence—

(a) the relevant period in relation to the alternative to prosecution ends at the same time as the rehabilitation period for the offence ends, and

(b) if the conviction occurs after the end of the period referred to sub-paragraph (2), the alternative to prosecution is to be treated as not having become spent in relation to any period before the end of the rehabilitation period for the offence.

2 (1) In this Schedule, "ancillary circumstances", in relation to an alternative to prosecution, means any circumstances of the following—

(a) the offence in respect of which the alternative to prosecution is given or the conduct constituting the offence,

(b) any process preliminary to the alternative to prosecution being given (including consideration by any person of how to deal with the offence and the procedure for giving the alternative to prosecution),

(c) any proceedings for the offence which took place before the alternative to prosecution was given (including anything that happens after that time for the purpose of bringing the proceedings to an end),

(d) any judicial review proceedings relating to the alternative to prosecution,

(e) in the case of an offer referred to in paragraph (e) of subsection (1) of section 8B, anything done or undergone in pursuance of the terms of the offer.

(2) Where an alternative to prosecution is given in respect of two or more offences, references in sub-paragraph (1) to the offence in respect of which the alternative to prosecution is given includes a reference to each of the offences.

(3) In this Schedule, "proceedings before a judicial authority" has the same meaning as in section 4.

Protection for spent alternatives to prosecution and ancillary circumstances

3 (1) A person who is given an alternative to prosecution in respect of an offence is, from the time the alternative to prosecution becomes spent, to be treated for all purposes in law as a person who has not committed, been charged with or prosecuted for, or been given an alternative to prosecution in respect of, the offence.

(2) Despite any enactment or rule of law to the contrary—

(a) where an alternative to prosecution given to a person in respect of an offence has become spent, evidence is not admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Scotland to prove that the person has committed, been charged with or prosecuted for, or been given an alternative to prosecution in respect of, the offence,

(b) a person must not, in any such proceedings, be asked any question relating to the person's past which cannot be answered without acknowledging or referring to an alternative to prosecution that has become spent or any ancillary circumstances, and

(c) if a person is asked such a question in any such proceedings, the person is not required to answer it.

(3) Sub-paragraphs (1) and (2) do not apply in relation to any proceedings—

(a) for the offence in respect of which the alternative to prosecution was given, and

(b) which are not part of the ancillary circumstances.

4 (1) This paragraph applies where a person ("A") is asked a question, otherwise than in proceedings before a judicial authority, seeking information about—

(a) A's or another person's previous conduct or circumstances,

(b) offences previously committed by A or the other person, or

(c) alternatives to prosecution previously given to A or the other person.

(2) The question is to be treated as not relating to alternatives to prosecution that have become spent or to any ancillary circumstances and may be answered accordingly.

(3) A is not to be subjected to any liability or otherwise prejudiced in law because of a failure to acknowledge or disclose an alternative to prosecution that has become spent or any ancillary circumstances in answering the question.

5 (1) An obligation imposed on a person ("A") by a rule of law or by the provisions of an agreement or arrangement to disclose any matter to another person does not extend to requiring A to disclose an alternative to prosecution (whether one given to A or another person) that has become spent or any ancillary circumstances.

(2) An alternative to prosecution that has become spent or any ancillary circumstances, or any failure to disclose an alternative to prosecution that has become spent or any ancillary circumstances, is not a ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing the person in any way in any occupation or employment.

6 The Scottish Ministers may by order—

(a) exclude or modify the application of any of paragraphs (a) to (c) of paragraph 3(2) in relation to questions put in such circumstances as may be specified in the order,

(b) provide for exceptions from any of the provisions of paragraphs 4 and 5 in such cases or classes of case, or in relation to alternatives to prosecution of such descriptions, as may be specified in the order.

7 Paragraphs 3 to 5 do not affect—

(a) the operation of an alternative to prosecution, or

(b) the operation of an enactment by virtue of which, because of an alternative to prosecution, a person is subject to a disqualification, disability, prohibition or other restriction or effect for a period extending beyond the time at which the alternative to prosecution becomes spent.

8 (1) Section 7(2), (3) and (4) apply for the purpose of this Schedule as follows.

(2) Subsection (2), apart from paragraphs (b) and (d), applies to the determination of any issue, and the admission or requirement of evidence, relating to alternatives to prosecution previously given to a person and to ancillary circumstances as it applies to matters relating to a person's previous convictions and circumstances ancillary thereto.

(3) Subsection (3) applies to evidence of alternatives to prosecution previously given to a person and ancillary circumstances as it applies to evidence of a person's previous convictions and the circumstances ancillary thereto.

(4) For that purpose, subsection (3) has effect as if—

(a) a reference to subsection (2) or (4) of section 7 were a reference to that subsection as applied by this paragraph, and

(b) the words "or proceedings to which section 8 below applies" were omitted.

(5) Subsection (4) applies for the purpose of excluding the application of paragraph 3.

(6) For that purpose, subsection (4) has effect as if the words "(other than proceedings to which section 8 below applies)" were omitted.

(7) References in the provisions applied by this paragraph to section 4(1) are to be read as references to paragraph 3.".

Medical services in prisons

79B Medical services in prisons

(1) For section 3A of the Prisons (Scotland) Act 1989 (c.45) (medical services in prisons) substitute—

"3A Medical officers for prisons

(1) The Scottish Ministers must designate one or more medical officers for each prison.

(2) A person may be designated as a medical officer for a prison only if the person is a registered medical practitioner performing primary medical services for prisoners at the prison under the National Health Service (Scotland) Act 1978 (c.29).

(3) A medical officer has the functions that are conferred on a medical officer for a prison by or under this Act or any other enactment.

(4) A medical officer is not an officer of the prison for the purposes of this Act.

(5) Rules under section 39 of this Act may provide for the governor of a prison to authorise the carrying out by officers of the prison of a search of any person who is in, or is seeking to enter, the prison for the purpose of providing medical services for any prisoner at the prison.

(6) Nothing in rules made by virtue of subsection (5) allows the governor to authorise an officer of a prison to require a person to remove any of the person's clothing other than an outer coat, jacket, headgear, gloves and footwear.".

(2) In section 41D of that Act (unlawful disclosure of information by medical officers), for subsection (1) substitute—

"(1) This section applies to—

(a) a medical officer for a prison, and

(b) any person acting under the supervision of such a medical officer.".

(3) In section 107 of the Criminal Justice and Public Order Act 1994 (c.33) (officers of contracted out prisons), for subsections (6) to (8) substitute—

"(6) The director must designate one or more medical officers for the prison.

(7) A person may be designated as a medical officer for the prison only if the person is a registered medical practitioner performing primary medical services for prisoners at the prison under the National Health Service (Scotland) Act 1978 (c.29).".

(4) In section 110 of that Act (consequential modifications of the 1989 Act etc.)—

(a) in each of subsections (3) and (4), for "3A(6)" substitute "3A(5) and (6)",

(b) subsection (4A) is repealed, and

(c) in subsection (6), for "3A(1) to (5) (medical services)" substitute "3A(1) and (2) (medical officers)".

(5) In section 111(3) of that Act (intervention by the Scottish Ministers), in paragraph (c), after "prison" insert "and the medical officer or officers for the prison".

Miscellaneous

80 Assistance for victim support

(1) The Scottish Ministers may make grants for the purposes of or in connection with the provision of assistance to victims, witnesses or other persons affected by an offence.

(2) Grants under subsection (1) may be made—

(a) to such bodies, and

(b) subject to such conditions,

as the Scottish Ministers consider appropriate.

81 Public defence solicitors

(1) In section 28A of the Legal Aid (Scotland) Act 1986 (c.47) (power of Board to employ solicitors to provide criminal assistance)—

(a) in subsection (1), the words from “may” where it first occurs to “accordingly,” are repealed, and

(b) subsection (9A) is repealed.

(2) In section 73 of the Criminal Justice (Scotland) Act 2003 (asp 7) (public defence), paragraph (b) is repealed.

82 Compensation for miscarriages of justice

(1) In section 133 of the Criminal Justice Act 1988 (c.33) (compensation for miscarriages of justice)—

(a) after subsection (1) insert—

“(1A) The Scottish Ministers may by order provide for—

(a) further circumstances in respect of which a person (or, if dead, the person’s representatives) may be paid compensation for a miscarriage of justice,

(b) circumstances in respect of which a person (or, if dead, the person’s representatives) may be paid compensation for wrongful detention prior to acquittal or a decision by the prosecutor to take no proceedings (or to discontinue proceedings).”,

(b) after subsection (2) insert—

“(2AA)Such an application requires to be made within the period of 3 years starting with—

(a) in the case of compensation under subsection (1), the date on which the conviction is reversed or (as the case may be) the person is pardoned,

(b) in the case of compensation under subsection (1A), whichever is relevant of—

(i) that date, or

(ii) the date on which the person is acquitted or the relevant decision is made known to the person.

(2AB)The Scottish Ministers may accept such an application outwith that time limit if they think it is appropriate in exceptional circumstances to do so.”,

(c) in subsection (4A), after paragraph (a) insert—

“(aa) the seriousness of the offence with which the person was charged or detained (but in respect of which offence the person was not convicted);”,

(d) after subsection (4A) insert—

“(4B) The assessor must also have particular regard to any guidance issued by the Scottish Ministers for the purposes of this section.”,

(e) in subsection (5)—

(i) after “quashed” insert “(or set aside)”,

(ii) the word “or” where it occurs immediately after each of paragraphs (a), (b) and (c) is repealed,

(iii) after paragraph (d) add “; or

(e) under section 188(1)(b) of the Criminal Procedure (Scotland) Act 1995.”,

(f) after subsection (6) insert—

“(6A) For the purposes of this section, a person suffers punishment as a result of conviction also where (in relation to the conviction) the court imposes some other disposal including by way of—

(a) making a probation order, or

(b) discharging the person absolutely.”, and

(g) after subsection (7) insert—

“(8) The power to make an order under subsection (1A) is exercisable by statutory instrument.

(9) A statutory instrument containing such an order is subject to annulment in pursuance of a resolution of the Scottish Parliament.”.

(2) In Schedule 12 to that Act (assessors of compensation for miscarriages of justice), in paragraph 1—

(a) immediately after sub-paragraph (c), insert “or”, and

(b) sub-paragraph (e) and the word “or” immediately preceding it are repealed.

83 Financial reporting orders

In section 77 of the Serious Organised Crime and Police Act 2005 (c.15) (financial reporting orders: making in Scotland), after subsection (4) insert—

“(4A) A financial reporting order may be made—

(a) on the prosecutor’s motion, or

(b) at the court’s own instance.”.

84 Compensation orders

(1) In section 249 of the 1995 Act (compensation order against convicted person)—

(a) in subsection (1)—

(i) for “Subject to subsections (2) and (4) below, where” substitute “Where”,

(ii) after “compensation” where it second occurs insert “in favour of the victim”,

(b) after subsection (1A) insert—

“(1B) Where a person is convicted of an offence, the court may (instead of or in addition to dealing with the person in any other way), in accordance with subsections (3A) to (3C), make a compensation order requiring the convicted person to pay compensation in favour of—

(a) the victim, or

(b) a person who is liable for funeral expenses in respect of which subsection (3C)(b) allows a compensation order to be made.

(1C) For the purposes of subsection (1B)(a), “victim” means—

(a) a person who has suffered personal injury, loss or damage in respect of which a compensation order may be made by virtue of subsection (3A), or

(b) a relative (as defined in Schedule 1 to the Damages (Scotland) Act 1976 (c.13)) who has suffered bereavement in respect of which subsection (3C)(a) allows a compensation order to be made.”,

(c) after subsection (3) insert—

“(3A) A compensation order may be made in respect of personal injury, loss or damage (apart from loss suffered by a person’s dependents in consequence of a person’s death) that was caused directly or indirectly by an accident arising out of the presence of a motor vehicle on a road if—

(a) it was being used in contravention of section 143(1) of the Road Traffic Act 1988 (c.52), and

(b) no compensation is payable under arrangements to which the Secretary of State is a party.

(3B) Where a compensation order is made by virtue of subsection (3) or (3A), the order may include an amount representing the whole or part of any loss of (including reduction in) preferential rates of insurance if the loss is attributable to the accident.

(3C) A compensation order may be made—

(a) for bereavement in connection with a person’s death resulting from the acts which constituted the offence,

(b) for funeral expenses in connection with such a death,

except where the death was due to an accident arising out of the presence of a motor vehicle on a road.”,

(d) in subsection (4)—

(i) for “No” substitute “Unless (and to the extent that) subsections (3) to (3C) allow a compensation order to be made, no”,

(ii) in paragraph (b), the words from “, except” to the end are repealed,

(e) subsection (6) is repealed, and

(f) after subsection (8) insert—

“(8A) In summary proceedings before the sheriff, where the fine or maximum fine to which a person is liable on summary conviction of an offence exceeds the prescribed sum, the sheriff may make a compensation order awarding in respect of the offence an amount not exceeding the amount of the fine to which the person is so liable.”.

(2) In section 251 of that Act (review of compensation order)—

(a) paragraph (a) of subsection (1) is repealed, and

(b) after subsection (1) insert—

“(1A) On the application of the prosecutor at any time before a compensation order has been complied with (or fully complied with), the court may increase the amount payable under the compensation order if it is satisfied that the person against whom it was made—

(a) because of the availability of materially different information about financial circumstances, has more means than were made known to the court when the order was made, or

(b) because of a material change of financial circumstances, has more means than the person had then.".

PART 6

DISCLOSURE

Meaning of "information"

85 Meaning of "information"

(1) In this Part, "information", in relation to criminal proceedings relating to a person, means material of any kind given to or obtained by the prosecutor in connection with the proceedings.

(3) In sections 96B to 96I, "information", in relation to appellate proceedings, includes material of any kind given to or obtained by the prosecutor in connection with the appellate proceedings or the earlier proceedings.

(4) In subsection (3)—

"appellate proceedings" has the meaning given by section 96A,

"earlier proceedings" has the meaning given in section 96B(5).

Provision of information to prosecutor

86 Provision of information to prosecutor: solemn cases

(1) This section applies where in a prosecution—

(a) an accused appears for the first time on petition, or

(b) an accused appears for the first time on indictment (not having appeared on petition in relation to the same matter).

(2) As soon as practicable after the appearance, the investigating agency must provide the prosecutor with details of all the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained (whether by the agency or otherwise) in the course of investigating the matter to which the appearance relates.

(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that information that the prosecutor specifies in the requirement.

(4) In this section, "investigating agency" means—

(a) a police force, or

(b) such other person who—

(i) engages (to any extent) in the investigation of crime or sudden deaths, and

(ii) submits reports relating to those investigations to the procurator fiscal,

as the Scottish Ministers may prescribe by regulations.

87 Continuing duty to provide information: solemn cases

(1) This section applies where—

(a) an investigating agency has complied with section 86(2) in relation to an accused, and

(b) during the relevant period the investigating agency becomes aware that further information that may be relevant to the case for or against the accused has been obtained (whether by the agency or otherwise) in the course of investigating the accused's case.

(2A) As soon as practicable after becoming aware of the further information, the investigating agency must provide the prosecutor with details of it.

(2B) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that further information that the prosecutor specifies in the requirement.

(3) In this section "relevant period" means the period—

(a) beginning with the investigating agency's compliance with section 86(2) in relation to the accused, and

(b) ending with the agency's receiving notice from the prosecutor of the conclusion of the proceedings against the accused.

(4) For the purposes of subsection (3), proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the indictment falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

88A Provision of information to prosecutor: summary cases

(1) This section applies where a plea of not guilty is recorded against an accused charged on summary complaint.

(2) As soon as practicable after the recording of the plea, the investigating agency must inform the prosecutor of the existence of all the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained (whether by the agency or otherwise) in the course of investigating the matter to which the plea relates.

(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that information that the prosecutor specifies in the requirement.

88B Continuing duty of investigating agency: summary cases

(1) This section applies where—

(a) an investigating agency has complied with section 88A(2) in relation to an accused, and

(b) during the relevant period the investigating agency becomes aware that further information that may be relevant to the case for or against the accused has been obtained (whether by the agency or otherwise) in the course of investigating the accused's case.

(2) As soon as practicable after becoming aware of the further information, the investigating agency must inform the prosecutor of the existence of the information.

(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that further information that the prosecutor specifies in the requirement.

(4) In this section, "relevant period" means the period—

(a) beginning with the investigating agency's compliance with section 88A(2) in relation to the accused, and

(b) ending with the agency's receiving notice from the prosecutor of the conclusion of the proceedings against the accused.

(5) For the purposes of subsection (4), proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

Prosecutor's duty to disclose information

89 Prosecutor's duty to disclose information

(1) This section applies where in a prosecution—

(a) an accused appears for the first time on petition,

(b) an accused appears for the first time on indictment (not having appeared on petition in relation to the same matter), or

(c) a plea of not guilty is recorded against an accused charged on summary complaint.

(2) As soon as practicable after the appearance or the recording of the plea, the prosecutor must—

(a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

(b) disclose to the accused the information to which subsection (3) applies.

(3) This subsection applies to information if—

(a) the information would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused,

(b) the information would materially strengthen the accused's case, or

(c) the information is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused.

(7) The prosecutor need not disclose under subsection (2)(b) anything that the prosecutor has already disclosed in relation to the same matter (whether because the same matter has been the subject of an earlier petition, indictment or complaint or otherwise).

89A Disclosure of other information: solemn cases

(1) This section applies where by virtue of subsection (2)(b) of section 89 the prosecutor is required to disclose information to an accused who falls within paragraph (a) or (b) of subsection (1) of that section.

(2) As soon as practicable after complying with the requirement, the prosecutor must disclose to the accused details of any information which the prosecutor is not required to disclose under section 89(2)(b) but which may be relevant to the case for or against the accused.

(3) The prosecutor need not disclose under subsection (2) details of sensitive information.

(4) In subsection (3), "sensitive", in relation to an item of information, means that if it were to be disclosed there would be a risk of—

(a) causing serious injury, or death, to any person,

(b) obstructing or preventing the prevention, detection, investigation or prosecution of crime, or

(c) causing serious prejudice to the public interest.

90 Continuing duty of prosecutor

(1) This section applies where the prosecutor has complied with section 89(2)(b) in relation to an accused.

(2) During the relevant period, the prosecutor must—

(a) from time to time review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

(b) disclose to the accused any information to which section 89(3) applies.

(2A) As soon as practicable after complying with subsection (2), the prosecutor must disclose to the accused details of any other information that may be relevant to the case for or against the accused of which the prosecutor is aware.

(2B) The prosecutor need not disclose under subsection (2A) details of sensitive information.

(2C) In subsection (2)—

"relevant period" means the period—

(a) beginning with the prosecutor's compliance with section 89(2)(b) in relation to an accused, and

(b) ending with the conclusion of the proceedings against the accused,

"sensitive" has the meaning given by section 89A(4).

(4) For the purposes of subsection (2C), proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the indictment or complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

Defence statements

94 Defence statements: solemn proceedings

(1) This section applies where the accused lodges a defence statement under section 70A of the 1995 Act.

(1A) As soon as practicable after the prosecutor receives a copy of the defence statement, the prosecutor must—

(a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

(b) disclose to the accused any information to which section 89(3) applies.

(2) After section 70 of the 1995 Act insert—

"70A Defence statements

(1) This section applies where an indictment is served on an accused.

(2) The accused must lodge a defence statement at least 14 days before the first diet.

(3) The accused must lodge a defence statement at least 14 days before the preliminary hearing.

(4) At least 7 days before the trial diet the accused must—

(a) where there has been no material change in circumstances in relation to the accused's defence since the last defence statement was lodged, lodge a statement stating that fact,

(b) where there has been a material change in circumstances in relation to the accused's defence since the last defence statement was lodged, lodge a defence statement.

(4A) If after lodging a statement under subsection (2), (3) or (4) there is a material change in circumstances in relation to the accused's defence, the accused must lodge a defence statement.

(4B) Where subsection (4A) requires a defence statement to be lodged, it must be lodged before the trial diet begins unless on cause shown the court allows it to be lodged during the trial diet.

(5) The accused may lodge a defence statement—

(a) at any time before the trial diet, or

(b) during the trial diet if the court on cause shown allows it.

(5A) As soon as practicable after lodging a defence statement or a statement under subsection (4)(a), the accused must send a copy of the statement to the prosecutor and any co-accused.

(6) In this section "defence statement" means a statement setting out—

(a) the nature of the accused's defence, including any particular defences on which the accused intends to rely,

(b) any matters of fact on which the accused takes issue with the prosecution and the reason for doing so,

(ba) particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence,

(c) any point of law which the accused wishes to take and any authority on which the accused intends to rely for that purpose,

(d) by reference to the accused's defence, the nature of any information that the accused requires the prosecutor to disclose, and

(e) the reasons why the accused considers that disclosure by the prosecutor of any such information is necessary.".

(3) In section 78 of the 1995 Act (special defences, incrimination, notice of witnesses etc.), after subsection (1) insert—

"(1A) Subsection (1) does not apply where—

(a) the accused lodges a defence statement under section 70A, and

(b) the accused's defence consists of or includes a special defence.".

95 Defence statements: summary proceedings

(1) This section applies where—

(a) a plea of not guilty is recorded against an accused charged on summary complaint, and

(b) during the relevant period the accused lodges a defence statement.

(2) A defence statement must set out—

(a) the nature of the accused's defence, including any particular defences on which the accused intends to rely,

(b) any matters of fact on which the accused takes issue with the prosecution and the reason for doing so, (ba) particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence,

(c) any point of law which the accused wishes to take and any authority on which the accused intends to rely for that purpose,

(d) by reference to the accused's defence, the nature of any information that the accused wishes the prosecutor to disclose, and

(e) the reasons why the accused considers that disclosure by the prosecutor of any such information is necessary.

(2A) As soon as practicable after lodging a defence statement, the accused must send a copy of the statement to the prosecutor and any co-accused.

(3) As soon as practicable after receiving a copy of the defence statement the prosecutor must—

(a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

(b) disclose to the accused any information to which section 89(3) applies..

(4) In this section, the "relevant period", in relation to the accused, is the period—

(a) beginning with the recording of the accused's plea of not guilty, and

(b) ending with the conclusion of the proceedings to which the plea relates.

(5) For the purposes of subsection (4), proceedings are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

(6) In section 149B of the 1995 Act (notice of defences), after subsection (2) insert—

"(2A) Subsection (1) does not apply where—

(a) the accused lodges a defence statement under section 95 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00),

(b) the statement is lodged—

(i) where an intermediate diet is to be held, at or before the diet, or

(ii) where such a diet is not to be held, no later than 10 clear days before the trial diet, and

(c) the accused's defence consists of or includes a defence to which that subsection applies.".

95A Change in circumstances following lodging of defence statement: summary proceedings

(1) This section applies where the accused lodges a defence statement under section 95 at least 14 days before the trial diet.

(2) At least 7 days before the trial diet the accused must—

(a) where there has been no material change in circumstances in relation to the accused's defence since the defence statement was lodged, lodge a statement stating that fact,

(b) where there has been a material change in circumstances in relation to the accused's defence since the defence statement was lodged, lodge a defence statement.

(3) If after lodging a statement under subsection (2) there is a material change in circumstances in relation to the accused's defence, the accused must lodge a defence statement.

(4) Where subsection (3) requires a defence statement to be lodged, it must be lodged before the trial diet begins unless on cause shown the court allows it to be lodged during the trial diet.

(5) As soon as practicable after lodging a statement under subsection (2)(a) or a defence statement under subsection (2)(b) or (3), the accused must send a copy of the statement concerned to the prosecutor and any co-accused.

(6) As soon as practicable after receiving a copy of a defence statement lodged under subsection (2)(b) or (3) the prosecutor must—

(a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

(b) disclose to the accused any information to which section 89(3) applies.

(7) In this section, "defence statement" is to be construed in accordance with section 95(2).

Court rulings on disclosure

95B Application by accused for ruling on disclosure

(1) This section applies where the accused—

(a) has lodged a defence statement under section 70A of the 1995 Act or section 95 or 95A of this Act, and

(b) considers that the prosecutor has failed, in responding to the statement, to disclose to the accused an item of information to which section 89(3) applies (the "information in question").

(2) The accused may apply to the court for a ruling on whether section 89(3) applies to the information in question.

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the accused is charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question, and

(c) the accused's grounds for considering that section 89(3) applies to the information in question.

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that section 89(3) applies to the information in question.

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the accused an opportunity to be heard before determining the application.

(7) On determining the application, the court must—

(a) make a ruling on whether section 89(3) applies to the information in question or to any part of the information in question, and

(b) where the accused is charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) Except where it is impracticable to do so, the application is to be assigned to the justice of the peace, sheriff or judge who is presiding, or is to preside, at the accused's trial.

95C Review of ruling under section 95B

(1) This section applies where—

(a) the court has made a ruling under section 95B that section 89(3) does not apply to an item of information (the "information in question"), and

(b) during the relevant period—

(i) the accused becomes aware of information (the "secondary information") that was unavailable to the court at the time it made its ruling, and

(ii) the accused considers that, had the secondary information been available to the court at that time, it would have made a ruling that section 89(3) does apply to the information in question.

(2) The accused may apply to the court which made the ruling for a review of the ruling.

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the accused is charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question and the secondary information, and

(c) the accused's grounds for considering that section 89(3) applies to the information in question.

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that section 89(3) applies to the information in question.

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the accused an opportunity to be heard before determining the application.

(7) On determining the application, the court may—

(a) affirm the ruling being reviewed, or

(b) recall that ruling and—

(i) make a ruling that section 89(3) applies to the information in question or to any part of the information in question, and

(ii) where the accused is charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) Except where it is impracticable to do so, the application is to be assigned to the justice of the peace, sheriff or judge who dealt with the application for the ruling that is being reviewed.

(9) Nothing in this section affects any right of appeal in relation to the ruling being reviewed.

(10) In this section, "relevant period", in relation to an accused, means the period—

(a) beginning with the making of the ruling being reviewed, and

(b) ending with the conclusion of proceedings against the accused.

(11) For the purposes of subsection (10), proceedings against the accused are taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the indictment or complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

95D Appeals against rulings under section 95B

(1) The prosecutor or the accused may, within the period of 7 days beginning with the day on which a ruling is made under section 95B, appeal to the High Court against the ruling.

(2) Where an appeal is brought under subsection (1), the court of first instance or the High Court may—

(a) postpone any trial diet that has been appointed for such period as it thinks appropriate,

(b) adjourn or further adjourn any hearing for such period as it thinks appropriate,

(c) direct that any period of postponement or adjournment under paragraph (a) or (b) or any part of such period is not to count toward any time limit applying in the case.

(3) In disposing of an appeal under subsection (1), the High Court may—

(a) affirm the ruling, or

(b) remit the case back to the court of first instance with such directions as the High Court thinks appropriate.

(4) This section does not affect any other right of appeal which any party may have in relation to a ruling under section 95B.

Effect of guilty plea

96 Effect of guilty plea

(1) This section applies where—

(a) by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b) or 95(3)(b) the prosecutor is required to disclose information to an accused, but

(b) before the prosecutor does so, a plea of guilty is recorded against the accused.

(2) The prosecutor need not comply with the requirement in so far as it relates to the disclosure of information which but for that plea would have been likely to have formed part of the evidence to be led by the prosecutor in the proceedings against the accused.

(3) Subsections (1) and (2) cease to apply if the accused withdraws the plea of guilty.

Disclosure after conclusion of proceedings at first instance

96A Sections 96B to 96I: interpretation

In sections 96B to 96I—

“appellant”, in relation to appellate proceedings, includes a person authorised by an order under section 303A(4) of the 1995 Act to institute or continue the proceedings,

“appellate proceedings” means—

(a) an appeal under section 106(1)(a) or (f) of the 1995 Act which brings under review an alleged miscarriage of justice,

(b) an appeal under paragraph (b), (ba), (bb), (c), (d), (db) or (dc) of subsection (1) of section 106 of the 1995 Act which brings under review in accordance with subsection (3)(a) of that section an alleged miscarriage of justice,

(c) an appeal under section 175(2)(a) or (d) of the 1995 Act which brings under review an alleged miscarriage of justice,

(d) an appeal under paragraph (b), (c) or (cb) of subsection (2) of section 175 of the 1995 Act which brings under review an alleged miscarriage of justice which is based on the type of miscarriage described in subsection (5) of that section,

(e) an appeal to the Supreme Court against a determination by the High Court of Justiciary of a devolution issue,

(f) an appeal against conviction by bill of suspension under section 191(1) of the 1995 Act,

(g) an appeal against conviction by bill of advocation,

(h) a petition to the *nobile officium* in respect of a matter arising out of criminal proceedings which brings under review an alleged miscarriage of justice which is based on the existence and significance of new evidence,

(i) an appeal under section 62(1)(b) of the 1995 Act against a finding under section 55(2) of that Act,

(j) the referral to the High Court of Justiciary under section 194B of the 1995 Act of—

  (i) a conviction, or

  (ii) a finding under section 55(2) of that Act.

96B Duty to disclose after conclusion of proceedings at first instance

(1) This section applies where appellate proceedings are instituted in relation to an appellant.

(2) As soon as practicable after the relevant act the prosecutor must—

(a) review all information of which the prosecutor is aware that relates to the grounds of appeal in the appellate proceedings, and

(b) disclose to the appellant any information that falls within subsection (3).

(3) Information falls within this subsection if it is—

(a) information that the prosecutor was required by virtue of section 89(2)(b) or 90(2)(b) to disclose in the earlier proceedings but did not disclose,

(b) information to which, during the earlier proceedings, the prosecutor considered paragraph (a) or (b) of section 89(3) did not apply but to which the prosecutor now considers one or both of those paragraphs would apply, or

(c) information of which the prosecutor has become aware since the disposal of the earlier proceedings that, had the prosecutor been aware of it during those proceedings, the prosecutor would have been required to disclose by virtue of section 89(2)(b) or 90(2)(b).

(4) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the appellant.

(5) In this section—

“earlier proceedings”, in relation to appellate proceedings, means the proceedings to which the appellate proceedings relate,

“relevant act” means—

(a) in relation to proceedings of the type mentioned in paragraph (a) or (b) of the relevant definition, the granting under section 107(1)(a) of the 1995 Act of leave to appeal,

(b) in relation to proceedings of the type mentioned in paragraph (c) or (d) of the relevant definition, the granting under section 180(1)(a) or, as the case may be, 187(1)(a) of that Act of leave to appeal,

(c) in relation to proceedings of the type mentioned in paragraph (e) of the relevant definition, the granting of leave to appeal by the High Court of Justiciary or, as the case may be, the Supreme Court,

(d) in relation to proceedings of the type mentioned in paragraph (f) of the relevant definition—

(i) if leave to appeal is required, the granting under section 191(2) of that Act of leave to appeal,

(ii) if leave to appeal is not required, service on the prosecutor under the relevant rule of a certified copy of the bill of suspension and the interlocutor granting first order for service,

(e) in relation to proceedings of the type mentioned in paragraph (g) of the relevant definition, service on the prosecutor under the relevant rule of a certified copy of the bill of advocation and the interlocutor granting first order for service,

(f) in relation to proceedings of the type mentioned in paragraph (h) of the relevant definition, service on the prosecutor under the relevant rule of a certified copy of the petition and the interlocutor granting first order for service,

(g) in relation to proceedings of the type mentioned in paragraph (i) of the relevant definition, the lodging of the appeal,

(h) in relation to proceedings of the type mentioned in paragraph (j) of the relevant definition, the lodging of the grounds of appeal by the person to whom the referral relates,

"relevant definition" means the definition of appellate proceedings in section 96A,

"relevant rule" means rule 29A.1(3) of the Criminal Procedure Rules 1996 (S.I. 1996/513).

96C Continuing duty of prosecutor

(1) This section applies where the prosecutor has complied with section 96B(2) in relation to an appellant.

(2) During the relevant period, the prosecutor must—

(a) from time to time review all information of which the prosecutor is aware that relates to the grounds of appeal in the appellate proceedings which relate to the appellant, and

(b) disclose to the appellant any information that falls within section 96B(3).

(3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the appellant.

(4) In subsection (2), "relevant period" means the period—

(a) beginning with the prosecutor's compliance with section 96B(2), and

(b) ending with the relevant conclusion.

(5) In subsection (4), "relevant conclusion" means—

(a) in relation to proceedings of the type mentioned in paragraph (a) or (b) of the relevant definition—

(i) the lodging under section 116(1) of the 1995 Act of a notice of abandonment, or

(ii) the disposal of the appeal under section 118 of that Act,

(b) in relation to proceedings of the type mentioned in paragraph (c) or (d) of the relevant definition—

(i) the disposal of the appeal under section 183(1)(b) to (d) of that Act,

(ii) the abandonment of the appeal under section 184(1) of that Act,

(iii) the setting aside of the conviction or sentence or, as the case may be, conviction and sentence under section 188(1) of that Act, or

(iv) the disposal of the appeal under section 190(1) of that Act,

(c) in relation to proceedings of the type mentioned in paragraph (e), (f), (g) or (h) of the relevant definition, the disposal or abandonment of the appeal,

(d) in relation to proceedings of the type mentioned in paragraph (i) of the relevant definition, the disposal of the appeal under section 62(6) of that Act or the abandonment of the appeal,

(e) in relation to proceedings of the type mentioned in paragraph (j) of the relevant definition—

(i) if the referral or finding is being treated as if it were an appeal under Part 8 of that Act, the conclusion mentioned in paragraph (a) above,

(ii) if the referral or finding is being treated as if it were an appeal under Part 10 of that Act, the conclusion mentioned in paragraph (b) above or, where the referral or finding proceeds by way of bill of suspension, bill of advocation or petition to the *nobile officium*, paragraph (c) above.

(6) In this section, “relevant definition” has the meaning given by section 96B(5).

96D Application to prosecutor for further disclosure

(1) This section applies where—

(a) the prosecutor has complied with section 96B(2) in relation to an appellant, and

(b) the appellant lodges a further disclosure request—

(i) during the preliminary period, or

(ii) if the court on cause shown allows it, after the preliminary period but before the relevant conclusion.

(2) A further disclosure request must set out—

(a) by reference to the grounds of appeal, the nature of the information that the appellant wishes the prosecutor to disclose, and

(b) the reasons why the appellant considers that disclosure by the prosecutor of any such information is necessary.

(3) As soon as practicable after receiving a copy of the further disclosure request the prosecutor must—

(a) review any information of which the prosecutor is aware that relates to the request, and

(b) disclose to the appellant any of that information that falls within section 96B(3).

(4) In this section—

"preliminary period", in relation to the appellate proceedings concerned, means the period beginning with the relevant act and ending with the beginning of the hearing of the appellate proceedings,

"relevant act" has the meaning given by section 96B(5),

"relevant conclusion" has the meaning given by section 96C(5).

96E Further duty of prosecutor: conviction upheld on appeal

(1) This section applies where—

(a) in an appeal to the High Court of Justiciary, the High Court upholds the conviction of a person, and

(b) after the conclusion of the appeal the prosecutor becomes aware of—

(i) information that the prosecutor was required by virtue of section 89(2)(b) or 90(2)(b) to disclose in the earlier proceedings but did not disclose, or

(ii) information that falls within section 96B(3) which would have related to the grounds of appeal but was not disclosed.

(2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.

(3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.

(4) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.

(5) In this section, "earlier proceedings" has the meaning given by section 96B(5).

96F Further duty of prosecutor: convicted persons

(1) This section applies where—

(a) a person has been convicted,

(b) after conviction the prosecutor becomes aware of information that the prosecutor was required by virtue of section 89(2)(b) or 90(2)(b) to disclose in the earlier proceedings but did not disclose, and

(c) section 96E does not apply.

(2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.

(3) If the person institutes appellate proceedings in relation to the conviction, the prosecutor need not comply with the duty imposed by subsection (2) during the appropriate period.

(4) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.

(5) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.

(6) In this section—

"appropriate period", in relation to appellate proceedings, means the period beginning with the relevant act and ending with the relevant conclusion,

"earlier proceedings" has the meaning given by section 96B(5),

"relevant act" has the meaning given by section 96B(5),

"relevant conclusion" has the meaning given by section 96C(5).

96G Further duty of prosecutor: appeal against acquittal

(1) This section applies where—

(a) the prosecutor appeals against the acquittal of a person, and

(b) after lodging the appeal the prosecutor becomes aware of information which relates to the appeal and falls within section 96B(3).

(2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.

(3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.

(4) The prosecutor ceases to be subject to the duty imposed by subsection (2) on the disposal of the appeal by the High Court of Justiciary.

(5) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.

Court rulings on disclosure: appellate proceedings

96H Application by appellant for ruling on disclosure

(1) This section applies where the appellant—

(a) has made a further disclosure request under section 96D, and

(b) considers that the prosecutor has failed, in responding to the request, to disclose to the appellant an item of information falling within section 96B(3) (the "information in question").

(2) The appellant may apply to the court for a ruling on whether the information in question falls within section 96B(3).

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the appellant is or was charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question, and

(c) the appellant's grounds for considering that the information in question falls within section 96B(3).

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that the information in question falls within section 96B(3).

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the appellant an opportunity to be heard before determining the application.

(7) On determining the application, the court must—

(a) make a ruling on whether the information in question, or any part of the information in question, falls within section 96B(3), and

(b) where the appellant is or was charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) In this section, "the court" means the court before which the appellant's appeal is brought.

(9) Except where it is impracticable to do so, the application is to be assigned to the judges who are to hear the appellant's appeal.

96I Review of ruling under section 96H

(1) This section applies where—

(a) the court has made a ruling under section 96H that an item of information (the "information in question") does not fall within section 96B(3), and

(b) during the relevant period—

(i) the appellant becomes aware of information ("secondary information") that was unavailable to the court at the time it made its ruling, and

(ii) the appellant considers that, had the secondary information been available to the court at that time, it would have made a ruling that the information in question does fall within section 96B(3).

(2) The appellant may apply to the court which made the ruling for a review of the ruling.

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the appellant is or was charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question and the secondary information, and

(c) the appellant's grounds for considering that the information in question falls within section 96B(3).

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that the information in question falls within section 96B(3).

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the appellant an opportunity to be heard before determining the application.

(7) On determining the application, the court may—

(a) affirm the ruling being reviewed, or

(b) recall that ruling and—

(i) make a ruling that the information in question, or any part of the information in question, falls within section 96B(3), and

(ii) where the appellant is or was charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) Except where it is impracticable to do so, the application is to be assigned to the judges who dealt with the application for the ruling that is being reviewed.

(9) Nothing in this section affects any right of appeal in relation to the ruling being reviewed.

(10) In this section, "relevant period", in relation to an appellant, means the period—

(a) beginning with the making of the ruling being reviewed, and

(b) ending with the relevant conclusion.

(11) In subsection (10), "relevant conclusion" has the meaning given by section 96C(5).

Redaction

92 Redaction of non-disclosable information by prosecutor

(1) Subsection (2) applies where—

(a) by virtue of this Part the prosecutor is required to disclose an item of information (the "disclosable information"), and

(b) the disclosable information forms part of, or contains, other information (the "non-disclosable information") which the prosecutor is not required to disclose by virtue of any of those sections.

(2) Before disclosing the disclosable information, the prosecutor may (whether by redaction or otherwise) remove or obscure the non-disclosable information.

Means of disclosure

97 Means of disclosure

(1) This section applies where by virtue of this Part the prosecutor is required to disclose information to an accused.

(2) The prosecutor may disclose the information by any means.

(3) In particular, the prosecutor may disclose the information by enabling the accused to inspect it at a reasonable time and in a reasonable place.

(4) Subsection (5) applies if the information is contained in—

(a) a precognition,

(b) a victim statement,

(c) a statement given by a person whom the prosecutor does not intend to call to give evidence in the proceedings, or

(d) where the proceedings relating to the accused are summary proceedings, a statement given by a person whom the prosecutor intends to call to give evidence in the proceedings.

(5) In complying with the requirement, the prosecutor need not disclose the precognition or, as the case may be, statement.

(6) Subsection (7) applies where the proceedings relating to the accused are solemn proceedings and—

(a) the information is contained in a statement given by a person whom the prosecutor intends to call to give evidence in the proceedings, or

(b) the information is contained in a statement and the prosecutor intends to apply under section 259 of the 1995 Act to have evidence of the statement admitted in the proceedings.

(7) In complying with the requirement, the prosecutor must disclose the statement.

Confidentiality

98 Confidentiality of disclosed information

(1) This section applies where by virtue of this Part the prosecutor discloses information to an accused.

(2) The accused must not use or disclose the information or anything recorded in it other than in accordance with subsection (3).

(3) The accused may use or disclose the information—

(a) for the purposes of the proper preparation and presentation of the accused's case in the proceedings in relation to which the information was disclosed ("the original proceedings"),

(b) with a view to the taking of an appeal in relation to the matter giving rise to the original proceedings,

(c) for the purposes of the proper preparation and presentation of the accused's case in any such appeal.

(4) A person to whom information is disclosed by virtue of subsection (3) must not use or disclose the information or anything recorded in it other than for the purpose for which it was disclosed.

(4A) If despite subsection (2) the accused discloses the information or anything recorded in it other than in accordance with subsection (3), a person to whom information is disclosed must not use or disclose the information or anything recorded in it.

(4B) Subsections (2), (4) and (4A) do not apply in relation to the use or disclosure of information which is in the public domain at the time of the use or disclosure.

(5) In subsection (3) "appeal" includes—

(a) the reference of a case to the High Court of Justiciary by the Scottish Criminal Cases Review Commission under section 194B of the 1995 Act,

(b) a petition to the *nobile officium*,

(c) proceedings in the European Court of Human Rights.

(6) Nothing in this section affects any other restriction or prohibition on the use or disclosure of information, whether the restriction or prohibition arises by virtue of an enactment (whenever passed or made) or otherwise.

99 Contravention of section 98

(1) A person who knowingly uses or discloses information in contravention of section 98 commits an offence.

(2) A person guilty of an offence under subsection (1) is liable—

(a) on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both,

(b) on conviction on indictment to imprisonment for a term not exceeding 2 years or to a fine or to both.

Exemptions from disclosure

91 Exemptions from disclosure

Information must not be disclosed by virtue of this Part to the extent that it is material the disclosure of which is prohibited by section 17 of the Regulation of Investigatory Powers Act 2000 (c.23).

Applications to court: orders preventing or restricting disclosure

102 Application for section 106 order

(1) This section applies where—

(a) by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or 95A(6)(b) the prosecutor is required to disclose an item of information to an accused,

(b) section 89(3)(a) or (b) applies to the information, and

(c) the prosecutor considers that subsection (2) applies.

(2) This subsection applies if disclosure of the item of information would be likely to cause a real risk of substantial harm or damage to the public interest.

(3) The prosecutor must apply to the court for an order under section 106 (a “section 106 order”).

103 Application for non-notification order or exclusion order

(1) This section applies where the prosecutor is required by section 102(3) to apply to the court for a section 106 order.

(2) If the application for a section 106 order relates to solemn proceedings, the prosecutor may also apply to the court for—

(a) a non-notification order and an exclusion order, or

(b) an exclusion order (but not a non-notification order).

(3) If the application for a section 106 order relates to summary proceedings, the prosecutor may also apply to the court for an exclusion order.

(4) A non-notification order is an order under section 104 prohibiting notice being given to the accused of—

(a) the making of an application for—

(i) the section 106 order to which the non-notification order relates,

(ii) the non-notification order, and

(iii) an exclusion order, and

(b) the determination of those applications.

(5) An exclusion order is an order under section 104 or 105 prohibiting the accused from attending or making representations in proceedings for the determination of the application for a section 106 order to which the exclusion order relates.

(6) Subsection (7) applies where the prosecutor applies—

(a) by virtue of subsection (2)(a) for a non-notification order and an exclusion order, or

(b) by virtue of subsection (2)(a) or (b) for an exclusion order.

(7) Before determining in accordance with section 106 the application for the section 106 order, the court must—

(a) in accordance with section 104, determine any applications for a non-notification order and an exclusion order,

(b) in accordance with section 105, determine any application for an exclusion order.

104 Application for non-notification order and exclusion order

(1) This section applies where the prosecutor applies for a non-notification order and an exclusion order.

(2) On receiving the application, the court must appoint a hearing to determine whether a non-notification order should be made.

(3) The accused is not to be notified of—

(a) the applications for the section 106 order, non-notification order and exclusion order, or

(b) the hearing appointed under subsection (2).

(4) The accused is not to be given the opportunity to be heard or be represented at the hearing.

(5) If, after giving the prosecutor an opportunity to be heard, the court is satisfied that the conditions in subsection (6) are met, the court may make a non-notification order.

(6) Those conditions are—

(a) that disclosure to the accused of the making of the application for the section 106 order would be likely to cause a real risk of substantial harm or damage to the public interest, and

(c) that, having regard to all the circumstances, the making of a non-notification order would be consistent with the accused’s receiving a fair trial.

(7) If the court makes a non-notification order it must also make an exclusion order.

(8) If the court refuses to make a non-notification order the court must appoint a hearing to determine the application for an exclusion order.

(9) If after giving the prosecutor and, subject to subsection (10), the accused an opportunity to be heard, the court is satisfied that the conditions in subsection (4) of section 105 are met, the court may make an exclusion order under subsection (3) of that section.

(10) On the application of the prosecutor the court may exclude the accused from the hearing appointed under subsection (8).

105 Application for exclusion order

(1) This section applies where by virtue of section 103(2)(b) or (3) the prosecutor applies for an exclusion order (but not a non-notification order).

(2) On receiving the application the court must appoint a hearing.

(2A) On the application of the prosecutor the court may exclude the accused from the hearing.

(3) If after giving the prosecutor and, subject to subsection (2A), the accused an opportunity to be heard on the applications for the exclusion order and the section 106 order to which it relates the court is satisfied that the conditions in subsection (4) are met, the court may make an exclusion order.

(4) Those conditions are—

(a) that disclosure to the accused of the nature of the information to which the application for the section 106 order relates would be likely to cause a real risk of substantial harm or damage to the public interest, and

(c) that, having regard to all the circumstances, the making of an exclusion order would be consistent with the accused's receiving a fair trial.

106 Application for section 106 order: determination

(1) This section applies where—

(a) the prosecutor applies for a section 106 order, and

(b) any application for a non-notification order or an exclusion order has been determined by the court.

(2) The court must—

(a) consider the item of information to which the application for a section 106 order relates,

(b) give the prosecutor and (if the court has not made an exclusion order) the accused the opportunity to be heard, and

(c) determine—

(i) whether the conditions in subsection (3) apply, and

(ii) if so, whether subsection (4) applies.

(3) The conditions are—

(a) that by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or 95A(6)(b) the prosecutor is required to disclose the item of information,

(aa) that section 89(3)(a) or (b) applies to the information,

(b) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,

(c) that withholding the item of information would be consistent with the accused's receiving a fair trial, and

(d) that the public interest would be protected only if a section 106 order were to be made.

(4) This subsection applies if the court considers that the item of information could be disclosed or partly disclosed in such a way that—

(a) the condition in paragraph (b) of subsection (3) would not be met, and

(b) the disclosure (or partial disclosure) would be consistent with the accused's receiving a fair trial.

(4A) If the court considers that subsection (3) (but not subsection (4)) applies, it may make a section 106 order preventing disclosure of the information.

(4B) If the court considers that subsection (4) applies, it may make a section 106 order requiring the information to be disclosed or partly disclosed to the accused in the manner specified in the order.

(5) For the purposes of subsection (4) the ways in which the item of information might be disclosed or partly disclosed include in particular—

(a) providing the information after (whether by redaction or otherwise) removing or obscuring parts of it,

(b) providing extracts or summaries of the information or part of it.

Orders preventing or restricting disclosure: Secretary of State

106A Order preventing or restricting disclosure: application by Secretary of State

(1) The Secretary of State may apply to the relevant court for an order under this section (a "section 106A order") in relation to the proposed disclosure by the prosecutor to the accused in relevant criminal proceedings of information which the prosecutor—

(a) is required to disclose by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or 95A(6)(b), or

(b) intends to disclose otherwise than by virtue of this Part.

(2) If the Secretary of State also makes an application in accordance with subsection (2) or (3) of section 106B, the relevant court must comply with subsections (6) and (7) of that section.

(3) Where an application is made under subsection (1), the relevant court must—

(a) consider the item of information to which the application relates,

(b) give the Secretary of State and the prosecutor the opportunity to be heard,

(c) if the application relates to information which the prosecutor is required to disclose by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or 95A(6)(b) and a non-attendance order has not been made, give the accused the opportunity to be heard, and

(d) determine—

(i) whether the conditions in subsection (4) apply, and

(ii) if so, whether subsection (5) applies.

(4) The conditions are—

(a) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,

(b) that withholding the item of information would be consistent with the accused's receiving a fair trial, and

(c) that the public interest would be protected only if a section 106A order of the type mentioned in subsection (6) were to be made.

(5) This subsection applies if the court considers that the item of information could be disclosed or partly disclosed in such a way that—

(a) the condition in paragraph (a) of subsection (4) would not be met, and

(b) the disclosure (or partial disclosure) would be consistent with the accused's receiving a fair trial.

(6) If the court considers that subsection (4) (but not subsection (5)) applies, it may make a section 106A order preventing disclosure of the information.

(7) If the court considers that subsection (5) applies, it may make a section 106A order requiring the information to be disclosed or partly disclosed to the accused in the manner specified in the order.

(8) For the purposes of subsection (7) the order may in particular specify that—

(a) the item of information be disclosed after removing or obscuring parts of it (whether by redaction or otherwise),

(b) extracts or summaries of the item of information (or part of it) be disclosed instead of the item of information.

(9) If an application is made under this section the relevant criminal proceedings must be adjourned until the application is disposed of or withdrawn.

(10) In this section and sections 106B to 106D—

"relevant court" means the court before which relevant criminal proceedings are taking place,

"relevant criminal proceedings" means criminal proceedings relating to the item of information to which the application under this section relates.

106B Application for ancillary orders: Secretary of State

(1) This section applies where the Secretary of State applies for a section 106A order.

(2) If the application under section 106A relates to solemn proceedings, the Secretary of State may also apply to the relevant court for—

(a) a restricted notification order and a non-attendance order, or

(b) a non-attendance order (but not a restricted notification order).

(3) If the application under section 106A relates to summary proceedings, the Secretary of State may also apply to the court for a non-attendance order.

(4) A restricted notification order is an order under section 106C prohibiting notice being given to the accused of—

(a) the making of an application for—

(i) the section 106A order to which the restricted notification order relates,

(ii) the restricted notification order, and

(iii) a non-attendance order, and

(b) the determination of those applications.

(5) A non-attendance order is an order under section 106D prohibiting the accused from attending or making representations in proceedings for the determination of the application for the section 106A order to which the non-attendance order relates.

(6) Subsection (7) applies where the Secretary of State applies—

(a) by virtue of subsection (2)(a) for a restricted notification order and a non-attendance order, or

(b) by virtue of subsection (2)(a) or (b) for a non-attendance order.

(7) Before determining the application for the section 106A order, the court must—

(a) in accordance with section 106C, determine any application for a restricted notification order and a non-attendance order,

(b) in accordance with section 106D, determine any application for a non-attendance order.

106C Application for restricted notification order and non-attendance order

(1) This section applies where by virtue of section 106B(2)(a) the Secretary of State applies for a restricted notification order and a non-attendance order.

(2) On receiving the application, the relevant court must appoint a hearing to determine whether a restricted notification order should be made.

(3) The accused is not to be notified of—

(a) the applications for the section 106A order, the restricted notification order and the non-attendance order, or

(b) the hearing appointed under subsection (2).

(4) The accused is not to be given the opportunity to be heard or be represented at the hearing.

(5) If, after giving the Secretary of State and the prosecutor an opportunity to be heard, the court is satisfied that the conditions in subsection (6) are met, the court may make a restricted notification order.

(6) Those conditions are—

(a) that disclosure to the accused of the making of the application for the section 106A order would be likely to cause a real risk of substantial harm or damage to the public interest, and

(b) that, having regard to all the circumstances, the making of a restricted notification order would be consistent with the accused's receiving a fair trial.

(7) If the court makes a restricted notification order, it must also make a non-attendance order.

(8) If the court refuses to make a restricted notification order, the court must appoint a hearing to determine the application for a non-attendance order.

(9) If after giving the Secretary of State, the prosecutor and, subject to subsection (10), the accused an opportunity to be heard, the court is satisfied that the conditions in subsection (5) of section 106D are met, the court may make a non-attendance order under subsection (4) of that section.

(10) On the application of the Secretary of State the court may exclude the accused from the hearing appointed under subsection (8).

106D Application for non-attendance order

(1) This section applies where by virtue of section 106B(2)(b) the Secretary of State applies for a non-attendance order (but not a restricted notification order).

(2) On receiving the application, the relevant court must appoint a hearing.

(3) On the application of the Secretary of State the court may exclude the accused from the hearing.

(4) If after giving the Secretary of State, the prosecutor and, if not excluded under subsection (3), the accused an opportunity to be heard the court is satisfied that the conditions in subsection (5) are met, the court may make a non-attendance order.

(5) Those conditions are—

(a) that disclosure to the accused of the nature of the information to which the application for the section 106A order relates would be likely to cause a real risk of substantial harm or damage to the public interest, and

(b) that, having regard to all the circumstances, the making of a non-attendance order would be consistent with the accused's receiving a fair trial.

Special counsel

107 Special counsel

(1) This section applies where the court is determining—

(a) an application for a non-notification order,

(aa) an application for an exclusion order,

(ab) an application for a section 106 order,

(ac) an application for a restricted notification order,

(ad) an application for a non-attendance order,

(ae) an application for a section 106A order,

(b) an application for review of the grant or refusal of any of those orders,

(c) an appeal relating to any of those orders.

(2) If the condition in subsection (3) is met, the court may appoint a person ("special counsel") to represent the interests of the accused in relation to the determination of the application, review or appeal.

(3) The condition is that the court considers that the appointment of special counsel is necessary to ensure that the accused receives a fair trial.

(4) Before deciding whether to appoint special counsel in a non-notification case, the court—

(a) must give the prosecutor an opportunity to be heard, but

(b) must not give the accused an opportunity to be heard.

(5) Before deciding whether to appoint special counsel in a restricted notification case, the court—

(a) must give the prosecutor and the Secretary of State an opportunity to be heard,

(b) must not give the accused an opportunity to be heard.

(6) Before deciding whether to appoint special counsel in any case other than a non-notification case or a restricted notification case, the court must give all the parties an opportunity to be heard.

(7) The prosecutor may appeal to the High Court against a decision of the court not to appoint special counsel in any case.

(8) The Secretary of State may appeal to the High Court against a decision of the court not to appoint special counsel in a restricted notification case.

(9) The accused may appeal to the High Court against a decision not to appoint special counsel in any case other than a non-notification case or a restricted notification case.

(10) In this section and section 107B—

“non-notification case” means a case where the court is determining—

(a) an application for a non-notification order,

(b) an application for review of the grant or refusal of a non-notification order,

(c) an appeal relating to such an order,

“restricted notification case” means a case where the court is determining—

(a) an application for a restricted notification order,

(b) an application for review of the grant or refusal of a restricted notification order,

(c) an appeal relating to such an order.

107A Persons eligible for appointment as special counsel

The court may appoint a person as special counsel under section 107(2) only if the person is a solicitor or advocate.

107B Role of special counsel

(1) Special counsel’s duty is, in relation to the determination of the relevant application or appeal, to act in the best interests of the accused with a view only to ensuring that the accused receives a fair trial.

(2) Special counsel—

(a) is entitled to see the confidential information, but

(b) must not disclose any of the confidential information to the accused or the accused’s representative (if any).

(3) Special counsel appointed in a non-notification case or a restricted notification case must not—

(a) disclose to the accused or the accused's representative (if any) the making of the relevant application or appeal, or

(b) otherwise communicate with the accused or the accused's representative (if any) about the relevant application or appeal.

(4) Special counsel appointed in any case other than a non-notification case or a restricted notification case must not communicate with the accused about the relevant application or appeal except—

(a) with the permission of the court, and

(b) where permission is given, in accordance with such conditions as the court may impose.

(5) Before deciding whether to grant permission, the court must give—

(a) the prosecutor, and

(b) in the case of an application for a section 106A order or a non-attendance order, the Secretary of State,

an opportunity to be heard.

(6) In this section—

"the confidential information" means—

(a) the information to which the relevant application or appeal relates, and

(b) a copy of the relevant application or appeal,

"relevant application or appeal" means the application or appeal referred to in section 107(1) in respect of which special counsel is appointed.

Appeals

107C Appeals

(1) The prosecutor may appeal to the High Court against—

(a) the making of a section 106 order under section 106(4B),

(b) the making of a section 106A order,

(c) the making of a restricted notification order,

(d) the making of a non-attendance order,

(e) the refusal of an application for a non-notification order,

(f) the refusal of an application for an exclusion order, or

(g) the refusal of an application for a section 106 order.

(2) The accused may appeal to the High Court against the making of—

(a) an exclusion order under section 105(3),

(b) a section 106 order,

(c) a section 106A order, or

(d) a non-attendance order.

(3) The Secretary of State may appeal to the High Court against—

(a) the making of a section 106A order under section 106A(7),

(b) the refusal of an application for a restricted notification order,

(c) the refusal of an application for a non-attendance order, or

(d) the refusal of an application for a section 106A order.

(4) If special counsel was appointed in relation to an application for a non-notification order, special counsel may appeal to the High Court against the making of—

(a) the non-notification order, or

(b) a section 106 order in relation to the same item of information.

(5) If special counsel was appointed in relation to an application for a restricted notification order, special counsel may appeal to the High Court against the making of—

(a) the restricted notification order, or

(b) a section 106A order in relation to the same item of information.

(6) An appeal must be lodged not later than 7 days after the decision appealed against.

(7) The prosecutor is entitled to be heard in any appeal under this section.

(8) The accused is entitled to be heard in an appeal under—

(a) subsection (1)(a) or (g) or (2)(b) unless—

(i) a non-notification order has been made, or

(ii) an exclusion order has been made,

(b) subsection (1)(b), (2)(c) or (3)(a) or (d) unless—

(i) a restricted notification order has been made, or

(ii) a non-attendance order has been made,

(c) subsection (1)(d), (2)(d) or (3)(c) unless the court, on the application of the Secretary of State, excludes the accused from the hearing,

(d) subsection (1)(f) or (2)(a) unless the court, on the application of the prosecutor excludes the accused from the hearing.

(9) The Secretary of State is entitled to be heard in an appeal under subsection (1)(b), (c) or (d), (2)(c) or (d) or (5).

Review of section 106 and 106A orders

111 Review of section 106 order

(1) This section applies where—

(a) the court makes a section 106 order, and

(b) during the relevant period the prosecutor or the accused becomes aware of information that was unavailable to the court at the time when the order was made.

(2) The prosecutor or, as the case may be, special counsel or the accused may apply to the court to review the section 106 order.

(3) Except in the case mentioned in subsection (4), the same persons are entitled to be heard on the application for review as were entitled to be heard on the application for the section 106 order.

(4) If—

(a) a non-notification order was granted in relation to the section 106 order which is under review, and

(b) the court is satisfied that the conditions in section 104(6) are met,

the court may, where the prosecutor or, as the case may be, special counsel applies for the review, make an order prohibiting notification being given to the accused of the application for review.

(5) If—

(a) an exclusion order was granted in relation to the section 106 order which is under review, and

(b) the court is satisfied that the conditions in section 105(4) are met,

the court may, where the prosecutor or, as the case may be, special counsel or the accused applies for the review, exclude the accused from the review.

(6) If the court is not satisfied that the conditions mentioned in section 106(3) are met, the court may—

(a) recall the section 106 order, or

(b) recall the section 106 order and make an order requiring disclosure to the specified extent.

(7) Nothing in this section affects any right of appeal in relation to the section 106 order.

(8) In this section—

“specified” means specified in the order of the court,

“the relevant period”, in relation to an accused, means the period—

(a) beginning with the making of the section 106 order, and

(b) ending with the conclusion of the proceedings against the accused.

(9) For the purposes of this section, proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted simpliciter,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(e) any appeal by the prosecutor is determined or abandoned, or

(f) the accused is convicted and any appeal is determined or abandoned.

111A Review of section 106A order

(1) This section applies where—

(a) the court makes a section 106A order, and

(b) during the relevant period the Secretary of State, the prosecutor, special counsel or the accused becomes aware of information that was unavailable to the court at the time when the order was made.

(2) The Secretary of State or, as the case may be, the prosecutor, special counsel or the accused may apply to the court to review the order.

(3) Except in the case mentioned in subsection (4), the same persons are entitled to be heard on the application for review as were entitled to be heard on the application for the order.

(4) If—

(a) a restricted notification order was granted in relation to the order which is under review, and

(b) the court is satisfied that the conditions in section 106C(6) are met,

the court may, where the Secretary of State or, as the case may be, the prosecutor or special counsel applies for the review, make an order prohibiting notification of the application for review being given to the accused.

(5) If—

(a) a non-attendance order was granted in relation to the order which is under review, and

(b) the court is satisfied that the conditions in section 106D(5) are met,

the court may, where the Secretary of State or, as the case may be, the prosecutor, special counsel or the accused applies for the review, exclude the accused from the review.

(6) If the court is not satisfied that the conditions mentioned in section 106A(4) are met, the court may—

(a) recall the order which is under review, or

(b) recall the order which is under review and make an order requiring the information to be disclosed or partly disclosed to the accused in the specified manner.

(7) Nothing in this section affects any right of appeal in relation to the order which is under review.

(8) In this section—

"specified" means specified in the order of the court,

"the relevant period", in relation to an accused, means the period—

(a) beginning with the making of the section 106A order, and

(b) ending with the conclusion of the proceedings against the accused.

112 Review by court of section 106 order and section 106A order

(1) This section applies where the court makes a section 106 order or a section 106A order.

(2) During the relevant period, the court must from time to time consider in relation to each order whether, having regard to the information of which the court is aware, the order concerned continues to be appropriate.

(3) If the court considers that the order concerned might no longer be appropriate, the court must appoint a hearing to review the matter.

(4) In this section “the relevant period” has the same meaning as in section 111(8).

Applications and reviews: general

113 Applications and reviews: general provisions

(1) This section applies in relation to—

(a) an application for an order mentioned in subsection (2), and

(b) a review relating to such an order.

(2) The orders are—

(a) a non-notification order,

(b) an exclusion order,

(c) a section 106 order.

(3) Except where it is impracticable to do so, the application or review is to be assigned to the same justice of the peace, sheriff or, as the case may be, judge as has been (or is to be assigned) to the trial diet in the proceedings against the accused to which the application relates.

(4) The accused is not entitled to see or be made aware of the contents of an application for—

(a) a non-notification order,

(b) an exclusion order,

(c) a section 106 order,

(d) a review made by the prosecutor.

Code of practice

114 Code of practice

(1) The Lord Advocate—

(a) must issue a code of practice providing guidance about this Part, and

(b) may from time to time revise the code for the time being in force.

(2) The persons mentioned in subsection (3) must have regard to the code of practice for the time being in force in carrying out their functions in relation to the investigation and reporting of crime and sudden deaths.

(3) Those persons are—

(a) police forces,

(b) prosecutors,

(c) such other persons who—

(i) engage (to any extent) in the investigation of crime or sudden deaths, and

(ii) submit reports relating to those investigations to the procurator fiscal,

as the Scottish Ministers may prescribe by regulations.

(4) The Lord Advocate must lay before the Scottish Parliament any code or revised code issued under this section.

Acts of adjournal

115 Acts of adjournal

The High Court may by act of adjournal make such rules as it considers necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of this Part.

Abolition of common law

115A Abolition of common law rules about disclosure

(1) The provisions of this Part replace any equivalent common law rules about disclosure of information by the prosecutor in connection with criminal proceedings.

(2) The common law rules about disclosure of information by the prosecutor in connection with criminal proceedings are abolished in so far as they are replaced by or are inconsistent with the provisions of this Part.

(3) Sections 95B and 96H do not affect any right under the common law of an accused or appellant to seek disclosure or recovery of information by or from the prosecutor by means of a procedure other than an application under one or other of those sections.

(4) Subsection (5) applies where, following an application (the "earlier disclosure application") by the accused or the appellant under section 95B or section 96H, the court has made a ruling that (as the case may be)—

(a) section 89(3) does not apply to information, or

(b) information does not fall within section 96B(3).

(5) The accused or, as the case may be, the appellant, is not entitled to seek the disclosure or recovery of the same information by or from the prosecutor by means of any other procedure at common law on grounds that are substantially the same as any of those on which the earlier disclosure application was made.

(6) Subsection (7) applies where, following an application (the "earlier common law application") by the accused under a procedure other than an application under section 95B or 96H, the court has decided not to make an order for the recovery or disclosure of information by or from the prosecutor.

(7) The accused or, as the case may be, the appellant is not entitled to make an application under section 95B or 96H in relation to the same information on grounds that are substantially the same as any of those on which the earlier common law application was made.

(8) In this section, "appellant" has the meaning given by section 96A.

Interpretation of Part 6

116 Interpretation of Part 6

(1) In this Part—

"investigating agency" has the meaning given by section 86(4), "procurator fiscal" and "prosecutor" have the meanings given by section 307(1) of the 1995 Act.

(2) References in the following sections to the accused include references to a solicitor or advocate acting on behalf of the accused—

(a) section 89(2)(b),

(aa) section 89A(2),

(b) section 90(1),

(d) section 95(1)(b),

(e) section 97,

(f) section 98(1), and (2) and (where it first occurs) (3),

(h) section 102,

(i) section 103,

(j) section 104,

(k) section 105,

(l) section 106(2), and

(m) section 111(1), (2), (4) and (5).

PART 7

MENTAL DISORDER AND UNFITNESS FOR TRIAL

117 Criminal responsibility of persons with mental disorder

Before section 52 of the 1995 Act insert—

"*Criminal responsibility of mentally disordered persons*

51A Criminal responsibility of persons with mental disorder

(1) A person is not criminally responsible for conduct constituting an offence, and is to be acquitted of the offence, if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.

(2) But a person does not lack criminal responsibility for such conduct if the mental disorder in question consists only of a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct.

(3) The defence set out in subsection (1) is a special defence.

(4) The special defence may be stated only by the person charged with the offence and it is for that person to establish it on the balance of probabilities.

(5) In this section, "conduct" includes acts and omissions.

Diminished responsibility

51B Diminished responsibility

(1) A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind.

(2) For the avoidance of doubt, the reference in subsection (1) to abnormality of mind includes mental disorder.

(3) The fact that a person was under the influence of alcohol, drugs or any other substance at the time of the conduct in question does not of itself—

(a) constitute abnormality of mind for the purposes of subsection (1), or

(b) prevent such abnormality from being established for those purposes.

(4) It is for the person charged with murder to establish, on the balance of probabilities, that the condition set out in subsection (1) is satisfied.

(5) In this section, "conduct" includes acts and omissions.".

118 Acquittal involving mental disorder: procedure

Before section 54 of the 1995 Act insert—

"*Acquittal involving mental disorder*

53E Acquittal involving mental disorder

(1) Where the prosecutor accepts a plea (by the person charged with the commission of an offence) of the special defence set out in section 51A of this Act, the court must declare that the person is acquitted by reason of the special defence.

(2) Subsection (3) below applies where—

(a) the prosecutor does not accept such a plea, and

(b) evidence tending to establish the special defence set out in section 51A of this Act is brought before the court.

(3) Where this subsection applies the court is to—

(a) in proceedings on indictment, direct the jury to find whether the special defence has been established and, if they find that it has, to declare whether the person is acquitted on that ground,

(b) in summary proceedings, state whether the special defence has been established and, if it states that it has, declare whether the person is acquitted on that ground.".

119 Unfitness for trial

(1) In the 1995 Act, after section 53E (inserted by section 118), insert—

"Unfitness for trial

53F Unfitness for trial

(1) A person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of a mental or physical condition, of participating effectively in a trial.

(2) In determining whether a person is unfit for trial the court is to have regard to—

(a) the ability of the person to—

(i) understand the nature of the charge,

(ii) understand the requirement to tender a plea to the charge and the effect of such a plea,

(iii) understand the purpose of, and follow the course of, the trial,

(iv) understand the evidence that may be given against the person,

(v) instruct and otherwise communicate with the person's legal representative, and

(b) any other factor which the court considers relevant.

(3) The court is not to find that a person is unfit for trial by reason only of the person being unable to recall whether the event which forms the basis of the charge occurred in the manner described in the charge.

(4) In this section "the court" means—

(a) as regards a person charged on indictment, the High Court or the sheriff court,

(b) as regards a person charged summarily, the sheriff court.".

(2) The title of section 54 of the 1995 Act (insanity in bar of trial) is replaced by "Unfitness for trial: further provision", the cross-heading which precedes it is omitted and the section is amended as follows—

(a) in subsection (1)—

(i) the words ", on the written or oral evidence of two medical practitioners," are repealed, and

(ii) for "insane" substitute "unfit for trial",

(b) in subsection (3)—

(i) for "the insanity of a person" substitute "whether a person is unfit for trial", and

(ii) after "mental" insert "or physical", and

(c) in subsection (5), for "insane" substitute "unfit for trial".

(3) Subsections (6) and (7) are repealed.

120 Abolition of common law rules

Any rule of law providing for—

(a) the special defence of insanity,

(b) the plea of diminished responsibility, or

(c) insanity in bar of trial,

ceases to have effect.

PART 8

LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982

121 Conditions to which licences under 1982 Act are to be subject

(1) The 1982 Act is amended as follows.

(2) In section 3(4) (automatic grant or renewal of licence where application not determined within specified period), the word "unconditionally" is repealed.

(3) After section 3 insert—

"3A Mandatory licence conditions

(1) The Scottish Ministers may by order made by statutory instrument prescribe conditions to which licences granted by licensing authorities under this Act are to be subject.

(2) Different conditions may be prescribed under subsection (1)—

(a) in respect of different licences, or different types of licence,

(b) otherwise for different purposes, circumstances or cases.

(3A) No order may be made under subsection (1) unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.

(4) Subsection (1) does not affect any other power of the Scottish Ministers under this Act or any other enactment to prescribe conditions—

(a) to which licences granted by licensing authorities under this Act are to be subject, or

(b) to be imposed by licensing authorities in granting or renewing licences under this Act.

(5) The following conditions are referred to in this Part and Part 2 of this Act as "mandatory conditions"—

(a) conditions prescribed under subsection (1),

(b) conditions prescribed under any power referred to in subsection (4), and

(c) conditions imposed, or required to be imposed, by any provision of this Part or Part 2 of this Act.

(6) In this section and section 3B, references to licences granted by licensing authorities include references to—

(a) licences renewed by licensing authorities, and

(b) licences deemed by virtue of section 3(4) to be granted or renewed by licensing authorities.

3B Standard licence conditions

(1) A licensing authority may determine conditions to which licences granted by them under this Act are to be subject.

(2) Conditions determined under subsection (1) are referred to in this Part and Part 2 as “standard conditions”.

(3) Different conditions may be determined under subsection (1)—

(a) in respect of different licences, or different types of licence,

(b) otherwise for different purposes, circumstances or cases.

(4) A licensing authority must publish, in such manner as they think appropriate, any standard conditions determined by them.

(5) Standard conditions have no effect—

(a) unless they are published, and

(b) so far as they are inconsistent with any mandatory conditions.

(6) Subsection (1) is subject to paragraph 5(1A)(a) of Schedule 1 to this Act.”.

(4) In section 27C (conditions in respect of knife dealers’ licences)—

(a) in subsection (1)—

(i) in paragraph (b), after “prejudice to” insert “section 3B and”, and

(ii) in paragraph (c), after “that” insert “section and”, and

(b) subsection (2) is repealed.

(5) In section 41(3) (power to attach conditions to public entertainment licences), after “prejudice to” insert “section 3B of and”.

(6) In Schedule 1 (further provisions as to the general licensing system), in paragraph 5—

(a) in sub-paragraph (1)—

(i) in paragraph (a), the word “unconditionally” is repealed, and

(ii) paragraph (b) is repealed,

(b) after that sub-paragraph insert—

“(1A) In granting or renewing a licence under sub-paragraph (1)(a), a licensing authority may (either or both)—

(a) disapply or vary any standard conditions so far as applicable to the licence,

(b) impose conditions in addition to any mandatory or standard conditions to which the licence is subject.”,

(c) in sub-paragraph (2), for “(1)(b)” substitute “(1A)(b)”, and

(d) after that sub-paragraph insert—

“(2A) A variation made under sub-paragraph (1A)(a) or condition imposed under sub-paragraph (1A)(b) has no effect so far as it is inconsistent with any mandatory condition to which the licence is subject.”.

122 Licensing: powers of entry and inspection for civilian employees

(1) The 1982 Act is amended as follows.

(2) In section 5 (rights of entry and inspection)—

(a) in subsection (1), after "licensing authority" insert ", an authorised civilian employee",

(b) in subsection (3)(a) and (b)—

(i) after "constable" where it first occurs insert ", an authorised civilian employee", and

(ii) after "such an" insert "employee or",

(c) in subsection (3)(c), after "constable" insert ", an authorised civilian employee",

(d) in subsection (4)—

(i) after "licensing authority" insert ", an authorised civilian employee", and

(ii) after "the officer" insert ", employee", and

(e) in subsection (6), after "licensing authority" insert "or authorised civilian employee".

(3) In section 8 (interpretation of Parts 1 and 2), after the definition of "appropriate relevant authority" insert—

""authorised civilian employee" means a person—

(a) employed by a police authority under section 9(1)(a) of the Police (Scotland) Act 1967 (c.77), and

(b) authorised by the chief constable for the purposes of sections 5 and 11 of this Act;".

(4) In section 11 (inspection and testing of vehicles), in subsection (2)—

(a) after "the authority)" insert ", an authorised civilian employee",

(b) in paragraph (b), after "licensing authority" insert ", an authorised civilian employee", and

(c) after "authorised officer" where it last occurs, insert ", employee".

(5) In paragraph 3 (miscellaneous definitions) of Schedule 2 (control of sex shops), after the definition of "appropriate relevant authority" insert—

""authorised civilian employee" means a person—

(a) employed by a police authority under section 9(1)(a) of the Police (Scotland) Act 1967 (c.77), and

(b) authorised by the chief constable for the purposes of paragraph 20 of this Schedule;".

(6) In paragraph 20 of that Schedule (rights of entry and inspection)—

(a) in sub-paragraph (1), after "local authority" insert ", an authorised civilian employee",

(b) in sub-paragraph (3), after "local authority" insert "or an authorised civilian employee", and

(c) in sub-paragraph (5)—

(i) after "constable" where it first occurs insert ", an authorised civilian employee", and

(ii) after "such" insert "employee or".

124 Licensing of taxis and private hire cars

(1) The 1982 Act is amended as follows.

(2) In section 13 (taxi and private hire car licences), in subsection (3), for "during any continuous period of 12 months" substitute "throughout the period of 12 months immediately".

(3) In section 17 (taxi fares)—

(a) for subsections (2) to (4) substitute—

"(2) The licensing authority must fix scales for the fares and other charges mentioned in subsection (1) within 18 months beginning with the date on which the scales came into effect.

(3) In fixing scales under subsection (2), the licensing authority may—

(a) alter fares or other charges,

(b) fix fares or other charges at the same rates.

(4) Before fixing scales under subsection (2), the licensing authority must review the scales in accordance with subsection (4A).

(4A) In carrying out a review, the licensing authority must—

(a) consult with persons or organisations appearing to it to be, or to be representative of, the operators of taxis operating within its area,

(b) following such consultation—

(i) review the existing scales, and

(ii) propose new scales (whether at altered rates or the same rates),

(c) publish those proposed scales in a newspaper circulating in its area—

(i) setting out the proposed scales,

(ii) explaining the effect of the proposed scales,

(iii) proposing a date on which the proposed scales are to come into effect, and

(iv) stating that any person may make representations in writing until the relevant date, and

(d) consider any such representations.

(4B) In subsection (4A)(c)(iv) "the relevant date" is a date specified by the licensing authority falling at least one month after the first publication by the authority of the proposed scales.

(4C) After fixing scales under subsection (2), the licensing authority must give notice in accordance with subsection (4D).

(4D) The licensing authority must—

(a) set out, and explain the effect of, the scales as fixed,

(b) notify the persons mentioned in subsection (4E) of—

(i) the date on which the scales as fixed are to come into effect, and

(ii) the rights of appeal under section 18.

(4E) Those persons are—

(a) all operators of taxis operating within their area, and

(b) the persons and organisations consulted under subsection (4A)(a).", and

(b) in subsection (5)—

(i) for "(4)" where it first occurs substitute "(4D)(b)",

(ii) in paragraph (a)—

(A) for "(4)" where it first occurs substitute "(4E)",

(B) for "five days after the decision referred to in subsection (4)" substitute "seven days after the scales are fixed under subsection (2)".

(4) In section 18 (appeals in respect of taxi fares)—

(a) for subsection (1) substitute—

"(1) Any person mentioned in subsection (1A) may, within 14 days of notice being given under section 17(4C), appeal against those scales to the traffic commissioner for the Scottish Traffic Area as constituted for the purpose of the Public Passenger Vehicles Act 1981.",

(b) after that subsection insert—

"(1A) Those persons are—

(a) any person who operates a taxi in an area for which scales have been fixed under section 17(2), and

(b) any person or organisation appearing to the traffic commissioner to be representative of such taxi operators.",

(c) in subsection (3)—

(i) the words "to them" are repealed,

(ii) in paragraph (b) the word "may" is repealed, and

(iii) in paragraph (b)(i), for "on the grounds that" substitute "if", and

(d) subsection (9) is repealed.

(5) After section 18 insert—

"18A Publication and coming into effect of taxi fares

(1) Following the fixing of scales by a licensing authority under section 17(2), the licensing authority must—

(a) determine the date on which the scales are to come into effect, and

(b) publish the scales in accordance with subsections (3) to (5).

(2) The scales may come into effect no earlier than seven days after the date on which they are published.

(3) The licensing authority must—

(a) give notice of the scales by advertisement in a newspaper circulating in its area, and

(b) specify in that advertisement the date on which the scales are to come into effect.

(4) The authority must give notice of the scales—

(a) where no appeal has been lodged under subsection (1) of section 18, as soon as practicable after the expiry of the period of 14 days mentioned in that subsection,

(b) where such an appeal has been lodged, as soon as practicable after the determination of the appeal.

(5) For the purposes of subsection (4), an appeal is determined on the date on which the appeal is abandoned or notice is given to the appellant of its disposal.”.

124A Licensing of street trading: food hygiene certificates

(1) Section 39 of the 1982 Act (street traders’ licences) is amended as follows.

(2) In subsection (4), for the words from “the requirements” to the end substitute “such requirements as the Scottish Ministers may by order made by statutory instrument specify”.

(3) After subsection (4), insert—

“(5) An order under subsection (4) may specify requirements by reference to provision contained in another enactment.

(6) A statutory instrument containing an order made under subsection (4) is subject to annulment in pursuance of a resolution of the Scottish Parliament.”.

126 Licensing of public entertainment

(1) Section 41 of the 1982 Act (public entertainment licences) is amended as follows.

(2) In subsection (2)—

(a) the words “, on payment of money or money’s worth,” are repealed,

(b) in paragraph (d), for “, section 1 of the Cinemas Act 1985 or Part II of the Gaming Act 1968” substitute “or section 1 of the Cinemas Act 1985”,

(c) for paragraph (e), substitute—

“(e) premises in respect of which there is a club gaming permit (within the meaning of section 271 of the Gambling Act 2005 (c.19)) or a prize gaming permit (within the meaning of section 289 of that Act of 2005);”,

(d) the word “or” immediately preceding paragraph (g) is repealed, and

(e) after paragraph (g), add “, or

(h) such other premises as the Scottish Ministers may by order made by statutory instrument specify.”.

(3) After subsection (2) insert—

“(2A) A statutory instrument containing an order made under subsection (2)(h) is subject to annulment in pursuance of a resolution of the Scottish Parliament.”.

127 Licensing of late night catering

(1) Section 42 of the 1982 Act (late hours catering) is amended as follows.

(2) In subsections (1) and (2), for “meals or refreshment” in each place where those words occur substitute “food”.

(3) In subsection (2), for “they are” substitute “it is”.

(4) In subsection (3), for “meals or refreshments” in both places where those words occur substitute “food”.

(5) After subsection (6), add—

> “(7) In this section “food” has the meaning given in section 1 of the Food Safety Act 1990 (c.16).”.

128 Applications for licences

(1) The 1982 Act is amended as follows.

(2) In Schedule 1 (further provisions as to the general licensing system)—

(a) in paragraph 1(2)(b), for “and address” in both places where those words occur substitute “, address and date and place of birth”,

(b) in paragraph 1(2)(c)—

(i) in sub-paragraph (iii), for “and private addresses” substitute “, private addresses and dates and places of birth”, and

(ii) in sub-paragraph (iv), for “and address” substitute “, address and date and place of birth”,

(ba) in paragraph 2(3)(b), after “application” insert “(other than the date and place of birth of any person)”,

(bb) in paragraph 2(8)(a), after “application” insert “(other than the date and place of birth of any person)”,

(c) in paragraph 3(1)(e), for “21” substitute “28”,

(d) in paragraph 4(2), for “7” substitute “14”,

(e) in paragraph 8, after sub-paragraph (5) insert—

> “(5A) On good cause being shown, a licensing authority may, for the purposes of sub-paragraph (5), deem an application for renewal of a licence made up to 28 days after the expiry of the licence to be an application made before the expiry.”,

(f) in paragraph 11(8), for “21” substitute “14”, and

(g) in paragraph 17(2), for “28” substitute “21”.

(3) In Schedule 2 (control of sex shops)—

(a) in paragraph 6(2), for paragraph (b) substitute—

> “(b) the date and place of birth of the applicant;”,

(b) in paragraph 6(2)(c), for “age” substitute “date and place of birth”,

(c) in paragraph 6(3)—

(i) in paragraph (c), for "and private addresses" substitute ", private addresses and dates and places of birth", and

(ii) in paragraph (d), for "age" substitute "date and place of birth",

(d) in paragraph 8(7), after "them" insert "and, where they propose to do so, must, within such reasonable period (not being less than 14 days) of the date of the hearing, notify the applicant and each such person of that date",

(e) in paragraph 9(3), in both paragraphs (e) and (f), for "the United Kingdom" substitute "a member state of the European Union",

(f) in paragraph 12, after sub-paragraph (3) insert—

"(3A) On good cause being shown, a local authority may, for the purposes of sub-paragraph (3), deem an application for renewal of a licence made up to 28 days after the expiry of the licence to be an application made before the expiry.",

(g) in paragraph 13(6), for "21" substitute "14", and

(h) in paragraph 23(2), for "28" substitute "21".

PART 9

ALCOHOL LICENSING

130 Premises licence applications: notification requirements

(1) Section 21 of the 2005 Act (notification of premises licence application) is amended as follows.

(2) For subsection (2), substitute—

"(2) On giving notice of an application under subsection (1), the Licensing Board—

(a) must provide the appropriate chief constable with a copy of the application, and

(b) may provide any other person to whom notice is given with a copy of the application.".

(3) In subsection (3), the following are repealed—

(a) the word "and" after paragraph (a), and

(b) paragraph (b).

(4) In subsection (6), the following are repealed—

(a) the definition of "antisocial behaviour",

(b) the word "and" following the definition of "neighbouring land", and

(c) the definition of "relevant period".

131 Premises licence applications: modification of layout plans

In section 23 of the 2005 Act (determination of premises licence application), in subsection (7)(b), after "plan" insert "or layout plan (or both)".

131A Reviews of premises licences: notification of determinations

(1) The 2005 Act is amended as follows.

(2) After section 39 (Licensing Board's powers on review), insert—

“**39A Notification of determinations**

(1) Where a Licensing Board, at a review hearing—

(a) decides to take one of the steps mentioned in section 39(2), or

(b) decides not to take one of those steps,

the Board must give notice of the decision to each of the persons mentioned in subsection (2).

(2) The persons referred to in subsection (1) are—

(a) the holder of the premises licence, and

(b) where the decision is taken in connection with a premises licence review application, the applicant.

(3) Where subsection (1)(a) applies, the holder of the premises licence may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(4) Where—

(a) subsection (1)(a) or (b) applies, and

(b) the decision is taken in connection with a premises licence review application,

the applicant may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(5) Where the clerk of a Board receives a notice under subsection (3) or (4), the Board must issue a statement of the reasons for the decision to—

(a) the person giving the notice, and

(b) any other person to whom the Board gave notice under subsection (1).

(6) A statement of reasons under subsection (5) must be issued—

(a) by such time, and

(b) in such form and manner,

as may be prescribed.”.

132 Premises licence applications: antisocial behaviour reports

(1) The 2005 Act is amended as follows.

(2) In section 22 (objections and representations), after subsection (2) insert—

“(2A) The appropriate chief constable may, under subsection (1)(b), make representations concerning a premises licence application by giving to the Licensing Board a report detailing—

(a) any cases of antisocial behaviour indentified by constables as having taken place on, or in the vicinity of, the premises,

(b) any complaints or other representations made to constables concerning antisocial behaviour on, or in the vicinity of, the premises.”.

(3) After section 24 insert—

“24A Power to request antisocial behaviour report

(1) A Licensing Board may, at any time before determining a premises licence application, request the appropriate chief constable to give the Board a report detailing—

(a) all cases of antisocial behaviour indentified within the relevant period by constables as having taken place on, or in the vicinity of, the premises,

(b) all complaints or other representations made within the relevant period to constables concerning antisocial behaviour on, or in the vicinity of, the premises.

(2) The appropriate chief constable must give the report within 21 days of the request.

(3) Where the Licensing Board requests a report under subsection (1), the Board must suspend consideration of the application until it receives the report.

(4) On receipt of the chief constable’s report under subsection (2), the Licensing Board must—

(a) give a copy of the report to the applicant in such manner and by such time as may be prescribed by regulations, and

(b) resume consideration of the application and determine it in accordance with section 23.

(5) In this section—

“antisocial behaviour” has the same meaning as in section 143 of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8), and

“relevant period” means the period of one year ending with the date of the request.”.

132A Premises licences: connected persons and interested parties

(1) The 2005 Act is amended as follows.

(2) After section 40 insert—

“*Connected persons and interested parties*

40A Connected persons and interested parties: licence holder’s duty to notify changes

(1) A premises licence holder must, not later than one month after a person becomes or ceases to be—

(a) a connected person in relation to the licence holder, or

(b) an interested party in relation to the licensed premises,

give the appropriate Licensing Board notice of that fact.

(2) A notice under subsection (1) that a person has become a connected person or an interested party must specify—

(a) the name and address of the person, and

(b) if the person is an individual, the person's date of birth.

(3) Where a Licensing Board receives a notice under subsection (1), the Board must give a copy of the notice to the appropriate chief constable.

(4) A premises licence holder who fails, without reasonable excuse, to comply with subsection (1) commits an offence.

(5) A person guilty of an offence under subsection (4) is liable on summary conviction to a fine not exceeding level 2 on the standard scale.".

(3) In section 48 (notification of change of name or address)—

(a) in subsection (1)—

(i) the word "or" immediately following paragraph (a) is repealed, and

(ii) after paragraph (b) insert ", or

(c) the name or address of any person who is—

(i) a connected person in relation to the licence holder, or

(ii) an interested party in relation to the licensed premises,",

(b) after subsection (2) insert—

"(2A) Where a Licensing Board receives a notice under subsection (1), the Board must give a copy of the notice to the appropriate chief constable.".

(4) In section 147 (interpretation), after subsection (4) insert—

"(5) For the purposes of this Act, a person is an interested party in relation to licensed premises if the person is not the holder of the premises licence nor the premises manager in respect of the premises but—

(a) has an interest in the premises as an owner or tenant, or

(b) has management and control over the premises or the business carried on on the premises.".

(5) In section 148 (index of defined expressions), in the table, insert at the appropriate place—

"interested party	section 147(5).".

132B Premises licence applications: food hygiene certificates

(1) Section 50 of the 2005 Act (certificates as to planning, building standards and food hygiene) is amended as follows.

(2) In subsection (7), for the words from "the requirements" to the end substitute "such requirements as the Scottish Ministers may, by order, specify.".

(3) After subsection (7), insert—

"(7A) An order under subsection (7) may specify requirements by reference to provision contained in another enactment.".

(4) In subsection (8)(c), for "the 1990 Act" substitute "section 5 of the Food Safety Act 1990 (c.16)".

133 Sale of alcohol to trade

(1) The 2005 Act is amended as follows.

(2) In section 63 (prohibition of sale, consumption and taking away of alcohol outwith licensed hours), in subsection (2)(f), after "on" where it first occurs insert "or taken from".

(3) In section 117 (offence relating to sale of alcohol to trade), in subsection (1), after "from" insert "licensed premises or".

134 Occasional licences

(1) The 2005 Act is amended as follows.

(2) In section 57 (notification of application to chief constable and Licensing Standards Officer), after subsection (3), add—

> "(4) Subsection (5) applies where the Licensing Board is satisfied that the application requires to be dealt with quickly.
>
> (5) Subsections (2) and (3) have effect in relation to the application as if the references to the period of 21 days were references to such shorter period of not less than 24 hours as the Board may determine.".

(3) In paragraph 10 of schedule 1 (delegation of functions of Licensing Boards), in sub-paragraph (4), after "Board" in the second place where it appears insert "or to a member of staff provided under paragraph 8(1)(b)".

134A Extended hours applications: notification period

(1) Section 69 of the 2005 Act (notification of extended hours application) is amended as follows.

(2) After subsection (3), add—

> "(4) Subsections (5) and (6) apply where the Licensing Board is satisfied that the application requires to be dealt with quickly.
>
> (5) Subsections (2) and (3) have effect in relation to the application as if the references to the period of 10 days were references to such shorter period of not less than 24 hours as the Board may determine.
>
> (6) Subsection (3) has effect in relation to the application as if for the word "must" there were substituted "may".".

135 Extended hours applications: variation of conditions

After section 70 of the 2005 Act insert—

> **"70A Extended hours applications: variation of conditions**
>
> (1) On granting an extended hours application under section 68(1) in respect of a premises licence, the Licensing Board may make such variation of the conditions to which the licence is subject as the Board considers necessary or expedient for the purposes of any of the licensing objectives.
>
> (2) A variation made under subsection (1)—

(a) may have effect only in relation to a period of licensed hours which is extended under section 68(1), and

(b) ceases to have effect at the end of the period for which the extension of the licensed hours has effect under section 68(2).

(3) In subsection (1), "variation" includes addition, deletion or other modification.".

136 Personal licences

(1) The 2005 Act is amended as follows.

(2) In section 74 (determination of personal licence application)—

(a) in subsection (2)—

(i) the word "and" immediately following paragraph (a) is repealed, and

(ii) after paragraph (b) add—

"(ba) the notice does not include a recommendation under section 73(4),

(c) the applicant has signed the application, and

(d) subsection (8) does not apply,",

(b) in subsection (3)—

(i) the word "and" immediately following paragraph (b) is repealed, and

(ii) after paragraph (b) insert—

"(ba) the applicant does not already hold a personal licence, and", and

(c) after subsection (6) insert—

"(7) Subsection (8) applies if—

(a) all of the conditions specified in subsection (3) are met in relation to the applicant,

(b) the Board has received from the appropriate chief constable a notice under section 73(3)(a), and

(c) the applicant has held a personal licence which—

(i) expired within the period of 3 years ending on the day on which the application was received, or

(ii) was surrendered by the applicant by notice under section 77(6) received within that period.

(8) The Licensing Board may—

(a) hold a hearing for the purposes of considering and determining the application, and

(b) after having regard to the circumstances in which the personal licence previously held expired or, as the case may be, was surrendered—

(i) refuse the application, or

(ii) grant the application.".

(3) In section 76 (issue of licence), after subsection (3) add—

“(4) A person who holds a void personal licence must surrender it to the Licensing Board.

(5) A person who, without reasonable excuse, fails to comply with subsection (4) commits an offence.

(6) A person who passes off a void personal licence as a valid personal licence knowing that the licence is void commits an offence.

(7) A person guilty of an offence under subsection (5) or (6) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.”.

(4) In section 92 (theft, loss etc. of personal licence), after subsection (3) insert—

“(3A) A replacement personal licence is void if at the time it is issued the personal licence in respect of which it was issued is not lost, stolen, damaged or destroyed.

(3B) Where a replacement personal licence is issued in respect of a personal licence which has been lost or stolen, the replacement personal licence becomes void if the personal licence is subsequently found or recovered.

(3C) A person who holds a void replacement personal licence must surrender it to the Licensing Board.

(3D) A person who, without reasonable excuse, fails to comply with subsection (3C) commits an offence.

(3E) A person who passes off a void replacement personal licence as a valid licence, knowing that the licence is void, commits an offence.

(3F) A person guilty of an offence under subsection (3D) or (3E) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.”.

137 Emergency closure orders

(1) The 2005 Act is amended as follows.

(2) In section 97 (closure orders)—

(a) in subsection (2), for “senior police officer may, if the officer” substitute “constable of or above the rank of inspector may, if the constable”, and

(b) in subsection (4), the words “by a senior police officer” are repealed.

(3) In section 98 (termination of closure orders)—

(a) in subsection (1)—

(i) for “senior police officer” substitute “constable of or above the rank of inspector”, and

(ii) for “the officer” substitute “the constable”,

(b) in subsection (2)—

(i) for “senior police office” substitute “constable”, and

(ii) for “the officer” substitute “the constable”.

(4) In section 99 (extension of emergency closure order), in subsection (1)—

(a) for “senior police officer” substitute “constable of or above the rank of inspector”, and

(b) in paragraph (b), for “officer” substitute “constable”.

137A Appeals

In section 131(2) of the 2005 Act (appeals), the words “by way of stated case, at the instance of the appellant,” are repealed.

137B Liability for offences

(1) The 2005 Act is amended as follows.

(2) In each of the following provisions, the word “knowingly” is repealed—

(a) section 1(3)(b),

(b) section 103(1),

(c) section 106(2),

(d) section 107(1),

(e) section 118(1),

(f) section 120(2) and (3),

(g) section 121(1),

(h) section 127(4), and

(i) section 128(5).

(3) After section 141 (offences by bodies corporate etc.) insert—

“**141A Defence of due diligence for certain offences**

(1) It is a defence for a person charged with an offence to which this section applies to prove that the person—

(a) did not know that the offence was being committed, and

(b) exercised all due diligence to prevent the offence being committed.

(2) This section applies to an offence under any of the following provisions of this Act—

section 1(3)(b),

section 103(1),

section 106(2),

section 107(1),

section 118(1),

section 120(2) or (3),

section 121(1),

section 127(4),

section 128(5).

141B Vicarious liability of premises licence holders and interested parties

(1) Subsection (2) applies where, on or in relation to any licensed premises, a person commits an offence to which this section applies while acting as the employee or agent of—

(a) the holder of the premises licence, or

(b) an interested party.

(2) The holder of the premises licence or, as the case may be, the interested party is also guilty of the offence and liable to be proceeded against and punished accordingly.

(3) It is a defence for a holder of a premises licence or an interested party charged with an offence to which this section applies by virtue of subsection (2) to prove that the holder of the licence or, as the case may be, the interested party—

(a) did not know that the offence was being committed by the employee or agent, and

(b) exercised all due diligence to prevent the offence being committed.

(4) Proceedings may be taken against the holder of the premises licence or the interested party in respect of the offence whether or not proceedings are also taken against the employee or agent who committed the offence.

(5) This section applies to an offence under any of the following provisions of this Act—

section 1(3),
section 15(5),
section 63(1),
section 97(7),
section 102(1),
section 103(1),
section 106(2),
section 107(1),
section 108(2) or (3),
section 113(1),
section 114,
section 115(2),
section 118(1),
section 119(1),
section 120(2),
section 121(1),
section 138(5).”.

138 False statements in applications: offence

After section 134 of the 2005 Act insert—

"134A Offence of knowingly making a false statement in an application

(1) A person who knowingly makes a false statement in an application under this Act commits an offence.

(2) A person guilty of an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.".

138A Powers of Licensing Standards Officers

(1) Section 15 of the 2005 Act is amended as follows.

(2) The section title becomes "Powers of entry, inspection and seizure".

(3) In subsection (2)—

(a) the word "and" immediately preceding paragraph (b) is repealed, and

(b) after that paragraph insert—

"(c) power to take copies of, or of an entry in, any document found on the premises, and

(d) power to seize and remove any substances, articles or documents found on the premises.".

(4) In subsection (3)—

(a) for "either" substitute "any", and

(b) in paragraph (b), after "information" insert "or explanation".

(5) After subsection (4) insert—

"(4A) Subsection (3)(c) includes power to require any document which is stored in electronic form and which is accessible from the premises to be produced in a form—

(a) in which it is legible, and

(b) in which it can be removed from the premises.

(4B) Nothing in subsection (3) requires a person to produce any document if the person would be entitled to refuse to produce that document in any proceedings in any court on the grounds of confidentiality of communications.

(4C) Nothing in subsection (3) requires a person to provide any information or explanation or produce any document if to do so would incriminate that person or that person's spouse or civil partner.".

(6) After subsection (6) insert—

"(7) The Scottish Ministers may by regulations make further provision about the procedure to be followed in the exercise of a power under this section.

(8) Where a Licensing Standards Officer seizes any substance, article or document under subsection (2)(d), the Officer must leave on the premises a notice—

(a) stating what was seized, and

(b) explaining why it was seized.

(9) The Scottish Ministers may by regulations make provision about the treatment of substances, articles or documents seized under subsection (2)(d).

(10) Regulations under subsection (9) may, in particular, make provision—

(a) about the retention, use, return, disposal or destruction of anything seized,

(b) about compensation for anything seized.”.

139 Further modifications of 2005 Act

Schedule 4 makes further modifications of the 2005 Act (including extending police powers to object).

PART 10

MISCELLANEOUS

141 Annual report on Criminal Justice (Terrorism and Conspiracy) Act 1998

Section 8 of the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c.40) (requirement for annual report on working of the Act) is repealed.

PART 11

GENERAL

143 Orders and regulations

(1) Any power of the Scottish Ministers to make regulations or an order under this Act is exercisable by statutory instrument.

(2) Any such power includes power to make—

(a) such incidental, supplementary, consequential, transitional, transitory or saving provision as the Scottish Ministers think necessary or expedient,

(b) different provision for different purposes or different areas.

(3) Subject to subsection (4), a statutory instrument containing regulations or an order under this Act (except an order under section 148(1)) is subject to annulment in pursuance of a resolution of the Scottish Parliament.

(4) A statutory instrument containing—

(xa) an order under section 24A(1),

(ya) an order under section 52A(2),

(za) an order under section 67A(1),

(aa) an order under section 146(1) containing provisions which modify any enactment (including this Act), or

(b) an order under section 147(1) containing provisions which add to, replace or omit any part of the text of an Act,

is not to be made unless a draft of the instrument containing the regulations or order has been laid before, and approved by resolution of, the Parliament.

144 Interpretation

In this Act—

“the 1982 Act” means the Civic Government (Scotland) Act 1982 (c.45),

“the 1995 Act” means the Criminal Procedure (Scotland) Act 1995 (c.46), and

“the 2005 Act” means the Licensing (Scotland) Act 2005 (asp 16).

145 Modification of enactments

Schedule 5 modifies enactments.

146 Ancillary provision

(1) The Scottish Ministers may by order make such supplementary, incidental or consequential provision as they consider appropriate for the purposes of, in consequence of or for giving full effect to any provision of this Act.

(2) An order under subsection (1) may modify any enactment (including this Act).

147 Transitional provision etc.

(1) The Scottish Ministers may by order make such provision as they consider necessary or expedient for transitory, transitional or saving purposes in connection with the coming into force of any provision of this Act.

(2) An order under subsection (1) may modify any enactment (including this Act).

148 Short title and commencement

(1) The provisions of this Act, other than this section and sections 143 to 147, come into force in accordance with provision made by order by the Scottish Ministers.

(2) This Act may be cited as the Criminal Justice and Licensing (Scotland) Act 2009.

SCHEDULE 1
(introduced by section 3(2))

THE SCOTTISH SENTENCING COUNCIL

Membership

1 (1) The Council consists of a chairing member, other judicial members, legal members and lay members.

(2) The chairing member is the Lord Justice Clerk.

(3) The other judicial members comprise—

(a) one other person holding the office of judge who normally sits as a judge of the Outer House of the Court of Session or the High Court of Justiciary,

(b) one person holding the office of sheriff (other than a sheriff principal),

(c) two persons holding the office of justice of the peace or stipendiary magistrate, and

(d) one other person holding—

(i) any of the offices mentioned in paragraphs (a) to (c), or

(ii) the office of sheriff principal.

(4) The legal members comprise—

(a) one prosecutor within the meaning of section 307 of the 1995 Act,

(c) one advocate practising as such in Scotland (other than one who is a prosecutor), and

(d) one solicitor practising as such in Scotland (other than one who is a prosecutor).

(5) The lay members comprise—

(za) one constable,

(a) one person appearing to the Scottish Ministers to have knowledge of the issues faced by victims of crime, and

(b) one other person who is not qualified for appointment as a judicial or legal member.

Procedure for appointment of members

2 (1) It is for the Lord Justice General, after consulting the Scottish Ministers, to appoint the members of the Council other than the Lord Justice Clerk and the lay members.

(2) It is for the Scottish Ministers, with the approval of the Lord Justice General, to appoint the lay members.

(3) The Lord Justice General may appoint a person to be a member only if the person has been nominated, or otherwise selected for appointment, in accordance with such procedures as the Scottish Ministers may by regulations prescribe.

(4) The regulations may—

(a) in particular, make provision for or in connection with enabling a person to nominate or select persons suitable for appointment,

(b) prescribe different procedures for different categories of membership.

(5) The Scottish Ministers must consult the Lord Justice General before making the regulations.

Persons disqualified from membership

3 A person is disqualified from appointment, and from holding office, as a member of the Council if the person is or becomes—

(a) a member of the House of Commons,

(b) a member of the Scottish Parliament,

(c) a member of the European Parliament,

(d) a councillor of any council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39),

(e) a Minister of the Crown, or

(f) a member of the Scottish Executive.

Term of office

4 (1) A member holds office for such period not exceeding 5 years as the Lord Justice General or, as the case may be, the Scottish Ministers may, at the time of appointment, determine.

(2) A member ceases to hold office—

(a) on becoming disqualified from holding office as a member, or

(b) on ceasing to fall within the category of membership under which the member was appointed.

(3) A person who has previously been a member may not be re-appointed.

(4) In this paragraph, “a member” means a member appointed by the Lord Justice General or the Scottish Ministers.

Resignation and removal of members

5 (1) A member appointed by the Lord Justice General may resign office by giving notice in writing to the Lord Justice General.

(2) A member appointed by the Scottish Ministers may resign office by giving notice in writing to the Scottish Ministers.

(3) The Lord Justice General may, by notice in writing, remove a judicial or legal member if satisfied that the member is unfit to be a member by reason of inability, neglect of duty or misbehaviour.

(4) The Scottish Ministers may, by notice in writing, remove a lay member if satisfied that the member is unfit to be a member by reason of inability, neglect of duty or misbehaviour.

Suspension of judicial members

6 A judicial member is suspended from acting as such during any period in which the member is suspended from the judicial office which the member holds.

Chairing of the Council

7 (1) The Lord Justice Clerk is to chair meetings of the Council.

(2) If the Lord Justice Clerk is for any reason unable to chair a meeting, the meeting may be chaired by another judicial member nominated—

(a) by the Lord Justice Clerk, or

(b) if the Lord Justice Clerk is unable to make such a nomination, by the Council.

(3) The Lord Justice Clerk may nominate another judicial member to chair meetings of the Council for a temporary period.

Committees

8 The Council may establish committees comprising members of the Council.

Proceedings

9 The Council may determine—

(a) its own procedure (including the number of members required to constitute a quorum), and

(b) the procedure (including the number of members required to constitute a quorum) of any committees established by it.

Validity of acts

10 The validity of proceedings or actings of the Council is not affected by—

(a) any vacancy in the membership of the Council,

(b) any defect in the appointment of a member of the Council, or

(c) disqualification of any person from holding office as a member of the Council.

Ancillary powers

11 The Council may do anything which it considers necessary or expedient for the purposes of or in connection with its functions.

Delegation

12 (1) Any function of the Council, other than the function of submitting sentencing guidelines to the High Court of Justiciary for approval, may be carried out on its behalf by—

(a) a member of the Council,

(b) a committee, or

(c) any other person,

authorised (whether specially or generally) by it for the purpose.

(2) Nothing in sub-paragraph (1) prevents the Council from exercising any function delegated under that sub-paragraph.

Maladministration

13 In the Scottish Public Services Ombudsman Act 2002 (asp 11), in schedule 2 (which lists the authorities subject to investigation under that Act), in Part 2 (entries amendable by Order in Council), after paragraph 50 insert—

“50A The Scottish Sentencing Council.”.

Freedom of information

14 In the Freedom of Information (Scotland) Act 2002 (asp 13), in schedule 1 (which lists the Scottish public authorities subject to that Act), in Part 7 (other authorities), after paragraph 98 insert—

“98A The Scottish Sentencing Council.”.

SCHEDULE 1A

(introduced by section 14(2))

COMMUNITY PAYBACK ORDERS: CONSEQUENTIAL MODIFICATIONS

PART 1

THE 1995 ACT

The 1995 Act

1 The 1995 Act is amended as follows.

2 In section 52H(3) (early termination of assessment order), the following are repealed—

(a) the word “or” immediately following paragraph (e), and

(b) paragraph (f).

3 In section 52R(3) (termination of treatment order), the following are repealed—

(a) the word “or” immediately following paragraph (e), and

(b) paragraph (f).

4 In section 53(12)(a) (interim compulsion orders), for sub-paragraphs (vi) and (vii) substitute—

“(vi) impose a community payback order;
(vii) make a drug treatment and testing order; or
(viii) make a restriction of liberty order,”.

5 In section 57A(15)(a) (compulsion order), for sub-paragraphs (vi) and (vii) substitute—

“(vi) impose a community payback order;
(vii) make a drug treatment and testing order; or
(viii) make a restriction of liberty order,”.

6 In section 58(8) (order for hospital admission or guardianship), for "make a probation order or a community service order" substitute "impose a community payback order or make a drug treatment and testing order".

7 In section 106(1) (right of appeal), for paragraph (d) substitute—

"(d) against any drug treatment and testing order;".

8 In section 108 (Lord Advocate's right of appeal against disposal)—

(a) in subsection (1), paragraphs (d) and (e) are repealed, and

(b) in subsection (2)(b)(iii), for "(d) to (e)" substitute "(dd)".

9 In section 121A(4) (suspension of certain sentences pending determination of appeal), for paragraphs (a) to (c) substitute—

"(aa) a community payback order;".

10 In section 175 (right of appeal)—

(a) in subsection (2)(c), for "probation order, drug treatment and testing order or any community service order" substitute "drug treatment and testing order",

(b) in subsection (4), paragraphs (d) and (e) are repealed, and

(c) in subsection (4A)(b)(iii), for "(d) to (e)" substitute "(dd)".

11 In section 193A(4) (suspension of certain sentences pending determination of appeal)—

(a) for paragraphs (a) to (c) substitute—

"(aa) a community payback order;", and

(b) paragraph (e) is repealed.

12 Sections 228 to 234 (probation) are repealed.

13 In section 234H (disposal on revocation of drug treatment and testing order)—

(a) in subsection (1), for "drugs" substitute "drug", and

(b) in subsection (3), for the words from "subject to" where they first occur to the end substitute ", in respect of the same offence, also subject to a community payback order, by virtue of section 234J, or a restriction of liberty order, by virtue of section 245D, the court shall, before disposing of the offender under subsection (1) above, revoke the community payback order or restriction of liberty order (as the case may be).".

14 (1) Section 234J (concurrent drug treatment and testing and probation orders) is amended as follows.

(2) In subsection (1)—

(a) for "sections 228(1) and" substitute "section", and

(b) for "probation order" substitute "community payback order".

(3) In subsection (3)—

(a) for "probation order" substitute "community payback order", and

(b) for paragraphs (b) and (c) substitute—

"(ba) the local authority within whose area the offender will reside for the duration of each order.".

(4) In subsection (4)—

(a) in paragraph (a), for "probation order and is dealt with under section 232(2)(c)" substitute "community payback order and is dealt with under section 227ZB(5)(c)", and

(b) in paragraph (b), for "232(2)(c) of this Act in relation to the probation order" substitute "227ZB(5)(c) of this Act in relation to the community payback order".

(5) In subsection (5)—

(a) for "probation order" substitute "community payback order", and

(b) for "232(2)" substitute "227ZB(5)".

15 Sections 235 to 245 (supervised attendance orders and community service orders) are repealed.

16 (1) Section 245A (restriction of liberty orders) is amended as follows.

(2) In subsection (2), the words from "but" to the end are repealed.

(3) After subsection (2) insert—

"(2A) In making a restriction of liberty order containing provision under subsection (2)(a), the court must ensure that the offender is not required, either by the order alone or the order taken together with any other relevant order or requirement, to be in any place or places for a period or periods totalling more than 12 hours in any one day.

(2B) In subsection (2A), "other relevant order or requirement" means—

(a) any other restriction of liberty order in effect in respect of the offender at the time the court is making the order referred to in subsection (2A), and

(b) any restricted movement requirement under section 227ZD in effect in respect of the offender at that time.".

(4) In subsection (12)(a), for "subsection (2)" substitute "subsection (2A)".

17 (1) Section 245D (combination of restriction of liberty orders with other orders) is amended as follows.

(2) In subsection (1)(b)—

(a) in sub-paragraph (i), for "probation order made under section 228(1)" substitute "community payback order imposed under section 227A(1)", and

(b) in sub-paragraph (ii)—

(i) for "probation order made under section 228(1) of this Act," substitute "community payback order imposed under section 227A(1) of this Act or", and

(ii) the words "or both such orders" are repealed.

(3) In subsection (2), for "probation order" substitute "community payback order".

(4) In subsection (3)—

(a) the word "228(1)," is repealed,

(b) in paragraph (a), for "probation order" substitute "community payback order", and

(c) in paragraph (b), for "either or both of a probation order and" substitute "either a community payback order or".

(5) In subsection (4)—

(a) for "probation order" substitute "community payback order", and

(b) for paragraph (b) substitute—

"(b) the local authority within whose area the offender will reside for the duration of each order.".

(6) Subsection (6) is repealed.

(7) In subsection (7)—

(a) in paragraph (a)—

(i) for "contained in a probation order and is dealt with under section 232(2)(c)" substitute "imposed by a community payback order and is dealt with under section 227ZB(5)(c)", and

(ii) the words from "234G(2)(b)" to "section" where it third occurs are repealed,

(b) in paragraph (b), the words from "232(2)(c)" to "section" where it third occurs are repealed, and

(c) in paragraph (c), for "232(2)(c) of this Act in relation to a probation order" substitute "227ZB(5)(c) of this Act in relation to a community payback order".

(8) In subsection (8), for "232(2)" substitute "227ZB".

(9) In subsection (9)—

(a) in paragraph (a), for "probation order" substitute "community payback order", and

(b) paragraph (c) is repealed.

18 (1) Section 245G (disposal on revocation of restriction of liberty order) is amended as follows.

(2) In subsection (2), for the words from "by virtue" to the end substitute "in respect of the same offence, also subject to a community payback order or a drug treatment and testing order, by virtue of section 245D(3), it shall before disposing of the offender under subsection (1) above, revoke the community payback order or drug treatment and testing order.".

(3) In subsection (3), for "probation order discharged" substitute "community payback order".

(4) Subsection (4) is repealed.

19 In section 245J (breach of certain orders: adjourning hearing and remanding in custody etc.)—

(a) in subsection (1)—

(i) for "a probationer or" substitute "an",

(ii) for "probation order" substitute "community payback order", and

(iii) the words "supervised attendance order, community service order" are repealed,

(b) in subsection (2), the words "probationer or" are repealed, and

(c) in subsection (4), for "A probationer or" substitute "An".

20 Sections 245K to 245Q (community reparation orders) are repealed.

21 In section 246 (admonition and absolute discharge), in each of subsections (2) and (3), the words "and that a probation order is not appropriate" are repealed.

22 In section 249(2) (compensation order against convicted person), for paragraph (b) substitute—

"(ab) where, under section 227A of this Act, it imposes a community payback order;".

23 In section 307 (interpretation)—

(a) in subsection (1)—

(i) insert at the appropriate places—

""alcohol treatment requirement" has the meaning given in section 227V(1);"

""community payback order" means a community payback order (within the meaning of section 227A(2)) imposed under section 227A(1) or (4) or 227M(2);"

""compensation requirement" has the meaning given in section 227H(1);"

""conduct requirement" has the meaning given in section 227VA(1);"

""drug treatment requirement" has the meaning given in section 227U(1);"

""mental health treatment requirement" has the meaning given in section 227R(1);"

""programme requirement" has the meaning given in section 227P(1);"

""residence requirement" has the meaning given in section 227Q(1);"

""responsible officer", in relation to a community payback order, is to be construed in accordance with section 227C;"

""restricted movement requirement" has the meaning given in section 227ZD(1);"

""supervision requirement" has the meaning given in section 227G(1);"

""unpaid work or other activity requirement" has the meaning given in section 227I(1), and "level 1 unpaid work or other activity requirement" and "level 2 unpaid work or other activity requirement" are to be construed in accordance with section 227I(4) and (5) respectively;", and

(ii) the definitions of the following terms are repealed—

"appropriate court"

"community service order"

"probationer"

"probation order"

"probation period", and

(b) subsection (3) is repealed.

24 Schedules 6 and 7 are repealed.

PART 2

OTHER ENACTMENTS

The Social Work (Scotland) Act 1968 (c.49)

25 (1) The Social Work (Scotland) Act 1968 is amended as follows.

(2) In section 27 (supervision and care of persons put on probation or released from prisons etc.), in subsection (1)(b)—

(a) in paragraph (iii), for the words from "community service order" to the end substitute "community payback order imposed under section 277A or 227M of the Criminal Procedure (Scotland) Act 1995 imposing an unpaid work or other activity requirement", and

(b) sub-paragraphs (iv) and (va) are repealed.

(3) In section 86(3) (adjustments between authority providing accommodation etc. and authority of area of residence), after "supervision order" insert ", community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995,".

The Rehabilitation of Offenders Act 1974 (c.53)

26 (1) The Rehabilitation of Offenders Act 1974 is amended as follows.

(2) In section 5(4A) (rehabilitation periods for particular sentences), the words "a probation order or" are repealed.

(3) In section 6(3) (the rehabilitation period applicable to a conviction), the following are repealed—

(a) the words "or a probation order was made",

(b) the words "or a breach of the order", and

(c) the words "or probation order".

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55)

27 In Schedule 1 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, in Part 2 (ineligibility for and disqualification and excusal from jury service), in paragraph (bb)—

(a) for sub-paragraph (i) substitute—

"(i) a community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46);", and

(b) sub-paragraph (iii) is repealed.

The Local Government and Planning (Scotland) Act 1982 (c.43)

28 In section 24 of the Local Government and Planning (Scotland) Act 1982 (councils' functions in relation to the provision of gardening assistance for the disabled and the elderly), in subsection (3), for the words from "instruction" to "that Act" substitute "determination that may be made or instruction that may be given, for the purposes of an unpaid work or other activity requirement imposed in a community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46), by the responsible officer in relation to the order,".

The Foster Children (Scotland) Act 1984 (c.56)

29 In section 2 of the Foster Children (Scotland) Act 1984 (exceptions to section 1), in subsection (3), for "probation order" substitute "community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46)".

The Road Traffic Offenders Act 1988 (c.53)

30 In section 46(3)(b) of the Road Traffic Offenders Act 1988 (combination of disqualification and endorsement with probation orders and orders for discharge), the words "section 228 (probation) or" are repealed.

The Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40)

31 In Schedule 3 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (transitional provisions, transitory modifications and savings), in Part 2, paragraph 13 is repealed.

The Proceeds of Crime (Scotland) Act 1995 (c.43)

32 (1) The Proceeds of Crime (Scotland) Act 1995 is amended as follows.

(2) In section 25(9) (recall or variation of suspended forfeiture order), the words "probation order or" are repealed.

(3) In section 26(9) (property wrongly forfeited: return or compensation), the words "probation order or" are repealed.

The Crime and Punishment (Scotland) Act 1997 (c.48)

33 In the Crime and Punishment (Scotland) Act 1997, the following provisions are repealed—

(a) section 26 (evidence concerning certain orders), and

(b) in Schedule 1 (minor and consequential amendments), in paragraph 21, sub-paragraphs (27) to (29).

The Crime and Disorder Act 1998 (c.37)

34 In the Crime and Disorder Act 1998, in Schedule 6 (drug treatment and testing orders: amendment of the 1995 Act), in Part 1, paragraphs 1 and 2 are repealed.

The Powers of Criminal Courts (Sentencing) Act 2000 (c.6)

35 In Schedule 9 to the Powers of Criminal Courts (Sentencing) Act 2000 (consequential amendments), paragraphs 176 to 178 are repealed.

The Criminal Justice and Court Services Act 2000 (c.43)

36 (1) Schedule 7 to the Criminal Justice and Court Services Act 2000 (minor and consequential amendments) is amended as follows.

(2) In paragraph 4(2), in the entry relating to the Criminal Procedure (Scotland) Act 1995, for “sections 209(3)(a) and 234(1)(a)” substitute “section 209(3)(a)”.

(3) Paragraphs 122 to 125 are repealed.

The Social Security Fraud Act 2001 (c.11)

37 In section 7(9)(b) of the Social Security Fraud Act 2001 (loss of benefit for commission of benefit offences), the words “or a court in Scotland makes a probation order” are repealed.

The Justice (Northern Ireland) Act 2002 (c.26)

38 In Schedule 4 to the Justice (Northern Ireland) Act 2002 (functions of justices of the peace), paragraph 37 is repealed.

The Criminal Justice (Scotland) Act 2003 (asp 7)

39 (1) The Criminal Justice (Scotland) Act 2003 is amended as follows.

(2) In section 42 (drugs courts)—

(a) in subsection (4)—

(i) for “probationer with the requirements of a probation order” substitute “community payback order”,

(ii) in paragraph (b), for the words from “make” to “work” substitute “in the case of a failure to comply with the requirements of a drug treatment and testing order, make a community payback order imposing a level 1 unpaid work or other activity requirement, so however that the total hours of unpaid work or other activity”, and

(iii) for “probation order” where those words second occur substitute “community payback order”,

(b) in subsection (6), for paragraph (b) substitute—

“(b) alleged at—

(i) a progress review carried out by such a court in relation to a community payback order; or

(ii) a diet of such a court to which an offender has been cited under section 227ZB(2) of that Act (breach of community payback order),

that the offender has failed to comply with a requirement imposed by a community payback order,”,

(c) in subsection (7)—

(i) the words "or probationer" are repealed, and

(ii) for "232" substitute "227ZB",

(d) for subsection (9) substitute—

"(9) If a community payback order is revoked under section 227ZB(5)(b) of the 1995 Act, the court (whether or not a drugs court) must, in dealing with the offender by virtue of that section, take into account any sentence which has been imposed under paragraph (a) of subsection (4) of this section in relation to a failure to comply with the community payback order.",

(e) in subsection (10)—

(i) insert at the appropriate places—

""community payback order" means an order imposed under section 227A of the 1995 Act;"

""level 1 unpaid work or other activity requirement" has the meaning given in section 227I(4) of the 1995 Act;", and

(ii) the definition of "probation order" is repealed, and

(f) in subsection (11), paragraphs (a) and (b) are repealed.

(3) Section 46 (requirement for remote monitoring in probation order) is repealed.

(4) In section 50 (amendments in relation to certain non-custodial sentences), subsections (1), (2) and (4) are repealed.

(5) In section 60 (unified citation provisions)—

(a) in subsection (1), paragraphs (a), (b), (e) and (f) are repealed, and

(b) subsections (3) and (4) are repealed.

The Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)

40 In the Mental Health (Care and Treatment) (Scotland) Act 2003, the following provisions are repealed—

(a) section 135 (amendment of 1995 Act: probation for treatment of mental disorder), and

(b) in schedule 4 (minor and consequential amendments), in paragraph 8, sub-paragraph (15).

The Criminal Justice Act 2003 (c.44)

41 In Schedule 32 to the Criminal Justice Act 2003 (amendments relating to sentencing), paragraphs 69 to 72 are repealed.

The Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8)

42 In the Antisocial Behaviour etc. (Scotland) Act 2004, the following provisions are repealed—

(a) section 120 (community reparation orders), and

(b) in schedule 4 (minor and consequential amendments), in paragraph 5, sub-paragraphs (3), (5), (6) and (11).

The Management of Offenders etc. (Scotland) Act 2005 (asp 14)

43 (1) The Management of Offenders etc. (Scotland) Act 2005 is amended as follows.

(2) In section 10 (arrangements for assessing and managing risks posed by certain offenders), in subsection (1)(b), for sub-paragraph (i) substitute—

> "(i) is subject to a community payback order imposed under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46), or".

(3) Section 12 (probation progress review) is repealed.

The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6)

44 In the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, the following provisions are repealed—

(a) in section 49 (compensation orders), subsection (4),

(b) section 57 (probation and community service orders), and

(c) in paragraph 26 of the schedule (modification of enactments), sub-paragraphs (l) and (n).

The Criminal Justice and Immigration Act 2008 (c.4)

45 In Part 1 of Schedule 4 to the Criminal Justice and Immigration Act 2008 (youth rehabilitation orders: consequential amendments), paragraphs 43 to 46 are repealed.

SCHEDULE 2
(introduced by section 18(9))

SHORT-TERM CUSTODY AND COMMUNITY SENTENCES: CONSEQUENTIAL AMENDMENTS

Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17)

1 The Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17) is amended in accordance with paragraphs 2 to 14.

2 In section 34 (period during which licence in force), for subsection (1) substitute—

> "(1) Where a short-term custody and community prisoner is released on short-term community licence by virtue of section 5, 27(1) or, as the case may be, 42(4)(a), the licence remains in force until the expiry of the prisoner's sentence.".

3 In the following places after "section" insert "5,"—

(a) section 35 (prisoner to comply with licence conditions),

(b) subsection (1)(a) of section 36 (suspension of licence conditions while detained),

(c) subsections (1)(a) and (4)(a) of section 37 (revocation of licence).

4 In section 40 (compassionate release: effect of revocation in certain circumstances), in subsection (3), for paragraph (a) substitute—

"(a) in the case of a short-term custody and community prisoner, one-half of the prisoner's sentence,".

5 (1) Section 42 (consideration by Parole Board) is amended as follows.

(2) In subsection (1), after "41(2)(b)" insert ", 42A(9)".

(3) In subsection (5), after "on" insert "short-term community licence,".

6 After section 42 insert—

"42A Determination that section 42(3) applicable: consequences for short-term custody and community prisoners

(1) This section applies where the Parole Board determines, under subsection (2) of section 42, that subsection (3) of that section applies to a short-term custody and community prisoner.

(2) The Parole Board must give the prisoner reasons in writing for its determination.

(3) If on the day of the determination less than 4 months of the prisoner's sentence remain to be served, the prisoner must be confined until the expiry of the prisoner's sentence.

(4) If on the day of the determination at least 4 months but no more than 2 years of the prisoner's sentence remain to be served, the Parole Board may, subject to section 26, fix a date falling within the period mentioned in subsection (5) on which it will next consider the prisoner's case.

(5) That period is the period—

(a) beginning with the day falling 4 months after the day of the determination, and

(b) ending on the expiry of the prisoner's sentence.

(6) If no date is fixed under subsection (4) the prisoner must be confined until the expiry of the prisoner's sentence.

(7) If on the day of the determination at least 2 years of the prisoner's sentence remain to be served, the Parole Board must, subject to section 26, fix a date falling within the period mentioned in subsection (8) on which it will next consider the prisoner's case.

(8) That period is the period—

(a) beginning with the day falling 4 months after the day of the determination, and

(b) ending immediately before the second anniversary of the day of the determination.

(9) Where a date is fixed under subsection (4) or (7), the Scottish Ministers must refer the case to the Parole Board before that date.".

7 (1) Section 45 (prisoner's right to request early reconsideration by Parole Board) is amended as follows.

(2) In subsection (1), after "under—" insert—

"(za) section 42A(4),

(zb) section 42A(7),".

(3) In subsection (2), after "section" insert "42A(4), 42A(7),".

(4) In subsection (3), after "section" insert "42A(4) or".

(5) In subsection (4), after "section" insert "42A(4) or, as the case may be,".

8 In section 46 (multiple licences to be replaced by single licence), in subsection (1)(a), after "section" insert "5,".

9 (1) Section 51 (prisoners serving extended sentences) is amended as follows.

(2) In subsection (1), for "(2)" substitute "(1A)".

(3) After that subsection insert—

> "(1A) In section 5, the reference to the prisoner's short-term custody and community sentence is to be read as a reference to the confinement term of the prisoner's extended sentence.".

10 (1) Section 55 (application to young offenders and children) is amended as follows.

(2) In subsection (1), for "custody-only" substitute "short-term custody and community".

(3) In subsection (2)(a), for "15 days" substitute "the prescribed period".

(4) In subsection (4)(a), for "15 days or more" substitute "at least the prescribed period".

11 In section 56 (fine defaulters and persons in contempt of court), in subsection (1), for "custody-only" substitute "short-term custody and community".

12 In section 65 (rules, regulations and orders), in subsection (4)(a), for "4(2), 7, 47(1)(b)" substitute "4(1), 7, 47(1)(b), 55(2) or (4)".

13 (1) Schedule 2 (prisoners serving more than one sentence) is amended as follows.

(2) Before paragraph 1, in the italic heading, for "custody-only" substitute "short-term custody and community".

(3) In paragraph 1—

- (a) in sub-paragraph (1)(a), for "custody-only" substitute "short-term custody and community",
- (b) in sub-paragraph (3)—
  - (i) for "and 34(1)" substitute ", 34(1) and 42A",
  - (ii) for "custody-only" in both places where it occurs substitute "short-term custody and community",
- (c) after sub-paragraph (3) add—

> "(4) In section 47(3A)—
>
> (a) references to the expiry of one-half of the prisoner's sentence are to be read as references to the expiry of one-half of the short-term custody and community sentence that expires after the expiry of one-half of the other short-term custody and community sentence (or sentences),
>
> (b) in paragraph (a)(i), the reference to the expiry of the prisoner's sentence is to be read as a reference to the longer (or longest) of the sentences imposed on the prisoner.".

(4) Before paragraph 3, in the italic heading, for "custody-only" substitute "short-term custody and community".

(5) In paragraph 3—

(a) in sub-paragraph (1)(a), for "custody-only" substitute "short-term custody and community",

(b) in sub-paragraph (3), for "and 34(1)" substitute ", 34(1), 42A and subsections (3A) and (8)(a) of section 47",

(c) in sub-paragraph (4)—

(i) for "the custody-only" substitute "one-half of the short-term custody and community",

(ii) in paragraph (a), for "any other custody-only" substitute "one-half of any other short-term custody and community",

(d) in sub-paragraph (5)(b)(ii) and (6)(b), for "the custody-only" substitute "at least one-half of the short-term custody and community".

(6) In paragraph 5—

(a) in sub-paragraph (1), in both paragraphs (a) and (b), for "custody-only" substitute "short-term custody and community",

(b) in sub-paragraph (3)—

(i) after "19" insert ", 29A, 29B",

(ii) after "(2)" insert ", 42A".

(c) in sub-paragraph (4)—

(i) for "the custody-only" substitute "one-half of the short-term custody and community",

(ii) in paragraph (a), for "any other custody-only" substitute "one-half of any other short-term custody and community".

(7) In paragraph 6, in sub-paragraph (1)(b), after "section" insert "5,".

(8) In paragraph 7, after sub-paragraph (1) insert—

"(1A) Where a short-term custody and community sentence imposed on a prisoner is an extended sentence, the modifications in paragraphs 1(3) and (4), 3(4), (5)(b)(ii), (6) and (8A) are to be read subject to sub-paragraph (2).".

14 (1) Schedule 3 (sentences framed to run consecutively) is amended as follows.

(2) In paragraph 1(4)(a), for "custody-only sentence, that sentence" substitute "short-term custody and community sentence, one-half of that sentence".

(3) Before paragraph 3 insert—

"2A (1) This paragraph applies where—

(a) the court imposes a short-term custody and community sentence as a further sentence,

(b) the court frames the sentence to take effect in accordance with paragraph 1(2) or (3), and

(c) the prisoner's previous sentence (or one of the prisoner's previous sentences) is a short-term custody and community sentence.

(2) In determining the date on which the previous sentence expires, no account is to be taken of the period of confinement served under the further sentence.

(3) In determining the date on which the further sentence expires, no account is to be taken of the balance of the previous sentence.”.

(4) In paragraph 3—

(a) in sub-paragraph (1)(a), for “custody-only” substitute “short-term custody and community”,

(b) after sub-paragraph (2) insert—

“(3) In determining the date on which the further sentence expires, no account is to be taken of the balance of the previous sentence.”.

(5) After paragraph 3 insert—

“3A (1) This paragraph applies where—

(a) the court imposes a custody and community sentence as a further sentence,

(b) the court frames the sentence to take effect in accordance with paragraph 1(2) or (3), and

(c) the prisoner’s previous sentence (or one of the prisoner’s previous sentences) is a short-term custody and community sentence.

(2) In determining the date on which the previous sentence expires, no account is to be taken of the period of confinement served under the further sentence.

(3) In determining the date on which the further sentence expires, no account is to be taken of the balance of the previous sentence.”.

(6) In paragraph 5—

(a) sub-paragraph (1) is repealed,

(b) in sub-paragraphs (2) and (3), for “paragraph 4” substitute “the relevant paragraph”,

(c) in sub-paragraph (4)—

(i) in paragraph (a), for “4(2) and (3)” substitute “sub-paragraphs (2) and (3) of the relevant paragraph”, and

(ii) in paragraph (c), for “paragraph 4(3)” substitute “sub-paragraph (3) of the relevant paragraph”,

(d) after sub-paragraph (4) insert—

“(4A) Where a short-term custody and community sentence or custody and community sentence imposed on a prisoner is an extended sentence, references in this schedule to—

(a) the prisoner’s “previous sentence” are to be read as references to the “previous confinement term” of the prisoner’s sentence,

(b) the prisoner’s “further sentence” are to be read as references to the “further confinement term” of the prisoner’s sentence.”, and

(e) after sub-paragraph (5) insert—

"(6) In this paragraph "the relevant paragraph" means paragraph 2A, 3, 3A or 4 (whichever applies in the circumstances described).".

The 1995 Act

15 The 1995 Act is amended in accordance with paragraphs 16 and 17.

16 (1) Section 167 (forms of finding and sentence in summary proceedings) is amended as follows.

(2) In subsection (7D), for "any previous custody-only" substitute "one-half of any previous short-term custody and community".

(3) In subsection (7E), for "custody-only" substitute "short-term custody and community".

17 (1) Section 210A (extended sentences for sex and violent offenders) is amended as follows.

(2) In subsections (1)(b) and (2)(b), after "a" insert "short-term community or".

(3) In subsection (10), after the definition of "sexual offence" insert—

""short-term community licence" has the same meaning as in Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17).".

SCHEDULE 2A

(introduced by section 52A(1))

CONVICTIONS BY COURTS IN OTHER EU MEMBER STATES: MODIFICATIONS OF ENACTMENTS

PART 1

THE 1995 ACT

The 1995 Act

1 The 1995 Act is amended as follows.

2 In section 23C(2)(d)(i) (previous convictions to be taken into consideration in determining bail), for "outwith Scotland" substitute "by courts outside the European Union".

3 In section 27 (breach of bail conditions: offences), after subsection (3) insert—

"(3A) The reference in subsection (3)(b) to any previous conviction of an offence under subsection (1)(b) includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to an offence under subsection (1)(b).

(3B) The references in subsection (3)(c) to subsection (3) are to be read, in relation to a previous conviction by a court referred to in subsection (3A), as references to any provision that is equivalent to subsection (3).

(3C) Any issue of equivalence arising in pursuance of subsection (3A) or (3B) is for the court to determine.".

4 In section 202(2) (deferred sentence), for "Great Britain" substitute "the United Kingdom or in another member State of the European Union".

5 In section 204 (restrictions on passing sentence of imprisonment or detention)—

(a) in each of subsections (1) and (2), after "United Kingdom" insert "or in another member State of the European Union",

(b) after subsection (4) insert—

"(4A) The court shall, for the purpose of determining whether a person has been previously sentenced to imprisonment or detention by a court in a member State of the European Union other than the United Kingdom—

(a) disregard any previous sentence of imprisonment which, being the equivalent of a suspended sentence, has not taken effect;

(b) construe detention as meaning an equivalent sentence to any of those mentioned in subsection (4)(b).

(4B) Any issue of equivalence arising in pursuance of subsection (4A) is for the court to determine.".

6 In section 205B (minimum sentence for third conviction of certain offences relating to drug trafficking)—

(a) in subsection (1)(b), for "been convicted in any part of the United Kingdom of two other class A drug trafficking offences" substitute "two previous convictions for relevant offences",

(b) after subsection (1) insert—

"(1A) In subsection (1), "relevant offence" means—

(a) in relation to a conviction by a court in any part of the United Kingdom, a class A drug trafficking offence;

(b) in relation to a conviction by a court in a member State of the European Union other than the United Kingdom, an offence that is equivalent to a class A drug trafficking offence.

(1B) Any issue of equivalence arising in pursuance of subsection (1A)(b) is for the court to determine.".

7 In section 275A (disclosure of accused's previous convictions where court allows questioning or evidence under section 275)—

(a) in subsection (10)—

(i) the word "or" immediately following paragraph (a) is repealed,

(ii) after paragraph (a) insert—

"(aa) a conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to one to which section 288C of this Act applies by virtue of subsection (2) thereof; or",

(b) after subsection (10) insert—

"(10A) Any issue of equivalence arising in pursuance of subsection (10)(aa) is for the court to determine.".

8 In section 307 (interpretation)—

(a) in subsection (1), insert the following definition at the appropriate place—

"“conviction”, in relation to a previous conviction by a court outside Scotland, means a final decision of a criminal court establishing guilt of a criminal offence;", and

(b) for subsection (5) substitute—

"(5) Except where the context requires otherwise—

(a) any reference in this Act to a previous conviction is to be construed as a reference to a previous conviction by a court in any part of the United Kingdom or in any other member State of the European Union;

(b) any reference in this Act to a previous sentence is to be construed as a reference to a previous sentence passed by any such court;

(c) any reference to a previous conviction of a particular offence is to be construed, in relation to a previous conviction by a court outside Scotland, as a reference to a previous conviction of an equivalent offence; and

(d) any reference to a previous sentence of a particular kind is to be construed, in relation to a previous sentence passed by a court outside Scotland, as a reference to a previous sentence of an equivalent kind.".

PART 2

OTHER ENACTMENTS

The Civic Government (Scotland) Act 1982 (c.45)

9 In section 58 of the Civic Government (Scotland) Act 1982, after subsection (4) insert—

"(4A) In subsection (4), the reference to a conviction for theft includes a reference to a conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to theft.

(4B) Any issue of equivalence arising in pursuance of subsection (4A) is for the court to determine.".

The Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9)

10 In section 27(1) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (interpretation of Part 1), insert at the appropriate place—

"“previous conviction” means a previous conviction by a court in any part of the United Kingdom or in any other member State of the European Union;".

The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)

11 (1) Section 9 of the Criminal Law (Consolidation) (Scotland) Act 1995 (permitting girl to use premises for intercourse) is amended as follows.

(2) In subsection (2A)—

(a) the word "or" immediately following paragraph (a) is repealed, and

(b) after paragraph (a) insert—

"(aa) that person has a previous conviction for a relevant foreign offence committed against a person under the age of 16; or".

(3) In subsection (3)—

(a) the word "and" immediately following paragraph (a) is repealed, and

(b) after paragraph (a) insert—

"(aa) "a previous conviction for a relevant foreign offence" has the same meaning as in section 39(5)(aa) of that Act; and".

The Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17)

12 In section 4(1) of the Custodial Sentences and Weapons (Scotland) Act 2007 (basic definitions for purposes of Part 2), insert at the appropriate place—

""previous conviction" means a previous conviction by a court in any part of the United Kingdom or in any other member State of the European Union,".

The Sexual Offences (Scotland) Act 2009 (asp 9)

13 (1) Section 39 of the Sexual Offences (Scotland) Act 2009 (defences in relation to offences against older children) is amended as follows.

(2) In subsection (2)—

(a) in paragraph (a)—

(i) the word "or" immediately following sub-paragraph (i) is repealed, and

(ii) after sub-paragraph (i) insert—

"(ia) if A has a previous conviction for a relevant foreign offence committed against a person under the age of 16, or",

(b) in paragraph (b)—

(i) the word "or" immediately following sub-paragraph (i) is repealed, and

(ii) after sub-paragraph (i) insert—

"(ia) if B has a previous conviction for a relevant foreign offence committed against a person under the age of 16, or".

(3) In subsection (5), after paragraph (a) insert—

"(aa) "a previous conviction for a relevant foreign offence" means a previous conviction by a court in a member State of the European Union other than the United Kingdom for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1,".

(4) After subsection (5) insert—

"(5A) Any issue of equivalence arising in pursuance of subsection (5)(aa) is for the court to determine.

(5B) For that purpose, an offence may be equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1 even though, under the law of the member State (or part of the member State) in question, it is an offence—

(a) regardless of the age of the victim, or

(b) only if committed against a person under an age other than 16 years.”.

SCHEDULE 3
(introduced by section 66(4))

WITNESS ANONYMITY ORDERS: TRANSITIONAL

Interpretation

1 In this schedule—

“commencement” means the day on which section 66 comes into force,

“pre-commencement anonymity order” means an order made by a court before commencement under any rule of law relating to the power of the court to make an order for securing that the identity of a witness in criminal proceedings is withheld from the accused (or, on a defence application, from other accused),

“witness anonymity order” has the meaning given by section 271N of the 1995 Act.

Pre-commencement anonymity orders: appeals

2 (1) This paragraph applies where—

(a) the High Court of Justiciary is considering an appeal against a conviction in a case where the trial began before commencement, and

(b) the court from which the appeal lies (“the trial court”) made a pre-commencement anonymity order in relation to a witness at the trial.

(2) The High Court—

(a) may not quash the conviction solely on the ground that the trial court had no power under any rule of law to make the order mentioned in sub-paragraph (1)(b), but

(b) must quash the conviction if it considers that, as a result of the order, the accused did not receive a fair trial.

SCHEDULE 4
(introduced by section 139)

FURTHER MODIFICATIONS OF 2005 ACT

1 The 2005 Act is amended in accordance with the following paragraphs.

2 In section 4 (the licensing objectives), subsection (2) is repealed.

3 In section 21 (notification of premises licence applications), subsection (5) is repealed.

4 In section 22 (objections and representations), subsection (2) is repealed.

5 In section 23 (determination of premises licence application), for subsection (6) substitute—

“(6) In considering whether the granting of the application would be inconsistent with one or more of the licensing objectives, the Licensing Board must in particular take into account—

(a) any conviction, notice of which is given by the appropriate chief constable under subsection (4)(b) of section 21, and

(b) any report given by the appropriate chief constable under section 24A(2).”.

6 (1) Section 24 (applicant’s duty to notify Licensing Board of convictions) is amended as follows.

(2) In subsection (8)(b), for “the crime prevention objective” substitute “any of the licensing objectives”.

(3) For subsection (10) substitute—

“(10) In considering for the purposes of section 23 whether the granting of the application would be inconsistent with one or more of the licensing objectives, the Licensing Board must take into account, in addition to the matters in subsection (6) of that section—

(a) any conviction confirmation of which is given by the appropriate chief constable in a notice under subsection (7)(b) of this section, or

(b) any recommendation of the chief constable included in such a notice.”.

7 (1) Section 33 (transfer of premises licence on application of licence holder) is amended as follows.

(2) For subsections (7) to (9) substitute—

“(7) On giving a notice under subsection (6)(a) or (b), if the appropriate chief constable considers that it is necessary for the purposes of any of the licensing objectives that the application for the transfer of the licence to the transferee be refused, the chief constable may include in the notice a recommendation to that effect.

(8) Where, in relation to an application under subsection (1)—

(a) the Licensing Board receives a notice under subsection (6)(a), and

(b) the notice does not include a recommendation under subsection (7),

the Board must grant the application.

(9) In any other case, the Licensing Board must hold a hearing for the purpose of considering and determining the application.”.

(3) In subsection (10)(a), for “the crime prevention objective” substitute “any of the licensing objectives”.

8 In section 44 (procedure where Licensing Board receives notice of conviction), in subsection (5)(b), for “the crime prevention objective” substitute “any of the licensing objectives”.

9 In section 57 (notification of occasional licence application to chief constable and Licensing Standards Officer), subsection (2) is repealed.

10 (1) Section 59 (determination of occasional licence application) is amended as follows.

(2) In subsection (2), paragraph (a) is repealed.

(3) Subsection (7) is repealed.

11 In section 69 (notification of extended hours application), in subsection (2), for "the crime prevention objective" substitute "any of the licensing objectives".

12 In section 73 (notification of personal licence application to chief constable), for subsection (4) substitute—

> "(4) On giving a notice under subsection (3)(a) or (b), if the appropriate chief constable considers that it is necessary for the purposes of any of the licensing objectives that the personal licence application be refused, the chief constable may include in the notice a recommendation to that effect.".

13 (1) Section 74 (determination of personal licence application) is amended as follows.

(3) In subsection (5), for paragraph (b) substitute—

> "(b) the notice received from the appropriate chief constable under subsection (3)(a) or (b) of section 73 includes a recommendation under subsection (4) of that section,".

(4) After subsection (5) insert—

> "(5A) If—
>
> (a) all of those conditions are met in relation to the applicant,
>
> (b) the Board has received from the appropriate chief constable a notice under subsection (3)(b) of section 73, and
>
> (c) the notice does not include a recommendation under subsection (4) of that section,
>
> the Board may hold a hearing for the purpose of considering and determining the application.
>
> (5B) If the Board decides not to hold a hearing under subsection (5A), the Board must grant the application.".

(5) In subsection (6)—

(a) after "subsection (5)" insert "or (5A)",

(b) in paragraph (a), for "the crime prevention objective" substitute "any of the licensing objectives".

14 (1) Section 75 (applicant's duty to notify Licensing Board of convictions) is amended as follows.

(2) In subsection (7)(b), for "the crime prevention objective" substitute "any of the licensing objectives".

(3) In subsection (9)—

(a) the word "and" immediately following paragraph (a) is repealed,

(b) after paragraph (b) add ", and

> (c) references in it to a recommendation under section 73(4) include references to a recommendation under subsection (7) of this section.".

15 (1) Section 83 (procedure where Licensing Board receives notice of conviction) is amended as follows.

(2) In subsection (5)(b), for "the crime prevention objective" substitute "any of the licensing objectives".

(3) In subsection (8)(c), for "the crime prevention objective" substitute "any of the licensing objectives".

16 After section 84 insert—

"84A Power of chief constable to report conduct inconsistent with the licensing objectives

(1) If a chief constable considers that any personal licence holder has acted in a manner which is inconsistent with any of the licensing objectives, the chief constable may report the matter to the relevant Licensing Board.

(2) Where a Licensing Board receives a report from a chief constable under subsection (1), the Board must hold a hearing.

(3) Subsections (6), (7) and (8)(a) of section 84 and subsection (1)(b) of section 85 apply in relation to a hearing under subsection (2) of this section as they apply in relation to a hearing under subsection (3)(a) or (5) of section 84.

(4) In subsection (1), "relevant Licensing Board" has the meaning given in section 83(11).".

17 In section 148 (index of defined expressions), in the table, the entry relating to "crime prevention objective" is repealed.

18 In schedule 1 (Licensing Boards), in paragraph 10(4), the words from ", or no notice" to the end are repealed.

SCHEDULE 5
(introduced by section 145)

MODIFICATIONS OF ENACTMENTS

The Libel Act 1792 (c.60)

A1 The Libel Act 1792 is repealed.

The Criminal Libel Act 1819 (c.8)

A2 The Criminal Libel Act 1819 is repealed.

The Defamation Act 1952 (c.66)

A3 In the Defamation Act 1952, section 17(2) is repealed.

The False Oaths (Scotland) Act 1933 (c.20)

1 The False Oaths (Scotland) Act 1933 is repealed.

The Public Records (Scotland) Act 1937 (c.43)

2 In section 14 of the Public Records (Scotland) Act 1937 (interpretation)—

(a) for the definition of "court records" substitute—

"“court records” includes (in addition to records of the ordinary courts) records of the Scottish Land Court;", and

(b) for subsection (2) substitute—

"(2) Any question as to whether or not a document is part of the records of a particular court is to be determined—

(a) in the case of the High Court, by the Lord Justice General,

(b) in any other case, by the Lord President.".

The Law Officers Act 1944 (c.25)

2A In section 2(3) of the Law Officers Act 1944 (Lord Advocate and Solicitor General for Scotland), for the words from "three" to the end substitute "287 of the Criminal Procedure (Scotland) Act 1995 (c.46)".

The Rehabilitation of Offenders Act 1974 (c.53)

3 (1) The Rehabilitation of Offenders Act 1974 is amended as follows.

(2) In section 1 (rehabilitated persons and spent convictions), in subsection (4)(b), after "insanity" insert "or, as the case may be, a finding that a person is not criminally responsible under section 51A of the Criminal Procedure (Scotland) Act 1995 (c.46)".

(3) In section 6(6)(bb) (convictions in service disciplinary proceedings), for "the Schedule" substitute "Schedule 1".

(4) The Schedule (service disciplinary proceedings) is renumbered as Schedule 1.

The Evidence (Proceedings in Other Jurisdictions) Act 1975 (c.34)

4 In Schedule 1 to the Evidence (Proceedings in Other Jurisdictions) Act 1975 (consequential amendments), the paragraph relating to the False Oaths (Scotland) Act 1933 is repealed.

The 1982 Act

5 The 1982 Act is amended as follows.

6 In section 52 (indecent photographs etc. of children), subsection (7) is repealed.

7 In section 64 (appeals against orders in relation to public processions), in subsection (6), for "paragraph (a)(ii)" substitute "paragraph (a)(i)".

The Incest and Related Offences (Scotland) Act 1986 (c.36)

7A The Incest and Related Offences (Scotland) Act 1986 is repealed.

The Legal Aid (Scotland) Act 1986 (c.47)

8 In section 22 of the Legal Aid (Scotland) Act 1986 (automatic availability of criminal legal aid), in subsection (1)—

(a) in paragraph (da), for "he is insane so that his trial cannot proceed or continue;" substitute "the accused is unfit for trial under section 53F of the Criminal Procedure (Scotland) Act 1995;", and

(b) in paragraph (dc), for "in case involving insanity" substitute "where accused found not criminally responsible or unfit for trial".

The Criminal Justice (Scotland) Act 1987 (c.41)

9 In the Criminal Justice (Scotland) Act 1987, sections 51 to 54 (investigation of serious or complex fraud) are repealed.

The Criminal Justice Act 1988 (c.33)

10 In the Criminal Justice Act 1988, in Schedule 15 (minor and consequential amendments), paragraphs 89, 111 and 117 are repealed.

The Trade Union and Labour Relations (Consolidation) Act 1992 (c.52)

10A In section 243(4)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 (restriction of offence of conspiracy: Scotland), the words "or sedition" are repealed.

The Criminal Justice and Public Order Act 1994 (c.33)

11 In the Criminal Justice and Public Order Act 1994, in section 164 (extension of powers of Serious Fraud Office and of powers to investigate serious fraud in Scotland), subsections (3) and (4) are repealed.

The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)

12 The Criminal Law (Consolidation) (Scotland) Act 1995 is amended as follows.

13 Section 16 (powers of search) is repealed.

14 In section 23 (interpretation of Part 2), in the definition of "period of a designated sporting event", for "in" substitute "it".

The Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40)

14A In Schedule 4 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (minor and consequential amendments), in paragraph 44, sub-paragraph (2) is repealed.

The 1995 Act

15 The 1995 Act is amended as follows.

16 After section 5 insert—

"**5A Signing of warrants etc. outwith sheriff's jurisdiction**

The competence of a sheriff to sign any warrant, judgement, interlocutor or other document relating to any proceedings within the sheriff's jurisdiction extends to competence to do so at any other place in Scotland.".

17 In section 10A (jurisdiction for transferred cases)—

(a) after subsection (1) insert—

“(1A) The jurisdiction of a JP court includes jurisdiction for any cases which come before it by virtue of section 137CA, 137CB or 137CC of this Act.”,

(b) in subsection (2)—

(i) the word “and” immediately following paragraph (a) is repealed,

(ii) after paragraph (a) insert—

“(aa) power to prosecute in any cases which come before a JP court of that district by virtue of a provision mentioned in subsection (1A) above;”, and

(iii) in paragraph (b), for “criminal proceedings which otherwise come before that sheriff” substitute “the other cases which come before that sheriff when exercising criminal jurisdiction or (as the case may be) before that JP court”, and

(c) for subsection (3) substitute—

“(3) This section is without prejudice to sections 4 to 10 of this Act.”.

17A In section 11 (certain offences committed outside Scotland)—

(a) in subsection (3), for “proceeded against, indicted” substitute “prosecuted”,

(b) in subsection (4), for “dealt with, indicted” substitute “prosecuted”.

17B In section 17A (right of person accused of sexual offence to be told about restriction on conduct of defence: arrest), in subsection (1)—

(a) for paragraphs (za) and (a) substitute—

“(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,”, and

(b) in paragraph (c), for the words from “preliminary” to “trial” substitute “hearing”.

17C In section 18(8)(c) (power to take prints etc. under authority of a warrant unaffected by section), for “prints, impressions” substitute “relevant physical data”.

17D In section 19(1)(b) (samples etc. taken from person convicted of offence), the words “impression or”, in both places where they occur, are repealed.

18 In section 19A (samples etc. from persons convicted of sexual and violent offences), in subsection (6), in paragraph (a) of the definition of “conviction”, for the words from “, by” to the end substitute “by reason of the special defence set out in section 51A of this Act;”.

18A Section 20 (use of prints, samples, etc.) is repealed.

19 In section 22 (liberation by police), subsections (1H), (2), (4), (4A) and (5) are repealed.

19A In section 23A (bail and liberation where person already in custody)—

(a) in each of subsections (1) and (4), for “23 or 65(8C)” substitute “23, 65(8C) or 107A(2)(b)”, and

(b) in subsection (3), for “22A(3) or 23(7)” substitute “22A(3), 23(7) or 107A(2)(b)”.

19B In section 35 (judicial examination), in subsection (4A)—

(a) for paragraphs (za) and (a) substitute—

“(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,”, and

(b) in paragraph (c), for the words from “preliminary” to “trial” substitute “hearing”.

20 In section 55(4) (acquittal at examination of facts)—

(a) for the words from “insane” to “omission” substitute “not, because of section 51A of this Act, criminally responsible for the conduct”, and

(b) for “on the ground of such insanity” substitute “by reason of the special defence set out in that section”.

21 The title of section 57 (disposal of case where accused found to be insane) is amended by substituting “not criminally responsible or unfit for trial” for “to be insane” and the cross-heading which precedes it is amended by substituting “*where accused found not criminally responsible*” for “*in case of insanity*”.

22 In section 57 (disposal of case where accused found to be insane), in subsection (1)(a), for the words from “, by” to “omission” substitute “acquitted by reason of the special defence set out in section 51A of this Act”.

23 In section 60C(7) (disapplication of provision where person acquitted on ground of insanity)—

(a) after “apply” insert “in a case where the person is acquitted by reason of the special defence set out in section 51A of this Act.”, and

(b) paragraphs (a) and (b) are repealed.

24 In section 61 (requirements as to medical evidence)—

(a) in subsection (1), the words “under section 54(1)(a) of this Act or” are repealed,

(b) in subsection (3), the words “or 54(1)(a)” are repealed, and

(c) in subsection (5), for “the said section 54(1)” substitute “section 54(1)(c) of this Act”.

25 The title of section 62 (appeal by accused in case involving insanity) is amended by substituting “not criminally responsible or unfit for trial” for “in case involving insanity” and the section is amended as follows—

(a) in subsection (1)(a), for “insane” substitute “unfit for trial”, and

(b) in subsection (2)(b)(iii), for the words from “virtue” to “omission” substitute “reason of the special defence set out in section 51A of this Act”.

26 The title of section 63 (appeal by prosecutor in case involving insanity) is amended by substituting “where accused found not criminally responsible or unfit for trial” for “in case involving insanity” and subsection (1) of that section is amended as follows—

(a) in paragraph (a), for “insane” substitute “unfit for trial”,

(b) for paragraph (b) substitute—

“(b) an acquittal by reason of the special defence set out in section 51A of this Act;”, and

(c) in paragraph (c), for the words from “on” to “omission” substitute “by reason of the special defence set out in section 51A of this Act”.

26A In section 66 (service and lodging of indictment etc.), in subsection (6A)(a)—

(a) for sub-paragraphs (zi) and (i) substitute—

“(i) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings (including at any commissioner proceedings) may be conducted only by a lawyer,”, and

(b) in sub-paragraph (iii), for the words from “preliminary” to “trial” substitute “hearing”.

26B In section 71 (first diet)—

(a) in subsection (A1), for the words “his defence at the trial” substitute “the conduct of his case at any relevant hearing in the course of the proceedings”,

(b) in subsection (B1)(c), for the words “before the trial diet” substitute “in relation to any hearing in the course of the proceedings”,

(c) in subsection (1A)(a), for “the trial” substitute “any hearing in the course of the proceedings”,

(d) in subsection (1B)(a), for “the trial” substitute “any hearing in the course of the proceedings”,

(e) in subsection (5A)(b), for the words “his defence at the trial” substitute “the conduct of his case at any relevant hearing in the course of the proceedings”, and

(f) after subsection (7), insert—

“(7A) In subsections (A1) and (5A)(b), “relevant hearing” means—

(a) in relation to proceedings mentioned in paragraph (a) of subsection (B1), any hearing at, or for the purposes of, which a witness is to give evidence,

(b) in relation to proceedings mentioned in paragraph (b) of that subsection, a hearing referred to in section 288E(2A),

(c) in relation to proceedings mentioned in paragraph (c) of that subsection, a hearing in respect of which an order is made under section 288F.”.

27 In section 78(2) (which attracts the procedure for notifying special defences in relation to certain other defences), after “apply” insert “to a plea of diminished responsibility or”.

27A In section 79 (preliminary pleas and preliminary issues), in subsection (2)(b)(ii), after “under section” insert “22ZB(3)(b),”.

28 In section 90D (review of orders under section 90B(1)(a) or (b)), in subsection (3)(b), for “any other any” substitute “any other”.

29 In section 102A (failure of accused to appear), for paragraph (b) of subsection (4) substitute—

“(b) section 27(7) of this Act,”.

30 In section 118(5) (disposal of appeal from solemn proceedings where High Court considers appellant to have been insane)—

(a) for “insane when he did so” substitute “not, because of section 51A of this Act, criminally responsible for it”, and

(b) for "on the ground of insanity" substitute "by reason of the special defence set out in section 51A of this Act".

31 In section 136A (time limits for transferred and related cases), in subsection (1)—

(a) in paragraph (a)(i), for "in pursuance of section 137A(1)" substitute "under section 137A or 137CA", and

(b) in paragraph (a)(ii), for "in pursuance of section 137B(1), (1A) or (1C)" substitute "under 137B or 137CB".

32 In section 137B (transfer of sheriff court summary proceedings outwith sheriffdom), in subsection (4), for "a sheriff who has made an order under subsection (2A) above" substitute "the sheriff who has made an order under subsection (2A) above (or another sheriff of the same sheriffdom)".

32A In section 140 (citation), in subsection (2A)—

(a) for paragraph (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings (including at any commissioner proceedings) may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words "his defence at the trial" substitute "the conduct of his case at, or for the purposes of, the hearing".

32B In section 144 (procedure at first diet), in subsection (3A)—

(a) for paragraph (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words "his defence at the trial" substitute "the conduct of his case at, or for the purposes of, the hearing".

32C In section 146 (plea of not guilty), in subsection (3A)—

(a) for paragraph (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words "his defence at the trial" substitute "the conduct of his case at, or for the purposes of, the hearing".

33 The title of section 190 (disposal of appeal where appellant insane) is amended by substituting "not criminally responsible" for "insane".

34 In section 190—

(a) in subsection (1), for "insane when he did so" substitute "not, because of section 51A of this Act, criminally responsible for it", and

(b) for "on the ground of insanity" substitute "by reason of the special defence set out in section 51A of this Act".

40 In section 247 (effect of probation and absolute discharge)—

(a) in subsection (1), for the words from "placing" to "him" substitute "discharging the offender",

(b) in subsection (2), the words "placed on probation or" are repealed, and

(c) subsection (6) is repealed.

41 In section 254 (search warrant for forfeited articles)–

(a) the existing provision becomes subsection (1), and

(b) after that subsection insert—

"(2) In subsection (1), "article" includes animal.".

42 In section 258 (uncontroversial evidence), after subsection (4A) insert—

"(4AA) Where in summary proceedings the relevant diet for the purposes of subsection (4A) above is an intermediate diet, an application under that subsection may be made at (or at any time before) that diet.".

43 In section 307 (interpretation), in subsection (1), after the definition of "treatment order", insert—

""unfit for trial" has the meaning given by section 53F of this Act;".

The Offensive Weapons Act 1996 (c.26)

43A In the Offensive Weapons Act 1996, section 5 is repealed.

The Defamation Act 1996 (c.31)

43B In the Defamation Act 1996, section 20(2) is repealed.

The Crime and Punishment (Scotland) Act 1997 (c.48)

44 (1) The Crime and Punishment (Scotland) Act 1997 is amended as follows.

(2) In section 9 (power to specify hospital unit), in subsection (1)(a), for "insane" substitute "found not criminally responsible or unfit for trial".

(3) In section 13 (increase in sentences available to sheriff and district courts), subsection (2) is repealed.

(4) In section 56 (powers of the court on remand or committal of children and young persons), subsection (3) is repealed.

The Terrorism Act 2000 (c.11)

45 In paragraph 30 of Part II of Schedule 5 to the Terrorism Act 2000 (explanations), in sub-paragraph (3)(a), for "section 2 of the False Oaths (Scotland) Act 1933" substitute "section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)".

The Protection of Children (Scotland) Act 2003 (asp 5)

46 In section 10 of the Protection of Children (Scotland) Act 2003 (referral of individuals acquitted of offence against a child on ground of insanity), in subsection (11)(a)—

(a) in sub-paragraph (i), for "on the ground of insanity" substitute "by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995 (c.46)", and

(b) in sub-paragraph (ii), for "the Criminal Procedure (Scotland) Act 1995 (c.46)" substitute "that Act".

The Criminal Justice (Scotland) Act 2003 (asp 7)

47 In section 3 of the Criminal Justice (Scotland) Act 2003 (the Risk Management Authority), in paragraph (b) of subsection (2), for "to be insane" substitute "not criminally responsible or unfit for trial".

The Legal Deposit Libraries Act 2003 (c.28)

47A Section 10 of the Legal Deposit Libraries Act 2003 (exemption from liability: activities in relation to publications) is amended as follows—

(a) in subsection (1), the words ", or subject to any criminal liability," are repealed,

(b) in subsection (2)(a), the words "in the case of liability in damages" are repealed,

(c) in subsection (3), the words ", or subject to any criminal liability," are repealed,

(d) in subsection (4)(a), the words "in the case of liability in damages" are repealed,

(e) in subsection (6)(a), the words ", or subject to any criminal liability," are repealed, and

(f) in subsection (8), the words "and criminal liability" are repealed.

The Sexual Offences Act 2003 (c.42)

48 In section 135 of the Sexual Offences Act 2003 (interpretation: mentally disordered persons), after subsection (2) insert—

"(2A) In the application of this Part in relation to Scotland, a reference to a person being found not guilty of an offence by reason of insanity is to be read as a reference to a person being acquitted of an offence by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995.".

The Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5)

48A In the Criminal Procedure (Amendment) (Scotland) Act 2004 the following provisions are repealed—

(a) in section 4 (prohibition on accused conducting case in person in certain cases), subsection (4),

(b) section 17 (bail conditions: remote monitoring of restrictions on movements), and

(c) in the schedule (further modifications of the 1995 Act), paragraph 55.

The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9)

49 In section 8 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (effect of conviction etc. under section 7 above or section 128 of Sexual Offences Act 2003)—

(a) in subsection (1)—

(i) the word "or" immediately following paragraph (c) is repealed, and

(ii) after paragraph (c) insert—

"(ca) is acquitted by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995 (c.46), or", and

(b) in subsection (5)—

(i) in paragraph (a), for "(1)(a), (c) or (d)" substitute "(1)(a) or (c) to (d)", and

(ii) in paragraph (c), for "(1)(a), (c) or (d)" substitute "(1)(a) or (c) to (d)".

The Management of Offenders etc. (Scotland) Act 2005 (asp 14)

50 In section 10 of the Management of Offenders etc. (Scotland) Act 2005 (arrangements for assessing and managing risks posed by certain offenders)—

(a) in subsection (1)—

(i) in paragraph (c)(i), for "on the ground of insanity" substitute "by reason of the special defence set out in section 51A of that Act of 1995", and

(ii) in paragraph (d), for the words from "section 54(1)" to the end substitute "section 53F of that Act of 1995 (unfitness for trial) to be unfit for trial;", and

(b) in subsection (11)(a), for "to be insane" substitute "not criminally responsible or unfit for trial".

The Serious Organised Crime and Police Act 2005 (c.15)

51 In section 65 of the Serious Organised Crime and Police Act 2005 (restrictions on the use of statements), in subsection (2)(c), for "section 2 of the False Oaths (Scotland) Act 1933 (c.20)" substitute "section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)".

The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6)

52 The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 is amended as follows.

53 In section 7 (liberation on undertaking), in subsection (2), paragraphs (c), (e), (f) and (g) are repealed.

53A In section 74 (appointment of stipendiary magistrates), subsection (6) is repealed.

53B After section 74 insert—

"74A Exercise of functions by stipendiary magistrates

(1) A stipendiary magistrate may, by reason of holding that office—

(a) exercise the same judicial and signing functions as are exercisable by a JP,

(b) do so in the same manner as a JP (including by using the title of office of JP).

(2) For the purpose of subsection (1)—

(a) the acts of a stipendiary magistrate are valid as if the magistrate were a JP,

(b) it does not matter if an enactment from which a JP derives authority to act in a specific case does not bear to give equivalent authority to a stipendiary magistrate.

(3) However, subsections (1) and (2) are subject to any provision of an enactment which expressly excludes a stipendiary magistrate from acting in a specific case.

(4) This section does not limit any other functions of a stipendiary magistrate (in particular, those exercisable in that capacity only).".

53C In section 76 (signing functions)—

(a) in subsection (2), for "signing functions in the same manner as" substitute "the same signing functions as are exercisable by",

(b) subsection (4) is repealed.

54 In the schedule (modification of enactments)—

(a) paragraph 3(b) is repealed, and

(b) in paragraph 26—

(i) the words "(in addition to the provisions amended by paragraphs 7(4) and 16(a))" are repealed, and

(ii) sub-paragraph (b) is repealed.

The Protection of Vulnerable Groups (Scotland) Act 2007 (asp 14)

55 In section 32 of the Protection of Vulnerable Groups (Scotland) Act 2007 (relevant offences etc.), in subsection (3)(b)(i), for "on the ground of insanity" substitute "by reason of the special defence set out in section 51A of the 1995 Act".

The Counter-Terrorism Act 2008 (c.28)

56 In section 45 of the Counter-Terrorism Act 2008 (sentences or orders triggering notification requirements), in subsection (2)(b)—

(a) in sub-paragraph (ii), for the words from "on grounds of insanity" to the end substitute "by reason of the special defence set out in section 51A of that Act (criminal responsibility of persons with mental disorder), or", and

(b) in sub-paragraph (iii), for the words from "the Criminal" to "facts)" substitute "that Act (examination of facts where person unfit for trial)".

The Sexual Offences (Scotland) Act 2009 (asp 9)

56A In section 55(7) of the Sexual Offences (Scotland) Act 2009 (offences committed outside the United Kingdom), for "proceeded against, indicted" substitute "prosecuted".

The Coroners and Justice Act 2009 (c.25)

57 In section 156 of the Coroners and Justice Act 2009 (exploitation proceeds orders: qualifying offenders)—

(a) in subsection (2)—

(i) the word "or" immediately following paragraph (b) is repealed, and

(ii) after paragraph (b) insert—

"(ba) has been acquitted by such a court of an offence by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995 (c.46), or", and

(b) in subsection (3)(a)—

(i) the word "or" immediately following sub-paragraph (ii) is repealed, and

(ii) after sub-paragraph (ii) insert—

"(iia) such a court has made, in respect of a foreign offence, a finding equivalent to a finding of the person's acquittal by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995, or".

Criminal Justice and Licensing (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision about sentencing, offenders and defaulters; to make provision about criminal law, procedure and evidence; to make provision about criminal justice and the investigation of crime (including police functions); to amend the law relating to the licensing of certain activities by local authorities; to amend the law relating to the sale of alcohol; and for connected purposes.

Introduced by:	Kenny MacAskill
On:	5 March 2009
Bill type:	Executive Bill

This document relates to the Criminal Justice and Licensing (Scotland) Bill as amended at Stage 2 (SP Bill 24A)

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised documents are published to accompany the Criminal Justice and Licensing (Scotland) Bill as amended at Stage 2.

EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

COMMENTARY ON SECTIONS

PART 1 - SENTENCING

Sections 3 - 13 - The Scottish Sentencing Council

4. Sections 3 – 13 and Schedule 1 set out the provisions for the establishment of a Scottish Sentencing Council ("the Council"), which will produce sentencing guidelines for Scotland.

5. Section 3 establishes the name of the Council and its status as a body corporate.

6. Section 4 sets out the objectives of the Council, which it must seek to achieve when carrying out its functions. These are to promote consistency in sentencing, assist the development of sentencing policy and support transparency in sentencing by promoting greater awareness and understanding of sentencing policy and practice.

7. Section 5 relates to the sentencing guidelines to be produced by the Council for the approval of the High Court of Justiciary and what they may be about. Subsection (5) requires the Council, on preparing guidelines, also to prepare an assessment of the costs and benefits of the guideline and the projected impacts on the criminal justice system. Subsection (6) requires the Council to review any published sentencing guidelines from time to time, and after such a review, they may submit revised guidelines to the High Court for approval.

8. Section 6 sets out the consultation procedure for the Council, ahead of submitting the guidelines to the High Court of Justiciary for approval. The Council must publish a draft of the proposed guidelines and the assessment of costs and benefits for comment before submitting them to the High Court. There is a requirement on the Council to consult the Scottish Ministers and the Lord Advocate, as well as such other persons as the Council considers appropriate before submitting the guidelines to the High Court for approval.

9. Section 6A sets out the role of the High Court in the approval of sentencing guidelines. The High Court may approve or reject the guidelines in whole or in part and it may modify them. If it modifies or rejects them, it must state its reasons for doing so. It remains for the Council to publish the guidelines and the assessments referred to in section 5(5) once the High Court has approved them.

10. Section 7 details the effect of the guidelines on the courts. A court must have regard to any guidelines which are applicable in a case and must state its reasons if it chooses to depart from the guidelines. The guidelines that are applicable are those in force and applicable to the case at the time the court is sentencing the offender.

11. When the High Court is dealing with an appeal and is passing a different sentence under relevant provisions in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), then it must have regard to the guidelines that are applicable at the time that it is considering the appeal. The provisions in the 1995 Act are as follows:

- Section 118(3) relates to the power of the High Court to quash a sentence and pass another one of equal measure when dealing with an appeal against conviction;
- Section 118(4)(b) relates to the power of the High Court to pass a greater or lesser sentence when dealing with an appeal against conviction;
- Section 118(4A)(b) relates to cases where a court has imposed a sentence other than a mandatory sentence and the High Court opts to pass a different sentence, but one that is still not the mandatory sentence;
- Section 118(4A)(c)(ii) relates to the High Court’s decision to set aside a decision and any sentence that departs from the mandatory sentence for drugs offences made under section 205B of the 1995 Act, and instead impose the mandatory minimum sentence or greater;
- Section 189(1)(b) relates to the power of the High Court, in an appeal against sentence in summary proceedings to quash the sentence and substitute another, whether more or less severe.

12. Section 7(6) is intended to prevent the revision of sentencing guidelines from becoming a ground for appeal referral by the Scottish Criminal Cases Review Commission. The

Commission often deals with cases in which a significant period of time has lapsed between the original conviction and the appeal.

13. Section 7(7) requires the Lord Advocate to have regard to applicable sentencing guidelines when deciding whether to appeal a sentence.

14. Section 7(8) requires the prosecutor to have regard to applicable sentencing guidelines when deciding whether to appeal a sentence.

15. Section 8 gives the Scottish Ministers the power to request that the Council prepares or reviews sentencing guidelines on any matter. While the Council must have regard to the request, it is not bound to comply with it. It must however, provide reasons for its decision not to comply.

16. Section 9(1) provides the High Court of Justiciary with the power to request that the Council prepare, for the Courts approval, sentencing guidelines on any matter, or undertake a review of any sentencing guidelines published by the Council on any matter.

17. Section 9(2) places a requirement for the High Court to state its reasons for making a requirement under subsection (1).

18. Section 9(3) places a requirement on the Council to comply with a requirement made under subsection (1), and in doing so, must have regard to the High Courts reasons for making the requirement.

19. Section 9(A) places a requirement upon the Sentencing Council to publish opinions of the High Court pronounced under sections 118(7) or 189(7) of the 1995 Act, and a requirement upon the Scottish Court Service to provide the Council with a copy of any opinion as soon as possible after it has been pronounced. The section does not affect any powers or responsibilities of the Scottish Court Service to publish opinions of the High Court.

20. Section 10 provides that the Scottish Court Service must provide the Council with information it may reasonably require in the form in which it requires.

21. Section 11 provides the Council with the power to publish and provide information and guidance on sentencing and conduct research into sentencing.

22. Section 12 relates to the business plan of the Council and sets out the requirements for the plan. It requires the Council to submit a 3 year plan to the Scottish Ministers describing how it plans to carry out its functions. Scottish Ministers must lay the plan before Parliament and the Council must publish it. It may also be revised at any time during its three years.

23. Section 13 relates to the annual report which the Council must submit to the Scottish Ministers and sets out the requirements for the content of the report. Each report must be laid before the Scottish Parliament by the Scottish Ministers and published thereafter by the Council.

Section 14 – Community payback orders

24. Section 14 inserts new sections 227A to 227ZK into the Criminal Procedure (Scotland) Act 1995 to establish community payback orders.

25. Section 227A(1) makes provision for the court to impose a community payback order (CPO) on an offender, who has committed an offence which would otherwise be punishable by imprisonment. Subsection (2) sets out the nine different requirements that can be included in a CPO. Subsection (3) requires the court to be satisfied that the seriousness of the offence(s) warrants imposition of a CPO. Subsection (4) enables a CPO of a certain type to be imposed in relation to non-imprisonable offences, specifically a CPO which contains a supervision requirement, a level 1 unpaid work or other activity requirement, or a conduct requirement. Subsections (5) and (6) set out the restrictions on requirements a justice of the peace court may impose. Subsection (7) requires the court to ensure that when imposing a CPO with two or more requirements, the requirements are compatible with each other. Subsections (8) and (9) provide powers for the Scottish Ministers to amend the requirements which may be imposed by the justice of the peace court by means of statutory instrument. Subsection (10) provides definitions of "court" and "imprisonment."

26. Section 227B sets out the general procedures, which a court requires to apply, before imposing a CPO. Subsection (2) provides that before making a CPO, the court requires to obtain and take account of a report from a local authority officer. Subsection (2A) provides that the form of the report and the information to be contained in it may be specified by an Act of Adjournal. Subsection (2B) sets out the circumstances where a report is not required. Subsection (3) sets out who should receive a copy of the report. Subsection (4) provides that before making the order, the court must explain in open court, to the offender the purpose and effect of the CPO and the consequences for the offender should he/she fail to comply with its terms. Subsection (5) requires the offender to confirm that he/she understands and is willing to comply with all the requirements which form the CPO and subsection (6) sets out the circumstances where a CPO may be imposed without the consent of the offender.

27. Section 227C (1) and (2) (a) to (g) set out the generic requirements which need to feature in a CPO. These include the need to identify the area where the offender will reside and for the relevant local authority to nominate a responsible officer within 2 days of receiving a copy of the order. The order will indicate the need for the offender to comply with any instructions given by the responsible officer including change of address, the times at which the offender usually works or attends school, and where the order imposes an unpaid work or other activity requirement, require the offender to undertake the number of hours specified in the order and the type of work or other activity instructed by the responsible officer. Subsections (3) and (4) set out the duties of the responsible officer including matters of compliance by the offender. Subsection (5) provides that in calculating the period of 2 days for the local authority to nominate a responsible officer, no account will be taken of Saturdays and Sundays or local or public holidays.

28. Section 227E makes further provision in relation to the CPO. Subsection (1) provides that a CPO is to be regarded as a sentence of the court. Subsection (2) provides that the court must give reasons for imposing the CPO in open court. Subsection (3) provides that the court in imposing a CPO is not prevented from taking other actions e.g. imposing a fine or other sentence (other than imprisonment) that it would be entitled to make in respect of the offence.

Subsections (4) and (5) indicate the arrangements to be followed by the clerk of the court with regard to those who should receive copies of the order and how they should be given. Subsection (6) provides for the form of the order to be set out in an Act of Adjournal.

29. Section 227F provides that the court in deciding on the requirements, which will form a CPO, should so far as possible avoid any conflict with the offender's religious beliefs, or interference with the offender's times of work or attendance at school or any other educational establishment.

30. Section 227FA sets out that Scottish Ministers may, by order, provide for payment of offenders' travelling or other expenses to enable them to comply with the requirements imposed on them by the CPO.

31. Section 227G (1) sets out that as part of an offender supervision requirement and for the period specified the offender must attend as instructed for appointments with the responsible officer or his/her nominee. This indicates that the purpose of the requirement is to engage with the offender to support their rehabilitation. Subsection (2) concerns the circumstances under which a court must impose an offender supervision requirement. Subsection (2)(a) provides that an offender supervision requirement must be imposed on an offender under 18 years of age (at the time the order is imposed). Subsection (2)(b) provides that an offender supervision requirement must be included in a CPO where certain other specified requirements are included. An offender supervision requirement (subsection (3)) must be at least 6 months and not exceed 3 years , although as noted in subsection 3(A) the minimum of 6 months need not apply if the supervision requirement is being imposed purely as a result of the imposition of a restricted movement requirement under subsection 227ZB(7). Subsection 3(B) sets out the maximum duration of the specified period where an offender supervision requirement is imposed on a person aged 16 or 17 along with only a level 1 unpaid work or other activity requirement.

32. Section 227H sets out that where a court makes a CPO and imposes a compensation requirement on the offender, the offender must pay compensation for any relevant matter in favour of a relevant person. Subsection (2) sets out what the "relevant matters" are. The compensation can be paid (subsection (3)) by a lump sum or in instalments as determined by the court. Subsection (4)(a) and (b) provide that where compensation is to be paid, it must be paid in full by the offender no later than 18 months after the CPO is imposed or not later than 2 months before the end of the supervision period, whichever is earlier. Subsection (5) sets out the further provisions which apply to a compensation requirement as if the references in them to a compensation order also included a compensation requirement.

33. Section 227I(1) sets out the provisions the court must apply when imposing a CPO with (a) unpaid work or (b) unpaid work and other activity. Subsection (1A) sets out that it is for the responsible officer to determine if the offender will undertake "other activity" as well as unpaid work; and subsection (2) that it is for the responsible officer to determine the nature of the unpaid work and any other activity which the offender is to carry out. Subsection (3) specifies the minimum and maximum number of hours that constitute an unpaid work or other activity requirement. Subsections (4) and (5) provide for two levels of unpaid work and other activity, to be known as level 1 and level 2, and defines the range of hours within these levels. Subsections (6), (6A) and (7) provide that the Scottish Ministers may, by order and within a defined range, vary the minimum and maximum hours of unpaid work or other activity that an offender can be

required to perform. Subsection (8) defines 'specified' as relating to the unpaid work and activity requirement as set out in the CPO.

34. Section 227J sets out further provisions in relation to an unpaid work and other activity requirement. Subsection (1) restricts the court to imposing this requirement only on an offender aged 16 years or over. Subsection (2) provides that this requirement can only be imposed by the court if the court considers the offender to be suitable to perform unpaid work. Subsection (2A) provides that subsection (2) does not apply where the court is considering imposing a CPO imposing only a level 1 unpaid work or other activity requirement, or if the CPO would be imposed as a mandatory alternative to imprisonment following fine default. Subsection (3) provides for the Scottish Ministers to make regulations that could in future allow justice of the peace courts to impose a level 2 unpaid work and activity requirement and subsection (4) provides that such regulations would require to be made by an affirmative resolution of the Scottish Parliament.

35. Section 227K(1) provides for the split between unpaid work or other activity to be determined by the responsible officer subject to limits set out in subsection (2) on the maximum number of hours of other activity that can count towards the requirement. Subsection (3) and (4) provide the Scottish Ministers with powers to vary the limits specified in subsection (2) by order made by affirmative resolution of the Scottish Parliament.

36. Section 227L sets out the maximum time limit for completion of levels 1 and 2 unpaid work or other activity requirement, as three months or six months respectively, unless a longer period is specified by the court in the requirement.

37. Section 227M (1) and (2) provide that where the offender has defaulted on a fine and the amount of the default does not exceed level 2 on the standard scale (at present £500) and where the court in disposing of the matter would otherwise have imposed a custodial sentence, the court must impose a CPO with a level 1 unpaid work and other activity requirement. Subsection (2A) sets out that where, in these circumstances, the court is imposing a CPO on a person aged 16 or 17; it must also impose an offender supervision requirement. Subsection (3) limits the number of hours to 50 for the requirement where the amount of the default does not exceed level 1 on the standard scale (at present £200).

38. Subsection (4) provides that the fine or remaining instalment is discharged when the offender completes the hours of unpaid work and other activity requirement imposed by the court. Subsection (5) provides for discharge of the order where the offender after its imposition pays in full the amount of the fine outstanding. Subsection (7) provides that under the circumstances described in the section, a level 1 unpaid work and other activity requirement can be imposed on an offender without his or her consent. Subsection (9) provides that the court cannot impose a level 1 unpaid work and other activity requirement on an offender aged under 16 years, or where within the context of an overall maximum of 300 hours' unpaid work a further requirement would breach this limit. Subsection (10) does not apply this section to the High Court.

39. Section 227N(1)(a) and (b) indicates that this section applies to situations where a court is considering imposing an unpaid work and other activity requirement on an offender already subject to one or more existing such requirements). Subsection (2) gives the court discretion to

direct that the new requirement can be concurrent to any existing requirement(s). Where a concurrent requirement is made, subsection (3) sets out that the hours of unpaid work and other activity undertaken in respect of the new requirement also count towards any existing requirements.

40. Subsections (4) and (5) provide that where an order is to be imposed consecutively with another order (or orders) the maximum number of hours of unpaid work or other activity that can be imposed as part of the order is 300 less the net balance of actual hours outstanding on existing requirements. Where the existing requirements are concurrent, the hours outstanding on these requirements must only be counted once in determining the net balance (subsection (5A)). Subsection (6) specifies that a court cannot impose a new unpaid work and activity requirement where the maximum number of hours' that can be imposed is less than 20.

41. Section 227O gives the Scottish Ministers the power to make rules conferring functions on responsible officers for regulating performance of unpaid work and other activity requirements including in relation to a daily maximum number of hours, calculations of time undertaken, and record keeping.

42. Section 227P requires the offender to participate in a specified programme at the place specified and on the specified number of days. Subsection (2) provides a definition of “programme”. Subsection (3) prevents the court from making a programme requirement unless recommended by a local authority officer as being suitable for the offender to take part in. If the cooperation of someone other than the offender would be necessary to ensure the compliance of an offender with the proposed programme requirement, subsection (4) provides that the court can only impose the requirement if that other person consents. Subsection (5) specifies that the court cannot impose a programme requirement requiring the offender to participate in a specified programme which would extend beyond the last day of the accompanying offender supervision requirement. If the offender is subject to a programme requirement, Subsection (6) requires the offender to comply with any instructions given by the person in charge of the programme. Subsection (7) defines “specified” in relation to the programme requirement.

43. Section 227Q(1) requires the offender as part of a residence requirement to reside at a specified place for a specified period. If the specified place is to be a hostel or institution, subsection (2) restricts the court from imposing the requirement unless it has been recommended by a local authority officer. Subsection (3) stipulates that the specified period must not be longer than the period specified in the supervision requirement. “Specified” means specified in the requirement (subsection (4)).

44. Section 227R(1) provides a definition, including purpose, of a mental health treatment requirement. Subsection (2) indicates that subject to certain specified types of treatment listed in subsection (3) the nature of the treatment is not to be specified. Before imposing a mental health requirement subsection (4) requires the court to be satisfied on the basis of evidence submitted by appropriately qualified individuals that three conditions (A – C) have been met. Subsection (5) sets out the considerations in relation to Condition A in that the offender must be suffering from a mental condition, which requires and may be susceptible to treatment and that other specified orders are not appropriate. Condition B is set out in subsection (6) and requires the proposed treatment to be appropriate for the offender. Condition C is set out in subsection (7) and requires that arrangements must have been made for the proposed treatment. Subsection (8)

requires that the period for which the offender must submit to the treatment should be no longer than the specified period in the offender supervision requirement to be imposed at the same time as the mental health treatment requirement. Subsection (9) defines the specified treatment or specified period as being the treatment or period specified by the court in the requirement.

45. Section 227S(1) provides that proof of signature or qualifications on a report from an approved medical practitioner is not necessary when the report is submitted in evidence for imposition of a mental health treatment requirement. Subsections (2) and (3) state that the offender and his/her solicitor must receive a copy of the report of the medical evidence and the case may be adjourned to give the offender further time to consider the report.. Where the offender is being detained in hospital or remanded to custody, subsections (4) and (5) make provision for an examination of the offender by an approved medical practitioner for the purposes of challenging the evidence to be presented in court. Subsection (6) provides for any such examination to be undertaken in private.

46. Section 227T(1) to (3) enable the practitioner under whose direction the treatment is being carried out to make arrangements where appropriate for the offender to receive a different kind of treatment or to receive it at a different place. Subsection (4) states that the treatment to be provided must be of a kind which could have been specified in the original requirement. An exception is set out in subsection (5) which allows for the offender to receive treatment as a residential patient in an institution or place which it might not have been possible to specify for that purpose in the original requirement. Subsection (6) requires the agreement of the offender and the responsible officer to the proposed changes, for the agreement of a registered medical practitioner to accept the offender as a patient and where the offender is to be a resident patient for him/her to be received as such. Subsection (7) requires the court to be informed of changes under this section and for the newly arranged treatment to be regarded as required under the CPO.

47. Section 227U(1) specifies the definition and purpose of a drug treatment requirement. Subsection (2) indicates that subject to certain specified types of treatment listed in subsection (3) the nature of the treatment is not to be specified. The person who treats or directs the treatment of the offender (subsection 4) must be appropriately qualified or experienced. Subsection (5) states that the period for which the drug treatment requirement is imposed must not be longer than the period of the accompanying supervision requirement. Subsection (6) requires the court to satisfy itself before imposing a drug treatment requirement that a) the offender is dependent on, or misuses, controlled drugs, b) his/her condition may be treatable and c) arrangements can be made for the offender's treatment. Subsection (7) defines "specified".

48. Section 227V(1) specifies the definition and purpose of an alcohol treatment requirement. Subsection (2) indicates that subject to certain specified types of treatment listed in subsection (3) the nature of the treatment is not to be specified. The person who treats or directs the treatment of the offender (subsection 4) must be appropriately qualified or experienced. Subsection (5) states that the specified period must not be longer than the period of the supervision requirement. Subsection (6) requires the court to satisfy itself before imposing an alcohol treatment requirement that a) the offender is dependent on alcohol, b) his/her condition may be treatable and c) arrangements can be made for the offender's treatment. Subsection (7) defines "specified".

49. Section 227VA provides that the court may impose, as part of a CPO a “conduct requirement”. Subsection (1) provides that for the specified period, the offender must, do, or refrain from doing specified things which the court may decide. Subsection (2) provides that a conduct requirement may only be imposed if the court considers it is necessary to promote the offender’s good behaviour or prevent further offending. Subsection (3) provides that the conduct requirement cannot be longer than 3 years. Subsections (4) (a) and (b) provide that the specified things must not include anything that could be required by imposing one of the other requirements available as part of the CPO, or anything which would be inconsistent with the rules relating to other available requirements. Subsection (5) explains that “specified” in relation to the conduct requirement means specified in the requirement.

50. Section 227W sets out the arrangements for periodic review of a CPO. When the court makes a CPO, subsection (1) provides for it to be reviewed at the time or times stated in the Order. Such reviews are to be referred to as “progress reviews” (subsection 2). Subsection (3) allows progress reviews to be carried out by the court which made the CPO or by the appropriate court (which is defined in 227ZK) and subsection (4) allows the court to determine how it will carry out the review. Subsection (5) requires the responsible officer to provide the court with a written report before a progress review takes place and subsection (6) requires the offender to attend each such review. Where the offender fails to attend the progress review, subsection (7) provides for the court to (a) issue a citation for the offender’s attendance or (b) a warrant for his/her arrest. Subsection (8) defines the citation provisions. Subsections (8A) and (8B) explain that if during a progress review the court is given reason to think that the offender has failed to comply with the CPO, the court must initiate breach proceedings. The steps it must take are set out in (8B) and (8C). Subsection (9) allows the court to vary, revoke or discharge the CPO in light of a progress review. (Under 227Y, one of the variations it could make would be to schedule a further progress review.)

51. Section 227X provides for application by the offender or the responsible officer to vary, revoke or discharge a CPO.

52. Section 227Y sets out rules where a court proposes to vary, revoke or discharge a CPO. Subsection (2) provides that the court can only revoke, vary or discharge the order where it is in the interests of justice to do so, having regard to the circumstances which have arisen since the start of the order (except under (2A) where the order is being varied as a result of a breach of the order). Subsection (3) and (4) set out the options available to the court in considering variation of the order. Subsections (6) and (6A)-(6B) provide that where the court proposes to extend the number of hours specified in an unpaid work or other activity requirement the new number of hours cannot be longer than the overall maximum period or limit allowable for such a requirement. Rules for calculating the maximum are set out along the same lines as in 227N. Subsection (6C) similarly places a limit on the amount by which a compensation requirement can be varied. Subsection (7) provides that where the court varies a restricted movement requirement, a copy of the variation order must be provided to the person responsible for monitoring the offender’s compliance. Subsection (8) allows the court when revoking an order to deal with the offender as it could if the order had not been made. This means that where the CPO was originally imposed at first instance as an alternative to imprisonment, the court can, after revoking the CPO, decide to impose a custodial sentence. Subsection (8A) provides that where the court revokes a CPO which was imposed in respect of fine default the reference to the offence for which the order was imposed was a reference to the failure to pay a fine or fines for which the CPO was imposed. This means that in this case too the court will also have the option

of imposing a custodial sentence after revoking the CPO. Where the court proposes to vary, revoke or discharge the order, other than on the application of the offender, subsection (9) provides that it must normally issue a citation requiring the offender to appear before the court (except where the offender is required to appear in connection with a progress review, or in connection with a breach of an order). Where the offender fails to appear as cited, subsection (10) allows a warrant for his/her arrest to be issued by the court. Subsection (11) defines the unified citation provisions.

53. Section 227Z(1) and (2) require the court when considering varying a CPO to first obtain a report from the responsible officer about the offender and the offender's circumstances. Subsection (2A) provides that the form of the report and the information to be contained in it may be prescribed by Act of Adjournal. Subsection (2B) provides that such a report is not required where the court is considering varying a CPO which only imposes a level 1 unpaid work or other activity requirement or where the CPO has been imposed as a mandatory alternative to imprisonment following fine default. Subsection (3) sets out who is to be provided with a copy of the report. Subsection (4) requires that when varying the order the court must explain in ordinary language to the offender (a) the purpose and effect of each of the proposed varied requirements, (b) the consequences of non-compliance and (c) any arrangements or variation to arrangements for progress reviews. Subsection (5) requires confirmation from the offender that he or she understands the variations and is willing to comply with each of them.

54. Where the variation would impose a new requirement, subsection (6) sets out that (a) the court cannot impose the new requirement if it could not have been imposed when the order was originally made; and (b) where a new requirement is permissible the court must undertake the necessary steps before imposing the requirement that would have applied had it been imposed at the outset. Subsection (6A) explains that subsection (6)(a) does not prevent the imposition of a restricted movement requirement in respect of breach of a CPO. (This is required since a restricted movement requirement cannot be imposed at first instance.) Subsection (6B) provides that the effect of existing unpaid work or other activity requirements need not be taken into account when deciding whether an unpaid work or other activity requirement could have been imposed at first instance. Subsection (7) reinforces the need for the court to ensure that any variation to a requirement could have been imposed at the point of imposition of the order. Subsection (8) sets out the procedures for providing the offender and local authority with a copy of the CPO, as varied.

55. Section 227ZA applies to situations where the offender (a) proposes to change, or has changed, address to a different local authority from that specified in the order and (b) an application to vary the order to specify the new address has been made to the appropriate court. The court (subsection (2)) may only vary the order as proposed if arrangements can be made in the new local authority area for the offender to comply with the order's requirements. Subsection (3) requires the new local authority to nominate one of its officers to be the responsible officer for the order.

56. Section 227ZB details the procedures and powers of the court in dealing with cases where the offender has failed to comply with the terms and conditions of a CPO and is considered to be in breach of the order. Subsections (1) to (4) set out the procedures for bringing cases to court, including issue of citations and warrants as required. Subsection (4A) indicates the steps the court must take before considering the alleged breach. As set out in subsection (4B), however, these steps need not be taken again if they have already been carried out as part

of, or following, a progress review. Subsection (5) sets out the options available to the court in dealing with cases where breach of an order has been admitted or proven. These include revoking the order and imposing a term of imprisonment of up to 60 days in the justice of the peace courts and up to 3 months in any other case; varying the order to impose a new requirement; varying, revoking or discharging any requirement; or imposing a fine and vary the order. Subsection (5A) provides that where the court revokes a CPO and deals with the offender as it might have done had it not imposed a CPO and where for the same offence the offender was also sentenced to a concurrent Drug Treatment and Testing Order (DTTO) or a Restriction of Liberty Order (RLO) the court must also revoke the DTTO or RLO. Where the court is satisfied that the offender has breached a requirement imposed by the order, but had a reasonable excuse for the failure, it can (subject to section 227Y(2)) vary the order to impose a new requirement, vary any requirement or revoke or discharge any requirement imposed by the order (subsection (5B)).

57. Subsection (6) indicates that where a court decides to vary the order by imposing a new requirement, this can include a restricted movement requirement. Subsection (7) provides that where the court varies the order to impose a restricted movement requirement, it must also impose a supervision requirement, unless one has already been imposed as part of the order. Subsection (7A) provides that where such a supervision requirement has to be imposed, it must be for as long as the restricted movement requirement, and where a supervision requirement is already part of an order, the court must, if necessary, vary it accordingly. Subsection (7B) makes clear that the minimum supervision period of 6 months does not apply in these circumstances.

58. Subsection (8) requires the restricted movement contractor to be provided with a copy of any such requirement. Subsection (10) requires the contractor supervising the restricted movement requirement to report any failure in compliance to the responsible officer. Subsection (11) requires the responsible officer to report incidents of failure of compliance to the court. Subsection (14) explains that subsections (5)(b), (ba) and (5A) are subject to the powers of drugs courts to deal with breach of CPOs.

59. Section 227ZC details supplementary requirements in respect of evidence and penalties related to dealing with breaches of CPOs. Subsection (3) provides that evidence of one witness is sufficient to establish that an offender has breached a requirement of a CPO. Subsections (4) and (5) detail the evidence required to prove a breach of a CPO with a compensation requirement. Subsection (6) provides for the court in dealing with cases of alleged breach to obtain a report from the responsible officer on the offender's compliance during the order.

60. Section 227ZD defines a restricted movement requirement (RMR) which can be imposed as a requirement of a community payback order for failure to comply with that order (see section 227ZB(5)(c) and (6)) and replicates some of the provisions of section 245A of the Criminal Procedure (Scotland) Act 1995 in respect of the requirements of the RMR.

61. Subsection (2) provides that the RMR may require an offender to remain at a specified address, and/or away from a specified address during certain specified times or periods. Subsection (3) provides that the court must ensure that the duration of the RMR, either alone or taken together with any other requirement or RLO to which the offender is already subject, is restricted to a maximum of 12 hours in any one day. Subsection (3A) provides a definition of "other relevant requirement or order. Subsection (4) provides that the restricted movement

requirement takes effect from the day specified on the order and has effect for the period specified on the order. Subsection (4A) provides that the RMR must have a duration not less than 14 days and not more than 12 months. Subsections (4B) and (4C) provide that where an RMR is being imposed for breach of a CPO on an offender under the age of 18 or where the only requirement imposed by the CPO was a level 1 unpaid work or other requirement, the specified period of the RMR should be no more than 60 days in the justice of the peace courts, and no more than 3 months in any other court. Subsection (5) requires the court to specify the method of compliance and the person responsible for monitoring that compliance on the RMR. Subsections (6) and (7) provide for the Scottish Ministers to prescribe by regulation changes to the restrictions set out in subsections (3) and (4A)(b)). Subsection (8) defines "specified" for the purposes of the section.

62. Section 227ZE further replicates some of the provisions of section 245A of the 1995 Act in respect of requirements placed on the court. Subsection (1) requires the court to be satisfied that compliance with the RMR can be monitored in the way specified in the order – which will be by way of remote (electronic) monitoring. Failure to be satisfied means that the RMR cannot be imposed. Subsections (2) and (3) require the court to obtain a report from the local authority, usually the social work service, about the specified address and the views of the people staying at that address who are likely to be affected by the enforced presence of the offender. The court may hear from the report writer if required before imposing the RMR

63. Section 227ZF provides for the court to vary the terms of the RMR to change the specified address. Before agreeing to the variation the court must consider a report as detailed in section 227ZE above, and may hear from the report writer, if required, before making the variation.

64. Section 227ZG applies section 245C of the 1995 Act (remote monitoring of compliance with restriction of liberty orders) to remote monitoring requirements. In particular this provides for the Scottish Ministers to make arrangements, including contractual arrangements, to remotely monitor compliance with RMRs and to specify by regulation the devices which may be used in remote monitoring. It also provides that an offender made subject to an RMR will be required to wear a device to enable such remote monitoring and should not tamper with or damage the devices used for remote monitoring.

65. Section 227ZH makes various provisions with respect to the functions of the Scottish Ministers, replicating some provisions from section 245A and 245B of the 1995 Act.

66. Subsections (1) to (3) provide for the Scottish Ministers to prescribe by regulations the court or classes of courts which may impose RMRs, the method of monitoring which may be used to monitor compliance with the RMR and the class of offender who may be made subject to an RMR. These regulations are subject to negative resolution procedure.

67. Subsections (4) and (5) require the Scottish Ministers to determine the person or persons responsible for monitoring compliance with the RMR and provides for different persons to be determined for different methods of monitoring. In practice, this is likely to be the company contracted to provide the remote monitoring service as referred to in section 227ZG.

68. Subsections (6) to (8) require the Scottish Ministers to advise the court of who is responsible for monitoring compliance with the RMR, enabling the court to specify this on the order. These subsections also require Scottish Ministers to advise the courts if there is any change in the persons responsible for monitoring compliance, and for those courts to subsequently vary the RMR to specify the new responsible persons, to send a copy of the varied order to the new responsible person, to the responsible officer and to notify the offender of the variation.

69. Section 227ZI details the documentary evidence required in order to establish in any proceedings (most likely in breach proceedings) whether the offender has complied with the RMR. It provides that a document produced by the device specified in section 245C of the 1995 Act, as applied by section 227ZG (in practice the remote monitoring system), certificated by a person nominated by the Scottish Ministers that the statement provides information on the presence or otherwise of the offender at the specified address at the date and times shown on that document is sufficient evidence of the facts.

70. Section 227ZJ(1) requires local authorities to consult prescribed persons annually about the nature of the unpaid work and other activities to be undertaken as part of a CPO within their areas. Subsection (2) defines "prescribed persons" as such persons or class or classes of persons as prescribed by Scottish Ministers by regulations. A statutory instrument containing such regulations will be subject to annulment by resolution of the Scottish Parliament (subsection (3)).

71. Section 227ZK provides definition of the term "the appropriate court" as used in relation to the provisions for the CPO.

Section 15 – Non-harassment orders

72. Section 234A of the Criminal Procedure (Scotland) Act 1995 ("the Act"), enables a prosecutor to apply for a non-harassment order against a person convicted of an offence involving harassment towards a victim. This section makes changes to the Act to make it less onerous for prosecutors to apply for an order.

73. Subsection (a) changes the test in section 234A(1) of the Act so that an order may be applied for where a person is convicted of an offence involving misconduct towards a victim. Misconduct is defined (as per the substituted definition at subsection (d)) as including "conduct that causes alarm or distress". This is a lower threshold than the existing reference to 'harassment' of the victim and will remove the need for the accused to have been convicted of an offence which in itself involved conduct on more than one occasion. It will allow criminal non-harassment orders to be considered in a greater number of cases.

74. Subsection (b) makes an associated change so that an order can be made to prevent harassment rather than merely any 'further harassment' therefore giving the court powers to protect victims at an earlier stage.

75. Subsection (c) inserts new subsections (2A), (2B) and (2C) into section 234A. New subsection (2A)(a) allows the court to have regard to information on other offences which involved misconduct towards the victim which the offender has been convicted of or has

accepted a fixed penalty or compensation offer or work order for under sections 302(1), 302A(1) and 303ZA(6) of the 1995 Act.

76. New subsection (2A)(b) sets out the way in which the information can be given to the court and will allow the court to see the relevant details of previous convictions (rather than simply a list of previous convictions as they currently do) when deliberating on an application for a non-harassment order. This is to enable a court to have fuller details of the past offending behaviour of a person.

77. New subsection (2B) limits the court's right to have regard to this information in accordance with the existing rules on previous convictions, offers or orders set out in sections 101, 101A (solemn proceedings) and 166 and 166A (summary proceedings) of the 1995 Act. New subsection (2C) requires the court to give the offender the opportunity to respond to the application for a non-harassment order.

78. Subsection (d) substitutes a new subsection (7) relating to definitions.

Section 16 - Short periods of detention

79. Section 169 of the Criminal Procedure (Scotland) Act 1995 permits summary courts to detain offenders at court or a police station until 8pm in lieu of imprisonment, so long as the offender can get home that day. As this section is not used and has been redundant for some time, it is being repealed.

80. Section 206(1) of the Criminal Procedure (Scotland) Act 1995 provides that a summary court cannot impose imprisonment for a period of less than five days. The time period for imposing imprisonment is being extended from less than "five days" to less than "fifteen days". Subsections (2) to (6) permit summary courts to sentence an offender to be detained in a certified police cell or similar place for up to four days. As there are no such certified police cells in Scotland, and have not been any for some time, subsections (2) to (6) are redundant and are therefore being repealed.

Section 18 - Amendments of Custodial Sentences and Weapons (Scotland) Act 2007

81. Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007 ("2007 Act") deals with the confinement and release of prisoners. These provisions of the 2007 Act have not yet been commenced. Section 18 makes amendments to a number of statutory provisions in the 2007 Act to change the framework relating to the release of prisoners from custody.

82. Subsections (2) and (3) repeal the provisions providing for custody-only sentences and prisoners in the 2007 Act and make provision for a new type of sentence called a short-term custody and community sentence. A short-term custody and community sentence is a sentence of imprisonment for less than the period prescribed in an order made by the Scottish Ministers. A custody and community sentence is a sentence of imprisonment for at the least the period prescribed by the Scottish Ministers in an order. For example a short-term custody and community sentence may be a sentence of imprisonment for less than one year and a custody and community sentence a sentence of imprisonment for a year or more. A prisoner serving a short-term custody and community sentence (a "short-term custody and community prisoner") is

released after he or she has served one-half of his or her sentence of imprisonment and is released on licence for the remainder of the sentence. Subsection (2) also makes provision for the order making power prescribing the period sentence of imprisonment that determines a short-term custody and community sentence and a custody and community sentence is subject to the affirmative resolution procedure.

83. Subsection (4) makes a consequential amendment to the chapter title in Chapter 3 of Part 2 of the 2007 Act so that it refers to short-term custody and community prisoners.

84. Subsection (5) amends section 29 of the 2007 Act to require the Scottish Ministers to include supervision conditions in a prisoner's licence where the prisoner being released (other than one liable to removal from the United Kingdom) falls into the following categories: a life prisoner; a custody and community prisoner; a short-term custody and community prisoner released on compassionate grounds, a short-term custody and community prisoner subject to an extended sentence, a short-term custody and community prisoner who is a sex offender and is serving 6 months or more, or short-term custody and community prisoner who is a child.

85. Subsection (6) inserts a new provision relating to the licence conditions to which a short-term custody and community prisoner is to be subject to. The Scottish Ministers must include the standard conditions in the licence. The Scottish Ministers must also include the supervision conditions in the licence if the prisoner is a person to whom section 29(1) of the 2007 Act applies i.e. a prisoner released on compassionate grounds; a prisoner serving an extended sentence; a sex offender serving 6 months or more; or a child sentenced to detention. The Scottish Ministers may include other licence conditions if they consider this appropriate.

86. Subsection (7) inserts a new provision for the assessment of conditions for short-term community licences (the licence that a short-term custody and community prisoner is released on). The Scottish Ministers and local authorities are required to put in place joint working arrangements in relation the assessment and management of the risks posed by short-term custody and community prisoners. In deciding whether to include non-mandatory supervision conditions in a short-term community licence for a particular prisoner, the Scottish Ministers and the appropriate local authority must jointly assess whether any of such conditions are appropriate.

87. The appropriate local authority is defined as either the local authority in whose area the offender resided immediately prior to being sentenced or the local authority in whose area the offender intends to reside in upon his or her release on licence.

88. Subsection (8) amends section 47 of the 2007 Act to provide that Scottish Ministers may release, on a curfew licence, a short-term custody and community prisoner who is serving a sentence of 3 months or more and is of a description to be specified by the Ministers by order. Such an order is subject to the affirmative resolution procedure. Section 47(3) of the 2007 Act provides that the curfew licence must include a curfew condition, which is described in section 48 of the 2007 Act.

89. Subsection (8)(c) amends section 47 of the 2007 Act to specify the period during which a short-term custody and community prisoner may be released on a curfew licence. The Scottish Ministers may only release a short-term custody and community prisoner on curfew licence after

the later of: the day on which the prisoner has served one-quarter or four weeks of the sentence (whichever is the greater), or the day falling 166 days before the expiry of one-half of the sentence. In addition, release must be before the day falling 14 days before the expiry of one-half of the sentence. So the window for release on curfew licence is between 166 days and 14 days before the expiry of one-half of the sentence so long as the prisoner has served at least one-quarter (or 4 weeks if this is more than one quarter) of his or her sentence at the proposed time of release.

90. Subsection (8)(e) amends section 47(8) of the 2007 Act to provide that a curfew licence for a short-term custody and community prisoner remains in force until the expiry of the first half of that prisoner's sentence.

91. Paragraphs 2 to 5 of Schedule 1 make consequential amendments to sections 34, 35, 36, 37, 40 and 42 of the 2007 Act.

92. Paragraph 6 of Schedule 1 inserts a new section 42A into the 2007 Act. Section 42A applies where the Parole Board considers under section 42(3) of the 2007 Act that it is in the public interest that a recalled short-term custody and community prisoner be confined. The parole Board are required to provide the prisoner with the reasons for its determination in writing. If there is less than 4 months of the prisoner's sentence remaining, the prisoner must remain in custody for the remainder of the sentence. If there are between 4 months and 2 years of the prisoner's sentence remaining, the Board must fix a date when it will next review the prisoner's case within the period mentioned in section 42A(5). Section 42A(5) specifies that the period begins 4 months after the date of the determination and ends on the expiry of the prisoner's sentence. Subparagraph (6) provides that if no date is set under section 42A(4) the prisoner must remain in prison to the end of the sentence.

93. Section 42A(7) of the 2007 Act provides that if at least 2 years remain of the short-term custody and community prisoner's sentence then the Parole Board must, subject to section 26, fix a date for when it will next hear the prisoner's case within the period mentioned in section 42A(8). Section 42A(8) provides that the period begins 4 months after the date of the determination and ends immediately before the second anniversary of the determination. Section 42A(9) requires Scottish Ministers to refer the case to the Parole Board before any date set by the Parole Board under section 42A(4) or (7).

94. Paragraphs 7 to 14 of Schedule 1 make consequential amendments to sections 45, 46, 51, 55, 56 and Schedules 2 and 3 of the 2007 Act. Paragraphs 15 to 17 make minor consequential amendments to sections 167 and 210A of the Criminal Procedure (Scotland) Act 1995.

Section 19 – Early removal of certain short-term prisoners from the United Kingdom

95. This section substitutes a new version of Schedule 6 to the Custodial Sentences and Weapons (Scotland) Act 2007 ("2007 Act"). The Schedule contains transitory amendments to Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("1993 Act"), which will have effect until the 1993 Act is repealed by the 2007 Act. Paragraph 3(a) replicates the effect of the existing version of Schedule 6.

96. Paragraph 4 inserts three new sections, 9A to 9C, into the 1993 Act. Inserted section 9A provides for a definition of prisoners who are eligible for but not liable to removal from the UK. In order to be eligible for removal, a prisoner must be able to satisfy the Scottish Ministers that he or she has the settled intention of residing permanently outside the UK if removed from prison. If satisfied, the Scottish Ministers may release the prisoner from prison using the power under inserted section 9B.

97. Inserted section 9B provides the Scottish Ministers with a discretionary power to release short-term prisoners who are liable to or eligible for removal from the UK. This power may be exercised at any time during the 180 day period before the prisoner will have served one-half of their sentence, provided that the prisoner has already served at least one-quarter of his or her sentence. This corresponds to the existing time limits for Home Detention Curfew in the 1993 Act (inserted by the Management of Offenders etc. (Scotland) Act 2005). The Scottish Ministers also have the power to amend the 180 day period, up or down, by means of an order subject to approval by the Scottish Parliament.

98. Inserted section 9B(3) sets out conditions that must be satisfied before a prisoner can be removed from prison under the powers conferred by this section. If a prisoner removed under this section remains in the UK but has not been returned to prison, subsection 9B(4) enables the Scottish Ministers to exercise their duties and powers under sections 1(1), 1AA or 3 of the 1993 Act in relation to the prisoner as if the prisoner were in prison (i.e. duty to release the prisoner after serving one half of the sentence, and the power to release on compassionate grounds).

99. Inserted section 9C provides for the detention and/or further removal of a person who re-enters the UK within a certain time after being released from prison under section 9B.

100. Paragraph 5 makes amendments to the International Criminal Court (Scotland) Act 2001. The amendments to section 24 of the 2001 Act prevent sections 9A, 9B and 9C of the 1993 Act from being applied to international criminal court prisoners.

Section 20 - Reports about supervised persons

101. This section amends section 203 of the 1995 Act (reports) to provide that where a local authority officer makes a report to the court to assist in deciding on the most appropriate sentence, a copy requires to be given to the offender, the offender's solicitor (if any) and the prosecutor.

Section 20A – Pre-sentencing reports about organisations

102. This section inserts a new section 203A in the Criminal Procedure (Scotland) Act 1995 and will apply when an organisation is convicted of an offence. The amendment will allow the court to order a pre-sentencing background report into the financial affairs and structural arrangements of an organisation before dealing with the organisation in respect of the offence. The power will be available both in summary and solemn cases.

103. The report will be prepared by a person appointed by the court and will be referred to as the 'reporter'. The court may also issue directions to the reporter about the information contained in the report, particular matters to be covered in the report and the time by which the

report is to be submitted to the court. The amendment will also enable the court to make an order requiring the organisation to provide access to its books, documents etc. and to provide assistance when necessary. Failure to comply with this order could be treated as contempt of court.

104. The reporter's costs in preparing the report will be paid by the clerk of court in the first instance. However, the court may order the organisation to reimburse to the clerk all or a part of those costs. An order to pay the costs of the report to the court may be enforced by civil diligence as if it were a fine.

105. On receipt of the report, the clerk of the court must provide a copy to the organisation, the organisation's solicitor (if any) and the prosecutor. The court must also have regard to the report in deciding how to deal with the organisation in respect of the offence. If the court decides to impose a fine, the court must, in determining the amount of the fine, have regard to the report and the cost of the report, if the organisation has to reimburse the clerk of the court for its preparation. If the court decides to fine the organisation and to seek reimbursement for preparing the report, any payment by the organisation will be first applied to the preparation of the report. The purpose of this is to make this amendment cost neutral for the criminal justice system, so far as possible.

106. If the court makes a compensation order in respect of the offence, any payment will first be made in satisfaction of the compensation order before consideration of payment for the preparation of the report or a fine.

107. 'Organisation' will have the same meaning as in section 307(1) (interpretation) of the Criminal Procedure (Scotland) Act 1995 as amended by section 48 of the Criminal Justice & Licensing (Scotland) Bill. This includes, among others, bodies corporate, partnerships and government departments.

Section 21 - Extended sentences for certain sexual offences

108. Under the provisions of section 86(1) of the Crime and Disorder Act 1998, which inserted section 210A into the Criminal Procedure (Scotland) Act 1995, the court is able to impose an "extended sentence" on an offender who is convicted of a relevant sexual or violent offence in circumstances where the offender would, but for the extended sentence, receive a determinate sentence of imprisonment of any length in respect of a sexual offence or a sentence of 4 years or more in respect of a violent offence.

109. Imposition of an extended sentence provides for an additional period of supervision on licence in the community over and above that which would normally have been the case. An extended sentence may only be passed in indictment cases and if the court is of the opinion that the period of supervision on licence, which the offender would otherwise be subject to, would not be adequate for the protection of the public from serious harm from the offender.

110. An extended sentence is defined, by subsection (2) of section 210A, as being the aggregate of the term of imprisonment which the court would otherwise have passed ("the custodial term") and a further period, known as the "extension period", for which the offender is to be on licence (and which is in addition to any licence period attributable to the "custodial

term"). The extension period shall not exceed 10 years (though subsection (5) provides that the total length of an extended sentence shall not exceed any statutory maximum for a particular offence).

111. The following example demonstrates how the extended sentence arrangements currently work in practice (i.e. from the implementation of section 15 of the Management of Offenders etc. (Scotland) Act 2005 in February 2006 which provided for sex offenders sentenced to more than 6 months in custody to be released on licence).

- Example - An offender sentenced to 3 years custodial term and 3 years extension period would be released after serving 18 months in prison but will be on licence for the balance of the custodial period i.e. 18 months plus a further 3 years = 4 years and six months in total on licence.

112. Section 210A provides a definition of "sexual offence", which takes the form of listed offences, either under statute or at common law. It also defines "violent offence".

113. The new provision will allow courts in appropriate circumstances, to impose an extended sentence where a person is convicted of an offence which discloses, in the court's opinion, a significant sexual aspect to the offender's behaviour but which is not otherwise covered by the current definitions of "sexual offence" and "violent offence".

114. Schedule 3 to the Sexual Offences Act 2003, lists at paragraphs 36-59 the sexual offences in Scotland in relation to which the notification requirements under that Act apply. Paragraph 60 includes "an offence in Scotland other than those mentioned in paragraphs 36 to 59 if the Court, in imposing sentence or otherwise disposing of the case, determines for the purposes of this paragraph that there was a significant sexual aspect to the offender's behaviour in committing the offence".

115. The new provision will remedy the current absence of a power for the courts to impose an extended sentence in such cases by adding a further "catch all" category to the list of offences, but this will be dependent on the offender being subject, by virtue of Schedule 3 to the Sexual Offences Act 2003, to the notification requirements of Part 2 of that Act.

Section 22 - Effect of probation and absolute discharge

116. This section makes amendments to a number of statutory provisions in order to remove unnecessary references to probation orders and to ensure that probation orders and orders for absolute discharge are treated appropriately in the Licensing (Scotland) Act 2005.

117. Subsection (1) amends section 1(4) of the Rehabilitation of Offenders Act 1974 to update references to statutory provisions which have now been consolidated twice. There is no change to the effect of the sections, and the amendment simply makes the section easier to read.

118. Subsections (2) and (3) remove redundant references to probation orders in sections 49(6) and 58(3) of the Civic Government (Scotland) Act 1982.

119. Subsection (4) inserts a new subsection (2A) into section 96 of the Licensing (Scotland) Act 2005. This will ensure that the court can make an exclusion order when dealing with a person who has been convicted of a violent offence and placed on probation. It displaces section 247(1), which would otherwise provide that the person would not be treated as having been convicted.

120. Subsection (5) inserts new subsections (5) and (6) into section 129 of the Licensing (Scotland) Act 2005 and specifies a number of provisions to which sections 247(1) and (2) of the Criminal Procedure (Scotland) Act 1995 do not apply. The purpose is to ensure that probation orders and orders for absolute discharge are treated as convictions for the purposes of these provisions of the Licensing (Scotland) Act 2005.

Section 23 - Offences aggravated by prejudice

121. Section 96 of the Crime and Disorder Act 1998 ("the 1998 Act") created a statutory aggravation relating to race requiring that the court shall, on convicting a person of an offence, take the aggravation into account in determining the appropriate sentence.

122. In a similar vein, section 74 of the Criminal Justice (Scotland) Act 2003 ("the 2003 Act") created a statutory aggravation relating to religion requiring that the court shall, on convicting a person of an offence, take the aggravation into account in determining the appropriate sentence.

123. This section amends both the 1998 Act and the 2003 Act to require that the courts record how an aggravation has affected a sentence (if at all) and to ensure consistency between the statutory provisions.

124. Subsection (1) substitutes subsection (5) of section 96 of the 1998 Act. This requires that, where an aggravation relating to prejudice is proved, the court must also explain how the aggravation has affected the sentence (if at all – and if not, then the reasons for this) and record the conviction in a manner which shows that the offence was aggravated by prejudice related to race.

125. Subsection (2)(a) inserts a new subsection (2A) into section 74 of the 2003 Act. This provides that the aggravation can apply even if prejudice relating to religion is not the sole motivation for the offence. This is already the case for racial aggravations and therefore ensures consistency between the two provisions.

126. Subsection (2)(b) replaces subsections (3) and (4) of section 74 of the 2003 Act with subsection (4A), which requires that, where an aggravation relating to prejudice is proved, the court must explain how the aggravation has affected the sentence (if at all – and if not, then the reasons for this) and record the conviction in a manner which shows that the offence was aggravated by prejudice related to religion.

Section 24A- Mutual recognition of judgements and probation decisions

127. Section 24A(1) enables the Scottish Ministers to make provision, by way of affirmative Order, for and in connection with the implementation of the EU Framework Decision on the

mutual recognition of judgements and probation decisions (in so far as within the legislative competence of the Scottish Parliament).

128. Subsection (2) allows for such provision to confer functions on Scottish Ministers or other persons. Subsection (3) provides that an order made under subsection (1) may modify any primary or secondary legislation. Subsection (4) provides details of the specific Framework Decision this section relates to.

Section 24B – Minimum sentence for having in a public place an article with a blade or a point

129. This section inserts new subsections (5A) and (5B) into section 49 of the Criminal Law (Consolidation) (Scotland) Act 1995 and a new paragraph (aa) into section 207(3A) of the Criminal Procedure (Scotland) Act 1995.

130. Section 49 of the Criminal Law (Consolidation) (Scotland) Act 1995 makes it an offence to be in possession of an article with a blade or a sharp point in a public place. A person found guilty of this offence is liable to a custodial sentence of up to four years and/or a fine.

131. Subsections (5A) and (5B) requires a court to impose a sentence of imprisonment of at least 6 months on an offender convicted of possessing an article with a blade or a sharp point in a public place. This only applies if the offender is aged 16 years or over and the offence was committed after the commencement of subsection (5A). A court is not required to impose such a sentence if it is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify not doing so.

132. Section 207 of the Criminal Procedure (Scotland) Act 1995 relates to the detention of young offenders. A young offender is a person aged 16 or over but under 21 years of age. A court cannot impose a period of imprisonment on an offender under the age of 21 but may impose a period of detention on a young offender where it could have imposed a period of imprisonment on an offender aged 21 years or over. The court may not impose a period of detention on a young offender unless it is satisfied that there is no other method of dealing with the young offender. Section 207(3A)(aa) provides that the power to impose detention on a young offender and the requirement not to impose detention unless there is no other method of dealing with the offender are subject to the provisions in section 49(5A) and (5B) of the Criminal Law (Consolidation) (Scotland) Act 1995. So where section 49(5A) applies to a young offender the court will be required to imposed a period of detention of at least 6 months unless it is of the opinion that there are exceptional circumstances, relating to the offence or the offender, that justify not doing so.

PART 2 - CRIMINAL LAW

Section 25 – Involvement in serious organised crime

133. Section 25(1) makes it an offence for a person to agree with at least one other person to become involved in the commission of serious organised crime including when a person agrees to do something when he or she knows, or ought reasonably to have known or suspected that

such an act would further serious organised crime. The effect is that those who conspire to commit serious organised crime, as defined, are guilty of an offence.

134. Section 25(2) defines serious organised crime for the purpose of this section and sections 26, 27 and 28 as crime involving two or more people acting together for the principal purpose of committing or conspiring to commit one or more serious offences.

135. A "serious offence" is also defined in subsection (2). It is an indictable offence that is committed with the intention of obtaining a material benefit, for any person or an act of violence committed, or a threat made for the purpose of obtaining such benefit at some time in the future. "Material benefit" for these purposes is a right in or interest in any property.

136. Section 25(3) provides that this offence will attract a maximum penalty on indictment of 10 years imprisonment, an unlimited fine or both. In summary proceedings the available penalties are a maximum of 12 months imprisonment or a fine not exceeding the statutory maximum or both.

Section 26 – Offences aggravated by connection with serious organised crime

137. Section 26 makes provision about a statutory aggravation which applies in cases where an accused commits an offence connected with serious organised crime. Subsection (1) provides that section 26 applies where an indictment or complaint libels or specifies that an offence is aggravated by a connection with serious organised crime and it is subsequently proved that the offence is aggravated in that way.

138. Section 26(2) explains the circumstances in which an offence can be regarded to have been aggravated by a connection with serious organised crime. This relies on proof that the accused was motivated, in whole or in part, by the objective of committing or conspiring to commit serious organised crime. In terms of subsection (3), it is not material to the matter of establishing the accused's motivation whether or not the accused actually enabled a person to commit serious organised crime (as defined in section 25(2)).

139. Section 26(4) specifies that the normal rules on corroboration in criminal proceedings do not apply to establishing the aggravation. Evidence from a single source is sufficient proof.

140. Section 26(5) sets out the steps the court must take when it is libelled in an indictment or specified in a complaint that an offence is aggravated by a connection with serious organised crime and proved that the offence is so aggravated. In addition to a number of formal matters, the court must take the aggravation into account in determining the appropriate sentence.

Section 27 – Directing serious organised crime

141. Section 27(1) makes it an offence to direct another person to commit a serious offence (as defined in section 25(2)) or an offence aggravated by a connection with serious organised crime under section 26.

142. Section 27(2) provides that a person also commits an offence where the direction he or she gives is to direct a further person to commit a serious offence or an offence aggravated by a connection with serious organised crime.

143. Section 27(3) and (7) set out what constitutes direction for the purposes of subsections (1) and (2). First, by virtue of section 27(3), the accused must have done something, or a series of things, to direct another person to commit an offence. Second, the accused must have intended that the thing or things done will persuade that person to commit an offence. And third, the accused must intend that the direction will result in a person committing or enable a person to commit serious organised crime. Section 27(7) provides that "directing" a person to commit an offence includes, but is not limited to, "inciting" a person to commit an offence.

144. By virtue of section 27(5), any person directing a person to commit an offence mentioned in section 27(1) will be deemed to have done so regardless of whether that offence was in fact committed.

145. Section 27(8) deals with penalties. The penalty for the offences in subsections (1) and (2) when tried on indictment is a maximum of 14 years imprisonment, a fine or both. On summary conviction, the available penalties are a maximum of 12 months imprisonment, a fine not exceeding the statutory maximum or both.

Section 28 – Failure to report serious organised crime

146. Section 28 places certain classes of individual under a duty to report to the police any knowledge or suspicion of another person's involvement in serious organised crime. It is an offence for an individual under such a duty to fail to disclose that knowledge or suspicion.

147. Subsections (1) and (2) describe the circumstances in which section 28 applies. Subsection (1) provides that this section applies where a person knows or suspects that another person has committed an offence under section 25 or 27 or an offence aggravated under section 26 in cases where that knowledge or suspicion arises from information obtained in one of two sets of circumstances, namely: (a) in the course of a person's trade, profession, business or employment or (b) as a result of a close personal relationship between the person holding the knowledge or suspicion and the person who has allegedly committed the offences. By virtue of subsection (2), section 28 only applies by virtue of a close personal relationship where the person holding the knowledge or suspicion has obtained material benefit as a result of the commission of serious organised crime by the alleged offender.

148. Section 28(3) describes the offence. It provides that where this section applies it is an offence to fail to disclose to a constable any knowledge or suspicion described above and the information on which that is based.

149. Section 28(4) provides that it will be a defence to prove that the accused had a reasonable excuse for failing to disclose a knowledge or suspicion or the information on which it is based.

150. Subsections (5) and (6) provide that disclosure is not required by a professional legal adviser in relation to information they have received in privileged circumstances and set out what is meant by "privileged circumstances".

151. Section 28(7) makes it clear that the reference to a constable in subsection (3) includes a reference to a police member of the Scottish Crime and Drug Enforcement Agency.

152. The penalty for failing to report serious organised crime is stated in subsection (8) to be a maximum of five years imprisonment, a fine or both in proceedings tried on indictment or a maximum of 12 months imprisonment or a fine not exceeding the statutory maximum or both on summary conviction.

Section 28A – Genocide, crimes against humanity and war crimes: UK residents

Section 28B – Genocide, crimes against humanity and war crimes: retrospective application

153. Sections 28A and 28B amend the International Criminal Court (Scotland) Act 2001 ("the 2001 Act") in respect of the offences of genocide, crimes against humanity and war crimes. These sections match changes made to the International Criminal Court Act 2001 for England and Wales and Northern Ireland by the Coroners and Justice Act 2009.

154. Section 28A inserts a new section 8A into the 2001 Act to make supplemental provision about UK residents. Such residents are liable under the 2001 Act for offences committed abroad if they are resident at the time of committing the crime or subsequently become resident. New section 8A makes additional provision in respect of UK residents in two ways. First, subsection (2) lists a number of categories of person who are to be treated as being resident in the UK for the specific purposes of Part 1 of the 2001 Act to the extent this would not otherwise be the case. The specific categories are listed in paragraphs (a) to (j). Secondly, subsection (3) of new section 8A provides a non-exhaustive list of considerations a court must take into account in determining whether a person is resident in the UK.

155. Section 28B inserts a new section 9A into the 2001 Act. The new section 9A provides for the retrospective application of the offences of genocide, crimes against humanity and war crimes and related offences to things done on or after 1 January 1991. That is the date from which the International Criminal Tribunal for the former Yugoslavia had jurisdiction to try offences under the Tribunal's Statute adopted by the United Nations Security Council.

156. New section 9A has the effect of applying certain offences to acts committed on or after 1 January 1991. Those offences are genocide, crimes against humanity, war crimes, conduct ancillary to such offences committed outside the jurisdiction, offences ancillary to those offences and offences based on the responsibility of commanders and other superiors for such offences. With the exception of genocide and some of the categories of war crimes, the retrospective application of these offences is subject to a requirement that, at the time of its commission, the act constituting the offence amounted in the circumstances to a criminal offence under international law.

157. The effect of this requirement is to allow the courts to apply these offences in the 2001 Act to the extent that they were recognised in international law during the relevant period. So, for example, if a particular offence was recognised in international law at the time of the relevant conduct but in a narrower form than that of the offence set out in the 2001 Act, the defendant may still be convicted of the offence provided that his or her conduct met the elements of the offence as recognised at the relevant time in international law. The international law requirement ensures that the provisions comply with the principles enshrined in Article 7 of the European Convention of Human Rights. The requirement does not apply to genocide and certain categories of war crimes as it is beyond dispute that those offences (and all their constituent elements) were fully recognised in international law in 1991. The requirement is necessary for the other offences as, whilst the vast majority of them were recognised in international law during the relevant period, a small number may have been recognised in a narrower form than that provided for in the 2001 Act and a very small number of offences may not have been sufficiently recognised at all. In addition, international law developed during the period in question.

158. Section 28B also inserts a new section 9B into the 2001 Act. The new section 9B modifies the penalties applicable for the period of retrospection (1 January 1991 to either 1 September or 17 December 2001) in respect of certain specific offences. The 2001 Act provides for a maximum sentence of 30 years' imprisonment (other than where murder is involved). The same will generally apply for offences committed from 1 January 1991.

159. However for genocide and grave breaches of the Geneva Conventions (a category of war crimes), both of which were already offences in domestic law in 1991, a maximum penalty of 14 years' imprisonment applies instead of 30 years' (other than where murder is involved). New section 9B(2) ensures that a higher penalty cannot be imposed for such offences than existed in domestic law at the time of their commission and consequently ensures compliance with Article 7 of the European Convention of Human Rights. The two different dates in 2001 are necessary because the International Criminal Court Act 2001 raised the penalty throughout the UK for grave breaches of the Geneva Conventions from 1 September 2001, with the International Criminal Court (Scotland) Act 2001 coming into force later in the year on 17 December 2001.

Section 29 – Articles banned in prison

160. This section amends section 41 of the Prisons (Scotland) Act 1989 ("the 1989 Act") to create additional specific offences in relation to the introduction, use and possession of a personal communication device (including a mobile telephone and any component part of a mobile telephone) in prisons. In addition, it provides a definition of "proscribed article" and "personal communication device", for the purpose of this section, and inserts further provisions which define the maximum penalty that can be imposed for the introduction, use or possession of personal communication device in a prison, and provide limited circumstances where it is not an offence to have a committed such an act .

161. Subsection (1)(a) substitutes section 41(1) of the 1989 Act, and provides that it is an offence for a person to introduce or attempt to introduce a "proscribed article" in a prison, without a reasonable excuse. It also provides that the maximum penalty that can be imposed for introducing or attempting to introduce a proscribed article (other than a personal communication device) into a prison is, on summary conviction, a period of imprisonment not exceeding 30 days, or a fine not exceeding level 3 on the standard scale (or both).

162. Subsections (1)(b)-(e) make minor consequential amendments to sections 41(2), 41(2A), 41(2B) and 41(3) of the 1989 Act.

163. Subsection (1)(f) inserts two new subsections after section 41(9). The new subsection (9A) provides a definition of "proscribed article" and the new subsection (9B) provides a definition of what a personal communication device includes.

164. Subsection (1)(g) updates the definition of "offensive weapon" in section 41(10) of the 1989 Act, by substituting the reference to the Prevention of Crime Act 1953 with a reference to the definition contained in section 47 of the Criminal Law (Consolidation)(Scotland) Act 1995.

165. Subsection (2) inserts two new sections after section 41 of the 1989 Act in relation to personal communication devices; sections 41ZA and 41ZB.

166. The new sections 41ZA(1)-(3) provides that it is an offence for a person to: Give a personal communication device to a prisoner while the prisoner is inside a prison; transmit or intentionally receive any communication by means of a personal communication device in a prison; or be in possession of a personal communication device while inside a prison.

167. Offences in section 41ZA(1)-(3) are, on indictment, a period of imprisonment not exceeding two years, or a fine, or both; or, in summary proceedings, a period of imprisonment not exceeding 12 months, or to a fine not exceeding the statutory maximum, or both.

168. The new section 41ZB provides a number of exceptions in relation to communication devices. In particular, subsections (1) and (2) of section 41AB provide that it will not be an offence to introduce, use or possess a personal communication device in a designated area of a prison, or where the person has received written authorisation from the governor, director of a prison, or the Scottish Ministers.

169. Subsections (3) and (4) of section 41ZB provide that it will not be an offence for a prison officer (or other prison official) to introduce, use or possess a personal communication device if the device is one supplied to the person specifically for use in the course of the person's official duties at the prison, or the person is acting in accordance with those duties.

170. Subsection (5) of section 41ZB provides that no offence is committed by a person, other than a prisoner, where there is a reasonable excuse for the possession. A prisoner would not have a reasonable excuse, given that personal communication devices are not permitted in prisons and they are asked as part of the reception process whether or not they have any proscribed articles on their possession.

171. Subsections (6) and (7) of section 41ZB provide that it is a defence for a person accused of introducing, using or possessing a personal communication device in a prison to show that the person reasonably believed that the person was acting with authorisation or in circumstances where there was an overriding public interest which justified the person's actions. For example, where an individual from the emergency service had to access the prison with a communication device, in an emergency situation, and there was insufficient time for the individual to receive written authorisation.

172. Subsection (8) of section 41ZB provides the circumstances where written authorisation is given. In particular it provides that written authorisation should be provided in favour of a specified person (or person of a specified description), or for a specified purpose. Written authorisation is given either by the governor or director of the prison (in relation to activities at that prison), or the Scottish Ministers (in relation to activities at a prison specified in the authorisation).

173. Subsection (9) of section 41ZB provides the definition of a designated part of a prison, where it is not an offence to introduce, use or possess a personal communication device. This is necessary because it is not illegal to use or possess a personal communication device in the community. It is not the intention to penalise a person for entering an administrative area or other designated area of a prison with a personal communication device. It should only be an offence to introduce, use or possess a personal communication device beyond the designated part of a prison i.e. in the secure part of the establishment.

174. Subsection (10) of section 41ZB provides that prison officers or other prison officials who are crown servants or agents do not benefit from Crown immunity in relation to an offence of introducing, using or possessing a personal communication device in a prison. This is to ensure that the personal communication devices are only permitted in prisons in limited circumstances e.g. with authorisation.

Section 30 - Sale and hire of crossbows to persons under 18

175. The Crossbows Act 1987 controls the sale and hire of crossbows and this section introduces new provisions to that Act. Subsection (3) introduces a new section 1A to achieve consistency with the proof of age provisions of the Licensing (Scotland) Act 2005 by clarifying the defences a person charged with selling an article to someone underage can rely upon. Subsection (4) introduces a new section 3A which has the effect of legalising an attempt to purchase or hire a crossbow by a young person, where the young person is acting as part of an authorised test purchasing scheme. It also makes provision to ensure the safety of young people participating in such a scheme. These provisions bring the Act into line with the test purchasing provisions of the Licensing (Scotland) Act 2005.

Section 31 - Sale and hire of knives and certain other articles to persons under 18

176. Section 141A of the Criminal Justice Act 1988 controls the sale of knives and certain articles with a blade or point to under 18s. Subsections (2) and (3) amend the Act to close a gap in the law relating to the hiring of a knife or bladed article to an under 18. Subsection (4) amends the proof of age provisions of section 141A to ensure consistency with the Licensing (Scotland) Act 2005 by clarifying the defences a person charged with selling an article to someone underage can rely upon.

Section 31A – Offensive weapons etc.

177. Section 31A amends the Criminal Law (Consolidation) (Scotland) Act 1995 (“the 1995 Act”). Section 47 of the 1995 Act sets out an offence relating to the possession of an offensive weapon in a public place; section 49 sets out an offence relating to the possession of a knife in a public place; section 49A sets out an offence relating the possession of an offensive weapon or a

knife on school premises and section 49C sets out an offence relating to the possession of an offensive weapon or a knife in certain prisons.

178. Section 31A amends the definition of "public place" in sections 47 and 49 of the 1995 Act so that a public place means any place other than domestic premises, school premises or prisons. "Domestic premises" specifically excludes the common parts of a shared property. This means that the offences in sections 47 and 49 of the 1995 Act may be committed by possession of an offensive weapon or a knife on the common parts of shared properties such as common landings in tenement blocks of flats.

179. Sections 47, 49, 49A and 49C of the 1995 Act do not currently provide the same defences to the offences created by those provisions. A person charged with an offence under section 47 of the 1995 Act is provided with a defence if they can prove they had "lawful authority or reasonable excuse" for carrying an offensive weapon in a public place. By contrast, someone charged with an offence under section 49 is provided with a defence if they can prove that they had "good reason or lawful authority" for carrying a knife in a public place.

180. Section 31A amends the statutory defences available to those charged with an offence under sections 47, 49, 49A, and 49C so that the same defence is applicable to each offence. That defence is that the person is able to show that they had a reasonable excuse or lawful authority to be in possession of the offensive weapon or knife, as the case may be.

181. The penalties for offences relating to obstruction or concealment detailed in sections 48(2) and 50(4) differ. The maximum penalty under section 48(2) is a level 4 fine while the maximum penalty under section 50(4) is a level 3 fine. Section 31A increases the maximum penalty under section 50(4) of the 1995 Act to a level 4 fine in order to align that provision with the similar offence under section 48(2) of the 1995 Act.

Section 31B – Offence of stalking

182. This section creates an offence of 'stalking'. Subsection (1) provides that a person (A) who stalks another person (B) commits an offence. Subsection (2) provides that A stalks B where he engages in a course of conduct and either subsection (3) or subsection (4) applies and A's course of conduct causes B to suffer physical or psychological harm, or apprehension or fear for B's safety or for the safety of any other person.

183. Subsection (3) applies where A engages in a course of conduct with the intention of causing physical or psychological harm to B, or with the intention of arousing apprehension or fear for the safety of B or any other person.

184. Subsection (4) applies where A engages in a course of conduct which he knows, or ought in all the circumstances to know would be likely to cause such harm or arouse such apprehension or fear, irrespective of whether or not A's *purpose* is to cause B such harm, apprehension or fear.

185. Subsection (5) provides for three defences to the offence. The first is that A's actions were authorised by virtue of any enactment or rule of law. The second is that A engaged in the

conduct for the purpose of preventing or detecting crime. The third is that the course of action was, in the particular circumstances, reasonable.

186. Subsection (6) provides that, for the purpose of the offence of ‘stalking’, a ‘course of conduct’ involves conduct on at least two occasions. A non-exhaustive definition of ‘conduct’ is provided at subsection (6)(2). It includes:

- following B or any other person;
- contacting B or any other person by post, telephone, email, text message or any other method;
- publishing any statement or other material which either relates to, or purposes to relate to B or to any other person, or purports to originate from B or from any other person;
- tracing the use by B or by any other person of the internet, email or any other form of electronic communication;
- entering or loitering in the vicinity of the place of residence of B or any other person, the place of work or business of B or of any other person, or any place frequented by B or any other person;
- interfering with any property in the possession of B or of any other person;
- giving offensive material to B or to any other person or leaving such material where it may be found by, given to or brought to the attention of B or any other person;
- keeping B or any other person under surveillance; or
- acting in any other way that a reasonable person would expect would arouse apprehension or fear in B for B’s own safety or for the safety of any other person.

187. Subsection (7) provides that the maximum penalty on conviction on indictment is imprisonment for a term not exceeding 5 years or a fine or both, and the maximum penalty on summary conviction is imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both..

Section 32 - Certain sexual offences by non-natural persons

188. This section makes amendments to the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005. Subsection (2) broadens the range of penalties available for offences under sections 9(4)(b), 9(5)(b), 10(2)(b), 11(2)(b) and 12(2)(b) of the 2005 Act to include an unlimited fine. Consequently, a person found guilty of an offence on indictment under sections 9 to 12 of the 2005 Act, may be liable to an unlimited fine and/or imprisonment for up to 7 years in the case of offences to which section 9(4)(b) relate or, for the other relevant offences, for up to 14 years.

189. Subsection (3) inserts a new section 14A into the 2005 Act. Inserted section 14A provides that, where an offence under sections 10, 11 or 12 of the 2005 Act is committed by a body corporate (such as a company), a Scottish partnership, or an unincorporated association, certain officers of the body or other persons purporting to act in such a capacity may in certain circumstances be held to have committed the offence and will be liable to prosecution as well as the body.

Section 33 - Indecent images of children

190. This section extends the provisions of sections 52 and 52A of the Civic Government (Scotland) Act 1982 ("the 1982 Act") to make it an offence to take, make, distribute, show, publish or possess etc. derivatives of indecent photographs or pseudo-photographs such as line traced and computer traced images. It also extends Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (Offences Against Children Under the Age of 17 Years to which Special Provisions Apply) to include pseudo-photographs and amends Schedule 3 to the Sexual Offences Act 2003 (Sexual offences for the purposes of Part 2 of that Act) in relation to derivatives of indecent photographs or pseudo-photographs.

191. Subsection (1)(a)(i) amends section 52(2C)(b) of the 1982 Act to make clear that indecent pseudo-photographs include data capable of conversion into a pseudo-photograph only where that conversion would result in an indecent image.

192. Subsection (1)(a)(ii) amends section 52 of the 1982 Act by the insertion of new subsections (9) and (10). Section 52(9) extends the definition of "photograph" to cover derivatives of photographs or pseudo-photographs or combinations of these. For example, it includes a computer tracing which is neither a photograph nor a pseudo-photograph but is derived from one. Section 52(10) provides that subsection 52(2B) applies to such derivatives in the same way that it applies to pseudo-photographs.

193. Subsection (2) amends paragraph 2B of Schedule 1 to the Criminal Procedure (Scotland) Act 1995, which lists offences against children under the age of 17 to which special provisions apply. Paragraph 2B, which concerns offences under sections 52 and 52A of the Civic Government (Scotland) Act 1982, is amended to include offences involving indecent pseudo-photographs, as well as indecent photographs of a child under the age of 17 years.

194. Subsection (3) amends Schedule 3 to the Sexual Offences Act 2003, which lists sexual offences for the purposes of Part 2 of that Act. Part 2 of the 2003 Act makes provision for relevant offenders to be subject to the notification requirements set out in that Part of that Act

195. Subsection (3)(a) amends paragraph 44 of Schedule 3 to the Sexual Offences Act 2003 which relates to offences under section 170 of the Customs and Excise Management Act 1979 (concerning the penalty for the fraudulent evasion of duty etc.) in relation to goods which are prohibited from being imported where they included indecent photographs of children under 16. So as to provide consistency with the entries in the Schedule relating to offences in the Civic Government (Scotland) Act 1982 concerning the making, possessing &c of such indecent images, the entry is amended to provide that it applies only where the offender is 18 or over, or is or has been sentenced to at least 12 months imprisonment, or where the court considers it appropriate that the sex offender notification requirements should apply. While this will limit the automatic application of the notification requirements, the provisions outlined in the preceding paragraphs concerning SOPOs will mean that the restriction does not apply in relation to applications for SOPOs. Paragraph 44 of Schedule 3 to the Sexual Offences Act 2003 is also amended to include reference to pseudo-photographs of children under 16.

196. Subsection (3)(b) amends the interpretative provision in paragraph 97(b) of Schedule 3 to the 2003 Act to extend the meaning of indecent photographs and pseudo-photographs for that

Act to include derivatives of such photographs and pseudo-photographs (by applying definitions in the 1982 Act which include the amendments made by subsection (1)(a)(ii), above).

Section 34 - Extreme pornography

197. This section creates a new offence of possession of extreme pornography and increases the maximum penalty for the sale etc. of obscene material of that nature. It inserts new sections 51A to 51C into the Civic Government (Scotland) Act 1982, amends section 51 of that Act and inserts new paragraph 44A into Schedule 3 to the Sexual Offences Act 2003.

198. Subsection (1) amends section 51(3) of the 1982 Act to increase the maximum penalty, on conviction on indictment, from 3 to 5 years imprisonment for the offence of displaying, publishing, selling, distributing or possessing etc. with a view to selling or distributing obscene material, where that material contains an extreme pornographic image.

199. Subsection (2) inserts new sections 51A "Extreme pornography", 51B "Exception to section 51A offence" and 51C "Defences to section 51A offence" into the 1982 Act.

200. Section 51A creates an offence of possession of an extreme pornographic image, defines such images and specifies the maximum penalty which may be imposed for the offence.

201. Subsection 51A(2) provides that an extreme pornographic image must be "obscene", "pornographic" and "extreme". The test of "obscene" means that the material must be of such a nature that it would fall within the category of the material whose sale etc. is already prohibited under section 51 of the 1982 Act.

202. Subsection 51A(3) defines a "pornographic" image as one which must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal. Therefore, an image is not pornographic if it can reasonably be assumed that the image has been made principally for another purpose e.g. educational purposes.

203. Subsection 51A(4) provides that where an image forms part of a series of images which can provide a context, then that context and the image itself must be taken into account when determining whether the image is pornographic and reference may also be had to any sounds accompanying the image.

204. Subsection 51A(5) sets out an example of how subsection 51A(4) can work. Where an image forms an integral part of a narrative (e.g. a story), the whole story will be considered for the purposes of determining whether the image in question is pornographic. This could lead to the conclusion that an image is not pornographic, notwithstanding that when considered on its own, the opposite conclusion would be reached. Subsection 51A(5) is only one example of how subsection 51A(4) may operate. The reference to "context" in subsection 51A(4) not only covers a narrative, it can also, for example, include a series of images which do not tell a story, but which have a recurring theme. In addition, subsection 51A(4) may operate so as to have the opposite effect to that described in subsection 51A(5)(b): examination of an image's context could lead to the conclusion that an image *is* pornographic.

205. Subsection 51A(6) provides that an image is extreme if it depicts in an explicit and realistic way any of the acts set out in subsection 51A(6)(a) to (e). The terms “explicit” and “realistic” require that the act depicted in the image must be clearly seen, lifelike and convincing and appear to a reasonable person to be real. It is not required that the act itself is real.

206. Subsection 51A(7) provides that where an image is an integral part of a narrative, the context provided by that narrative may be taken into account in determining whether an image is extreme in terms of subsection 51A(6). In addition, any description or sound accompanying the image can similarly be taken into account.

207. Section 51B makes provision to exclude images in unaltered classified works and defines the circumstances in which such images are not excluded.

208. Subsections 51B(1) and (2) provide that possession of an excluded image is not an offence under section 51A and define an excluded image.

209. Subsection 51B(3) provides that an image extracted from a classified work for the purposes of sexual arousal is not an excluded image.

210. Subsection 51B(4) provides that in determining whether an image has been extracted for the purpose of sexual arousal, account may be taken of the storage, description, accompanying sound and context of the image.

211. Subsection 51B(5) defines terms used in this section including “classified work” and thereby “excluded image” in subsection 51B(2).

212. Section 51C makes provisions for defences to the offence of possession of extreme pornography. It replicates defences provided for possession of indecent images of children under section 52A of the 1982 Act and makes specific provision in relation to extreme images.

213. Subsection 51C(1) provides that the onus is on the accused to prove the matters specified in subsections 51C(2), (3) and (4) in order to use one or more of the defences. The Crown must prove the essential elements of the offence beyond reasonable doubt.

214. Subsection 51C(2) provides that it is a defence for a person to prove that: (a) he/she had a legitimate reason for possession of the image, (b) he/she had no knowledge of the image and no awareness as to the nature of the image or (c) the image was unsolicited and disposed of promptly.

215. Subsection 51C(3) provides a defence for those who directly participated in the act depicted in an extreme pornographic image and can prove the circumstances set out in subsection 51C(4). When read with subsections 51C(4) and (5) this subsection limits the defence to those who directly participate in simulated acts and retain the images for their own private use. The defence does not extend to a person who films or watches an act depicted in an image but who does not participate directly.

216. Subsection 51C(4) provides that a direct participant must be able to demonstrate that the act depicted in the image was simulated i.e. that it did not actually:

- take or threaten a person's life;
- result in nor was it likely to result in severe injury;
- involve non-consensual activity;
- feature a human corpse;
- feature an animal or carcase.

217. Subsection 51C(5) provides that the defence in subsection 51C(3) is not available if the image in question is shown, given or offered for sale to any person who was not a direct participant in the act depicted in the image.

218. Subsection 51C(6) provides that the terms "image" and "extreme pornographic" image are to be construed in accordance with section 51A.

219. Subsection (3) inserts paragraph 44A into Schedule 3 to the Sexual Offences Act 2003, which lists the offences conviction of which leads to an offender being made subject to the sex offender notification requirement contained at Part 2 of the 2003 Act. It provides that a person convicted of the offence of possession of extreme pornography who is 18 years of age or over at the time of the offence, and is sentenced to a term of imprisonment of more than 12 months, may be made subject to the sex offender notification requirements where the court considers it appropriate.

Section 34A – Voyeurism: additional forms of conduct

220. Section 34A amends the voyeurism offence in the Sexual Offences (Scotland) Act 2009 to include additional forms of conduct.

221. Subsection (2)(a) inserts two new subsections into the voyeurism offence at section 9 of that Act: subsections (4A) and (4B) which provide for additional forms of conduct constituting the offence of voyeurism.

222. New subsection (4A) provides that the voyeurism offence is committed where a person (A) operates equipment beneath another person (B)'s clothing, with the intention of enabling A or another person (C) to observe B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks in circumstances where the genitals, buttocks or underwear would not otherwise be visible, without B's consent and without any reasonable belief that B consents. The offence is committed where A acts for the purpose of causing B humiliation, alarm or distress, or for the purpose of obtaining sexual gratification (whether for A or C).

223. New subsection (4B) provides that the voyeurism offence is committed where a person (A) records an image beneath another person (B)'s clothing of B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, without B's consent and without any reasonable belief that B consents, and in circumstances where B's genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person will look at the image. The offence is committed where A acts for the purpose of

causing B humiliation, alarm or distress, or for the purpose of obtaining sexual gratification (whether for A or for a third person).

224. Subsections (2)(b), (c) and (3) make consequential changes to sections 9 and 10 of the 2009 Act as a result of the insertion of new subsections (4A) and (4B).

225. Subsection (4) makes equivalent changes to the offence of 'voyeurism towards a young child' at section 26 of the 2009 Act but there is no reference to consent as children under the age of 13 are deemed to lack the capacity to consent to sexual activity.

226. Subsection (5) makes equivalent changes to the offence of 'voyeurism towards an older child' at section 36 of the 2009 Act without reference to consent, as it is an offence for a person over the age of 16 to engage in voyeuristic conduct towards a child under 16, regardless of whether the child consents.

Section 34B – Sexual offences: defences in relation to offences against older children

227. This section amends section 39 of the Sexual Offences (Scotland) Act 2009 so as to provide that the defence of 'proximity of age' provided for at section 39(4) shall apply in respect of the offence at section 30(2)(e).

Section 34C – Penalties for offences of brothel-keeping and living on the earnings of prostitution

228. This section amends sections 11 and 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 ("the 1995 Act") to increase the maximum penalties for offences under sections 11(1)(a) (living on the earnings of prostitution), 11(5) (brothel-keeping) and 13(9) (living on the earnings of male prostitution).

229. Subsection (2) of this section amends section 11(1) of the 1995 Act by deleting the reference to existing penalties which apply and inserting a new subsection (1A) that increases the maximum penalty for an offence under section 11(1)(a), on conviction on indictment, to imprisonment for a period not exceeding 7 years, a fine or both. The penalty on summary conviction for this offence changes to imprisonment for a period not exceeding 12 months, a fine not exceeding the statutory maximum or both.

230. The change to the term of imprisonment for the offence under section 11(1)(b) of the 1995 Act is to conform with the provisions of section 45 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 which increased the sentencing powers of the sheriff court from 6 months to 12 months for statutory offences triable both summarily and on indictment. While there is no specific provision for a fine to be imposed for an offence under section 11(1)(b), section 199 of the Criminal Procedure (Scotland) Act 1995 allows for a fine to be substituted instead of imprisonment.

231. Section 11(4) of the 1995 Act is amended to reflect the penalties at new subsection (1A).

232. The penalties provided for in section 11(6), for an offence under section 11(5) of the 1995 Act, are replaced by a new subsection (6) which increases the maximum penalty that applies on conviction on indictment to imprisonment for a period not exceeding 7 years, to a fine

or both. The penalty on summary conviction for this offence changes to imprisonment for a period not exceeding 12 months, a fine not exceeding the statutory maximum or both. This is replicated for the maximum penalties which apply in respect of offences under section 13(9) of the 1995 Act.

Section 35 - People trafficking

233. Trafficking for the purposes of prostitution or for the making or production of obscene or indecent material is an offence under the provisions of section 22 of the Criminal Justice (Scotland) Act 2003, (the "2003 Act") including where it is believed that another person is likely to exercise such control or to so involve the individual.

234. Section 35 amends section 22 of the 2003 Act by:

- aligning the wording of section 22 of the 2003 Act with that now contained in the Sexual Offences Act 2003 by amending section 22(1)(a) to extend its scope so that it refers to facilitating "entry into" the UK as well as the "arrival in" the UK to reflect the changes made by the UK Borders Act 2007;

- creating a new offence (under section 22(1A)) which covers the trafficking of persons into, within or out of a country other than the UK;

- amending section 22(2), which explains what is meant by a person exercising control over prostitution by an individual, so that it applies to the new offence;

- substituting a new section 22(4) to provide that the offences in sections 22(1) and (1A) apply to anything done in or outwith the UK;

- replacing section 22(5) to provide greater certainty in statute to clarify that the sheriff court has jurisdiction, under both solemn and summary procedure, for any offence to which section 22 applies;

- amending section 22(6) by extending the extra-territorial effect by providing that the offences in sections 22(1) and (1A) apply to UK nationals, person habitually resident in Scotland and UK corporate bodies.

235. Similar changes are made to the offences relating to trafficking for purposes other than sexual exploitation in sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ("the 2004 Act") by amending:

- section 4(1) by extending its scope so that it refers to "entry into" the UK as well as the "arrival in" the UK;
- section 4(2) to remove the requirement that a person who arranges or facilitates the travel of an individual within the UK intending to exploit that individual (or believes that someone else is likely to do so) has a belief that an offence under section 4(1) may have been committed; and

- creation of a new offence under section 4 as set out in new section 4(3A) which covers the trafficking of persons into, within or out of a country other than the UK regardless of where the exploitation is to occur.

236. The definition of exploitation in section 4(4) of the 2004 Act is expanded in several ways:

- The existing reference in section 4(4)(b) to exploitation which would involve offences under the UK human tissue legislation is expanded to ensure that it applies to such conduct wherever it takes place.

- A new paragraph (ba) is added to section 4(4) to cover exploitation involving removal of body parts which would amount to an offence other than under the human tissue legislation (which deals principally with removal of organs for transplantation). For these purposes body parts comprise all parts of the body including blood.

- The existing paragraph (d) in section 4(4)(d) is replaced by a new paragraph (d) to make an equivalent change to that made for other parts of the UK in section 54 of the Borders, Citizenship and Immigration Act 2009, to cover the use or attempted use of a person for the provision of services or the provision or acquisition of benefits of any kind, where the person is chosen on the grounds of ill-health, disability, youth or family relationship. This will ensure the offence captures those cases where the role of the person being exploited is entirely passive, and where the person is being used as a tool by which others can gain a benefit of any kind.

- Section 5 of the 2004 Act is amended to make clear that that the offences in sections 4 (1), (2), (3) and (3A) apply to anything done in or outwith the UK and that the extra-territorial effect is extended by providing that these offences apply to UK nationals, person habitually resident in Scotland and UK corporate bodies. New sections (2A) and (2B) have been added to this section of the 2004 Act in order to provide greater certainty in statute to clarify that the sheriff court has jurisdiction, under both solemn and summary procedure, for any offence to which section 4 applies.

Section 35A - Slavery, servitude and forced or compulsory labour

237. This section introduces a new statutory offence of holding someone in slavery or servitude, or requiring a person to perform forced or compulsory labour. The offence has been introduced in response to the case of *Siliadin v France*[1] (where the European Court of Human Rights held that there had been a violation of Article 4 of the European Convention on Human Rights which covers the exploitative behaviours of slavery, servitude and forced or compulsory labour).

238. Subsection (2) provides that the offence must be interpreted in accordance with Article 4 of the European Convention on Human Rights which prohibits these exploitative behaviours and sets out the circumstances in which where such behaviour would not fall under the term “forced

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[1] http://www.coe.int/t/dghl/monitoring/trafficking/docs/echr/SILIADIN_v_FR.pdf

or compulsory labour" e.g. work required while subject to a term of imprisonment, military service, etc.

239. The maximum penalties for an offence under this section are provided for in subsection (3), namely:

- on conviction on indictment, to imprisonment for a period not exceeding 14 years, to a fine or both;
- on summary conviction for this offence increases to imprisonment for a period not exceeding 12 months, to a fine not exceeding the statutory maximum or both.

Section 36 - Alternative charges for fraud and embezzlement

240. Paragraph 8 of Schedule 3 to the Criminal Procedure (Scotland) Act 1995 can be applied in certain cases where the evidence led in court would not support a conviction on the basis of the offence as charged but would permit conviction of a different offence. It permits this application of an alternative charge in certain offences involving dishonest appropriation of property. For example, in terms of paragraph 8(2) of Schedule 3 an accused person charged with theft may instead be convicted of reset if the evidence led would not support conviction of theft but would support conviction of reset.

241. The amendments to Schedule 3 extend this principle to cover fraud and embezzlement. As a result of these changes, it will be possible for an accused charged with "breach of trust and embezzlement" to instead be convicted of "falsehood, fraud and wilful imposition". Similarly, an accused charged with "falsehood, fraud and wilful imposition" may be convicted instead of "breach of trust and embezzlement".

Section 36A – Articles for use in fraud

242. Section 36A provides for two new criminal offences relating to fraud.

243. Section 36A(1) makes it an offence for a person to possess or have within their control an article for use in, or in connection with, the commission of fraud. It will have to be established that the accused possessed or had control of the article and that the article was to be used in the course of or in connection with fraud. Section 36A(2) provides that an offence under subsection (1) can be tried both in summary proceedings (where the maximum penalty will be a custodial sentence not exceeding 12 months and/or a fine not exceeding the statutory maximum) and on indictment (where the maximum penalty will be a custodial sentence of up to 5 years and/or an unlimited fine).

244. Section 36A(3) makes it an offence to make, adapt, supply or offer to supply an article knowing either that the article is designed or adapted for use in, or in connection with, the commission of fraud; or intending the article to be used in, or in connection with, the commission of fraud. Section 36A(4) provides that an offence under subsection (3) can be tried both in summary proceedings (where the maximum penalty will be a custodial sentence not exceeding 12 months and/or a fine not exceeding the statutory maximum) and on indictment

(where the maximum penalty will be a custodial sentence not exceeding 10 years and/or an unlimited fine).

245. Section 36A(5) provides that an 'article' within this new section includes a program or data held in electronic form. Therefore, the definition of 'article' includes more than simply a physical object and could include, for example, such a thing as a list of credit card numbers held on a computer.

Section 37 - Conspiracy to commit offences outwith Scotland

246. Section 11A of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") provides that conspiracy in Scotland to commit an offence outwith the United Kingdom is in itself an offence, provided that the criminal purpose being conspired would constitute an offence in the place where it was intended to be carried out. However, section 11A of the 1995 Act does not cover conspiracies formed in Scotland to commit an offence in England, Wales and Northern Ireland. This section amends the scope of section 11A of the 1995 Act to cover conspiracy in Scotland to commit an offence in other parts of the United Kingdom.

Section 37A – Abolition of offences of sedition and leasing-making

247. Section 37A abolishes the common law offences of sedition and leasing-making. This follows amendments made in section 73 of the Coroners and Justice Act 2009 (c.25) to abolish the common law offences of sedition, seditious libel, defamatory libel and obscene libel, which applied in the rest of the UK.

248. Paragraphs A1 and A2 of Schedule 5 to the Bill repeal the Libel Act 1792 and the Criminal Libel Act 1819 in their entirety.

249. Paragraphs A3, 10A, 43B and 47A of Schedule 5 to the Bill provide for consequential amendments to the Defamation Acts of 1952 and 1996, the Trade Union and Labour Relations (Consolidation) Act 1992 and the Legal Deposit Libraries Act 2003. These remove references that are made redundant either by the abolition of the offence of sedition in Scotland or the abolition of the various forms of criminal libel in the rest of the United Kingdom.

PART 3 - CRIMINAL PROCEDURE

Section 38 – Prosecution of children

250. Section 38 implements in part the Scottish Law Commission's Report on Age of Criminal Responsibility, published in 2002.

251. This section implements Recommendation 2 of the Scottish Law Commission's Report by inserting a new section 41A into the Criminal Procedure (Scotland) Act 1995 prohibiting the prosecution of any child under the age of 12. The age limit applies at the commencement of the prosecution. In addition to the SLC's recommendation, subsection (2) prevents persons over the age of 12 being prosecuted for an offence they committed under that age.

252. The prosecution of children between 12 and 16 would remain subject to the existing statutory provisions, requirements of the European Convention on Human Rights, and the current practices and directions of the Lord Advocate and the Crown Office. The main statutory provision limiting prosecution of children under 16 is section 42(1). This provides that no child under 16 is to be prosecuted except on the instructions of the Lord Advocate or at his instance and that any prosecution is to take place in the High Court or a sheriff court. Subsection (3) makes consequential amendments to section 42 so that it will apply to children aged between 12 and 16.

253. Subsection (4) makes a consequential amendment to section 234AA(2)(b), which provides that the criminal courts can make an antisocial behaviour order only where at the time when he committed the offence, the offender was at least 12 years of age. In light of the limit on prosecution established by section 41A, this provision is no longer necessary and is repealed.

254. The existing rule in section 41 that it shall be conclusively presumed that no child under the age of eight years can be guilty of any offence is retained.

Section 39 – Offences: liability of partners

255. Section 39 provides that where a partnership is guilty of a "corporate offence" that has been committed with the consent or connivance of a partner or attributable to the partner's neglect that partner will also be guilty of the offence. "Corporate offences" are those where in similar circumstances statute provides for individual liability for directors of a body corporate.

256. The effect is to put partners of partnerships (including those who purport to be partners of partnerships) in the same position as directors of bodies corporate in relation to statutory criminal offences. Similar provision has already been made under the Limited Liability Partnerships (Scotland) Regulations 2001 in relation to partners of Limited Liability Partnerships, so these are excluded from the operation of section 39. As some statutes have already made provision for individual liability of partners, subsection (3) disapplies the new provisions where such provision has already been made.

Section 40 – Witness statements

257. Section 40 allows the Crown at any point, both before commencement and during the trial, to provide to any witness who is cited a copy of their statement or to give a witness access to it at a reasonable time and place. "Statement" is defined at (3) with reference to section 262 of the 1995 Act.

Section 41 - Breach of undertaking

258. Under section 22 (liberation on undertaking) of the 1995 Act an accused person can be released by the police on the undertaking that they will appear at court at a later date and that they will comply with certain conditions. The conditions which can be attached to a police undertaking are the same as those which can be applied to a bail order granted by a court and include, for example, a requirement not to commit further offences.

259. Section 41 adds new sections 22ZA and 22ZB to the 1995 Act. It makes provision in relation to offences committed while a person is subject to a police undertaking. These provisions are broadly similar to those that apply where an accused person commits an offence while liberated on bail.

260. Section 22ZA(1) provides that a person commits an offence where they fail to appear at court as required under an undertaking and also where they fail to comply with a condition attached to that undertaking. Subsection (2) provides for the applicable penalty levels for section 22ZA(1) offences. Subsections (3) (read with subsection (4)) provides that where a person subject to an undertaking commits a further offence, the fact that they have breached the undertaking is not to be treated as a separate offence, but is to be taken account of (along with the other listed factors in subsection (4)) by the court in determining the sentence for the further offence.

261. Subsections (4A) to (4C) build upon subsections (3) and (4). They allow the court to consider any previous offence committed in another EU jurisdiction that is considered by the court to be equivalent (in that jurisdiction) to an offence of failing to comply with a condition attached to an undertaking.

262. Section 22ZB makes provision for evidential and procedural matters in relation to offences committed or dealt with under section 22ZA.

Section 41A - Grant of warrants for execution by constables and police members of SCDEA

263. Section 41A inserts a new section which clarifies the law on the scope of a sheriff's jurisdiction to grant a warrant at common law to police members of the SCDEA and constables from a police force not within the area of the sheriff's jurisdiction.

264. This section provides that a sheriff or justice of the peace does not lack power or jurisdiction to grant a warrant for execution by a constable or a police member of the Scottish Crime and Drug Enforcement Agency simply on the basis that the constable or police member is not a constable of a police force for a police area which is within the sheriff's or justice's sheriffdom.

Section 42 - Bail review applications

265. The prosecutor or the accused can apply for review of a decision to grant, or to refuse to grant, an application for bail or for review of the conditions attached to the grant of bail, e.g. for a change of address.

266. This section amends sections 30 and 31 of the 1995 Act to remove the requirement to hold a hearing in circumstances where an application for review is made but only when the other party consents to, and the court considers it appropriate to grant, the application. Section 30 is also amended to make it clear that an application for review by the accused must be intimated to the prosecutor.

Section 43 - Bail condition for identification procedures etc.

267. Section 43 introduces a new standard bail condition. This new condition provides, that whenever reasonably instructed by a constable to do so, a person released on bail should participate in an identification parade or other identification procedure, and allow any print, impression or sample to be taken from him or her. Although such a condition is not currently a standard condition, under section 24(4)(b) of the 1995 Act, the court may currently impose a further condition to this effect.

Section 43A - Bail conditions: remote monitoring requirements

268. Section 43A repeals sections 24A to 24E of the Criminal Procedure (Scotland) Act 1995. Those provisions enable the court to impose an electronically monitored movement restriction as a condition of bail (electronic tagging) as a direct alternative to custodial remand in certain circumstances. This repeal will ensure that the court cannot impose an electronically monitored movement restriction condition as a condition of a bail order.

Section 44 - Prosecution on indictment: Scottish Law Officers

269. This section amends the procedures contained in the 1995 Act for the raising of indictments in name of the Lord Advocate.

270. Section 287 of the 1995 Act sets out transitional arrangements for the situation where a Lord Advocate resigns or dies and where there is a gap in time before a new Lord Advocate is appointed. In this case indictments are raised in the name of the Solicitor General. Section 287 makes provision for circumstances where both offices of the Lord Advocate and Solicitor General are vacant, to include where both Law Officers demit office on the same day.

271. Section 64 of the 1995 Act currently provides that all prosecutions before the High Court of Justiciary or before the Sheriff sitting with a jury shall proceed in name of Her Majesty's Advocate.

272. Subsection (2) amends section 64 of the 1995 Act (and subsection (4) amends Schedule 2 to the 1995 Act) to provide that indictments are to be libelled at the instance of "Her Majesty's Advocate", removing any requirement for the individual Lord Advocate to be named, personally. Subsection (3)(a)(i) makes a consequential amendment to section 287(1) of the 1995 Act in relation to the continuation of indictments raised by the Lord Advocate during any period where there is no Lord Advocate in office.

273. Subsection (3)(b)(i) makes a similar amendment to subsection 287(2) of the 1995 Act with regard to the Solicitor General where there is no Lord Advocate in office. It also allows indictments to be raised at the instance of the Lord Advocate where that office is vacant.

274. Subsection (3)(a)(ii) makes clear that section 287(1) of the 1995 Act applies where the holder of the office of Lord Advocate has died or demitted office and subsection (3)(a)(iii) makes clear that indictments raised by a Lord Advocate can, where the circumstances set out in section 287(1) of the 1995 Act apply, be taken up by the Solicitor General. This is to ensure the continuity of criminal proceedings in Scotland.

275. Subsection (3)(c),where it inserts new subsection (2A) in section 287, provides that indictments raised by the Solicitor General may be signed by that Law Officer. It also provides, by the insertion of new subsections (2B) and (2C) in that section, that during any period where both offices of the Scottish Law Officers are vacant, regardless of the cause of those vacancies, that it shall be lawful for indictments to be raised at the instance of Her Majesty's Advocate. It provides, by the insertion of subsection (2AA) in that section, that where an indictment is raised at the instance of the Solicitor General, that indictment continues to be valid even if that person has since died or left office, and ensures that such indictments can continue to be taken up and proceeded with by either the person's successor as Solicitor General or by the Lord Advocate. This mirrors existing provision in section 287(1) of the 1995 Act. Subsection (3)(d) includes provision that ensures that indictments raised by a Solicitor General can be taken up and proceeded with by advocates depute and procurators fiscal, notwithstanding any vacancy in the office of the Solicitor General. Subsection (3)(d) also includes provision allowing indictments which have been raised at the instance of the Lord Advocate where there is no Lord Advocate or Solicitor General in post to be taken up and proceeded with by advocates depute or procurators fiscal.

Section 45 -Transfer of justice of the peace court cases

276. This section introduces new provisions into the 1995 Act relating to the jurisdiction of the JP court in relation to the commencement and transfer of proceedings. Three new sections, 137CA, 137CB and 137CC, are inserted. The purpose is to make provision for JP courts similar to that which exists for the transfer of sheriff court cases under section 137A to 137C of the 1995 Act. It should be noted that consequential amendment to section 10A of the 1995 Act is made in Schedule 5 to this Bill.

277. Section 137CA provides that where an accused person has been cited to a diet, or where citation has not taken place but proceedings have been commenced against an accused in a JP court, the prosecutor may apply to a justice to transfer the proceedings to another JP court in the same sheriffdom.

278. Subsections (1) and (2) of section 137CB provide that where the clerk of a JP court informs the prosecutor that due to unforeseen circumstances it is not practicable for that JP court or any other JP court in the sheriffdom to proceed with some or all of the cases due to call at a diet, the prosecutor may apply to the sheriff principal to transfer the proceedings to a JP court in another sheriffdom.

279. Subsections (3) and (4) provide that where an accused person has been cited to a diet, or where proceedings have been commenced against an accused person in a JP court, the prosecutor can apply to a justice to transfer the proceedings to a JP court in another sheriffdom, if there are proceedings against the accused in a JP court in that sheriffdom.

280. Subsections (5) and (6) provide that where it is intended to take proceedings against an accused person in a JP court, and there are proceedings against the accused in a JP court in another sheriffdom, the prosecutor may apply to a justice for authority to take proceedings against the accused in a JP court in the other sheriffdom.

281. Subsection (7) provides that where an application is made under subsection (2), a sheriff principal may only make the order with the consent of the sheriff principal of the other sheriffdom. Subsection (9) permits the sheriff principal who has made an order under subsection (7) to revoke or vary it, with the consent of the sheriff principal of the receiving sheriffdom.

282. Subsection (8) provides that where an application is made under subsection (4) or (6), the justice is to make the order sought if s/he considers it expedient and if a justice of the other sheriffdom consents. Subsection (10) provides that a justice who has made an order under subsection (8) (or any justice of the same sheriffdom) may revoke or vary that order, if a justice of the receiving sheriffdom consents.

283. Subsections (1) & (2) provide that where there are exceptional circumstances leading to an unusually high number of accused persons appearing from custody for a first calling in JP courts, and it is unlikely that those courts would be able to deal with all these cases, the prosecutor may apply to the sheriff principal for authority to take proceedings against some or all of the accused in a JP court in another sheriffdom. The sheriff principal may order that the proceedings are to be maintained at the receiving JP court, or at the original court. Under subsection (4), the order may be made in relation to a particular period of time, or particular circumstances.

Section 46 – Additional charge where bail etc. breached

284. This section amends sections 27 (breach of bail conditions: offences) and 150 (failure of accused to appear) of the 1995 Act.

285. The effect of these amendments is to allow a complaint to be amended to include an additional charge covering an offence committed as a result of breaching bail conditions or an offence committed in respect of a failure to appear at a diet. A similar provision to allow amendment of a complaint to include a charge of breaching an undertaking is to be found in section 22ZB(10).

Section 46A – Dockets and charges in sex cases

286. This section inserts two new sections, 288BA and 288BB into the Criminal Procedure (Scotland) Act 1995.

287. New section 288BA provides a statutory basis for the use by the prosecution of a ‘docket’ to inform the defence of the prosecution’s intention to lead evidence in sexual offence cases of an offence not charged.

288. Subsection (1) provides that an indictment or complaint may include a docket which specifies an act or omission connected with a sexual offence charged in the indictment or complaint. Subsection (2) provides that an act or omission is connected with the offence if it is specifiable by way of reference to a sexual offence and relates to the same event as the offence, or a series of events of which that offence is also part.

289. Subsection (3) provides that the docket is to be in the form of a note apart from the offence charged.

290. Subsection (4) provides that a docket may specify an act or omission even where, if it were instead charged as an offence, it could not competently be dealt with by the court in which the indictment or complaint is proceeding (e.g. a docket which states that evidence will be led that the accused raped the complainer, though the indictment is not being tried in the High Court).

291. Subsection (5) provides that where such a docket is included in an indictment or complaint, the accused is deemed to have been given fair notice of the intention to lead evidence of the act or omission specified in the docket, and the evidence is admissible as relevant.

292. Subsection (6) provides that any offence under the Sexual Offences (Scotland) Act 2009 and any other offence involving a significant sexual element shall be considered to be a 'sexual offence' for the purpose of this section.

293. New subsection 288BB provides that it shall be competent for the Crown to libel more than one statutory sexual offence under the Sexual Offences (Scotland) Act 2009 in a single charge (e.g. rape at section 1 of the 2009 Act and sexual assault at section 3 of that Act), and to libel one or more statutory offences under that Act and one or more common law offences together in a single charge (e.g. assault at common law and rape at section 1 of the 2009 Act).

294. Subsection (1) provides that an indictment or complaint may include a charge framed in the manner set out in subsections (2) or (3) or both.

295. Subsection (2) provides that a charge may be framed so as to comprise the specification of more than one sexual offence. Subsection (3) provides that it may specify in addition to a sexual offence, any other act or omission and may do so in any manner except by way of reference to a statutory offence.

296. Subsection (4) provides that, where an indictment or complaint is framed as mentioned in subsection (2) or (3) or both, it is to be regarded as a single, yet cumulative charge. Subsection (5) provides that the references to a 'sexual offence' in this section are to an offence under the Sexual Offences (Scotland) Act 2009.

Section 47 - Remand and committal of children and young persons

297. This section repeals the provisions contained in section 51 of the 1995 Act, which allow for the remand of children aged 14 and 15 years to prison.

298. Where a child under the age of 16 years is not released on bail or ordained to appear he shall instead be remanded to the local authority to be detained either in secure accommodation or a suitable place of safety.

Sections 48 to 51 - Prosecution of organisations

299. Sections 48 to 51 deal with procedural matters in relation to the prosecution of organisations.

300. Section 70 of the 1995 Act deals with proceedings on indictment against bodies corporate. It provides for how the indictment is served, appearance by a representative for certain purposes, and the recovery of fines. It does not make provision about partnerships or other unincorporated associations. In contrast, section 143 of the same Act, which deals with summary procedure, specifically provides for how proceedings may be brought against partnerships, associations, and bodies of trustees as well as bodies corporate.

301. Sections 48 to 51 clarify and extend these procedural provisions by extending them to apply to "organisations", as defined in the new definition inserted in the 1995 Act by section 48.

302. Section 49 amends section 70 of the 1995 Act to provide for:

- how indictments may be served on different sorts of organisation;
- how organisations may appear by a representative (defined in section 70(8) and (9)) for the purpose of stating objections to the competency or relevancy of the indictment or proceedings, tendering a plea of guilty or not guilty, making a statement in mitigation of sentence;
- the trial to proceed and the case be disposed of where an organisation does not appear either by a representative or by counsel or solicitor; and
- the recovery of fines.

303. Section 50 similarly amends section 143 of the 1995 Act to provide for:

- summary proceedings to be taken against an organisation in its corporate capacity for against an individual representative of the organisation;
- how organisations may appear by a representative for the purpose of stating objections to the competency or relevancy of the complaint or proceedings, tendering a plea of guilty or not guilty, making a statement in mitigation of sentence;
- the case to proceed and the case be disposed of where an organisation does not appear either by a representative or by counsel or solicitor; and
- recovery of fines.

304. Section 51 amends section 141(2)(b) of the 1995 Act to provide that an organisation (other than a body of trustees) may be cited in summary proceedings if the citation is left at its ordinary place of business with a partner, director, secretary or other official or if it is cited in the same manner as if the proceedings were in a civil court. Section 141(2)(c) already deals with citation of bodies of trustees.

Section 51A – Prohibition of personal conduct of case by accused in certain proceedings

305. This section extends the existing prohibitions in sections 288C, 288E and 288F of the 1995 Act, that prevent an accused person conducting their own defence in certain cases, to any relevant hearing in the proceedings. Previously, the prohibitions only applied to preliminary hearings, trials and victim statement proofs. "Relevant hearing" means any hearing in the course of proceedings at, or for the purposes of, which a witness is to give evidence.

306. Subsection (2) amends section 288C of the 1995 Act to ensure that, in proceedings in respect of a sexual offence specified in 288C(2), an accused is prohibited from conducting his case in person at or for any relevant hearing in the course of the proceedings. It also repeals section 288C(8).

307. Subsection (3) amends section 288D of the 1995 Act so that an accused must be notified that his case, at or for any relevant hearing, must be conducted by a lawyer.

308. Subsection (4) amends section 288E of the 1995 Act so that, in proceedings in respect of an offence specified in section 288E(2)(a), an accused is prohibited from conducting his case in person at or for any relevant hearing where a child witness under the age of 12 is to give evidence. It also repeals section 288E(8).

309. Subsection (5) amends section 288F of the 1995 Act an accused in proceedings in respect of any offence involving a vulnerable witness (other than proceedings to which sections 288C or 288E apply) is prohibited from conducting his case in person at or for any relevant hearing where that witness is to give evidence. It repeals subsection (6) of that section of the 1995 Act which defines "victim statement proof".

Section 52 - Disclosure of convictions and non-court disposals

310. This section makes provision relating to the circumstances in which convictions and non-court disposals may be disclosed to the court in summary and solemn proceedings. Two new sections, 101A and 166A, are introduced to the 1995 Act and amendment is made to the existing provisions of the 1995 Act in relation to the disclosure of non-court disposals.

311. Subsections (1) and (2) of section 101A provide that when considering sentence in solemn proceedings the court may have regard to convictions, or non-court disposals, acquired after the date of the offence with which the accused is charged but before the date of conviction.

312. Subsection (3) specifies the non-court disposals which are referred to in subsection (2). These are:

- fixed penalties under section 302(1);
- compensation offers under section 302A(1); and
- work orders under section 303ZA(6) of the 1995 Act.

313. A fixed penalty or compensation offer may be disclosed only if it has been accepted (or deemed to have been accepted) before the date of conviction. Only a work order that has been completed before the date of conviction may be disclosed to the court.

314. Subsection (4) of section 101A requires the prosecutor to provide the court with a notice of the conviction or non-court disposal.

315. Subsection (5) allows the court to consider convictions acquired on or after the date of the offence in other EU jurisdictions.

316. Section 52(2) substitutes a new section 166A into the 1995 Act. The previous version of section 166A, inserted by section 12 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, allowed the court in deciding on the disposal of a case in summary proceedings to have regard to any convictions acquired between the date of the offence and the date of conviction. The effect of new section 166A is to expand that provision to include non-court disposals. This is in the same manner as the provision for solemn proceedings under new section 101A discussed above.

317. Subsections (3) and (4) make amendments to section 302 and section 302A of the 1995 Act. Those sections provide for the offer of a procurator fiscal fixed penalty or compensation offer respectively. The amendments extend the provisions relating to the information to be provided to an alleged offender when an offer of these disposals is made. Subsections (3) & (4) provide that an offer of a fixed penalty or compensation offer must state that if it is accepted, or deemed to have been accepted, that fact may be disclosed to a court in any proceedings to which the alleged offender is (or is liable to become) subject at that time.

318. Amendments to section 303ZA of the 1995 Act under subsection (5) make provision relating to the information that must be included in an offer of a work order.

319. In addition to the information listed in section 303ZA the offer must also state that:

- if it is refused, or not completed, that fact may be disclosed in any proceedings for the offence in question;
- if it is completed, that fact may be disclosed in any proceedings for an offence committed within two years of the date of completion;
- if it is completed, that fact may be disclosed in any proceedings to which the alleged offender is (or is liable to become) subject at that time.

Section 52A - Convictions by courts in other EU member States

320. Section 52A introduces schedule 2A, which details a range of amendments to the 1995 Act and to other enactments to implement the Council of the European Union Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings. The effect will be that previous convictions issued by other Member States of the European Union will have the same effect as previous convictions handed down by a court in Scotland throughout the criminal proceedings: at the pre-trial stage, at the trial, and at the time of sentencing. Section 52A(2) includes an Order-making power to enable the Scottish Ministers to make any further amendments to legislation which are required to fully implement the Framework Decision. Provision in section 143(4) means that any order will be subject to the affirmative resolution procedure in the Scottish Parliament.

Section 53 – Time limits for lodging certain appeals

321. Section 74 of the 1995 Act makes provision in solemn criminal cases to allow for appeals to be taken in respect of certain decisions made by a court at either a first diet or a preliminary hearing. Section 174 of the 1995 Act makes provision for the procedure to be followed at the "first diet" of a summary criminal case. Both sections provide for appeals to be made against

certain decisions of the court and stipulate that any appeal must be lodged no later than two days after the decision. Subsections (2) and (3) of section 53 amend sections 74 and 174 of the 1995 Act, by extending the time limit for lodging these appeals from 2 days to 7 days.

Section 54 – Submissions as to sufficiency of evidence

322. This section inserts sections 97A, 97B 97C and 97D into the Criminal Procedure (Scotland) Act 1995. New section 97A effectively creates a statutory replacement for what is termed a "common law submission". Under the common law a submission to the court may be made by the defence at the end of all evidence in a case. If successful, it typically results in a direction, in the course of the judge's charge to the jury, that the jury should not convict on a particular charge, or should consider only a reduced charge. This direction may be focused on the basis that the evidence in the case is insufficient in law to justify a conviction. It is made in the context of the judge's role in determining questions of law, which comes before the ultimate assessment of questions of fact by the jury.

323. At present, an accused may make a submission as of right only after the Crown speech to the jury, although the Crown commonly consents to a submission being made at the close of the evidence. Where a submission is made after the Crown speech, the Crown does not have a right of reply, on the basis that at that stage the prosecutor is *functus officio* (prevented from taking the matter further as a result of having fulfilled his or her official duties).

324. Subsection (1) of section 97A gives the accused the right to make certain submissions immediately after the close of the evidence or after the prosecutor has addressed the jury. Subsection (2)(a) permits such a submission to contend that the evidence is insufficient in law to justify the accused's being convicted of the offence (or of any other offence of which he could be convicted under the indictment). The meaning of "insufficient in law" is the same as in section 97 of the 1995 Act and is a test of technical sufficiency rather than a test as to the quality of the evidence. This permits an accused to submit that there is no case to answer. Accordingly, a submission under subsection 2(a) will most commonly succeed where there is an absence of corroboration or in the rare circumstance (such as arose in *HMA v Purcell* 2008 SLT 44) where the indictment is irrelevant and the judge could not permit the jury to convict regardless of the evidence. Subsection (2)(b) permits a submission to be made that there is no evidence to support some part of the circumstances set forth in the indictment; for example, to support the allegation of the use of a weapon in a charge of assault.

325. Section 97B applies where the accused makes a submission under section 97A(2)(a) that the evidence is insufficient in law to justify the accused's being convicted of the indicted offence or of any other offence of which the accused could be convicted under the indictment.

326. Subsection (2) makes provision for where the judge is satisfied that the evidence is insufficient in law to justify a conviction for the indicted offence. It ensures that the trial will proceed only where the judge is satisfied that the evidence is sufficient in law to justify the accused's being convicted of a related offence or where another offence is libelled in the indictment which has not itself been subject to a submission under section 97A(2). When the judge is satisfied that the accused may be convicted of a related offence, the judge must order that the indictment be amended to reflect this.

327. Subsection (3) provides for the continuation of the trial where the judge rejects a submission under section 97A(2)(a).

328. Subsection (5) ensures that the judge or the clerk of court will check and confirm that an amendment to the indictment under subsection (2)(b) has been properly made.

329. Section 97D makes explicit provision to ensure that it will not be competent for the defence to make a common law submission to the effect that no reasonable jury, properly directed on the evidence led in the case, could convict on a particular charge.

330. The provision in this section is a rejection of the Scottish Law Commission's Recommendation 2(a)(iv), made in its 2008 Report on Crown Appeals. The underlying policy background is set out in paragraphs 284-286 of the Bill's Policy Memorandum.

Section 55 – Prosecutor's right of appeal

331. The Crown is not able under the existing law to challenge a decision by a judge that brings a solemn criminal case to an end. The existing rights of appeal available to the Crown are highly restricted. The prosecution may be able to use a bill of advocation in relation to some aspects of the trial process, although this is normally confined to procedural errors in the preliminary stages of a case. The Crown may also appeal against sentence under section 108 of the Criminal Procedure (Scotland) Act 1995. This can be on a number of grounds, including that the disposal of the case was unduly lenient. The other option available to the Crown is not technically an appeal, but a reference made by the Lord Advocate under section 123 of the 1995 Act where the Crown wish the High Court to consider a particular point of law that arose in a criminal case. This has no effect on the disposal of the case that led to the reference.

332. Section 107A gives the Crown a right of appeal against certain decisions by a judge that bring a criminal case to an end without a decision by a jury. These are rulings of no case to answer under section 97 and decisions under section 97B(2)(a) (a decision that the evidence is insufficient in law to convict the accused - the statutory replacement for a common law submission). The section also creates a right of appeal in relation to certain directions for the indictment to be amended. Section 107B provides the Crown with a right of appeal against certain findings relating to the admissibility of prosecution evidence. None of these changes create rights of appeal in relation to a decision by a jury.

333. Section 107A(1)(a) creates a right of appeal in relation to a decision by a judge under section 97 that, at the close of the evidence for the prosecution, the evidence led is insufficient in law to justify the accused being convicted of the offence charged. Paragraph (a) of subsection (1) also provides a right of appeal in relation to a decision taken under section 97B(2)(a), to acquit the accused of the indicted offence on the grounds that the evidence is insufficient in law to justify the conviction of the accused for that offence.

334. Paragraph (b) of subsection (1) creates a right of appeal in relation to a direction made under section 97B(2)(b). This is a direction for the indictment to be amended and is given where the judge is satisfied that the evidence is sufficient in law to justify the accused being convicted of a related offence. Paragraph (b) also provides a right of appeal against a decision under

section 97C(2) directing an amendment to the indictment to reflect a decision that there is no evidence to support some part of the circumstances set out in the indictment.

335. Subsections (1A) to (1E) make provision for time limits where a prosecutor wishes to exercise the Crown right of appeal set out in subsection (1).

336. Subsections (1A) and (1B) cover the position where a judge has made an acquittal or direction of a type specified in subsection (1). The subsections permit the prosecutor to respond to the acquittal or direction by seeking an adjournment of up to two days in order to consider whether to bring an appeal. Where the adjournment is sought in respect of an acquittal, this must be granted unless the court considers that there are no arguable grounds of appeal. Where the adjournment is sought in respect of a direction, this must be granted unless the court considers that it would not be in the interests of justice to do so.

337. Subsection (1D) sets out the timing for a prosecutor to bring an appeal under section 107A. It requires the prosecutor to take immediate action if it is wished to appeal an acquittal or direction of a kind listed in subsection (1). The prosecutor will have to either immediately intimate an intention to appeal or seek an adjournment under subsection (1A) or (1B). Where an adjournment is sought, any subsequent intimation of appeal would have to be made immediately after the period of adjournment or immediately after the refusal of the request for an adjournment.

338. The intimation under subsection (1D) is only of an intention to appeal. Section 57(1) of this Bill amends section 110(1) of the 1995 Act to provide that there is usually an overall deadline of 7 days from the making of the decision being appealed for the lodging of the note of appeal.

339. Subsection (2) of section 107A requires the court, where the prosecution has intimated an intention to appeal (or where there is an adjournment under subsection (1A) for the prosecution to consider making an appeal) to suspend the effect of the acquittal. This will allow the court to grant bail without there appearing to be two contradictory orders in operation.

340. Section 4(2) of the Contempt of Court Act 1981 allows a court, where it appears to be necessary in order to avoid a substantial risk of prejudice to the administration of justice in the proceedings or in any other proceedings which are pending or imminent, to order that the publication of any report of the proceedings be postponed for such period as the court thinks necessary. Subsection (2)(a) of section 107A allows the court, where the prosecution has intimated an intention to appeal (or where there is an adjournment under subsection (1A) for the prosecution to consider making an appeal) to make an order under section 4(2) of the Contempt of Court Act 1981. This will avoid the risk of prejudice to any further proceedings.

341. Subsection (2)(b) permits the court to order the detention of an acquitted person in custody or admit him to bail pending the hearing of the prosecution appeal. Subsection (3) ensures that detention can only occur where there are arguable grounds of appeal.

342. Most rulings on the admissibility of evidence are made at preliminary diets or preliminary hearings. However, some evidential questions may still arise during the course of a trial, for

example where an unexpected development occurs in the course of oral evidence. If a challenge to admissibility of evidence is successful and the accused is acquitted, it could be maintained that a ruling on admissibility had been fatal to the entire prosecution.

343. Section 107B gives the prosecutor a right of appeal against findings made during the course of the trial that evidence which the prosecution seeks to lead is inadmissible. Subsection (2) establishes that the leave of the trial court is required in all appeal cases involving a finding that evidence is inadmissible. Subsection (3) requires any motion for leave to appeal to be made before the close of the Crown case. Subsection (4) sets out the factors to be taken into account by the court in determining whether or not to grant leave to appeal.

344. Subsection (1) of section 107C allows the High Court, in considering an appeal under section 107A or 107B, to review not only the decision appealed against but any earlier decisions which may have a bearing on the decision appealed against. So, for example, where an acquittal under section 97 is appealed, the High Court will be able to review not only the trial judge's decision that the evidence led by the prosecution was insufficient in law to justify the conviction of the accused, but also an earlier finding by that judge that an element of prosecution evidence was inadmissible. Subsection (2) provides that the test to be applied by the High Court in considering an appeal under section 107A or 107B is whether the trial judge's decision was wrong in law.

345. If a Crown appeal (under either section 107A or 107B) is successful, then the Crown may seek to continue the prosecution. It is likely that in the majority of cases the continuation of the existing trial would not be a realistic possibility because of the delay that would necessarily be incurred during the appeal process. Proceeding with the case in those circumstances would therefore require the Crown to raise a fresh prosecution. However, in some instances it may be considered practicable for the appeal to be heard and determined during an adjournment of the trial, allowing the trial to continue if the appeal is upheld. Such an appeal is defined as an "expedited appeal" in subsection (3) of section 107D.

346. Section 107D makes provision for expedited appeals to be heard and determined during an adjournment of the trial. Subsection (1) and (2) provide for the court to take steps to determine whether it would be practicable to continue the existing trial following the appeal. After hearing the views of both the Crown and the accused, the Court will decide whether the appeal should be heard during an adjournment of the trial.

347. Subsection (6) means that where an appeal against an acquittal under section 97 or 97B(2)(a) is successful; the High Court will quash the acquittal and direct that the trial is to continue in respect of the offence.

348. Section 107E makes provision for appeals against an acquittal that are not subject to the expedited appeal procedure provided for by section 107D. It applies to acquittals arising under section 97 or section 97B(2)(a) or as a consequence of a ruling that evidence that the prosecution sought to lead was inadmissible under section 107B(1). This section will apply where it would not be practicable to continue the existing trial whilst the appeal against conviction is being considered. Subsection (1) limits section 107E to appeals against an acquittal. Non expedited appeals that are *not* against an acquittal are dealt with under section 107F.

349. The effect of subsections (1)(c) and (2) are that where the High Court (sitting as a court of appeal) determines that the acquittal was wrong in law, it shall quash the acquittal. Subsection (3) provides for the High Court to grant authority for a new prosecution in accordance with section 119 of the Criminal Procedure (Scotland) Act 1995 for the same or any similar offence arising from the same facts. The High Court will not grant authority to bring a new prosecution where it considers that doing so would be contrary to the interests of justice.

350. Subsection (4) provides that if no motion is made for authority to bring a new prosecution, or if the High Court refuses such a motion, the High Court shall itself acquit the accused of the offence in question.

351. Section 107F makes provision for appeals made under section 107A or 107B that are not appeals against an acquittal and that are not subject to the expedited appeal procedure provided for by section 107D. This section will apply where it would not be practicable to continue the existing trial whilst the appeal against conviction was being considered. The practical effect of subsection (1) is to limit section 107F to non-expedited appeals against:

- a direction to amend the indictment to cover a related offence (where the judge is satisfied that the evidence is insufficient in law to justify the accused's being convicted of the indicted offence) (section 97B(2)(b));
- a direction to amend the indictment (where the judge has ruled that there is no evidence to support some part of the circumstances set out in the indictment) (section 97C(2);
- a finding that prosecution evidence is inadmissible.

352. Non expedited appeals against an acquittal are dealt with under section 107E.

353. Because the appeal in question is not being expedited, the trial is unable to continue in relation to any offence to which the appeal relates. Subsection (2) therefore provides for the court to desert the diet in relation to that charge (or those charges) *pro loco et tempore* and, under subsection (3), the trial shall proceed only in relation to any other charges remaining on the indictment. The ordinary consequence of desertion *pro loco et tempore* is that the Crown is free to bring a fresh indictment (see Renton & Brown, *Criminal Procedure* (6th edn, R 22: Apr 2005) paragraph 18-21). Subsection (3A) ensures that a trial will not continue in circumstances where a Crown appeal has been brought in relation to one aspect of the case and it is thought that no purpose would be served in continuing with the rest of the case. This might arise where an appeal is made in relation to a judicial decision affecting some but not all of the charges on the indictment.

354. Subsection (4) provides for the High Court to grant authority for a new prosecution in accordance with section 119 of the Criminal Procedure (Scotland) Act 1995 for the same or any similar offence arising from the same facts. The High Court (sitting as a court of appeal) will not grant authority to bring a new prosecution where it considers that doing so would be contrary to the interests of justice.

Section 56 – Power of High Court in appeal under section 107A of 1995 Act

355. This section amends section 104 of the 1995 Act to make a number of powers available to the High Court for use in connection with appeals under sections 107A and 107B. Section 104 already confers powers upon the High Court when hearing appeals under section 106(1) or 108 of that Act, including power to order the production of documents, to hear evidence etc.

Section 57 – Further amendment of the 1995 Act

356. This section makes a number of amendments to the 1995 Act. The amendments made by subsections (1) to (3) relate to the lodging of notes of appeal and the provision of the trial judge's report. Subsection (4) makes amendments concerned with the procedure following the granting of the High Court's authority to bring further proceedings following a successful Crown appeal.

357. Section 110 of the 1995 Act makes provision for notes of appeal. Subsection (1) of that section contains time limits for lodging such notes and provides for the transmission of copies of notes to the court and to the parties concerned in the appeal. Subsection (3) of that section requires that a note of appeal identify the proceedings, contain a full statement of the ground of appeal, and be in as nearly as may be the form prescribed by Act of Adjournal. Subsection (4) of that section provides that, except by leave of the High Court on cause shown, it shall not be competent for an appellant to found any aspect of his appeal on a ground not contained in the note of appeal.

358. Subsection (1) of section 57 inserts new paragraphs (c), (d) and (e) into section 110(1) of the 1995 Act. Paragraphs (c) and (d) make provision for appeals which have not been expedited using the procedure in section 107D. They provide an overall deadline of 7 days for the lodging of an appeal. In relation to appeals against an acquittal or direction made under section 107A(1), the 7 day period runs from the day of intimation by the acquittal or direction. In relation to appeals under section 107B(1), the seven day period runs from the granting of leave. Paragraph (e) makes provision for expedited appeals and requires the lodging of the appeal to be as soon as practicable after a decision under section 107D(2) that an appeal be expedited. An effect of these paragraphs is that subsections (3) and (4) (of section 110 of the 1995 Act) apply to Crown appeals as they do to appeals by a convicted person under section 106 and by the Lord Advocate against disposal under section 108. (Note, however, that while the time limits for appeals by convicted persons may be extended under either section 110(2) or 111(2), the time limit imposed upon a Crown appeal by inserted paragraphs (c) and (d) of section 110(1) cannot be extended).

359. Section 113 of the 1995 Act requires the trial judge, on receiving the copy note of appeal sent to him under section 110(1), to furnish the Clerk of Justiciary with a written report giving the judge's opinion on the case generally and on the grounds contained in the note of appeal. It is appropriate that such a note should be provided to assist the High Court in considering a Crown appeal; but in an expedited appeal, where the appeal is to be heard during an adjournment of the trial, it will often be impractical to require a full report.

360. Subsections (2) and (3) of section 57 of this Bill address these points. The effect of subsection (2), together with subsection (1), is to apply section 113 of the 1995 Act to non-expedited appeals: in any such appeal, the trial judge will be required to provide a full report. Subsection (3) inserts a new section 113A into the 1995 Act, permitting the trial judge in an expedited appeal to furnish the Clerk of Justiciary with such written observations as he or she

thinks fit. However the High Court may hear and determine an appeal without any written observations.

361. Subsection (4) of section 57 makes amendments to ensure section 119 of the 1995 Act (provision where High Court authorises new prosecution) applies to Crown appeals. Paragraph (a) inserts reference to new prosecutions authorised under section 107E(3) and section 107F(4) in relation to non expedited appeals arising under section 107A or 107B.

362. Paragraph (b) replaces subsection (2) of section 119 of the 1995 Act. New subsection (2)(a) reproduces the existing law which states that a new prosecution granted where a conviction is quashed under section 118 of the 1995 Act (following a successful appeal by the defence) may not proceed upon the basis of a more serious charge than that on which the accused was convicted in the earlier proceedings.

363. New subsection (2)(b) provides, where a new prosecution is granted after a successful appeal against an acquittal under section 107A or 107B, that a new prosecution may not proceed upon the basis of a more serious charge than that on which the accused was acquitted in the earlier proceedings.

364. New subsection (2)(c) places a similar restriction in relation to a new prosecution authorised under section 107F(4) resulting from an appeal against a direction as to sufficiency, admissibility or lack of evidence. By virtue of this subsection a new indictment may not contain a more serious charge than that libelled in the original proceedings.

365. Where a successful appeal under section 107A has resulted in a new prosecution, new subsection 2A of section 119 of the 1995 Act (inserted by paragraph (c)) ensures that the circumstances set out in the new indictment are not to be inconsistent with any direction made by a trial judge to amend the old indictment under section 97B(2)(b) or 97C(2). A direction under those provisions would have been to either include a related offence within the indictment (the judge having ruled that the evidence was insufficient in law to justify a conviction under the indicted offence) or to reflect a ruling that that there was no evidence to support some part of the circumstances set out in the indictment. However, this requirement does not apply if the High Court determines that the direction under section 97B(2)(b) or 97C(2) was wrong in law.

366. Paragraph (d) amends subsection (9) of section 119 of the 1995 Act. The effect of this amendment is that where two months elapse following the date upon which the High Court grants authority under section 107E(3) or section 107F(4) and no new prosecution has been brought, the order granting authority to bring a new prosecution shall have the effect, for all purposes, of an acquittal.

Sections 58 – 60 - Retention and use of samples etc.

367. Sections 58 to 60 contain provisions on the retention and use of samples.

368. The law on police powers to take, retain and use DNA, fingerprints and other forensic data (such as palm prints) is predominantly set out in sections 18-20 of the 1995 Act. In general, samples and records of forensic data must be destroyed once the decision is taken not to

prosecute an individual for the offence the samples and records were collected in connection with, or, if the individual is prosecuted, when the proceedings end without a conviction. If the individual is found guilty of the offence, the samples and records of their forensic data can be retained indefinitely.

369. Section 18A of the 1995 Act allows an exception to this general rule where criminal proceedings have been initiated against an individual for an offence, but end without a conviction. This only applies to criminal proceedings for a list of serious sexual or violent offences set out in section 19A(6) of the 1995 Act. In these circumstances, DNA samples and records can be retained by the police for at least three years. At the end of that time, the Chief Constable can apply to a sheriff for these samples and records to be kept for up to a further two years and this process can be repeated at the end of each extended period.

370. Section 58 amends sections 18 and 18A of the 1995 Act, extending this exception to cover the retention of “relevant physical data” (which is defined in section 18(7A) of the 1995 Act as fingerprints, palm prints, prints or impressions of another external part of the body, and records of skin on an external part of the body) as well as DNA records.

371. Section 58(2)(a) amends section 18(3) of the 1995 Act which concerns the destruction of forensic data taken from people who are not convicted or against whom no criminal proceedings are raised. Section 58(2)(a) inserts a reference to the new sections 18B and 18C of the 1995 Act introduced by section 59(1). It means that forensic data taken under section 18 of the 1995 Act do not have to be destroyed following a decision not to raise criminal proceedings if criteria in section 18B or 18C (retention of forensic data from children’s who are referred to a children’s hearing) are met.

372. The definition of “relevant physical data” in section 18(7A) of the 1995 Act (mainly fingerprints and palm prints) applies throughout sections 18A to 19C of the 1995 Act. Section 58(2)(b) and (c) modifies the definition of “relevant physical data” in section 18(7A)(d) for the purpose of section 19C of the 1995 (inserted by section 60). This is to make it clear that when forensic data is obtained from outside Scotland a record of a person’s skin on an external body part constitutes “relevant physical data”. This modification is made because Law enforcement agencies outside Scotland could not take a record of a person’s skin on an external body part by a device approved by Scottish Ministers.

373. Section 58(3)(a), (b), (c) and (d) amends section 18A of the 1995 Act so that this section applies to relevant physical data, as well as to samples and information derived from samples which are taken under section 18 of the Act.

374. Section 58(3)(ca) amends section 18A of the 1995 Act, providing for the sheriff principal to have the specific power to grant an order amending or further amending the destruction date of a DNA sample, profile or other types of forensic data (fingerprints etc) if he overturns the decision of a sheriff to refuse an application by a chief constable to extend the period of retention.

375. Section 58(3)(e) modifies the definition of a relevant sexual offence in section 18A of the 1995 Act to replace the offence “shameless indecency” with “public indecency”. The change

provides that public indecency is only a relevant sexual offence if it is apparent from the charge in the criminal proceedings which are raised that there was a sexual element to the behaviour.

376. Sections 58A inserts new section 18AA and 18AB into the 1995 Act. New section 18AA provides that DNA samples, relevant physical data and information derived from a sample taken from individuals who are arrested or detained for an offence do not have to be destroyed for a specified time if that person is issued with and subsequently accepts a relevant offer issued under sections 302 to 303ZA of the 1995 Act. A definition of "relevant offer" is found in section 18AA(3). An acceptance of a "relevant offer" is not a conviction but is classed as an alternative to prosecution for an offence.

377. Section 18AA(5) sets out what the date of destruction is and is dependent on the type of offences for which a relevant offer is issued. A relevant offer can be issued in relation to more than one offence. Where the fiscal disposal only relates to offences which are not relevant sexual or relevant violent offences, the data must be destroyed within two years of the date on which the disposal was issued. That period cannot be extended.

378. Where the fiscal disposal relates only to a relevant sexual or relevant violent offence, as defined by reference to the list of sexual and violent offences set out in section 19A(6) of the 1995 Act, the forensic data can be retained for at least three years from the date on which the offer was issued. A fiscal disposal can be issued in relation to a number of offences. Where a disposal is issued in respect of a mixture of offences (i.e. some of the offences are relevant sexual or relevant violent offences and some are not), the forensic data can be retained for at least three years from the date on which the measure was issued.

379. Relevant offers are not convictions; they are alternatives to prosecution for an offence. This means that if an individual were to refuse to accept a relevant offer their forensic data can be retained in accordance with section 18(3) of the 1995 Act until the fiscal decides whether or not to raise criminal proceedings against that person. If the fiscal decides not to raise criminal proceedings and does not issue a further relevant offer, the person's forensic data must then be destroyed as soon as possible. If however, the fiscal decided to raise criminal proceedings following the refusal to accept a fixed penalty notice under the 2004 Act, that person's forensic data can be retained indefinitely under section 18(3) of the 1995 Act if they are subsequently prosecuted and convicted of the offence in court.

380. New section 18AB provides for the extension of the retention period beyond three years where the fiscal offer was issued, and accepted, in relation to a relevant sexual or relevant violent offence. The police can apply to a sheriff to have the retention period extended for a further period of two years, on a rolling basis. The decision of a sheriff can be appealed to the sheriff principal by both parties. The sheriff principal's decision on the application will be final.

381. Section 58B inserts new section 18AC into the 1995 Act. This section provides that DNA samples, relevant physical data and information derived from a sample taken from individuals who are arrested or detained for a fixed penalty offence (as defined by section 18AC) do not have to be destroyed if that person is issued with and subsequently accepts a fixed penalty notice issued under section 129 of the Antisocial Behaviour (Scotland) Act 2004 ("the 2004 Act") or pays the sum which become due under section 131(5) of the 2004 Act. Forensic data can only be retained under new section 18AC of the 1995 Act when a police constable has arrested or

detained a person under section 14(1) of the 1995 Act before he or she issued a fixed penalty notice. The forensic data must be destroyed no later than two years from the date on which the fixed penalty notice was issued. Unlike the provisions in section 18AA and 18AB of the 1995 Act, in section 18AC there is no provision for an extension of the retention period.

382. Section 18AC(3) provides that if there is more than one fixed penalty notice issued in connection with other fixed penalty offences arising out of the same incident then the data must be destroyed no later than two years from the date of the later notice.

383. Fixed penalty notices are not convictions; they are alternatives to prosecution for an offence. This means that if an individual were to refuse to accept a fixed penalty notice, their forensic data can be retained in accordance with section 18(3) of the 1995 Act until the fiscal decides whether or not to raise criminal proceedings against that person. If the fiscal decides not to raise criminal proceedings and does not issue a fiscal alternative to prosecution under section 302 to 303ZA of the 1995 Act, the person's forensic data must then be destroyed as soon as possible. If however, the fiscal decided to raise criminal proceedings following the refusal to accept a fixed penalty notice under the 2004 Act, that person's forensic data can be retained indefinitely under section 18(3) of the 1995 Act if they are subsequently prosecuted and convicted of the offence in court.

384. Section 59 inserts new sections 18B and 18C to the 1995 Act. These introduce a similar exception to the normal rules governing retention of DNA, fingerprint and other physical data to that described above in relation to section 58, covering certain cases dealt with by the Children's Hearings System. This applies where a child is referred to a Children's Hearing on the grounds that they have committed one of a list of specified serious violent or sexual offences and has had DNA, fingerprint or other physical data taken from them under section 18 of the 1995 (upon his/her arrest or detention). The list of relevant offences will be drawn from the lists of sexual or violent offences in section 19A(6) of the 1995 Act, and set out in secondary legislation, which will need to be approved by the Scottish Parliament. The definition of "relevant sexual offence" is modified by section 59(11) to include public indecency if it is apparent from the ground of referral to the children's hearing that there was a sexual aspect to the behaviour of the child.

385. If the child and relevant person (a parent or person with control over the child) accepts that he or she has committed one of the relevant offences, or a sheriff establishes that they have done so, DNA, fingerprint or other physical data does not have to be destroyed for at least three years.

386. Section 18C of the 1995 Act provides that the Chief Constable can apply to a sheriff for an extension of up to two years at the end of this time, and this process can be repeated at the end of each extended period. The decision of the sheriff can be appealed to the sheriff principal by both the chief constable (if the application is refused by the sheriff) or by the person's whose forensic data is retained (if the sheriff grants the application). Section 18B(4) and (4A) provides that the sheriff principal allows the appeal that he or she may make an order amending or further amending the destruction date. The decision of the sheriff principal is final. The sheriff principal must not specify a destruction date more than 2 years later than the previous date.

387. Section 18C(7) provides for forensic data to be destroyed as soon as possible after the period in which an appeal may be brought has elapsed or after it is withdrawn or determined and results in no further extension.

388. If a child is referred to a Children's Hearing on the grounds of having committed a relevant offence and refuses to accept that such an offence was committed, any DNA, fingerprints and other physical data which has been taken from that child under section 18 of the 1995 Act must be destroyed. This also applies where the commission of a relevant offence by the child is not established by a sheriff, to whom a children's hearing refers the case to establish the facts or who reviews the case under section 85 of the Children (Scotland) Act 1995.

389. Section 59A amends and extends the list of relevant sexual and relevant violent offences in section 19A(6) of the 1995 Act. The term "shameless indecency" is replaced with the offence of "public indecency" in the list of relevant sexual offences. The offence of public indecency will only be a "relevant sexual offence" if a court makes a finding under paragraph 60 of Schedule 3 to the Sexual Offences Act 2003 that there was a significant sexual aspect to the behaviour. Section 59A also adds section 47(1), 49(1), 49A(1) and (2) and 49C of the Criminal Law (Consolidation) (Scotland) Act 1995 (offences involving the carrying of an offensive weapon or articles with a point or blade in a public place) to the list of "relevant violent offences" in section 19A(6) of the 1995 Act.

390. The police have the power to take forensic data in section 19A(2) of the 1995 Act from any person who has been convicted of a relevant sexual or a relevant violent offence. They will therefore be able to exercise these powers in relation to a person who has been convicted of these additional offences. Section 18A of the 1995 Act provides that any forensic data which is taken from a person under section 18 does not have to be destroyed for at least 3 years if a person is proceeded against for a relevant sexual or relevant violent offence as set out in section 19A(6) of the 1995 Act. Provided the criteria of section 18A are met, a person may have their forensic data retained for at least 3 years if they are proceeded against for one of these additional offences.

391. Section 60 inserts a new section 19C into the 1995 Act, setting out the general purposes for which DNA and fingerprint information can be used. This makes it clear that the police can use the DNA and fingerprint information – including data taken from, or provided by, a person from outwith Scotland, provided it is held by a police force in Scotland, the Scottish Police Services Authority (SPSA) or a person acting on behalf of a police force in Scotland or the SPSA - as a tool to help prevent, detect, and investigate crime, including cross-border crime, and prosecute crime in court. It also allows the information to be used to establish the identity of a deceased person and also a person from whom DNA samples, relevant physical data and information from samples comes from, as there may be a need to identify a person from whom a body or body part where no criminal activity is suspected: for example, following a natural disaster. These purposes apply whether the crime or incident occurs or is being investigated in Scotland, elsewhere in the UK or abroad, enabling the police to assist with investigations and prosecutions wherever they take place.

392. New section 19C(2A) to (2C) of the 1995 Act provides that any forensic data which is provided to a police force in Scotland, the SPSA or a person acting on behalf of such a force or the SPSA can be used for the purposes set out in section 19C(2) but also that this information can be checked against other relevant physical data, samples or information derived from samples which are held by a police force or the SPSA. Forensic data provided by other jurisdictions can also be checked against Scottish data held on the relevant databases.

393. The terms of section 19C(3) of the 1995 Act introduced by section 60 mean that forensic data collected in Scotland can be used for the investigation of a crime or suspected crime and the conduct of a prosecution in a country or territory outside Scotland including England, Wales and Northern Ireland.

394. Section 20 of the 1995 Act (use of prints, samples etc) is superseded by new section 19C. The repeal of section 20 is provided for in schedule 5 of the Bill.

395. At present, police use common law powers for the use of fingerprints and DNA in criminal investigations and prosecutions. The powers in new section 19C aim to provide clarity on the purpose for which samples and records of forensic data can be used. They are without prejudice to existing powers at common law. New section 19C(2) ensures safeguards for the uses of the data.

396. Section 60(2) amends section 56 of the Criminal Justice (Scotland) Act 2003 ("the 2003 Act") which concerns the retention of samples or relevant physical data when given voluntarily. Section 56 applies to DNA samples, information derived from samples and relevant physical data. Section 60(2) removes references to "information derived from relevant physical data" found in section 56 of the 2003 Act. As there is no identifiable information which is classed as "information derived from relevant physical data", removing this phrase removes any doubt as to what it is intended to catch.

397. Section 60(2)(b) provides that any forensic data taken from people under section 56 of the 2003 Act can be held or used for the prevention or detection of crime, the investigation of an offence or conduct of a prosecution or the identification of a person or a deceased person. This includes cross-border crime.

Section 61 - Referrals from Scottish Criminal Cases Review Commission: grounds for appeal

398. The Scottish Criminal Cases Review Commission was established by section 194A of the 1995 Act, inserted by the Crime and Punishment (Scotland) Act 1997.

399. Section 194B(1) of the 1995 Act sets out the Commission's power to refer a person's conviction or sentence to the High Court. Where the Commission makes a reference to the High Court, the Commission is required to give the Court a statement of their reasons for making the reference, in accordance with section 194D(4).

400. The High Court is then required to consider the matter referred as if it were an appeal under Part 8 (appeals from solemn proceedings) or Part 10 (appeals from summary proceedings) of the 1995 Act.

401. Section 194C of the 1995 Act sets out the grounds on which the Commission can make a reference to the High Court. These are that the Commission believe that a miscarriage of justice may have occurred, and that it is in the interests of justice that a reference should be made.

402. The effect of a reference by the Commission is that there is no need for the applicant to seek leave to appeal under section 107 of the 1995 Act (for solemn appeals) and section 180 (for summary appeals). Where the Commission has made a reference to the High Court there is nothing to limit the appellant from raising grounds of appeal that are not related to the reasons that the Commission made the reference. Section 194D is being amended so that where the Commission make a reference, an appeal arising from this reference can only be based on grounds relating to one or more of the reasons given by the Commission in its statement of reasons.

403. The new subsection (4A) being inserted into section 194D of the 1995 Act will require that the grounds for appeal arising from an SCCRC reference must relate to one or more of the reasons contained in the Commission's statement of reasons. However, the statement of reasons produced by the Commission will commonly set out not only the reasons why it is making a referral but also the other possible grounds it has considered and has decided not to refer on. The inclusion of the words "for making a reference" in this subsection will avoid any risk of an appeal being founded on something the Commission has said in the statement of reasons which is not a reason for referral.

404. If the appellant seeks to make a case based on grounds of appeal that are not related to the reasons contained for the Commission's reference, then this will only be possible if leave is given by the High Court in the interests of justice.

PART 4 - EVIDENCE

Section 61A – Admissibility of prior statements of witnesses: abolition of competence test

405. This section clarifies that the abolition of the competency test for all witnesses – brought into effect by section 24 of the Vulnerable Witnesses (Scotland) Act 2004 Act - also applies to evidence given by a prior statement made before 1 April 2005. Section 24 removed the court's entitlement to ask questions of witnesses to establish that they had a sufficient understanding of the truth, understood the duty to tell the truth and had the ability to give coherent testimony.

406. Where a prior statement made before the coming into force of section 24 of the 2004 Act is sought to be admitted as evidence in a case under section 260 of the 1995 Act, then for the purposes of subsection 2(c) of section 260, section 24 is taken to have been in force at the time the statement was made. This means that the court, when deciding whether to admit the statement, should not take any steps to establish whether the witness understood the matters set out in section 24 at the time the statement was made.

Section 62 – Witness statements: use during trial

407. Section 62 creates a power for the court to allow a witness to refer to his statement during the giving of evidence subject to the witness statement having been made available to the Crown and to the defence in advance of the trial. Subsection (3) extends the applicability of section 262 (construction of sections on hearsay) of the 1995 Act to witness statements. Within that, subsection (3)(c) disapplies the meanings of "criminal proceedings" and "made" to witness statements.

Section 63 - Spouse or civil partner of accused a compellable witness

408. This section makes provision for the spouse or civil partner of an accused to be a competent and compellable witness. This section amends section 264 of the 1995 Act and repeals section 130 of the Civil Partnership Act 2004. The common law provisions regarding the spouse as a witness will also be overturned.

409. This section provides that the spouse or civil partner of an accused is a competent and compellable witness for the prosecution, accused or co-accused in the proceedings against the accused. Currently the law provides that a spouse is a competent witness in all circumstances. However, s/he is a compellable witness for the prosecution or a co-accused only where s/he is compellable at common law. In respect of the common law, a spouse is only compellable where the accused is charged with an offence against him or her. The operation of the common law rule is not restricted to offences of personal injury, but extends to false accusation and to offences against property, including theft and even the forgery of the spouse's signature on a cheque.

410. It does not extend to damage to property of which the spouse is only a tenant, unless perhaps if s/he is liable to pay for the repair of the damage. If a spouse of an accused is the victim of the crime with which the accused is charged then their marital status is of no consequence. A spouse and an unmarried partner would be a compellable witness for the prosecution in such a case.

411. It is only where the spouse is not the victim that s/he can decline to give evidence for the prosecution. If the spouse of an accused is called as a Crown witness, in circumstances in which s/he is not compellable against her husband or wife, s/he has the option of declining to give evidence. But if s/he elects to give evidence against the accused, s/he cannot decline to answer questions which incriminate the spouse. An unmarried partner cannot decline to give evidence in any circumstances.

412. By the 2004 Act, a civil partner is not a compellable witness for the prosecutor or a co-accused. Persons in a registered civil partnership are, accordingly, never compellable against each other.

413. This provision of the Bill will provide that the spouse and civil partner of an accused will be competent and compellable witnesses for the prosecution, accused or co-accused in any proceedings against the accused. In effect they will be treated no differently to any other witness. It will also take away the common law right of an accused's spouse to refuse to give evidence of matrimonial communings.

Section 64 – Special measures for child witnesses and other vulnerable witnesses

414. This section amends sections 271-271M of the 1995 Act to allow the special measures (listed at section 271H) that are available for vulnerable witness to be used in "any relevant criminal proceedings in the High Court or the sheriff court", as defined in subsection 2(b)(ii).

415. Subsections (3)-(9) replace all references to "trial" in sections 271-271M with references to the relevant criminal proceedings. This allows the special measures to be used in proceedings other than trials.

416. Subsection (10) makes consequential amendment to section 288E (5) of the 1995 Act.

Section 64A – Child witnesses in proceedings for people trafficking offences

417. This section raises the age of automatic entitlement to standard special measures when giving evidence in human trafficking cases from up to age 16 to up to age 18. The special measures are those listed in sections 271H of the Criminal Procedure (Scotland) Act 1995. Human trafficking cases means offences committed under section 22 of the Criminal Justice (Scotland) Act 2003 (Traffic in prostitution etc) or section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (trafficking people for exploitation). All witnesses (in human trafficking cases or otherwise) can be considered on application for further (non-standard) special measures.

Section 65 – Amendment of Criminal Justice (Scotland) Act 2003

418. Section 65 repeals section 15A of the Criminal Justice (Scotland) Act 2003. This section allowed the special measures to be used in relation to proofs in relation to victim statements. This section is no longer necessary now that the special measures may be used in any hearing in relevant criminal proceedings.

Section 66 - Witness anonymity orders

419. Subsection (1) inserts new sections 271N to 271Y into the 1995 Act and provides courts with an order-making power to secure anonymity for witnesses when giving evidence in court.

420. The new section 271N(1) sets out what a witness anonymity order is and defines the order in such a way as to grant the court a wide discretion as to how the court protects the anonymity of a witness in any particular case.

421. The new section 271N(2) refers to procedures detailed at sections 271P, 271Q and 271R which deal with how applications should be made and what conditions the court needs to consider when considering whether to make an order.

422. The new section 271N(3) and (4) lists the kinds of measures the court may use to secure the witness's anonymity. The list is only illustrative; the court may employ other measures if it thinks fit. Technological developments and the practical arrangements in the court may affect such decisions.

423. The new section 271N(5) provides that the court may not make a witness anonymity order which prevents the judge or jury either from seeing the witness or from hearing the witness's natural voice. The judge and jury must always be able to see and hear the witness.

424. The new section 271P(1) provides that applications for a witness anonymity order may be made by the accused as well as prosecutors. This reflects the position in the case of *R v Davis* [2008] UKHL 36, where the Court of Appeal allowed a defence witness as well as prosecution witnesses to give evidence anonymously. It is expected that defence applications are most likely to be made in multiple accused cases where one accused does not wish a witness's identity to be known by the other accused. But this subsection does not exclude the possibility of a defence application in a single accused case.

425. The new section 271P(2) provides that, where an application for a witness anonymity order is made by the prosecutor, the identity of witnesses may be withheld from the accused before and during the making of the application. This ensures that the operation of the legislation is not impeded by procedural challenges to the power of the prosecution to withhold this information pending the court's determination of the application for the witness anonymity order.

426. The new section 271P(2) therefore provides that prosecutors are under no obligation to disclose the witness's identity to the accused at the application stage but must inform the court of the identity of the witness. Similar provision is made for the accused in the new section 271P(3), except that the accused must always disclose the identity of the witness to the prosecutor and the court but do not have to disclose it to any other defendant.

427. The new section 271P(4) provides that where the prosecutor or the accused proposes to make an application for a witness anonymity order, information that might identify the witness must be taken out of any relevant material which is disclosed before the application has been determined. This does not, however, override the obligation to disclose the identity of the witness to the court (in the case of a prosecutor's application) or to the court and prosecutor (in the case of an accused's application).

428. The new section 271P(2) also enables the court to direct that it should not be informed of the identity of the witness. This provides for the possibility that, whilst in the vast majority of cases the court will require to be informed of the witness's identity, there may be rare cases (particularly national security related cases) where even the court will neither need nor wish to know it.

429. The new section 271P(6) and (7) set out two basic principles. Subsection (6) states that on an application for a witness anonymity order every party to the proceedings must be given the opportunity to be heard. However, it may be necessary in the course of making the application to reveal some or all of the very information to which the application relates: for example, the name and address of the witness who is fearful of being identified. So subsection (7) provides that the court has the power to hear any party without an accused or the accused's legal representative being present. This reflects the existing practice, by which prosecution applications were expected to be made in the absence of any other parties in the case, with the accused able to make representations later at a hearing with the prosecution (and possibly other accused) present. It is expected that defence applications will be permitted without other accused being present but will always be made in the presence of the prosecution.

430. The new section 271Q(1) and (2) requires four conditions to be met before a court can make a witness anonymity order. They are described as conditions A, B, C and D.

431. The new section 271Q(3) sets out condition A, which is that the measures to be specified in the order are necessary for one of two reasons. The first is to protect the safety of the witness or another person or to prevent serious damage to property. There is no requirement for any actual threat to the witness or any other person. The second is to prevent real harm to the public interest. This will include, but will not be restricted to, the public interest in police or security service undercover officers being able to carry out future operations, whether or not they are fearful in any particular case.

432. The new section 271Q(4) sets out condition B, which is that the effect of the order would be consistent with the accused receiving a fair trial. Thus the grant of the order must be compliant with Article 6 of the ECHR.

433. The new section 271Q(5) sets out condition C, which is that the witness's testimony is such that in the interests of justice the witness ought to testify. New section 271Q(6) sets out condition D which provides that either the witness would not testify if the order was not made or there would be real harm to the public interest if the witness were to testify without an order being made. Such harm might, for example, arise as a result of the identity of a member of the security services being made public but it can also apply to other witnesses where the interest of justice require that they are able to give evidence anonymously in a case. This public interest element should be brought out in the application for an order.

434. The new section 271Q(7) specifies that in determining for the purposes of condition A whether the order is necessary to protect the safety of the witness, another person or prevent damage to property, the court must have regard to:-

- the witness's reasonable fear of death or injury either to himself or herself or to another person (for example "we'll get your kids", or family or friends"), or

- reasonable fear that there would be serious damage to property, (for example "we'll firebomb your house").

Although not explicitly defined in the section, "injury" is not restricted to physical injury, but could also include serious harm to a person's mental health; and "serious damage to property" can include serious financial or economic loss.

435. The new section 271R(1) requires the court to have regard to the considerations set out in the new section 271R(2) when deciding whether to make an order. The court must also have regard to any other factors it considers relevant.

436. The considerations in new section 271R(2) are the accused's general right to know the identity of a witness, the extent to which credibility of the witness is relevant in assessing the evidence he or she gives, whether the witness's evidence might be material in implicating the accused, whether the witness's evidence can be properly tested without knowing the witness's identity, whether the witness has a tendency or any motive to be dishonest and whether alternative means could be used to protect the witness's identity.

437. New section 271S requires the judge to direct the jury in a trial on indictment in such way as the judge considers appropriate, so as to ensure that the fact that the order was made does not prejudice the accused.

438. New section 271T(1), (2) and (3) provide for the court that has made an order to discharge or vary it in those proceedings, either on an application by a party to the proceedings or on its own initiative. This power may be used where, for example, a witness who previously gave evidence anonymously is content for the anonymity to be lifted.

439. New section 271T(4) the court must give every party to the proceedings an opportunity to be heard before determining an application for variation or discharge of an order or before varying or discharging an order on its own initiative.

440. New subsection 271U(1) sets out the various grounds for making an appeal to the High Court in relation to witness anonymity orders. An appeal can be made by the prosecutor or the accused.

441. New section 271U(4) allows the High Court hearing the appeal to postpone the relevant trial for as long as it thinks appropriate and instruct that any postponement should not affect any time limit associated with the case being tried.

442. New section 271V provides that the High Court, having considered an appeal, must overturn the granting of a witness anonymity order by the court hearing the relevant trial if it decides that the decision to grant the order was wrong in law. Once this decision has been taken the trial can continue but without the witness who was the subject of the order giving their evidence anonymously.

443. New section 271W enables the High Court, having considered an appeal, to reverse the decision of a court which has refused an application for a witness anonymity order, if it concludes that the decision of the judge in that court was wrong in law. The High Court must then order that appropriate measures should be taken to preserve the anonymity of the relevant witness when he or she is giving their evidence.

444. New subsections 271X(1) and (2) enable the High Court, having considered an appeal, to reverse the decision of a court that has varied the way in which the witness anonymity order has been applied if it concludes that the decision of the judge in that court was wrong according to the law. New subsection 271X(3) provides that the High Court can decide that other variations to the order are justified under the relevant terms of the law as set out at 271Q and 271R.

445. New subsection 271Y(1) enables the High Court, having considered an appeal, to reverse the decision of a court that has refused an application made by either the prosecutor or the accused to vary or disallow a witness anonymity order if it concludes that the decision of the judge in that court was wrong according to the law. Thereafter new subsections 271Y(2) and (3) provide for the High Court to disallow an order or vary it depending on the case, and allows it make an additional variation to the order as it deems appropriate and under the relevant terms of the law as set out at 271Q and 271R.

446. Subsection (2) provides for the coming into effect of provisions for witness anonymity orders.

447. Subsection (3) provides that witness anonymity orders made under an existing rule of law in a trial or a hearing that starts before the day the new provisions come into effect are not affected by the coming into force of these provisions.

Section 67 - Television link evidence

448. This section provides that section 273 of the Criminal Procedure (Scotland) Act 1995 will be amended to allow witnesses to give evidence from abroad via live television link in all criminal proceedings in the High Court or sheriff court.

449. A new section 273A is inserted that allows witnesses to give evidence via live television link from outwith Scotland, but within the United Kingdom, from an acceptable location within the United Kingdom, thereby relieving them of the requirement to travel to Scotland and give their evidence in the Scottish court.

Section 67A – European evidence warrants

450. This section provides an Order-making power to facilitate implementation of the Council of the European Union Framework Decision 2008/978/JHA of December 2008 on the European Evidence Warrant (EEW) for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. Any order will be subject to the affirmative procedure, and may confer functions on the Scottish Ministers and the Lord Advocate to provide evidence requested by other Member States and to obtain evidence held by other Member States to assist with criminal investigations or proceedings. The power will permit the creation of new offences and penalties (subject to the limits set out in subsection (5)).

PART 5 - CRIMINAL JUSTICE

Section 67B – Lists of jurors

451. This section makes amendments to sections 84 and 85 of the Criminal Procedure (Scotland) Act 1995. Subsection (2)(b) makes provision to allow jurors to be selected for service in criminal trials in the sheriff court not only from the sheriff court district in which a trial is being held, but also, at the discretion of the sheriff principal, from any other district or districts in that sheriffdom. The amendments in subsection (3) ensure that, once the list of jurors has been prepared, any jurors on the list who reside outside the sheriff court district where the trial is to be held are cited by the clerk for the district in which the trial is to take place.

452. This section also makes an amendment to the Criminal Procedure (Scotland) Act 1995 to allow the clerks of court to use lists of jurors for trials other than those for which they were originally required. This second change in subsection (2)(d) is achieved by the repeal of section 84(7) of the 1995 Act, which links lists of jurors with particular trials.

Section 68 - Upper age limit for jurors

453. This section provides that there shall be no upper age limit for jurors serving on criminal juries in Scotland.

454. This involves amendment to section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 introducing a new subsection (1A) in respect of criminal proceedings. This amendment will allow individuals over 65 years of age to be cited for jury service on criminal trials in Scotland. The upper age limit for jurors serving on civil trials remains unchanged at 65 years of age.

Section 68A – Excusal from jury service

455. This section makes changes to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 to ensure that people who are listed for jury service who wish to apply for excusal as of right do so within 7 days of receiving the first notice that they may have to serve. Part III of Schedule 1 to the 1980 Act lists the categories of people who are excusable as of right from jury service. The first step in the citation process is that the sheriff principal may require any person in one of his sheriff court districts who appears to be qualified for jury service to confirm their personal details in writing (under section 3(2) of the Jurors (Scotland) Act 1825). At the same time they are notified that they may be called for jury service, and they are asked to advise of any holiday dates and confirm whether they are ineligible for or disqualified from service. The earliest opportunity to seek excusal as of right would be on receipt of this notice. Subsection (3) introduces a new section, section 1A, into the 1980 Act which requires someone who wishes to be excused from jury service as of right to apply for that excusal within 7 days of receiving this notice.

456. A new section 1A requires to be created as the 1980 Act applies both to civil and criminal juries, whereas this Bill is only concerned with matters of criminal justice. Section 1A therefore refers to criminal proceedings only. Subsection (2) makes other amendments restricting the effect of section 1(2) and (3) of the 1980 Act, which sets out the circumstances where potential jurors can currently apply for excusal as of right, to civil proceedings only.

457. A requirement to apply for excusal as of right within 7 days of receipt of the revisal notice could be operationally difficult and hard to apply for people in the forces, particularly where they are serving in remote places. The requirement is therefore disapplied for people who are listed in Group C of Part III of Schedule 1 of the 1980 Act, who are currently full-time serving members of the armed forces, the Women's Royal Naval Service, Queen Alexandra's Royal Naval Nursing Service or any Voluntary Aid Detachment serving with the Royal Navy by the new section 1A(2) of the 1980 Act, which is inserted by subsection (3). Not only does the 7 day requirement not apply, but the individual concerned is also not required to apply for excusal personally: his or her commanding officer may do so where the officer considers it would be prejudicial to the efficiency of the force for that person to be absent from duty.

458. Since individuals entitled to be excused as of right are being required to seek excusal within 7 days of receipt of the revisal notice, the change in subsection (4) applies the offence of falsely claiming to be excusable as of right from jury service, which is contained in section 3(1)(a) of the 1980 Act, to that earlier stage of the citation process.

Section 69 - Persons excusable from jury service

459. This section makes two changes to paragraph (a) of Schedule 1, Part III, Group F of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980. The first concerns the period of entitlement to excusal from criminal jury service in Scotland. This section makes provision to reduce the exemption period from 5 to 2 years for individuals who attend court but who are not subsequently balloted to sit on a jury. Currently the system makes no distinction between those who attend at court as required but do not then get picked from the ballot to serve, and those who attend and are selected by ballot to form part of a jury in a case.

460. It is not the intention that this should be a retrospective change; rather it will apply from the commencement date of this section of the legislation. This subsection has no impact on the power that a judge has, for example following particularly long or difficult trials, to direct that jurors be excused from service for any period up to and including excusal for life.

461. The second change adds persons who have attained the age of 71 to the categories of people who are excusable as of right from jury service. Thus, although following the changes made by section 68 there is no upper age limit to serve as a juror in a criminal trial, if someone who is over 71 is notified that they may be called for jury service or they are cited, he or she does not have to serve but may claim excusal as of right. Persons aged 71 or over therefore, would only have to undertake jury service if he or she wished.

462. Those who have not reached the age of 71 would not be made excusable of right by this section, and the effect of the change in section 68 therefore is that those between 65 and 70 years of age who are called to perform jury service in criminal proceedings would have to serve from the commencement of this provision. The upper age limit for service as a juror in a civil trial of 65 years, and the provisions relating to excusal as of right, remain unchanged.

Section 70 - Data matching for detection of fraud etc.

463. Section 73 of, and Schedule 7 to, the Serious Crime Act 2007 provided the national audit agencies in England, Wales and Northern Ireland with the power to match data, and provides statutory provision for an existing data-matching scheme known as the National Fraud Initiative. The National Fraud Initiative is a UK-wide data matching scheme conducted for the purpose of assisting in the prevention and detection of fraud.

464. Section 70 of this Bill amends the Public Finance and Accountability (Scotland) Act 2000 to provide equivalent provisions enabling the National Fraud Initiative to be carried out in Scotland on a statutory basis. The main amendment consists of the insertion of a new Part 2A (Data Matching) of the 2000 Act consisting of sections 26A to 26G.

465. Section 26A(1) provides for Audit Scotland to carry out data matching exercises or to arrange for another organisation to do this on its behalf. Subsection (2) defines what a data matching exercise is. It involves the comparison of sets of data, for example, the taking of two local authority payroll databases and matching them. Matching exercises may identify fraudulent activity as having taken place. Subsection (3) defines the purposes for which a data matching exercise can be exercised. These purposes are assisting in the prevention and detection of fraud, assisting in the prevention and detection of crime other than fraud, and assisting in the

apprehension and prosecution of offenders. Subsection (4) provides that data matching may not be used to identify patterns and trends in an individual's characteristics or behaviour which suggest nothing more than his potential to commit fraud in future. This is designed to prevent the Audit Scotland from creating individual "profiles" of future fraudsters.

466. Section 26B(1) provides that a person may disclose data to Audit Scotland for the purposes of a data matching exercise. This could include private sector bodies such as mortgage providers who wish to be part of the exercise. There is no compulsion on any of these bodies to take part in a data matching exercise. Subsection (2) provides that the disclosure of information does not breach (a) any duty of confidentiality owed by a person making the disclosure or (b) any other restriction on the disclosure of information, however imposed. Subsection (3) provides that nothing relating to voluntary provision of data authorises any disclosure which (a) contravenes the Data Protection Act 1998, or (b) is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000, or (c) allows the disclosure of data comprising or including patient data. Subsection (4) defines patient data as meaning data relating to an individual which is held for medical purposes and from which the individual can be identified. Subsection (5) defines medical purposes. Subsection (6) provides that this section does not limit the circumstances in which data may be disclosed apart from this section. Subsection (7) provides that data matching exercises may include data disclosed by a person outside Scotland.

467. Section 26C(1) enables Audit Scotland to require the disclosure of information to conduct a data matching exercise. Subsection (2) sets out which persons may be required to disclose data under subsection (1). They are those bodies whose accounts are subject to audit by the Auditor General, or are sent to him for auditing, local authorities, Licensing Boards and their officers, office-holders or members. Subsection (5) creates an offence and accompanying penalty for non-compliance with this requirement.

468. Section 26D sets out the circumstances in which information relating to a data matching exercise, including the results of such an exercise, may be disclosed by or on behalf of Audit Scotland, and the persons and bodies to whom the data may be disclosed. Subsection (6) imposes special restrictions on the disclosure of information if it includes patient data (as defined in subsection (7). Subsection (8) places restrictions on the further disclosure of information disclosed under subsection (2) and allows the further disclosure in certain specified circumstances. Subsection (9) creates an offence of disclosing information where the disclosure is made other than as authorised by subsections (2) and (8), and sets out the penalty.

469. Section 26E(1) makes clear that Audit Scotland will be able to publish a report on its data matching exercises notwithstanding the limitation on disclosure as is provided under section 26D. Subsection (2) provides that a report that is published under section 26E may not include information relating to a particular person if (a) the person is the subject of any data included in the data matching exercise; and (b) the person can be identified from the information; and (c) the data is not otherwise in the public domain. Subsection (3) provides that Audit Scotland may publish a report in such a manner as it considers appropriate for bringing it to the attention of those members of the public who may be interested. Subsection (5) preserves the existing powers of an auditor to publish information under Part 2 of the 2000 Act or Part 7 of the Local Government (Scotland) Act 1973.

470. Section 26F(1) provides that Audit Scotland must prepare and keep under review a code of data matching practice. Subsection (2) sets out that all those involved in this process must have regard to the code of data matching practice. Subsection (3) requires Audit Scotland to consult all those bodies or office holders who must provide data, the Information Commissioner, and such other bodies as Audit Scotland thinks appropriate before preparing or altering the code of data matching. Subsection (4*)* places a duty on Audit Scotland to publish the code from time to time.

471. Section 26G(1) provides for the Scottish Ministers to add public bodies to those listed in new section 26C(2) by order. The Scottish Ministers may also, by that subsection, modify the application of Part 2A to any body so added, and may remove bodies from section 26C(2). Subsection (2) provides that any order made under section 26G can include any incidental, consequential, supplemental or transitional provision the Scottish Ministers think fit. Subsection (3) defines the meaning of public body. Subsection (4) provides that a public body, whose functions are both public and private in nature, is a public body only to the extent of its functions which are public in nature.

472. Section 70(2) amends section 11 of the 2000 Act to allow Audit Scotland to impose reasonable charges in respect of the exercise of its functions in connection with a data matching exercise (such fees would currently be charged as part of any audit fee), and for these charges to be imposed on those who supply data for a data matching exercise and/or those who receive the results of such an exercise.

Section 71 - Sharing information with anti-fraud organisations

473. The Serious Crime Act 2007 ("the 2007 Act") allows public authorities (within the meaning of section 6 of the Human Rights Act 1998) in England, Wales and Northern Ireland to disclose information as a member of a specified anti-fraud organisation for the purposes of preventing fraud or a particular kind of fraud.

474. Sections 68 to 72 of the 2007 Act provide the framework for the scheme. The information may be information of any kind, including personal and documentary information. Sections 68(5) and (6), 69(3) and 71(4) of the 2007 Act provide that the information sharing scheme, by which certain information may be shared for the purposes of preventing fraud, shall extend to reserved but not devolved information held by Scottish public authorities. By repealing these sections of the 2007 Act, this section will allow Scottish public authorities to disclose devolved information, for the purposes of the prevention of fraud or a particular kind of fraud, to a specified anti-fraud organisation.

475. Section 68(5) and (6) of the 2007 Act, excludes Scottish public authorities from the information sharing scheme in respect of devolved information. This section repeals 68(5) and (6) and as a result will allow Scottish public authorities to disclose and share such devolved information with anti-fraud organisations in the same way as public authorities in England, Wales and Northern Ireland.

476. Section 69(1) makes it an offence for a person to further disclose protected information which had been disclosed by a public authority member of an anti-fraud organisation or otherwise in accordance with any arrangements made by such an organisation. "Protected

information" is any revenue and customs information disclosed by HM Revenue and Customs which reveals the identity of the persons to whom the information relates, and specified information disclosed by other public authorities. Section 69(3) provides that this offence does not apply where the original disclosure was by a relevant public authority (i.e. an authority not covered by the new power in section 68) and related to devolved matters. As the power in section 68 is being extended to cover devolved information of Scottish public authorities, this exclusion can be removed and the offence in section 69(1) will apply to any protected information.

477. Section 71 of the 2007 Act provides that the Secretary of State must prepare and keep under review a code of practice with respect of the disclosure, for the purposes of preventing fraud or a particular type of fraud, of information by public authorities. This section of the Bill repeals section 71(4) of the 2007 Act so that the code of practice will apply for disclosures of devolved information made for the purposes of the prevention of fraud by Scottish public authorities. Section 71(4) of the 2007 Act provides that this does not apply in relation to disclosures, relating to devolved information, by Scottish public authorities. This section of the Bill also repeals in part section 71(6) of the 2007 Act to remove the now redundant definition of "relevant public authority".

Section 72 - Closure of premises associated with human exploitation etc.

478. This section makes amendments to the Antisocial Behaviour etc. (Scotland) Act 2004 and provides for the closure of premises associated with the commission of "exploitation offences" such as human trafficking and child sexual abuse. Subsection (1) inserts new subsections (3A) and (3B) into section 26 of the 2004 Act. The inserted subsections (3A) and (3B) set out the grounds on which a senior police officer may authorise the service of a closure notice in cases involving an exploitation offence.

479. Subsection (2) amends the provisions in section 27 of the 2004 Act to take account of the form and service of a closure notice in cases involving an exploitation offence.

480. Subsection (3) makes amendments to section 30 of the 2004 Act and inserts new subsections (2A) and (3A). The inserted subsection (2A) sets out the conditions that must be met before the sheriff can make a closure order in respect of premises associated with the commission of an exploitation offence. The inserted subsection (3A) provides that, in determining whether or not to make a closure order, a sheriff shall have regard to any vulnerability of a victim of an exploitation offence.

481. Subsection (4) inserts new subsections (1A) and (3A) into section 32 of the 2004 Act. The inserted subsection (1A) enables a sheriff to extend the duration of a closure order for a period not exceeding the maximum period where it is necessary to prevent the commission of an exploitation offence. The inserted subsection (3A) sets out the conditions which must be satisfied before a senior police officer can make an application to extend the period for which a closure order has effect in cases involving an exploitation offence.

482. Subsection (5) amends section 33 of the 2004 Act in order to provide for the revocation of a closure order, following an application, in cases involving an exploitation offence.

483. Subsection (6) amends section 36 of the 2004 Act in order to provide for the making of appeals in respect of closure orders which have been given an extension in cases involving an exploitation offence.

484. Subsection (7) inserts a new section 40A into the 2004 Act and sets out the offences which may be considered as exploitation offences for the closure of premises under the 2004 Act.

Section 73 - Sexual offences prevention orders

485. Section 73 makes a number of amendments to the provisions of the Sexual Offences Act 2003 which relate to sexual offences prevention orders (SOPOs).

486. Subsections (1) and (2)(a) make provision concerning the criteria which currently exist in some cases before a person may become subject to the notification requirements under the 2003 Act, and before a SOPO can be made. Courts in Scotland can make a SOPO when dealing with an offender for an offence listed in Schedule 3 to the 2003 Act. For some offences listed in Schedule 3 there are conditions, which are based on the sentence or age of the persons involved in the offence, in place which currently limit the application of the scheme which provides for the making of a SOPO. Section 141 of the Criminal Justice and Immigration Act 2008 amended the 2003 Act for England and Wales and Northern Ireland to provide that these conditions do not restrict the making of a SOPO in cases where the conditions are not met. Section 73(1) and (2)(a) extends the application of the amendment made by section 141 of the 2008 Act so that it applies in Scotland.

487. Subsection (2)(b) corrects a minor error in section 109 of the Sexual Offences Act 2003. It ensures that section 107(2) will apply in applications for interim SOPOs. That section provides that prohibitions (which will, in due course, be extended by the Bill to include requirements) may be included in an order are those necessary for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant, applies to interim SOPOs as well as full SOPOs.

488. Subsection (2)(c) inserts new section 111A into the Sexual Offences Act 2003. New subsections 111A(2)-(3) have effect of extending the permitted content of a SOPO, and an interim SOPO, so that the court can impose requirements as well as such other terms in the order, whether prohibitions, restrictions, or other terms, as it considers appropriate so as to protect the public by preventing, restricting or disrupting the involvement of the subject of the order in sexual crime.

489. Subsection (2)(d) amends section 112 of the Sexual Offences Act 2003 to provide that a SOPO may be made at the instance of the court or on the motion of the prosecutor.

Section 74 - Foreign travel orders

490. This section amends the provisions on foreign travel orders (“FTO”) in Part 2 of the Sexual Offences Act 2003 (“the 2003 Act”).

491. Subsections (2) and (3) amend sections 115 and 116 of the 2003 Act by increasing the age of a child from under 16 to under 18. The effect of subsection (2) is that a court can impose a foreign travel order on a qualifying offender if that offender is considered to pose a risk to a child who is outside the United Kingdom who is aged under 18.

492. The effect of subsection (3) is that it alters the criteria determining which sex offenders are to be regarded as "qualifying offenders". A qualifying offender is a sex offender against whom a court may impose a FTO, provided all the other criteria set out in sections 114 to 116 of the 2003 Act are met. The amendment means that those who have committed certain sexual offences against children under 18, rather than offences against children under 16 will be regarded as "qualifying offenders".

493. Subsection (4) amends section 117 of the 2003 Act to increase the maximum duration of any foreign travel order specified in s117(2), from six months to five years. Therefore, a court has the discretion to impose a FTO on a qualifying offender for any period of time up to a maximum of 5 years.

494. Subsection (5) inserts a new section 117B into the 2003 Act to require offenders who are subject to a FTO imposed under section 117(2)(c), that prohibits them from travelling anywhere in the world, to surrender their passports at a police station in Scotland specified in the order. Such offenders must also surrender any new passports which they acquire throughout the duration of a FTO.

495. This new section also requires the police to return any passport as soon as reasonably practicable after the relevant FTO has ceased, unless that passport is a foreign passport or a passport issued by an international organisation and it has been returned by the police to the authorities outside the United Kingdom which issued the passport.

496. Subsection (6) amends section 122 of the 2003 Act to create new offences in Scots law of failing to comply with a requirement to surrender a passport in Scotland, by virtue of section 117B(2), and in England, Wales, and Northern Ireland by virtue of section 117A(2) of the 2003 Act. Section 117A of the 2003 Act was inserted by section 25 of the Policing and Crime Act 2009. Subsection (6) also makes clear that the sheriff court has jurisdiction to deal with those offences. This mean a person who fails to surrender a passport in England, Wales and Northern Ireland can be prosecuted for this offence if that person comes to Scotland.

Section 74A – Sex offender notification requirements

497. Section 74A amends provisions in Part 2 of the Sexual Offences Act 2003 which concern the sex offender notification requirements. Subsection (2) gives the Scottish Ministers the power to bring forward regulations which set out how frequently an offender who does not have a sole or main residence in the United Kingdom must verify their details to police. Scottish Ministers cannot make regulations which allow this class of sex offenders to verify their information to the police at intervals which are less than once a year. Subsection (6) provides that the powers conferred on the Scottish Ministers to make an order or regulations under sections 83, 84, 85, 86, 87 or 130 of the 2003 Act can make different provision for different purposes and include supplementary, incidental, consequential, transitional, transitory or saving provisions. As a consequence, subsections (3) to (5) repeal sections 86(4), 87(6) and 96(4) of the 2003 Act.

Section 75 - Risk of sexual harm orders

498. Section 75 amends provisions of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 which concern risk of sexual harm orders. The amendments are similar to those provided by section 73 for sexual offences prevention orders and have the effect of extending the permitted content of a risk of sexual harm order so that the court can impose requirements on persons who are made subject to such orders. Currently, like SOPOs, risk of sexual harm orders can only impose prohibitions on such persons.

Section 75A - Risk of sexual harm orders: spent convictions

499. This section inserts a new paragraph (bc) into section 7(2) of the Rehabilitation of Offenders Act 1974. It provides that nothing in section 4(1) of that Act is to affect the determination of any issue or prevent the admission or requirement of any evidence relating to a person's previous convictions or to circumstances ancillary thereto in any proceedings under sections 2, 4, 5 and in any appeal under section 6 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (proceedings in relation to Risk of Sexual Harm Orders).

500. This provision therefore allows evidence of previous convictions which are spent for the purposes of the Rehabilitation of Offenders Act 1974 to be led in proceedings for Risk of Sexual Harm Orders in Scotland.

Section 76 – Obtaining information from outwith United Kingdom

501. The Scottish Criminal Cases Review Commission (SCCRC) cannot currently issue, or apply for, a letter to request assistance from outwith the United Kingdom because its investigations are not within the scope of the Crime (International Co-operation) Act 2003 ("the 2003 Act").

502. This section creates a bespoke power for the SCCRC to apply to a judge of the High Court to request assistance in obtaining information from outwith the United Kingdom for the purposes of carrying out its functions.

503. Section 7 of the 2003 Act sets out the authorities which may make requests for assistance, and in which circumstances and form requests may be made. Section 8 of the 2003 Act deals with requests for assistance from the United Kingdom and sets out to which authorities requests may be sent. Section 9 of the 2003 Act sets out what may be done with the evidence obtained in relation to a request for assistance from abroad under section 7 of this Act.

504. Subsection (4) applies section 8 of the 2003 Act to requests for assistance from abroad by the SCCRC in the same way as it applies to section 7 of the 2003 Act, so that, requests for assistance are sent to a foreign court or authority designated by government of that country, or Interpol or EuroJust in cases of urgency.

505. Subsection (5) applies provisions of section 9 of the 2003 Act to requests for assistance from abroad by the SCCRC in the same way as they apply to section 7 of the 2003 Act. The effect is that information may not without the consent of the appropriate overseas authority be used for any purpose other that specified in the request and when information is no longer

required for that purpose (or any other purpose for which consent has been obtained) it must be returned to the appropriate overseas authority, unless that authority indicates that it need not be returned.

Section 77 – Grant of authorisations for directed and intrusive surveillance

506. This section amends the Regulation of Investigatory Powers (Scotland) Act 2000 ("the 2000 Act") in relation to joint surveillance operations.

507. Subsection (3) amends section 10 (authorisations for intrusive surveillance) of the 2000 Act. Currently, the persons who may grant authorisations for the carrying out of intrusive surveillance are the chief constable of a police force and the Director General of the SCDEA. Section 10 is amended so as to include the Deputy Director General of the SCDEA as a person who may grant an authorisation for intrusive surveillance.

508. Subsection (3A) inserts a new section 10A into the 2000 Act which makes provision about who may grant authorisations for the use of directed surveillance, Covert Human Intelligence Sources ("CHIS") and intrusive surveillance in a joint surveillance operation. Subsection (6) inserts a definition of "joint surveillance operation" into section 31 of the 2000 Act; such an operation is one involving at least two police forces in Scotland working together, or at least one police force in Scotland and the Scottish Crime and Drug Enforcement Agency ("the SCDEA") working together.

509. The new section 10A of the 2000 Act provides that the persons who are designated for the purpose of granting an authorisation for directed surveillance, CHIS and intrusive surveillance in a joint surveillance operation are the same people who are designated for the purposes of sections 6, 7 and 10 of the 2000 Act. In terms of an order made by the Scottish Ministers under section 8(1)[2] of that Act, to grant authorisations for directed surveillance and CHIS where the operation is not a joint surveillance operation: in relation to the SCDEA, that person is an officer of the rank of at least Superintendent or Grade PO7 Authorising Officer (Inspector in an urgent case); in relation to a police force that person is an officer of the rank of at least Superintendent (Inspector in an urgent case). The authorisation level for intrusive surveillance is a chief constable of a Scottish police force, the Director General of the SCDEA and, as is explained below, the Deputy Director of the SCDEA

510. Subsections (4) and (5) make consequential amendments as a result of the addition of the Deputy Director General of the SCDEA as a person who may grant authorisations for the carrying out of intrusive surveillance (including a joint surveillance operation). Subsection (4) amends section 11(3) of the 2000 Act so as to make it clear that the Deputy Director General of the SCDEA can only grant an authorisation for the carrying out of intrusive surveillance where the application is made by a police member of that Agency. Subsection (5) amends section 12A(1) of the 2000 Act so as to include the Deputy Director General of the SCDEA within the ambit of that section which deals with the grant of authorisations for intrusive surveillance in cases of urgency. Subsection (5A) adds the rank of the Deputy Director General of the SCDEA to the definition in section 14 of the 2000 Act of the 'most senior relevant person' to whom a

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[2] That Order is currently the Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions)(Scotland) Order 2000 (S.S.I. 2000/343) (as amended by the Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland) Amendment Order 2009 (S.S.I. 466/2006))

Surveillance Commissioner must make a report should he or she decide not to approve an intrusive surveillance authorisation. Subsection (5B) amends section 16 of the 2000 Act to add the rank of Deputy Director General of the SCDEA to the list of ranks who may appeal to the Chief Surveillance Commissioner about a decision made by a Surveillance Commissioner.

511. Subsection (6) amends section 31 of the 2000 Act so as to include a definition of joint surveillance operation.

Section 78 – Authorisations to interfere with property etc.

512. This section amends section 93 of the Police Act 1997 ("the 1997 Act") so as to make equivalent amendments in relation to authorisations for interference with property as those which have been made by virtue of section 77 in relation to authorisations for directed and intrusive surveillance.

513. Subsection (2)(a) inserts subsections (3AA) to (3D) into section 93 of the 1997 Act. Subsections (3AA) to (3C) make provision about authorisations to interfere with property where there is a joint operation. Subsection (3D) defines a "joint operation" in the same way as it is defined for the purposes of the 2000 Act.

514. These provisions when read together ensure that in the case of a joint operation, the chief constable of a Scottish police force involved in the operation may authorise the persons mentioned in subsection (3C) to take action under section 93(1) of the 1997 Act. The persons mentioned in subsection (3C) are constables of any of the police forces involved in the joint operation (including action which might be outwith the area of operation of the constable's own force) and if the SCDEA are involved in the operation, a police member of that Agency.

515. Similarly, where the SCDEA is involved in the joint operation, the Director General or the Deputy Director General of the SCDEA may authorise the persons mentioned in subsection (3C) to take action under section 93(1) to interfere with property.

516. As the 1997 Act extends to England and Wales also, subsection (3B)(a)(i) is designed to ensure that the amendments will only catch Scottish police forces.

517. Subsection (2)(b) amends subsection (5)(j) of section 93 of the 1997 Act so as to include the Deputy Director General of the SCDEA alongside the Director General as an "authorising officer" who may authorise interference with property. Subsection (2)(c) includes the rank of Deputy Director General of the SCDEA at section 93(6)(cc) of the Police Act. This is to define the area for which the Deputy Director General can approve authorisations for property interference.

518. Subsection (3)(c) inserts subsections (6) and (7) into section 94 (authorisation given in the absence of authorising officer) of the 1997 Act. These two new provisions read together make it clear that where the SCDEA are the lead Agency in a joint operation and the Director General or the Deputy Director General are not available then an application for an authorisation to interfere with property may be made to the chief constable of one of the forces involved in the joint operation.

519. Subsection (3)(a) and (b) make amendments consequential upon the insertion of new subsections (6) and (7) into section 94 of the 1997 Act.

Section 79 - Amendments of Part 5 of Police Act 1997

520. This section amends Part 5 of the Police Act 1997 ("the 1997 Act"). The 1997 Act is the legislation under which criminal record certificates (basic, standard and enhanced disclosures) are issued for employment and other purposes. The day to day functions of the Scottish Ministers under Part 5 of the 1997 Act are carried out by Disclosure Scotland.

521. Section 79 makes three amendments to the 1997 Act: the first makes provision for sex offender notification requirements to be included on enhanced criminal record certificates; the second provides an order making power to amend 5 definitions used in Part 5 of the 1997 Act; and the third clarifies the power to charge fees in connection with registration in the register of registered persons kept under section 120 of the 1997 Act.

522. Section 79(1A) makes provision for the fact that a person is subject to notification requirements under Part 2 of the Sexual Offences Act 2003 to be included on enhanced criminal record certificates (commonly referred to as "enhanced disclosure") issued under section 113B of the Police Act 1997 ("the 1997 Act").

523. Section 112 of the 1997 Act makes provision as to criminal convictions certificates (commonly referred to as "basic disclosure"). Section 113A of the 1997 Act makes provision as to criminal record certificates (commonly referred to as "standard disclosures"). Section 78 of the Protection of Vulnerable Groups (Scotland) Act 2007 ("the 2007 Act") will, when commenced, amend sections 112 and 113A of the 1997 Act to make provision for notification requirements under Part 2 of the Sexual Offences Act 2003 (c.42) to be included in basic and standard disclosures.

524. Section 49 of the 2007 Act makes provision for notification requirements under Part 2 of the Sexual Offences Act 2003 to be included in scheme record disclosures under the 2007 Act.

525. Section 79(1A) brings provision for enhanced disclosure into line with that for basic, standard and scheme record disclosures, correcting an anomaly in the 1997 Act and reflecting the long-standing policy intention.

526. Section 79(2) inserts a new section 113BA into Part 5 of the 1997 Act that will enable Scottish Ministers, by order, to amend the definitions of the expressions: "criminal conviction certificate" (basic disclosure) in section 112(2); "central records" in sections 112(3) and 113A(6); "criminal record certificate" (standard disclosure) in section 113A(3); "relevant matter" in section 113A(6); and "enhanced criminal record certificate" (enhanced disclosure) in section 113B(3).

527. Section 113BA(2) restricts the use of the order making power. An order can only be made to enable certificates to include information held outside the United Kingdom, or in connection with enabling that to be done. Section 113BA(3) provides that any order will be a

class 1 instrument, i.e. it cannot be made unless it has been laid in draft and approved by resolution of the Scottish Parliament.

528. It is intended that the order making power will be used to enable disclosure certificates to include relevant information from outside the United Kingdom (e.g. information relating to convictions for offences outside the United Kingdom) where that information is provided to the Scottish Ministers on the basis that it may be used for employment purposes.

529. The third amendment to the 1997 Act is at section 79(3) and the effect is to insert two new subsections into section 120ZB.

530. An application for either a standard or an enhanced disclosure certificate must be countersigned by a person whose name is listed in the register kept by Scottish Ministers under section 120 of the 1997 Act. Section 120ZB, which was inserted into the 1997 Act by section 81 of the Protection of Vulnerable Groups (Scotland) Act 2007 (not yet in force), allows regulations to be made about this registration.

531. Section 120ZB(2A) clarifies the fee charging power in section 120ZB(2)(a). It provides that, in particular Ministers may charge fees in respect of applications to be listed in the register, this will allow fees for registration itself and for the nomination of counter-signatories. Different fees may be charged in different circumstances, annual or recurring fees may be charged and fees may be charged in advance or arrears.

532. It is intended that the power will be used to provide different fees for different situations. For example, a different charge is likely to be made for inclusion in the register for the first time as compared with an application from someone already listed to have another signatory added to act on behalf of their registration entry.

533. Lastly, section 120ZB(2B) will enable Ministers to disregard an application for inclusion in the register if the fee for that application is not paid.

Section 79A – Spent alternatives to prosecution: Rehabilitation of Offenders Act 1974

534. This section inserts two new sections (8B and 9B) and a new Schedule 3 into the Rehabilitation of Offenders Act 1974 (“the 1974 Act”). The 1974 Act provides protection to people who are convicted of a criminal offence and receive a prison sentence of 2.5 years or less. After a certain period of time, which varies according to the length of sentence passed, these convictions become “spent” and the offender is considered to be rehabilitated. The amendment will extend the protection under the 1974 Act to include individuals who have been given an alternative to prosecution (ATP) in respect of an offence in Scotland. It also provides protection to individuals who have been given anything corresponding to an ATP in respect of an offence under the law of a country or territory outside Scotland.

535. The new section 8B(1) of the 1974 Act defines an ATP for the purposes of these provisions. In Scotland a person has been given an ATP in respect of an offence in the following circumstances:

- they have been given a warning by a constable or a procurator fiscal;

- they have accepted or are deemed to have accepted a conditional offer to pay a fixed penalty issued under section 302 of the 1995 Act or a compensation offer issued under section 302A of the 1995 Act, and this includes, by implication, acceptance or deemed acceptance of a combined fixed penalty and compensation offer which can be made under section 302B of the 1995 Act;

- they have had a work order made against them under section 303ZA of the 1995 Act, which offers the individual the opportunity of undertaking unpaid work;

- they have been given a fixed penalty notice under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004; or

- they have accepted an offer from a procurator fiscal to undertake an activity or treatment or to receive services.

The definition of an ATP includes any disposal which is given in a jurisdiction outside Scotland which corresponds with one of the Scottish ATP's contained within this list.

536. The new section 9B of the 1974 Act is essentially replicating section 9 of the 1974 Act (unauthorised disclosure of spent convictions) but makes provision for the unauthorised disclosure of ATP's. Section 9 of the 1974 Act provides some protection for the rehabilitated offender and there are criminal sanctions where an individual discloses information outwith the course of their duties or improperly obtains information on spent convictions. Under the new section 9B, an individual found guilty of disclosing information which relates to a person being given an ATP which has become spent outwith the course of their official duties will be liable on summary conviction to a fine not exceeding level 4 on the standard scale. Where a person improperly obtains information which concerns a person being given an ATP in terms of subsection (8) they will be liable on summary conviction to a fine not exceeding level 5 on the standard scale, or to imprisonment for a term not exceeding 6 months, or to both.

537. The new section 9B(6) of the 1974 Act provides the Scottish Ministers the power to make an Order to except the disclosure of information on ATP's which originates from an official record in particular cases or classes of disclosure from the offence of unauthorised disclosure. There is a similar power in section 9(5) of the 1974 Act in relation to the unauthorised disclosure of spent convictions. This power will be subject to the affirmative procedure.

538. The new Schedule 3 to the 1974 Act essentially mirrors the provisions in sections 4, 5, 6 and 7 of the 1974 Act with appropriate modifications to apply them to ATP's. Paragraph 1 of the new Schedule 3 defines when an ATP becomes spent. Warnings issued by a procurator fiscal or a constable or a fixed penalty notice issued under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004 all become spent at the time they are given. All other ATP's will become spent after 3 months.

539. Sub-paragraphs (5) and (6) of paragraph 1 of the new Schedule 3 to the 1974 Act explain what will happen to the rehabilitation period if an individual is subsequently prosecuted and

convicted of the offence for which the ATP was given. If a person is given an ATP (other than a fiscal or police warning) in respect of an offence and is then prosecuted and convicted of the offence, the rehabilitation period for the ATP will end at the same time as the rehabilitation period for the offence. Further to this, with the exception of fixed penalty notices issued under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004, if the conviction occurs after the end of the 3 month rehabilitation period, the ATP will be treated as not being spent until the rehabilitation period for the offence ends. This can arise, for example, where a person is subsequently prosecuted as they accepted an ATP, but then fail to adhere to its terms.

540. Paragraph 2 of the new Schedule 3 to the 1974 Act provides a definition of “ancillary circumstances” in relation to an ATP. Paragraph 3 of the new Schedule 3 to the 1974 Act sets out what protection is afforded to persons in relation to their spent ATP’s and any ancillary circumstances in civil proceedings. Paragraph 4 of the new Schedule 3 to the 1974 Act provides that if a person who has a spent ATP is asked questions seeking specific information other than during court proceedings that may lead to the disclosure of the ATP or any ancillary circumstances; they are not required to answer it.

541. Under paragraph 5 of the new Schedule 3 to the 1974 Act, when an ATP becomes spent that person will not have to declare it or any circumstances ancillary to the offence, and failure to do so will not be a ground for dismissing or excluding that person from any office, profession, occupation or employment or for prejudicing that person in any way for not doing so. Paragraph 6(a) of the new Schedule 3 provides the Scottish Ministers the power to make an Order to exclude or modify the application of any of paragraphs (a) to (c) of paragraph 3(2) in relation to questions put in such circumstances as may be specified in the order. Paragraph 6(b) of the new Schedule 3 provides the Scottish Ministers the power to provide for exceptions from any of the provisions of paragraphs 4 and 5 in such cases or classes of case, or in relation to alternatives to prosecution of such descriptions, as may be specified in the order.

542. Paragraph 8 of the new Schedule 3 to the 1974 Act provides for limitations on the effect of rehabilitation under the 1974 Act for an ATP in a similar way to section 7 of that Act for convictions and sets out the circumstances where the protection under certain provisions of the 1974 Act will not apply. For example, previous convictions, spent or otherwise, must be disclosed in criminal proceedings. This paragraph also gives power to the Scottish Ministers, by the application of section 7(4) of the 1974 Act to Schedule 3, to exclude the application of paragraph 3 of that Schedule in relation to any specified proceedings, by order. This power will be subject to the affirmative procedure.

Section 79B – Medical services in prison

543. Section 79B amends the Prisons (Scotland) Act 1989 and the Criminal Justice and Public Order Act 1994 so as to remove the duty on the Scottish Ministers to provide medical services in state run Scottish Prisons and the duty on the contractor to provide these services in contracted out prisons. As a result, the responsibility for providing medical services in all prisons falls to NHS Health Boards under general health legislation.

544. The intention is that subordinate legislation could be used, if considered necessary, to introduce specific provision required to ensure that primary health care services in prisons are equivalent to those available outside prisons. The relevant powers to introduce any such

subordinate legislation are found in general health legislation with no further powers being created in section 79B for this purpose.

545. Section 79B recognises the special role and status of medical officers in prisons. The amendments made by section 79B require the Scottish Ministers and directors of contracted-out prisons to designate one or more medical officers for each prison, and limits who can be designated as a medical officer. The amendments have the effect that medical officers will no longer be deemed to be prison officers. The other amendments made by section 79B ensure that medical officers designated under these new powers have much the same status within the prison as medical officers appointed under current powers do, for example in relation to searches and restrictions on the disclosure of information.

Section 80 - Assistance for victim support

546. This section allows the Scottish Ministers to make grants for the purposes of the provision of assistance to victims, witnesses or other persons affected by a criminal offence. This extends the power to make grants under section 10 of the Social Work (Scotland) Act 1968, which permits grants to be made to national organisations or innovative projects, but excludes grants to local authorities.

Section 81 - Public defence solicitors

547. This section amends section 28A of the Legal Aid (Scotland) Act 1986 ("the 1986 Act") to place the Public Defence Solicitors Office ("the PDSO") on a permanent footing. The PDSO was established in 1998 to provide criminal defence services from solicitors employed by the Scottish Legal Aid Board (‘the Board’) on a trial basis.

548. Section 28A of the 1986 Act currently provides for regulations to be made for the purpose of carrying out a feasibility study. It also provides for the laying of a report before Parliament by 31 December 2008. The report was laid on 23 December 2008 [SG/2008/259]. This section removes these provisions as the PDSO is to be permanent.

549. Regulations have been made under section 28A of the 1986 Act[3]. These regulations make provision for the employment of solicitors by the Board to provide criminal legal assistance.

Section 82 - Compensation for miscarriages of justice

550. The Scottish Government operates two schemes for the payment of compensation as a result of a miscarriage of justice. The statutory scheme under section 133 of the Criminal Justice Act 1988 (“the 1988 Act”) provides for compensation to be paid in certain circumstances. The decision as to whether compensation is payable is for Scottish Ministers but the amount of the award is quantified solely by an independent assessor. An ex gratia scheme covering other types of cases has also operated for a number of years with successful cases treated in the same way as statutory ones by the assessor.

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[3] The Scottish Legal Aid Board (Employment of Solicitors to Provide Criminal Legal Assistance) Regulations 1998 (SI 1998/1938) as amended by the Scottish Legal Aid Board (Employment of Solicitors to Provide Criminal Legal Assistance) Amendment Regulations 2008 (SSI 2003/511)

551. Subsection (1)(a) provides an Order-making power for Scottish Ministers to specify further sets of circumstances in which compensation may be payable. This power will be used to replace the existing ex gratia scheme by placing it on a statutory footing with the existing statutory scheme. It is intended to correspond to the existing ex gratia criteria. The seriousness of the offence for which the individual was charged or detained, but not convicted, will be taken account of when assessing compensation (subsection (1)(c)). This is consistent with the way the assessor takes into account the seriousness of the offence when assessing compensation under the statutory scheme where the individual had been convicted.

552. Subsection (1)(b) inserts a new section into the 1988 Act to impose a time limit of 3 years for applications to be made for compensation. It also allows a discretionary power for the Scottish Ministers to waive that time limit where it is in the interests of justice to do so, or where there are exceptional circumstances. The 3 year time limit is consistent with civil limitation periods for personal injury claims.

553. Subsection (1)(d) makes the Independent Assessors have particular regard to any guidance issued by the Scottish Ministers. It is necessary to have a statutory basis for this guidance as the assessor is discharging a quasi-judicial role. It is not intended for the guidance to impinge on the independence of the assessor when making a decision on the quantum of a claim but is designed to promote consistency in decision making.

554. Section 133(5) of the 1988 Act states that a conviction being "reversed" (one of the criteria for eligibility for compensation) shall be taken to mean as referring to a conviction being quashed in certain circumstances. Section 188 of the Criminal Procedure (Scotland) Act 1995 allows for a conviction and sentence or both to be set aside by way of a minute from the prosecutor to the court without an appeal being heard but in such circumstances this would not entitle a successful appellant to seek compensation for a miscarriage of justice. Subsection (1)(e) makes appropriate changes to the 1988 Act to allow someone who has had their conviction set aside by way of section 188(1)(b) of the 1995 Act to be considered for compensation.

555. Subsection (1)(f) makes an amendment to the 1988 Act so that those persons who are subject to a probation order or discharged absolutely are eligible to seek compensation in accordance with the Act. The order-making power in this section is exercisable by statutory instrument subject to annulment in pursuance of a resolution of the Scottish Parliament.

556. Subsection (2) removes a redundant reference to the Criminal Injuries Compensation Board in Schedule 12 to the 1988 Act.

Section 83 - Financial reporting orders

557. The Serious Organised Crime and Police Act 2005 ("the 2005 Act") introduced the use of Financial Reporting Orders (FRO). Those persons subject to an FRO are required to report their financial dealings over a specified period of time as directed by the court. In Scotland they can only be applied when someone is convicted of the common law offence of fraud or an offence specified in Schedule 4 to the Proceeds of Crime Act 2002.

558. Section 83 amends section 77 of the 2005 Act by inserting a new subsection (4A). The inserted subsection (4A) sets out the two ways in which an FRO can be made. It makes it clear

that either a prosecutor may apply to the court to make an FRO or the court may make such an order at its own instance.

Section 84 - Compensation orders

559. Under section 249 of the 1995 Act, where a person is convicted of an offence, the court may make an order requiring him to pay compensation for any personal injury, loss or damage caused directly or indirectly, or alarm or distress caused directly, to the victim.

560. A court cannot make a compensation order in respect of loss suffered in consequence of the death of any person; or injury loss or damage due to an accident involving a motor vehicle on the road, except where the damage is treated as having arisen out of the theft of the car by the convicted person.

561. The maximum amount which may be awarded under a compensation order by a sheriff or stipendiary magistrate in summary proceedings is £10,000 ("the prescribed sum"). The maximum amount which can be awarded by a Justice of the Peace is an amount not exceeding level 4 on the standard scale (£2,500). In solemn proceedings there is no limit on the amount which may be awarded.

562. Subsection (1)(a)(i) amends section 249(1) of the 1995 Act. This allows courts to make compensation orders in relation to deaths or road accidents, subject to the following amendments.

563. Subsection (1)(a)(ii) amends section 249(1) to clarify that a compensation order must be paid in favour of the victim.

564. Subsection (1)(b) inserts a new subsection (1B) into section 249, which provides that compensation may be paid to a victim or a person who is liable for funeral expenses. A new subsection (1C) is also inserted, which defines a victim as either the person who has suffered injury, loss or damage, or a relative who has suffered a bereavement caused by an offence being committed.

565. Subsection (1)(c) inserts new subsections (3A), (3B) and (3C) into section 249. Subsection (3A) allows a compensation order to be made in cases where a road accident has been caused by an uninsured driver, provided no other type of compensation is payable. Subsection (3B) provides that where a compensation order is made following damage to a stolen vehicle or an accident with an uninsured driver, then that compensation may include some or all of the cost of the loss of preferential insurance rates. Subsection (3C) provides that a compensation order may be made in respect of loss suffered as a result of bereavement and funeral expenses in connection with a person's death, except where the death was as a result of a road accident.

566. Subsection (1)(d) amends subsection (4) of section 249. This provides that unless subsections (3) – (3C) allow a compensation order to be made, then compensation orders shall not be made in respect of loss relating to a death or, injury, loss or damage relating to a road accident.

567. In some exceptional cases, statute provides that summary courts may impose a maximum fine, the amount of which exceeds "the prescribed sum" (i.e. the statutory maximum) of £10,000 set out by section 225(8) of the 1995 Act. Subsection (1)(f) inserts a new subsection (8A) into section 249 of the 1995 Act. Section (8A) allows the sheriff, in cases where an exceptionally high fine may be imposed, to make a compensation order up to the same amount.

568. Subsection (2) amends section 251 of the 1995 Act. It repeals paragraph (a) of subsection (1) of section 251 and removes the power of the court to reduce or discharge the compensation order when the injury, loss or damage has been held in civil proceedings to be less than it was taken to be for the purposes of the compensation order. This removes any explicit link with civil proceedings.

569. Subsection (2)(b) inserts a new subsection (1A) into section 251 of the 1995 Act. Subsection (1A) allows the court to review the compensation order at any time before it has been fully complied with and gives the court the power to increase the order if materially new information about the means of the offender has become available or the offender's financial circumstances have improved.

PART 6 - DISCLOSURE

570. This part of the Bill makes provision concerning the disclosure of evidence in criminal proceedings. It is a long established rule in the Scottish legal system that the Crown has an obligation to give the accused notice of the case against him, i.e. to tell him what charges he faces and what evidence the Crown intends to bring to prove the charges. Any *exculpatory* material should be identified and given/disclosed to the accused/defence. Disclosure is presently carried out on a common law basis but it is clear that there are shortcomings in the current regime. A series of high profile decisions of the Judicial Committee of the Privy Council including the cases of *Holland and Sinclair*, have refined that duty but have also given rise to some uncertainty about the exact requirements of the duty of disclosure.

571. Following these decisions Lord Coulsfield was invited to carry out a review on the law and practice of disclosure of evidence in the Scottish criminal justice system, which was published in August 2007. He recommended that disclosure would benefit from having a statutory framework. The provisions in the Bill seek to give effect to that recommendation and build on other recommendations made to clarify the law and practice in disclosure in criminal proceedings.

Section 85 - Meaning of "information"

572. This section defines what the term "information" covers where it is used in the provisions. It covers material of any kind which is given to or obtained by the prosecutor in connection with the proceedings. In appellate proceedings the definition of "information" includes material given to or obtained by the prosecutor in connection with the appellate proceedings and the earlier proceedings to which the appellate proceedings relate.

Section 86 – Provision of information to prosecutor: solemn cases

573. This section applies to solemn cases. It creates a duty on the investigating agency, (as defined in subsection (4)), to provide the prosecutor with details of all the information that may be relevant to the case for or against the accused as soon as practicable after the accused's first appearance in court in respect of the proceedings. "Information" includes information that the agency is aware of which was obtained by another agency. If the prosecutor requires the information itself, rather than just the details, the investigating agency must provide it as soon as is practicable.

Section 87 – Continuing duty to provide information: solemn cases

574. This section provides for a continuing duty on the investigating agency in solemn cases to submit to the prosecutor as soon as practicable after becoming aware of further information the details of further information obtained during the course of the investigation that may be relevant to the case for or against the accused. Upon receipt of these details, if the prosecutor requires the information itself, rather than only the details of it, the investigating agency must provide it as soon as practicable. This duty commences when the investigating agency provides details of information to the prosecutor under section 86(2) and continues until proceedings against the accused are concluded. Subsection (4) sets out the circumstances in which the proceedings are deemed to have concluded.

Section 88A – Provision of information to prosecutor: summary cases

575. This section applies where a plea of not guilty is recorded against an accused charged on a summary complaint and sets out the duties of the investigating agency in such circumstances. The investigating agency is required to inform the prosecutor as soon as practicable after the recording of the plea of the existence of all the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained in the course of the investigation of the matter. The agency must provide to the prosecutor any such information that the prosecutor then requests.

Section 88B – Continuing duty of investigating agency: summary cases

576. This section provides for a continuing duty on the investigating agency in summary cases to inform the prosecutor of the existence of further information as soon as practicable after becoming aware of it; information that may be relevant to the case for or against the accused, obtained during the course of the investigation. Upon receipt of this, if the prosecutor requires the information itself the investigating agency must provide it as soon as practicable. This duty continues until proceedings against the accused are concluded. Subsection (5) sets out the circumstances in which the proceedings are deemed to have concluded.

Section 89 – Prosecutor's duty to disclose information

577. This section sets out the test by which information has to be disclosed to the accused under the statutory scheme in both solemn and summary cases. It provides that, where the accused appears for the first time in solemn proceedings, or where a plea of not guilty is recorded against the accused charged on summary complaint, the prosecutor has a duty to review all of the information of which the prosecutor is aware which may be relevant to the case for or

against the accused. The prosecutor must then disclose to the accused any such information to which subsection (3) applies.

578. Subsection (3) sets out the rules which determine whether the information must be disclosed by the prosecutor. If subsection (3) applies to any of that information then the prosecutor must disclose all such information to the accused. If subsection (3) does not apply to any of that information, then the prosecutor need not disclose that information to the accused.

579. Subsection (7) provides that the prosecutor need not disclose anything that he has already disclosed in respect of the same matter (whether because it has been the subject matter of earlier proceedings or otherwise).

Section 89A – Disclosure of other information : solemn cases

580. This section applies to solemn cases only and applies to any information which is not sensitive information and which does not require to be disclosed in terms of section 89. The prosecutor is obliged to disclose the details of such information to the accused which may be relevant to the case for or against the accused.

581. Subsection (3) provides that the prosecutor is not required to disclose the details of any "sensitive" information under this section.

582. Subsection (4) sets out the meaning of "sensitive" in relation to an item of information.

Section 90 – Continuing duty of prosecutor

583. This section confirms that in cases where the disclosure statutory scheme applies (both summary and solemn), the prosecutor has a duty to proactively review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware. Having done so the prosecutor must disclose to the accused any such information which falls under the test in section 89 (information which is material or likely to form part of the evidence led by the prosecutor).

584. Subsection (2A) sets out that having complied with the duty to review and disclose the information falling under section 89(3) the prosecutor must also disclose details of any other information of which he or she is aware that may be relevant to the case for or against the accused. This additional duty does not apply to "sensitive" information.

585. Subsection (4) defines when a case is considered concluded.

Section 94 – Defence statements: solemn proceedings

586. This section provides that defence statements shall be mandatory in all solemn cases and provides the timings for lodging of such statements. Subsection (1A) sets out that as soon as practicable after the prosecutor receives a copy of the defence statement, the prosecutor must review all of the information which may be relevant to the case for or against the accused of

which he is aware. Having done so the prosecutor must then disclose to the accused any information which falls to be disclosed under s.89.

587. Subsection (2) amends the Criminal Procedure (Scotland) Act 1995 by inserting a new section 70A. That section provides that the accused must lodge a defence statement at least 14 days before the first diet in sheriff and jury proceedings, and the preliminary hearing in High Court proceedings. The information that the defence statement must contain is specified in subsection (6) of new section 70A of the Criminal Procedure (Scotland) Act 1995.

588. The new section 70A also provides that, at least 7 days before the trial diet, the accused must lodge a further statement. This statement must set out whether there has or has not been a material change in circumstances since the defence statement was lodged. If a material change has occurred, the statement must set out the details of that change and what the new position is. Further material changes must similarly be detailed in subsequent statements. Any defence statements must be lodged before the trial diet unless on cause shown the court allows otherwise. Subsection (5A) requires the accused to send a copy of any defence statement to the prosecutor and any co-accused.

589. Subsection (3) amends section 78 of the Criminal Procedure (Scotland) Act 1995 by providing that where a defence statement is lodged and the defence consists of or includes a special defence the requirement under section 78 of that Act to lodge and intimate such a defence no longer applies.

Section 95 – Defence statements: summary proceedings

590. Unlike solemn proceedings, an accused is not obliged to lodge a defence statement in summary proceedings. This section enables him to do so however, should he wish, where a plea of not guilty is recorded against him. Such statements will be required should the accused seek recourse to the court under section 95B to recover information he considers material to the case in terms of section 89 but which the prosecutor has not disclosed. The accused may lodge defence statements in summary cases at any time following the plea of not guilty until the conclusion of the proceedings. Subsection (5) defines when proceedings are to be taken to be concluded.

591. Subsection (2) sets out what a defence statement shall contain. Subsection (2A) provides that as soon as practicable after lodging a defence statement the accused must send a copy of the statement to the prosecutor and any co-accused.

592. By subsection (3) the prosecutor must, as soon as practicable after receiving the defence statement, review all the information that relates to the proceedings of which the prosecutor is aware for the purposes of determining whether the section 89 disclosure test is satisfied. By subsection (3) the prosecutor must then disclose any information that he is required to disclose.

593. Subsection (6) inserts a new provision in the Criminal Procedure (Scotland) Act 1995 which under certain circumstances removes the requirement upon the accused to lodge notice of a special defence in terms of section 149B of the 1995 Act where a defence statement which sets our the special defence has already been lodged.

Section 95A – Change in circumstances following lodging of defence statement: summary proceedings

594. This section provides the continuing duties upon the accused where a defence statement in a summary cases has been lodged at least 14 days before the trial diet. By subsection (2) where there has been no material change in circumstances in respect of the accused's defence since the statement was lodged a further statement must be lodged at least 7 days before the trial stating that fact. If such a material change has taken place a defence statement must be lodged to that effect before the trial diet begins unless on cause shown the court allows it to be lodged during the trial diet. The accused is required to send a copy of such statements to the prosecutor and any co-accused and subsection (6) provides the duties of the prosecutor upon receiving such a statement.

Section 95B – Application by accused for ruling on disclosure

595. The purpose of this section is to provide the accused with an opportunity in both summary and solemn cases to recover information from the prosecutor where the accused considers that the prosecutor has failed to disclose information which meets the disclosure test in section 89. The section allows the accused to apply to the court for a ruling on the matter. Subsection (1)(a) provides that such an application is only possible if the accused has already lodged a defence statement in the case. It is a mechanism by which the accused can contest the prosecutor's decision not to disclose information in response to their lodging a defence statement, information in respect of which the accused considers meets the section 89 test.

596. Subsection (3) provides the content of the accused's written application to the court.

597. Subsections (4) to (7) provide the duties of the court upon receipt of such an application including the disposals available to the court. By subsection (8) it is provided that except where it is impracticable to do so the justice of the peace, sheriff or judge who is presiding or will preside at the trial must deal with the application.

Section 95C – Review of ruling under section 95B

598. This section allows the accused to apply to the court to review its earlier ruling in terms of section 95B. Such an application can be made if the accused becomes aware of further information following the ruling and considers that had this further information been available to the court at the earlier hearing, the court would have made a ruling to disclose the original information.

599. Subsection (3) provides the content of the accused's written application to the court.

600. Subsections (4) to (7) provide the duties of the court upon receipt of such an application including the disposals available to the court. By subsection (8) unless it is impracticable to do so the justice of the peace, sheriff or judge who is presiding or will preside at the trial must deal with the application.

Section 95D – Appeals against rulings under section 95B

601. This section provides the prosecutor or the accused with a right to appeal to the High Court against a ruling made under section 95B. The appeal must be made within 7 days of the ruling being made. Subsection (2) provides that the court of first instance or the High Court may, where an appeal is brought, postpone any trial diet that has been appointed for such period as it think appropriate, or adjourn further adjourn any hearing for such period as it thinks appropriate, or direct that any period of postponement or adjournment is not to count towards any time limit applying in the case. Subsection (3) provides that the High Court may affirm the ruling or remit the case back to the court of first instance. By subsection (4) it is provided that the section does not affect any other right of appeal which any party may have in relation to a section 95B ruling.

Section 96 – Effect of guilty plea

602. This section provides that where the prosecutor is required to disclose information to an accused, but before doing so a plea of guilty is recorded against the accused, that the prosecutor need not comply with the requirement in so far as it relates to the disclosure of information which is likely to form part of the prosecution case. If the accused withdraws the plea of guilty then this provision ceases to apply.

Section 96A – Sections 96B to 96I: Interpretation

603. This section defines the terms “appellant” and “appellate proceedings” where they appear in sections 96B to 96I. The definition of “appellate proceedings” lists all those proceedings which that term covers in those provisions. It covers the full range of appellate proceedings that might be raised by an appellant following his conviction where he seeks to bring his conviction under review alleging any miscarriage of justice, or in sentence appeals where he alleges a miscarriage of justice based on the existence and significance of evidence not heard in the original proceedings.

Section 96B – Duty to disclose after conclusion of proceedings at first instance

604. This section applies in cases where an appeal is taken against the verdict in the first instance proceedings. Subsection (2) requires the prosecutor to review the information of which he is aware that relates to the grounds of appeal and to disclose to the appellant that information that is specified in subsection (3). Subsection (5) specifies the trigger point for this duty, with reference to each individual type of appeal that is listed in the definition provision. The effect of this is that the duty requires to be complied with only when certain specified events have taken place. Subsection (4) confirms that the prosecutor is not required to disclose anything that has already been disclosed to the appellant.

Section 96C – Continuing duty of prosecutor

605. This section establishes the continuing nature of the prosecutor’s duty of disclosure in appellate proceedings, requiring the prosecutor to review information held that relates to the grounds of appeal in the appellate proceedings and to disclose information that meets the tests set out in section 96B(3). Subsection (3) confirms that the prosecutor is not required to disclose anything that has already been disclosed to the appellant. Subsections (4) and (5) set out the start

and end points of the duty. They provide that the duty is brought to an end by the conclusion of the appeal, whether that conclusion be a final disposal or determination by the court or the abandonment of the appeal.

Section 96D – Application to prosecutor for further disclosure

606. This section enables an appellant to apply to the prosecutor to seek the disclosure of information which has not already been disclosed to him in terms of section 96B(2). Its effect is to enable such an application to be made to the prosecutor, setting out, by reference to the grounds of appeal, the nature of the information that the appellant wishes the prosecutor to disclose and the reasons why he considers that disclosure by the prosecutor is necessary. The provision places a duty on the prosecutor, as soon as practicable after receiving such an application to review any information which he is aware of and disclose to the appellant any information which meets the tests set out in subsection (3) of section 96B.

Section 96E – Further duty of prosecutor: conviction upheld on appeal

607. This section sets out the prosecutor's duty of disclosure in cases where the accused's conviction is upheld following his appeal. It provides that, if, after the conclusion of the appeal, the prosecutor becomes aware of information that should have been disclosed either in terms of sections 89, 90 or 96B then the prosecutor must, as soon as practicable after becoming aware of it, disclose the information to that person. The provision confirms that the prosecutor is not required to disclose anything that has already been disclosed. Subsection (4) makes clear that there is no requirement placed on the prosecutor to proactively review the information he holds in the event that a conviction is upheld on appeal.

Section 96F – Further duty of prosecutor: convicted persons

608. This section sets out the prosecutor's duty of disclosure in cases where the accused is convicted and does not appeal that conviction. It provides that, if, after the conclusion of the appeal the prosecutor becomes aware of information that should have been disclosed in terms of sections 89 or 90 then, as soon as practicable after becoming aware of it, the prosecutor must disclose it to the convicted person. Subsection (3) confirms that, if the convicted person appeals, then this duty does not need to be complied with while that appeal is ongoing. Subsection (4) confirms that the prosecutor is not required to disclose anything that has already been disclosed. Subsection (5) makes clear that there is no requirement on the prosecutor to proactively review the information he holds upon conviction of the accused.

Section 96G – Further duty of prosecutor: appeal against acquittal

609. This section provides that, where an accused person is acquitted and the prosecutor appeals against that acquittal then, if after lodging his appeal the prosecutor becomes aware of information that relates to the appeal and which meets the test in section 96B then, as soon as practicable thereafter, the prosecutor must disclose that information to the acquitted person. Subsection (3) confirms that the prosecutor is not required to disclose anything that has already been disclosed. Subsection (4) provides that this duty is brought to an end by the disposal of the appeal by the High Court and subsection (5) makes it clear that there is no requirement on the prosecutor to proactively review the information he holds in such circumstances.

Section 96H – Application by appellant for ruling on disclosure

610. This section allows an appellant to contest a prosecutor's decision not to disclose an item of information in response to a request for further disclosure in terms of section 96D. The basis upon which the appellant would do so would be that the prosecutor had failed to disclose information that satisfies the prosecutor's duty in appellate proceedings. The section allows the accused to apply to the court for a ruling on the matter.

611. Subsection (3) provides the content of the accused's written application to the court.

612. Subsections (4) to (7) provide the duties of the court upon receipt of such an application including the disposals available to the court. By subsection (8) it is provided that except that where it is impracticable to do so the application should be assigned to the judges who are to hear the appellant's appeal.

Section 96I – Review of ruling under section 96H

613. This section allows the appellant to apply to the court to review its earlier ruling in terms of section 96H. Such an application can be made if the appellant becomes aware of further information following the ruling and considers that had this further information been available to the court at the earlier hearing, the court would have made a ruling to disclose the information which it had previously ruled as not being information requiring to be disclosed.

614. Subsection (3) provides the content of the accused's written application to the court.

615. Subsections (4) to (7) provide the duties of the court upon receipt of such an application including the disposals available to the court. By subsection (8) it is provided that except where it is impracticable to do so the application should be assigned to the judges who ruled upon the original application.

Section 92 – Redaction of non-disclosable information by prosecutor

616. This section applies where the prosecutor has a document or other piece of information in his possession that satisfies the disclosure test but which also contains information upon which there is no duty to disclose. It provides that the prosecutor is able to redact, edit or obscure the non-disclosable part of the information.

Section 97 – Means of disclosure

617. This section provides that the prosecutor may disclose information by any means including allowing the information to be viewed by the accused at a reasonable time and in a reasonable place. The provision is designed to make clear that the means of disclosure is entirely a matter for the prosecutor's discretion, and will ensure that it is open to the Crown to fulfil its disclosure obligations through provision of a narrative detailing the information.

618. Subsections (4) to (7) address the disclosure of statements. In summary proceedings the prosecutor need not disclose the statements themselves rather is only obliged to disclose the information within the statements which meet the disclosure test. In both summary and solemn

proceedings the same is true for precognitions, victim statements and statements given by a person whom the prosecutor does not intend to call to give evidence.

619. Subsections (6) and (7) provide that in solemn proceedings, the prosecutor must disclose the statement of a witness whom he intends to lead in evidence, or a statement of a witness that the prosecutor intends to have admitted in terms of section 259 of the Criminal Procedure (Scotland) Act 1995. In summary proceedings, subsections (4) and (5) provide that such statements need not be disclosed to the accused.

Section 98 – Confidentiality of disclosed information

620. This section covers disclosed information and restricts how the accused and others may use information that has been disclosed to him. The restrictions are set out in subsections (3) and (4). These prevent the accused and all other persons to whom the information has been disclosed, whether by the prosecutor or any other person, from using or sharing disclosed information with anyone else in any way except where subsection (3) applies. By subsection (4A) if the accused discloses information to a person in a way other than in accordance with the restrictions then the person to whom the information has been disclosed must not use or disclose the information or anything recorded in it. Subsection (4B) provides that the restriction does not apply to information already in the public domain at the time of the disclosure.

621. Subsections (3) and (5) make provision to ensure that, notwithstanding the overall restriction, the accused may use the information disclosed to him for certain specified purposes connected with the preparation and presentation of his case or appeal and with a view to taking an appeal, which include references to the SCCRC, petitions to the *nobile officium* and applications to the European Court of Human Rights.

622. Subsection (6) ensures that other legislation is given effect to, for example Data Protection Act 1998 and any other statutory scheme which creates prohibitions or obligations of confidentiality.

Section 99 – Contravention of section 98

623. This section provides that any person who knowingly misuses information or otherwise breaches the confidentiality of the disclosed information in terms of section 98, which has been disclosed to them, will commit an offence. The section provides that the maximum sentence on conviction in summary proceedings is 12 months imprisonment or a fine not exceeding the statutory maximum or both and, on conviction on indictment, 2 years imprisonment or a fine or both.

Section 91 – Exemptions from disclosure

624. This section sets out the information which is exempt from the statutory scheme for disclosure. Information, the disclosure of which is prohibited by section 17 of the Regulation of Investigatory Powers Act 2000, must not be disclosed.

Section 102 – Application for section 106 order

625. This section imposes a duty upon the prosecutor to apply to the Court for an order prohibiting disclosure of information which he would otherwise require to disclose where such disclosure would be likely to cause a real risk of substantial harm or damage to the public interest. Subsection (2) sets out what that public interest means i.e. would likely cause serious injury, or death to any person, or would likely obstruct or prevent the prevention, detection, investigation or prosecution of crime or would be likely to cause serious prejudice to the public interest. The order sought from the court is referred to as a 'section 106 order'.

Section 103 – Application for non-notification order or exclusion order

626. Lord Coulsfield envisaged there being three types of procedure, broadly described as type 1, type 2 and type 3:

- Non-Disclosure application only - Crown and defence (and special counsel if appointed by the court) represented at hearing and have opportunity to make representations
- Exclusion with non disclosure applications - Crown represented at hearing and special counsel if appointed by Court. Defence may be represented only to allow them to be heard on the procedure, thereafter they are to be excluded from the hearing to decide whether the non-disclosure order is to be made
- Non-notification with exclusion and non disclosure applications - Crown represented at hearing and special counsel if appointed by Court. Accused and his/her legal representative are not present and are not notified of any of the hearings.

The provisions are designed to give effect to this.

627. Section 103 sets out the additional order the prosecutor should consider where he has applied for an order in terms of s.106. Subsection (2) provides that where the s.106 order relates to solemn proceedings the prosecutor may also apply to the court for a non-notification order and/or simply an exclusion order alone.

628. Subsection (3) provides that if the s.106 order relates to summary proceedings the prosecutor may only apply for an exclusion order and not a non notification order. .

629. Subsection (4) explains the effect of a non-notification order i.e. that it is an order prohibiting notice being given to the accused of the making of the applications for non-notification, exclusion and s.106 orders and also the decisions of the court in relation to any of those applications.

630. Subsection (5) explains the effect of an exclusion order i.e. that it is an order prohibiting the accused from attending or making representations in proceedings relating to the application for a s.106 order.

631. Subsections (6) and (7) set out the order in which the court must consider each application. Before making a decision on whether a s.106 order should be granted the court must first make a decision in relation to any applications for non-notification and/or exclusion. This

has the effect of ensuring that the court first considers whether any application for non-notification (if applied for) should be granted, then considers whether any application for exclusion should be granted (if applied for) and only then can consider whether the application for the s.106 order should be made.

Section 104 – Application for non-notification order and exclusion order

632. This section applies where the prosecutor has made an application for both a non-notification order and an exclusion order.

633. Subsection (2) requires the court, first, to fix a hearing to determine whether a non-notification order should be made.

634. Subsections (3) and (4) establish that, where an application is made for non notification and exclusion is made the accused will not be notified of either the making of such applications or of the hearing appointed to consider the applications. The accused will not be present nor represented at the hearing. (Although his interests may be represented by Special Counsel if one is appointed by the court).

635. Subsection (5) provides that the court may make a non-notification order if the requirements set out in subsection (6) are met. The court has to consider whether knowledge of the very existence of the application for a s.106 order would be likely to cause a real risk of substantial harm or damage to the public interest as opposed to knowledge of the actual information itself which is the subject of the s.106 application.

636. Subsection (7) provides that if the court makes a non-notification order, the court must also grant the application for an exclusion order.

637. Subsection (8) provides that, if the court refuses to make a non-notification order, the court will then appoint a hearing to determine the application for an exclusion order. Subsection (10) allows the prosecutor to apply to the court to exclude the accused from the hearing.

638. Subsection (9) provides that the prosecutor and if not excluded the accused, have the opportunity to be heard on the application for the exclusion order. The court may make the order if satisfied that the requirements set out in s.105 are met.

Section 105 – Application for exclusion order

639. Where the prosecutor makes an application for an exclusion order only the court must appoint a hearing to consider it, subsection (2).

640. Subsections (2A) provides that the Court may exclude the accused from the hearing. Having heard the prosecutor and the accused, until he is excluded, on the application for the exclusion order and the section 106 order the Court may make the exclusion order providing certain conditions set out in subsection (4) are met. The tests in subsection (4) require the court to look at the information, and to consider what the effect will be of revealing the nature of the information to the accused and the impact of that on the public interest; whilst at the same time

in considering disclosure versus non disclosure, balancing the competing interests of the injury to the public interest imperative on the one side, with the private individuals interests and right to a fair trial on the other.

Section 106 – Application for non-disclosure order: determination

641. This section allows the prosecutor to apply for an order which would result in the information in question not being disclosed (in the manner so specified) to the accused. Its purpose is to ensure that, in determining an application for a section 106 order, the court applies a two-pronged test. The court must consider first whether the conditions in subsection (3) of section 106 apply. If the court decides that those conditions do apply, then it must go on to consider whether subsection (4) applies. This is to achieve the minimum derogation from the golden rule of disclosure. This requires the court to carry out a balancing exercise between fairness to the accused on the one hand and protection of the public interest on the other. The test is whether the information can be disclosed - or partly disclosed - in such a way that would not be likely to cause a real risk of substantial harm or damage to the public interest.

642. Subsections (2) provides that the court must consider the information that the application relates to and give the prosecutor and, before being excluded, the accused the opportunity to make representation to the court. The court must consider (subsection 3) whether the prosecutor is required to disclose the information in question, that the information will not be s89(c) information that forms part of the prosecution case, and then consider what the impact would be if the information were to be disclosed, namely would disclosure result in a real risk of substantial harm or damage to the public interest. The court is required to balance the public interest against the private individual’s right to a fair trial. A further test is at subsection (3)(d) - that the public interest would be protected only by making the section 106 order and not by any other means.

643. Subsection (4) provides that the court must consider whether the information could be disclosed or partly disclosed in such a way as to provide the accused with something rather than nothing and still achieve the correct balance between public and private interests.

644. Subsection (5) provides for ways in which the court might decide that information could be disclosed e.g. by provision of redacted or edited information or summaries of the information.

Section 106A – Order preventing or restricting disclosure: application by Secretary of State

645. Sections 106A to 106D establish a system to enable applications to be made to the court by a Minister of the UK Government (a “Secretary of State”) for orders prohibiting the disclosure of information which the prosecutor is otherwise required to disclose and for other orders ancillary to that order where, if the information were to be disclosed there would be a real risk of substantial harm or damage to the public interest. This recognises that there may be public interest issues which arise in criminal proceedings in which Secretaries of State may have an interest.

646. Section 106A enables the Secretary of State to apply to the court before which the criminal proceedings are taking place for an order preventing or restricting the disclosure of

information which the prosecutor would otherwise be required to disclose or which the prosecutor, otherwise, intends to disclose. Subsection (3) provides that the court must consider the information that the application relates to and give the prosecutor and, if until he is excluded, the accused the opportunity to make representations to the court. The Secretary of State is, also, entitled to be heard.

647. By subsections (3) and (4) the court must consider whether, if the item of information were to be disclosed, there would be real risk of substantial harm or damage to the public interest, whether withholding the item of information would be consistent with the accused's receiving a fair trial and whether the only way of protecting the public interest is by making such an order. If the court is satisfied those conditions are met it may make an order preventing or restricting disclosure.

648. Subsections (5) to (7) enable the court to make an order requiring the information to be disclosed, in the manner specified in the order (i.e. in whole or in part), if its disclosure would not cause a real risk of substantial harm or damage to the public interest and the disclosure (or partial disclosure) would be consistent with the accused receiving a fair trial.

649. Subsection (9) states that until the application is disposed of or withdrawn, the substantive criminal proceedings to which the application relates must be adjourned to ensure that a trial cannot proceed whilst such an application is outstanding.

Section 106B – Application for ancillary orders: Secretary of State

650. This section allows the Secretary of State to apply to the court for ancillary orders where an application for an order is made under section 106A. It sets out the procedure by which the Secretary of State may apply for a non-attendance order or a restricted notification order.

651. Subsections (2) and (3) provide that the Secretary of State may in solemn proceedings apply for a restricted notification order and a non-attendance order or simply just a non attendance order on it own. He may only apply for a non-attendance order in summary proceedings and not a restricted notification order.

652. Subsection (4) explains the effect of a restricted notification order. It is an order prohibiting notice being given to the accused of both the making of any application for an order made under sections 106A and 106B and the decisions of the court in relation to any of those applications.

653. Subsection (5) explains the effect of a non-attendance order. It is an order prohibiting the accused from attending or making representations in proceedings relating to the determination of any application under section 106A for an order preventing or restricting disclosure.

654. Subsection (7) sets out the order in which the court must consider each application mirroring the provision in section 103. It provides that the court must consider any application for ancillary orders before determining any application for the order in respect of which section 106A applies.

Section 106C – Application for restricted notification order and non-attendance order

655. This section sets out the procedure to be followed where the Secretary of State has made an application in solemn proceedings for both a restricted notification order and a non-attendance order. Subsection (2) requires the court to fix a hearing to determine whether a restricted notification order should be made.

656. Subsections (3) and (4) provide that where an application for a restricted notification order is made, the accused will not be notified of either the making of the applications or of the hearing, nor will he be represented or appear at the hearing. However, it is likely that Special Counsel may be appointed by the court). Subsection (5) provides that the prosecutor and the Secretary of State will be entitled to be heard however and further provides that the court may make a restricted notification order if certain conditions set out in subsection (6) are met. Again this requires the court to consider the balance between the real risk of harm or damage to the public interest and fairness to the accused.

657. Subsection (7) provides that if the court makes a restricted notification order it must also grant the application for a non-attendance order. If the court refuses to make a restricted notification order it must then appoint a hearing to determine the application for a non-attendance order, subsection (8). The accused may be excluded from such a hearing by virtue of subsection (10).

Section 106D - Application for non-attendance order

658. This section sets out the procedure to be followed where the Secretary of State applies for a non-attendance order alone (i.e. without a restricted notification order) seeking to exclude the accused from attending, and making representations, at the hearing on the order preventing or restricting disclosure. Subsection (2) provides that the court must appoint a hearing on receiving an application for a non-attendance order. Subsections (4) and (5) provide that at that hearing the Secretary of State, the prosecutor and the accused (unless excluded following application being made by the Secretary of State) will be entitled to make representations, after which, the court may make a non-attendance order if it is satisfied that the conditions are met namely the balance between a fair trial and the real risk of harm or damage to the public interest.

Section 107 – Special counsel

659. This section gives a power to the court in considering an application for various orders to appoint special counsel to represent the interests of the accused in respect of the determination of the application at a hearing or any review or appeal thereon. The appointment does not extend to representing the interests of the accused at the trial itself, only the determination of the application.

660. Subsection (3) sets out the test for such an appointment, namely to ensure that the accused receives a fair trial.

661. Subsections (4) to (6) provide that the prosecutor, or, as the case may be, the Secretary of State and, in limited circumstances, the accused, are able to make representation to the court before the court decides whether to appoint special counsel.

662. Subsection (9) makes provision for appeal against the decision of the court not to appoint special counsel.

Section 107A – Persons eligible for appointment as special counsel

663. This section provides that only solicitors or advocates may be appointed as special counsel.

Section 107B – Role of special counsel

664. This section regulates the role and functions of special counsel and the interaction between special counsel and the accused. Subsection (1) sets out the duty of special counsel which is to act in the best interests of the accused insofar as ensuring that the accused receives a fair trial.

665. Subsection (2) provides that special counsel is entitled to see the confidential information concerned but must not disclose any of that information to the accused or his representatives. Subsection (3) prohibits communication with the accused in non notification and restricted notification cases. In any other case communication is only possible with the permission of the court, subsection (4). Both the prosecutor and where appropriate the Secretary of State must have been given an opportunity to be heard on any request to communicate with accused.

Section 107C - Appeals

666. This section provides the prosecutor, the accused, the Secretary of State and Special Counsel, where appointed, a right of appeal against the orders specified in the section. All appeals are to be to the High Court of Justiciary and subsection (6) provides that they must be lodged not later than seven days after the decision being appealed against. The section further specifies who is entitled to make representations to the court in respect of the appeals.

Section 111 – Review of section 106 order

667. This section entitles the prosecutor or the accused to apply to the court to seek review of a section 106 order. This would be on the basis that they have become aware of material information which was not available at the time the order was made.

668. Subsections (1) and (2) provides that such an application for review can be made only where the court has made a section 106 order, where the prosecutor or accused becomes aware of information that was unavailable to the court at the time of making that order and that the prosecutor or accused considers that the 106 order should be revisited in light of this new information. Where appointed, special counsel may also make the application.

669. Subsection (3) provides who can attend at a review hearing. Subject to subsection (4), the same parties as were heard in relation to the section 106 order will have the opportunity to make representations.

670. In terms of subsection (4), where there was a non-notification order in place and the court is satisfied that the grounds for non-notification remain, the court may make an order prohibiting

the accused being notified of the application for review, thus having the same effect as a non-notification order.

671. Similarly, in terms of subsection (5), where there was an exclusion order in place and the court is satisfied that the grounds for exclusion remain, the court may make an order excluding the accused from the review.

672. Subsection (6) provides that if the court on reviewing the order in light of the new information is satisfied that the grounds for the section 106 order no longer remain, the court may recall the order, or make an order for partial disclosure.

673. Subsections (8) and (9) have the effect of allowing applications for review at any time following the making of the section 106 order until the conclusion of the proceedings, as defined in subsection (9).

Section 111A – Review of section 106A order

674. This section mirrors section 111 which provides for reviews of section 106 orders sought by the prosecutor.

675. Subsections (1) and (2) provides that such an application for review can be made only where the court has made a section 106A order and where the Secretary of State, prosecutor or accused becomes aware of information that was unavailable to the court at the time of making that order and that the prosecutor or accused considers that the 106A order should be revisited in light of this new information. Where appointed, special counsel may also make the application.

676. Subsection (3) provides who can attend at a review hearing. Subject to subsection (4), the same parties as were heard in relation to the section 106A order will have the opportunity to make representations.

677. In terms of subsection (4), where there was a restricted notification order in place and the court is satisfied that the grounds for non-notification remain, the court may make an order prohibiting the accused being notified of the application for review, thus having the same effect as a non-notification order.

678. Similarly, in terms of subsection (5), where there was a non attendance order in place and the court is satisfied that the grounds for that remain, the court may make an order excluding the accused from the review.

679. Subsection (6) provides that if the court on reviewing the order in light of the new information is satisfied that the grounds for the section 106A order no longer remain, the court may recall the order, or make an order for partial disclosure.

680. Subsection (8) has the effect of allowing applications for review at any time following the making of the section 106A order until the conclusion of the proceedings against the accused.

Section 112 – Review by court of section 106 order and section 106A order

681. Section 112 provides that the court is to be under a duty to keep under review each order made under section 106 and 106A and consider whether they remain appropriate whilst the proceedings are ongoing.

682. Subsection (3) provides that, where the court considers that the orders might no longer be appropriate, the court must appoint a hearing to review the matter.

Section 113 – Applications and reviews: general provisions

683. This section sets out the procedure for dealing with applications, appeals and reviews of non-notification orders, exclusion orders and section 106 orders. Subsection (3) provides that such matters must where practicable be assigned to the judge assigned to the trial to which the application relates. The same sheriff or judge who made the section 106 or section 106A order and performed the balancing exercise is then best placed to consider any review of that order in light of the information. Subsection (4) provides that the accused is not entitled to see or be made aware of the contents of the application for such orders.

Section 114 – Code of practice

684. This section provides for a code of practice to accompany the legislation. It is intended that the legislation will provide the statutory framework for the disclosure scheme and the code will provide the detail on how it will operate in practice.

685. Subsections (1) and (4) provides for the Lord Advocate to prepare the code and lay it and any revisions to the code before Parliament. The intended effect of the provisions is that the code will regulate its own procedures and the date on which it, and any revised code, comes into effect.

686. Subsections (2) and (3) specify those persons who must have regard to the code namely police, prosecutors and any other investigating agency whom the Scottish Ministers prescribe, who carry out functions in relation to the investigation of crime or sudden deaths.

Section 115 – Acts of Adjournal

687. This section provides for the High Court to make such rules as it considers necessary to give full effect to these provisions.

Section 115A – Abolition of common law rules about disclosure

688. The purpose of this section is to ensure that the statutory provisions on disclosure will displace the current common law rules on disclosure but only to the extent that they are replaced by, or are inconsistent with, the provisions of Part 6.

689. Subsection (3) provides that sections 95B and 96H do not affect any right of an accused or an appellant to seek the disclosure, or recovery, of information by or from the prosecutor under a procedure other than the proposed new statutory procedure set out in those provisions.

690. Subsections (4) to (7) clarify the interaction between the provisions in Part 6 and the existing common law remedies that are available allowing persons to recover information. If the court has ruled that information does not meet the tests set out in either section 89(3) or section 96B(3) then the accused/appellant cannot then seek the recovery of the information through another remedy on substantially the same grounds. Equally a person cannot rely on the new ruling on materiality provisions to seek information when he has already sought that information on substantially the same grounds by a common law remedy and been unsuccessful in doing so.

Section 116 – Interpretation of Part 6

691. Subsection (1) clarifies the meaning of 'investigating agency', 'procurator fiscal' and 'prosecutor' where they appear in these provisions.

692. Subsection (2) clarifies that where there are references to the accused having information disclosed to him, or imposes any obligation on him in relation to disclosure; those references should be read as including reference to a solicitor or advocate acting on behalf of the accused.

PART 7 - MENTAL DISORDER AND UNFITNESS FOR TRIAL

Section 117 - Criminal responsibility of persons with mental disorder

693. Sections 117 to 120 and associated minor amendments in Schedule 5 implement the Scottish Law Commission's Report on Insanity and Diminished Responsibility, published in 2004. The provisions directly reflect the draft Bill contained in the Commission's Report, with changes only to reflect the incorporation of the provisions within the larger Criminal Justice and Licensing (Scotland) Bill, to deal with changes to the law since the Commission's Report, and to correct some minor errors and omissions.

694. Section 117 introduces a new statutory defence to replace the common law defence of insanity. It does so by inserting a new section 51A into the 1995 Act. It provides for a special defence in respect of persons who lack criminal responsibility by reason of their mental disorder at the time of the offence with which they are charged.

695. Subsection (1) sets out the test for the new statutory defence. It provides that there are two elements to the test. The first is the presence of a mental disorder suffered by the accused at the time of the conduct constituting the offence. Secondly, the mental disorder must have a specific effect on the accused for the defence to be available. This effect is the inability of the accused to appreciate either the nature or wrongfulness of the conduct constituting the offence. 'Nature' and 'wrongfulness' are alternative concepts and the defence may be established by proving lack of appreciation in respect of only one of them. The concept of appreciation is wider than that of mere knowledge. Failure to appreciate the nature of conduct would not therefore be precluded by knowledge of the physical attributes of the conduct. Similarly the defence may be available to an accused who knew that his conduct was in breach of legal or moral norms but who had reasons for believing that he was nonetheless right to do what he did.

696. Subsection (2) provides that the special defence does not apply to a person who at the time of the conduct constituting the offence had a mental disorder which consisted of a psychopathic personality disorder alone. The exclusion in this subsection applies only to

psychopathic personality disorder. Other forms of personality disorder may give rise to the defence provided that the effect on the accused satisfies the test in subsection (1) above. The defence would also be available where psychopathic personality disorder co-existed with another mental disorder (including other personality disorders) provided that the effect of the other mental disorder falls within the test in subsection (1).

697. Under the common law insanity is classified as a special defence. Subsection (3) provides for a similar rule in relation to the new statutory defence based on mental disorder. The main effect of the characterisation of a defence as a special defence is in relation to various procedural requirements under the 1995 Act (e.g. section 78(1) (giving of notice), section 89 (reading of the defence to the jury)).

698. Subsection (4) deals with who can raise the defence and with the relevant standard of proof. It provides that the special defence can be raised only by the person charged with the offence. It cannot be raised by the Crown or by the court of its own accord. This provision is in contrast to the common law defence, which can be raised by the Crown. The subsection also provides that the standard of proof on an accused person who states the defence is the balance of probabilities. This rule corresponds with that for the common law defence of insanity (*HM Advocate v Mitchell* 1951 JC 53).

699. Section 117 introduces a statutory version of the plea of diminished responsibility in place of the common law plea. It does so by inserting a new section 51B into the 1995 Act. The test for the statutory plea is modelled on the common law as set out in *Galbraith v HM Advocate* 2002 JC 1, subject to some variations noted below.

700. Subsection (1) provides that a plea of diminished responsibility is applicable in cases of murder but not in respect of any other crime or offence. The effect of the plea, if proved, is that a person who would otherwise be convicted of murder is to be convicted instead of culpable homicide. The main difference between the two outcomes is that the court has a discretion in sentencing a person convicted of culpable homicide which it lacks in a murder case (a person convicted of murder must be given a sentence of life imprisonment: 1995 Act, section 205(1)). The test for the plea is based on that laid down in *Galbraith v HM Advocate*, namely at the time of the killing the accused must have been suffering from an abnormality of mind which substantially impaired his ability to determine or control his conduct. Comments by the Court in the *Galbraith* case on this part of the common law test will be of use in interpreting the statutory test.

701. Subsection (2) makes two significant changes to the law on the plea of diminished responsibility. At common law the plea is not available where the relevant abnormality of mind falls within the scope of the insanity defence. The position is different under the Bill where the accused’s condition at the time of an unlawful killing falls within the definitions of the both the defence based on mental disorder and diminished responsibility. In this situation, the accused has the option of advancing either the defence or the plea. Secondly the subsection allows for diminished responsibility to be based on the condition of psychopathic personality disorder. At common law this condition cannot be used as a basis for the plea (*Carraher v HM Advocate* 1946 JC 108). The subsection makes clear that this exclusion does not apply to the statutory test for diminished responsibility.

702. Subsection (3) clarifies the effect which a state of intoxication has on the availability of diminished responsibility. In the first place, the provision re-states the rule laid down in *Brennan v HM Advocate* 1977 JC 38 that a person who kills whilst in state of intoxication cannot found a plea of diminished responsibility on that condition. Secondly, it states that the presence of intoxication does not preclude diminished responsibility provided that there is a basis for the plea independently of the intoxication.

703. Subsection (4) deals with the burden and standard of proof in relation to a plea of diminished responsibility. The subsection follows the same approach as that for the defence based on mental disorder. Only the accused can raise the plea, and if raised the accused has to prove diminished responsibility on the balance of probabilities. The rule is in substance the same as the common law rule (*HM Advocate v Braithwaite* 1945 JC 55).

Section 118 - Acquittal involving mental disorder: procedure

704. Section 118 inserts a new section 53E into the 1995 Act. The new section deals with the procedure where an accused is acquitted by reason of mental disorder.

705. Subsection (1) of the new section 53E replaces the existing statutory procedure under section 54(6) of the 1995 Act for acquittal involving mental disorder. Under section 54(6) of the 1995 Act (before its repeal by this Bill), where the defence of insanity is raised in a solemn case, there must be a verdict returned by the jury. A consequence of section 54(6) is that a jury requires to be empanelled and directed to return a verdict even where the Crown accepts a plea of insanity. This subsection provides for a different procedure for the statutory defence based on mental disorder. Where the Crown accepts a plea by the accused based on the defence, the court is to declare that the accused has been acquitted by reason of the special defence. This provision assimilates the procedure for solemn and summary cases. A declaration setting out the special nature of the acquittal is necessary in order to trigger the provisions in Part VI of the 1995 Act which deal with disposals.

706. Subsections (2) and (3) of the new section 53E provide for the situation where the Crown has not accepted a plea by the accused of the defence based on mental disorder. The defence does not become an issue for the court or jury to consider unless there has been evidence to support it. If the defence falls to be considered, in solemn cases the court must direct the jury to make a finding whether or not they accept that the defence has been established. Where the jury find that the defence has been established they must also declare whether their verdict of acquittal is based on the defence. A similar procedure applies in summary cases, where the court must state whether it finds that the defence has been established. If it has, the court must also declare whether the accused has been acquitted on that ground. The purpose of the declaration, in both solemn and summary cases, is to deal with the possibility that a jury might acquit the accused on some other ground. In this situation, even if the defence has been proved, the acquittal is not a special one triggering the disposal provisions of Part VI of the 1995 Act.

Section 119 - Unfitness for trial

707. Subsection (1) inserts a new section 53F into the 1995 Act. The new section replaces the existing common law rule on insanity as a plea in bar of trial, with a new statutory plea of unfitness based on the mental or physical condition of the accused.

708. Subsection (1) of the new section 53F sets out a general test for the new statutory plea of unfitness for trial. The effect of the provision is that a person is unfit for trial if he cannot effectively participate in the proceedings because of his mental or physical condition.

709. The Bill does not change the common law rule that the issue of an accused's fitness for trial may be raised by the accused, the Crown, or by the court. However, this subsection makes clear that the appropriate standard of proof for a finding of unfitness for trial is on the balance of probabilities.

710. Subsection (2) of the new section 53F lists various inabilities which if proved in respect of the accused indicate his unfitness for trial. The list in paragraph (a) is illustrative, and not exhaustive, of the types of inabilities which constitute lack of ability to participate effective in proceedings. Paragraph (b) provides that other factors may be relevant to making a determination.

711. Subsection (3) of the new section 53F applies to the statutory plea a common rule laid down in *Russell v HM Advocate* 1946 JC 37. It makes clear that a person is not unfit for trial simply because he cannot remember what happened at the time of the offence with which he is charged. However the rule does not apply where the accused is suffering from problems affecting memory of events at the time of the trial itself.

712. Subsection (4) of the new section 53F explains the meaning of "the court" when used in the new section 53F.

713. Subsection (2) of section 119 amends the title of section 54 of the 1995 Act and introduces some amendments to that section.

714. Subsection (2)(a)(i) repeals part of section 54(1) of the 1995 Act. Section 54(1) of the 1995 Act contained a requirement that various court orders must be based on the evidence of two medical practitioners, one of whom must have been approved as having special expertise in mental health. The effect of subsection 2(a)(i) is that this requirement does not apply to a finding by a court that a person is unfit for trial.

715. Subsections (2)(b) and (c) amend section 54 to reflect the names for the new defence and plea in bar of trial. References to insanity as a plea in bar are changed to refer to unfitness for trial.

716. Subsection (3) of section 119 repeals subsection (6) of section 54 of the 1995 Act. That provision dealt with procedure on insanity as a defence. The repeal follows on from the introduction by section 118 of the Bill of the new statutory defence based on the accused's mental disorder. By placing the defence in provisions separate from section 54, the definition of "court" in section 54(8) no longer applies to the procedure relating to the defence. The effect is to make clear that the provisions for recording an acquittal based on the defence apply to proceedings in the district/justice of the peace courts.

717. Subsection (3) of section 119 also repeals subsection (7) of section 54 of the 1995 Act. The effect is that the procedure in summary cases for the giving of notice of a plea of unfitness

for trial is governed by the general rules for intimation of pleas in bar (see 1995 Act, section 144).

Section 120 - Abolition of common law rules

718. The effect of section 120 is to abolish any existing common law rules regarding the special defence of insanity, the plea of diminished responsibility and the plea of insanity in bar of trial.

PART 8 - LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982

719. Part 8 of the Bill makes various changes to the general licensing provisions of the Civic Government (Scotland) Act 1982 Act and to its specific provisions on metal dealers, market operators, public entertainment, late hours catering, and taxis and private hire cars.

Section 121 - Conditions to which licences under 1982 Act are to be subject

720. This section provides for mandatory and standard conditions to be attached to licences issued under the 1982 Act and makes consequential amendments.

721. Mandatory conditions are determined by the Scottish Ministers, or by the 1982 Act itself or other powers under other legislation to prescribe conditions. Under new section 3A(3A), the order-making power for the Scottish Ministers to set mandatory conditions will be subject to the affirmative resolution procedure.

722. Standard conditions are determined by the licensing authorities under the 1982 Act - they must not be inconsistent with any mandatory conditions and must be reasonable. Licensing authorities have a duty (new section 3B(4)) to publish standard conditions determined by them and these can be applied to deemed grants or renewals (i.e. grant or renewal of licences where the authority has failed to reach a decision on an application within the statutory period allowed). Subsection (6) enables licensing authorities to impose further conditions, as well as omit or vary any of the standard conditions applicable to licences.

723. For both mandatory and standard conditions, different sets of conditions can be set for different types of licence (e.g. boat-hire licences or street traders’ licences under sections 38 and 39 of the 1982 Act respectively).

Section 122 - Licensing: powers of entry and inspection for civilian employees

724. Section 5 of the 1982 Act empowers a constable or ‘authorised officer’ to enter and inspect premises to ensure compliance with licence conditions. This section extends the powers of ‘authorised officers’ to include civilian staff employed by the police (under the provisions of section 9 of the Police (Scotland) Act 1967) and makes consequential amendments to other parts of the 1982 Act.

Section 124 – Licensing of taxis and private hire cars

725. Subsection (2) amends section 13(3) of the Civic Government (Scotland) Act 1982 to provide that an applicant for a taxi or private hire car driver's licence must have held throughout the period of 12 months immediately prior to the date of the application a licence authorising the person to drive a motor car issued under Part III of the Road Traffic Act 1988 or a licence which would at the time of the application entitle the person to such a licence without taking a test, not being a provisional licence.

726. Subsection (3) inserts new sections 17(2) – (4) which provide that a licensing authority must fix scales for the fares and other charges referred to in subsection (1) within 18 months beginning with the date on which the scales came into effect. Subsection (3) provides that in fixing the scales under subsection (2) a licensing authority may alter the fares or other charges or fix fares or other charges at the same rates. Subsection (4) provides that the licensing authority review the scales in accordance with subsection (4A) before fixing scales under subsection (2). Subsection (4A)(a) provides that a licensing authority, in carrying out a review, consult with persons or organisations appearing to be representative of taxi operators in the area. Subsections (4A)(b) and (c) set out procedures for consultation and notification of the licensing authority's proposals and subsection (d) provides that they consider any representations received thereon. Subsection 4B provides that a review must be completed before the end of the 18 month period beginning with the fixing of scales under subsection (2). Subsection (4D) sets out the duty to give notice as to the effect of the fare scales fixed and subsection (4E) contains the notification requirements. Subsection (4F) provides that after fixing scales they must notify all operators of taxis within their area and the persons and organisations consulted under subsection (4A)(a). Section 17(5)(a) is amended to extend the period provided for notification of a licensing authority's decision from 5 days to 7 days.

727. Subsection (4) amends section 18(1) and introduces a new section 18(1A) to extend the right of appeal against the decision by a licensing authority in regard to the fixing of taxi fare scales or review to persons or bodies representative of taxi operators in the licensing area.

728. Subsection (5) inserts a new section 18A(1) which provides that following the fixing of scales or the carrying out of a review the licensing authority must determine the date upon which the scales are to come into effect and publish them in accordance with the terms of section 18A(3) to (5). Section 18A(2) provides that the revised scales may not come into effect earlier than 7 days after the date on which they were published. Sections 18A(3) to (5) set out the notification procedures and the timescale to be followed. Section 18(9) is repealed in consequence.

Section 124A – Licensing of street trading: food hygiene certificates

729. Section 124A amends section 39 (street traders' licences) of the 1982 Act to amend the requirements of the certificate that must accompany certain applications for a street trader's licence. The effect is to provide that the certificate must state that the vehicle, kiosk or moveable stall complies with any requirements set out in an order made by the Scottish Ministers. This will enable the requirements set out in the certificate to be amended following any changes in food safety legislation.

Section 126 – Licensing of public entertainment

730. Subsection (2) repeals the words "on payment of money or money's worth" from section 41(2) of the 1982 Act. This allows licensing authorities to control large-scale public entertainments that are free to enter but authorities have discretion whether to license events such as gala days or school fetes.

731. Subsection (2) also updates some references to gambling legislation for premises that are exempt from the public entertainment licensing provisions (sections 41(2)(d) and (e) of the 1982 Act refer) and empowers the Scottish Ministers to add other premises to the list of exemptions. Under subsection (3), the order-making power for the Scottish Ministers to exempt other premises will be subject to the negative resolution procedure.

Section 127 - Licensing of late night catering

732. Under section 42 of the 1982 Act, premises providing meals and refreshments between 11pm and 5am require to be licensed where licensing authorities have opted to use this provision. This section replaces the references to "meals or refreshments" with "food", thus bringing late-night grocers and 24-hour stores within the scope of the provisions. It will continue to be for licensing authorities to determine which classes of premises actually require to be licensed.

Section 128 - Applications for licences

733. This section requires people applying for licences under the 1982 Act to provide details of their date and place of birth on the application forms. Where the applicant is not responsible for the day-to-day management of the activity being licensed, an employee or agent with such responsibility must provide such details. Similar provision is made in respect of applications on behalf of companies. Subsection 2(ba) and (bb) ensures that an applicant's date and place of birth are not included within the notices required for display and publication for the purposes of a licence application under Part 2 of the 1982 Act.

734. Subsections (2)(c), (d), (e), (f) and (g), and subsections (3)(d), (f), (g) and (h) amend various time limits of the application process to: make representations; provide reasons for decisions; give notice of hearings; and for licensing authorities to consider licence renewal applications received after the expiry date as renewals, rather than new applications.

735. Subsection (3)(e) updates paragraph 9(3) of Schedule 2 to the 1982 Act to reflect the position of the United Kingdom as a member state of the European Union and its obligations under EC law.

PART 9 - ALCOHOL LICENSING

Section 130 - Premises licence applications: notification requirements

736. This section amends the list of those to whom the Licensing Board must send a copy of an application when undertaking its obligations under section 21(1) of the Licensing (Scotland) Act 2005. Previously a copy of the application was required to accompany each notice issued under section 21(1) of the 2005 Act. The section also removes the chief constable's obligation to

provide the Board with antisocial behaviour reports. A Licensing Board's ability to request such reports is now provided for under section 24A of the Licensing (Scotland) Act 2005, inserted by section 132 of the Bill.

Section 131 - Premises licence applications: modification of layout plans

737. This section amends section 23(7) of the Licensing (Scotland) Act 2005 concerning the determination of an application for a premises licence. Section 23(7) provided that a Licensing Board could propose a modification to the operating plan in circumstances where the Licensing Board would otherwise refuse the application. The Licensing Board would grant the license if the applicant agreed to the proposed modification.

738. This section extends section 23(7) so that a Licensing Board can also propose a modification to the layout plan, which is required to accompany the application under section 20(2)(b) of the Licensing (Scotland) Act 2005. The Licensing Board may propose a modification to the layout plan in circumstances where the Licensing Board would otherwise refuse the application. The Licensing Board grants the license if the applicant agrees to the proposed modification. The amendment allows the Licensing Board to propose modifications to either the operating plan or the layout plan, or both if necessary.

Section 131A – Review of premises licences: notification of determinations

739. Section 131A inserts section 39A into the Licensing (Scotland) Act 2005. Section 39A(1) and (2) requires a Licensing Board to provide notification of the outcome of a premises licence review to the premises licence holder and, if applicable, the person who applied for the premises licence review.

740. Section 39A(3) and (4) set out when a premises licence holder and the applicant for a premises licence review may require a statement of reasons for a Licensing Board's decision on a premises licence review. If a request is made in accordance with section 39A(3) or (4) then section 39A(5) requires a Licensing Board to issue a statement of reasons for its decision on the premises licence review to the premises licence holder and, if applicable, the person who applied for the premises licence review.

741. Section 39A(6) enables Scottish Ministers to prescribe the form and timing of such a statement of reasons.

Section 132 - Premises licence applications: antisocial behaviour reports

742. This section amends the Licensing (Scotland) Act 2005 requirements concerning a Chief Constable's obligation to provide the Licensing Board with an antisocial behaviour report. It would be no longer necessary for the chief constable to provide a report in respect of every application. Instead, a report will only be required if the Licensing Board requests one, or if the chief constable wishes to forward a report for the Board's consideration.

Section 132A – Premises licences: connected persons and interested parties

743. Section 132A inserts a new section 40A into the Licensing (Scotland) Act 2005. Section 40A(1) imposes a duty on a premises licence holder to notify the appropriate Licensing Boards if a person becomes or ceases to be a connected person or interested party.

744. The notification must set out the interested party or connected person's name, address and date of birth. The notification must be made within one month of the person becoming or ceasing to be an interested party or connected person.

745. The Licensing Board is required to give a copy of the notice to the chief constable. Failure to supply this notice to the Licensing Board is an offence which may incur a fine not exceeding level 2 on the standard scale.

746. Subsection (3) amends section 48 of the 2005 Act to require a premises licence holder to inform the appropriate Licensing Board of changes in the names and addresses of connected persons or interested parties. Subsection (3) also provides that these details, together with any changes to the name and address of the premises licence holder or premises manager, are forwarded to the chief constable.

747. The meaning of "connected person" is set out in section 147(3) of the 2005 Act. Section 132A amends section 147 to insert the meaning given to "interested parties". A person is an interested party in relation to licensed premises if they are neither the premises licence holder or premises manager but has an interest in the premises either as owner or tenant or have managerial control over the premises or the business taking place on the premises.

Section 132B – Premises licence applications: food hygiene certificates

748. Section 132B amends section 50 of the Licensing (Scotland) Act 2005 to amend the requirements of a food hygiene certificate. The effect is to provide that a food hygiene certificate must state that premises comply with any requirements set out in an order made by the Scottish Ministers. This will enable the requirements specified in the certificate to be amended following any changes in food safety legislation.

Section 133 – Sale of alcohol to trade

749. This section adjusts an offence in the Licensing (Scotland) Act 2005 to enable the trade as defined by section 147(2) of the 2005 Act to purchase alcohol from a premises which holds a premises licence or occasional licence granted for the sale of alcohol under section 17 and 56 of the 2005 Act respectively. Previously the trade would only have been able to purchase from premises which supplied trade only. This section would now allow, for example, a restaurant owner to purchase alcohol from a supermarket for the restaurant without committing an offence.

Section 134 - Occasional licences

750. This section reduces the length of time a Licensing Board is required to wait for comments from the Chief Constable and the Licensing Standards Officer in respect of an application for an occasional licence by the Chief Constable and the Licensing Standards Officer

from 21 days to a period of not less than 24 hours where the Licensing Board is satisfied that the application requires to be dealt with quickly. Subsection (3) extends the ability to delegate approval of occasional licences applications to the Clerk of the Board or a member of support staff where no objections or representations are lodged.

Section 134A – Extended hours applications: notification period

751. This section amends section 69 of the Licensing (Scotland) Act 2005 to reduce the length of time a Licensing Board is required to wait for comments from the Chief Constable and the Licensing Standards Officer in respect of an application for an extended hours application. The period is reduced from 21 days to a period of not less than 24 hours where the Licensing Board is satisfied that the application requires to be dealt with quickly.

Section 135 - Extended hours application: variation of conditions

752. This section will enable Licensing Boards to amend for the first time the conditions of operation for a licensed premises for the duration of the extended period and the period that the extension applies to. For example if a premises was ordinarily open on a Saturday from 11am until 11pm and applied to extend its licence to 2am on that day, a Licensing Board would be able to vary conditions, for example, requiring door supervisors or use of plastic drinking vessels for the whole period, 11am on Saturday until 2am on Sunday, or any part of that period, not just for the extended period after 11pm.

Section 136 - Personal licences

753. Under section 76(3) of the Licensing (Scotland) Act 2005 a personal licence is not valid if at the time it is issued the individual to whom it is issued already holds a personal licence. The 2005 Act does not prevent an applicant making a second application, it is not a criminal offence and a Licensing Board must grant the application as the 2005 Act does not enable a Board to refuse an application on the grounds that an applicant already holds one.

754. This section amends the 2005 Act by enabling the Licensing Board to enact other options than granting, these being to refuse the application or hold a hearing to decide whether or not to grant the application if the applicant already holds a personal licence or if a previous personal licence held by the applicant had been surrendered or expired in the previous three years before a new application was made.

755. This provision is to close a possible loophole where a licence holder who had an endorsement under section 85(1) of the 2005 Act could avoid the suspension or revocation provisions of section 86 of the 2005 Act by voluntarily surrendering their personal licence before the Licensing Board had had an opportunity to consider what action it might take under section 86 of the 2005 Act, and then apply for another personal licence which would be "clean". The section also makes it a criminal offence not to surrender a void personal licence or attempt to use a void licence as a valid licence. A level 3 fine under section 225 of the Criminal Procedure (Scotland) Act 1995 presently stands at £1000.

Section 137 - Emergency closure orders

756. This section changes the rank of the constable who may request or order a closure order for licensed premises and its subsequent extension or termination under section 97 to 99 of the Licensing (Scotland) Act 2005. The change is from a constable of or above the rank of superintendent as defined by section 147(1) of the Licensing (Scotland) Act 2005 to a constable of or above the rank of inspector.

Section 137A – Appeals

757. This section amends section 131(2) of the Licensing (Scotland) Act 2005 to remove the requirement that an appeal under section 131 is to made by way of stated case. The effect of this is that as section 131 is silent as to the format of the appeal, the general rules on appeals contained in Part 2 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals Etc. Rules) 1999 will apply for the purposes of appeals under section 131 of the 2005 Act.

Section 137B - Liability for offences

758. Subsection (2) repeals the word "knowingly" from certain offences in the Licensing (Scotland) Act 2005. Where criminal conduct has been allowed to take place in terms of the listed offences, an offence will be committed whether or not the person involved has knowledge of the conduct taking place.

759. Subsection (3) inserts new sections 141A and 141B into the 2005 Act. New section 141A provides a defence to certain offences where the person accused had no knowledge that the offence was being committed and exercised all due diligence to prevent the offence being committed.

760. New section 141B provides that if a person commits certain offences whilst acting as the employee or agent of a premises licence holder or an interested party then that premises licence holder or, if applicable, that is guilty of that offence.

761. A defence of due diligence is available to the premises licence holder and interested party. Proceedings may be taken against the premises licence holder or interested party even if they are not taken against the employee or agent.

Section 138 – False statements in applications: offence

762. An offence is committed by any person who makes a false statement on an application. This section could be used in respect of those who apply for a second personal licence, which a personal licence holder may wish to have as a backup as their original licence being suspended or revoked for improper conduct. The personal licence form specifically asks if the applicant already hold a licence. A level 3 fine under section 225 of the 1995 Act presently stands at £1000.

Section 138A - Powers of Licensing Standards Officers

763. This section amends section 15 of the Licensing (Scotland) Act 2005 Act to widen the powers available to Licensing Standards Officers ("LSOs") when investigating the activities being carried out on licensed premises.

764. Section 15(2) of the 2005 Act provides LSOs with powers to enter and carry out an inspection of the premises. Section 138A(3) amends section 15(2) to allow LSOs to take copies of documents and to seize and remove any substances, articles or documents found on the premises.

765. Where LSOs exercise any of their powers under section 15 then section 15(3), as amended by section 138A(4), amends section 15(3) to allows the LSOs to require an explanation from the licence holder, the premises manager or any member of staff working on the premises at the time the powers are exercised.

766. Section 138A(5) makes several amendments to section 15. It provides that the LSOs' power to take copies of documents includes the power to request certain documents stored in electronic form. It provides that a person may refuse to produce a document required by an LSO on the grounds of confidentiality of communications. It also allows a person to refuse to provide information or explanation or produce any documents to an LSO if this would incriminate that person or their spouse or civil partner.

767. Section 138A(6) inserts new subsections into section 15. These allow Ministers to make regulations on the procedure to be followed in the exercise of an LSO's powers and on the treatment of items seized by an LSO. Such regulations may include provision on the treatment of items seized and on about compensation for anything seized. These also provide where an LSO seizes any item from the premises then the LSO must leave a notice on the premises specifying what was seized and why those items were seized.

Section 139 – Further modifications of 2005 Act

768. Police powers to object to the granting of licenses for the sale of alcohol under the Licensing (Scotland) Act 2005 are extended.

769. Section 22 of the 2005 Act allows any person to object to an application for a premises licence, but subsection (2) limits the chief constable so that he can only object on the ground that he has reason to believe that the applicant is involved in serious organised crime and that refusal of the application is necessary for the purpose of the crime prevention objective (section 4(2)). Under section 21(5) the chief constable may recommend that an application be refused if necessary for the purpose of the crime prevention objective, but only where he is giving notice of any relevant or foreign offence. For occasional licences, section 57(2) allows the chief constable to recommend the refusal of an application only on the grounds of the crime prevention objective. Under section 73 of the 2005 Act, the chief constable may not object but may recommend that an application for a personal licence be refused if necessary for the purposes of the crime prevention objective, but only where he is giving notice of any relevant or foreign offence.

770. The amendments in Schedule 4 widen the grounds a licensing board may consider in refusing an application for a premises licence on receiving a notice from the chief constable, from the crime prevention objective to any of the licensing objectives listed in section 4 of the 2005 Act. This effectively widens the grounds on which a chief constable may object from purely crime prevention to securing public safety, preventing public nuisance and protecting children from harm. Paragraph 5 sees this widening in relation to an application for a premises licence and this process is repeated in paragraph 6 where an applicant or connected person is convicted during the determination of a premises licence; in paragraph 7 it concerns the transfer of a premises licence on application of the licence holder; paragraph 12 & 13 are in respect of an application for a personal licence; paragraph 14 where an applicant is convicted during the determination of a personal licence and paragraph 15 where a personal licence holder is convicted.

771. Paragraph 16 ensures that the chief constable may report a personal licence holder to the licensing board for actions which are inconsistent with the licensing objectives and that a licensing board must then hold a hearing to consider what action if any should be taken against the personal licence holder as allowed by section 84(7) of the 2005 Act.

PART 10 - MISCELLANEOUS

Section 141 - Annual report on Criminal Justice (Terrorism and Conspiracy) Act 1998

772. The Criminal Justice (Terrorism and Conspiracy) Act 1998 (“the 1998 Act”) was passed following emergency parliamentary procedure in the wake of the Omagh bombing in August 1998.

773. There were 2 main parts in the 1998 Act. Sections 1 to 4 made provision about procedure and forfeiture in relation to offences concerning proscribed organisations. Sections 5 to 7 concern conspiracy to commit offences outside the United Kingdom.

774. Section 8 requires that a statutory report on the working of the Act be laid before both Houses of Parliament on an annual basis. Although the section is drafted in such a way so as it applies generally to the working of the Act as a whole, it is understood that the requirement was directed principally at the terrorism provisions in sections 1 to 4, which have now been repealed.

775. Section 8 is now considered redundant. It has been repealed for England, Wales and Northern Ireland by the Criminal Justice and Immigration Act 2008. This section repeals section 8 of the 1998 Act as it applies to Scotland. The effect is that the section will be repealed UK wide.

PART 11 - GENERAL

Section 143 - Orders and regulations

776. This section regulates the powers of the Scottish Ministers contained in the Act to make regulations and orders. It provides for these powers to be exercisable by statutory instrument, and provides standard powers for instruments to include ancillary provisions and to make different provisions for different purposes. It also provides for the level of Parliamentary

procedure to which any instrument is to be subject. In particular, section 143(4)(aa) provides that any order brought forward under the powers contained in section 146 which modifies any enactment (which could be through either textual or non textual amendment) will be subject to affirmative resolution procedure.

Section 144 – Interpretation

777. This section provides short references for three enactments referred to frequently throughout the Bill.

Section 145 - Modification of enactments

778. This section introduces Schedule 5 which makes modifications to certain enactments.

Section 146 – Ancillary provision

779. This section allows the Scottish Ministers by order to make supplementary, incidental or consequential provisions in connection with any provision of the Bill.

Section 147 -Transitional provision etc.

780. This section allows the Scottish Ministers by order to make transitory, transitional or savings provisions in connection with the coming into force of any provision of the Bill.

Section 148 – Short title and commencement

781. This section provides for commencement of the majority of the Bill to be made by order. Sections 143 to 148 will commence upon Royal Assent.

Schedule 1 – The Scottish Sentencing Council

782. Schedule 1 provides for the membership of the Council. It sets out the procedures for the appointment of members and membership of the Council.

783. It also contains detailed provisions on the procedure of the Council, ancillary process and powers to delegated functions.

784. Paragraph 13 places the Council on the list of authorities subject to investigation by the Scottish Public Services Ombudsman. Paragraph 14 places the Council under the requirements of the Freedom of Information (Scotland) Act 2002.

Schedule 1A – Community Payback Orders: Consequential Modifications

785. Schedule 1A details those amendments to primary legislation as a consequence of the introduction of the community payback order (section 14 of this Bill) which will replace probation orders, supervised attendance orders and community service orders.

786. Part 1 of Schedule 1A amends the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act").

787. Paragraphs 2, 3, 7, 8, 10 and 21 repeal references to probation order and/or community service order in sections 52H(3) (early termination of an assessment order), 52R(3) (termination of a treatment order), 106(1) (right of appeal), 108(1) and (2) (Lord Advocate's right of appeal), 175 (right of appeal) and 246 (admonition and absolute discharge) of the 1995 Act as a consequence of section 14 of this Bill which replaces these orders with community payback orders. There is no requirement to replace these references with community payback order as a community payback order is a sentence following conviction and so is covered under other provisions in the specified sections.

788. Paragraphs 4, 5, 6, 9, 11, 14, 19 and 22 replace references to probation order, community service order and/or supervised attendance order in sections 53(12)(a) (interim compulsion orders), 57A(15)(a) (compulsion orders), 58(8) (order for hospital admission or guardianship), 121A(4) (suspension of certain sentences pending determination of appeal), 193A(4) (suspension of certain sentences pending determination of appeal), 234J (concurrent drug treatment and testing and probation orders), 245J (breach of certain orders: adjourning hearing and remanding in custody etc) and 249(2) (compensation order against convicted person) of the 1995 Act with references to community payback order and relevant sections as a consequence of section 14 of this Bill.

789. Paragraphs 4 and 5 also add restriction of liberty orders and drug treatment and testing orders to the list of orders in sections 53(12)(a) and 57A(15)(a) which cannot be imposed at the same time as an interim compulsion order or a compulsion order. Paragraph 14 also amends section 234J(3) to ensure that the relevant local authority responsible for supervising the offender is provided with a copy of all concurrent orders.

790. Paragraph 12 repeals sections 228 to 234 of the 1995 Act which relate to probation orders.

791. Paragraph 13 amends a typographical error in section 234H(1) (disposal on revocation of a drug treatment and testing order) of the 1995 Act and amends subsection (3) to replace the reference to probation order with community payback order and to make it clear that in cases where a community payback order or restriction of liberty order have been imposed concurrently with a drug treatment and testing order for the same offence and that drug treatment and testing order has been revoked, the court must also revoke the concurrent community payback order or restriction of liberty order.

792. Paragraph 15 repeals sections 235 to 245 of the 1995 Act which relate to supervised attendance orders and community service orders. Paragraph 24 repeals schedules 6 and 7 of the 1995 Act which relate to probation orders and supervised attendance orders. These provisions are being replaced by the provisions in section 14 of this Bill which introduce the community payback order.

793. Paragraph 20 repeals sections 245K to 245Q of the 1995 Act. These provisions relate to community reparation orders (CROs). CROs were introduced as a court disposal specifically aimed at dealing with low level anti social behaviour such as vandalism by means of requiring

offenders to carry out unpaid community work for periods up to 100 hours. The orders were trailed on a pilot basis and an independent evaluation of the pilots determined that for a range of reasons the CRO had not achieved the original objectives. Following a decision by Scottish Ministers provisions for CRO ceased in December 2007. The community payback order, introduced by section 14 of this Bill, replaces the CRO.

794. Paragraphs 16, 17 and 18 amend sections 245A, 245D and 245G of the 1995 Act which relate to restriction of liberty orders (RLOs).

795. Paragraph 16 amends section 245A(2) by inserting subsection (2A) which requires a court, when imposing a restriction of liberty order, to have due regard to any other relevant order or requirement (either another restriction of liberty order or a restricted movement requirement imposed as a sanction for breaching a community payback order) already imposed to ensure that the offender is not required, either by the RLO being imposed or the RLO taken together with any other requirement, to be restricted to a specified place or places for more than 12 hours in any day. A definition of other relevant order or requirement is also inserted as section 245A(2B).

796. Paragraph 17 amends section 245D which relates to the combination of restriction of liberty orders with other orders. References to probation order are replaced with community payback order in sections 245D (1)(b), (2), (3), (4), (7) and (9). Subsection (4)(b) is amended to ensure that the relevant local authority responsible for supervising the offender is provided with a copy of all concurrent orders imposed for the same offence. Subsection (6) is repealed since a court will no longer be able to make a probation order.

797. Section 245D(7) is also amended by paragraph 17(7) to make it clear that a restriction of liberty order may be imposed concurrently with a community payback order or a drug treatment or testing order but cannot be imposed concurrently with both these orders.

798. Paragraph 18 amends 245G of the 1995 Act to provide that the court, when revoking a restriction of liberty order which has been imposed concurrently with a community payback order or drug treatment and testing order for the same offence, must also revoke the concurrent community payback order or drug treatment and testing order.

799. Paragraph 23 inserts definitions of the various requirements referred to in section 14 of this Bill into section 307 (interpretation) of the 1995 Act. Paragraph 23 also repeals certain definitions which no longer apply as a consequence of section 14.

800. Part 2 of Schedule 1A amends other enactments.

Paragraph 25 – The Social Work (Scotland) Act 1968 (c.49).

801. Section 27(1)(b)(iii) and (iv) of the Social Work (Scotland) Act 1968 provide that every local authority must supervise, and provide advice, guidance and assistance to offenders subject to: a community service order; a probation order which includes an unpaid work requirement; or a supervised attendance order. Paragraph 25(2) amends section 27(1)(b)(iii) replacing the references to probation order and community service order with community payback order imposing an unpaid work and other activity requirement. Section 27(1)(b)(iv) is repealed.

Section 27(1)(b)(va) which refers to community reparation orders, is also repealed since the provisions in the 1995 Act relating to CROs are repealed.

802. Section 86 of the 1968 Act details the process to be followed in respect of the provision of accommodation and when determining the ordinary residence of a person subject to local authority supervision. Paragraph 25(3) inserts a reference to community payback order into subsection (3).

Paragraph 26 – The Rehabilitation of Offenders Act 1974 (c.53).

803. Paragraph 26(2) removes reference to probation order in respect of the rehabilitation period for particular sentences in the Rehabilitation of Offenders Act 1974. A community payback order is designated a sentence (unlike a probation order) and so is covered under the general provisions and does not need to be specifically referred to.

804. Paragraph 26(3) also removes references to probation orders in respect of the rehabilitation period applicable to a conviction in section 6(3) of the 1974 Act.

Paragraph 27 - The Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55).

805. Schedule 1, part 2 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 lists those persons who are disqualified from jury service. Paragraph (bb) is amended to substitute community payback order for probation order in sub-paragraph (i). Sub-paragraph (iii) which refers to community service orders is repealed.

Paragraph 28 – The Local Government and Planning (Scotland) Act 1982 (c.43).

806. Section 24 of the Local Government and Planning (Scotland) Act 1982 refers to councils' functions in relation to the provision of gardening assistance for the disabled and the elderly. Subsection (3) is amended to replace references to instructions given under the Community Service by Offenders (Scotland) Act 1978 in respect of community service orders with references to determinations made under section 227A of the Criminal Procedure Scotland Act in respect of community payback orders with unpaid work and other activity requirement.

Paragraph 29 – The Foster Children (Scotland) Act 1984 (c.56).

807. Paragraph 29 replaces references to probation order with community payback order in section 2(3) of the Foster Children (Scotland) Act 1984 which lists the circumstances in which a child is not considered to be a foster child under the terms of section 1 of the 1984 Act.

Paragraph 30 – The Road Traffic Offenders Act 1988 (c.53).

808. References to probation order in section 46(3)(b) of the Road Traffic Offenders Act 1998 are repealed. As a community payback order is considered to be a sentence, following a conviction, there is no requirement to refer specifically to this.

Paragraph 31 – The Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40).

809. Paragraph 13 of Schedule 3, Part 2 of the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995, which relates solely to supervised attendance orders, is repealed as a

consequence of section 14 of this Bill which replaces supervised attendance orders with community payback orders.

Paragraph 32 – The Proceeds of Crime (Scotland) Act 1995 (c.43).

810. Paragraph 32 repeals references to probation order in sections 25(9) and 26(9) of the Proceeds of Crime (Scotland) Act 1995. As imposition of a community payback order is considered a sentence, and action in respect of sentences is specifically provided for, there is no requirement to replace the references to probation with community payback order.

Paragraph 33 – The Crime and Punishment (Scotland) Act 1997 (c.48).

811. Section 26 of the Crime and Punishment (Scotland) Act 1997 which relates to evidence requirements in respect of offences committed whilst the offender is subject to a probation order or a community service order is repealed.

812. Paragraph 21, sub-paragraphs (27) to (29) of Schedule 1 to the 1997 Act, which also relate to probation orders, are repealed.

Paragraph 34 – The Crime and Disorder Act 1998 (c.37).

813. Paragraphs 1 and 2 of Schedule 6, Part 1 of the Crime and Disorder Act 1998 relate to imposition of drug treatment and testing orders or restriction of liberty orders concurrently with probation orders, and amend the relevant provisions in the Criminal Procedure (Scotland) Act 1995 to enable these combinations to be imposed. Paragraph 34 repeals these provisions as probation orders will be replaced by community payback orders and provisions relating to orders which may be imposed concurrently are contained in section 14 of this Bill.

Paragraph 35 – The Powers of Criminal Courts (Sentencing) Act 2000 (c.6).

814. Paragraphs 176 to 178 of the Powers of Criminal Courts (Sentencing) Act 2000 amend sections 234 (probation orders), 242 and 244 (community service orders) of the Criminal Procedure (Scotland) Act 1995. These sections are repealed as a consequence of section 14 of this Bill which replaces probation orders and community service orders with community payback orders.

Paragraph 36 – The Criminal Justice and Court Services Act 2000 (c.43).

815. Paragraph 36 repeals the reference to 234(1)(a) of the Criminal Procedure (Scotland) Act 1995 in Schedule 7, paragraph 4(2) of the Criminal Justice and Court Services Act 2000. Section 234 of the 1995 Act refers to probation orders and is repealed as a consequence of section 14 of this Bill which replaces probation orders and community service orders with community payback orders.

Paragraph 37 – The Social Security Fraud Act 2001 (c.11).

816. Section 7 of the Social Security Fraud Act 2001 relates to loss of benefit as a consequence of benefit offences. Subsection (9)(b) defines conviction as including the imposition of a probation order by a Scottish court. Paragraph 37(3) repeals the reference to probation order. There is no requirement to replace this reference with community payback order as a community payback order is a sentence following conviction.

Paragraph 38 – The Justice (Northern Ireland) Act 2002 (c.26).

817. Paragraph 38 repeals Schedule 4, paragraph 37 of the Justice (Northern Ireland) Act 2002. Paragraph 37 of the 2002 Act amends section 244 of the Criminal Procedure (Scotland) Act 1995 (relating to community service orders). Section 244 is repealed as a consequence of section 14 of this Bill which replaces community service orders with community payback orders.

Paragraph 39 – The Criminal Justice (Scotland) Act 2003 (asp 7).

818. Paragraph 39 amends sections 42, 46, 50 and 60 of the Criminal Justice (Scotland) Act 2003. Section 42 relates to drugs courts and the amendments to this section replace references to probation order and community service order with community payback order and replace references in the Criminal Procedure (Scotland) Act 1995 which relate to probation orders with corresponding references relating to community payback orders. Section 46 provides for remote monitoring as a condition of a probation order and this provision is repealed as a consequence of the repeal of probation orders in their entirety. Section 50(1), (2) and (4), which relate solely to supervised attendance orders, are also repealed as a consequence of section 14 of this Bill which replaces the provisions relating to supervised attendance orders. Section 60(1)(a), (b), (e) and (f) and subsections (3) and (4) are repealed. These relate solely to procedures relating probation orders, community service orders and supervised attendance orders, all of which are replaced by community payback orders.

Paragraph 40 – The Mental Health (Care and Treatment) (Scotland) Act 2003 (asp. 13).

819. Paragraph 40 repeals section 135 of and paragraph 8(15) of Schedule 4 to the Mental Health (Care and Treatment) (Scotland) Act 2003. Section 135 and paragraph 8(15) amend section 230 of the Criminal Procedure (Scotland) Act 1995 in respect of probation for treatment of a mental disorder. Section 230 is repealed as a consequence of section 14 of this Bill which replaces probation orders with community payback orders. Section 14 also provides for mental health treatment requirements as part of a community payback order.

Paragraph 41 – The Criminal Justice Act 2003 (c.44).

820. Paragraph 41 repeals paragraphs 69 to 27 of Schedule 32 of the Criminal Justice Act 2003. Schedule 32 of the 2003 Act amends primary legislation which relates to sentencing. Paragraphs 69 to 72 amend sections 234, 242 and 244 of the Criminal Procedure (Scotland) Act which relate to probation orders and community service orders. Sections 234, 242 and 244 are repealed as a consequence of section 14 of this Bill which replaces probation orders and community service orders with community payback orders.

Paragraph 42 – The Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8).

821. Section 120 of the Antisocial Behaviour etc. (Scotland) Act 2004 relates solely to community reparation orders (CROs). Paragraph 42 repeals section 120 and Schedule 4, paragraph 5, sub-paragraphs (3), (5), (6) and (11) of the 2004 Act (which amend provisions in the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) relating to CROs, supervised attendance orders and community service orders). Provisions in the 1995 Act relating to supervised attendance orders and community service orders are repealed as a consequence of section 14 of this Bill which replaces supervised attendance orders and community service orders with community payback orders.

Paragraph 43 – The Management of Offenders etc. (Scotland) Act 2005 (asp 14).

822. Paragraph 43 amends section 10 of the Management of Offenders etc (Scotland) Act which deals with the arrangements for assessing and managing risk posed by certain offenders. In subsection (1)(b) references to probation order are replaced by references to community payback order which are intended to replace probation orders.

Paragraph 44 – The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6).

823. Paragraph 44 repeals sections 49(4), 57 and paragraph 26(l) and (n) of the schedule. Section 49(4) provides for a compensation requirement to be imposed as part of a probation order, section 57 relates specifically to breach of probation orders and community service orders and paragraph 26(l) and (n) of the schedule relate to community service orders and community reparation orders respectively. The relevant sections of the Criminal Procedure (Scotland) Act 1995 which provide for probation orders, community service orders and community reparation orders are repealed as a consequence of section 14 of this Bill. Section 14 provides for a compensation requirement to be imposed as part of a community payback order and for the process to be followed in the event of breach of a community payback order, replacing those provisions which are being repealed.

Paragraph 45 – The Criminal Justice and Immigration Act 2008 (c.4).

824. Paragraph 45 repeals paragraphs 43 to 46 of Schedule 4, Part 1 of the Criminal Justice and Immigration Act 2008. These provisions detail the effect of the Criminal Procedure (Scotland) Act 1995 in respect of the 2008 Act and relate specifically to sections 234 (probation orders), 242 and 244 (community service orders). These sections are repealed as a consequence of section 14 of this Bill which introduces the community payback order which replaces probation orders and community service orders.

Schedule 2 – Short-term custody and community sentences: consequential amendments

825. See section 18 above.

Schedule 2A – Convictions by Courts in other EU Member States: Modifications of Enactments

826. Schedule 2A outlines a number of amendments to legislation to allow courts to take account of previous convictions in other European Union Member States. The amendments seek to implement the Council of the European Union Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

827. The amendments add references to convictions or sentences issued by courts in other Member States of the EU to the following existing provisions:

828. Part 1 of the schedule, comprising paragraphs 1 to 8, makes amendments to the 1995 Act.

829. Paragraph 2 amends section 23C, which concerns grounds for refusing bail. This provision previously permitted previous convictions from courts outside Scotland to be taken into account the amendment simply maintains that position, but it is necessary to ensure this

provision is consistent with the change to the general definition of a previous conviction in section 307(5).

830. Paragraph 3 amends section 27 which sets out the consequences where an individual is charged with an offence, granted bail and breaches their bail conditions by committing a further offence. The section provides that the accused will not be charged separately for breaching the bail conditions, but certain factors will be taken into account by the court in determining the sentence/ disposal for the subsequent offence and this includes any previous conviction of the accused for failing to comply with a condition imposed on bail. The amendment allows the court to consider any conviction for an offence committed in another EU Member State which is considered by the court to be equivalent to the offence of failing to comply with a condition imposed on bail.

831. Paragraph 4 amends section 202, which provides that where the accused has been given a deferred sentence and is subsequently convicted of a separate offence during the period of deferment, the court can issue a warrant for the accused’s arrest or issue a citation requiring the accused to appear before the court in relation to the deferred sentence. The amendment will ensure that where a person is given a deferred sentence in Scotland and then commits a further offence in another EU Member State, the conviction for the subsequent offence can be taken into account under this provision.

832. Paragraph 5 amends section 204, which sets out restrictions on imposing a custodial sentence, for example where the accused is not legally represented and has not been previously sentenced, to ensure that the references in that section to a person having been previously sentenced to imprisonment or detention will include equivalent previous sentences from another EU Member State.

833. Paragraph 6 amends section 205B, which provides that where an accused is given a third conviction for certain offences relating to drug trafficking he shall be sentenced to a minimum period of imprisonment unless the court considers it would be unjust to do so in all the circumstances. The amendment requires the court to take into account any conviction for an offence committed in another EU Member State where the offence is considered by the court to be equivalent to an offence of class A drug trafficking.

834. Paragraph 7 amends section 275A, which concerns the disclosure of previous convictions relating to sexual offences in certain circumstances, to ensure that the prosecutor can place before the court a previous conviction from another EU Member State for an offence which is equivalent to the sexual offences listed in section 288C.

835. Paragraph 8 amends section 307 - the interpretation section - to ensure that where the term “previous conviction” or “previous sentence” appears in the 1995 Act, it will include a conviction or sentence handed down by a court in any other Member State of the EU, rather than limiting this definition to disposals within the United Kingdom, unless the context of the provision requires otherwise. The definition of conviction in subsection (1) is taken from Article 2 of the Council Framework Decision (2008/675/JHA).

836. Part 2 of the schedule, comprising paragraphs 9 to 13, make amendments to a range of other enactments that refer to previous convictions or previous sentences.

837. Paragraph 9 amends section 58 of the Civic Government (Scotland) Act 1982. This section provides that a person commits an offence where they possess or have recently possessed a tool or object where it can be reasonably inferred that they intend to commit or have committed an act of theft, the accused cannot demonstrate that possession was not for that purpose, and the accused holds 2 previous convictions for theft. The amendment allows the court to consider any conviction for an offence committed in another EU Member State that is considered by the court to be equivalent to theft.

838. Paragraph 10 amends section 27 - the interpretation section for Part I - of the Prisoners and Criminal Proceedings (Scotland) Act 1993 to ensure that any reference in Part I of that Act to "previous conviction" will include convictions from any part of the UK or another EU Member State .

839. Paragraph 11 amends section 9 of the Criminal Law (Consolidation) (Scotland) Act 1995. This will ensure that the defence to a charge of permitting a girl to use premises for intercourse that the alleged offender considered the victim to be 16 years or more, cannot apply where the offender has a previous conviction from another EU Member State for a sexual offence which is defined in section 39(5)(aa) of the Sexual Offences (Scotland) Act 2009.

840. Paragraph 12 amends section 4 of the Custodial Sentences and Weapons (Scotland) Act 2007 to provide that any reference to "previous conviction" in Part 2 of that Act includes a previous conviction in any part of the UK or another EU Member State. Paragraph 13 amends section 39 of the Sexual Offences (Scotland) Act 2009. This will ensure that the defence to a charge in proceedings, where the offence was allegedly committed against an older child, that the accused reasonably believed that the victim was 16 years or more at the time the conduct took place, cannot be used where the accused has a previous conviction from another EU Member State for a sexual offence which is equivalent to the offences listed in schedule 1 of that Act.

Schedule 3 – Witness anonymity orders

841. This Schedule deals with appeals on the granting of witness anonymity orders made under common law powers prior to the provisions under 271N to 271T coming into effect. The High Court can only quash a conviction if, as a result of an order made under common law, the accused did not receive a fair trial. It cannot quash a conviction simply on the basis that the trial court had no power to make a witness anonymity order under common law.

Schedule 4 – Further modifications of 2005 Act

842. See section 139 above.

Schedule 5 – Modification of enactments

Paragraphs A1-A3, 10A, 43B, 47A – The Libel Act 1792 (para A1), The Criminal Libel Act 1819 (para A2), The Defamation Act 1952 (para A3), The Trade Union and Labour Relations (Consolidation) Act 1992 (para 10A), The Defamation Act 1996 (para 43B) and The Legal Deposit Libraries Act 2003 (para 47A)

843. See section 37A above.

Paragraph 1 – The False Oaths (Scotland) Act 1933

844. Sections 44 to 46 of the Criminal Law (Consolidation) (Scotland) Act 1995 ("the 1995 Act") re-enact most of the False Oaths (Scotland) Act 1933 ("the 1933 Act"). Schedule 5 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 which lists the repeals undertaken in the consolidation exercise does not include a reference to the 1933 Act. This is an error and should have been included at the time of the consolidation exercise was carried out. This section repeals the 1933 Act in full. Consequential amendments are required where reference is made to the 1933 Act, or a provision of that Act, in other pieces of legislation, substituting a reference to the new provisions in the 1995 Act. Paragraphs 4, 45 and 51 make the necessary consequential amendments.

Paragraph 2 – The Public Records (Scotland) Act 1937

845. Paragraph 2 amends section 14 of the Public Records (Scotland) Act 1937. Paragraph 1(a) puts beyond any doubt that references to "court records" in that Act include the Scottish Land Court as well as all the ordinary courts. Paragraph (2) provides that any question as to whether or not a document is part of the records of a particular court is to be determined by either the Lord President or the Lord Justice General.

Paragraph 2A – the Law Officers Act 1944

846. Schedule 5 paragraph 2A updates a cross-reference in section 2 of the Law Officers Act 1944. Following the passage of the 1995 Act the correct provision dealing with demission of office by the Law Officers is section 287 of the 1995 Act rather than the provisions currently mentioned in the 1944 Act which previously did so.

Paragraph 3 – The Rehabilitation of Offenders Act 1974

847. Paragraph 3(2) amends section 1(4)(b) of the Rehabilitation of Offenders Act 1974 (c.53) to change the reference of "insanity" in that Act to refer to the new defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill.

848. Paragraph 3(3) substitutes "Schedule 1" for "the Schedule" in section 6(6)(bb) of the Rehabilitation of Offenders Act 1974. This change is necessary because section 79A of this Bill inserts a Schedule 3 into the 1974 Act. In addition, the Criminal Justice and Immigration Act 2008 (c.4) which made similar amendments to the 1974 Act for cautions in England and Wales inserted a Schedule 2 into the 1974 Act.

849. Paragraph 3(4) renumbers the Schedule after section 11 of the Rehabilitation of Offenders Act 1974 to "Schedule 1" to reflect the introduction of further Schedules to that Act, as referred to in the previous sub-paragraph.

Paragraph 4 – The Evidence (Proceedings in Other Jurisdictions) Act 1975

850. This amendment is consequential on the repeal of the False Oaths (Scotland) Act 1933 by paragraph 1.

Paragraphs 5 –7 - The 1982 Act

851. Section 52(7) of the Civic Government (Scotland) Act 1982 provided that offences of taking, permitting to be taken, or making of any indecent photograph or pseudo-photograph (section 52(1)(a) of the 1982 Act) were to be included in the list of offences contained in Schedule 1 to the Criminal Procedure (Scotland) Act 1975. Schedule 1 to the 1975 Act listed offences against children under the age of 17 years, to which special provisions applied. Section 52(7) of the 1982 Act also provided that section 52(1)(a) offences were included in Schedule 1 to the 1975 Act for the purposes of Part III of the Social Work (Scotland) Act 1968, which has since been repealed.

852. Schedule 1 to the 1975 Act has since become Schedule 1 to the Criminal Procedure (Scotland) Act 1995, and was later amended by the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 to insert the offences under sections 52 and 52A of the 1982 Act in relation to an indecent photograph of a child under the age of 17 years. As section 52(7) has been overtaken by subsequent legislation, this subsection is repealed.

853. Paragraph 6 repeals a minor amendment made to section 52(7) of the Civic Government (Scotland) Act 1982 by the Criminal Justice Act 1988, consequential on the repeal of section 52 (7) by paragraph 6 of this schedule.

854. Paragraph 7 simply corrects a minor error in section 64 of the 1982 Act, which provides for appeals against orders in relation to public processions.

Paragraph 8 – The Legal Aid (Scotland) Act 1986

855. Paragraph 8 amends section 22 of the Legal Aid (Scotland) Act 1986 (c.47) which deals with the availability of criminal legal aid so as to substitute reference to the new defence and plea of unfitness for trial in place of the references to cases involving “insanity”.

Paragraph 9 – The Criminal Justice (Scotland) Act 1987

856. Sections 27 to 30 of the Criminal Law (Consolidation)(Scotland) Act 1995 provide for special investigating powers to be exercised by a nominee of the Lord Advocate in the event of a direction being given when a suspected offence may involve serious or complex fraud. They re-enact sections 51 to 54 of the Criminal Justice (Scotland) Act 1987.

Paragraph 11 – The Criminal Justice and Public Order Act 1994

857. Schedule 5 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 lists the provisions which were repealed as part of the consolidation exercise. However, the schedule does not include sections 51 to 54 of the 1987 Act. This is an error and should have been included at the time of the consolidation exercise. This paragraph repeals sections 51 to 54 of the 1987 Act, and paragraphs 8 and 9 repeal amendments made to those sections by the Criminal Justice Act 1988 and the Criminal Justice and Public Order Act 1994. .

Paragraphs 12, 13 and 14 – The Criminal Law (Consolidation) (Scotland) Act 1995

858. Section 16 of the Criminal Law (Consolidation) (Scotland) Act 1995 allows any parent, relative, guardian or person acting in the best interests of a woman or girl to ask for a warrant to

be issued. This warrant will authorise a named constable to enter a specified place and search for that woman or girl where they believe she is unlawfully being held for immoral purposes. If the woman or girl is found she will be delivered to her parents or guardians.

859. There is also a right afforded to the person requesting the warrant to accompany the constable when the warrant is executed. This is an outmoded provision and in practical terms the police already have the common law power to request warrants for circumstances such as this. This section repeals section 16. The power has not been used for many years, and is repealed as it is considered to be redundant.

860. Part II of the Criminal Law (Consolidation) (Scotland) Act 1995 makes provision for sporting events and specifically makes provision regarding the control of alcohol, fireworks and flares at sporting grounds and sporting events. Paragraph 14 substitutes “it” for “in” section 23 (interpretation of part 2) to correct a typographical error. The relevant provision was originally section 77 of the Criminal Justice (Scotland) Act 1980 where the text was correct. Although we are not aware of any problems arising from the error in the definition we have taken the opportunity offered by this Bill to correct this mistake.

Paragraph 14A – The Criminal Procedure(Consequential Provisions) (Scotland) Act 1995

861. Paragraph 14A repeals a provision in the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 that is made redundant by the provisions on extreme pornography in section 34 of the Bill.

Paragraphs 15-43 – The 1995 Act

862. Paragraph 16 inserts new section 5A into the 1995 Act providing that it is competent for a sheriff to sign certain documents at any place in Scotland. As this is currently provided for under section 9A of the 1995 Act, this amendment has no effect on existing practice. However, new section 5A will become necessary upon the full repeal of section 9A (by paragraph 9(7) of the Schedule to the Criminal Proceedings etc. (Reform) (Scotland) Act 2007). Separate provision as to the signing of documents by justices of the peace and stipendiary magistrates is made in section 62 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007.

863. Paragraph 17 amends section 10A of the 1995 Act and is consequential upon section 46 of the Bill. It confers jurisdiction upon both the JP court and the procurator fiscal of the relevant court where proceedings have been initiated in or transferred to another JP court.

864. Paragraph 17A amends subsections (3) and (4) of section 11 of the Criminal Procedure (Scotland) Act 1995 to provide that where applicable the offences referred to within the 1995 provisions may be triable by either solemn or summary procedure. Section 11 gives jurisdiction to the Scottish courts to try certain specified offences which are committed outside Scotland by certain specified individuals. Subsection (3) makes provision concerning the jurisdiction of the sheriff court in the taking of proceedings in relation to these offences. Subsection (4) makes provision concerning the taking of proceedings in Scotland in relation to certain specified criminal behaviour taking place in Scotland concerning property which has been stolen outwith Scotland but within the United Kingdom.

865. Paragraphs 17B, 19B, 26A and 26B, 27A, 32A, 32B and 32C substitute references to specific types of hearings (such as trials and victim statement proofs) with "any relevant hearing" in sections 17A, 35, 66, 140, 144 and 146 of the 1995 Act. These are consequential upon section 51A, which extends the prohibitions on an accused conducting his own defence contained in sections 288C, 288E and 288F of the 1995 Act to any relevant hearings.

866. Paragraph 17C amends section 18(8)(c) of the 1995 Act. The amendment to section 18(8)(c) removes the reference to "impressions" and replaces the reference to "prints" with "relevant physical data". Since the meaning of "prints" is limited to fingerprints, its replacement with "relevant physical data" ensures there is no doubt that palm prints and other kinds of relevant physical data, as defined in section 18(7A) of the 1995 Act, are included for the purpose of section 18(8)(c). The power to take samples, information derived from samples and relevant physical data under authority of a warrant remains.

867. Paragraph 17D removes the obsolete reference to "impressions" in section 19(1)(c) of the 1995 Act.

868. Paragraphs 18, 20, 21, 22, 23, 25, 26, 30 and 33-34 all concern the change in references to "insanity" and "insanity as a plea in bar" in the 1995 Act. References in the 1995 Act to "insanity" as a defence are changed to refer to the defence created by the new section 51A of the 1995 Act, as inserted by section 117 of this Bill. References to "insanity as a plea in bar" are changed to refer to unfitness for trial.

869. Paragraph 18A repeals section 20 of the 1995 in consequence of new section 19C (inserted by section 60).

870. Paragraph 19 repeals parts of section 22 of the 1995 Act, in consequence of the amendments made by section 41.

871. Paragraph 19A amends section 23A of the 1995 Act, which provides that bail can be granted notwithstanding that an accused is in custody for another offence. The amendment inserts a reference to bail granted pending a Crown appeal under new section 107A (2)(b), which is being inserted into the 1995 Act by section 55 of the Bill.

872. Paragraph 24 amends section 61 of the 1995 Act. Section 61 of the 1995 Act contains a requirement that various court orders must be based on the evidence of two medical practitioners, one of whom must have been approved as having special expertise in mental health. The effect of these amendments is that this requirement does not apply to a finding by a court that a person is unfit for trial.

873. Paragraph 27 amends section 78(2) of the 1995 Act so as to provide that diminished responsibility is treated as if it were a special defence for the purpose of giving advance notice (see 1995 Act, section 78(1)). The plea is not treated as if it were a special defence for any other purpose (eg disclosure to the jury under section 89(1)).

874. Paragraph 28 removes a superfluous word from section 90D of the 1995 Act.

875. Paragraph 29 substitutes a new subsection (4) into section 102A of the 1995 Act. The effect of this is to remove from that subsection a reference to section 27(1)(a) of the 1995 Act which has no application in the context of the section 102A provision.

876. Paragraph 31 is consequential upon section 45 of the Bill. The effect is to ensure time limits for transferred and related cases apply also to relevant cases in JP courts.

877. Paragraph 32 makes an amendment to section 137B of the 1995 Act. Where a sheriff has made an order allowing the transfer of, or initiation of proceedings in, another sheriff court paragraph 28 provides that any other sheriff of the same sheriffdom may revoke or vary that order.

878. Paragraph 41 amends section 254 to make clear that the term “article” includes animal. A consequential rearrangement of section 254 is made.

879. Paragraph 42 inserts new subsection (4AA) into section 258.. This clarifies that where an objection to a notice of uncontroversial evidence has been lodged in summary proceedings, this may be challenged at any time prior to an intermediate diet.

880. Paragraph 43 amends section 307 of the 1995 Act (which defines certain terms for the purposes of the 1995 Act) so as to provide that the meaning of "unfit for trial" is given in the new section 53F.

Paragraph 43A – The Offensive Weapons Act 1996

881. This amendment is consequential on amendment of section 47(4) of the Criminal Law (Consolidation) (Scotland) Act 1995 made by section 31A of this Bill.

Paragraph 44 – The Crime and Punishment (Scotland) Act 1997

882. Paragraph 44(2) amends section 9 the Crime and Punishment (Scotland) Act 1997. Section 9 of the 1997 Act refers to "section 57(2)(a) of the 1995 Act (disposal where accused insane)." The effect is to substitute references to “insane” with a reference to the new statutory defence and plea in bar of trial which is contained in section 117 of the Bill.

883. Paragraphs 44(3) and 44(4) repeal provisions in the Crime and Punishment (Scotland) Act 1997 that are made redundant by the changes to summary court sentencing powers contained in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 and by the provisions on remand and committal of children and young persons (contained in section 47 of the Bill).

Paragraph 45 – The Terrorism Act 2000

884. This amendment is consequential on the repeal of the False Oaths (Scotland) Act 1933 by paragraph 1.

Paragraph 46 – The Protection of Children (Scotland) Act 2003

885. Paragraph 46 amends section 10 of the Protection of Children (Scotland) Act 2003 so as to substitute reference to the special defence created by the new section 51A of the Criminal

Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill, in place of the reference to acquittal on the ground of “insanity”.

Paragraph 47 – The Criminal Justice (Scotland) Act 2003

886. Paragraph 47 amends the Criminal Justice (Scotland) Act 2003 to adjust a reference in section 3 of that Act to section 57 of the 1995 Act to take account of the change of the title of section 57 by paragraph 21 of this Schedule.

Paragraph 48 – The Sexual Offences Act 2003

887. Paragraph 48 amends section 135 of the Sexual Offences Act 2003 so that references in Part 2 of that Act (notification and orders) to a person being found not guilty of an offence by reason of insanity include reference to a person acquitted by reason of the defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill.

Paragraph 48A– The Criminal Procedure (Amendment) (Scotland) Act 2004

888. Paragraph 48A is consequential to sections 43A and 51A. Subsection (4) of section 4, section 17 and paragraph 55 of the schedule to the Criminal Procedure (Amendment) (Scotland) Act 2004 are repealed.

Paragraph 49 – The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005

889. Paragraph 49 amends section 8 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, which deals with persons who breach Risk of Sexual Harm Orders. It adds reference to a person acquitted of an offence of breaching an risk of sexual harm order by reason of the defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill alongside references to a person being found not guilty of such an offence by reason of insanity.

Paragraph 50 – The Management of Offenders etc. (Scotland) Act 2005

890. Paragraph 50 amends section 10 of the Management of Offenders etc. (Scotland) Act 2005 so that references to persons acquitted on the ground of insanity and persons found to be insane in bar of trial are updated to reflect the new equivalents established by this Bill.

Paragraph 51 – Serious Organised Crime and Police Act 2005

891. This amendment is consequential on the repeal of the False Oaths (Scotland) Act 1933 by Paragraph 1.

Paragraphs 52 – 54 - The Criminal Proceedings etc. (Reform) (Scotland) Act 2007

892. Paragraphs 53 and 54 remove unnecessary references from section 7 of, and the Schedule to, the 2007 Act, in consequence of the amendments made by section 41 of this Bill.

893. Section 74(6) of the 2007 Act states that a Stipendiary Magistrate may exercise judicial and signing functions in the same manner as a Justice of the Peace (JP). Section 76(2) of that Act states that a member of a local authority may also exercise signing functions in the same manner as a JP.

894. Paragraphs 53A-C clarifies the position by replacing the reference to Stipendiary Magistrates acting "in the same manner" as a JP with a new section 74A which states that a Stipendiary Magistrate may exercise the same judicial and signing functions as a JP as if the magistrate was a JP. It also clarifies that a member of a local authority may exercise the same signing functions as a JP.

Paragraph 55 – The Protection of Vulnerable Groups (Scotland) Act 2007

895. Paragraph 55 amends section 32 of the Protection of Vulnerable Groups (Scotland) Act 2007 so as to substitute reference to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 119 of this Bill, in place of the reference to acquittal on the ground of "insanity".

Paragraph 56 – The Counter-Terrorism Act 2008

896. Paragraph 56 amends section 45 of the Counter-Terrorism Act 2008 so as to substitute reference to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill, in place of the reference to acquittal on the ground of "insanity" and to update a reference to section 55 of the Criminal Procedure (Scotland) Act 1995.

Paragraph 56A – The Sexual Offences (Scotland) Act 2009

897. Paragraph 56A amends section 55(7) of the Sexual Offences (Scotland) Act 2009 to provide greater certainty in statute to clarify that these offences may be triable by either solemn or summary procedure. Section 55(7) of the 2009 Act gives the sheriff court jurisdiction to try certain specified offences committed outwith the United Kingdom by persons to whom section 55 of the 2009 Act applies.

Paragraph 57 – The Coroners and Justice Act 2009

898. Paragraph 57 amends section 156 of the Coroners and Justice Bill so as to substitute references to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill, in place of the references to acquittal on the ground of "insanity".

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

SUPPLEMENTARY FINANCIAL MEMORANDUM

1. This document relates to the Criminal Justice and Licensing (Scotland) Bill introduced in the Scottish Parliament on 5 March 2009. This Supplementary Financial Memorandum complements the Financial Memorandum provided with the introduction of the Bill and includes the financial impact of Stage 2 amendments on the Bill only where the cost implications of the Bill have been significantly altered.

SECTION 24B – MINIMUM SENTENCE FOR HAVING IN A PUBLIC PLACE AN ARTICLE WITH A BLADE OR POINT

2. Sections 49(1) of the 1995 Act provides for the offence of having in a public an article with a blade or is sharply pointed. The provisions in section 24B will introduce mandatory minimum custodial sentences of at least 6 months for all offences committed under section 49(1) of the Criminal Law (Consolidation) (Scotland) Act 1995.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

3. There were 3,529 persons convicted of a main crime of handling an offensive weapon in 2008-09. Of these, 1,847 persons were convicted of ‘Having in a public place an article with a blade or point’, and the remainder (1,682 persons) were convicted of ‘Possession of an offensive weapon’. The following estimates have been derived by only including crimes of ‘Having in a public place an article with a blade or point’.[1]

4. In 2008-09, of the 1,847 persons convicted, just over one third (669) were given a custodial sentence, with an average length of over 9 months (277 days). The additional costs for the Scottish Prison Service of imposing the minimum 6 month mandatory custodial sentences, on those offenders who received a non-custodial sentence and those offenders who received a custodial sentence of less than six months, is *estimated* to be **£13.0m** per annum (on the assumption that half the time is served in custody). This has been calculated using an estimated

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[1] Where an offence modifier exists for crimes of ‘Having in a public place an article with a blade or point’, the overwhelming majority of modifiers are knives or other bladed/pointed articles. Where an offence modifier exists for crimes of ‘Possession of an offensive weapon’, 30% are knives or other bladed/pointed articles. In addition, in 2008-09 there were over 1,000 other crimes of offences not in the handling an offensive weapons category, but with a modifier of knife or other bladed/pointed article (around 27% of which were serious assault, 28% minor assault, and 23% breach of the peace).

cost of a one year custodial prison place of £44,447 (Scottish Prison Service Annual Report 2008-09).

5. In terms of prisoner numbers, the (very simple) estimate of the impact on the annual prison population of a mandatory 6 month sentence would be around 300 additional people.

BREAKDOWN OF COST INCREASE

		CURRENT COSTS		**NEW COSTS**	
Sentences given in 2008-09	Number of persons	Average cost per person (£)	Total cost (£m)	Average cost per person (£)	Total cost (£m)
Custodial	669	16,866	11.3	18,875	12.6
Community Service Order	667	2,184	1.5	11,112	7.4
Monetary	354	0	0.0	11,112	3.9
Other	157	0	0.0	11,112	1.7
Total	**1,847**		**12.7**		**25.7**

Increase in cost per year (£m) = 25.7 – 12.7 = 13.0

Notes

1. The custodial costs per person are based on data in the SPS annual report (2008/09) which provides £44,447 as the annual cost of a prison place. All calculations shown assume half the custodial sentence is served on the basis of the current legislative framework. For example therefore, where £11,112 is shown as the new cost per person, this refers to the cost of a custodial sentence of 6 months with time spent in custody of 3 months.
2. The current cost per person for a custodial sentence (£16,866) is based on the current average (mean) sentence for these crimes and associated prison costs. The current cost per person of a community service order is based on the costs presented in the original Financial Memorandum for this Bill (pages 96 and 97 of the explanatory notes).
3. The new cost per person for a custodial sentence assumes that those persons currently sentenced to custody for less than 6 months instead receive a 6 month custodial sentence, and that those persons currently sentenced to 6 months or more in custody continue to receive that sentence.
4. The new cost per person for those persons previously sentenced to community service orders, monetary sentences and other sentences is based on these persons instead receiving a 6 month custodial sentence.

COSTS ON LOCAL AUTHORITIES

6. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

7. We do not anticipate any additional costs on other bodies, individuals and businesses. In particular, the calculation assumes that the costs to the Scottish Court Service for someone sentenced to prison are similar to the cost for someone sentenced to a non-custodial sentence.

Summary

Section 24B - Minimum sentence for having in a public place an article with a blade or point – (all figures in £m)						
Year 1		Year 2				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
13.0	0.0	13.0	0.0	13.0	0.0	0.0

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Subordinate Legislation Committee in its consideration of the Criminal Justice and Licensing (Scotland)) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or substantially amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

Section 14 (new section 227B(2A) of the 1995 Act) – Power to prescribe by Act of Adjournal the nature and format of information, to be provided in a report to the court by the local authority before imposition of a community payback order

Power conferred on: **High Court of Justiciary**
Power exercisable by: **Act of Adjournal**
Parliamentary procedure: **None**

Provision

2. Section 227B sets out the general procedures which a court requires to apply before imposing a community payback order (CPO). At introduction there was a power for the information to be contained in a report from a local authority officer to be specified by Act of Adjournal. Amendments at Stage 2 added the power to prescribe the format of such a report by Act of Adjournal. These powers have been set out in a new subsection (2A). A new subsection (2B) now provides that subsection (2) (requirement for the court to obtain and consider a report from the local authority) does not apply where the court is considering imposing a CPO which contains only a level 1 unpaid work and other activity requirement or which is imposed under section 227M(2) (for fine default). Subsection (2B) is inserted to reduce the burden on local authority social work departments by limiting the types of cases in which reports must be provided.

Reason for taking this power

3. Section 227B(2) precludes a court from imposing a community payback order without first obtaining a report from the relevant local authority unless the circumstances in subsection (2B) apply. Setting out the form of the report and the details of the information to be included in it is essentially an administrative matter and would not normally be the subject of primary legislation. We therefore consider it appropriate that the High Court of Justiciary should be able to prescribe it if required.

Choice of procedure

4. Detailed matters relating to court procedure, such as the content of reports to assist with sentencing decisions, are not considered appropriate to be included in primary legislation. Such administrative matters can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any parliamentary procedure (see section 305 of the Criminal Procedure (Scotland) Act 1995, which makes provision about Acts of Adjournal generally).

Section 14 (new section 227FA(1) of the 1995 Act) - Power to make an order for the payment to offenders of travelling or other expenses in connection with compliance with requirements imposed by community payback orders

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order made by statutory instrument**
Parliamentary procedure:	**Negative resolution of the Scottish Parliament**

Provision

5. Section 227FA gives the Scottish Ministers the power to make provision for the payment to offenders of travelling or other expenses in connection with undertaking any of the requirements of a community payback order. This is a new section but the power is pre-existing from the Bill as introduced where it was included at section 227O(2)(c) in a slightly different form. Subsection (1) specifies that Scottish Ministers may provide for such payment by order made by statutory instrument. Subsection (2) provides that an order made under subsection (1) may specify such expenses or provide for them to be determined under the order; to provide for the payments to be made by or on behalf of local authorities and make different provision for different purposes. Subsection (3) specifies that the negative resolution procedure should be followed.

Reason for taking this power

6. These provisions continue the existing power under the 1995 Act (section 245) for ministers to regulate work under community service orders including by making provision for the payment of travelling and other expenses. These are essentially administrative matters and would not normally be the subject of primary legislation.

Choice of procedure

7. The negative resolution procedure is specified in section 245 of the 1995 Act. It is the appropriate level of parliamentary scrutiny in light of the limited nature of the enabling power.

Section 14 (new section 227I(6) of the 1995 Act) – Power to make an order varying the minimum and maximum hours of unpaid work or other activity requirement

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Negative resolution of the Scottish Parliament**

Provision

8. Section 227I sets out the provisions the court must apply when imposing a CPO with an unpaid work and other activity requirement. The power in subsection (6) is pre-existing from the Bill as introduced. The Subordinate Legislation Committee raised a concern about the power as originally drafted, which enabled Scottish Ministers to vary by order the minimum and maximum number of hours of unpaid work and other activity which could be specified in a requirement in a CPO. The Committee recommended that the power should be expressed as a power to vary within defined maximum and minimum limits. New subsection (6A) provides the minimum and maximum number of hours which may be substituted by an order made under subsection (6) for the hours specified in subsections (3) to (5).

Reason for taking this power

9. Subsection (3) sets out the minimum and maximum hours that may constitute an unpaid work or other activity requirement, subsection (4) provides a definition of a level 1 unpaid work and other activity requirement and subsection (5) a definition of a level 2 unpaid work and other activity requirement. Subsection (6) provides for Scottish Ministers to vary the number of hours stated in subsections (3), (4) and (5) without recourse to primary legislation. An order-making power is considered more appropriate to make such changes and can be brought forward in shorter timescales than primary legislation. Subsection (6A) sets minimum and maximum hours which may be substituted by order for those already specified.

Choice of procedure

10. We consider negative resolution procedure is sufficient for the purpose of varying the number of hours. It is a matter of detail that is unlikely to require to be debated, but use of negative procedure still affords Parliament the opportunity to debate any variation.

Section 14 (new section 227K(3) of the 1995 Act) – Power to vary the limits of the current balance of other activity within the unpaid work or other activity requirement

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Affirmative resolution of the Scottish Parliament**

Provision

11. Section 227K(1) provides for the split between unpaid work and other activity to be determined by the responsible officer subject to limits set out in subsection (2) on the maximum number of hours of other activity that can count towards the requirement. In response to concerns from the Subordinate Legislation Committee the pre-existing power in subsection (3) has been amended at stage 2 to narrow the scope of the power to allow the Scottish Ministers to

vary the limits specified in subsection (2), rather than a broad power to amend subsection (2). Again in response to concerns from the Committee subsection (4) now requires any such order made to follow the affirmative resolution procedure.

Reason for taking this power

12. Scottish Ministers may wish at some future date to vary in the light of experience the current balance within subsection (2) between unpaid work and other activity. Subsections (3)(a) and (b) enable the percentage of hours or number of hours to be amended.

Choice of procedure

13. Varying the existing balance between the unpaid work and other activities components of the requirement may alter the perceived balance between punishment and rehabilitation as aims of the community payback order. Any such change is likely to require debate and use of the affirmative procedure will enable an appropriate level of parliamentary scrutiny.

Section 14 (new section 227O(1) of the 1995 Act) – Power to make rules about the performance of unpaid work and other activity requirements in relation to a daily maximum number of hours, calculations of time undertaken and record keeping

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Rules made by statutory instrument**
Parliamentary procedure:	**Negative resolution of the Scottish Parliament**

Provision

14. New section 227O(1) of the 1995 Act gives the Scottish Ministers the power to make rules about the performance of unpaid work and other activity requirements in relation to a daily maximum number of hours, calculations of time undertaken and record keeping. This is a pre-existing power from the Bill as introduced. The provisions relating to payment to offenders of travelling or other expenses in connection with undertaking any of the requirements of a community payback order, which were in 227O(2)(c) in the Bill as introduced, have been moved to new section 227FA. A new subsection (2A) has been inserted which provides that rules under subsection (1) may confer functions on responsible officers and includes rules on how such officers are to exercise functions under the 1995 Act.

Reason for taking this power

15. These are essentially administrative matters and would not normally be the subject of primary legislation.

Choice of procedure

16. The negative resolution procedure is considered the appropriate level of parliamentary scrutiny for any regulations made under this section in light of the limited nature of the enabling power.

Section 14 (new section 227Z(2A) of the 1995 Act) – Power to prescribe the nature and format of information to be provided by a responsible officer in a report to the court before variation of a community payback order

Power conferred on: **High Court of Justiciary**
Power exercisable by: **Act of Adjournal**
Parliamentary procedure: **None**

Provision

17. Section 227Z sets out the general procedures which a court requires to apply before varying a community payback order (CPO). At introduction there was a power for the information to be contained in a report from a local authority officer to be specified by Act of Adjournal. Amendments at Stage 2 added the power to prescribe the format of such a report by Act of Adjournal. These powers have been set out in a new subsection (2A). A new subsection (2B) provides that subsection (2) (requirement for the court to obtain and consider a report from the local authority) does not apply where the court is considering imposing a CPO which contains only a level 1 unpaid work and other activity requirement or which is imposed under section 227M(2) (for fine default). Subsection (2B) is inserted to reduce the burden on local authority social work departments by limiting the types of cases in which reports must be provided

Reason for taking this power

18. Section 227Z(2) provides that where the court is considering varying a community payback order, the court must not make the variation unless it has obtained and taken account of a report from the responsible officer unless the circumstances in subsection (2B) apply. Setting out the form of the report and details of the information to be included in it is essentially an administrative matter and would not normally be the subject of primary legislation. We therefore consider it appropriate that the High Court of Justiciary should be able to prescribe it if required.

Choice of procedure

19. Detailed matters relating to court procedure, such as the content of reports to assist with decisions on variation of orders, relate to matters which are not considered appropriate to be included in primary legislation. Such administrative matters can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any parliamentary procedure (see section 305 of the Criminal Procedure (Scotland) Act 1995, which makes provision about Acts of Adjournal generally).

Section 14 (new section 227ZD(6) of the 1995 Act) – Power to make regulations to specify the maximum number of hours for which an offender can be required to be at any place in any one day, and to specify the maximum duration of a restricted movement requirement

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by statutory instrument**
Parliamentary procedure: **Affirmative resolution of the Scottish Parliament**

Provision

20. New section 227ZD of the 1995 Act makes provision about restricted movement requirements that can be imposed by a community payback order. Section 227ZD(3) specifies the maximum number of hours for which an offender can be required by a restricted movement requirement to be at any place in any one day. It sets the maximum to be 12 hours. Section 227ZD(6)(a) permits the making of regulations to specify a different maximum. This power was included in the Bill as introduced. Section 227ZD4A(b) specifies the maximum duration of a restricted movement requirement to be 12 months. Section 227ZD6(b) permits the making of regulations to specify a different maximum. In its Stage 1 report, the Subordinate Legislation Committee noted that section 227ZB(9)(b) of the Bill as introduced also specified a maximum duration for a restricted movement requirement, and that 227ZB(12) would have permitted the Scottish Ministers to substitute the number of months specified in subsection (9)(b) with another number of months. The Committee noted its concern that these two figures could be varied without maintaining parity and we agreed with these concerns in our response to the Committee. Sections 227ZB(9)(b) and 227ZB(12) have been removed from the Bill at Stage 2.

Reason for taking this power

21. The Scottish Ministers may at some future date wish in the light of experience to vary the maximum period of time for which an offender may be required to remain in one place in any one day, or to vary the maximum duration of a restricted movement requirement. These are matters of detail that would not be appropriate for primary legislation.

Choice of procedure

22. The Scottish Parliament may wish to debate any changes to the limits specified in sections 227ZD(3) and 227ZD4A(b) and the affirmative resolution procedure would provide the opportunity for it to do so.

Section 24A(1) – Power to modify any enactment for the purposes of implementing UK obligations arising from the EU Council Framework Decision 2008/947/JHA on the mutual recognition of judgements and probation decisions

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Affirmative resolution of the Scottish Parliament**

Provision

23. Section 24A provides an order making power for the Scottish Ministers to make provision for the purposes of implementing the Council Framework Decision 2008/947/JHA on

the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. The Framework Decision makes provision for offenders subject to supervision in the community as part of a community sentence or following release on license from custody to return to their home country and to be supervised in that country. Subsection (2) provides that such an order may confer functions on Scottish Ministers or other persons. Subsection (3) provides that such an order may modify any enactment.

Reason for taking this power

24. In order to implement the Framework Decision amendments will be required to existing legislation. The complexity in devising a scheme, identifying the legislation which requires amendment and consulting fully with partner agencies means that it has not been possible to include the amendments to existing legislation in the Bill. Section 24A will enable Scottish Ministers to implement the UK's obligations under the Framework Decision as they affect Scotland. The deadline for implementation of the Framework Decision is 6th December 2011.

Choice of procedure

25. Exercise of the order making power will involve modifications to primary legislation and so a high level of parliamentary scrutiny is required. For this reason the affirmative resolution procedure is considered most appropriate.

Section 52A(2) – Power to make further provision in Scotland implementing UK obligations arising from the EU Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order made by statutory instrument**
Parliamentary procedure:	**Affirmative resolution of the Scottish Parliament**

Provision

26. It is intended that the Framework Decision will be implemented by the amendments made to the Bill at Stage 2, in sections 41, 52 and 52A and schedule 2A. These amendments change a number of statutes (and references to previous convictions in the Bill itself) to ensure that Scottish courts will be able to consider previous convictions in other EU countries on the same basis as they would consider Scottish previous convictions throughout the criminal proceedings: at the pre-trial stage, at the trial and at the time of sentencing. Section 52A(2) provides an Order-making power which will enable the Scottish Ministers to make any further amendments to legislation which are required to fully implement the Framework Decision. The power is limited to the extent that it can only be used to implement provisions which are necessary to comply with the Framework Decision. Subsection (3) provides that such an order may confer functions on the Scottish Ministers or other persons. Subsection (4) provides that an order made under the provision may modify any enactment.

Reason for taking power

27. Although the amendments made to the Bill at Stage 2 are intended to achieve implementation of the Framework Decision, it is thought possible that not every Act of Parliament that makes a relevant reference to a previous conviction or other related term has been identified. If other Acts are identified that need to be updated to conform with the Framework Decision, this power will permit the change to be made by Order, rather than by primary legislation.

Reason for choice of procedure

28. Section 143(4) provides that any order made under this section will be subject to affirmative resolution procedure. As any order may include modifications to primary legislation, we consider that this provides the appropriate level of parliamentary scrutiny for the powers conferred.

Section 67A(1) – Power to make provision in Scotland implementing UK obligations arising from the EU Council Framework Decision 2008/978/JHA on the European evidence warrant

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order made by statutory instrument**
Parliamentary procedure:	**Affirmative resolution of the Scottish Parliament**

Provision

29. Section 67A of the Bill was inserted by amendment at stage 2, and makes provision in relation to the implementation of the Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant (EEW) for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

30. The power in section 67A(1) will enable Scottish Ministers to make provision by affirmative order to give effect to the Framework Decision. The power will permit Scottish Ministers to confer functions on themselves, the Lord Advocate and on other persons and therefore includes provision for the conferral of functions. The Order made under the provision may modify any enactment. As part of the enforcement regime for the Framework Decision, the power will permit the creation of new offences and penalties. Adoption of the EEW will allow Member States to obtain:

- objects, documents and data (including from a third party), from a search of premises including the private premises of the suspect; and
- historical data on the use of any services including financial transactions, historical records of statements, interviews and hearings, and other records, including the results of special investigative techniques,

for the purpose of sharing them between Member States for use in proceedings in criminal matters.

Reason for taking power

31. Implementation of the Framework Decision is required by 19 January 2011. Implementing the Framework Decision by Order will permit further time to consult with key stakeholders on the detail of the provisions for implementing the Framework Decision in Scotland. It will also allow the Scottish Government to bring forward provisions in discussion with the UK Home Office, which has yet to take steps to implement the Decision in the rest of the UK. An additional point is that there are currently two EU initiatives under discussion that may lead to this Framework Decision being revised and possibly replaced. The likelihood of this is not clear, but implementation by Order will allow the Scottish Government to respond to these EU developments as and when they occur.

Reason for choice of procedure

32. As the power is fairly broad in nature, the affirmative procedure is considered to be appropriate. In other cases where powers have been taken to implement European Framework Decisions by Order (e.g. section 56 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, which allowed Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties to be implemented by Order) that Order has been subject to the affirmative procedure.

Section 74A(2) (new section 85(5) of the 2003 Act) - Power to make regulations specifying frequency with which a person subject to the sex offender notification requirements who has no sole or main residence in the UK must notify the police of the required information

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Regulations by statutory instrument**
Parliamentary Procedure:	**Affirmative resolution of the Scottish Parliament**

Provision

33. Section 74A was introduced into the Bill by way of a Scottish Government amendment at Stage 2. Section 74A (1) and (2) amend section 85 (1), and (3) and inserts new subsections (5) and (6) into section 85 of the Sexual Offences Act 2003 ("the 2003 Act"). New subsections (5) and (6) allows the Scottish Ministers to make regulations prescribing the frequency of the periodic notification requirement provided for under section 85 in relation to those sex offenders who do not have a sole or main residence, but who are nevertheless in the UK. The prescribed frequency under the regulations shall not exceed one year. Currently under section 85, all sex offenders subject to the notification requirements are required to notify the police annually of the information specified in section 83.

Reason for taking this power

34. It is felt appropriate to provide the Scottish Ministers with the power to provide for more frequent notification under section 85 of the 2003 Act in relation to homeless sex offenders who may otherwise be able to abscond more easily, as they only need notify the police of an address or location where they can be found regularly. It is also intended to prevent exploitation of the provisions by those offenders with a main or sole residence who nevertheless attempt to notify as homeless in an attempt to evade the police.

35. The frequency of reporting is to be set out in regulations rather than fixed on the face of the Bill because this provides the Scottish Ministers with more flexibility to vary the intervals in the future. The need to alter the frequency of the prescribed periods will be largely shaped by operational experience and what is considered necessary to protect the public. It is therefore important that any changes can be made at the earliest opportunity. Taking a regulation making power will enable the Scottish Ministers to take such action.

Choice of procedure

36. We take the view that the affirmative resolution procedure will provide the appropriate level of Parliamentary scrutiny in line with the regulation making powers provided in section 138(2) of the 2003 Act, given that the use of this power will impose a more frequent reporting requirement on certain types of sex offender and that failure to comply with this requirement will be a criminal offence.

Section 74A(3) and (6) (section 138 of 2003 Act) – Power to make ancillary provision

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order or regulations by statutory instrument**
Parliamentary procedure: **Affirmative resolution of the Scottish Parliament in relation to regulations made under sections 83, 84, 85, 86 or 130 of the Sexual Offences Act 2003. Negative resolution of the Scottish Parliament in relation to regulations made under section 87 or 96 of the Sexual Offences Act 2003**

Provision

37. Section 74A (3) and (6) was introduced into the Bill by way of a Scottish Government amendment at Stage 2. Section 74A (3)-(6) amends section 138 of the Sexual Offences Act 2003 ("the 2003 Act"). The amendment does not provide Scottish Ministers with any additional subordinate legislation powers but modifies the scope of the subordinate legislation powers which the Ministers can exercise under Part 2 of the 2003 Act.

38. The amendment provides that any order or regulations made under sections 83, 84, 85, 86, 87, 96 or 130 of the 2003 Act can make supplementary, incidental, consequential, transitional, transitory or saving provisions. The amendment amends section 138 of the 2003 Act to make it clear that all such orders or regulations can also make different provision for different purposes. The 2003 Act already has such provision in relation to the regulation making powers under sections 86(4), 87(6) and 96(4) but the amendment ensures that this power is neatly contained in one section (section 138), as opposed to being repeated in different sections throughout Part 2 of the 2003 Act. As a consequence, section 74A(3) to (5) repeal sections 86(4), 87(6) and 96(4) of the 2003 Act.

Reason for taking this power

39. The amendment to section 138 of the 2003 Act will allow the Scottish Ministers to make any subordinate legislation under Part 2 of the 2003 Act and ensures that there is the power to make any supplemental, incidental, consequential, transitional, transitory or savings provisions any regulations or orders.

40. Section 138 of the 2003 Act does not expressly provide that any subordinate legislation made under Part 2 of the 2003 Act can make supplemental, incidental, consequential, transitional, transitory or savings provision and different provision for different purposes (the regulation making powers under sections 86, 87 and 96 do enable different provision to be made for different purposes). There are numerous precedents for enabling subordinate legislation to make such general provision such as section 103 of the Police, Public Order and Criminal Justice (Scotland) Act 2006, section 59 of the Sexual Offences (Scotland) Act 2009 and section 165 of Marine (Scotland) Act 2010 in case this is deemed to be necessary in the future.

41. There are significant changes made by the Bill to the 2003 Act and it is possible that not all of the consequences of them have been identified. Furthermore, the future exercise of the other subordinate legislative powers in Part 2 of the 2003 Act could also require supplemental, incidental, consequential, transitional, transitory or savings provision to be made to address a matter that may not have been identified or anticipated. This provision allows flexibility if further changes are found to be necessary.

Choice of procedure

42. Section 138 of the 2003 Act provides that any orders or regulations made under sections 83, 84, 85, 86, or 130 of that Act will be subject to the affirmative resolution procedure. Therefore, if any supplementary, incidental, consequential, transitional, transitory or savings provision is necessary to include under those regulations, such provision will also be subject to affirmative procedure. Section 138 of the 2003 Act provides that any regulations made under section 87 or 96 of that Act will be subject to negative resolution procedure. Therefore, if supplementary, incidental, consequential, transitional, transitory or savings provision is necessary to include under those regulations, such provision will also be subject to affirmative procedure.

43. As noted above, the amendment does not adopt any new procedure. It plugs into the existing Parliamentary procedures which certain regulation making powers are already subject to and which Parliament have already considered provides the most appropriate level of scrutiny for the regulation making powers conferred.

Section 79A(3) (new section 9B(6) of the 1974 Act) – Power to make provision to except the disclosure of information on alternatives to prosecution which originates from an official record, in particular cases or classes of disclosure, from the offence of unauthorised disclosure

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order by statutory instrument**
Parliamentary procedure:	**Affirmative resolution of the Scottish Parliament**

Provision

44. Section 79A of the Bill inserts a new section 9B into the Rehabilitation of Offenders Act 1974. Subsection (3) makes it an offence where a person who, in the course of their official duties, has custody or access to any official record or information contained in an official record which imputes that a named or otherwise identifiable living person has committed, been charged with, prosecuted for, or given an alternative to prosecution (ATP) in respect of an offence which

has been the subject of an ATP which is now spent if, knowing or having reasonable cause to suspect that the information is ATP information, they disclose it, otherwise in the course of their duties, to another person. New section 9B(6) provides that the Scottish Ministers may by order provide for the disclosure of ATP information derived from an official record to be excepted from subsection (3) in such cases or classes of cases which are specified in the order.

Reason for taking power

45. To replicate the existing order making power the Scottish Ministers have under section 9(5) of the Rehabilitation of Offenders Act 1974 for the unauthorised disclosure of spent convictions. This power provides the Scottish Ministers with flexibility to determine what relevant information can be disclosed from an official record.

Reason for choice of procedure

46. It is recognised that the creation of any exception to this offence under the Rehabilitation of Offenders Act 1974 merits full consideration and approval by the Scottish Parliament. Therefore, an order made under this section would be subject to affirmative procedure. The existing order making power in section 9(5) of the 1974 Act is also subject to the affirmative procedure by virtue of section 10 of that Act.

Section 79A(4) (Paragraph 6(a) of the new Schedule 3 to the 1974 Act) – Power to exclude or modify the provisions which concern a person being asked for information in relation to alternatives to prosecution in proceedings before a judicial authority

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order by statutory instrument**
Parliamentary procedure:	**Affirmative resolution of the Scottish Parliament**

Provision

47. Section 79A(4) of the Bill inserts a new Schedule 3 into the Rehabilitation of Offenders Act 1974. Paragraph 3(1) of the new Schedule 3 to the 1974 Act provides that where a person receives an alternative to prosecution (ATP) which becomes spent, that person is be treated for all purposes in law as a person who has not committed, been charged with or prosecuted for, or been given an ATP in relation to that offence. Paragraph 6(a) of the new Schedule 3 to the 1974 Act provides that the Scottish Ministers may by order exclude or modify the application of any of paragraphs (a) to (c) of paragraph 3(2) of this Schedule in relation to questions put in such circumstances as may be specified in the order. Therefore, the Scottish Ministers will have the power to exclude or modify the application of the provisions which concern a person being asked for information in relation to alternatives to prosecution in proceedings before a judicial authority. However, paragraphs (a) to (c) of paragraph 3(2) were referred to in error and the intention is to provide an order making power in relation to paragraphs 4(2) and (3) of the new Schedule 3 to the 1974 Act. We intend to lodge an amendment to this provision at Stage 3 to correct this error. If this order making power is amended at Stage 3 it will mirror the order making power in section 4(4)(a) of the 1974 Act. Orders made under that provision have specified various offices and types of employment where the employer can ask questions about spent convictions.

Reason for taking power

48. The Scottish Ministers already have order making powers under provisions in the Rehabilitation of Offenders Act 1974 to make exceptions to the application of the general rule which is set out in section 4(1) of the 1974 Act that a person should be treated for all purposes in law as a person who has not been given a previous conviction once it becomes spent. We wish to mirror the order making powers currently contained in the 1974 Act provisions to apply them to ATP's.

Reason for choice of procedure

49. It is recognised that the creation of an exception to the general rule that a person should be treated as if they have not been given an ATP once it has become spent merits full consideration and approval by the Scottish Parliament. Therefore, an order made under this section would be subject to affirmative procedure.

Section 79A(4) (Paragraph 6(b) of the new Schedule 3 to the 1974 Act) – Power to provide for exceptions in cases/classes of cases/particular types of alternatives to prosecution to the protection afforded under section 79A in respect of spent alternatives to prosecution

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order by statutory instrument**
Parliamentary procedure:	**Affirmative resolution of the Scottish Parliament**

Provision

50. Section 79A of the Bill inserts a new Schedule 3 into the Rehabilitation of Offenders Act 1974. Paragraph 6(b) of the new Schedule 3 to the 1974 Act provides that the Scottish Ministers may by order provide for exceptions from any of the provisions of paragraphs 4 and 5 of this Schedule in such cases or classes of case, or in relation to alternatives to prosecution of such descriptions, as may be specified in the order. Therefore, the Scottish Ministers will have the power to provide for exceptions to the general "rule" in paragraph 4 that a person who is asked particular questions, other than in judicial proceedings, can treat the question as not relating to ATP's which have become spent and that person cannot be subjected to any liability or be prejudiced in law due to their failure to acknowledge or disclose this information. However, paragraph 4 of the new Schedule 3 was referred to in error in this provision and the intention is to provide an order making power solely in relation to paragraph 5 of the new Schedule 3 to the 1974 Act. We intend to lodge an amendment to this provision at Stage 3 to correct this error.

51. Similarly, the Scottish Ministers will have the power to provide for exceptions to the provision in paragraph 5 of the new Schedule 3 to the 1974 Act that any obligation imposed by a rule of law or provisions in an agreement/ arrangement to disclose information does not extend to alternatives to prosecution and ancillary circumstances and that a person cannot be dismissed/excluded from any office, profession, occupation or employment, or be prejudiced in any way in any occupation or employment, as a result of their failure to disclose this information.

Reason for taking power

52. The Scottish Ministers already have a similar power under section 4(4)(b) of the Rehabilitation of Offenders Act 1974 in relation to a person's previous convictions. The power sought under this provision replicates this existing power, but for spent alternatives to prosecution, and also makes reference to paragraph 4 of the new Schedule 3 to the 1974 Act. This provision is also included to correspond with the relevant provisions contained in the Criminal Justice and Immigration Act 2008 for England and Wales (in paragraph 6 of Schedule 10 to the 2008 Act, which inserts paragraph 4(b) of Schedule 2 into the 1974 Act).

Reason for choice of procedure

53. It is recognised that any creation of an exception to the general rule that a person should be treated as if they have not been given an ATP once it has come spent merits full consideration and approval by the Scottish Parliament. Therefore, an order made under this section would be subject to affirmative procedure. The existing order making power in section 4(4)(b) of the 1974 Act is also subject to the affirmative procedure by virtue of section 10 of that Act.

Section 79A(4) (Paragraph 8(1) of the new Schedule 3 to the 1974 Act) – Power to exclude the application of paragraph 3 of the new Schedule 3 to the 1974 Act in relation to any proceedings before a judicial authority specified in the order to such an extent and for such purposes as may be so specified

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order by statutory instrument**
Parliamentary procedure:	**Affirmative resolution of the Scottish Parliament**

Provision

54. Section 79A of the Bill inserts a new Schedule 3 into the Rehabilitation of Offenders Act 1974. Section 7(4) of the 1974 Act allows the Scottish Ministers by order to exclude the application of section 4(1) of the 1974 Act. Paragraph 8(1) of the new Schedule 3 to the 1974 Act applies section 7(4) of the 1974 Act in relation to alternatives to prosecution (ATP) by reference, which applies for the purpose of excluding the application of paragraph 3 of that Schedule. This power is to allow the Scottish Ministers, by order, to provide an exception in certain types of proceedings to the general "rule" that information relating to spent ATP's does not require to be disclosed in judicial proceedings.

Reason for taking power

55. This is not a new power as the Scottish Ministers already have this power in the Rehabilitation of Offenders Act 1974 in relation to a person's previous convictions in section 7(4). This provision will allow the Scottish Ministers to exclude the application of paragraph 3 of the new Schedule 3 of the 1974 Act for alternatives to prosecution.

Reason for choice of procedure

56. It is recognised that the creation of an exception to the general rule that a person should be treated as if they have not been given an ATP once it has become spent merits full consideration and approval by the Scottish Parliament. It is already provided that this order

making power in section 7(4) of the 1974 Act is subject to the affirmative procedure by virtue of section 10 of that Act.

Section 121(3) (inserted section 3A(1) of 1982 Act) – Power to set mandatory conditions for licences granted under the Civic Government (Scotland) Act 1982

57. Section 121(3) inserts section 3A into the Civic Government (Scotland) Act 1982. Section 3A enables the Scottish Ministers to prescribe by order mandatory licence conditions. New section 3A(3A) provides that such an order is subject to the affirmative procedure.

58. With reference to the entry in the delegated powers memorandum provided with the introduction of the Bill entitled as above, we can confirm that a Stage 2 amendment amended new section 3A so that the power is exercisable through affirmative procedure. This was the intention (and is what the delegated powers memorandum provided with the introduction of the Bill states at paragraphs 100-102), but the Subordinate Legislation Committee noted that the provision in section 121(3) didn't achieve the policy intent (as the provision provided for the power being exercisable through negative procedure). Our Stage 2 amendment remedied this.

Section 124A (section 39 of 1982 Act) – Power to specify the requirements that a food hygiene order is to state compliance with

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order made by statutory instrument**
Parliamentary procedure:	**Negative resolution of the Scottish Parliament**

Provision

59. Section 124A amends section 39 of the Civic Government (Scotland) Act 1982. Section 39 provides that certain applications for a street trader's licence must be refused unless a certificate as to compliance with certain requirements of regulations made under section 16 of the Food Safety Act 1990 is provided. Section 124A amends this to provide that the certificate to be produced may specify such requirements as the Scottish Ministers may by order specify. The intention is to specify requirements currently provided in the Food Hygiene (Scotland) Regulations 2006 (SSI 2006/3) which were made under the European Communities Act 1972.

Reason for taking power

60. Taking a power provides flexibility to allow the requirements of the certificate to be amended to reflect any changes in food safety legislation.

Reason for choice of procedure

61. Given the limited nature of the enabling power, negative resolution procedure is considered appropriate.

Section 131A (inserted section 39A of 2005 Act) – Power to prescribe the form, manner and timings for a Licensing Board's statement of reasons following a review of a premises licence

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by statutory instrument**
Parliamentary procedure: **Negative resolution of the Scottish Parliament**

Provision

62. Section 131A inserts a new section 39A into the Licensing (Scotland) Act which requires a Licensing Board to notify premises licence holders and applicants of its decision following a review of a premises licence. It also sets out the when the premises licence holder and applicant can request, and a Licensing Board must issue, a statement of reasons for the Licensing Board's decision. Section 39A(6) provides that the statement of reasons must be in the form and manner as may be prescribed and be issued by such time as may be prescribed. Section 147(1) of the Licensing (Scotland) Act 2005 defines "prescribed" as meaning prescribed in regulations made by the Scottish Ministers.

Reason for taking power

63. It is considered preferable for this level of detail to be contained in secondary rather than primary legislation. This will allow changes to be made over time to reflect more modern practices which may ultimately reduce administration for Licensing Boards.

Reason for choice of procedure

64. Given the limited nature of the enabling power, negative resolution procedure is considered appropriate.

Section 132B (section 50 of 2005 Act) – Power to specify the requirements that a food hygiene order is to state compliance with

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Negative resolution of the Scottish Parliament**

Provision

65. Section 132B amends section 50 of the Licensing (Scotland) Act 2005. Section 50 provides that a food hygiene certificate must state that the premises comply with certain requirements of regulations made under section 16 of the Food Safety Act 1990. Section 132B amends this to provide that a food hygiene certificate must state that the premises comply with such requirements as the Scottish Ministers may by order specify. The intention is to specify requirements currently provided in the Food Hygiene (Scotland) Regulations 2006 (SSI 2006/3) which were made under the European Communities Act 1972.

Reason for taking power

66. Taking a power provides flexibility to allow the requirements of the certificate to be amended to reflect any changes in food safety legislation.

Reason for choice of procedure

67. Given the limited nature of the enabling power, negative resolution procedure is considered appropriate.

Section 138A(6) (section 15 of the 2005 Act) – Power to specify the procedure to be followed in the exercise of the Licensing Standards Officer's powers of entry, inspection and seizure

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by statutory instrument**
Parliamentary procedure: **Negative resolution of the Scottish Parliament**

Provision

68. Section 15 of the Licensing (Scotland) Act 2005 provides Licensing Standards Officers with powers to enter and inspect premises in the course of an investigation of licensed premises. Section 138A amends section 15 of the Licensing (Scotland) Act 2005 to extend the powers of Licensing Standards Officers so that they can take copies of documents and seize substances, articles or documents in the course of an investigation of licensed premises. Section 138A(6) inserts subsection (7) into section 15 of the Licensing (Scotland) Act 2005. Section 15(7) enables Scottish Ministers to make regulations about the procedures to be followed in the exercise of the powers of entry, inspection and seizure.

Reason for taking power

69. To provide flexibility to enable the Scottish Ministers to consider the procedures being used for exercise the powers of entry, inspection and seizure and, if it is considered necessary, to bring forward regulations.

Reason for choice of procedure

70. Given the limited nature of the enabling power, negative resolution procedure is considered appropriate.

Section 138A(6) (section 15 of the 2005 Act) – Power to set out the treatment of items seized by Licensing Standards Officers

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by statutory instrument**
Parliamentary procedure: **Negative resolution of the Scottish Parliament**

Provision

71. Section 138A amends section 15 of the Licensing (Scotland) Act 2005 to provide Licensing Standards Officers with powers to seize substances, articles or documents in the

course of an investigation of licensed premises. Section 138A(6) inserts subsections (9) and (10) in section 15 of the Licensing (Scotland) Act 2005. Section 15(9) and (10) provides a power for the Scottish Ministers to make provision about the treatment of any item seized under section 15(2)(d). This may include provision about the retention, use, return, disposal or destruction of these items and about compensation for these items.

Reason for taking power

72. To provide flexibility to enable the Scottish Ministers to consider the appropriate procedures regarding the treatment of any item seized under section 15(2)(d) and, if it is considered necessary in light of experience of the use of the powers, to bring forward regulations.

Reason for choice of procedure

73. Given the limited nature of the enabling power, negative resolution procedure is considered appropriate.

Section 146(1) – Power to make supplementary, incidental or consequential provision for the purposes of, in consequence of or giving full effect to any provision of the Bill

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order by statutory instrument**
Parliamentary procedure:	**Generally negative resolution but affirmative resolution if modifying any enactment**

Provision

74. As noted in paragraph 112 of the delegated powers memorandum provided with the introduction print of the Bill, section 146(1) of the Bill confers on the Scottish Ministers a power to make by order such supplementary, incidental or consequential provision as they consider appropriate for the purposes of, in consequence of or for giving full effect to any provision of the Bill. Section 146(2) provides that the power extends to the modification of any enactment (including the Bill).

Reason for taking power

75. See paragraphs 113-115 of the delegated powers memorandum provided with the introduction print of the Bill.

Reason for choice of procedure

76. Section 143(4)(aa) provides that any order made under this section will be subject to affirmative resolution procedure if it modifies any enactment (otherwise an order under this section would be subject to negative resolution procedure). Such a modification could take the form of textual or non textual amendment.

77. We consider that in the context of this Bill it is appropriate that any amendment to primary legislation using the order making power under section 146 should be exercised by Order made subject to affirmative procedure, whether the amendments are achieved by textual

amendment of the Act or otherwise. In other circumstances it may be more appropriate to reserve the use of affirmative procedure only to cases where textual amendments to an Act are being made.

The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

39th Report, 2010 (Session 3)

Criminal Justice and Licensing (Scotland) Bill as amended at Stage 2

Published by the Scottish Parliament on 23 June 2010

The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

Remit and membership

Remit:

1. The remit of the Subordinate Legislation Committee is to consider and report on-

(a) any-

(i) subordinate legislation laid before the Parliament;

(ii) Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter;

(iii) Pension or grants motion as described in Rule 8.11A.1;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation; and

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

Bob Doris
Helen Eadie
Rhoda Grant
Alex Johnstone
Ian McKee (Deputy Convener)
Elaine Smith
Jamie Stone (Convener)

Committee Clerking Team:

Clerk to the Committee
Irene Fleming

Assistant Clerk
Jake Thomas

Support Manager
Stephen Fricker

SL/S3/10/R38

The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

39th Report, 2010 (Session 3)

Criminal Justice and Licensing (Scotland) Bill as amended at Stage 2

The Committee reports to the Parliament as follows—

1. At its meeting on 22 June 2010, the Subordinate Legislation Committee considered the delegated powers provisions in the Criminal Justice and Licensing (Scotland) Bill as amended at Stage 2. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. The Scottish Government provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill ("the supplementary DPM")[1].

Delegated Powers Provisions

3. The Committee considered the supplementary DPM and other delegated powers in the Bill and is content with the powers contained in sections: 14 (new sections 227B(2A), 227FA(1), 227I(6), 227K(3), 227O(1), 227Z(2A), 227ZD(6) of the Criminal Procedure (Scotland) Act 1995) ("the 1995 Act"), section 18(2)(a)(iii), paragraphs 10(3) and (4) of schedule 2, 24A(1), 52A(2), 67A(1), 74A(2) (new section 85(5) of the Sexual Offences Act 2003)("the 2003 Act"), 74A (6)(amending section 138 of the 2003 Act), 79A(3) (new section 9B(6) of the Rehabilitation of Offenders Act 1974)("the 1974 Act"), 79A(4), (paragraphs 6(a),(b) and 8(1) of the new schedule 3 to the 1974 Act), 121(3) 124A, 131A, 132B, 138A(6) and section 146(1).

Background

Section 115 – Power to establish rules of court in relation to Part 6

4. Part 6 of the Bill creates a statutory regime for disclosure in criminal proceedings. Section 115 enables the High Court to make such rules as it considers necessary or expedient for the purposes of, in consequence of, or for giving full effect to Part 6 of the Bill by Act of Adjournal. Given the terms of section 305(1)(a) and (b) of the Criminal Procedure (Scotland) Act 1995 ('the 1995 Act'),

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[1] Supplementary Delegated Powers Memorandum

the Committee was surprised that the Scottish Government considered it necessary and appropriate to create a new power. In its Stage 1 report, the Committee expressed concern that the power could permit matters addressed by Act of Adjournal (which would be subject to no procedure) to stray beyond the realms of criminal procedure into areas of substantive law.

5. In its response to the Committee's Stage 1 report, the Scottish Government stated that it was considered that section 305 of the 1995 Act was not sufficient for the Scottish Government's purposes. No explanation was given for this view being taken. There has been no amendment to the terms of section 115 at Stage 2.

6. **The Committee accepts that any rules made in exercise of the power in section 115 may relate only to Part 6 of the Bill and may relate only to matters over which the High Court has jurisdiction. However, the original basis for its concern remains, namely that it is unclear why the rules are not restricted to matters of criminal procedure given that they are subject to no parliamentary procedure.**

Section 121(3) – Power to set mandatory conditions to licences granted under the Civic Government (Scotland) Act 1982

7. This provision enables the Scottish Ministers to set mandatory conditions which are applicable to licences granted under the Civic Government (Scotland) Act 1982. Local authorities are the licensing authorities under the 1982 Act in relation to a number of activities listed in that Act. These include taxis, second hand dealers, knife dealers, metal dealers, street traders, markets, public entertainment, window cleaners and sex shops.

8. In its Stage 1 report the Committee noted that it was the Government's stated intention that the power to prescribe mandatory conditions in respect of licences under the Civic Government (Scotland) Act 1982 should be subject to affirmative procedure in line with the approach taken to alcohol licensing under the Licensing (Scotland) Act 2005, but that new section 3A(3) in fact provided for such orders to be subject to annulment. The Government has corrected this error at Stage 2.

9. **The Committee welcomes the amendment brought forward by the Government which makes the exercise of the power under section 3A of the Civic Government (Scotland) Act 1982 subject to affirmative procedure.**

Section 129(4) – new section 27A Licensing (Scotland) Act 2005 - Power to prescribe those areas in respect of which licensing boards may vary all or a particular group of premises licences' conditions of operation

10. Section 129(4) introduced a new section 27A(1) into the Licensing (Scotland) Act 2005 which confers on the Scottish Ministers the power to prescribe by regulations the matters in respect of which licensing boards may vary all or a particular group of premises licences' conditions of operation.

11. This power has been removed from this Bill and is being taken forward by the Alcohol etc. (Scotland) Bill.

12. **The Committee notes that this power was removed at Stage 2.**

Section 140(1) – Power to make provision for the imposition on relevant licence-holders of a social responsibility levy

13. Section 140 provides a power for the Scottish Ministers to make regulations imposing and setting out the detail of a social responsibility levy. This power has been removed from this Bill and is being taken forward by the Alcohol etc. (Scotland) Bill.

14. **The Committee notes that this power was removed at Stage 2.**

Section 146(1) – Power to make supplemental, incidental or consequential provision appropriate for the purposes of, or in connection with the Bill

15. Section 146(1) confers on the Scottish Ministers a power to make by order such supplemental, incidental, or consequential provision as they consider appropriate for the purposes of, or in connection with, giving full effect to any provision of the Bill. Section 146(2) provides that the power extends to the modification of any enactment.

16. On introduction section 143(4) provided that an order under section 146 which makes textual amendments to an Act is subject to affirmative procedure. Otherwise the power is subject to negative procedure.

17. Following correspondence with the Committee at Stage 1 the Government undertook to amend the Bill to provide that any provision made under section 146 which modifies any enactment whether directly by textual amendment or otherwise should be subject to affirmative procedure. The Committee notes that section 143 of the Bill has been amended at Stage 2 to reflect this.

18. **The Committee welcomes the amendment brought forward by the Scottish Government to provide that any exercise of the power under section 146 which modifies enactments is subject to affirmative procedure.**

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Letter from the Cabinet Secretary for Justice to the Convener

I am writing to follow up on points that were raised at the Justice Committee’s formal session on Stage 2 of the Criminal Justice and Licensing (Scotland) Bill on 16 March 2010, in particular in relation to Robert Brown’s amendment 99. You will recall that the amendment concerned annual reports on the operation of the community payback order. I undertook to write to the Committee to set out in detail the work that we are doing to improve information collection

In 2008, recognising the need for data, the Scottish Government commissioned a sample audit of individual local authority performance in relation to the immediacy and speed with which offenders commence and complete community orders. This snapshot audit, at November 2008, provided baseline information of activity across Scotland which allows progress to be tracked. The November 2008 data was published and placed in SPICe in April 2009 (Bib number 47783). A second audit was carried out for November 2009 and the findings were published and placed in SPICe (Bib number 49886) on 20 May 2010. The information is also available on the Scottish Government website*. We plan to commission a further audit, based on a snapshot at November 2010. The results of this will be available in spring 2011. We will apply the findings of the audit to inform and reinforce our work with partner agencies to improve the delivery of community service orders and, if the Parliament passes the Bill at Stage 3, community payback orders.

Additionally, to ensure consistent collation of data, we are working with partners who deal with front-line services to review the scope and collection of criminal justice social work statistics to ensure that they will provide robust information on the delivery, uptake and impact of the community payback order. A stakeholder group has been established to review criminal justice social work statistics. Its membership includes front-line delivery partners such as local authorities and other partners such as SWIA and Community Justice Authorities, together with Scottish Government officials. The first meeting took place in March and stakeholders will continue to meet regularly over the summer.

You will also recall that, in discussion of Robert Brown's proposed amendment 276 I offered to discuss in more detail with members of the Justice Committee the timescales for induction and commencement of community payback orders. If such a meeting would be helpful, I would be grateful if the appropriate member's office, or the Committee Clerk, could contact my Diary Secretary, Kevin Farquharson, on 0131 244 2553 to arrange a mutually convenient time.

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* http://www.scotland.gov.uk/Topics/Justice/public-safety/offender-management/offender/community/16906/6822 *[Link no longer operates]*

Kenny MacAskill MSP
Cabinet Secretary for Justice
4 June 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Letter from the Cabinet Secretary for Justice to the Convener

I write to follow up discussion surrounding some issues raised during Stage 2 proceedings of the Criminal Justice and Licensing (Scotland) Bill.

During the session on 20 April, amendments relating to genocide, crimes against humanity and war crimes were considered and agreed by the Committee (sections 28A and 28B of the Bill as amended at Stage 2). I attach the relevant link to the Official Report of the discussion:

http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1302.htm#Col2907

In response to Bill Butler's query relating to maximum sentence levels contained within new section 9B being inserted into the International Criminal Court (Scotland) Act 2001 ("the 2001 Act"), the new section 9B modifies the penalties applicable to the offences for the period of retrospection (1 January 1991 to either 1 September or 17 December 2001) in respect of certain specific offences. The 2001 Act provides for a maximum sentence of 30 years' imprisonment (other than where murder is involved). The same will generally apply for offences committed from 1 January 1991.

However for genocide and grave breaches of the Geneva Conventions (a category of war crimes), both of which were already offences in domestic law in 1991, a maximum penalty of 14 years' imprisonment applies instead of 30 years' (other than where murder is involved). This provision ensures that a higher penalty cannot be imposed for such offences than existed in domestic law at the time of their commission and consequently ensures compliance with Article 7 of the European Convention of Human Rights.

During the session on 4 May, amendments relating to medical services in prisons were considered and agreed by the Committee (section 79B of the Bill as amended at Stage 2). I attach the relevant link to the Official Report of the discussion:

http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1502.htm#Col3062

In response to Dr Richard Simpson's query relating to the use of "registered medical practitioner" in section 79B, the statutory definition of "registered medical practitioner" in the Interpretation Act 1978 is a fully registered person within the meaning of the Medical Act 1983 (c.54) who holds a licence to practise under that Act. As such, the reference to "registered medical practitioner" in section 3A of the Prisons (Scotland) Act 1989, as substituted by section 79B will be construed accordingly.

Dr Simpson offered comments on the wording of section 3A(6) of the Prisons (Scotland) Act 1989 (as inserted by section 79B(1) of the Bill) relating to searches of persons entering prison to provide medical services. The wording used in section 3A(6) ties in with the wording used in current Prison Rules relating to searches and, in effect, restricts the removal of clothes in a search to the items listed in section 3A(6). The ability to search under section 3A(6) is applicable for any persons entering prison to provide medical services.

I hope this is helpful.

Kenny MacAskill MSP
Cabinet Secretary for Justice
8 June 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 3

Letter from the Cabinet Secretary for Justice to the Convener

New Offences of Serious Organised Crime

During the Stage 2 session on 20 April when the serious organised crime provisions in the Criminal Justice and Licensing Bill were discussed, Fergus Ewing, Minister for Community Safety undertook to write to clarify our considerations on some specific points that were made.

Directing Serious Organised Crime (Section 27)

The offence of directing serious organised crime is targeted at those individuals who direct another to commit a serious offence. I understand you are concerned that this new offence does not add anything to the existing common law. I believe that the new offence will provide added flexibility to law enforcement and the Crown to tackle such offending and is therefore a valuable new statutory offence that adds to the common law.

Whilst the majority of such offending could be proceeded against by current common law offences there will be a notable addition to existing criminality caught by this offence. That is where currently we have insufficient evidence to establish a sufficiency in respect of a particular substantive crime but have strands of separate criminality of evidence where an inference of profiting from criminal behaviour can be drawn which taken together would amount to a contravention of section 27. Additionally current law offences will not necessarily reflect the nature of the conduct - to secure benefit for serious organised crime - and therefore the Crown should be able to libel an offence under section 27 of the Bill, which would truly reflect the nature and seriousness of the conduct, place it in its context and allow the court to impose a sentence reflecting the criminality.

This offence is aimed squarely at those few individuals who direct others to commit offences but who do not routinely become directly involved in serious organised crime, yet live off its profits and the misery of Scottish communities.

Failing to Report Offence (Section 28)

Robert Brown asked if we would consider further the possibility of adding some form of definition that would include reporting knowledge or suspicion "with good reason". Having given this matter further consideration, I am still satisfied that sufficient safeguards are already in place and am not convinced that adding this further requirement is necessary. The provisions already make clear that the Crown will have to prove that someone "*has actual knowledge or suspicion*" and that has to be proved beyond reasonable doubt and, in addition, there is also a defence of reasonable excuse. We therefore have no plans to amend this provision further.

Reporting to a Constable (Section 28)

Mr Brown also asked us to look at including other public officials as a route to which someone could report their knowledge or suspicion of serious organised crime. I have considered this matter further.

I initially considered adding a member of Her Majesty's Revenue and Customs (HMRC) and other agencies as a suitable reporting arrangement. However, there are practical problems in adding HMRC and other agencies. For example, the functions of HMRC are reserved to the UK Government and this could cause us some considerable difficulties. If someone were to report a matter to an officer of HMRC, but that issue is outwith the HMRC officer's remit, we would then have to place a specific duty on an HMRC officer in such cases to pass on the information to the police. I would consider that placing such a duty on an HMRC officer would be likely to be a reserved matter and I do not therefore consider that the Scottish Parliament would have legislative competence to place such an obligation on the officer of HMRC to do anything with the information that they received.

There is also a wider range of enforcement agencies that would fall under the legislative competence of the Scottish Parliament, for example, SEPA and SFPA. While we could seek to list them and the circumstances in which reporting would be relevant, we believe it could make it confusing or difficult for an individual to know who to report to and/or for the police and Crown to decide whether a person had correctly discharged their obligations to report or not. Therefore, on balance we believe the current provision where a constable is the identified reporting route as the most straightforward and appropriate.

That said, before deciding whether it was appropriate to raise proceedings against an individual for failing to report, the Crown would consider all of the facts and circumstances of the case, including whether any attempt had been made, in good faith, to report the matter to an official.

I hope this is helpful and clarifies the position.

Kenny MacAskill MSP
Cabinet Secretary for Justice
18 June 2010

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 3

Letter from the Cabinet Secretary for Justice to the Convener

I wrote to you on 8 April 2010 regarding the DNA and fingerprint provisions in the Criminal Justice and Licensing (Scotland) Bill and specifically the list of offences for inclusion in the order that will give practical effect to section 59 of the Bill on children's hearings. My letter set out the position with regard to consideration of the list of offences by the Forensic Data Working Group and noted that further thought needed to be given to three particular offences i.e. incest, assault and reckless conduct causing actual injury.

I explained in my letter that I had asked the Forensic Data Working Group to give further consideration to the issues and report back to me. The Group has now completed this work and on the basis of their recommendations, I have reached the following conclusions.

Incest

The offence of incest should be included in the list on the basis that the majority of children in such circumstances (i.e. siblings) are referred to a hearing for protection rather than on grounds of having committed an offence (so retention would not be triggered in such cases). Decisions to refer a child on offence grounds in relation to incest are very rare and would have been carefully thought through. The children who are referred to a hearing on grounds of committing the offence of incest are likely to pose more of a danger to society. I, therefore, consider that the retention of forensic data can be justified in such cases.

Assault

In order to distinguish between minor and serious assaults, we intend to refer to a scale used by the Crown Office and Procurator Fiscal Service which breaks down the offence of assault according to its severity. The intention is that the following categories of assault would be included: assault to severe injury; assault to severe injury and permanent disfigurement; assault to severe injury and permanent impairment; assault to severe injury, permanent disfigurement and permanent impairment. Retention would not be triggered in relation to assault or assault to injury.

The intention is to bring an amendment at Stage 3 to give effect to this proposal. At present, the Bill currently only allows for the order making power in section 59 of the Bill to prescribe an offence listed in section 19A(6) of the Criminal Procedure (Scotland) Act 1995 in its entirety. It does not allow for any gradation. Therefore, the amendment will allow a "relevant violent offence", listed in section 19A(6) of the 1995 Act (such as assault), to be prescribed as a "relevant offence" by reference to the level of seriousness, for the purpose of the children's hearings forensic data provisions This will meet the commitment we gave at the time of the withdrawal of a related amendment by James Kelly MSP at Stage 2.

Reckless conduct causing actual injury

The offence of reckless conduct causing actual injury should not be included in the list of offences. There is no existing definition to categorise this offence according to severity. The offence hinges on the reckless (rather than intended) conduct, the outcome of which may not be predictable. Therefore, it could be argued that it is not an indicator of future offending behaviour or appropriate to apply to children who, unlike adults, do not necessarily have the capacity to predict the various unintended outcomes of their actions. I do not believe that the retention of forensic data is justified in this instance.

I hope that the Committee is able to support these proposals.

The full list of offences that we intend to include in the order is attached. The Forensic Data Working Group will consider this further – and the relevant categories of assault as provided for by the stage 3 amendment – as the order under section 18B(6) is developed. Some offences that have been repealed by the Sexual Offences (Scotland) Act 2009 are included in the list because offences committed before the Act came into force will be prosecuted using the old offences.

I will be happy to answer any questions Committee members may have at Stage 3.

Kenny MacAskill MSP
Cabinet Secretary for Justice
22 June 2010

List of Offences - 35 Agreed for Inclusion

LIST OF SEXUAL OFFENCES IN SECTION 19A(6) OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995 AS AMENDED BY THE SEXUAL OFFENCES (SCOTLAND) ACT 2009

“relevant sexual offence” means any of the following offences—

Common law offences	Notes
(c) abduction of a woman with intent to rape;	
(d) assault with intent to rape or ravish;	
(e) indecent assault;	Retained in addition to new statutory offence of sexual assault in section 3 of the 2009 Act, to catch behaviour not falling within that section.
(g) public indecency;	Now replaced in the Sexual Offences (Scotland) act 2009 with statutory offence of “public indecency”, - hope to add this to section 19A(6) at Stage 2 of CJ&L Bill.

(i) any offence which consists of a contravention of any of the following statutory provisions—

Offence	Notes
(i) section 52 of the Civic Government (Scotland) Act 1982 (taking and distribution of indecent images of children);	
(ii) section 52A of that Act (possession of indecent images of children);	
(vi) section 2 of that Act (intercourse with step-child);	
(xii) section 8 of that Act (abduction and unlawful detention of women and girls);	

(j) any offence which consists of a contravention of any of the following provisions of the Sexual Offences (Scotland) Act 2009 (asp 9) —

Offence	Notes
(i) section 1 (rape),	Equivalent to common law rape or indecent assault (statutory rape offence wider than existing common law offence)

(ii) section 2 (sexual assault by penetration),	Equivalent to indecent assault or rape (though where offence constitutes common law rape, would almost certainly be prosecuted as rape under statute)
(j) any offence which consists of a contravention of any of the following provisions of the Sexual Offences (Scotland) Act 2009 (asp 9) —	
(iii) section 3 (sexual assault),	Largely replaces common law indecent assault.
(iv) section 4 (sexual coercion),	No specific offence. Would probably be prosecuted as Art and part or conspiracy to commit rape or indecent assault
(v) section 5 (coercing a person into being present during a sexual activity),	
(vi) section 6 (coercing a person into looking at a sexual image),	
(vii) section 7(1) (communicating indecently),	
(viii) section 7(2) (causing a person to see or hear an indecent communication),	
(ix) section 8 (sexual exposure),	Common law public indecency or breach of the peace
(x) section 9 (voyeurism),	Cases have been prosecuted under common law as breach of the peace
(xi) section 18 (rape of a young child),	A "young child" is one who has not attained the age of 13.
	Belief that victim was 13 or over or that victim consented is not a defence. Where victim is female, would currently be prosecuted at section 5 or 6 (where victim is 12 or over) of the Criminal Law (Consolidation) (Scotland) Act 1995, or under common law as rape, indecent assault
(j) any offence which consists of a contravention of any of the following provisions of the Sexual Offences (Scotland) Act 2009 (asp 9) —	

(xii) section 19 (sexual assault on a young child by penetration),	Refer to (xi) section 18.
(xiii) section 20 (sexual assault on a young child),	A "young child" is one who has not attained the age of 13.
	Belief that victim was 13 or over or that victim consented is not a defence. Where victim is female, this would currently be prosecuted as lewd and libidinous conduct (where victim is under the age of 12), indecent assault or at section 6 of the Criminal Law (where child is 12
(xiv) section 21 (causing a young child to participate in a sexual activity),	A "young child" is one who has not attained the age of 13.
	Belief that victim was 13 or over or that victim consented is not a defence. No specific offence. Would probably be prosecuted as art-and-part or conspiracy to commit the offences listed above.
(xv) section 22 (causing a young child to be present during a sexual activity),	A "young child" is one who has not attained the age of 13.
	Belief that victim was 13 or over or that victom consented is not a defence. This would currently be prosecuted as lewd and libidinous conduct, or at section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995 where victim is female and over 12 years old.
(xvi) section 23 (causing a young child to look at a sexual image),	A "young child" is one who has not attained the age of 13.
	Belief that victim was 13 or over or that victim consented is not a defence. This would currently be prosecuted as lewd and libidinous conduct, or at section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995 where victim is female and over 12 years old.

(j) any offence which consists of a contravention of any of the following provisions of the Sexual Offences (Scotland) Act 2009 (asp 9) —	
(xvii) section 24(1) (communicating indecently with a young child),	A “young child” is one who has not attained the age of 13.
	No lack of consent required.
	Belief that victim was 13 or over is not a defence. This would currently be prosecuted as lewd and libidinous conduct, or at section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995 where victim is female and over 12 years old.
(xviii) section 24(2) (causing a young child to see or hear an indecent communication),	A “young child” is one who has not attained the age of 13.
	Belief that victim was 13 or over or victim consented is not a defence. This would currently be prosecuted as lewd and libidinous conduct, or at section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995 where victim is female and over 12 years old.
(xix) section 25 (sexual exposure to a young child),	A “young child” is one who has not attained the age of 13.
	Belief that victim was 13 or over or that victim consented is not a defence. This would currently be prosecuted as lewd and libidinous conduct, public indecency or at section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995 where victim is female and over 12 years old.
(xx) section 26 (voyeurism towards a young child),	Refer to (xi) section 18.
	This would currently be prosecuted as a breach of the peace. Dependent on circumstances, prosecution for lewd and libidinous conduct, or at section 6 of the Criminal Law (Consolidation) (Scotland) Act.

LIST OF VIOLENT OFFENCES IN SECTION 19A(6) OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995 INCLUDING MAXIMUM PENALTIES

“relevant violent offence” means any of the following offences—

(a) murder or culpable homicide;	
(b) uttering a threat to the life of another person;	
(c) perverting the course of justice in connection with an offence of murder;	
(d) fire raising;	

LIST OF VIOLENT OFFENCES IN SECTION 19A(6) OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995 INCLUDING MAXIMUM PENALTIES

“relevant violent offence” means any of the following offences—

(g) abduction; and	
(h) any offence which consists of a contravention of any of the following statutory provisions—	
(i) sections 2 (causing explosion likely to endanger life) or 3 (attempting to cause such an explosion) of the Explosive Substances Act 1883;	
(iii) sections 16 (possession of firearm with intent to endanger life or cause serious injury), 17 (use of firearm to resist arrest) or 18 (having a firearm for purpose of committing an offence listed in Schedule 2) of the Firearms Act 1968;	

LIST OF SEXUAL OFFENCES IN SECTION 19A(6) OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995 AS AMENDED BY THE SEXUAL OFFENCES (SCOTLAND) ACT 2009

The Sexual Offences (Scotland) Act 2009 (the 2009 Act) adds offences to the list in section 19A(6), but does not

Common law offences	**Notes**
(a) rape at common law;	Repealed by 2009 Act
(b) clandestine injury to women;	Repealed by 2009 Act
(f) lewd, indecent or libidinous behaviour or practices;	Repealed by 2009 Act
(h) sodomy;	Repealed by 2009 Act

(i) any offence which consists of a contravention of any of the following statutory provisions—

Offence	Notes
(iii) section 311 of the Mental Health (Care and Treatment)(Scotland) Act 2003 (non consensual sexual acts)	Repealed by 2009 Act
(iv) section 313 of that Act (persons providing care services: sexual offences);	Repealed by 2009 Act
(v) section 1 of the M3 Criminal Law (Consolidation)(Scotland) Act 1995 (incest);	Both parties guilty unless one unaware of relationship or not consenting
(vii) section 3 of that Act (intercourse with child under 16 years by person in position of trust);	Repealed by 2009 Act
	Can only be committed by person over age of 16.
(viii) section 5(1) or (2) of that Act (unlawful intercourse with girl under 13 years);	Repealed by 2009 Act
(xvi) section 13(2)(b) and (c) of that Act (homosexual offences);	Repealed by 2009 Act
	Section 13(5)(b) – without consent of both parties

LIST OF VIOLENT OFFENCES IN SECTION 19A(6) OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995 INCLUDING MAXIMUM PENALTIES

“relevant violent offence” means any of the following offences—

Offence	N/A
(e) assault;	Stage 3 amendment will allow gradation of assaults through the order-making power in section 18B(6) of the 1995 Act.

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 3

Letter from the Cabinet Secretary for Justice to David McLetchie MSP

I am writing to you about your Stage 2 amendments to the Criminal Justice and Licensing (Scotland) Bill to remove the upper age limit for jurors in criminal trials, which were agreed by the Justice Committee.

As you know, we accepted the view of the Committee in respect of these amendments, and we are keen to ensure that these provisions work as well as possible. As my colleague Fergus Ewing remarked when before the Committee, there is an interaction between the aspect of the amendments which gives those aged 71 and over the right to be excused from jury service, and our own amendments to ensure that those entitled to excusal as of right should apply for that excusal within 7 days of receipt of the revisal notice. These amendments, too, were approved by the Committee.

Clearly it is very useful to the Scottish Court Service to be informed as early as possible about applications for excusal. However, the Scottish Court Service, like the Government, acknowledges that there might be reasons why expecting those aged 71 and over to apply for excusal as of right within 7 days could be unreasonable and impracticable. Therefore, following discussions with the Scottish Court Service, we are proposing the attached amendments at Stage 3. These will permit those aged 71 and over to apply for the excusal to which they are to be entitled at any time up to the day on which they are first cited to attend court.

These amendments are intended to ensure the system for juror service for those aged 71 and over works as well as possible, and I hope you will be able to support them.

A copy of this letter goes to the Justice Committee.

Kenny MacAskill MSP
Cabinet Secretary for Justice
22 June 2010

[Note by the clerk: The amendments have now been numbered as 90, 91, 92 and 186 respectively.**]**

Kenny MacAskill

In section 68A, page 115, line 33, at beginning insert <Subject to subsection (3),>

Kenny MacAskill

In section 68A, page 116, line 4, at beginning insert <Without prejudice to subsection (1),>

Kenny MacAskill

In section 68A, page 116, line 11, at end insert—

<(3) Subsection (1) does not apply to a person who is qualified under section 1(1) but is among the persons listed in paragraph (a)(iii) of Group F of Part III of Schedule 1 to this Act (persons who have attained the age of 71), but instead such a person is to be excused from jury service in relation to criminal proceedings on any occasion where—

(a) in the case of a person who has been required to provide information under section 3(2) of the Jurors (Scotland) Act 1825, the person gives written notice to the sheriff principal that the person wishes to be excused; or

(b) in the case of a person who has been cited to attend for jury service, the person—

(i) gives written notice to the clerk of court issuing the citation that the person wishes to be excused, before the date on which the person is cited first to attend; or

(ii) attends in compliance with the citation and intimates to the court that the person wishes to be excused.”.>

Kenny MacAskill

In schedule 5, page 225, line 32, at end insert—

<In section 85 (juries: citation and attendance of jurors), in subsection (6), after “section 1” insert “or 1A”.>

Justice Committee

Criminal Justice and Licensing (Scotland) Bill – Stage 3

Letter from the Cabinet Secretary for Justice to the Convener

Offence of threatening or abusive behaviour

I am writing to you further to my letter of 19 May (copy attached for ease of reference) concerning the Government's proposed approach to addressing the Committee's concerns with amendment 378 to the Bill.

As you will recall, our intention in lodging amendment 378 at Stage 2 was to address the uncertainty about the scope of the offence of breach of the peace created by the *Harris v. HMA* judgement, which concluded that some public element is essential for the offence of breach of the peace to be committed. While this judgement does not affect the majority of breach of the peace cases, which take place in a public place, we remain concerned that it will make it difficult for the criminal law to intervene in domestic disputes and other circumstances where the offence of breach of the peace has in the past been used to prosecute conduct where there is not necessarily a public element.

As you may be aware, at the Annual Conference of the Association of Scottish Police Superintendents in May, the Association's incoming President expressed concern that *Harris v. HMA* made it much more difficult to prosecute people who are abusive towards police officers.

Amendment 378 therefore provided that it was an offence for a person to behave in such a way that a reasonable person would be caused fear, alarm or distress by the behaviour. However, the Justice Committee and others were concerned that the amendment was too wide. In particular, there was concern that it might inadvertently criminalise people simply for expressing opinions which a reasonable person might find distressing

We have considered the Committee's concerns about the potential breadth of the offence which was lodged at Stage 2 and we now intend to lodge a more narrowly framed offence which we consider criminalises the kinds of conduct occurring in private which would have been prosecuted as a breach of the peace prior to *Harris v. HMA* without the risk of inadvertently unduly interfering with a person's right to freedom of expression

The offence of 'threatening or abusive behaviour' provides that it shall be an offence for a person to behave in a threatening or abusive manner, such as to be likely to cause a reasonable person fear or alarm. Unlike the offence provided for in the amendment lodged at Stage 2, conduct which would cause a reasonable person to feel distress, but not fear or alarm, would not be caught by this offence. The amendment is also restricted to conduct which is 'threatening or abusive' which will provide a further protection to ensure that it does not inadvertently criminalise a person who expresses views which a reasonable person may find distressing or even alarming.

The amendment also provides for that it shall be a defence for an accused to show that their conduct was, in the circumstances, reasonable. This is the same as the defence provided for in subsection 5(c) of the stalking offence in section 31B of the Bill and provides an important additional safeguard.

I hope this explanation of our thinking on this is helpful and reassures you and your committee that our amendment has taken account of the concerns you expressed at Stage 2. I have attached the amendment to the letter for your information.

Kenny MacAskill MSP
Cabinet Secretary for Justice
23 June 2010

[Note by the clerk: The amendment has been numbered as 63.**]**

After section 31A, insert—

<Threatening or abusive behaviour

Threatening or abusive behaviour

(1) A person ("A") commits an offence if—

  (a) A behaves in a threatening or abusive manner,

  (b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and

  (c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.

(2) It is a defence for a person charged with an offence under subsection (1) to show that the behaviour was, in the particular circumstances, reasonable.

(3) Subsection (1) applies to—

  (a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done, and

  (b) behaviour consisting of—

    (i) a single act, or

    (ii) a course of conduct.

(4) A person guilty of an offence under subsection (1) is liable—

  (a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or

  (b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.>

Criminal Justice and Licensing (Scotland) Bill

Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections 3 to 148	Schedules 1 to 5
Long Title	

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 12

Robert Brown

8 In section 12, page 5, line 37, after <Advocate,> insert—

<( ) the Lord Justice General,>

Section 14

Robert Brown

9 In section 14, page 6, line 39, at end insert—

<(1A) The purpose of a community payback order is to punish an offender in a way that helps to pay back to the community adversely affected by the conduct of the offender, including by supporting the offender in addressing the behaviour or circumstances that contributed to that conduct.

(1B) When imposing a community payback order, the court must have regard to the purpose of such an order as stated in subsection (1A).>

Kenny MacAskill

33 In section 14, page 7, leave out lines 12 to 15 and insert—

<( ) Subsection (4) applies where—

(a) a person (the “offender”) is convicted of an offence punishable by a fine (whether or not it is also punishable by imprisonment), and

(b) where the offence is also punishable by imprisonment, the court decides not to impose—

(i) a sentence of imprisonment, or

(ii) a community payback order under subsection (1) instead of a sentence of imprisonment.>

Kenny MacAskill

34 In section 14, page 7, line 16, leave out from <Where> to <may> in line 17 and insert <The court may, instead of or as well as imposing a fine,>

Kenny MacAskill

35 In section 14, page 7, line 18, after <imposing> insert <one or more of the following requirements>

Kenny MacAskill

36 In section 14, page 7, line 19, leave out <a> and insert <an offender>

Kenny MacAskill

37 In section 14, page 7, leave out lines 30 to 32

Kenny MacAskill

38 In section 14, page 8, line 5, at end insert—

<( ) The court must not impose the order unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was serious enough to warrant the imposition of such an order.

( ) Before imposing a community payback order imposing two or more requirements, the court must consider whether, in the circumstances of the case, the requirements are compatible with each other.>

Kenny MacAskill

39 In section 14, page 8, line 34, leave out <(5)> and insert <(5)(b)>

Kenny MacAskill

40 In section 14, page 9, line 32, at end insert <in the area of the local authority concerned.>

Kenny MacAskill

41 In section 14, page 11, line 20, leave out <227ZB(7B)> and insert <227ZCA(4)>

Kenny MacAskill

42 In section 14, page 11, line 21, leave out first <a> and insert <an offender>

Kenny MacAskill

43 In section 14, page 11, line 27, leave out <a> and insert <an offender>

Kenny MacAskill

44 In section 14, page 12, line 8, after <the> insert <offender>

Kenny MacAskill

45 In section 14, page 14, leave out lines 29 and 30 and insert—

<( ) the offender is not serving a sentence of imprisonment, and>

Kenny MacAskill

46 In section 14, page 14, leave out lines 34 to 36 and insert—

<(2) Instead of imposing a period of imprisonment under section 219(1) of this Act, the court—

(a) where the amount of the fine or the instalment does not exceed level 2 on the standard scale, must impose a community payback order on the offender imposing a level 1 unpaid work or other activity requirement,

(b) where the amount of the fine or the instalment exceeds that level, may impose such a community payback order.>

Kenny MacAskill

47 In section 14, page 14, line 38, leave out <a> and insert <an offender>

Kenny MacAskill

48 In section 14, page 15, leave out lines 8 to 10

Kenny MacAskill

49 In section 14, page 17, line 36, after first <the> insert <written or oral>

Kenny MacAskill

50 In section 14, page 18, line 18, leave out <purpose of making a finding under> and insert <purposes of>

Robert Brown

10 In section 14, page 21, line 30, at end insert—

<*Community payback orders: regulations about standards*

227VB Standards with which community payback orders must comply

(1) The Scottish Ministers may, by regulations made by statutory instrument, specify standards with which community payback orders must comply.

(2) Standards specified under subsection (1) must aim to ensure that community payback orders (and any requirements imposed by them) begin as soon as practicable and are—

(a) capable of being delivered promptly,

(b) effective,

(c) proportionate to the nature of the offence and the circumstances of the offender, and

(d) consistent with the purposes and principles of sentencing.

(3) Regulations under subsection (1) are subject to annulment in pursuance of a resolution of the Scottish Parliament.>

Kenny MacAskill

51 In section 14, page 23, line 21, leave out <an offender> and insert <a>

Kenny MacAskill

52 In section 14, page 24, line 29, leave out <which> and insert <so that it>

Kenny MacAskill

53 In section 14, page 25, line 41, leave out <of> and insert <imposed by>

Kenny MacAskill

54 In section 14, page 25, line 41, at end insert—

<( ) If the court considers that a requirement ("the requirement concerned") imposed by the order cannot be complied with if the offender resides in the new locality, the court must not vary the order so as to specify the new local authority area unless it also varies the order so as to—

(a) revoke or discharge the requirement concerned, or

(b) substitute for the requirement concerned another requirement that can be so complied with.>

Kenny MacAskill

55 In section 14, page 26, line 29, leave out <If> and insert <Where the order was imposed under section 227A, if>

Kenny MacAskill

56 In section 14, page 27, leave out lines 1 to 5

Kenny MacAskill

57 In section 14, page 27, line 10, at end insert—

<(5ZA)Where the order was imposed under section 227M(2), if the court is satisfied that the offender has failed without reasonable excuse to comply with a requirement imposed by the order, the court may—

(a) revoke the order and impose on the offender a period of imprisonment for a term not exceeding—

(i) where the court is a justice of the peace court, 60 days,

(ii) in any other case, 3 months, or

(b) vary—

(i) the number of hours specified in the level 1 unpaid work or other activity requirement imposed by the order, and

(ii) where the order also imposes an offender supervision requirement, the specified period under section 227G in relation to the requirement.>

Kenny MacAskill

58 In section 14, page 27, line 23, leave out from beginning to end of line 2 on page 28

Kenny MacAskill

59 In section 14, page 28, line 10, leave out <an offender> and insert <a>

Kenny MacAskill

60 In section 14, page 28, line 19, at end insert—

<*Restricted movement requirement*

227ZCA Restricted movement requirement

(1) The requirements which the court may impose under section 227ZB(5)(c) include a restricted movement requirement.

(2) If the court varies a community payback order under section 227ZB(5)(c) so as to impose a restricted movement requirement, the court must also vary the order so as to impose an offender supervision requirement, unless an offender supervision requirement is already imposed by the order.

(3) The court must ensure that the specified period under section 227G in relation to the offender supervision requirement is at least as long as the period for which the restricted movement requirement has effect and, where the community payback order already imposes an offender supervision requirement, must vary it accordingly, if necessary.

(4) The minimum period of 6 months in section 227G(3) does not apply in relation to an offender supervision requirement imposed under subsection (2).

(5) Where the court varies the order so as to impose a restricted movement requirement, the court must give a copy of the order making the variation to the person responsible for monitoring the offender's compliance with the requirement.

(6) If during the period for which the restricted movement requirement is in effect it appears to the person responsible for monitoring the offender's compliance with the requirement that the offender has failed to comply with the requirement, the person must report the matter to the offender's responsible officer.

(7) On receiving a report under subsection (6), the responsible officer must report the matter to the court.>

Robert Brown

11 In section 14, page 32, line 11, at end insert—

<Annual reports on community payback orders

227ZJA Annual reports on community payback orders

(1) Each local authority must, as soon as practicable after the end of each reporting year, prepare a report on the operation of community payback orders within their area during that reporting year, and send a copy of the report to the Scottish Ministers.

(2) The Scottish Ministers may issue directions to local authorities about the content of their reports under subsection (1); and local authorities must comply with any such directions.

(3) The Scottish Ministers must, as soon as practicable after the end of each reporting year, lay before the Scottish Parliament and publish a report that collates and summarises the data included in the various reports under subsection (1).

(4) In this section, "reporting year" means—

(a) the period of 12 months beginning on the day this section comes into force, or

(b) any subsequent period of 12 months beginning on an anniversary of that day.>

After section 16

Kenny MacAskill

61 After section 16, insert—

<Presumption against short periods of imprisonment

In section 204 of the 1995 Act (restrictions on passing sentence of imprisonment or detention), after subsection (3) insert—

"(3A) A court must not pass a sentence of imprisonment for a term of 3 months or less on a person unless the court considers that no other method of dealing with the person is appropriate.

(3B) Where a court passes such a sentence, the court must—

(a) state its reasons for the opinion that no other method of dealing with the person is appropriate, and

(b) have those reasons entered in the record of the proceedings.

(3C) The Scottish Ministers may by order made by statutory instrument substitute for the number of months for the time being specified in subsection (3A) another number of months.

(3D) An order under subsection (3C) is not to be made unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.".>

Robert Brown

61A As an amendment to amendment 61, line 17, at end insert—

<(2) The Scottish Ministers may not bring subsection (1) into force until they have—

(a) prepared a report setting out—

(i) the reduction in the number of sentences of imprisonment or detention imposed annually that is expected as a result of bringing those subsections into force,

(ii) the increase in the number of community payback orders imposed annually that is expected as a result of bringing those subsections into force (by comparison with the number of such orders imposed annually that would be expected if those subsections were not brought into force),

(iii) the estimated annual cost implications of the changes referred to in sub-paragraphs (i) and (ii), and

(iv) the additional funding, if any, that Ministers will provide to community justice authorities or local authorities to ensure that they have the capacity to support the requirements expected to be imposed by any additional community payback orders identified under sub-paragraph (ii);

(b) laid that report before the Scottish Parliament; and

(c) taken into account any views expressed on it by any committee of the Parliament the remit of which includes the criminal justice system.>

Patrick Harvie

187* After section 16, insert—

<**Presumption against short periods of imprisonment or detention**

(1) The 1995 Act is amended as follows.

(2) In section 204 (restrictions on passing sentence of imprisonment or detention), after subsection (4) insert—

"(4A) A court may pass a sentence of imprisonment for a term not exceeding 6 months on a person only where the court considers that no other method of dealing with the person is appropriate.

(4B) Where a court passes such a sentence, the court must—

(a) state its reasons for the opinion that no other method of dealing with the person is appropriate, and

(b) have those reasons entered in the record of the proceedings.".

(3) In section 208 (detention of children convicted on indictment)—

(a) after subsection (1) insert—

"(1A) Where the court imposes a sentence of detention for a term not exceeding 6 months on a child, the court must—

(a) state its reasons for the opinion that no other method of dealing with the child is appropriate, and

(b) have those reasons entered in the record of the proceedings.", and

(b) in subsection (2), for "Subsection (1) above is" substitute "Subsections (1) and (1A) above are".>

Robert Brown

12* After section 16, insert—

<**Report on operation of sections 14 and (*Presumption against short periods of imprisonment*)**

(1) The Scottish Ministers must, no later than 5 years after sections 14 and (*Presumption against short periods of imprisonment*) come fully into force, lay before the Scottish Parliament and publish a report on the operation of those sections.

(2) The report under subsection (1) must, in particular, include an assessment of whether and to what extent those sections, individually or collectively, have—

(a) reduced offending,

(b) increased public safety.>

After section 20

Kenny MacAskill

62 After section 20, insert—

<**Detention of children convicted on indictment**

(1) Section 208 of the 1995 Act (detention of children convicted on indictment) is amended as follows.

(2) After subsection (1), insert—

"(1A) Where the court imposes a sentence of detention on a child, the court must—

(a) state its reasons for the opinion that no other method of dealing with the child is appropriate, and

(b) have those reasons entered in the record of the proceedings.".

(3) In subsection (2), for "Subsection (1) above is" substitute "Subsections (1) and (1A) above are".>

After section 23

Kenny MacAskill

2 After section 23, insert—

<**Voluntary intoxication by alcohol: effect in sentencing**

(1) Subsection (2) applies in relation to an offender who was, at the time of the offence, under the influence of alcohol as a result of having voluntarily consumed alcohol.

(2) A court, in sentencing the offender in respect of the offence, must not take that fact into account by way of mitigation.>

Section 24B

Kenny MacAskill

3 Leave out section 24B

Section 26

Robert Brown

13 In section 26, page 44, line 3, leave out <Evidence from a single source is sufficient> and insert <Corroborating evidence is required>

After section 31A

Kenny MacAskill

63 After section 31A, insert—

<Threatening or abusive behaviour

Threatening or abusive behaviour

(1) A person ("A") commits an offence if—

(a) A behaves in a threatening or abusive manner,

(b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and

(c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.

(2) It is a defence for a person charged with an offence under subsection (1) to show that the behaviour was, in the particular circumstances, reasonable.

(3) Subsection (1) applies to—

(a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done, and

(b) behaviour consisting of—

(i) a single act, or

(ii) a course of conduct.

(4) A person guilty of an offence under subsection (1) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.>

John Lamont

188 After section 31A, insert—

<Threatening or abusive behaviour: domestic abuse

Threatening or abusive behaviour: domestic abuse

(1) A person (“A”) commits an offence if—

(a) A behaves in such a manner that another person (“B”) would be likely to be caused fear, alarm or distress, and

(b) the conditions in subsections (2) and (3) are satisfied.

(2) It is a condition that B is in such a relationship with A that B would be eligible to make an application for a matrimonial or domestic interdict in respect of A under the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

(3) It is a condition that A—

(a) intends the behaviour to cause B fear, alarm or distress, or

(b) is reckless as to whether the behaviour would cause B fear, alarm or distress.

(4) It is a defence that—

(a) the accused had no reason to believe that there was any person within the hearing or sight of the accused who was likely to be caused fear, alarm or distress, or

(b) the behaviour was in the circumstances reasonable.

(5) An offence under this section may be committed in a public or in a private place.

(6) A person guilty of an offence under subsection (1) is liable on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both.>

Section 31B

Kenny MacAskill

64 In section 31B, page 56, leave out lines 11 to 13 and insert <fear or alarm.>

Kenny MacAskill

65 In section 31B, page 56, line 15, leave out from first <such> to end of line and insert <B to suffer fear or alarm.>

Kenny MacAskill

66 In section 31B, page 56, line 17, leave out from <such> to end of line 18 and insert <B to suffer fear or alarm.>

Kenny MacAskill

67 In section 31B, page 56, line 20, leave out <action> and insert <conduct>

Robert Brown

14 In section 31B, page 56, line 22, after <crime,> insert—

<( ) was engaged in as part of public protest or industrial action that was reasonable and (leaving aside the question of whether it constituted an offence under subsection (1)) lawful,>

Kenny MacAskill

68 In section 31B, page 56, line 25, leave out <includes (but is not limited to)> and insert <means>

Kenny MacAskill

69 In section 31B, page 56, line 27, after <contacting> insert <, or attempting to contact,>

Kenny MacAskill

70 In section 31B, page 56, line 27, leave out from <post> to end of line 28 and insert <any means,>

Kenny MacAskill

71 In section 31B, page 56, line 32, leave out <tracing> and insert <monitoring>

Kenny MacAskill

72 In section 31B, page 56, leave out lines 34 to 37 and insert—

<( ) entering any premises,

( ) loitering in any place (whether public or private),>

Kenny MacAskill

73 In section 31B, page 57, line 1, leave out <offensive material> and insert <anything>

Kenny MacAskill

74 In section 31B, page 57, line 1, leave out <such material> and insert <anything>

Kenny MacAskill

75 In section 31B, page 57, leave out line 4 and insert—

<( ) watching or spying on B or any other person,>

Kenny MacAskill

76 In section 31B, page 57, line 6, leave out from <arouse> to end of line 7 and insert <cause B to suffer fear or alarm, and>

Kenny MacAskill

77 In section 31B, page 57, line 12, leave out <6> and insert <12>

Kenny MacAskill

78 In section 31B, page 57, line 13, at end insert—

<(8) Subsection (9) applies where, in the trial of a person ("the accused") charged with the offence of stalking, the jury or, in summary proceedings, the court—

(a) is not satisfied that the accused committed the offence, but

(b) is satisfied that the accused committed an offence under section (*Threatening or abusive behaviour*)(1).

(9) The jury or, as the case may be, the court may acquit the accused of the charge and, instead, find the accused guilty of an offence under section (*Threatening or abusive behaviour*)(1).>

After section 34C

Marlyn Glen

6 After section 34C, insert—

<Offences of engaging in and advertising paid-for sexual activities

(1) The Sexual Offences (Scotland) Act 2009 (asp 9) is amended as follows.

(2) After section 11 insert—

"Engaging in and advertising paid-for sexual activities

11A Engaging in a paid-for sexual activity

(1) A person ("A") commits an offence, to be known as the offence of engaging in a paid-for sexual activity, if A knowingly engages in a paid-for sexual activity with another person ("B").

(2) A sexual activity is paid for where B—

(a) engages in that activity in exchange for payment, and

(b) would not have engaged in that activity without the expectation of payment.

(3) For the purposes of subsection (2), it is immaterial whether the payment is made (or expected to be made)—

(a) by A or by another person, or

(b) to B or to another person on B's behalf.

(4) The Scottish Ministers may, by order, make further provision about the circumstances in which sexual activity qualifies as paid-for for the purposes of subsection (1).

11B Advertising paid-for sexual activities

(1) A person ("A") commits an offence, to be known as the offence of advertising paid-for sexual activities, if A knowingly advertises, by any means, the availability of sexual activities that can be engaged in for payment.

(2) But A does not commit an offence under subsection (1) by advertising only the availability of sexual activities involving A as a participant.

11C Arrest for offences under sections 11A and 11B

(1) Where a constable reasonably believes that a person is committing or has committed an offence under section 11A or 11B, the constable may arrest the person without warrant.

(2) Subsection (1) is without prejudice to any power of arrest conferred by law apart from that subsection.”.

(3) In the table in schedule 2 insert at the appropriate place—

“Engaging in a paid-for sexual activity	Section 11A	A fine not exceeding level 3 on the standard scale	
Advertising paid-for sexual activities	Section 11B	A fine not exceeding level 3 on the standard scale”>.	

Richard Baker

79 After section 34C, insert—

<**Offence of paying for sexual services of a prostitute subjected to force etc.**

(1) The Sexual Offences (Scotland) Act 2009 (asp 9) is amended as follows.

(2) After section 11 insert—

“Paying for sexual services of a prostitute subjected to force etc.

11E Paying for sexual services of a prostitute subjected to force etc.

(1) A person (“A”) commits an offence, to be known as the offence of paying for sexual services of a coerced prostitute, if—

(a) A makes or promises payment for the sexual services of a prostitute (“B”),

(b) a third person (“C”) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and

(c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).

(2) The following are irrelevant—

(a) where in the world the sexual services are to be provided and whether those services are provided,

(b) whether A is, or ought to be, aware that C has engaged in exploitative conduct.

(3) C engages in exploitative conduct if—

(a) C uses force, threats (whether or not relating to violence) or any other form of coercion, or

(b) C practises any form of deception.”.

(3) In the table in schedule 2 insert at the appropriate place—

“Paying for sexual services of a coerced prostitute	Section 11E	A fine not exceeding level 3 on the standard scale”.>	

After section 37A

Robert Brown

189 After section 37A, insert—

<Breach of the peace

Breach of the peace: modification of common law offence

In deciding the question whether an accused person has committed the offence of breach of the peace, the court is not required to decide that question in the negative solely because the person’s behaviour took place in private, so long as—

(a) that behaviour led to mischief to the public peace or could (in the view of a reasonable person) have led to such a mischief, or

(b) that behaviour led to, or was such that it could have led to, a person reasonably suffering fear or alarm;

and any rule of law to the contrary ceases to have effect.>

Section 38

Robert Brown

190 In section 38, page 70, line 18, at end insert—

<(3) The Scottish Ministers may, by order made by statutory instrument, substitute for the number of years for the time being specified in subsections (1) and (2) and for the first number of years for the time being specified in section 42(1) a higher number of years.

(4) A statutory instrument containing an order under subsection (3) is not made unless a draft has been laid before, and approved by resolution of, the Scottish Parliament.”>

After section 40

Margaret Curran

4 After section 40, insert—

<Parole: victims' representation

Victims' representation at Parole Board hearings

(1) Section 17 of the Criminal Justice (Scotland) Act 2003 (asp 7) is amended as follows.

(2) After subsection (1), insert—

"(1A) Representations under subsection (1) may include notification by the victim of a desire to be heard (either in person or through a representative) at the relevant hearing of the Parole Board for Scotland.

(1B) In this section, the "relevant hearing" of the Board is the hearing at which the Board is to consider the convicted person's case in order to decide whether to recommend, or direct, that person's release on licence (and if there are to be a number of hearings which otherwise meet this description, the Board may determine which is the relevant hearing for the purposes of this section).".

(3) In subsection (3), for "Parole Board for Scotland" substitute "Board".

(4) After subsection (5), insert—

"(5A) Where representations are made under subsection (1) which include notification of a desire to be heard at the relevant hearing, the Board must—

(a) give the victim reasonable notice in writing of when and where the hearing is to take place and invite the victim to—

(i) attend the hearing, with or without an accompanying person, in order to be heard in person; or

(ii) send a representative to the hearing to be heard on the victim's behalf;

(b) in so doing, give the victim appropriate information about the hearing and how it is likely to be conducted, including in particular—

(i) information about any parts of the hearing from which the victim and any accompanying person are, or the victim's representative is, to be excluded; and

(ii) any limits on their participation during the other parts of the hearing;

(c) at the hearing, afford the victim (or the victim's representative) a reasonable opportunity to be heard.

(5B) A victim's representative may only be a member of the victim's immediate family or a friend of the victim.

(5C) In reaching its decision at or after the hearing, the Board must take account of—

(a) any written representations made under subsection (1); and

(b) anything said by the victim (or the victim's representative) at the hearing.".

(5) In section 20(4) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9) (Parole Board rules), after paragraph (ba) insert—

“(bb) in relation to victims who have made representations under section 17(1) of the Criminal Justice (Scotland) Act 2003 (asp 7) which include notifications of a desire to be heard at the relevant hearing (within the meaning of subsection (1B) of that section), enabling such victims to attend such hearings of the Board;”.>

Section 46A

Kenny MacAskill

80 In section 46A, page 79, line 36, at end insert—

<**288BC Aggravation by intent to rape**

(1) Subsection (2) applies as respects a qualifying offence charged in an indictment or a complaint.

(2) Any specification in the charge that the offence is with intent to rape (however construed) may be given by referring to the statutory offence of rape.

(3) In this section—

(a) the reference to a qualifying offence is to an offence of assault or abduction (and includes attempt, conspiracy or incitement to commit such an offence),

(b) the reference to the statutory offence of rape is (as the case may be) to—

(i) the offence of rape under section 1 of the Sexual Offences (Scotland) Act 2009, or

(ii) the offence of rape of a young child under section 18 of that Act.”.>

Section 59

Kenny MacAskill

81 In section 59, page 99, line 3, at end insert—

<( ) An order under subsection (6) may prescribe a relevant violent offence by reference to a particular degree of seriousness.>

Robert Brown

191 In section 59, page 99, leave out lines 4 to 20 and insert—

<(7) Where—

(a) the second condition is satisfied, the relevant person must notify the relevant chief constable of that fact within 7 days of the date on which the ground of referral is accepted as mentioned in that condition,

(b) the third or fourth condition is satisfied, the sheriff must notify the relevant chief constable of that fact within 7 days of the date on which the ground of referral is established as mentioned in the condition in question.

(7A) The relevant chief constable may, by summary application made within 3 months of receiving notice under subsection (7), apply to the sheriff for an order under subsection (7C).

(7B) An application under subsection (7A) may be made to any sheriff—

(a) in whose sheriffdom the child mentioned in subsection (1) resides;

(b) in whose sheriffdom that child is believed by the applicant to be; or

(c) to whose sheriffdom that child is believed by the applicant to be intending to come.

(7C) On receipt of such an application, the sheriff may, by order, specify a date that is no later than 3 years after the date mentioned in subsection (7)(a) or (as the case may be) (b).

(7D) The sheriff may only make the order mentioned in subsection (7C) if satisfied that—

(a) the child continues to pose a risk to public safety; and

(b) retention of the relevant physical data, sample or information until the date specified in the order is justified by that risk.

(7E) Where—

(a) an application made under subsection (7A) is refused, the relevant data, sample or information must be destroyed as soon as possible after that refusal;

(b) no application is made under subsection (7A), the relevant data, sample or information must be destroyed as soon as possible after the expiry of the period of 3 months mentioned in that subsection.

(8) Where an order is made under subsection (7C), the data, sample or information must, subject to section 18C(6) and (7), be destroyed no later than the date ("the destruction date") which is—

(a) the date specified in the order made under subsection (7C); or

(b) such later date as an order under section 18C(1) may specify.>

Robert Brown

192 In section 59, page 99, line 24, at end insert—

<"relevant chief constable" has the same meaning as in subsection (11) of section 18A, with the modification that references to the person referred to in subsection (2) of that section are references to the child referred to in section 18B(1);>

Robert Brown

16 In section 59, page 99, line 38, leave out from <there> to end of line 39 and insert <at least one ground for doing so, specified by virtue of subsection (1A), is established, make an order amending (or further amending) the destruction date.

(1A) The Scottish Ministers must, by regulations made by statutory instrument, specify the grounds on which an order under subsection (1) may be made.

(1B) Before making regulations under subsection (1A), the Scottish Ministers must consult such persons as they consider appropriate.

(1C) A statutory instrument containing regulations under subsection (1A) is subject to annulment in pursuance of a resolution of the Scottish Parliament.>

Section 66

Kenny MacAskill

82 In section 66, page 107, line 32, leave out <section 271P> and insert <sections 271P and 271PA>

Kenny MacAskill

83 In section 66, page 108, line 37, leave out from <Accordingly> to <any> in line 38 and insert <Subsections (4A) and (4B) apply where the prosecutor or the accused proposes to make an application under this section in respect of a witness.

(4A) Any>

Kenny MacAskill

84 In section 66, page 109, line 3, at end insert—

<(4B) Despite any provision in this Act to the contrary, any relevant list, application or notice lodged, made or given by that party before the determination of the application must not—

(a) disclose the identity of the witness, or

(b) contain any other information that might enable the witness to be identified,

but the list, application or notice must, instead, refer to the witness by a pseudonym.>

Kenny MacAskill

85 In section 66, page 109, line 7, at end insert—

<( ) "Relevant list, application or notice" means—

(a) a list of witnesses,

(b) a list of productions,

(c) a notice under section 67(5) or 78(4) relating to the witness,

(d) a motion or application under section 268, 269 or 270 relating to the witness,

(e) any other motion, application or notice relating to the witness.>

Kenny MacAskill

86 In section 66, page 109, line 15, at end insert—

<**271PA Making and determination of applications**

(1) In proceedings on indictment, an application under section 271P is a preliminary issue (and sections 79 and 87A and other provisions relating to preliminary issues apply accordingly).

(2) No application under section 271P may be made in summary proceedings by any party unless notice of the party's intention to do so has been given—

(a) if an intermediate diet has been fixed, before that diet,

(b) if no intermediate diet has been fixed, before the commencement of the trial.

(3) Subsection (2) is subject to subsections (4) and (8).

(4) In summary proceedings in which an intermediate diet has been fixed, the court may, on cause shown, grant leave for an application under section 271P to be made without notice having been given in accordance with subsection (2)(a).

(5) Subsection (6) applies where—

(a) the court grants leave for a party to make an application under section 271P without notice having been given in accordance with subsection (2)(a), or

(b) notice of a party's intention to make such an application is given in accordance with subsection (2)(b).

(6) The application must be disposed of before the commencement of the trial.

(7) Subsection (8) applies where a motion or application is made under section 268, 269 or 270 to lead the evidence of a witness.

(8) Despite section 79(1) and subsection (2) above, an application under section 271P may be made in respect of the witness at the same time as the motion or application under section 268, 269 or 270 is made.

(9) The application must be determined by the court before continuing with the trial.

(10) Where an application is made under section 271P, the court may postpone or adjourn (or further adjourn) the trial diet.

(11) In this section, "commencement of the trial" means the time when the first witness for the prosecution is sworn.>

Kenny MacAskill

87 In section 66, page 111, line 25, at end insert—

<( ) The appeal may be brought only with the leave of the court of first instance, granted—

(a) on the motion of the party making the appeal, or

(b) on its own initiative.>

Kenny MacAskill

88 In section 66, page 111, leave out lines 27 to 31 and insert—

<( ) If an appeal is brought under this section—

(a) the period between the lodging of the appeal and its determination does not count towards any time limit applying in respect of the case,

(b) the court of first instance or the High Court may do either or both of the following—

(i) postpone or adjourn (or further adjourn) the trial diet,

(ii) extend any time limit applying in respect of the case.>

Kenny MacAskill

89 In section 66, page 112, line 34, at end insert—

<( ) The 1995 Act is amended as follows—

(a) in section 79 (preliminary pleas and preliminary issues)—

(i) after subsection (1), insert—

"(1A) Subsection (1) is subject to section 271PA(8).",

(ii) in subsection (2)(b), after sub-paragraph (ii), insert—

"(iia) an application for a witness anonymity order under section 271P of this Act;",

(b) in section 148 (intermediate diets), after subsection (3), insert—

"(3AA)At an intermediate diet, the court shall also dispose of any application for a witness anonymity order under section 271P of this Act of which notice has been given in accordance with section 271PA(2)(a) of this Act.".>

Section 68A

Kenny MacAskill

90 In section 68A, page 115, line 33, at beginning insert <Subject to subsection (3),>

Kenny MacAskill

91 In section 68A, page 116, line 4, at beginning insert <Without prejudice to subsection (1),>

Kenny MacAskill

92 In section 68A, page 116, line 11, at end insert—

<(3) Subsection (1) does not apply to a person who is qualified under section 1(1) but is among the persons listed in paragraph (a)(iii) of Group F of Part III of Schedule 1 to this Act (persons who have attained the age of 71), but instead such a person is to be excused from jury service in relation to criminal proceedings on any occasion where—

(a) in the case of a person who has been required to provide information under section 3(2) of the Jurors (Scotland) Act 1825, the person gives written notice to the sheriff principal that the person wishes to be excused; or

(b) in the case of a person who has been cited to attend for jury service, the person—

(i) gives written notice to the clerk of court issuing the citation that the person wishes to be excused, before the date on which the person is cited first to attend; or

(ii) attends in compliance with the citation and intimates to the court that the person wishes to be excused.”.>

Section 72

Marlyn Glen

7 In section 72, page 124, line 26, at end insert <other than an offence under section 11A (engaging in a paid-for sexual activity) or 11B (advertising paid-for sexual activities),>

Section 79A

Kenny MacAskill

93 In section 79A, page 134, leave out lines 27 to 29 and insert—

<(e) anything done or undergone in pursuance of the terms of the alternative to prosecution.>

Kenny MacAskill

94 In section 79A, page 135, line 39, leave out <any of paragraphs (a) to (c) of paragraph 3(2)> and insert <either or both of sub-paragraphs (2) and (3) of paragraph 4>

Kenny MacAskill

95 In section 79A, page 135, line 42, leave out <paragraphs 4 and> and insert <paragraph>

Section 85

Kenny MacAskill

193 In section 85, page 141, line 13, leave out <sections 96B to 96I> and insert <this Part>

Section 87

Kenny MacAskill

96 In section 87, page 142, line 25, at end insert—

<( ) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal,>

Section 88B

Kenny MacAskill

97 In section 88B, page 143, line 25, at end insert—

<( ) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal,>

Section 89

Kenny MacAskill

98 In section 89, page 144, line 10, leave out subsection (7)

Section 90

Kenny MacAskill

99 In section 90, page 144, line 29, leave out <This section> and insert <Subsection (2)>

Kenny MacAskill

100 In section 90, page 144, line 35, after <(2)> insert <in relation to an accused who falls within section 89(1)(a) or (b)>

Kenny MacAskill

101 In section 90, page 145, line 11, at end insert—

<( ) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal,>

Section 94

Robert Brown

17 Leave out section 94

Section 95

Kenny MacAskill

102 In section 95, page 147, line 24, at end insert—

<( ) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal,>

Robert Brown

18 Leave out section 95

Section 95A

Robert Brown

19 Leave out section 95A

After section 95A

Kenny MacAskill

103 After section 95A, insert—

<*Sections 89 to 95A: general*

Sections 89 to 95A: no need to disclose same information more than once

(1) Subsection (2) applies where the prosecutor is required by section 89(2)(b), 89A(2), 90(2)(b) or (2A), 94(1A)(b), 95(3)(b) or 95A(6)(b) to disclose information to an accused.

(2) The prosecutor need not disclose anything that the prosecutor has already disclosed to the accused in relation to the same matter (whether because the same matter has been the subject of an earlier petition, indictment or complaint or otherwise).>

Section 95B

Robert Brown

20 Leave out section 95B

Section 95C

Kenny MacAskill

104 In section 95C, page 150, line 26, at end insert—

<( ) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal,>

Robert Brown

21 Leave out section 95C

Section 95D

Robert Brown

22 Leave out section 95D

Section 96

Robert Brown

23 In section 96, page 151, line 13, leave out <, 90(2)(b), 94(1A)b) or 95(3)(b)> and insert <or 90(2)(b)>

Kenny MacAskill

105 In section 96, page 151, line 13, leave out <or 95(3)(b)> and insert <, 95(3)(b) or 95A(6)(b)>

Section 96D

Kenny MacAskill

106 In section 96D, page 155, line 1, at end insert—

<(3A) The prosecutor need not disclose under subsection (3)(b) anything that the prosecutor has already disclosed to the appellant.>

Section 96F

Kenny MacAskill

107 In section 96F, page 155, line 27, leave out <earlier proceedings> and insert <proceedings in which the person was convicted>

Kenny MacAskill

108 In section 96F, page 156, leave out line 3

Section 92

Kenny MacAskill

109 In section 92, page 158, line 22, leave out <any of those sections> and insert <this Part>

Kenny MacAskill

110 Move section 92 to after section 113

Section 97

Kenny MacAskill

111 In section 97, page 159, line 13, leave out <the statement> and insert <a copy of the statement (but subsections (2) and (3) continue to apply).

( ) This section is subject to any provision made by an order under section 106(4B), 106A(7), 111(6) or 111A(6).

( ) In this section—

“accused” includes appellant or, in any case relating to section 96E(2), 96F(2) or 96G(2), other person to whom the section concerned applies,

“appellant” has the meaning given by section 96A.>

Kenny MacAskill

112 Move section 97 to after section 113

Section 98

Kenny MacAskill

113 In section 98, page 159, line 40, at end insert—

<( ) In this section, “accused” includes, where information is disclosed by virtue of section 96B(2)(b), 96C(2)(b), 96D(3)(b), 96E(2), 96F(2) or 96G(2), the appellant or, as the case may be, person to whom the prosecutor is required to disclose the information.>

Kenny MacAskill

114 Move section 98 to after section 113

Section 99

Kenny MacAskill

115 Move section 99 to after section 113

Section 91

Kenny MacAskill

116 Move section 91 to after section 113

Section 102

Kenny MacAskill

117 In section 102, page 160, line 19, after <where> insert <the conditions in subsection (1A) or (1B) are met.

(1A) The conditions are that—>

Robert Brown

24 In section 102, page 160, line 20, leave out <, 90(2)(b), 94(1A)(b), 95(3)(b) or 95A(6)(b)> and insert <or 90(2)(b)>

Kenny MacAskill

118 In section 102, page 160, line 23, at end insert—

<(1B) The conditions are that—

(a) by virtue of section 96B(2)(b), 96C(2)(b), 96D(3)(b), 96E(2), 96F(2) or 96G(2) the prosecutor is required to disclose an item of information to an appellant or, as the case may be, a person,

(b) where there are proceedings, the information is not likely to form part of the evidence to be led by the prosecutor in the proceedings, and

(c) the prosecutor considers that subsection (2) applies.>

Section 103

Kenny MacAskill

119 In section 103, page 160, line 31, after <proceedings> insert <(whether continuing or concluded)>

Kenny MacAskill

120 In section 103, page 160, line 35, after <proceedings> insert <(whether continuing or concluded)>

Kenny MacAskill

121 In section 103, page 161, line 19, at end insert—

<(8) In this section and sections 104 to 106—

“accused” includes, where subsection (3) of section 102 applies by virtue of the conditions in subsection (1B) of that section being met, the appellant or other person to whom the prosecutor is required to disclose the item of information,

“appellant” has the meaning given by section 96A.>

Section 104

Kenny MacAskill

122 In section 104, page 162, line 7, at end insert—

<( ) In this section and sections 105 and 106, references to the accused’s receiving a fair trial include, where subsection (3) of section 102 applies by virtue of the conditions in subsection (1B) of that section being met, references to the appellant or other person to whom the prosecutor is required to disclose the item of information having received a fair trial.>

Section 106

Kenny MacAskill

123 In section 106, page 162, line 35, at beginning insert <where the application for the section 106 order is made by virtue of section 102(1A),>

Kenny MacAskill

124 In section 106, page 162, line 35, leave out <and

(ii) if so,> and insert <or

(ii) where the application for the section 106 order is made by virtue of section 102(1B), whether the conditions in subsection (3A) apply, and

( ) if the court determines that the conditions in subsection (3) or, as the case may be, (3A) apply, determine>

Robert Brown

25 In section 106, page 162, line 38, leave out <, 90(2)(b), 94(1A)(b), 95(3)(b) or 95A(6)(b)> and insert <or 90(2)(b)>

Kenny MacAskill

125 In section 106, page 163, line 6, at end insert—

<(3A) The conditions are—

(a) that by virtue of section 96B(2)(b), 96C(2)(b), 96D(3)(b), 96E(2), 96F(2) or 96G(2) the prosecutor is required to disclose an item of information to an appellant or, as the case may be, a person,

(b) where there are proceedings, the information is not likely to form part of the evidence to be led by the prosecutor in the proceedings,

(c) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,

(d) that withholding the item of information is not inconsistent with the person's having received a fair trial in the proceedings to which the item relates, and

(e) that the public interest would be protected only if a section 106 order were to be made.>

Kenny MacAskill

126 In section 106, page 163, line 9, after <(3)> insert <or, as the case may be, paragraph (b) of subsection (3A)>

Kenny MacAskill

127 In section 106, page 163, line 12, after <(3)> insert <or, as the case may be, (3A)>

Section 106A

Kenny MacAskill

128 In section 106A, page 163, line 24, leave out subsection (1) and insert—

<(1) Where the condition in subsection (1A), (1B) or (1C) is met in relation to an item of information that the prosecutor proposes to disclose, the Secretary of State may apply to the court for an order under this section (a "section 106A order") in relation to the item of information.

(1A) The condition is that the prosecutor proposes to disclose to the accused information which the prosecutor is required to disclose by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or 95A(6)(b).

(1B) The condition is that the prosecutor proposes to disclose to an appellant or, as the case may be, a person information which the prosecutor is required to disclose by virtue of section 96B(2)(b), 96C(2)(b), 96D(3)(b), 96E(2), 96F(2) or 96G(2).

(1C) The condition is that the prosecutor proposes to disclose to an accused, appellant or person to whom section 96E, 96F or 96G applies information which the prosecutor is not required to disclose by virtue of this Part.>

Robert Brown

26 In section 106A, page 163, line 27, leave out <, 90(2)(b), 94(1A)(b), 95(3)(b) or 95A(6)(b)> and insert <or 90(2)(b)>

Kenny MacAskill

129 In section 106A, page 163, line 31, leave out <relevant>

Kenny MacAskill

130 In section 106A, page 163, line 33, leave out <relevant>

Kenny MacAskill

131 In section 106A, page 163, line 37, leave out from <section> to <95A(6)(b)> and insert <subsection (1A) or (1B)>

Robert Brown

27 In section 106A, page 163, line 37, leave out <, 90(2)(b), 94(1A)(b), 95(3)(b) or 95A(6)(b)> and insert <or 90(2)(b)>

Kenny MacAskill

132 In section 106A, page 163, line 41, at beginning insert <where the application for the section 106A order is made by virtue of subsection (1A),>

Kenny MacAskill

133 In section 106A, page 163, line 41, leave out <and

(ii) if so,> and insert <or

(ii) where the application for the section 106A order is made by virtue of subsection (1B) or (1C), whether the conditions in subsection (4A) apply, and

( ) if the court determines that the conditions in subsection (4) or, as the case may be, (4A) apply, determine>

Kenny MacAskill

134 In section 106A, page 164, line 8, at end insert—

<(4A) The conditions are—

(a) in the case of an application made by virtue of subsection (1B), that by virtue of section 96B(2)(b), 96C(2)(b), 96D(3)(b), 96E(2), 96F(2) or 96G(2) the prosecutor is required to disclose an item of information to an appellant or, as the case may be, a person,

(b) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,

(c) that withholding the item of information is not inconsistent with the person's having received a fair trial in the proceedings to which the item relates, and

(d) that the public interest would be protected only if a section 106A order of the type mentioned in subsection (6) were to be made.>

Kenny MacAskill

135 In section 106A, page 164, line 11, after <(4)> insert <or, as the case may be, paragraph (b) of subsection (4A)>

Kenny MacAskill

136 In section 106A, page 164, line 14, after <(4)> insert <or, as the case may be, (4A)>

Kenny MacAskill

137 In section 106A, page 164, line 24, leave out subsection (9)

Kenny MacAskill

138 In section 106A, page 164, leave out lines 27 to 30 and insert—

<"accused" includes, where subsection (1B) or (1C) applies, the appellant or other person to whom the prosecutor is required to disclose the item of information,

"appellant" has the meaning given by section 96A.

( ) In this section and sections 106B to 106D, references to the accused's receiving a fair trial include, where subsection (1B) or (other than in relation to an accused) (1C) applies, references to the appellant or other person to whom the prosecutor is required to disclose the item of information having received a fair trial.>

Section 106B

Kenny MacAskill

139 In section 106B, page 164, line 33, after <proceedings> insert <(whether continuing or concluded)>

Kenny MacAskill

140 In section 106B, page 164, line 34, leave out <relevant>

Kenny MacAskill

141 In section 106B, page 164, line 37, after <proceedings> insert <(whether continuing or concluded)>

Kenny MacAskill

142 In section 106B, page 165, line 6, after <section> insert <106C(7) or>

Section 106C

Kenny MacAskill

143 In section 106C, page 165, line 21, leave out <relevant>

Section 106D

Kenny MacAskill

144 In section 106D, page 166, line 12, leave out <relevant>

Section 107

Kenny MacAskill

145 In section 107, page 167, line 18, at end insert—

<"accused" includes appellant or, where the order relates to section 96E(2), 96F(2) or 96G(2), other person to whom the section concerned applies,

"appellant" has the meaning given by section 96A,>

Section 107B

Kenny MacAskill

146 In section 107B, page 168, line 8, after <accused> insert <or the accused's representative (if any)>

Section 107C

Kenny MacAskill

147 In section 107C, page 169, line 28, at end insert—

<( ) In this section—

"accused" includes appellant or, where the order relates to section 96E(2), 96F(2) or 96G(2), other person to whom the section concerned applies,

"appellant" has the meaning given by section 96A.>

After section 107C

Kenny MacAskill

148 After section 107C, insert—

<**Prohibition on disclosure pending determination of certain appeals**

(1) Subsection (2) applies where—

(a) the prosecutor appeals to the High Court under subsection (1)(a), (b) or (g) of section 107C, or

(b) the Secretary of State appeals to the High Court under subsection (3)(a) or (d) of that section.

(2) Pending the determination or abandonment of the appeal, the prosecutor must not disclose the item of information to which the appeal relates.>

Section 111

Kenny MacAskill

149 In section 111, page 170, line 23, at end insert—

<"accused" includes appellant or, where the order relates to section 96E(2), 96F(2) or 96G(2), other person to whom the section concerned applies,

"appellant" has the meaning given by section 96A,>

Kenny MacAskill

150 In section 111, page 170, line 34, at end insert—

<(da) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed,

(db) the indictment falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation,>

Kenny MacAskill

151 In section 111, page 170, line 36, at end insert—

<( ) In its application to proceedings against an appellant or other person, subsection (9) is to be read as if paragraphs (a) to (db) were omitted.>

Section 111A

Kenny MacAskill

152 In section 111A, page 171, line 31, at end insert—

<"accused" includes appellant or, where the order relates to section 96E(2), 96F(2) or 96G(2), other person to whom the section concerned applies,

"appellant" has the meaning given by section 96A,>

Kenny MacAskill

153 In section 111A, page 171, line 35, at end insert—

<(9) For the purposes of this section, proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed,

(f) the indictment falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation,

(g) any appeal by the prosecutor is determined or abandoned, or

(h) the accused is convicted and any appeal is determined or abandoned.

(10) In its application to proceedings against an appellant or other person, subsection (9) is to be read as if paragraphs (a) to (f) were omitted.>

Section 113

Kenny MacAskill

154 In section 113, page 172, line 6, leave out <This section> and insert <Subsection (3)>

Kenny MacAskill

155 In section 113, page 172, line 12, at end insert—

<( ) a restricted notification order,

( ) a non-attendance order,

( ) a section 106A order.>

Kenny MacAskill

156 In section 113, page 172, line 13, leave out from third <to> to end of line 16 and insert <in accordance with subsection (3A).

(3A) The application or, as the case may be, review is to be assigned—

(a) if the proceedings against the accused to which the application or review relates are continuing (or have concluded and there are no appellate proceedings), to the same justice of the peace, sheriff or, as the case may be, judge as has been (or is to be or was) assigned to the trial diet in those proceedings,

(b) if the appellate proceedings to which the application or review relates are continuing, to the same judge as has been (or is to be) assigned to those proceedings.>

Kenny MacAskill

157 In section 113, page 172, line 17, after <accused> insert <, appellant or, as the case may be, other person to whom the order relates>

Kenny MacAskill

158 In section 113, page 172, leave out lines 19 to 22 and insert—

<( ) an order mentioned in subsection (2),

( ) a review relating to such an order made by the prosecutor, the Secretary of State or special counsel.>

Kenny MacAskill

159 In section 113, page 172, line 22, at end insert—

<( ) In this section, "appellant" and "appellate proceedings" have the meanings given by section 96A.

( ) The reference in subsection (3A)(a) to proceedings against the accused includes a reference to an appeal by the prosecutor against an acquittal.>

Section 115

Rhoda Grant

194 In section 115, page 173, line 7, at end insert—

<( ) In any case where the rules do anything other than (or in addition to) regulating practice and procedure in relation to criminal procedure, the act of adjournal under subsection (1) is subject to annulment in pursuance of a resolution of the Scottish Parliament.>

Section 115A

Robert Brown

28 In section 115A, page 173, line 15, leave out <Sections 95B and 96H do> and insert <Section 96H does>

Robert Brown

29 In section 115A, page 173, line 19, leave out <section 95B or>

Robert Brown

30 In section 115A, page 173, line 29, leave out <95B or>

Robert Brown

31 In section 115A, page 173, line 32, leave out <95B or>

Section 116

Kenny MacAskill

160* In section 116, page 174, leave out lines 7 to 10 and insert—

<( ) section 90(2)(b) and (2A),

( ) section 94(1A)(b),

( ) section 95(3)(b),

( ) section 95A(6)(b),

( ) section (*Sections 89 to 95A*: *no need to disclose same information more than once*)(2),

( ) section 95B(1)(b),

( ) section 95C(6).

( ) References in the following sections to the accused or the appellant or other person include references to a solicitor or advocate acting on behalf of the accused or, as the case may be, the appellant or other person—

(a) section 97,

(b) section 98(1), (2), (where it first occurs) (3) and (4A),>

Robert Brown

32 In section 116, page 174, leave out line 8

Kenny MacAskill

161 In section 116, page 174, leave out lines 15 and 16 and insert <(other than subsection (4)(c)),

( ) section 106(3A)(a) and (4B),

( ) section 106A (other than subsections (4)(b), (5)(b) and (4A)(c)),

( ) section 106B,

( ) section 106C (other than subsection (6)(b)),

( ) section 106D (other than subsection (5)(b)),

( ) section 107C(8)(c) and (d),

( ) section 111(1) and (4),

( ) section 111A(1)(b), (4), (5) (in the second place where it occurs) and (6)

( ) section 113(4).>

Kenny MacAskill

162 In section 116, page 174, line 16, at end insert—

<( ) References in the following sections to an appellant include references to a solicitor or advocate acting on behalf of the appellant—

(a) section 96B(2)(b) and (4),

(b) section 96C(1), (2)(b) and (3),

(c) section 96D(1), (2), (3)(b) and (3A).

( ) References in the following sections to a person include references to a solicitor or advocate acting on behalf of the person or, as the case may be, to a solicitor or advocate who acted on behalf of the person in the proceedings to which the information relates—

(a) section 96E(2) and (3),

(b) section 96F(2) and (4),

(c) section 96G(2) and (3).>

After section 124

John Lamont
Supported by: Bill Aitken

195 After section 124, insert—

<**Licensing of knife dealers: exceptions for qualified sport teachers**

(1) Section 27A of the 1982 Act (knife dealers' licences) is amended as follows.

(2) In subsection (4), at beginning insert "Subject to subsection (6A),".

(3) After subsection (6) insert—

"(6A) Where a person ("A") is teaching another person ("B") a recognised sport, the hiring, offering or exposing for hire, lending or giving of equipment necessary for the sport by A to B is not to be taken to be a business for the purposes of subsection (4), but only where A is qualified to teach B in the sport.

(6B) For the purposes of subsection (6A), the Scottish Ministers must list, in regulations made by statutory instrument, all the sports for the time being recognised as sports by sportscotland.

(6C) In subsections (6A) and (6B)—

"recognised sport" means a sport listed in regulations made under subsection (6B), and

"sportscotland" means the body created by Royal Charter as the Scottish Sports Council.".

(4) On the day on which, by virtue of the coming into force of regulations under section 27A(6B) (as inserted by subsection (3)), fencing becomes a recognised sport, article 3 of the Knife Dealers (Exceptions) Order 2009 (SSI 2009/218) is revoked.>

John Lamont
Supported by: Bill Aitken

196 After section 124, insert—

<**Licensing of knife dealers: exceptions for qualified archery teachers**

(1) Section 27A of the 1982 Act (knife dealers' licences) is amended as follows.

(2) In subsection (4), at the beginning insert "Subject to subsection (6A),".

(3) After subsection (6) insert—

“(6A) Where a person (“A”) is teaching another person (“B”) the sport of archery, the hiring, offering or exposing for hire, lending or giving of arrows designed for use in that sport by A to B is not to be taken to be a business for the purposes of subsection (4), but only where A is qualified to teach B in the sport of archery.”.>

John Lamont
Supported by: Bill Aitken

197 After section 124, insert—

<**Licensing of knife dealers: special provision for sporting goods dealers**

(1) The 1982 Act is amended as follows.

(2) In section 27A (knife dealers’ licences)—

(a) in subsection (3), insert at the beginning “Subject to subsection (3A),”,

(b) after that subsection insert—

“(3A) A knife dealer’s licence applied for by a person whose business is (or includes) dealing in sporting goods may, instead of specifying premises in or from which the activity is to be carried out, either—

(a) specify premises located in the area of the authority issuing the licence in or from which the activity is to be carried on, and authorise the carrying on of the activity in or from other premises in Scotland associated with sporting activity (without specifying those other premises); or

(b) specify the address in a part of the United Kingdom other than Scotland at or from which the dealer normally carries on business or resides, and authorise the carrying on of the activity which the dealer engages in in or from premises in Scotland associated with sporting activity (without specifying those other premises);

and such a licence is referred to as a “travelling knife dealer’s licence”.

(3B) Where an applicant for a travelling knife dealer’s licence intends that the licence should fall within subsection (3A)(b), the application should be made to the local authority in whose area is located the premises in or from which the applicant first expects to carry on activity under the licence.”.

(3) After section 27P insert—

“27PA Travelling knife dealers’ licences: further provision

(1) Where a sporting goods dealer holds a travelling knife dealer’s licence and wishes to carry on activity as such a dealer in premises not specified in the licence, the dealer must first give notice in writing to the local authority in whose area those premises are located, specifying in the notice the premises in question and the dates on which the activity will or may be carried on in those premises.

(2) The Scottish Ministers may, by regulations, make further provision about the notice that is to be given under subsection (1), and such provision may, in particular, specify—

(a) the form in which that notice is to be given, and

(b) how far in advance of any date specified in the notice the notice must be received by the local authority.

(3) If the local authority to whom notice is given under subsection (1) ("the notified authority") is not the authority that granted the travelling knife dealer's licence, the notified authority is to treat the licence as applicable in their area as if it was a licence they had granted.".>

After section 127

Sandra White

198 After section 127, insert—

<**Licensing of sexual entertainment venues**

(1) The 1982 Act is amended as follows.

(2) In section 41(2) (definition of place of public entertainment), after paragraph (aa) insert—

"(ab) a sexual entertainment venue (as defined in section 45A) in relation to which Schedule 2 (as modified for the purposes of section 45B) has effect, while being used as such;".

(3) The title of Part 3 becomes "Control of sex shops and sexual entertainment venues".

(4) After section 45 insert—

"**45A Licensing of sexual entertainment venues: interpretation**

(1) This section applies for the purposes of the interpretation of section 45B and Schedule 2 (as modified for the purposes of section 45B).

(2) "Sexual entertainment venue" means any premises at which sexual entertainment is provided before a live audience for the financial gain of the organiser.

(3) For the purposes of that definition—

"audience" includes an audience of one;

"financial gain" includes financial gain arising directly or indirectly from the provision of the sexual entertainment;

"organiser", in relation to the provision of sexual entertainment in premises, means—

(a) the person who is responsible for the management of the premises; or

(b) where that person exercises that responsibility on behalf of another person (whether by virtue of a contract of employment or otherwise), that other person;

"premises" includes any vehicle, vessel or stall but does not include any private dwelling to which the public is not admitted;

"sexual entertainment" means—

(a) any live performance; or

(b) any live display of nudity,

which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means).

(4) For the purposes of the definition of “sexual entertainment”, “display of nudity” means—

(a) in the case of a woman, exposure of her nipples, pubic area, genitals or anus;

(b) in the case of a man, exposure of his pubic area, genitals or anus.

(5) Sexual entertainment is provided if (and only if) it is provided (or allowed to be provided) by or on behalf of the organiser.

(6) References in Schedule 2 (as modified for the purposes of section 45B) to the use of any premises by a person as a sexual entertainment venue are to be read as references to their use by the organiser.

(7) The following are not sexual entertainment venues—

(a) premises being used in accordance with a public entertainment licence;

(b) a sex shop (within the meaning of paragraph 2(1) of Schedule 2);

(c) premises licensed under the Theatres Act 1968;

(d) such other premises as the Scottish Ministers may by order specify.

(8) An order under subsection (7)(d) may make—

(a) different provision for different cases or descriptions of case;

(b) different provision for different purposes.

(9) Premises at which sexual entertainment is provided as mentioned in subsection (2) on a particular occasion (“the current occasion”) are not to be treated as a sexual entertainment venue if sexual entertainment has not been provided on more than 3 previous occasions which fall wholly or partly within the period of 12 months ending with the start of the current occasion.

(10) For the purposes of subsection (9)—

(a) each continuous period during which sexual entertainment is provided on the premises is to be treated as a separate occasion; and

(b) where the period during which sexual entertainment is provided on the premises exceeds 24 hours, each period of 24 hours (and any part of a period of 24 hours) is to be treated as a separate occasion.

(11) The Scottish Ministers may by order provide for—

(a) descriptions of performances; or

(b) descriptions of displays of nudity,

which are not to be treated as sexual entertainment for the purposes of this section.

(12) An order under subsection (7)(d) or (11) is to be made by statutory instrument subject to annulment in pursuance of a resolution of the Scottish Parliament.

45B Licensing of sexual entertainment venues

(1) A local authority may resolve that Schedule 2 (as modified for the purposes of this section) is to have effect in their area in relation to sexual entertainment venues.

(2) If a local authority passes a resolution under subsection (1), Schedule 2 (as so modified) has effect from the day specified in the resolution.

(3) The day mentioned in subsection (2) must not be before the expiry of the period of one month beginning with the day on which the resolution is passed.

(4) A local authority must, not later than 28 days before the day mentioned in subsection (2), publish notice that they have passed a resolution under this section—

(a) on their website; or

(b) if they do not have a website, in a newspaper circulating in their area.

(5) The notice is to state the general effect of Schedule 2 (as modified for the purposes of this section).

(6) For the purposes of this section, paragraphs 1 and 3 to 25 of Schedule 2 apply with the following modifications—

(a) references to a sex shop are to be read as references to a sexual entertainment venue;

(b) references to the use by a person of premises, vehicles, vessels or stalls as a sexual entertainment venue are to be read as references to their use by the organiser;

(c) in paragraph 1—

(i) sub-paragraph (b)(ii) and the word "or" immediately preceding it is omitted; and

(ii) sub-paragraph (c) is omitted;

(d) in paragraph 7—

(i) in sub-paragraph (2), at the beginning insert "Subject to sub-paragraph (3A),"; and

(ii) after sub-paragraph (3) insert—

"(3A) If a local authority consider it appropriate to do so in relation to an application, the local authority may dispense with the requirement to publish an advertisement under sub-paragraph (2) and may instead publish notice of the application on the authority's website.

(3B) Publication under sub-paragraph (3A) must be not later than 7 days after the date of the application.";

(e) in paragraph 9, after sub-paragraph (6) insert—

"(6A) A local authority may refuse an application for the grant or renewal of a licence despite the fact that a premises licence under Part 3 of the Licensing (Scotland) Act 2005 is in effect in relation to the premises, vehicle, vessel or stall to which the application relates.";

(f) in paragraph 12, for sub-paragraph (2) substitute—

“(2) Subject to the provisions of this paragraph, licences granted by a local authority under this Schedule have effect for the period (including an indefinite period) that the local authority determine.”;

(g) in paragraph 19, sub-paragraph (1)(e) is omitted;

(h) in paragraph 20(2)(a)(iv), the words from “or” in the first place where it occurs to the end are omitted; and

(i) in paragraph 25, for “45” in both places where that word occurs substitute “45B”.

(7) In carrying out functions under this section, a local authority must have regard to any guidance issued by the Scottish Ministers.”.>

Before section 130

George Foulkes

163 Before section 130, insert—

<**Premises licence applications: statements about disabled access etc.**

(1) Section 20 of the 2005 Act (application for premises licence) is amended as follows.

(2) In subsection (2)(b)—

(a) the word “and” immediately following sub-paragraph (ii) is repealed, and

(b) after that sub-paragraph, insert—

“(iia) a disabled access and facilities statement, and”.

(3) After subsection (5), insert—

“(6) A “disabled access and facilities statement” is a statement, in the prescribed form, containing information about—

(a) provision made for access to the subject premises by disabled persons,

(b) facilities provided on the subject premises for use by disabled persons, and

(c) any other provision made on or in connection with the subject premises for disabled persons.

(7) In subsection (6), “disabled person” has the meaning given by section 1 of the Disability Discrimination Act 1995 (c.50).”.>

Section 130

Paul Martin

164 In section 130, page 184, line 26, leave out subsections (3) and (4)

Section 132

Paul Martin

165 Leave out section 132

After section 132A

Kenny MacAskill

166 After section 132A, insert—

<**Provisional premises licences: duration**

In section 45 of the 2005 Act (provisional premises licence), in subsection (6), for “2” substitute “4”.>

After section 132B

Kenny MacAskill

167 After section 132B, insert—

<**Provision of copies of licences to chief constable**

(1) The 2005 Act is amended as follows.

(2) In section 26 (issue of licence and summary), after subsection (2) insert—

“(3) Where a Licensing Board grants a premises licence application, the Board must send a copy of the premises licence to the appropriate chief constable.”.

(3) In section 47 (temporary premises licence), after subsection (4) insert—

“(4A) Where a Licensing Board issues a temporary premises licence, the Board must send a copy of the temporary premises licence to the appropriate chief constable.”.

(4) In section 49 (Licensing Board’s duty to update premises licence), after subsection (2) insert—

“(2A) Where a Licensing Board issues a new summary of the licence under subsection (2), the Board must send a copy of the new summary of the licence to the appropriate chief constable.”.

(5) In section 56 (occasional licence), after subsection (9) insert—

“(10) Where a Licensing Board issues an occasional licence under subsection (1), the Board must send a copy of the occasional licence to the appropriate chief constable.”.>

After section 136

James Kelly

199 After section 136, insert—

<**24 hour licences: refusal, revocation etc. on advice or recommendation of Local Licensing Forum**

(1) The 2005 Act is amended as follows.

(2) In section 11 (general functions of Local Licensing Forums), in subsection (2), insert at the end "except where it relates to an application for 24 hour licensing (within the meaning of section 64)".

(3) In section 64 (24 hour licences to be granted only in exceptional circumstances)—

(a) in subsection (1), for "Subsection (2) applies" substitute "Subsections (2) to (4) apply",

(b) in subsection (2), at the end insert "(the granting of any such application being referred to in this section and section 64A as "24 hour licensing")", and

(c) after subsection (2) insert—

"(3) In reaching a decision under subsection (2), the Licensing Board must have regard to any advice given or recommendations made by the Local Licensing Forum for the Board's area that allowing 24 hour licensing in the area in which the subject premises are situated would be inappropriate or undesirable.

(4) Where the Local Licensing Forum has not, at the time the application is made, given any advice or made any recommendations about the appropriateness or desirability of allowing 24 hour licensing, the Licensing Board may invite it to do so before reaching a decision under subsection (2).".

(4) After that section insert—

"**64A Revocation etc. of 24 hour licence on advice or recommendation of Local Licensing Forum**

(1) This section applies where—

(a) a Licensing Board has granted, under section 64, an application for 24 hour licensing, and

(b) the Local Licensing Forum for the Board's area subsequently gives advice or makes recommendations to the Board to the effect that 24 hour licensing in the area in which the subject premises are situated is inappropriate or undesirable.

(2) The Licensing Board—

(a) must have regard to the advice or recommendations of the Local Licensing Forum, and

(b) may either revoke the licence or vary it so as to restrict the licensed hours during which alcohol may be sold on the premises to a continuous period of less than 24 hours.".>

After section 141

Kenny MacAskill

168 After section 141, insert—

<**Modification of references to "Act", "enactment" etc. in certain Acts of Parliament**

(1) The 1982 Act is amended as follows—

(a) in section 8 (interpretation of Parts 1 and 2), insert at the appropriate place—

""enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament;",

(b) in section 49 (dangerous and annoying creatures), after subsection (8), add—

"(9) In subsection (7), "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.", and

(c) in Schedule 2 (control of sex shops), in paragraph 3 (miscellaneous definitions), insert at the appropriate place—

""enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament;".

(2) The Criminal Law (Consolidation) (Scotland) Act 1995 is amended as follows—

(a) in section 30 (disclosure of information), after subsection (7) add—

"(8) In subsection (2) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.",

(b) in section 44 (false statements and declarations), in each of the following provisions, namely subsection (2)(b) and (c), subsection (3)(a) and subsection (4), after "Act of Parliament" insert "or any Act of the Scottish Parliament",

(c) in section 45 (provision supplementary to section 44), after subsection (5) add—

"(6) In subsections (4) and (5), "other Act" includes an Act of the Scottish Parliament.", and

(d) in section 46 (proceedings for a contravention of section 44)—

(i) in subsection (4), the words "(including subordinate legislation)" are repealed, and

(ii) after subsection (4) add—

"(5) In subsection (4), "enactment" includes—

(a) an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament, and

(b) subordinate legislation.".

(3) Section 307(1) of the 1995 Act (interpretation) is amended as follows—

(a) in the definition of "crime", after "this Act," insert "or under any Act of the Scottish Parliament (whenever passed),",

(b) for the definition of "enactment" substitute—

""enactment" includes—

(a) an enactment contained in any local Act or any order, regulation or other instrument having effect by virtue of an Act, and

(b) an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament;", and

(c) for the definition of "statute" substitute—

""statute" means—

(a) any Act of Parliament, public, general, local or private,

(b) any Provisional Order confirmed by Act of Parliament, or

(c) any Act of the Scottish Parliament;".>

Section 143

Kenny MacAskill

169 In section 143, page 194, line 35, leave out <regulations or>

Section 148

Kenny MacAskill

170 In section 148, page 195, line 19, leave out <143 to> and insert <143, 144, 146 and>

Schedule 1

Stewart Maxwell

171 In schedule 1, page 196, line 12, leave out <two persons> and insert <one person>

Stewart Maxwell

172 In schedule 1, page 196, line 31, leave out <with the approval of> and insert <after consulting>

Schedule 1A

Kenny MacAskill

173 In schedule 1A, page 200, line 5, at end insert—

<(dza) against any disposal under section 227ZB(5)(a) to (ba) or (d) or (5ZA)(a) of this Act;".>

Kenny MacAskill

174 In schedule 1A, page 200, line 8, at end insert—

<In section 118(4) (disposal of appeals against sentence), after "(d)," insert "(dza),".>

Kenny MacAskill

175 In schedule 1A, page 200, line 11, at end insert—

<In section 173(2) (quorum of High Court in relation to appeals), for “175(2)(b) or (c)” substitute “175(2)(b), (c) or (cza)”.>

Kenny MacAskill

176 In schedule 1A, page 200, line 13, leave out <subsection (2)(c),> and insert <subsection (2)—

(i) in paragraph (c),>

Kenny MacAskill

177 In schedule 1A, page 200, line 14, at end insert—

<(ii) after paragraph (c), insert—

“(cza) against any disposal under section 227ZB(5)(a) to (ba) or (d) or (5ZA)(a) of this Act;”,>

Kenny MacAskill

178 In schedule 1A, page 200, line 16, at end insert—

<In section 186 (appeals against sentence only), in each of subsections (1), (2)(a), (9) and (10), for “175(2)(b) or (c)” substitute “175(2)(b), (c) or (cza)”.

In section 187(1) (leave to appeal against sentence), for “175(2)(b) or (c)” substitute “175(2)(b), (c) or (cza)”.

In section 189(5) (disposal of appeal against sentence), after “175(2)(c)” insert “or (cza)”.>

Kenny MacAskill

179 In schedule 1A, page 203, line 24, at end insert—

<““offender supervision requirement” has the meaning given in section 227G(1);”>

Kenny MacAskill

180 In schedule 1A, page 203, leave out line 31

Kenny MacAskill

181 In schedule 1A, page 204, line 5, at end insert—

<*The Firearms Act 1968 (c.27)*

(1) The Firearms Act 1968 is amended as follows.

(2) In section 21(3ZA) (possession of firearms by persons previously convicted of crime), for paragraph (b) substitute—

“(b) a community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46).”.

(3) In section 52(1A) (forfeiture and disposal of firearms: cancellation of certificate by convicting court), for paragraph (b) substitute—

"(b) a community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46).".>

Kenny MacAskill

182 In schedule 1A, page 205, line 8, at end insert—

<*The 1982 Act*

(1) The 1982 Act is amended as follows.

(2) In section 49(6) (dangerous and annoying creatures), the words "or makes a probation order in relation to him" are repealed.

(3) In section 58(3) (convicted thief in possession)—

(a) the words "or makes a probation order in relation to him" are repealed, and

(b) for the words from "discharged absolutely," to the end substitute "discharged absolutely.".>

Kenny MacAskill

183 In schedule 1A, page 205, line 16, at end insert—

<*The Jobseekers Act 1995 (c.18)*

In section 20D(5) of the Jobseekers Act 1995 (as inserted by section 25(2) of the Welfare Reform Act 2009 (c.24) (jobseeker's allowance: sanctions for violent conduct etc. in connection with claim)), the words "or a court in Scotland makes a probation order" are repealed.>

Kenny MacAskill

184 In schedule 1A, page 206, line 11, leave out from <In> to <2001> and insert—

<( ) The Social Security Fraud Act 2001 is amended as follows.

( ) In section 6C(5)(b)(i) (provisions supplementary to section 6B), the words "or a court in Scotland makes a probation order" are repealed.

( ) In section 7(9)(b)>

Kenny MacAskill

185 In schedule 1A, page 208, line 8, after <(c.46)> insert <imposing an offender supervision requirement (within the meaning given by section 227G(1) of that Act) whether alone or along with any other requirement>

Schedule 5

Kenny MacAskill

186 In schedule 5, page 225, line 32, at end insert—

<In section 85 (juries: citation and attendance of jurors), in subsection (6), after "section 1" insert "or 1A".>

Criminal Justice and Licensing (Scotland) Bill

Groupings of Amendments for Stage 3

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated at Stage 3, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

Note: The time limits indicated are those set out in the timetabling motion to be considered by the Parliament before the Stage 3 proceedings begin. If that motion is agreed to, debate on the groups above each line must be concluded by the time indicated, although the amendments in those groups may still be moved formally and disposed of later in the proceedings. The timings in relation to groups 1 to 16 relate to the time from the commencement of proceedings in the morning (expected to be approximately 9.20 am), while the timings for groups 17 to 32 relate to the time from the start of proceedings in the afternoon (2.30 pm).

MORNING

Group 1: Scottish Sentencing Council
8, 171, 172

Group 2: Purpose of community payback orders etc.
9, 10, 11

Group 3: Community payback orders – offences punishable by a fine
33, 34, 35

Group 4: Community payback orders – minor, drafting and consequential amendments
36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 49, 50, 51, 52, 53, 58, 59, 60, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185

Group 5: Community payback orders – fine defaulters
45, 46, 55, 56, 57

Group 6: Community payback orders – change of offender's residence
54

Debate to end no later than 45 minutes after proceedings begin

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Group 7: Presumption against short sentences
61, 61A, 187, 12, 62

Group 8: Voluntary intoxication by alcohol: effect in sentencing
2

Debate to end no later than 1 hour 35 minutes after proceedings begin

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Group 9: Minimum sentence for having in a public place an article with a blade or point
3

Debate to end no later than 2 hours 20 minutes after proceedings begin

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Group 10: Offences aggravated by connection with serious organised crime
13

Group 11: Threatening or abusive behaviour and stalking
63, 188, 64, 65, 66, 67, 14, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 189

Group 12: Sexual offences
6, 79, 7

Debate to end no later than 3 hours 10 minutes after proceedings begin

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Group 13: Age of criminal prosecution
190

Group 14: Victims' representation at parole board hearings
4

Group 15: Aggravation by intent to rape
80

Group 16: DNA retention: children referred to children's hearing
81, 191, 192, 16

Debate to end no later than 3 hours 40 minutes after proceedings begin

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AFTERNOON

Group 17: Witness anonymity orders
82, 83, 84, 85, 86, 87, 88, 89

Group 18: Excusal from jury service
90, 91, 92, 186

Group 19: Rehabilitation of offenders – spent alternatives to prosecution
93, 94, 95

Debate to end no later than 10 minutes after proceedings begin

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Group 20: Disclosure – definitions of "information" and "conclusion of proceedings" and other minor changes
193, 96, 97, 101, 102, 104, 107, 108, 109, 110, 112, 114, 115, 116, 142, 146, 150, 153

Group 21: Disclosure – prosecutor's duty to disclose
98, 99, 100, 17, 18, 19, 103, 20, 21, 22, 23, 105, 106, 24, 25, 26, 27, 148, 28, 29, 30, 31, 32

Notes on amendments in group
Amendment 23 pre-empts amendment 105
Amendment 26 is pre-empted by amendment 128 in group 22
Amendment 27 is pre-empted by amendment 131 in group 22
Amendment 32 is pre-empted by amendment 160 in group 22

Group 22: Application of provisions to disclosure after conclusion of trial etc.
111, 113, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 143, 144, 145, 147, 149, 151, 152, 154, 155, 156, 157, 158, 159, 160, 161, 162

Notes on amendments in group
Amendment 128 pre-empts amendment 26 in group 21
Amendment 131 pre-empts amendment 27 in group 21
Amendment 160 pre-empts amendment 32 in group 21

Group 23: Acts of adjournal
194

Debate to end no later than 40 minutes after proceedings begin

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Group 24: Licensing of knife dealers
195, 196, 197

Group 25: Licensing of sexual entertainment venues
198

Group 26: Premises license applications: statements about disabled access etc.
163

Group 27: Premises licence applications: antisocial behaviour reports
164, 165

Debate to end no later than 1 hour 10 minutes after proceedings begin

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Group 28: Alcohol licensing – duration of provisional premises licences
166

Group 29: Alcohol licensing – provision of copies of licences to police
167

Group 30: 24 hour licences – role of local licensing forum
199

Group 31: Modification of references to "Act", "enactment" etc.
168

Group 32: Minor drafting and technical amendments
169, 170

Debate to end no later than 1 hour 30 minutes after proceedings begin

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Criminal Justice and Licensing (Scotland) Bill

Correction Slip to the Marshalled List of Amendments for Stage 3

Amendment 126 appeared incorrectly in the Marshalled List of Amendments for Stage 3 and should read as follows:

Kenny MacAskill

126 In section 106, page 163, line 9, after <(3)> insert <or, as the case may be, paragraph (c) of subsection (3A)>

Amendment 126 originally referred incorrectly to paragraph (b) of subsection (3A). The correct reference was to paragraph (c) of subsection (3A) and the above amendment rectifies this error. When amendment 126 is called, reference should be made to the version of amendment 126 contained within this correction slip. The amendment will be called at the same juncture in the Marshalled List.

EXTRACT FROM THE MINUTES OF PROCEEDINGS

Vol. 4, No. 15 Session 3

Meeting of the Parliament

Wednesday, 30 June 2010

Note: (DT) signifies a decision taken at Decision Time.

Criminal Justice and Licensing (Scotland) Bill: Bruce Crawford, on behalf of the Parliamentary Bureau, moved S3M-6673—That the Parliament agrees that, during Stage 3 of the Criminal Justice and Licensing (Scotland) Bill—

(a) debate on the groups of amendments specified below in relation to the morning and afternoon shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limits indicated;

(b) each time limit specified in relation to the morning shall be calculated from the beginning of proceedings in the morning and each time limit specified in relation to the afternoon shall be calculated from the beginning of proceedings in the afternoon; and

(c) all time limits shall exclude any period when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in each of the morning and the afternoon being called) or otherwise not in progress:

Morning

Groups 1 to 6: 45 minutes
Groups 7 and 8: 1 hour 35 minutes
Group 9: 2 hours 20 minutes
Groups 10 to 12: 3 hours 10 minutes
Groups 13 to 16: 3 hours 40 minutes

Afternoon

Groups 17 to 19: 10 minutes
Groups 20 to 23: 40 minutes
Groups 24 to 27: 1 hour 10 minutes
Groups 28 to 32: 1 hour 30 minutes.

The motion was agreed to.

Criminal Justice and Licensing(Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to without division: 8, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59, 60, 64, 65, 66, 67, 68, 69, 72, 73, 74, 75, 76, 77, 78, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 193, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 167, 168, 169, 170, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185 and 186.

The following amendments were agreed to (by division)—

54 (For 81, Against 46, Abstentions 0)
11 (For 78, Against 48, Abstentions 0)
61 (For 65, Against 62, Abstentions 0)
62 (For 81, Against 0, Abstentions 46)
2 (For 47, Against 33, Abstentions 45)
3 (For 63, Against 61, Abstentions 0)
63 (For 92, Against 29, Abstentions 0)
70 (For 117, Against 3, Abstentions 0)
71 (For 117, Against 3, Abstentions 0)
166 (For 77, Against 44, Abstentions 0)
172 (For 60, Against 58, Abstentions 1)

The following amendments were disagreed to (by division)—

9 (For 62, Against 64, Abstentions 0)
12 (For 31, Against 96, Abstentions 0)
13 (For 32, Against 88, Abstentions 1)
14 (For 16, Against 105, Abstentions 0)
6 (For 44, Against 78, Abstentions 0)
79 (For 44, Against 78, Abstentions 0)
190 (For 15, Against 108, Abstentions 0)
4 (For 43, Against 78, Abstentions 0)
191 (For 15, Against 105, Abstentions 0)
16 (For 15, Against 104, Abstentions 0)
198 (For 45, Against 76, Abstentions 0)
164 (For 45, Against 64, Abstentions 13)
165 (For 45, Against 63, Abstentions 13)
199 (For 56, Against 63, Abstentions 0)
171 (For 48, Against 69, Abstentions 1)

The following amendments were moved and, with the agreement of the Parliament, withdrawn: 61A, 194 and 195.

The following amendments were not moved: 10, 187, 188, 189, 192, 7, 17, 18, 19, 20, 21, 22, 23, 24, 25, 28, 29, 30, 31, 196 and 197.

The following amendments were pre-empted: 26, 27 and 32.

The Deputy Presiding Officers extended time limits under Rule 9.8.4A (c).

Motion without notice: Bruce Crawford moved without notice that, under Rule 9.8.5A, the debate on Groups 30 to 32 be extended by up to 10 minutes.

The motion was agreed to.

Criminal Justice and Licensing (Scotland) Bill: The Cabinet Secretary for Justice (Kenny MacAskill) moved S3M-6604—That the Parliament agrees that the Criminal Justice and Licensing (Scotland) Bill be passed.

After debate, the motion was agreed to ((DT) by division: For 64, Against 61, Abstentions 0).

Business Motions

The Presiding Officer: The next item of business is consideration of business motion S3M-6673, in the name of Bruce Crawford, on behalf of the Parliamentary Bureau, setting out a timetable for stage 3 consideration of the Criminal Justice and Licensing (Scotland) Bill.

Motion moved,

That the Parliament agrees that, during Stage 3 of the Criminal Justice and Licensing (Scotland) Bill—

(a) debate on the groups of amendments specified below in relation to the morning and afternoon shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limits indicated;

(b) each time limit specified in relation to the morning shall be calculated from the beginning of proceedings in the morning and each time limit specified in relation to the afternoon shall be calculated from the beginning of proceedings in the afternoon; and

(c) all time limits shall exclude any period when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in each of the morning and the afternoon being called) or otherwise not in progress:

Morning	
Groups 1 to 6:	45 minutes
Groups 7 and 8:	1 hour 35 minutes
Group 9:	2 hours 20 minutes
Groups 10 to 12:	3 hours 10 minutes
Groups 13 to 16:	3 hours 40 minutes
Afternoon	
Groups 17 to 19:	10 minutes
Groups 20 to 23:	40 minutes
Groups 24 to 27:	1 hour 10 minutes
Groups 28 to 32:	1 hour 30 minutes.
followed by	Stage 3 Proceedings: Criminal Justice and Licensing (Scotland) Bill—[*Bruce Crawford*.]

Motion agreed to.

Criminal Justice and Licensing (Scotland) Bill: Stage 3

09:21

The Presiding Officer (Alex Fergusson): The next item of business is stage 3 proceedings on the Criminal Justice and Licensing (Scotland) Bill. In dealing with amendments, members should have the bill as amended at stage 2, which is SP bill 24A, the marshalled list, which is SP bill 24A-ML, the correction slip to the marshalled list, and the groupings, which I, as Presiding Officer, have agreed.

The division bell will sound and proceedings will be suspended for five minutes for the first division this morning. The voting period for the first division will be 30 seconds. Thereafter, the voting period will be one minute for the first division after a debate and 30 seconds for all other divisions.

Bill Kidd (Glasgow) (SNP): On a point of order, Presiding Officer. In light of the statement by the Lord Chancellor that was reported in *The Daily Telegraph* today, have you been made aware whether there will be a forthcoming statement from Westminster on his ideas on prisons and sentencing? [*Interruption*.]

The Presiding Officer: Order. Mr Kidd, that is—

Bill Kidd: We had no idea that the respect agenda extended to the Scottish Government's proposals on short sentences.

The Presiding Officer: That is not a point of order for me, Mr Kidd.

Section 12—Business plan

The Presiding Officer: Group 1 is on the Scottish sentencing council. Amendment 8, in the name of Robert Brown, is grouped with amendments 171 and 172.

Robert Brown (Glasgow) (LD): It is good to begin with a bit of light amusement in what I think will be a long day.

It is my privilege to speak to the first amendment that we must consider during stage 3 proceedings on the bill. [*Interruption*.]

The Presiding Officer: Order. There is far too much noise in the chamber.

Robert Brown: I am grateful to the Government for accepting that the Scottish sentencing council should be an advisory body that prepares sentencing guidelines for the approval of the High Court. Amendment 8 is really a carry-over amendment that provides that the Lord Justice General should be consulted on the sentencing council's business plan. As the court has to approve the eventual outcome of the work, it seems only sensible that the head of the judiciary should have the opportunity to provide input into the work plan as of right. That may well happen in practice, but the bill should say so.

I turn to Stewart Maxwell's amendments 171 and 172. I am fairly relaxed about the judicial and legal balance on an advisory sentencing council, but it seems to me that the original idea that the Justice Committee approved—of having both a justice of the peace and a stipendiary magistrate on the council—was sound. Therefore, I am inclined to reject amendment 171.

I am also fairly relaxed about amendment 172, which would take away the Lord Justice General's block on the appointment of lay members of the council and reduce that to a right to be consulted. It may be a legitimate policy matter for the Government to determine the type of lay members who are needed. I am inclined to support amendment 172, but I will listen to the arguments on it.

I move amendment 8.

The Presiding Officer: I commend Robert Brown's brevity and suggest that other members are similarly brief, as we have a lot to get through today.

Stewart Maxwell (West of Scotland) (SNP): During stage 2 consideration of the bill's provisions on the Scottish sentencing council, the Justice Committee was clear that there were concerns about the influence of sentencing guidelines on judicial discretion and about how the sentencing council would function alongside the High Court. In its stage 1 report, the Justice Committee suggested that there were a number of options to address those concerns, including recasting the council as an advisory body or creating a judicial majority in its membership.

In light of that, and in line with the Justice Committee's recommendations, the Government lodged amendments at stage 2 that recast the council as an advisory body that would prepare sentencing guidelines for endorsement by the High Court. The committee agreed to those amendments.

However, the cumulative result of several other amendments relating to the make-up of the council was that the balance of the membership was altered, to stand at six judicial members and six non-judicial members. Given the changes that have been made to the status of the council and the role that the High Court will play in the final sign-off of draft guidelines, I believe that the council should have a membership with a small non-judicial majority.

It is central to the creation of the sentencing council that its work helps to deliver greater transparency and public confidence in our criminal justice system. The current format of a council with no lay-member majority that drafts guidelines for judicial approval does not represent a sufficient improvement on the status quo. I raised that issue in the Justice Committee.

Amendment 171 would provide that, after the Lord Justice Clerk, a High Court judge and a sheriff, one council member must be a justice of the peace or a stipendiary magistrate. The provisions are drafted to allow for the fifth and final judicial member to be drawn from the ranks of justices of the peace or stipendiary magistrates, should the Lord Justice General prefer, but they retain flexibility to allow that place to be filled by a sheriff, a sheriff principal or a High Court judge. I hope that that answers Robert Brown's point—that flexibility will remain. The council's judicial membership will reflect the breadth of judicial expertise and the non-judicial majority on the council will help to encourage greater clarity and openness in its sentencing.

Amendment 172 relates to the appointment of lay members of the council. Amendments at stage 2 created a requirement for the Scottish ministers to seek the approval of the Lord Justice General on the appointment of lay members of the council. However, the Lord Justice General is required only to consult the Scottish ministers on the appointment of the legal members of the council. I am not clear why there should be an imbalance in the procedures for the appointment of the members. The effect of amendment 172 would be that the Scottish ministers would have to consult the Lord Justice General on the appointment of lay members, rather than to seek the Lord Justice General's approval of those lay members. I ask for support for that amendment, which would merely provide that the same approach that applies to the appointment of legal members would apply to the appointment of lay members.

Richard Baker (North East Scotland) (Lab): The Labour Party recognises the concerns that have existed for some time over consistency in sentencing. We hope that consistency will be aided by the establishment of a sentencing council, although the key issue today will be about Parliament setting an appropriate framework for sentencing. There are important issues about the independence of the courts.

If the sentencing council is to be effective, it is absolutely crucial that it has the confidence of the judiciary. It is essential to have balanced representation on the council if it is to improve public confidence in our system. That is why Stewart Maxwell's amendment 171 is not necessary. I am aware that, in the Justice Committee, Mr Maxwell raised concerns about a possible imbalance on the council because of the existence of a judicial majority, but I do not see why that should weaken the council, particularly as the cabinet secretary has stated the clear intention that the council should act through consensus. The council will include lay membership and representatives of victims of crime, which is important. The judicial membership of the council is likely to benefit the council and help it work with the courts.

On the same basis, I do not consider amendment 172, on the appointment of lay members, to be necessary either.

Given that the Lord Justice General is responsible for matters such as appointment of the judicial members of the council, it seems logical that he should be consulted on the business plan. We therefore support Robert Brown's amendment 8.

Bill Aitken (Glasgow) (Con): Robert Brown's amendment 8 has validity. There might well be an argument that the amendment should be supported, given that the Judiciary and Courts (Scotland) Act 2008 makes the Lord Justice General responsible for the running of the courts.

Mr Maxwell's amendments 171 and 172 are simply not acceptable. The Justice Committee took the view that there should be a judicial majority on the council. Stewart Maxwell's amendments would change that. I adopt the arguments of Mr Baker. I have little doubt that the thinking behind the amendments is that the sentencing council would be packed with a liberal majority of the good and the great from Edinburgh, acting at the behest of the cabinet secretary. As such, we cannot support them.

The Cabinet Secretary for Justice (Kenny MacAskill): Amendment 8 would require the Lord Justice General to be consulted on the sentencing council's business plan. Nothing in the current provisions would prevent the Lord Justice General from being consulted on that but, for the sake of clarity, I note that we recognise the principle that lies behind Robert Brown's amendment and are happy to support it. We believe that Scotland must have the appropriate framework in place to ensure fairness and justice in sentencing.

We are grateful to the Justice Committee for the time that it took to examine the matter in detail and we feel that the amendments that were made at stage 2 to the sentencing council provisions addressed the concerns that had been raised about judicial independence and the role of the council in existing criminal justice structures. The sentencing council will operate as an advisory body, with its guidelines being approved by the High Court.

09:30

In balancing the membership of the council, it is key that we ensure that it commands legitimacy in the eyes of both sentencers and the public. However, with the High Court's role in giving the final approval to draft guidelines, we believe that it is even more important that the concerns of the wider criminal justice community and the public are represented at the drafting stage. We believe that it is key that the non-judicial members of the council have a sufficient voice at the drafting stage, in light of which we support Stewart Maxwell's amendment 171.

Amendment 172 would ensure that the process for the appointment of the lay members of the council is the same as the process for the appointment of the legal members. We are not clear why there should be unequal requirements for the appointment of different members. All the members of the council will have equal status. It will not be a case of setting the legal and lay members against one another.

We envisage a collaborative approach to the drafting of guidelines and would like all the council members to be appointed on the same basis to assist in that process. We therefore support amendment 172.

The Presiding Officer: I call Robert Brown to wind up and indicate whether he will press or withdraw amendment 8.

Robert Brown: I will press amendment 8, which I think has support. I have only one comment to make in winding up, which is on Stewart Maxwell's amendment 171. People are becoming a bit obsessed about majorities and minorities. There will be a substantial judicial presence and a substantial lay presence on the council, which is to be an advisory body. Therefore, where the majority lies does not matter too much. The most important thing is to have the wide range of judicial experience for which the current provisions provide. I ask members to reject amendment 171.

Amendment 8 agreed to.

Section 14—Community payback orders

The Presiding Officer: We come to group 2. Amendment 9, in the name of Robert Brown, is grouped with amendments 10 and 11.

Robert Brown: Amendments 9 to 11 relate to community payback orders. Amendment 9 seeks to insert a definition of the purpose of community payback orders into the bill. I am rather surprised that that has not been done already, because I believe that it would give greater clarity to one of the more important reforms in the bill. I have changed the wording of the amendment that I lodged at stage 2 to accommodate what, on reflection, I thought was a valid objection from the minister, which related to the fact that the convicted person's addressing their offending behaviour was seen as part of the process of payback to the community for his or her misdeeds. The wording of amendment 9 reflects that more adequately. I hope that it appeals to the minister and to the Parliament. I do not think that the purpose of the provision is academic. On the contrary, I think that what I am suggesting would give definition to the purpose and a clearer instruction to the court as to the policy intention, which in turn would help the court decide on the right balance of measures in an order.

Amendment 10 is intended to empower Scottish ministers to specify standards with which CPOs must comply. The powers are helpful and necessary. The whole area is bedevilled by the fact that provision, speed of commencement and completion of orders and, above all, their effectiveness, tend to be fairly patchy across the country. At present, those given community orders have a reoffending rate of about 42 per cent within two years. That is certainly better than the reoffending rate for people coming out of prison of 74 per cent, but it is still not very good. If the reoffending rate, which I accept is only one measure of success, could be knocked down to, say, 30 per cent, there would be a significant hit on the revolving door syndrome and a considerable saving to the public purse, and many more people would cease to be a nuisance to the public. The Scottish Government has a part to play in supporting and requiring best practice in this area. These specific powers would be helpful to it.

Amendment 11 relates to a requirement on the Scottish Government to make an annual report to the Parliament on the success of community payback orders based on reports prepared by local authorities. In response to the minister's comments, I have made amendment 11 less onerous than the one that I lodged at stage 2, but I believe that the requirement is still appropriate. It should be seen as an opportunity for local authorities to show the public the substantial public works done by offenders to pay back to communities for their crimes. The public must have confidence in our country's penal regime, particularly if we move—as I believe that we should—to slash the number of short-term prison sentences. Information about what is happening locally and how it compares with the position elsewhere in the country is a central requirement of democratic support for CPOs. A duty would be imposed on councils, but it is a vital duty that should work with the grain of what they are doing anyway, and it should not impose a significant cost. Councils, the Government and the public need to know if CPOs are not working as well as they should.

I know that ministers are still opposed to amendments 9 and 11, which I will press. They collect quite a bit of information already through social work and audit figures. Ministers will say that they already set standards, that they will tighten these things up in association with social work provision and that they will focus specifically on the causes of crime. If the minister says such helpful things, I will be prepared not to move amendment 10.

I move amendment 9.

James Kelly (Glasgow Rutherglen) (Lab): I reiterate our support for community payback orders, which in some instances will be more appropriate than prison sentences. It is important that the public have confidence in the orders, so they must be transparent—the public must see clear start and finish times. It is also important that the orders are funded correctly.

I support Robert Brown's amendments 9 to 11. It is correct to set out the purpose of community payback orders, as amendment 9 does, and the standards, as amendment 10 does. That is essential to ensure consistency throughout the country.

On amendment 11, an annual report to the Parliament is crucial. As Robert Brown said, that would help local authorities. It would also be important for forecasting the financial requirements of community payback orders. As I suggested, that will be essential if the orders are to succeed and if the public's support for them is to be maintained.

Bill Aitken: We will return repeatedly to public confidence in today's proceedings. Robert Brown's amendment 11 has merit. The consensus in the Parliament is that, sometimes, we do not revisit legislation to assess its effectiveness. What Robert Brown suggests is some way short of doing that, but there is merit in going down that line.

Amendments 9 and 10 are similar to amendments that Robert Brown lodged at stage 2. I am not persuaded of a great necessity for them—my view on that has not changed.

Kenny MacAskill: Amendment 9 would define the purpose of a community payback order as to pay back to the community that was affected by the offending behaviour and to support the offender in addressing the underlying causes of his or her offending. We understand and support the intention behind the amendment, but we continue to have reservations about it.

In our response to the Justice Committee's stage 1 report, we made it clear that the name "community payback order" is based on the wider definition of payback that is assumed in the Scottish Prisons Commission's report. Every requirement that a court can impose in a community payback order is designed to pay back to the community through unpaid work or by addressing offending behaviour and its causes. Therefore, every community payback order—whatever requirements it contains—will meet the purposes that Robert Brown's amendment describes. The extra text that would be inserted by the amendment is not needed to achieve that.

We are concerned about the drafting of amendment 9, which requires that the offender

> "pay back to the community adversely affected by the conduct of the offender".

That implies—perhaps unintentionally—that every community payback order must provide payback to the community in which the offence was committed and could give rise to several problems. An offender might commit an offence in an area other than that in which he or she lives. If they had to travel a considerable distance to comply with the requirement, the time to complete the order could well overrun and difficulties could arise with social workers' responsibilities to supervise offenders. Requests for transfers to another local authority area, which are allowed for in other community sentences, might become more difficult if the court had to take account of a need for the offender to pay back to the community that had been adversely affected. For all those reasons, we resist amendment 9.

Amendment 10 proposes new section 227VB of the Criminal Procedure (Scotland) Act 1995, which would provide for the Scottish ministers to specify in a statutory instrument standards of compliance for community payback orders. Ministers already specify standards for the operation of community sentences. Work is well under way to revise the national outcomes and standards for criminal justice social work, which will be published later this year.

I know that Robert Brown is interested in the standards, so I will say that they are being revised in consultation with the Association of Directors of Social Work and will include comprehensive guidance on community payback orders, including guidance on the immediacy and frequency of a social worker's contact with an offender and on the level and intensity of supervision. The standards will underline the fact that, for example, unpaid work placements should begin within seven days of sentencing. They will also make it clear that the interventions of criminal justice social work services, through all the requirements of a community payback order, should be designed to support effectively the individual's efforts to desist from offending. In addition to those non-statutory standards, powers are already in the bill to make rules in connection with the undertaking of unpaid work. Those are contained in new section 227O(2A) of the 1995 act.

Unfortunately, the requirements that amendment 10 proposes are so broad, ill-defined and unclear about who they bind as to be unworkable. For example, under paragraph 2(a) in the amendment, who is responsible for ensuring prompt delivery of community payback orders?

The Presiding Officer: I must hurry you, minister.

Kenny MacAskill: Under paragraph 2(b), it is not clear how matters would be set out. Further, there are no principles or purposes.

Amendment 11 imposes reporting requirements. We already have matters on which local authorities and Government report. Our position is that the amendment is unnecessary. Indeed, these matters can already be brought back to the chamber and the Parliament.

I invite Robert Brown to withdraw amendment 9.

Robert Brown: I am grateful to the minister for his response, particularly on amendment 10. I largely accept what he says about what is happening in that regard and in terms of the purpose and intent of the Government. I welcome the good work that is being done to improve the standards of CPOs. However, I reiterate the point: my aim—and, I hope, that of the chamber—is to make a big success of community payback orders. We need to spread good practice that is based on what works and to jam the revolving door of repeat offending. I am particularly keen on work that is focused on addressing the causes of crime.

Given the minister's assurances, I am prepared not to move amendment 10. I will, however, press amendment 9 and will move amendment 11. My only point on amendment 9 is on the community aspect, which the minister slightly overstated. The amendment is at a generalised intention level; the detail is in the rest of the bill. The purpose of CPOs is central, but perhaps more important is the need for local authorities to make an annual report to their communities and for the Scottish Government to make such a report to Parliament. Those reports will be absolutely essential if we are to boost understanding of the orders and ensure their effectiveness. In addition, they would give the Parliament the materials to allow it to keep a close eye on progress. I press amendment 9.

The Presiding Officer: The question is, that amendment 9 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division. As it is the first division, proceedings will be suspended for five minutes.

09:42

Meeting suspended.

09:47

On resuming—

The Presiding Officer: We will proceed with the division.

For

Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McArthur, Liam (Orkney) (LD)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
O'Donnell, Hugh (Central Scotland) (LD)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scott, Tavish (Shetland) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stewart, David (Highlands and Islands) (Lab)
Stone, Jamie (Caithness, Sutherland and Easter Ross)

(LD)
Tolson, Jim (Dunfermline West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

Against

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kidd, Bill (Glasgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Presiding Officer: The result of the division is: For 62, Against 64, Abstentions 0.

Amendment 9 disagreed to.

The Presiding Officer: Group 3 is on community payback orders—offences punishable by a fine. Amendment 33, in the name of the cabinet secretary, is grouped with amendments 34 and 35.

Kenny MacAskill: Amendments 33 to 35 clarify the court's powers in respect of making a CPO under proposed new section 227A(4) of the Criminal Procedure (Scotland) Act 1995, by providing that the court may make such an order only where the offender has been convicted of an offence that is punishable by a fine, or by a fine and imprisonment, and where the court has decided not to impose a custodial sentence or a CPO under proposed new section 227A(1). They also provide that the court may impose a CPO under the section instead of, or as well as, imposing a fine, and they clarify that the court may impose one or more of the listed requirements in such an order.

It is clear from the wording of proposed new section 227A(1), when it is read in context, that a CPO is meant to be a genuine alternative to prison. For the purposes of our separate amendment to create a presumption against short sentences, the court must take into account proposed new section 227A(1) as an alternative to imposing a short prison sentence. In effect that means that, where the court decides that a short prison sentence is the only option, it must first rule out a CPO as being inappropriate in the case.

I move amendment 33.

Amendment 33 agreed to.

Amendments 34 and 35 moved—[Kenny MacAskill]—and agreed to.

The Presiding Officer: We move on to group 4. Amendment 36, in the name of the cabinet secretary, is grouped with amendments 37 to 44, 47 to 53, 58 to 60 and 173 to 185.

Kenny MacAskill: The majority of the amendments in the group are minor or technical in nature and seek to provide consistency of language or greater clarity of meaning. They will not change the meaning of the provisions to which they relate.

The group also includes a number of consequential amendments. Some will simply repeal references to "probation", as a consequence of the introduction of the CPO. The majority, however, will amend provisions in the Criminal Procedure (Scotland) Act 1995 that relate to appeals, and provide explicitly for an appeal against a sentence imposed for breaching a CPO.

I move amendment 36.

Amendment 36 agreed to.

Amendments 37 to 44 moved—[Kenny MacAskill]—and agreed to.

The Presiding Officer: We move on to group 5. Amendment 45, in the name of the cabinet secretary, is grouped with amendments 46 and 55 to 57.

Kenny MacAskill: In some sections of the bill that relate to CPOs, the provisions as drafted would limit the powers of the court in comparison with the provisions in the 1995 act that they are intended to replace. That is not the policy intention, so amendments 46 and 57 seek to rectify the position. The other amendments in the group are technical or will remove provisions that are to be replaced.

I move amendment 45.

Amendment 45 agreed to.

Amendments 46 to 50 moved—[Kenny MacAskill]—and agreed to.

Amendment 10 not moved.

Amendments 51 to 53 moved—[Kenny MacAskill]—and agreed to.

The Presiding Officer: We move on to group 6. Amendment 54, in the name of the cabinet secretary, is the only amendment in the group.

Kenny MacAskill: Amendment 54 provides for the court, following a request to move to another local authority area, to amend a CPO by removing or amending any specific requirement that cannot be supervised in the new local authority area, which might otherwise have prevented the order from being transferred.

I move amendment 54.

James Kelly: I oppose amendment 54. First, an offender should comply with the CPO in the local authority area that is designated in the order. Secondly, amendment 54 will provide for a power to change or revoke an order, which might give an offender an incentive to move to a different local authority area to seek to get the order changed or revoked.

Bill Aitken: I cannot understand Mr Kelly's argument. It seems to me that Mr Kelly's blocking of amendment 54 could prevent a person from moving for a positive reason. For example, a CPO might be imposed in Glasgow, but the offender might move to Manchester for work reasons. Amendment 54 is justified and will plug a potential hole in the bill.

Kenny MacAskill: I understand where Mr Kelly is coming from, but I agree with Bill Aitken. Mr Kelly's approach would work against people who were seeking to improve themselves. People must do the time for the offence that they have committed. However, if they move to get away from bad company, for example, it would be perverse to force them to go back to the area from which they had moved to try to break the cycle of reoffending.

What matters is that offenders do the hours of work that they are required to do because of the damage that they have done. It is their right and entitlement to move for whatever reason. However, they will have to do the time whether they do it in the community in which they first resided or one to which they move.

The Presiding Officer: The question is, that amendment 54 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kidd, Bill (Glasgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McArthur, Liam (Orkney) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)

McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
O'Donnell, Hugh (Central Scotland) (LD)
Paterson, Gil (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Robison, Shona (Dundee East) (SNP)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicol (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Against

Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

The Presiding Officer: The result of the division is: For 81, Against 46, Abstentions 0.

Amendment 54 agreed to.

Amendments 55 to 60 moved—[Kenny MacAskill]—and agreed to.

Amendment 11 moved—[Robert Brown].

The Presiding Officer: The question is, that amendment 11 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)

Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McArthur, Liam (Orkney) (LD)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
O'Donnell, Hugh (Central Scotland) (LD)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stewart, David (Highlands and Islands) (Lab)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

Against

Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Campbell, Aileen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Presiding Officer: The result of the division is: For 78, Against 48, Abstentions 0.

Amendment 11 agreed to.

After section 16

The Presiding Officer: We come to group 7. Amendment 61, in the name of the cabinet secretary, is grouped with amendments 61A, 187, 12 and 62.

Kenny MacAskill: Amendment 61 will impose on courts a presumption against imposing custodial sentences of three months or less unless they consider that it is the only appropriate way of dealing with the offender.

The presumption against short custodial sentences has, of course, already been the subject of much debate; indeed we saw only yesterday support for the approach from none other than the Secretary of State for Justice south of the border, Ken Clarke. He is not alone because, last summer, in “Do Better Do Less: The report of the Commission on English Prisons Today”, the commission’s president, Cherie Booth QC, said:

> “Scotland has taken a courageous lead in the UK by taking serious steps to address its prison crisis”

and that

> “more widespread use of effective community sentences would both allow us to reduce the use of prison and allow for reinvestment of resources into local communities to cut offending.”

On Robert Brown’s amendment 61A, the Government shares his concern that the community payback order should be adequately funded, that its operation should be effective and properly monitored and that the long-term benefits arising from the new approach should be clearly demonstrated. We have already provided £9 million of extra resource to local authorities to improve the performance of the community service system and to prepare for the community payback order. I acknowledge the representations of Liberal Democrat MSPs to me on that issue.

10:00

Robert Brown will understand that at this stage in the budget cycle I cannot offer additional commitments on funding. I am, however, willing to commit the Government to ensuring that, as soon as possible after the bill is given royal assent, a community payback order working group, led by the Scottish Government and involving key justice stakeholders, will be established. The group will play a full part in the Scottish Government's reducing reoffending programme. It will monitor preparation for the community payback order before it is brought into force and will, once it is in force, ensure that the kind of information that was mentioned by Robert Brown is regularly gathered and analysed. Those data and the group's conclusions will be provided to ministers and to Parliament to help to inform future decisions, including decisions relating to funding for community sentences. I note in particular Robert Brown's concern that the impact of the community payback order in reducing reoffending should be captured in the group's work. I confirm that that will be the case.

Further, I would be happy to update the Justice Committee on the Scottish Government's preparation for the community payback order, including the progress of the working group, prior to any court's being able to make a community payback order and prior to implementation of the presumption against short sentences, should Parliament agree to that. I hope that reassures Robert Brown that the issues that he has identified will continue to be a focus of work as the community payback order is introduced and I hope, on that basis, that he feels able not to press his amendments.

Amendment 187, in the name of Patrick Harvie, seeks to replicate the Scottish Government's original proposal to create a presumption against short sentences of six months or less. Although I am pleased that he supports the principle of the presumption that we brought forward when the bill was introduced in March 2009, we have been over this ground many times already. In the spirit of co-operation and of allowing Parliament to move on with a clear mandate, I call on Patrick Harvie not to move amendment 187, but instead to join us in taking a first step in the right direction by supporting the presumption against sentences of three months or less. We believe that the operation of the presumption will be effective and that evidence will be forthcoming to demonstrate that.

The Government's amendment 61 creates a power for ministers to amend the period to which the presumption applies by secondary legislation—subject, of course, to the will of Parliament. That is the pragmatic way to move the matter forward and I call on Patrick Harvie to support it. If, however, he wishes to press amendment 187 to a vote, we will abstain.

Amendment 12 seeks to introduce a further reporting requirement, but its plan for a report five years from now and its broad remit means that it is not very useful to Parliament. I am sure that Parliament will want to hear regularly and in detail from ministers about the impact of the measures. Instead of waiting five years, we should be engaging now with all the stakeholders on getting and publishing regular performance information; indeed, we are the first Scottish Government to conduct an audit of performance information in the operation of community sentences. After stage 2, I offered to write to the Justice Committee setting out how we are doing that. I wrote to the convener in such terms on 3 June, and offered to meet members of the committee to discuss that work if that would be helpful. Amendment 12 is bureaucratic and will be unhelpful to Parliament. We resist it.

Amendment 62 seeks to ensure that the position of children who are detained following a conviction on indictment has the same safeguards as already exist for young offenders. By that, I mean that courts should be required to give their reasons for considering that a period of detention is the only appropriate disposal, and the court will be required to enter its reason for that decision in the record of proceedings.

We all share the desire to break the current situation on reoffending in Scotland, which damages many of our communities. The evidence is there: three quarters of people who are given short prison sentences will reoffend within two years, whereas three fifths of those who are given tough community payback orders do not reoffend. This is about making our communities safer. In a time of tight budgets, it is about ending the free-bed-and-board culture. I commend the views of Cherie Blair and Ken Clarke.

I move amendment 61.

Robert Brown: Short-term sentences do not work in the vast majority of cases. Throughout the passage of the bill, we—and other members who have positive contributions to make—have been trying to bring into place practical and effective arrangements to deal with the matter. I welcome the cabinet secretary's conversion to the Liberal Democrat view, which we have expressed from the beginning, that at least initially the target should be short-term sentences of under three months, not six months. I have already commented on the importance of ensuring that

CPOs are as effective as possible and that they have the confidence of the public.

The proposed power to amend the minimum period of imprisonment and, in the future, to substitute a period of, say, six months, is an approach with which the Liberal Democrats can agree. The proposal would enable matters to move forward when the time is right and with the agreement of Parliament, but without the need for fresh legislation. Amendment 61A, in my name, is intended to set down a clear marker of the things that need to be in place before such a reform could be activated. I am grateful to the minister for his positive and constructive approach to my amendment. We are all aware of the huge pressure on public funding at present, so I am also grateful for the minister's response to my earlier representations to the effect that specific funding will be required to bring about an improvement in the effectiveness of the existing orders, which have had a demonstrable effect.

My aim throughout has been to produce a practical outcome that will work and that will maintain public confidence. The arrangements need to be able to deal with an increase in the number of orders and to respond to issues such as drug and alcohol addiction problems, literacy issues and mental health problems. The bill will have failed in its purpose if that does not happen.

In general terms, the motivation behind amendment 12 is to ensure that a report on the success of the reforms be laid before Parliament no later than five years after the act comes into force. We need to keep an eye on the issue without micromanaging the situation or drawing premature conclusions.

Ultimately, there are only two sides to this debate. On the one side are the doomsayers who see the end of the world as we know it if the proposed reforms pass. They seem to be incapable of acknowledging all the evidence that shows that prison rarely works to rehabilitate offenders. They see no significance in the fact that 91 per cent of detainees in HM Young Offenders Institution Polmont have been detained previously. They also disregard all the research evidence that points to illiteracy, drug and alcohol addiction, mental health problems and parental disaster areas as being the key risk factors that result in people ending up in jail. The Labour Party and the Conservative party members from whom we have heard today have been entirely negative in their responses to those issues.

On the other side are those of us who believe that there can be a system that is capable of reducing the human degradation and waste that results from short-term sentences. We believe that ending the revolving-door syndrome of repeat offending will better protect the public. The deal that we have in amendments 61 and 61A, following the bill's consideration by the Justice Committee, is one that will stand and which is intellectually supportable. The proposed reforms will make a big difference to many people in Scotland, not least to the victims of crime. I have great pleasure in supporting the proposals.

I move amendment 61A.

Patrick Harvie (Glasgow) (Green): When I learned that the Government had reached an agreement with the Liberal Democrats on a compromise position and had lodged amendments to that effect, I was not dismayed. We were able to consider the issue in the stage 1 debate, but I feel that it is important that the whole Parliament should at stage 3—I did not have the opportunity to be involved in the Justice Committee's in-depth consideration of all the options at stage 2—have the opportunity to debate and vote on the original proposal.

Ultimately, the question is about what prison is for or, at least, about what it is good for. There are those who will argue that prison is a punishment and that that is an end in itself. They will argue that prison provides a kind of satisfaction by ensuring that wrongdoers suffer because of the wrong that they have done. That position is taken regardless of the consequences, regardless of whether prison makes offenders more or less likely to reoffend and regardless, even, of whether prison provides an effective deterrent. Prison is good at one thing: providing walls for confinement. That is all that it is good at. [*Interruption*.]

If members will allow me, let me say that even many of those who work very hard to try to provide rehabilitation services—to tackle the education, literacy, mental health and addiction issues that Robert Brown mentioned—will admit privately that they are fighting a losing battle inside the prison walls because of the capacity and resource constraints that they face. Prison is not the best place to do that work.

A sentence of three, four or five months—the time that is actually spent in prison is probably even less than that—is not an adequate time in which to do anything substantial with some offenders.

If a person poses a genuine threat to society, putting them in prison for three or four months provides no real protection. It wastes the opportunity of confinement, the one thing that prison is good at. It abandons the opportunity to do more substantial things to prevent more victims from being created in the future, and to give someone the opportunity to turn their life around. That opportunity is best given outside prison for low-level offenders. When someone poses a genuine threat, prison is necessary, but I do not see how anyone can argue that short-term confinement of six months or less gives genuine protection to communities.

The Presiding Officer: A large number of members wish to speak. They will be able to do so if they stick to the times that I give them.

Richard Baker: We believe that the sentencing system in this country must focus on what best serves justice and public safety. The proposed presumption would not achieve those aims. It would apply not only to minor offences, as some members have sought to suggest, but to 38 per cent of convictions for assault and to almost one quarter of convictions for carrying a knife. Today, we seek to ensure that more of those who offend with knives go to jail, but the SNP and the Liberals want fewer of them to do so.

Of those who receive custodial sentences for domestic abuse, 68 per cent receive sentences of three months or less. In its evidence, Scottish Women's Aid highlighted that the presumption could have a negative impact on people who are experiencing domestic abuse, and that organisation has written to us today to ask us to demonstrate our support for women, children and young people who are experiencing domestic abuse by maintaining the present position for our courts. That window of opportunity, which might be a month or two, can be crucial in such situations.

Of course, this time last week, the Scottish Government's policy was exactly the same as Patrick Harvie's, and he has had the integrity to bring that up. Today, we have a presumption for sentences of three months or less, with a provision to vary by statutory instrument. The Scottish Government had to revise the proposal the day before the close of lodging of amendments, which highlights its fundamental weakness, which is that it is unworkable, unfunded, and will put an intolerable burden on our community sentencing system. The Government has been forced to move to three months because that argument is overwhelming.

Even in endorsing the presumption for three months, the Liberal Democrats have lodged an amendment that suggests that it should not be brought into force until a report is compiled on the expected increase in community sentences and the cost implications, and the views of an appropriate committee have been taken into account. Surely all that should have been done before the Government sought to change the law in this way? The Liberal Democrats are seeking to close the door after the horse has bolted. It gives the lie to what we all know: the proposal has not been properly funded, it will create 7,000 more community sentences in a system that already too often cannot cope. Unfortunately one third of community sentences are already being breached at the moment.

Far from investment in organisations that have the expertise to ensure that community sentences are properly resourced being increased, budgets right across the country are being cut. The cabinet secretary has talked about budgets and finance, but his officials explained to the Finance Committee that the proposal will not produce savings in the prison estate because the infrastructure will need to be maintained.

The argument has been made again today that those who go to jail are more likely to reoffend. The unfortunate reality, which none of us likes, is that by the time an offender receives a custodial sentence, they will normally have received numerous different disposals for other offences. They are, by definition, repeat offenders by the time they get to jail. Of course, we need to do more to drive down reoffending, whether it be by custodial or community sentencing. We should also look to have more robust community sentences.

That is why the Parliament offered the opportunity for a pilot community court in Glasgow that would deliver fast and effective community justice. It was supported by everyone in the chamber, apart from the SNP, which now wants 7,000 more community sentences. Where is the logic or consistency in that? Today the SNP tells us that it wants thousands more sentences to be given, not through the provision of community courts but through this legislative presumption.

The proposal is not credible—it has unravelled before our eyes in the past week. Worse than that, it is not a responsible proposal. We are deeply concerned about its impact on our justice system and community safety, so we will oppose it.

John Lamont (Roxburgh and Berwickshire) (Con): Our prisons should serve four functions in society: they should protect the public, deter potential offenders, punish criminals and rehabilitate those who are inside. The most important of the four functions is the protection of the public from those who decide to commit crimes, closely followed by the need to rehabilitate criminals to ensure that we are addressing the underlying causes of their criminal behaviour and stopping the cycle of reoffending.

10:15

Short-term custodial sentences will always be a necessary part of our summary justice system. If an individual is a persistent offender or continuously breaches their community sentencing orders, the judiciary may feel that a short prison sentence is the best disposal to fit the circumstances. The possibility of a short prison sentence needs to remain an option that is available to the courts in dealing with some offenders.

The role of the Government should be not to restrict the courts' ability to send people to prison, but to support the courts in their sentencing disposals and to ensure that adequate provisions exist to allow the disposals to be carried out. The courts must be allowed to retain their independence and they should be left in charge of sentencing. If the courts want to use short-term sentencing, Parliament should not prevent them from doing so.

It is perhaps true that short-term prison sentences do not achieve much by way of rehabilitation, but surely that means that we need to reconsider how we can use prison time more effectively to deal with rehabilitation, even if just for a few months. Just because there has been little success in rehabilitating some offenders during short sentences, there is no reason to abolish short-term prison sentences altogether.

Robert Brown: What does John Lamont make of the fact that a significant number of longer-term prisons are not getting rehabilitation because of a clog-up of short-term prisoners?

John Lamont: The need to understand the problems in our prisons and why rehabilitation is not happening is a problem that we all share and an issue that we all acknowledge across the Parliament, but abolishing short-term sentences is not the answer. It will simply make the situation worse. We need to make prisons better able to rehabilitate and to understand the underlying concerns of reoffending.

The Minister for Community Safety (Fergus Ewing): Will John Lamont give way?

John Lamont: The power of Scotland's courts to choose the length of prison sentences that are served by criminals should be maintained free from interference. That is the only way to protect our communities, and it should be the first step in the process of rehabilitation. For those reasons, we cannot support the amendments to create a presumption against short-term sentences, which will do nothing but extend the arm of the Scottish National Party's soft-touch Scotland.

Fergus Ewing: I am interested—

The Presiding Officer: I think that the member has finished rather taken an intervention.

I call Stewart Maxwell.

Stewart Maxwell: I rise to support amendments 61 and 62 and to speak against amendments 61A and 12, basically because those two amendments are unnecessary and overly bureaucratic. The cabinet secretary dealt adequately with amendment 187.

Presiding Officer,

> "just banging up more and more people for longer without actively seeking to change them is what you would expect of Victorian England ... It is virtually impossible to do anything productive with offenders on short sentences."

That is a quotation from the Lord Chancellor, Ken Clarke. I am sorry that his party colleagues in the Scottish Parliament cannot understand that. At least Ken Clarke can.

John Lamont: Will the member give way?

Stewart Maxwell: I am sorry, but I do not have time.

Short sentences are ineffective. It is expensive to hold prisoners, the work involved in processing short-term prisoners is heavy in relation to the length of their sentences, and the time could be better spent on rehabilitation of long-term prisoners. The community can benefit from work that is carried out by someone who is on a work programme rather than in prison, and the offender may benefit from the experience of work and the skills that can be acquired.

It appears to be the policy of the Labour and Tory parties that, if they want to knock down a wall, they bang their heads against it for 100 years and, if that does not work, they keep on banging their heads against it. That is just ridiculous.

Let us listen to the evidence and the research. I have heard cries of, "Where's the evidence? Where's the research?" There are stacks of it. Professor Alec Spencer of the Scottish Consortium on Crime and Criminal Justice stated that

> "the use of short-term and very short-term sentences is complete eye-wash. It has no effect at all on reducing crime."—[*Official Report, Justice Committee*, 19 May 2009; c 1891.]

Let us listen to those who actually represent victims—because it is not the Labour Party that represents victims. I want to listen to David McKenna, the chief executive of Victim Support Scotland, who stated:

> "Sending people to prison for short periods of time does nothing to help victims of crime and often results in more victims in the future. The time is right to end this revolving door."

David Strang, the chief constable of Lothian and Borders Police, said that

> "The evidence is that sending people to prison for a short time does little to reduce offending in the long-term. In fact there is an argument that it is likely to lead to increased offending".

There is evidence that is piled higher than any wall that Labour members want to bang their heads against, but the fact is that they do not want to see that. The Parliament should support the amendments in the cabinet secretary's name.

Dr Richard Simpson (Mid Scotland and Fife) (Lab): There is a real problem with this debate, because the division between the parties is nothing like as great as people imagine. However, the solution that is offered in the Government's proposal is wrong.

In 2001, when I was the Deputy Minister for Justice, there were 6,000 more admissions to prisons for short-term sentences. However, through the provision of robust alternatives such as drug treatment and testing orders and the time-out centre for women, we were able to reduce that number considerably. Robust alternatives will be used by the judiciary and the Labour Party will support that. What we will not support is a presumption that people such as me can be assaulted by drug dealers who will not then go to jail—that is wrong. When people who are involved in domestic violence are not removed from the situation to allow the family to readjust, in many cases that presumption is, frankly, wrong.

The main increase in our prison population is not in short-term prisoners; the big problem in our prisons is having to cope with prisoners on remand, whose number has increased by more than 6,000. There are now 24,000 admissions for remand as opposed to 18,000—and dropping—for short-term sentences. There is no proposal in the bill to tackle the fact that we are not dealing with remand. The Equal Opportunities Committee addressed that in its report and referred to Cath Smith of Glasgow City Council, who said that if we could bail just one woman, whether to the 218 centre or on bail supervision, instead of remanding her to Cornton Vale, it would be a huge achievement.

The Government's proposal is the wrong proposal and it addresses the situation in the wrong way at the wrong time. Let us have robust community sentences that the judiciary will use, not this facile proposal.

Bill Aitken: As a young man from a poor area of Glasgow, I had many friends in low places and got to know the criminal mindset. [*Laughter*.]

The Presiding Officer: Order.

Bill Aitken: That impression was confirmed when I sat on the bench and has been reinforced by discussions with criminal lawyers in Glasgow. For a troublesome and small minority, prison is the only thing that will work. A situation has been created in Scotland in which many offenders do not pay their fines—indeed, on the evidence of the Sheriffs Association, the payment of fines now takes place on a more or less voluntary basis—therefore fines are not the answer.

The breach rate of social work orders in respect of compulsory work is disturbingly high, and social workers admit that, were they to be thorough in the application of such orders, as many as 75 per cent of the orders could technically be breached. Yet what is the cabinet secretary seeking to do? To remove the only possible alternative that is likely to impact on those offenders. If the new community payback orders are to work—we all profoundly want them to work—the removal of the possibility of a short-term custodial sentence for default or the removal of the ability to impress on offenders that any further offending will inevitably result in custody sends out a stupid message.

Fergus Ewing: Bill Aitken began by talking about friends in his earlier life. I want to ask him about one of his current friends, Kenneth Clarke. I ask Bill Aitken to respond on behalf of the Scottish Conservatives: was Ken Clarke right or wrong?

Bill Aitken: As a staunch upholder of devolution over the years, Mr Ewing will appreciate the fact that different approaches are required north and south of the border. If his proposals are agreed to today, for many people in Scotland that will send out the message to carry on thieving, disturbing the peace, shoplifting, subjecting people to fear and alarm and perpetuating the miscellany of petty crime that makes life a misery for so many people.

The Government's proposals would profoundly damage Scotland's society. I urge members to recognise that the Justice Committee got it right and that the existing provisions in the bill should be those that are agreed to today.

Angela Constance (Livingston) (SNP): I am pleased to have the opportunity to speak in favour of amendment 61. Given the fact that the Labour Party voted with the Tories to amend the original Government proposal and remove the presumption against sentences of six months or less from the bill at stage 2, it is entirely proper that Parliament now gets the opportunity to debate the principle of having a presumption against short-term sentences, albeit sentences of three months or less. If the Parliament is passionate about reducing crime and making communities safer, we must cast a cool eye over the evidence and decide dispassionately what works in punishing and changing offenders. All the evidence shows that short prison sentences do not work for low-level offenders. They are counterproductive and costly. We can no longer afford to have a misplaced confidence in prison.

I am surprised that members of the Labour Party think that it is entirely appropriate for those convicted of domestic violence to receive sentences of three months or less. If they were really concerned about the sentences that are given to wife beaters, they should not have voted for proposals to water down the sentencing council.

It is interesting that other European countries have walked away from imposing short sentences, other than in extraordinary circumstances. The prison population in Germany is 89 per 100,000, yet in Scotland it is 150 per 100,000. Is there something intrinsically more criminogenic about the Scots? I think not. I remind the chamber that the McLeish commission stated that political factors have more of an influence on high rates of imprisonment than the rates of crime do.

On short sentences, it is time for politicians to show leadership and courage instead of resorting to populist and primitive Old Testament views of justice. Goodness me, even Ken Clarke has seen the light. On 14 June, he told *The Guardian*:

> "It's not to be soft on sentencing, it's to be sensible on sentencing"

and reminded us that it costs more to send a boy to prison than to Eton.

In its evidence to the Justice Committee, Victim Support Scotland said that what victims of crime want most is for offending to stop and for no one else to experience what they have experienced. That requires politicians to take their eyes off political expediency and tabloid headlines and have the courage to implement measures that will work in the long term.

Johann Lamont (Glasgow Pollok) (Lab): Stewart Maxwell said that we should not have a straw-man argument or debate positions that are not being put, and should instead reflect seriously on what people are saying in the chamber today. I am therefore surprised that Robert Brown chose to describe those who oppose the proposal as "doomsayers". I do not think that we should call Scottish Women's Aid doomsayers. I think that we should reflect on the fact that, over the years, women's organisations have managed to persuade the legal establishment that the way that things are done does not work in the interests of victims.

The Scottish Government's position is that short-term sentences do not work and that we should use community sentences instead. The logic of that position is that, if community sentences are put in place, short-term sentences will wither on the vine. However, what is being proposed is that the presumption against short-term sentences will be put in place, leaving victims—not the people in this Parliament—to face the risk that that approach will not work.

In the short time that I have, I will not appeal to the minister, as his complacency and arrogance are evident to us all. However, I will appeal to his back benchers, who listen to women's organisations, to listen to what Women's Aid has said. It believes that the criminal behaviour of perpetrators of domestic abuse does not fall into the category of people with chaotic lifestyles, for whom prison is a revolving door, that a presumption against the use of prison

> "will only serve to increase the risks to safety for women, children and young people experiencing domestic abuse"

and will undermine the work that is done within the criminal justice system to address the issues of domestic abuse, and that

> "It would be disastrous if the proposals were to foster an attitude amongst abusers that their behaviour was no longer being taken seriously in terms of sentencing".

I know that there are people on the Scottish National Party back benches who are concerned about the issues of women, children and victims of domestic abuse. Do not allow this debate to be characterised as an academic theoretical debate between people who hold different views on prison sentencing. Listen to people on the ground who say that the Government's proposal will put people at risk. If the Government wants to prove that short sentences do not work, it should put money into community payback and let short sentences wither on the vine; it should not do it in the way that is proposed, which is short-term political expediency dressed up as a strategy. Listen to the women's organisations and oppose this proposal. The SNP listens to women's organisations on some issues; it should listen to them on this one, too.

10:30

Dave Thompson (Highlands and Islands) (SNP): It is not only Cherie Blair and Ken Clarke who support a presumption against short sentences. We also have the Right Rev John Christie, the Moderator of the General Assembly of the Church of Scotland. I can do no better than quote the letter that he sent us yesterday:

> "All the available evidence affirms that short periods of imprisonment do not work. They damage family relationships leaving 16,500 children separated from a parent; they separate offenders from their communities and they damage employment prospects."

He went on to state:

> "During a short period of imprisonment there is no time to provide rehabilitation to an offender. People receive short sentences for offences such as theft of a vehicle or breach of the peace; if a presumption against short sentences were to be introduced the change would not affect most violent offenders. Indeed, a reduction in the prison population leaves prisons free to focus on the rehabilitation of serious offenders."

Like Bill Aitken, I had an acquaintance in my younger days who was sentenced to 30 days for fighting. He was given intensive physical education and he came out after the 30 days fitter and stronger and desperate for a fight. That is not what we should be looking to do with short prison sentences. We need to give people proper rehabilitation and take them away from their criminal offending.

James Kelly: I oppose the Government's amendment 61, which is backed by the grand alliance of the SNP and their little Liberal helpers. [*Interruption*.]

The Presiding Officer: Order.

James Kelly: There is no doubt that the proposal represents a threat to communities. We should listen to the wise words of Scottish Women's Aid, because 68 per cent of domestic abuse sentences are of three months or less. Angela Constance would do well to pay heed to those words.

On finance, Stewart Maxwell should read the *Official Report* of the Finance Committee's discussions on the bill. Scottish Prison Service officials made it absolutely clear that releasing prisoners into the community would not save any money. We have two facts to consider—no money will be saved by releasing people into the community and vast investment in community sentences will be needed to make the policy work. We heard from the minister that no money is being set aside in the budget for the proposals. To create 7,000 community sentences would require £22 million. There is a black hole in the SNP's funding for the policy.

The Presiding Officer: I must hurry you.

James Kelly: It is clear that the Liberal Democrats have been conned on the issue. They have known all along that there is no funding, but the minister has bought them off with a working group.

The proposal will not serve communities well. The SNP has buried its head in the sand in relation to finance. The proposal is destined to fail and I urge the Parliament to vote against it.

The Presiding Officer: I can give Nigel Don one minute. I am afraid that is all.

Nigel Don (North East Scotland) (SNP): Thank you, Presiding Officer. I will therefore be brief.

First, I remind the Parliament that amendment 61 creates a presumption against short prison sentences. Every time that a member has risen to say that the option of short prison sentences will be taken away, he has been talking nonsense.

Secondly, Dr Richard Simpson suggested that there should be an amendment on remand. I ask him why he did not lodge such an amendment.

Thirdly, I refer to Professor Fergus McNeill's evidence to the Justice Committee, which is quoted in paragraph 175 of its report. He said:

> "three things help people to stop offending: getting older and becoming more mature; developing social ties that mean something to them; and changing their view of what they are about as a person. Short periods in prison do not help with any of those three things."—[*Official Report*, *Justice Committee*, 19 May 2009; c 1893.]

Kenny MacAskill: First, I thank Patrick Harvie for his eloquent and sensible contribution. I say to him that all the evidence shows that we have the right direction of travel. We are trying to achieve results on a matter of great discussion and debate in our communities. We have to take practical, pragmatic steps, and that is why we reserve the right to come back, subject to the will of the Parliament, to seek to extend matters if we can show the doomsayers that Scotland has not collapsed and that we are beginning to deal with the issue.

I turn now to the particular issue of domestic violence that Johann Lamont raised. Do we have a problem in Scotland with domestic violence? Yes, we do. Can it be solved by prison sentences alone? No, I do not think so. Do those who commit serious and violent offences deserve to go to prison? Absolutely. Is that where they will go? Definitely. However, with regard to domestic violence, in Scotland we have a real problem with a culture of violence and machismo. Frankly, the rhetoric from the Labour-Tory coalition seems to be that we are going to sort it out by getting ramped up, tooled up and tore in. Nothing is going to change the culture of violence in Scotland less than taking that kind of attitude.

Why is there a presumption against short sentences? [*Interruption*.]

The Presiding Officer: Order.

Kenny MacAskill: Nigel Don has already answered that question, but I will tell the chamber again. One only has to meet the likes of Sheriff Raeburn, who sits on the domestic violence court in Glasgow. She has said that there are instances in which it is appropriate for someone who has breached a probation order that she has placed on them to be given a short, sharp shock and to be put away to give the family some respite. I accept that argument.

There will be domestic violence cases in which the presumption is overturned and rebutted, because the sheriff will tell the accused, "Your behaviour's out of order. The wife and the bairns are entitled to some peace and quiet, and you are going to prison." Whether that sentence is two weeks or three months, that sheriff will have the full support of this Government and this chamber. The presumption against short sentences does not overrule such an approach. Instead, it ensures that we tackle the root causes of minor offences—alcohol, low-level mental health problems and drugs—instead of allowing this machismo culture to go on.

In concluding, I make it quite clear that this direction of travel is supported not just by the liberal coalition that members have referred to but by my friend Henry McLeish, who is a former Labour First Minister, and the current United Kingdom Secretary of State for Justice, Ken Clarke, who, given his attitude to the national health service as a member of Margaret Thatcher's Government, cannot be viewed as a liberal. That coalition of McLeish and Clarke shows that people are recognising that, to make our communities safer, we need to break the cycle of offending, tackle the root causes of that offending—which, as I have said, are alcohol, drugs and low-level mental health problems—and do what works. What works can be seen in the statistics: three quarters of those who are given short prison sentences reoffend within two years. Those people go back into their communities to continue the cycle of offending and to keep going into and out of prison with, as Robert Brown and other members have pointed out, the Prison Service unable to do anything other than contain them. It is quite right to contain some of those who perpetrate domestic violence, but those who have other problems need to have them addressed in the community.

Nevertheless, it is quite clear what works: tough community sentences allied to measures to deal with underlying alcohol and drugs issues and mental health problems. With such an approach, three fifths of offenders do not reoffend, as opposed to the three quarters of offenders who reoffend when given short prison sentences. That is why this is our direction of travel. This bill is about making our communities safer and, as their wise counsel shows, Ken Clarke, Cherie Blair and Henry McLeish support our approach.

I press amendment 61.

The Presiding Officer: I understand that Robert Brown does not wish to wind up, but I must ask him whether he wishes to press or withdraw amendment 61A.

Robert Brown: In light of the cabinet secretary's comments—which, to be frank, I think members on the Labour benches should have listened to carefully instead of giggling through—I seek to withdraw amendment 61A.

Amendment 61A, by agreement, withdrawn.

The Presiding Officer: The question is, that amendment 61 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Campbell, Aileen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
O'Donnell, Hugh (Central Scotland) (LD)
Paterson, Gil (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Robison, Shona (Dundee East) (SNP)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicol (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Against

Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

The Presiding Officer: The result of the division is: For 65, Against 62, Abstentions 0.

Amendment 61 agreed to.

Amendment 187 not moved.

Amendment 12 moved—[Robert Brown].

The Presiding Officer: The question is, that amendment 12 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Carlaw, Jackson (West of Scotland) (Con)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West of Scotland) (Con)
Hume, Jim (South of Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Edinburgh Pentlands) (Con)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
O’Donnell, Hugh (Central Scotland) (LD)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

Against

Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Keith (Ochil) (SNP)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Margaret (Glasgow Baillieston) (Lab)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)

Godman, Trish (West Renfrewshire) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
MacDonald, Margo (Lothians) (Ind)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Morgan, Alasdair (South of Scotland) (SNP)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Presiding Officer: The result of the division is: For 31, Against 96, Abstentions 0.

Amendment 12 disagreed to.

After section 20

Amendment 62 moved—[Kenny MacAskill].

The Presiding Officer: The question is, that amendment 62 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kidd, Bill (Glasgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McArthur, Liam (Orkney) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
O'Donnell, Hugh (Central Scotland) (LD)
Paterson, Gil (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Robison, Shona (Dundee East) (SNP)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Russell, Michael (South of Scotland) (SNP)

Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicol (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Abstentions

Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

The Presiding Officer: The result of the division is: For 81, Against 0, Abstentions 46.

Amendment 62 agreed to.

After section 23

The Deputy Presiding Officer (Trish Godman): We move to group 8. Amendment 2, in the name of the cabinet secretary, is the only amendment in the group.

Kenny MacAskill: Amendment 2 seeks to reinsert in the bill a section that provides that at the point of sentencing an offender, a court must not consider it a mitigating factor that the offender was voluntarily intoxicated at the time the offence was committed. The provision forms part of our comprehensive framework for action to rebalance Scotland’s relationship with alcohol.

There remains a very strong link between alcohol misuse and offending, particularly violent offending. My predecessor, Cathy Jamieson, quite correctly referred to a booze and blade culture. The key issue is the astonishingly high level of offending associated with alcohol.

In spite of the understanding of the courts that the excuse of too much bevvy should not mitigate the sentence, there is evidence that, time and again, voluntary intoxication is being put before them as a mitigating factor. In her evidence to the committee, the Lord Advocate said:

> “Day in, day out, notwithstanding the understanding that it does not mitigate, solicitors continue to put it before the courts in mitigation that their client would not have carried out the crime if sober. That is particularly prevalent as an excuse or as a form of mitigation in domestic abuse cases.”—[*Official Report*, *Justice Committee*, 9 June 2009; c 2060.]

The provision does not prevent the courts from considering other mitigating factors when sentencing an offender. Whether in cases of domestic violence or antisocial behaviour, we do not want to hear the litany of excuses that are rolled out in Scottish courts day in, day out. We do not want to hear that it was the drink that done it—it was not.

10:45

Robert Brown: Does the cabinet secretary accept that what solicitors say to the court does not matter so much and that the key point is what the courts do in response?

Kenny MacAskill: It is both. The issue is changing the culture that exists in Scotland that somebody is actually quite a nice fellow, but it was the drink that did it. I have no doubt that such people have redeeming qualities but, at the end of the day, it was not the alcohol that did it; it was the individual. We must stop tolerating that excuse and we must make it clear to those who defend offenders that that excuse will not be tolerated. We must also make that clear to the judiciary, as they have to be part of the process.

We fully accept that being drunk is not a defence in Scottish law. However, having practised for 20 years in the courts in Scotland—Robert Brown has practised here also—and having listened to the Lord Advocate, who knows more than anyone about what goes on in the courts of Scotland, I know that a litany of excuse is put forward daily that it was the drink that done it. No it was not. Let us make it clear and drive home the point that we will not tolerate violence, domestic or otherwise, or antisocial behaviour because someone simply went out and got bevvied.

I move amendment 2.

Richard Baker: When the issue was discussed at stage 2, Robert Brown and the convener of the Justice Committee made the valid point that the judiciary do not consider voluntary intoxication to be a mitigating factor when deciding on appropriate sentences. We supported Robert Brown's amendment to delete the section that contained the provision, because it should be superfluous. We remain unconvinced that amendment 2 is necessary and we think that puddings are being a bit over egged. However, we are mindful of the Lord Advocate's statement that

> "Day in, day out, notwithstanding the understanding that it does not mitigate, solicitors continue to put it before the courts in mitigation that their client would not have carried out the crime if sober. That is particularly prevalent as an excuse or as a form of mitigation in domestic abuse cases."—[*Official Report*, *Justice Committee*, 9 June 2009; c 2060.]

We accept that it does not necessarily follow that such pleas for mitigation are successful, but we feel that the arguments for and against the provision are finely balanced.

I do not believe, as some have argued, that agreeing to amendment 2 would mean that courts would not be aware when alcohol had played a part in an offence. I acknowledge that all members want effective action to tackle alcohol-related crime and to send a clear message that such crime will not be tolerated. I hope that amendments to come will send out a clear message on violence, too.

Although we believe that amendment 2 is probably unnecessary, it is at worst superfluous and we will abstain in the vote on it.

Bill Aitken: Presiding Officer, picture if you will Edinburgh sheriff court in 1990. A young if not exactly fresh-faced defence agent sits as the depute fiscal narrates the circumstances of a case. The sheriff looks up and calls Mr MacAskill. Mr MacAskill stands up and says, "My lord, this is a serious matter. My client broke the glass in the public house and put it in the complainer's face, as a result of which he received 24 stitches. However, my client was drunk at the time." Mr MacAskill would have received very short shrift from that court, as he well knows. The reality is that courts will not consider drink as a mitigation in any offence. Let us talk about the realities. Amendment 2 is absolutely and totally unnecessary. There is no justification for putting the provision in the bill—it is merely part of a crusade that Kenny MacAskill is carrying out with regard to drink and its consequences. The provision was thrown out by the Justice Committee and the amendment has absolutely no merit.

Robert Brown: With respect, the minister should have left the issue alone after the committee deleted the then section 24 at stage 2. The committee took the view that the courts and legal practitioners are perfectly well aware that alcohol is not a mitigating factor and do not require statutory direction to tell them so. It is true that solicitors frequently tell the court that their client was under the influence of alcohol when an offence was committed. If a solicitor has a client with a list of previous convictions as long as their arm, they might well be struggling for anything much to say in mitigation. However, the issue is not what solicitors tell the court, but what notice the court takes of the submission.

I do not accept Richard Baker's suggestion that the provision is incidental and that the arguments are nicely balanced. Although the fact that an offence was committed under the influence of alcohol does not sound in mitigation, that is not to say that it is always irrelevant. There are cases in which alcohol has been taken under the pressure of personal events such as bereavement and where that is said to be a one-off. There are cases in which intervention to help to tackle a problem of alcoholism is highly relevant to sentencing. The courts are well aware of those issues and of when they are relevant and, more commonly, not relevant.

I am against putting into statute provisions that are likely to have all sorts of unintended consequences. Amendment 2 singles out alcohol but ignores the parallel issue of drugs, which is unsatisfactory. What about situations of drinks being spiked? The common law is flexible enough to take account of such things on their merits. It is doubtful whether what the Government is proposing would be; rather, it will create unhelpful ambiguity. It is not clear what the amendment is intended to do. The Government has provided little if any evidence of a problem in the working of the common law. The amendment should be rejected wholesale.

Stewart Maxwell: I support amendment 2 in the name of the cabinet secretary. When the Justice Committee debated this issue at stage 2, the same lines of argument were used by Mr Aitken and Mr Brown. I did not think that their arguments washed then and I do not think that they wash now. The fact is that statements about voluntary intoxication are used in our courts every single day and every single newspaper reports them every single day. It is not necessarily the case, as Robert Brown suggested, that sheriffs or judges will just ignore such statements. They might well do, but why do lawyers continually use them, day in, day out? If statements about voluntary intoxication have no relevance, no influence and no part to play in the process, why do lawyers continue to use them day in, day out? They believe that such statements have influence and are relevant, which is why we hear them in our courts every day.

We have to change the drinking culture and the drinking and violence culture, because the two are combined. Part of that must mean sending out a strong message that alcohol is no excuse for people's behaviour. Whether someone is involved in a pub fight or is a wife beater in the home, that is unacceptable and drink has no place as an excuse for it in the court. I want to see an end to statements about voluntary intoxication.

Robert Brown said that the amendment could cause problems in a scenario of someone's drink having been spiked. I do not understand the logic of that, because the plea in mitigation would be not that the person was under the influence of alcohol but that their drink had been spiked. Such a plea would be absolutely acceptable and it would be absolutely correct for the lawyer to make it.

Let us not mix messages and try to create a smokescreen. Let us deal with the issue and send out a strong message.

Kenny MacAskill: I concur with Stewart Maxwell's comments. Voluntary intoxication is continually rolled out as an excuse. I have not practised in the Scottish courts for more than 11 years, but it was prevalent as an excuse then and I have heard from the Lord Advocate that it continues to be used on a daily basis. Is it accepted within the law? No, but as Richard Baker accepted and Stewart Maxwell said, there are times when the law must try to trigger a cultural change. We must put on record the point that it is entirely unacceptable to use alcohol abuse as an excuse whether for low-level domestic violence or for more serious offences. Sadly, that excuse is rolled out by lawyers and accepted by individuals, even if in most cases it is rejected officially by the judiciary.

I say to the Liberal Democrats and the Tories that the genesis of this matter was not simply the comments made by the Lord Advocate; the first person to challenge me on the issue was Chief Superintendent John Carnochan of the violence reduction unit, who recognised—as my predecessor Cathy Jamieson recognised, to her credit—the clear link between booze and blade in Scotland. If we are going to reduce violence in Scotland, whether in the home, the street or our communities, we need to tackle the problem of alcohol. Therefore, we need to drive home the message that alcohol abuse will not be viewed as an excuse. That is why John Carnochan raised the issue and why the Lord Advocate supports amendment 2. If the head of the violence reduction unit and the chief prosecutor and law officer are saying that we have a problem and that there is an issue that needs to be tackled, we should trust their judgment and back them.

The Deputy Presiding Officer: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Campbell, Aileen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)

Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Against

Aitken, Bill (Glasgow) (Con)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Carlaw, Jackson (West of Scotland) (Con)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West of Scotland) (Con)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South of Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Edinburgh Pentlands) (Con)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
O'Donnell, Hugh (Central Scotland) (LD)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

Abstentions

Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

The Deputy Presiding Officer: The result of the division is: For 47, Against 33, Abstentions 45.

Amendment 2 agreed to.

Section 24B—Minimum sentence for having in a public place an article with a blade or point

The Deputy Presiding Officer: We move to group 9. Amendment 3, in the cabinet secretary's name, is the only amendment in the group.

Kenny MacAskill: Amendment 3 will remove section 24B, which was inserted at stage 2 to provide for mandatory minimum sentences for knife possession offences.

We are doing more than ever before to tackle knife crime. Tougher sentences and tough police action are taking weapons off our streets. That goes hand in hand with groundbreaking initiatives to educate young people about the dangers of knives. The results of that work are demonstrated in statistics that show that recorded crime last year was at its lowest level in nearly 30 years and that violent crime was at its lowest level since 1986. Our courts are handing down tougher sentences for carrying a knife—the average custodial sentence for knife carriers increased from 116 days in 2003-04 to 217 days in 2007-08.

Mandatory minimum custodial sentences for knife carriers—a one-size-fits-all approach—are not the solution. We are not the only ones who say so. Strathclyde Police's chief constable, Stephen House, has said that mandatory minimum sentences are not the answer. I have referred to John Carnochan, the head of the national violence reduction unit. I do not think that he would mind my describing him as a hard-bitten Glasgow detective. In his evidence to the Justice Committee, he said:

> "Jail doesn't work, we need early intervention, restricting access to alcohol and knives."

We should listen to those who are at the front line of the fight against knife crime.

John Muir and Chief Constable David Strang gave evidence to the Justice Committee on 23 March. Despite their divergent views, a clear message about the importance of education and prevention emerged from that session. We need to pursue a twin approach of education and enforcement and we need to give our courts the discretion to consider the circumstances of each case that comes before them. We need to give our judges sufficient discretion to sentence individuals, not offences. It would be more appropriate for the Scottish sentencing council to consider the appropriate disposals for people who are found carrying knives or other offensive weapons in public and to produce guidelines on that.

We should remember that, under the current law, a sentence of four years can be imposed simply for possessing a knife. When the police have, by the grace of God, intercepted somebody who was out to create mayhem, why would we wish to restrict a sheriff's ability to impose a four-year sentence and instead impose a mandatory six-month sentence? The Government will support fully any sheriff who feels that giving the maximum sentence is necessary.

Richard Baker: It is clear that Mr MacAskill has not understood our previous amendment. He misrepresents our policy.

Members: Oh.

The Deputy Presiding Officer: Order.

Richard Baker: Section 24B imposes a mandatory minimum sentence. The courts would still be able to set sentences of four years, but they would have to give sentences of a minimum of six months. Under the Government's proposals, more of these guys will walk free.

Kenny MacAskill: We must consider the facts. More people are being stopped and searched—almost 250,000 in Strathclyde alone. Fewer people are carrying knives. Of those who are caught with knives, more are going to prison and for longer.

Yes, we accept that we in Scotland have a problem with knife carrying. The solution is tough laws and visible enforcement but also education and allowing those in the front line—whether they are police officers or the judiciary—to use their discretion. Let us remember that progress is being made—the number of knife offences has reduced. That is against the background of the lowest recorded homicide rates in Glasgow in 10 years and in Edinburgh in 20 years and the lowest recorded crime rate in Scotland in 30 years.

There is a journey to travel, but we are taking action against the booze and the blade. Mandatory sentences would create injustice. Let us leave it to our judiciary to impose the appropriate sentence for the appropriate individual and the appropriate crime.

I move amendment 3.

11:00

Richard Baker: It is a bit rich hearing the Cabinet Secretary for Justice talk of leaving it to the judiciary given the law under the amendment that we have just agreed to.

The reason why this Parliament needs to take new measures to tackle knife crime could not be more clear. Scotland suffers from rates of violent crime that are higher than anywhere else in the United Kingdom and probably Europe. Thirty per cent of crime in Scotland is violent whereas in England and Wales the figure is 20 per cent. For us, knife crime remains at persistently high levels.

Robert Brown: Will the member give way?

Richard Baker: I cannot take an intervention. No one took my interventions—[*Interruption.*]—apart from the cabinet secretary, but that is the only thing that I will give him in the debate.

There were 3,422 convictions for knife carrying in 2007-08 and more—3,529—last year. We have sought to do more in the Parliament to tackle knife crime. In the last session, we passed new laws, opposed bail for knife criminals, conducted knife amnesties, and doubled the maximum sentence for carrying a knife—it is still available to the judiciary. However, we cannot escape the fact that, despite all those actions, the chronic problem persists. It is our duty to respond and to take further action. That is why we proposed a minimum mandatory sentence of six months for possession of a knife except in exceptional circumstances. We are pleased that the Justice Committee backed our amendment at stage 2. Therefore, it is particularly disappointing that the cabinet secretary should seek to remove the provision at stage 3. I am stunned by his lack of basic understanding of it.

We do not dispute that the provision represents a significant change in the law, but it is a necessary and practical one. The provision that we suggest is in line with that already in place for firearms offences. We already have a mandatory minimum sentence of five years for the possession of an illegal firearm, but there is no such provision for knife carrying despite the fact that knives account for far more murders in this country than guns do. Last year, 58 per cent of homicides in Scotland were committed with a knife, the highest percentage ever recorded. That is why we need to challenge more effectively the knife culture in this country. Every time that someone goes out carrying a knife—every time that they engage in that culture—they dramatically increase the chance that someone will be killed or injured. In future, we need to ensure that they leave the knife at home. For us, that means that someone who gets caught carrying a blade needs to expect not to get a fine but to go to jail.

Some have questioned the cost, saying that the provision will cost some £20 million. We do not believe that; we believe that it will act as a deterrent. Last year, 2,000 people were admitted to hospital with knife injuries. Knife crime costs our national health service in Scotland £500 million—half a billion pounds—and that is before we even look at the costs to the police and courts. However, we have to look beyond the statistics; we need to look at the people behind these cases. The human cost of these crimes cannot be counted. We can all point to comments from chief constables—I could refer to those from the Association of Scottish Police Superintendents—but what we really need to do is to listen to the victims of knife crime and their families. [*Applause*.]

The Deputy Presiding Officer: I am sorry, but it is not appropriate for those in the public gallery to applaud.

Richard Baker: I take that on board, Presiding Officer, but they are here today to bear witness to the devastating impact that knife crime has had on their lives.

I have met victims of knife crimes across the country, from Glasgow to Greenock and Cowdenbeath to Aberdeen. Also, 30,000 Scots have now backed the petition for minimum mandatory sentences for knife crime. They should not be ignored. Let us remember that the campaign was started not by a political party but by the father of a victim of knife crime. John Muir has given powerful testimony to the Parliament on the impact on knife crime. The loss of his son Damian in a random and senseless knife attack has been devastating for John and his family. He was not beaten by that; he is campaigning so that other families do not have to go through what his family had to face. He has worked with other families who have also been devastated by knife violence and his is one of a number of successful initiatives to tackle knife crime, including by way of educating young people.

We all know that there is no single solution, but John Muir, Kelly McGee and members of other affected families have argued consistently that to achieve the kind of culture change that we need—to get those who carry knives to leave the blade at home—we need to make this change. They want that not out of a sense of retribution, but because they do not want others to go through what they have had to endure. That is by far the most powerful case that has been put to the Parliament. The families are here today; I pay tribute to them and their campaigns. We should support them today and do all that we can to spare further innocent people the scourge of knife crime. I ask Parliament to listen to them and to reject the cabinet secretary's amendment. Unless we do that, we will have failed them and failed to take the action on knives that this country needs.

Sandra White (Glasgow) (SNP): I say to people in the public gallery and others who have been affected by knife crime that I sincerely sympathise with them and offer them my condolences. However, I rise to support the amendment in the cabinet secretary's name. It is wrong to politicise this very sensitive issue.

As a Glasgow MSP, I know only too well the knife culture that is associated with areas of Glasgow. It is shameful and shocking that the majority of knife crimes are committed in Glasgow. As all members have said, the problem must be tackled and stopped, but mandatory sentencing is not the answer. There is no evidence that mandatory sentencing will reduce reoffending. It does not matter what the Opposition Labour Party says, there is no evidence to support that claim. We must consider alternatives and ask why people carry knives. We must look at education, work with young people and support initiatives such as no knives, better lives, working with local communities. Surely spending £500,000 on initiatives such as no knives, better lives is much better than automatic jail sentences that will achieve nothing for the victims of knife crime or for the perpetrators.

The cabinet secretary and others have quoted at length John Carnochan, from Strathclyde Police's violence reduction unit. I have a great deal of respect for John Carnochan, who is at the coalface. He says:

> "What we should be looking at is not mandatory sentencing, but mandatory rehabilitation."

That is what it is all about.

We have a great deal of respect and sympathy for the victims of any knife crime, but we cannot have a knee-jerk reaction. Steve House, the chief constable of Strathclyde, states:

> "We have to deal with the possession and use of knives sensitively and intelligently, rather than in a dramatic, headline-grabbing way that sounds like the obvious answer."—[*Official Report*, *Justice Committee*, 26 May 2009; c 1911.]

We should listen to the victims and their families, but we should also listen to the experts. Mandatory jail sentences for carrying a knife will not work. People will go in, come back out and learn nothing. We must look at initiatives such as no knives, better lives and work with communities, groups and victims.

Robert Brown: No one doubts that knife crime is a serious menace in our society or that the possession of a knife or other weapon by individuals in a public place is to be prevented. The question is, what is the best way of tackling the issue? Labour and the Conservatives believe that automatically locking people up for possession of a knife in all bar exceptional cases is how to reduce the problem. If that were the case, there would be some evidence to the effect that prison acts as a deterrent. Richard Baker slid over that issue in his speech. In reality, there is no such evidence. Researchers, prison governors, police chiefs and people such as Detective Chief Superintendent John Carnochan, of the violence reduction unit, are against the policy.

The evidence of the figures is stark. They show that even the experience, let alone the threat, of prison does not provide a deterrent. Out of a sample of 180 prisoners who on 7 March this year were serving prison sentences for carrying a bladed or pointed instrument, 163—90 per cent—had received previous custodial sentences during the past 10 years. All of those offenders had received prior custodial sentences for the same crime. There is some significance in the fact that 2,802 of the 4,892 possession cases last year were in the Strathclyde area. The problem is variable across Scotland.

The single thing that deters people from criminal behaviour is the likelihood of being caught. The stop and searches that Strathclyde Police has carried out have been effective, as the diminishing returns show. Fewer and fewer people who are searched at crime hotspots or elsewhere are found to be carrying weapons. For example, in March a report from Strathclyde Police's Glasgow central and west division, which covers the city centre, showed a 21.6 per cent drop in crimes of violence and a 75 per cent reduction in murders. Cases that involved offensive weapons fell by 28.4 per cent and incidents that involved knives fell by 20.2 per cent. The force reported that it was searching more people and recovering fewer weapons. Those are significant results, which are worthy of closer examination.

If the Parliament were to enact a mandatory prison sentence for carrying a knife, what would be the result? The most immediate result would be the need to build a new Barlinnie prison or three new Shotts prisons, to accommodate the 1,345 people who were caught with knives last year but who did not go to jail—those are John Carnochan's words, not mine. We would spend £31,000 per annum per head on those prisoners, so that they could learn new tricks from hardened criminals in jail.

Our prisons are already overflowing. Polmont young offenders institution, in particular, cannot accommodate any more prisoners. Where would Richard Baker or the Conservatives get the capital funding to build the new prisons or the revenue funding to pay the prison officers who would staff them? Sending 1,345 people to prison for six months, as Labour proposes, would cost almost £21 million. Labour cannot be serious about the matter.

The Government's amendment 3, which would remove from the bill the provisions on mandatory sentences for knife crime, must be agreed to. This is a serious Parliament, which is in the business of representing the people by taking up serious issues of concern, such as the challenge of knife crime, and supporting effective action to tackle them. It would be a dereliction of our duty were we to adopt hugely expensive policies, which even the politicians who support them know will not work, when there is a wealth of evidence to tell us what works to reduce offending.

People have experienced grievous and incomprehensible losses and are entitled to have the Parliament provide a criminal justice system that is as effective as possible. That is what amendment 3 is about and that is what the Government is about. It is what we seek to do through this debate.

Duncan McNeil (Greenock and Inverclyde) (Lab): I speak for those of us in this Parliament and in the gallery who understand the need to address knife crime. We propose a mandatory sentence not as an alternative to a long-term strategy, but as an essential part of an approach that will address Scotland's knife culture.

I say to Sandra White that the tough approach that we propose does not exclude the early prevention work that the cabinet secretary outlined, which has been piloted in my community with some success. However, I think, as other people do, that it is never acceptable to carry and use a knife to intimidate, wound or kill. Carrying a knife is a serious offence and the message should be clear: carry a knife and go to jail.

I welcome the campaigners who are in the gallery, including Margo Hagen, mother of Darren; Lexi Lyall, mother of William; Kelly McGee, sister of Paul; Georgette Neil, wife of Malcolm; and, of course, John Muir, father of Damian. John Muir has campaigned, doggedly, effectively and with dignity against the evils of Scotland's knife culture, making his case for a mandatory sentence for knife crime. In the spirit of President Obama, when he was asked whether we can achieve political change from the ground up, he replied, "Yes, we can." Through his petition, he has ensured that the Parliament has had one of its most important debates. The petition led to a knife-crime summit, and John Muir's arguments won the support of the Justice Committee during the passage of the bill. With the support of members of all parties, we hope to defeat the Government's amendment 3.

11:15

This is a significant test for our democracy and for the Parliament, the very purpose of which was to bring forward Scottish solutions to Scottish problems. The Parliament claims to be closer to the Scottish people and to understand their lives. It should be open and accessible. More important, it should be accountable to the people whom it serves. It would be a mistake for the Scottish National Party Government and its supporters in the Liberal Democrats to regard John Muir simply as a bereaved father speaking out only for his family's loss. He also speaks for his neighbours in Inverclyde, the west of Scotland and the more than 30,000 people throughout Scotland who supported the petition for action on knife crime. He has given voice to communities throughout Scotland that demand action.

John Muir has won the popular argument against the Government, which has so far refused to listen and which, by its actions, would put more knife criminals on our streets. It is a complacent Government, with complacent MSPs who have lost the argument with a longsuffering public, who fear that the perceived rights of a criminal minority are more important than those of the innocent majority.

We have an opportunity to change that perception, to listen and to act on the public's concerns. The success of today's proceedings will be measured not in the quality of the debate or how many column inches it generates: we will be judged by whether we effect change that responds to the innocent majority. That will be the democratic test. I hope that we will not let that majority down and that people power will defeat party power. I hope that, by defeating the amendment in the cabinet secretary's name, we will make a difference and answer the people's call.

Bill Aitken: I realise that there is genuine concern throughout the Parliament about the effects of knife crime, but the existing situation cannot be allowed to continue. We cannot have so many young men, not only in our cities, going out for a night with a knife in their pocket. We cannot tolerate so many ending up in an accident and emergency facility with scarred faces, or on a mortuary slab. That situation is far too prevalent and we must do something about it.

There has been, arguably, judicial recognition of the extent of the problem, but that is not enough. The cabinet secretary said that we had to listen to people in the front line of the argument. How much closer to the front line can we get than people such as John Muir and Kelly McGee? They have seen at first hand in the most poignant of circumstances the impact of knife crime. We cannot have a continued litany of bereaved families telling of the pain and anguish that they have suffered. We must do something about it.

When the matter was debated at the Justice Committee, I did not think that Richard Baker's amendment went far enough. Our preferred option was for a sentence of two years in respect of such offences in order that the message could get home. We have to save lives from being wasted.

It is simply not good enough that we sit idly on the sidelines while the slaughter—I use that term advisedly—continues. That is, in effect, what the Government wishes us to do on the matter, but it is high time that the Parliament and the Government spoke up for the victims of crime, not for the potential perpetrators. If the word got out that, if you carry a knife, you go to jail, people would simply not carry knives. We would not have the spurious defence that the knife was being carried for protection. That is the route to anarchy and we can tolerate it no longer.

The Justice Committee got it right. The Government, as it often does on justice matters, has got it completely wrong. It is completely at odds with public opinion and refuses to recognise the realities of the situation. For once—just for once in his tenure of office—Mr MacAskill should listen to the public and protect it.

Paul Martin (Glasgow Springburn) (Lab): What has struck me in the contributions from Labour members so far is that they speak on behalf of the victims of crime and not on behalf of those who commit the crimes. We make no apologies for that. When Sandra White talks about headline grabbing, I hope that she is not referring to people such as John Muir. I am sure that John would rather be at home with his son Damian than be here in the Parliament.

The focus of the amendments from Kenny MacAskill's supporters, with their carefully scripted speeches, has been on the great success of community sentences in their local areas. I am not convinced that many of those who have been subject to such sentences in the past have complied with or feared them. If the sentences are so successful, why were 2,000 people injured and more than 50 people killed last year as a result of knife crime? Labour is clear that doing nothing is not an option. It is time for Parliament, and the members opposite, to stand up for the victims of crime, some of whom are here in Parliament today.

Stewart Maxwell: I very much agree with Robert Brown's opening comments. In all seriousness, though, those members who claim that others are ignoring the suffering of bereaved families belittle only themselves and should show caution before making such false accusations. I want to talk about the evidence rather than the arguments, opinions and emotions on both sides of the debate. There are deeply held views on both sides. However, the evidence from around the world is crystal clear.

Professor Michael Tonry, a specialist in criminal law and public policy at the University of Minnesota, researched the unintended effects of mandatory penalties. He said:

> "One claim often made for mandatory minimum sentence laws is that their enactment and enforcement deter would-be offenders and thereby reduce crime rates."

That is the Labour argument. That claim, if true, makes a powerful case. Unfortunately, the accumulated evidence shows that it is not true. If mandatory sentences worked, I and every other member would support them. However, they do not.

Richard Baker: We have mandatory sentences for firearms offences, and firearms offences are falling.

Stewart Maxwell: We are talking about laws that we are trying to introduce today—[*Laughter*.] Let us be serious about this. Let us devolve firearms legislation to this Parliament, then let us debate it and see how Opposition members react.

Returning to the issue of evidence, in Western Australia, mandatory sentencing laws were introduced following an increase in car thefts by juveniles. That produced police chases in which 16 related traffic deaths occurred in 18 months. Research showed that the law's enactment had had no effect on the rates of automobile theft, and the law was repealed.

In South Africa, mandatory minimum sentences were introduced mainly for drugs offences. Research by the Viljoen commission showed that the law resulted in unfair sentences and substantially increased the prison population without any observable effect on crime rates.

The same is true in the United States of America. For example, in Massachusetts, studies concluded that mandatory minimum sentences had no deterrent effect on the use of firearms in violent crimes or a small short-term effect that quickly disappeared. Studies throughout the United States show that mandatory sentencing laws do not work. In Detroit, Michigan, the mandatory sentencing law did not have a preventive effect on crime. In Jacksonville, Florida, and elsewhere the same research showed the same outcome. The law does not work. If it worked, we should support it, but the evidence shows that it does not.

This is Scottish Labour's flagship policy on crime. It is utterly discredited. It is rejected by criminal justice professionals, by victims' representatives and by Scottish Labour's colleagues in England and Wales. It is based on a mixture of fantasy, hypocrisy and deceit.

Margaret Curran (Glasgow Baillieston) (Lab): To Stewart Maxwell, I say that I will be driven by the experience in Glasgow and Scotland rather than by research from the United States.

I am moved to speak in the debate because of the experience of my constituents—such as Sam, who is in the public gallery today—who have lost their loved ones in a knife-crime incident and now have a tragedy that lasts forever.

Members of this Parliament, especially those of us who have been here since the beginning, need to be honest—indeed, I am struck and saddened by the SNP's complacency on this—that we have already tried many approaches. I was not persuaded of the need for mandatory sentencing earlier in my parliamentary career, but I am persuaded now because previous approaches have failed to make the breakthrough in tackling knife crime.

We know that far too many in Scotland carry a knife with impunity. Too many who carry a knife are not frightened of arrest or of facing court, because they know that they will probably not go to jail. Far too many crimes—their victims are in the public gallery today—are perpetrated by people who are already out on bail for previous knife-crime offences. Despite all our best efforts, the time has come to be radical. It is time that this Scottish Parliament was radical.

The statistics tell us that, if knives are carried, they get used. We need to break the myth that somehow knives protect people. We know that knives endanger those who carry them and that they endanger others. Mandatory sentencing is a big step—I acknowledge that—but it is a big step because we have a big problem.

Margo MacDonald (Lothians) (Ind): Will the member give way?

Margaret Curran: I would love to, but I do not have time.

If we agree to the proposal in the bill today, a message will run round Scotland that we no longer accept the carrying of knives. That message of "No ducking, no diving, if you carry a knife, you will face the consequences" will be understood on our streets.

Scotland needs that wake-up call. I am sad to say that the Scottish Government needs that as much as the criminal and hooligans do. It is time for tough love. It is what we need to save lives, and it will work.

The Deputy Presiding Officer: A considerable number of members wish to speak, so members may speak for only a tight two minutes each.

Patrick Harvie: Like, I suspect, all members in the chamber, I feel nothing but respect for the campaigners who are present in the public gallery watching the debate and for the politicians who have joined—[*Interruption*.] I ask members to listen. I also have respect for the politicians who have joined that campaign and for their intentions and motives. That respect is not properly shown if we allow the debate to descend into political parties barking at one another about who cares or does not care. Everybody cares about the issue.

I agree with several of the comments that have been made by Richard Baker, Margaret Curran and even my good friend Bill Aitken. Far too many knives are being carried. Far too many people do not fear the consequences of carrying a knife. Every time that a knife is carried in public hugely increases the risk not only to other members of the public, but to the person carrying the knife. I also agree that the Parliament has a responsibility to act and to take the issue, and our duty, seriously.

Where I disagree with the specific proposal that the Labour Party is backing today is that it fails to differentiate between different circumstances. The issue comes back to the points that I made about short sentences earlier in today's proceedings.

The Deputy Presiding Officer: You have 30 seconds left.

Patrick Harvie: Just as there are some things that prison is good for—no member here disagrees that it is necessary to confine those who pose a serious danger—there are some things that legislation is good for and some things that it is not good for. Discriminating between a frightened wee boy who knows that he has made a mistake and a genuine thug who poses a threat is something that legislation cannot do. The courts need to do that. There is a genuine risk that, if we impose mandatory sentences, we will create a culture change among some frightened wee boys. A few months in Barlinnie will change their culture for the worse, not for the better.

The Deputy Presiding Officer: I remind members that they have a very tight two minutes.

James Kelly: This is one of the most important debates that the Parliament has had during the parliamentary session. Barely a weekend goes by in which there are not knife incidents throughout Scotland. In Glasgow at the weekend, two men were stabbed outside the Renfrew ferry. Knife crime continues to be a problem and is involved in 58 per cent of homicides.

Some have argued that mandatory sentences do not work. That is a complacent argument. They have cited people on the front line to back up their argument, but let me quote the argument that was made by Kelly McGee, a knife-crime campaigner who unfortunately lost her brother. She said:

> "If people break the law, they should be made to face the consequences. I believe that mandatory minimum custodial sentences for knife carriers will make people think twice about carrying a blade in public. If criminals are not afraid of the consequences, they will not think twice about their actions."

Margo MacDonald: Will the member give way?

11:30

James Kelly: I am sorry, but I have only two minutes.

Robert Brown said that the Parliament must be a serious one, and I agree. The question is, what will we do today? Politics is about making a difference, and this change will make a difference. This is not the time for whimpering responses; it is a time for leadership, a time to stand up and be counted, and a time for the Parliament to send out the strong message that knife crime is unacceptable and we will root it out in our communities. Members should support the bill as amended at stage 2 and give hope to those families who have suffered as a result of knife crime.

Dave Thompson: There is no evidence that mandatory sentencing reduces reoffending, but the Scottish Government is taking action that is having an effect on knife crime. The Scottish Government is showing leadership.

For example, the Scottish Government is working with the national violence reduction unit, with direct and record Government investment of £1.4 million over the past two years. The Scottish Government has invested £80,000 in a new initiative—medics against violence—which was launched on 18 November. The Scottish Government is providing £1.6 million over two years to the community initiative to reduce violence, with a further £3.4 million in funding being provided in services and in kind by partners to tackle the long-standing problem of gang violence in one of Glasgow's hardest-hit areas. The Scottish Government has introduced tougher prosecution guidelines, with the result that more than 600 knife carriers have been prosecuted on indictment rather than summary complaint, and 78 per cent of those prosecutions have resulted in imprisonment. The average sentence of imprisonment that is passed for knife-crime prosecutions on indictment is more than 11 months.

The key to tackling knife crime is catching as many knife carriers as possible, giving judges greater flexibility with longer sentences, and investing in things that divert and occupy young people. The SNP has taken action on all three.

Margo MacDonald: Will the member give way?

Dave Thompson: Yes.

The Deputy Presiding Officer: You will need to be very brief, because Mr Thomson has only two minutes.

Margo MacDonald: Does the member agree that we saw the last of the razor culture in Glasgow without mandatory sentencing, but with judges doing their job?

The Deputy Presiding Officer: Mr Thomson, you have exactly 20 seconds.

Dave Thompson: Yes, we should let the judges do their job; we should trust them and the sheriffs, because they know the details of every individual case.

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): The carrying and use of knives is often more dangerous in Scotland than guns are and, in most cases, the perpetrator's age is the same as that of the victim—under 19. The reoffending rate is far too high, and mandatory sentences will have no impact on that. Cathy Jamieson argued that case eloquently when I was on the Justice 2 Committee, and Margaret Curran also held that view at the time. Have we explored all the options?

At that time, I proposed a maximum seven-year combined sentence of custody and community service. A maximum of four years would be served in custody, and a minimum of three years would be community service. That would get us to the roots of why young people carry knives in Scotland, particularly in our cities. The Labour members of the committee at that time voted down that proposal. At that meeting, Jackie Baillie said that the argument that was used was simplistic and that the proposal would mean that people would carry guns instead of knives. The Labour Party's argument was that, if we make the law the same for those who carry knives as it is for those who carry guns, people will carry guns rather than knives. That was the wrong argument then, and it is the wrong argument now.

Mr Kelly asked for leadership in the debate. Leadership is about using judgment that is based on evidence; it is about getting to the root cause, not just taking an option that we know will not have a long-term success rate. That should be the focus of the debate.

Karen Gillon (Clydesdale) (Lab): We have mandatory sentences for carrying firearms because they are deadly weapons. So are knives.

Fifteen years ago, on Christmas day, my friend John was killed in Jedburgh by a single knife wound. He was an innocent victim in the wrong place at the wrong time, killed by a single stab wound that had devastating consequences for him, his family and the community. Fifteen years on, day in and day out, people are still killed and injured on our streets by a knife or other pointed implement.

Hundreds of thousands of innocent families have suffered. People who have been slashed have lost their employment chances because they have a slash down their face and nobody will give them a job, even though they were the innocent victim. Families have lost loved ones. Only four weeks ago, on Lanark High Street at 2 o'clock in the afternoon, a man was slashed from ear to ear. The community had to deal with that.

The cabinet secretary presents a false choice: if we have a mandatory sentence, we cannot do education, rehabilitation and stop and search. What a lot of nonsense. Sandra White says that there is no evidence that a mandatory sentence will stop people carrying knives. Well, there is plenty of evidence that the current system does not stop young people carrying knives on our streets. We have reached a situation in which, for far too many young people, particularly young men, a knife is as much a designer accessory as a hat, a belt or a baseball cap. We are letting them all down.

Patrick Harvie talked about a scared wee boy—that wee boy is as likely to be the victim as the aggressor. Today, we can do something brave: we can vote against the cabinet secretary's amendment and do something for young people in Scotland.

Nigel Don: I point out to Karen Gillon that the evidence is that the number of knives being carried is reducing. The number of knives being found is certainly reducing, and the police are looking very hard for them.

Richard Baker said:

> "we need to ensure that they leave the knife at home."

I absolutely agree with him. I suggest that there is no dispute throughout the chamber, nor within the public gallery, that the knife should be left at home. The issue is how we ensure that.

I return to the point that has been made many times in the debate. Whether I like it or not—and I do not like it—the evidence is that mandatory sentences do not work.

Richard Baker: Will Nigel Don give way?

Nigel Don: Forgive me for a moment, Richard.

We merely have to look back over the centuries in which we had capital punishment to realise that it did not prevent people from doing a lot of things. Mandatory sentences simply do not work, and we know that. That is why we have to ensure that we listen to the evidence and do things that are appropriate.

I want also, improbably, to quote Bill Aitken. He said:

> "We have to save lives from being wasted."

I agree with him. One of the best ways of wasting lives is to send young men, who are simply doing something that they perceive, incorrectly, is appropriate in their culture, to prison—the university of crime. Those are the points that are being forgotten about or ignored, and they are the other side of the argument.

If I believed that mandatory sentences would stop people carrying knives, I would vote for mandatory sentences, Government whip notwithstanding; I think that most of my colleagues would do so, too. However, the evidence is that mandatory sentences are not the right way to go and on that basis—because I care about the long-term future of Scotland—I cannot support the bill as it stands.

Kenny MacAskill: Let us be clear: there is a problem in Scotland with knife crime. We recognise that. Far too many families are bereaved, and we pay tribute to those who, despite their loss, have campaigned to try to make things better. In particular, we pay tribute to John Muir and others who have sought to make changes, which are working in Greenock and Inverclyde, where problems are still far too prevalent but progress is being made.

We have to take action, but it is a question of what we do and what works. As I said earlier, more people are being stopped and searched, fewer are carrying knives and those who do face tougher and longer sentences. That is appropriate. Equally, we must ensure that we do not have any knee-jerk reactions that would impact in other ways. If we spend money on prisons by locking everybody up, we cannot pour money into the no knives, better lives campaign, diversionary initiatives and education. Those things cost money, but what has been shown in Greenock and Inverclyde is that matters are working and progress is being made.

Margaret Curran made various points, but I refer to John Carnochan, who is on the front line and who asked, "If we give somebody two years in jail the first time they're caught carrying a knife, what do we do the second, third and fourth time? Do we operate a three-strikes-and-you're-out system?" That is why we have to listen to guys such as John Carnochan and do what is right. We have a problem in Scotland; let us ensure that we tackle it.

Let us listen to those on the front line. Patrick Harvie was mocked and sneered at by some on the Labour benches, but there are frightened wee laddies who carry knives. They have to face the consequences of their actions, but I can tell members this: putting them in prison would not improve them or change the situation. Indeed, it would probably make matters worse.

Let me quote Sheriff John Herald, who sits at Greenock sheriff court. He said:

> "I have spent many years going on about possession of knives in this town, the damage they can do and what people found with these items can expect to happen when they appear in this court."

Sheriff Herald is no shrinking violet. He continued:

> "There have been four cases today involving possession of knives and four cases where I haven't sent anyone to prison. No doubt that will attract some criticism ... But there are times where campaigners wanting mandatory sentences for people found in possession of knives do not understand that all cases must be looked at and considered on their own merits."

Sheriff Herald would have my full support in giving somebody four years simply for possessing a knife. He has a track record in making it clear that there is a problem in Inverclyde and in taking action and imposing severe sentences when necessary. However, he also recognises—as does Patrick Harvie—the case of the frightened wee laddie.

Labour members should also think about the situation of the soldier who has served in Iraq, who has come home from Helmand and who is self-medicating—he has problems with alcohol. He picks up a knife at a party or in the house but does not use it. Would they give him six months in prison at Her Majesty's pleasure? Or would they allow Sheriff Herald and others to remember the service that that soldier has given to Queen and country? Six-month mandatory sentences bring manifest injustices not simply for frightened wee laddies, but for those who suffer from post-traumatic stress disorder.

The Deputy Presiding Officer: The question is, that amendment 3 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Campbell, Aileen (South of Scotland) (SNP)

Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
O'Donnell, Hugh (Central Scotland) (LD)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Robison, Shona (Dundee East) (SNP)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicol (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Against

Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

The Deputy Presiding Officer: The result of the division is: For 63, Against 61, Abstentions 0.

Amendment 3 agreed to.

Section 26—Offences aggravated by connection with serious organised crime

The Deputy Presiding Officer: We come to group 10, on offences aggravated by connection with serious organised crime. Amendment 13, in the name of Robert Brown, is the only amendment in the group.

Robert Brown: Sections 25 to 28 introduce a number of new offences in the area of serious and organised crime, which build on the common-law crime of conspiracy. The whole chamber will support effective measures to get at the Mr Bigs behind criminal gangs—the people with layers of underlings between them and the direct commission of a crime. At stage 2, the committee endeavoured to test the Government's proposals in this difficult area. We had specific concerns about whether the crimes that the bill will create were sufficiently defined to target the people whom we are after. Despite the targeting of serious and organised crimes, that remains an important aspect of legislation.

Amendment 13 addresses the need for corroboration of the aggravation of connection with serious and organised crime. In common law, an aggravation does not require to be corroborated provided that the main corpus of the crime is proved by corroborated evidence. The same is true for statutory aggravations such as racial and sectarian offences. That is entirely reasonable. I do, however, have some concerns in this instance. A minor breach of the peace or a theft charge attracting, in the normal way, a monetary penalty would, if aggravated by connection with serious and organised crime, carry a potential prison sentence of five or 10 years. Section 25, "Involvement in serious organised crime", provides for a potential sentence of 10 years in jail. I am not sure that that does not change the nature of the crime entirely and, therefore, propose that it might require corroboration. I would like to hear the minister's justification for the bill as it stands.

11:45

An example has been suggested to me of a case in which someone is charged with living off immoral earnings, but in which there is one credible strand of evidence that the girls involved had been trafficked. I find that example compelling, given the lack of prosecutions and convictions for trafficking. Of course, everyone knows that Al Capone was jailed for tax evasion rather than for gangster crimes but, at the other extreme, we could end up with a situation in which a minor offender is locked up for years on the basis of thin evidence of links to something bigger. The amendment makes a serious point, but I am ready to listen to what the minister has to say.

I move amendment 13.

James Kelly: I oppose Robert Brown's amendment 13. There is agreement across the chamber that we must tackle serious and organised crime through the bill, to support police officers and public services that award procurement contracts and want to ensure that they do not tie in to serious and organised crime. The amendment would weaken the bill. I support the bill's provisions on taking evidence from a single source. We cannot be complacent in the fight against serious and organised crime, and in this case the bill is adequate.

Bill Aitken: With respect to James Kelly, I do not think that that is the issue. Robert Brown makes a good point with amendment 13. He and I do not agree on many justice issues, but we share qualms about breaching fundamental principles of Scots law, of which corroboration is one.

I am aware that, in recent times, we have departed from that principle radically in respect of racial or homophobic aggravations to assaults and breaches of the peace, for example. There have been good cases for doing so, but I have never been quite comfortable about it.

James Kelly's arguments do not have a great deal of validity. The failure to agree amendment 13 would impact, to some extent, on the principles of justice, but it would not impact on the issue with which he and I are concerned, which is that the serious and organised crime provisions should be effective, as the corroboration in that respect would be the crime itself, and it would be fairly easy to come up with the additional corroboration that would be needed to ensure that the prosecution would succeed. I know that that is a fine point, but I think that Robert Brown is correct, and we will support his amendment.

Kenny MacAskill: Although we understand the reason for amendment 13, we do not think it appropriate or necessary. The Solicitor General has already spoken to Robert Brown on the issue but I will try to further clarify matters.

We should be clear that the normal rules of corroboration still apply to the underlying offence that would incur a statutory aggravation. The current provision requires a single source of evidence to establish the aggravation. That is in line with the common law on aggravation and with previous statutory aggravations, such as the Offences (Aggravation by Prejudice) (Scotland) Act 2009.

If amendment 13 were accepted, it would require corroboration for the aggravation to apply. However, if the fiscal had more than one source of evidence establishing an accused's involvement in serious or organised crime, he would likely be seeking a conviction on one of the substantive offences in sections 25, 27 and 28. Therefore, the amendment would make the statutory aggravation meaningless and devoid of any practical use.

Robert Brown is, correctly, concerned that an offender might receive a sentence where the aggravation could be more severe than the original sentence. All that this section does is require the sentencing sheriff or judge to record the aggravation and to take it into account in determining the appropriate sentence, and to indicate whether and how the sentence is different to the one that would have been imposed if the offence were not aggravated. That is a matter for the court to determine after hearing all the facts and circumstances of the case, but the starting point in determining the sentence will be the index offence and the appropriate sentence for that offence.

I invite Robert Brown to withdraw amendment 13. The issues are technical and complicated. As I said, the Solicitor General has spoken to Robert Brown already—and doubtless did better than I have just done—but I hope that I have supplied additional clarification.

Robert Brown: We have had an interesting and worthwhile debate on this important matter. We need to go back to where the Justice Committee began, which is the fact that a number of new offences are proposed to deal with the significant problem of the Mr Bigs in crime. I remind the Parliament that the new offences—the cabinet secretary touched on them—are involvement in serious organised crime, directing serious organised crime and failure to report serious organised crime. In all those cases, the boat is pushed out considerably beyond the current definition of conspiracy, under which the matter is dealt with at present.

The Justice Committee's starting point was its concern that the proposed offences are not as well defined as they might be. We bowed to the Government's view on that, because it has a galaxy of legal officers behind it to provide support on technical matters, but it seems to me that the point that I made in my opening speech is still valid. Ultimately, the new offences exacerbate relatively minor crimes and make them into things that carry serious penal consequences on what might appear to be thin evidence. To be frank, if we cannot get the guy under involvement in, directing or failure to report serious organised crime, the evidence must be pretty thin. In those circumstances, although I find the area difficult, I will press my amendment.

The Deputy Presiding Officer (Alasdair Morgan): The question is, that amendment 13 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Carlaw, Jackson (West of Scotland) (Con)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West of Scotland) (Con)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South of Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Roxburgh and Berwickshire) (Con)
MacDonald, Margo (Lothians) (Ind)
McArthur, Liam (Orkney) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Edinburgh Pentlands) (Con)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
O'Donnell, Hugh (Central Scotland) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

Against

Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Keith (Ochil) (SNP)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Margaret (Glasgow Baillieston) (Lab)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)

Macintosh, Ken (Eastwood) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Abstentions

Martin, Paul (Glasgow Springburn) (Lab)

The Deputy Presiding Officer: The result of the division is: For 32, Against 88, Abstentions 1.

Amendment 13 disagreed to.

After section 31A

The Deputy Presiding Officer: Group 11 is on threatening or abusive behaviour and stalking. Amendment 63, in the name of the cabinet secretary, is grouped with amendments 188, 64 to 67, 14, 68 to 78 and 189.

Kenny MacAskill: Amendment 63 creates an offence of threatening or abusive behaviour. It is intended to address the uncertainty about the scope of the common-law offence of breach of the peace that arose as a result of the appeal court's decision in Harris v Her Majesty's Advocate. In that case, the court ruled that a public element to the offending behaviour is required for the offence of breach of the peace to be committed. Although the judgment does not affect the majority of breach of the peace cases, which take place in public, we are concerned that it will make it more difficult for the criminal law to intervene, where that is appropriate, in domestic abuse cases that involve threatening or abusive behaviour but in which there is no evidence of physical violence that would enable a charge of assault to be libelled, as such cases often lack an obvious public element.

The incoming president of the Association of Scottish Police Superintendents expressed concern at its annual conference in May that the decision has also made it much more difficult to prosecute people who are abusive towards police officers, especially when the abusive behaviour takes place in private.

Amendment 63 provides a statutory offence that is intended to ensure that conduct that could have been prosecuted as breach of the peace prior to the decision can continue to be prosecuted. It provides that it shall be a criminal offence for a person to behave in a threatening or abusive manner that is likely to cause fear or alarm to a reasonable person where the accused either intends to cause fear or alarm or is reckless as to whether their behaviour will cause fear or alarm. Unlike in the common-law offence of breach of the peace, it does not matter whether the conduct takes place in private or in public.

In lodging amendment 63, we have taken account of the Justice Committee's concern that the stage 2 amendment on the matter was too widely drawn and risked interfering with a person's right to freedom of expression. The offence in amendment 63 is more narrowly defined in that it applies only to behaviour that would cause a reasonable person to feel fear or alarm and does not refer to distress.

Margo MacDonald: Would soliciting be an example of that?

Kenny MacAskill: No, I do not think that that would be a specific example. I am talking about people who, for example, shout abuse at policemen when no other members of the public are present or shout abuse in their home as a form of domestic violence. As I say, amendment 63 seeks to deal with situations in which the public are not present and, in that respect, soliciting is a separate issue.

Instead of applying only to any behaviour which

"would ... cause a reasonable person ... fear or alarm"

the offence will require that the accused's behaviour is "threatening or abusive" to ensure that we focus on the accused's behaviour as well as the effect that it is likely to have on a reasonable person. We have also included a defence that would allow an accused person to show that their behaviour was, in all the circumstances, reasonable.

Amendment 63 also seeks to provide the police and prosecution with the power to act in respect of criminal conduct that had previously been prosecuted as a breach of the peace and which lacks the requisite public element without unreasonably restricting a person's right to freedom of expression. The common-law offence of breach of the peace is not affected by this amendment and remains available as a charge in suitable cases. Indeed, the president of the Association of Scottish Police Superintendents has expressed the association's support for this amendment, which he says is

> "necessary to protect police officers from threatening and abusive behaviour in line with our duty to protect the communities that we serve across Scotland."

Amendments 64 to 78 are intended to ensure that the new statutory criminal offence of stalking, the result of amendments lodged at stage 2 by Rhoda Grant and agreed by the Justice Committee, operates as robustly and effectively as possible. My officials discussed the amendments with Rhoda Grant before lodging them and they have been shared with Action Scotland Against Stalking's Ann Moulds, who has led the campaign for legislation to tackle stalking and who has confirmed that she is content with them.

Following concerns expressed by the Crown Office about the requirement in the new offence to prove that a victim suffered "psychological harm" as a result of stalking activity, amendment 64 seeks to amend the new offence to provide that A stalks B where A's course of conduct causes B to suffer "fear or alarm". The Crown Office considered that the original provision could prove to be a significant barrier to prosecution, especially if the courts determined that it was necessary to provide evidence that the victim suffered a mental illness as a result of this activity. By contrast, the courts are familiar with the test of "fear or alarm" because a similar one is used to determine whether conduct constitutes breach of the peace. It is conduct that causes "fear or alarm" that is the essential harm that we are seeking to criminalise. Amendments 65, 66 and 76 make changes that are consequential on amendment 64.

Amendments 67 and 68 are technical amendments. Amendment 67 seeks to amend section 31B(5) to refer to a "course of conduct" rather than a "course of action" and amendment 68 seeks to provide that the list of activities constituting "conduct" for the purpose of this offence is exhaustive rather than illustrative. That is appropriate because of the catch-all provision in section 31B(6)(i).

Amendments 69 through 75 seek to make minor amendments to the list of examples of conduct in section 31B(6). Amendments 69 and 70 seek to amend section 31B(6)(b) to include attempts to contact a person—for example, by leaving voice-mail messages on a person's phone or sending e-mails that may or may not be read—and to remove references to the means by which such contact may be made to ensure that future technological developments do not result in the provision becoming outdated.

Amendment 71 seeks to amend section 31B(6)(d) so that it refers to "monitoring" rather than "tracing" a person's use of the internet, e-mail or other electronic communication. We consider that reference to be clearer.

Amendment 72 is intended to simplify the drafting of section 31B(6)(e) while ensuring that it continues to apply to all premises and places, whether public or private. It is important to remember that the list of activities set out in section 31B(6) may in themselves be entirely innocent. The offence is committed only if these activities are undertaken with the intention of, or with recklessness as to the possibility of, causing fear or alarm and actually have that effect.

Amendments 73 and 74 seek to amend section 31B(6)(g) to ensure that it applies to the giving of "anything"—not only "offensive material"—to B or any other person. Again the offence will be committed only if there is an intention to cause fear or alarm, or recklessness as to the possibility of causing fear or alarm, and that is achieved. We are aware of stalking cases in which material that is not objectively offensive but which, in context, may cause a victim of stalking fear or alarm is given or left so as to be brought to the victim's attention.

Amendment 75 seeks to amend section 31B(6)(h), replacing

> "keeping B or any other person under surveillance"

with

> "watching or spying on B or any other person",

as the original drafting could appear to be an example of a course of conduct while the other examples in section 31B(6) refer to individual acts.

Amendment 77 is intended to increase the maximum penalty on summary conviction from six to 12 months to reflect the greater sentencing powers of summary courts.

Amendment 78 provides that the offence of threatening or abusive behaviour is an implied alternative to the offence of stalking. That means that, in circumstances in which someone is charged with stalking but the court is not satisfied that the accused committed the stalking offence but is satisfied that the accused committed the offence of threatening or abusive behaviour, it may convict of that offence.

12:00

We assume that amendment 14 seeks to ensure that the stalking offence does not inadvertently criminalise otherwise lawful public protest or industrial action. We share Robert Brown's concern that we should be careful to ensure that we do not inadvertently criminalise legitimate, lawful public protest or industrial action. The right to peaceful protest is a cornerstone of our democracy. However, the difficulty with amendment 14 is that it creates an ambiguity. It is unclear whether it is the individual's course of conduct, the public protest or the industrial action that must be reasonable. If, as we think Robert Brown intends, it is the course of conduct that must be reasonable, we do not consider the amendment to be necessary. The offence already contains safeguards that ensure that it could not be used to prosecute people engaged in lawful public protest or industrial action. However, it is possible to interpret the amendment as creating a defence, even if the accused's course of conduct is not reasonable, provided that the public protest or industrial action is reasonable. That cannot be right, because it would mean that those intent on unacceptable behaviour could use legitimate public protest or industrial action as a cover for such behaviour. Legitimate public protest and industrial action should be peaceful and about making a point; they should not be about causing fear or alarm to those who may have different views or who simply happen to be in the place where the protest or industrial action is taking place. Where such fear or alarm is caused, that would in any case almost certainly constitute a breach of the peace under common law and so would not be otherwise lawful under the terms of the amendment. Furthermore, the stalking offence already contains a defence that the accused's conduct was reasonable in the circumstances. That would be a matter for the courts to determine.

I hope that I have reassured Robert Brown that the safeguards that are contained in the stalking offence are sufficient to ensure that it could not be used to prosecute people involved in lawful public protest or industrial action. As I said, we think that amendment 14 creates an ambiguity.

I turn to amendment 188.

The Deputy Presiding Officer: You should be as brief as possible, minister, please.

Kenny MacAskill: I understand that amendment 188 seeks to deal with one of the most serious consequences of the Harris v Her Majesty's Advocate judgment, but I do not think that it is necessary if the Government's amendment 63 is agreed to. There is also a difficulty in retaining reference to behaviour that is likely to cause distress, which was the reason for removing it from the Government's provision. Amendment 188 is too narrow; what the Government has drafted is better.

Finally, the provision allows only for prosecution on summary complaint with a maximum sentence of 12 months' imprisonment, but we may wish to proceed further.

I move amendment 63.

The Deputy Presiding Officer: I let the minister speak at length, as it is often important to get such things on the record, but I would be glad if other members could be as brief as possible.

John Lamont: I speak in favour of my amendment 188, which was drafted in opposition to the Scottish Government's amendment 63.

At stage 2, the Scottish Government lodged amendment 378 with the intention of creating a new statutory offence. My colleague Bill Aitken and a number of members of all parties expressed concern about the wide-ranging nature of that amendment, which could, arguably, have impinged on freedom of speech. The Government withdrew its amendment at stage 2 and said that it would return with a revised formulation at stage 3.

The Scottish Conservatives recognise the issue that has arisen from the appeal court ruling in the Harris v HMA case—that some public element must be present for a breach of the peace to occur—and the need to resolve that issue. At committee, the cabinet secretary discussed the concern that the decision in the Harris case had made it more difficult to prosecute criminal behaviour that had arisen from domestic disputes and in other circumstances in which there is not necessarily a public element.

It was hoped that the Scottish Government's amendment at stage 3 would have been narrower in its drafting than what we are faced with. I would not suggest that my amendment 188 is perfect; it does not take account of domestic abuse in civil partnerships or abuse towards an ex-partner or a partner who does not reside with the victim, which it should. However, its imperfections aside, its aim was to limit the offence to a person in a defined relationship and to allow more scope for the police and prosecutors to deal with domestic abuse incidents. The scope of the offence that is created in amendment 63 applies far beyond domestic relationships or protecting the police from abuse. It can apply to one-off comments by anyone anywhere in Scotland, and carries a penalty of up to five years in prison. I believe that, in its current form, the offence created in amendment 63 could inadvertently interfere with civil liberties and free speech, as amendment 378 could have.

I lodged amendment 188 to encourage further debate on how best to tackle the consequences of the ruling in the Harris case. I agree with the

Government's intention and that action needs to be taken to allow the police and fiscals to charge and prosecute behaviour that would previously have been dealt with under breach of the peace.

My amendment, which was originally drafted by Labour's former Advocate General for Scotland, Lord Davidson, goes some way to demonstrating how the scope of such provisions could and should be narrowed. It is important that we act on the issue as quickly as possible, but that is not an excuse for badly drafted or wide-ranging provisions with unintended consequences. We must ensure that the issue is addressed without threatening freedom of speech. I hope that the Scottish Government will seek to withdraw amendment 63 and will go back to the drawing board and introduce a narrower provision that deals with the specific issues that have been highlighted.

Robert Brown: As has been said, this group of amendments deals with the consequences of the introduction of the separate offence of stalking, which was approved at stage 2, and the issues surrounding the definition of breach of the peace, following the decision in the Harris case, which indicated that such an offence could normally not be committed in private. That raised issues about the ability to prosecute domestic abuse in some situations and to charge people with offensive behaviour towards the police inside a police station.

I do not think that there is any difference over the policy intent. Everyone wants to sort out the breach of the peace problem, but there are three possibilities on offer. I suggest that we can dismiss John Lamont's amendment 188 fairly readily, although I do not dismiss the arguments that he gave in support of it, which were mainly valid. As he said, the amendment is reasonable in its own terms, but it is fairly clearly too narrow, in that it deals only with domestic abuse and does not cover civil partnerships. The central concern is that we do not want to criminalise actions that are expressions of opinion, even if they might distress other people. That is a fair point.

The second option is Government amendment 63, which is a somewhat reduced version of an attempt to establish what was more or less a statutory version of breach of the peace at stage 2, but which was withdrawn. The version in amendment 63 is open to the same objections as the earlier amendment was. It is a major change in the law that has not been consulted on. It could have all sorts of unintended consequences. I am not even sure that it gets rid of the need for a public element to the crime and, if it does, it probably places breach of the peace in a private place on a par with breach of the peace in public, which goes significantly beyond reversing the Harris judgment. In short, amendment 63 is cumbersome, does not add anything in clarity and loses a lot of the flexibility of a very useful common-law offence. Furthermore, it does not replace breach of the peace, but sits alongside it in uneasy symbiosis.

My amendment 189 offers a more satisfactory way forward, which is to modify only to the extent necessary the definition of the common-law breach of the peace crime. It brings in the Harris definition of behaviour that leads to a

"mischief to the public peace".

It says that the fact that something happened in private does not by itself stop it being a crime, but it leaves open the existing flexibility of definition and keeps in the likely consequence of fear and alarm. I think that my amendment does the trick and I hope that ministers and the Parliament will be attracted to it. However, like John Lamont, I believe that, if members are not satisfied with the amendments that are on offer, it would be better to go back to the drawing board and consider the issue again.

The stalking provisions were, rightly, a big success for Ann Moulds and her campaigners at stage 2. I support the Government amendments that will tighten up the provisions on stalking, but I am concerned that the new stalking offence might accidentally penalise people in situations in which they should not be penalised, particularly in the realm of public protest or industrial dispute. I gave the example of a picket at someone's workplace, which would normally be regarded as legal, but which could cause fear and alarm in other people. Similar concerns could be expressed about a protest march or demonstration. The response was that that would be covered by the defence of reasonableness in section 31B(5)(c). The minister went on to say that the defence that I had proposed was too wide. It would certainly knock out stalking, but there are other offences of assault, breach of the peace, intimidating behaviour and so on.

The defence in section 31B(5)(c) might be okay, but it seemed to me that the interrelation of the right of public protest, which is more a tolerance to do what is not forbidden, with the new stalking crime could in practice narrow what is allowed by way of demonstration or protest. That is the basis of my amendment 14. It is helpful and, at worst, does no harm. I hope that members will consider very carefully the situation and the important implications that come from it.

The Deputy Presiding Officer: I can give the remaining speakers in the group a maximum of one and a half minutes.

James Kelly: I will run through the issues briefly. I support the Government amendments that have been lodged in response to the amendment on stalking that Rhoda Grant lodged at stage 2. I pay tribute to her work on the issue and to the work of Ann Moulds and the anti-stalking campaigners.

I am minded to support Government amendment 63. As others have said, the provision has been tightened up and fine tuned since a similar amendment was debated at stage 2.

We have had concerns raised with us by churches that the amendment would inhibit their ability to take their religious teachings on to the street. I would be interested to hear the minister address those concerns in summing up.

We do not support amendment 188, in the name of John Lamont, which we believe is too restrictive as it relates only to those who are married or are in cohabiting relationships and does not deal with potential violence against children, elderly people or civil partners.

We do not support amendments 14 and 18, in the name of Robert Brown, which we believe are unnecessary as what they propose is covered by other amendments or existing law.

Nigel Don: Amendment 63 replaces stage 2 amendment 378, which we were not very happy about when it came to the Justice Committee. I point out to James Kelly and others who are concerned about freedom of speech that, if amendment 63 is agreed to, the bill will say that, to commit the offence, a person has to behave in a threatening and abusive manner, has to cause fear and alarm and has to intend to do so or be reckless as to whether they are doing so. The offence under the suggested provision is very much narrower than the one that was suggested at stage 2. It is very much narrower than the offence of breach of the peace, which would cover all that and a lot more. This response to the decision in the Harris case has created a very narrow offence. I do not think that we need have any worries about those who wish to preach anything at all. If the preaching of any gospel is threatening and abusive and likely to cause fear and alarm, I suggest that it should not be so preached.

One of the other issues that emerged is that the original amendment 378 did not have a title, which caused us some problems. When we were considering serious and organised crime—

The Deputy Presiding Officer: Wind up please.

Nigel Don: I am sorry. I will stop.

The Deputy Presiding Officer: I am obliged.

Patrick Harvie: Of the major amendments in this group, the Government's amendment seems the most preferable, for reasons that I do not have time to go into.

I welcome amendment 14. The minister's concerns about it are probably not legitimate. If behaviour that is unreasonable is part of a public protest, it seems to me that the public protest is unreasonable. Reasonable behaviour being part of the public protest should mean that the protest itself is reasonable.

The amendments to which I object—or which I at least question—are the two that look on the surface to be very minor amendments to section 31B, on the offence of stalking. I had concerns when that section was introduced that it perhaps went too far and could cover behaviour that should not be considered criminal. Those concerns were addressed and allayed to some extent earlier on. However, amendments 70 and 71, which will add "any means" of communication and change "tracing" internet activity to "monitoring" internet activity cause me concern. I am thinking in particular of the recent internet campaign against Carter-Ruck and Trafigura. Carter-Ruck—a legal firm vile enough, I am sure, to use any legal option to try to oppose internet activism—would no doubt be able to argue that monitoring internet activity was for the most part what people were doing. To add "any means" of communication to the section will leave open the possibility that honestly non-intrusive and passive internet activity—normal use of the internet—could be covered. I am sure that that is not what is intended, but I think that we run that risk if we agree to amendments 70 and 71.

Rhoda Grant (Highlands and Islands) (Lab): I support Government amendment 32, as opposed to amendment 188, in the name of John Lamont. He said in his opening comments that there were problems with it in that it covered only people who were married or cohabiting in a heterosexual relationship. We all know that people who are fleeing an abusive relationship are in most danger. Amendment 188 would not help such people. It would not help same-sex couples, elderly people who are being abused in their own home and children who are being abused. I urge the Parliament not to support amendment 188, although I recognise that it was intended to be helpful.

I thank the Government for its amendments to section 31B, on stalking, and for the work that it did with me and Ann Moulds to ensure that we were happy.

I do not support amendment 14, because it is not required. The defences in section 31B include showing that behaviour was lawful and reasonable. Any industrial action or public protest would fall into those categories.

Patrick Harvie expressed concerns about the insertion of the words "any means" and "monitoring". The crime of stalking must involve a course of conduct, not one incident. Stalking is insidious and involves behaviour that could be legal on its own.

12:15

Patrick Harvie *rose—*

Rhoda Grant: Do I have time to take an intervention?

The Deputy Presiding Officer *indicated disagreement.*

Rhoda Grant: I am sorry.

The reference to a course of conduct means that, if somebody watches someone else's activity but does no other activity to form the crime of stalking, the problem will not arise. I hope that I have convinced Patrick Harvie to back amendments 70 and 71.

Kenny MacAskill: I echo James Kelly in paying tribute to Rhoda Grant, whom we thank for raising the issue. Like him, I pay tribute to Ann Moulds.

We seek to address two matters, one of which is stalking, which is entirely unacceptable. We need to ensure that statutory provision to tackle that is in place. As I said, we thank Rhoda Grant and Ann Moulds for raising the issue and for their co-operation thereafter.

The second issue is ensuring that breach of the peace covers incidents that occur in a non-public place, such as officers being abused because of their service, which they should not have to endure, or cases of domestic violence when no witnesses are about.

I assure James Kelly that we recognise the fears that individuals and the Justice Committee were correct to express. Amendment 63, which is an amended version of a stage 2 amendment, restricts the offence to "Threatening or abusive behaviour". Removing the reference to distress will ensure that we do not inadvertently criminalise conduct that should not be criminal and which we do not intend to catch, while providing prosecutors and the police with a power that is wide enough to deal with the other matters. We are aware of and have taken on board the concerns of some in the Christian community and we have changed what was proposed in the stage 2 amendment, which we did not move.

I assure James Kelly and the whole Parliament that we have taken the appropriate action to deal with stalking and with breach of the peace offences in domestic violence situations or against police officers. We continue to guarantee that those who have Christian views can express their views without coming before the courts.

The Deputy Presiding Officer: The question is, that amendment 63 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Keith (Ochil) (SNP)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Margaret (Glasgow Baillieston) (Lab)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
MacDonald, Margo (Lothians) (Ind)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)

McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Against

Aitken, Bill (Glasgow) (Con)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Carlaw, Jackson (West of Scotland) (Con)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West of Scotland) (Con)
Hume, Jim (South of Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Edinburgh Pentlands) (Con)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
O'Donnell, Hugh (Central Scotland) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

The Deputy Presiding Officer: The result of the division is: For 92, Against 29, Abstentions 0.

Amendment 63 agreed to.

Amendment 188 not moved.

Section 31B—Offence of stalking

Amendments 64 to 67 moved—[Kenny MacAskill]—and agreed to.

Amendment 14 moved—[Robert Brown].

The Deputy Presiding Officer: The question is, that amendment 14 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Brown, Robert (Glasgow) (LD)
Finnie, Ross (West of Scotland) (LD)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South of Scotland) (LD)
MacDonald, Margo (Lothians) (Ind)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
O'Donnell, Hugh (Central Scotland) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

Against

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Margaret (Glasgow Baillieston) (Lab)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)

Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 16, Against 105, Abstentions 0.

Amendment 14 disagreed to.

Amendments 68 to 78 moved—[Kenny MacAskill].

The Deputy Presiding Officer: Does any member object to a single question being put on amendments 68 to 78?

Patrick Harvie: I object.

The Deputy Presiding Officer: Are there particular amendments that you wish to be taken separately?

Patrick Harvie: Amendments 70 and 71.

The Deputy Presiding Officer: We will go through the amendments.

Amendments 68 and 69 agreed to.

The Deputy Presiding Officer: The question is, that amendment 70 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Margaret (Glasgow Baillieston) (Lab)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Glen, Marlyn (North East Scotland) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Harvie, Christopher (Mid Scotland and Fife) (SNP)

Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McArthur, Liam (Orkney) (LD)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
O'Donnell, Hugh (Central Scotland) (LD)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicol (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Against

Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
MacDonald, Margo (Lothians) (Ind)

The Deputy Presiding Officer: The result of the division is: For 117, Against 3, Abstentions 0.

Amendment 70 agreed to.

The Deputy Presiding Officer: The question is, that amendment 71 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Margaret (Glasgow Baillieston) (Lab)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley)

(Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McArthur, Liam (Orkney) (LD)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
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Scott, John (Ayr) (Con)
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Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Against

Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
MacDonald, Margo (Lothians) (Ind)

The Deputy Presiding Officer: The result of the division is: For 117, Against 3, Abstentions 0.

Amendment 71 agreed to.

Amendments 72 to 78 agreed to.

After section 34C

The Deputy Presiding Officer: Amendment 6, in the name of Marlyn Glen, is grouped with amendments 79 and 7.

Marlyn Glen (North East Scotland) (Lab): I acknowledge and pay tribute to the work that Trish Godman has done on the issues that are addressed in the amendments in the group, which seek to introduce new sections into the Sexual Offences (Scotland) Act 2009 under which it would be illegal both to engage in and to advertise paid-for sexual activity. The penalty for so doing would be

"A fine not exceeding level 3 on the standard scale".

Margo MacDonald: Will the member give way?

Marlyn Glen: I would like to get started.

Basically, the first new section would make it an offence to buy sex using any form of payment, including payment in kind and presents.

The amendments are an attempt to recognise and deal with the exploitation, violence and abuse that are a reality for the majority of individuals—female and male—who sell sex. The amendments focus on the buyer of sex, acknowledge the harm of prostitution, challenge its acceptance and recognise the analysis of prostitution as being on the spectrum of violence against women. This Government accepts that analysis, as did the previous Government.

Margo MacDonald: Will the member now give way?

Marlyn Glen: I would like to move on.

Margo MacDonald: Will you define "sexual activity"?

The Deputy Presiding Officer: Order.

Marlyn Glen: Thank you, Presiding Officer.

For too long, interventions have focused solely on the women who are engaged in prostitution—in the main, it is women—and not on demand. It is high time that we started to work together to control the demand for paid-for sex and take further the provisions that we introduced in the previous session to tackle so-called kerb crawling. The legislation in that regard provides a deterrent that works. Members know that from examples in our constituencies where it has been used to excellent effect. We now need a further deterrent to curb the demand for buying sex. In particular, work must be done before the commencement of construction work for the Commonwealth games.

The amendments are not directed at women working in prostitution, but the dangers of commercial sexual exploitation cannot be ignored. Routes out of prostitution must continue to be recognised and supported.

At stage 2, concern was expressed about driving prostitution indoors and underground, but organisations such as the trafficking awareness-raising alliance have no difficulty finding and supporting women now, whatever their circumstances. I am confident that TARA and other, similar organisations will adapt and continue their services in new circumstances.

The bill is extremely wide ranging. I thank the members of and clerks to the Justice Committee for the work that they have put into it. However, I suggest that agreeing to amendments 6 and 7 would make a massive difference to the lives of many women, mainly young people, who could be helped to make different choices in their lives. If we take a lead, we can challenge the acceptance of and address the demand for paid-for sex.

I move amendment 6.

Richard Baker: At stage 2, we made clear our position that the best way of improving the law to deal with prostitution in Scotland is through the amendments that were originally lodged by Trish Godman and have been lodged for stage 3 consideration by Marlyn Glen. There is a persuasive argument that it is neither effective nor equitable to punish in law only those who sell sex, who are often vulnerable victims of abuse or self-abusers, when the behaviour of those who purchase sexual activity is not dealt with in the same way.

We already know that women are being trafficked into Scotland for the purpose of sexual exploitation. John Watson of Amnesty International highlighted the challenge that we face when he pointed out that

> “there have been no prosecutions for trafficking offences in Scotland, although there have been well over 100 in England and Wales.”—[*Official Report*, *Equal Opportunities Committee*, 15 June 2010; c 1865.]

I refer to the issue of trafficking because fears have been expressed across the chamber that there may be an increase in the number of women who are trafficked to Scotland for the purposes of prostitution as we approach the 2014 Commonwealth games. Parliament must set in place the right legislative framework to help us to deal best with the problem.

Although our preference is to change the law through the amendments in the name of Marlyn Glen, that proposal was rejected in committee and, I fear, will be rejected again today. I have lodged amendment 79 because not to include that proposal in the bill would be to leave Scotland with weaker laws to tackle prostitution than the rest of the UK. That would only provide encouragement to those who, right now, may be looking to the 2014 Commonwealth games as an opportunity to profit from the misery of trafficked women.

Nigel Don lodged the same amendment at stage 2 but withdrew it because it introduces strict liability. That is necessary, or it will be far too difficult to secure a conviction under the proposal. The previous UK Government concluded that the measure was compatible with European law, and it has been enacted in England and Wales. It will be an effective way of ensuring that those who pay for sex are forced to consider the circumstances of the prostitute who will provide the sexual services, while protecting those who have not chosen to be involved in prostitution. Making those who would purchase sex consider that there may be consequences for them will reduce demand for the purchase of sex and, hopefully, reduce trafficking, too.

We must challenge those who purchase sex to recognise the consequences and impact of their actions for the victims of prostitution and trafficking and, if they are convicted, for themselves. We cannot do that without changing the law. If Parliament does not do that today, it will not properly help those who find themselves in the appalling misery of being sexually exploited so that others can profit. There has been much talk about taking action on the issue—it is time to act by changing the law. We must not leave ourselves in a situation where our laws on this important and destructive area of crime are weaker than those in the rest of the UK. That is why I seek support for amendment 79, which I will move if the other amendments do not succeed.

The Deputy Presiding Officer: I am exercising my power under standing order 9.8.4A(c) to extend debate beyond the next time limit, to prevent the debate from being unduly constrained. However, members will need to constrain themselves to one and a half minutes.

Bill Aitken: There are difficulties with what is proposed. When the Justice Committee considered the matter, we called a number of witnesses, in a constructive attempt to get evidence on it. Frankly, that evidence was mixed. There is a unanimity of view in the chamber that no person should be forced into prostitution. The law is already in force to ensure that, where violence is involved, that is dealt with. The same is true of people trafficking. That is as it should be, because people trafficking is a very serious matter. However, there is no great evidence that it is a serious issue in Scotland.

Richard Baker: Will the member give way?

Bill Aitken: I am sorry, I do not have time.

The evidence that the police gave to the Justice Committee was that the approach that has been proposed would have a negative impact, in that it would inhibit the police's ability to investigate crime and bring to book those responsible.

I suspect that the members who lodged amendments 6, 7 and 79 at stage 3 are mindful of the recent appalling crimes in Bradford and other assaults on women who work as prostitutes. We are all very unhappy in that respect. However, we need to examine the matter much more deeply and in a more mature way. We all want to do what we can to eliminate prostitution, but we must acknowledge the realities and difficulties that are involved. There is not too much merit in the amendments.

12:30

Robert Brown: This is a valid debate. Many good points have been made, most of which I have some sympathy with. However, I remain opposed to amendments 6, 7 and 79, partly for the reasons that the convener of the Justice Committee has just given.

I will not repeat the argument that we made at stage 2, which was, in essence, that the approach that is proposed in amendment 6 represents a major change in an area that attracts widely differing views—and views tend to differ in different parts of Scotland. It seems unlikely that the oldest profession would be got rid of by an amendment to a Scottish Parliament bill that has not been fully consulted on or considered. There would be considerable scope for unintended consequences of a difficult nature.

I have more sympathy with amendment 79, in Richard Baker's name, which focuses on trafficking and coercion. I have spoken out on such matters in the past, and I do not accept Bill Aitken's point that there is no evidence that trafficking is an issue. We need only to consider the number of people whom TARA supports to appreciate the nature of the problem. The problem is not that trafficking does not happen in Scotland but that there have been no prosecutions for trafficking in Scotland.

However, the approach in amendment 79 is not likely to offer a way forward. It is an objectionable principle for a person to suffer the rigours of the law for factual aspects that he does not know about or which it was not reasonable for him to know about, which is the express objective of amendment 79, as Richard Baker conceded. It might be possible to penalise a person who had paid for sex with a person whom he knew had been trafficked, or who was reckless as to whether the person had been trafficked, but that is not the approach in amendment 79.

Elaine Smith (Coatbridge and Chryston) (Lab): I am grateful for the opportunity to speak in support of amendments 6 and 7, in Marlyn Glen's name.

Prostitution is predominantly male violence against women and children. The Government in Scotland has accepted that. Prostitution is not a career choice and it is not a profession, and women do not aspire to such a lifestyle. People who are involved in prostitution are generally vulnerable and get involved in it due to reasons such as previous abuse, poverty, substance misuse or trafficking.

The cloak of secrecy should be lifted from the men who buy sex. The social harm of their behaviour must be recognised and acknowledged. Prostitution is not a career choice or a simple business transaction; it is violence, it is exploitation and it is abuse. Women go to prison for it, but if anyone should go to prison it should be the pimps and the purchasers, not their victims.

Criminalising buyers would undoubtedly reduce demand for prostitution. I urge members to support amendments 6 and 7. We have an opportunity to make a real difference.

Stewart Maxwell: I very much support the intention behind the amendments in the group, although I cannot support the amendments themselves.

As we discussed at stage 2, there are problems with the approach that is proposed. I agree with Marlyn Glen's comments and I pay tribute to the people who work to support and help women out of prostitution. However, I agree with much of what Bill Aitken said, particularly about the evidence that the committee heard at stage 2. I also agree with much of what Robert Brown said.

I remain concerned about how "sexual activity" is defined. I will not go back over the debate that we had on the matter, in some detail, at stage 2. There are other basic questions and problems to do with the approach that is proposed in amendment 6. The activity goes on behind closed doors, so how does someone know what occurred and whether payment was involved, particularly if payment was in kind? Where will they get evidence for a prosecution? Who will be the witnesses? I suggest that none of the people involved will want to complain to the police or make a statement about what has or has not occurred. In other words, we would put the police in an impossible position, because the provisions would be unenforceable.

Many of the issues that I have raised could be dealt with, but they are not dealt with by amendments 6, 7 and 79. My main objection to the amendments is that the subject is too serious and complex to be dealt with by stage 3 amendments. If the matter is to be addressed properly, detailed study and research will be required before recommendations can be made and we can decide how to move forward. I urge the Parliament to reject the amendments.

Margo MacDonald: I feel a Danny Alexander moment coming on: I can scarcely add to what Stewart Maxwell said on the amendments in this group.

I appreciate the intensity and belief that lie behind much of the opposition to what I have campaigned for. However, we must define our terms. What are sexual activities? President Clinton’s idea of what amounted to sex was different from Monica Lewinsky’s. I am not being facetious: we have not attempted to say whether “sexual activity” means full intercourse or applies to people who want to engage in rather deviant behaviour but not sex. Are they allowed to pay for that or not, and what does “payment” amount to? Is it a nice night out at the casino and a visit to the races, getting the rent paid or gifts of jewellery? That is real life and real prostitution.

We do not have evidence of trafficking in Scotland because the police here are much better informed about what goes on in what we now must regretfully call the sex industry. Therefore, I urge all the members who want the Parliament to improve the legislation on coercion and violence against women to reject all the amendments in the group and to tackle the issue holistically at a proper and later date.

Johann Lamont: We do not need to call prostitution the sex industry. It is not a job or a lifestyle choice.

If the amendments in the group are not the way forward, it is incumbent on the Government to propose something else. We will not necessarily eradicate prostitution, but we have to address who the victims are. Marlyn Glen’s amendments 6 and 7 focus our attention on that—they do not accept that we have to live with prostitution or that there is something inevitable about it.

There are no exchanges of jewellery for prostitutes on the streets of Glasgow. We need to give them help and support rather than implying that it is another job choice when clearly it is not.

Kenny MacAskill: Nobody disputes that human trafficking is a heinous offence or that prostitution is a deeply complex matter in which people are abused and women are frequently the victims. Johann Lamont is correct that we have to take action. That is what we are doing, but we must ensure that we do not legislate in haste and repent at leisure in relation to this complex matter.

The committee has already taken evidence from a variety of sources. Indeed, the police and others have been wary about what we should do. What are we doing? First of all, significant action was taken in the previous parliamentary session to deal with on-street prostitution. There was to be further investigation into off-street prostitution and that, to some extent, is what we now seek to do because, after all, human trafficking tends to be off street by nature.

We introduced the Sexual Offences (Scotland) Act 2009, which brought in measures to ensure that we tightened up the legislation, so action has been taken. In the bill, action is being taken to increase the penalties for those who brothel keep because the levels of brothel keeping that were being dealt with were entirely unacceptable.

We must also recognise that the Equality and Human Rights Commission is undertaking an inquiry into human trafficking, which is chaired by Baroness Helena Kennedy. She has undertaken to include in that inquiry an investigation into off-street prostitution.

The Government has taken action. Let us see what Helena Kennedy concludes. The issue is deeply complex but I assure Johann Lamont and others that, if Helena Kennedy highlights matters that require legislation, we will not hesitate to take the necessary action.

Let us listen to what Helena Kennedy and others come back with and take appropriate action then.

Marlyn Glen: I am conscious of time, so I will sum up the debate by repeating that we should not miss this opportunity. Major change is required to stop commercial sexual exploitation. Prostitution cannot be regarded as a career choice, as has been said, nor as just another industry with workers.

In reply to Stewart Maxwell, I say that, sadly, similar arguments to his used to be made against the introduction of legislation against domestic abuse.

I ask members to take a lead and to challenge the acceptance of, as well as to address the demand for, paid-for sex. I ask them to vote for amendment 6.

The Deputy Presiding Officer: The question is, that amendment 6 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
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McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

Against

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
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Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
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Finnie, Ross (West of Scotland) (LD)
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Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kidd, Bill (Glasgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
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White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 44, Against 78, Abstentions 0.

Amendment 6 disagreed to.

Amendment 79 moved—[Richard Baker].

The Deputy Presiding Officer: The question is, that amendment 79 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

Against

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kidd, Bill (Glasgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McArthur, Liam (Orkney) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Central Scotland) (SNP)
O'Donnell, Hugh (Central Scotland) (LD)
Paterson, Gil (West of Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicol (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 44, Against 78, Abstentions 0.

Amendment 79 disagreed to.

After section 37A

Amendment 189 not moved.

Section 38—Prosecution of children

The Deputy Presiding Officer: We come to group 13, on the age of criminal prosecution. Amendment 190, in the name of Robert Brown, is the only amendment in the group.

Robert Brown: The age of criminal responsibility has been a difficult and, to an extent, controversial subject. I am disappointed that the Government has not fully grasped that and raised the age of criminal responsibility; instead, it has raised just the age at which prosecutions can take place. It may be that it intends to deal with the subject properly in the context of the Children's Hearings (Scotland) Bill. However, as the matter stands, Scotland is still left open to criticism under the United Nations Convention on the Rights of the Child; the bill also leaves issues about DNA retention and children's criminal records unsatisfactorily messy.

My amendment is designed to take matters a stage further and to give ministers power by affirmative instrument—obviously, with the consent of Parliament—to raise further in due course the age at which children can be prosecuted. There is a significant issue only at the age of 15, when the number of offenders that are prosecuted goes up substantially. Below that, there are few prosecutions of 12, 13 or 14-year-olds. Providing that the powers of the children's panels are adequate to protect the public, my view is that it is objectionable to put underage children through an adult court process. There is also another oddity, which is that the divide for the Sexual Offences (Scotland) Act 2009 is the age of 13, not 12. The Justice Committee adverted to that point earlier on. Interestingly, the Criminal Procedure (Scotland) Act 1995 even provides that no child under 14

> "shall be permitted to be present in court during any proceedings against any other person",

except as a witness; obviously, a different view is taken about people who are charged.

At eight, Scotland had the lowest age of criminal responsibility in Europe, modified only by the fact that most offenders of that age go to hearings. Eight remains the age of criminal responsibility, but even the age of 12 for prosecution is pretty low. I hope that amendment 190 will give us scope to reconsider the matter in a reasoned atmosphere when the time is right.

I move amendment 190.

Richard Baker: There has been extensive debate during the bill process about whether the Scottish Government's proposal to change the age of prosecution to 12 is the correct one, or whether the age of criminal responsibility itself should be changed. For our part, the crucial issue is to ensure that it should no longer be possible for children under 12 to be prosecuted in adult courts. I believe that the recent case in England in which two children who were accused of attempted rape were tried in an adult court highlighted the concern that that is not the appropriate forum for dealing with such matters, particularly as we have a successful children's hearings system with access to the same disposals as the courts have for children who are convicted of such offences. It is therefore difficult to see what could be gained by having such offences dealt with in adult courts.

12:45

There has been wider debate around changing the age of criminal responsibility. I believe that further debate on the issue is likely to focus on that point rather than on changing the age of criminal prosecution, as is suggested in Robert Brown's amendment 190. I also believe that his proposal to change the age of criminal prosecution, rather than the age of criminal responsibility, would require other changes to the children's hearings system and would need more extensive parliamentary consideration.

Therefore, I cannot see what could be gained by dealing with the matter by changing the age of criminal prosecution by statutory instrument rather than through that fuller debate. As Robert Brown said, we need to reconsider the whole issue, for which the full parliamentary procedure for primary legislation will be required.

The Deputy Presiding Officer: You must wind up, please.

Richard Baker: I believe that Parliament will return to these issues in the future. I concede that many of the age levels might be arbitrary, but I am not persuaded by the case that has been made by Robert Brown in amendment 190. There are likely to be further opportunities for fuller debate, to which we look forward.

Bill Aitken: Amendment 190 deals with a sensitive matter that has already attracted a considerable amount of debate. There can be no doubt that Scotland has to some extent been out on a limb, although I comment in passing that I am a bit fed up of being lectured on such matters by people from other jurisdictions that have scant regard for human rights more widely.

That said, the bill as it stands recognises that we need to do something while retaining a level of protection for wider society. In extreme situations, youngsters can do terrible things. Although the Bulger case and the recent case in Doncaster that involved two young boys are highly exceptional, we cannot permit a society in which other children—who are often the victims in such cases—have no protection.

The children's hearings system in Scotland is far from perfect, but it provides a valuable facility for dealing with youngsters that is missing from many of the other jurisdictions where people have been making criticisms. It is worthy of note that children under the age of 12 have been prosecuted in only a handful of cases in the past 10 years. Against the background of that fact, I am content that the bill as it stands does what is necessary and that Robert Brown's amendment 190 should be rejected.

The Deputy Presiding Officer: I ask the cabinet secretary to respond briefly to the debate.

Kenny MacAskill: We appreciate the spirit and intention behind what Robert Brown's amendment 190 seeks to achieve. However, as Richard Baker said, this sensitive matter has already been discussed and debated quite extensively by the committee during stage 2. It appears to us that we should leave matters as they are. On this side of the chamber, members of my party are prepared to consider moving on from where we are at some future stage. However, given the sensitivity of the issue, it should be dealt with not through subordinate legislation but through the full majesty of primary legislation, which is more appropriate.

On that basis, while recognising the spirit of what he is trying to achieve, and following the full discussion that we have had today, I ask Robert Brown to withdraw amendment 190.

The Deputy Presiding Officer: In winding up the debate, Robert Brown should say whether he will press or withdraw amendment 190.

Robert Brown: I will press amendment 190.

It is worth making the point that the issue is not about the disposal of such cases but about the procedure that underage children undergo. Frankly, I think that there is no division of principle—at least I hope not—among members about how younger children should be dealt with. However, we have been very—dare I say it—pusillanimous in the approach that we have taken, notwithstanding the views of many children's groups and others who support my proposal.

I appreciate that amendment 190 will be defeated today, but I hope that the issue will come back in some more satisfactory form in the future, because I think that there is a case to be made.

The Deputy Presiding Officer: The question is, that amendment 190 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Brown, Robert (Glasgow) (LD)
Finnie, Ross (West of Scotland) (LD)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South of Scotland) (LD)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
O'Donnell, Hugh (Central Scotland) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

Against

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Margaret (Glasgow Baillieston) (Lab)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
MacDonald, Margo (Lothians) (Ind)
Macintosh, Ken (Eastwood) (Lab)

Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 15, Against 108, Abstentions 0.

Amendment 190 disagreed to.

After section 40

The Deputy Presiding Officer: Group 14 is on victims' representations at Parole Board hearings. Amendment 4, in the name of Margaret Curran, is the only amendment in the group.

Margaret Curran: I lodged a similar amendment at stage 2, but decided to bring the issue back at stage 3. At stage 2, the proposal was agreed in principle, and the minister indicated that he would introduce the proposal. Nothing has happened yet, although I appreciate that the minister will drive the proposal forward. However, this is an opportunity for the Parliament's voice to be heard in support of ministerial action. Surely it is right for Parliament to express a view on such an important proposal.

As I said, the principle was agreed at stage 2, and I welcomed the Government's support, which helped to overcome the arguments that were made. Some of those arguments misunderstood the proposal while others were of a largely practical nature and could be addressed in guidance on implementing the proposal.

Amendment 4 is clear, specific and straightforward. Section 16 of the Criminal Justice (Scotland) Act 2003 allows individuals to submit in writing to the Parole Board their views on decisions that the board might take. Amendment 4 goes a small step further by guaranteeing the victim's right to make oral representation. We need to understand that, for a variety of reasons, many individuals find it difficult to make written representations. Written reports, particularly in the circumstances that are under consideration, might not fully capture the victim's experience or fully explain what they want the Parole Board to take into account. Further, the amendment will assure us that the Parole Board will not make its decision without fully comprehending the victim's experience and the impact of its decision.

To be clear, amendment 4 will not change the objectives or operations of the Parole Board. In fact, what is proposed already happens in England and Wales quite straightforwardly.

Amendment 4 represents a small but important step forward for the rights of victims, and I hope that Parliament will take the opportunity to show its support today. The Parole Board hears from many people, including criminologists and social workers, so surely it should hear from victims as well. That is what amendment 4 is about.

I move amendment 4.

Bill Aitken: I have already indicated some sympathy for the proposal, but I have serious concerns about its workability. The majority of those who appear before the Parole Board will have spent many years in custody for crimes that they committed in the distant past. Over that time, many of the victims of those crimes will have moved elsewhere and there will be practical difficulties in tracing them. The same will apply when the families of murder victims have moved elsewhere in the country or, in the case of elderly parents, have died of natural causes.

There are also all sorts of difficulties around the Parole Board atmosphere becoming a little bit charged, because inevitably it deals with emotive matters. Margaret Curran's intentions are undoubtedly good, but amendment 4 contains practical difficulties that have not really been addressed.

Nigel Don: I support Bill Aitken, although I am absolutely with the principle of amendment 4 and the idea that some people have something to say to the Parole Board but would struggle to write it. However, Parole Board proceedings could rapidly turn into a court-type situation, where people would need to be represented and there would be the opportunity for cross-examination. Amendment 4 would create a problem rather than a solution.

Fergus Ewing: Margaret Curran's amendment 4 is similar to her stage 2 amendment on the topic, and we acknowledge the changes that she made to meet some of the concerns. The amendment takes us a bit further. Unfortunately, she has failed to lodge a workable amendment. We are particularly concerned that, as drafted, amendment 4 could mean some victims emerging fearful or traumatised by having to relive the crime at Parole Board hearings, where they would be in close proximity to the offender. That is clearly not what Margaret Curran wants.

Margaret Curran is right that we indicated that we accepted in principle the right of victims to make oral representations to the Parole Board in serious cases, which is why I undertook to put together proposals that would achieve just that. Just to be clear, we did not pledge to lodge amendments to that effect at stage 3, as we recognised that it would not be possible to do that. However, we have already taken steps to improve the victim notification scheme by extending it to victims of those offenders who are sentenced to 18 months or more in prison.

We have also formed a working group to consider the practicalities of the matter—and there are some serious practicalities. Bill Aitken has alluded to some, but there are others. At present, representations are made to the Scottish ministers, who can redact sensitive information. That would not be possible under the scheme in amendment 4. Also, solicitors would be excluded, but what would happen if someone who could not speak or did not have a friend or family member who could speak for them needed a solicitor? The procedure in Margaret Curran's amendment 4 would prevent that.

We have the support of both David McKenna of Victim Support Scotland and Professor Cameron of the Parole Board for Scotland, both of whom agree that our approach in setting up a working party is the correct way forward. To proceed in haste would perhaps cause us to repent at leisure. Therefore, although we agree with the sentiments behind amendment 4, I respectfully suggest that we take more time to consider the issue and come forward with a workable and effective scheme for victims in Scotland so that they have the right to make oral representations, when appropriate, at Parole Board hearings.

Margaret Curran: I am surprised by the Tories' decision and confused by the SNP's decision.

I am surprised by the Tories, who seem to be putting hurdles in the way of what is a straightforward proposal. I must say to Bill Aitken that of course emotion is involved in such circumstances, but we should not deny victims the right to speak in case they get emotional or say that professionals are more objective so there is more value in their comments. That is most unfair on victims.

I am confused by the SNP's position, too. I acknowledge that I did not anticipate the Government's lodging amendments at stage 3, but having lodged the stage 2 amendment I expected progress to be indicated somewhere along the line.

Nigel Don seemed to argue against amendment 4 in principle, as if somehow it would mean that the court case would be re-enacted. That would not be the case. The proposal is straightforward: it would allow the victim's voice to be heard, and it has been implemented in England and Wales without the terrible problems that the Government seems to be worried about. I accept that a working group is a reasonable way forward, but I do not think that there is any harm in voting for amendment 4, thereby saying that Parliament's view is that victims should be heard—if prisoners are heard, victims should be heard too; that is a straightforward principle—and allowing the working group to be established by guidance as a way of implementing the proposal.

I do not see what the big difference is, so I think that we should agree to amendment 4 in order that, yet again, we take a step forward in supporting the rights of victims and allowing their voices to be heard whenever we can make that happen.

The Deputy Presiding Officer: The question is, that amendment 4 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
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Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
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Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

Against

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kidd, Bill (Glasgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McArthur, Liam (Orkney) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Central Scotland) (SNP)
O'Donnell, Hugh (Central Scotland) (LD)
Paterson, Gil (West of Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicol (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 43, Against 78, Abstentions 0.

Amendment 4 disagreed to.

Section 46A—Dockets and charges in sex cases

The Deputy Presiding Officer: We come to group 15, on aggravation by intent to rape. Amendment 80, in the name of the minister, is the only amendment in the group.

Kenny MacAskill: Amendment 80 is a technical amendment that provides that it shall be competent to libel a charge of assault or abduction with the aggravation that it was committed with the intent to commit rape, by reference to the statutory offences of rape and rape of a young child at sections 1 and 18 of the Sexual Offences (Scotland) Act 2009.

There is some uncertainty as to whether a court would accept as competent and relevant a charge that the accused committed the common-law offence of assault or abduction with the intent of committing the statutory offence of rape or rape of a young child. For the avoidance of doubt, the amendment is intended to ensure that the Crown will continue to be able to charge the offences of assault and abduction with the aggravation that they were committed with the intent of committing the offence of rape when the common-law offence of rape is repealed and replaced with the statutory offences in the 2009 act.

I move amendment 80.

13:00

Bill Butler (Glasgow Anniesland) (Lab): Amendment 80 seems to be an uncontroversial, technical addition to previous Scottish Government amendments in the area. The bill, as amended at stage 2, provides a statutory basis for the use of a docket attached to an indictment or to a complaint by the Crown informing the defence of the Crown's intention to lead evidence of an offence that has not been charged. That approach might be used when a complainer alleges that a more serious sexual offence than that which has been charged was committed against her but there is sufficient corroborative evidence to support only a less serious charge. That approach, which was proposed by the Scottish Government, was supported unanimously by the committee at stage 2. On that basis, Labour will support amendment 80.

Amendment 80 agreed to.

Section 59—Retention of samples etc from children referred to children's hearings

The Deputy Presiding Officer: We come to group 16, on DNA retention: children referred to children's hearings. Amendment 81, in the name of the minister, is grouped with amendments 191, 192 and 16.

Fergus Ewing: Amendment 81 inserts a new subsection into section 18B of the Criminal Procedure (Scotland) Act 1995, which concerns the retention of prints and samples from children who have been referred to children's hearings. Amendment 81 addresses the particular concern—which, I believe, was shared by the committee—that forensic data should not be retained from children who have been involved in only minor assaults.

Section 18B(6) of the 1995 act provides that relevant offences for the purposes of section 18B are such relevant sexual or violent offences as Scottish ministers may prescribe by order. The offences must be taken from the list of relevant violent and relevant sexual offences that is set out in section 19A of the 1995 act. The list is fairly extensive and includes, for example, rape, indecent assault and sodomy, in the case of sexual offences, and murder, assault and abduction, in the case of violent offences.

Amendment 81 widens the scope of section 18B(6) of the 1995 act. It provides for an order to be made by Scottish ministers under section 18B(6) to prescribe a relevant violent offence by reference to a particular degree of seriousness rather than by reference simply to the list of offences in section 19A of the 1995 act. Amendment 81 will, for example, allow ministers to prescribe by order that only serious assaults—not all assaults—will be relevant offences and lead to the retention of forensic data that are collected from children. That will allow a more flexible and proportionate approach to be taken to the definition of offences that are carried out by children that can lead to the retention of forensic data.

Amendment 16 changes the process by which a sheriff will extend the retention period. Robert Brown lodged an identical amendment at stage 2 and it was rejected. We believe that the arguments that were used against the amendment then apply now. He urges that Scottish ministers should be able to set out grounds, but he does not set out what those should be. He urges that we should consult, but he does not say whom we should consult. We believe that amendment 16 would see powers pass to Scottish ministers from the police and the courts, who are the people with the expertise and ability to consider individual cases, therefore we do not believe that Mr Brown's amendment 16, which was rejected by the committee, should be supported today. I urge Parliament to reject the amendments in the name of Robert Brown.

I move amendment 81.

The Deputy Presiding Officer: I again exercise my power under rule 9.8.4A(c) to extend the time limit for this group of amendments. Members should be reassured that not many members want to speak to them.

Robert Brown: I am in a somewhat invidious position between discussion of this group of amendments and lunch time, but it is an important debate.

Most people agree that DNA from children should be retained only in exceptional circumstances. The Government's approach has been to prescribe the list of offences—with some difficulty, it is fair to say—that are covered by assault, minor assault, severe assault and so forth. I accept that the list of offences that has been developed is, at least, workable. Nevertheless, my view—which is supported by Scotland's Commissioner for Children and Young People and others—is that the children's hearings system is a welfare system, and that the retention of DNA and fingerprints should occur only in cases that have serious implications for public safety. Furthermore, that should be done only by application to the court within three months of the grounds for referral being established or accepted.

We should remember what we are dealing with in numbers. Parliamentary questions in April established that the DNA profiles of only 31 youngsters aged 12 to 15 were on the Scottish DNA database and that the database contained no profiles of anyone aged under 12. The retention of DNA samples from children is already highly unusual. It should stay that way and be subject to specific request.

Because of the time, I will not go into further detail, but I will conclude by saying that we have prided ourselves on the fact that the general regime of DNA retention in Scotland has proved to be robust and ECHR-compliant, unlike the situation in England. I urge the chamber to be similarly robust on the retention of children's DNA.

It is easy to claim that the more DNA is retained, the more crimes will be prevented. However, DNA remains a matter of fact and circumstance, and retention must be justified against proper criteria.

James Kelly: I support the use of DNA as a tool in fighting crime, particularly in Scotland, where we have 2,000 unsolved rapes and rape convictions are at a 25-year low. DNA can be used to combat that situation.

The amendments in this group deal with the sensitive issue of children's DNA. I do not support Robert Brown's amendments 191 and 192, because they seek to weaken the existing regime and make it more difficult to retain DNA correctly. I also do not support amendment 16. I concur with the minister that it is incorrect to pass to ministers powers on extending timetables for DNA retention—it is correct that such matters should be decided by sheriffs, as appropriate.

I support the Government's amendment 81, which clarifies issues around serious offences and takes on board some of the concerns that I expressed at stage 2.

Bill Aitken: The issue of serious offences was canvassed at the Justice Committee, where issues around the lack of specificity were raised. Amendment 81 deals with the required definitions.

Amendments 191 and 192 represent views that Robert Brown holds sincerely, and he has been active in pursuing them for quite some time. However, I heard nothing new in his arguments today to persuade me that my decision on the matter when it came before the Justice Committee was incorrect, therefore my party will not be supporting his amendments.

The Deputy Presiding Officer: The minister has indicated that he does not wish to wind up.

Amendment 81 agreed to.

Amendment 191 moved—[Robert Brown].

The Deputy Presiding Officer: The question is, that amendment 191 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Brown, Robert (Glasgow) (LD)
Finnie, Ross (West of Scotland) (LD)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South of Scotland) (LD)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
O'Donnell, Hugh (Central Scotland) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

Against

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Margaret (Glasgow Baillieston) (Lab)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Henry, Hugh (Paisley South) (Lab)

Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
MacDonald, Margo (Lothians) (Ind)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 15, Against 105, Abstentions 0.

Amendment 191 disagreed to.

Amendment 192 not moved.

Amendment 16 moved—[Robert Brown].

The Deputy Presiding Officer: The question is, that amendment 16 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Brown, Robert (Glasgow) (LD)
Finnie, Ross (West of Scotland) (LD)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South of Scotland) (LD)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
O'Donnell, Hugh (Central Scotland) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

Against

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Margaret (Glasgow Baillieston) (Lab)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)

Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
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Peattie, Cathy (Falkirk East) (Lab)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 15, Against 104, Abstentions 0.

Amendment 16 disagreed to.

The Deputy Presiding Officer: As some members have anticipated, that concludes this morning's proceedings.

13:10

Meeting suspended.

14:30

On resuming—

The Presiding Officer (Alex Fergusson): Good afternoon. The first item of business this afternoon is continuation of stage 3 proceedings on the Criminal Justice and Licensing (Scotland) Bill. I remind members that in dealing with amendments they should have before them the bill as amended at stage 2, which is SP Bill 24A; the marshalled list, which is SP Bill 24A-ML; the correction slip to the marshalled list; and the groupings. I also remind members that, as was the case this morning, the division bell will sound and proceedings will be suspended for five minutes before the first division. We will have a voting period of one minute for the first division after a debate and all other divisions will be 30 seconds.

Section 66—Witness anonymity orders

The Presiding Officer: We come to group 17. Amendment 82, in the name of the cabinet secretary, is grouped with amendments 83 to 89.

Fergus Ewing: Amendments 82 to 89 set out in more detail the way in which applications for witness anonymity orders can be made and how appeals arising out of such applications are to be dealt with, in particular at what points appeals must be made. The amendments are mainly technical and are designed to make the arrangements workable in practice. The overall principle behind the amendments is to ensure that the anonymity of a witness can be protected until an application for a witness anonymity order is determined. I have several more pages of speaking notes, but I propose simply to leave it there and say that I am happy to deal with any specific queries on amendments.

I move amendment 82.

Bill Aitken: On amendment 86, it is most unlikely that many summary cases will be involved. On amendment 87, perhaps I may have an explanation from Mr Ewing as to why it was felt necessary to restrict the appeal to such an extent that it must be granted by the court of first instance. I would have thought that normal appeal procedures in such matters would suffice. Those are small and minor points, but I look for some reassurance, in particular on amendment 87.

Fergus Ewing: On amendment 87, the judgment is a matter of balance. The granting of a witness anonymity order is a serious matter and it should be appealable. However, we want to safeguard against spurious appeals or delaying tactics and have concluded for that reason that there should be leave to appeal.

Amendment 82 agreed to.

Amendments 83 to 89 moved—[Fergus Ewing]—and agreed to.

Section 68A—Excusal from jury service

The Presiding Officer: We come to group 18. Amendment 90, in the name of the cabinet secretary, is grouped with amendments 91, 92 and 186.

Fergus Ewing: At stage 2, the Justice Committee agreed to amendments proposed by David McLetchie and supported by Age Scotland to remove the upper age limit for jury service in criminal trials. The amendments provided that those aged 71 or over be entitled to be excused from jury service as of right. In other words, those aged 71 or over may serve on juries in criminal trials but do not have to if they do not wish to.

The committee also agreed to our amendments to provide that persons who seek excusal as of right do so within seven days of receipt of the revisal notice, which is the first warning of potential jury service. As I said at the time, there is an interaction between our amendments and David McLetchie's amendments. Amendments 90 to 92 and 186 seek to address that interaction. Although we believe that it is correct that most people seeking excusal as of right should do so at the earliest opportunity, which is desirable in managing court business from the Scottish Court Service's point of view, we do not believe that it is either fair or practicable to expect all those in the age group 71 or over to be able to comply with that. In consultation with the Scottish Court Service, we have decided that that age group should be able to seek excusal as of right at any time up to any trial diet to which they might eventually be cited. The Scottish Court Service has confirmed that it is ready to make the necessary operational arrangements to allow that to happen.

The other amendments in the group are minor, technical amendments, which tidy up the juror provisions.

I move amendment 90.

David McLetchie (Edinburgh Pentlands) (Con): I compliment the minister on lodging this group of amendments, which complement and, as he said, interact with the amendments that I lodged at stage 2 and which the Justice Committee supported. The combined effect will be to take Scotland ahead of the game, rather than just catching up with England, which we were doing before. I understand that a similar measure is under active consideration by the Ministry of Justice in England, and I hope that this entirely sensible proposal will be adopted there, as it will be adopted by us today, and that, on that issue at least, the Lord Chancellor and I will be in complete harmony.

Bill Butler: I support the amendments in the name of the cabinet secretary, and I agree with Mr McLetchie's remarks. That does not make us a holy trinity, of course.

The amendments are sensible. They make a number of changes to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 relating to the excusal system for jurors. Amendment 92 sets out the rules about excusal for people aged 71 and over, and they seem eminently reasonable and worthy of support. Similarly, amendment 91, which relates to serving members of the forces, should be backed. Labour views the amendments in the group as tidying amendments, and we will support them.

Fergus Ewing: I am interested to hear David McLetchie's remarks that we are catching up on England. I look forward to the day when England catches up with us in relation to short sentences.

Amendment 90 agreed to.

Amendments 91 and 92 moved—[Fergus Ewing]—and agreed to.

Section 72—Closure of premises associated with human exploitation etc

Amendment 7 not moved.

Section 79A—Spent alternatives to prosecution: Rehabilitation of Offenders Act 1974

The Presiding Officer: We come to group 19. Amendment 93, in the name of the cabinet secretary, is grouped with amendments 94 and 95.

Fergus Ewing: Amendment 93 is a minor amendment to ensure that all the alternatives to prosecution are covered within the definition of "ancillary circumstances" contained in paragraph 2 of the new schedule 3 to the Rehabilitation of Offenders Act 1974. It was felt that the current wording would exclude anything that had been done or undergone in pursuance of a work order under the current definition.

Amendments 94 and 95 were lodged to correct errors in relation to the order-making powers that are referred to in paragraphs 6(a) and 6(b) of new schedule 3 to the 1974 act. They do not change the policy intention. The amendments ensure that our provisions mirror the existing order-making powers of the Scottish ministers under the 1974 act for spent convictions, but apply them to alternatives to prosecution.

I move amendment 93.

Amendment 93 agreed to.

Amendments 94 and 95 moved—[Fergus Ewing]—and agreed to.

Section 85—Meaning of "information"

The Presiding Officer: We come to group 20. Amendment 193, in the name of the cabinet secretary, is grouped with amendments 96, 97, 101, 102, 104, 107 to 110, 112, 114 to 116, 142, 146, 150 and 153.

Kenny MacAskill: All the amendments in the group are necessary minor and technical amendments to part 6 of the bill, concerning the disclosure of evidence by the prosecutor to accused persons in criminal proceedings.

Amendments 96, 97, 101, 102 and 104 extend the definition of "conclusion of the proceedings" where it appears, in certain sections of the bill, to include circumstances where the accused is convicted and then appeals against the conviction before the expiry of the time that is allowed for the appeal. The amendments are necessary because they complete the picture as to what "conclusion of the proceedings" means.

Amendments 150 and 153 amend sections 111 and 111A, also in relation to the meaning of the term "conclusion of the proceedings". Amendments 193 and 109 amend sections 85 and 92 to ensure that they apply to the whole of part 6, rather than just to some sections.

Section 96F sets out the prosecutor's duty of disclosure in cases in which the accused has been convicted and does not appeal the conviction. Amendment 107 seeks to clarify the duty of the prosecutor under section 96F by making it clear what the reference to "earlier proceedings" means—they are the proceedings in which the person was convicted. Amendment 108 is consequential to amendment 107.

Amendment 142 will extend the definition of non-attendance order that is provided in section 106B(5). Amendment 146 will amend section 107B(4) to make it clear that special counsel must not communicate with the accused's representative about applications or appeals in which special counsel has been appointed unless the court has given permission.

Amendments 110, 112, 114, 115 and 116 seek to alter the order of the provisions so that the general provisions come after all the provisions to which they apply.

I move amendment 193.

Amendment 193 agreed to.

Section 87—Continuing duty to provide information: solemn cases

Amendment 96 moved—[Kenny MacAskill]—and agreed to.

Section 88B—Continuing duty of investigating agency: summary cases

Amendment 97 moved—[Kenny MacAskill]—and agreed to.

Section 89—Prosecutor's duty to disclose information

The Presiding Officer: We come to group 21. Amendment 98, in the name of the cabinet secretary, is grouped with amendments 99, 100, 17 to 19, 103, 20 to 23, 105, 106, 24 to 27, 148 and 28 to 32. I draw members' attention to the pre-emption information that is given on the list of groupings.

Kenny MacAskill: Amendments 98 to 100, 103, 105, 106 and 148 are Government amendments that seek to make minor and technical amendments to provisions in part 6 of the bill that deal with disclosure of information in criminal proceedings.

Amendments 103 and 106 are necessary to avoid duplication of effort so that when the prosecutor is required to disclose information under any of the relevant provisions of part 6, he or she need not disclose the same information more than once. Amendment 98 will remove similar provision from section 89 in consequence of amendment 103.

Amendments 99 and 100 seek to amend section 90 to clarify that, in solemn first instance cases only, the prosecutor need only provide certain specified information.

Amendment 105 is a minor technical amendment to section 96, which seeks to insert a reference to a provision concerning defence statements that was added at stage 2.

Amendment 148 deals with the interplay between the prosecutor's statutory duty of disclosure and the effect on it of a court order for non-disclosure of certain appeals by the prosecutor or secretary of state against section 106, section 106A and ancillary orders. The amendment is necessary to make it clear that until the appeal is determined or abandoned, the prosecutor must not disclose the information in question, in order to protect the public interest at stake until the court has made a final determination.

Robert Brown's amendments deal with two different but related aspects of part 6—defence statements and court rulings on materiality—which are highly technical and complex matters. I am aware that the Solicitor General for Scotland has discussed those issues with various people, and I have no doubt that he will have explained things much more eloquently and confidently than I could have done but, given the complexity, I will try to explain what we are doing.

On defence statements, we accept that sections 94, 95 and 95A deal with highly technical procedural matters, but the underlying principles at their heart are simple. The accused provides a defence statement, in the light of which the prosecutor considers whether anything further needs to be disclosed. If the prosecutor decides that no further information needs to be disclosed and the accused is dissatisfied with that decision, he can apply to the court for a ruling on whether the information needs to be disclosed.

We accept that the provisions are detailed, but that detail is necessary to set out clearly for accused persons what they are required to do. There can be no room for uncertainty here. Our position on the need for defence statements is simple and twofold.

First, the provisions of the bill as drafted are designed to ensure that all that should be disclosed to the accused for them to receive a fair trial is disclosed. That is absolutely fundamental. We cannot risk something not being disclosed inadvertently and through no fault of the prosecutor because they did not appreciate, and could not have appreciated, its significance. That is not fair or just. Requiring defence statements in solemn cases is the best way confidently to secure disclosure to the accused of all the information that needs to be disclosed to him and, as a result, a fair trial. It is also a more efficient and effective way for justice to be delivered.

Secondly, if the defence seeks additional information, it should be required to provide some information to explain the materiality and relevance of the information that is sought. If the defence is to challenge lack of disclosure, we believe that it must be required to explain why it is challenging it and, in doing so, must refer to the aspects of the accused's defence to which it says that the information is material and relevant. The issue is one not of payment, as the Glasgow Bar Association suggested in its submission, but of proper argument being made in what is, after all, an adversarial system.

We recognise the complexities in these matters, and I am aware that Robert Brown has lodged amendments to deal with particular issues. He suggested at stage 2 that these provisions are unnecessary, and that the court would have implicit powers to rule on disclosure or perhaps even to request a review of new information.

However, we are creating an entirely new statutory regime, and if we wish the court to have particular powers, or if we want remedies to be available to parties in criminal proceedings, we need to set them out as part of that regime. I am conscious that Robert Brown has not lodged similar amendments with regard to sections 96D and 96H, which apply the equivalent scheme in relation to disclosure and appellate proceedings.

It is difficult to follow the logic in that. If the procedure is necessary in the course of an appeal, it must also be necessary in the first instance. The prosecutor has duties of disclosure at both stages, and although those differ in substance, the underlying principle—namely, to ensure that the accused has disclosed to the prosecutor all that is required to secure a fair trial—is identical. I therefore urge members to reject all the amendments lodged by Robert Brown.

I am happy to give further clarification beyond that which, I hope, the Solicitor General has already managed to give. These provisions are about ensuring that we provide balance. The matter is complex and technical, but we need to ensure that in an adversarial system, the system is equitable to the prosecutor and to the defence.

I move amendment 98.

14:45

Robert Brown: As the cabinet secretary rightly says, this area is very complex, and I am loth to push against the Government on such matters. However, the issue of disclosure has been difficult, and the committee was bothered by the sheer extent of the sections of the bill that deal with it.

At stage 3, therefore, I have not gone there—I have dealt with the issue of the defence statement, which also bothered the committee. It may have been satisfactory to the prosecution, but it bothered many of the senior figures with judicial and legal expertise who gave evidence to the committee.

Amendments 17 to 32 are intended to remove the requirement for the defence statement, which is a straightforward issue in one sense. For convenience, I indicate to members that if amendment 17 is rejected, I will not move amendments 18 to 32—although that is not intended as an inducement with regard to how members might vote later on.

The committee heard highly persuasive evidence at stage 1 from senior judicial and legal sources. Lord Coulsfield, who is the expert in this field, said in his report that the experience of English practitioners was

> "that in the majority of cases defence statements are late, unspecific and unhelpful"

and that it would be difficult to make the system work better through more rigorous enforcement

> "without either causing delay, or prejudicing a legitimate defence or both."

He took the view that

> "In Scotland there are well-established rules"

for notification of the existing special defences, and that the relatively new mechanisms for holding pre-trial hearings fulfilled most of the functions that are expected of defence statements. He went on to state in the report that he was not

> "convinced that a general requirement for a defence statement would give any significant additional benefit, to justify the additional work and cost which would be generated."

It is quite a bureaucratic process. Lord Coulsfield told the committee:

> "Requiring the preparation of defence statements would have a cost in time and expense, and they could cause confusion and delay and add to complexity in the conduct of trials."—[*Official Report*, *Justice Committee*, 2 June 2009; c 2003.]

Similar views were expressed by the Sheriffs Association, the Law Society of Scotland and the Faculty of Advocates.

Defence statements are something of an import from English procedure. The objections to them are that they are unnecessary and will not be used. They are unnecessary because there are already well-established special defences of alibi, impersonation, self defence and so on in Scots law that cover most of the usual situations.

The Crown argues that defence statements are needed in fairness to the defence, so that the prosecutor knows what it is likely to be relevant to disclose. I accept that, but others say that it could be covered by the defence lodging—if appropriate and necessary—a voluntary defence statement. A compulsory statement is overbureaucratic and will add to the expense and complication of cases to little advantage.

The minister has not made the case for defence statements, and he certainly has not overridden the expert evidence that the committee received at earlier stages on the difficulties that relate to this particular matter. I am unhappy that we are seeking to import something from a different legal jurisdiction, in a different situation, into the Scottish jurisdiction, which has at its heart simplicity and clarity in dealing with such matters.

I urge support for amendment 17 in particular.

Bill Aitken: When disclosure was discussed, I too favoured the minimalist approach that is favoured by Lord Coulsfield. The net result of my efforts was to see the bill extended by a further 30 pages.

I have some sympathy for Robert Brown's submissions in this respect. For the second time today, he and I are perhaps unique in agreeing that the bar over which the Crown must get should be a high one. Since the matter was determined, however, I have discussed it at some length with the Solicitor General. As has been said, there are at least several instances in which an accused person, in lodging a special defence, has in effect to provide a defence statement. The purpose of that well-established procedure is to ensure that the Crown has the opportunity to investigate exculpatory evidence to see whether it stands up. There are occasions when that would benefit the accused and might, in fact, result in the dropping of an indictment. Accordingly, there is a question of balance. While I am largely persuaded by Mr Brown's eloquence on this matter—I am not prejudiced by the inducement that he offered—I am not prepared to support his proposal at this stage. It is a question of balance, but I think that the existing position is preferable.

Kenny MacAskill: I appreciate how complex the issue is. I also appreciate Bill Aitken's comment that, notwithstanding the Justice Committee's comments, matters increased exponentially. We have not departed lightly from Lord Coulsfield's recommendations, which were fully consulted on. The provisions that we have brought forward are broadly the same in effect as those that apply in England, Wales and Northern Ireland. Those places have, as Mr Brown quite correctly said, a different system, but we are basically fleshing out our own system. We are just ensuring that the balance is the same. I appreciate that our provisions are complex and, to an extent, I apologise for the complexity. However, it was felt necessary to have these complex provisions, which will ensure that justice is served and that the Crown is aware of what information it must provide. As I said, if it could have been done in a simpler, shorter form, we would have done so. However, the provisions will ensure that justice is done. I do not think that Robert Brown's amendments are required.

Amendment 98 agreed to.

Section 90—Continuing duty of prosecutor

Amendments 99 to 101 moved—[Kenny MacAskill]—and agreed to.

Section 94—Defence statements: solemn proceedings

The Presiding Officer: Amendment 17, in the name of Robert Brown, has already been debated with amendment 98. I ask Robert Brown whether he will move or not move amendment 17.

Robert Brown: In the circumstances, I will not move amendment 17. I do not want to push a technical matter of this sort against the Government's opposition.

Amendment 17 not moved.

Section 95—Defence statements: summary proceedings

Amendment 102 moved—[Kenny MacAskill]—and agreed to.

Amendment 18 not moved.

Section 95A—Change in circumstances following lodging of defence statement: summary proceedings

Amendment 19 not moved.

After section 95A

Amendment 103 moved—[Kenny MacAskill]—and agreed to.

Section 95B—Application by accused for ruling on disclosure

Amendment 20 not moved.

Section 95C—Review of ruling under section 95B

Amendment 104 moved—[Kenny MacAskill]—and agreed to.

Amendment 21 not moved.

Section 95D—Appeals against rulings under section 95B

Amendment 22 not moved.

Section 96—Effect of guilty plea

Amendment 23 not moved.

Amendment 105 moved—[Kenny MacAskill]—and agreed to.

Section 96D—Application to prosecutor for further disclosure

Amendment 106 moved—[Kenny MacAskill]—and agreed to.

Section 96F—Further duty of prosecutor: convicted persons

Amendments 107 and 108 moved—[Kenny MacAskill]—and agreed to.

Section 92—Redaction of non-disclosable information by prosecutor

Amendments 109 and 110 moved—[Kenny MacAskill]—and agreed to.

Section 97—Means of disclosure

The Presiding Officer: We come to group 22. Amendment 111, in the name of the cabinet secretary, is grouped with amendments 113, 117 to 141, 143 to 145, 147, 149, 151, 152 and 154 to 162. I call members' attention to the pre-emption information that is shown on the list of groupings.

Kenny MacAskill: Amendments 117 to 141, 143 to 145, 147, 149, 151, 152 and 154 to 159 relate to sections 102 to 113 concerning the procedure for the making and determination of applications for non-disclosure of information on public interest grounds. The amendments extend those sections so as to make them apply in relation to duties to disclose information that arise after the original proceedings have concluded. Those amendments and amendments 111, 113 and 160 to 162 are related to sections 96B to 96G, which were inserted into the bill at stage 2 and set out the duties of the prosecutor after the conclusion of the original proceedings and in the course of appeals. The amendments are necessary to ensure that applications for section 106 and 106A orders, and ancillary orders, can be made by the prosecutor or by the secretary of state.

Section 113 makes general provision in relation to applications to the court for orders under sections 106 and 106A and for review of those orders. Amendments 154, 155, 157 and 158 extend section 113 so that it also applies where the application or review relates to a disclosure duty that arises after the original proceedings are concluded. Amendments 119, 120, 139 and 141 are technical amendments that extend the scope of those provisions. Amendments 111, 113, 121, 145, 147, 149 and 152 are also technical amendments that widen the definition of "accused" to include "appellant" or "other person", in certain cases. Amendment 151 is a technical amendment to clarify when criminal proceedings come to an end for the purposes of disclosure post conviction and in appeals. Amendments 160 to 162 are technical amendments to ensure that references to "accused", "appellant" or "other person" should be taken to include his or her solicitor or advocate where appropriate.

I move amendment 111.

Amendment 111 agreed to.

Amendment 112 moved—[Kenny MacAskill]—and agreed to.

Section 98—Confidentiality of disclosed information

Amendments 113 to 114 moved—[Kenny MacAskill]—and agreed to.

Section 99—Contravention of section 98

Amendment 115 moved—[Kenny MacAskill]—and agreed to.

Section 91—Exemptions from disclosure

Amendment 116 moved—[Kenny MacAskill]—and agreed to.

Section 102—Application for section 106 order

Amendment 117 moved—[Kenny MacAskill]—and agreed to.

Amendment 24 not moved.

Amendment 118 moved—[Kenny MacAskill]—and agreed to.

Section 103—Application for non-notification order or exclusion order

Amendments 119 to 121 moved—[Kenny MacAskill]—and agreed to.

Section 104—Application for non-notification order and exclusion order

Amendment 122 moved—[Kenny MacAskill]—and agreed to.

Section 106—Application for section 106 order: determination

Amendments 123 and 124 moved—[Kenny MacAskill]—and agreed to.

Amendment 25 not moved.

Amendments 125 to 127 moved—[Kenny MacAskill]—and agreed to.

Section 106A—Order preventing or restricting disclosure: application by Secretary of State

The Presiding Officer: Amendment 128 is in the name of the cabinet secretary. If it is agreed to, I cannot call amendment 26.

Amendment 128 moved—[Kenny MacAskill]—and agreed to.

Amendments 129 and 130 moved—[Kenny MacAskill]—and agreed to.

The Presiding Officer: Amendment 131 is in the name of the cabinet secretary. If it is agreed to, I cannot call amendment 27.

Amendment 131 moved—[Kenny MacAskill]—and agreed to.

Amendments 132 to 138 moved—[Kenny MacAskill]—and agreed to.

Section 106B—Application for ancillary orders: Secretary of State

Amendments 139 to 142 moved—[Kenny MacAskill]—and agreed to.

Section 106C—Application for restricted notification order and non-attendance order

Amendment 143 moved—[Kenny MacAskill]—and agreed to.

Section 106D—Application for non-attendance order

Amendment 144 moved—[Kenny MacAskill]—and agreed to.

Section 107—Special counsel

Amendment 145 moved—[Kenny MacAskill]—and agreed to.

Section 107B—Role of special counsel

Amendment 146 moved—[Kenny MacAskill]—and agreed to.

Section 107C—Appeals

Amendment 147 moved—[Kenny MacAskill]—and agreed to.

After section 107C

Amendment 148 moved—[Kenny MacAskill]—and agreed to.

Section 111—Review of section 106 order

Amendments 149 to 151 moved—[Kenny MacAskill]—and agreed to.

Section 111A—Review of section 106A order

Amendments 152 and 153 moved—[Kenny MacAskill]—and agreed to.

Section 113—Applications and reviews: general provisions

Amendments 154 to 159 moved—[Kenny MacAskill]—and agreed to.

Section 115—Acts of adjournal

The Presiding Officer: Amendment 194, in the name of Rhoda Grant, is in a group of its own.

Rhoda Grant (Highlands and Islands) (Lab): Under section 305 of the Criminal Procedure (Scotland) Act 1995, acts of adjournal can be made only in relation to criminal court practice and procedure. An act of adjournal is a piece of legislation that can be brought forward by judges of the High Court without recourse to Parliament. Section 115 of the bill permits the court to create acts of adjournal

“for the purposes of ... or for giving full effect to” part 6, which is on the conduct of criminal proceedings with regard to disclosure. Such acts would no longer be restricted to matters about the conduct of the process, but could be about anything that is within the jurisdiction of the court that comes under part 6. The Subordinate Legislation Committee was concerned that the provision in the bill would allow acts of adjournal to come into force on areas of substantive law without Parliament's having the opportunity to scrutinise the proposal.

15:00

At stage 1, the committee asked the Government why the existing powers regarding practice and procedure under section 305 of the 1995 act are not sufficient for the purposes of part 6. At that point, the Government responded that more flexibility is needed to allow the High Court to do what it would need to do to ensure that the statutory scheme works efficiently. However, it gave no examples of when that would be the case. Acts of adjournal are not subject to parliamentary procedure, so the provision in section 115 as it stands would give the courts the power to legislate in areas of substantive law, without any parliamentary scrutiny.

Amendment 194 makes it clear that the powers that will be conferred by section 115, beyond those that are conferred by the 1995 act, must be scrutinised by Parliament under the negative procedure. That means that the desired flexibility is still in the bill, but there are checks and balances on that ability.

I move amendment 194.

Kenny MacAskill: We have some sympathy for the concerns that the Subordinate Legislation Committee expressed and that Rhoda Grant has articulated. We share the committee's view that it is for Parliament and not the courts to make provision in substantive criminal law. It is not our intention that section 115 would be used in that way, and we do not imagine that the High Court would do so.

However, we accept that the section is not restricted to criminal procedure and practice—and necessarily so. This is the first time that disclosure has been put on a statutory footing. We need flexibility to enable the High Court to do everything that we think it is likely to require to do to regulate court practice and procedure in order to ensure that the scheme works efficiently.

Moreover, the provision is needed to remove any doubts that might arise as to the scope of the powers. For example, part 6, as amended at stage 2, makes provision for the duty of disclosure after conviction where there are no live criminal proceedings. It also enables applications to be made at that stage to the court for non-disclosure on public-interest grounds. Although we are quite clear that such matters are still criminal procedure because of their direct relationship to the fairness of the accused's criminal trial, we are conscious that in such cases there are no longer criminal proceedings and believe that it is necessary to leave no room for possible doubts.

There has been too much historical uncertainty on disclosure, so part 6 is designed to put an end to that. Agreement to amendment 194 would lead to uncertainty, not only over what rules can and cannot be created, but over what rules may or may not be the subject of parliamentary resolution. We do not agree that the power that is contained in section 115 is entirely open. What the bill proposes is limited to aspects that are required to give full effect to the part 6 provisions on disclosure—no more, no less. I assure Parliament that the intention is only that rules of court may be developed that regulate court procedure and practice and that such rules should not stray into making provision on the substantive criminal law.

Although we have sympathy with where members are coming from, I ask Parliament to reject amendment 194.

Rhoda Grant: Given the reassurances that the cabinet secretary has provided, I seek leave to withdraw amendment 194.

Amendment 194, by agreement, withdrawn.

Section 115A—Abolition of common law

Amendments 28 to 31 not moved.

Section 116—Interpretation of Part 6

Amendment 160 moved—[Kenny MacAskill]—and agreed to.

The Presiding Officer: Amendment 32 is pre-empted.

Amendments 161 and 162 moved—[Kenny MacAskill]—and agreed to.

After section 124

The Presiding Officer: We move on to group 24. Amendment 195, in the name of John Lamont, is grouped with amendments 196 and 197.

John Lamont: The purpose of amendments 195, 196 and 197 is to deal with the unforeseen consequences for the sports of archery and fencing in Scotland in relation to the Custodial Sentences and Weapons (Scotland) Act 2007, which came into force on 1 June 2010.

Under the 2007 act, archery and fencing will be severely compromised in their ability to attract new participants, because the ability to buy equipment will be restricted. Equipment for the sports is expensive and it is unfair to expect new participants to purchase items when they start. Most clubs are able to attract new members by using an equipment hiring system. Without new participants, these Olympic sports will ultimately cease to be played in Scotland.

Amendments 195 and 196 would amend the 2007 act to afford archery the same exceptions as exist for fencing. A delay in such provisions being agreed to by Parliament will be a serious risk to thousands of archers in Scotland. Furthermore, the world cup of archery, which comes to Edinburgh this summer, will be threatened. If amendments 195 and 196 are not agreed to, thousands of people will be unable to participate and there will be an economic blow due to withdrawal from future events.

Amendment 197 would support sporting goods dealers throughout the country and would ensure that participants continue to have access to equipment. The amendment would require all dealers to conform to the recording regulations under the 2007 act. The change would require a sporting goods dealer to buy one licence from the local authority where their primary place of business is located, which would cover them to operate throughout Scotland.

Scottish Fencing has been notified that two major businesses in Scotland that deal in equipment will no longer attend events if they have to purchase a licence for each event. Eastcote Archery, which is a major equipment dealer, has estimated that if it wanted to deal at every event in Scotland, licensing would potentially cost at least £4,800. That would be an unjust charge, particularly given that fencing and archery clubs exist due to the work and time that are given by many volunteers.

The sports are played by a minority of people, but that is no reason to legislate in a way that will cause problems for people who enjoy them, or to harm the sports' ability to attract new participants. The 2007 act had the best intentions for society, but to place fencing and archery alongside knife crime would be unfair.

The amendments have the support of the Scottish Sports Association, Scottish Fencing and the Scottish Archery Association. I hope that the Scottish Government will give them due consideration, particularly in the light of the forthcoming world cup of archery.

I move amendment 195.

Robert Brown: I support the thrust of John Lamont's amendments—[*Laughter*.] Perhaps that was not the best-chosen phrase that ever was.

The situation that John Lamont described illustrates the difficulty of legislating to deal with many different sorts of situation, with criminal activity on one hand and necessary, desirable and praiseworthy sports on the other. I think that I am right in saying that exemptions have been put in place in relation to fencing, but which might not be adequate to the task, as John Lamont said. However, there is no obvious reason to distinguish between fencing and archery. If the Government is not amenable to the amendments in John Lamont's name, I hope that it can satisfy members that it can deal with the issue in some other way, perhaps through its powers to make subordinate legislation under current legislation.

John Lamont has raised a valid issue, with which the cabinet secretary needs to deal.

Bill Butler: I am sympathetic to the concerns that John Lamont expressed. We should do our utmost to protect the sport of archery, especially because the world cup of archery comes to Edinburgh this summer. We would not want to send a message that archery is not welcome in Scotland.

However, Parliament has a duty to examine thoroughly any proposed legislation in order to test whether it is fit for purpose. Labour's view is that amendment 195 is drawn too widely. Exempting all sports goods dealers from the requirement to hold a licence is too far-reaching and the approach would exempt a number of dealers who sell potentially dangerous knives for hunting and fishing. I fear that exempting all sports dealers from the requirement would potentially allow premises that the Government is trying to target to sell knives without the appropriate licence. On that basis, Labour will not support amendment 195.

Amendment 196 is a different matter. It would allow a specific exception for archery along the lines of the exception that is provided for fencing. Given that the statutory instrument that provided the exception for fencing was accepted without demur, it would be perverse to object to the same exemption for archery. Amendment 196 takes a sensible and proportionate approach in relation to archery. Labour will support amendment 196, because it is specific to archery, will benefit the sport and seems to be proportionate.

Amendment 197 appears to seek to lessen the financial and bureaucratic burden on sporting goods dealers who may travel round the country, in that it would remove the requirement for them to apply for a knife dealer's licence to each local authority in whose area they seek to carry out business. Among other things, it states:

> "If the local authority to whom notice is given ... is not the authority that granted the travelling knife dealer's licence, the notified authority is to treat the licence as applicable in their area as if it was a licence they had granted."

That suggests that an individual could obtain a licence in the Borders and use it to trade in Sauchiehall Street simply by notifying Glasgow City Council of his intention to do so. That begs the question as to which local authority would be responsible if a person who was granted a travelling knife dealer's licence failed to adhere to conditions that had been set by the issuing authority, where that failure occurred on premises outwith the issuing authority's area.

Labour's view is that amendment 197 has not been properly thought through and may have unacceptable, if unintended, consequences. Therefore, Labour cannot support amendments 197 and 195 but will support amendment 196.

Kenny MacAskill: I thank John Lamont for raising the issue with me. Members have received correspondence on it—Robert Brown and Bill Butler referred to that—but he stepped forward to raise the matter and the difficulties that were coming for the archery world cup.

The Government acknowledges that there is a gap. The purpose of the knife dealers licensing scheme is to make it more difficult for non-domestic knives to fall into the wrong hands. It is not meant to interfere with legitimate sports.

We do not dispute that there is a problem; the question is what to do about it. We can seek to legislate in the bill, but we face the difficulty that if we are to address the issue for the forthcoming archery world cup, the measures that we could pass in the bill would not come into force in sufficient time because of the timing of royal assent. However, I assure John Lamont in particular, and all other members, that we recognise the problem. We can address it by regulation and use the powers that we have under the Civic Government (Scotland) Act 1982 to provide for the further exemptions that are necessary. I am more than happy to assure members that we will do whatever is necessary to introduce the appropriate legislation to deal with the oversight and gap that we are all agreed upon without endangering our communities.

The Presiding Officer: I offer Mr Lamont the opportunity to parry some of the rapier-like arguments that have been thrust in his direction.

John Lamont: That is very good, Presiding Officer.

I am happy to accept the minister's undertaking in relation to resolving the matter and will not press the amendments in my name.

Amendment 195, by agreement, withdrawn.

Amendments 196 and 197 not moved.

After section 127

The Presiding Officer: We come to group 25. Amendment 198, in the name of Sandra White, is the only amendment in the group.

Sandra White: I thank the officials and clerks for their guidance. I also thank the Justice Committee for devoting time in its busy schedule to discuss my original stage 2 amendment and for outlining its concerns. I return with a new amendment that deals with those concerns.

To avoid any confusion, I reiterate the statement that I made to the committee: the amendment would not ban lap-dancing clubs. It is about the serious issue of ensuring that local people can control what takes place in their communities. It is about ensuring that local authorities have at their disposal the tools to do what their communities ask them to do.

My amendment would enable local authorities to license venues that offer sexual entertainment—in other words, lap-dancing clubs. It would be an optional scheme. It would be for a local authority to decide whether it was appropriate to apply it in its area. It would not be mandatory. It would always be a local authority's choice to apply the legislation if it so wished.

The amendment would enable a local authority to control the introduction or expansion of lap-dancing premises. It would allow the authority to specify the number of such venues that it considered appropriate for the relevant locality. That number could be zero. Local authorities would also be able to apply operating conditions to, monitor and take action against premises if they did not operate as required.

15:15

The new amendment has been significantly redrafted to offer protection to the arts. It specifically excludes licences for hosting theatrical productions and entertainment. The definition of sexual entertainment is explicit and there is provision to extend the exclusions, should that prove necessary. I note the submissions by Scottish Ballet, the Federation of Scottish Theatre, the Festival Fringe Society and others, but I believe that the redrafting covers the concerns that they raise.

This is intended to be a dual licensing regime, separate from and additional to alcohol licensing. Some premises may require both a licence for alcohol and a licence for sexual entertainment, but I am sure that no member would disagree that this activity deserves more scrutiny and control. I also note the submissions by the Law Society of Scotland and the Convention of Scottish Local Authorities, and COSLA's comments that very few premises fall into this category. I believe that that answers any questions raised by the organisations that I mentioned previously.

By licensing sexual entertainment venues separately, we also ensure that the fact that a premises does or does not have a premises licence under the Licensing (Scotland) Act 2005 is no longer material to whether it requires a sexual entertainment licence.

I will address one of the issues that Robert Brown, I think, raised at stage 2. Where there are existing lap-dancing clubs and local authorities wish to impose a zero limit, it would be for the local authority to justify why that approach was appropriate and in the public interest. It would also be for the local authority to demonstrate that the interference with property rights could be justified in the public interest. I think that that answers the concerns that the committee raised. The amendment is about ensuring that individual local authorities are given the powers and the freedom to take the action that they deem appropriate in delivering for their local communities.

I move amendment 198.

The Deputy Presiding Officer (Trish Godman): A considerable number of members wish to speak. I can give you about one and a half minutes each.

Robert Brown: The Liberal Democrats are opposed to amendment 198, largely on technical grounds. As the Law Society points out, and as Sandra White accepts, it sets up a dual licensing regime, which is in itself complicated.

I am not sure that there is any real evidence of a problem with the current powers. As far as I am aware, no new licences for lap-dancing clubs have been granted in recent years. I am unsure, despite Sandra White's explanation, what the effect of the amendment would be on the position of existing clubs, because there could certainly be substantial legal challenges if that is not got right.

Again, despite Sandra White's assertions to the contrary, the definitions are undoubtedly difficult and they are reminiscent of the arguments that one used to read about what was permitted at the Windmill Club or the Edinburgh festival. Above all, it is not particularly helpful to try to deal with the issue without effective consultation, or consideration by the committee, and as part of a large bill dealing with many other issues and in which the relevant sections are more focused on alcohol licensing. We have not heard much from local authorities about their views.

It may well be that issues will arise from this discussion and the debate is obviously helpful, but it is a proposal that would have to come back in some other form, with a much more substantial background consultation, if it was to attract support throughout the chamber.

James Kelly: Scottish Labour is sympathetic to many of the objectives of amendment 198. We do not want entertainment venues to be used to degrade or exploit women and we also do not want them used as vehicles for prostitution, trafficking or serious and organised crime. Such activities are unacceptable. However, we need to consider the impact that the amendment would have. In that regard, we have some issues. I cite the Law Society's submission, which reiterates that there could potentially be unintended consequences. There are serious concerns that there could be a conflict between the powers of local authorities and the powers of licensing boards. If we agree to an amendment, we want it to help address the issues, not lead to confusion.

The SNP has had three years to address the issue and I think that Sandra White has lodged the amendment out of frustration that nothing has happened. The Labour Party gives a commitment that we will work on a detailed and robust scheme that we will bring forward when we return to government.

John Lamont: We have two concerns about the amendment. First, we are concerned that it has not been properly scrutinised. Secondly, we have concerns about the dual licensing system. In addition, many—if not all—members will have received a letter from Toni Bartley, who wrote on behalf of many women who work in lap-dancing bars in Glasgow to express concerns about how the proposed regime would impact on their ability to work. Indeed, Ms Bartley speaks with some passion about the impact that amendment 198 would have on her job, as I found out when I had the opportunity to meet her here in the Parliament to discuss her concerns. Indeed, she is in the public gallery.

Toni Bartley was, quite frankly, insulted by the claims that lap dancers are prostitutes being exploited and that their work is demeaning. For those who do not know, Toni is in fact a politics student at the University of Strathclyde and hopes to become a teacher. Her job helps her to pay her way through university. Many of us made choices to work in clubs or shops or bars to support ourselves while studying. This young woman has chosen to dance. Some of us might have moral objections to that, but I am a great advocate of freedom of choice.

To ensure the safety of those who choose to work in such an environment, and to avoid exploitation, I believe that rigorous enforcement of the licensing regime, regular police visits and internal self-policing are required. I have been assured that all of that takes place. However, I am open-minded and am prepared to look at all the evidence. If there is a need for additional legislation, it should be introduced only after further and proper examination of the current procedures.

I am perhaps not the most likely advocate of lap dancing, of which I suspect other members might have more experience, but I am happy to look at all the evidence.

We will oppose Ms White's amendment 198.

Margo MacDonald: Should I repeat my name for the benefit of the member in the front row? I have never taken part in any lap-dancing, couch-dancing or pole-dancing activity. That does not make me a bad person.

I am interested in Sandra White's amendment, and I realise how seriously she takes the issue. I am fortunate enough to have learned most of what I know about the issue from having lived—for the past 30 years now—in Edinburgh, where there has been a system of regulation and policing that provides proper intelligence about what goes on in what some people think of as burlesque clubs. I realise that Glasgow has not quite got it together, so I would support anything that required such places to be licensed if the template was the way in which the saunas in Edinburgh are dealt with.

That does not mean that I approve of lap dancing as a career, or anything like it—I do not—but I think that lap dancing is perhaps like the fashion that there used to be for topless dancing. People in Edinburgh will know that there used to be topless dancers in every bar, but that is no longer the case. The fashion passed.

Amendment 198 provides—I refer to proposed new section 45A(3)—that the licensing would apply to clubs that were judged as having solely or principally the purpose of sexual stimulation. Without wishing to go into the fine details—subsection (4) is quite graphic—would that include telephone sex, given that there are telephone sex lines now? If the purpose of the provision is to dissuade people from participating in an activity that Sandra White perhaps deems to be antisocial, should we not be looking at the role that telephone sex and the internet play in such adult activities?

I will certainly vote against amendment 198 because, although well intentioned, the provisions do not fit the job and they could do with more scrutiny.

Kenny MacAskill: We are content that amendment 198 will tackle the concerns that we previously shared with members of the Justice Committee and many arts organisations. The amendment that Sandra White moved at stage 2 could have led to the performing arts being caught by a licensing regime that is designed to regulate lap-dancing bars. We understand and agree with Sandra White's wish for communities to be able to regulate lap dancing and, where there is sufficient evidence, to refuse to license venues that provide that type of entertainment. Therefore, we will support amendment 198.

Sandra White: I honestly did not want to bring politics into the issue—I am sorry that James Kelly did so—and I do not want to go on about the politics of it.

My reason for lodging amendment 198 is plain and simple. Some local authorities are quite happy to have lap-dancing and pole-dancing venues, but other local authorities are not. By dealing with a gap in the Civic Government (Scotland) Act 1982, the amendment would enable local authorities to decide to have zero lap-dancing clubs. That is the reason why I lodged amendment 198.

In answer to Margo MacDonald's question, I think that telecommunications are a reserved matter, but I do not want to go into that.

I have done research on lap-dancing clubs with other people, such as reporters, and what I saw makes me feel that women are being objectified and used as sexual objects. That is my belief, whether other people agree with me or not. It is also the belief of Glasgow City Council, which is why I lodged the amendment today.

I have also received a letter from Steve McDonald threatening to take me to court. All I did was repeat what I heard in a lap-dancing club from a group of young men who called the girls slappers, and said that they would not like their girlfriends, sisters or wives to be doing it. I was repeating what they said.

I still believe that lap-dancing clubs are not a great way to make a living. I have not met any girls in the lap-dancing clubs who think that it is a great way to make a living.

I am sorry that Labour, the Tories and the Liberal Democrats do not feel that it is appropriate to support the amendment. I have not lodged the amendment because of the Government. I have been fighting for this legislation for about eight or nine years, so I can say to James Kelly that it is not just a flash in the pan, and I am not the only one who has been pushing for such changes. I will be very sorry if the amendment falls, because local authorities have a duty to the communities who vote them in. Glasgow City Council wanted to reiterate what the communities have been saying to it, but now democracy has been taken away from local authorities. All they want is to be able to choose to represent their communities. I will press the amendment.

The Deputy Presiding Officer: The question is, that amendment 198 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division. As the division is the first one of the afternoon, there will be a five-minute suspension.

15:26

Meeting suspended.

15:31

On resuming—

The Deputy Presiding Officer: We come to the division on amendment 198.

For

Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Campbell, Aileen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Against

Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
MacDonald, Margo (Lothians) (Ind)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
O'Donnell, Hugh (Central Scotland) (LD)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stewart, David (Highlands and Islands) (Lab)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

The Deputy Presiding Officer: The result of the division is: For 45, Against 76, Abstentions 0.

Amendment 198 disagreed to.

Before section 130

The Deputy Presiding Officer: We move to group 26. Amendment 163, in the name of George Foulkes, is the only amendment in the group.

George Foulkes (Lothians) (Lab): I welcome the opportunity to move amendment 163 and to give the Parliament the opportunity to turn the aims of the barred campaign into a realistic and workable law that will enhance the ability of people with disabilities to enjoy an independent lifestyle.

There has been wide consultation on the amendment, with both the licensed trade and the organisations that represent people with disabilities. Together we have had meetings with the equalities minister, Alex Neil, and we have been very encouraged by his helpful and positive response—I hope that my praise does not do him irreparable damage.

The amendment has taken a number of forms over the months. In our papers today, it is in its most refined form, which is supported by activists and publicans alike. I thank the clerks to the Justice Committee and the lawyers for both Capability Scotland and the licensed trade for their help in drafting it.

For the sake of clarity, it is worth reminding the Parliament what I said in the members' business debate—that the proposal is not anti-pub. In fact, the amendment recognises that the licensed trade is currently struggling and that adaptations can be expensive or impossible to make due to planning regulations or listed building restrictions.

The amendment does not, therefore, put onerous burdens on licensed premises to make adjustments to their properties to maintain their licence. All that it asks is that the compliance statement that licensees are already duty-bound to complete includes a new requirement to detail the accessibility of the premises. That simple step will enable local authority licensing boards to summarise the accessibility of pubs and clubs and to get the right information about the accessibility of venues into the hands of the disabled people in their areas.

I pay a particular tribute to Mark Cooper, the pioneer of the campaign, who is with us in the public gallery. [*Applause*.] The amendment has been 15 months in the making, during which time Mark has spoken to many MSPs. Without his work, we would not have it before us today. As with so many disabled people, his spirit and determination to fight inequality and discrimination is truly admirable. No one should be barred from accessing a pub or club or receive a poorer standard of service because of a perceived disability.

With the support of the Scottish Parliament, amendment 163, if it is agreed to, will empower disabled people to make informed choices about where they relax and socialise, and it will ensure that they have the best possible independent lifestyle.

I move amendment 163.

The Deputy Presiding Officer: Before I call those who wish to speak, I exercise my powers under rule 9.8.4A(c) to extend the debate to allow all members who wish to speak to do so.

Bill Butler: As George Foulkes says, the amendment was lodged in support of Capability Scotland's barred campaign, which aims to improve the amount of information that is available to disabled people and their friends about the accessibility of pubs and clubs. I, too, had the pleasure of meeting Mark Cooper, the parliamentary and policy officer at Capability Scotland, who started the campaign after being forced to leave a pub in Edinburgh in the middle of a night out because it had no accessible toilet, despite having a level access entrance. That is quite unacceptable in this day and age. A recent poll showed that 75 per cent of disabled people experience barriers when they attempt to access pubs and clubs in Scotland. The Parliament must act to change that.

Amendment 163 is both timely and eminently reasonable. It merely requires licensees to provide information on the accessibility of their premises to people with disabilities. It is a modest proposal that will deliver fair treatment to many of our fellow citizens and allow them fully to enjoy an evening out. It is by no stretch of the imagination excessive. I commend George Foulkes for lodging the amendment and I urge colleagues to support it.

Robert Brown: I add my support to the campaign and the amendment. I, too, have met Mark Cooper—he must have met just about everybody in the Parliament in the course of the campaign. This illustrates what success an individual and corporate campaign can achieve with a bit of determination and imagination, with people getting stuck in and doing the thing properly. Mark has approached the issue with respect and consideration, he has been prepared to take ideas on board in doing that and he has brought the campaign to a successful conclusion in the hands of George Foulkes this afternoon. Amendment 163 is simple in concept but potentially significant in what it can do for disabled people, particularly young disabled people.

George Foulkes said that the amendment is not anti-pub; in fact, it is pro-pub. It arises from people's wish to be able to exercise the social rights that most of us take for granted—going to pubs and other establishments of that sort—and doing so in the way that others take for granted, without the barriers that disablement can sometimes bring. It is a worthy matter and I hope not only that the amendment will be passed unanimously by the Parliament, but that it will be followed by effective action by the trade and the Government.

Bill Aitken: I, too, add my praise for Mark Cooper and the barred campaign. It has been an absolutely superb campaign that has struck a real chord with everyone who has been involved over the past few months. I also congratulate George Foulkes on lodging amendment 163. As we all know, his lordship is a convivial cove who is ever eager to socialise. At the same time, however, he has the sensitivity to realise that not everyone is able to enjoy a night out in reasonably safe and comfortable circumstances. I am sure that that was the thinking behind his lodging the amendment. It is a very positive amendment that will improve the lives of not only people who like a drink but, perhaps more important, those who like some conviviality and some company. As Bill Butler says, the demands that are being made of the licensed trade are not excessive but perfectly reasonable. The fact that the trade has indicated its satisfaction with the amendment commends it to the Parliament.

Nigel Don: I share in congratulating Mark Cooper on the success of the campaign. I also congratulate Lord Foulkes on lodging an amendment that has changed over time, with the duty being brought back to the provision of information so that it is not discriminatory against pubs that would otherwise have struggled to comply with it. I hope that what we finish up with is only the start of changing the culture in which pubs operate and the way in which they choose to set up their facilities. Rather than put a stick to their backsides, we have dangled in front of them a carrot of what should be good behaviour.

Kenny MacAskill: We concur with what has been said. We have been grateful to work with Capability Scotland and Lord Foulkes to ensure that the amendment works within the existing framework of the Licensing (Scotland) Act 2005. We support amendment 163 and hope that the Parliament agrees to it.

George Foulkes: There is little more to add, other than to thank the Parliament for the all-party support for my amendment—most people will know that that is not something that I am used to. I particularly want to thank not only Alex Neil, but Kenny MacAskill, who has given the issue sympathetic consideration. I am grateful to him.

I am also particularly grateful to my old friend, Baillie Aitken, and I look forward to celebrating with him the passage of this amendment with a drink in Babbity Bowster's in the very near future.

To those who were generous enough to praise me, I say that that is inappropriate, as all the praise should go to Capability Scotland and Mark Cooper.

Amendment 163 agreed to.

Section 130—Premises licence applications: notification requirements

The Deputy Presiding Officer: We move to group 27. Amendment 164, in the name of Paul Martin, is grouped with amendment 165.

Paul Martin: By way of background, it is important to recognise that the Licensing (Scotland) Act 2005 placed a requirement on all chief constables in Scotland to provide antisocial behaviour reports in a recognised manner for all new applications. That provision was included as a result of an amendment that I lodged during the passage of the bill. My amendment was intended to ensure consistency in respect of the information that is provided in connection with antisocial behaviour around licensed premises, with police officers and police authorities providing robust information in a consistent manner.

I was disappointed to learn that the Government intended to use the legislation that we are discussing today to amend the 2005 act and to place the provision of antisocial behaviour reports at the discretion of chief constables and licensing authorities.

The experience of my colleagues throughout Scotland will be that information that is provided to licensing authorities by police authorities is, indeed, inconsistent. A number of my constituents have raised concerns about the inconsistency of such information when they have made representations to licensing authorities. My amendments will ensure that the situation reverts to the status quo of the 2005 act, which places a requirement on all chief constables to provide information in a consistent manner.

I move amendment 164.

Bill Aitken: Paul Martin canvassed those views in the Justice Committee, prior to his elevation to the dizzy heights of being Labour's chief whip. The arguments were not accepted by the committee on the basis that the proposal might create an unnecessary amount of bureaucracy. At the same time, however, as he made clear in his speech, the existing laws do not prevent the police from raising with the licensing board the history of disorder around any premises. Therefore, although it is not mandatory to do so, the police will bring to the attention of the licensing board situations in which there has been a difficulty.

There is little value in the police bringing reports to the licensing board as a matter of routine when they should be concentrating on premises that are problematical. Those are the ones that the licensing board should know about and in relation to which it should take action. There is no merit in Paul Martin's amendments, which should be rejected.

Kenny MacAskill: We must strike the appropriate balance between the needs and wants of our communities, the requirements that are placed on the police and the amount of information that can be dealt with by a licensing board that is charged with the responsibility of deciding whether to grant an application.

Amendments 164 and 165 would impose an unnecessary burden on the police in respect of antisocial behaviour reports, as a report would be required on all premises applications, even when the licensing board and the police considered it unnecessary. That would be reporting for reporting's sake.

Sections 130 and 132 ensure that, when an application for a premises licence is being considered, the police may choose to supply the licensing board with information about antisocial behaviour in the vicinity of the premises. In addition, the licensing board may choose to request such information from the police.

Robert Brown: Does the minister believe that the new context, in which applications are made only for new licences as opposed to every year for repeat licences, alters the arguments on the matter in any respect?

15:45

Kenny MacAskill: No, I do not think that it does. What matters is the point that Bill Aitken made. Under sections 130 and 132, if the police wish to bring matters to the board's attention, they can do so, and if the board has concerns, legitimate or otherwise, it is entitled to request information. We do not need reports to be made irrespective of whether they are needed or wanted. That would not be useful to the board and it would represent a waste of police time. That is why the Government maintains that sections 130 and 132 will be operationally effective and cost effective. I therefore ask Paul Martin to withdraw amendment 164 and not to move amendment 165.

Paul Martin: The minister talks about what is necessary. I refer back to the debate that we had at stage 2 of the Licensing (Scotland) Bill. The reason why I raised the matter is that constituents in the Ruchazie part of my constituency were concerned that, when they made representations in connection with an application, they and the licensing authority were advised by the police that there was nothing to report, yet they learned at a later stage that the police had made 212 calls to the premises. I argue that that is incompetent and inconsistent.

The only way in which to ensure that our police authorities consistently provide accurate information is to ensure that they do that in the form of antisocial behaviour reports. We should not leave the matter to police officers' discretion. We have heard from the Government many times today that police authorities know best and that communities should do as they are told. I do not accept that philosophy. Communities are entitled to be sure that, when applications are submitted, there is a proper interrogation of the antisocial behaviour that has taken place surrounding the premises.

Robert Brown makes the powerful point that, as we will now have perpetual licences, the licensing authorities' workload will be significantly reduced, as will the workload of police officers and the bureaucracy that he mentioned.

I press my amendment 164.

The Deputy Presiding Officer: The question is, that amendment 164 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)

Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

Against

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Abstentions

Brown, Robert (Glasgow) (LD)
Finnie, Ross (West of Scotland) (LD)
Hume, Jim (South of Scotland) (LD)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
O'Donnell, Hugh (Central Scotland) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

The Deputy Presiding Officer: The result of the division is: For 45, Against 64, Abstentions 13.

Amendment 164 disagreed to.

Section 132—Premises licence applications: antisocial behaviour reports

Amendment 165 moved—[Paul Martin].

The Deputy Presiding Officer: The question is, that amendment 165 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)

Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

Against

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Abstentions

Brown, Robert (Glasgow) (LD)
Finnie, Ross (West of Scotland) (LD)
Hume, Jim (South of Scotland) (LD)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
O'Donnell, Hugh (Central Scotland) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

The Deputy Presiding Officer: The result of the division is: For 45, Against 63, Abstentions 13.

Amendment 165 disagreed to.

After section 132A

The Deputy Presiding Officer: We come to group 28. Amendment 166, in the name of the cabinet secretary, is the only amendment in the group.

Fergus Ewing: Amendment 166 amends section 45 of the Licensing (Scotland) Act 2005 to provide that the provisional period within which a provisional premises licence must be confirmed is increased from two to four years.

Members of the Justice Committee will recall the debate on Robert Brown's stage 2 amendment—I think that it was amendment 543—on provisional premises licences. We said at stage 2 and continue to believe that the ability to scrutinise applications effectively, either at the start or at the end of the application process, is imperative.

The police and licensing boards must have the ability to consider provisional premises licence applications to ensure that policing and overprovision implications of proposed developments can be given timely and effective consideration. It is equally important that the public know exactly what developments are being proposed in their communities. The original amendment did not achieve that because it undermined significantly the ability of the public to know what was being proposed in their communities and the police's ability to comment effectively on the effect on the area or the increase in policing required. For licensing boards, the vague outline effectively reduced any sensible consideration of what was or was not going to be built. When premises were completed, there was no effective method for the public, the police or even the licensing board to influence the licence until the premises were operating.

Bill Aitken raised a good point during the stage 2 debate:

> "A two-year provisional licence might not be appropriate in respect of larger-scale developments. The last thing that any member wants to do is to inhibit development, in particular in the difficult economic times that are likely to be faced by the licensed trade and everyone else."—[*Official Report*, *Justice Committee,* 11 May 2010; c 3132.]

We agree with Bill Aitken's judgment, and not for the first time.

Under the 2005 act, the licence has to be confirmed within two years, otherwise it will be revoked. We recognise that the current timeframe of two years for provisional premises licences can, on occasion, present difficulties for some developers who do not complete the development within two years. Indeed, we recall that this place was supposed to have been completed within two years, by 2001; we might also recall that that did not happen. Developments might not be completed within two years, which is why we propose that the period be extended from two to four years. The licensing board will be able to extend the period if construction or conversion work is delayed for reasons outwith the licence holder's control.

I move amendment 166.

James Kelly: I oppose amendment 166. Although I recognise why it has been lodged, four years for a provisional premises licence is too long. Section 45 of the 2005 act allows for two years and for extensions to that period. A four-year limit without any review of how the licence application is proceeding is too long; the correct time limit is two years. The existing legislation provides opportunities to seek extensions to that period.

Robert Brown: I was conscious of the ghost of my Scottish Parliament Corporate Body past as the minister glared at me when he spoke about the Scottish Parliament building, on whose financial costs I used to have the privilege of reporting.

The Government has moved in the right direction on provisional premises licences. It will be interesting to hear the answer to James Kelly's point on the extension of the period because it is relevant to our overall consideration. However, the basic point that companies cannot always get everything in order in sufficient time is appropriate and the minister has made the proper response to such situations.

Fergus Ewing: The key points are that there must be the opportunity properly to scrutinise the licence application and the operating plan, and for the licensing board, the police and the public to know what is being proposed. Of lesser importance is the length of time that it takes for a development to be completed. In this Parliament, we all know that developments take longer than they might otherwise have done because of economic difficulties. Are we really going to penalise developers further by stating that the limit of their provisional premises licence will be two years when, for reasons that might be outwith their control because of financial difficulties, a development could take longer than two years to complete? Are we going to put further obstacles in their place? I submit that we should not do so.

I agree with the comments that Robert Brown has made, and I agree with the comments that Bill Aitken made so sagaciously at the Justice Committee. I very much hope that Parliament will support amendment 166.

The Deputy Presiding Officer: The question is, that amendment 166 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)

Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McArthur, Liam (Orkney) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Central Scotland) (SNP)
O'Donnell, Hugh (Central Scotland) (LD)
Paterson, Gil (West of Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicol (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Against

Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

The Deputy Presiding Officer: The result of the division is: For 77, Against 44, Abstentions 0.

Amendment 166 agreed to.

After section 132B

The Deputy Presiding Officer: We now move to group 29. Amendment 167, in the name of the cabinet secretary, is the only amendment in the group.

Fergus Ewing: Amendment 167 amends the Licensing (Scotland) Act 2005 to require licensing boards to provide copies of premises licences and occasional licences, and summaries of those licences, to the police when they send copies to licensing applicants and licence holders. It is important for the police to be made aware of the licensing conditions attached to each licence in order for the conditions of that licence to be properly enforced.

We believe that amendment 167 will assist the police when they undertake their licensing enforcement duties, and that it will make a positive addition to the existing enforcement measures that are already available to licensing boards and the police under the 2005 act.

I move amendment 167.

Amendment 167 agreed to.

After section 136

The Deputy Presiding Officer: We now move to group 30. Amendment 199, in the name of James Kelly, is the only amendment in the group.

James Kelly: I seek the Parliament's support for amendment 199, which would give powers to communities in relation to 24-hour licences.

I recognise that there are special occasions when 24-hour licences are appropriate, and those are catered for, in exceptional circumstances, under the existing legislation. However, there are occasions when such licences would not be appropriate, and there have been instances when they have been granted and communities have raised concerns over excessive alcohol consumption leading to antisocial behaviour.

Amendment 199 acknowledges those concerns and gives local licensing forums the power to make their views known and to make representations to the licensing board. The licensing board will have to have regard to that advice.

The issue was raised at stage 2, when the cabinet secretary indicated that, in his view, such arrangements were covered by the existing legislation. I withdrew a similar amendment at the time to consider the matter further. I have lodged a stage 3 amendment because section 11 of the 2005 act states that local licensing forums are not allowed to "make recommendations" or "give advice". That limits their powers in relation to 24-hour licences.

We should support local licensing forums in the bill. We should encourage them and give them an enhanced role in relation to existing and proposed 24-hour licences. That would protect our communities from the excesses of such licences where they are inappropriate.

I move amendment 199.

Bill Aitken: The matter was canvassed at stage 2, when Mr Kelly withdrew his amendment. His arguments have some merit. There can be nothing worse than living in an area bedevilled by antisocial behaviour caused by a 24-hour licence. The remedy is already contained in legislation, however, and in the police action that can be taken. Although James Kelly presents an arguable case, I am not disposed to support the amendment.

16:00

Robert Brown: I am disposed to support amendment 199 because it seems to me that, in quite an elegant fashion, it raises an issue and suggests a way forward. The point that James Kelly seeks to make is that there needs to be an element of community power in the consideration of such matters. I do not think that the amendment would make a major difference to the scheme, but it would ensure inclusion of that element. There was a time when opening up access to licensed facilities was the direction of travel, but some of us have begun to roll back from that extreme position. Amendment 199 raises a valid issue and I propose to support it.

Fergus Ewing: We certainly support the objectives that Mr Kelly seeks to achieve, but we take the view, as we did at stage 2, that, with great respect, he has misunderstood the legal provisions that already apply, which make his amendment unnecessary. The provision that he seeks to make is available under the existing law.

In Scotland, unlike in England and Wales, there is a legislative presumption against 24-hour licensing. A licensing board here must refuse an application for 24-hour licensing unless it is satisfied that there are exceptional circumstances that justify such an application.

The Scottish ministers' guidance to licensing boards states that more detailed consideration should be given to any application for a licence that requests opening times in excess of 14 continuous hours. Licensing boards must consider such matters, as I think Bill Aitken suggested earlier and in committee. There are therefore a number of safeguards in place that restrict the ability of a licensing board to grant 24-hour licences. That is right and proper. The system in Scotland has worked because we are simply not seeing such licences emerge, unlike south of the border, where 24-hour licences are granted, notably for large supermarkets.

Licensing boards are already under a general obligation to have regard to advice that is given or recommendations that are made by local licensing forums. I say with respect to Mr Kelly that that knocks on the head his suggestion that the law does not cover the issue; it does. Rightly and properly, the views of local licensing forums must be taken into account and considered by licensing boards.

Amendment 199 seeks to allow licensing boards to revoke or vary a 24-hour licence following the recommendation of a local licensing forum but, as I said, licensing boards can already take those steps—the relevant powers exist under sections 36 and 37 of the 2005 act. Therefore, if a 24-hour licence is granted and it subsequently causes concerns that are relevant to any of the licensing objectives, a licensing board has the power to take the action that is envisaged in amendment 199.

We believe that safeguards for communities against 24-hour licensing are already contained in the 2005 act and that amendment 199 could undermine the effectiveness of those safeguards. I assume that Mr Kelly has no wish to do that. If that is the case, I trust that he will seek to withdraw amendment 199.

The Deputy Presiding Officer: Before Mr Kelly winds up, in order to complete the remaining proceedings, I invite a motion without notice to extend the final time limit for consideration of amendments by up to 10 minutes.

Motion moved,

That, under Rule 9.8.5A, the debate on Groups 30 to 32 be extended by up to 10 minutes.—[*Bruce Crawford*.]

Motion agreed to.

James Kelly: Amendment 199 pertains to the provisions of the 2005 act, which I propose to strengthen. The 2005 act provides powers in relation to 24-hour licences, and although I accept that licensing boards must give weight to the views of local licensing forums, amendment 199 would give local licensing forums more power, in that they would be allowed to make recommendations or give advice to licensing boards. That is stronger than the provisions in the existing licensing legislation.

I intend to press amendment 199, because it would give local licensing forums more power and, in doing so, would give communities more power to deal with issues, to give voice to concerns about antisocial behaviour and to express them to the licensing board through the local licensing forum.

The Deputy Presiding Officer: The question is, that amendment 199 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McArthur, Liam (Orkney) (LD)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
O'Donnell, Hugh (Central Scotland) (LD)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Scott, Tavish (Shetland) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stewart, David (Highlands and Islands) (Lab)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

Against

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)

Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 56, Against 63, Abstentions 0.

Amendment 199 disagreed to.

After section 141

The Deputy Presiding Officer: We move to group 31. Amendment 168, in the name of the cabinet secretary, is the only amendment in the group.

Fergus Ewing: The Interpretation Act 1978 defines a number of commonly used terms so that separate definitions do not have to be provided in each piece of legislation by the United Kingdom Parliament. As amended by the Scotland Act 1998, it provides definitions of “Act” and “enactment” that exclude acts of the Scottish Parliament and instruments made under such acts.

There are a large number of references to “Act” and “enactment” in statute. For example, section 307 of the Criminal Procedure (Scotland) Act 1995 defines “crime” as

> “any crime or offence at common law or under any Act of Parliament whenever passed”.

That leads to anomalies. There is no good reason why the definition of “crime” in the 1995 act should not include crimes that are created by the Scottish Parliament, without the Scottish Parliament specifically having to say so every time that it legislates.

Amendment 168 provides a solution specifically for the Criminal Procedure (Scotland) Act 1995, the Criminal Law (Consolidation) (Scotland) Act 1995 and the licensing provisions in the Civic Government (Scotland) Act 1982, which are the main pre-devolution statutes that are dealt with in the bill. Each reference to “Act” or “enactment” has been checked to ensure that the extension to include acts of the Scottish Parliament is appropriate.

I move amendment 168.

Amendment 168 agreed to.

Section 143

The Deputy Presiding Officer: We move to group 32. Amendment 169, in the name of the cabinet secretary, is grouped with amendment 170.

Fergus Ewing: Amendment 169 is a minor technical amendment that tidies up the wording of section 143, following amendments that were made at stage 2.

Amendment 170 is a minor technical amendment that provides that section 145 of and schedule 5 to the bill will come into force through a commencement order made by the Scottish ministers.

I move amendment 169.

Amendment 169 agreed to.

Section 148

Amendment 170 moved—[Fergus Ewing]—and agreed to.

Schedule 1

Amendment 171 moved—[Stewart Maxwell].

The Deputy Presiding Officer: The question is, that amendment 171 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Campbell, Aileen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)

Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Against

Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
O'Donnell, Hugh (Central Scotland) (LD)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stewart, David (Highlands and Islands) (Lab)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

Abstentions

MacDonald, Margo (Lothians) (Ind)

The Deputy Presiding Officer: The result of the division is: For 48, Against 61, Abstentions 1.

Amendment 171 disagreed to.

Amendment 172 moved—[Stewart Maxwell].

The Deputy Presiding Officer: The question is, that amendment 172 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Campbell, Aileen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)

Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McInnes, Alison (North East Scotland) (LD)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
O'Donnell, Hugh (Central Scotland) (LD)
Paterson, Gil (West of Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicol (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Against

Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

Abstentions

MacDonald, Margo (Lothians) (Ind)

The Deputy Presiding Officer: The result of the division is: For 60, Against 58, Abstentions 1.

Amendment 172 agreed to.

Schedule 1A—Community payback orders: consequential modifications

Amendments 173 to 186 moved—[Fergus Ewing]—and agreed to.

The Deputy Presiding Officer: That ends consideration of amendments.

Criminal Justice and Licensing (Scotland) Bill

The Deputy Presiding Officer (Alasdair Morgan): The next item of business is a debate on motion S3M-6604, in the name of Kenny MacAskill, on the Criminal Justice and Licensing (Scotland) Bill.

16:12

The Cabinet Secretary for Justice (Kenny MacAskill): I am pleased to open the stage 3 debate. For the purposes of rule 9.11 of the standing orders, I advise the Parliament that Her Majesty, having been informed of the purport of the Criminal Justice and Licensing (Scotland) Bill, has consented to place her prerogative and interests, so far as they are affected by the bill, at the disposal of the Parliament for the purposes of the bill. It was necessary to obtain Crown consent for the bill on the basis that part 9 of the bill makes amendments to the Licensing (Scotland) Act 2005, for which Crown consent was needed.

Some fifteen months ago—in March 2009—we introduced the Criminal Justice and Licensing (Scotland) Bill into Parliament. It would be appropriate at this juncture to give thanks to all those who have been involved in what has been a substantial bit of legislation, particularly the bill team and the convener and members of the Justice Committee. I am aware of the great periods of time that had to be given to investigating matters that are very complex, as we discovered earlier today, and matters that are deeply sensitive, as we experienced this morning.

The bill as introduced contained provisions relating to around 80 different topics. After stage 2, that number has grown to around 100 topics. The bill is a comprehensive piece of legislation that takes forward the Government's priorities to reform our justice system by providing measures that strengthen, simplify and modernise it. Despite disagreements over some of the content of the bill, we had some excellent debates this morning, as would be expected. I place on record my thanks for all the work that was done by everybody involved. With a bill this size, it cannot have been easy.

One of the Government's key priorities is to tackle serious organised crime. For too long, these crooks have terrorised and brought misery to Scottish communities. That is unacceptable and we are fighting back, but we require to have the appropriate legislation. Serious organised crime is very wide ranging and constantly evolving, and any response needs to reflect that. The four new measures on serious organised crime—the statutory aggravation and the offences of involvement, direction and failure to report—should be seen as a package of measures that will strengthen the hand of law enforcement agencies and the Crown Office to have better, more effective tools and more flexibility to tackle organised criminals at all levels and make it easier to prosecute individuals who organise others to commit crimes.

We have introduced a power of retention of fingerprints, palm prints and other physical data for a limited time from those who have been prosecuted for but not convicted of a serious violent or sexual offence. That correctly brings the laws for the retention of fingerprints, palm prints and other physical data into line with the current laws on DNA retention. We believe that the forensic data provisions in the bill are proportionate and fair; they strike a balance between the needs of the justice system, the protection of the public and the rights of the individual.

We are committed to supporting children's rights as a key strand that underpins our activity to improve outcomes for all Scotland's children and young people. Raising the minimum age of prosecution from 8 to 12 is an important move, which addresses key concerns about the very young age at which children in Scotland can currently end up in the criminal justice system. It also brings us into line with most of Europe and strengthens our commitment to the United Nations Convention on the Rights of the Child.

We have provided a statutory regime for disclosure of evidence in criminal proceedings. It is a long-established rule in the Scottish legal system that the prosecutor has an obligation to give the accused notice of the case against him and to tell him what charges he faces and what evidence the Crown intends to bring to prove the charges. Any exculpatory material should be identified and given or disclosed to the accused or the defence. A fair trial demands that, and rightly so. We are glad that the Parliament has generally welcomed our proposals on that. The provision is deeply complex and it will have to be scrutinised, but we believe that it provides the right balance.

We appreciate the different opinions in the chamber on community payback orders. I hope that everyone recognises the desire of all members to break the culture of recidivism, to end reoffending and to ensure that paybacks are made. We all want to work together to achieve the goal of ensuring that we punish offenders but address the areas of offenders' lives that need to change and which fuel much of their offending.

On short custodial sentences, we have advanced a proposal that has evidence, experience, and expert support on its side. We recognise that the proposal has divided the chamber, but it has been passed and we need to work at it. As I said earlier, we will work with the judiciary on the matter. I can only remind those who are aggrieved at the decision that it is a matter of a presumption. The Government position is clear: when a sheriff believes that that presumption is overturned, they will have our full support. We are about empowering our judiciary.

We believe that the evidence on the subject is clear. As I said earlier, the reconviction rate after two years for offenders who receive community service orders is 42 per cent whereas, for offenders who receive short custodial sentences—whether of six months or less, or of less than three months—the reconviction rate after two years is around 74 per cent. The experts are clear. When David Strang, the chief constable of Lothian and Borders Police, spoke for the Association of Chief Police Officers in Scotland at the Justice Committee last year, he said:

> "the likelihood of reoffending is less with a community sentence than with a repeat short prison sentence. ACPOS welcomes that proposal in the bill."—[*Official Report*, *Justice Committee*, 26 May 2009; c 1930.]

Margo MacDonald (Lothians) (Ind): I am interested in the detail of this. Which groups of offenders were identified in the research as recidivists?

Kenny MacAskill: I do not have the information in front of me that would allow me to drill down to which groups were identified. As I said, the research shows that those who are given a tough community sentence are less likely to reoffend—I refer to the three fifths who do not reoffend as opposed to the three quarters who do. Clearly, if we were to drill down, we would find individuals with deeply troubled lives. Part of the community payback order is meant to ensure sometimes that people do tough work. Equally, though, for many young women offenders, for example, we have sometimes to address underlying problems, which may not be simply physical but may be to do with child care—

The Deputy Presiding Officer: The minister should wind up now.

Kenny MacAskill: Twenty per cent of the order can be aimed at addressing underlying problems such as alcohol, drugs, low-level mental health or educational failure.

This is a positive bill that drives forward. We appreciate that there are areas on which the chamber is divided, but the areas on which members are united are much greater. I hope that we can get the support of others to make our communities safer and stronger.

I move,

That the Parliament agrees that the Criminal Justice and Licensing (Scotland) Bill be passed.

16:19

Richard Baker (North East Scotland) (Lab): Like the cabinet secretary, in the closing debate of the protracted consideration of the bill I pay tribute to those whose efforts have enabled the issues that the bill covers to be properly discussed and scrutinised over a period of well over a year. Labour members do not currently benefit from the advice of the civil service and rely on the extraordinary efforts of a small team. I thank Gordon Aikman in my office and Gavin Yates and Julia Braun in the Labour support unit, as well as the Scottish Parliament information centre, for its assistance. I congratulate the Justice Committee on its scrutiny of the bill, which would not have been possible without the diligence and patience of the clerks, who have been patient with a number of us. I am sure that members from all parties recognise the superb efforts of Andrew Mylne and his team. I congratulate the committee convener and members, especially the Labour members, Bill Butler, James Kelly and Cathie Craigie.

The bill arrived in the chamber in a good condition, as legislation that we could support, with a sensible approach on sentencing and meaningful action on violent crime. However, the bill as it now stands is very different, with measures that we cannot support. Unlike Iain Gray with the Scottish National Party manifesto, I will not rip the bill in two, for obvious reasons, but I emphasise how much it has been eviscerated during today's proceedings.

I must tell the cabinet secretary that what divides us on the bill is far more significant than what unites us. A bill that arrived in the chamber without the Scottish Government's flawed and reckless proposal for a legislative presumption against custodial sentences of six months and under now includes such a proposal for three-month sentences. It will apply not just to minor offending but to 28 per cent of those who are convicted of indecent assault, 68 per cent of those who are convicted of crimes of domestic abuse and almost a quarter of those who are convicted of knife crimes. The Liberal Democrats' amendments demonstrated that the measure is unworkable and unfunded, but they supported it anyway. The additional 7,000 community sentences that will follow the proposal will put an intolerable strain on an already stretched system. We support more and better community sentences; that is why we supported the plans for a pilot community court in Glasgow, which the Scottish Government opposed. That exposes the lack of consistency and credibility in its position.

At the beginning of my speech, I congratulated many of those whose hard work has been crucial to the scrutiny of the bill. I also pay tribute to those outside the chamber who have contributed to the bill's consideration. In particular, I thank John Muir, Kelly McGee and all of the families of the victims of knife crime, who have taken their campaign so passionately and—for some of us, at least—so persuasively to the Parliament. It is almost beyond belief that the Scottish Government and others have actively removed from the bill a robust and necessary measure to tackle knife crime, in the form of our proposal for mandatory minimum sentences for knife possession. That proposal has not succeeded today, but I assure the families of the victims of knife crime and the 30,000 Scots who signed their petition that this is not the end of the campaign. We will continue to work with them until we change the law in this country to take the action against knife crime that we need.

In other areas, such as tackling prostitution, the bill is also inadequate or silent. There are proposals that we can support, such as the establishment of a sentencing council, and some measures that are beneficial. We particularly welcome the new provisions on stalking. I congratulate Rhoda Grant on her important work in the area, which was inspired by those who have been victims of such crimes. If the bill falls today, I know that she will employ her member's bill as an alternative legislative vehicle to make the changes. In that event, we make clear that we will support fast-track legislation to put in place the other measures in the bill on which there is clearly consensus.

However, such measures are outweighed by the bill's failure to act on knife crime and the reckless proposals on sentencing. For more than a year, we have made clear that there are two lines in the sand for us that will determine our support or opposition to the bill. The need to reject the legislative presumption on sentencing and the need to take robust action on knife crime have always outweighed for us any other benefits of the bill. Those lines have been crossed today, so we will act as we have consistently advised the chamber that we would. Regrettably, we cannot support this flawed bill. Accordingly, we will vote that the Parliament should not pass it.

16:24

Bill Aitken (Glasgow) (Con): It is unfortunate, to say the least, that, although there is much of value in the bill, its effect has been lost by the approach on sentencing policy. The steps that have been taken to combat serious and organised crime are praiseworthy. Issues to do with disclosure cause problems, but the Scottish Government and the Crown Office and Procurator Fiscal Service have worked constructively with the Justice Committee to ease problems. The approach to the age of criminal responsibility has been sensitive, sympathetic and realistic.

However, that is not the real issue. The approach to sentencing in the bill will cause immeasurable damage in the years ahead. It is little short of tragic that there will be no deterrent and nothing to force people to co-operate with community sentences, which can offer a constructive approach. We all want the community payback system to work. There are serious issues to do with the financing of the system, which James Kelly and other members have raised consistently and persistently, but we are all committed to ensuring that community payback works.

However, when the community payback system does not work, there must be a custodial remedy. For many of the tiny minority of people who cause us problems, getting up early in the morning to do community service is not on the radar. Those people are not prepared to pay fines, and the fines enforcement system in the country borders on the farcical. Unless we are able to persuade people that there will be an unpleasant alternative, they simply will not co-operate. That is the tragedy of the situation. I acknowledge that the Government has worked hard, but there is a real and unfortunate parting of the ways over the issue.

If the sentencing proposals had not been in the bill, we would have supported the vast majority of the measures in it with enthusiasm and alacrity. However, those provisions are in the bill and, to some extent, the Government has turned its back on the campaigners on knife crime whom we saw in the Parliament today. That is very unfortunate indeed, and we will therefore not support the bill at decision time.

16:27

Robert Brown (Glasgow) (LD): Like other members, I thank the clerks, in particular, Government officials and members of the Justice Committee for their work on the bill. I am always impressed by the elegance of the solutions that the clerks come up with on the difficult issues that we present to them.

The bill is complex, as the cabinet secretary said, but it has emerged from the process considerably improved. I absolutely part company with Richard Baker and Bill Aitken in that regard. The end result is a bill that contains significant measures. We have got the provisions on the Scottish sentencing council right, after making changes to make it an advisory council. We have sharpened up support for community sentences, and I pay tribute to the cabinet secretary's work in that regard. As I said during consideration of amendments at stage 3, Richard Baker should reconsider the cabinet secretary's comments to me on how the matter will be taken forward. There are substantial measures in that regard.

Some provisions are less liberal and less radical than I would have liked them to be, such as the provisions that raise the age of criminal responsibility and the provisions on the DNA of children.

The major issues that dominated the debates at stage 3 were knife crime and short-term sentences. The end result is a liberal bill that Liberal Democrats are happy to support. We have made the presumption against short-term sentences practical and workable. We have reduced by half the scale of the issue—in relation to the numbers that will be affected—which is a valid approach and will provide a bit of breathing space.

I accept that, as members said, the credibility of the Government and the measures will be at stake to some extent as we go forward, but some members have taken too dismal an attitude to what is possible. It seems to me that, in providing for advances in human opportunity and advances in the protection of the public through a more effective criminal justice system, the bill has much to recommend it.

From the outset, I took the approach that I would judge the proposals on what the evidence tells us about what works and makes a difference. I regret that, on the major issues, that has not been the position of some parties in the Parliament. However, let me try to put the matter in perspective and quote from a speech by Mr Ben Skosana MP, who was the Minister of Correctional Services in South Africa. Talking about the problems that came from overcrowding in prisons and the financial challenges that South Africa faced—I suspect that the difficulties there were rather greater than they are here—he said:

> "it is an indisputable fact that the vast majority of the inmates in our prison system are from the previously disadvantaged groups who are unskilled and of little value in the labour market. It is our responsibility as Correctional Services to see to it that they too are the beneficiaries of the new democratic dispensation by providing them with the necessary basic skills to better their chances of becoming economically active ... and thus helping to break the cycle of crime."

He went on to make a number of other similar comments.

In that speech, Ben Skosana also quoted from Winston Churchill in his days as a minister in the great Liberal Government of 1906, when he was Home Secretary. Churchill's comments were echoed to a degree by the current Prime Minister at Prime Minister's questions today, when he supported the equivalent of the presumption against short-term sentences at the UK level. Churchill said:

> "The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A ... desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment"

and

> "unfailing faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols, which ... measure the stored-up strength of a nation."

That is how we should approach the bill and the opportunities in its liberal measures.

16:31

Stewart Maxwell (West of Scotland) (SNP): I thank the clerks, the witnesses, the Scottish Parliament information centre and the other committee members for a long experience in dealing with the bill—it took around a year, from memory.

The bill has been a difficult one to get through. We have had to discuss and come to a conclusion and consensus on various difficult and complex parts of the law. We arrived at consensus on many areas, which had much to do with the willingness of many members of the committee to work hard on the bill. Other members of the committee appreciate that. The committee does not always agree, but we did a pretty good job on the bill as far as we could.

I will address some of the comments that have been made on the bill. To be frank, I am a bit disappointed that the Labour Party and the Conservatives will vote against it, not because they perceive difficulties with some parts of the bill, such as the presumption against short sentences—we have said it many times, but it is a presumption—and the lack of mandatory sentences for the carrying of knives. I must point out to both those parties that, if they successfully vote down the bill, they vote down not only the presumption against short sentences or the approach to knife crime but extremely important and much needed measures on serious and organised crime, genocide, crimes against humanity and war crimes; articles banned in prison; sexual offences, particularly indecent images of children and extreme pornography; people trafficking, slavery, servitude and forced or compulsory labour; fraud, embezzlement and conspiracy; sexual offences prevention orders—

Richard Baker: Will the member give way?

Stewart Maxwell: I have not finished yet.

They will vote down measures on foreign travel orders, sex offender notification requirements and risk of sexual harm orders. Those provisions and the amendment moved by George Foulkes on the issues that disabled people face with getting out and about and being with friends of an evening, which we all supported, will fall. On their heads be it if that is the case.

Richard Baker: Does Mr Maxwell acknowledge that I have already made it clear that, on those areas where there is consensus—there clearly are such areas—we support fast-track legislation? That would quite easily be done and there would be no need to go through all the normal process. Indeed, emergency legislation may well be required in the Parliament in October anyway.

Stewart Maxwell: I am sorry, but no matter how fast the track might be for fast-track legislation, it would be slower than the bill that is before us tonight because, if Richard Baker and his colleagues vote down the bill, it will at the very least delay the measures on the issues that I raised. They are serious issues indeed for the people concerned and I am extremely disappointed in the Labour Party and the Conservatives on that.

I will make a couple of points about mandatory sentences for the crime of carrying a knife. We have a limited amount of money to deal with these issues and the choice that we face is clear: do we want to have more police to lower crime rates, or do we want more prisons to hold more and more people, creating long-term criminals? My choice is for more police on our streets lowering crime rates, rather than the choice that the Labour Party wishes to make.

The presumption against short-term sentences and the introduction of community payback orders, which are obviously linked, are a radical but very progressive move and I am disappointed by the reaction of other parties. The Conservative party is, this very day, facing in at least two different directions on the issue.

The Deputy Presiding Officer: The member will need to wind up.

Stewart Maxwell: In winding up, I have one final point, Presiding Officer.

The Deputy Presiding Officer: No. I am sorry, but there is no time for one final point.

16:35

Charlie Gordon (Glasgow Cathcart) (Lab): Carry a knife, go to jail is a sentencing policy that I have advocated since my time as leader of Glasgow City Council when there were, as there continue to be, high rates of knife crime in Glasgow.

As a rookie MSP back in May 2006, I floated an amendment during the passage of the Police, Public Order and Criminal Justice (Scotland) Bill proposing mandatory jail sentences for knife possession. Back then, Parliament's overwhelming view was that the way forward was to double the maximum sentence for knife possession and oppose bail for repeat knife offenders. Four years on, knife possession, knife assault and knife murder rates remain unacceptably high. In addition, many knife assaults go unreported and knife murder rates would be far higher were it not for the skill of our surgeons.

Not enough has changed since, four years ago, my constituent Craig McCulloch strolled home from a celebration. He encountered some younger acquaintances and they bantered together homeward. Two teenagers appeared and threatened Craig and his companions. Craig's reaction was typical of one who, when a schoolboy, counted two victims of bullying as his friends after Craig had sorted out the bullies: he sent his young companions home. By now, the two aggressors had armed themselves with knives. Alone, Craig offered them a square go—an old-fashioned Glasgow term for a fair fight with the fists. However, we live in different days: one of his assailants used a knife. He took the life of that fine young man, Craig McCulloch, on Craig's 18th birthday.

I want young people to aspire to live their lives like Craig McCulloch lived his, but I want to help them to avoid replicating the tragedy of Craig's death. I do not refer only to the young men of Glasgow; for be in no doubt tonight that, not only in our cities but in our seaside towns, in our rural villages and in our leafy suburbs, hundreds of teenagers will carry knives. To be sure, some will be the scared wee boys who were referred to in the debate on the amendments, but some may seek to practise the obscenity known as recreational violence. This is a major problem for our country, which has not gone away.

Carry a knife, go to jail is a campaign that will not go away until the Parliament does yet more to save the lives of our young people.

The Deputy Presiding Officer: We need to move to the wind-up speeches. I offer my apologies to members whom I could not call.

16:38

Nicol Stephen (Aberdeen South) (LD): I add my thanks to the clerks, the officials, the bill team, the minister, all the individuals and organisations that have contributed to the bill, the members of the Justice Committee and, especially, the front-bench spokespeople who have all worked so hard on the bill. I give particular thanks to Robert Brown for all his efforts on behalf of the Liberal Democrats. Politics and the media often deal in slogans: we hear about the revolving door of crime and also the cycle of reoffending and prisons and young offenders institutions are called colleges of crime. This is our chance to do something about the big issues.

Remember the minister's words. He said that, of those who go to prison for a short sentence, three quarters reoffend, whereas of those who are given a community sentence, three fifths do not reoffend. Having tried to sort out the maths in my mind, I reckon that that means that 15 out of 20 people who go to prison will reoffend, whereas eight out of 20 who are given a community service order will do so. The proportion is not quite double, but it means that about 75 per cent more offenders will carry out a further offence if they are given a short-term prison sentence rather than community service. That is the scale of the problem and that is how serious the issue is. Serious issues deserve serious consideration and a serious response, not populism.

It might sound tough to call for longer prison sentences and automatic prison sentences as an alternative to the Scottish Government's policy proposals, but let us be clear that, if the Labour or Conservative option was followed, it would be more expensive and would lead to more crime in our communities, more victims and more lives destroyed. That is why the bill is so important.

The Liberal Democrats have been at the heart of the debate surrounding the bill. We have had many successes to date, including the deletion of sections 1 and 2, which were on the purposes and principles of sentencing, and the conversion of the Scottish sentencing council into an advisory body. The Liberal Democrats believe that we need to change the mindset of our criminal justice system so that the goal of reducing reoffending is a key objective in the effort to cut crime in Scotland.

Although imprisonment might be appropriate for serious or violent offenders, sending people to prison for short periods is a hugely expensive way of making bad people worse and communities less safe. Introducing a presumption against custodial sentences of three months or less will be a big success not just for the initiative that Robert Brown has taken on behalf of the Liberal Democrats but, I believe, for Scotland. It is a hugely significant reform. The presumption against sentences of three months or less—rather than six—will ensure that the resulting increase in the number of community payback orders is manageable.

Throughout the passage of the bill, we have pursued a robust approach that has emphasised that the quality of community payback orders is vital. We have pressed the Government to put additional money into existing community sentences to make them speedier, more robust and more effective. In their populist efforts to appear tough on crime, Labour and the Conservatives have completely ignored the fact that replacing short sentences with tough, effective community penalties is the right way to reduce reoffending and to cut crime in Scotland's communities.

Labour has been populist on all the big issues today. If all its proposals were so fundamental and crucial and urgent, why did Labour not take the action that it has urged during its 13 years in power in England and Wales?

Richard Baker: Will the member take an intervention?

Nicol Stephen: I have no time for an intervention, but I think that that is a very strong point on which to finish.

16:43

John Lamont (Roxburgh and Berwickshire) (Con): The bill has been on a long journey, and not just as it has passed through its final stages today. As others have said, many have been involved in getting the bill to this stage. I will not waste time repeating the thanks that others have given, but I will particularly thank Erin Boyle in the Conservative research team for her help to me during the stages of the bill.

The bill is complex and covers many areas of our criminal justice system. It is true that many aspects of the bill are not contentious and act simply to tidy up the existing criminal justice system, so much of the bill can be welcomed. However, as members have heard today, we take serious issue with the proposal to create a presumption against short-term sentences. The language might have changed, but the SNP Government's enthusiasm to empty Scotland's jails without putting in place a robust community sentencing regime is no less diminished.

The failing in the current system—this is a key point—is that our prisons do not offer short-term rehabilitation options to those prisoners who are on short sentences. Indeed, some would suggest that effective rehabilitation is not in place for any of our prisoners. It is bizarre to suggest that people can be rehabilitated in their communities based on a few hours of contact each week but that absolutely nothing can be achieved during a short-term sentence in prison. Simply because our prisons are not successfully rehabilitating people during short-term sentences does not mean that we should abolish such sentences completely. Much more must be done to identify the underlying causes of criminality, what can be done to support offenders during their time in prison and, perhaps more important, what agencies should be involved in their rehabilitation once they are released.

On the other side of the coin, we should consider the impact on communities of short-term sentences when a disruptive individual has been removed and put in prison, albeit for a short time. It might not be for very long, but those residents whose neighbourhoods have been blighted by the activities of that individual—many of us have constituents in that situation—often get the respite that they have been longing for. Similarly, during the detention, albeit for a short period, opportunities might open up for local antisocial behaviour units and housing associations to put in place more permanent solutions to deal with the individual concerned.

The bill has been through a long process, so it is unfortunate that we find ourselves unable to support it at stage 3. We have supported the need for short-term sentences for many years, and the Government could have had our support today had it not insisted on reinstating the controversial proposals on sentencing. It is with much regret, but in the interests of Scotland's criminal justice system and the law-abiding majority of Scots, that we will vote against the bill at decision time.

16:46

James Kelly (Glasgow Rutherglen) (Lab): As others have done, I pay tribute to the clerks and members of the bill team who assisted with the amendments. The bill is complex and technical and, as Robert Brown said, we must pay tribute to those who make sense of our policy intentions and turn them into amendments.

It has been a long day of debates and we have covered a lot of issues, but the decision comes down to short-term sentences and knife crime. We do not support the policy of a presumption against short-term sentences. Sixty-eight per cent of those who are found guilty of domestic abuse are serving sentences of three months or less; others are serving such sentences for crimes such as indecent assault and robbery. To me, it stands to reason that the correct place for such individuals is to serve time in prison. Some members have argued with that by saying that reoffending rates have gone up. I will not run away from that issue; I have spoken about it consistently throughout the process. However, I do not accept that, because there is an issue with reoffending rates, we should just release difficult prisoners into the community. That is illogical.

The challenge is for all political parties to come up with a policy programme that makes prison work and ensures that we work with prisoners, particularly in the final days of their sentences, to try to transfer them into the community with some stability. The Wise Group in Glasgow has had some success in that, and 19 per cent of those in the group that it has been working with have been able to go on to stable employment, compared with 6 per cent of those who have been on the normal Scottish Prison Service scheme. We should be looking towards such schemes.

As I have said throughout, the presumption against short-term sentences is the wrong policy. I also do not believe that the correct amount of finance has been put behind it, and real problems could lie ahead if there is no additional money to support the policy intention.

Today's other major issue was knife crime. The cabinet secretary spoke at length about crime statistics, indicating that homicide rates had fallen, and I understand all that. However, it is quite clear that, over a period of time, knife crime continues to rise in Scotland. Last year, 58 per cent of homicides involved knife crime, and over a 20-year period from 1982 to 2002, during which homicides rose by 83 per cent, homicides by knife rose by 164 per cent.

We heard earlier about the costs to the national health service associated with knife crime. *The Sunday Times* indicated that there are costs of £500 million as a result of 1,170 admissions, but that figure has risen—as Iain Gray revealed yesterday, last year there were 1,857 admissions to national health service hospitals as a result of knife incidents. Clearly, that puts a great deal of pressure on NHS finances. The violence reduction unit has acknowledged that and the cost of violence in general. There is also an issue as people are more vulnerable in certain parts of Scotland. For example, someone is 32 times more likely to be the victim of a knife attack if they stay in a socially deprived area. Considering all those factors, I submit that action on knife crime would save costs in certain areas.

Stewart Maxwell characterised the argument as whether we want more people in prison or more police officers on the street. As I look at it, if we pursued the minimum mandatory sentences for knife crime, we would perhaps not have to hear sad tales such as the one that Charlie Gordon gave of his constituent, Craig McCulloch, and we would save more lives. That point weighs much more heavily than the issue of cost.

The Liberal Democrats have faced both ways on a number of the issues. In December 2008, Robert Brown was quoted in *The Sun*—he was pictured in it as well—saying:

> "Carrying knives is always stupid and should normally lead to a prison sentence for those caught with weapons."

There has clearly been yet another change of policy from the Liberal Democrats.

Knife campaigners arrived here this morning looking for the Parliament to make a difference, but they were given a slap in the face by the Scottish National Party and the Liberal Democrats. Actions speak louder than words. The SNP and the Lib Dems ignored the powerful messages from John Muir and Kelly McGee, the voices of the 30,000 who signed the petition, and the voices of knife campaigners throughout Scotland. That is shameful, and Labour will stand with the campaigners at half past 5 and vote down the bill.

16:52

Kenny MacAskill: We should remind ourselves that we are dealing with the final stages of a huge bill. Everyone who has spoken has correctly paid tribute to those involved. What I am most aggrieved, surprised and perplexed by is the position that has been taken by Labour and the Tories.

Richard Baker said that more divides than unites us. I have been looking at the bill again. It is one of the biggest bills that we have ever brought to the Parliament. There are nine parts to it, and many sections in it have not been contentious at all. However, because Labour and the Tories disagree with the votes of Parliament so far on a presumption against short sentences and on knife crime, whole swathes of the bill are to be ignored. For petty party politics, Labour and the Tories are jeopardising many provisions.

Let us consider what Labour and the Tories want to vote down: provisions on serious organised crime to tackle the Mr Bigs in the city of Glasgow—not just the wee neds, but the people who hang around and sometimes apparently, if rumours are to be believed, corrupt even those in the body politic. They want to vote down those provisions.

There are provisions on articles banned in prison. We know that hits are sometimes organised from prison, but we will seek to deal with mobile phones in there. There are provisions on indecent images of children, but Labour and the Tories do not want to take action against them. There are provisions on extreme pornography, but they do not want to take action against that. The bill includes foreign travel orders to prevent the perverts and paedophiles in our communities from going away, whether to Thailand or anywhere else, to carry out abuse. Labour and the Tories want to vote down those measures simply because they did not get their way earlier in stage 3.

Patrick Harvie (Glasgow) (Green): I am sorry to ask to lower the temperature just a little, but I wonder whether the cabinet secretary will say a little more about one of the measures that has had less debate and attention but which involves some contention—the measure that he mentioned on extreme pornography. He will be aware that the measure that exists in England and Wales is having no effect in reducing the production of genuinely violent or abusive images, but is being used just as a top-up charge in a small number of cases in which the most serious offence is rape or sexual assault, which attract a higher sentence. If we end up in a similar situation—with the charge being used in a similar way in Scotland, as a mere top-up—will we not have to look again at whether it serves any purpose?

Kenny MacAskill: I am more than happy to discuss that with the member afterwards. We must have appropriate laws, and such things have been dealt with by the Scottish Crime and Drug Enforcement Agency. Sadly, there are individuals in our communities who would perpetrate such offences.

Huge swathes of the bill are not contentious and will change criminal procedure in Scotland—which needs to be changed—for the better. We have not even debated many of the bill's provisions, which have, correctly, gone through unchallenged. Yet, Labour and the Tories say that they will vote down legislation that would make our communities safer, protect our children from sexual perverts and protect our communities from serious organised crime, simply because they did not get their way.

As we keep being told, we are a minority Government; therefore, this is not something that we have foisted on the Parliament. Let us be clear: there are aspects of the bill that the Government has had to bend to the will of Parliament. For example, the position that we have reached on the sentencing council is not the position that we started out from. Nevertheless, we recognised the merits of what was put forward and the pragmatism of what can be achieved and we agreed with that. We began with a presumption against sentences of six months or less, but we accepted that, to get the bill passed and make the progress that we needed, we had to change that to a presumption against sentences of three months or less. We are grateful to Robert Brown and Patrick Harvie for the positions that they have taken on that. It is not a matter of our forcing or foisting anything on the Parliament.

Let us be clear: the decisions on knife crime and on sentencing that we made earlier were not made by an autocracy or enforced by me; they reflected the will of Parliament and a majority vote of the SNP, the Liberal Democrats, the Greens and Margo MacDonald. Those decisions have not been foisted on the Parliament by some corrupt autocracy; therefore, it is a strange position that the Labour-Tory coalition has got itself into. When those parties do not get the wee things that they want, they are prepared to bring down the whole bill because they are opposed to it. There is something perplexing in the society that we live in when Ken Clarke is much more liberal in his policies not simply than Jack Straw, but than the Labour Party north of the border.

The bill contains some contentious elements and things that people disagree with, and there are matters that the Government has had to accept—that is democracy. Equally, in a democracy it is incumbent on each of us to protect our children and our communities. If Labour and the Tories vote against the bill, they are voting against clear policies and legislative progress that would make Scotland much safer and stronger. We can continue to disagree on matters such as sentencing and knife crime—that is why, as a Government and as a body politic, we will have elections next year. However, they should not jeopardise the interests and safety of our communities simply because of that.

Richard Baker: Is the cabinet secretary saying that, if the bill falls tonight, he will not introduce legislation that we could support and which could be passed in a matter of days, which would cover all the issues that he is talking about?

Kenny MacAskill: It is utterly preposterous for Mr Baker to suggest that, if the bill falls, we can pass emergency legislation on all those matters before the Government ceases to be in government, next year.

Richard Baker: You did it for the budget.

The Presiding Officer (Alex Fergusson): Order. One debate at a time, please.

Kenny MacAskill: Is Richard Baker really suggesting that we could pass emergency legislation on serious organised crime, indecent images and child pornography? Frankly, that is utterly ridiculous. Sometimes, members must accept the decision of Parliament. The Government has had to accept it both in government and, in the past, when we were in opposition. Labour had eight years in government and never addressed any of those matters.

Nicol Stephen: Thirteen years.

Kenny MacAskill: Labour had 13 years in government, as Nicol Stephen correctly points out, yet it took no action on those matters. The fact is that Labour is failing to address what is necessary.

It is a good bill that will make Scotland safer and stronger. There are areas on which we divide and disagree, but we must recognise that it has been voted on by Parliament and promoted not simply by the SNP, the Liberal Democrats and the Greens, but by police officers, the violence reduction unit and those who are in the front line of Scottish policing. I commend the bill to Parliament.

Decision Time

17:37

The Presiding Officer (Alex Fergusson): There are four questions to be put as a result of today's business. The first question is, that motion S3M-6604, in the name of Kenny MacAskill, on the Criminal Justice and Licensing (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Campbell, Aileen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
O'Donnell, Hugh (Central Scotland) (LD)
Paterson, Gil (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicol (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Against

Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)

Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

The Presiding Officer: The result of the division is: For 64, Against 61, Abstentions 0.

Motion agreed to,

That the Parliament agrees that the Criminal Justice and Licensing (Scotland) Bill be passed.

Criminal Justice and Licensing (Scotland) Bill
[AS PASSED]

CONTENTS

Section

PART 1

SENTENCING

The Scottish Sentencing Council

3 The Scottish Sentencing Council
4 The Council's objectives
5 Sentencing guidelines
6 Consultation on proposed sentencing guidelines
6A Approval of sentencing guidelines by High Court
7 Effect of sentencing guidelines
8 Ministers' power to request that sentencing guidelines be prepared or reviewed
9 High Court's power to require preparation or review of sentencing guidelines
9A Publication of High Court guideline judgments
10 Scottish Court Service to provide sentencing information to the Council
11 The Council's power to provide information, advice etc.
12 Business plan
13 Annual report

Community payback orders

14 Community payback orders

Non-harassment orders

15 Non-harassment orders

Short sentences

16 Short periods of detention
16A Presumption against short periods of imprisonment
18 Amendments of Custodial Sentences and Weapons (Scotland) Act 2007
19 Early removal of certain short-term prisoners from the United Kingdom

Other sentencing measures

20 Reports about supervised persons
20ZA Detention of children convicted on indictment
20A Pre-sentencing reports about organisations
21 Extended sentences for certain sexual offences
22 Effect of probation and absolute discharge
23 Offences aggravated by racial or religious prejudice
23A Voluntary intoxication by alcohol: effect in sentencing
24A Mutual recognition of judgments and probation decisions

PART 2

CRIMINAL LAW

Serious organised crime

25 Involvement in serious organised crime
26 Offences aggravated by connection with serious organised crime
27 Directing serious organised crime
28 Failure to report serious organised crime

Genocide, crimes against humanity and war crimes

28A Genocide, crimes against humanity and war crimes: UK residents
28B Genocide, crimes against humanity and war crimes: retrospective application

Articles banned in prison

29 Articles banned in prison

Crossbows, knives etc.

30 Sale and hire of crossbows to persons under 18
31 Sale and hire of knives and certain other articles to persons under 18

Offensive weapons etc.

31A Offensive weapons etc.

Threatening or abusive behaviour

31AA Threatening or abusive behaviour

Stalking

31B Offence of stalking

Sexual offences

32 Certain sexual offences by non-natural persons
33 Indecent images of children
34 Extreme pornography
34A Voyeurism: additional forms of conduct
34B Sexual offences: defences in relation to offences against older children
34C Penalties for offences of brothel-keeping and living on the earnings of prostitution

People trafficking

35 People trafficking

Slavery, servitude and forced or compulsory labour

35A Slavery, servitude and forced or compulsory labour

Fraud and embezzlement

36 Alternative charges for fraud and embezzlement
36A Articles for use in fraud

Conspiracy

37 Conspiracy to commit offences outwith Scotland

Abolition of offences of sedition and leasing-making

37A Abolition of offences of sedition and leasing-making

PART 3

CRIMINAL PROCEDURE

Children

38 Prosecution of children

Offences: liability of partners

39 Offences: liability of partners

Witness statements

40 Witness statements

Police liberation

41 Breach of undertaking

Grant of warrants

41A Grant of warrants for execution by constables and police members of SCDEA

Bail

42 Bail review applications
43 Bail condition for identification procedures etc.
43A Bail conditions: remote monitoring requirements

Prosecution on indictment

44 Prosecution on indictment: Scottish Law Officers

Transfer of justice of the peace court cases

45 Transfer of justice of the peace court cases

Additions to complaint

46 Additional charge where bail etc. breached

Dockets and charges in sex cases

46A Dockets and charges in sex cases

Remand and committal of children

47 Remand and committal of children and young persons

Prosecution of organisations

48 Meaning of "organisation"
49 Proceedings on indictment against organisations
50 Prosecution of organisations by summary procedure
51 Manner of citation of organisations in summary proceedings

Personal conduct of case by accused

51A Prohibition of personal conduct of case by accused in certain proceedings

Disclosure of convictions etc.

52 Disclosure of convictions and non-court disposals
52A Convictions by courts in other EU member States

Appeals: time limits

53 Time limits for lodging certain appeals

Crown appeals

54 Submissions as to sufficiency of evidence
55 Prosecutor's right of appeal
56 Power of High Court in appeal under section 107A of 1995 Act
57 Further amendment of 1995 Act

Retention and use of samples etc.

58 Retention of samples etc.
58A Retention of samples etc. where offer under sections 302 to 303ZA of the 1995 Act accepted
58B Retention of samples etc. taken or provided in connection with certain fixed penalty offences
59 Retention of samples etc. from children referred to children's hearings
59A Extension of section 19A of 1995 Act
60 Use of samples etc.

Referrals from the Scottish Criminal Cases Review Commission

61 Referrals from Scottish Criminal Cases Review Commission: grounds for appeal

PART 4

EVIDENCE

61A Admissibility of prior statements of witnesses: abolition of competence test
62 Witness statements: use during trial
63 Spouse or civil partner of accused a compellable witness
64 Special measures for child witnesses and other vulnerable witnesses
64A Child witnesses in proceedings for people trafficking offences
65 Amendment of Criminal Justice (Scotland) Act 2003
66 Witness anonymity orders
67 Television link evidence
67A European evidence warrants

PART 5

CRIMINAL JUSTICE

Jury service

67B Lists of jurors
68 Upper age limit for jurors
68A Excusal from jury service
69 Persons excusable from jury service

Data matching for detection of fraud etc.

70 Data matching for detection of fraud etc.

Sharing information with anti-fraud organisations

71 Sharing information with anti-fraud organisations

Closure of premises associated with human exploitation etc.

72 Closure of premises associated with human exploitation etc.

Sexual offences prevention orders

73 Sexual offences prevention orders

Foreign travel orders

74 Foreign travel orders

Sex offender notification requirements

74A Sex offender notification requirements

Risk of sexual harm orders

75 Risk of sexual harm orders
75A Risk of sexual harm orders: spent convictions

Obtaining information from outwith United Kingdom

76 Obtaining information from outwith United Kingdom

Surveillance

77 Grant of authorisations for surveillance

Interference with property

78 Authorisations to interfere with property etc.

Amendments of Part 5 of Police Act 1997

79 Amendments of Part 5 of Police Act 1997

Rehabilitation of offenders

79A Spent alternatives to prosecution: Rehabilitation of Offenders Act 1974

Medical services in prisons

79B Medical services in prisons

Miscellaneous

80 Assistance for victim support
81 Public defence solicitors
82 Compensation for miscarriages of justice
83 Financial reporting orders
84 Compensation orders

PART 6

DISCLOSURE

Meaning of "information"

85 Meaning of "information"

Provision of information to prosecutor

86 Provision of information to prosecutor: solemn cases
87 Continuing duty to provide information: solemn cases
88A Provision of information to prosecutor: summary cases
88B Continuing duty of investigating agency: summary cases

Prosecutor’s duty to disclose information

89 Prosecutor’s duty to disclose information
89A Disclosure of other information: solemn cases
90 Continuing duty of prosecutor

Defence statements

94 Defence statements: solemn proceedings
95 Defence statements: summary proceedings
95A Change in circumstances following lodging of defence statement: summary proceedings

Sections 89 to 95A: general

95AA Sections 89 to 95A: no need to disclose same information more than once

Court rulings on disclosure

95B Application by accused for ruling on disclosure
95C Review of ruling under section 95B
95D Appeals against rulings under section 95B

Effect of guilty plea

96 Effect of guilty plea

Disclosure after conclusion of proceedings at first instance

96A Sections 96B to 96I: interpretation
96B Duty to disclose after conclusion of proceedings at first instance
96C Continuing duty of prosecutor
96D Application to prosecutor for further disclosure
96E Further duty of prosecutor: conviction upheld on appeal
96F Further duty of prosecutor: convicted persons
96G Further duty of prosecutor: appeal against acquittal

Court rulings on disclosure: appellate proceedings

96H Application by appellant for ruling on disclosure
96I Review of ruling under section 96H

Applications to court: orders preventing or restricting disclosure

102 Application for section 106 order
103 Application for non-notification order or exclusion order
104 Application for non-notification order and exclusion order
105 Application for exclusion order
106 Application for section 106 order: determination

Orders preventing or restricting disclosure: Secretary of State

106A Order preventing or restricting disclosure: application by Secretary of State

106B Application for ancillary orders: Secretary of State
106C Application for restricted notification order and non-attendance order
106D Application for non-attendance order

Special counsel

107 Special counsel
107A Persons eligible for appointment as special counsel
107B Role of special counsel

Appeals

107C Appeals
107D Prohibition on disclosure pending determination of certain appeals

Review of section 106 and 106A orders

111 Review of section 106 order
111A Review of section 106A order
112 Review by court of section 106 order and section 106A order

Applications and reviews: general

113 Applications and reviews: general provisions

General

91 Exemptions from disclosure
97 Means of disclosure
92 Redaction of non-disclosable information by prosecutor
98 Confidentiality of disclosed information
99 Contravention of section 98
114 Code of practice
115 Acts of Adjournal
115A Abolition of common law rules about disclosure

Interpretation of Part 6

116 Interpretation of Part 6

PART 7

MENTAL DISORDER AND UNFITNESS FOR TRIAL

117 Criminal responsibility of persons with mental disorder
118 Acquittal involving mental disorder: procedure
119 Unfitness for trial
120 Abolition of common law rules

PART 8

LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982

121 Conditions to which licences under 1982 Act are to be subject
122 Licensing: powers of entry and inspection for civilian employees
124 Licensing of taxis and private hire cars
124A Licensing of street trading: food hygiene certificates
126 Licensing of public entertainment
127 Licensing of late night catering

128 Applications for licences

PART 9

ALCOHOL LICENSING

129A Premises licence applications: statements about disabled access etc.
130 Premises licence applications: notification requirements
131 Premises licence applications: modification of layout plans
131A Reviews of premises licences: notification of determinations
132 Premises licence applications: antisocial behaviour reports
132A Premises licenses: connected persons and interested parties
132AA Provisional premises licences: duration
132B Premises licence applications: food hygiene certificates
132C Provision of copies of licences to chief constable
133 Sale of alcohol to trade
134 Occasional licences
134A Extended hours applications: notification period
135 Extended hours applications: variation of conditions
136 Personal licences
137 Emergency closure orders
137A Appeals
137B Liability for offences
138 False statements in applications: offence
138A Powers of Licensing Standards Officers
139 Further modifications of 2005 Act

PART 10

MISCELLANEOUS

141 Annual report on Criminal Justice (Terrorism and Conspiracy) Act 1998
141A Modification of references to “Act”, “enactment” etc. in certain Acts of Parliament

PART 11

GENERAL

143 Orders and regulations
144 Interpretation
145 Modification of enactments
146 Ancillary provision
147 Transitional provision etc.
148 Commencement and short title

Schedule 1—The Scottish Sentencing Council
Schedule 1A—Community payback orders: consequential modifications
    Part 1—The 1995 Act
    Part 2—Other enactments
Schedule 2—Short-term custody and community sentences: consequential amendments
Schedule 2A—Convictions by courts in other EU member States: modifications of enactments
    Part 1—The 1995 Act
    Part 2—Other enactments

Schedule 3—Witness anonymity orders: transitional
Schedule 4—Further modifications of 2005 Act
Schedule 5—Modifications of enactments

Amendments to the Bill since the previous version are indicated by sidelining in the right margin. Wherever possible, provisions that were in the Bill as introduced retain the original numbering.

Criminal Justice and Licensing (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to make provision about sentencing, offenders and defaulters; to make provision about criminal law, procedure and evidence; to make provision about criminal justice and the investigation of crime (including police functions); to amend the law relating to the licensing of certain activities by local authorities; to amend the law relating to the sale of alcohol; and for connected purposes.

PART 1

SENTENCING

The Scottish Sentencing Council

3 The Scottish Sentencing Council

(1) There is established a body corporate to be known as the "Scottish Sentencing Council" (referred to in this Part as the "Council").

(2) Schedule 1 makes further provision about the Council.

4 The Council's objectives

The Council must, in carrying out its functions, seek to—

(a) promote consistency in sentencing practice,

(b) assist the development of policy in relation to sentencing,

(c) promote greater awareness and understanding of sentencing policy and practice.

5 Sentencing guidelines

(1) The Council is from time to time to prepare, for the approval of the High Court of Justiciary, guidelines relating to the sentencing of offenders.

(2) Such guidelines are to be known as "sentencing guidelines".

(3) Sentencing guidelines may in particular relate to—

(a) the principles and purposes of sentencing,

(b) sentencing levels,

(c) the particular types of sentence that are appropriate for particular types of offence or offender,

(d) the circumstances in which the guidelines may be departed from.

(4) Sentencing guidelines may be general in nature or may relate to a particular category of offence or offender or a particular matter relating to sentencing.

(5) The Council must, on preparing any sentencing guidelines, also prepare—

(a) an assessment of the costs and benefits to which the implementation of the guidelines would be likely to give rise,

(b) an assessment of the likely effect of the guidelines on the criminal justice system generally.

(8) The Council—

(a) must from time to time review any sentencing guidelines published by it, and

(b) may prepare, for the approval of the High Court of Justiciary, revised guidelines.

(9) In this section and sections 6 to 13, references to sentencing guidelines include references to revised sentencing guidelines.

6 Consultation on proposed sentencing guidelines

(1) The Council must, before submitting any sentencing guidelines to the High Court of Justiciary for approval—

(a) publish a draft of the proposed guidelines together with a draft of the assessments referred to in section 5(5), and

(b) consult the following persons about the drafts—

(i) the Scottish Ministers,

(ii) the Lord Advocate,

(iii) such other persons as the Council considers appropriate.

(3) The Council must, in finalising the guidelines and assessments for submission to the High Court of Justiciary, have regard to any comments made on the drafts following publication and consultation under subsection (1).

6A Approval of sentencing guidelines by High Court

(1) Sentencing guidelines have no effect unless approved by the High Court of Justiciary.

(2) On submitting sentencing guidelines to the High Court for approval, the Council must also provide the High Court with the assessments referred to in section 5(5).

(3) Where the Council submits sentencing guidelines to the High Court for approval, the Court may—

(a) approve the proposed guidelines—

(i) in whole or in part,

(ii) with or without modifications, or

(b) reject the proposed guidelines, in whole or in part.

(4) Where the High Court—

(a) rejects any of the proposed guidelines, or

(b) modifies any of them,

the Court must state its reasons for doing so.

(5) Sentencing guidelines approved by the High Court take effect on such date as the Court may determine.

(6) Different dates may be determined in relation to—

(a) different provisions of the guidelines, or

(b) different purposes.

(7) As soon as possible after the approval of sentencing guidelines by the High Court, the Council must publish—

(a) the guidelines as approved (including the date on which they take effect), and

(b) the assessments referred to in section 5(5) (revised as necessary to take account of any modifications of the guidelines prior to their approval).

(8) The guidelines and assessments are to be published in such manner as the Council considers appropriate.

7 Effect of sentencing guidelines

(1) A court (whether at first instance or on appeal) must—

(a) in sentencing an offender in respect of an offence, have regard to any sentencing guidelines which are applicable in relation to the case,

(b) in carrying out any other function relating to the sentencing of offenders, have regard to any sentencing guidelines applicable to the carrying out of the function.

(2) If the court decides not to follow the guidelines, or to depart from them in accordance with provision contained in them under section 5(3)(d), it must state the reasons for its decision.

(3) The sentencing guidelines to which the court must have regard under subsection (1) are those applicable to the case at the time the court is sentencing the offender or, as the case may be, carrying out the function.

(4) Subsection (5) applies where, on appeal in any case, the High Court of Justiciary passes another sentence under one of the following provisions of the 1995 Act—

(a) section 118(3),

(b) section 118(4)(b),

(c) section 118(4A)(b),

(d) section 118(4A)(c)(ii),

(e) section 189(1)(b).

(5) The sentencing guidelines which the High Court must have regard to under subsection (1) in passing that other sentence are those applicable to the case at the time it is passed.

(6) A revision of the sentencing guidelines after an offender is sentenced in respect of an offence is not a ground for the referral of the case to the High Court of Justiciary under section 194B of the 1995 Act (references to the High Court of cases dealt with on indictment).

(7) In section 108 of the 1995 Act (Lord Advocate's right of appeal against disposal where conviction on indictment), after subsection (2) insert—

> "(2A) In deciding whether to appeal under subsection (1) in any case, the Lord Advocate must have regard to any sentencing guidelines which are applicable in relation to the case.".

(8) In section 175 of the 1995 Act (prosecutor's right of appeal against disposal in summary proceedings), after subsection (4B) insert—

> "(4C) In deciding whether to appeal under subsection (4) in any case, the prosecutor must have regard to any sentencing guidelines which are applicable in relation to the case.".

8 Ministers' power to request that sentencing guidelines be prepared or reviewed

(1) The Scottish Ministers may request that the Council consider—

- (a) preparing, for the approval of the High Court of Justiciary, sentencing guidelines on any matter, or
- (b) reviewing any sentencing guidelines published by the Council.

(2) The Council must have regard to any request made by the Scottish Ministers.

(3) If the Council decides not to comply with a request made by the Scottish Ministers, it must provide the Scottish Ministers with reasons for its decision.

9 High Court's power to require preparation or review of sentencing guidelines

(1) Where the High Court of Justiciary pronounces an opinion under section 118(7) or 189(7) of the 1995 Act, the Court may require the Council to—

- (a) prepare, for the Court's approval, sentencing guidelines on any matter, or
- (b) review any sentencing guidelines published by the Council on any matter.

(2) On making a requirement under subsection (1), the High Court must state its reasons for doing so.

(3) The Council must comply with a requirement made under subsection (1) and, in doing so, must have regard to the High Court's reasons for making the requirement.

9A Publication of High Court guideline judgments

(1) The Council must publish the opinions of the High Court of Justiciary pronounced under section 118(7) or 189(7) of the 1995 Act.

(2) As soon as possible after the High Court pronounces such an opinion, the Scottish Court Service must provide the Council with a copy of the opinion.

(3) The copy opinion is to be provided in such form and by such means as the Council may require.

(4) The opinions are to be published in such manner, and at such times, as the Council considers appropriate.

(5) This section does not affect any power or responsibility of the Scottish Court Service in relation to the publication of opinions of the High Court.

10 Scottish Court Service to provide sentencing information to the Council

(1) The Scottish Court Service must provide the Council with such information relating to the sentences imposed by courts as the Council may reasonably require for the purposes of its functions.

(2) The information must be provided in such form and by such means as the Council may require.

(3) The Council must from time to time publish information about the sentences imposed by courts.

11 The Council's power to provide information, advice etc.

(1) The Council may—

(a) publish or otherwise disseminate information about sentencing matters,

(b) provide advice or guidance of a general nature about such matters,

(c) conduct research into such matters.

(4) In this section, "sentencing matters" means—

(a) sentencing guidelines,

(b) the practice of the courts in relation to sentencing, and

(c) any other matter relating to sentencing.

12 Business plan

(1) The Council must, before the submission day for each period of 3 years, prepare and submit to the Scottish Ministers a plan (a "business plan") describing how the Council proposes to carry out its functions during the period.

(2) The "submission day" is—

(a) for the period of 3 years beginning on the day on which this section comes into force, the day specified by order made by the Scottish Ministers,

(b) for each succeeding period of 3 years, the first day of the period.

(3) A business plan must—

(a) be prepared in such form as the Scottish Ministers may direct,

(b) contain the information specified in subsection (4) and such other information as they may direct, and

(c) be submitted by such time as they may direct.

(4) The information referred to in subsection (3)(b) is details of the matters in relation to which the Council proposes to prepare sentencing guidelines.

(5) The Council may include in a business plan such other information as it considers appropriate.

(6) In preparing a business plan, the Council must consult—

(a) the Scottish Ministers,

(b) the Lord Advocate,

(ba) the Lord Justice General, and

(c) such other persons as it considers appropriate.

(7) The Scottish Ministers must lay before the Scottish Parliament each business plan submitted to them.

(8) The Council must, as soon as practicable after a business plan has been laid before the Parliament, publish it in such manner as it considers appropriate.

(9) The Council may at any time during a period covered by a business plan review the plan for the period and submit to the Scottish Ministers a revised plan.

(10) Subsections (3) to (8) apply to a revised plan as they apply to a business plan.

13 Annual report

(1) The Council must, as soon as practicable after the end of each financial year, prepare and submit to the Scottish Ministers a report on the carrying out of its functions during the year.

(2) The report must—

(a) be prepared in such form as the Scottish Ministers may direct,

(b) contain the information specified in subsection (3) and such other information as they may direct, and

(c) be submitted by such time as they may direct.

(3) The information referred to in subsection (2)(b) is details of—

(a) the sentencing guidelines published or revised during the year (if any),

(aa) any sentencing guidelines submitted during the year to the High Court of Justiciary for approval and of the Court's response to them,

(b) any draft sentencing guidelines being consulted upon,

(c) requests made by the Scottish Ministers under section 8 and of the Council's response to them, and

(d) requirements made by the High Court of Justiciary under section 9 and of the Council's response to them.

(4) The Council may include in the report such other information as it considers appropriate.

(5) The Scottish Ministers must lay before the Scottish Parliament each report submitted to them.

(6) The Council must, as soon as practicable after the report has been laid before the Parliament, publish it in such manner as it considers appropriate.

Community payback orders

14 Community payback orders

(1) After section 227 of the 1995 Act insert—

“*Community payback orders*

227A Community payback orders

(1) Where a person (the “offender”) is convicted of an offence punishable by imprisonment, the court may, instead of imposing a sentence of imprisonment, impose a community payback order on the offender.

(2) A community payback order is an order imposing one or more of the following requirements—

(a) an offender supervision requirement,

(aa) a compensation requirement,

(b) an unpaid work or other activity requirement,

(c) a programme requirement,

(d) a residence requirement,

(e) a mental health treatment requirement,

(f) a drug treatment requirement,

(g) an alcohol treatment requirement,

(h) a conduct requirement.

(2A) Subsection (4) applies where—

(a) a person (the “offender”) is convicted of an offence punishable by a fine (whether or not it is also punishable by imprisonment), and

(b) where the offence is also punishable by imprisonment, the court decides not to impose—

(i) a sentence of imprisonment, or

(ii) a community payback order under subsection (1) instead of a sentence of imprisonment.

(4) The court may, instead of or as well as imposing a fine, impose a community payback order on the offender imposing one or more of the following requirements—

(za) an offender supervision requirement,

(a) a level 1 unpaid work or other activity requirement,

(c) a conduct requirement.

(5) A justice of the peace court may only impose a community payback order imposing one or more of the following requirements—

(a) an offender supervision requirement,

(aa) a compensation requirement,

(b) an unpaid work or other activity requirement,

(c) a residence requirement,

(d) a conduct requirement.

(6) Subsection (5)(b) is subject to section 227J(3).

(8) The Scottish Ministers may by order made by statutory instrument amend subsection (5) so as to add to or omit requirements that may be imposed by a community payback order imposed by a justice of the peace court.

(9) An order is not to be made under subsection (8) unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.

(10) In this section and sections 227B to 227ZI, except where the context requires otherwise—

"court" means the High Court, the sheriff or a justice of the peace court,

"imprisonment" includes detention.

227B Community payback order: procedure prior to imposition

(1) This section applies where a court is considering imposing a community payback order on an offender.

(1A) The court must not impose the order unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was serious enough to warrant the imposition of such an order.

(1B) Before imposing a community payback order imposing two or more requirements, the court must consider whether, in the circumstances of the case, the requirements are compatible with each other.

(2) The court must not impose the order unless it has obtained, and taken account of, a report from an officer of a local authority containing information about the offender and the offender's circumstances.

(2A) An Act of Adjournal may prescribe—

(a) the form of a report under subsection (2), and

(b) the particular information to be contained in it.

(2B) Subsection (2) does not apply where the court is considering imposing a community payback order—

(a) imposing only a level 1 unpaid work or other activity requirement, or

(b) under section 227M(2).

(3) The clerk of the court must give a copy of any report obtained under subsection (2) to—

(a) the offender,

(b) the offender's solicitor (if any), and

(c) the prosecutor.

(4) Before imposing the order, the court must explain to the offender in ordinary language—

(a) the purpose and effect of each of the requirements to be imposed by the order,

(b) the consequences which may follow if the offender fails to comply with any of the requirements imposed by the order, and

(c) where the court proposes to include in the order provision under section 227W for it to be reviewed, the arrangements for such a review.

(5) The court must not impose the order unless the offender has, after the court has explained those matters, confirmed that the offender—

(a) understands those matters, and

(b) is willing to comply with each of the requirements to be imposed by the order.

(6) Subsection (5)(b) does not apply where the court is considering imposing a community payback order under section 227M(2).

227C Community payback order: responsible officer

(1) This section applies where a court imposes a community payback order on an offender.

(2) The court must, in imposing the order—

(a) specify the locality in which the offender resides or will reside for the duration of the order,

(b) require the local authority within whose area that locality is situated to nominate, within two days of its receiving a copy of the order, an officer of the authority as the responsible officer for the purposes of the order,

(c) require the offender to comply with any instructions given by the responsible officer—

(i) about keeping in touch with the responsible officer, or

(ii) for the purposes of subsection (3),

(e) require the offender to report to the responsible officer in accordance with instructions given by that officer,

(f) require the offender to notify the responsible officer without delay of—

(i) any change of the offender's address, and

(ii) the times, if any, at which the offender usually works (or carries out voluntary work) or attends school or any other educational establishment, and

(g) where the order imposes an unpaid work or other activity requirement, require the offender to undertake for the number of hours specified in the requirement such work or activity as the responsible officer may instruct, and at such times as may be so instructed.

(3) The responsible officer is responsible for—

(a) making any arrangements necessary to enable the offender to comply with each of the requirements imposed by the order,

(b) promoting compliance with those requirements by the offender,

(c) taking such steps as may be necessary to enforce compliance with the requirements of the order or to vary, revoke or discharge the order.

(4) References in this Act to the responsible officer are, in relation to an offender on whom a community payback order has been imposed, the officer for the time being nominated in pursuance of subsection (2)(b).

(5) In reckoning the period of two days for the purposes of subsection (2)(b), no account is to be taken of a Saturday or Sunday or any day which is a local or public holiday in the area of the local authority concerned.

227E Community payback order: further provision

(1) Where a community payback order is imposed on an offender, the order is to be taken for all purposes to be a sentence imposed on the offender.

(2) On imposing a community payback order, the court must state in open court the reasons for imposing the order.

(3) The imposition by a court of a community payback order on an offender does not prevent the court imposing a fine or any other sentence (other than imprisonment), or making any other order, that it would be entitled to impose or make in respect of the offence.

(4) Where a court imposes a community payback order on an offender, the clerk of the court must ensure that—

(a) a copy of the order is given to—

(i) the offender, and

(ii) the local authority within whose area the offender resides or will reside, and

(b) a copy of the order and such other documents and information relating to the case as may be useful are given to the clerk of the appropriate court (unless the court imposing the order is that court).

(5) A copy of the order may be given to the offender—

(a) by being delivered personally to the offender, or

(b) by being sent—

(i) by a registered post service (as defined in section 125(1) of the Postal Services Act 2000 (c.26)), or

(ii) by a postal service which provides for the delivery of the document to be recorded.

(6) A community payback order is to be in such form, or as nearly as may be in such form, as may be prescribed by Act of Adjournal.

227F Requirement to avoid conflict with religious beliefs, work etc.

(1) In imposing a community payback order on an offender, the court must ensure, so far as practicable, that any requirement imposed by the order avoids—

(a) a conflict with the offender's religious beliefs,

(b) interference with the times, if any, at which the offender normally works (or carries out voluntary work) or attends school or any other educational establishment.

(2) The responsible officer must ensure, so far as practicable, that any instruction given to the offender avoids such a conflict or interference.

227FA Payment of offenders’ travelling and other expenses

(1) The Scottish Ministers may by order made by statutory instrument provide for the payment to offenders of travelling or other expenses in connection with their compliance with requirements imposed on them by community payback orders.

(2) An order under subsection (1) may—

- (a) specify expenses or provide for them to be determined under the order,
- (b) provide for the payments to be made by or on behalf of local authorities,
- (c) make different provision for different purposes.

(3) An order under subsection (1) is subject to annulment in pursuance of a resolution of the Scottish Parliament.

Offender supervision requirement

227G Offender supervision requirement

(1) In this Act, an “offender supervision requirement” is, in relation to an offender, a requirement that, during the specified period, the offender must attend appointments with the responsible officer or another person determined by the responsible officer, at such time and place as may be determined by the responsible officer, for the purpose of promoting the offender’s rehabilitation.

(2) On imposing a community payback order, the court must impose an offender supervision requirement if—

- (a) the offender is under 18 years of age at the time the order is imposed, or
- (b) the court, in the order, imposes—
  - (zi) a compensation requirement,
  - (i) a programme requirement,
  - (ii) a residence requirement,
  - (iii) a mental health requirement,
  - (iv) a drug treatment requirement,
  - (v) an alcohol treatment requirement, or
  - (vi) a conduct requirement.

(3) The specified period must be at least 6 months and not more than 3 years.

(3A) Subsection (3) is subject to subsection (3B) and section 227ZCA(4).

(3B) In the case of an offender supervision requirement imposed on a person aged 16 or 17 along with only a level 1 unpaid work or other activity requirement, the specified period must be no more than whichever is the greater of—

- (a) the specified period under section 227L in relation to the level 1 unpaid work or other activity requirement, and
- (b) 3 months.

(4) In this section, “specified”, in relation to an offender supervision requirement, means specified in the requirement.

Compensation requirement

227H Compensation requirement

(1) In this Act, a “compensation requirement” is, in relation to an offender, a requirement that the offender must pay compensation for any relevant matter in favour of a relevant person.

(2) In subsection (1)—

“relevant matter” means any personal injury, loss, damage or other matter in respect of which a compensation order could be made against the offender under section 249 of this Act, and

“relevant person” means a person in whose favour the compensation could be awarded by such a compensation order.

(3) A compensation requirement may require the compensation to be paid in a lump sum or in instalments.

(4) The offender must complete payment of the compensation before the earlier of the following—

(a) the end of the period of 18 months beginning with the day on which the compensation requirement is imposed,

(b) the beginning of the period of 2 months ending with the day on which the offender supervision requirement imposed under section 227G(2) ends.

(5) The following provisions of this Act apply in relation to a compensation requirement as they apply in relation to a compensation order, and as if the references in them to a compensation order included a compensation requirement—

(a) section 249(3), (4), (5) and (8) to (10),

(b) section 250(2),

(c) section 251(1), (1A) and (2)(b), and

(d) section 253.

Unpaid work or other activity requirement

227I Unpaid work or other activity requirement

(1) In this Act, an “unpaid work or other activity requirement” is, in relation to an offender, a requirement that the offender must, for the specified number of hours, undertake—

(a) unpaid work, or

(b) unpaid work and other activity.

(1A) Whether the offender must undertake other activity as well as unpaid work is for the responsible officer to determine.

(2) The nature of the unpaid work and any other activity to be undertaken by the offender is to be determined by the responsible officer.

(3) The number of hours that may be specified in the requirement must be (in total)—

(a) at least 20 hours, and

(b) not more than 300 hours.

(4) An unpaid work or other activity requirement which requires the work or activity to be undertaken for a number of hours totalling no more than 100 is referred to in this Act as a “level 1 unpaid work or other activity requirement”.

(5) An unpaid work or other activity requirement which requires the work or activity to be undertaken for a number of hours totalling more than 100 is referred to in this Act as a “level 2 unpaid work or other activity requirement”.

(6) The Scottish Ministers may by order made by statutory instrument substitute another number of hours for any of the numbers of hours for the time being specified in subsections (3) to (5).

(6A) An order under subsection (6) may only substitute for the number of hours for the time being specified in a provision mentioned in the first column of the following table a number of hours falling within the range set out in the corresponding entry in the second column.

Provision	*Range*	
	No fewer than	*No more than*
Subsection (3)(a)	10 hours	40 hours
Subsection (3)(b)	250 hours	350 hours
Subsections (4) and (5)	70 hours	150 hours

(7) An order under subsection (6) is subject to annulment in pursuance of a resolution of the Scottish Parliament.

(8) In this section, “specified”, in relation to an unpaid work or other activity requirement, means specified in the requirement.

227J Unpaid work or other activity requirement: further provision

(1) A court may not impose an unpaid work or other activity requirement on an offender who is under 16 years of age.

(2) A court may impose such a requirement on an offender only if the court is satisfied, after considering the report mentioned in section 227B(2), that the offender is a suitable person to undertake unpaid work in pursuance of the requirement.

(2A) Subsection (2) does not apply where the court is considering imposing a community payback order—

(a) imposing only a level 1 unpaid work or other activity requirement, or

(b) under section 227M(2).

(3) A justice of the peace court may impose a level 2 unpaid work or other activity requirement only if—

(a) the Scottish Ministers by regulations made by statutory instrument so provide, and

(b) the requirement is imposed in such circumstances and subject to such conditions as may be specified in the regulations.

(4) Regulations are not to be made under subsection (3) unless a draft of the statutory instrument containing them has been laid before and approved by resolution of the Scottish Parliament.

227K Allocation of hours between unpaid work and other activity

(1) Subject to subsection (2), it is for the responsible officer to determine how many out of the number of hours specified in an unpaid work or other activity requirement are to be allocated to undertaking, respectively—

(a) unpaid work, and

(b) any other activity to be undertaken.

(2) The number of hours allocated to undertaking an activity other than unpaid work must not exceed whichever is the lower of—

(a) 30% of the number of hours specified in the requirement, and

(b) 30 hours.

(3) The Scottish Ministers may by order made by statutory instrument—

(a) substitute another percentage for the percentage for the time being specified in subsection (2)(a),

(b) substitute another number of hours for the number of hours for the time being specified in subsection (2)(b).

(4) An order is not to be made under subsection (3) unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.

227L Time limit for completion of unpaid work or other activity

(1) The number of hours of unpaid work and any other activity that the offender is required to undertake in pursuance of an unpaid work or other activity requirement must be completed by the offender before the end of the specified period beginning with the imposition of the requirement.

(2) The “specified period” is—

(a) in relation to a level 1 unpaid work or other activity requirement, 3 months or such longer period as the court may specify in the requirement,

(b) in relation to a level 2 unpaid work or other activity requirement, 6 months or such longer period as the court may specify in the requirement.

227M Fine defaulters

(1) This section applies where—

(a) a fine has been imposed on an offender in respect of an offence,

(b) the offender fails to pay the fine or an instalment of the fine,

(ba) the offender is not serving a sentence of imprisonment, and

(d) apart from this section, the court would have imposed a period of imprisonment on the offender under section 219(1) of this Act in respect of the failure to pay the fine or instalment.

(2) Instead of imposing a period of imprisonment under section 219(1) of this Act, the court—

(a) where the amount of the fine or the instalment does not exceed level 2 on the standard scale, must impose a community payback order on the offender imposing a level 1 unpaid work or other activity requirement,

(b) where the amount of the fine or the instalment exceeds that level, may impose such a community payback order.

(2A) The court, in imposing a community payback order under subsection (2) on a person aged 16 or 17, must also impose an offender supervision requirement.

(3) Where the amount of the fine or the instalment does not exceed level 1 on the standard scale, the number of hours specified in the requirement must not exceed 50.

(4) On completion of the hours of unpaid work and any other activity specified in an unpaid work or other activity requirement imposed under this section, the fine in respect of which the requirement was imposed is discharged (or, as the case may be, the outstanding instalments of the fine are discharged).

(5) If, after a community payback order is imposed on an offender under this section, the offender pays the fine or the full amount of any outstanding instalments, the appropriate court must discharge the order.

(9) Subsection (2) is subject to sections 227J(1) and 227N(2), (3) and (6).

(10) In this section, “court” does not include the High Court.

227N Offenders subject to more than one unpaid work or other activity requirement

(1) This section applies where—

(a) a court is considering imposing an unpaid work or other activity requirement on an offender (referred to as the “new requirement”), and

(b) at the time the court is considering imposing the requirement, there is already in effect one or more community payback orders imposing such a requirement on the same offender (each referred to as an “existing requirement”).

(2) The court may, in imposing the new requirement, direct that it is to be concurrent with any existing requirement.

(3) Where the court makes a direction under subsection (2), hours of unpaid work or other activity undertaken after the new requirement is imposed count for the purposes of compliance with that requirement and the existing requirement.

(4) Subsection (5) applies where the court does not make a direction under subsection (2).

(5) The maximum number of hours which may be specified in the new requirement is the number of hours specified in section 227I(3)(b) less the aggregate of the number of hours of unpaid work or activity still to be completed under each existing requirement at the time the new requirement is imposed.

(5A) In calculating that aggregate, if any existing requirement is concurrent with another (by virtue of a direction under subsection (2)), hours that count for the purposes of compliance with both (or, as the case may be, all) are to be counted only once.

(6) Where that maximum number is less than the minimum number of hours that can be specified by virtue of section 227I(3)(a), the court must not impose the new requirement.

227O Rules about unpaid work and other activity

(1) The Scottish Ministers may make rules by statutory instrument for or in connection with the undertaking of unpaid work and other activities in pursuance of unpaid work or other activity requirements.

(2) Rules under subsection (1) may in particular make provision for—

(a) limiting the number of hours of work or other activity that an offender may be required to undertake in any one day,

(b) reckoning the time spent undertaking unpaid work or other activity,

(d) the keeping of records of unpaid work and any other activity undertaken.

(2A) Rules under subsection (1) may—

(a) confer functions on responsible officers,

(b) contain rules about the way responsible officers are to exercise functions under this Act.

(3) Rules under subsection (1) are subject to annulment in pursuance of a resolution of the Scottish Parliament.

Programme requirement

227P Programme requirement

(1) In this Act, a "programme requirement" is, in relation to an offender, a requirement that the offender must participate in a specified programme, at the specified place and on the specified number of days.

(2) In this section, "programme" means a course or other planned set of activities, taking place over a period of time, and provided to individuals or groups of individuals for the purpose of addressing offending behavioural needs.

(3) A court may impose a programme requirement on an offender only if the specified programme is one which has been recommended by an officer of a local authority as being suitable for the offender to participate in.

(4) If an offender's compliance with a proposed programme requirement would involve the co-operation of a person other than the offender, the court may impose the requirement only if the other person consents.

(5) A court may not impose a programme requirement that would require an offender to participate in a specified programme after the expiry of the period specified in the offender supervision requirement to be imposed at the same time as the programme requirement (by virtue of section 227G(2)(b)).

(6) Where the court imposes a programme requirement on an offender, the requirement is to be taken to include a requirement that the offender, while attending the specified programme, complies with any instructions given by or on behalf of the person in charge of the programme.

(7) In this section, "specified", in relation to a programme requirement, means specified in the requirement.

Residence requirement

227Q Residence requirement

(1) In this Act, a "residence requirement" is, in relation to an offender, a requirement that, during the specified period, the offender must reside at a specified place.

(2) The court may, in a residence requirement, require an offender to reside at a hostel or other institution only if the hostel or institution has been recommended as a suitable place for the offender to reside in by an officer of a local authority.

(3) The specified period must not be longer than the period specified in the offender supervision requirement to be imposed at the same time as the residence requirement (by virtue of section 227G(2)(b)).

(4) In this section, "specified", in relation to a residence requirement, means specified in the requirement.

Mental health treatment requirement

227R Mental health treatment requirement

(1) In this Act, a "mental health treatment requirement" is, in relation to an offender, a requirement that the offender must submit, during the specified period, to treatment by or under the direction of a registered medical practitioner or a registered psychologist (or both) with a view to improving the offender's mental condition.

(2) The treatment to which an offender may be required to submit under a mental health treatment requirement is such of the kinds of treatment described in subsection (3) as is specified; but otherwise the nature of the treatment is not to be specified.

(3) Those kinds of treatment are—

(a) treatment as a resident patient in a hospital (other than a State hospital) within the meaning of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) ("the 2003 Act"),

(b) treatment as a non-resident patient at such institution or other place as may be specified, or

(c) treatment by or under the direction of such registered medical practitioner or registered psychologist as may be specified.

(4) A court may impose a mental health treatment requirement on an offender only if the court is satisfied—

(a) on the written or oral evidence of an approved medical practitioner (within the meaning of the 2003 Act), that Condition A is met,

(b) on the written or oral evidence of the registered medical practitioner or registered psychologist by whom or under whose direction the treatment is to be provided, that Condition B is met, and

(c) that Condition C is met.

(5) Condition A is that—

(a) the offender suffers from a mental condition,

(b) the condition requires, and may be susceptible to, treatment, and

(c) the condition is not such as to warrant the offender's being subject to—

(i) a compulsory treatment order under section 64 of the 2003 Act, or

(ii) a compulsion order under section 57A of this Act.

(6) Condition B is that the treatment proposed to be specified is appropriate for the offender.

(7) Condition C is that arrangements have been made for the proposed treatment including, where the treatment is to be of the kind mentioned in subsection (3)(a), arrangements for the offender's reception in the hospital proposed to be specified in the requirement.

(8) The specified period must not be longer than the period specified in the offender supervision requirement to be imposed at the same time as the mental health treatment requirement (by virtue of section 227G(2)(b)).

(9) In this section, "specified", in relation to a mental health treatment requirement, means specified in the requirement.

227S Mental health treatment requirements: medical evidence

(1) For the purposes of section 227R(4)(a) or (b), a written report purporting to be signed by an approved medical practitioner (within the meaning of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)) may be received in evidence without the need for proof of the signature or qualifications of the practitioner.

(2) Where such a report is lodged in evidence otherwise than by or on behalf of the offender, a copy of the report must be given to—

(a) the offender, and

(b) the offender's solicitor (if any).

(3) The court may adjourn the case if it considers it necessary to do so to give the offender further time to consider the report.

(4) Subsection (5) applies where the offender is—

(a) detained in a hospital under this Act, or

(b) remanded in custody.

(5) For the purpose of calling evidence to rebut any evidence contained in a report lodged as mentioned in subsection (2), arrangements may be made by or on behalf of the offender for an examination of the offender by a registered medical practitioner.

(6) Such an examination is to be carried out in private.

227T Power to change treatment

(1) This section applies where—

(a) a mental health treatment requirement has been imposed on an offender, and

(b) the registered medical practitioner or registered psychologist by whom or under whose direction the offender is receiving the treatment to which the offender is required to submit in pursuance of the requirement is of the opinion mentioned in subsection (2).

(2) That opinion is—

(a) that the offender requires, or that it would be appropriate for the offender to receive, a different kind of treatment (whether in whole or in part) from that which the offender has been receiving, or

(b) that the treatment (whether in whole or in part) can be more appropriately given in or at a different hospital or other institution or place from that where the offender has been receiving treatment.

(3) The practitioner or, as the case may be, psychologist may make arrangements for the offender to be treated accordingly.

(4) Subject to subsection (5), the treatment provided under the arrangements must be of a kind which could have been specified in the mental health treatment requirement.

(5) The arrangements may provide for the offender to receive treatment (in whole or in part) as a resident patient in an institution or place even though it is one that could not have been specified for that purpose in the mental health treatment requirement.

(6) Arrangements may be made under subsection (3) only if—

(a) the offender and the responsible officer agree to the arrangements,

(b) the treatment will be given by or under the direction of a registered medical practitioner or registered psychologist who has agreed to accept the offender as a patient, and

(c) where the treatment requires the offender to be a resident patient, the offender will be received as such.

(7) Where arrangements are made under subsection (3)—

(a) the responsible officer must notify the court of the arrangements, and

(b) the treatment provided under the arrangements is to be taken to be treatment to which the offender is required to submit under the mental health treatment requirement.

Drug treatment requirement

227U Drug treatment requirement

(1) In this Act, a "drug treatment requirement" is, in relation to an offender, a requirement that the offender must submit, during the specified period, to treatment by or under the direction of a specified person with a view to reducing or eliminating the offender's dependency on, or propensity to misuse, drugs.

(2) The treatment to which an offender may be required to submit under a drug treatment requirement is such of the kinds of treatment described in subsection (3) as is specified (but otherwise the nature of the treatment is not to be specified).

(3) Those kinds of treatment are—

(a) treatment as a resident in such institution or other place as is specified,

(b) treatment as a non-resident at such institution or other place, and at such intervals, as is specified.

(4) The specified person must be a person who has the necessary qualifications or experience in relation to the treatment to be provided.

(5) The specified period must not be longer than the period specified in the offender supervision requirement to be imposed at the same time as the drug treatment requirement (by virtue of section 227G(2)(b)).

(6) A court may impose a drug treatment requirement on an offender only if the court is satisfied that—

(a) the offender is dependent on, or has a propensity to misuse, any controlled drug (as defined in section 2(1)(a) of the Misuse of Drugs Act 1971 (c.38)),

(b) the dependency or propensity requires, and may be susceptible to, treatment, and

(c) arrangements have been, or can be, made for the proposed treatment including, where the treatment is to be of the kind mentioned in subsection (3)(a), arrangements for the offender's reception in the institution or other place to be specified.

(7) In this section, "specified", in relation to a drug treatment requirement, means specified in the requirement.

Alcohol treatment requirement

227V Alcohol treatment requirement

(1) In this Act, an "alcohol treatment requirement" is, in relation to an offender, a requirement that the offender must submit, during the specified period, to treatment by or under the direction of a specified person with a view to the reduction or elimination of the offender's dependency on alcohol.

(2) The treatment to which an offender may be required to submit under an alcohol treatment requirement is such of the kinds of treatment described in subsection (3) as is specified (but otherwise the nature of the treatment is not to be specified).

(3) Those kinds of treatment are—

(a) treatment as a resident in such institution or other place as is specified,

(b) treatment as a non-resident at such institution or other place, and at such intervals, as is specified,

(c) treatment by or under the direction of such person as is specified.

(4) The person specified under subsection (1) or (3)(c) must be a person who has the necessary qualifications or experience in relation to the treatment to be provided.

(5) The specified period must not be longer than the period specified in the offender supervision requirement to be imposed at the same time as the alcohol treatment requirement (by virtue of section 227G(2)(b)).

(6) A court may impose an alcohol treatment requirement on an offender only if the court is satisfied that—

(a) the offender is dependent on alcohol,

(b) the dependency requires, and may be susceptible to, treatment, and

(c) arrangements have been, or can be, made for the proposed treatment, including, where the treatment is to be of the kind mentioned in subsection (3)(a), arrangements for the offender's reception in the institution or other place to be specified.

(7) In this section, "specified", in relation to an alcohol treatment requirement, means specified in the requirement.

Conduct requirement

227VA Conduct requirement

(1) In this Act, a "conduct requirement" is, in relation to an offender, a requirement that the offender must, during the specified period, do or refrain from doing specified things.

(2) A court may impose a conduct requirement on an offender only if the court is satisfied that the requirement is necessary with a view to—

(a) securing or promoting good behaviour by the offender, or

(b) preventing further offending by the offender.

(3) The specified period must be not more than 3 years.

(4) The specified things must not include anything that—

(a) could be required by imposing one of the other requirements listed in section 227A(2), or

(b) would be inconsistent with the provisions of this Act relating to such other requirements.

(5) In this section, "specified", in relation to a conduct requirement, means specified in the requirement.

Community payback orders: review, variation etc.

227W Periodic review of community payback orders

(1) On imposing a community payback order on an offender, the court may include in the order provision for the order to be reviewed at such time or times as may be specified in the order.

(2) A review carried out in pursuance of such provision is referred to in this section as a "progress review".

(3) A progress review may be carried out by the court which imposed the community payback order or (if different) the appropriate court, and, where those courts are different, the court must specify in the order which of those courts is to carry out the reviews.

(4) A progress review is to be carried out in such manner as the court carrying out the review may determine.

(5) Before each progress review, the responsible officer must give the court a written report on the offender's compliance with the requirements imposed by the community payback order in the period to which the review relates.

(6) The offender must attend each progress review.

(7) If the offender fails to attend a progress review, the court may—

(a) issue a citation requiring the offender's attendance, or

(b) issue a warrant for the offender's arrest.

(8) The unified citation provisions apply in relation to a citation under subsection (7)(a) as they apply in relation to a citation under section 216(3)(a) of this Act.

(8A) Subsections (8B) and (8C) apply where, in the course of carrying out a progress review in respect of a community payback order, it appears to the court that the offender has failed to comply with a requirement imposed by the order.

(8B) The court must—

(a) provide the offender with written details of the alleged failure,

(b) inform the offender that the offender is entitled to be legally represented, and

(c) inform the offender that no answer need be given to the allegation before the offender—

(i) has been given an opportunity to take legal advice, or

(ii) has indicated that the offender does not wish to take legal advice.

(8C) The court must then—

(a) if it is the appropriate court, appoint another hearing for consideration of the alleged failure in accordance with section 227ZB, or

(b) if it is not the appropriate court, refer the alleged failure to that court for consideration in accordance with that section.

(9) On conclusion of a progress review in respect of a community payback order, the court may vary, revoke or discharge the order in accordance with section 227Y.

227X Applications to vary, revoke and discharge community payback orders

(1) The appropriate court may, on the application of either of the persons mentioned in subsection (2), vary, revoke or discharge a community payback order in accordance with section 227Y.

(2) Those persons are—

(a) the offender on whom the order was imposed,

(b) the responsible officer in relation to the offender.

227Y Variation, revocation and discharge: court's powers

(1) This section applies where a court is considering varying, revoking or discharging a community payback order imposed on an offender.

(2) The court may vary, revoke or discharge the order only if satisfied that it is in the interests of justice to do so having regard to circumstances which have arisen since the order was imposed.

(2A) Subsection (2) does not apply where the court is considering varying the order under section 227ZB(5)(c).

(3) In varying an order, the court may, in particular—

(a) add to the requirements imposed by the order,

(b) revoke or discharge any requirement imposed by the order,

(c) vary any requirement imposed by the order,

(d) include provision for progress reviews under section 227W,

(e) where the order already includes such provision, vary that provision.

(4) In varying a requirement imposed by the order, the court may, in particular—

(a) extend or shorten any period or other time limit specified in the requirement,

(b) in the case of an unpaid work or other activity requirement, increase or decrease the number of hours specified in the requirement,

(c) in the case of a compensation requirement, vary the amount of compensation or any instalment.

(6) The court may not, under subsection (4)(b), increase the number of hours beyond the appropriate maximum.

(6A) The appropriate maximum is the number of hours specified in section 227I(3)(b) at the time the unpaid work or other activity requirement being varied was imposed less the aggregate of the number of hours of unpaid work or other activity still to be completed under each other unpaid work or other activity requirement (if any) in effect in respect of the offender at the time of the variation (a "current requirement").

(6B) In calculating that aggregate, if any current requirement is concurrent with another (by virtue of a direction under section 227N(2)), hours that count for the purposes of compliance with both (or, as the case may be, all) are to be counted only once.

(6C) The court may not, under subsection (4)(c), increase the amount of compensation beyond the maximum that could have been awarded at the time the requirement was imposed.

(7) Where the court varies a restricted movement requirement imposed by a community payback order, the court must give a copy of the order making the variation to the person responsible for monitoring the offender's compliance with the requirement.

(8) Where the court revokes a community payback order, the court may deal with the offender in respect of the offence in relation to which the order was imposed as it could have dealt with the offender had the order not been imposed.

(8A) Subsection (8) applies in relation to a community payback order imposed under section 227M(2) as if the reference to the offence in relation to which the order was imposed were a reference to the failure to pay in respect of which the order was imposed.

(9) Where the court is considering varying, revoking or discharging the order otherwise than on the application of the offender, the court must issue a citation to the offender requiring the offender to appear before the court (except where the offender is required to appear by section 227W(6)) or 227ZB(2)(b).

(10) If the offender fails to appear as required by the citation, the court may issue a warrant for the arrest of the offender.

(11) The unified citation provisions apply in relation to a citation under subsection (9) as they apply in relation to a citation under section 216(3)(a) of this Act.

227Z Variation of community payback orders: further provision

(1) This section applies where a court is considering varying a community payback order imposed on an offender.

(2) The court must not make the variation unless it has obtained, and taken account of, a report from the responsible officer containing information about the offender and the offender's circumstances.

(2A) An Act of Adjournal may prescribe—

(a) the form of a report under subsection (2), and

(b) the particular information to be contained in it.

(2B) Subsection (2) does not apply where the court is considering varying a community payback order—

(a) so that it imposes only a level 1 unpaid work or other activity requirement, or

(b) imposed under section 227M(2).

(3) The clerk of the court must give a copy of any report obtained under subsection (2) to—

(a) the offender,

(b) the offender's solicitor (if any).

(4) Before making the variation, the court must explain to the offender in ordinary language—

(a) the purpose and effect of each of the requirements to be imposed by the order as proposed to be varied,

(b) the consequences which may follow if the offender fails to comply with any of the requirements imposed by the order as proposed to be varied, and

(c) where the court proposes to include in the order as proposed to be varied provision for a progress review under section 227W, or to vary any such provision already included in the order, the arrangements for such a review.

(5) The court must not make the variation unless the offender has, after the court has explained those matters, confirmed that the offender—

(a) understands those matters, and

(b) is willing to comply with each of the requirements to be imposed by the order as proposed to be amended.

(6) Where the variation would impose a new requirement—

(a) the court must not make the variation if the new requirement is not a requirement that could have been imposed by the order when it was imposed,

(b) if the new requirement is one which could have been so imposed, the court must, before making the variation take whatever steps the court would have been required to take before imposing the requirement had it been imposed by the order when it was imposed.

(6A) Subsection (6)(a) does not prevent the imposition of a restricted movement requirement under section 227ZB(5)(c).

(6B) In determining for the purpose of subsection (6)(a) whether an unpaid work or other activity requirement is a requirement that could have been imposed by the order when the order was imposed, the effect of section 227N(6) is to be ignored.

(7) Where the variation would vary any requirement imposed by the order, the court must not make the variation if the requirement as proposed to be varied could not have been imposed, or imposed in that way, by the order when it was imposed.

(8) Subsections (4) and (5) of section 227E apply, with the necessary modifications, where a community payback order is varied as they apply where such an order is imposed.

227ZA Change of offender's residence to new local authority area

(1) The section applies where—

(a) the offender on whom a community payback order has been imposed proposes to change, or has changed, residence to a locality ("the new locality") situated in the area of a different local authority from that in which the locality currently specified in the order is situated, and

(b) the court is considering varying the order so as to specify the new local authority area in which the offender resides or will reside.

(2) The court may vary the order only if satisfied that arrangements have been, or can be, made in the local authority area in which the new locality is situated for the offender to comply with the requirements imposed by the order.

(2A) If the court considers that a requirement ("the requirement concerned") imposed by the order cannot be complied with if the offender resides in the new locality, the court must not vary the order so as to specify the new local authority area unless it also varies the order so as to—

(a) revoke or discharge the requirement concerned, or

(b) substitute for the requirement concerned another requirement that can be so complied with.

(3) Where the court varies the order, the court must also vary the order so as to require the local authority for the area in which the new locality is situated to nominate an officer of the authority to be the responsible officer for the purposes of the order.

Breach of community payback order

227ZB Breach of community payback order

(1) This section applies where it appears to the appropriate court that an offender on whom a community payback order has been imposed has failed to comply with a requirement imposed by the order.

(2) The court may—

(a) issue a warrant for the offender's arrest, or

(b) issue a citation to the offender requiring the offender to appear before the court.

(3) If the offender fails to appear as required by a citation issued under subsection (2)(b), the court may issue a warrant for the arrest of the offender.

(4) The unified citation provisions apply in relation to a citation under subsection (2)(b) as they apply in relation to a citation under section 216(3)(a) of this Act.

(4A) The court must, before considering the alleged failure—

(a) provide the offender with written details of the alleged failure,

(b) inform the offender that the offender is entitled to be legally represented, and

(c) inform the offender that no answer need be given to the allegation before the offender—

(i) has been given an opportunity to take legal advice, or

(ii) has indicated that the offender does not wish to take legal advice.

(4B) Subsection (4A) does not apply if the offender has previously been provided with those details and informed about those matters under section 227W(8B) of this Act.

(5) Where the order was imposed under section 227A, if the court is satisfied that the offender has failed without reasonable excuse to comply with a requirement imposed by the order, the court may—

(a) impose on the offender a fine not exceeding level 3 on the standard scale,

(b) where the order was imposed under section 227A(1), revoke the order and deal with the offender in respect of the offence in relation to which the order was imposed as it could have dealt with the offender had the order not been imposed,

(ba) where the order was imposed under section 227A(4), revoke the order and impose on the offender a sentence of imprisonment for a term not exceeding—

(i) where the court is a justice of the peace court, 60 days,

(ii) in any other case, 3 months,

(c) vary the order so as to impose a new requirement, vary any requirement imposed by the order or revoke or discharge any requirement imposed by the order, or

(d) both impose a fine under paragraph (a) and vary the order under paragraph (c).

(5ZA) Where the order was imposed under section 227M(2), if the court is satisfied that the offender has failed without reasonable excuse to comply with a requirement imposed by the order, the court may—

(a) revoke the order and impose on the offender a period of imprisonment for a term not exceeding—

(i) where the court is a justice of the peace court, 60 days,

(ii) in any other case, 3 months, or

(b) vary—

(i) the number of hours specified in the level 1 unpaid work or other activity requirement imposed by the order, and

(ii) where the order also imposes an offender supervision requirement, the specified period under section 227G in relation to the requirement.

(5A) Where the court revokes a community payback order under subsection (5)(b) or (ba) and the offender is, in respect of the same offence, also subject to—

(a) a drug treatment and testing order, by virtue of section 234J, or

(b) a restriction of liberty order, by virtue of section 245D(3),

the court must, before dealing with the offender under subsection (5)(b) or (ba), revoke the drug treatment and testing order or, as the case may be, restriction of liberty order.

(5B) If the court is satisfied that the offender has failed to comply with a requirement imposed by the order but had a reasonable excuse for the failure, the court may, subject to section 227Y(2), vary the order so as to impose a new requirement, vary any requirement imposed by the order or revoke or discharge any requirement imposed by the order.

(14) Subsections (5)(b) and (ba) and (5A) are subject to section 42(9) of the Criminal Justice (Scotland) Act 2003 (asp 7) (powers of drugs courts to deal with breach of community payback orders).

227ZC Breach of community payback order: further provision

(3) Evidence of one witness is sufficient for the purpose of establishing that an offender has failed without reasonable excuse to comply with a requirement imposed by a community payback order.

(4) Subsection (5) applies in relation to a community payback order imposing a compensation requirement.

(5) A document bearing to be a certificate signed by the clerk of the appropriate court and stating that the compensation, or an instalment of the compensation, has not been paid as required by the requirement is sufficient evidence that the offender has failed to comply with the requirement.

(6) The appropriate court may, for the purpose of considering whether an offender has failed to comply with a requirement imposed by a community payback order, require the responsible officer to provide a report on the offender's compliance with the requirement.

Restricted movement requirement

227ZCA Restricted movement requirement

(1) The requirements which the court may impose under section 227ZB(5)(c) include a restricted movement requirement.

(2) If the court varies a community payback order under section 227ZB(5)(c) so as to impose a restricted movement requirement, the court must also vary the order so as to impose an offender supervision requirement, unless an offender supervision requirement is already imposed by the order.

(3) The court must ensure that the specified period under section 227G in relation to the offender supervision requirement is at least as long as the period for which the restricted movement requirement has effect and, where the community payback order already imposes an offender supervision requirement, must vary it accordingly, if necessary.

(4) The minimum period of 6 months in section 227G(3) does not apply in relation to an offender supervision requirement imposed under subsection (2).

(5) Where the court varies the order so as to impose a restricted movement requirement, the court must give a copy of the order making the variation to the person responsible for monitoring the offender's compliance with the requirement.

(6) If during the period for which the restricted movement requirement is in effect it appears to the person responsible for monitoring the offender's compliance with the requirement that the offender has failed to comply with the requirement, the person must report the matter to the offender's responsible officer.

(7) On receiving a report under subsection (6), the responsible officer must report the matter to the court.

227ZD Restricted movement requirement: effect

(1) In this Act, a "restricted movement requirement" is, in relation to an offender, a requirement restricting the offender's movements to such extent as is specified.

(2) A restricted movement requirement may in particular require the offender—

(a) to be in a specified place at a specified time or during specified periods, or

(b) not to be in a specified place, or a specified class of place, at a specified time or during specified periods.

(3) In imposing a restricted movement requirement containing provision under subsection (2)(a), the court must ensure that the offender is not required, either by the requirement alone or the requirement taken together with any other relevant requirement or order, to be at any place for periods totalling more than 12 hours in any one day.

(3A) In subsection (3), "other relevant requirement or order" means—

(a) any other restricted movement requirement in effect in respect of the offender at the time the court is imposing the requirement referred to in subsection (3), and

(b) any restriction of liberty order under section 245A in effect in respect of the offender at that time.

(4) A restricted movement requirement—

(a) takes effect from the specified day, and

(b) has effect for such period as is specified.

(4A) The period specified under subsection (4)(b) must be—

(a) not less than 14 days, and

(b) subject to subsections (4B) and (4C), not more than 12 months.

(4B) Subsection (4C) applies in the case of a restricted movement requirement imposed for failure to comply with a requirement of a community payback order—

(a) where the offender was under 18 years of age at the time the order was imposed, or

(b) where the only requirement imposed by the order is a level 1 unpaid work or other activity requirement.

(4C) The period specified under subsection (4)(b) must be not more than—

(a) where the order was imposed by a justice of the peace court, 60 days, or

(b) in any other case, 3 months.

(5) A court imposing a restricted movement requirement must specify in it—

(a) the method by which the offender's compliance with the requirement is to be monitored, and

(b) the person who is to be responsible for monitoring that compliance.

(6) The Scottish Ministers may by regulations made by statutory instrument substitute—

(a) for the number of hours for the time being specified in subsection (3) another number of hours,

(b) for the number of months for the time being specified in subsection (4A)(b) another number of months.

(7) Regulations are not to be made under subsection (6) unless a draft of the statutory instrument containing the regulations has been laid before and approved by resolution of the Scottish Parliament.

(8) In this section, "specified", in relation to a restricted movement requirement, means specified in the requirement.

227ZE Restricted movement requirements: further provision

(1) A court may not impose a restricted movement requirement requiring the offender to be, or not to be, in a specified place unless it is satisfied that the offender's compliance with the requirement can be monitored by the method specified in the requirement.

(2) Before imposing a restricted movement requirement requiring the offender to be in a specified place, the appropriate court must obtain and consider a report by an officer of the local authority in whose area the place is situated on—

(a) the place, and

(b) the attitude of any person (other than the offender) likely to be affected by the enforced presence of the offender at the place.

(3) The court may, before imposing the requirement, hear the officer who prepared the report.

227ZF Variation of restricted movement requirement

(1) This section applies where—

(a) a community payback order which is in force in respect of an offender imposes a restricted movement requirement requiring the offender to be at a particular place specified in the requirement for any period, and

(b) the court is considering varying the requirement so as to require the offender to be at a different place ("the new place").

(2) Before making the variation, the appropriate court must obtain and consider a report by an officer of the local authority in whose area the new place is situated on—

(a) the new place, and

(b) the attitude of any person (other than the offender) likely to be affected by the enforced presence of the offender at the new place.

(3) The court may, before making the variation, hear the officer who prepared the report.

227ZG Remote monitoring

Section 245C of this Act, and regulations made under that section, apply in relation to the imposition of, and compliance with, restricted movement requirements as they apply in relation to the imposition of, and compliance with, restriction of liberty orders.

227ZH Restricted movement requirements: Scottish Ministers’ functions

(1) The Scottish Ministers may by regulations made by statutory instrument prescribe—

(a) which courts, or class or classes of courts, may impose restricted movement requirements,

(b) the method or methods of monitoring compliance with a restricted movement requirement which may be specified in such a requirement,

(c) the class or classes of offender on whom such a requirement may be imposed.

(2) Regulations under subsection (1) may make different provision about the matters mentioned in paragraphs (b) and (c) of that subsection in relation to different courts or classes of court.

(3) Regulations under subsection (1) are subject to annulment in pursuance of a resolution of the Scottish Parliament.

(4) The Scottish Ministers must determine the person, or class or description of person, who may be specified in a restricted movement requirement as the person to be responsible for monitoring the offender’s compliance with the requirement (referred to in this section as the “monitor”).

(5) The Scottish Ministers may determine different persons, or different classes or descriptions of person, in relation to different methods of monitoring.

(6) The Scottish Ministers must notify each court having power to impose a restricted movement requirement of their determination.

(7) Subsection (8) applies where—

(a) the Scottish Ministers make a determination under subsection (4) changing a previous determination made by them, and

(b) a person specified in a restricted movement requirement in effect at the date the determination takes effect as the monitor is not a person, or is not of a class or description of person, mentioned in the determination as changed.

(8) The appropriate court must—

(a) vary the restricted movement requirement so as to specify a different person as the monitor,

(b) send a copy of the requirement as varied to that person and to the responsible officer, and

(c) notify the offender of the variation.

227ZI Documentary evidence in proceedings for breach of restricted movement requirement

(1) This section applies for the purposes of establishing in any proceedings whether an offender on whom a restricted movement requirement has been imposed has complied with the requirement.

(2) Evidence of the presence or absence of the offender at a particular place at a particular time may be given by the production of a document or documents bearing to be—

(a) a statement automatically produced by a device specified in regulations made under section 245C of this Act, by which the offender's whereabouts were remotely monitored, and

(b) a certificate signed by a person nominated for the purposes of this paragraph by the Scottish Ministers that the statement relates to the whereabouts of the offender at the dates and times shown in the statement.

(3) The statement and certificate are, when produced in evidence, sufficient evidence of the facts stated in them.

(4) The statement and certificate are not admissible in evidence at any hearing unless a copy of them has been served on the offender before the hearing.

(5) Where it appears to any court before which the hearing is taking place that the offender has not had sufficient notice of the statement or certificate, the court may adjourn the hearing or make any order that it considers appropriate.

Local authorities: annual consultation about unpaid work

227ZJ Local authorities: annual consultations about unpaid work

(1) Each local authority must, for each year, consult prescribed persons about the nature of unpaid work and other activities to be undertaken by offenders residing in the local authority's area on whom community payback orders are imposed.

(2) In subsection (1), "prescribed persons" means such persons, or class or classes of person, as may be prescribed by the Scottish Ministers by regulations made by statutory instrument.

(3) A statutory instrument containing regulations under subsection (2) is to be subject to annulment in pursuance of a resolution of the Scottish Parliament.

Annual reports on community payback orders

227ZJA Annual reports on community payback orders

(1) Each local authority must, as soon as practicable after the end of each reporting year, prepare a report on the operation of community payback orders within their area during that reporting year, and send a copy of the report to the Scottish Ministers.

(2) The Scottish Ministers may issue directions to local authorities about the content of their reports under subsection (1); and local authorities must comply with any such directions.

(3) The Scottish Ministers must, as soon as practicable after the end of each reporting year, lay before the Scottish Parliament and publish a report that collates and summarises the data included in the various reports under subsection (1).

(4) In this section, "reporting year" means—

(a) the period of 12 months beginning on the day this section comes into force, or

(b) any subsequent period of 12 months beginning on an anniversary of that day.

Community payback order: meaning of "the appropriate court"

227ZK Meaning of "the appropriate court"

(1) In sections 227A to 227ZI, "the appropriate court" means, in relation to a community payback order—

(a) where the order was imposed by the High Court of Justiciary, that Court,

(b) where the order was imposed by a sheriff, a sheriff having jurisdiction in the locality mentioned in subsection (2),

(c) where the order was imposed by a justice of the peace court—

(i) the justice of the peace court having jurisdiction in that locality, or

(ii) if there is no justice of the peace court having jurisdiction in that locality, a sheriff having such jurisdiction.

(2) The locality referred to in subsection (1) is the locality for the time being specified in the community payback order under section 227C(2)(a).".

(2) Schedule 1A modifies enactments in consequence of this section.

Non-harassment orders

15 Non-harassment orders

In section 234A of the 1995 Act (non-harassment orders)—

(a) in subsection (1), for "harassment of" substitute "misconduct towards",

(b) in subsection (2), for "further harassment" substitute "harassment (or further harassment)",

(c) after subsection (2) insert—

"(2A) The court may, for the purpose of subsection (2) above, have regard to any information given to it for that purpose by the prosecutor—

(a) about any other offence involving misconduct towards the victim—

(i) of which the offender has been convicted, or

(ii) as regards which the offender has accepted (or has been deemed to have accepted) a fixed penalty or compensation offer under section 302(1) or 302A(1) or as regards which a work order has been made under section 303ZA(6),

(b) in particular, by way of—

(i) an extract of the conviction along with a copy of the complaint or indictment containing the charge to which the conviction relates, or

(ii) a note of the terms of the charge to which the fixed penalty offer, compensation offer or work order relates.

(2B) But the court may do so only if the court may, under section 101 or 101A (in a solemn case) or section 166 or 166A (in a summary case), have regard to the conviction or the offer or order.

(2C) The court must give the offender an opportunity to make representations in response to the application.", and

(d) for subsection (7) substitute—

"(7) For the purposes of this section—

"harassment" and "conduct" are to be construed in accordance with section 8 of the Protection from Harassment Act 1997 (c.40),

"misconduct" includes conduct that causes alarm or distress.".

Short sentences

16 Short periods of detention

(1) The 1995 Act is amended as follows.

(2) Section 169 (detention in precincts of court) is repealed.

(3) In section 206 (minimum periods of detention)—

(a) in subsection (1), for "five" substitute "15", and

(b) subsections (2) to (6) are repealed.

16A Presumption against short periods of imprisonment

In section 204 of the 1995 Act (restrictions on passing sentence of imprisonment or detention), after subsection (3) insert—

"(3A) A court must not pass a sentence of imprisonment for a term of 3 months or less on a person unless the court considers that no other method of dealing with the person is appropriate.

(3B) Where a court passes such a sentence, the court must—

(a) state its reasons for the opinion that no other method of dealing with the person is appropriate, and

(b) have those reasons entered in the record of the proceedings.

(3C) The Scottish Ministers may by order made by statutory instrument substitute for the number of months for the time being specified in subsection (3A) another number of months.

(3D) An order under subsection (3C) is not to be made unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.".

18 Amendments of Custodial Sentences and Weapons (Scotland) Act 2007

(1) The Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17) is amended as follows.

(2) In section 4 (basic definitions)—

(a) in subsection (1)—

(i) the definitions of "custody-only prisoner" and "custody-only sentence" are repealed,

(ii) in the definition of "custody and community sentence" for "15 days or more" substitute "at least the prescribed period",

(iii) after the definition of "Parole Board" insert—

""prescribed period" means such period as the Scottish Ministers may by order specify,", and

(iv) after the definition of "punishment part" insert—

""short-term custody and community prisoner" means a person serving a short-term custody and community sentence,

"short-term custody and community sentence" means a sentence of imprisonment for an offence for a term of less than the prescribed period", and

(b) subsection (2) is repealed.

(3) For section 5 (release of custody-only prisoners on completion of sentence) substitute—

"Short-term custody and community prisoners

5 Release of short-term custody and community prisoners

As soon as a short-term custody and community prisoner has served one-half of the prisoner's short-term custody and community sentence the Scottish Ministers must release the prisoner on short-term community licence.".

(4) In Chapter 3 of Part 2, in the chapter title, for "Community" substitute "Short-term community, community".

(5) In section 29 (release on licence of certain prisoners: the supervision conditions), in subsection (2)(a)—

(a) in sub-paragraph (ii), the words from "serving" to the end are repealed,

(b) sub-paragraph (iii) is repealed,

(c) in sub-paragraphs (iv) and (v), for "person" substitute "short-term custody and community prisoner",

(d) in sub-paragraph (vi), for "person" substitute "short-term custody and community prisoner serving a sentence of imprisonment of 6 months or more and", and

(e) in sub-paragraph (vii), at the beginning insert "a short-term custody and community prisoner who is".

(6) After section 29 insert—

"Short-term community licences

29A Release on short-term community licence: conditions

(1) This section applies where, by virtue of section 5, the Scottish Ministers release a prisoner on short-term community licence.

(2) The Scottish Ministers must include in the prisoner's short-term community licence—

(a) the standard conditions, and

(b) where the prisoner falls within section 29(2), the supervision conditions.

(3) The Scottish Ministers may include in the prisoner's short-term community licence—

(a) where the prisoner does not fall within section 29(2), any of the supervision conditions,

(b) such other conditions as they consider appropriate.

(4) The Scottish Ministers may—

(a) vary any condition mentioned in subsection (2) or (3),

(c) cancel any condition mentioned in subsection (3),

(b) include any further conditions in the licence.

(5) The Scottish Ministers may not cancel any condition mentioned in subsection (2).

(6) Before exercising any of the powers conferred by subsection (3) or (4), the Scottish Ministers must, in pursuance of arrangements established under section 46A(1), co-operate with the appropriate local authority.

(7) In this section, "appropriate local authority", in relation to a short-term custody and community prisoner, means the local authority for the area in which the prisoner—

(a) resided immediately before the imposition of the short-term custody and community sentence, or

(b) intends to reside on release on short-term community licence.

(8) If, by virtue of subsection (7), two or more local authorities are the appropriate local authority in relation to a short-term custody and community prisoner, those authorities may agree that the functions conferred on them by subsection (5) and section 46A(2) may be carried out by only one of them.".

(7) After section 46 insert—

“*Assessment of conditions for short-term community licences*

46A Joint arrangements between Scottish Ministers and local authorities

(1) The Scottish Ministers and each local authority must jointly establish arrangements for the assessment and management of the risk posed in the local authority’s area by short-term custody and community prisoners released on licence subject to the supervision conditions.

(2) For the purposes of assisting the Scottish Ministers in deciding whether, under section 29A(3)(a), to include any of the supervision conditions in a prisoner’s short-term community licence, the Scottish Ministers and the appropriate local authority must, during the first half of a short-term custody and community prisoner’s sentence, assess, in accordance with arrangements established under subsection (1), whether any of those conditions are appropriate.

(3) In this section, “appropriate local authority” is to be construed in accordance with section 29A(7) and (8).”.

(8) In section 47 (curfew licences)—

(a) in subsection (1), after “to” insert “a short-term custody and community prisoner or”,

(b) in subsection (2) for “the custody part of the prisoner’s sentence” substitute—

“(a) in the case of a short-term custody and community prisoner, the first half of the prisoner’s sentence,

(b) in the case of a custody and community prisoner, the custody part of the prisoner’s sentence”,

(c) after subsection (3) insert—

“(3A) The Scottish Ministers may release a short-term custody and community prisoner on curfew licence only—

(a) after the later of—

(i) the day on which the prisoner has served the greater of one-quarter or four weeks of the prisoner’s sentence, or

(ii) the day falling 166 days before the expiry of one-half of the prisoner’s sentence, and

(b) before the day falling 14 days before the expiry of one-half of the prisoner’s sentence.”,

(d) in subsection (4)—

(i) after “a” insert “custody and community”, and

(ii) in paragraph (a)(ii), for “135” substitute “166”, and

(e) in subsection (8), for “the custody part of the prisoner’s sentence” substitute—

“(a) in the case of a short-term custody and community prisoner, the first half of the prisoner’s sentence,

(b) in the case of a custody and community prisoner, the custody part of the prisoner’s sentence”.

(9) Schedule 2 amends the Custodial Sentences and Weapons (Scotland) Act (asp 17) and the 1995 Act in consequence of amendments made by this section.

19 Early removal of certain short-term prisoners from the United Kingdom

For schedule 6 to the Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17) (transitory amendments of the Prisoners and Criminal Proceedings (Scotland) Act 1993) substitute—

“SCHEDULE 6
(introduced by section 66(3))

TRANSITORY AMENDMENTS

1 Until the coming into force of the repeal by this Act of Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9), that Part has effect in accordance with paragraphs 2 to 4.

2 In section 1 (release of short-term and long-term prisoners), subsection (3) has effect as if for paragraphs (a) and (b) there were substituted “must,”.

3 Section 9 (persons liable to removal from the United Kingdom) has effect as if—

(a) subsection (1) were repealed, and

(b) in subsection (3), after “section”, where it first occurs, there were inserted “and sections 9A and 9B”.

4 That Part has effect as if after section 9 there were inserted—

“9A Persons eligible for removal from the United Kingdom

(1) For the purposes of this Part, to be “eligible for removal from the United Kingdom” a person must show, to the satisfaction of the Scottish Ministers, that the condition in subsection (2) is met.

(2) The condition is that the person has the settled intention of residing permanently outside the United Kingdom if removed from prison under section 9B.

(3) The person must not be one who is liable to removal from the United Kingdom.

9B Early removal of certain short-term prisoners from the United Kingdom

(1) Subject to subsection (2), where a short-term prisoner is liable to, or eligible for, removal from the United Kingdom, the Scottish Ministers may remove the prisoner from prison under this section at any time during the period of 180 days ending with the day on which the prisoner will have served one-half of the prisoner’s sentence.

(2) Subsection (1) does not apply in relation to a prisoner unless the prisoner has served one-quarter of the sentence.

(3) A prisoner removed from prison under this section—

(a) if liable to removal from the United Kingdom, is so removed only for the purpose of enabling the Secretary of State to remove the prisoner from the United Kingdom under powers conferred by—

(i) Schedule 2 or 3 to the Immigration Act 1971 (c.77), or

(ii) section 10 of the Immigration and Asylum Act 1999 (c.33),

(b) if eligible for removal from the United Kingdom, is so removed only for the purpose of enabling the prisoner to leave the United Kingdom in order to reside permanently outside the United Kingdom, and

(c) in either case, so long as remaining in the United Kingdom, remains liable to be detained in pursuance of the prisoner's sentence until the prisoner has served one-half of the sentence.

(4) So long as a prisoner removed from prison under this section remains in the United Kingdom but has not been returned to prison, any duty or power of the Scottish Ministers under section 1(1), 1AA or 3 is exercisable in relation to the prisoner as if the prisoner were in prison.

(5) The Scottish Ministers may by order amend the number of days for the time being specified in subsection (1).

(6) A statutory instrument containing an order under subsection (5) may not be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.

9C Re-entry into United Kingdom of prisoner removed from prison early

(1) This section applies in relation to a person (referred to in this section as "the removed person") who, after being removed from prison under section 9B, has been removed from the United Kingdom before serving one-half of the sentence.

(2) Where the removed person re-enters the United Kingdom at any time before the date on which the person would have served the person's sentence in full (but for the person's removal from prison under section 9B), the person is liable to be detained in pursuance of the person's sentence until the earlier of the following—

(a) the date of the expiry of the outstanding custodial period,

(b) the date on which the person would have served the person's sentence in full (but for the person's removal from prison under section 9B).

(3) In the case of a person liable to be detained under subsection (2), the duty to release the person under section 1(1) or 1AA(1) applies only after the expiry of the outstanding custodial period.

(4) A person who is liable to be detained by virtue of subsection (2) is, if at large, to be taken for the purposes of section 40 of the Prisons (Scotland) Act 1989 (c.45) (persons unlawfully at large) to be unlawfully at large.

(5) Subsection (2) does not prevent—

(a) the further removal from prison under section 9B(1) of a person falling within that subsection, or

(b) the further removal from the United Kingdom of such a person.

(6) In this section, the "outstanding custodial period" means, in relation to a removed person, a period of time equal to the period beginning with the date of removal from the United Kingdom and ending with the date on which the person would, but for the removal, have served one-half of the sentence.".

5 Until the coming into force of the repeal by this Act of Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9), paragraph (c) of section 24 of the International Criminal Court (Scotland) Act 2001 (asp 13) (limited disapplication of certain provisions relating to sentences) has effect as if—

(a) after "9" there were inserted ", 9A, 9B, 9C", and

(b) after "transfer" there were inserted ", removal".".

Other sentencing measures

20 Reports about supervised persons

(1) Section 203 of the 1995 Act (reports) is amended as follows.

(2) In subsection (3), for the words from "the offender" to the end substitute—

"(a) the offender,

(b) the offender's solicitor (if any), and

(c) the prosecutor.".

20ZA Detention of children convicted on indictment

(1) Section 208 of the 1995 Act (detention of children convicted on indictment) is amended as follows.

(2) After subsection (1), insert—

"(1A) Where the court imposes a sentence of detention on a child, the court must—

(a) state its reasons for the opinion that no other method of dealing with the child is appropriate, and

(b) have those reasons entered in the record of the proceedings.".

(3) In subsection (2), for "Subsection (1) above is" substitute "Subsections (1) and (1A) above are".

20A Pre-sentencing reports about organisations

After section 203 of the 1995 Act (reports), insert—

"**203A Reports about organisations**

(1) This section applies where an organisation is convicted of an offence.

(2) Before dealing with the organisation in respect of the offence, the court may obtain a report into the organisation's financial affairs and structural arrangements.

(3) The report is to be prepared by a person appointed by the court.

(4) The person appointed to prepare the report is referred to in this section as the "reporter".

(5) The court may issue directions to the reporter about—

(a) the information to be contained in the report,

(b) the particular matters to be covered by the report,

(c) the time by which the report is to be submitted to the court.

(6) The court may order the organisation to give the reporter and any person acting on the reporter's behalf—

(a) access at all reasonable times to the organisation's books, documents and other records,

(b) such information or explanation as the reporter thinks necessary.

(7) The reporter's costs in preparing the report are to be paid by the clerk of court, but the court may order the organisation to reimburse to the clerk all or a part of those costs.

(8) An order under subsection (7) may be enforced by civil diligence as if it were a fine.

(9) On submission of the report to the court, the clerk of court must provide a copy of the report to—

(a) the organisation,

(b) the organisation's solicitor (if any), and

(c) the prosecutor.

(10) The court must have regard to the report in deciding how to deal with the organisation in respect of the offence.

(11) If the court decides to impose a fine, the court must, in determining the amount of the fine, have regard to—

(a) the report, and

(b) if the court makes an order under subsection (7), the amount of costs that the organisation is required to reimburse under the order.

(12) Where the court—

(a) makes an order under subsection (7), and

(b) imposes a fine on the organisation,

any payment by the organisation is first to be applied in satisfaction of the order under subsection (7).

(13) Where the court also makes a compensation order in respect of the offence, any payment by the organisation is first to be applied in satisfaction of the compensation order before being applied in accordance with subsection (12).".

21 Extended sentences for certain sexual offences

In section 210A of the 1995 Act (extended sentences for sex and violent offenders)—

(a) in subsection (10), at the end of the definition of "sexual offence" add—

"(xxviii) an offence (other than one mentioned in the preceding paragraphs) where the court determines for the purposes of this paragraph that there was a significant sexual aspect to the offender's behaviour in committing the offence;", and

(b) after subsection (11) add—

"(12) An extended sentence may be passed by reference to paragraph (xxviii) only if the offender is or is to become, by virtue of Schedule 3 to the Sexual Offences Act 2003 (c.42), subject to the notification requirements of Part 2 of that Act.".

22 Effect of probation and absolute discharge

(1) In section 1(4) of the Rehabilitation of Offenders Act 1974 (c.53) (construction of references in Act to "conviction"), for "section 9 of the Criminal Justice (Scotland) Act 1949" substitute "section 247 of the Criminal Procedure (Scotland) Act 1995 (c.46)".

(2) In section 49(6) of the 1982 Act (offences relating to dangerous and annoying creatures: power to order disposal of creature), the words "or makes a probation order in relation to him" are repealed.

(3) In section 58(3) of the 1982 Act (convicted thief in possession: power to order forfeiture of tools etc.)—

(a) the words "or makes a probation order in relation to him" are repealed, and

(b) for the words from "discharged absolutely" to the end substitute ", as the case may be, discharged absolutely.".

(4) In section 96 of the 2005 Act (exclusion orders: supplementary provision), after subsection (2) insert—

"(2A) For the purposes of section 94, section 247(1) of the Criminal Procedure (Scotland) Act 1995 (c.46) (convictions deemed not be convictions where offender placed on probation or discharged absolutely) does not apply to a conviction for a violent offence within the meaning of section 94.".

(5) In section 129 of the 2005 Act (relevant and foreign offences), after subsection (4) add—

"(5) For the purposes of the provisions of this Act specified in subsection (6), section 247(1) and (2) of the Criminal Procedure (Scotland) Act 1995 (c.46) (convictions deemed not to be convictions where offender placed on probation or discharged absolutely) does not apply to a conviction for a relevant offence.

(6) Those provisions are—

(a) section 21(4),

(b) section 23(6),

(c) section 24,

(d) section 33(6),

(e) sections 41 to 44,

(f) section 73(3),

(g) section 75,

(h) sections 80 to 83,

(i) section 89(4) and (5),

(j) subsection (3) of this section, and

(k) section 130.”.

23 Offences aggravated by racial or religious prejudice

(1) In section 96 of the Crime and Disorder Act 1998 (c.37) (racially aggravated offences), for subsection (5) substitute—

“(5) The court must—

(a) state on conviction that the offence was racially aggravated,

(b) record the conviction in a way that shows that the offence was so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.”.

(2) In section 74 of the Criminal Justice (Scotland) Act 2003 (asp 7) (offences aggravated by religious prejudice)—

(a) after subsection (2) insert—

“(2A) It is immaterial whether or not the offender’s malice and ill-will is also based (to any extent) on any other factor.”,

(b) subsections (3) and (4) are repealed, and

(c) after subsection (4) insert—

“(4A) The court must—

(a) state on conviction that the offence was aggravated by religious prejudice,

(b) record the conviction in a way that shows that the offence was so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.”.

23A Voluntary intoxication by alcohol: effect in sentencing

(1) Subsection (2) applies in relation to an offender who was, at the time of the offence, under the influence of alcohol as a result of having voluntarily consumed alcohol.

(2) A court, in sentencing the offender in respect of the offence, must not take that fact into account by way of mitigation.

24A Mutual recognition of judgments and probation decisions

(1) The Scottish Ministers may by order make provision for the purposes of and in connection with implementing any obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).

(2) The provision may, in particular, confer functions—

(a) on the Scottish Ministers,

(b) on other persons.

(3) An order under subsection (1) may modify any enactment.

(4) In this section, the "Framework Decision" means Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

PART 2

CRIMINAL LAW

Serious organised crime

25 Involvement in serious organised crime

(1) A person who agrees with at least one other person to become involved in serious organised crime commits an offence.

(1A) Without limiting the generality of subsection (1), a person agrees to become involved in serious organised crime if the person—

(a) agrees to do something (whether or not the doing of that thing would itself constitute an offence), and

(b) knows or suspects, or ought reasonably to have known or suspected, that the doing of that thing will enable or further the commission of serious organised crime.

(2) For the purposes of this section and sections 26 to 28—

"serious organised crime" means crime involving two or more persons acting together for the principal purpose of committing or conspiring to commit a serious offence or a series of serious offences,

"serious offence" means an indictable offence—

(a) committed with the intention of obtaining a material benefit for any person, or

(b) which is an act of violence committed or a threat made with the intention of obtaining such a benefit in the future, and "material benefit" means a right or interest of any description in any property, whether heritable or moveable and whether corporeal or incorporeal.

(3) A person guilty of an offence under subsection (1) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both.

26 Offences aggravated by connection with serious organised crime

(1) This subsection applies where it is—

(a) libelled in an indictment or specified in a complaint that an offence is aggravated by a connection with serious organised crime, and

(b) proved that the offence is so aggravated.

(2) An offence is aggravated by a connection with serious organised crime if the person committing the offence is motivated (wholly or partly) by the objective of committing or conspiring to commit serious organised crime.

(3) It is immaterial whether or not in committing the offence the person in fact enables the person or another person to commit serious organised crime.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated by a connection with serious organised crime.

(5) Where subsection (1) applies, the court must—

(a) state on conviction that the offence is aggravated by a connection with serious organised crime,

(b) record the conviction in a way that shows that the offence was so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.

27 Directing serious organised crime

(1) A person commits an offence by directing another person—

(a) to commit a serious offence,

(b) to commit an offence aggravated by a connection with serious organised crime under section 26.

(2) A person commits an offence by directing another person to direct a further person to commit an offence mentioned in subsection (1).

(3) For the purposes of subsections (1) and (2), a person directs another person to commit an offence if the person—

(a) does something, or a series of things, to direct the person to commit the offence,

(b) intends that the thing or things done will persuade the person to commit the offence, and

(c) intends that the thing or things done will—

(i) result in a person committing serious organised crime, or

(ii) enable a person to commit serious organised crime.

(5) The person directing the other person commits an offence under subsection (1) whether or not the other person in fact commits—

(a) a serious offence, or

(b) an offence aggravated by a connection with serious organised crime under section 26.

(7) In this section "directing" a person to commit an offence includes inciting the person to commit the offence.

(8) A person guilty of an offence under subsection (1) or (2) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 14 years or to a fine or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both.

28 Failure to report serious organised crime

(1) This section applies where—

(a) a person ("the person") knows or suspects that another person ("the other person") has committed—

(i) an offence under section 25 or 27, or

(ii) an offence which is aggravated by a connection with serious organised crime under section 26, and

(b) that knowledge or suspicion originates from information obtained—

(i) in the course of the person's trade, profession, business or employment, or

(ii) as a result of a close personal relationship between the person and the other person.

(2) In the case of knowledge or suspicion originating from information obtained by the person as a result of a close personal relationship between the person and the other person, this section applies only where the person has obtained a material benefit as a result of the commission of serious organised crime by the other person.

(3) The person commits an offence if the person does not disclose to a constable—

(a) the person's knowledge or suspicion, and

(b) the information on which that knowledge or suspicion is based.

(4) It is a defence for a person charged with an offence under subsection (3) to prove that the person had a reasonable excuse for not making the disclosure.

(5) Subsection (3) does not require disclosure by a person who is a professional legal adviser (an "adviser") of—

(a) information which the adviser obtains in privileged circumstances, or

(b) knowledge or a suspicion based on information obtained in privileged circumstances.

(6) For the purpose of subsection (5), information is obtained by an adviser in privileged circumstances if it comes to the adviser, otherwise than for the purposes of committing serious organised crime—

(a) from a client (or from a client's representative) in connection with the provision of legal advice by the adviser to that person,

(b) from a person seeking legal advice from the adviser (or from that person's representative), or

(c) from a person, for the purpose of actual or contemplated legal proceedings.

(7) The reference in subsection (3) to a constable includes a reference to a police member of the Scottish Crime and Drug Enforcement Agency.

(8) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both.

Genocide, crimes against humanity and war crimes

28A Genocide, crimes against humanity and war crimes: UK residents

(1) The International Criminal Court (Scotland) Act 2001 (asp 13) is amended as follows.

(2) After section 8, insert—

"8A Meaning of "United Kingdom national" and "United Kingdom resident"

(1) In this Part—

"United Kingdom national" means—

(a) a British citizen, a British Overseas Territories citizen, a British National (Overseas) or a British Overseas citizen,

(b) a person who under the British Nationality Act 1981 (c.61) is a British subject, or

(c) a British protected person within the meaning of that Act,

"United Kingdom resident" means a person who is resident in the United Kingdom.

(2) To the extent that it would not otherwise be the case, the following individuals are to be treated for the purposes of this Part as being resident in the United Kingdom—

(a) an individual who has indefinite leave to remain in the United Kingdom,

(b) any other individual who has made an application for such leave (whether or not it has been determined) and who is in the United Kingdom,

(c) an individual who has leave to enter or remain in the United Kingdom for the purposes of work or study and who is in the United Kingdom,

(d) an individual who has made an asylum claim, or a human rights claim, which has been granted,

(e) any other individual who has made an asylum claim or a human rights claim (whether or not the claim has been determined) and who is in the United Kingdom,

(f) an individual named in an application for indefinite leave to remain, an asylum claim or a human rights claim as a dependant of the individual making the application or claim if—

 (i) the application or claim has been granted, or

 (ii) the named individual is in the United Kingdom (whether or not the application or claim has been determined),

(g) an individual who would be liable to removal or deportation from the United Kingdom but cannot be removed or deported because of section 6 of the Human Rights Act 1998 (c.42) or for practical reasons,

(h) an individual—

 (i) against whom a decision to make a deportation order under section 5(1) of the Immigration Act 1971 (c.77) by virtue of section 3(5)(a) of that Act (deportation conducive to the public good) has been made,

 (ii) who has appealed against the decision to make the order (whether or not the appeal has been determined), and

 (iii) who is in the United Kingdom,

(i) an individual who is an illegal entrant within the meaning of section 33(1) of the Immigration Act 1971 or who is liable to removal under section 10 of the Immigration and Asylum Act 1999 (c.33),

(j) an individual who is detained in lawful custody in the United Kingdom.

(3) When determining for the purposes of this Part whether any other individual is resident in the United Kingdom regard is to be had to all relevant considerations including—

(a) the periods during which the individual is, has been or intends to be in the United Kingdom,

(b) the purposes for which the individual is, has been or intends to be in the United Kingdom,

(c) whether the individual has family or other connections to the United Kingdom and the nature of those connections, and

(d) whether the individual has an interest in residential property located in the United Kingdom.

(4) In this section—

“asylum claim” means—

 (a) a claim that it would be contrary to the United Kingdom’s obligations under the Refugee Convention for the claimant to be removed from, or required to leave, the United Kingdom,

(b) a claim that the claimant would face a real risk of serious harm if removed from the United Kingdom,

"Convention rights" means the rights identified as Convention rights by section 1 of the Human Rights Act 1998,

"detained in lawful custody" means—

(a) detained in pursuance of a sentence of imprisonment or detention, a sentence of custody for life or a detention and training order,

(b) remanded in or committed to custody by an order of a court,

(c) detained pursuant to an order under section 2 of the Colonial Prisoners Removal Act 1884 (c.31) or a warrant under section 1 or 4A of the Repatriation of Prisoners Act 1984 (c.47),

(d) detained under Part 3 of the Mental Health Act 1983 (c.20) or by virtue of an order under section 5 of the Criminal Procedure (Insanity) Act 1964 (c.84) or section 6 or 14 of the Criminal Appeal Act 1968 (c.19) (hospital orders etc.),

(e) detained by virtue of an order under Part 6 of the Criminal Procedure (Scotland) Act 1995 (c.46) (other than an order under section 60C) or a hospital direction under section 59A of that Act, and includes detention by virtue of the special restrictions set out in Part 10 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) to which a person is subject by virtue of an order under section 59 of the Criminal Procedure (Scotland) Act 1995,

(f) detained under Part 3 of the Mental Health (Northern Ireland) Order 1986 (SI 1986/595) or by virtue of an order under section 11 or 13(5A) of the Criminal Appeal (Northern Ireland) Act 1980 (c. 47),

"human rights claim" means a claim that to remove the claimant from, or to require the claimant to leave, the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Convention) as being incompatible with the person's Convention rights,

"the Refugee Convention" means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol to the Convention,

"serious harm" has the meaning given by article 15 of Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

(5) In this section, a reference to having leave to enter or remain in the United Kingdom is to be construed in accordance with the Immigration Act 1971.

(6) This section applies in relation to any offence under this Part (whether committed before or after the coming into force of this section).".

(3) In section 28(1) (interpretation), the definitions of "United Kingdom national" and "United Kingdom resident" are repealed.

28B Genocide, crimes against humanity and war crimes: retrospective application

After section 9 of the International Criminal Court (Scotland) Act 2001 (asp 13) insert—

“9A Retrospective application of certain offences

(1) Section 1 of this Act applies to acts committed on or after 1 January 1991.

(2) But that section does not apply to an act committed before 17 December 2001 which constitutes a crime against humanity or a war crime within article 8.2(b) or (e) unless, at the time the act was committed, it amounted in the circumstances to a criminal offence under international law.

(3) Section 2 of this Act applies to conduct engaged in on or after 1 January 1991.

(4) The references in subsections (1), (3) and (5) of that section to an offence include an act or conduct that would not constitute an offence but for this section.

(5) Any enactment or rule of law relating to an offence ancillary to a relevant offence applies—

(a) to conduct engaged in on or after 1 January 1991, and

(b) even if the act or conduct constituting the relevant offence would not constitute such an offence but for this section.

(6) But section 2 of this Act, and any enactment or rule of law relating to an offence ancillary to a relevant offence, do not apply to—

(a) conduct engaged in before 17 December 2001, or

(b) conduct engaged in on or after that date which was ancillary to an act or conduct that—

(i) was committed or engaged in before that date, and

(ii) would not constitute a relevant offence but for this section,

unless, at the time the conduct was engaged in, it amounted in the circumstances to a criminal offence under international law.

(7) Section 5 of this Act, so far as it has effect in relation to relevant offences, applies—

(a) to failures to exercise control of the kind mentioned in subsection (2) or (3) of that section which occurred on or after 1 January 1991, and

(b) even if the act or conduct constituting the relevant offence would not constitute an offence but for this section.

(8) But section 5 of this Act, so far as it has effect in relation to relevant offences, does not apply to a failure to exercise control of the kind mentioned in subsection (2) or (3) of that section which occurred before 17 December 2001 unless, at the time it occurred, it amounted in the circumstances to a criminal offence under international law.

(9) In this section, “relevant offence” means an offence under section 1 or 2 of this Act or an offence ancillary to such an offence.

9B Provision supplemental to section 9A: modification of penalties

(1) This section applies in relation to—

(a) an offence under section 1 of this Act on account of an act committed before 17 December 2001 constituting genocide, if at the time the act was committed it also amounted to an offence under section 1 of the Genocide Act 1969,

(b) an offence under section 1 of this Act on account of an act committed before 1 September 2001 constituting a war crime, if at the time the act was committed it also amounted to an offence under section 1 of the Geneva Conventions Act 1957 (c.52) (grave breaches of the Conventions),

(c) an offence ancillary to an offence within paragraph (a) or (b) above.

(2) Section 3(5) of this Act has effect in relation to such an offence as if for "30 years" there were substituted "14 years".".

Articles banned in prison

29 Articles banned in prison

(1) In section 41 of the Prisons (Scotland) Act 1989 (c.45) (unlawful introduction of tobacco etc. into prison)—

(a) for subsection (1) substitute—

"(1) A person commits an offence if without reasonable excuse the person—

(a) brings or otherwise introduces into a prison a proscribed article (or attempts to do so),

(b) takes out of or otherwise removes from a prison a proscribed article (or attempts to do so).

(1A) A person who commits an offence under this section—

(a) where the proscribed article falls within paragraphs (b) to (f) of subsection (9A), is liable on summary conviction to imprisonment for a period not exceeding 30 days or to a fine not exceeding level 3 on the standard scale (or to both),

(b) where the proscribed article falls within paragraph (a) of subsection (9A) (whether or not also within paragraph (f) of that subsection), is liable to the penalties set out in section 41ZA(5).",

(b) in subsection (2), for "the foregoing subsection" substitute "subsection (1)(a),",

(c) in subsection (2A)—

(i) for "article mentioned in paragraphs (a) to (e) of subsection (1) above" substitute "proscribed article", and

(ii) for "article mentioned in those paragraphs" substitute "proscribed article",

(d) in subsection (2B)(c), for the words from "mentioned" to "that subsection)" substitute "that is a proscribed article falling within paragraph (d) to (f) of subsection (9A) (but not also within paragraph (b) or (c) of that subsection), or falling within paragraph (a) of that subsection",

(e) in subsection (3), for "subsection (1) above" substitute "this section or section 41ZA",

(f) after subsection (9) insert—

"(9A) In this section, a "proscribed article" is—

(a) any personal communication device,

(b) any drug,

(c) any firearm or ammunition,

(d) any offensive weapon,

(e) any article which has a blade or is sharply pointed,

(f) any article (or other article) which is a prohibited article within the meaning of rules made under section 39.

(9B) In this section, a "personal communication device" includes—

(a) a mobile telephone,

(b) any other portable electronic device that is capable of transmitting or receiving a communication of any kind,

(c) any—

(i) component part of a device mentioned in paragraph (a) or (b),

(ii) article that is designed or adapted for use with such a device.", and

(g) in subsection (10), in the definition of "offensive weapon", for "the Prevention of Crime Act 1953" substitute "section 47 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)".

(2) After section 41 of that Act insert—

"41ZA Further provision for communication devices

(1) A person commits an offence if, knowing another person to be a prisoner, the person gives a personal communication device to the prisoner while the prisoner is inside a prison.

(2) A person commits an offence if, by means of a personal communication device, the person—

(a) transmits, from inside a prison, a communication of any kind, or

(b) intentionally receives, when inside a prison, a communication of any kind.

(3) A person commits an offence if, while inside a prison, the person is in possession of a personal communication device.

(4) A person who commits an offence under subsections (1) to (3) is liable to the penalties set out in subsection (5).

(5) The penalties are—

(a) on conviction on indictment, to imprisonment for a period not exceeding 2 years or to a fine (or to both),

(b) on summary conviction, to imprisonment for a period not exceeding 12 months or to a fine not exceeding the statutory maximum (or to both).

(6) In this section, "personal communication device" is to be construed in accordance with section 41(9B).

41ZB Exceptions as to communication devices

(1) No offence—

(a) under section 41, where the proscribed article falls within paragraph (a) of subsection (9A) (whether or not also within paragraph (f) of that subsection), or

(b) under section 41ZA(1) to (3),

is committed by a person where subsection (2) applies.

(2) This subsection applies—

(a) if (and in so far as) the act which constitutes the offence is done by the person at or in relation to a designated area at the prison, or

(b) if (and in so far as) the person is acting in circumstances to which an authorisation under subsection (8) applies.

(3) No offence—

(a) under section 41, where the proscribed article falls within paragraph (a) of subsection (9A) (whether or not also within paragraph (f) of that subsection), or

(b) under section 41ZA(2) or (3),

is committed by a prison officer (or other prison official) where subsection (4) applies.

(4) This subsection applies—

(a) if the device is one supplied to the person specifically for use in the course of the person's official duties at the prison, or

(b) if (and in so far as) the person is acting in accordance with those duties.

(5) No offence under section 41ZA(3) is committed by a person other than a prisoner if in the circumstances there is a reasonable excuse for the possession.

(6) The defences mentioned in subsection (7) apply in any proceedings for an offence under—

(a) section 41(1), where the proscribed article falls within paragraph (a) of subsection (9A) (whether or not also within paragraph (f) of that subsection), or

(b) section 41ZA(1) to (3).

(7) In relation to such an offence, it is a defence for the accused person to show that—

(a) the person reasonably believed that the person was acting in circumstances to which an authorisation under subsection (8) applied (even though no such authorisation did apply), or

(b) in the circumstances there was an overriding public interest which justified the person's actions.

(8) An authorisation under this subsection is a written authorisation that is given—

(a) in favour of any person specified in the authorisation (or person of a specified description),

(b) for a specified purpose, and

(c) by—

(i) the governor or director of a prison in relation to activities at that prison, or

(ii) the Scottish Ministers in relation to activities at any specified prison.

(9) A designated area referred to in subsection (2)(a) is any part of the prison, used solely or principally for an administrative or similar purpose, that is specified as such by a written designation given under this paragraph by the governor or director of the prison.

(10) Prison officers (or other prison officials) who are Crown servants or agents do not benefit from Crown immunity in relation to an offence under—

(a) section 41, where the proscribed article falls within paragraph (a) of subsection (9A) of that section (whether or not also within paragraph (f) of that subsection), or

(b) section 41ZA.".

Crossbows, knives etc.

30 Sale and hire of crossbows to persons under 18

(1) The Crossbows Act 1987 (c.32) is amended as follows.

(2) In section 1 (sale and letting on hire), the words from "unless" to the end are repealed.

(3) After that section insert—

"1A Defences

(1) It is a defence for a person charged with an offence under section 1 (referred to in this section as "the accused") to show that—

(a) the accused believed the person to whom the crossbow or part was sold or let on hire (referred to in this section as "the purchaser or hirer") to be aged 18 or over, and

(b) either—

(i) the accused had taken reasonable steps to establish the purchaser or hirer's age, or

(ii) no reasonable person could have suspected from the purchaser or hirer's appearance that the purchaser or hirer was under the age of 18.

(2) For the purposes of subsection (1)(b)(i), the accused is to be treated as having taken reasonable steps to establish the purchaser or hirer's age if and only if—

(a) the accused was shown any of the documents mentioned in subsection (3), and

(b) the document would have convinced a reasonable person.

(3) Those documents are any document bearing to be—

(a) a passport,

(b) a European Union photocard driving licence, or

(c) such other document, or a document of such other description, as the Scottish Ministers may by order made by statutory instrument prescribe.

(4) A statutory instrument containing an order under subsection (3)(c) is subject to annulment in pursuance of a resolution of the Scottish Parliament.”.

(4) After section 3 insert—

“3A Test purchasing

(1) A person under the age of 18 who buys or hires, or attempts to buy or hire, a crossbow or a part of a crossbow does not commit an offence under section 2 or 3 if the person is authorised to do so by the chief constable for the purpose of determining whether an offence is being committed under section 1.

(2) A chief constable may authorise a person under the age of 18 to buy or hire, or attempt to buy or hire, a crossbow or a part of a crossbow only if satisfied that all reasonable steps have been or will be taken to—

(a) ensure the person’s safety, and

(b) avoid any risk to the person’s welfare.”.

31 Sale and hire of knives and certain other articles to persons under 18

(1) Section 141A of the Criminal Justice Act 1988 (c.33) (sale of knives and certain articles with blade or point to persons under eighteen) is amended as follows.

(2) In subsection (1), after “sells” insert “or lets on hire”.

(3) In subsection (3A), after “sell” insert “or let on hire”.

(4) For subsection (4) substitute—

“(4) It is a defence for a person charged with an offence under subsection (1) (referred to in this section as “the accused”) to show that—

(a) the accused believed the person to whom the article was sold or let on hire (referred to in this section as “the purchaser or hirer”) to be of or above the relevant age, and

(b) either—

(i) the accused had taken reasonable steps to establish the purchaser or hirer’s age, or

(ii) no reasonable person could have suspected from the purchaser or hirer’s appearance that the purchaser or hirer was aged under the relevant age.

(4A) For the purposes of subsection (4)(b)(i), the accused is to be treated as having taken reasonable steps to establish the purchaser or hirer’s age if and only if—

(a) the accused was shown any of the documents mentioned in subsection (4B), and

(b) the document would have convinced a reasonable person.

(4B) Those documents are any document bearing to be—

(a) a passport,

(b) a European Union photocard driving licence, or

(c) such other document, or a document of such other description, as the Scottish Ministers may by order prescribe.

(4C) In subsection (4), "the relevant age" is—

(a) in the case where the article is a knife or knife blade designed for domestic use, 16 years, and

(b) in any other case, 18 years.".

Offensive weapons etc.

31A Offensive weapons etc.

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.

(2) In section 47 (prohibition of the carrying of offensive weapons)—

(a) in subsection (1), the words from "without" to "him," are repealed,

(b) after subsection (1), insert—

"(1A) It is a defence for a person charged with an offence under subsection (1) to show that the person had a reasonable excuse or lawful authority for having the weapon with the person in the public place.", and

(c) for subsection (4), substitute—

"(4) In this section—

"offensive weapon" means any article—

(a) made or adapted for use for causing injury to a person, or

(b) intended, by the person having the article, for use for causing injury to a person by—

(i) the person having it, or

(ii) some other person,

"public place" means any place other than—

(a) domestic premises,

(b) school premises (within the meaning of section 49A(6)),

(c) a prison (within the meaning of section 49C(7)),

"domestic premises" means premises occupied as a private dwelling (including any stair, passage, garden, yard, garage, outhouse or other appurtenance of such premises which is not used in common by the occupants of more than one such dwelling).".

(3) In section 49 (offence of having in public place article with blade or point)—

(a) in subsection (4), for the words "prove that he had good reason" substitute "show that the person had a reasonable excuse",

(b) in subsection (5), for "prove" substitute "show", and

(c) for subsection (7), substitute—

"(7) In this section, "public place" has the same meaning as in section 47(4).".

(4) In section 49A (offence of having article with blade or point (or offensive weapon) on school premises)—

(a) in subsection (3), for the words "prove that he had good reason" substitute "show that the person had a reasonable excuse", and

(b) in subsection (4), for "prove" substitute "show".

(5) In section 49C(2) (offence of having offensive weapon etc. in prison), for the words "prove that he had good reason" substitute "show that the person had a reasonable excuse".

(6) In section 50(4) (extension of constable's power to stop, search and arrest without warrant), for "3" substitute "4".

Threatening or abusive behaviour

31AA Threatening or abusive behaviour

(1) A person ("A") commits an offence if—

(a) A behaves in a threatening or abusive manner,

(b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and

(c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.

(2) It is a defence for a person charged with an offence under subsection (1) to show that the behaviour was, in the particular circumstances, reasonable.

(3) Subsection (1) applies to—

(a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done, and

(b) behaviour consisting of—

(i) a single act, or

(ii) a course of conduct.

(4) A person guilty of an offence under subsection (1) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

Stalking

31B Offence of stalking

(1) A person ("A") commits an offence, to be known as the offence of stalking, where A stalks another person ("B").

(2) For the purposes of subsection (1), A stalks B where—

(a) A engages in a course of conduct,

(b) subsection (3) or (4) applies, and

(c) A's course of conduct causes B to suffer fear or alarm.

(3) This subsection applies where A engages in the course of conduct with the intention of causing B to suffer fear or alarm.

(4) This subsection applies where A knows, or ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause B to suffer fear or alarm.

(5) It is a defence for a person charged with an offence under this section to show that the course of conduct—

(a) was authorised by virtue of any enactment or rule of law,

(b) was engaged in for the purpose of preventing or detecting crime, or

(c) was, in the particular circumstances, reasonable.

(6) In this section—

"conduct" means—

(a) following B or any other person,

(b) contacting, or attempting to contact, B or any other person by any means,

(c) publishing any statement or other material—

(i) relating or purporting to relate to B or to any other person,

(ii) purporting to originate from B or from any other person,

(d) monitoring the use by B or by any other person of the internet, email or any other form of electronic communication,

(da) entering any premises,

(db) loitering in any place (whether public or private),

(f) interfering with any property in the possession of B or of any other person,

(g) giving anything to B or to any other person or leaving anything where it may be found by, given to or brought to the attention of B or any other person,

(h) watching or spying on B or any other person,

(i) acting in any other way that a reasonable person would expect would cause B to suffer fear or alarm, and

"course of conduct" involves conduct on at least two occasions.

(7) A person convicted of the offence of stalking is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

(8) Subsection (9) applies where, in the trial of a person ("the accused") charged with the offence of stalking, the jury or, in summary proceedings, the court—

(a) is not satisfied that the accused committed the offence, but

(b) is satisfied that the accused committed an offence under section 31AA(1).

(9) The jury or, as the case may be, the court may acquit the accused of the charge and, instead, find the accused guilty of an offence under section 31AA(1).

Sexual offences

32 Certain sexual offences by non-natural persons

(1) The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) is amended as follows.

(2) At the end of each of the following provisions insert "or a fine or both"—

(a) subsections (4)(b) and (5)(b) of section 9 (paying for sexual services of a child),

(b) subsection (2)(b) of section 10 (causing or inciting provision by child of sexual services or child pornography),

(c) subsection (2)(b) of section 11 (controlling a child providing sexual services or involved in pornography), and

(d) subsection (2)(b) of section 12 (arranging or facilitating provision by child of sexual services or child pornography).

(3) After section 14 insert—

"**14A Offences by bodies corporate etc.**

(1) Subsection (2) applies where an offence under sections 10 to 12 committed—

(a) by a body corporate, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—

(i) is a director, manager, secretary or other similar officer of the body corporate, or

(ii) purports to act in any such capacity,

(b) by a Scottish partnership, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—

(i) is a partner, or

(ii) purports to act in that capacity,

(c) by an unincorporated association other than a Scottish partnership, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—

(i) is concerned in the management or control of the association, or

(ii) purports to act in the capacity of a person so concerned.

(2) The individual (as well as the body corporate, Scottish partnership or, as the case may be, unincorporated association) commits the offence and is liable to be proceeded against and punished accordingly.

(3) Where the affairs of a body corporate are managed by its members, this section applies in relation to acts and defaults of a member in connection with the member's function of management as if the member were a director of the body corporate.".

33 Indecent images of children

(1) In the 1982 Act—

(a) in section 52 (indecent photographs etc. of children)—

(i) in subsection (2C)(b), for "a pseudo-photograph" substitute "an indecent pseudo-photograph",

(ii) after subsection (8) add—

"(9) In this section, references to a photograph also include a tracing or other image, whether made by electronic or other means (of whatever nature), which is not itself a photograph or pseudo-photograph but which is derived from the whole or part of a photograph or pseudo-photograph (or a combination of either or both).

(10) And subsection (2B) applies in relation to such an image as it applies in relation to a pseudo-photograph.", and

(b) in section 52A (possession of indecent photographs of children), in subsection (4), for "and (8)" substitute "and (8) to (10)".

(2) In Schedule 1 to the 1995 Act (offences against children under the age of 17 years to which special provisions apply), in paragraph 2B, after "photograph" insert "or pseudo-photograph".

(3) In Schedule 3 to the Sexual Offences Act 2003 (c.42) (list of sexual offences for the purposes of Part 2)—

(a) in paragraph 44, for the words from "the" where it third occurs to the end substitute—

"(a) the prohibited goods included indecent photographs or pseudo-photographs of persons under 16 and the offender—

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph.".

(b) in paragraph 97(b), for "and (8)" substitute "and (8) to (10)".

34 Extreme pornography

(1) In section 51 of the 1982 Act (obscene material)—

(a) for subsection (3) substitute—

"(3) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a period not exceeding 12 months or to a fine not exceeding the statutory maximum or to both, or

(b) on conviction on indictment—

(i) in a case where the obscene material is or includes an extreme pornographic image, to imprisonment for a period not exceeding 5 years or to a fine or to both, or

(ii) in any other case, to imprisonment for a period not exceeding 3 years or to a fine or to both.", and

(b) in subsection (8)—

(i) before the definition of "material" insert—

""extreme pornographic image" is to be construed in accordance with section 51A;", and

(ii) the definition of "prescribed sum" is repealed.

(2) After section 51 of that Act insert—

"51A Extreme pornography

(1) A person who is in possession of an extreme pornographic image is guilty of an offence under this section.

(2) An extreme pornographic image is an image which is all of the following—

(a) obscene,

(b) pornographic,

(c) extreme.

(3) An image is pornographic if it is of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal.

(4) Where (as found in the person's possession) an image forms part of a series of images, the question of whether the image is pornographic is to be determined by reference to—

(a) the image itself, and

(b) where the series of images is such as to be capable of providing a context for the image, its context within the series of images,

and reference may also be had to any sounds accompanying the image or the series of images.

(5) So, for example, where—

(a) an image forms an integral part of a narrative constituted by a series of images, and

(b) having regard to those images as a whole, they are not of such a nature that they must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal,

the image may, by virtue of being part of that narrative, be found not to be pornographic (even if it may have been found to be pornographic where taken by itself).

(6) An image is extreme if it depicts, in an explicit and realistic way any of the following—

(a) an act which takes or threatens a person's life,

(b) an act which results, or is likely to result, in a person's severe injury,

(c) rape or other non-consensual penetrative sexual activity,

(d) sexual activity involving (directly or indirectly) a human corpse,

(e) an act which involves sexual activity between a person and an animal (or the carcase of an animal).

(7) In determining whether (as found in the person's possession) an image depicts an act mentioned in subsection (6), reference may be had to—

(a) how the image is or was described (whether the description is part of the image itself or otherwise),

(b) any sounds accompanying the image,

(c) where the image forms an integral part of a narrative constituted by a series of images—

(i) any sounds accompanying the series of images,

(ii) the context provided by that narrative.

(8) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a period not exceeding 12 months or to a fine not exceeding the statutory maximum or to both,

(b) on conviction on indictment, to imprisonment for a period not exceeding 3 years or to a fine or to both.

(9) In this section, an "image" is—

(a) a moving or still image (made by any means), or

(b) data (stored by any means) which is capable of conversion into such an image.

51B Extreme pornography: excluded images

(1) An offence is not committed under section 51A if the image is an excluded image.

(2) An "excluded image" is an image which is all or part of a classified work.

(3) An image is not an excluded image where—

(a) it has been extracted from a classified work, and

(b) it must be reasonably be assumed to have been extracted (whether with or without other images) from the work solely or principally for the purpose of sexual arousal.

(4) In determining whether (as found in the person's possession) the image was extracted from the work for the purpose mentioned in subsection (3)(b), reference may be had to—

(a) how the image was stored,

(b) how the image is or was described (whether the description is part of the image itself or otherwise),

(c) any sounds accompanying the image,

(d) where the image forms an integral part of a narrative constituted by a series of images—

(i) any sounds accompanying the series of images,

(ii) the context provided by that narrative.

(5) In this section—

"classified work" means a video work in respect of which a classification certificate has been issued by a designated authority,

"classification certificate" and "video work" have the same meanings as in the Video Recordings Act 1984 (c.39),

"designated authority" means an authority which has been designated by the Secretary of State under section 4 of that Act,

"extract" includes an extract of a single image,

"image" is to be construed in accordance with section 51A.

51C Extreme pornography: defences

(1) Where a person ("A") is charged with an offence under section 51A, it is a defence for A to prove one or more of the matters mentioned in subsection (2).

(2) The matters are—

(a) that A had a legitimate reason for being in possession of the image concerned,

(b) that A had not seen the image concerned and did not know, nor had any cause to suspect, it to be an extreme pornographic image,

(c) that A—

(i) was sent the image concerned without any prior request having been made by or on behalf of A, and

(ii) did not keep it for an unreasonable time.

(3) Where A is charged with an offence under section 51A, it is a defence for A to prove that—

(a) A directly participated in the act depicted, and

(b) subsection (4) applies.

(4) This subsection applies—

(a) in the case of an image which depicts an act described in subsection (6)(a) of that section, if the act depicted did not actually take or threaten a person's life,

(b) in the case of an image which depicts an act described in subsection (6)(b) of that section, if the act depicted did not actually result in (nor was it actually likely to result in) a person's severe injury,

(c) in the case of an image which depicts an act described in subsection (6)(c) of that section, if the act depicted did not actually involve non-consensual activity,

(d) in the case of an image which depicts an act described in subsection (6)(d) of that section, if what is depicted as a human corpse was not in fact a corpse,

(e) in the case of an image which depicts an act described in subsection (6)(e) of that section, if what is depicted as an animal (or the carcase of an animal) was not in fact an animal (or a carcase).

(5) The defence under subsection (3) is not available if A shows, gives or offers for sale the image to any person who was not also a direct participant in the act depicted.

(6) In this section "image" and "extreme pornographic image" are to be construed in accordance with section 51A.".

(3) In Schedule 3 to the Sexual Offences Act 2003 (c.42) (sexual offences for the purposes of Part 2 of that Act), after paragraph 44 insert—

"44A An offence under section 51A of the Civic Government (Scotland) Act 1982 (c.45) (possession of extreme pornography) if—

(a) the offender—

(i) was 18 or over, and

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of more than 12 months, and

(b) in imposing sentence, the court determines that it is appropriate that Part 2 of this Act should apply in relation to the offender.".

34A Voyeurism: additional forms of conduct

(1) The Sexual Offences (Scotland) Act 2009 (asp 9) is amended as follows.

(2) In section 9 (voyeurism)—

(a) after subsection (4), insert—

"(4A) The fourth thing is that A—

(a) without another person ("B") consenting, and

(b) without any reasonable belief that B consents,

operates equipment beneath B's clothing with the intention of enabling A or another person ("C"), for a purpose mentioned in subsection (7), to observe B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A—

(a) without another person ("B") consenting, and

(b) without any reasonable belief that B consents,

records an image beneath B's clothing of B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at the image.",

(b) in subsection (5)—

(i) for "fourth" substitute "sixth", and

(ii) for paragraph (b), substitute—

"(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).", and

(c) in subsection (7), for "and (4)" substitute ", (4), (4A) and (4B)".

(3) In section 10(2) (interpretation of section 9), after "section 9(3)" insert "and (4A)".

(4) In section 26 (voyeurism towards a young child)—

(a) after subsection (4), insert—

"(4A) The fourth thing is that A operates equipment beneath B's clothing with the intention of enabling A or another person ("C"), for a purpose mentioned in subsection (7), to observe—

(a) B's genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A records an image beneath B's clothing of—

(a) B's genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at the image.",

(b) in subsection (5)—

(i) for "fourth" substitute "sixth", and

(ii) for paragraph (b), substitute—

"(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).",

(c) in subsection (7), for "and (4)" substitute ", (4), (4A) and (4B)", and

(d) in subsection (8)—

(i) after "section 9(3)" insert ", (4A)", and

(ii) after "subsections (3)" insert ", (4A)".

(5) In section 36 (voyeurism towards an older child)—

(a) after subsection (4), insert—

"(4A) The fourth thing is that A operates equipment beneath B's clothing with the intention of enabling A or another person ("C"), for a purpose mentioned in subsection (7), to observe—

(a) B's genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A records an image beneath B's clothing of—

(a) B's genitals or buttocks (whether exposed or covered with underwear), or

(b) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at the image.",

(b) in subsection (5)—

(i) for "fourth" substitute "sixth", and

(ii) for paragraph (b), substitute—

"(b) constructs or adapts a structure or part of a structure,

with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).",

(c) in subsection (7), for "and (4)" substitute ", (4), (4A) and (4B)", and

(d) in subsection (8)—

(i) after "section 9(3)" insert ", (4A)", and

(ii) after "subsections (3)" insert ", (4A)".

34B Sexual offences: defences in relation to offences against older children

In section 39 of the Sexual Offences (Scotland) Act 2009 (asp 9) (defences in relation to offences against older children), in subsection (4)(c), after "section 30(2)(d)" insert "or (e)".

34C Penalties for offences of brothel-keeping and living on the earnings of prostitution

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.

(2) In section 11 (trading in prostitution and brothel-keeping)—

(a) in subsection (1), for the words from "liable" to the end substitute "guilty of an offence and liable to the penalties set out in subsection (1A)",

(b) after that subsection insert—

"(1A) A person—

(a) guilty of the offence set out in subsection (1)(a) is liable—

(i) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(ii) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both,

(b) guilty of the offence set out in subsection (1)(b) is liable—

(i) on conviction on indictment, to imprisonment for a term not exceeding two years,

(ii) on summary conviction, to imprisonment for a term not exceeding 12 months.”,

(c) in subsection (4), for “subsection (1)” substitute “subsection (1A)(a)”, and

(d) for subsection (6) substitute—

“(6) A person guilty of an offence under subsection (5) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both.”.

(3) In section 13(9) (living on earnings of another from male prostitution), for paragraphs (a) and (b) substitute—

“(a) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both.”.

People trafficking

35 People trafficking

(1) In section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (traffic in prostitution etc.)—

(a) in subsection (1)(a)—

(i) after “arrival in” insert “or the entry into”,

(ii) after “such arrival” insert “or entry”,

(aa) after subsection (1) insert—

“(1A) A person to whom subsection (6) applies commits an offence if the person arranges or facilitates—

(a) the arrival in or the entry into a country (other than the United Kingdom), or travel there (whether or not following such arrival or entry) by, an individual and—

(i) intends to exercise control over prostitution by the individual or to involve the individual in the making or production of obscene or indecent material; or

(ii) believes that another person is likely to exercise such control or so to involve the individual,

there or elsewhere; or

(b) the departure from a country (other than the United Kingdom) of an individual and—

(i) intends to exercise such control or so to involve the individual; or

(ii) believes that another person is likely to exercise such control or so to involve the individual,

outwith the country.”,

(ab) in subsection (2), for “subsection (1)” substitute “subsections (1) and (1A)”,

(b) for subsection (4) substitute—

“(4) Subsections (1) and (1A) apply to anything done in or outwith the United Kingdom.”,

(c) for subsection (5) substitute—

“(5) A person may be prosecuted, tried and punished for any offence to which this section applies—

(a) in any sheriff court district in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).”, and

(d) in subsection (6)—

(i) the word “and” immediately following paragraph (e) is repealed, and

(ii) after paragraph (f) insert—

“(g) a person who at the time of the offence was habitually resident in Scotland, and

(h) a body incorporated under the law of a part of the United Kingdom.”.

(2) In section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation)—

(a) in subsection (1), after “arrival in” insert “or the entry into”,

(b) in subsection (2), the words from “in” where it first occurs to “committed” are repealed,

(c) after subsection (3) insert—

“(3A) A person to whom section 5(2) applies commits an offence if—

(a) in relation to an individual (the “passenger”), he arranges or facilitates—

(i) the arrival in or the entry into a country other than the United Kingdom of the passenger,

(ii) travel by the passenger within a country other than the United Kingdom,

(iii) the departure of the passenger from a country other than the United Kingdom, and

(b) he—

(i) intends to exploit the passenger, or

(ii) believes that another person is likely to exploit the passenger,

(wherever the exploitation is to occur).”,

(d) in subsection (4)—

(i) in paragraph (b), the words from “as a result” to “Act 2004,” become sub-paragraph (i),

(ii) immediately following that sub-paragraph insert “or

(ii) which, were it done in Scotland, would constitute an offence mentioned in sub-paragraph (i),”,

(iii) after paragraph (b) insert—

“(ba) he is encouraged, required or expected to do anything in connection with the removal of any part of a human body—

(i) as a result of which he or another person would commit an offence under the law of Scotland (other than an offence mentioned in paragraph (b)(i)), or

(ii) which, were it done in Scotland, would constitute such an offence,”, and

(iv) for paragraph (d) substitute—

“(d) another person uses or attempts to use him for any purpose within sub-paragraph (i), (ii) or (iii) of paragraph (c), having chosen him for that purpose on the grounds that—

(i) he is mentally or physically ill or disabled, he is young, or he has a family relationship with a person, and

(ii) a person without the illness, disability, youth or family relationship would be likely to refuse to be used for that purpose.”.

(3) In section 5 of that Act—

(a) in subsection (1), for the words from “(3)” to the end substitute “(3A) of section 4 apply to anything done in or outwith the United Kingdom.”,

(b) in subsection (2)—

(i) the word “and” immediately following paragraph (e) is repealed, and

(ii) after paragraph (f) insert—

“(g) a person who at the time of the offence was habitually resident in Scotland, and

(h) a body incorporated under the law of a part of the United Kingdom.”,

(c) after subsection (2) insert—

“(2A) A person may be prosecuted, tried and punished for any offence to which section 4 applies—

(a) in any sheriff court district in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).

(2B) In subsection (2A), "sheriff court district" is to be construed in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995 (c.46) (interpretation).".

Slavery, servitude and forced or compulsory labour

35A Slavery, servitude and forced or compulsory labour

(1) A person ("A") commits an offence if—

(a) A holds another person in slavery or servitude and the circumstances are such that A knows or ought to know that the person is so held, or

(b) A requires another person to perform forced or compulsory labour and the circumstances are such that A knows or ought to know that the person is being required to perform such labour.

(2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention (which prohibits a person from being held in slavery or servitude or being required to perform forced or compulsory labour).

(3) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 14 years, or to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

(4) In this section "Human Rights Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms agreed by the Council of Europe at Rome on 4 November 1950.

Fraud and embezzlement

36 Alternative charges for fraud and embezzlement

In Schedule 3 to the 1995 Act (indictments and complaints), after paragraph 8(3) insert—

"(3A) Under an indictment or a complaint for breach of trust and embezzlement, an accused may be convicted of falsehood, fraud and wilful imposition.

(3B) Under an indictment or a complaint for falsehood, fraud and wilful imposition, an accused may be convicted of breach of trust and embezzlement.".

36A Articles for use in fraud

(1) A person ("A") commits an offence if A has in A's possession or under A's control an article for use in, or in connection with, the commission of fraud.

(2) A person guilty of an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine, or to both.

(3) A person commits an offence if the person makes, adapts, supplies or offers to supply an article—

(a) knowing that the article is designed or adapted for use in, or in connection with, the commission of fraud, or

(b) intending the article to be used in, or in connection with, the commission of fraud.

(4) A person guilty of an offence under subsection (3) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine, or to both.

(5) In this section, “article” includes a program or data held in electronic form.

Conspiracy

37 Conspiracy to commit offences outwith Scotland

(1) The title of section 11A of the 1995 Act becomes “Conspiracy to commit offences outwith Scotland”.

(2) In that section—

(a) in subsection (1), for “in a country or territory outside the United Kingdom” substitute “outwith Scotland”,

(b) in subsection (3)—

(i) for “the law in force in the country or territory where the act or other event was intended to take place” substitute “the relevant law”, and

(ii) for “the law in force in the country or territory” where it second occurs substitute “that law”, and

(c) after subsection (3) insert—

“(3A) In subsection (3) above, “the relevant law” is—

(a) if the act or event was intended to take place in another part of the United Kingdom, the law in force in that part,

(b) if the act or event was intended to take place in a country or territory outwith the United Kingdom, the law in force in that country or territory.”.

Abolition of offences of sedition and leasing-making

37A Abolition of offences of sedition and leasing-making

The following offences under the common law of Scotland are abolished—

(a) the offence of sedition,

(b) the offence of leasing-making.

PART 3

CRIMINAL PROCEDURE

Children

38 Prosecution of children

(1) The 1995 Act is amended as follows.

(2) After section 41 insert—

“**41A Prosecution of children under 12**

(1) A child under the age of 12 years may not be prosecuted for an offence.

(2) A person aged 12 years or more may not be prosecuted for an offence which was committed at a time when the person was under the age of 12 years.”.

(3) In section 42 (prosecution of children), in subsection (1)—

(a) for “No child under the age of 16 years shall” substitute “A child aged 12 years or more but under 16 years may not”,

(b) for “his instance” substitute “the instance of the Lord Advocate”, and

(c) for “a child under the age of 16 years” substitute “such a child”.

(4) In section 234AA (antisocial behaviour order), in subsection (2), paragraph (b) is repealed.

Offences: liability of partners

39 Offences: liability of partners

(1) A partner of a partnership (other than a limited liability partnership) is guilty of a corporate offence where—

(a) the partnership is guilty of the corporate offence, and

(b) it is proved that the corporate offence committed by the partnership—

(i) was committed with the consent or connivance of the partner (whether alone or among others), or

(ii) was attributable to the neglect of the partner (whether alone or among others).

(2) In subsection (1), a “corporate offence” is an offence in relation to which an enactment has the effect that where—

(a) a body corporate is guilty of the offence, and

(b) it is proved that the offence—

(i) was committed with the consent or connivance of a director (whether alone or among others), or

(ii) was attributable to the neglect of a director (whether alone or among others), the director (as well as the body corporate) is guilty of the offence.

(2A) In subsection (1), the references to a partner of a partnership include references to a person purporting to act as a partner of the partnership.

(3) Subsection (1) does not apply in relation to a corporate offence if an enactment (other than subsection (1)) makes provision in relation to the offence having the same effect as that subsection.

Witness statements

40 Witness statements

(1) This section applies where—

(a) in the course of a criminal investigation, a witness makes a statement in relation to the matter to which the investigation relates,

(b) the statement is contained in a document, and

(c) the witness is likely to be cited to give evidence in criminal proceedings arising from the matter.

(2) Before the witness gives evidence in the criminal proceedings, the prosecutor may—

(a) give the witness a copy of the statement, or

(b) make the statement available for inspection by the witness at a reasonable time and in a reasonable place.

(3) Section 262 of the 1995 Act (interpretation of certain expressions for purposes of sections 259 to 261A of that Act) applies for the purposes of this section as it applies for the purposes of section 261A of that Act except that for the purposes of this section "statement" does not include a victim statement.

Police liberation

41 Breach of undertaking

After section 22 of the 1995 Act insert—

"22ZA Offences where undertaking breached

(1) A person who without reasonable excuse breaches an undertaking given by the person under section 22—

(a) by reason of failing to appear at court as required under subsection (1C)(a) of section 22, or

(b) by reason of failing to comply with a condition imposed under subsection (1D) of that section,

is guilty of an offence.

(2) A person who is guilty of an offence under subsection (1) is liable on summary conviction to—

(a) a fine not exceeding level 3 on the standard scale, and

(b) imprisonment for a period—

(i) where conviction is in the JP court, not exceeding 60 days,

(ii) where conviction is in the sheriff court, not exceeding 12 months.

(3) Despite subsection (1)(b), where (and to the extent that) the person breaches the undertaking by reason of committing an offence while subject to the undertaking—

(a) the person is not guilty of an offence under that subsection, and

(b) subsection (4) applies instead.

(4) The court, in determining the sentence for the subsequent offence, must have regard to—

(a) the fact that the subsequent offence was committed in breach of the undertaking,

(b) the number of undertakings to which the person was subject when that offence was committed,

(c) any previous conviction of the person of an offence under subsection (1)(b),

(d) the extent to which the sentence or disposal in respect of any previous conviction differed, by virtue of this subsection, from that which the court would have imposed but for this subsection.

(4A) The reference in subsection (4)(c) to any previous conviction of an offence under subsection (1)(b) includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to an offence under subsection (1)(b).

(4B) The references in subsection (4)(d) to subsection (4) are to be read, in relation to a previous conviction by a court referred to in subsection (4A), as references to any provision that is equivalent to subsection (4).

(4C) Any issue of equivalence arising in pursuance of subsection (4A) or (4B) is for the court to determine.

(5) Subsections (3)(b) and (4) apply only if the fact that the subsequent offence was committed while the person was subject to an undertaking is specified in the complaint or indictment.

(6) In this section and section 22ZB, “the subsequent offence” is the offence committed by a person while the person is subject to an undertaking.

22ZB Evidential and procedural provision

(1) In any proceedings in relation to an offence under section 22ZA(1), the fact that a person—

(a) breached an undertaking given by the person under section 22 by reason of failing to appear at court as required under subsection (1C)(a) of that section, or

(b) was subject to any particular condition imposed under subsection (1D) of that section,

is, unless challenged by preliminary objection before the person’s plea is recorded, to be held as admitted.

(2) In any proceedings in relation to an offence under section 22ZA(1) or (as the case may be) the subsequent offence—

(a) something in writing, purporting to be an undertaking given by a person under section 22 (and bearing to be signed and certified), is sufficient evidence of the terms of the undertaking so given,

(b) a document purporting to be a notice (or copy of a notice) effected under subsection (1F) of that section is sufficient evidence of the terms of the notice,

(c) an undertaking whose terms are modified under paragraph (b) of that subsection is to be regarded as if given in the terms as so modified.

(3) The fact that the subsequent offence was committed while the person was subject to an undertaking is to be held as admitted, unless challenged—

(a) in summary proceedings, by preliminary objection before the person's plea is recorded, or

(b) in the case of proceedings on indictment, by giving notice of a preliminary objection in accordance with section 71(2) or 72(6)(b)(i) of this Act.

(4) Where the maximum penalty in respect of the subsequent offence is specified by (or by virtue of) any enactment, that maximum penalty is, for the purposes of the court's determination of the appropriate sentence or disposal in respect of that offence, increased—

(a) where it is a fine, by the amount equivalent to level 3 on the standard scale, and

(b) where it is a period of imprisonment—

(i) as respects conviction in the JP court, by 60 days,

(ii) as respects conviction in the sheriff court or the High Court, by 6 months,

even if the maximum penalty as so increased exceeds the penalty which it would otherwise be competent for the court to impose.

(5) A penalty under section 22ZA(2) may be imposed in addition to any other penalty which it is competent for the court to impose even if the total of penalties imposed may exceed the maximum penalty which it is competent to impose in respect of the original offence.

(6) The reference in subsection (5) to a penalty being imposed in addition to another penalty means, in the case of sentences of imprisonment or detention—

(a) where the sentences are imposed at the same time (whether or not in relation to the same complaint), framing the sentences so that they have effect consecutively,

(b) where the sentences are imposed at different times, framing the sentence imposed later so that (if the earlier sentence has not been served) the later sentence has effect consecutive to the earlier sentence.

(7) Subsection (6)(b) is subject to section 204A of this Act.

(8) The court must state—

(a) where the sentence or disposal in respect of the subsequent offence is different from that which the court would have imposed but for section 22ZA(4), the extent of and the reasons for that difference, or

(b) otherwise, the reasons for there being no such difference.

(9) A court which finds a person guilty of an offence under section 22ZA(1) may remit that person for sentence in respect of that offence to any court which is considering the original offence.

(10) At any time before the trial of an accused in summary proceedings for the original offence, it is competent to amend the complaint to include an additional charge of an offence under section 22ZA(1).

(11) In this section, "the original offence" is the offence in relation to which an undertaking is given.".

Grant of warrants

41A Grant of warrants for execution by constables and police members of SCDEA

(1) A sheriff or justice of the peace does not lack power or jurisdiction to grant a warrant for execution by a person mentioned in subsection (2) solely because the person is not a constable of a police force for a police area lying wholly or partly in the sheriff's or justice's sheriffdom.

(2) The persons referred to in subsection (1) are—

(a) a constable,

(b) a police member of the Scottish Crime and Drug Enforcement Agency.

Bail

42 Bail review applications

(1) The 1995 Act is amended as follows.

(2) In section 30 (bail review)—

(a) for subsection (2A) substitute—

"(2A) On receipt of an application under subsection (2), the court must—

(a) intimate the application to the prosecutor, and

(b) before determining the application, give the prosecutor an opportunity to be heard.

(2AA)Despite subsection (2A)(b), the court may grant the application without having heard the prosecutor if the prosecutor consents.", and

(b) in subsection (2C), in paragraph (b), for "heard" substitute "determined".

(3) In section 31 (bail review on prosecutor's application)—

(a) after subsection (2), insert—

"(2ZA) Despite subsection (2)(b), the court may grant the application without fixing a hearing if the person granted bail consents.", and

(b) in subsection (3), the word "hearing" is repealed.

43 Bail condition for identification procedures etc.

In section 24 of the 1995 Act (bail and bail conditions)—

(a) in paragraph (b) of subsection (4), sub-paragraph (ii) and the word "and" immediately preceding it are repealed,

(b) in subsection (5), after paragraph (ca) insert—

"(cb) whenever reasonably instructed by a constable to do so—

(i) participates in an identification parade or other identification procedure; and

(ii) allows any print, impression or sample to be taken from the accused;".

43A Bail conditions: remote monitoring requirements

Sections 24A to 24E of the 1995 Act (bail conditions: remote monitoring) are repealed.

Prosecution on indictment

44 Prosecution on indictment: Scottish Law Officers

(1) The 1995 Act is amended as follows.

(2) In section 64 (prosecution on indictment), in subsection (1), for "in name" substitute "at the instance".

(2A) The title of section 287 becomes "Demission from office of Lord Advocate and Solicitor General for Scotland".

(3) In that section—

(a) in subsection (1)—

(i) for "by a Lord Advocate" substitute "at the instance of Her Majesty's Advocate",

(ii) for "his" where it first occurs substitute "the holder of the office of Lord Advocate", and

(iii) after "successor" insert "or the Solicitor General",

(b) in subsection (2)—

(i) for "in name of" substitute "at the instance of Her Majesty's Advocate or", and

(ii) the words "then in office" are repealed,

(c) after subsection (2), insert—

"(2A) Any such indictments in proceedings at the instance of the Solicitor General may be signed by the Solicitor General.

(2AA) All indictments which have been raised at the instance of the Solicitor General shall remain effective notwithstanding the holder of the office of Solicitor General subsequently having died or demitted office and may be taken up and proceeded with by his successor or the Lord Advocate.

(2B) Subsection (2C) applies during any period when the offices of Lord Advocate and Solicitor General are both vacant.

(2C) It is lawful to indict accused persons at the instance of Her Majesty's Advocate.", and

(d) in subsection (4)—

(i) after "Advocate" insert "or Solicitor General",

(ia) in paragraph (a), after "subsection (1)" insert "or (2AA)",

(ii) in paragraph (b), for "in the name" substitute "raised at the instance", and

(iii) after that paragraph, insert—

"(c) by virtue of subsection (2C) above, is raised at the instance of Her Majesty's Advocate".

(4) In Schedule 2, the words "A.F.R. (*name of Lord Advocate*)," are repealed.

Transfer of justice of the peace court cases

45 Transfer of justice of the peace court cases

After section 137C of the 1995 Act insert—

"137CA Transfer of JP court proceedings within sheriffdom

(1) Subsection (2) applies—

(a) where the accused person has been cited in summary proceedings to attend a diet of a JP court, or

(b) if the accused person has not been cited to such a diet, where summary proceedings against the accused have been commenced in a JP court.

(2) The prosecutor may apply to a justice for an order for the transfer of the proceedings to another JP court in the sheriffdom (and for adjournment to a diet of that court).

(3) On an application under subsection (2), the justice may make the order sought.

(4) In this section and sections 137CB and 137CC, "justice" does not include the sheriff.

137CB Transfer of JP court proceedings outwith sheriffdom

(1) Subsection (2) applies where the clerk of a JP court informs the prosecutor that, because of exceptional circumstances which could not reasonably have been foreseen, it is not practicable for the JP court or any other JP court in the sheriffdom to proceed with some or all of the summary cases due to call at a diet.

(2) The prosecutor shall as soon as practicable apply to the sheriff principal for an order for the transfer of the proceedings to a JP court in another sheriffdom (and for adjournment to a diet of that court).

(3) Subsection (4) applies where—

(a) either—

(i) the accused person has been cited in summary proceedings to attend a diet of a JP court, or

(ii) if the accused person has not been cited to such a diet, summary proceedings against the accused have been commenced in a JP court, and

(b) there are also summary proceedings against the accused person in a JP court in another sheriffdom.

(4) The prosecutor may apply to a justice for an order for the transfer of the proceedings to a JP court in the other sheriffdom (and for adjournment to a diet of that court).

(5) Subsection (6) applies where—

(a) the prosecutor intends to take summary proceedings against an accused person in a JP court, and

(b) there are also summary proceedings against the accused person in a JP court in another sheriffdom.

(6) The prosecutor may apply to a justice for an order for authority for the proceedings to be taken at a JP court in the other sheriffdom.

(7) On an application under subsection (2), the sheriff principal may make the order sought with the consent of the sheriff principal of the other sheriffdom.

(8) On an application under subsection (4) or (6), the justice is to make the order sought if—

(a) the justice considers that it would be expedient for the different cases involved to be dealt with by the same court, and

(b) a justice of the other sheriffdom consents.

(9) On the application of the prosecutor, the sheriff principal who has made an order under subsection (7) may, with the consent of the sheriff principal of the other sheriffdom—

(a) revoke the order, or

(b) vary it so as to restrict its effect.

(10) On the application of the prosecutor, the justice who has made an order under subsection (8) (or another justice of the same sheriffdom) may, with the consent of a justice of the other sheriffdom—

(a) revoke the order, or

(b) vary it so as to restrict its effect.

137CC Custody cases: initiating JP court proceedings outwith sheriffdom

(1) Subsection (2) applies where the prosecutor believes—

(a) that, because of exceptional circumstances (and without an order under subsection (3)), it is likely that there would be an unusually high number of accused persons appearing from custody for the first calling of cases in summary prosecutions in the JP courts in the sheriffdom, and

(b) that it would not be practicable for those courts to deal with all the cases involved.

(2) The prosecutor may apply to the sheriff principal for an order authorising summary proceedings against some or all of the accused persons to be—

(a) taken at a JP court in another sheriffdom, and

(b) maintained—

(i) at that JP court, or

(ii) at any of the JP courts referred to in subsection (1) as may at the first calling of the case be appointed for further proceedings.

(3) On an application under subsection (2), the sheriff principal may make the order sought with the consent of the sheriff principal of the other sheriffdom.

(4) An order under subsection (3) may be made by reference to a particular period or particular circumstances.”.

Additions to complaint

46 Additional charge where bail etc. breached

(1) In section 27 of the 1995 Act (breach of bail conditions: offences), after subsection (8) insert—

“(8A) At any time before the trial of an accused in summary proceedings for the original offence, it is competent to amend the complaint to include an additional charge of an offence under this section.”.

(2) In section 150 of that Act (failure of accused to appear), for subsection (10) substitute—

“(10) At any time before the trial in the prosecution in which the failure to appear occurred, it is competent to amend the complaint to include an additional charge of an offence under subsection (8).”.

Dockets and charges in sex cases

46A Dockets and charges in sex cases

After section 288B of the 1995 Act insert—

“*Dockets and charges in sex cases*

288BA Dockets for charges of sexual offences

(1) An indictment or a complaint may include a docket which specifies any act or omission that is connected with a sexual offence charged in the indictment or complaint.

(2) Here, an act or omission is connected with such an offence charged if it—

(a) is specifiable by way of reference to a sexual offence, and

(b) relates to—

(i) the same event as the offence charged, or

(ii) a series of events of which that offence is also part.

(3) The docket is to be in the form of a note apart from the offence charged.

(4) It does not matter whether the act or omission, if it were instead charged as an offence, could not competently be dealt with by the court (including as particularly constituted) in which the indictment or complaint is proceeding.

(5) Where under subsection (1) a docket is included in an indictment or a complaint, it is to be presumed that—

(a) the accused person has been given fair notice of the prosecutor's intention to lead evidence of the act or omission specified in the docket, and

(b) evidence of the act or omission is admissible as relevant.

(6) The references in this section to a sexual offence are to—

(a) an offence under the Sexual Offences (Scotland) Act 2009,

(b) any other offence involving a significant sexual element.

288BB Mixed charges for sexual offences

(1) An indictment or a complaint may include a charge that is framed as mentioned in subsection (2) or (3) (or both).

(2) That is, framed so as to comprise (in a combined form) the specification of more than one sexual offence.

(3) That is, framed so as to—

(a) specify, in addition to a sexual offence, any other act or omission, and

(b) do so in any manner except by way of reference to a statutory offence.

(4) Where a charge in an indictment or a complaint is framed as mentioned in subsection (2) or (3) (or both), the charge is to be regarded as being a single yet cumulative charge.

(5) The references in this section to a sexual offence are to an offence under the Sexual Offences (Scotland) Act 2009.

288BC Aggravation by intent to rape

(1) Subsection (2) applies as respects a qualifying offence charged in an indictment or a complaint.

(2) Any specification in the charge that the offence is with intent to rape (however construed) may be given by referring to the statutory offence of rape.

(3) In this section—

(a) the reference to a qualifying offence is to an offence of assault or abduction (and includes attempt, conspiracy or incitement to commit such an offence),

(b) the reference to the statutory offence of rape is (as the case may be) to—

(i) the offence of rape under section 1 of the Sexual Offences (Scotland) Act 2009, or

(ii) the offence of rape of a young child under section 18 of that Act.".

Remand and committal of children

47 Remand and committal of children and young persons

(1) Section 51 of the 1995 Act (remand and committal of children and young persons) is amended in accordance with subsections (2) and (3).

(2) The following provisions are repealed—

(a) in subsection (1)—

(i) in paragraph (a) the words from "but" to "applies", and

(ii) paragraph (bb),

(b) in subsection (2A), the words "Subject to subsection (4) below",

(c) subsections (3) and (4), and

(d) in subsection (4A), the words "or subsection (4) above".

(3) In subsection (5), for "(1)(aa), (b)(ii), (bb)(ii) or (3)(b)" substitute "(1)(aa) or (b)(ii)".

(4) In section 23 of the Criminal Justice (Scotland) Act 2003 (asp 7) (remand and committal of children and young persons), subsections (6) and (7) are repealed.

Prosecution of organisations

48 Meaning of "organisation"

In section 307(1) of the 1995 Act (interpretation), after the definition of "order for lifelong restriction", insert—

""organisation" means—

(a) a body corporate;

(b) an unincorporated association;

(c) a partnership;

(d) a body of trustees;

(e) a government department;

(f) a part of the Scottish Administration;

(g) any other entity which is not an individual;".

49 Proceedings on indictment against organisations

(1) The title of section 70 of the 1995 Act (proceedings against bodies corporate) is amended by substituting "organisations" for "bodies corporate".

(2) Section 70 of that Act is amended as follows.

(3) In subsection (1), for "a body corporate" substitute "an organisation".

(4) For subsection (2) substitute—

"(2) The indictment may be served by delivery of a copy of the indictment together with notice to appear at—

(a) in the case of a body of trustees—

(i) the dwelling-house or place of business of any of the trustees, or

(ii) if the solicitor of the body of trustees is known, the place of business of the solicitor,

(b) in the case of any other organisation, the registered office or, if there is no registered office or the registered office is not in the United Kingdom, at the principal place of business in the United Kingdom of the organisation.”.

(5) In subsection (3)—

(a) for “the registered office or principal place of business of the body corporate” substitute “any place”, and

(b) for “the registered office or place of business” substitute “that place”.

(6) In subsection (4)—

(a) for “A body corporate” substitute “An organisation”, and

(b) the words “of the body corporate” are repealed.

(7) In subsection (5), for “body corporate” in both places that expression occurs substitute “organisation”.

(8) In subsection (5A)(a), for “body corporate” substitute “organisation”. and

(9) In subsection (6)—

(a) for “a body corporate” substitute “an organisation”, and

(b) for “the body corporate” substitute “the organisation”.

(10) In subsection (7), for “a body corporate” substitute “an organisation”.

(11) In subsection (8), for paragraph (c) substitute—

“(ba) in the case of a partnership (other than a limited liability partnership), a partner or other person in charge, or locally in charge, of the partnership’s affairs;

(bb) in the case of an unincorporated association, the secretary or other person in charge, or locally in charge, of the association’s affairs;

(c) in the case of any other organisation, an employee, officer or official of the organisation duly appointed by it for the purposes of the proceedings.”.

(12) In subsection (9), after paragraph (b) insert—

“(c) in the case of a partnership (other than a limited liability partnership), purporting to be signed by a partner;

(d) in the case of an unincorporated association, purporting to be signed by an officer of the association;

(e) in the case of a government department or a part of the Scottish Administration, purporting to be signed by a senior officer in the department or part,”.

50 Prosecution of organisations by summary procedure

(1) Section 143 of 1995 Act (prosecution of companies etc.) is amended as follows.

(2) In subsection (1), for “a partnership, association, body corporate or body of trustees” substitute “an organisation”.

(3) In subsection (2), for “partnership, association, body corporate or body of trustees in their” substitute “organisation in its”.

(4) In subsection (4), for “A partnership, association, body corporate or body of trustees” substitute “An organisation”.

(5) In subsection (5)(b), for “of the partnership, association, body corporate or body of trustees” substitute “, officer or official of the organisation”.

(6) In subsection (6), after paragraph (d) insert—

> “(e) in the case of a government department or part of the Scottish Administration, purporting to be signed by a senior officer in the department or part,”.

(7) In subsection (7)—

- (a) for “a partnership, association, body corporate or body of trustees” substitute “an organisation”,
- (b) for “partnership, association, body corporate or (as the case may be) body of trustees” substitute “organisation”.

51 Manner of citation of organisations in summary proceedings

In section 141 of the 1995 Act (manner of citation), in subsection (2)(b), for “a partnership, association or body corporate” substitute “an organisation other than a body of trustees”.

Personal conduct of case by accused

51A Prohibition of personal conduct of case by accused in certain proceedings

(1) The 1995 Act is amended as follows.

(2) In section 288C (prohibition of personal conduct of defence in cases of certain sexual offences)—

- (a) for subsection (1) substitute—

> “(1) An accused charged with a sexual offence to which this section applies is prohibited from conducting his case in person at, or for the purposes of, any relevant hearing in the course of proceedings (other than proceedings in a JP court) in respect of the offence.
>
> (1A) In subsection (1), “relevant hearing” means a hearing at, or for the purposes of, which a witness is to give evidence.”, and

- (b) subsection (8) is repealed.

(3) In section 288D (appointment of solicitor by court in cases to which section 288C applies)—

- (a) in subsection (1), after “proceedings” insert “(other than proceedings in a JP court)”,
- (b) in subsection (2)(a), for sub-paragraphs (i) and (ii) substitute—

“(i) the conduct of his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the proceedings; or”, and

(c) in subsection (6), for the words from “of the accused’s defence” to the end substitute “referred to in subsection (2)(a) above.”.

(4) In section 288E (prohibition of personal conduct of defence in certain cases involving child witness under the age of 12)—

(a) subsection (1) is repealed,

(b) in subsection (2)(b), for “the trial” substitute “any hearing in the course of the proceedings”,

(c) after subsection (2) insert—

“(2A) The accused is prohibited from conducting his case in person at, or for the purposes of, any hearing at, or for the purposes of, which the child witness is to give evidence.”,

(d) in subsection (4), at the end insert “and as if references to a relevant hearing were references to a hearing referred to in subsection (2A) above”,

(e) in subsection (6)—

(i) for paragraphs (za) and (a) substitute—

“(a) that his case at, or for the purposes of, any hearing in the course of the proceedings at, or for the purposes of, which the child witness is to give evidence may be conducted only by a lawyer,”, and

(ii) in paragraph (c), for the words from “preliminary” to “trial” substitute “hearing”, and

(f) subsection (8) is repealed.

(5) In section 288F (power to prohibit personal conduct of defence in other cases involving vulnerable witnesses)—

(a) in subsection (1), for “the trial” substitute “any hearing in the course of the proceedings”,

(b) in subsection (2), for the words from “defence” to the end substitute “case in person at any hearing at, or for the purposes of, which the vulnerable witness is to give evidence.”,

(c) in subsection (3)(a), for “trial” substitute “hearing”,

(d) in subsection (4), for the words from “after” to the end substitute “in relation to a hearing after, as well as before, the hearing has commenced.”,

(e) subsection (4A) is repealed,

(f) in subsection (5), at the end insert “and as if references to a relevant hearing were references to any hearing in respect of which an order is made under this section”, and

(g) subsection (6) is repealed.

Disclosure of convictions etc.

52 Disclosure of convictions and non-court disposals

(1) After section 101 of the 1995 Act insert—

“101A Post-offence convictions etc.

(1) This section applies where an accused person is convicted of an offence (“offence O”) on indictment.

(2) The court may, in deciding on the disposal of the case, have regard to—

(a) any conviction in respect of the accused which occurred on or after the date of offence O but before the date of conviction in respect of that offence,

(b) any of the alternative disposals in respect of the accused that are mentioned in subsection (3).

(3) Those alternative disposals are—

(a) a—

(i) fixed penalty under section 302(1) of this Act, or

(ii) compensation offer under section 302A(1) of this Act,

that has been accepted (or deemed to have been accepted) on or after the date of offence O but before the date of conviction in respect of that offence,

(b) a work order under section 303ZA(6) of this Act that has been completed on or after the date of offence O but before the date of conviction in respect of that offence.

(4) The court may have regard to any such conviction or alternative disposal only if it is—

(a) specified in a notice laid before the court by the prosecutor, and

(b) admitted by the accused or proved by the prosecutor (on evidence adduced then or at another diet).

(5) A reference in this section to a conviction which occurred on or after the date of offence O is a reference to such a conviction by a court in any part of the United Kingdom or in any other member State of the European Union.”.

(2) For section 166A of that Act substitute—

“166A Post-offence convictions etc.

(1) This section applies where an accused person is convicted of an offence (“offence O”) on summary complaint.

(2) The court may, in deciding on the disposal of the case, have regard to—

(a) any conviction in respect of the accused which occurred on or after the date of offence O but before the date of conviction in respect of that offence,

(b) any of the alternative disposals in respect of the accused that are mentioned in subsection (3).

(3) Those alternative disposals are—

(a) a—

(i) fixed penalty under section 302(1) of this Act, or

(ii) compensation offer under section 302A(1) of this Act,

that has been accepted (or deemed to have been accepted) on or after the date of offence O but before the date of conviction in respect of that offence,

(b) a work order under section 303ZA(6) of this Act that has been completed on or after the date of offence O but before the date of conviction in respect of that offence.

(4) The court may have regard to any such conviction or alternative disposal only if it is—

(a) specified in a notice laid before the court by the prosecutor, and

(b) admitted by the accused or proved by the prosecutor (on evidence adduced then or at another diet).

(5) A reference in this section to a conviction which occurred on or after the date of offence O is a reference to such a conviction by a court in any part of the United Kingdom or in any other member State of the European Union.”.

(3) In section 302 of that Act (fixed penalty: conditional offer by procurator fiscal), in subsection (2), after sub-paragraph (ii) of paragraph (e) insert—

“(iia)that that fact may be disclosed to the court also in any proceedings for an offence to which the alleged offender is, or is liable to become, subject at such time as the offer is accepted;”.

(4) In section 302A of that Act (compensation offer by procurator fiscal), in subsection (2), after sub-paragraph (ii) of paragraph (f) insert—

“(iia)that that fact may be disclosed to the court also in any proceedings for an offence to which the alleged offender is, or is liable to become, subject at such time as the offer is accepted;”.

(5) In section 303ZA of that Act (work orders), in subsection (3)—

(a) after sub-paragraph (i) of paragraph (e) insert—

“(ia) that if a work offer is not accepted, that fact may be disclosed to the court in any proceedings for the offence to which the offer relates;”,

(b) in sub-paragraph (ii) of that paragraph, for “the offer has been accepted” substitute “a resultant work order has been completed”,

(c) after sub-paragraph (ii) of that paragraph insert—

“(iia)that that fact may be disclosed to the court also in any proceedings for an offence to which the alleged offender is, or is liable to become, subject at such time as the offer is accepted;”, and

(d) in sub-paragraph (iii) of that paragraph, for “work order under subsection (6) below” substitute “resultant work order”.

52A Convictions by courts in other EU member States

(1) Schedule 2A makes modifications of the 1995 Act and other enactments for the purposes of and in connection with implementing obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).

(2) The Scottish Ministers may by order make further provision for the purposes of and in connection with implementing those obligations.

(3) The provision may, in particular, confer functions—

(a) on the Scottish Ministers,

(b) on other persons.

(4) An order under subsection (2) may modify any enactment.

(5) In this section, the "Framework Decision" means Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

Appeals: time limits

53 Time limits for lodging certain appeals

(1) The 1995 Act is amended as follows.

(2) In section 74 (appeals in connection with preliminary diets), in subsection (2)(b), for "2" substitute "seven".

(3) In section 174 (appeals relating to preliminary pleas), in subsection (1), for "two" substitute "seven".

Crown appeals

54 Submissions as to sufficiency of evidence

After section 97 of the 1995 Act insert—

> **"97A Submissions as to sufficiency of evidence**
>
> (1) Immediately after one or other (but not both) of the appropriate events, the accused may make either or both of the submissions mentioned in subsection (2) in relation to an offence libelled in an indictment (the "indicted offence").
>
> (2) The submissions are—
>
> (a) that the evidence is insufficient in law to justify the accused's being convicted of the indicted offence or any other offence of which the accused could be convicted under the indictment (a "related offence"),
>
> (b) that there is no evidence to support some part of the circumstances set out in the indictment.
>
> (2A) For the purposes of subsection (1), "the appropriate events" are—
>
> (a) the close of the whole of the evidence,
>
> (b) the conclusion of the prosecutor's address to the jury on the evidence.
>
> (4) A submission made under this section must be heard by the judge in the absence of the jury.

97B Acquittals etc. on section 97A(2)(a) submissions

(1) This section applies where the accused makes a submission of the kind mentioned in section 97A(2)(a).

(2) If the judge is satisfied that the evidence is insufficient in law to justify the accused's being convicted of the indicted offence, then—

  (a) where the judge is satisfied that the evidence is also insufficient in law to justify the accused's being convicted of a related offence—

    (i) the judge must acquit the accused of the indicted offence, and

    (ii) the trial is to proceed only in respect of any other offence libelled in the indictment,

  (b) where the judge is satisfied that the evidence is sufficient in law to justify the accused's being convicted of a related offence, the judge must direct that the indictment be amended accordingly.

(3) If the judge is not satisfied as is mentioned in subsection (2)—

  (a) the judge must reject the submission, and

  (b) the trial is to proceed as if the submission had not been made.

(4) The judge may make a decision under this section only after hearing both (or all) parties.

(5) An amendment made by virtue of this section must be sufficiently authenticated by the initials of the judge or the clerk of court.

(6) In this section, "indicted offence" and "related offence" have the same meanings as in section 97A.

97C Directions etc. on section 97A(2)(b) submissions

(1) This section applies where the accused makes a submission of the kind mentioned in section 97A(2)(b).

(2) If the judge is satisfied that there is no evidence to support some part of the circumstances set out in the indictment, the judge must direct that the indictment be amended accordingly.

(3) If the judge is not satisfied as is mentioned in subsection (2)—

  (a) the judge must reject the submission, and

  (b) the trial is to proceed as if the submission had not been made.

(4) The judge may make a decision under this section only after hearing both (or all) parties.

(5) An amendment made by virtue of this section must be sufficiently authenticated by the initials of the judge or the clerk of court.

97D No acquittal on "no reasonable jury" grounds

(1) A judge has no power to direct the jury to return a not guilty verdict on any charge on the ground that no reasonable jury, properly directed on the evidence, could convict on the charge.

(2) Accordingly, no submission based on that ground or any ground of like effect is to be allowed.”.

55 Prosecutor’s right of appeal

After section 107 of the 1995 Act insert—

“107A Prosecutor’s right of appeal: decisions on section 97 and 97A submissions

(1) The prosecutor may appeal to the High Court against—

(a) an acquittal under section 97 or 97B(2)(a), or

(b) a direction under section 97B(2)(b) or 97C(2).

(1A) If, immediately after an acquittal under section 97 or 97B(2)(a), the prosecutor moves for the trial diet to be adjourned for no more than 2 days in order to consider whether to appeal against the acquittal under subsection (1), the court of first instance must grant the motion unless the court considers that there are no arguable grounds of appeal.

(1B) If, immediately after the giving of a direction under section 97B(2)(b) or 97C(2), the prosecutor moves for the trial diet to be adjourned for no more than 2 days in order to consider whether to appeal against the direction under subsection (1), the court of first instance must grant the motion unless the court considers that it would not be in the interests of justice to do so.

(1C) In considering whether it would be in the interests of justice to grant a motion for adjournment under subsection (1B), the court must have regard, amongst other things, to—

(a) whether, if an appeal were to be made and to be successful, continuing with the diet would have any impact on any subsequent or continued prosecution,

(b) whether there are any arguable grounds of appeal.

(1D) An appeal may not be brought under subsection (1) unless the prosecutor intimates intention to appeal—

(a) immediately after the acquittal or, as the case may be, the giving of the direction,

(b) if a motion to adjourn the trial diet under subsection (1A) or (1B) is granted, immediately upon resumption of the diet, or

(c) if such a motion is refused, immediately after the refusal.

(1E) Subsection (2) applies if—

(a) the prosecutor intimates an intention to appeal under subsection (1)(a), or

(b) the trial diet is adjourned under subsection (1A).

(2) Where this subsection applies, the court of first instance must suspend the effect of the acquittal and may—

(a) make an order under section 4(2) of the Contempt of Court Act 1981 (c.49) (which gives a court power, in some circumstances, to order that publication of certain reports be postponed) as if proceedings for the offence of which the person was acquitted were pending or imminent,

(b) after giving the parties an opportunity of being heard, order the detention of the person in custody or admit him to bail.

(3) The court may, under subsection (2)(b), order the detention of the person in custody only if the court considers that there are arguable grounds of appeal.

107B Prosecutor’s right of appeal: decisions on admissibility of evidence

(1) The prosecutor may appeal to the High Court against a finding, made after the jury is empanelled and before the close of the evidence for the prosecution, that evidence that the prosecution seeks to lead is inadmissible.

(2) The appeal may be made only with the leave of the court of first instance, granted—

(a) on the motion of the prosecutor, or

(b) on that court’s initiative.

(3) Any motion for leave to appeal must be made before the close of the case for the prosecution.

(4) In determining whether to grant leave to appeal the court must consider—

(a) whether there are arguable grounds of appeal, and

(b) what effect the finding has on the strength of the prosecutor’s case.

107C Appeals under section 107A and 107B: general provisions

(1) In an appeal brought under section 107A or 107B the High Court may review not only the acquittal, direction or finding appealed against but also any direction, finding, decision, determination or ruling in the proceedings at first instance if it has a bearing on the acquittal, direction or finding appealed against.

(2) The test to be applied by the High Court in reviewing the acquittal, direction or finding appealed against is whether it was wrong in law.

107D Expedited appeals

(1) Subsection (2) applies where—

(a) the prosecutor intimates intention to appeal under section 107A or leave to appeal is granted by the court under section 107B, and

(b) the court is able to obtain confirmation from the Keeper of the Rolls that it would be practicable for the appeal to be heard and determined during an adjournment of the trial diet.

(2) The court must inform both parties of that fact and, after hearing them, must decide whether or not the appeal is to be heard and determined during such an adjournment.

(3) An appeal brought under section 107A or 107B which is heard and determined during such an adjournment is referred to in this Act as an “expedited appeal”.

(4) If the court decides that the appeal is to be an expedited appeal the court must, pending the outcome of the appeal—

(a) adjourn the trial diet, and

(b) where the appeal is against an acquittal, suspend the effect of the acquittal.

(5) Where the court cannot obtain from the Keeper of the Rolls confirmation of the kind mentioned in subsection (1)(b), the court must inform the parties of that fact.

(6) Where the High Court in an expedited appeal determines that an acquittal of an offence libelled in the indictment was wrong in law it must quash the acquittal and direct that the trial is to proceed in respect of the offence.

107E Other appeals under section 107A: appeal against acquittal

(1) This section applies where—

(a) an appeal brought under section 107A is not an expedited appeal,

(b) the appeal is against an acquittal, and

(c) the High Court determines that the acquittal was wrong in law.

(2) The court must quash the acquittal.

(3) If the prosecutor seeks leave to bring a new prosecution charging the accused with the same offence as that libelled in the indictment, or a similar offence arising out of the same facts as the offence libelled in the indictment, the High Court must grant the prosecutor authority to do so in accordance with section 119, unless the court considers that it would be contrary to the interests of justice to do so.

(4) If—

(a) no motion is made under subsection (3), or

(b) the High Court does not grant a motion made under that subsection,

the High Court must in disposing of the appeal acquit the accused of the offence libelled in the indictment.

107F Other appeals under section 107A or 107B: appeal against directions etc.

(1) This section applies where—

(a) an appeal brought under section 107A or 107B is not an expedited appeal, and

(b) the appeal is not against an acquittal.

(2) The court of first instance must desert the diet *pro loco et tempore* in relation to any offence to which the appeal relates.

(3) The trial is to proceed only if another offence of which the accused has not been acquitted and to which the appeal does not relate is libelled in the indictment.

(3A) However, if the prosecutor moves for the diet to be deserted *pro loco et tempore* in relation to such other offence, the court must grant the motion.

(4) If the prosecutor seeks leave to bring a new prosecution charging the accused with the same offence as that libelled in the indictment, or a similar offence arising out of the same facts as the offence libelled in the indictment, the High Court must grant the prosecutor authority to do so in accordance with section 119, unless the court considers that it would be contrary to the interests of justice to do so.”.

56 Power of High Court in appeal under section 107A of 1995 Act

In section 104(1) of the 1995 Act (which makes provision as regards the power of the High Court in appeals under section 106(1) or 108 of that Act), after “106(1)” insert “, 107A, 107B”.

57 Further amendment of 1995 Act

(1) In section 110(1) of the 1995 Act (note of appeal), after paragraph (b), add—

“(c) where the prosecutor intimates intention to appeal under section 107A(1), within 7 days after the acquittal or direction appealed against, the prosecutor may, except in the case of an expedited appeal, lodge such a note with the Clerk of Justiciary, who must send a copy to the judge and to the accused or to the accused’s solicitor,

(d) within 7 days after leave to appeal under section 107B(1) is granted, the prosecutor may, except in the case of an expedited appeal, lodge such a note with the Clerk of Justiciary, who must send a copy to the judge and to the accused or to the accused’s solicitor,

(e) in the case of an expedited appeal, as soon as practicable after the decision as to hearing and determining the case is made under section 107D(2), the prosecutor may—

(i) lodge such a note with the Clerk of Justiciary, and

(ii) provide a copy to the judge and to the accused or to the accused’s solicitor.”.

(2) In section 113(1) of that Act (judge’s report), after “under” insert “any of paragraphs (a) to (d) of”.

(3) After section 113 of that Act insert—

“113A Judge’s observations in expedited appeal

(1) On receiving a note of appeal given under section 110(1)(e), the judge who presided at the trial may give the Clerk of Justiciary any written observations that the judge thinks fit on—

(a) the case generally,

(b) the grounds contained in the note of appeal.

(2) The High Court may hear and determine the appeal without any such written observations.

(3) If written observations are given under subsection (1), the Clerk of Justiciary must give a copy of them to—

(a) the accused or the accused’s solicitor, and

(b) the prosecutor.

(4) The written observations of the judge are available only to—

(a) the High Court,

(b) the parties, and

(c) any other person or classes of person prescribed by Act of Adjournal, in accordance with any conditions prescribed by Act of Adjournal.”.

(4) In section 119 of that Act (provision where High Court authorises new prosecution)—

(a) in each of subsections (1) and (10), after “118(1)(c)” insert “or 107E(3) or 107F(4)”,

(b) for subsection (2), substitute—

“(2) In a new prosecution under this section—

(a) where authority for the prosecution is granted under section 118(1)(c), the accused must not be charged with an offence more serious than that of which the accused was convicted in the earlier proceedings,

(b) where authority for the prosecution is granted under section 107E(3), the accused must not be charged with an offence more serious than that of which the accused was acquitted in the earlier proceedings,

(c) where authority for the prosecution is granted under section 107F(4), the accused must not be charged with an offence more serious than that originally libelled in the indictment in the earlier proceedings.”,

(c) after subsection (2) insert—

“(2A) In a new prosecution under this section brought by virtue of section 107F(4), the circumstances set out in the indictment are not to be inconsistent with any direction given under section 97B(2)(b) or 97C(2) in the proceedings which gave rise to the appeal in question unless the High Court, in disposing of that appeal, determined that the direction was wrong in law.”, and

(d) in subsection (9), after “setting aside the verdict” insert “or under section 107E(3) or 107F(4) granting authority to bring a new prosecution”.

Retention and use of samples etc.

58 Retention of samples etc.

(1) The 1995 Act is amended as follows.

(2) In section 18 (prints, samples etc. in criminal investigations)—

(a) in subsection (3), for “section 18A” substitute “sections 18A to 18C”,

(b) in subsection (7A), for “sections 19 to 20” substitute “, subject to the modification in subsection (7AA), sections 18A to 19C”, and

(c) after subsection (7A) insert—

“(7AA) The modification is that for the purposes of section 19C as it applies in relation to relevant physical data taken from or provided by a person outwith Scotland, subsection (7A) is to be read as if in paragraph (d) the words from “created” to the end were omitted.”.

(3) In section 18A (retention of samples)—

(a) for subsection (1) substitute—

“(1) This section applies to—

(a) relevant physical data taken or provided under section 18(2), and

(b) any sample, or any information derived from a sample, taken under section 18(6) or (6A),

where the condition in subsection (2) is satisfied.”,

(b) in subsection (2), after “whom” insert “the relevant physical data was taken or by whom it was provided or, as the case may be, from whom”,

(c) in subsection (3), for “sample or information” substitute “relevant physical data, sample or information derived from a sample”,

(ca) after subsection (8) insert—

“(8A) If the sheriff principal allows an appeal against the refusal of an application under subsection (5), the sheriff principal may make an order amending, or further amending, the destruction date.

(8B) An order under subsection (8A) must not specify a destruction date more than 2 years later than the previous destruction date.”,

(d) in subsection (10), for “sample or information” substitute “relevant physical data, sample or information derived from a sample”,

(e) in subsection (11)—

(i) in paragraph (a) of the definition of “the relevant chief constable”, after “who” insert “took the relevant physical data or to whom it was provided or who”, and

(ii) in the definition of “relevant sexual offence” and “relevant violent offence”, after “have” insert “, subject to the modification in subsection (12),”, and

(f) after subsection (11) insert—

“(12) The modification is that the definition of “relevant sexual offence” in section 19A(6) is to be read as if for paragraph (g) there were substituted—

“(g) public indecency if it is apparent from the offence as charged in the indictment or complaint that there was a sexual aspect to the behaviour of the person charged;”.”.

58A Retention of samples etc. where offer under sections 302 to 303ZA of the 1995 Act accepted

After section 18A of the 1995 Act insert—

“18AA Retention of samples etc. where offer under sections 302 to 303ZA accepted

(1) This section applies to—

(a) relevant physical data taken from or provided by a person under section 18(2), and

(b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A),

where the conditions in subsection (2) are satisfied.

(2) The conditions are—

(a) the relevant physical data or sample was taken from or provided by the person while the person was under arrest or being detained in connection with the offence or offences in relation to which a relevant offer is issued to the person, and

(b) the person—

(i) accepts a relevant offer, or

(ii) in the case of a relevant offer other than one of the type mentioned in paragraph (d) of subsection (3), is deemed to accept a relevant offer.

(3) In this section “relevant offer” means—

(a) a conditional offer under section 302,

(b) a compensation offer under section 302A,

(c) a combined offer under section 302B, or

(d) a work offer under section 303ZA.

(4) Subject to subsections (6) and (7) and section 18AB(9) and (10), the relevant physical data, sample or information derived from a sample must be destroyed no later than the destruction date.

(5) In subsection (4), “destruction date” means—

(a) in relation to a relevant offer that relates only to—

(i) a relevant sexual offence,

(ii) a relevant violent offence, or

(iii) both a relevant sexual offence and a relevant violent offence,

the date of expiry of the period of 3 years beginning with the date on which the relevant offer is issued or such later date as an order under section 18AB(2) or (6) may specify,

(b) in relation to a relevant offer that relates to—

(i) an offence or offences falling within paragraph (a), and

(ii) any other offence,

the date of expiry of the period of 3 years beginning with the date on which the relevant offer is issued or such later date as an order under section 18AB(2) or (6) may specify,

(c) in relation to a relevant offer that does not relate to an offence falling within paragraph (a), the date of expiry of the period of 2 years beginning with the date on which the relevant offer is issued.

(6) If a relevant offer is recalled by virtue of section 302C(5) or a decision to uphold it is quashed under section 302C(7)(a), all record of the relevant physical data, sample and information derived from a sample must be destroyed as soon as possible after—

(a) the prosecutor decides not to issue a further relevant offer to the person,

(b) the prosecutor decides not to institute criminal proceedings against the person, or

(c) the prosecutor institutes criminal proceedings against the person and those proceedings conclude otherwise than with a conviction or an order under section 246(3).

(7) If a relevant offer is set aside by virtue of section 303ZB, all record of the relevant physical data, sample and information derived from a sample must be destroyed as soon as possible after the setting aside.

(8) In this section, "relevant sexual offence" and "relevant violent offence" have, subject to the modification in subsection (9), the same meanings as in section 19A(6) and include any attempt, conspiracy or incitement to commit such an offence.

(9) The modification is that the definition of "relevant sexual offence" in section 19A(6) is to be read as if for paragraph (g) there were substituted—

"(g) public indecency if it is apparent from the relevant offer (as defined in section 18AA(3)) relating to the offence that there was a sexual aspect to the behaviour of the person to whom the relevant offer is issued;".

18AB Section 18AA: extension of retention period where relevant offer relates to certain sexual or violent offences

(1) This section applies where the destruction date for relevant physical data, a sample or information derived from a sample falls within section 18AA(5)(a) or (b).

(2) On a summary application made by the relevant chief constable within the period of 3 months before the destruction date, the sheriff may, if satisfied that there are reasonable grounds for doing so, make an order amending, or further amending, the destruction date.

(3) An application under subsection (2) may be made to any sheriff—

(a) in whose sheriffdom the appropriate person resides,

(b) in whose sheriffdom that person is believed by the applicant to be, or

(c) to whose sheriffdom the person is believed by the applicant to be intending to come.

(4) An order under subsection (2) must not specify a destruction date more than 2 years later than the previous destruction date.

(5) The decision of the sheriff on an application under subsection (2) may be appealed to the sheriff principal within 21 days of the decision.

(6) If the sheriff principal allows an appeal against the refusal of an application under subsection (2), the sheriff principal may make an order amending, or further amending, the destruction date.

(7) An order under subsection (6) must not specify a destruction date more than 2 years later than the previous destruction date.

(8) The sheriff principal's decision on an appeal under subsection (5) is final.

(9) Section 18AA(4) does not apply where—

(a) an application under subsection (2) has been made but has not been determined,

(b) the period within which an appeal may be brought under subsection (5) against a decision to refuse an application has not elapsed, or

(c) such an appeal has been brought but has not been withdrawn or finally determined.

(10) Where—

(a) the period within which an appeal referred to in subsection (9)(b) may be brought has elapsed without such an appeal being brought,

(b) such an appeal is brought and is withdrawn or finally determined against the appellant, or

(c) an appeal brought under subsection (5) against a decision to grant an application is determined in favour of the appellant,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the period has elapsed, or, as the case may be, the appeal is withdrawn or determined.

(11) In this section—

"appropriate person" means the person from whom the relevant physical data was taken or by whom it was provided or from whom the sample was taken,

"destruction date" has the meaning given by section 18AA(5),

"the relevant chief constable" has the same meaning as in subsection (11) of section 18A, with the modification that references to the person referred to in subsection (2) of that section are references to the appropriate person.".

58B Retention of samples etc. taken or provided in connection with certain fixed penalty offences

After section 18A of the 1995 Act insert—

"18AC Retention of samples etc. taken or provided in connection with certain fixed penalty offences

(1) This section applies to—

(a) relevant physical data taken from or provided by a person under section 18(2), and

(b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A),

where the conditions in subsection (2) are satisfied.

(2) The conditions are—

(a) the person was arrested or detained in connection with a fixed penalty offence,

(b) the relevant physical data or sample was taken from or provided by the person while the person was under arrest or being detained in connection with that offence,

(c) after the relevant physical data or sample was taken from or provided by the person, a constable gave the person under section 129(1) of the 2004 Act—

  (i) a fixed penalty notice in respect of that offence (the "main FPN"), or

  (ii) the main FPN and one or more other fixed penalty notices in respect of fixed penalty offences arising out of the same circumstances as the offence to which the main FPN relates, and

(d) the person, in relation to the main FPN and any other fixed penalty notice of the type mentioned in paragraph (c)(ii)—

  (i) pays the fixed penalty, or

  (ii) pays any sum that the person is liable to pay by virtue of section 131(5) of the 2004 Act.

(3) Subject to subsections (4) and (5), the relevant physical data, sample or information derived from a sample must be destroyed before the end of the period of 2 years beginning with—

(a) where subsection (2)(c)(i) applies, the day on which the main FPN is given to the person,

(b) where subsection (2)(c)(ii) applies and—

  (i) the main FPN and any other fixed penalty notice are given to the person on the same day, that day,

  (ii) the main FPN and any other fixed penalty notice are given to the person on different days, the later day.

(4) Where—

(a) subsection (2)(c)(i) applies, and

(b) the main FPN is revoked under section 133(1) of the 2004 Act,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the revocation.

(5) Where—

(a) subsection (2)(c)(ii) applies, and

(b) the main FPN and any other fixed penalty notices are revoked under section 133(1) of the 2004 Act,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the revocations.

(6) In this section—

"the 2004 Act" means the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8), "fixed penalty notice" has the meaning given by section 129(2) of the 2004 Act,

"fixed penalty offence" has the meaning given by section 128(1) of the 2004 Act.".

59 Retention of samples etc. from children referred to children's hearings

After section 18A of the 1995 Act insert—

"18B Retention of samples etc.: children referred to children's hearings

(1) This section applies to—

(a) relevant physical data taken from or provided by a child under section 18(2); and

(b) any sample, or any information derived from a sample, taken from a child under section 18(6) or (6A),

where the first condition, and the second, third or fourth condition, are satisfied.

(2) The first condition is that the child's case has been referred to a children's hearing under section 65(1) of the Children (Scotland) Act 1995 (c.36) (the "Children Act").

(3) The second condition is that—

(a) a ground of the referral is that the child has committed an offence mentioned in subsection (6) (a "relevant offence");

(b) both the child and the relevant person in relation to the child accept, under section 65(5) or (6) of the Children Act, the ground of referral; and

(c) no application to the sheriff under section 65(7) or (9) of that Act is made in relation to that ground.

(4) The third condition is that—

(a) a ground of the referral is that the child has committed a relevant offence;

(b) the sheriff, on an application under section 65(7) or (9) of the Children Act—

(i) deems, under section 68(8) of the Children Act; or

(ii) finds, under section 68(10) of that Act,

the ground of referral to be established; and

(c) no application to the sheriff under section 85(1) of that Act is made in relation to that ground.

(5) The fourth condition is that the sheriff, on an application under section 85(1) of the Children Act—

(a) is satisfied, under section 85(6)(b) of that Act, that a ground of referral which constitutes a relevant offence is established; or

(b) finds, under section 85(7)(b) of that Act, that—

(i) a ground of referral, which was not stated in the original application under section 65(7) or (9) of that Act, is established; and

(ii) that ground constitutes a relevant offence.

(6) A relevant offence is such relevant sexual offence or relevant violent offence as the Scottish Ministers may by order made by statutory instrument prescribe.

(6A) An order under subsection (6) may prescribe a relevant violent offence by reference to a particular degree of seriousness.

(7) Subject to section 18C(6) and (7), the relevant physical data, sample or information derived from a sample must be destroyed no later than the destruction date.

(8) The destruction date is—

(a) the date of expiry of the period of 3 years following—

(i) where the second condition is satisfied, the date on which the ground of referral was accepted as mentioned in that condition;

(ii) where the third condition is satisfied, the date on which the ground of referral was established as mentioned in that condition;

(iii) where the ground of referral is established as mentioned in paragraph (a) of the fourth condition, the date on which that ground was established under section 68(8) or, as the case may be, (10) of the Children Act; or

(iv) where the ground of referral is established as mentioned in paragraph (b) of the fourth condition, the date on which that ground was established as mentioned in that paragraph; or

(b) such later date as an order under section 18C(1) may specify.

(9) No statutory instrument containing an order under subsection (6) may be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.

(10) In this section—

"relevant person" has the same meaning as in section 93(2) of the Children Act;

"relevant sexual offence" and "relevant violent offence" have, subject to the modification in subsection (11), the same meanings as in section 19A(6) and include any attempt, conspiracy or incitement to commit such an offence.

(11) The modification is that the definition of "relevant sexual offence" in section 19A(6) is to be read as if for paragraph (g) there were substituted—

"(g) public indecency if it is apparent from the ground of referral relating to the offence that there was a sexual aspect to the behaviour of the child;".

18C Retention of samples etc. relating to children: appeals

(1) On a summary application made by the relevant chief constable within the period of 3 months before the destruction date the sheriff may, if satisfied that there are reasonable grounds for doing so, make an order amending, or further amending, the destruction date.

(2) An application under subsection (1) may be made to any sheriff—

(a) in whose sheriffdom the child mentioned in section 18B(1) resides;

(b) in whose sheriffdom that child is believed by the applicant to be; or

(c) to whose sheriffdom that child is believed by the applicant to be intending to come.

(3) An order under subsection (1) must not specify a destruction date more than 2 years later than the previous destruction date.

(4) The decision of the sheriff on an application under subsection (1) may be appealed to the sheriff principal within 21 days of the decision.

(4A) If the sheriff principal allows an appeal against the refusal of an application under subsection (1), the sheriff principal may make an order amending, or further amending, the destruction date.

(4B) An order under subsection (4A) must not specify a destruction date more than 2 years later than the previous destruction date.

(5) The sheriff principal's decision on an appeal under subsection (4) is final.

(6) Section 18B(7) does not apply where—

(a) an application under subsection (1) has been made but has not been determined;

(b) the period within which an appeal may be brought under subsection (4) against a decision to refuse an application has not elapsed; or

(c) such an appeal has been brought but has not been withdrawn or finally determined.

(7) Where—

(a) the period within which an appeal referred to in subsection (6)(b) may be brought has elapsed without such an appeal being brought;

(b) such an appeal is brought and is withdrawn or finally determined against the appellant; or

(c) an appeal brought under subsection (4) against a decision to grant an application is determined in favour of the appellant,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the period has elapsed or, as the case may be, the appeal is withdrawn or determined.

(8) In this section—

"destruction date" has the meaning given by section 18B(8); and "relevant chief constable" has the same meaning as in subsection (11) of section 18A, with the modification that references to the person referred to in subsection (2) of that section are references to the child referred to in section 18B(1).".

59A Extension of section 19A of 1995 Act

In section 19A(6) of the 1995 Act (definitions of certain expressions for purposes of section 19A)—

(a) in the definition of "relevant sexual offence", for paragraph (g) substitute—

"(g) public indecency if the court, in imposing sentence or otherwise disposing of the case, determined for the purposes of paragraph 60 of Schedule 3 to the Sexual Offences Act 2003 (c.42) that there was a significant sexual aspect to the offender's behaviour in committing the offence;", and

(b) in paragraph (h) of the definition of "relevant violent offence", after sub-paragraph (iv), insert—

"(v) section 47(1) (possession of offensive weapon in public place), 49(1) (possession of article with blade or point in public place), 49A(1) or (2) (possession of article with blade or point or offensive weapon on school premises) or 49C(1) (possession of offensive weapon or article with blade or point in prison) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39);".

60 Use of samples etc.

(1) After section 19B of the 1995 Act insert—

"19C Sections 18 and 19 to 19AA: use of samples etc.

(1) Subsection (2) applies to—

(a) relevant physical data taken or provided under section 18(2), 19(2)(a), 19A(2)(a) or 19AA(3)(a),

(b) a sample, or any information derived from a sample, taken under section 18(6) or (6A), 19(2)(b) or (c), 19A(2)(b) or (c) or 19AA(3)(b) or (c),

(c) relevant physical data or a sample taken from a person—

(i) by virtue of any power of search,

(ii) by virtue of any power to take possession of evidence where there is immediate danger of its being lost or destroyed, or

(iii) under the authority of a warrant,

(d) information derived from a sample falling within paragraph (c), and

(e) relevant physical data, a sample or information derived from a sample taken from, or provided by, a person outwith Scotland which is given by any person to—

(i) a police force,

(ii) the Scottish Police Services Authority, or

(iii) a person acting on behalf of a police force.

(2) The relevant physical data, sample or information derived from a sample may be used—

(a) for the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or

(b) for the identification of a deceased person or a person from whom the relevant physical data or sample came.

(2A) Subsections (2B) and (2C) apply to relevant physical data, a sample or information derived from a sample falling within any of paragraphs (a) to (d) of subsection (1) ("relevant material").

(2B) If the relevant material is held by a police force, the Scottish Police Services Authority or a person acting on behalf of a police force, the police force or, as the case may be, the Authority or person may give the relevant material to another person for use by that person in accordance with subsection (2).

(2C) A police force, the Scottish Police Services Authority or a person acting on behalf of a police force may, in using the relevant material in accordance with subsection (2), check it against other relevant physical data, samples and information derived from samples received from another person.

(3) In subsection (2)—

(a) the reference to crime includes a reference to—

(i) conduct which constitutes a criminal offence or two or more criminal offences (whether under the law of a part of the United Kingdom or a country or territory outside the United Kingdom), or

(ii) conduct which is, or corresponds to, conduct which, if it all took place in any one part of the United Kingdom would constitute a criminal offence or two or more criminal offences,

(b) the reference to an investigation includes a reference to an investigation outside Scotland of a crime or suspected crime, and

(c) the reference to a prosecution includes a reference to a prosecution brought in respect of a crime in a country or territory outside Scotland.

(4) This section is without prejudice to any other power relating to the use of relevant physical data, samples or information derived from a sample.".

(2) In section 56 of the Criminal Justice (Scotland) Act 2003 (asp 7) (use of samples etc. voluntarily given)—

(a) in subsection (1), after "from," insert "or provided by",

(b) in subsection (2), for the words from "may" where it first occurs to the end substitute ", or information derived from that sample may be held and used—

(a) for the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or

(b) for the identification of a deceased person or a person from whom the sample or relevant physical data came.",

(c) in subsection (3), after "information" insert "derived from a sample", (ca) in subsection (5)(b), the words "with all information derived from them" are repealed,

(f) in subsection (6)(a), for "it or them" substitute "the sample",

(h) in subsection (7)(a), the words "or relevant physical data", in the second place where they occur, are repealed, and

(i) after subsection (7) insert—

"(7A) In subsection (2)—

(a) the reference to crime includes a reference to—

(i) conduct which constitutes a criminal offence or two or more criminal offences (whether under the law of a part of the United Kingdom or a country or territory outside the United Kingdom), or

(ii) conduct which is, or corresponds to, conduct which, if it all took place in any one part of the United Kingdom would constitute a criminal offence or two or more criminal offences,

(b) the reference to an investigation includes a reference to an investigation outside the United Kingdom of a crime or suspected crime, and

(c) the reference to a prosecution includes a reference to a prosecution brought in respect of a crime in a country or territory outside the United Kingdom.".

Referrals from the Scottish Criminal Cases Review Commission

61 Referrals from Scottish Criminal Cases Review Commission: grounds for appeal

In section 194D of the 1995 Act (further provisions as to references to the High Court by the Scottish Criminal Cases Review Commission), after subsection (4) insert—

"(4A) The grounds for an appeal arising from a reference to the High Court under section 194B of this Act must relate to one or more of the reasons for making the reference contained in the Commission's statement of reasons.

(4B) Despite subsection (4A), the High Court may, if it considers it is in the interests of justice to do so, grant leave for the appellant to found the appeal on additional grounds.

(4C) An application by the appellant for leave under subsection (4B) must be made and intimated to the Crown Agent within 21 days after the date on which a copy of the Commission's statement of reasons is sent under subsection (4)(b).

(4D) The High Court may, on cause shown, extend the period of 21 days mentioned in subsection (4C).

(4E) The Clerk of Justiciary must intimate to the persons mentioned in subsection (4F)—

(a) a decision under subsection (4B), and

(b) in the case of a refusal to grant leave for the appeal to be founded on additional grounds, the reasons for the decision.

(4F) Those persons are—

(a) the appellant or the appellant's solicitor, and

(b) the Crown Agent.”.

PART 4

EVIDENCE

61A Admissibility of prior statements of witnesses: abolition of competence test

(1) This section applies in relation to a prior statement made by a witness before the commencement of section 24 of the Vulnerable Witnesses (Scotland) Act 2004 (asp 3) (“the 2004 Act”) (which abolishes the competence test for witnesses in criminal and civil proceedings).

(2) For the purpose of the application of subsection (2)(c) of section 260 of the 1995 Act (admissibility of prior statement depends on competence of the witness at the time of the statement) in relation to the statement, section 24 of the 2004 Act is taken to have been in force at the time the statement was made.

(3) In this section, “prior statement” has the meaning it has in section 260 of the 1995 Act.

62 Witness statements: use during trial

(1) The 1995 Act is amended as follows.

(2) After section 261 insert—

“*Witness statements*

261A Witness statements: use during trial

(1) Subsection (2) applies where—

(a) a witness is giving evidence in criminal proceedings,

(b) the witness has made a prior statement,

(c) the prosecutor has seen or has been given an opportunity to see the statement, and

(d) the accused (or a solicitor or advocate acting on behalf of the accused in the proceedings) has seen or has been given an opportunity to see the statement.

(2) The court may allow the witness to refer to the statement while the witness is giving evidence.”.

(3) In section 262 (construction of sections 259 to 261 of Act)—

(a) in the title, for “261” substitute “261A”,

(b) in each of subsections (1) to (4), for “261” substitute “261A”, and

(c) in subsection (3)—

(i) in the definition of “criminal proceedings”, after “include” insert “(other than in section 261A)”, and

(ii) in the definition of “made”, after “includes” insert “(other than in section 261A)”.

63 Spouse or civil partner of accused a compellable witness

(1) For section 264 of the 1995 Act (spouse of accused a competent witness) substitute—

“**264 Spouse or civil partner of accused a compellable witness**

(1) The spouse or civil partner of an accused is a competent and compellable witness for the prosecution, the accused or any co-accused in the proceedings against the accused.

(2) Subsection (1) is, if the spouse or civil partner is a co-accused in the proceedings, subject to any enactment or rule of law by virtue of which an accused need not (by reason of being an accused) give evidence in the proceedings.

(3) Subsection (1) displaces any other rule of law that would (but for that subsection) prevent or restrict, by reference to the relationship, the giving of evidence by the spouse or civil partner of an accused.”.

(2) Section 130 of the Civil Partnership Act 2004 (c.33) (civil partner of accused a competent witness) is repealed.

64 Special measures for child witnesses and other vulnerable witnesses

(1) The 1995 Act is amended as follows.

(2) In section 271 (vulnerable witnesses: main definitions)—

(a) in subsection (1)—

(i) for “a trial” substitute “a hearing in relevant criminal proceedings”, and

(ii) for “the trial”, wherever it occurs, substitute “the hearing”, and

(b) in subsection (5)—

(i) the definition of “trial” is repealed, and

(ii) after the definition of “court” insert—

““hearing in relevant criminal proceedings” means any hearing in the course of any criminal proceedings in the High Court or the sheriff court.”.

(3) In section 271A (child witnesses)—

(a) in subsection (1), for “a trial” substitute “a hearing in relevant criminal proceedings”,

(b) in subsection (5A)(c), for “the trial diet” substitute “the hearing at which the evidence is to be given”,

(c) in subsection (6)(a), for “the trial” substitute “a hearing in relevant criminal proceedings”,

(d) in subsection (7)(b)(ii), for “the trial” substitute “the hearing at which the evidence is to be given”,

(e) in subsection (8), for “the trial diet” substitute “the hearing at which the evidence is to be given”,

(f) in subsection (10)(b)(i), for “the trial diet” substitute “the hearing at which the evidence is to be given”,

(g) in subsection (12), for "the trial diet in the case" substitute "the hearing at which the evidence is to be given", and

(h) in subsection (13A)(c), for "the trial diet" substitute "the hearing at which the evidence is to be given".

(4) In section 271B (further special provision for child witnesses under the age of 12)—

(a) in subsection (1)(a), for "a trial" substitute "a hearing in relevant criminal proceedings",

(b) in subsection (1)(b), for "the trial" substitute "the hearing", and

(c) in subsection (3)(b)(i), for "the trial" substitute "the hearing".

(5) In section 271C (vulnerable witnesses other than child witnesses)—

(a) in subsection (1), for "a trial" substitute "a hearing in relevant criminal proceedings",

(b) in subsection (5A)(c), for "the trial diet" substitute "the hearing at which the evidence is to be given",

(c) in subsection (6), for "the trial diet" substitute "the hearing at which the evidence is to be given",

(d) in subsection (10), for "the trial diet in the case" substitute "the hearing at which the evidence is to be given", and

(e) in subsection (12)(c), for "the trial diet" substitute "the hearing at which the evidence is to be given".

(6) In section 271D (review of arrangements for vulnerable witnesses)—

(a) in subsection (1)—

(i) for "the trial", where it first occurs, substitute "a hearing in relevant criminal proceedings", and

(ii) for "the trial", where it second occurs, substitute "the hearing", and

(b) in subsection (4)(b)(i), for "the trial" substitute "the hearing".

(7) In section 271F (the accused)—

(a) in subsection (1)—

(i) for "the trial", where it first occurs, substitute "a hearing in relevant criminal proceedings", and

(ii) for "the trial", where it second occurs (in subsection (1)(a)), substitute "the hearing",

(b) in subsection (2)—

(i) for "the trial", where it first occurs, substitute "the hearing",

(ii) for "the trial", where it second occurs (in subsection (2)(a)(iii)), substitute "a hearing in relevant criminal proceedings", and

(iii) for "the trial", where it third occurs (in subsection (2)(b)(i)), substitute "a hearing in relevant criminal proceedings",

(c) in subsection (3), for "the trial" substitute "a hearing in relevant criminal proceedings", and

(d) in subsection (5), for "the trial" substitute "the hearing".

(8) In section 271J (live television link)—

(a) in subsection (1), for "the trial" substitute "the hearing",

(b) in subsection (2)(b), for "the trial" substitute "the hearing", and

(c) in subsection (5)(a), for "the trial" substitute "the hearing".

(9) In section 271L (supporters), in subsection (2), for "the trial" substitute "that or any other hearing in the proceedings".

(10) In section 288E (prohibition of personal conduct of defence in certain cases involving child witnesses under the age of 12), in subsection (5), for "a child witness referred to in subsection (2)(b) above" substitute "the trial".

64A Child witnesses in proceedings for people trafficking offences

In section 271 of the 1995 Act (vulnerable witnesses: main definitions)—

(a) in subsection (1)(a), for "age of 16" substitute "relevant age", and

(b) after subsection (1), insert—

"(1A) In subsection (1)(a), "the relevant age" means—

(a) in the case of a person who is giving or is to give evidence in proceedings for an offence under section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (trafficking in prostitution etc.) or section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation), the age of 18, and

(b) in any other case, the age of 16.".

65 Amendment of Criminal Justice (Scotland) Act 2003

Section 15A of the Criminal Justice (Scotland) Act 2003 (asp 7) (application of certain vulnerable witness provisions in proofs) is repealed.

66 Witness anonymity orders

(1) After section 271M of the 1995 Act insert—

"*Witness anonymity orders*

271N Witness anonymity orders

(1) A court may make an order requiring such specified measures to be taken in relation to a witness in criminal proceedings as the court considers appropriate to ensure that the identity of the witness is not disclosed in or in connection with the proceedings.

(2) The court may make such an order only on an application made in accordance with sections 271P and 271PA, if satisfied of the conditions set out in section 271Q having considered the matters set out in section 271R.

(3) The kinds of measures that may be required to be taken in relation to a witness include in particular measures for securing one or more of the matters mentioned in subsection (4).

(4) Those matters are—

(a) that the witness's name and other identifying details may be—

(i) withheld,

(ii) removed from materials disclosed to any party to the proceedings,

(b) that the witness may use a pseudonym,

(c) that the witness is not asked questions of any specified description that might lead to the identification of the witness,

(d) that the witness is screened to any specified extent,

(e) that the witness's voice is subjected to modulation to any specified extent.

(5) Nothing in this section authorises the court to require—

(a) the witness to be screened to such an extent that the witness cannot be seen by the judge or the jury,

(b) the witness's voice to be modulated to such an extent that the witness's natural voice cannot be heard by the judge or the jury.

(6) An order made under this section is referred to in this Act as a "witness anonymity order".

(7) In this section "specified" means specified in the order concerned.

271P Applications

(1) An application for a witness anonymity order to be made in relation to a witness in criminal proceedings may be made to the court by the prosecutor or the accused.

(2) Where an application is made by the prosecutor, the prosecutor—

(a) must (unless the court directs otherwise) inform the court of the identity of the witness, but

(b) is not required to disclose in connection with the application—

(i) the identity of the witness, or

(ii) any information that might enable the witness to be identified,

to any other party to the proceedings (or to the legal representatives of any other party to the proceedings).

(3) Where an application is made by the accused, the accused—

(a) must inform the court and the prosecutor of the identity of the witness, but

(b) if there is more than one accused, is not required to disclose in connection with the application—

(i) the identity of the witness, or

(ii) any information that might enable the witness to be identified,

to any other accused (or to the legal representatives of any other accused).

(4) Subsections (4A) and (4B) apply where the prosecutor or the accused proposes to make an application under this section in respect of a witness.

(4A) Any relevant information which is disclosed by or on behalf of that party before the determination of the application must be disclosed in such a way as to prevent—

(a) the identity of the witness, or

(b) any information that might enable the witness to be identified,

from being disclosed except as required by subsection (2)(a) or (3)(a).

(4B) Despite any provision in this Act to the contrary, any relevant list, application or notice lodged, made or given by that party before the determination of the application must not—

(a) disclose the identity of the witness, or

(b) contain any other information that might enable the witness to be identified,

but the list, application or notice must, instead, refer to the witness by a pseudonym.

(5) "Relevant information" means any document or other material which falls to be disclosed, or is sought to be relied on, by or on behalf of the party concerned in connection with the proceedings or proceedings preliminary to them.

(5A) "Relevant list, application or notice" means—

(a) a list of witnesses,

(b) a list of productions,

(c) a notice under section 67(5) or 78(4) relating to the witness,

(d) a motion or application under section 268, 269 or 270 relating to the witness,

(e) any other motion, application or notice relating to the witness.

(6) The court must give every party to the proceedings the opportunity to be heard on an application under this section.

(7) Subsection (6) does not prevent the court from hearing one or more of the parties to the proceedings in the absence of an accused and the accused's legal representatives, if it appears to the court to be appropriate to do so in the circumstances of the case.

(8) Nothing in this section is to be taken as restricting any power to make rules of court.

271PA Making and determination of applications

(1) In proceedings on indictment, an application under section 271P is a preliminary issue (and sections 79 and 87A and other provisions relating to preliminary issues apply accordingly).

(2) No application under section 271P may be made in summary proceedings by any party unless notice of the party's intention to do so has been given—

(a) if an intermediate diet has been fixed, before that diet,

(b) if no intermediate diet has been fixed, before the commencement of the trial.

(3) Subsection (2) is subject to subsections (4) and (8).

(4) In summary proceedings in which an intermediate diet has been fixed, the court may, on cause shown, grant leave for an application under section 271P to be made without notice having been given in accordance with subsection (2)(a).

(5) Subsection (6) applies where—

(a) the court grants leave for a party to make an application under section 271P without notice having been given in accordance with subsection (2)(a), or

(b) notice of a party's intention to make such an application is given in accordance with subsection (2)(b).

(6) The application must be disposed of before the commencement of the trial.

(7) Subsection (8) applies where a motion or application is made under section 268, 269 or 270 to lead the evidence of a witness.

(8) Despite section 79(1) and subsection (2) above, an application under section 271P may be made in respect of the witness at the same time as the motion or application under section 268, 269 or 270 is made.

(9) The application must be determined by the court before continuing with the trial.

(10) Where an application is made under section 271P, the court may postpone or adjourn (or further adjourn) the trial diet.

(11) In this section, "commencement of the trial" means the time when the first witness for the prosecution is sworn.

271Q Conditions for making orders

(1) This section applies where an application is made for a witness anonymity order to be made in relation to a witness in criminal proceedings.

(2) The court may make the order only if it is satisfied that Conditions A to D below are met.

(3) Condition A is that the proposed order is necessary—

(a) in order to protect the safety of the witness or another person or to prevent any serious damage to property, or

(b) in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities or otherwise).

(4) Condition B is that, having regard to all the circumstances, the effect of the proposed order would be consistent with the accused's receiving a fair trial.

(5) Condition C is that the importance of the witness's testimony is such that in the interests of justice the witness ought to testify.

(6) Condition D is that—

(a) the witness would not testify if the proposed order were not made, or

(b) there would be real harm to the public interest if the witness were to testify without the proposed order being made.

(7) In determining whether the measures to be specified in the order are necessary for the purpose mentioned in subsection (3)(a), the court must have regard in particular to any reasonable fear on the part of the witness—

(a) that the witness or another person would suffer death or injury, or

(b) that there would be serious damage to property,

if the witness were to be identified.

271R Relevant considerations

(1) When deciding whether Conditions A to D in section 271Q are met in the case of an application for a witness anonymity order, the court must have regard to—

(a) the considerations mentioned in subsection (2), and

(b) such other matters as the court considers relevant.

(2) The considerations are—

(a) the general right of an accused in criminal proceedings to know the identity of a witness in the proceedings,

(b) the extent to which the credibility of the witness concerned would be a relevant factor when the witness's evidence comes to be assessed,

(c) whether evidence given by the witness might be material in implicating the accused,

(d) whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without the witness's identity being disclosed,

(e) whether there is any reason to believe that the witness—

(i) has a tendency to be dishonest, or

(ii) has any motive to be dishonest in the circumstances of the case,

having regard in particular to any previous convictions of the witness and to any relationship between the witness and the accused or any associates of the accused,

(f) whether it would be reasonably practicable to protect the witness's identity by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court.

271S Direction to jury

(1) Subsection (2) applies where, in a trial on indictment, any evidence has been given by a witness at a time when a witness anonymity order applied to the witness.

(2) The judge must give the jury such direction as the judge considers appropriate to ensure that the fact that the order was made in relation to the witness does not prejudice the accused.

271T Discharge and variation of order

(1) This section applies where a court has made a witness anonymity order in relation to any criminal proceedings.

(2) The court may discharge or vary (or further vary) the order if it appears to the court to be appropriate to do so in view of the provisions of sections 271Q and 271R that applied to the making of the order.

(3) The court may do so—

(a) on an application made by a party to the proceedings if there has been a material change of circumstances since the relevant time, or

(b) on its own initiative.

(4) The court must give every party to the proceedings the opportunity to be heard—

(a) before determining an application made to it under subsection (3)(a), and

(b) before discharging or varying the order on its own initiative.

(5) Subsection (4) does not prevent the court from hearing one or more of the parties to the proceedings in the absence of an accused and the accused's legal representatives, if it appears to the court to be appropriate to do so in the circumstances of the case.

(6) In subsection (3)(a) "the relevant time" means—

(a) the time when the order was made, or

(b) if a previous application has been made under that subsection, the time when the application (or the last application) was made.

271U Appeals

(1) The prosecutor or the accused may appeal to the High Court against—

(a) the making of a witness anonymity order under section 271N,

(b) the kinds of measures that are required to be taken in relation to a witness under a witness anonymity order made under that section,

(c) the refusal to make a witness anonymity order under that section,

(d) the discharge of a witness anonymity order under section 271T,

(e) the variation of a witness anonymity order under that section, or

(f) the refusal to discharge or vary a witness anonymity order under that section.

(1A) The appeal may be brought only with the leave of the court of first instance, granted—

(a) on the motion of the party making the appeal, or

(b) on its own initiative.

(3) The procedure in relation to the appeal is to be prescribed by Act of Adjournal.

(3A) If an appeal is brought under this section—

(a) the period between the lodging of the appeal and its determination does not count towards any time limit applying in respect of the case,

(b) the court of first instance or the High Court may do either or both of the following—

(i) postpone or adjourn (or further adjourn) the trial diet,

(ii) extend any time limit applying in respect of the case.

(5) An appeal under this section does not affect any right of appeal in relation to any other decision of any court in the criminal proceedings.

271V Appeal against the making of a witness anonymity order

(1) This section applies where—

(a) an appeal is brought under section 271U(1)(a) against the making of a witness anonymity order, and

(b) the High Court determines that the decision of the judge at first instance was wrong in law.

(2) The High Court must discharge the order and the trial is to proceed as if the order had not been made.

271W Appeal against the refusal to make a witness anonymity order

(1) This section applies where—

(a) an appeal is brought under section 271U(1)(c) against the refusal to make a witness anonymity order in relation to a witness in criminal proceedings, and

(b) the High Court determines that the decision of the judge at first instance was wrong in law.

(2) The High Court must make an order requiring such specified measures to be taken in relation to the witness in the proceedings as the court considers appropriate to ensure that the identity of the witness is not disclosed in or in connection with the proceedings.

271X Appeal against a variation of a witness anonymity order

(1) This section applies where—

(a) an appeal is brought under section 271U(1)(e) against a variation of a witness anonymity order, and

(b) the High Court determines that the decision of the judge at first instance was wrong in law.

(2) The High Court must discharge the variation.

(3) If the High Court determines that it is appropriate to make an additional variation in view of the provisions of sections 271Q and 271R, the court may do so.

271Y Appeal against a refusal to vary or discharge a witness anonymity order

(1) This section applies where—

(a) an appeal is brought under section 271U(1)(f) against a refusal to discharge or vary a witness anonymity order, and

(b) the High Court determines that the decision of the judge at first instance was wrong in law.

(2) The High Court must discharge the order, or make the variation, as the case requires.

(3) If, in the case of a variation, the High Court determines that it is appropriate to make an additional variation in view of the provisions of sections 271Q and 271R, the court may do so.”.

(1A) The 1995 Act is amended as follows—

(a) in section 79 (preliminary pleas and preliminary issues)—

(i) after subsection (1), insert—

“(1A) Subsection (1) is subject to section 271PA(8).”,

(ii) in subsection (2)(b), after sub-paragraph (ii), insert—

“(iia) an application for a witness anonymity order under section 271P of this Act;”,

(b) in section 148 (intermediate diets), after subsection (3), insert—

“(3AA) At an intermediate diet, the court shall also dispose of any application for a witness anonymity order under section 271P of this Act of which notice has been given in accordance with section 271PA(2)(a) of this Act.”.

(2) Sections 271N to 271Y of the 1995 Act apply to proceedings in cases where the trial or hearing begins on or after the day on which this section comes into force.

(3) Nothing in this section or sections 271N to 271Y of the 1995 Act affects the power of a court under any rule of law to make an order for securing that the identity of a witness in a trial or hearing in criminal proceedings is withheld from the accused (or, on a defence application, from other accused), where the trial or hearing begins before the day on which this section comes into force.

(4) Schedule 3 makes provision about certain appeals.

67 Television link evidence

(1) The 1995 Act is amended as follows.

(2) In section 273 (television link evidence from abroad), in subsection (1), for “solemn” substitute “criminal”.

(3) After that section insert—

“Evidence from other parts of the United Kingdom

273A Television link evidence from other parts of the United Kingdom

(1) In any criminal proceedings in the High Court or the sheriff court a person other than the accused may give evidence through a live television link if—

(a) the witness is within the United Kingdom but outside Scotland,

(b) an application under this section for the issue of a letter of request has been granted, and

(c) the court is satisfied as to the arrangements for the giving of evidence in that manner by that witness.

(2) The prosecutor or the defence in any proceedings referred to in subsection (1) may apply for the issue of a letter of request.

(3) The application must be made to a judge of the court in which the trial is to take place or, if that court is not yet known, to a judge of the High Court.

(4) The judge may, on an application under this section, issue a letter to a court or tribunal exercising jurisdiction in the place where the witness is ordinarily resident requesting assistance in facilitating the giving of evidence by that witness through a live television link, if the judge is satisfied of the matters set out in subsection (5).

(5) Those matters are—

(a) that the evidence which it is averred the witness is able to give is necessary for the proper adjudication of the trial,

(b) that the granting of the application—

(i) is in the interests of justice, and

(ii) in the case of an application by the prosecutor, is not unfair to the accused.”.

67A European evidence warrants

(1) The Scottish Ministers may by order make provision for the purposes of and in connection with implementing any obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).

(2) The provision may, in particular, confer functions—

(a) on the Scottish Ministers,

(b) on the Lord Advocate,

(c) on other persons.

(3) An order under subsection (1) may modify any enactment.

(4) An order under subsection (1) may contain provision creating offences and a person who commits such an offence is liable to such penalties, not exceeding those mentioned in subsection (5), as are provided for in the order.

(5) Those penalties are—

(a) on conviction on indictment, imprisonment for a period not exceeding 2 years, or a fine, or both,

(b) on summary conviction, imprisonment for a period not exceeding 12 months, or a fine not exceeding the statutory maximum, or both.

(6) In this section, the "Framework Decision" means Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

PART 5

CRIMINAL JUSTICE

Jury service

67B Lists of jurors

(1) The 1995 Act is amended as follows.

(2) In section 84 (juries: returns of jurors and preparation of lists)—

(a) in subsection (3), for "list" substitute "lists",

(b) for subsection (4) substitute—

"(4) For the purpose of a trial in the sheriff court, the sheriff principal must furnish the clerk of court with a list of names, containing the number of persons required, from lists of potential jurors of—

(a) the sheriff court district in which the trial is to be held (the "local district"), and

(b) if the sheriff principal considers it appropriate, any other sheriff court district or districts in the sheriffdom in which the trial is to be held ("other districts").

(4A) Where the sheriff principal furnishes a list containing names of potential jurors of other districts, the sheriff principal may determine the proportion as between the local district and the other districts in which jurors are to be summoned.",

(c) in subsection (5), for "list", in both places where it occurs, substitute "lists", and

(d) subsection (7) is repealed.

(3) In section 85(4) (juries: citation and attendance of jurors)—

(a) for the words from the beginning to "shall", in the first place where it occurs, substitute "The sheriff clerk of—

(a) the sheriffdom in which the High Court is to sit, or

(b) the sheriff court district in which a trial in the sheriff court is to be held,

shall", and

(b) the word "such", in the first place where it occurs, is repealed.

68 Upper age limit for jurors

(1) Section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55) (qualification of jurors) is amended as follows.

(2) In subsection (1)—

(a) in paragraph (b), at beginning insert "subject to subsection (1A),", and

(b) the words ", civil or criminal" are repealed.

(3) After subsection (1) insert—

"(1A) In relation to criminal proceedings, a person is qualified and liable to serve as a juror despite being over 65 years of age.".

68A Excusal from jury service

(1) The Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 is amended as follows.

(2) In section 1 (qualification of jurors)—

(a) in subsection (1), after "below" insert "and to section 1A",

(b) in subsection (2), after "service" in the second place where it occurs insert "in relation to civil proceedings",

(c) in subsection (3), after "service" in the first place where it occurs insert "in relation to civil proceedings",

(d) in subsection (5), after "above" insert "or under section 1A", and

(e) in subsection (6), after paragraph (a) insert—

"(aa) section 1A;".

(3) After section 1 insert—

"1A Excusal of jurors in relation to criminal proceedings

(1) Subject to subsection (3), a person who is qualified under section 1(1) but is among the persons listed in Part III of Schedule 1 to this Act (being persons excusable as of right from jury service) is to be excused from jury service in relation to criminal proceedings on any occasion where the person—

(a) has been required to provide information under section 3(2) of the Jurors (Scotland) Act 1825 (c.22); and

(b) gives written notice to the sheriff principal that the person wishes to be excused, before the end of the period of 7 days beginning with the day on which the person receives the requirement.

(2) Without prejudice to subsection (1), a person who is qualified under section 1(1) but is among the persons listed in Group C of Part III of Schedule 1 to this Act is to be excused from jury service in relation to criminal proceedings on any occasion where—

(a) the person has been required to provide information under section 3(2) of the Jurors (Scotland) Act 1825; and

(b) the person's commanding officer certifies to the sheriff principal that it would be prejudicial to the efficiency of the force of which the person is a member were the person required to be absent from duty.

(3) Subsection (1) does not apply to a person who is qualified under section 1(1) but is among the persons listed in paragraph (a)(iii) of Group F of Part III of Schedule 1 to this Act (persons who have attained the age of 71), but instead such a person is to be excused from jury service in relation to criminal proceedings on any occasion where—

(a) in the case of a person who has been required to provide information under section 3(2) of the Jurors (Scotland) Act 1825, the person gives written notice to the sheriff principal that the person wishes to be excused; or

(b) in the case of a person who has been cited to attend for jury service, the person—

(i) gives written notice to the clerk of court issuing the citation that the person wishes to be excused, before the date on which the person is cited first to attend; or

(ii) attends in compliance with the citation and intimates to the court that the person wishes to be excused.”.

(4) In section 3(1)(a) (offences in connection with jury service), after “been” insert “required to provide information under section 3(2) of the Jurors (Scotland) Act 1825 or”.

69 Persons excusable from jury service

In the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55), in Schedule 1 (ineligibility for and disqualification and excusal from jury service), Part 3, Group F, for paragraph (a) substitute—

“(a) where citation for jury service would result in a person’s serving as a juror in relation to criminal proceedings—

(i) persons who have served as a juror in the period of 5 years ending with the date on which the person is cited first to attend;

(ii) persons who have attended for jury service in relation to criminal proceedings, but have not served as a juror, in the period of 2 years ending with the date on which the person is cited first to attend; and

(iii) persons who have attained the age of 71;

(aa) where citation for jury service would result in a person’s serving as a juror in relation to civil proceedings, persons who have served, or duly attended for service, as a juror in the period of 5 years ending with the date on which the person is cited first to attend;”.

Data matching for detection of fraud etc.

70 Data matching for detection of fraud etc.

(1) The Public Finance and Accountability (Scotland) Act 2000 (asp 1) is amended as follows.

(2) In section 11 (Audit Scotland: financial provisions)—

(a) after subsection (1)(c) insert—

“(ca) carrying out a data matching exercise under section 26A,”, and

(b) after subsection (5) insert—

“(5A) Charges under subsection (1)(ca) may be imposed on (either or both)—

(a) persons who disclose data for a data matching exercise,

(b) persons who receive the results of such an exercise.”.

(3) After section 26 insert—

“PART 2A

DATA MATCHING

26A Power to carry out data matching exercises

(1) Audit Scotland may carry out data matching exercises or arrange for them to be carried out on its behalf.

(2) A data matching exercise is an exercise involving the comparison of sets of data to determine how far they match (including the identification of any patterns and trends).

(3) The power in subsection (1) may be exercised for one or more of the following purposes—

(a) assisting in the prevention and detection of fraud,

(b) assisting in the prevention and detection of crime (other than fraud),

(c) assisting in the apprehension and prosecution of offenders.

(4) A data matching exercise may not be used for the sole purpose of identifying patterns and trends in a person’s characteristics or behaviour which suggest the person is likely to commit fraud in the future.

26B Voluntary disclosure of data to Audit Scotland

(1) For the purposes of a data matching exercise, any person may disclose data to Audit Scotland (or a person acting on its behalf).

(2) Such disclosure does not breach—

(a) any duty of confidentiality owed by the person making the disclosure, or

(b) any other restriction on the disclosure of data.

(3) Nothing in this section authorises a disclosure—

(a) which contravenes the Data Protection Act 1998 (c.29),

(b) which is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000 (c.23) (interception, acquisition and disclosure of communications data), or

(c) of data comprising or including patient data.

(4) “Patient data” means data relating to an individual which is held for medical purposes and from which the individual can be identified.

(5) “Medical purposes” are the purposes of—

(a) preventative medicine,

(b) medical diagnosis,

(c) medical research,

(d) the provision of care and treatment,

(e) the management of health and social care services, and

(f) informing individuals about their physical or mental health or condition, the diagnosis of their condition or their care and treatment.

(6) Nothing in this section prevents disclosure of data under any other provision of this Act, another enactment or any rule of law.

(7) Data matching exercises may include data disclosed by a person outside Scotland.

26C Power to require disclosure of data

(1) Audit Scotland may require the persons mentioned in subsection (2) to disclose to it (or a person acting on its behalf) such data as it (or the person acting on its behalf) may reasonably require for the purpose of carrying out data matching exercises in such form as it (or such person) may so require.

(2) Those persons are—

(a) a body or an office holder any of whose accounts is an account in relation to which sections 21 and 22 apply,

(b) a body whose accounts must be audited under Part 7 of the Local Government (Scotland) Act 1973 (c.65) (finance),

(c) a Licensing Board continued in existence by or established under section 5 of the Licensing (Scotland) Act 2005 (asp 16), or

(d) an officer or a member of a body, office holder or board mentioned in paragraph (a), (b) or (c).

(3) Audit Scotland must not require a person to disclose data if—

(a) the disclosure would contravene the Data Protection Act 1998 (c.29),

(b) the disclosure is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000 (c.23) (interception, acquisition and disclosure of communications data).

(4) A disclosure made in response to a requirement imposed under subsection (1) does not breach—

(a) any duty of confidentiality owed by the person making the disclosure, or

(b) any other restriction on the disclosure of data.

(5) A person mentioned in subsection (2) who without reasonable excuse fails to comply with a requirement made in accordance with this section is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

26D Disclosure of results of data matching

(1) This section applies to the following data—

(a) data relating to a particular person obtained by or on behalf of Audit Scotland for the purpose of carrying out a data matching exercise, and

(b) the results of such an exercise.

(2) Data to which this section applies may be disclosed by or on behalf of Audit Scotland if the disclosure is—

(a) for, or in connection with, a purpose for which a data matching exercise is carried out,

(b) to a Scottish audit agency, or a related party, for, or in connection with a function of that audit agency under—

(i) Part 2 of this Act, or

(ii) Part 7 of the Local Government (Scotland) Act 1973 (c.65) (finance),

(c) to a United Kingdom audit agency, or a related party, for, or in connection with, a function of that audit agency corresponding or similar to—

(i) the functions of a Scottish audit agency, or

(ii) the functions of Audit Scotland under this Part, or

(d) in pursuance of a duty imposed by or under an enactment.

(3) "Scottish audit agency", for the purpose of subsections (2)(b) and (c)(i), means—

(a) the Auditor General, or

(b) the Accounts Commission.

(4) "United Kingdom audit agency", for the purposes of subsection (2)(c), means—

(a) the National Audit Office,

(b) the Audit Commission for Local Authorities and the National Health Service in England,

(c) the Auditor General for Wales,

(d) the Comptroller and Auditor General for Northern Ireland, or

(e) a person designated as a local government auditor under article 4 of the Local Government (Northern Ireland) Order 2005 (S.I. 2005/1968 (NI.18)).

(5) "Related party", in relation to a Scottish or United Kingdom audit agency means—

(a) a person acting on its behalf,

(b) a body or office holder whose accounts are required to be audited by it or by a person appointed by it, or

(c) a person appointed by it to audit those accounts.

(6) If the data used for a data matching exercise includes patient data—

(a) subsection (2)(a) applies only so far as the purpose for which the disclosure is made relates to a relevant NHS body, and

(b) subsection (2)(b) or (c) applies only so far as the function for, or in connection with, which the disclosure is made relates to such a body.

(7) In subsection (6)—

"patient data" has the same meaning as section 26B(4), and "relevant NHS body" means—

(a) an NHS body as defined in section 22(1) of the Community Care and Health (Scotland) Act 2002 (asp 5),

(b) a health service body as defined in section 53(1) of the Audit Commission Act 1998 (c.18),

(c) a Welsh NHS body as defined in section 60 of the Public Audit (Wales) Act 2004 (c.23),

(d) a health and social care body mentioned in paragraphs (a) to (e) of section 1(5) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 (c.1).

(8) Data disclosed under subsection (2) may not be further disclosed except—

(a) for, or in connection with—

(i) the purpose for which it was disclosed under subsection (2)(a), or

(ii) the function for which it was disclosed under subsection (2)(b) or (c),

(b) otherwise for the investigation or prosecution of an offence, or

(c) in pursuance of a duty imposed by or under an enactment.

(9) Except as authorised by subsections (2) and (8), a person who discloses data to which this section applies is guilty of an offence and liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine or to both, or

(b) on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both.

26E Publication of reports on data matching

(1) Audit Scotland may publish a report on a data matching exercise (including a report on the results of an exercise).

(2) Such a report must not include data relating to a particular person if—

(a) the person is the subject of any data included in the data matching exercise,

(b) the person can be identified from the data, and

(c) the data is not otherwise in the public domain.

(3) A report published under subsection (1) is to be published in such manner as Audit Scotland considers appropriate for the purposes of bringing it to the attention of those members of the public who may be interested.

(4) Nothing in section 26D prevents publication under this section.

(5) This section does not affect any powers of an auditor where the data matching exercise in question forms part of an audit under—

(a) Part 2 of this Act, or

(b) Part 7 of the Local Government (Scotland) Act 1973 (c.65) (finance).

26F Data matching code of practice

(1) Audit Scotland must prepare, and keep under review, a code of practice with respect to data matching exercises.

(2) Regard must be had to the code in carrying out and participating in any such exercise.

(3) Audit Scotland must consult the following persons before preparing or altering the code of practice—

- (a) the Information Commissioner,
- (b) the persons mentioned in section 26C(2), and
- (c) any other person Audit Scotland thinks fit.

(4) Audit Scotland must, from time to time, publish the code.

26G Powers of the Scottish Ministers

(1) The Scottish Ministers may by order amend this Part—

- (a) to add a public body to the persons mentioned in section 26C(2),
- (b) to modify the application of this Part in relation to a public body so added, or
- (c) to remove a person from the persons mentioned in section 26C(2).

(2) An order under this section may include such incidental, consequential, supplementary or transitional provision as the Scottish Ministers think fit.

(3) In this section, "public body" means a person whose functions—

- (a) are functions of a public nature, or
- (b) include functions of a public nature.

(4) A person referred to in subsection (3)(b) is a public body to the extent only of the functions referred to in that subsection.".

Sharing information with anti-fraud organisations

71 Sharing information with anti-fraud organisations

In the Serious Crime Act 2007 (c.27), the following provisions are repealed—

- (a) in section 68 (disclosure of information to prevent fraud), subsections (5) and (6),
- (b) in section 69 (offence for certain further disclosures of information), subsection (3), and
- (c) in section 71 (code of practice for disclosure of information to prevent fraud)—
  - (i) subsection (4), and
  - (ii) in subsection (6), the definition of "relevant public authority".

Closure of premises associated with human exploitation etc.

72 Closure of premises associated with human exploitation etc.

(1) In section 26 of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8) (authorisation of closure notice)—

(a) in subsection (1), for "and (3)" substitute "to (3B)",

(b) in subsection (3), after "may" insert ", in a case involving antisocial behaviour,", and

(c) after subsection (3) insert—

"(3A) A senior police officer may, in a case involving an exploitation offence, authorise the service of a closure notice only where the senior police officer—

(a) has reasonable grounds for believing that—

(i) such an offence is being (or, at any time in the immediately preceding 3 months, was) committed in the premises, or

(ii) the premises are being (or, at any time in the immediately preceding 3 months, have been) used for or in connection with the commission of such an offence, and

(b) is satisfied that—

(i) the local authority for the area in which the premises are situated has been consulted, and

(ii) reasonable steps have been taken to establish the identity of any person who lives on, has control of, has responsibility for or has an interest in the premises.

(3B) Subsection (3A) is without prejudice to subsection (3) (including in so far as subsection (3) is applicable in relation to a brothel or other place where prostitution may occur).".

(2) In section 27 of that Act (service etc.), in subsection (2)—

(a) in paragraph (b)(i), after "section 26(3)(b)(ii)" insert "or (as the case may be) (3A)(b)(ii)", and

(b) in paragraph (b)(ii), for "in that subsection" substitute "there".

(3) In section 30 of that Act (application: determination)—

(a) in subsection (1), after "subsection (2)" insert "or (2A)",

(b) in subsection (2), for "Those" substitute "Where the application is in a case involving antisocial behaviour, the",

(c) after subsection (2) insert—

"(2A) Where the application is in a case involving an exploitation offence, the conditions are—

(a) that it appears that—

(i) such an offence is being (or was recently) committed in the premises, or

(ii) the premises continue to be (or recently have been) used for or in connection with the commission of such an offence, and

(b) that the making of the order is necessary to prevent the commission of such an offence for the period specified in the order.”,

(d) in subsection (3)(b), for the words from “engaged” to the end substitute “(as the case may be)—

(i) engaged in antisocial behaviour which has occurred in the premises, or

(ii) involved in the commission of an exploitation offence in or connected with the premises.”, and

(e) after subsection (3) insert—

“(3A) For the purpose of paragraph (b)(ii) of subsection (3), a person such as is mentioned in paragraph (a) of that subsection is not involved in the commission of an exploitation offence where that person is the victim of the offence.”.

(4) In section 32 of that Act (extension)—

(a) after subsection (1) insert—

“(1A) The sheriff may, on the application of a senior police officer and if satisfied that it is necessary to do so to prevent the commission of an exploitation offence, make an order extending the period for which a closure order has effect for a period not exceeding the maximum period.”,

(b) in subsection (2), for “subsection (1)” substitute “subsections (1) and (1A)”,

(c) in subsection (3)—

(i) after “may” insert “, in a case involving antisocial behaviour,”, and

(ii) for “this section” substitute “subsection (1)”, and

(d) after subsection (3) insert—

“(3A) A senior police officer may, in a case involving an exploitation offence, make an application under subsection (1A) only if—

(a) it is made while the closure order has effect, and

(b) the senior police officer—

(i) has reasonable grounds for believing that it is necessary to extend the period for which the closure order has effect for the purpose of preventing the commission of an exploitation offence, and

(ii) is satisfied that the appropriate local authority has been consulted about the intention to make the application.”.

(5) In section 33 of that Act (revocation), in subsection (1), for the words from “the occurrence” to the end substitute “(as the case may be)—

(a) the occurrence of relevant harm, or

(b) the commission of an exploitation offence,

revoke the order.”.

(6) In section 36 of that Act (appeals), in subsection (5), after “section 32(1)” insert “or (1A)”.

(7) After section 40 of that Act insert—

“40A Exploitation offences

(1) In this Part, an “exploitation offence” is any of the following offences—

- (a) so far as concerning travel or identity documentation for enabling the trafficking of people (including passports, visas and work permits)—
  - (i) fraud, or
  - (ii) uttering a forged document,
- (b) so far as concerning the trafficking of people, an offence under section 26(1)(d) of the Immigration Act 1971 (c.77) (falsification of documentation),
- (c) an offence under section 52 or 52A of the Civic Government (Scotland) Act 1982 (c.45) (possession, taking or distribution of indecent images of children),
- (d) an offence under sections 7 to 12 or 13(9) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (offences relating to prostitution and brothels),
- (e) an offence under section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (traffic in prostitution etc.),
- (f) an offence under section 1 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) (meeting a child following certain preliminary contact),
- (g) an offence under sections 9 to 12 of that Act (offences relating to provision by child of sexual services or child pornography),
- (h) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation),
- (i) an offence under Part 1 of the Sexual Offences (Scotland) Act 2009 (asp 9) (rape etc.),
- (j) an offence under Part 4 of that Act (sexual offences involving children) other than an offence under section 37 (older children engaging in sexual conduct with each other),
- (k) an offence under section 42 of that Act (sexual abuse of trust),
- (l) an offence under section 46 of that Act (sexual abuse of trust of a mentally disordered person),
- (m) an offence under section 35A (slavery, servitude and forced or compulsory labour) of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00).

(2) For the purposes of subsection (1)(a) and (b), a reference to trafficking of people is a reference to a person intentionally doing something in respect of at least one other person which involves the commission of an offence mentioned in subsection (1)(e) or (h).

(3) For the purposes of subsection (1), a reference to an offence includes a reference to—

- (a) an attempt to commit an offence,
- (b) incitement to commit an offence,

(c) counselling or procuring the commission of an offence,

(d) involvement art and part in an offence, and

(e) an offence as modified by section 54 of the Sexual Offences (Scotland) Act 2009 (asp 9) (incitement to commit certain sexual acts outside the United Kingdom).

(4) The Scottish Ministers may by order add to or otherwise modify the specification of offences listed in subsection (1).".

Sexual offences prevention orders

73 Sexual offences prevention orders

(1) In section 141 of the Criminal Justice and Immigration Act 2008 (c.4) (sexual offences prevention orders: relevant sexual offences), subsection (2) is repealed.

(2) In the Sexual Offences Act 2003 (c.42)—

(a) in section 106 (applications and grounds for sexual offences prevention orders: supplemental), in subsection (13), the words from "in their" to the end are repealed,

(b) in section 109 (interim SOPOs), in subsection (5), for "107(3)" substitute "107(2)",

(c) after section 111 insert—

"111A SOPO and interim SOPO requirements: Scotland

(1) This section applies in relation to a sexual offences prevention order or an interim sexual offences prevention order made, or to be made, by a court in Scotland.

(2) Such an order, in addition to or instead of prohibiting the defendant from doing anything described in the order, may require the defendant to do anything described in the order.

(3) Accordingly, in relation to such an order—

(a) the references in sections 107(2) and 108(5) to a prohibition include a reference to a requirement, and

(b) the reference in section 113(1) to a person's doing anything which he is prohibited from doing includes a reference to his failing to do anything which he is required to do.", and

(d) in section 112 (provisions relating to sexual offences prevention orders in Scotland), in subsection (1), after paragraph (d) insert—

"(da) a court may make an order under section 104(1)—

(i) at its own instance, or

(ii) on the motion of the prosecutor;".

Foreign travel orders

74 Foreign travel orders

(1) The Sexual Offences Act 2003 (c.42) is amended as follows.

(2) In section 115 (definition of "protecting children generally or any child from serious sexual harm from the defendant outside the United Kingdom"), in subsection (2), for "16" in both places it occurs substitute "18".

(3) In section 116 (qualifying offenders: offences), in subsection (2)(d), for "16" substitute "18".

(4) In section 117(1) (foreign travel orders: effect), for "6 months" substitute "5 years".

(5) Before section 118, insert—

"**117B Surrender of passports: Scotland**

(1) This section applies in relation to a foreign travel order which contains a prohibition within section 117(2)(c).

(2) The order must require the person in respect of whom the order has effect to surrender all of the person's passports, at a police station in Scotland specified in the order—

(a) on or before the date when the prohibition takes effect, or

(b) within a period specified in the order.

(3) Any passports surrendered must be returned as soon as reasonably practicable after the person ceases to be subject to a foreign travel order containing a prohibition within section 117(2)(c).

(4) Subsection (3) does not apply in relation to—

(a) a passport issued by or on behalf of the authorities of a country outside the United Kingdom if the passport has been returned to those authorities;

(b) a passport issued by or on behalf of an international organisation if the passport has been returned to that organisation.

(5) In this section "passport" means—

(a) a United Kingdom passport within the meaning of the Immigration Act 1971 (c.77);

(b) a passport issued by or on behalf of the authorities of a country outside the United Kingdom, or by or on behalf of an international organisation;

(c) a document that can be used (in some or all circumstances) instead of a passport.".

(6) In section 122 (breach of foreign travel order), before subsection (2) insert—

"(1B) A person commits an offence if, without reasonable excuse, the person fails to comply with—

(a) a requirement under section 117A(2) (surrender of passports: England and Wales and Northern Ireland), or

(b) a requirement under section 117B(2) (surrender of passports: Scotland).

(1C) A person may be prosecuted, tried and punished for any offence under subsection (1B)—

(a) in any sheriff court district in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine, as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial or punishment, to be deemed to have been committed in that district).”.

Sex offender notification requirements

74A Sex offender notification requirements

(1) The Sexual Offences Act 2003 (c.42) is amended as follows.

(2) In section 85 (notification requirements: periodic notification)—

(a) in subsection (1), for “period of one year” substitute “applicable period”,

(b) in subsection (3), for “period referred to in subsection (1)” substitute “applicable period”, and

(c) after subsection (4) insert—

“(5) In this section, the “applicable period” means—

(a) in any case where subsection (6) applies to the relevant offender, such period not exceeding one year as the Scottish Ministers may prescribe in regulations, and

(b) in any other case, the period of one year.

(6) This subsection applies to the relevant offender if the last home address notified by the offender under section 83(1) or 84(1) or subsection (1) was the address or location of such a place as is mentioned in section 83(7)(b).”.

(3) In section 86 (notification requirements: travel outside the United Kingdom), subsection (4) is repealed.

(4) In section 87 (method of notification and related matters), subsection (6) is repealed.

(5) In section 96 (information about release or transfer), subsection (4) is repealed.

(6) In section 138 (orders and regulations)—

(a) in subsection (2), after “84,” insert “85,”, and

(b) after subsection (3) insert—

“(4) Orders or regulations made by the Scottish Ministers under this Act may—

(a) make different provision for different purposes,

(b) include supplementary, incidental, consequential, transitional, transitory or saving provisions.”.

Risk of sexual harm orders

75 Risk of sexual harm orders

(1) The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) is amended as follows.

(2) In section 2 (risk of sexual harm orders: applications, grounds and effect)—

(a) in subsection (7)(a), after “doing” insert “, or requires that person to do,”, and

(b) in subsection (8), after “prohibitions” insert “or requirements”.

(3) In section 4 (risk of sexual harm orders: variations, renewals and discharges), in subsection (4), after "prohibitions" in both places where it occurs insert "or requirements".

(4) In section 5 (interim risk of sexual harm orders), in subsection (3), after "doing" insert ", or requiring that person to do,".

(5) In section 7 (offence: breach of risk of sexual harm order or interim risk of sexual harm order), in subsection (1), after "doing" insert ", or fails to do anything which the person is required to do,".

75A Risk of sexual harm orders: spent convictions

In section 7 of the Rehabilitation of Offenders Act 1974 (c.53) (limitations on rehabilitation under the Act), in subsection (2), after paragraph (bb) insert—

> "(bc) in any proceedings on an application under section 2, 4 or 5 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) or in any appeal under section 6 of that Act;".

Obtaining information from outwith United Kingdom

76 Obtaining information from outwith United Kingdom

After section 194I of the 1995 Act insert—

> **"194IA Power to request assistance in obtaining information abroad**
>
> (1) Where it appears to the Commission that there may be information which they require for the purposes of carrying out their functions, and the information is outside the United Kingdom, they may apply to the High Court to request assistance.
>
> (2) On an application made by the Commission under subsection (1), the High Court may request assistance if satisfied that it is reasonable in the circumstances.
>
> (3) In this section, "request assistance" means request assistance in obtaining outside the United Kingdom any information specified in the request for use by the Commission for the purposes of carrying out their functions.
>
> (4) Section 8 of the Crime (International Co-operation) Act 2003 (c.32) (sending requests for assistance) applies to requests for assistance under this section as it applies to requests for assistance under section 7 of that Act.
>
> (5) Subsections (2), (3) and (6) of section 9 of that Act (use of evidence obtained) apply to information obtained pursuant to a request for assistance under this section as they apply under subsection (1) of that section to evidence obtained pursuant to a request for assistance under section 7 of that Act.".

Surveillance

77 Grant of authorisations for surveillance

(1) The Regulation of Investigatory Powers (Scotland) Act 2000 (asp 11) is amended as follows.

(3) In section 10 (authorisation of intrusive surveillance)—

(a) in subsection (1), for the words from "the" where it second occurs to the end substitute "any of the persons mentioned in subsection (1A) may grant authorisations for the carrying out of intrusive surveillance.", and

(b) after that subsection insert—

"(1A) Those persons are—

(a) the chief constable of every police force,

(b) the Director General of the Scottish Crime and Drug Enforcement Agency,

(c) the Deputy Director General of the Scottish Crime and Drug Enforcement Agency.".

(3A) After that section insert—

"10A Authorisation of surveillance: joint surveillance operations

In the case of a joint surveillance operation, where authorisation is sought for the carrying out of any form of conduct to which this Act applies, authorisation may be granted by any one of the persons having power to grant authorisation for the carrying out of that conduct.".

(4) In section 11 (rules for grant of authorisations), in subsection (3), after "General" insert "or the Deputy Director General".

(5) In section 12A (grant of authorisations in cases of urgency: Scottish Crime and Drug Enforcement Agency), in subsection (1), after "General" insert "or the Deputy Director General".

(5A) In section 14 (approval required for authorisations to take effect)—

(a) in subsection (5)(b), after "General" insert "or the Deputy Director General", and

(b) subsection (7) is repealed.

(5B) In section 16 (appeals against decisions by Surveillance Commissioners), in subsection (1), after "General" insert "or the Deputy Director General".

(6) In section 31 (interpretation), in subsection (1), after the definitions of "directed" and "intrusive" insert—

""joint surveillance operation" means a case involving—

(a) at least two police forces in Scotland working together; or

(b) at least one police force in Scotland and the Scottish Crime and Drug Enforcement Agency working together;".

Interference with property

78 Authorisations to interfere with property etc.

(1) The Police Act 1997 (c.50) is amended as follows.

(2) In section 93 (authorisations to interfere with property etc.)—

(a) after subsection (3A) insert—

"(3AA)In the case of a joint operation, an authorising officer mentioned in subsection (3B) may authorise a person mentioned in subsection (3C) to take such action as is referred to in subsection (1).

(3B) Those authorising officers are—

(a) the chief constable of a police force—

(i) maintained under or by virtue of section 1 of the Police (Scotland) Act 1967, and

(ii) involved in the joint operation,

(b) where the Scottish Crime and Drug Enforcement Agency is involved in the joint operation, the Director General or Deputy Director General of that Agency.

(3C) The persons who may be authorised under subsection (1) are—

(a) a constable of any of the police forces involved in the joint operation (whether or not the authorised action is to be carried out in the area of operation of the constable's police force),

(b) where the joint operation falls within paragraph (b) of subsection (3B), a police member of the Scottish Crime and Drug Enforcement Agency.

(3D) In subsection (3AA), "joint operation" means a case involving—

(a) at least two police forces in Scotland working together, or

(b) at least one police force in Scotland and the Scottish Crime and Drug Enforcement Agency working together.",

(b) in paragraph (j) of subsection (5), after "General" insert ", or Deputy Director General,", and

(c) in paragraph (cc) of subsection (6), after "General" insert ", or Deputy Director General,".

(3) In section 94 (authorisations given in absence of authorising officer)—

(a) in subsection (2)(h), after "(5)" insert "or, as the case may be, subsection (6)",

(b) in subsection (5), at the beginning insert "Where the case is not a joint operation,", and

(c) after subsection (5), add—

"(6) Where the case is a joint operation, the person referred to in subsection (2)(h) is the chief constable of a police force involved in the joint operation in the relevant area.

(7) In subsections (5) and (6)—

"joint operation" has the meaning given by section 93(3D), and

"relevant area" means the area—

(a) for which the police forces involved in the joint operation are maintained, and

(b) to which the application for authorisation relates.".

Amendments of Part 5 of Police Act 1997

79 Amendments of Part 5 of Police Act 1997

(1) The Police Act 1997 (c.50) is amended as follows.

(1A) In section 113B (enhanced criminal record certificates), in subsection (3), for the words from ", or" immediately following paragraph (a) to the end of paragraph (b), substitute "(or states that there is no such matter or information), and

(b) if the applicant is subject to notification requirements under Part 2 of the Sexual Offences Act 2003 (c.42), states that fact.".

(2) After that section insert—

"113BA Information held outside the United Kingdom

(1) The Scottish Ministers may by order made by statutory instrument amend the definition of—

(a) "criminal conviction certificate" in section 112(2),

(b) "central records" in sections 112(3) and 113A(6),

(c) "criminal record certificate" in section 113A(3),

(d) "relevant matter" in section 113A(6),

(e) "enhanced criminal record certificate" in section 113B(3).

(2) An order under subsection (1) may be made only for the purposes of, or in connection with, enabling certificates issued under this Part to include details of information held outside the United Kingdom.

(3) No order may be made under subsection (1) unless a draft of the statutory instrument containing the order has been laid before, and approved by resolution of, the Scottish Parliament.".

(3) In section 120ZB (regulations about registration), after subsection (2) insert—

"(2A) The provision which may be made by virtue of subsection (2)(a) includes in particular provision for—

(a) the payment of fees in respect of applications to be listed in the register,

(b) the payment of different fees in different circumstances,

(c) annual or other recurring fees to be paid in respect of registration, and

(d) such annual or other recurring fees to be paid in advance or in arrears.

(2B) Where provision is made under subsection (2)(a) for a fee to be charged in respect of an application to be listed in the register, the Scottish Ministers need not consider the application unless the fee is paid.".

Rehabilitation of offenders

79A Spent alternatives to prosecution: Rehabilitation of Offenders Act 1974

(1) The Rehabilitation of Offenders Act 1974 (c.53) is amended as follows.

(2) After section 8A (protection afforded to spent cautions), insert—

"8B Protection afforded to spent alternatives to prosecution: Scotland

(1) For the purposes of this Act, a person has been given an alternative to prosecution in respect of an offence if the person (whether before or after the commencement of this section)—

(a) has been given a warning in respect of the offence by—

(i) a constable in Scotland, or

(ii) a procurator fiscal,

(b) has accepted, or is deemed to have accepted—

(i) a conditional offer issued in respect of the offence under section 302 of the Criminal Procedure (Scotland) Act 1995 (c.46), or

(ii) a compensation offer issued in respect of the offence under section 302A of that Act,

(c) has had a work order made against the person in respect of the offence under section 303ZA of that Act,

(d) has been given a fixed penalty notice in respect of the offence under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8),

(e) has accepted an offer made by a procurator fiscal in respect of the offence to undertake an activity or treatment or to receive services or do any other thing as an alternative to prosecution, or

(f) in respect of an offence under the law of a country or territory outside Scotland, has been given, or has accepted or is deemed to have accepted, anything corresponding to a warning, offer, order or notice falling within paragraphs (a) to (e) under the law of that country or territory.

(2) In this Act, references to an "alternative to prosecution" are to be read in accordance with subsection (1).

(3) Schedule 3 to this Act (protection for spent alternatives to prosecution: Scotland) has effect.".

(3) After section 9A (unauthorised disclosure of spent cautions), insert—

"9B Unauthorised disclosure of spent alternatives to prosecution: Scotland

(1) In this section—

(a) "official record" means a record that—

(i) contains information about persons given an alternative to prosecution in respect of an offence, and

(ii) is kept for the purposes of its functions by a court, police force, Government department, part of the Scottish Administration or other local or public authority in Scotland,

(b) "relevant information" means information imputing that a named or otherwise identifiable living person has committed, been charged with, prosecuted for or given an alternative to prosecution in respect of an offence which is the subject of an alternative to prosecution which has become spent,

(c) "subject of the information", in relation to relevant information, means the named or otherwise identifiable living person to whom the information relates.

(2) Subsection (3) applies to a person who, in the course of the person's official duties (anywhere in the United Kingdom), has or has had custody of or access to an official record or the information contained in an official record.

(3) The person commits an offence if the person—

(a) obtains relevant information in the course of the person's official duties,

(b) knows or has reasonable cause to suspect that the information is relevant information, and

(c) discloses the information to another person otherwise than in the course of the person's official duties.

(4) Subsection (3) is subject to the terms of an order under subsection (6).

(5) In proceedings for an offence under subsection (3), it is a defence for the accused to show that the disclosure was made—

(a) to the subject of the information or to a person whom the accused reasonably believed to be the subject of the information, or

(b) to another person at the express request of the subject of the information or of a person whom the accused reasonably believed to be the subject of the information.

(6) The Scottish Ministers may by order provide for the disclosure of relevant information derived from an official record to be excepted from the provisions of subsection (3) in cases or classes of cases specified in the order.

(7) A person guilty of an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(8) A person commits an offence if the person obtains relevant information from an official record by means of fraud, dishonesty or bribery.

(9) A person guilty of an offence under subsection (8) is liable on summary conviction to a fine not exceeding level 5 on the standard scale, or to imprisonment for a term not exceeding 6 months, or to both.".

(4) After Schedule 2 (protection for spent cautions) insert—

"SCHEDULE 3

PROTECTION FOR SPENT ALTERNATIVES TO PROSECUTION: SCOTLAND

Preliminary

1 (1) For the purposes of this Act, an alternative to prosecution given to any person (whether before or after the commencement of this Schedule) becomes spent—

(a) in the case of—

(i) a warning referred to in paragraph (a) of subsection (1) of section 8B, or

(ii) a fixed penalty notice referred to in paragraph (d) of that subsection,

at the time the warning or notice is given,

(b) in any other case, at the end of the relevant period.

(2) The relevant period in relation to an alternative to prosecution is the period of 3 months beginning on the day on which the alternative to prosecution is given.

(3) Sub-paragraph (1)(a) is subject to sub-paragraph (5).

(4) Sub-paragraph (2) is subject to sub-paragraph (6).

(5) If a person who is given a fixed penalty notice referred to in section 8B(1)(d) in respect of an offence is subsequently prosecuted and convicted of the offence, the notice—

(a) becomes spent at the end of the rehabilitation period for the offence, and

(b) is to be treated as not having become spent in relation to any period before the end of that rehabilitation period.

(6) If a person who is given an alternative to prosecution (other than one to which sub-paragraph (1)(a) applies) in respect of an offence is subsequently prosecuted and convicted of the offence—

(a) the relevant period in relation to the alternative to prosecution ends at the same time as the rehabilitation period for the offence ends, and

(b) if the conviction occurs after the end of the period referred to in sub-paragraph (2), the alternative to prosecution is to be treated as not having become spent in relation to any period before the end of the rehabilitation period for the offence.

2 (1) In this Schedule, “ancillary circumstances”, in relation to an alternative to prosecution, means any circumstances of the following—

(a) the offence in respect of which the alternative to prosecution is given or the conduct constituting the offence,

(b) any process preliminary to the alternative to prosecution being given (including consideration by any person of how to deal with the offence and the procedure for giving the alternative to prosecution),

(c) any proceedings for the offence which took place before the alternative to prosecution was given (including anything that happens after that time for the purpose of bringing the proceedings to an end),

(d) any judicial review proceedings relating to the alternative to prosecution,

(e) anything done or undergone in pursuance of the terms of the alternative to prosecution.

(2) Where an alternative to prosecution is given in respect of two or more offences, references in sub-paragraph (1) to the offence in respect of which the alternative to prosecution is given includes a reference to each of the offences.

(3) In this Schedule, “proceedings before a judicial authority” has the same meaning as in section 4.

Protection for spent alternatives to prosecution and ancillary circumstances

3 (1) A person who is given an alternative to prosecution in respect of an offence is, from the time the alternative to prosecution becomes spent, to be treated for all purposes in law as a person who has not committed, been charged with or prosecuted for, or been given an alternative to prosecution in respect of, the offence.

(2) Despite any enactment or rule of law to the contrary—

(a) where an alternative to prosecution given to a person in respect of an offence has become spent, evidence is not admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Scotland to prove that the person has committed, been charged with or prosecuted for, or been given an alternative to prosecution in respect of, the offence,

(b) a person must not, in any such proceedings, be asked any question relating to the person's past which cannot be answered without acknowledging or referring to an alternative to prosecution that has become spent or any ancillary circumstances, and

(c) if a person is asked such a question in any such proceedings, the person is not required to answer it.

(3) Sub-paragraphs (1) and (2) do not apply in relation to any proceedings—

(a) for the offence in respect of which the alternative to prosecution was given, and

(b) which are not part of the ancillary circumstances.

4 (1) This paragraph applies where a person ("A") is asked a question, otherwise than in proceedings before a judicial authority, seeking information about—

(a) A's or another person's previous conduct or circumstances,

(b) offences previously committed by A or the other person, or

(c) alternatives to prosecution previously given to A or the other person.

(2) The question is to be treated as not relating to alternatives to prosecution that have become spent or to any ancillary circumstances and may be answered accordingly.

(3) A is not to be subjected to any liability or otherwise prejudiced in law because of a failure to acknowledge or disclose an alternative to prosecution that has become spent or any ancillary circumstances in answering the question.

5 (1) An obligation imposed on a person ("A") by a rule of law or by the provisions of an agreement or arrangement to disclose any matter to another person does not extend to requiring A to disclose an alternative to prosecution (whether one given to A or another person) that has become spent or any ancillary circumstances.

(2) An alternative to prosecution that has become spent or any ancillary circumstances, or any failure to disclose an alternative to prosecution that has become spent or any ancillary circumstances, is not a ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing the person in any way in any occupation or employment.

6 The Scottish Ministers may by order—

(a) exclude or modify the application of either or both of sub-paragraphs (2) and (3) of paragraph 4 in relation to questions put in such circumstances as may be specified in the order,

(b) provide for exceptions from any of the provisions of paragraph 5 in such cases or classes of case, or in relation to alternatives to prosecution of such descriptions, as may be specified in the order.

7 Paragraphs 3 to 5 do not affect—

(a) the operation of an alternative to prosecution, or

(b) the operation of an enactment by virtue of which, because of an alternative to prosecution, a person is subject to a disqualification, disability, prohibition or other restriction or effect for a period extending beyond the time at which the alternative to prosecution becomes spent.

8 (1) Section 7(2), (3) and (4) apply for the purpose of this Schedule as follows.

(2) Subsection (2), apart from paragraphs (b) and (d), applies to the determination of any issue, and the admission or requirement of evidence, relating to alternatives to prosecution previously given to a person and to ancillary circumstances as it applies to matters relating to a person's previous convictions and circumstances ancillary thereto.

(3) Subsection (3) applies to evidence of alternatives to prosecution previously given to a person and ancillary circumstances as it applies to evidence of a person's previous convictions and the circumstances ancillary thereto.

(4) For that purpose, subsection (3) has effect as if—

(a) a reference to subsection (2) or (4) of section 7 were a reference to that subsection as applied by this paragraph, and

(b) the words "or proceedings to which section 8 below applies" were omitted.

(5) Subsection (4) applies for the purpose of excluding the application of paragraph 3.

(6) For that purpose, subsection (4) has effect as if the words "(other than proceedings to which section 8 below applies)" were omitted.

(7) References in the provisions applied by this paragraph to section 4(1) are to be read as references to paragraph 3.".

Medical services in prisons

79B Medical services in prisons

(1) For section 3A of the Prisons (Scotland) Act 1989 (c.45) (medical services in prisons) substitute—

"3A Medical officers for prisons

(1) The Scottish Ministers must designate one or more medical officers for each prison.

(2) A person may be designated as a medical officer for a prison only if the person is a registered medical practitioner performing primary medical services for prisoners at the prison under the National Health Service (Scotland) Act 1978 (c.29).

(3) A medical officer has the functions that are conferred on a medical officer for a prison by or under this Act or any other enactment.

(4) A medical officer is not an officer of the prison for the purposes of this Act.

(5) Rules under section 39 of this Act may provide for the governor of a prison to authorise the carrying out by officers of the prison of a search of any person who is in, or is seeking to enter, the prison for the purpose of providing medical services for any prisoner at the prison.

(6) Nothing in rules made by virtue of subsection (5) allows the governor to authorise an officer of a prison to require a person to remove any of the person's clothing other than an outer coat, jacket, headgear, gloves and footwear.".

(2) In section 41D of that Act (unlawful disclosure of information by medical officers), for subsection (1) substitute—

"(1) This section applies to—

(a) a medical officer for a prison, and

(b) any person acting under the supervision of such a medical officer.".

(3) In section 107 of the Criminal Justice and Public Order Act 1994 (c.33) (officers of contracted out prisons), for subsections (6) to (8) substitute—

"(6) The director must designate one or more medical officers for the prison.

(7) A person may be designated as a medical officer for the prison only if the person is a registered medical practitioner performing primary medical services for prisoners at the prison under the National Health Service (Scotland) Act 1978 (c.29).".

(4) In section 110 of that Act (consequential modifications of the 1989 Act etc.)—

(a) in each of subsections (3) and (4), for "3A(6)" substitute "3A(5) and (6)",

(b) subsection (4A) is repealed, and

(c) in subsection (6), for "3A(1) to (5) (medical services)" substitute "3A(1) and (2) (medical officers)".

(5) In section 111(3) of that Act (intervention by the Scottish Ministers), in paragraph (c), after "prison" insert "and the medical officer or officers for the prison".

Miscellaneous

80 Assistance for victim support

(1) The Scottish Ministers may make grants for the purposes of or in connection with the provision of assistance to victims, witnesses or other persons affected by an offence.

(2) Grants under subsection (1) may be made—

(a) to such bodies, and

(b) subject to such conditions,

as the Scottish Ministers consider appropriate.

81 Public defence solicitors

(1) In section 28A of the Legal Aid (Scotland) Act 1986 (c.47) (power of Board to employ solicitors to provide criminal assistance)—

(a) in subsection (1), the words from "may" where it first occurs to "accordingly," are repealed, and

(b) subsection (9A) is repealed.

(2) In section 73 of the Criminal Justice (Scotland) Act 2003 (asp 7) (public defence), paragraph (b) is repealed.

82 Compensation for miscarriages of justice

(1) In section 133 of the Criminal Justice Act 1988 (c.33) (compensation for miscarriages of justice)—

(a) after subsection (1) insert—

"(1A) The Scottish Ministers may by order provide for—

(a) further circumstances in respect of which a person (or, if dead, the person's representatives) may be paid compensation for a miscarriage of justice,

(b) circumstances in respect of which a person (or, if dead, the person's representatives) may be paid compensation for wrongful detention prior to acquittal or a decision by the prosecutor to take no proceedings (or to discontinue proceedings).",

(b) after subsection (2) insert—

"(2AA)Such an application requires to be made within the period of 3 years starting with—

(a) in the case of compensation under subsection (1), the date on which the conviction is reversed or (as the case may be) the person is pardoned,

(b) in the case of compensation under subsection (1A), whichever is relevant of—

(i) that date, or

(ii) the date on which the person is acquitted or the relevant decision is made known to the person.

(2AB)The Scottish Ministers may accept such an application outwith that time limit if they think it is appropriate in exceptional circumstances to do so.",

(c) in subsection (4A), after paragraph (a) insert—

"(aa) the seriousness of the offence with which the person was charged or detained (but in respect of which offence the person was not convicted);",

(d) after subsection (4A) insert—

"(4B) The assessor must also have particular regard to any guidance issued by the Scottish Ministers for the purposes of this section.",

(e) in subsection (5)—

(i) after "quashed" insert "(or set aside)",

(ii) the word "or" where it occurs immediately after each of paragraphs (a), (b) and (c) is repealed,

(iii) after paragraph (d) add "; or

(e) under section 188(1)(b) of the Criminal Procedure (Scotland) Act 1995.”,

(f) after subsection (6) insert—

“(6A) For the purposes of this section, a person suffers punishment as a result of conviction also where (in relation to the conviction) the court imposes some other disposal including by way of—

(a) making a probation order, or

(b) discharging the person absolutely.”, and

(g) after subsection (7) insert—

“(8) The power to make an order under subsection (1A) is exercisable by statutory instrument.

(9) A statutory instrument containing such an order is subject to annulment in pursuance of a resolution of the Scottish Parliament.”.

(2) In Schedule 12 to that Act (assessors of compensation for miscarriages of justice), in paragraph 1—

(a) immediately after sub-paragraph (c), insert “or”, and

(b) sub-paragraph (e) and the word “or” immediately preceding it are repealed.

83 Financial reporting orders

In section 77 of the Serious Organised Crime and Police Act 2005 (c.15) (financial reporting orders: making in Scotland), after subsection (4) insert—

“(4A) A financial reporting order may be made—

(a) on the prosecutor’s motion, or

(b) at the court’s own instance.”.

84 Compensation orders

(1) In section 249 of the 1995 Act (compensation order against convicted person)—

(a) in subsection (1)—

(i) for “Subject to subsections (2) and (4) below, where” substitute “Where”,

(ii) after “compensation” where it second occurs insert “in favour of the victim”,

(b) after subsection (1A) insert—

“(1B) Where a person is convicted of an offence, the court may (instead of or in addition to dealing with the person in any other way), in accordance with subsections (3A) to (3C), make a compensation order requiring the convicted person to pay compensation in favour of—

(a) the victim, or

(b) a person who is liable for funeral expenses in respect of which subsection (3C)(b) allows a compensation order to be made.

(1C) For the purposes of subsection (1B)(a), “victim” means—

(a) a person who has suffered personal injury, loss or damage in respect of which a compensation order may be made by virtue of subsection (3A), or

(b) a relative (as defined in Schedule 1 to the Damages (Scotland) Act 1976 (c.13)) who has suffered bereavement in respect of which subsection (3C)(a) allows a compensation order to be made.",

(c) after subsection (3) insert—

"(3A) A compensation order may be made in respect of personal injury, loss or damage (apart from loss suffered by a person's dependents in consequence of a person's death) that was caused directly or indirectly by an accident arising out of the presence of a motor vehicle on a road if—

(a) it was being used in contravention of section 143(1) of the Road Traffic Act 1988 (c.52), and

(b) no compensation is payable under arrangements to which the Secretary of State is a party.

(3B) Where a compensation order is made by virtue of subsection (3) or (3A), the order may include an amount representing the whole or part of any loss of (including reduction in) preferential rates of insurance if the loss is attributable to the accident.

(3C) A compensation order may be made—

(a) for bereavement in connection with a person's death resulting from the acts which constituted the offence,

(b) for funeral expenses in connection with such a death,

except where the death was due to an accident arising out of the presence of a motor vehicle on a road.",

(d) in subsection (4)—

(i) for "No" substitute "Unless (and to the extent that) subsections (3) to (3C) allow a compensation order to be made, no",

(ii) in paragraph (b), the words from ", except" to the end are repealed,

(e) subsection (6) is repealed, and

(f) after subsection (8) insert—

"(8A) In summary proceedings before the sheriff, where the fine or maximum fine to which a person is liable on summary conviction of an offence exceeds the prescribed sum, the sheriff may make a compensation order awarding in respect of the offence an amount not exceeding the amount of the fine to which the person is so liable.".

(2) In section 251 of that Act (review of compensation order)—

(a) paragraph (a) of subsection (1) is repealed, and

(b) after subsection (1) insert—

"(1A) On the application of the prosecutor at any time before a compensation order has been complied with (or fully complied with), the court may increase the amount payable under the compensation order if it is satisfied that the person against whom it was made—

(a) because of the availability of materially different information about financial circumstances, has more means than were made known to the court when the order was made, or

(b) because of a material change of financial circumstances, has more means than the person had then.”.

PART 6

DISCLOSURE

Meaning of “information”

85 Meaning of “information”

(1) In this Part, “information”, in relation to criminal proceedings relating to a person, means material of any kind given to or obtained by the prosecutor in connection with the proceedings.

(3) In this Part, “information”, in relation to appellate proceedings, includes material of any kind given to or obtained by the prosecutor in connection with the appellate proceedings or the earlier proceedings.

(4) In subsection (3)—

“appellate proceedings” has the meaning given by section 96A,

“earlier proceedings” has the meaning given by section 96B(5).

Provision of information to prosecutor

86 Provision of information to prosecutor: solemn cases

(1) This section applies where in a prosecution—

(a) an accused appears for the first time on petition, or

(b) an accused appears for the first time on indictment (not having appeared on petition in relation to the same matter).

(2) As soon as practicable after the appearance, the investigating agency must provide the prosecutor with details of all the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained (whether by the agency or otherwise) in the course of investigating the matter to which the appearance relates.

(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that information that the prosecutor specifies in the requirement.

(4) In this section, “investigating agency” means—

(a) a police force, or

(b) such other person who—

(i) engages (to any extent) in the investigation of crime or sudden deaths, and

(ii) submits reports relating to those investigations to the procurator fiscal,

as the Scottish Ministers may prescribe by regulations.

87 Continuing duty to provide information: solemn cases

(1) This section applies where—

(a) an investigating agency has complied with section 86(2) in relation to an accused, and

(b) during the relevant period the investigating agency becomes aware that further information that may be relevant to the case for or against the accused has been obtained (whether by the agency or otherwise) in the course of investigating the accused's case.

(2A) As soon as practicable after becoming aware of the further information, the investigating agency must provide the prosecutor with details of it.

(2B) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that further information that the prosecutor specifies in the requirement.

(3) In this section, "relevant period" means the period—

(a) beginning with the investigating agency's compliance with section 86(2) in relation to the accused, and

(b) ending with the agency's receiving notice from the prosecutor of the conclusion of the proceedings against the accused.

(4) For the purposes of subsection (3), proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(da) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the indictment falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

88A Provision of information to prosecutor: summary cases

(1) This section applies where a plea of not guilty is recorded against an accused charged on summary complaint.

(2) As soon as practicable after the recording of the plea, the investigating agency must inform the prosecutor of the existence of all the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained (whether by the agency or otherwise) in the course of investigating the matter to which the plea relates.

(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that information that the prosecutor specifies in the requirement.

88B Continuing duty of investigating agency: summary cases

(1) This section applies where—

(a) an investigating agency has complied with section 88A(2) in relation to an accused, and

(b) during the relevant period the investigating agency becomes aware that further information that may be relevant to the case for or against the accused has been obtained (whether by the agency or otherwise) in the course of investigating the accused's case.

(2) As soon as practicable after becoming aware of the further information, the investigating agency must inform the prosecutor of the existence of the information.

(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that further information that the prosecutor specifies in the requirement.

(4) In this section, "relevant period" means the period—

(a) beginning with the investigating agency's compliance with section 88A(2) in relation to the accused, and

(b) ending with the agency's receiving notice from the prosecutor of the conclusion of the proceedings against the accused.

(5) For the purposes of subsection (4), proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(da) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

Prosecutor's duty to disclose information

89 Prosecutor's duty to disclose information

(1) This section applies where in a prosecution—

(a) an accused appears for the first time on petition,

(b) an accused appears for the first time on indictment (not having appeared on petition in relation to the same matter), or

(c) a plea of not guilty is recorded against an accused charged on summary complaint.

(2) As soon as practicable after the appearance or the recording of the plea, the prosecutor must—

(a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

(b) disclose to the accused the information to which subsection (3) applies.

(3) This subsection applies to information if—

(a) the information would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused,

(b) the information would materially strengthen the accused's case, or

(c) the information is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused.

89A Disclosure of other information: solemn cases

(1) This section applies where by virtue of subsection (2)(b) of section 89 the prosecutor is required to disclose information to an accused who falls within paragraph (a) or (b) of subsection (1) of that section.

(2) As soon as practicable after complying with the requirement, the prosecutor must disclose to the accused details of any information which the prosecutor is not required to disclose under section 89(2)(b) but which may be relevant to the case for or against the accused.

(3) The prosecutor need not disclose under subsection (2) details of sensitive information.

(4) In subsection (3), "sensitive", in relation to an item of information, means that if it were to be disclosed there would be a risk of—

(a) causing serious injury, or death, to any person,

(b) obstructing or preventing the prevention, detection, investigation or prosecution of crime, or

(c) causing serious prejudice to the public interest.

90 Continuing duty of prosecutor

(1) Subsection (2) applies where the prosecutor has complied with section 89(2)(b) in relation to an accused.

(2) During the relevant period, the prosecutor must—

(a) from time to time review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

(b) disclose to the accused any information to which section 89(3) applies.

(2A) As soon as practicable after complying with subsection (2) in relation to an accused who falls within section 89(1)(a) or (b), the prosecutor must disclose to the accused details of any other information that may be relevant to the case for or against the accused of which the prosecutor is aware.

(2B) The prosecutor need not disclose under subsection (2A) details of sensitive information.

(2C) In subsection (2)—

"relevant period" means the period—

(a) beginning with the prosecutor's compliance with section 89(2)(b) in relation to an accused, and

(b) ending with the conclusion of the proceedings against the accused,

"sensitive" has the meaning given by section 89A(4).

(4) For the purposes of subsection (2C), proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(da) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the indictment or complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

Defence statements

94 Defence statements: solemn proceedings

(1) This section applies where the accused lodges a defence statement under section 70A of the 1995 Act.

(1A) As soon as practicable after the prosecutor receives a copy of the defence statement, the prosecutor must—

(a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

(b) disclose to the accused any information to which section 89(3) applies.

(2) After section 70 of the 1995 Act insert—

"70A Defence statements

(1) This section applies where an indictment is served on an accused.

(2) The accused must lodge a defence statement at least 14 days before the first diet.

(3) The accused must lodge a defence statement at least 14 days before the preliminary hearing.

(4) At least 7 days before the trial diet the accused must—

(a) where there has been no material change in circumstances in relation to the accused's defence since the last defence statement was lodged, lodge a statement stating that fact,

(b) where there has been a material change in circumstances in relation to the accused's defence since the last defence statement was lodged, lodge a defence statement.

(4A) If after lodging a statement under subsection (2), (3) or (4) there is a material change in circumstances in relation to the accused's defence, the accused must lodge a defence statement.

(4B) Where subsection (4A) requires a defence statement to be lodged, it must be lodged before the trial diet begins unless on cause shown the court allows it to be lodged during the trial diet.

(5) The accused may lodge a defence statement—

(a) at any time before the trial diet, or

(b) during the trial diet if the court on cause shown allows it.

(5A) As soon as practicable after lodging a defence statement or a statement under subsection (4)(a), the accused must send a copy of the statement to the prosecutor and any co-accused.

(6) In this section "defence statement" means a statement setting out—

(a) the nature of the accused's defence, including any particular defences on which the accused intends to rely,

(b) any matters of fact on which the accused takes issue with the prosecution and the reason for doing so,

(ba) particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence,

(c) any point of law which the accused wishes to take and any authority on which the accused intends to rely for that purpose,

(d) by reference to the accused's defence, the nature of any information that the accused requires the prosecutor to disclose, and

(e) the reasons why the accused considers that disclosure by the prosecutor of any such information is necessary.".

(3) In section 78 of the 1995 Act (special defences, incrimination, notice of witnesses etc.), after subsection (1) insert—

"(1A) Subsection (1) does not apply where—

(a) the accused lodges a defence statement under section 70A, and

(b) the accused's defence consists of or includes a special defence.".

95 Defence statements: summary proceedings

(1) This section applies where—

(a) a plea of not guilty is recorded against an accused charged on summary complaint, and

(b) during the relevant period the accused lodges a defence statement.

(2) A defence statement must set out—

(a) the nature of the accused’s defence, including any particular defences on which the accused intends to rely,

(b) any matters of fact on which the accused takes issue with the prosecution and the reason for doing so,

(ba) particulars of the matters of fact on which the accused intends to rely for the purposes of the accused’s defence,

(c) any point of law which the accused wishes to take and any authority on which the accused intends to rely for that purpose,

(d) by reference to the accused’s defence, the nature of any information that the accused wishes the prosecutor to disclose, and

(e) the reasons why the accused considers that disclosure by the prosecutor of any such information is necessary.

(2A) As soon as practicable after lodging a defence statement, the accused must send a copy of the statement to the prosecutor and any co-accused.

(3) As soon as practicable after receiving a copy of the defence statement the prosecutor must—

(a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

(b) disclose to the accused any information to which section 89(3) applies..

(4) In this section, “relevant period”, in relation to the accused, is the period—

(a) beginning with the recording of the accused’s plea of not guilty, and

(b) ending with the conclusion of the proceedings to which the plea relates.

(5) For the purposes of subsection (4), proceedings are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(da) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

(6) In section 149B of the 1995 Act (notice of defences), after subsection (2) insert—

“(2A) Subsection (1) does not apply where—

(a) the accused lodges a defence statement under section 95 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 00),

(b) the statement is lodged—

(i) where an intermediate diet is to be held, at or before the diet, or

(ii) where such a diet is not to be held, no later than 10 clear days before the trial diet, and

(c) the accused's defence consists of or includes a defence to which that subsection applies.".

95A Change in circumstances following lodging of defence statement: summary proceedings

(1) This section applies where the accused lodges a defence statement under section 95 at least 14 days before the trial diet.

(2) At least 7 days before the trial diet the accused must—

(a) where there has been no material change in circumstances in relation to the accused's defence since the defence statement was lodged, lodge a statement stating that fact,

(b) where there has been a material change in circumstances in relation to the accused's defence since the defence statement was lodged, lodge a defence statement.

(3) If after lodging a statement under subsection (2) there is a material change in circumstances in relation to the accused's defence, the accused must lodge a defence statement.

(4) Where subsection (3) requires a defence statement to be lodged, it must be lodged before the trial diet begins unless on cause shown the court allows it to be lodged during the trial diet.

(5) As soon as practicable after lodging a statement under subsection (2)(a) or a defence statement under subsection (2)(b) or (3), the accused must send a copy of the statement concerned to the prosecutor and any co-accused.

(6) As soon as practicable after receiving a copy of a defence statement lodged under subsection (2)(b) or (3) the prosecutor must—

(a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

(b) disclose to the accused any information to which section 89(3) applies.

(7) In this section, "defence statement" is to be construed in accordance with section 95(2).

Sections 89 to 95A: general

95AA Sections 89 to 95A: no need to disclose same information more than once

(1) Subsection (2) applies where the prosecutor is required by section 89(2)(b), 89A(2), 90(2)(b) or (2A), 94(1A)(b), 95(3)(b) or 95A(6)(b) to disclose information to an accused.

(2) The prosecutor need not disclose anything that the prosecutor has already disclosed to the accused in relation to the same matter (whether because the same matter has been the subject of an earlier petition, indictment or complaint or otherwise).

Court rulings on disclosure

95B Application by accused for ruling on disclosure

(1) This section applies where the accused—

(a) has lodged a defence statement under section 70A of the 1995 Act or section 95 or 95A of this Act, and

(b) considers that the prosecutor has failed, in responding to the statement, to disclose to the accused an item of information to which section 89(3) applies (the "information in question").

(2) The accused may apply to the court for a ruling on whether section 89(3) applies to the information in question.

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the accused is charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question, and

(c) the accused's grounds for considering that section 89(3) applies to the information in question.

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that section 89(3) applies to the information in question.

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the accused an opportunity to be heard before determining the application.

(7) On determining the application, the court must—

(a) make a ruling on whether section 89(3) applies to the information in question or to any part of the information in question, and

(b) where the accused is charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) Except where it is impracticable to do so, the application is to be assigned to the justice of the peace, sheriff or judge who is presiding, or is to preside, at the accused's trial.

95C Review of ruling under section 95B

(1) This section applies where—

(a) the court has made a ruling under section 95B that section 89(3) does not apply to an item of information (the "information in question"), and

(b) during the relevant period—

(i) the accused becomes aware of information (the "secondary information") that was unavailable to the court at the time it made its ruling, and

(ii) the accused considers that, had the secondary information been available to the court at that time, it would have made a ruling that section 89(3) does apply to the information in question.

(2) The accused may apply to the court which made the ruling for a review of the ruling.

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the accused is charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question and the secondary information, and

(c) the accused's grounds for considering that section 89(3) applies to the information in question.

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that section 89(3) applies to the information in question.

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the accused an opportunity to be heard before determining the application.

(7) On determining the application, the court may—

(a) affirm the ruling being reviewed, or

(b) recall that ruling and—

(i) make a ruling that section 89(3) applies to the information in question or to any part of the information in question, and

(ii) where the accused is charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) Except where it is impracticable to do so, the application is to be assigned to the justice of the peace, sheriff or judge who dealt with the application for the ruling that is being reviewed.

(9) Nothing in this section affects any right of appeal in relation to the ruling being reviewed.

(10) In this section, "relevant period", in relation to an accused, means the period—

(a) beginning with the making of the ruling being reviewed, and

(b) ending with the conclusion of proceedings against the accused.

(11) For the purposes of subsection (10), proceedings against the accused are taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before expiry of the time allowed for such an appeal, (da) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

(f) the indictment or complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

95D Appeals against rulings under section 95B

(1) The prosecutor or the accused may, within the period of 7 days beginning with the day on which a ruling is made under section 95B, appeal to the High Court against the ruling.

(2) Where an appeal is brought under subsection (1), the court of first instance or the High Court may—

(a) postpone any trial diet that has been appointed for such period as it thinks appropriate,

(b) adjourn or further adjourn any hearing for such period as it thinks appropriate,

(c) direct that any period of postponement or adjournment under paragraph (a) or (b) or any part of such period is not to count toward any time limit applying in the case.

(3) In disposing of an appeal under subsection (1), the High Court may—

(a) affirm the ruling, or

(b) remit the case back to the court of first instance with such directions as the High Court thinks appropriate.

(4) This section does not affect any other right of appeal which any party may have in relation to a ruling under section 95B.

Effect of guilty plea

96 Effect of guilty plea

(1) This section applies where—

(a) by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or 95A(6)(b) the prosecutor is required to disclose information to an accused, but

(b) before the prosecutor does so, a plea of guilty is recorded against the accused.

(2) The prosecutor need not comply with the requirement in so far as it relates to the disclosure of information which but for that plea would have been likely to have formed part of the evidence to be led by the prosecutor in the proceedings against the accused.

(3) Subsections (1) and (2) cease to apply if the accused withdraws the plea of guilty.

Disclosure after conclusion of proceedings at first instance

96A Sections 96B to 96I: interpretation

In sections 96B to 96I—

"appellant", in relation to appellate proceedings, includes a person authorised by an order under section 303A(4) of the 1995 Act to institute or continue the proceedings,

"appellate proceedings" means—

(a) an appeal under section 106(1)(a) or (f) of the 1995 Act which brings under review an alleged miscarriage of justice,

(b) an appeal under paragraph (b), (ba), (bb), (c), (d), (db) or (dc) of subsection (1) of section 106 of the 1995 Act which brings under review in accordance with subsection (3)(a) of that section an alleged miscarriage of justice,

(c) an appeal under section 175(2)(a) or (d) of the 1995 Act which brings under review an alleged miscarriage of justice,

(d) an appeal under paragraph (b), (c) or (cb) of subsection (2) of section 175 of the 1995 Act which brings under review an alleged miscarriage of justice which is based on the type of miscarriage described in subsection (5) of that section,

(e) an appeal to the Supreme Court against a determination by the High Court of Justiciary of a devolution issue,

(f) an appeal against conviction by bill of suspension under section 191(1) of the 1995 Act,

(g) an appeal against conviction by bill of advocation,

(h) a petition to the *nobile officium* in respect of a matter arising out of criminal proceedings which brings under review an alleged miscarriage of justice which is based on the existence and significance of new evidence,

(i) an appeal under section 62(1)(b) of the 1995 Act against a finding under section 55(2) of that Act,

(j) the referral to the High Court of Justiciary under section 194B of the 1995 Act of—

  (i) a conviction, or

  (ii) a finding under section 55(2) of that Act.

96B Duty to disclose after conclusion of proceedings at first instance

(1) This section applies where appellate proceedings are instituted in relation to an appellant.

(2) As soon as practicable after the relevant act the prosecutor must—

(a) review all information of which the prosecutor is aware that relates to the grounds of appeal in the appellate proceedings, and

(b) disclose to the appellant any information that falls within subsection (3).

(3) Information falls within this subsection if it is—

(a) information that the prosecutor was required by virtue of section 89(2)(b) or 90(2)(b) to disclose in the earlier proceedings but did not disclose,

(b) information to which, during the earlier proceedings, the prosecutor considered paragraph (a) or (b) of section 89(3) did not apply but to which the prosecutor now considers one or both of those paragraphs would apply, or

(c) information of which the prosecutor has become aware since the disposal of the earlier proceedings that, had the prosecutor been aware of it during those proceedings, the prosecutor would have been required to disclose by virtue of section 89(2)(b) or 90(2)(b).

(4) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the appellant.

(5) In this section—

“earlier proceedings”, in relation to appellate proceedings, means the proceedings to which the appellate proceedings relate,

“relevant act” means—

(a) in relation to proceedings of the type mentioned in paragraph (a) or (b) of the relevant definition, the granting under section 107(1)(a) of the 1995 Act of leave to appeal,

(b) in relation to proceedings of the type mentioned in paragraph (c) or (d) of the relevant definition, the granting under section 180(1)(a) or, as the case may be, 187(1)(a) of that Act of leave to appeal,

(c) in relation to proceedings of the type mentioned in paragraph (e) of the relevant definition, the granting of leave to appeal by the High Court of Justiciary or, as the case may be, the Supreme Court,

(d) in relation to proceedings of the type mentioned in paragraph (f) of the relevant definition—

(i) if leave to appeal is required, the granting under section 191(2) of that Act of leave to appeal,

(ii) if leave to appeal is not required, service on the prosecutor under the relevant rule of a certified copy of the bill of suspension and the interlocutor granting first order for service,

(e) in relation to proceedings of the type mentioned in paragraph (g) of the relevant definition, service on the prosecutor under the relevant rule of a certified copy of the bill of advocation and the interlocutor granting first order for service,

(f) in relation to proceedings of the type mentioned in paragraph (h) of the relevant definition, service on the prosecutor under the relevant rule of a certified copy of the petition and the interlocutor granting first order for service,

(g) in relation to proceedings of the type mentioned in paragraph (i) of the relevant definition, the lodging of the appeal,

(h) in relation to proceedings of the type mentioned in paragraph (j) of the relevant definition, the lodging of the grounds of appeal by the person to whom the referral relates,

“relevant definition” means the definition of appellate proceedings in section 96A, "relevant rule" means rule 29A.1(3) of the Criminal Procedure Rules 1996 (S.I. 1996/513).

96C Continuing duty of prosecutor

(1) This section applies where the prosecutor has complied with section 96B(2) in relation to an appellant.

(2) During the relevant period, the prosecutor must—

(a) from time to time review all information of which the prosecutor is aware that relates to the grounds of appeal in the appellate proceedings which relate to the appellant, and

(b) disclose to the appellant any information that falls within section 96B(3).

(3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the appellant.

(4) In subsection (2), "relevant period" means the period—

(a) beginning with the prosecutor's compliance with section 96B(2), and

(b) ending with the relevant conclusion.

(5) In subsection (4), "relevant conclusion" means—

(a) in relation to proceedings of the type mentioned in paragraph (a) or (b) of the relevant definition—

(i) the lodging under section 116(1) of the 1995 Act of a notice of abandonment, or

(ii) the disposal of the appeal under section 118 of that Act,

(b) in relation to proceedings of the type mentioned in paragraph (c) or (d) of the relevant definition—

(i) the disposal of the appeal under section 183(1)(b) to (d) of that Act,

(ii) the abandonment of the appeal under section 184(1) of that Act,

(iii) the setting aside of the conviction or sentence or, as the case may be, conviction and sentence under section 188(1) of that Act, or

(iv) the disposal of the appeal under section 190(1) of that Act,

(c) in relation to proceedings of the type mentioned in paragraph (e), (f), (g) or (h) of the relevant definition, the disposal or abandonment of the appeal,

(d) in relation to proceedings of the type mentioned in paragraph (i) of the relevant definition, the disposal of the appeal under section 62(6) of that Act or the abandonment of the appeal,

(e) in relation to proceedings of the type mentioned in paragraph (j) of the relevant definition—

(i) if the referral or finding is being treated as if it were an appeal under Part 8 of that Act, the conclusion mentioned in paragraph (a) above,

(ii) if the referral or finding is being treated as if it were an appeal under Part 10 of that Act, the conclusion mentioned in paragraph (b) above or, where the referral or finding proceeds by way of bill of suspension, bill of advocation or petition to the *nobile officium*, paragraph (c) above.

(6) In this section, "relevant definition" has the meaning given by section 96B(5).

96D Application to prosecutor for further disclosure

(1) This section applies where—

(a) the prosecutor has complied with section 96B(2) in relation to an appellant, and

(b) the appellant lodges a further disclosure request—

(i) during the preliminary period, or

(ii) if the court on cause shown allows it, after the preliminary period but before the relevant conclusion.

(2) A further disclosure request must set out—

(a) by reference to the grounds of appeal, the nature of the information that the appellant wishes the prosecutor to disclose, and

(b) the reasons why the appellant considers that disclosure by the prosecutor of any such information is necessary.

(3) As soon as practicable after receiving a copy of the further disclosure request the prosecutor must—

(a) review any information of which the prosecutor is aware that relates to the request, and

(b) disclose to the appellant any of that information that falls within section 96B(3).

(3A) The prosecutor need not disclose under subsection (3)(b) anything that the prosecutor has already disclosed to the appellant.

(4) In this section—

"preliminary period", in relation to the appellate proceedings concerned, means the period beginning with the relevant act and ending with the beginning of the hearing of the appellate proceedings,

"relevant act" has the meaning given by section 96B(5),

"relevant conclusion" has the meaning given by section 96C(5).

96E Further duty of prosecutor: conviction upheld on appeal

(1) This section applies where—

(a) in an appeal to the High Court of Justiciary, the High Court upholds the conviction of a person, and

(b) after the conclusion of the appeal the prosecutor becomes aware of—

(i) information that the prosecutor was required by virtue of section 89(2)(b) or 90(2)(b) to disclose in the earlier proceedings but did not disclose, or

(ii) information that falls within section 96B(3) which would have related to the grounds of appeal but was not disclosed.

(2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.

(3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.

(4) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.

(5) In this section, "earlier proceedings" has the meaning given by section 96B(5).

96F Further duty of prosecutor: convicted persons

(1) This section applies where—

(a) a person has been convicted,

(b) after conviction the prosecutor becomes aware of information that the prosecutor was required by virtue of section 89(2)(b) or 90(2)(b) to disclose in the proceedings in which the person was convicted but did not disclose, and

(c) section 96E does not apply.

(2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.

(3) If the person institutes appellate proceedings in relation to the conviction, the prosecutor need not comply with the duty imposed by subsection (2) during the appropriate period.

(4) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.

(5) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.

(6) In this section—

"appropriate period", in relation to appellate proceedings, means the period beginning with the relevant act and ending with the relevant conclusion,

"relevant act" has the meaning given by section 96B(5),

"relevant conclusion" has the meaning given by section 96C(5).

96G Further duty of prosecutor: appeal against acquittal

(1) This section applies where—

(a) the prosecutor appeals against the acquittal of a person, and

(b) after lodging the appeal the prosecutor becomes aware of information which relates to the appeal and falls within section 96B(3).

(2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.

(3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.

(4) The prosecutor ceases to be subject to the duty imposed by subsection (2) on the disposal of the appeal by the High Court of Justiciary.

(5) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.

Court rulings on disclosure: appellate proceedings

96H Application by appellant for ruling on disclosure

(1) This section applies where the appellant—

(a) has made a further disclosure request under section 96D, and

(b) considers that the prosecutor has failed, in responding to the request, to disclose to the appellant an item of information falling within section 96B(3) (the "information in question").

(2) The appellant may apply to the court for a ruling on whether the information in question falls within section 96B(3).

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the appellant is or was charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question, and

(c) the appellant's grounds for considering that the information in question falls within section 96B(3).

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that the information in question falls within section 96B(3).

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the appellant an opportunity to be heard before determining the application.

(7) On determining the application, the court must—

(a) make a ruling on whether the information in question, or any part of the information in question, falls within section 96B(3), and

(b) where the appellant is or was charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) In this section, "the court" means the court before which the appellant's appeal is brought.

(9) Except where it is impracticable to do so, the application is to be assigned to the judges who are to hear the appellant's appeal.

96I Review of ruling under section 96H

(1) This section applies where—

(a) the court has made a ruling under section 96H that an item of information (the "information in question") does not fall within section 96B(3), and

(b) during the relevant period—

(i) the appellant becomes aware of information ("secondary information") that was unavailable to the court at the time it made its ruling, and

(ii) the appellant considers that, had the secondary information been available to the court at that time, it would have made a ruling that the information in question does fall within section 96B(3).

(2) The appellant may apply to the court which made the ruling for a review of the ruling.

(3) An application under subsection (2) is to be made in writing and must set out—

(a) where the appellant is or was charged with more than one offence, the charge or charges to which the application relates,

(b) a description of the information in question and the secondary information, and

(c) the appellant's grounds for considering that the information in question falls within section 96B(3).

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that the information in question falls within section 96B(3).

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the appellant an opportunity to be heard before determining the application.

(7) On determining the application, the court may—

(a) affirm the ruling being reviewed, or

(b) recall that ruling and—

(i) make a ruling that the information in question, or any part of the information in question, falls within section 96B(3), and

(ii) where the appellant is or was charged with more than one offence, specify the charge or charges to which the ruling relates.

(8) Except where it is impracticable to do so, the application is to be assigned to the judges who dealt with the application for the ruling that is being reviewed.

(9) Nothing in this section affects any right of appeal in relation to the ruling being reviewed.

(10) In this section, "relevant period", in relation to an appellant, means the period—

(a) beginning with the making of the ruling being reviewed, and

(b) ending with the relevant conclusion.

(11) In subsection (10), "relevant conclusion" has the meaning given by section 96C(5).

Applications to court: orders preventing or restricting disclosure

102 Application for section 106 order

(1) This section applies where the conditions in subsection (1A) or (1B) are met.

(1A) The conditions are that—

(a) by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or 95A(6)(b) the prosecutor is required to disclose an item of information to an accused,

(b) section 89(3)(a) or (b) applies to the information, and

(c) the prosecutor considers that subsection (2) applies.

(1B) The conditions are that—

(a) by virtue of section 96B(2)(b), 96C(2)(b), 96D(3)(b), 96E(2), 96F(2) or 96G(2) the prosecutor is required to disclose an item of information to an appellant or, as the case may be, a person,

(b) where there are proceedings, the information is not likely to form part of the evidence to be led by the prosecutor in the proceedings, and

(c) the prosecutor considers that subsection (2) applies.

(2) This subsection applies if disclosure of the item of information would be likely to cause a real risk of substantial harm or damage to the public interest.

(3) The prosecutor must apply to the court for an order under section 106 (a "section 106 order").

103 Application for non-notification order or exclusion order

(1) This section applies where the prosecutor is required by section 102(3) to apply to the court for a section 106 order.

(2) If the application for a section 106 order relates to solemn proceedings (whether continuing or concluded), the prosecutor may also apply to the court for—

(a) a non-notification order and an exclusion order, or

(b) an exclusion order (but not a non-notification order).

(3) If the application for a section 106 order relates to summary proceedings (whether continuing or concluded), the prosecutor may also apply to the court for an exclusion order.

(4) A non-notification order is an order under section 104 prohibiting notice being given to the accused of—

(a) the making of an application for—

(i) the section 106 order to which the non-notification order relates,

(ii) the non-notification order, and

(iii) an exclusion order, and

(b) the determination of those applications.

(5) An exclusion order is an order under section 104 or 105 prohibiting the accused from attending or making representations in proceedings for the determination of the application for a section 106 order to which the exclusion order relates.

(6) Subsection (7) applies where the prosecutor applies—

(a) by virtue of subsection (2)(a) for a non-notification order and an exclusion order, or

(b) by virtue of subsection (2)(a) or (b) for an exclusion order.

(7) Before determining in accordance with section 106 the application for the section 106 order, the court must—

(a) in accordance with section 104, determine any applications for a non-notification order and an exclusion order,

(b) in accordance with section 105, determine any application for an exclusion order.

(8) In this section and sections 104 to 106—

"accused" includes, where subsection (3) of section 102 applies by virtue of the conditions in subsection (1B) of that section being met, the appellant or other person to whom the prosecutor is required to disclose the item of information,

"appellant" has the meaning given by section 96A.

104 Application for non-notification order and exclusion order

(1) This section applies where the prosecutor applies for a non-notification order and an exclusion order.

(2) On receiving the application, the court must appoint a hearing to determine whether a non-notification order should be made.

(3) The accused is not to be notified of—

(a) the applications for the section 106 order, non-notification order and exclusion order, or

(b) the hearing appointed under subsection (2).

(4) The accused is not to be given the opportunity to be heard or be represented at the hearing.

(5) If, after giving the prosecutor an opportunity to be heard, the court is satisfied that the conditions in subsection (6) are met, the court may make a non-notification order.

(6) Those conditions are—

(a) that disclosure to the accused of the making of the application for the section 106 order would be likely to cause a real risk of substantial harm or damage to the public interest, and

(c) that, having regard to all the circumstances, the making of a non-notification order would be consistent with the accused's receiving a fair trial.

(7) If the court makes a non-notification order it must also make an exclusion order.

(8) If the court refuses to make a non-notification order the court must appoint a hearing to determine the application for an exclusion order.

(9) If after giving the prosecutor and, subject to subsection (10), the accused an opportunity to be heard, the court is satisfied that the conditions in subsection (4) of section 105 are met, the court may make an exclusion order under subsection (3) of that section.

(10) On the application of the prosecutor the court may exclude the accused from the hearing appointed under subsection (8).

(11) In this section and sections 105 and 106, references to the accused's receiving a fair trial include, where subsection (3) of section 102 applies by virtue of the conditions in subsection (1B) of that section being met, references to the appellant or other person to whom the prosecutor is required to disclose the item of information having received a fair trial.

105 Application for exclusion order

(1) This section applies where by virtue of section 103(2)(b) or (3) the prosecutor applies for an exclusion order (but not a non-notification order).

(2) On receiving the application the court must appoint a hearing.

(2A) On the application of the prosecutor the court may exclude the accused from the hearing.

(3) If after giving the prosecutor and, subject to subsection (2A), the accused an opportunity to be heard on the applications for the exclusion order and the section 106 order to which it relates the court is satisfied that the conditions in subsection (4) are met, the court may make an exclusion order.

(4) Those conditions are—

(a) that disclosure to the accused of the nature of the information to which the application for the section 106 order relates would be likely to cause a real risk of substantial harm or damage to the public interest, and

(c) that, having regard to all the circumstances, the making of an exclusion order would be consistent with the accused's receiving a fair trial.

106 Application for section 106 order: determination

(1) This section applies where—

(a) the prosecutor applies for a section 106 order, and

(b) any application for a non-notification order or an exclusion order has been determined by the court.

(2) The court must—

(a) consider the item of information to which the application for a section 106 order relates,

(b) give the prosecutor and (if the court has not made an exclusion order) the accused the opportunity to be heard, and

(c) determine—

(i) where the application for the section 106 order is made by virtue of section 102(1A), whether the conditions in subsection (3) apply, or

(ii) where the application for the section 106 order is made by virtue of section 102(1B), whether the conditions in subsection (3A) apply, and

(d) if the court determines that the conditions in subsection (3) or, as the case may be, (3A) apply, determine whether subsection (4) applies.

(3) The conditions are—

(a) that by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or 95A(6)(b) the prosecutor is required to disclose the item of information,

(aa) that section 89(3)(a) or (b) applies to the information,

(b) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,

(c) that withholding the item of information would be consistent with the accused's receiving a fair trial, and

(d) that the public interest would be protected only if a section 106 order were to be made.

(3A) The conditions are—

(a) that by virtue of section 96B(2)(b), 96C(2)(b), 96D(3)(b), 96E(2), 96F(2) or 96G(2) the prosecutor is required to disclose an item of information to an appellant or, as the case may be, a person,

(b) where there are proceedings, the information is not likely to form part of the evidence to be led by the prosecutor in the proceedings,

(c) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,

(d) that withholding the item of information is not inconsistent with the person's having received a fair trial in the proceedings to which the item relates, and

(e) that the public interest would be protected only if a section 106 order were to be made.

(4) This subsection applies if the court considers that the item of information could be disclosed or partly disclosed in such a way that—

(a) the condition in paragraph (b) of subsection (3) or, as the case may be, paragraph (c) of subsection (3A) would not be met, and

(b) the disclosure (or partial disclosure) would be consistent with the accused's receiving a fair trial.

(4A) If the court considers that subsection (3) or, as the case may be, (3A) (but not subsection (4)) applies, it may make a section 106 order preventing disclosure of the information.

(4B) If the court considers that subsection (4) applies, it may make a section 106 order requiring the information to be disclosed or partly disclosed to the accused in the manner specified in the order.

(5) For the purposes of subsection (4) the ways in which the item of information might be disclosed or partly disclosed include in particular—

(a) providing the information after (whether by redaction or otherwise) removing or obscuring parts of it,

(b) providing extracts or summaries of the information or part of it.

Orders preventing or restricting disclosure: Secretary of State

106A Order preventing or restricting disclosure: application by Secretary of State

(1) Where the condition in subsection (1A), (1B) or (1C) is met in relation to an item of information that the prosecutor proposes to disclose, the Secretary of State may apply to the court for an order under this section (a "section 106A order") in relation to the item of information.

(1A) The condition is that the prosecutor proposes to disclose to the accused information which the prosecutor is required to disclose by virtue of section 89(2)(b), 90(2)(b), 94(1A)(b), 95(3)(b) or 95A(6)(b).

(1B) The condition is that the prosecutor proposes to disclose to an appellant or, as the case may be, a person information which the prosecutor is required to disclose by virtue of section 96B(2)(b), 96C(2)(b), 96D(3)(b), 96E(2), 96F(2) or 96G(2).

(1C) The condition is that the prosecutor proposes to disclose to an accused, appellant or person to whom section 96E, 96F or 96G applies information which the prosecutor is not required to disclose by virtue of this Part.

(2) If the Secretary of State also makes an application in accordance with subsection (2) or (3) of section 106B, the court must comply with subsections (6) and (7) of that section.

(3) Where an application is made under subsection (1), the court must—

- (a) consider the item of information to which the application relates,
- (b) give the Secretary of State and the prosecutor the opportunity to be heard,
- (c) if the application relates to information which the prosecutor is required to disclose by virtue of subsection (1A) or (1B) and a non-attendance order has not been made, give the accused the opportunity to be heard, and
- (d) determine—
  - (i) where the application for the section 106A order is made by virtue of subsection (1A), whether the conditions in subsection (4) apply, or
  - (ii) where the application for the section 106A order is made by virtue of subsection (1B) or (1C), whether the conditions in subsection (4A) apply, and
- (e) if the court determines that the conditions in subsection (4) or, as the case may be, (4A) apply, determine whether subsection (5) applies.

(4) The conditions are—

- (a) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,
- (b) that withholding the item of information would be consistent with the accused's receiving a fair trial, and
- (c) that the public interest would be protected only if a section 106A order of the type mentioned in subsection (6) were to be made.

(4A) The conditions are—

- (a) in the case of an application made by virtue of subsection (1B), that by virtue of section 96B(2)(b), 96C(2)(b), 96D(3)(b), 96E(2), 96F(2) or 96G(2) the prosecutor is required to disclose an item of information to an appellant or, as the case may be, a person,

(b) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,

(c) that withholding the item of information is not inconsistent with the person's having received a fair trial in the proceedings to which the item relates, and

(d) that the public interest would be protected only if a section 106A order of the type mentioned in subsection (6) were to be made.

(5) This subsection applies if the court considers that the item of information could be disclosed or partly disclosed in such a way that—

(a) the condition in paragraph (a) of subsection (4) or, as the case may be, paragraph (b) of subsection (4A) would not be met, and

(b) the disclosure (or partial disclosure) would be consistent with the accused's receiving a fair trial.

(6) If the court considers that subsection (4) or, as the case may be, (4A) (but not subsection (5)) applies, it may make a section 106A order preventing disclosure of the information.

(7) If the court considers that subsection (5) applies, it may make a section 106A order requiring the information to be disclosed or partly disclosed to the accused in the manner specified in the order.

(8) For the purposes of subsection (7) the order may in particular specify that—

(a) the item of information be disclosed after removing or obscuring parts of it (whether by redaction or otherwise),

(b) extracts or summaries of the item of information (or part of it) be disclosed instead of the item of information.

(10) In this section and sections 106B to 106D—

"accused" includes, where subsection (1B) or (1C) applies, the appellant or other person to whom the prosecutor is required to disclose the item of information,

"appellant" has the meaning given by section 96A.

(11) In this section and sections 106B to 106D, references to the accused's receiving a fair trial include, where subsection (1B) or (other than in relation to an accused) (1C) applies, references to the appellant or other person to whom the prosecutor is required to disclose the item of information having received a fair trial.

106B Application for ancillary orders: Secretary of State

(1) This section applies where the Secretary of State applies for a section 106A order.

(2) If the application under section 106A relates to solemn proceedings (whether continuing or concluded), the Secretary of State may also apply to the court for—

(a) a restricted notification order and a non-attendance order, or

(b) a non-attendance order (but not a restricted notification order).

(3) If the application under section 106A relates to summary proceedings (whether continuing or concluded), the Secretary of State may also apply to the court for a non-attendance order.

(4) A restricted notification order is an order under section 106C prohibiting notice being given to the accused of—

(a) the making of an application for—

(i) the section 106A order to which the restricted notification order relates,

(ii) the restricted notification order, and

(iii) a non-attendance order, and

(b) the determination of those applications.

(5) A non-attendance order is an order under section 106C(7) or 106D prohibiting the accused from attending or making representations in proceedings for the determination of the application for the section 106A order to which the non-attendance order relates.

(6) Subsection (7) applies where the Secretary of State applies—

(a) by virtue of subsection (2)(a) for a restricted notification order and a non-attendance order, or

(b) by virtue of subsection (2)(a) or (b) for a non-attendance order.

(7) Before determining the application for the section 106A order, the court must—

(a) in accordance with section 106C, determine any application for a restricted notification order and a non-attendance order,

(b) in accordance with section 106D, determine any application for a non-attendance order.

106C Application for restricted notification order and non-attendance order

(1) This section applies where by virtue of section 106B(2)(a) the Secretary of State applies for a restricted notification order and a non-attendance order.

(2) On receiving the application, the court must appoint a hearing to determine whether a restricted notification order should be made.

(3) The accused is not to be notified of—

(a) the applications for the section 106A order, the restricted notification order and the non-attendance order, or

(b) the hearing appointed under subsection (2).

(4) The accused is not to be given the opportunity to be heard or be represented at the hearing.

(5) If, after giving the Secretary of State and the prosecutor an opportunity to be heard, the court is satisfied that the conditions in subsection (6) are met, the court may make a restricted notification order.

(6) Those conditions are—

(a) that disclosure to the accused of the making of the application for the section 106A order would be likely to cause a real risk of substantial harm or damage to the public interest, and

(b) that, having regard to all the circumstances, the making of a restricted notification order would be consistent with the accused's receiving a fair trial.

(7) If the court makes a restricted notification order, it must also make a non-attendance order.

(8) If the court refuses to make a restricted notification order, the court must appoint a hearing to determine the application for a non-attendance order.

(9) If after giving the Secretary of State, the prosecutor and, subject to subsection (10), the accused an opportunity to be heard, the court is satisfied that the conditions in subsection (5) of section 106D are met, the court may make a non-attendance order under subsection (4) of that section.

(10) On the application of the Secretary of State the court may exclude the accused from the hearing appointed under subsection (8).

106D Application for non-attendance order

(1) This section applies where by virtue of section 106B(2)(b) the Secretary of State applies for a non-attendance order (but not a restricted notification order).

(2) On receiving the application, the court must appoint a hearing.

(3) On the application of the Secretary of State the court may exclude the accused from the hearing.

(4) If after giving the Secretary of State, the prosecutor and, if not excluded under subsection (3), the accused an opportunity to be heard the court is satisfied that the conditions in subsection (5) are met, the court may make a non-attendance order.

(5) Those conditions are—

(a) that disclosure to the accused of the nature of the information to which the application for the section 106A order relates would be likely to cause a real risk of substantial harm or damage to the public interest, and

(b) that, having regard to all the circumstances, the making of a non-attendance order would be consistent with the accused's receiving a fair trial.

Special counsel

107 Special counsel

(1) This section applies where the court is determining—

(a) an application for a non-notification order,

(aa) an application for an exclusion order,

(ab) an application for a section 106 order,

(ac) an application for a restricted notification order,

(ad) an application for a non-attendance order,

(ae) an application for a section 106A order,

(b) an application for review of the grant or refusal of any of those orders,

(c) an appeal relating to any of those orders.

(2) If the condition in subsection (3) is met, the court may appoint a person ("special counsel") to represent the interests of the accused in relation to the determination of the application, review or appeal.

(3) The condition is that the court considers that the appointment of special counsel is necessary to ensure that the accused receives a fair trial.

(4) Before deciding whether to appoint special counsel in a non-notification case, the court—

(a) must give the prosecutor an opportunity to be heard, but

(b) must not give the accused an opportunity to be heard.

(5) Before deciding whether to appoint special counsel in a restricted notification case, the court—

(a) must give the prosecutor and the Secretary of State an opportunity to be heard,

(b) must not give the accused an opportunity to be heard.

(6) Before deciding whether to appoint special counsel in any case other than a non-notification case or a restricted notification case, the court must give all the parties an opportunity to be heard.

(7) The prosecutor may appeal to the High Court against a decision of the court not to appoint special counsel in any case.

(8) The Secretary of State may appeal to the High Court against a decision of the court not to appoint special counsel in a restricted notification case.

(9) The accused may appeal to the High Court against a decision not to appoint special counsel in any case other than a non-notification case or a restricted notification case.

(10) In this section and section 107B—

“accused” includes appellant or, where the order relates to section 96E(2), 96F(2) or 96G(2), other person to whom the section concerned applies,

“appellant” has the meaning given by section 96A,

“non-notification case” means a case where the court is determining—

(a) an application for a non-notification order,

(b) an application for review of the grant or refusal of a non-notification order,

(c) an appeal relating to such an order,

“restricted notification case” means a case where the court is determining—

(a) an application for a restricted notification order,

(b) an application for review of the grant or refusal of a restricted notification order,

(c) an appeal relating to such an order.

107A Persons eligible for appointment as special counsel

The court may appoint a person as special counsel under section 107(2) only if the person is a solicitor or advocate.

107B Role of special counsel

(1) Special counsel’s duty is, in relation to the determination of the relevant application or appeal, to act in the best interests of the accused with a view only to ensuring that the accused receives a fair trial.

(2) Special counsel—

(a) is entitled to see the confidential information, but

(b) must not disclose any of the confidential information to the accused or the accused's representative (if any).

(3) Special counsel appointed in a non-notification case or a restricted notification case must not—

(a) disclose to the accused or the accused's representative (if any) the making of the relevant application or appeal, or

(b) otherwise communicate with the accused or the accused's representative (if any) about the relevant application or appeal.

(4) Special counsel appointed in any case other than a non-notification case or a restricted notification case must not communicate with the accused or the accused's representative (if any) about the relevant application or appeal except—

(a) with the permission of the court, and

(b) where permission is given, in accordance with such conditions as the court may impose.

(5) Before deciding whether to grant permission, the court must give—

(a) the prosecutor, and

(b) in the case of an application for a section 106A order or a non-attendance order, the Secretary of State,

an opportunity to be heard.

(6) In this section—

"the confidential information" means—

(a) the information to which the relevant application or appeal relates, and

(b) a copy of the relevant application or appeal,

"relevant application or appeal" means the application or appeal referred to in section 107(1) in respect of which special counsel is appointed.

Appeals

107C Appeals

(1) The prosecutor may appeal to the High Court against—

(a) the making of a section 106 order under section 106(4B),

(b) the making of a section 106A order,

(c) the making of a restricted notification order,

(d) the making of a non-attendance order,

(e) the refusal of an application for a non-notification order,

(f) the refusal of an application for an exclusion order, or

(g) the refusal of an application for a section 106 order.

(2) The accused may appeal to the High Court against the making of—

(a) an exclusion order under section 105(3),

(b) a section 106 order,

(c) a section 106A order, or

(d) a non-attendance order.

(3) The Secretary of State may appeal to the High Court against—

(a) the making of a section 106A order under section 106A(7),

(b) the refusal of an application for a restricted notification order,

(c) the refusal of an application for a non-attendance order, or

(d) the refusal of an application for a section 106A order.

(4) If special counsel was appointed in relation to an application for a non-notification order, special counsel may appeal to the High Court against the making of—

(a) the non-notification order, or

(b) a section 106 order in relation to the same item of information.

(5) If special counsel was appointed in relation to an application for a restricted notification order, special counsel may appeal to the High Court against the making of—

(a) the restricted notification order, or

(b) a section 106A order in relation to the same item of information.

(6) An appeal must be lodged not later than 7 days after the decision appealed against.

(7) The prosecutor is entitled to be heard in any appeal under this section.

(8) The accused is entitled to be heard in an appeal under—

(a) subsection (1)(a) or (g) or (2)(b) unless—

(i) a non-notification order has been made, or

(ii) an exclusion order has been made,

(b) subsection (1)(b), (2)(c) or (3)(a) or (d) unless—

(i) a restricted notification order has been made, or

(ii) a non-attendance order has been made,

(c) subsection (1)(d), (2)(d) or (3)(c) unless the court, on the application of the Secretary of State, excludes the accused from the hearing,

(d) subsection (1)(f) or (2)(a) unless the court, on the application of the prosecutor excludes the accused from the hearing.

(9) The Secretary of State is entitled to be heard in an appeal under subsection (1)(b), (c) or (d), (2)(c) or (d) or (5).

(10) In this section—

“accused” includes appellant or, where the order relates to section 96E(2), 96F(2) or 96G(2), other person to whom the section concerned applies,

“appellant” has the meaning given by section 96A.

107D Prohibition on disclosure pending determination of certain appeals

(1) Subsection (2) applies where—

(a) the prosecutor appeals to the High Court under subsection (1)(a), (b) or (g) of section 107C, or

(b) the Secretary of State appeals to the High Court under subsection (3)(a) or (d) of that section.

(2) Pending the determination or abandonment of the appeal, the prosecutor must not disclose the item of information to which the appeal relates.

Review of section 106 and 106A orders

111 Review of section 106 order

(1) This section applies where—

(a) the court makes a section 106 order, and

(b) during the relevant period the prosecutor or the accused becomes aware of information that was unavailable to the court at the time when the order was made.

(2) The prosecutor or, as the case may be, special counsel or the accused may apply to the court to review the section 106 order.

(3) Except in the case mentioned in subsection (4), the same persons are entitled to be heard on the application for review as were entitled to be heard on the application for the section 106 order.

(4) If—

(a) a non-notification order was granted in relation to the section 106 order which is under review, and

(b) the court is satisfied that the conditions in section 104(6) are met,

the court may, where the prosecutor or, as the case may be, special counsel applies for the review, make an order prohibiting notification being given to the accused of the application for review.

(5) If—

(a) an exclusion order was granted in relation to the section 106 order which is under review, and

(b) the court is satisfied that the conditions in section 105(4) are met,

the court may, where the prosecutor or, as the case may be, special counsel or the accused applies for the review, exclude the accused from the review.

(6) If the court is not satisfied that the conditions mentioned in section 106(3) are met, the court may—

(a) recall the section 106 order, or

(b) recall the section 106 order and make an order requiring disclosure to the specified extent.

(7) Nothing in this section affects any right of appeal in relation to the section 106 order.

(8) In this section—

"accused" includes appellant or, where the order relates to section 96E(2), 96F(2) or 96G(2), other person to whom the section concerned applies,

"appellant" has the meaning given by section 96A,

"relevant period", in relation to an accused, means the period—

(a) beginning with the making of the section 106 order, and

(b) ending with the conclusion of the proceedings against the accused,

"specified" means specified in the order of the court.

(9) For the purposes of this section, proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(da) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed,

(db) the indictment falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation,

(e) any appeal by the prosecutor is determined or abandoned, or

(f) the accused is convicted and any appeal is determined or abandoned.

(10) In its application to proceedings against an appellant or other person, subsection (9) is to be read as if paragraphs (a) to (db) were omitted.

111A Review of section 106A order

(1) This section applies where—

(a) the court makes a section 106A order, and

(b) during the relevant period the Secretary of State, the prosecutor, special counsel or the accused becomes aware of information that was unavailable to the court at the time when the order was made.

(2) The Secretary of State or, as the case may be, the prosecutor, special counsel or the accused may apply to the court to review the order.

(3) Except in the case mentioned in subsection (4), the same persons are entitled to be heard on the application for review as were entitled to be heard on the application for the order.

(4) If—

(a) a restricted notification order was granted in relation to the order which is under review, and

(b) the court is satisfied that the conditions in section 106C(6) are met, the court may, where the Secretary of State or, as the case may be, the prosecutor or special counsel applies for the review, make an order prohibiting notification of the application for review being given to the accused.

(5) If—

(a) a non-attendance order was granted in relation to the order which is under review, and

(b) the court is satisfied that the conditions in section 106D(5) are met,

the court may, where the Secretary of State or, as the case may be, the prosecutor, special counsel or the accused applies for the review, exclude the accused from the review.

(6) If the court is not satisfied that the conditions mentioned in section 106A(4) are met, the court may—

(a) recall the order which is under review, or

(b) recall the order which is under review and make an order requiring the information to be disclosed or partly disclosed to the accused in the specified manner.

(7) Nothing in this section affects any right of appeal in relation to the order which is under review.

(8) In this section—

“accused” includes appellant or, where the order relates to section 96E(2), 96F(2) or 96G(2), other person to whom the section concerned applies,

“appellant” has the meaning given by section 96A,

“relevant period”, in relation to an accused, means the period—

(a) beginning with the making of the section 106A order, and

(b) ending with the conclusion of the proceedings against the accused,

“specified” means specified in the order of the court.

(9) For the purposes of this section, proceedings against an accused are to be taken to be concluded if—

(a) a plea of guilty is recorded against the accused,

(b) the accused is acquitted,

(c) the proceedings against the accused are deserted *simpliciter*,

(d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed,

(f) the indictment falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation,

(g) any appeal by the prosecutor is determined or abandoned, or

(h) the accused is convicted and any appeal is determined or abandoned.

(10) In its application to proceedings against an appellant or other person, subsection (9) is to be read as if paragraphs (a) to (f) were omitted.

112 Review by court of section 106 order and section 106A order

(1) This section applies where the court makes a section 106 order or a section 106A order.

(2) During the relevant period, the court must from time to time consider in relation to each order whether, having regard to the information of which the court is aware, the order concerned continues to be appropriate.

(3) If the court considers that the order concerned might no longer be appropriate, the court must appoint a hearing to review the matter.

(4) In this section, "relevant period" has the same meaning as in section 111(8).

Applications and reviews: general

113 Applications and reviews: general provisions

(1) Subsection (3) applies in relation to—

  (a) an application for an order mentioned in subsection (2), and

  (b) a review relating to such an order.

(2) The orders are—

  (a) a non-notification order,

  (b) an exclusion order,

  (c) a section 106 order,

  (d) a restricted notification order,

  (e) a non-attendance order,

  (f) a section 106A order.

(3) Except where it is impracticable to do so, the application or review is to be assigned in accordance with subsection (3A).

(3A) The application or, as the case may be, review is to be assigned—

  (a) if the proceedings against the accused to which the application or review relates are continuing (or have concluded and there are no appellate proceedings), to the same justice of the peace, sheriff or, as the case may be, judge as has been (or is to be or was) assigned to the trial diet in those proceedings,

  (b) if the appellate proceedings to which the application or review relates are continuing, to the same judge as has been (or is to be) assigned to those proceedings.

(4) The accused, appellant or, as the case may be, other person to whom the order relates is not entitled to see or be made aware of the contents of an application for—

  (a) an order mentioned in subsection (2),

  (b) a review relating to such an order made by the prosecutor, the Secretary of State or special counsel.

(5) In this section, "appellant" and "appellate proceedings" have the meanings given by section 96A.

(6) The reference in subsection (3A)(a) to proceedings against the accused includes a reference to an appeal by the prosecutor against an acquittal.

General

91 Exemptions from disclosure

Information must not be disclosed by virtue of this Part to the extent that it is material the disclosure of which is prohibited by section 17 of the Regulation of Investigatory Powers Act 2000 (c.23).

97 Means of disclosure

(1) This section applies where by virtue of this Part the prosecutor is required to disclose information to an accused.

(2) The prosecutor may disclose the information by any means.

(3) In particular, the prosecutor may disclose the information by enabling the accused to inspect it at a reasonable time and in a reasonable place.

(4) Subsection (5) applies if the information is contained in—

(a) a precognition,

(b) a victim statement,

(c) a statement given by a person whom the prosecutor does not intend to call to give evidence in the proceedings, or

(d) where the proceedings relating to the accused are summary proceedings, a statement given by a person whom the prosecutor intends to call to give evidence in the proceedings.

(5) In complying with the requirement, the prosecutor need not disclose the precognition or, as the case may be, statement.

(6) Subsection (7) applies where the proceedings relating to the accused are solemn proceedings and—

(a) the information is contained in a statement given by a person whom the prosecutor intends to call to give evidence in the proceedings, or

(b) the information is contained in a statement and the prosecutor intends to apply under section 259 of the 1995 Act to have evidence of the statement admitted in the proceedings.

(7) In complying with the requirement, the prosecutor must disclose a copy of the statement (but subsections (2) and (3) continue to apply).

(8) This section is subject to any provision made by an order under section 106(4B), 106A(7), 111(6) or 111A(6).

(9) In this section—

"accused" includes appellant or, in any case relating to section 96E(2), 96F(2) or 96G(2), other person to whom the section concerned applies,

"appellant" has the meaning given by section 96A.

92 Redaction of non-disclosable information by prosecutor

(1) Subsection (2) applies where—

(a) by virtue of this Part the prosecutor is required to disclose an item of information (the "disclosable information"), and

(b) the disclosable information forms part of, or contains, other information (the "non-disclosable information") which the prosecutor is not required to disclose by virtue of this Part.

(2) Before disclosing the disclosable information, the prosecutor may (whether by redaction or otherwise) remove or obscure the non-disclosable information.

98 Confidentiality of disclosed information

(1) This section applies where by virtue of this Part the prosecutor discloses information to an accused.

(2) The accused must not use or disclose the information or anything recorded in it other than in accordance with subsection (3).

(3) The accused may use or disclose the information—

(a) for the purposes of the proper preparation and presentation of the accused's case in the proceedings in relation to which the information was disclosed ("the original proceedings"),

(b) with a view to the taking of an appeal in relation to the matter giving rise to the original proceedings,

(c) for the purposes of the proper preparation and presentation of the accused's case in any such appeal.

(4) A person to whom information is disclosed by virtue of subsection (3) must not use or disclose the information or anything recorded in it other than for the purpose for which it was disclosed.

(4A) If despite subsection (2) the accused discloses the information or anything recorded in it other than in accordance with subsection (3), a person to whom information is disclosed must not use or disclose the information or anything recorded in it.

(4B) Subsections (2), (4) and (4A) do not apply in relation to the use or disclosure of information which is in the public domain at the time of the use or disclosure.

(5) In subsection (3) "appeal" includes—

(a) the reference of a case to the High Court of Justiciary by the Scottish Criminal Cases Review Commission under section 194B of the 1995 Act,

(b) a petition to the *nobile officium*,

(c) proceedings in the European Court of Human Rights.

(5A) In this section, "accused" includes, where information is disclosed by virtue of section 96B(2)(b), 96C(2)(b), 96D(3)(b), 96E(2), 96F(2) or 96G(2), the appellant or, as the case may be, person to whom the prosecutor is required to disclose the information.

(6) Nothing in this section affects any other restriction or prohibition on the use or disclosure of information, whether the restriction or prohibition arises by virtue of an enactment (whenever passed or made) or otherwise.

99 Contravention of section 98

(1) A person who knowingly uses or discloses information in contravention of section 98 commits an offence.

(2) A person guilty of an offence under subsection (1) is liable—

(a) on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both,

(b) on conviction on indictment to imprisonment for a term not exceeding 2 years or to a fine or to both.

114 Code of practice

(1) The Lord Advocate—

(a) must issue a code of practice providing guidance about this Part, and

(b) may from time to time revise the code for the time being in force.

(2) The persons mentioned in subsection (3) must have regard to the code of practice for the time being in force in carrying out their functions in relation to the investigation and reporting of crime and sudden deaths.

(3) Those persons are—

(a) police forces,

(b) prosecutors,

(c) such other persons who—

(i) engage (to any extent) in the investigation of crime or sudden deaths, and

(ii) submit reports relating to those investigations to the procurator fiscal,

as the Scottish Ministers may prescribe by regulations.

(4) The Lord Advocate must lay before the Scottish Parliament any code or revised code issued under this section.

115 Acts of Adjournal

The High Court may by Act of Adjournal make such rules as it considers necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of this Part.

115A Abolition of common law rules about disclosure

(1) The provisions of this Part replace any equivalent common law rules about disclosure of information by the prosecutor in connection with criminal proceedings.

(2) The common law rules about disclosure of information by the prosecutor in connection with criminal proceedings are abolished in so far as they are replaced by or are inconsistent with the provisions of this Part.

(3) Sections 95B and 96H do not affect any right under the common law of an accused or appellant to seek disclosure or recovery of information by or from the prosecutor by means of a procedure other than an application under one or other of those sections.

(4) Subsection (5) applies where, following an application (the "earlier disclosure application") by the accused or the appellant under section 95B or 96H, the court has made a ruling that (as the case may be)—

(a) section 89(3) does not apply to information, or

(b) information does not fall within section 96B(3).

(5) The accused or, as the case may be, the appellant, is not entitled to seek the disclosure or recovery of the same information by or from the prosecutor by means of any other procedure at common law on grounds that are substantially the same as any of those on which the earlier disclosure application was made.

(6) Subsection (7) applies where, following an application (the "earlier common law application") by the accused under a procedure other than an application under section 95B or 96H, the court has decided not to make an order for the recovery or disclosure of information by or from the prosecutor.

(7) The accused or, as the case may be, the appellant is not entitled to make an application under section 95B or 96H in relation to the same information on grounds that are substantially the same as any of those on which the earlier common law application was made.

(8) In this section, "appellant" has the meaning given by section 96A.

Interpretation of Part 6

116 Interpretation of Part 6

(1) In this Part—

"investigating agency" has the meaning given by section 86(4),

"procurator fiscal" and "prosecutor" have the meanings given by section 307(1) of the 1995 Act.

(2) References in the following sections to the accused include references to a solicitor or advocate acting on behalf of the accused—

(a) section 89(2)(b),

(aa) section 89A(2),

(ab) section 90(2)(b) and (2A),

(ac) section 94(1A)(b),

(ad) section 95(3)(b),

(ae) section 95A(6)(b),

(af) section 95AA(2),

(ag) section 95B(1)(b),

(ah) section 95C(6).

(3) References in the following sections to the accused or the appellant or other person include references to a solicitor or advocate acting on behalf of the accused or, as the case may be, the appellant or other person—

(a) section 97,

(b) section 98(1), (2), (3) (where it first occurs) and (4A),

(h) section 102,

(i) section 103,

(j) section 104,

(k) section 105 (other than subsection (4)(c)),

(l) section 106(3A)(a) and (4B),

(m) section 106A (other than subsections (4)(b), (5)(b) and (4A)(c)),

(n) section 106B,

(o) section 106C (other than subsection (6)(b)),

(p) section 106D (other than subsection (5)(b)),

(q) section 107C(8)(c) and (d),

(r) section 111(1) and (4),

(s) section 111A(1)(b), (4), (5) (in the second place where it occurs) and (6)

(t) section 113(4).

(4) References in the following sections to an appellant include references to a solicitor or advocate acting on behalf of the appellant—

(a) section 96B(2)(b) and (4),

(b) section 96C(1), (2)(b) and (3),

(c) section 96D(1), (2), (3)(b) and (3A).

(5) References in the following sections to a person include references to a solicitor or advocate acting on behalf of the person or, as the case may be, to a solicitor or advocate who acted on behalf of the person in the proceedings to which the information relates—

(a) section 96E(2) and (3),

(b) section 96F(2) and (4),

(c) section 96G(2) and (3).

PART 7

MENTAL DISORDER AND UNFITNESS FOR TRIAL

117 Criminal responsibility of persons with mental disorder

Before section 52 of the 1995 Act insert—

"*Criminal responsibility of mentally disordered persons*

51A Criminal responsibility of persons with mental disorder

(1) A person is not criminally responsible for conduct constituting an offence, and is to be acquitted of the offence, if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.

(2) But a person does not lack criminal responsibility for such conduct if the mental disorder in question consists only of a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct.

(3) The defence set out in subsection (1) is a special defence.

(4) The special defence may be stated only by the person charged with the offence and it is for that person to establish it on the balance of probabilities.

(5) In this section, “conduct” includes acts and omissions.

Diminished responsibility

51B Diminished responsibility

(1) A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person’s ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind.

(2) For the avoidance of doubt, the reference in subsection (1) to abnormality of mind includes mental disorder.

(3) The fact that a person was under the influence of alcohol, drugs or any other substance at the time of the conduct in question does not of itself—

(a) constitute abnormality of mind for the purposes of subsection (1), or

(b) prevent such abnormality from being established for those purposes.

(4) It is for the person charged with murder to establish, on the balance of probabilities, that the condition set out in subsection (1) is satisfied.

(5) In this section, “conduct” includes acts and omissions.”.

118 Acquittal involving mental disorder: procedure

Before section 54 of the 1995 Act insert—

“*Acquittal involving mental disorder*

53E Acquittal involving mental disorder

(1) Where the prosecutor accepts a plea (by the person charged with the commission of an offence) of the special defence set out in section 51A of this Act, the court must declare that the person is acquitted by reason of the special defence.

(2) Subsection (3) below applies where—

(a) the prosecutor does not accept such a plea, and

(b) evidence tending to establish the special defence set out in section 51A of this Act is brought before the court.

(3) Where this subsection applies the court is to—

(a) in proceedings on indictment, direct the jury to find whether the special defence has been established and, if they find that it has, to declare whether the person is acquitted on that ground,

(b) in summary proceedings, state whether the special defence has been established and, if it states that it has, declare whether the person is acquitted on that ground.”.

119 Unfitness for trial

(1) In the 1995 Act, after section 53E (inserted by section 118), insert—

“Unfitness for trial

53F Unfitness for trial

(1) A person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of a mental or physical condition, of participating effectively in a trial.

(2) In determining whether a person is unfit for trial the court is to have regard to—

(a) the ability of the person to—

(i) understand the nature of the charge,

(ii) understand the requirement to tender a plea to the charge and the effect of such a plea,

(iii) understand the purpose of, and follow the course of, the trial,

(iv) understand the evidence that may be given against the person,

(v) instruct and otherwise communicate with the person’s legal representative, and

(b) any other factor which the court considers relevant.

(3) The court is not to find that a person is unfit for trial by reason only of the person being unable to recall whether the event which forms the basis of the charge occurred in the manner described in the charge.

(4) In this section “the court” means—

(a) as regards a person charged on indictment, the High Court or the sheriff court,

(b) as regards a person charged summarily, the sheriff court.”.

(2) The title of section 54 of the 1995 Act (insanity in bar of trial) is replaced by “Unfitness for trial: further provision”, the cross-heading which precedes it is omitted and the section is amended as follows—

(a) in subsection (1)—

(i) the words “, on the written or oral evidence of two medical practitioners,” are repealed, and

(ii) for “insane” substitute “unfit for trial”,

(b) in subsection (3)—

(i) for “the insanity of a person” substitute “whether a person is unfit for trial”, and

(ii) after “mental” insert “or physical”, and

(c) in subsection (5), for “insane” substitute “unfit for trial”.

(3) Subsections (6) and (7) are repealed.

120 Abolition of common law rules

Any rule of law providing for—

(a) the special defence of insanity,

(b) the plea of diminished responsibility, or

(c) insanity in bar of trial,

ceases to have effect.

PART 8

LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982

121 Conditions to which licences under 1982 Act are to be subject

(1) The 1982 Act is amended as follows.

(2) In section 3(4) (automatic grant or renewal of licence where application not determined within specified period), the word “unconditionally” is repealed.

(3) After section 3 insert—

“3A Mandatory licence conditions

(1) The Scottish Ministers may by order made by statutory instrument prescribe conditions to which licences granted by licensing authorities under this Act are to be subject.

(2) Different conditions may be prescribed under subsection (1)—

(a) in respect of different licences, or different types of licence,

(b) otherwise for different purposes, circumstances or cases.

(3A) No order may be made under subsection (1) unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.

(4) Subsection (1) does not affect any other power of the Scottish Ministers under this Act or any other enactment to prescribe conditions—

(a) to which licences granted by licensing authorities under this Act are to be subject, or

(b) to be imposed by licensing authorities in granting or renewing licences under this Act.

(5) The following conditions are referred to in this Part and Part 2 of this Act as “mandatory conditions”—

(a) conditions prescribed under subsection (1),

(b) conditions prescribed under any power referred to in subsection (4), and

(c) conditions imposed, or required to be imposed, by any provision of this Part or Part 2 of this Act.

(6) In this section and section 3B, references to licences granted by licensing authorities include references to—

(a) licences renewed by licensing authorities, and

(b) licences deemed by virtue of section 3(4) to be granted or renewed by licensing authorities.

3B Standard licence conditions

(1) A licensing authority may determine conditions to which licences granted by them under this Act are to be subject.

(2) Conditions determined under subsection (1) are referred to in this Part and Part 2 as “standard conditions”.

(3) Different conditions may be determined under subsection (1)—

(a) in respect of different licences, or different types of licence,

(b) otherwise for different purposes, circumstances or cases.

(4) A licensing authority must publish, in such manner as they think appropriate, any standard conditions determined by them.

(5) Standard conditions have no effect—

(a) unless they are published, and

(b) so far as they are inconsistent with any mandatory conditions.

(6) Subsection (1) is subject to paragraph 5(1A)(a) of Schedule 1 to this Act.”.

(4) In section 27C (conditions in respect of knife dealers’ licences)—

(a) in subsection (1)—

(i) in paragraph (b), after “prejudice to” insert “section 3B and”, and

(ii) in paragraph (c), after “that” insert “section and”, and

(b) subsection (2) is repealed.

(5) In section 41(3) (power to attach conditions to public entertainment licences), after “prejudice to” insert “section 3B of and”.

(6) In Schedule 1 (further provisions as to the general licensing system), in paragraph 5—

(a) in sub-paragraph (1)—

(i) in paragraph (a), the word “unconditionally” is repealed, and

(ii) paragraph (b) is repealed,

(b) after that sub-paragraph insert—

“(1A) In granting or renewing a licence under sub-paragraph (1)(a), a licensing authority may (either or both)—

(a) disapply or vary any standard conditions so far as applicable to the licence,

(b) impose conditions in addition to any mandatory or standard conditions to which the licence is subject.”,

(c) in sub-paragraph (2), for “(1)(b)” substitute “(1A)(b)”, and

(d) after that sub-paragraph insert—

"(2A) A variation made under sub-paragraph (1A)(a) or condition imposed under sub-paragraph (1A)(b) has no effect so far as it is inconsistent with any mandatory condition to which the licence is subject.".

122 Licensing: powers of entry and inspection for civilian employees

(1) The 1982 Act is amended as follows.

(2) In section 5 (rights of entry and inspection)—

(a) in subsection (1), after "licensing authority" insert ", an authorised civilian employee",

(b) in subsection (3)(a) and (b)—

(i) after "constable" where it first occurs insert ", an authorised civilian employee", and

(ii) after "such an" insert "employee or",

(c) in subsection (3)(c), after "constable" insert ", an authorised civilian employee",

(d) in subsection (4)—

(i) after "licensing authority" insert ", an authorised civilian employee", and

(ii) after "the officer" insert ", employee", and

(e) in subsection (6), after "licensing authority" insert "or authorised civilian employee".

(3) In section 8 (interpretation of Parts 1 and 2), after the definition of "appropriate relevant authority" insert—

""authorised civilian employee" means a person—

(a) employed by a police authority under section 9(1)(a) of the Police (Scotland) Act 1967 (c.77), and

(b) authorised by the chief constable for the purposes of sections 5 and 11 of this Act;".

(4) In section 11 (inspection and testing of vehicles), in subsection (2)—

(a) after "the authority)" insert ", an authorised civilian employee",

(b) in paragraph (b), after "licensing authority" insert ", an authorised civilian employee", and

(c) after "authorised officer" where it last occurs, insert ", employee".

(5) In paragraph 3 (miscellaneous definitions) of Schedule 2 (control of sex shops), after the definition of "appropriate relevant authority" insert—

""authorised civilian employee" means a person—

(a) employed by a police authority under section 9(1)(a) of the Police (Scotland) Act 1967 (c.77), and

(b) authorised by the chief constable for the purposes of paragraph 20 of this Schedule;".

(6) In paragraph 20 of that Schedule (rights of entry and inspection)—

(a) in sub-paragraph (1), after "local authority" insert ", an authorised civilian employee",

(b) in sub-paragraph (3), after "local authority" insert "or an authorised civilian employee", and

(c) in sub-paragraph (5)—

(i) after "constable" where it first occurs insert ", an authorised civilian employee", and

(ii) after "such" insert "employee or".

124 Licensing of taxis and private hire cars

(1) The 1982 Act is amended as follows.

(2) In section 13 (taxi and private hire car licences), in subsection (3), for "during any continuous period of 12 months" substitute "throughout the period of 12 months immediately".

(3) In section 17 (taxi fares)—

(a) for subsections (2) to (4) substitute—

"(2) The licensing authority must fix scales for the fares and other charges mentioned in subsection (1) within 18 months beginning with the date on which the scales came into effect.

(3) In fixing scales under subsection (2), the licensing authority may—

(a) alter fares or other charges,

(b) fix fares or other charges at the same rates.

(4) Before fixing scales under subsection (2), the licensing authority must review the scales in accordance with subsection (4A).

(4A) In carrying out a review, the licensing authority must—

(a) consult with persons or organisations appearing to it to be, or to be representative of, the operators of taxis operating within its area,

(b) following such consultation—

(i) review the existing scales, and

(ii) propose new scales (whether at altered rates or the same rates),

(c) publish those proposed scales in a newspaper circulating in its area—

(i) setting out the proposed scales,

(ii) explaining the effect of the proposed scales,

(iii) proposing a date on which the proposed scales are to come into effect, and

(iv) stating that any person may make representations in writing until the relevant date, and

(d) consider any such representations.

(4B) In subsection (4A)(c)(iv) "the relevant date" is a date specified by the licensing authority falling at least one month after the first publication by the authority of the proposed scales.

(4C) After fixing scales under subsection (2), the licensing authority must give notice in accordance with subsection (4D).

(4D) The licensing authority must—

(a) set out, and explain the effect of, the scales as fixed,

(b) notify the persons mentioned in subsection (4E) of—

(i) the date on which the scales as fixed are to come into effect, and

(ii) the rights of appeal under section 18.

(4E) Those persons are—

(a) all operators of taxis operating within their area, and

(b) the persons and organisations consulted under subsection (4A)(a).", and

(b) in subsection (5)—

(i) for "(4)" where it first occurs substitute "(4D)(b)",

(ii) in paragraph (a)—

(A) for "(4)" where it first occurs substitute "(4E)",

(B) for "five days after the decision referred to in subsection (4)" substitute "seven days after the scales are fixed under subsection (2)".

(4) In section 18 (appeals in respect of taxi fares)—

(a) for subsection (1) substitute—

"(1) Any person mentioned in subsection (1A) may, within 14 days of notice being given under section 17(4C), appeal against those scales to the traffic commissioner for the Scottish Traffic Area as constituted for the purpose of the Public Passenger Vehicles Act 1981.",

(b) after that subsection insert—

"(1A) Those persons are—

(a) any person who operates a taxi in an area for which scales have been fixed under section 17(2), and

(b) any person or organisation appearing to the traffic commissioner to be representative of such taxi operators.",

(c) in subsection (3)—

(i) the words "to them" are repealed,

(ii) in paragraph (b) the word "may" is repealed, and

(iii) in paragraph (b)(i), for "on the grounds that" substitute "if", and

(d) subsection (9) is repealed.

(5) After section 18 insert—

“18A Publication and coming into effect of taxi fares

(1) Following the fixing of scales by a licensing authority under section 17(2), the licensing authority must—

(a) determine the date on which the scales are to come into effect, and

(b) publish the scales in accordance with subsections (3) to (5).

(2) The scales may come into effect no earlier than seven days after the date on which they are published.

(3) The licensing authority must—

(a) give notice of the scales by advertisement in a newspaper circulating in its area, and

(b) specify in that advertisement the date on which the scales are to come into effect.

(4) The authority must give notice of the scales—

(a) where no appeal has been lodged under subsection (1) of section 18, as soon as practicable after the expiry of the period of 14 days mentioned in that subsection,

(b) where such an appeal has been lodged, as soon as practicable after the determination of the appeal.

(5) For the purposes of subsection (4), an appeal is determined on the date on which the appeal is abandoned or notice is given to the appellant of its disposal.”.

124A Licensing of street trading: food hygiene certificates

(1) Section 39 of the 1982 Act (street traders’ licences) is amended as follows.

(2) In subsection (4), for the words from “the requirements” to the end substitute “such requirements as the Scottish Ministers may by order made by statutory instrument specify”.

(3) After subsection (4), insert—

“(5) An order under subsection (4) may specify requirements by reference to provision contained in another enactment.

(6) A statutory instrument containing an order made under subsection (4) is subject to annulment in pursuance of a resolution of the Scottish Parliament.”.

126 Licensing of public entertainment

(1) Section 41 of the 1982 Act (public entertainment licences) is amended as follows.

(2) In subsection (2)—

(a) the words “, on payment of money or money’s worth,” are repealed,

(b) in paragraph (d), for “, section 1 of the Cinemas Act 1985 or Part II of the Gaming Act 1968” substitute “or section 1 of the Cinemas Act 1985”,

(c) for paragraph (e), substitute—

"(e) premises in respect of which there is a club gaming permit (within the meaning of section 271 of the Gambling Act 2005 (c.19)) or a prize gaming permit (within the meaning of section 289 of that Act of 2005);",

(d) the word "or" immediately preceding paragraph (g) is repealed, and

(e) after paragraph (g), add ", or

(h) such other premises as the Scottish Ministers may by order made by statutory instrument specify.".

(3) After subsection (2) insert—

"(2A) A statutory instrument containing an order made under subsection (2)(h) is subject to annulment in pursuance of a resolution of the Scottish Parliament.".

127 Licensing of late night catering

(1) Section 42 of the 1982 Act (late hours catering) is amended as follows.

(2) In subsections (1) and (2), for "meals or refreshment" in each place where those words occur substitute "food".

(3) In subsection (2), for "they are" substitute "it is".

(4) In subsection (3), for "meals or refreshments" in both places where those words occur substitute "food".

(5) After subsection (6), add—

"(7) In this section "food" has the meaning given in section 1 of the Food Safety Act 1990 (c.16).".

128 Applications for licences

(1) The 1982 Act is amended as follows.

(2) In Schedule 1 (further provisions as to the general licensing system)—

(a) in paragraph 1(2)(b), for "and address" in both places where those words occur substitute ", address and date and place of birth",

(b) in paragraph 1(2)(c)—

(i) in sub-paragraph (iii), for "and private addresses" substitute ", private addresses and dates and places of birth", and

(ii) in sub-paragraph (iv), for "and address" substitute ", address and date and place of birth",

(ba) in paragraph 2(3)(b), after "application" insert "(other than the date and place of birth of any person)",

(bb) in paragraph 2(8)(a), after "application" insert "(other than the date and place of birth of any person)",

(c) in paragraph 3(1)(e), for "21" substitute "28",

(d) in paragraph 4(2), for "7" substitute "14",

(e) in paragraph 8, after sub-paragraph (5) insert—

"(5A) On good cause being shown, a licensing authority may, for the purposes of sub-paragraph (5), deem an application for renewal of a licence made up to 28 days after the expiry of the licence to be an application made before the expiry.",

(f) in paragraph 11(8), for "21" substitute "14", and

(g) in paragraph 17(2), for "28" substitute "21".

(3) In Schedule 2 (control of sex shops)—

(a) in paragraph 6(2), for paragraph (b) substitute—

"(b) the date and place of birth of the applicant;",

(b) in paragraph 6(2)(c), for "age" substitute "date and place of birth",

(c) in paragraph 6(3)—

(i) in paragraph (c), for "and private addresses" substitute ", private addresses and dates and places of birth", and

(ii) in paragraph (d), for "age" substitute "date and place of birth",

(d) in paragraph 8(7), after "them" insert "and, where they propose to do so, must, within such reasonable period (not being less than 14 days) of the date of the hearing, notify the applicant and each such person of that date",

(e) in paragraph 9(3), in both paragraphs (e) and (f), for "the United Kingdom" substitute "a member state of the European Union",

(f) in paragraph 12, after sub-paragraph (3) insert—

"(3A) On good cause being shown, a local authority may, for the purposes of sub-paragraph (3), deem an application for renewal of a licence made up to 28 days after the expiry of the licence to be an application made before the expiry.",

(g) in paragraph 13(6), for "21" substitute "14", and

(h) in paragraph 23(2), for "28" substitute "21".

PART 9

ALCOHOL LICENSING

129A Premises licence applications: statements about disabled access etc.

(1) Section 20 of the 2005 Act (application for premises licence) is amended as follows.

(2) In subsection (2)(b)—

(a) the word "and" immediately following sub-paragraph (ii) is repealed, and

(b) after that sub-paragraph, insert—

"(iia) a disabled access and facilities statement, and".

(3) After subsection (5), insert—

"(6) A "disabled access and facilities statement" is a statement, in the prescribed form, containing information about—

(a) provision made for access to the subject premises by disabled persons,

(b) facilities provided on the subject premises for use by disabled persons, and

(c) any other provision made on or in connection with the subject premises for disabled persons.

(7) In subsection (6), "disabled person" has the meaning given by section 1 of the Disability Discrimination Act 1995 (c.50).".

130 Premises licence applications: notification requirements

(1) Section 21 of the 2005 Act (notification of premises licence application) is amended as follows.

(2) For subsection (2), substitute—

"(2) On giving notice of an application under subsection (1), the Licensing Board—

(a) must provide the appropriate chief constable with a copy of the application, and

(b) may provide any other person to whom notice is given with a copy of the application.".

(3) In subsection (3), the following are repealed—

(a) the word "and" after paragraph (a), and

(b) paragraph (b).

(4) In subsection (6), the following are repealed—

(a) the definition of "antisocial behaviour",

(b) the word "and" following the definition of "neighbouring land", and

(c) the definition of "relevant period".

131 Premises licence applications: modification of layout plans

In section 23 of the 2005 Act (determination of premises licence application), in subsection (7)(b), after "plan" insert "or layout plan (or both)".

131A Reviews of premises licences: notification of determinations

(1) The 2005 Act is amended as follows.

(2) After section 39 (Licensing Board's powers on review), insert—

"39A Notification of determinations

(1) Where a Licensing Board, at a review hearing—

(a) decides to take one of the steps mentioned in section 39(2), or

(b) decides not to take one of those steps,

the Board must give notice of the decision to each of the persons mentioned in subsection (2).

(2) The persons referred to in subsection (1) are—

(a) the holder of the premises licence, and

(b) where the decision is taken in connection with a premises licence review application, the applicant.

(3) Where subsection (1)(a) applies, the holder of the premises licence may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(4) Where—

(a) subsection (1)(a) or (b) applies, and

(b) the decision is taken in connection with a premises licence review application,

the applicant may, by notice to the clerk of the Board, require the Board to give a statement of reasons for the decision.

(5) Where the clerk of a Board receives a notice under subsection (3) or (4), the Board must issue a statement of the reasons for the decision to—

(a) the person giving the notice, and

(b) any other person to whom the Board gave notice under subsection (1).

(6) A statement of reasons under subsection (5) must be issued—

(a) by such time, and

(b) in such form and manner,

as may be prescribed.”.

132 Premises licence applications: antisocial behaviour reports

(1) The 2005 Act is amended as follows.

(2) In section 22 (objections and representations), after subsection (2) insert—

“(2A) The appropriate chief constable may, under subsection (1)(b), make representations concerning a premises licence application by giving to the Licensing Board a report detailing—

(a) any cases of antisocial behaviour indentified by constables as having taken place on, or in the vicinity of, the premises,

(b) any complaints or other representations made to constables concerning antisocial behaviour on, or in the vicinity of, the premises.”.

(3) After section 24 insert—

“24A Power to request antisocial behaviour report

(1) A Licensing Board may, at any time before determining a premises licence application, request the appropriate chief constable to give the Board a report detailing—

(a) all cases of antisocial behaviour indentified within the relevant period by constables as having taken place on, or in the vicinity of, the premises,

(b) all complaints or other representations made within the relevant period to constables concerning antisocial behaviour on, or in the vicinity of, the premises.

(2) The appropriate chief constable must give the report within 21 days of the request.

(3) Where the Licensing Board requests a report under subsection (1), the Board must suspend consideration of the application until it receives the report.

(4) On receipt of the chief constable's report under subsection (2), the Licensing Board must—

(a) give a copy of the report to the applicant in such manner and by such time as may be prescribed by regulations, and

(b) resume consideration of the application and determine it in accordance with section 23.

(5) In this section—

"antisocial behaviour" has the same meaning as in section 143 of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8), and

"relevant period" means the period of one year ending with the date of the request.".

132A Premises licences: connected persons and interested parties

(1) The 2005 Act is amended as follows.

(2) After section 40 insert—

"*Connected persons and interested parties*

40A Connected persons and interested parties: licence holder's duty to notify changes

(1) A premises licence holder must, not later than one month after a person becomes or ceases to be—

(a) a connected person in relation to the licence holder, or

(b) an interested party in relation to the licensed premises,

give the appropriate Licensing Board notice of that fact.

(2) A notice under subsection (1) that a person has become a connected person or an interested party must specify—

(a) the name and address of the person, and

(b) if the person is an individual, the person's date of birth.

(3) Where a Licensing Board receives a notice under subsection (1), the Board must give a copy of the notice to the appropriate chief constable.

(4) A premises licence holder who fails, without reasonable excuse, to comply with subsection (1) commits an offence.

(5) A person guilty of an offence under subsection (4) is liable on summary conviction to a fine not exceeding level 2 on the standard scale.".

(3) In section 48 (notification of change of name or address)—

(a) in subsection (1)—

(i) the word "or" immediately following paragraph (a) is repealed, and

(ii) after paragraph (b) insert “, or

(c) the name or address of any person who is—

(i) a connected person in relation to the licence holder, or

(ii) an interested party in relation to the licensed premises,”,

(b) after subsection (2) insert—

“(2A) Where a Licensing Board receives a notice under subsection (1), the Board must give a copy of the notice to the appropriate chief constable.”.

(4) In section 147 (interpretation), after subsection (4) insert—

“(5) For the purposes of this Act, a person is an interested party in relation to licensed premises if the person is not the holder of the premises licence nor the premises manager in respect of the premises but—

(a) has an interest in the premises as an owner or tenant, or

(b) has management and control over the premises or the business carried on on the premises.”.

(5) In section 148 (index of defined expressions), in the table, insert at the appropriate place—

“interested party	section 147(5).”.

132AA Provisional premises licences: duration

In section 45 of the 2005 Act (provisional premises licence), in subsection (6), for “2” substitute “4”.

132B Premises licence applications: food hygiene certificates

(1) Section 50 of the 2005 Act (certificates as to planning, building standards and food hygiene) is amended as follows.

(2) In subsection (7), for the words from “the requirements” to the end substitute “such requirements as the Scottish Ministers may, by order, specify.”.

(3) After subsection (7), insert—

“(7A) An order under subsection (7) may specify requirements by reference to provision contained in another enactment.”.

(4) In subsection (8)(c), for “the 1990 Act” substitute “section 5 of the Food Safety Act 1990 (c.16)”.

132C Provision of copies of licences to chief constable

(1) The 2005 Act is amended as follows.

(2) In section 26 (issue of licence and summary), after subsection (2) insert—

“(3) Where a Licensing Board grants a premises licence application, the Board must send a copy of the premises licence to the appropriate chief constable.”.

(3) In section 47 (temporary premises licence), after subsection (4) insert—

"(4A) Where a Licensing Board issues a temporary premises licence, the Board must send a copy of the temporary premises licence to the appropriate chief constable.".

(4) In section 49 (Licensing Board's duty to update premises licence), after subsection (2) insert—

"(2A) Where a Licensing Board issues a new summary of the licence under subsection (2), the Board must send a copy of the new summary of the licence to the appropriate chief constable.".

(5) In section 56 (occasional licence), after subsection (9) insert—

"(10) Where a Licensing Board issues an occasional licence under subsection (1), the Board must send a copy of the occasional licence to the appropriate chief constable.".

133 Sale of alcohol to trade

(1) The 2005 Act is amended as follows.

(2) In section 63 (prohibition of sale, consumption and taking away of alcohol outwith licensed hours), in subsection (2)(f), after "on" where it first occurs insert "or taken from".

(3) In section 117 (offence relating to sale of alcohol to trade), in subsection (1), after "from" insert "licensed premises or".

134 Occasional licences

(1) The 2005 Act is amended as follows.

(2) In section 57 (notification of application to chief constable and Licensing Standards Officer), after subsection (3), add—

"(4) Subsection (5) applies where the Licensing Board is satisfied that the application requires to be dealt with quickly.

(5) Subsections (2) and (3) have effect in relation to the application as if the references to the period of 21 days were references to such shorter period of not less than 24 hours as the Board may determine.".

(3) In paragraph 10 of schedule 1 (delegation of functions of Licensing Boards), in sub-paragraph (4), after "Board" in the second place where it appears insert "or to a member of staff provided under paragraph 8(1)(b)".

134A Extended hours applications: notification period

(1) Section 69 of the 2005 Act (notification of extended hours application) is amended as follows.

(2) After subsection (3), add—

"(4) Subsections (5) and (6) apply where the Licensing Board is satisfied that the application requires to be dealt with quickly.

(5) Subsections (2) and (3) have effect in relation to the application as if the references to the period of 10 days were references to such shorter period of not less than 24 hours as the Board may determine.

(6) Subsection (3) has effect in relation to the application as if for the word "must" there were substituted "may".".

135 Extended hours applications: variation of conditions

After section 70 of the 2005 Act insert—

"70A Extended hours applications: variation of conditions

(1) On granting an extended hours application under section 68(1) in respect of a premises licence, the Licensing Board may make such variation of the conditions to which the licence is subject as the Board considers necessary or expedient for the purposes of any of the licensing objectives.

(2) A variation made under subsection (1)—

(a) may have effect only in relation to a period of licensed hours which is extended under section 68(1), and

(b) ceases to have effect at the end of the period for which the extension of the licensed hours has effect under section 68(2).

(3) In subsection (1), "variation" includes addition, deletion or other modification.".

136 Personal licences

(1) The 2005 Act is amended as follows.

(2) In section 74 (determination of personal licence application)—

(a) in subsection (2)—

(i) the word "and" immediately following paragraph (a) is repealed, and

(ii) after paragraph (b) add—

"(ba) the notice does not include a recommendation under section 73(4),

(c) the applicant has signed the application, and

(d) subsection (8) does not apply,",

(b) in subsection (3)—

(i) the word "and" immediately following paragraph (b) is repealed, and

(ii) after paragraph (b) insert—

"(ba) the applicant does not already hold a personal licence, and", and

(c) after subsection (6) insert—

"(7) Subsection (8) applies if—

(a) all of the conditions specified in subsection (3) are met in relation to the applicant,

(b) the Board has received from the appropriate chief constable a notice under section 73(3)(a), and

(c) the applicant has held a personal licence which—

(i) expired within the period of 3 years ending on the day on which the application was received, or

(ii) was surrendered by the applicant by notice under section 77(6) received within that period.

(8) The Licensing Board may—

(a) hold a hearing for the purposes of considering and determining the application, and

(b) after having regard to the circumstances in which the personal licence previously held expired or, as the case may be, was surrendered—

(i) refuse the application, or

(ii) grant the application.".

(3) In section 76 (issue of licence), after subsection (3) add—

"(4) A person who holds a void personal licence must surrender it to the Licensing Board.

(5) A person who, without reasonable excuse, fails to comply with subsection (4) commits an offence.

(6) A person who passes off a void personal licence as a valid personal licence knowing that the licence is void commits an offence.

(7) A person guilty of an offence under subsection (5) or (6) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.".

(4) In section 92 (theft, loss etc. of personal licence), after subsection (3) insert—

"(3A) A replacement personal licence is void if at the time it is issued the personal licence in respect of which it was issued is not lost, stolen, damaged or destroyed.

(3B) Where a replacement personal licence is issued in respect of a personal licence which has been lost or stolen, the replacement personal licence becomes void if the personal licence is subsequently found or recovered.

(3C) A person who holds a void replacement personal licence must surrender it to the Licensing Board.

(3D) A person who, without reasonable excuse, fails to comply with subsection (3C) commits an offence.

(3E) A person who passes off a void replacement personal licence as a valid licence, knowing that the licence is void, commits an offence.

(3F) A person guilty of an offence under subsection (3D) or (3E) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.".

137 Emergency closure orders

(1) The 2005 Act is amended as follows.

(2) In section 97 (closure orders)—

(a) in subsection (2), for "senior police officer may, if the officer" substitute "constable of or above the rank of inspector may, if the constable", and

(b) in subsection (4), the words "by a senior police officer" are repealed.

(3) In section 98 (termination of closure orders)—

(a) in subsection (1)—

(i) for "senior police officer" substitute "constable of or above the rank of inspector", and

(ii) for "the officer" substitute "the constable",

(b) in subsection (2)—

(i) for "senior police office" substitute "constable", and

(ii) for "the officer" substitute "the constable".

(4) In section 99 (extension of emergency closure order), in subsection (1)—

(a) for "senior police officer" substitute "constable of or above the rank of inspector", and

(b) in paragraph (b), for "officer" substitute "constable".

137A Appeals

In section 131(2) of the 2005 Act (appeals), the words "by way of stated case, at the instance of the appellant," are repealed.

137B Liability for offences

(1) The 2005 Act is amended as follows.

(2) In each of the following provisions, the word "knowingly" is repealed—

(a) section 1(3)(b),

(b) section 103(1),

(c) section 106(2),

(d) section 107(1),

(e) section 118(1),

(f) section 120(2) and (3),

(g) section 121(1),

(h) section 127(4), and

(i) section 128(5).

(3) After section 141 (offences by bodies corporate etc.) insert—

"141A Defence of due diligence for certain offences

(1) It is a defence for a person charged with an offence to which this section applies to prove that the person—

(a) did not know that the offence was being committed, and

(b) exercised all due diligence to prevent the offence being committed.

(2) This section applies to an offence under any of the following provisions of this Act—

section 1(3)(b),

section 103(1),

section 106(2),
section 107(1),
section 118(1),
section 120(2) or (3),
section 121(1),
section 127(4),
section 128(5).

141B Vicarious liability of premises licence holders and interested parties

(1) Subsection (2) applies where, on or in relation to any licensed premises, a person commits an offence to which this section applies while acting as the employee or agent of—

(a) the holder of the premises licence, or

(b) an interested party.

(2) The holder of the premises licence or, as the case may be, the interested party is also guilty of the offence and liable to be proceeded against and punished accordingly.

(3) It is a defence for a holder of a premises licence or an interested party charged with an offence to which this section applies by virtue of subsection (2) to prove that the holder of the licence or, as the case may be, the interested party—

(a) did not know that the offence was being committed by the employee or agent, and

(b) exercised all due diligence to prevent the offence being committed.

(4) Proceedings may be taken against the holder of the premises licence or the interested party in respect of the offence whether or not proceedings are also taken against the employee or agent who committed the offence.

(5) This section applies to an offence under any of the following provisions of this Act—

section 1(3),
section 15(5),
section 63(1),
section 97(7),
section 102(1),
section 103(1),
section 106(2),
section 107(1),
section 108(2) or (3),
section 113(1),
section 114,

section 115(2),

section 118(1),

section 119(1),

section 120(2),

section 121(1),

section 138(5).”.

138 False statements in applications: offence

After section 134 of the 2005 Act insert—

“134A Offence of knowingly making a false statement in an application

(1) A person who knowingly makes a false statement in an application under this Act commits an offence.

(2) A person guilty of an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.”.

138A Powers of Licensing Standards Officers

(1) Section 15 of the 2005 Act is amended as follows.

(2) The section title becomes “Powers of entry, inspection and seizure”.

(3) In subsection (2)—

(a) the word “and” immediately preceding paragraph (b) is repealed, and

(b) after that paragraph insert—

“(c) power to take copies of, or of an entry in, any document found on the premises, and

(d) power to seize and remove any substances, articles or documents found on the premises.”.

(4) In subsection (3)—

(a) for “either” substitute “any”, and

(b) in paragraph (b), after “information” insert “or explanation”.

(5) After subsection (4) insert—

“(4A) Subsection (3)(c) includes power to require any document which is stored in electronic form and which is accessible from the premises to be produced in a form—

(a) in which it is legible, and

(b) in which it can be removed from the premises.

(4B) Nothing in subsection (3) requires a person to produce any document if the person would be entitled to refuse to produce that document in any proceedings in any court on the grounds of confidentiality of communications.

(4C) Nothing in subsection (3) requires a person to provide any information or explanation or produce any document if to do so would incriminate that person or that person’s spouse or civil partner.”.

(6) After subsection (6) insert—

“(7) The Scottish Ministers may by regulations make further provision about the procedure to be followed in the exercise of a power under this section.

(8) Where a Licensing Standards Officer seizes any substance, article or document under subsection (2)(d), the Officer must leave on the premises a notice—

(a) stating what was seized, and

(b) explaining why it was seized.

(9) The Scottish Ministers may by regulations make provision about the treatment of substances, articles or documents seized under subsection (2)(d).

(10) Regulations under subsection (9) may, in particular, make provision—

(a) about the retention, use, return, disposal or destruction of anything seized,

(b) about compensation for anything seized.”.

139 Further modifications of 2005 Act

Schedule 4 makes further modifications of the 2005 Act (including extending police powers to object).

PART 10

MISCELLANEOUS

141 Annual report on Criminal Justice (Terrorism and Conspiracy) Act 1998

Section 8 of the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c.40) (requirement for annual report on working of the Act) is repealed.

141A Modification of references to “Act”, “enactment” etc. in certain Acts of Parliament

(1) The 1982 Act is amended as follows—

(a) in section 8 (interpretation of Parts 1 and 2), insert at the appropriate place—

““enactment” includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament;”,

(b) in section 49 (dangerous and annoying creatures), after subsection (8), add—

“(9) In subsection (7), “enactment” includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.”, and

(c) in Schedule 2 (control of sex shops), in paragraph 3 (miscellaneous definitions), insert at the appropriate place—

““enactment” includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament;”.

(2) The Criminal Law (Consolidation) (Scotland) Act 1995 is amended as follows—

(a) in section 30 (disclosure of information), after subsection (7) add—

“(8) In subsection (2) above, “enactment” includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.”,

(b) in section 44 (false statements and declarations), in each of the following provisions, namely subsection (2)(b) and (c), subsection (3)(a) and subsection (4), after “Act of Parliament” insert “or any Act of the Scottish Parliament”,

(c) in section 45 (provision supplementary to section 44), after subsection (5) add—

“(6) In subsections (4) and (5), “other Act” includes an Act of the Scottish Parliament.”, and

(d) in section 46 (proceedings for a contravention of section 44)—

(i) in subsection (4), the words “(including subordinate legislation)” are repealed, and

(ii) after subsection (4) add—

“(5) In subsection (4), “enactment” includes—

(a) an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament, and

(b) subordinate legislation.”.

(3) Section 307(1) of the 1995 Act (interpretation) is amended as follows—

(a) in the definition of “crime”, after “this Act,” insert “or under any Act of the Scottish Parliament (whenever passed),”,

(b) for the definition of “enactment” substitute—

““enactment” includes—

(a) an enactment contained in any local Act or any order, regulation or other instrument having effect by virtue of an Act, and

(b) an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament;”, and

(c) for the definition of “statute” substitute—

““statute” means—

(a) any Act of Parliament, public, general, local or private,

(b) any Provisional Order confirmed by Act of Parliament, or

(c) any Act of the Scottish Parliament;”.

PART 11

GENERAL

143 Orders and regulations

(1) Any power of the Scottish Ministers to make regulations or an order under this Act is exercisable by statutory instrument.

(2) Any such power includes power to make—

(a) such incidental, supplementary, consequential, transitional, transitory or saving provision as the Scottish Ministers think necessary or expedient,

(b) different provision for different purposes or different areas.

(3) Subject to subsection (4), a statutory instrument containing regulations or an order under this Act (except an order under section 148(1)) is subject to annulment in pursuance of a resolution of the Scottish Parliament.

(4) A statutory instrument containing—

(xa) an order under section 24A(1),

(ya) an order under section 52A(2),

(za) an order under section 67A(1),

(aa) an order under section 146(1) containing provisions which modify any enactment (including this Act), or

(b) an order under section 147(1) containing provisions which add to, replace or omit any part of the text of an Act,

is not to be made unless a draft of the instrument containing the order has been laid before, and approved by resolution of, the Parliament.

144 Interpretation

In this Act—

"the 1982 Act" means the Civic Government (Scotland) Act 1982 (c.45),

"the 1995 Act" means the Criminal Procedure (Scotland) Act 1995 (c.46), and

"the 2005 Act" means the Licensing (Scotland) Act 2005 (asp 16).

145 Modification of enactments

Schedule 5 modifies enactments.

146 Ancillary provision

(1) The Scottish Ministers may by order make such supplementary, incidental or consequential provision as they consider appropriate for the purposes of, in consequence of or for giving full effect to any provision of this Act.

(2) An order under subsection (1) may modify any enactment (including this Act).

147 Transitional provision etc.

(1) The Scottish Ministers may by order make such provision as they consider necessary or expedient for transitory, transitional or saving purposes in connection with the coming into force of any provision of this Act.

(2) An order under subsection (1) may modify any enactment (including this Act).

148 Commencement and short title

(1) The provisions of this Act, other than this section and sections 143, 144, 146 and 147, come into force in accordance with provision made by order by the Scottish Ministers.

(2) This Act may be cited as the Criminal Justice and Licensing (Scotland) Act 2010.

SCHEDULE 1
(introduced by section 3(2)*)*

THE SCOTTISH SENTENCING COUNCIL

Membership

1 (1) The Council consists of a chairing member, other judicial members, legal members and lay members.

(2) The chairing member is the Lord Justice Clerk.

(3) The other judicial members comprise—

(a) one other person holding the office of judge who normally sits as a judge of the Outer House of the Court of Session or the High Court of Justiciary,

(b) one person holding the office of sheriff (other than a sheriff principal),

(c) two persons holding the office of justice of the peace or stipendiary magistrate, and

(d) one other person holding—

(i) any of the offices mentioned in paragraphs (a) to (c), or

(ii) the office of sheriff principal.

(4) The legal members comprise—

(a) one prosecutor within the meaning of section 307 of the 1995 Act,

(c) one advocate practising as such in Scotland (other than one who is a prosecutor), and

(d) one solicitor practising as such in Scotland (other than one who is a prosecutor).

(5) The lay members comprise—

(za) one constable,

(a) one person appearing to the Scottish Ministers to have knowledge of the issues faced by victims of crime, and

(b) one other person who is not qualified for appointment as a judicial or legal member.

Procedure for appointment of members

2 (1) It is for the Lord Justice General, after consulting the Scottish Ministers, to appoint the members of the Council other than the Lord Justice Clerk and the lay members.

(2) It is for the Scottish Ministers, after consulting the Lord Justice General, to appoint the lay members.

(3) The Lord Justice General may appoint a person to be a member only if the person has been nominated, or otherwise selected for appointment, in accordance with such procedures as the Scottish Ministers may by regulations prescribe.

(4) The regulations may—

(a) in particular, make provision for or in connection with enabling a person to nominate or select persons suitable for appointment,

(b) prescribe different procedures for different categories of membership.

(5) The Scottish Ministers must consult the Lord Justice General before making the regulations.

Persons disqualified from membership

3 A person is disqualified from appointment, and from holding office, as a member of the Council if the person is or becomes—

(a) a member of the House of Commons,

(b) a member of the Scottish Parliament,

(c) a member of the European Parliament,

(d) a councillor of any council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39),

(e) a Minister of the Crown, or

(f) a member of the Scottish Executive.

Term of office

4 (1) A member holds office for such period not exceeding 5 years as the Lord Justice General or, as the case may be, the Scottish Ministers may, at the time of appointment, determine.

(2) A member ceases to hold office—

(a) on becoming disqualified from holding office as a member, or

(b) on ceasing to fall within the category of membership under which the member was appointed.

(3) A person who has previously been a member may not be re-appointed.

(4) In this paragraph, “a member” means a member appointed by the Lord Justice General or the Scottish Ministers.

Resignation and removal of members

5 (1) A member appointed by the Lord Justice General may resign office by giving notice in writing to the Lord Justice General.

(2) A member appointed by the Scottish Ministers may resign office by giving notice in writing to the Scottish Ministers.

(3) The Lord Justice General may, by notice in writing, remove a judicial or legal member if satisfied that the member is unfit to be a member by reason of inability, neglect of duty or misbehaviour.

(4) The Scottish Ministers may, by notice in writing, remove a lay member if satisfied that the member is unfit to be a member by reason of inability, neglect of duty or misbehaviour.

Suspension of judicial members

6 A judicial member is suspended from acting as such during any period in which the member is suspended from the judicial office which the member holds.

Chairing of the Council

7 (1) The Lord Justice Clerk is to chair meetings of the Council.

(2) If the Lord Justice Clerk is for any reason unable to chair a meeting, the meeting may be chaired by another judicial member nominated—

(a) by the Lord Justice Clerk, or

(b) if the Lord Justice Clerk is unable to make such a nomination, by the Council.

(3) The Lord Justice Clerk may nominate another judicial member to chair meetings of the Council for a temporary period.

Committees

8 The Council may establish committees comprising members of the Council.

Proceedings

9 The Council may determine—

(a) its own procedure (including the number of members required to constitute a quorum), and

(b) the procedure (including the number of members required to constitute a quorum) of any committees established by it.

Validity of acts

10 The validity of proceedings or actings of the Council is not affected by—

(a) any vacancy in the membership of the Council,

(b) any defect in the appointment of a member of the Council, or

(c) disqualification of any person from holding office as a member of the Council.

Ancillary powers

11 The Council may do anything which it considers necessary or expedient for the purposes of or in connection with its functions.

Delegation

12 (1) Any function of the Council, other than the function of submitting sentencing guidelines to the High Court of Justiciary for approval, may be carried out on its behalf by—

(a) a member of the Council,

(b) a committee, or

(c) any other person,

authorised (whether specially or generally) by it for the purpose.

(2) Nothing in sub-paragraph (1) prevents the Council from exercising any function delegated under that sub-paragraph.

Maladministration

13 In the Scottish Public Services Ombudsman Act 2002 (asp 11), in schedule 2 (which lists the authorities subject to investigation under that Act), in Part 2 (entries amendable by Order in Council), after paragraph 50 insert—

“50A The Scottish Sentencing Council.”.

Freedom of information

14 In the Freedom of Information (Scotland) Act 2002 (asp 13), in schedule 1 (which lists the Scottish public authorities subject to that Act), in Part 7 (other authorities), after paragraph 98 insert—

“98A The Scottish Sentencing Council.”.

SCHEDULE 1A
(introduced by section 14(2))

COMMUNITY PAYBACK ORDERS: CONSEQUENTIAL MODIFICATIONS

PART 1

THE 1995 ACT

The 1995 Act

1 The 1995 Act is amended as follows.

2 In section 52H(3) (early termination of assessment order), the following are repealed—

(a) the word “or” immediately following paragraph (e), and

(b) paragraph (f).

3 In section 52R(3) (termination of treatment order), the following are repealed—

(a) the word “or” immediately following paragraph (e), and

(b) paragraph (f).

4 In section 53(12)(a) (interim compulsion orders), for sub-paragraphs (vi) and (vii) substitute—

“(vi) impose a community payback order;

(vii) make a drug treatment and testing order; or

(viii) make a restriction of liberty order,”.

5 In section 57A(15)(a) (compulsion order), for sub-paragraphs (vi) and (vii) substitute—

“(vi) impose a community payback order;

(vii) make a drug treatment and testing order; or

(viii) make a restriction of liberty order,”.

6 In section 58(8) (order for hospital admission or guardianship), for "make a probation order or a community service order" substitute "impose a community payback order or make a drug treatment and testing order".

7 In section 106(1) (right of appeal), for paragraph (d) substitute—

"(d) against any drug treatment and testing order;

(dza) against any disposal under section 227ZB(5)(a) to (ba) or (d) or (5ZA)(a) of this Act;".

8 In section 108 (Lord Advocate's right of appeal against disposal)—

(a) in subsection (1), paragraphs (d) and (e) are repealed, and

(b) in subsection (2)(b)(iii), for "(d) to (e)" substitute "(dd)".

8A In section 118(4) (disposal of appeals against sentence), after "(d)," insert "(dza),".

9 In section 121A(4) (suspension of certain sentences pending determination of appeal), for paragraphs (a) to (c) substitute—

"(aa) a community payback order;".

9A In section 173(2) (quorum of High Court in relation to appeals), for "175(2)(b) or (c)" substitute "175(2)(b), (c) or (cza)".

10 In section 175 (right of appeal)—

(a) in subsection (2)—

(i) in paragraph (c), for "probation order, drug treatment and testing order or any community service order" substitute "drug treatment and testing order",

(ii) after paragraph (c), insert—

"(cza) against any disposal under section 227ZB(5)(a) to (ba) or (d) or (5ZA)(a) of this Act;",

(b) in subsection (4), paragraphs (d) and (e) are repealed, and

(c) in subsection (4A)(b)(iii), for "(d) to (e)" substitute "(dd)".

10A In section 186 (appeals against sentence only), in each of subsections (1), (2)(a), (9) and (10), for "175(2)(b) or (c)" substitute "175(2)(b), (c) or (cza)".

10B In section 187(1) (leave to appeal against sentence), for "175(2)(b) or (c)" substitute "175(2)(b), (c) or (cza)".

10C In section 189(5) (disposal of appeal against sentence), after "175(2)(c)" insert "or (cza)".

11 In section 193A(4) (suspension of certain sentences pending determination of appeal)—

(a) for paragraphs (a) to (c) substitute—

"(aa) a community payback order;", and

(b) paragraph (e) is repealed.

12 Sections 228 to 234 (probation) are repealed.

13 In section 234H (disposal on revocation of drug treatment and testing order)—

(a) in subsection (1), for "drugs" substitute "drug", and

(b) in subsection (3), for the words from "subject to" where they first occur to the end substitute ", in respect of the same offence, also subject to a community payback order, by virtue of section 234J, or a restriction of liberty order, by virtue of section 245D, the court shall, before disposing of the offender under subsection (1) above, revoke the community payback order or restriction of liberty order (as the case may be).".

14 (1) Section 234J (concurrent drug treatment and testing and probation orders) is amended as follows.

(2) In subsection (1)—

(a) for "sections 228(1) and" substitute "section", and

(b) for "probation order" substitute "community payback order".

(3) In subsection (3)—

(a) for "probation order" substitute "community payback order", and

(b) for paragraphs (b) and (c) substitute—

"(ba) the local authority within whose area the offender will reside for the duration of each order.".

(4) In subsection (4)—

(a) in paragraph (a), for "probation order and is dealt with under section 232(2)(c)" substitute "community payback order and is dealt with under section 227ZB(5)(c)", and

(b) in paragraph (b), for "232(2)(c) of this Act in relation to the probation order" substitute "227ZB(5)(c) of this Act in relation to the community payback order".

(5) In subsection (5)—

(a) for "probation order" substitute "community payback order", and

(b) for "232(2)" substitute "227ZB(5)".

15 Sections 235 to 245 (supervised attendance orders and community service orders) are repealed.

16 (1) Section 245A (restriction of liberty orders) is amended as follows.

(2) In subsection (2), the words from "but" to the end are repealed.

(3) After subsection (2) insert—

"(2A) In making a restriction of liberty order containing provision under subsection (2)(a), the court must ensure that the offender is not required, either by the order alone or the order taken together with any other relevant order or requirement, to be in any place or places for a period or periods totalling more than 12 hours in any one day.

(2B) In subsection (2A), "other relevant order or requirement" means—

(a) any other restriction of liberty order in effect in respect of the offender at the time the court is making the order referred to in subsection (2A), and

(b) any restricted movement requirement under section 227ZD in effect in respect of the offender at that time.".

(4) In subsection (12)(a), for "subsection (2)" substitute "subsection (2A)".

17 (1) Section 245D (combination of restriction of liberty orders with other orders) is amended as follows.

(2) In subsection (1)(b)—

(a) in sub-paragraph (i), for "probation order made under section 228(1)" substitute "community payback order imposed under section 227A(1)", and

(b) in sub-paragraph (ii)—

(i) for "probation order made under section 228(1) of this Act," substitute "community payback order imposed under section 227A(1) of this Act or", and

(ii) the words "or both such orders" are repealed.

(3) In subsection (2), for "probation order" substitute "community payback order".

(4) In subsection (3)—

(a) the word "228(1)," is repealed,

(b) in paragraph (a), for "probation order" substitute "community payback order", and

(c) in paragraph (b), for "either or both of a probation order and" substitute "either a community payback order or".

(5) In subsection (4)—

(a) for "probation order" substitute "community payback order", and

(b) for paragraph (b) substitute—

"(b) the local authority within whose area the offender will reside for the duration of each order.".

(6) Subsection (6) is repealed.

(7) In subsection (7)—

(a) in paragraph (a)—

(i) for "contained in a probation order and is dealt with under section 232(2)(c)" substitute "imposed by a community payback order and is dealt with under section 227ZB(5)(c)", and

(ii) the words from "234G(2)(b)" to "section" where it third occurs are repealed,

(b) in paragraph (b), the words from "232(2)(c)" to "section" where it third occurs are repealed, and

(c) in paragraph (c), for "232(2)(c) of this Act in relation to a probation order" substitute "227ZB(5)(c) of this Act in relation to a community payback order".

(8) In subsection (8), for "232(2)" substitute "227ZB".

(9) In subsection (9)—

(a) in paragraph (a), for "probation order" substitute "community payback order", and

(b) paragraph (c) is repealed.

18 (1) Section 245G (disposal on revocation of restriction of liberty order) is amended as follows.

(2) In subsection (2), for the words from "by virtue" to the end substitute "in respect of the same offence, also subject to a community payback order or a drug treatment and testing order, by virtue of section 245D(3), it shall before disposing of the offender under subsection (1) above, revoke the community payback order or drug treatment and testing order.".

(3) In subsection (3), for "probation order discharged" substitute "community payback order".

(4) Subsection (4) is repealed.

19 In section 245J (breach of certain orders: adjourning hearing and remanding in custody etc.)—

- (a) in subsection (1)—
  - (i) for "a probationer or" substitute "an",
  - (ii) for "probation order" substitute "community payback order", and
  - (iii) the words "supervised attendance order, community service order" are repealed,
- (b) in subsection (2), the words "probationer or" are repealed, and
- (c) in subsection (4), for "A probationer or" substitute "An".

20 Sections 245K to 245Q (community reparation orders) are repealed.

21 In section 246 (admonition and absolute discharge), in each of subsections (2) and (3), the words "and that a probation order is not appropriate" are repealed.

22 In section 249(2) (compensation order against convicted person), for paragraph (b) substitute—

> "(ab) where, under section 227A of this Act, it imposes a community payback order;".

23 In section 307 (interpretation)—

- (a) in subsection (1)—
  - (i) insert at the appropriate places—

    ""alcohol treatment requirement" has the meaning given in section 227V(1);"

    ""community payback order" means a community payback order (within the meaning of section 227A(2)) imposed under section 227A(1) or (4) or 227M(2);"

    ""compensation requirement" has the meaning given in section 227H(1);"

    ""conduct requirement" has the meaning given in section 227VA(1);"

    ""drug treatment requirement" has the meaning given in section 227U(1);"

    ""mental health treatment requirement" has the meaning given in section 227R(1);"

    ""offender supervision requirement" has the meaning given in section 227G(1);"

"“programme requirement” has the meaning given in section 227P(1);"

"“residence requirement” has the meaning given in section 227Q(1);"

"“responsible officer”, in relation to a community payback order, is to be construed in accordance with section 227C;"

"“restricted movement requirement” has the meaning given in section 227ZD(1);"

"“unpaid work or other activity requirement” has the meaning given in section 227I(1), and “level 1 unpaid work or other activity requirement” and “level 2 unpaid work or other activity requirement” are to be construed in accordance with section 227I(4) and (5) respectively;", and

(ii) the definitions of the following terms are repealed—

“appropriate court”

“community service order”

“probationer”

“probation order”

“probation period”, and

(b) subsection (3) is repealed.

24 Schedules 6 and 7 are repealed.

PART 2

OTHER ENACTMENTS

The Firearms Act 1968 (c.27)

24A(1) The Firearms Act 1968 is amended as follows.

(2) In section 21(3ZA) (possession of firearms by persons previously convicted of crime), for paragraph (b) substitute—

“(b) a community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46).”.

(3) In section 52(1A) (forfeiture and disposal of firearms: cancellation of certificate by convicting court), for paragraph (b) substitute—

“(b) a community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46).”.

The Social Work (Scotland) Act 1968 (c.49)

25 (1) The Social Work (Scotland) Act 1968 is amended as follows.

(2) In section 27 (supervision and care of persons put on probation or released from prisons etc.), in subsection (1)(b)—

(a) in paragraph (iii), for the words from “community service order” to the end substitute “community payback order imposed under section 277A or 227M of the Criminal Procedure (Scotland) Act 1995 imposing an unpaid work or other activity requirement”, and

(b) sub-paragraphs (iv) and (va) are repealed.

(3) In section 86(3) (adjustments between authority providing accommodation etc. and authority of area of residence), after “supervision order” insert “, community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995,”.

The Rehabilitation of Offenders Act 1974 (c.53)

26 (1) The Rehabilitation of Offenders Act 1974 is amended as follows.

(2) In section 5(4A) (rehabilitation periods for particular sentences), the words “a probation order or” are repealed.

(3) In section 6(3) (the rehabilitation period applicable to a conviction), the following are repealed—

(a) the words “or a probation order was made”,

(b) the words “or a breach of the order”, and

(c) the words “or probation order”.

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55)

27 In Schedule 1 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, in Part 2 (ineligibility for and disqualification and excusal from jury service), in paragraph (bb)—

(a) for sub-paragraph (i) substitute—

“(i) a community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46);”, and

(b) sub-paragraph (iii) is repealed.

The Local Government and Planning (Scotland) Act 1982 (c.43)

28 In section 24 of the Local Government and Planning (Scotland) Act 1982 (councils’ functions in relation to the provision of gardening assistance for the disabled and the elderly), in subsection (3), for the words from “instruction” to “that Act” substitute “determination that may be made or instruction that may be given, for the purposes of an unpaid work or other activity requirement imposed in a community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46), by the responsible officer in relation to the order,”.

The 1982 Act

28A(1) The 1982 Act is amended as follows.

(2) In section 49(6) (dangerous and annoying creatures), the words “or makes a probation order in relation to him” are repealed.

(3) In section 58(3) (convicted thief in possession)—

(a) the words “or makes a probation order in relation to him” are repealed, and

(b) for the words from “discharged absolutely,” to the end substitute “discharged absolutely.”.

The Foster Children (Scotland) Act 1984 (c.56)

29 In section 2 of the Foster Children (Scotland) Act 1984 (exceptions to section 1), in subsection (3), for "probation order" substitute "community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46)".

The Road Traffic Offenders Act 1988 (c.53)

30 In section 46(3)(b) of the Road Traffic Offenders Act 1988 (combination of disqualification and endorsement with probation orders and orders for discharge), the words "section 228 (probation) or" are repealed.

The Jobseekers Act 1995 (c.18)

30A In section 20D(5) of the Jobseekers Act 1995 (as inserted by section 25(2) of the Welfare Reform Act 2009 (c.24) (jobseeker's allowance: sanctions for violent conduct etc. in connection with claim)), the words "or a court in Scotland makes a probation order" are repealed.

The Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40)

31 In Schedule 3 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (transitional provisions, transitory modifications and savings), in Part 2, paragraph 13 is repealed.

The Proceeds of Crime (Scotland) Act 1995 (c.43)

32 (1) The Proceeds of Crime (Scotland) Act 1995 is amended as follows.

(2) In section 25(9) (recall or variation of suspended forfeiture order), the words "probation order or" are repealed.

(3) In section 26(9) (property wrongly forfeited: return or compensation), the words "probation order or" are repealed.

The Crime and Punishment (Scotland) Act 1997 (c.48)

33 In the Crime and Punishment (Scotland) Act 1997, the following provisions are repealed—

(a) section 26 (evidence concerning certain orders), and

(b) in Schedule 1 (minor and consequential amendments), in paragraph 21, sub-paragraphs (27) to (29).

The Crime and Disorder Act 1998 (c.37)

34 In the Crime and Disorder Act 1998, in Schedule 6 (drug treatment and testing orders: amendment of the 1995 Act), in Part 1, paragraphs 1 and 2 are repealed.

The Powers of Criminal Courts (Sentencing) Act 2000 (c.6)

35 In Schedule 9 to the Powers of Criminal Courts (Sentencing) Act 2000 (consequential amendments), paragraphs 176 to 178 are repealed.

The Criminal Justice and Court Services Act 2000 (c.43)

36 (1) Schedule 7 to the Criminal Justice and Court Services Act 2000 (minor and consequential amendments) is amended as follows.

(2) In paragraph 4(2), in the entry relating to the Criminal Procedure (Scotland) Act 1995, for "sections 209(3)(a) and 234(1)(a)" substitute "section 209(3)(a)".

(3) Paragraphs 122 to 125 are repealed.

The Social Security Fraud Act 2001 (c.11)

37 (1) The Social Security Fraud Act 2001 is amended as follows.

(2) In section 6C(5)(b)(i) (provisions supplementary to section 6B), the words "or a court in Scotland makes a probation order" are repealed.

(3) In section 7(9)(b) (loss of benefit for commission of benefit offences), the words "or a court in Scotland makes a probation order" are repealed.

The Justice (Northern Ireland) Act 2002 (c.26)

38 In Schedule 4 to the Justice (Northern Ireland) Act 2002 (functions of justices of the peace), paragraph 37 is repealed.

The Criminal Justice (Scotland) Act 2003 (asp 7)

39 (1) The Criminal Justice (Scotland) Act 2003 is amended as follows.

(2) In section 42 (drugs courts)—

(a) in subsection (4)—

(i) for "probationer with the requirements of a probation order" substitute "community payback order",

(ii) in paragraph (b), for the words from "make" to "work" substitute "in the case of a failure to comply with the requirements of a drug treatment and testing order, make a community payback order imposing a level 1 unpaid work or other activity requirement, so however that the total hours of unpaid work or other activity", and

(iii) for "probation order" where those words second occur substitute "community payback order",

(b) in subsection (6), for paragraph (b) substitute—

"(b) alleged at—

(i) a progress review carried out by such a court in relation to a community payback order; or

(ii) a diet of such a court to which an offender has been cited under section 227ZB(2) of that Act (breach of community payback order),

that the offender has failed to comply with a requirement imposed by a community payback order,",

(c) in subsection (7)—

(i) the words "or probationer" are repealed, and

(ii) for "232" substitute "227ZB",

(d) for subsection (9) substitute—

"(9) If a community payback order is revoked under section 227ZB(5)(b) of the 1995 Act, the court (whether or not a drugs court) must, in dealing with the offender by virtue of that section, take into account any sentence which has been imposed under paragraph (a) of subsection (4) of this section in relation to a failure to comply with the community payback order.",

(e) in subsection (10)—

(i) insert at the appropriate places—

""community payback order" means an order imposed under section 227A of the 1995 Act;"

""level 1 unpaid work or other activity requirement" has the meaning given in section 227I(4) of the 1995 Act;", and

(ii) the definition of "probation order" is repealed, and

(f) in subsection (11), paragraphs (a) and (b) are repealed.

(3) Section 46 (requirement for remote monitoring in probation order) is repealed.

(4) In section 50 (amendments in relation to certain non-custodial sentences), subsections (1), (2) and (4) are repealed.

(5) In section 60 (unified citation provisions)—

(a) in subsection (1), paragraphs (a), (b), (e) and (f) are repealed, and

(b) subsections (3) and (4) are repealed.

The Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)

40 In the Mental Health (Care and Treatment) (Scotland) Act 2003, the following provisions are repealed—

(a) section 135 (amendment of 1995 Act: probation for treatment of mental disorder), and

(b) in schedule 4 (minor and consequential amendments), in paragraph 8, sub-paragraph (15).

The Criminal Justice Act 2003 (c.44)

41 In Schedule 32 to the Criminal Justice Act 2003 (amendments relating to sentencing), paragraphs 69 to 72 are repealed.

The Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8)

42 In the Antisocial Behaviour etc. (Scotland) Act 2004, the following provisions are repealed—

(a) section 120 (community reparation orders), and

(b) in schedule 4 (minor and consequential amendments), in paragraph 5, sub-paragraphs (3), (5), (6) and (11).

The Management of Offenders etc. (Scotland) Act 2005 (asp 14)

43 (1) The Management of Offenders etc. (Scotland) Act 2005 is amended as follows.

(2) In section 10 (arrangements for assessing and managing risks posed by certain offenders), in subsection (1)(b), for sub-paragraph (i) substitute—

> "(i) is subject to a community payback order imposed under section 227A of the Criminal Procedure (Scotland) Act 1995 (c.46) imposing an offender supervision requirement (within the meaning given by section 227G(1) of that Act) whether alone or along with any other requirement, or".

(3) Section 12 (probation progress review) is repealed.

The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6)

44 In the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, the following provisions are repealed—

(a) in section 49 (compensation orders), subsection (4),

(b) section 57 (probation and community service orders), and

(c) in paragraph 26 of the schedule (modification of enactments), sub-paragraphs (l) and (n).

The Criminal Justice and Immigration Act 2008 (c.4)

45 In Part 1 of Schedule 4 to the Criminal Justice and Immigration Act 2008 (youth rehabilitation orders: consequential amendments), paragraphs 43 to 46 are repealed.

SCHEDULE 2

(introduced by section 18(9)*)*

SHORT-TERM CUSTODY AND COMMUNITY SENTENCES: CONSEQUENTIAL AMENDMENTS

Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17)

1 The Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17) is amended in accordance with paragraphs 2 to 14.

2 In section 34 (period during which licence in force), for subsection (1) substitute—

> "(1) Where a short-term custody and community prisoner is released on short-term community licence by virtue of section 5, 27(1) or, as the case may be, 42(4)(a), the licence remains in force until the expiry of the prisoner's sentence.".

3 In the following places after "section" insert "5,"—

(a) section 35 (prisoner to comply with licence conditions),

(b) subsection (1)(a) of section 36 (suspension of licence conditions while detained),

(c) subsections (1)(a) and (4)(a) of section 37 (revocation of licence).

4 In section 40 (compassionate release: effect of revocation in certain circumstances), in subsection (3), for paragraph (a) substitute—

“(a) in the case of a short-term custody and community prisoner, one-half of the prisoner’s sentence,”.

5 (1) Section 42 (consideration by Parole Board) is amended as follows.

(2) In subsection (1), after “41(2)(b)” insert “, 42A(9)”.

(3) In subsection (5), after “on” insert “short-term community licence,”.

6 After section 42 insert—

“42A Determination that section 42(3) applicable: consequences for short-term custody and community prisoners

(1) This section applies where the Parole Board determines, under subsection (2) of section 42, that subsection (3) of that section applies to a short-term custody and community prisoner.

(2) The Parole Board must give the prisoner reasons in writing for its determination.

(3) If on the day of the determination less than 4 months of the prisoner’s sentence remain to be served, the prisoner must be confined until the expiry of the prisoner’s sentence.

(4) If on the day of the determination at least 4 months but no more than 2 years of the prisoner’s sentence remain to be served, the Parole Board may, subject to section 26, fix a date falling within the period mentioned in subsection (5) on which it will next consider the prisoner’s case.

(5) That period is the period—

(a) beginning with the day falling 4 months after the day of the determination, and

(b) ending on the expiry of the prisoner’s sentence.

(6) If no date is fixed under subsection (4) the prisoner must be confined until the expiry of the prisoner’s sentence.

(7) If on the day of the determination at least 2 years of the prisoner’s sentence remain to be served, the Parole Board must, subject to section 26, fix a date falling within the period mentioned in subsection (8) on which it will next consider the prisoner’s case.

(8) That period is the period—

(a) beginning with the day falling 4 months after the day of the determination, and

(b) ending immediately before the second anniversary of the day of the determination.

(9) Where a date is fixed under subsection (4) or (7), the Scottish Ministers must refer the case to the Parole Board before that date.”.

7 (1) Section 45 (prisoner’s right to request early reconsideration by Parole Board) is amended as follows.

(2) In subsection (1), after “under—” insert—

“(za) section 42A(4),

(zb) section 42A(7),”.

(3) In subsection (2), after “section” insert “42A(4), 42A(7),”.

(4) In subsection (3), after “section” insert “42A(4) or”.

(5) In subsection (4), after “section” insert “42A(4) or, as the case may be,”.

8 In section 46 (multiple licences to be replaced by single licence), in subsection (1)(a), after “section” insert “5,”.

9 (1) Section 51 (prisoners serving extended sentences) is amended as follows.

(2) In subsection (1), for “(2)” substitute “(1A)”.

(3) After that subsection insert—

“(1A) In section 5, the reference to the prisoner’s short-term custody and community sentence is to be read as a reference to the confinement term of the prisoner’s extended sentence.”.

10 (1) Section 55 (application to young offenders and children) is amended as follows.

(2) In subsection (1), for “custody-only” substitute “short-term custody and community”.

(3) In subsection (2)(a), for “15 days” substitute “the prescribed period”.

(4) In subsection (4)(a), for “15 days or more” substitute “at least the prescribed period”.

11 In section 56 (fine defaulters and persons in contempt of court), in subsection (1), for “custody-only” substitute “short-term custody and community”.

12 In section 65 (rules, regulations and orders), in subsection (4)(a), for “4(2), 7, 47(1)(b)” substitute “4(1), 7, 47(1)(b), 55(2) or (4)”.

13 (1) Schedule 2 (prisoners serving more than one sentence) is amended as follows.

(2) Before paragraph 1, in the italic heading, for “custody-only” substitute “short-term custody and community”.

(3) In paragraph 1—

(a) in sub-paragraph (1)(a), for “custody-only” substitute “short-term custody and community”,

(b) in sub-paragraph (3)—

(i) for “and 34(1)” substitute “, 34(1) and 42A”,

(ii) for “custody-only” in both places where it occurs substitute “short-term custody and community”,

(c) after sub-paragraph (3) add—

“(4) In section 47(3A)—

(a) references to the expiry of one-half of the prisoner’s sentence are to be read as references to the expiry of one-half of the short-term custody and community sentence that expires after the expiry of one-half of the other short-term custody and community sentence (or sentences),

(b) in paragraph (a)(i), the reference to the expiry of the prisoner’s sentence is to be read as a reference to the longer (or longest) of the sentences imposed on the prisoner.”.

(4) Before paragraph 3, in the italic heading, for “custody-only” substitute “short-term custody and community”.

(5) In paragraph 3—

(a) in sub-paragraph (1)(a), for “custody-only” substitute “short-term custody and community”,

(b) in sub-paragraph (3), for “and 34(1)” substitute “, 34(1), 42A and subsections (3A) and (8)(a) of section 47”,

(c) in sub-paragraph (4)—

(i) for “the custody-only” substitute “one-half of the short-term custody and community”,

(ii) in paragraph (a), for “any other custody-only” substitute “one-half of any other short-term custody and community”,

(d) in sub-paragraph (5)(b)(ii) and (6)(b), for “the custody-only” substitute “at least one-half of the short-term custody and community”.

(6) In paragraph 5—

(a) in sub-paragraph (1), in both paragraphs (a) and (b), for “custody-only” substitute “short-term custody and community”,

(b) in sub-paragraph (3)—

(i) after “19” insert “, 29A, 29B”,

(ii) after “(2)” insert “, 42A”.

(c) in sub-paragraph (4)—

(i) for “the custody-only” substitute “one-half of the short-term custody and community”,

(ii) in paragraph (a), for “any other custody-only” substitute “one-half of any other short-term custody and community”.

(7) In paragraph 6, in sub-paragraph (1)(b), after “section” insert “5,”.

(8) In paragraph 7, after sub-paragraph (1) insert—

“(1A) Where a short-term custody and community sentence imposed on a prisoner is an extended sentence, the modifications in paragraphs 1(3) and (4), 3(4), (5)(b)(ii), (6) and (8A) are to be read subject to sub-paragraph (2).”.

14 (1) Schedule 3 (sentences framed to run consecutively) is amended as follows.

(2) In paragraph 1(4)(a), for “custody-only sentence, that sentence” substitute “short-term custody and community sentence, one-half of that sentence”.

(3) Before paragraph 3 insert—

“2A (1) This paragraph applies where—

(a) the court imposes a short-term custody and community sentence as a further sentence,

(b) the court frames the sentence to take effect in accordance with paragraph 1(2) or (3), and

(c) the prisoner’s previous sentence (or one of the prisoner’s previous sentences) is a short-term custody and community sentence.

(2) In determining the date on which the previous sentence expires, no account is to be taken of the period of confinement served under the further sentence.

(3) In determining the date on which the further sentence expires, no account is to be taken of the balance of the previous sentence.”.

(4) In paragraph 3—

(a) in sub-paragraph (1)(a), for “custody-only” substitute “short-term custody and community”,

(b) after sub-paragraph (2) insert—

“(3) In determining the date on which the further sentence expires, no account is to be taken of the balance of the previous sentence.”.

(5) After paragraph 3 insert—

“3A (1) This paragraph applies where—

(a) the court imposes a custody and community sentence as a further sentence,

(b) the court frames the sentence to take effect in accordance with paragraph 1(2) or (3), and

(c) the prisoner’s previous sentence (or one of the prisoner’s previous sentences) is a short-term custody and community sentence.

(2) In determining the date on which the previous sentence expires, no account is to be taken of the period of confinement served under the further sentence.

(3) In determining the date on which the further sentence expires, no account is to be taken of the balance of the previous sentence.”.

(6) In paragraph 5—

(a) sub-paragraph (1) is repealed,

(b) in sub-paragraphs (2) and (3), for “paragraph 4” substitute “the relevant paragraph”,

(c) in sub-paragraph (4)—

(i) in paragraph (a), for “4(2) and (3)” substitute “sub-paragraphs (2) and (3) of the relevant paragraph”, and

(ii) in paragraph (c), for “paragraph 4(3)” substitute “sub-paragraph (3) of the relevant paragraph”,

(d) after sub-paragraph (4) insert—

“(4A) Where a short-term custody and community sentence or custody and community sentence imposed on a prisoner is an extended sentence, references in this schedule to—

(a) the prisoner’s “previous sentence” are to be read as references to the “previous confinement term” of the prisoner’s sentence,

(b) the prisoner’s “further sentence” are to be read as references to the “further confinement term” of the prisoner’s sentence.”, and

(e) after sub-paragraph (5) insert—

“(6) In this paragraph “the relevant paragraph” means paragraph 2A, 3, 3A or 4 (whichever applies in the circumstances described).”.

The 1995 Act

15 The 1995 Act is amended in accordance with paragraphs 16 and 17.

16 (1) Section 167 (forms of finding and sentence in summary proceedings) is amended as follows.

(2) In subsection (7D), for “any previous custody-only” substitute “one-half of any previous short-term custody and community”.

(3) In subsection (7E), for “custody-only” substitute “short-term custody and community”.

17 (1) Section 210A (extended sentences for sex and violent offenders) is amended as follows.

(2) In subsections (1)(b) and (2)(b), after “a” insert “short-term community or”.

(3) In subsection (10), after the definition of “sexual offence” insert—

““short-term community licence” has the same meaning as in Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17).”.

SCHEDULE 2A

(introduced by section 52A(1))

CONVICTIONS BY COURTS IN OTHER EU MEMBER STATES: MODIFICATIONS OF ENACTMENTS

PART 1

THE 1995 ACT

The 1995 Act

1 The 1995 Act is amended as follows.

2 In section 23C(2)(d)(i) (previous convictions to be taken into consideration in determining bail), for “outwith Scotland” substitute “by courts outside the European Union”.

3 In section 27 (breach of bail conditions: offences), after subsection (3) insert—

“(3A) The reference in subsection (3)(b) to any previous conviction of an offence under subsection (1)(b) includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to an offence under subsection (1)(b).

(3B) The references in subsection (3)(c) to subsection (3) are to be read, in relation to a previous conviction by a court referred to in subsection (3A), as references to any provision that is equivalent to subsection (3).

(3C) Any issue of equivalence arising in pursuance of subsection (3A) or (3B) is for the court to determine.”.

4 In section 202(2) (deferred sentence), for “Great Britain” substitute “the United Kingdom or in another member State of the European Union”.

5 In section 204 (restrictions on passing sentence of imprisonment or detention)—

(a) in each of subsections (1) and (2), after "United Kingdom" insert "or in another member State of the European Union",

(b) after subsection (4) insert—

"(4A) The court shall, for the purpose of determining whether a person has been previously sentenced to imprisonment or detention by a court in a member State of the European Union other than the United Kingdom—

(a) disregard any previous sentence of imprisonment which, being the equivalent of a suspended sentence, has not taken effect;

(b) construe detention as meaning an equivalent sentence to any of those mentioned in subsection (4)(b).

(4B) Any issue of equivalence arising in pursuance of subsection (4A) is for the court to determine.".

6 In section 205B (minimum sentence for third conviction of certain offences relating to drug trafficking)—

(a) in subsection (1)(b), for "been convicted in any part of the United Kingdom of two other class A drug trafficking offences" substitute "two previous convictions for relevant offences",

(b) after subsection (1) insert—

"(1A) In subsection (1), "relevant offence" means—

(a) in relation to a conviction by a court in any part of the United Kingdom, a class A drug trafficking offence;

(b) in relation to a conviction by a court in a member State of the European Union other than the United Kingdom, an offence that is equivalent to a class A drug trafficking offence.

(1B) Any issue of equivalence arising in pursuance of subsection (1A)(b) is for the court to determine.".

7 In section 275A (disclosure of accused's previous convictions where court allows questioning or evidence under section 275)—

(a) in subsection (10)—

(i) the word "or" immediately following paragraph (a) is repealed,

(ii) after paragraph (a) insert—

"(aa) a conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to one to which section 288C of this Act applies by virtue of subsection (2) thereof; or",

(b) after subsection (10) insert—

"(10A) Any issue of equivalence arising in pursuance of subsection (10)(aa) is for the court to determine.".

8 In section 307 (interpretation)—

(a) in subsection (1), insert the following definition at the appropriate place—

"“conviction”, in relation to a previous conviction by a court outside Scotland, means a final decision of a criminal court establishing guilt of a criminal offence;", and

(b) for subsection (5) substitute—

"(5) Except where the context requires otherwise—

(a) any reference in this Act to a previous conviction is to be construed as a reference to a previous conviction by a court in any part of the United Kingdom or in any other member State of the European Union;

(b) any reference in this Act to a previous sentence is to be construed as a reference to a previous sentence passed by any such court;

(c) any reference to a previous conviction of a particular offence is to be construed, in relation to a previous conviction by a court outside Scotland, as a reference to a previous conviction of an equivalent offence; and

(d) any reference to a previous sentence of a particular kind is to be construed, in relation to a previous sentence passed by a court outside Scotland, as a reference to a previous sentence of an equivalent kind.".

PART 2

OTHER ENACTMENTS

The 1982 Act

9 In section 58 of the 1982 Act, after subsection (4) insert—

"(4A) In subsection (4), the reference to a conviction for theft includes a reference to a conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to theft.

(4B) Any issue of equivalence arising in pursuance of subsection (4A) is for the court to determine.".

The Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9)

10 In section 27(1) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (interpretation of Part 1), insert at the appropriate place—

"“previous conviction” means a previous conviction by a court in any part of the United Kingdom or in any other member State of the European Union;".

The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)

11 (1) Section 9 of the Criminal Law (Consolidation) (Scotland) Act 1995 (permitting girl to use premises for intercourse) is amended as follows.

(2) In subsection (2A)—

(a) the word "or" immediately following paragraph (a) is repealed, and

(b) after paragraph (a) insert—

“(aa) that person has a previous conviction for a relevant foreign offence committed against a person under the age of 16; or”.

(3) In subsection (3)—

(a) the word “and” immediately following paragraph (a) is repealed, and

(b) after paragraph (a) insert—

“(aa) “a previous conviction for a relevant foreign offence” has the same meaning as in section 39(5)(aa) of that Act; and”.

The Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17)

12 In section 4(1) of the Custodial Sentences and Weapons (Scotland) Act 2007 (basic definitions for purposes of Part 2), insert at the appropriate place—

““previous conviction” means a previous conviction by a court in any part of the United Kingdom or in any other member State of the European Union,”.

The Sexual Offences (Scotland) Act 2009 (asp 9)

13 (1) Section 39 of the Sexual Offences (Scotland) Act 2009 (defences in relation to offences against older children) is amended as follows.

(2) In subsection (2)—

(a) in paragraph (a)—

(i) the word “or” immediately following sub-paragraph (i) is repealed, and

(ii) after sub-paragraph (i) insert—

“(ia) if A has a previous conviction for a relevant foreign offence committed against a person under the age of 16, or”,

(b) in paragraph (b)—

(i) the word “or” immediately following sub-paragraph (i) is repealed, and

(ii) after sub-paragraph (i) insert—

“(ia) if B has a previous conviction for a relevant foreign offence committed against a person under the age of 16, or”.

(3) In subsection (5), after paragraph (a) insert—

“(aa) “a previous conviction for a relevant foreign offence” means a previous conviction by a court in a member State of the European Union other than the United Kingdom for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1,”.

(4) After subsection (5) insert—

“(5A) Any issue of equivalence arising in pursuance of subsection (5)(aa) is for the court to determine.

(5B) For that purpose, an offence may be equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1 even though, under the law of the member State (or part of the member State) in question, it is an offence—

(a) regardless of the age of the victim, or

(b) only if committed against a person under an age other than 16 years.”.

SCHEDULE 3
(introduced by section 66(4))

WITNESS ANONYMITY ORDERS: TRANSITIONAL

Interpretation

1 In this schedule—

“commencement” means the day on which section 66 comes into force,

“pre-commencement anonymity order” means an order made by a court before commencement under any rule of law relating to the power of the court to make an order for securing that the identity of a witness in criminal proceedings is withheld from the accused (or, on a defence application, from other accused),

“witness anonymity order” has the meaning given by section 271N of the 1995 Act.

Pre-commencement anonymity orders: appeals

2 (1) This paragraph applies where—

(a) the High Court of Justiciary is considering an appeal against a conviction in a case where the trial began before commencement, and

(b) the court from which the appeal lies (“the trial court”) made a pre-commencement anonymity order in relation to a witness at the trial.

(2) The High Court—

(a) may not quash the conviction solely on the ground that the trial court had no power under any rule of law to make the order mentioned in sub-paragraph (1)(b), but

(b) must quash the conviction if it considers that, as a result of the order, the accused did not receive a fair trial.

SCHEDULE 4
(introduced by section 139)

FURTHER MODIFICATIONS OF 2005 ACT

1 The 2005 Act is amended in accordance with the following paragraphs.

2 In section 4 (the licensing objectives), subsection (2) is repealed.

3 In section 21 (notification of premises licence applications), subsection (5) is repealed.

4 In section 22 (objections and representations), subsection (2) is repealed.

5 In section 23 (determination of premises licence application), for subsection (6) substitute—

“(6) In considering whether the granting of the application would be inconsistent with one or more of the licensing objectives, the Licensing Board must in particular take into account—

(a) any conviction, notice of which is given by the appropriate chief constable under subsection (4)(b) of section 21, and

(b) any report given by the appropriate chief constable under section 24A(2).”.

6 (1) Section 24 (applicant’s duty to notify Licensing Board of convictions) is amended as follows.

(2) In subsection (8)(b), for “the crime prevention objective” substitute “any of the licensing objectives”.

(3) For subsection (10) substitute—

“(10) In considering for the purposes of section 23 whether the granting of the application would be inconsistent with one or more of the licensing objectives, the Licensing Board must take into account, in addition to the matters in subsection (6) of that section—

(a) any conviction confirmation of which is given by the appropriate chief constable in a notice under subsection (7)(b) of this section, or

(b) any recommendation of the chief constable included in such a notice.”.

7 (1) Section 33 (transfer of premises licence on application of licence holder) is amended as follows.

(2) For subsections (7) to (9) substitute—

“(7) On giving a notice under subsection (6)(a) or (b), if the appropriate chief constable considers that it is necessary for the purposes of any of the licensing objectives that the application for the transfer of the licence to the transferee be refused, the chief constable may include in the notice a recommendation to that effect.

(8) Where, in relation to an application under subsection (1)—

(a) the Licensing Board receives a notice under subsection (6)(a), and

(b) the notice does not include a recommendation under subsection (7),

the Board must grant the application.

(9) In any other case, the Licensing Board must hold a hearing for the purpose of considering and determining the application.”.

(3) In subsection (10)(a), for “the crime prevention objective” substitute “any of the licensing objectives”.

8 In section 44 (procedure where Licensing Board receives notice of conviction), in subsection (5)(b), for “the crime prevention objective” substitute “any of the licensing objectives”.

9 In section 57 (notification of occasional licence application to chief constable and Licensing Standards Officer), subsection (2) is repealed.

10 (1) Section 59 (determination of occasional licence application) is amended as follows.

(2) In subsection (2), paragraph (a) is repealed.

(3) Subsection (7) is repealed.

11 In section 69 (notification of extended hours application), in subsection (2), for "the crime prevention objective" substitute "any of the licensing objectives".

12 In section 73 (notification of personal licence application to chief constable), for subsection (4) substitute—

"(4) On giving a notice under subsection (3)(a) or (b), if the appropriate chief constable considers that it is necessary for the purposes of any of the licensing objectives that the personal licence application be refused, the chief constable may include in the notice a recommendation to that effect.".

13 (1) Section 74 (determination of personal licence application) is amended as follows.

(3) In subsection (5), for paragraph (b) substitute—

"(b) the notice received from the appropriate chief constable under subsection (3)(a) or (b) of section 73 includes a recommendation under subsection (4) of that section,".

(4) After subsection (5) insert—

"(5A) If—

(a) all of those conditions are met in relation to the applicant,

(b) the Board has received from the appropriate chief constable a notice under subsection (3)(b) of section 73, and

(c) the notice does not include a recommendation under subsection (4) of that section,

the Board may hold a hearing for the purpose of considering and determining the application.

(5B) If the Board decides not to hold a hearing under subsection (5A), the Board must grant the application.".

(5) In subsection (6)—

(a) after "subsection (5)" insert "or (5A)",

(b) in paragraph (a), for "the crime prevention objective" substitute "any of the licensing objectives".

14 (1) Section 75 (applicant's duty to notify Licensing Board of convictions) is amended as follows.

(2) In subsection (7)(b), for "the crime prevention objective" substitute "any of the licensing objectives".

(3) In subsection (9)—

(a) the word "and" immediately following paragraph (a) is repealed,

(b) after paragraph (b) add ", and

(c) references in it to a recommendation under section 73(4) include references to a recommendation under subsection (7) of this section.".

15 (1) Section 83 (procedure where Licensing Board receives notice of conviction) is amended as follows.

(2) In subsection (5)(b), for "the crime prevention objective" substitute "any of the licensing objectives".

(3) In subsection (8)(c), for "the crime prevention objective" substitute "any of the licensing objectives".

16 After section 84 insert—

"84A Power of chief constable to report conduct inconsistent with the licensing objectives

(1) If a chief constable considers that any personal licence holder has acted in a manner which is inconsistent with any of the licensing objectives, the chief constable may report the matter to the relevant Licensing Board.

(2) Where a Licensing Board receives a report from a chief constable under subsection (1), the Board must hold a hearing.

(3) Subsections (6), (7) and (8)(a) of section 84 and subsection (1)(b) of section 85 apply in relation to a hearing under subsection (2) of this section as they apply in relation to a hearing under subsection (3)(a) or (5) of section 84.

(4) In subsection (1), "relevant Licensing Board" has the meaning given in section 83(11).".

17 In section 148 (index of defined expressions), in the table, the entry relating to "crime prevention objective" is repealed.

18 In schedule 1 (Licensing Boards), in paragraph 10(4), the words from ", or no notice" to the end are repealed.

SCHEDULE 5
(introduced by section 145*)*

MODIFICATIONS OF ENACTMENTS

The Libel Act 1792 (c.60)

A1 The Libel Act 1792 is repealed.

The Criminal Libel Act 1819 (c.8)

A2 The Criminal Libel Act 1819 is repealed.

The False Oaths (Scotland) Act 1933 (c.20)

1 The False Oaths (Scotland) Act 1933 is repealed.

The Public Records (Scotland) Act 1937 (c.43)

2 In section 14 of the Public Records (Scotland) Act 1937 (interpretation)—

(a) for the definition of "court records" substitute—

""court records" includes (in addition to records of the ordinary courts) records of the Scottish Land Court;", and

(b) for subsection (2) substitute—

“(2) Any question as to whether or not a document is part of the records of a particular court is to be determined—

(a) in the case of the High Court, by the Lord Justice General,

(b) in any other case, by the Lord President.”.

The Law Officers Act 1944 (c.25)

2A In section 2(3) of the Law Officers Act 1944 (Lord Advocate and Solicitor General for Scotland), for the words from “three” to the end substitute “287 of the Criminal Procedure (Scotland) Act 1995 (c.46)”.

The Defamation Act 1952 (c.66)

A3 In the Defamation Act 1952, section 17(2) is repealed.

The Rehabilitation of Offenders Act 1974 (c.53)

3 (1) The Rehabilitation of Offenders Act 1974 is amended as follows.

(2) In section 1 (rehabilitated persons and spent convictions), in subsection (4)(b), after “insanity” insert “or, as the case may be, a finding that a person is not criminally responsible under section 51A of the Criminal Procedure (Scotland) Act 1995 (c.46)”.

(3) In section 6(6)(bb) (convictions in service disciplinary proceedings), for “the Schedule” substitute “Schedule 1”.

(4) The Schedule (service disciplinary proceedings) is renumbered as Schedule 1.

The Evidence (Proceedings in Other Jurisdictions) Act 1975 (c.34)

4 In Schedule 1 to the Evidence (Proceedings in Other Jurisdictions) Act 1975 (consequential amendments), the paragraph relating to the False Oaths (Scotland) Act 1933 is repealed.

The 1982 Act

5 The 1982 Act is amended as follows.

6 In section 52 (indecent photographs etc. of children), subsection (7) is repealed.

7 In section 64 (appeals against orders in relation to public processions), in subsection (6), for “paragraph (a)(ii)” substitute “paragraph (a)(i)”.

The Incest and Related Offences (Scotland) Act 1986 (c.36)

7A The Incest and Related Offences (Scotland) Act 1986 is repealed.

The Legal Aid (Scotland) Act 1986 (c.47)

8 In section 22 of the Legal Aid (Scotland) Act 1986 (automatic availability of criminal legal aid), in subsection (1)—

(a) in paragraph (da), for "he is insane so that his trial cannot proceed or continue;" substitute "the accused is unfit for trial under section 53F of the Criminal Procedure (Scotland) Act 1995;", and

(b) in paragraph (dc), for "in case involving insanity" substitute "where accused found not criminally responsible or unfit for trial".

The Criminal Justice (Scotland) Act 1987 (c.41)

9 In the Criminal Justice (Scotland) Act 1987, sections 51 to 54 (investigation of serious or complex fraud) are repealed.

The Criminal Justice Act 1988 (c.33)

10 In the Criminal Justice Act 1988, in Schedule 15 (minor and consequential amendments), paragraphs 89, 111 and 117 are repealed.

The Trade Union and Labour Relations (Consolidation) Act 1992 (c.52)

10A In section 243(4)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 (restriction of offence of conspiracy: Scotland), the words "or sedition" are repealed.

The Criminal Justice and Public Order Act 1994 (c.33)

11 In the Criminal Justice and Public Order Act 1994, in section 164 (extension of powers of Serious Fraud Office and of powers to investigate serious fraud in Scotland), subsections (3) and (4) are repealed.

The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)

12 The Criminal Law (Consolidation) (Scotland) Act 1995 is amended as follows.

13 Section 16 (powers of search) is repealed.

14 In section 23 (interpretation of Part 2), in the definition of "period of a designated sporting event", for "in" substitute "it".

The Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40)

14A In Schedule 4 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (minor and consequential amendments), in paragraph 44, sub-paragraph (2) is repealed.

The 1995 Act

15 The 1995 Act is amended as follows.

16 After section 5 insert—

> "**5A Signing of warrants etc. outwith sheriff's jurisdiction**
>
> The competence of a sheriff to sign any warrant, judgment, interlocutor or other document relating to any proceedings within the sheriff's jurisdiction extends to competence to do so at any other place in Scotland.".

17 In section 10A (jurisdiction for transferred cases)—

(a) after subsection (1) insert—

"(1A) The jurisdiction of a JP court includes jurisdiction for any cases which come before it by virtue of section 137CA, 137CB or 137CC of this Act.",

(b) in subsection (2)—

(i) the word "and" immediately following paragraph (a) is repealed,

(ii) after paragraph (a) insert—

"(aa) power to prosecute in any cases which come before a JP court of that district by virtue of a provision mentioned in subsection (1A) above;", and

(iii) in paragraph (b), for "criminal proceedings which otherwise come before that sheriff" substitute "the other cases which come before that sheriff when exercising criminal jurisdiction or (as the case may be) before that JP court", and

(c) for subsection (3) substitute—

"(3) This section is without prejudice to sections 4 to 10 of this Act.".

17A In section 11 (certain offences committed outside Scotland)—

(a) in subsection (3), for "proceeded against, indicted" substitute "prosecuted",

(b) in subsection (4), for "dealt with, indicted" substitute "prosecuted".

17B In section 17A (right of person accused of sexual offence to be told about restriction on conduct of defence: arrest), in subsection (1)—

(a) for paragraphs (za) and (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words from "preliminary" to "trial" substitute "hearing".

17C In section 18(8)(c) (power to take prints etc. under authority of a warrant unaffected by section), for "prints, impressions" substitute "relevant physical data".

17D In section 19(1)(b) (samples etc. taken from person convicted of offence), the words "impression or", in both places where they occur, are repealed.

18 In section 19A (samples etc. from persons convicted of sexual and violent offences), in subsection (6), in paragraph (a) of the definition of "conviction", for the words from ", by" to the end substitute "by reason of the special defence set out in section 51A of this Act;".

18A Section 20 (use of prints, samples, etc.) is repealed.

19 In section 22 (liberation by police), subsections (1H), (2), (4), (4A) and (5) are repealed.

19A In section 23A (bail and liberation where person already in custody)—

(a) in each of subsections (1) and (4), for "23 or 65(8C)" substitute "23, 65(8C) or 107A(2)(b)", and

(b) in subsection (3), for "22A(3) or 23(7)" substitute "22A(3), 23(7) or 107A(2)(b)".

19B In section 35 (judicial examination), in subsection (4A)—

(a) for paragraphs (za) and (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words from "preliminary" to "trial" substitute "hearing".

20 In section 55(4) (acquittal at examination of facts)—

(a) for the words from "insane" to "omission" substitute "not, because of section 51A of this Act, criminally responsible for the conduct", and

(b) for "on the ground of such insanity" substitute "by reason of the special defence set out in that section".

21 The title of section 57 (disposal of case where accused found to be insane) is amended by substituting "not criminally responsible or unfit for trial" for "to be insane" and the cross-heading which precedes it is amended by substituting "*where accused found not criminally responsible*" for "*in case of insanity*".

22 In section 57 (disposal of case where accused found to be insane), in subsection (1)(a), for the words from ", by" to "omission" substitute "acquitted by reason of the special defence set out in section 51A of this Act".

23 In section 60C(7) (disapplication of provision where person acquitted on ground of insanity)—

(a) after "apply" insert "in a case where the person is acquitted by reason of the special defence set out in section 51A of this Act.", and

(b) paragraphs (a) and (b) are repealed.

24 In section 61 (requirements as to medical evidence)—

(a) in subsection (1), the words "under section 54(1)(a) of this Act or" are repealed,

(b) in subsection (3), the words "or 54(1)(a)" are repealed, and

(c) in subsection (5), for "the said section 54(1)" substitute "section 54(1)(c) of this Act".

25 The title of section 62 (appeal by accused in case involving insanity) is amended by substituting "not criminally responsible or unfit for trial" for "in case involving insanity" and the section is amended as follows—

(a) in subsection (1)(a), for "insane" substitute "unfit for trial", and

(b) in subsection (2)(b)(iii), for the words from "virtue" to "omission" substitute "reason of the special defence set out in section 51A of this Act".

26 The title of section 63 (appeal by prosecutor in case involving insanity) is amended by substituting "where accused found not criminally responsible or unfit for trial" for "in case involving insanity" and subsection (1) of that section is amended as follows—

(a) in paragraph (a), for "insane" substitute "unfit for trial",

(b) for paragraph (b) substitute—

"(b) an acquittal by reason of the special defence set out in section 51A of this Act;", and

(c) in paragraph (c), for the words from "on" to "omission" substitute "by reason of the special defence set out in section 51A of this Act".

26A In section 66 (service and lodging of indictment etc.), in subsection (6A)(a)—

(a) for sub-paragraphs (zi) and (i) substitute—

“(i) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings (including at any commissioner proceedings) may be conducted only by a lawyer,”, and

(b) in sub-paragraph (iii), for the words from “preliminary” to “trial” substitute “hearing”.

26B In section 71 (first diet)—

(a) in subsection (A1), for the words “his defence at the trial” substitute “the conduct of his case at any relevant hearing in the course of the proceedings”,

(b) in subsection (B1)(c), for the words “before the trial diet” substitute “in relation to any hearing in the course of the proceedings”,

(c) in subsection (1A)(a), for “the trial” substitute “any hearing in the course of the proceedings”,

(d) in subsection (1B)(a), for “the trial” substitute “any hearing in the course of the proceedings”,

(e) in subsection (5A)(b), for the words “his defence at the trial” substitute “the conduct of his case at any relevant hearing in the course of the proceedings”, and

(f) after subsection (7), insert—

“(7A) In subsections (A1) and (5A)(b), “relevant hearing” means—

(a) in relation to proceedings mentioned in paragraph (a) of subsection (B1), any hearing at, or for the purposes of, which a witness is to give evidence,

(b) in relation to proceedings mentioned in paragraph (b) of that subsection, a hearing referred to in section 288E(2A),

(c) in relation to proceedings mentioned in paragraph (c) of that subsection, a hearing in respect of which an order is made under section 288F.”.

27 In section 78(2) (which attracts the procedure for notifying special defences in relation to certain other defences), after “apply” insert “to a plea of diminished responsibility or”.

27A In section 79 (preliminary pleas and preliminary issues), in subsection (2)(b)(ii), after “under section” insert “22ZB(3)(b),”.

27B In section 85 (juries: citation and attendance of jurors), in subsection (6), after “section 1” insert “or 1A”.

28 In section 90D (review of orders under section 90B(1)(a) or (b)), in subsection (3)(b), for “any other any” substitute “any other”.

29 In section 102A (failure of accused to appear), for paragraph (b) of subsection (4) substitute—

“(b) section 27(7) of this Act,”.

30 In section 118(5) (disposal of appeal from solemn proceedings where High Court considers appellant to have been insane)—

(a) for "insane when he did so" substitute "not, because of section 51A of this Act, criminally responsible for it", and

(b) for "on the ground of insanity" substitute "by reason of the special defence set out in section 51A of this Act".

31 In section 136A (time limits for transferred and related cases), in subsection (1)—

(a) in paragraph (a)(i), for "in pursuance of section 137A(1)" substitute "under section 137A or 137CA", and

(b) in paragraph (a)(ii), for "in pursuance of section 137B(1), (1A) or (1C)" substitute "under 137B or 137CB".

32 In section 137B (transfer of sheriff court summary proceedings outwith sheriffdom), in subsection (4), for "a sheriff who has made an order under subsection (2A) above" substitute "the sheriff who has made an order under subsection (2A) above (or another sheriff of the same sheriffdom)".

32A In section 140 (citation), in subsection (2A)—

(a) for paragraph (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings (including at any commissioner proceedings) may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words "his defence at the trial" substitute "the conduct of his case at, or for the purposes of, the hearing".

32B In section 144 (procedure at first diet), in subsection (3A)—

(a) for paragraph (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words "his defence at the trial" substitute "the conduct of his case at, or for the purposes of, the hearing".

32C In section 146 (plea of not guilty), in subsection (3A)—

(a) for paragraph (a) substitute—

"(a) that his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the course of the proceedings may be conducted only by a lawyer,", and

(b) in paragraph (c), for the words "his defence at the trial" substitute "the conduct of his case at, or for the purposes of, the hearing".

33 The title of section 190 (disposal of appeal where appellant insane) is amended by substituting "not criminally responsible" for "insane".

34 In section 190—

(a) in subsection (1), for "insane when he did so" substitute "not, because of section 51A of this Act, criminally responsible for it", and

(b) for "on the ground of insanity" substitute "by reason of the special defence set out in section 51A of this Act".

40 In section 247 (effect of probation and absolute discharge)—

(a) in subsection (1), for the words from “placing” to “him” substitute “discharging the offender”,

(b) in subsection (2), the words “placed on probation or” are repealed, and

(c) subsection (6) is repealed.

41 In section 254 (search warrant for forfeited articles)–

(a) the existing provision becomes subsection (1), and

(b) after that subsection insert—

“(2) In subsection (1), “article” includes animal.”.

42 In section 258 (uncontroversial evidence), after subsection (4A) insert—

“(4AA) Where in summary proceedings the relevant diet for the purposes of subsection (4A) above is an intermediate diet, an application under that subsection may be made at (or at any time before) that diet.”.

43 In section 307 (interpretation), in subsection (1), after the definition of “treatment order”, insert—

““unfit for trial” has the meaning given by section 53F of this Act;”.

The Offensive Weapons Act 1996 (c.26)

43A In the Offensive Weapons Act 1996, section 5 is repealed.

The Defamation Act 1996 (c.31)

43B In the Defamation Act 1996, section 20(2) is repealed.

The Crime and Punishment (Scotland) Act 1997 (c.48)

44 (1) The Crime and Punishment (Scotland) Act 1997 is amended as follows.

(2) In section 9 (power to specify hospital unit), in subsection (1)(a), for “insane” substitute “found not criminally responsible or unfit for trial”.

(3) In section 13 (increase in sentences available to sheriff and district courts), subsection (2) is repealed.

(4) In section 56 (powers of the court on remand or committal of children and young persons), subsection (3) is repealed.

The Terrorism Act 2000 (c.11)

45 In paragraph 30 of Part II of Schedule 5 to the Terrorism Act 2000 (explanations), in sub-paragraph (3)(a), for “section 2 of the False Oaths (Scotland) Act 1933” substitute “section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)”.

The Protection of Children (Scotland) Act 2003 (asp 5)

46 In section 10 of the Protection of Children (Scotland) Act 2003 (referral of individuals acquitted of offence against a child on ground of insanity), in subsection (11)(a)—

(a) in sub-paragraph (i), for “on the ground of insanity” substitute “by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995 (c.46)”, and

(b) in sub-paragraph (ii), for “the Criminal Procedure (Scotland) Act 1995 (c.46)” substitute “that Act”.

The Criminal Justice (Scotland) Act 2003 (asp 7)

47 In section 3 of the Criminal Justice (Scotland) Act 2003 (the Risk Management Authority), in paragraph (b) of subsection (2), for “to be insane” substitute “not criminally responsible or unfit for trial”.

The Legal Deposit Libraries Act 2003 (c.28)

47A Section 10 of the Legal Deposit Libraries Act 2003 (exemption from liability: activities in relation to publications) is amended as follows—

(a) in subsection (1), the words “, or subject to any criminal liability,” are repealed,

(b) in subsection (2)(a), the words “in the case of liability in damages” are repealed,

(c) in subsection (3), the words “, or subject to any criminal liability,” are repealed,

(d) in subsection (4)(a), the words “in the case of liability in damages” are repealed,

(e) in subsection (6)(a), the words “, or subject to any criminal liability,” are repealed, and

(f) in subsection (8), the words “and criminal liability” are repealed.

The Sexual Offences Act 2003 (c.42)

48 In section 135 of the Sexual Offences Act 2003 (interpretation: mentally disordered persons), after subsection (2) insert—

“(2A) In the application of this Part in relation to Scotland, a reference to a person being found not guilty of an offence by reason of insanity is to be read as a reference to a person being acquitted of an offence by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995.”.

The Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5)

48A In the Criminal Procedure (Amendment) (Scotland) Act 2004 the following provisions are repealed—

(a) in section 4 (prohibition on accused conducting case in person in certain cases), subsection (4),

(b) section 17 (bail conditions: remote monitoring of restrictions on movements), and

(c) in the schedule (further modifications of the 1995 Act), paragraph 55.

The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9)

49 In section 8 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (effect of conviction etc. under section 7 above or section 128 of Sexual Offences Act 2003)—

(a) in subsection (1)—

(i) the word "or" immediately following paragraph (c) is repealed, and

(ii) after paragraph (c) insert—

"(ca) is acquitted by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995 (c.46), or", and

(b) in subsection (5)—

(i) in paragraph (a), for "(1)(a), (c) or (d)" substitute "(1)(a) or (c) to (d)", and

(ii) in paragraph (c), for "(1)(a), (c) or (d)" substitute "(1)(a) or (c) to (d)".

The Management of Offenders etc. (Scotland) Act 2005 (asp 14)

50 In section 10 of the Management of Offenders etc. (Scotland) Act 2005 (arrangements for assessing and managing risks posed by certain offenders)—

(a) in subsection (1)—

(i) in paragraph (c)(i), for "on the ground of insanity" substitute "by reason of the special defence set out in section 51A of that Act of 1995", and

(ii) in paragraph (d), for the words from "section 54(1)" to the end substitute "section 53F of that Act of 1995 (unfitness for trial) to be unfit for trial;", and

(b) in subsection (11)(a), for "to be insane" substitute "not criminally responsible or unfit for trial".

The Serious Organised Crime and Police Act 2005 (c.15)

51 In section 65 of the Serious Organised Crime and Police Act 2005 (restrictions on the use of statements), in subsection (2)(c), for "section 2 of the False Oaths (Scotland) Act 1933 (c.20)" substitute "section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)".

The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6)

52 The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 is amended as follows.

53 In section 7 (liberation on undertaking), in subsection (2), paragraphs (c), (e), (f) and (g) are repealed.

53A In section 74 (appointment of stipendiary magistrates), subsection (6) is repealed.

53B After section 74 insert—

"**74A Exercise of functions by stipendiary magistrates**

(1) A stipendiary magistrate may, by reason of holding that office—

(a) exercise the same judicial and signing functions as are exercisable by a JP,

(b) do so in the same manner as a JP (including by using the title of office of JP).

(2) For the purpose of subsection (1)—

(a) the acts of a stipendiary magistrate are valid as if the magistrate were a JP,

(b) it does not matter if an enactment from which a JP derives authority to act in a specific case does not bear to give equivalent authority to a stipendiary magistrate.

(3) However, subsections (1) and (2) are subject to any provision of an enactment which expressly excludes a stipendiary magistrate from acting in a specific case.

(4) This section does not limit any other functions of a stipendiary magistrate (in particular, those exercisable in that capacity only).".

53C In section 76 (signing functions)—

(a) in subsection (2), for "signing functions in the same manner as" substitute "the same signing functions as are exercisable by",

(b) subsection (4) is repealed.

54 In the schedule (modification of enactments)—

(a) paragraph 3(b) is repealed, and

(b) in paragraph 26—

(i) the words "(in addition to the provisions amended by paragraphs 7(4) and 16(a))" are repealed, and

(ii) sub-paragraph (b) is repealed.

The Protection of Vulnerable Groups (Scotland) Act 2007 (asp 14)

55 In section 32 of the Protection of Vulnerable Groups (Scotland) Act 2007 (relevant offences etc.), in subsection (3)(b)(i), for "on the ground of insanity" substitute "by reason of the special defence set out in section 51A of the 1995 Act".

The Counter-Terrorism Act 2008 (c.28)

56 In section 45 of the Counter-Terrorism Act 2008 (sentences or orders triggering notification requirements), in subsection (2)(b)—

(a) in sub-paragraph (ii), for the words from "on grounds of insanity" to the end substitute "by reason of the special defence set out in section 51A of that Act (criminal responsibility of persons with mental disorder), or", and

(b) in sub-paragraph (iii), for the words from "the Criminal" to "facts)" substitute "that Act (examination of facts where person unfit for trial)".

The Sexual Offences (Scotland) Act 2009 (asp 9)

56A In section 55(7) of the Sexual Offences (Scotland) Act 2009 (offences committed outside the United Kingdom), for "proceeded against, indicted" substitute "prosecuted".

The Coroners and Justice Act 2009 (c.25)

57 In section 156 of the Coroners and Justice Act 2009 (exploitation proceeds orders: qualifying offenders)—

(a) in subsection (2)—

(i) the word "or" immediately following paragraph (b) is repealed, and

(ii) after paragraph (b) insert—

"(ba) has been acquitted by such a court of an offence by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995 (c.46), or", and

(b) in subsection (3)(a)—

(i) the word "or" immediately following sub-paragraph (ii) is repealed, and

(ii) after sub-paragraph (ii) insert—

"(iia) such a court has made, in respect of a foreign offence, a finding equivalent to a finding of the person's acquittal by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995, or".

Criminal Justice and Licensing (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to make provision about sentencing, offenders and defaulters; to make provision about criminal law, procedure and evidence; to make provision about criminal justice and the investigation of crime (including police functions); to amend the law relating to the licensing of certain activities by local authorities; to amend the law relating to the sale of alcohol; and for connected purposes.

Introduced by:	Kenny MacAskill
On:	5 March 2009
Bill type:	Executive Bill